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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

ALEX LORRE, Plaintiff and Appellant, v. VIRGIN AMERICA INC., Defendant and Respondent.	B271769 (Los Angeles County Super. Ct. No. BC554739)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mel Red Recana, Judge. Affirmed.

Berenji Law Firm, Shadie L. Berenji and Andrew J. Malatesta for Plaintiff and Appellant.

Sheppard, Mullin, Richter & Hampton, Thomas R. Kaufman and Paul Berkowitz for Defendant and Respondent.

Alex Lorre appeals from a judgment in favor of his former employer, Virgin America Inc. (Virgin), after the trial court granted summary adjudication in favor of Virgin on Lorre's claims for disability discrimination, wrongful termination, retaliation, defamation, and breach of contract. Lorre was employed by Virgin since 2008 as an airplane maintenance technician at the Los Angeles International Airport. In 2014 Virgin terminated Lorre's employment after Lorre offered to sell to his coworkers a headset a passenger left on an airplane. Lorre alleged that Virgin terminated his employment because of his physical disability and in retaliation for his request for medical leave, not for the stated reason that he had offered to sell the headset. Lorre also alleged that Virgin defamed him by falsely stating to his supervisors that he had committed a theft. Because Lorre failed to present evidence raising a triable issue of material fact as to each of the five causes of action, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Lorre's Employment and Disability*

On September 19, 2008 Virgin hired Lorre as an airplane maintenance technician at the Los Angeles International Airport. Lorre signed an offer letter acknowledging that his employment was at will. Lorre is also a professional actor and stunt performer.[1]

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[1] Lorre improperly relies on citations to his separate statement in his statement of facts and throughout his briefs. A party must support all references to evidence in the record with specific citations to the record. (Cal. Rules of Court, rule 8.204(a)(1)(C).) A separate statement in opposition to a motion

On December 15, 2008 Lorre injured his knee while on the job at the airport. Lorre underwent three surgeries and received ongoing medical treatment while he was employed at Virgin. Every year he took three to four months off from work related to his knee injury.

In June 2012 John Uchniat became Lorre's supervisor. In October 2012 Uchniat disciplined Lorre for leaving the flight deck of an airplane while the aircraft engine was idling. Uchniat imposed a "Performance Improvement Plan," which stated that Lorre's "error constituted a serious safety violation that could have led to serious injury and/or property damage." Although this was Lorre's first discipline, the document was entitled, "Final Warning." Uchniat testified that he did not start with the first level of discipline because "this was such an egregious safety act," and he wanted to monitor Lorre's performance for 180 days instead of the 90 days that would apply to a first warning. Lorre had a right to appeal the discipline, but did not do so. Virgin did not discipline Lorre again prior to his termination.

Effective June 2013, Virgin changed the terms of employment for its non-probationary employees. Its employee manual, known as the "Playbook," stated as of this date that "[t]here must be just cause" for Virgin to discipline or terminate an employee. The Playbook defined "just cause" to mean that "a

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for summary judgment or summary adjudication is not evidence, and citation to the separate statement is not adequate for appellate review without citation to the underlying evidence in the record. (*State of California ex rel. Standard Elevator Co., Inc. v. West Bay Builders, Inc.* (2011) 197 Cal.App.4th 963, 968, fn. 1; *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 178, fn. 4.) We limit our review to the facts supported by the record.

reasonable person could conclude there are justifiable grounds for the corrective action based on policy and practice." The Playbook stated further that employees "who are covered by this just cause policy will not be considered to be employed 'at will' for corrective action purposes."

The Playbook added, "If the performance issue or misconduct is sufficiently egregious, immediate separation from employment may be warranted." The Playbook provided examples of misconduct that could support immediate separation, including "a material disregard for safety, gross misconduct, criminal activity, violation of our drug and alcohol program, intentional falsification of company records, theft, fraud, dishonesty, insubordination, workplace violence, unlawful harassment or discrimination, or other unlawful activity."

On August 27, 2013 Lorre sent Uchniat an email explaining that he had complications from his last surgery, and his doctor "may" want him to have additional surgery on his knee. Lorre advised Uchniat he had another appointment with the doctor scheduled for September 19, 2013. The doctor canceled Lorre's appointment, and on September 20 Bryant Kolpak, a maintenance supervisor, sent Lorre an email stating, "Please bring a Doctor's Note when you return to work on Tuesday 9-24-13. It must state the reason why your appointment was canceled on Friday 9-19-13 @ 330pm and rescheduled for Monday 9-23-13 @ 400pm and why they didn't contact you before you arrived at the Doctors Office on Friday."

Lorre responded the same day by email, stating, "Yaay, go Bryant, thanks this is so good that is coming from an Airline manager/supervisor than ME requesting a letter. Please paste and add to it that if I do not show up with a letter on Tuesday, I

would not be able to work that day. They gotta be more organized, dragging ME in the heat, in a parking lot type traffic in 405 North to Van Nuys on My Friday, telling ME that Doctor needed to go to hospital. Furthermore, you can mention to them that we are operating an important Airline and doing business not a Chucky Cheese or Carl's Junior store and restaurant and it is not fair to waste time of an Airline Employee like ME like that. So my appointment is at 4:00 PM on Monday in Van Nuys blvd."

Uchniat received the two emails sent by Bryant and Lorre, and on September 20, 2013 he forwarded the messages to two other Virgin employees, adding his own comments. He wrote in an email to his supervisor Mike Lynch, who at the time was the acting director of maintenance, "Looks like Alex is off his meds again." He also wrote in an email to Christopher Reverski, the technical operations manager of JFK airport in New York, "Coo koo coo koo." At his deposition Uchniat did not recall why he sent the email to Lynch. As to the email to Reverski, Uchniat testified he "was referring to the entire team as the cuckoo's nest. Term of endearment." Uchniat testified that Reverski was his counterpart at JFK, and Uchniat "just kind of wanted to let [Reverski] see what I'm dealing with every day at LAX. Just a sample of what's going on at my station."

On November 25, 2013 Uchniat sent an email to Kerryn O'Connor, a manager in human resources, and Diane Chandra, who was covering O'Connor's position that day, raising a concern about Lorre "double dipping" with respect to his request for reimbursement of medical transportation costs. Uchniat attached a letter from a law firm regarding "Alex Lorre v. American Trans Air," with a workers' compensation claim number and a medical mileage expense form. In his email

Uchniat asked, "Why would we pay transportation costs for an injury sustained at another carrier. . . . Something does not look right." The employees responded that they had contacted a law firm and determined that use of the words on the letter, "American Trans Air," was a typographical error.

B. *The Headset Incident*

On December 31, 2013 a Virgin flight attendant, Jasper Ha, found an audio headset that had been left on an airplane seat. Ha discussed the headset with Lorre. Lorre initially told Ha to give the headset to the guest services team. According to Lorre, that is where employees are supposed to bring things they find on an airplane. Lorre left the airplane with the headset, and told Ha he was going to give the headset to a supervisor. The parties dispute how Lorre gained possession of the headset. Ha stated that Lorre took the headset from him; Lorre stated that he and Ha discussed the headset, but Lorre retrieved the headset from the airplane's first class galley when he left.

That night Lorre did not take the headset to a supervisor, the guest services team, or lost and found. He did not look for a supervisor because he assumed there would not be one working on New Year's Eve. Lorre was not aware that there was a lost and found. Instead, he locked the headset inside his personal locker, and went home for the night. Lorre did not write down the flight number or seat number where the headset was found.

Lorre worked the day shift on January 1, 2014, starting at 6:00 a.m. He did not speak with a supervisor in guest services or maintenance that day. That morning Lorre offered to sell the headset to two of his coworkers, Sergio Granados and George Iezzi. Lorre told Iezzi and Steve Vintch, the "lead" in Lorre's

unit, that he received the headset as a gift. Vintch asked Lorre if he could buy the headset for $60; Vintch would send Lorre home two hours early, worth $60, and Vintch would give Lorre $10. Lorre testified he did not sell the headset to Vintch because he could tell Vintch knew he was joking. Lorre left work at 4:30 p.m., and put the headset back in his personal locker.

On January 2, 2014 Lorre again reported to work at 6:00 a.m. That day Lorre offered to sell the headset to coworker Humberto Sanchez and a coworker named Lumberto. Lorre offered the sale with a "straight face," although he later stated he was joking.

Around 6:30 a.m. that day in the break room Vintch called Lorre a "liar" with respect to a maintenance issue. Uchniat overheard the conversation, and talked to Lorre outside the break room. Lorre testified he told Uchniat he was trying to sell the headset to some of his coworkers. Uchniat testified he also spoke with several technicians, who confirmed that Lorre had offered to sell the headset to his coworkers. Uchniat told Lorre to write a letter about what happened and fax or email it to him and human resources. Uchniat also asked Vintch, Granados, and Sanchez to email him statements about Lorre trying to sell them the headset.

Sometime before 7:00 a.m. Lorre gave the headset to a supervisor, Patricia Lazor. He told Lazor the headset was left on an airplane the previous day at Gate 37A, and that Ha gave him the headset. At his deposition Lorre acknowledged that he should have said two nights earlier. Lorre told Lazor there was no gate agent there with whom he could leave the headset. According to Lazor, Lorre asked if he could have the headset back

if no one claimed it; Lorre denied he said this. Lorre did not give Lazor information on the flight.

In his deposition Lorre admitted he offered to sell the headset to Granados and Iezzi, and he discussed a sale with Vintch, as follows:

"Q: So you asked [Granados] if he wanted to buy the headset?

"A. Yes.

"Q. Did you tell [Granados] that you were given the headset as [a] gift for Christmas?

"A. No.

"Q: Did you tell him or anyone that day that you had obtained or received this headset because it was a gift to you?

"A. Yes. Yes.

"Q. Who did you tell that to?

"A. I told him to both [Iezzi] and . . . Vintch.

"Q. . . . And did you also offer to sell the headset to [Iezzi]?

"A. Yes.

"Q. Did you also offer to sell the headset to [Vintch]?

"A. No. He asked me."

On January 2, 2014 at 3:54 p.m. Kolpak sent Uchniat an email stating that Lorre had just informed him that he had a doctor's appointment on the morning of January 6, 2014.

C. *Virgin's Investigation and Termination of Lorre*

Lorre sent Uchniat his statement in an email dated January 2, 2014. Lorre stated that on December 31, 2013 a flight attendant told him he found a headset on one of the seats in an airplane. As he was leaving the airplane, Lorre saw the

headset lying on the first class galley counter. Lorre did not want it to get lost or be taken by another employee. He first presented the headset to a gate agent he had not seen before, but she went inside the aircraft in a hurry. He then took it to the maintenance office to give to a supervisor, but he did not know any of the supervisors because he did not normally work at night. He was then called to work on another airplane, so he left the headset in his locker and went home.

Lorre stated further that on January 1, 2014 there were no supervisors around because of the holiday. He forgot about the headset and left to go home, leaving it in his locker. Lorre stated he brought the headset to the operations supervisor he knew on January 2, 2014. Lorre stated, "I was happy to finally get rid of it, that's why I made funny remarks but I kept a straight face. So since anyone's perception is different and sees the outcome of an issue differently, please be kind and i [*sic*] know that I turned the headset late, I apologize for that. I wanted to give it to a supervisor. I did not want to give it to people that listen to RAP with big headsets like that one. I did not want to give it to the Swissport supervisor either because he or she does not work for Virgin. And I did not want to go around and look for one beause I was busy working and forgot about it on holiday. I did not know where [the] lost [b]aggage department is, so I didnt [*sic*] want to go around to find it . . . at the time of going home I forgot about it."

On January 2, 2014 Vintch provided a written statement, stating: "On the morning of Wednesday, January 1, Alex Lorre came into the maintenance office trying to sell a headset to George Iezzi and myself. We asked him where he got the headset and he told us that he received it as a gift. We both showed some

interest in purchasing the headset and tried to negotiate a price and asked Alex if he had the box that the headset came in. He told us that he did not have the box and that he received the headset only. I told him that I was concerned that he found the headset on an airplane and if so he needed to give it to VA Operation. He assured me that he did not find the headset on an airplane and once again told me that he got it as a gift. George and I told him that we were no longer interested.

"Later that day on swing shift Tim Mutrux came into the office and Alex approached him on how he wanted to sell this headset that he received as a gift. Tim immediately told him that he was not interested. Alex then asked Tim to spread the word that he is selling the headset.

"On the morning of Thursday, January 2, Alex approached Hunberto [*sic*] Sanchez about purchasing the headset. I was in the office when this happen [*sic*] and told Alex that he need [*sic*] to turn in the headset to VA Operation because I overheard that he found them on an airplane. He told me yes he did find them on an airplane and was going to turn them in."

On January 2, 2014 Granados sent a written statement to Uchniat by email stating that the prior day "Lorre was trying to sell a pair of 'Phillips' headset among the Day shift technicians. He said that he received them as a gift and does not want[] them." According to Granados, Lorre was asking $100 for the headset. Lorre continued to offer the headset for sale on January 2 to the night shift personnel.

On January 3, 2014 Sanchez emailed his written statement to Uchniat, in which he stated that he overheard Lorre saying that he was "selling some headphones," but after looking at them

he told Lorre he was not interested. Sanchez added that he was "not sure if Alex was being serious or joking."

The same day Lazor stated in an email to Uchniat, "Yesterday, January 2, 2014, Alex from MX brought in a pair of headphones. [¶] I asked him where these had come from and he said they were left on a AC from the previous day. [¶] He said there was no gate agent to leave them with so he put them on the control panel of the jet bridge, then decided to take them with him to the MX office. [¶] Alex inquired what we did with lost and found items and I explained we keep them in BSO for 5 days then they are sent to SFO. [¶] He asked if no one claimed these headphones if he could get them back. I explained they are not kept locally and they would be sent to Central Baggage as we do not have a local donation center at this time. [¶] Alex did not have all of the flight information when he brought the headphones into operations."

Later that day Uchniat sent the written statements from himself, Vintch, Granados, Sanchez, Lazor, and Lorre to O'Connor, and later to Mark Vorzimmer, Virgin's director of security. In Uchniat's statement, he said, "On 1/2/14 Alex Lorre told me he took a headset from an aircraft at gate 37A on the evening of 12/31/13[.] He also stated he intended to keep the headset, but two days later turned the headset in on 1/2/14 to Operations Supervisor Patty Lazor. It was later reported to me by Alex's Lead, Steve Vintch that Alex was trying to sell this headset for $100 to fellow teammates. Below are copied and pasted statements."

At 11:14 a.m. Uchniat sent an email to Vorzimmer, copied to O'Connor in human resources and Mark Bianchi on the leadership team, stating, "An issue arose this week with an LAX

Tech Ops Team member concerning a guests' [*sic*] misplaced Headset (Phillips O'Niel Construct) and a failed attempt to sell them. My statement and other team members['] statements are below. After a lengthy discussion, Mark Bianchi suggested that I reach out to you as this is a matter of alleged theft, and you are expert in these matters, your thoughts and feedback are requested. Our concern is whether enough evidence is here to warrant separation for theft, and if not what further work needs to be accomplished."

Vorzimmer responded at 11:37 a.m., "Yes, it certainly sounds like enough to me. Have you been working with the People team on this matter, and what[']s the status of the teammate (i.e., out on suspension at present)?" At 11:53 a.m. Vorzimmer again emailed Uchniat, with copies to O'Connor and Bianchi, stating, "Yes, I would concur with separation, based on what you've indicated below." Vorzimmer recommended conducting a formal interview with Lorre "to find out whether he[']s ever done anything like this in the past, or whether he[']s aware of anyone who has. Either way, he should either be separated on Mon. or put out on suspension at that time." Vorzimmer also recommended that someone call Lorre to tell him he was suspended until the formal meeting so "that he is not permitted back on company property until he's spoken to at a formal meeting . . . ."

On January 6, 2014 Lorre went to a doctor's appointment. The doctor provided a note stating that Lorre was temporarily disabled and should not return to work before his next medical evaluation in four weeks. The next medical appointment was scheduled for February 3, 2014.

On January 7, 2014 Lorre went to Uchniat's office, and gave him a copy of the note. According to Lorre, he gave Uchniat the note before he was formally interviewed, and before he was suspended. Lorre also took a photograph of the note, and emailed it to O'Connor on January 9, 2014.

Vorzimmer interviewed Lorre by telephone on January 7. Vorzimmer and O'Connor participated from Vorzimmer's office in San Francisco; Lorre sat with Uchniat in Uchniat's office in Los Angeles. O'Connor took notes. Lorre stated he told Ha to give the headset to the guest services team, but as Lorre was leaving the airplane he saw that the headset was in the front galley, so Lorre picked it up to turn it in himself. Lorre was going to give it to the gate agent, but then decided to give it to the supervisor. He went to the operations office, but no one responded to his knock on the door. Lorre admitted he offered to sell the headset to "Robert and another guy." He offered it at $300, then $200, but Robert said no. So Lorre put the headset in his locker overnight to keep it safe.

Lorre admitted he tried to sell the headset to multiple people and that he told them he received the headset as a Christmas gift. However, Lorre stated he "was just joking around." At the end of the interview O'Connor told Lorre he was suspended pending further investigation.[2]

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[2] Virgin points to Lorre's testimony at his deposition that he was told on January 3, 2014 that he was suspended. However, although Lorre initially testified that Uchniat told him he was suspended during a phone call on January 3, 2014, he then clarified that Uchniat called him on January 3 to say he needed to be at work for a meeting on January 7, but he was not suspended on the January 3 call.

Later on January 7, 2014 Lorre sent a lengthy email message to Vorzimmer and Uchniat stating that he was not a thief, he was only joking with his coworkers, and he wanted personally to return the headset to a supervisor to earn the supervisor's approval. Lorre stated the flight attendant should not have given him the headset in the first place while Lorre was busy working. He noted that he did not push anyone into buying it and did not receive any money for the headset. He added, "my intention was not to sell it." Lorre again admitted he falsely stated the headset was a gift. He explained he said that because two individuals often told him that nobody liked him and he wanted to show that somebody liked him outside of work. Lorre apologized, and requested that Virgin give him a warning or suspend him for one week instead of terminating his employment.

On January 9, 2014 Vorzimmer interviewed Ha, with O'Connor present; O'Connor again took notes. Ha stated he found the headset on a seat in an airplane after the flight's arrival in Los Angeles. Lorre assured him he would take the headset to operations or lost and found, and then took the headset from Ha. Ha told Lorre the seat number. Ha stated that normally he would report a lost item to the guest services team.

On January 9, 2014 O'Connor and Uchniat called Lorre, and told him he was terminated.

D. *Lorre's Complaint*

On August 14, 2014 Lorre filed a complaint against Virgin, alleging that Virgin's managers falsely accused him of stealing a headset in order to justify his termination, and that he was terminated because of a physical disability (his knee injury) and

his request for medical leave. Lorre alleged that on January 7, 2014 he gave Uchniat a doctor's note regarding his knee injury and requested a four-week medical leave, and that later on the same day Virgin suspended him for two days. Then, on January 9, 2014 Virgin terminated his employment for "theft." Lorre also alleged that the accusation by Virgin's managers that he committed a theft was false or made with reckless disregard for the truth.

Lorre alleged causes of action for (1) defamation; (2) disability discrimination in violation of the California Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.); (3) retaliation in violation of the California Family Rights Act (CFRA; Gov. Code, § 12945.2); (4) wrongful termination in violation of public policy; (5) breach of contract; and (6) failure to provide employment records.

E. *Virgin's Motion for Summary Adjudication*

Virgin filed a motion for summary adjudication of the first five causes of action and Lorre's claim for punitive damages. Virgin argued that it terminated Lorre because he failed to turn in the headset and offered to sell it to his coworkers while misrepresenting that he had received it as a gift. Virgin argued this was a legitimate, nondiscriminatory reason, and there was no evidence of pretext. Virgin also argued regarding the CFRA retaliation cause of action that Lorre could not prove causation because he requested a medical leave after Virgin informed him of his suspension.

On the breach of contract cause of action, Virgin argued that any contractual limitation on termination under the Playbook was limited to "'just cause,'" and that this was defined

in the Playbook to mean that Virgin had to reasonably believe Lorre had engaged in misconduct. Virgin argued that Lorre's conduct after finding the headset supported Virgin's reasonable belief, and provided just cause for termination. Virgin also argued that the evidence showed there was no publication of a false statement of fact, and any statement made to other Virgin employees was protected under the common interest privilege. Virgin filed declarations and other evidence in support of its motion.

Lorre opposed the motion, and filed declarations and other evidence in support of his opposition. Lorre argued that he had not committed the crime of theft, Virgin performed an inadequate investigation, and Virgin's accusation that Lorre committed a theft was a pretext for termination of his employment based on his disability and in retaliation for his taking medical leave. Lorre also argued that because there were disputed questions of fact as to the adequacy of Virgin's investigation and whether Virgin acted in good faith, the motion should be denied as to his breach of contract claim. As to his defamation claim, Lorre argued that a charge of "theft" was a statement of fact, not opinion, and that there were disputed questions of fact as to whether Virgin acted with malice toward Lorre, defeating the common interest privilege. Lorre asserted arguments as to why he could recover punitive damages. Lorre also filed evidentiary objections.

On December 4, 2015 the trial court heard the motion for summary adjudication and took the matter under submission. On December 7, 2015 the court filed an order adopting its written

tentative ruling, and granting the motion.[3] The court found that Virgin had presented evidence of a legitimate, nondiscriminatory reason for Lorrre's termination, and that Lorre did not present substantial evidence that the stated reason was false, or that the actual reason was discrimination or retaliation. The trial court noted that even before Lorre gave Uchniat a copy of the doctor's note, Virgin had considered terminating Lorre's employment for misconduct, and when Vorzimmer stated in his email that "separation" seemed appropriate, he was unaware of Lorre's physical disability and request for medical leave. The court concluded that Virgin therefore was entitled to summary adjudication of the causes of action for discrimination, CRFA retaliation, and wrongful termination in violation of public policy.

The trial court found that Lorre also failed to raise a triable issue of fact as to whether Virgin lacked a reasonable belief that Lorre committed misconduct when Virgin terminated him, and thus his claim for breach of contract also failed. Finally, regarding defamation, the court held that the common interest privilege protected Uchniat's communications with other Virgin employees, and there was no evidence of actual malice, as required to overcome the privilege, because "[t]here is no evidence that Uchniat did not honestly believe that [Lorre] was terminated for theft."

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[3] The trial court ruled on Lorre's evidentiary objections, sustaining some of the objections. Lorre does not contend on appeal that the court's ruling on the evidentiary objections was in error.

F. *The Judgment and Appeal*

The parties settled Lorre's sixth cause of action for failure to provide employment records. On February 19, 2016 the trial court entered a judgment for Virgin on the first five causes of action based on the court's grant of summary adjudication. Lorre timely appealed.

DISCUSSION

A. *Standard of Review*

Summary judgment or summary adjudication of a cause of action is appropriate where "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).) We review the trial court's grant of Virgin's motion for summary adjudication de novo, and decide independently whether the facts not subject to dispute support a determination that the causes of action have no merit as a matter of law. (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347; *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 286; *Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1179 (*Husman*).)

A defendant moving for summary adjudication of a cause of action must show that one or more elements of the cause of action cannot be established or that there is a complete defense. (Code Civ. Proc., § 437c, subd. (p)(2).) "[T]he party moving for summary judgment [or adjudication] bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and 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." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850; accord, *Husman*, *supra*, 12 Cal.App.5th at p. 1180 ["Once the defendant's initial burden has been met, the burden shifts to the plaintiff to demonstrate, by reference to specific facts, not just allegations in the pleadings, there is a triable issue of material fact as to the cause of action"].)

In reviewing the evidence, """[w]e liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party."" [Citation.]" (*Hampton v. County of San Diego*, *supra*, 62 Cal.4th at p. 347; accord, *Husman*, *supra*, 12 Cal.App.5th at p. 1180.) "'[S]ummary judgment cannot be granted when the facts are susceptible to more than one reasonable inference . . . .' [Citations.]" (*Husman*, *supra*, at p. 1180.)

B. *Lorre Failed To Present Evidence Raising a Triable Issue That Virgin's Proffered Reason for Termination Was a Pretext for Prohibited Discrimination*

1. *Governing Law*

FEHA prohibits an employer from terminating an employee based on the employee's protected status, including a physical disability or medical condition. (Gov. Code, § 12940, subd. (a); *Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 591 (*Soria*).) California courts apply the burden-shifting approach set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802 [93 S.Ct. 1817, 36 L.Ed.2d 668], under which at trial a plaintiff must establish a prima facie case of discrimination by showing that: (1) the employee was a member

of a protected class, (2) he or she was qualified for and performing competently in the position he or she held, (3) he or she suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) circumstances suggesting a discriminatory motive. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 214 (*Harris*); *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355 (*Guz*); *Husman*, *supra*, 12 Cal.App.5th at p. 1181 [reversing trial court's grant of employer's motion for summary judgment, finding triable issue of material fact as to whether impermissible bias based on the employee's sexual orientation was a substantial motivating factor for his termination]; *Soria*, *supra*, 5 Cal.App.5th at p. 591 [reversing trial court's grant of employer's motion for summary judgment, finding triable issues of material fact as to whether the employer's stated reason for the plaintiff's termination was a pretext for discrimination based on her disability].)

If the plaintiff establishes a prima facie case, the burden shifts to the employer to rebut the presumption of discrimination by offering a legitimate nondiscriminatory reason for the adverse employment action. (*Harris*, *supra*, 56 Cal.4th at p. 214; *Guz*, *supra*, 24 Cal.4th at p. 355.) If the employer meets its burden, the presumption of discrimination disappears, and the burden shifts back to the plaintiff to produce evidence that the employer's reasons for the adverse employment action were a mere pretext for discrimination; the ultimate burden of persuasion on the issue of discrimination remains with the plaintiff. (*Harris*, *supra*, at pp. 214-215; *Guz*, *supra*, at p. 356.)

An employer may move for summary judgment or adjudication of an employment discrimination cause of action by presenting evidence that one or more elements of the prima facie

case is lacking, or the employer acted for a legitimate, nondiscriminatory reason. (*Husman*, *supra*, 12 Cal.App.5th at p. 1181; *Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1158 (*Featherstone*) [trial court properly granted employer's motion for summary judgment on FEHA claims because the employer's refusal to allow the plaintiff to rescind her resignation was not an adverse employment action]; *Soria*, *supra*, 5 Cal.App.5th at p. 591.) A legitimate, nondiscriminatory reason is one that is unrelated to the prohibited bias and that, if true, would preclude a finding of discrimination. (*Guz*, *supra*, 24 Cal.4th at p. 358.) "[I]f nondiscriminatory, [the employer's] true reasons need not necessarily have been wise or correct. [Citations.] While the objective soundness of an employer's proffered reasons supports their credibility . . . the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*." (*Ibid.*)

If the employer satisfies its initial burden, the burden shifts to the plaintiff to present evidence creating a triable issue of fact showing the employer's stated reason was a pretext for a discriminatory animus in order to avoid summary judgment or adjudication. (*Husman*, *supra*, 12 Cal.App.5th at p. 1182; *Featherstone*, *supra*, 10 Cal.App.5th at pp. 1158-1159; *Soria*, *supra*, 5 Cal.App.5th at p. 591.) "The plaintiff's evidence must be sufficient to support a reasonable inference that discrimination was a substantial motivating factor in the decision. [Citations.] The stronger the employer's showing of a legitimate, nondiscriminatory reason, the stronger the plaintiff's evidence must be in order to create a reasonable inference of a discriminatory motive. [Citation.]" (*Featherstone*, *supra*, at p. 1159; see also *Soria*, *supra*, at p. 591 [the plaintiff must

produce ‘“‘substantial responsive evidence” that the employer’s showing was untrue or pretextual’”].)

To meet this burden, the plaintiff may present evidence showing that the stated reason by the employer was “unworthy of credence” as circumstantial evidence of pretext. (*Guz*, *supra*, 24 Cal.4th at p. 361; *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 147 [120 S.Ct. 2097, 147 L.Ed.2d 105] [“In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose”].) However, in order to prevail on a motion for summary judgment or adjudication, there “[s]till . . . must be evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer’s actions.” (*Guz*, *supra*, at p. 361.)

In *Guz*, the Supreme Court considered an employer’s motion for summary judgment in which the employer presented undisputed evidence it terminated the plaintiff due to downsizing of the company, as part of which the division for which the plaintiff worked was eliminated and replaced by another entity owned by the employer. (*Guz*, *supra*, 24 Cal.4th at p. 364.) The plaintiff argued that the employer’s stated reason for his termination was a pretext for age discrimination, arguing that the employer had failed to follow its own guidelines in the layoff, had failed to help him find a new job at the company, and did not fairly consider him for vacant positions in the replacement entity. (*Id*. at pp. 364-365.) The plaintiff also presented evidence that most of the employees who filled the positions at the new entity were somewhat younger than the plaintiff. (*Id*. at p. 366.) The court concluded the trial court properly granted the employer’s

motion for summary judgment, finding the plaintiff's "evidence raised, at best, only a weak suspicion that discrimination was a likely basis for his release. Against that evidence, [the employer] has presented a plausible, and largely uncontradicted, explanation that it eliminated [the unit where the plaintiff worked], and chose others over [plaintiff], for reasons unrelated to age." (*Id*. at pp. 369-370.)

By contrast, in *Reeves*, the United States Supreme Court concluded there was substantial evidence to support the jury's finding that the employer's stated reason for terminating the plaintiff, alleged falsification of records, was a pretext for age-based animus, as shown by age-related comments made by a decisionmaker in the plaintiff's firing. (*Reeves v. Sanderson Plumbing Products, Inc.*, *supra*, 530 U.S. at pp. 152-153.)

2. *Lorre Failed To Show That Virgin's Proferred Reason for His Termination Was Pretextual*

Virgin presented evidence that it terminated Lorre's employment because Lorre gained possession of a passenger's lost headset and, instead of promptly turning it in to a supervisor or lost and found, he offered to sell the headset to his coworkers while misrepresenting that he had received it as a gift.

By presenting evidence that it acted for a legitimate, nondiscriminatory reason, Virgin satisfied its initial burden as the party moving for summary adjudication. Lorre does not dispute that Virgin presented evidence of a legitimate, nondiscriminatory reason for Lorre's termination. Thus, the burden shifted to Lorre to present evidence that Virgin's stated reason was a pretext for Virgin's discriminatory intent. (*Harris*,

supra, 56 Cal.4th at pp. 214-215; *Guz*, *supra*, 24 Cal.4th at pp. 355.)

Lorre argues that he repeatedly attempted to turn in the headset, ultimately did so, and was only joking about selling the headset. Lorre contends it was Uchniat who seized upon Lorre's attempts to be humorous by falsely accusing him of theft and terminating his employment. But the central question is not whether Lorre actually intended to sell the headset. Rather, the relevant question is whether Lorre presented evidence to support a permissible inference that Virgin acted based on discriminatory animus. (*Guz*, *supra*, 24 Cal.4th at p. 362; *Featherstone*, *supra*, 10 Cal.App.5th at p. 1159.) As the Supreme Court held in *Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal.4th 93, in the context of a plaintiff's breach of contract claim against his former employer for terminating him based on an allegedly false accusation that he sexually harassed a coworker, "The proper inquiry . . . , in other words, is not, 'Did the employee *in fact* commit the act leading to dismissal?' It is, 'Was the factual basis on which the employer concluded a dischargeable act had been committed reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual?'" (*Id.* at p. 107.)

Lorre has not presented any evidence that Uchniat or any other Virgin decisionmaker harbored discriminatory animus against him on the basis of his disability. Lorre points only to the emails Uchniat sent to two Virgin employees in August 2013 in which he stated regarding Lorre, "Looks like Alex is off his meds again," and "Coo koo coo koo." Uchniat's comments were in response to an email from Lorre, in which he dramatically stated how he was dragged in the heat to his doctor's appointment but

the doctor cancelled on him because the doctor needed to go to the hospital, not taking into account Lorre's important work for Virgin. Uchniat's emails did not express any animus toward Lorre with respect to his knee injury or his taking medical leave.

Lorre argues that Virgin's discriminatory animus can be shown by the fact the stated reason for Lorre's termination was false—because he did not steal the headset—and because Virgin failed to perform a thorough and fair investigation of the incident. However, Virgin presented evidence supporting its belief that Lorre attempted to sell the lost headset. Specifically, on January 1, 2014, the day after obtaining the headset, Lorre offered to sell the headset to his coworkers Granados, Iezzi, and Vintch. Lorre told Iezzi and Vintch that he received the headset as a gift. At the end of his shift, Lorre put the headset back in his personal locker.

The next day Lorre offered to sell the headset to two other coworkers, Sanchez and Lumberto. It was only after these offers were rejected that Lorre returned the headset to Lazor, two days after obtaining it. Further, Lorre failed to provide Lazor with any information about the flight from which he obtained the headset.

As to the thoroughness of the investigation, Uchniat asked Lorre, Lazor, Vintch, Granados, and Sanchez for statements. Notably, Lorre himself admitted that he tried to sell the headset to his coworkers. First, he admitted to Uchniat in their conversation on January 2, 2014 outside the break room that he tried to sell the headset to his coworkers. In his January 2 email to Uchniat, Lorre did not deny offering the headset for sale, instead explaining that he was "kidding around" with his

coworkers, and "made funny remarks but . . . kept a straight face." He apologized for turning in the headset late.

Lorre similarly admitted to Vorzimmer during his January 7, 2014 telephone interview that he offered to sell the headset to multiple people, including "Robert and another guy." He described that he offered the headset first at $300, then $200, but Robert rejected his offer. Lorre also admitted he told people he received the headset as a gift. However, he stated that he "was just joking around." Later that day Lorre sent an email to Vorzimmer in which he apologized for the incident, and noted that he did not "push people into buying it," did not receive any money for the headset, and did not argue with his coworkers "to negitiate [*sic*] any price." He again admitted he falsely stated the headset was a gift.

The written statements from Vintch, Granados, and Sanchez confirmed that Lorre had discussed selling the headset to them and others. Indeed, according to Vintch, Lorre assured him that Lorre did not find the headset on an airplane. Granados also recounted that Lorre continued to offer the headset for sale on January 2 to the night shift personnel. Uchniat also obtained a statement from Lazor, who explained that Lorre asked her whether he could have the headset back if no one claimed it, although Lorre later denied he made this statement. Vorzimmer interviewed Ha, who stated that Lorre took the headset from him, and assured him he would take it to operations or lost and found. This statement was inconsistent with Lorre's statement that he picked up the headset from the front galley as he was exiting the airplane, not from Ha directly.

Lorre argues that the witnesses who gave statements were hostile to him, pointing out that Lorre's coworkers had raised

concerns about Lorre in the past, and on January 2, 2014 Lorre had a heated dispute with some of his coworkers. However, he does not show how his coworkers fabricated their statements given that the statements were consistent with Lorre's own admissions. Lorre also argues that he was interviewed by phone instead of in person, and that Virgin did not interview the witnesses who gave statements.[4] However, Lorre does not explain how any further investigation would have revealed a different version of events. By Lorre's own accounts he attempted to sell the headset, and "kept a straight face." He also admitted he told his coworkers that the headset was a gift. Even accepting Lorre's account that he made multiple attempts to return the headset, it is undisputed that he failed to return the headset until two days after he obtained it. These undisputed facts support a finding as a matter of law that "'the factual basis on which the employer concluded a dischargeable act had been committed [was] reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual[.]'" (See *Cotran v. Rollins Hudig Hall Internat., Inc.*, *supra*, 17 Cal.4th at p. 107.)

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[4] Lorre also asserts that "it only took Vorzimmer a mere [39] minutes from the time he received Uchniat's e-mail accusing . . . Lorre of theft to conclude that . . . Lorre had indeed committed a theft and should be terminated." However, Vorzimmer was responding to Uchniat's email enclosing the statements from Uchniat, Lorre, Lazor, Vintch, Granados, and Sanchez. Vorzimmer stated, "Yes, I would concur with separation, based on what you[']ve indicated below." Following this email, Vorzimmer interviewed both Lorre and Ha before Virgin made a final decision.

Lorre contends Virgin violated its own policy for "Conducting Lawful Investigations." Although Virgin argues that the document cited by Lorre was only a training guide handed out in 2009 for sexual harassment investigations, the document refers to "claims of harassment or other employee misconduct." In any event, we accept as true for purposes of our review that this policy applied to Virgin's investigation of Lorre's alleged theft. However, the document does not show that Virgin's investigation was flawed. Although Lorre highlights that the document states that the investigators should not be biased and should interview all witnesses, in his deposition Lorre described Uchniat as "very fair." Lorre has not presented any evidence that the other individuals involved in the investigation or termination, including O'Connor, Vorzimmer, and Bianchi, were biased against him in any way. Lorre also cannot point to how any additional witness interviews would have changed the result in light of Lorre's admissions.

The cases relied on by Lorre, *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243 and *Mendoza v. Western Medical Center Santa Ana* (2014) 222 Cal.App.4th 1334, do not hold to the contrary. In *Nazir*, the plaintiff sued his former employer under FEHA, alleging that the stated reason for his termination—that he sexually harassed a female contractor—was a pretext for his employer's discrimination against him on the basis of his race and national origin. (*Nazir*, *supra*, at pp. 248-249.) The court reversed the trial court's grant of summary judgment for the employer, finding the employer failed to conduct a thorough investigation of the alleged sexual harassment by having a biased supervisor with an "axe to grind" perform the investigation, failing to comply with its own policy to give the alleged harasser

a copy of the written complaint, and failing to interview relevant witnesses, including the complaining witness's boyfriend, who prepared the witness's statement describing the harassment. (*Id.* at p. 277, 280.) Notably, in *Nazir* there was substantial evidence that the plaintiff's coworkers had harassed him based on his race and national origin, and that his supervisor who conducted the investigation failed to punish the harassers. (*Id.* at pp. 257-261.)

In *Mendoza*, the plaintiff sued his former employer for wrongful termination in violation of public policy, claiming he was fired because of his report of sexual harassment by his supervisor. (*Mendoza v. Western Medical Center Santa Ana*, *supra*, 222 Cal.App.4th at p. 1339.) The defendants argued they fired the plaintiff after determining he had willingly engaged in flirtatious and lewd behavior with his supervisor, and not as a result of any retaliatory animus. (*Id.* at p. 1343.) The court reversed the judgment for the plaintiff, finding instructional error, but it also concluded there was sufficient evidence in the record to show that a substantial motivating reason for the plaintiff's termination was his report of sexual harassment. (*Id.* at p. 1344.) The court noted that the plaintiff was fired "soon after" he reported the sexual harassment, and that by the plaintiff's account he was not complicit in the sexual misconduct. (*Ibid.*) Moreover, the court pointed to expert testimony that the employer failed to conduct a thorough investigation into what happened. (*Ibid.*)

In *Nazir* and *Mendoza* there was significant evidence of discrimination and retaliation for reporting harassment, respectively, not present here. Moreover, in both cases there was significant evidence that an inadequate investigation had been performed. Here, Lorre's own admissions supported the

conclusion that he attempted to sell the headset while misrepresenting that it was given to him as a gift.

Lorre's position that he was joking does not constitute ""substantial responsive evidence" that the employer's showing was untrue or pretextual.'" (*Soria*, *supra*, 5 Cal.App.5th at p. 591.) Neither does Lorre's argument as to an asserted flawed investigation. Rather, as in *Guz*, Lorre has failed to present "evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions." (*Guz*, *supra*, 24 Cal.4th at p. 361.) Lorre has therefore failed to raise a triable issue of material fact that Virgin discriminated against him based on his disability or medical condition.

C. *Lorre Failed To Present Evidence Raising a Triable Issue as to His Wrongful Termination Claim*

Disability discrimination in violation of FEHA can form the basis for a common law cause of action for wrongful termination in violation of public policy. (*City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1161 ["discrimination based on disability, like sex and age discrimination, violates a 'substantial and fundamental' public policy and can form the basis of a common law wrongful discharge claim"]; *Prue v. Brady Co./San Diego, Inc.* (2015) 242 Cal.App.4th 1367, 1378 [plaintiff alleged sufficient facts to state a cause of action for wrongful termination in violation of FEHA's public policy against disability discrimination].)

However, a plaintiff cannot prevail on a common law claim for wrongful termination in violation of public policy based on employment discrimination if the employer did not violate the

constitution or a statute. (*Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 272 [concluding the plaintiff had no claim for wrongful termination in violation of public policy based on age discrimination because the employer's denial of educational benefits based on age did not violate the constitution or FEHA]; *Featherstone*, *supra*, 10 Cal.App.5th at p. 1169 [wrongful termination claim failed because the plaintiff had not established a violation of FEHA].) Accordingly, because Lorre's claim for wrongful termination in violation of public policy is based on a FEHA violation, it also fails.

D. *Lorre Failed To Present Evidence Raising a Triable Issue as to His Claim for CFRA Retaliation*

Lorre contends the same evidence showing that Virgin terminated his employment because of unlawful discrimination also shows that his termination was retaliatory in violation of CFRA.

CFRA provides that a qualified employee of an employer with 50 or more employees may take up to 12 weeks of family care and medical leave in any 12-month period. (Gov. Code, § 12945.2, subd. (a).) The act prohibits an employer from taking any adverse employment action against an individual because of his or her exercise of the right to family care and medical leave. (*Id.*, subd. (l)(1);[5] *Bareno v. San Diego Community College Dist.* (2017) 7 Cal.App.5th 546, 560 (*Bareno*).)

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[5] Government Code section 12945.2, subdivision (l), states: "It shall be an unlawful employment practice for an employer to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because of . . . [¶] (1) an

In order to prove a cause of action for retaliation in violation of CFRA, the plaintiff must prove: "'"(1) the defendant was an employer covered by CFRA; (2) the plaintiff was an employee eligible to take CFRA [leave]; (3) the plaintiff exercised [his or] her right to take leave for a qualifying CFRA purpose; and (4) the plaintiff suffered an adverse employment action, such as termination, fine, or suspension, because of the exercise of [his or] her right to CFRA [leave].'" [Citation.]" (*Bareno*, *supra*, 7 Cal.App.5th at p. 560; accord, *Soria*, *supra*, 5 Cal.App.5th at p. 604; *Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 239, 248.)

The *McDonnell Douglas* burden-shifting analysis applicable to discrimination claims applies to a CFRA retaliation claim. (*Bareno*, *supra*, 7 Cal.App.5th at p. 560; *Soria*, *supra*, 5 Cal.App.5th at p. 604; *Moore v. Regents of University of California*, *supra*, 248 Cal.App.4th at pp. 239, 248, 250; *Faust v. California Portland Cement Co.* (2007) 150 Cal.App.4th 864, 885.)

As with FEHA claims, an employer may move for summary adjudication of a CFRA retaliation claim by presenting evidence that it acted for a legitimate, nonretaliatory reason. (*Bareno*, *supra*, 7 Cal.App.5th at p. 560; *Faust v. California Portland Cement Co.*, *supra*, 150 Cal.App.4th at p. 885.) If the employer satisfies this burden, the burden shifts to the employee to show that the employer's stated reasons were untrue or pretextual and the employer's decision was retaliatory. (*Bareno*, *supra*, at p. 560; *Faust*, *supra*, at p. 885.)

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individual's exercise of the right to family care and medical leave . . . ."

Virgin does not dispute that Lorre met the qualifications to take a medical leave related to his knee injury under CFRA. Instead, it argues that Lorre cannot show that he was terminated in retaliation for his request for leave because Lorre was suspended on January 3, 2014, before he gave Uchniat a doctor's note showing his need for four weeks' leave on January 7, 2014. However, after initially testifying at his deposition that Uchniat informed him that he was suspended during a phone call on January 3, 2014, Lorre later clarified that Unchniat did not inform him of his suspension on that call. We accept as true for purposes of our review that Lorre gave Uchniat the doctor's note requesting medical leave prior to his suspension.

Alternatively, Virgin argues that Lorre cannot show that his termination based on alleged theft was a pretext for retaliation for Lorre requesting medical leave. We agree. Virgin satisfied its initial burden as the party moving for summary adjudication by presenting evidence that it terminated Lorre's employment for a legitimate reason unrelated to his request for medical leave. Thus, the burden shifted to Lorre to present evidence that Virgin's stated reason was untrue or pretextual to raise a reasonable inference of retaliatory intent. (*Bareno*, *supra*, 7 Cal.App.5th at p. 560.)

Lorre did not present any evidence that Virgin's stated reason was pretextual other than the fact he submitted a doctor's note supporting medical leave on January 7, 2014, prior to his suspension. But Virgin's investigation of the headset incident was substantially completed by January 3, 2014, and Virgin had already made a tentative decision to terminate Lorre prior to receiving the doctor's note. Uchniat learned of Lorre's offer to sell the headset on January 2, on which date the investigation was

initiated. By January 3, Uchniat had written statements from Lorre, Granados, Sanchez, and Lazor, and sent them to O'Connor and Vorzimmer, along with his own statement. Vorzimmer responded the same day, indicating that based on the statements he "would concur with separation." Thus, by the time Lorre requested medical leave on January 7, 2014, Virgin had substantially all of the information on which it based its final decision of termination, including Lorre's admission that he offered to sell the headset to his coworkers, falsely stated that he received the headset as a gift, and failed to return the headset for two days.

Accordingly, Lorre's evidence was insufficient to create a reasonable inference that the stated reason for his termination was pretextual and the true reason was his request for medical leave. Lorre therefore failed to raise a triable issue of material fact regarding CFRA retaliation.

E. *Lorre Failed To Present Evidence Raising a Triable Issue as to His Defamation Claim*

In order to prove a defamation claim, a plaintiff must prove "'(a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage.' [Citation.]" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720; accord, *Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 1007, petn. for review pending, petn. filed Apr. 9, 2018.)

Virgin contends there was no publication of a provably false statement about Lorre. (See *Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1261 [defamation requires """"a provably false assertion of fact""""]; *Charney v. Standard General, L.P.* (2017) 10

Cal.App.5th 149, 157 [“‘to state a defamation claim, the plaintiff must present evidence of a statement of fact that is provably false’”].)

Lorre points to the testimony of Uchniat that he told O’Connor, Bianchi, and Uchniat’s four supervisors, James Childer, Jay Barrett, Raul Macias, and Kolpak, that “Lorre had committed theft.”[6] Uchniat testified he told the supervisors that Lorre committed theft after his termination because they were also Lorre’s supervisors, and therefore they needed to know why he was terminated. While the evidence showed that Lorre took possession of the headset and offered to sell it, there was a question of fact as to whether the statement that Lorre “committed theft” was false in light of Lorre’s statements that he was joking and did not intend to sell the headset.[7] We therefore turn to whether the statements were privileged.

The trial court found that the statements by Uchniat and other Virgin supervisors were privileged under the common interest privilege codified in Civil Code section 47, subdivision (c), because Lorre failed to present sufficient evidence of malice, and

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6 Lorre also asserts in his reply that he presented evidence that Virgin published a written statement to a third party; however, there is no evidence to support this assertion in the record on appeal.

7 The crime of theft by larceny “‘is committed by every person who (1) takes possession (2) of personal property (3) owned or possessed by another, (4) by means of trespass and (5) with intent to steal the property, and (6) carries the property away.’” (*People v. Vidana* (2016) 1 Cal.5th 632, 639; accord, *People v. Bunyard* (2017) 9 Cal.App.5th 1237, 1243.)

on this basis granted summary adjudication as to this claim. We agree.

Civil Code section 47, subdivision (c), provides in pertinent part that a communication is privileged if it is made "without malice, to a person interested therein, (1) by one who is also interested . . . ." (Civ. Code, § 47, subd. (c); see *Taus v. Loftus*, *supra*, 40 Cal.4th at p. 721 [concluding statements by psychology professor at conference attended by mental health professionals relating to the subject of the conference fell within the common interest privilege]; *Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 949-951 [concluding defendant tennis club met its burden on summary judgment to show that statements to club members that the plaintiff employee had secretly recorded a board meeting were made to individuals with a common interest, but finding there was a triable issue of fact whether the employer acted with malice].) The common interest privilege is a complete defense to a defamation cause of action. (*Taus*, *supra*, at p. 721; *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1538-1541.)

The defendant bears the initial burden of establishing that the statement in question was made on a privileged occasion; the burden then shifts to the plaintiff to establish that the statement was made with malice. (*Taus v. Loftus*, *supra*, 40 Cal.4th at p. 721; *Cornell v. Berkeley Tennis Club*, *supra*, 18 Cal.App.5th at p. 949.) "'Communications made in a commercial setting relating to the conduct of an employee have been held to fall squarely within the qualified privilege for communications to interested persons.'" (*Cornell*, *supra*, at p. 949.) Lorre does not contest that the statements were made to individuals with a common interest; instead, he argues that Virgin acted with malice.

"""The malice necessary to defeat a qualified privilege is 'actual malice' which is established by a showing that the publication was motivated by hatred or ill will towards the plaintiff *or* by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights [citations]."""
(*Taus v. Loftus*, *supra*, 40 Cal.4th at p. 721.)

Lorre points to three prior incidents to support an inference of malice. First, his only prior discipline, in October 2012, occurred less than one month after his return from a three-month medical leave, and he received a "final warning," rather than progressive discipline. In that incident, Lorre was cited for leaving the flight deck of an airplane while the engine was running. Uchniat issued a "final warning," stating, "Failure to follow Airbus Maintenance manual and VA GMM.011 Engine Run and Taxi check list on 10/4/2012 while performing an engine static run on aircraft N844VA. You voluntarily left the flight deck unattended while an aircraft engine was at idle. This is a fundamental error; as you are aware, under no circumstances should a technician leave the flight deck while an aircraft engine is running. Your error constituted a serious safety violation that could have led to serious injury and/or property damage."

Lorre does not dispute the historical facts stated in the final warning. Further, Uchniat testified that he gave a final warning because "this was such an egregious safety act," and he wanted to monitor Lorre's performance for 180 days instead of the 90 days that would apply to a first warning. Lorre had a right to appeal the discipline, but did not do so. In light of the seriousness of the incident, the timing and severity of the discipline do not support a reasonable inference of malice.

Lorre next claims that in November 2013 Uchniat falsely accused him of committing fraud by obtaining workers' compensation benefits from Virgin for medical expenses that were paid by another airline. However, Lorre only points to an email Uchniat sent to two Virgin employees in human resources stating, "Please review this form. I notice it's titled Alex Lorre v. ATA. I am concerned there is some double dipping here. Why would we pay transportation costs for an injury sustained at another carrier. Probably a Ca. thing that you all can enlighten me on. Anyhow- Something does not look right. Your thoughts and expertise please. Or at least some thoughts and prayers?" After investigating the matter, the employees informed Uchniat that the words "American Trans Air" on the form were included in error. Uchniat's inquiry into whether Lorre's workers' compensation claim sought payment for expenses related to another airline does not suggest any hatred or ill will, and cannot support a reasonable inference that Uchniat acted with malice in telling his supervisors that Lorre had committed theft.

Lorre also points to the two emails from Uchniat to other Virgin employees in August 2013, less than one month after he told Uchniat that he might need another knee surgery. Uchniat stated regarding Lorre, "Looks like Alex is off his meds again" and "Coo koo coo koo." Uchniat made those comments in response to Lorre's email addressing Kolpak's request for a doctor's note, in which Lorre stated: "Yaay, go Bryant, thanks this is so good that is coming from an Airline manager/supervisor than ME requesting a letter. . . . They gotta be more organized, dragging ME in the heat, in a parking lot type traffic in 405 North to Van Nuys on My Friday, telling ME that Doctor needed to go to hospital. Furthermore, you can mention to them that we

are operating an important Airline and doing business not a Chucky Cheese or Carl's Junior store and restaurant and it is not fair to waste time of an Airline Employee like ME like that. . . ."

Uchniat's comments in the two emails support Lorre's contention that Uchniat generally harbored ill will toward him. However, as this district held in *Biggins v. Hanson* (1967) 252 Cal.App.2d 16, "If the occasion is conditionally privileged, if the defendant's primary motive is the advancement of the interest which the privilege protects and if he speaks in good faith, the mere fact that he harbors ill will toward the plaintiff should be a neutral factor." (*Id.* at p. 20;[8] accord, *Williams v. Taylor* (1982)

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[8] In *Biggins*, the plaintiff sued his former employer and supervisor for defamation based on his supervisor's distribution of an internal memorandum to company managers stating that the plaintiff was fired in part "'[d]ue to . . . [his] threat to sabotage valuable laboratory equipment . . . .'" (*Biggins v. Hanson*, *supra*, 252 Cal.App.2d at p. 19.) Similar to the facts here, there was evidence of "friction" between the plaintiff and the supervisor who sent the memorandum. (*Id.* at pp. 18-20.) After the jury returned a verdict for the plaintiff, the trial court granted the defendants' motion for a new trial, but denied their motion for judgment notwithstanding the verdict. The Court of Appeal affirmed, concluding as to the motion for judgment notwithstanding the verdict that although there was evidence the plaintiff made the threat, there was substantial evidence that at the time he sent the memorandum the supervisor had no information about the threat; thus, he did not send the memorandum in good faith, and the common interest privilege did not apply. (*Id.* at pp. 20-21.) Here, unlike *Biggins*, when Uchniat sent the emails to Lorre's supervisors, he had information that Lorre had taken the headset; Lorre failed to present evidence showing that Uchniat's primary motive in sending the emails was his ill will toward Lorre.

129 Cal.App.3d 745, 752-753 ["'[If] the publication is made for the purpose of protecting the interest in question, the fact that the publication is inspired in part by resentment or indignation at the supposed misconduct of the person defamed does not constitute an abuse of the privilege'"]; *SDV/ACCI, Inc. v. AT & T Corp.* (9th Cir. 2008) 522 F.3d 955, 963 ["Whether or not [the defendant] hated [the] plaintiffs at the time the e-mails were sent is not the same question as whether [the defendant] was primarily motivated by ill will, spite, or some other improper motive, in sending the e-mails"]; see also 1 Sack on Defamation (5th ed. 2017) § 9:3.1, p. 9-43 ["in most jurisdictions it is not enough for a plaintiff to demonstrate that the defendant disliked the plaintiff, or that such animosity was *part* of the motive for the defamatory communication. It must be shown that the improper motive was predominant"].)

While Lorre has presented evidence that Uchniat harbored ill will against him, he has not created a triable issue of fact that Uchniat's "primary motive" in telling Lorre's supervisors that Lorre had committed a theft by taking the headset was ill will in light of Lorre's admission that he took the headset and the purpose of Uchniat's statements to explain why Lorre was fired. (*Biggins v. Hanson*, *supra*, 252 Cal.App.2d at p. 20.)

Lorre also argues that Uchniat accused him of theft on January 3, 2014, only a day after learning that Lorre would take time off from work for another doctor's appointment the following week. Lorre argues that the timing of the accusation, the fact he had already returned the headset, and the pattern of accusations of misconduct following his taking or requesting medical leave together show Uchniat's ill will and hostility towards Lorre.

However, the information before Uchniat, including Lorre's admission that he offered to sell the headset to multiple coworkers and falsely stated that he received it as a gift, the statements Uchniat received from three of Lorre's coworkers that confirmed this, the fact that Lorre only returned the headset after his offers were rejected, the fact he waited two days to return the headset, and Lazor's statement that Lorre inquired when he returned the headset whether he could have the headset back if no one claimed it, amply supported Uchniat's statements to Lorre's supervisors that Lorre was terminated because he had committed a theft. Further, as of January 3, Lorre had only requested time for a doctor's appointment, not the four-week leave he requested on January 7.

Finally, although Lorre raises flaws in the investigation as a basis for finding malice, as we discuss above, Lorre has failed to show how any different investigation, including, for example, interviews of additional witnesses, would have changed the result given Lorre's admission that he offered to sell the headset to multiple coworkers and falsely stated he received the headset as a gift. This was not a case where there was a dispute as to whether Lorre offered the headset for sale for which further investigation would have determined whether the allegation was true.

Accordingly, Lorre has failed to meet his burden to present evidence of a triable issue of fact that Uchniat acted with malice in stating that Lorre was terminated for committing a theft of the headset, and the common interest privilege applies.

F. *Lorre Failed To Present Evidence Raising a Triable Issue as to His Breach of Contract Claim*

Lorre contends summary adjudication of his breach of contract cause of action was improper because the question whether Virgin had good cause to terminate his employment presents a triable issue of fact. Lorre bases his argument on the same evidence he presented to show that his termination for theft was pretextual, and was instead based on discriminatory or retaliatory animus or ill will. Lorre also argues he had capably performed his job for over five years with no prior record of unethical or improper conduct.

Employment in California is at will absent an express or implied agreement to the contrary. (Lab. Code, § 2922; *Guz*, *supra*, 24 Cal.4th at pp. 335-336; *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 355.) An implied-in-fact agreement to terminate only for good cause requires the employer to have "fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond." (*Cotran v. Rollins Hudig Hall Internat., Inc.*, *supra*, 17 Cal.4th at p. 108.)

In this case, Virgin made an express agreement in its Playbook to discipline or terminate an employee only for "just cause," defined as where "a reasonable person could conclude there are justifiable grounds for the corrective action based on policy and practice." For the same reasons we conclude that Lorre has not met his burden to show that Virgin's proferred

reason for terminating him on the basis of his offers to sell the headset were pretextual or based on ill will, we conclude there was no substantial evidence that Virgin acted without just cause, in that "a reasonable person could conclude there are justifiable grounds" for his termination. Lorre therefore failed to create a triable issue of fact regarding his breach of contract cause of action.

DISPOSITION

The judgment is affirmed. Virgin is entitled to costs on appeal.

FEUER, J.*

We concur:

PERLUSS, P. J.

SEGAL, J.

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