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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

RON UDELL, Plaintiff and Appellant, v. KENKO INTERNATIONAL et al., Defendants and Respondents.	B280657 (Los Angeles County Super. Ct. No. BC547384)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry A. Green, Judge. Affirmed.

Shegerian & Associates and Carney R. Shegerian for Plaintiff and Appellant.

Fisher & Phillips, Todd B. Scherwin, Wendy McGuire Coats and Nathan V. Okelberry for Defendants and Respondents.

* * * * * *

In this employment case, plaintiff Ron Udell was hired as president of defendant Kenko International to make the company profitable. He failed to do so for five years straight and could not convince the board of directors he could turn the company around in the future, so the board of directors terminated him. Udell sued, claiming his termination was actually due to his race, his age, and several medical conditions and disabilities. The trial court granted summary judgment, finding he could not raise a triable issue of fact that his termination was based on anything other than his failure to make Kenko International profitable. We agree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Relationship of Defendants

In his lawsuit, Udell named three related entities as defendants: Kenko Corporation; Kenko Holdings Company, Inc.; and Kenko International (hereinafter defendants). Kenko Corporation is a Japanese company located in Japan and the parent company to Kenko Holdings Company, Inc., which is organized under California law. Kenko International is a wholly owned subsidiary of Kenko Holdings Company, Inc., with a headquarters in Los Angeles. Not named as a defendant but relevant to the background of this case, Soft Gel Technologies, Inc. (Soft Gel Technologies) is also a subsidiary of Kenko Holdings Company, Inc.

At the time he was terminated, Udell was ostensibly employed by Kenko International as president, which the undisputed evidence showed had no more than four employees within three years prior to his termination. However, Udell also alleged he was indirectly employed by Kenko Corporation and Kenko Holdings Company.

2. Udell's Employment

From 1995 to 2008, 66-year-old Udell was president of Soft Gel Technologies. In 2008, he was transferred to president of Kenko International. The year before Udell's departure, Soft Gel Technologies did not post a profit, and Udell admitted in his deposition one reason for his transfer was to increase profits at Soft Gel Technologies. Satomi Tsuchibe, chairman of the board of Kenko International, also believed Udell would make Kenko International more profitable. Udell and Tsuchibe had known each other since the 1970's and had what Udell viewed as a father-son relationship. He thought of himself as Tsuchibe's "go-to guy."

As Kenko International's president, Udell primarily reported to Tsuchibe. His responsibilities included managing the import, export, and sale of raw materials within North America, and overseeing quality control and administrative operations. Udell testified his "job [was] to make profitability."

Udell was terminated on February 28, 2014. Beginning with 2009—the first full year of Udell's tenure as president—through the end of 2013, Kenko International never made a profit. To the contrary, the company posted net losses of close to $500,000 in 2009 and 2010, around $230,000 in 2011, and around $121,000 in 2012. In Udell's last full year of employment in 2013, the company posted a net loss of nearly $375,000, which exceeded the losses for the two previous years combined. Kenko International also did not post a profit in the first two months of 2014 before Udell was terminated. Udell admitted in his deposition Kenko International never posted a profit while he was president.

After posting the loss in 2012, Udell and the board of directors took various steps to try to make the company profitable. The only reason Udell was not terminated then was because Tsuchibe argued against it and wanted to give Udell a chance to succeed. Heading into 2013, Kenko International's shareholders pressed the board of directors to make the company profitable. As the year progressed, however, it became apparent the company would post a fifth consecutive net loss higher than the previous years. Consequently, Kenko International reduced Udell's salary by $50,000 and Tsuchibe criticized his performance. For example, in an October 2013 e-mail, Tsuchibe pointed out Udell posted a loss of nearly $4 million from 2003 to 2008 while at Soft Gel Technologies. Tsuchibe wrote, "The record demonstrates how poor your management was on the Soft Gel was [*sic*]. [¶] You will understand that we can no longer allow you to make the same mistake in your current management of Kenko International." Udell testified he knew as of October 2013 that if he did not make Kenko International profitable, he was "not going to be the president of Kenko International anymore."

Tsuchibe died in early January 2014. His replacement, Hisazo Matsuo, conducted an internal review of Kenko International's performance under Udell. Matsuo and director Yuichi Takada—the only two members of Kenko International's board of directors—met with Udell in Japan on February 21, 2014 to discuss his performance. Finding Udell's explanation of the losses and plans for the future unconvincing, Matsuo and Takada voted to terminate Udell's employment effective February 28, 2014. Both testified their sole reason was the lack of profit at Kenko International during Udell's tenure and their belief he did not possess a sound business plan for making it

profitable. Both also testified they were unaware of Udell's age, any medical condition, or any disability.

3. Udell's Health Issues

Starting in the early 1990's, Udell suffered from three health issues. First, in 1991 or 1992, he was diagnosed with a chronic pain condition called trigeminal neuralgia. He shared that diagnosis with two people: his former assistant and Tsuchibe. He did not need any work-related accommodation for the condition. Sometime around 2007 to 2009, he began to walk with a limp and needed to use a cane, although he still did not need any accommodation.

While working for Soft Gel Technologies, Udell was diagnosed with a detached retina sometime around 1999 to 2001. He wore shaded sunglasses but required no workplace accommodation.

In September 2012, Udell broke his leg. He was given as much time off as he needed to heal. After several weeks off, he returned to work without any restrictions or need for accommodation. Generally, all of his requests for time off for medical appointments were granted.

4. Procedural History

Udell sued defendants alleging 11 causes of action related to his termination: (1) disability discrimination in violation of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.); (2) medical condition discrimination in violation of FEHA; (3) age discrimination in violation of FEHA; (4) race and national origin discrimination in violation of FEHA; (5) discrimination based on California Family Rights Act (CFRA) leave in violation of FEHA; (6) retaliation for taking CFRA leave in violation of FEHA; (7) failure to reasonably accommodate his

disability in violation of FEHA; (8) failure to engage in the interactive process in violation of FEHA; (9) wrongful termination in violation of public policy; (10) breach of implied-in-fact contract not to terminate him without good cause; and (11) breach of express oral contract not to terminate him without good cause.

Each defendant filed a motion for summary judgment. Udell opposed and filed objections to some of defendants' evidence. He argued defendants should all be considered his "employer." On the merits, he did not dispute Kenko International did not turn a profit during his tenure, but he argued that reason was pretext for discrimination, citing various categories of evidence we will discuss in more detail below. He also submitted his own declaration and a declaration from his attorney purporting to authenticate a host of exhibits. As part of their replies, defendants objected to portions of Udell's declaration and to five of the exhibits attached to his attorney's declaration.

The trial court overruled all but two of Udell's objections and sustained many of defendants' objections. It granted summary judgment to each defendant on several grounds. It found no dispute of fact that Kenko International was Udell's sole employer and it had only four employees. That defeated Udell's FEHA, CFRA, and wrongful termination claims. Alternatively, it concluded Udell failed to raise a triable issue that the reason for his termination was pretext. Similarly, it concluded Udell's contract claims failed because his failure to post a profit during his tenure constituted good cause for his termination. Udell appealed.

DISCUSSION

1. Legal Standard

We review de novo the grant of summary judgment, considering all the evidence presented by the parties except evidence for which objections were made and sustained. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) A court shall grant a motion for summary judgment if all the papers show there is no triable issue as to any material fact and the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) The moving party may do this by showing either (1) one or more elements of a cause of action cannot be established, or (2) a complete affirmative defense to the cause of action exists. (*Id.*, subds. (o)(1), (2), (p)(2).)

2. Scope of Review and Objections to Evidence

Udell has indicated that he is not challenging the trial court's summary judgment ruling in favor of Kenko Holdings Company or in favor of all defendants on his failure to accommodate, failure to engage in the interactive process, and CFRA claims. Thus, we confine our analysis to his claims against Kenko Corporation and Kenko International for disability, age, and race/national origin discrimination in violation of FEHA, for wrongful termination, and for breach of contract.

Further, as noted above, the trial court sustained many of defendants' objections and excluded portions of Udell's declaration and five exhibits attached to his attorney's declaration. Udell has not challenged those rulings on appeal, so he has forfeited any claim those rulings were erroneous. We must treat that evidence as properly excluded. (*Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1113; see *Orange County Water Dist. v. Sabic Innovative Plastics US, LLC* (2017)

14 Cal.App.5th 343, 368.) Although Udell has ignored these rulings in his briefs on appeal and cited excluded evidence, we will not consider that evidence when reviewing whether he has raised a triable issue of fact. (*Guz, supra,* 24 Cal.4th at p. 334.)

3. FEHA Discrimination Claims

a. Kenko Corporation as Udell's "Employer"

Government Code section 12926, subdivision (d) defines "employer" for the purpose of FEHA as including "any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly." The undisputed evidence, including Udell's own deposition testimony, showed Kenko International only employed four people. In his opening brief on appeal, he does not contend otherwise.[1] Thus, Kenko International is not subject to FEHA.

To save his claims, Udell argues he was *also* employed by Kenko Corporation, Kenko International's parent company, which had 50 employees. He relies on the "integrated enterprise" test set forth in *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727, 737,[2] which looks to four factors: "interrelation of operations, common management, centralized

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[1] In the trial court, Udell's attorney attempted to authenticate an organizational chart purporting to show Kenko International had five employees, but the court sustained defendants' objections and excluded that evidence. As noted, Udell does not challenge that ruling. Udell also suggests for the first time in his reply brief that Kenko International's Board of Directors should be considered employees. He provided no support or explanation for this contention so we will not consider it.

[2] Disapproved on another ground by *Reid v. Google, Inc.* (2010) 50 Cal.4th 512.

control of labor relations, and common ownership or financial control." (*Ibid.*) When considering a parent and subsidiary, there is a "strong presumption" that a parent company is not the employer of its subsidiary's employees, and an employee seeking to impose liability on a parent corporation bears a heavy burden to show otherwise. (*Ibid.*)

We will assume for the sake of our decision that Udell can raise a triable issue that Kenko Corporation can be considered his "employer," thereby qualifying him for protection under FEHA. As we explain below, his claims fail on the merits.

b. Merits

In reviewing summary judgment on FEHA discrimination claims, we follow the familiar burden-shifting framework from *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. (*Guz, supra,* 24 Cal.4th at p. 354.) For the purpose of trial, this requires the employee to first establish a prima facie case of discrimination. (*Ibid.*) The employee must provide evidence that "(1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Id.* at p. 355.)

Once the employee sets forth a prima facie case, the burden shifts to the employer to present evidence of a legitimate, nondiscriminatory reason for the adverse employment action. (*Guz, supra,* 24 Cal.4th at pp. 355-356.) The burden then shifts back to the employee to attack this reason as pretext for discrimination and offer any other evidence of discriminatory motive. (*Id.* at p. 356.)

When an employer moves for summary judgment, the employer satisfies its burden if it presents evidence of "nondiscriminatory reasons that would permit a trier of fact to find, more likely than not, that they were the basis for the termination." (*Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1097-1098.) If the employer presents a legitimate nondiscriminatory reason for the adverse action, the burden then shifts to the employee to "offer substantial evidence that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1004-1005 (*Hersant*).) "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." (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1159 (*Featherstone*).)

In support of their motions for summary judgment, defendants presented significant evidence that Udell was terminated because he failed to produce a profit as president of Kenko International. Udell admitted in his deposition his job was to make the company profitable. Yet, under his leadership the company posted losses every year, including a loss in his final full year of 2013 that exceeded the losses for the previous two years combined. After the loss in 2012, the only reason Udell was not terminated was because Tsuchibe argued against it and wanted to give Udell a chance to succeed. By October 2013,

however, Udell knew his job was in jeopardy: he testified if he did not make Kenko International profitable, he was "not going to be the president of Kenko International anymore." In his October 2013 e-mail to Udell, Tsuchibe wrote, "The record demonstrates how poor your management was on the Soft Gel was [*sic*]. [¶] You will understand that we can no longer allow you to make the same mistake in your current management of Kenko International."

Further, Matsuo and Takada testified the decision to terminate Udell was based on the lack of profit during Udell's tenure and their belief he did not possess a sound business plan for making the company profitable. Both testified they were unaware of Udell's age, any medical condition, or any disability.

In light of this showing, Udell could only avoid summary judgment by offering "substantial evidence" that defendants' reason was untrue or pretextual, or that defendants acted with a discriminatory animus, or both, "such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." (*Hersant, supra,* 57 Cal.App.4th at pp. 1004-1005.) In doing so, Udell " 'cannot simply show that the employer's decision was wrong or mistaken' "; he must show " 'such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [the [*sic*] asserted] non-discriminatory reasons." ' " (*Id.* at p. 1005.)

"Although an employee's evidence submitted in opposition to an employer's motion for summary judgment is construed liberally, it 'remains subject to careful scrutiny.' [Citation.] The

employee's 'subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations.' [Citation.] The employee's evidence must relate to the motivation of the decision makers and prove, by nonspeculative evidence, 'an actual causal link between prohibited motivation and termination.' " (*Featherstone, supra,* 10 Cal.App.5th at p. 1159.)

Udell alleged claims for race/national origin, age, and disability discrimination, but he does not separately address each of those grounds in his briefs on appeal. (Gov. Code, § 12940, subd. (a).) Instead, he lumps all his evidence together under the rubric of "discrimination." Nonetheless, we have reviewed his evidence and can place it into two categories: (1) evidence allegedly showing specific animus based on his race/national origin, age, or disability; and (2) evidence allegedly showing defendants' legitimate reason for his termination was false. We will address each category below. Viewing all the evidence together and in the light most favorable to Udell, his showing falls far short of that necessary to allow a reasonable jury to infer intentional discrimination on the basis of any protected category.

i. Race/National Origin Discrimination

Udell's only specific evidence of animus based on race or national origin was that all defendants' officers and the two individuals who terminated him were of Japanese descent. This is unsurprising, of course, since Kenko Corporation is a Japanese company. In any case, Udell conceded in his deposition he did not think he was terminated due to his race or national origin. Thus, he has failed to raise a triable issue that his termination was motivated by race or national origin discrimination.

ii. Age and Disability Discrimination

Udell suggests defendants harbored age-based animus because Kenko International chief financial officer Hiroshi Kishimoto testified in his deposition that it was a " 'matter of corporate common sense in Japan that companies do have a mandatory retirement age system.' " Udell misrepresents Kishimoto's testimony, which actually stated: "I *heard* just as a matter of corporate common sense in Japan that companies do have a mandatory retirement age system. However, I hardly have any employment experience in Japan. I don't know for sure, for a fact." (Italics added.) This vague and speculative statement does not prove it was actually "corporate common sense" in Japan to have mandatory retirement, let alone that *defendants* had such a policy or Udell was subject to it. It does not support an inference of age discrimination or pretext.

Udell also suggests defendants harbored age-and disability-based animus based on certain alleged comments by Kishimoto and Kenko International vice president Tomo Kirimoto. He cites Kishimoto's deposition testimony indicating Kishimoto was aware Udell had some physical problems and Kishimoto noticed Udell walked "slowly" around the office. He claims Kirimoto commented to him when he transferred to Kenko International, " 'When are you planning on retiring?' " and " 'You ought to retire.' " He also claims Kirimoto said in 2013 that Udell had "a difficult day" with a Japanese customer when Udell could not climb stairs and the group ate outside a restaurant. And he claims Kirimoto told him, " ' "Your leg condition is an

"eyesore" ' "; " 'Why are you wearing shaded glasses?' "; " 'Why can't you get your eye repaired?' "; and " 'Let me see your eye.' "[3]

With the arguable exception of the remark "Your leg condition is an 'eyesore,' " these comments appear to be innocuous and do not on their face implicate discriminatory animus based on age or disability. Even if a reasonable jury could conclude these remarks suggested discriminatory animus, comments of this sort are probative of discrimination only when considered in light of "who made the comments, when they were made in relation to the adverse employment decision, and in what context they were made," as well as in the context of all other evidence in the record. (*Reid v. Google, Inc.*, *supra*, 50 Cal.4th at p. 541.) Udell provides few details of the context surrounding these comments. He does not claim any of these remarks were made during the process of his termination or made to Matsuo and Takada, the members of the board of directors who decided to terminate him. Nor do they gain any significance when considered with other evidence in the record.

Udell attempts to link these comments to his termination by invoking the "cat's paw" doctrine and arguing that Kishimoto and Kirimoto were decisionmakers in that process. The "cat's

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[3] Udell claimed he heard from a coworker that president of Soft Gel Technologies Steve Holtby said " 'Udell's leg really isn't damaged' " and " 'Udell is not really hurt.' " The trial court sustained objections to this testimony in Udell's declaration and excluded it, a ruling Udell has not challenged. Defendants apparently did not object to the same testimony in Udell's deposition that Udell heard a "rumor" Holtby made these comments. Whether in his deposition or his declaration, this testimony was clearly inadmissible hearsay as the trial court ruled and we will not consider it.

paw" concept creates liability if a "significant participant" in an employment decision exhibited discriminatory animus, raising "an inference that the employment decision itself was discriminatory, even absent evidence that others in the process harbored such animus." (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 551.)

Udell's only evidentiary support that Kishimoto and Kirimoto were "significant participants" in his termination is a form interrogatory asking for names and contact information of each person "who participated in the TERMINATION decision" and "who provided any information relied upon in the TERMINATION decision." Responding to both questions together, defendants identified Takada, Matsuo, Kishimoto, Kirimoto, Steve Holtby (president of Soft Gel Technologies), and Juan Salgado (human resources manager for Soft Gel Technologies).

This response is at best ambiguous. The terms "participated in" and "provided any information relied upon" are extremely broad and not defined, and we cannot tell into which category Kishimoto and Kirimoto fell from defendants' interrogatory response. Kishimoto clarified in his deposition and declaration that he provided Chairman Matsuo with the financial history of Kenko International, but he was *not* involved with the decision to terminate Udell, was not involved in any discussion regarding the termination decision, never recommended Udell be terminated, and did not know about the decision until after it had been made. Udell apparently did not depose Kirimoto so we have no similar testimony from him. Yet, the declarations from Matsuo and Takada and other evidence indicates the board of directors—comprised solely of Matsuo and Takada—made the

decision to terminate Udell's employment. Other than defendants' interrogatory response, Udell offers no evidence to the contrary.

On this record, defendants' single ambiguous interrogatory response creates too tenuous a link between Kirimoto and Kishimoto and the decision to terminate Udell's employment to render their comments relevant to his claims. Thus, their isolated remarks are " 'entitled to virtually no weight in considering whether the firing was pretextual or whether the decisionmaker harbored discriminatory animus.' " (*Slatkin v. University of Redlands* (2001) 88 Cal.App.4th 1147, 1160; *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 810 (*Horn*).)[4]

iii. Additional Evidence

Udell cites a few other categories of evidence he contends show pretext, but none of them rebuts the undisputed evidence he was terminated for failing to turn a profit for Kenko International. Again relying on the interrogatory response

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[4] Udell suggests a jury could infer that Matsuo and Takada acted with disability-based animus because Udell traveled to Japan and they saw his disabilities for themselves. But the trial court sustained objections and excluded his statement in his declaration that they "saw my physical disabilities first hand, specifically my eye, limp and use of my cane." The only admissible evidence on this point was Matsuo's and Takada's declarations that they were unaware of Udell's disabilities. (See *Featherstone, supra,* 10 Cal.App.5th at p. 1167 [" 'While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the *only* reasonable interpretation of the known facts.' "].)

discussed above, he argues defendants gave "inconsistent statements" as to who participated in the decisionmaking process in order to argue the true decisionmakers—Matsuo and Takada—were unaware of his disabilities. As we have explained, the interrogatory response is at best ambiguous and the undisputed evidence showed Matsuo and Takada made the termination decision. Similar to Kishimoto, both Holtby and Salgado testified they were not decisionmakers in Udell's termination. Holtby provided Matsuo and Takada information about the process to terminate Udell, told them Udell was an "at-will" employee, and provided them with an opinion from a lawyer about the process. Salgado was merely given certain paperwork after Udell was terminated. Nothing in this record supports an inference that defendants listed individuals in the interrogatory response to conceal a discriminatory motive.

Next, Udell points out that for three years before he became president, Kenko International did not post a profit under Tsuchibe. He also claims in 2014, the year he was terminated, one product ended up selling for a profit. Even so, this evidence casts no doubt on the undisputed evidence that Udell was brought in to make Kenko International profitable and he failed to do so. Whether the company experienced profits or losses before hiring him is irrelevant, and making a profit on a single product in his final year of employment does not undermine defendants' reliance on his years-long string of losses as grounds for his termination.

Further, Udell emphasizes a form "Separation Notice" memorializing his termination, which he claims shows pretext because none of the options were marked to identify the reason for his termination. Yet, there is nothing inconsistent or false

about failing to mark a reason on this form and terminating him for failing to make Kenko International profitable.

Next, Udell claims Kishimoto "falsely" testified he did not recall Udell complaining of discrimination, even though a document showed Kishimoto responded to a complaint from him. This related to the construction of a new headquarters for Soft Gel Technologies next to the building Soft Gel Technologies and Kenko International previously shared. Holtby denied Udell's request to move offices to the new building and Udell complained to Tsuchibe. Kishimoto addressed Udell's complaint regarding his office location in a memorandum to Tsuchibe, explaining Udell was not being moved because his current office was spacious, looked professional, and there was a Kenko International logo in front. He also had a close parking space and did not have to walk a long distance. In his deposition, Kishimoto testified he did not *think* Udell complained, but his statements were equivocal. Though the memorandum shows Kishimoto must have been aware of Udell's complaint that he would not be changing offices, it does not show Kishimoto testified "falsely" in such a way to support an inference of discriminatory animus. Even if it did, as discussed above, Kishimoto had no influence over the decision to terminate Udell. Assuming arguendo that a reasonable jury would view this testimony as false, the assumption fails to undermine the veracity of defendants' reason for Udell's termination.

Udell also mentions in passing that he was excluded from business meetings regarding a new product, and once he was not given a company shirt at a trade show when others were. He gives no details or context for these incidents and does not link them to the termination decision or the decisionmakers.

Finally, Udell believed Tsuchibe forced him to make bad business decisions and buy bad raw materials, which prevented Kenko International from making a profit. Whether or not accurate, that clearly is not probative of pretext since Tsuchibe had died before Matsuo and Takada decided to terminate Udell's employment. Even so, this shows at most Kenko International might have been mistaken or unwise in terminating him, *not* that it harbored a discriminatory motive. (See *Hersant, supra,* 57 Cal.App.4th at p. 1005.)[5]

iv. Summary

Viewing the evidence together and in his favor, Udell has failed to rebut defendants' showing that he was terminated because he failed to make Kenko International profitable. He has not raised a triable issue that defendants intentionally discriminated against him. Summary judgment on these claims was proper.

4. Wrongful Termination in Violation of Public Policy

To establish a claim for common law wrongful termination in violation of public policy, Udell must show: "(1) an employer-employee relationship, (2) the employer terminated the plaintiff's employment, (3) the termination was substantially motivated by a violation of public policy, and (4) the discharge caused the plaintiff harm." (*Yau v. Allen* (2014) 229 Cal.App.4th 144, 154.) This claim rests on a violation of FEHA based on the same

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[5] Defendants offered Udell a severance package in exchange for a release of liability, which Udell argues shows a consciousness of guilt. That evidence is inadmissible under California law to prove defendants' liability, so it cannot create a triable issue of fact. (Evid. Code, § 1152, subd. (a); *Mangano v. Verity, Inc.* (2009) 179 Cal.App.4th 217, 222.)

evidence we have discussed. "Under California law, if an employer did not violate FEHA, the employee's claim for wrongful termination in violation of public policy necessarily fails." (*Featherstone, supra,* 10 Cal.App.5th at p. 1169.) Summary judgment on this claim was proper as well.

5. Breach of Contract Claims

Udell alleged two contract claims, both of which rested on his allegations that the parties formed an implied agreement that Udell could only be terminated for good cause. "An employment, having no specified term, may be terminated at the will of either party on notice to the other." (Lab. Code, § 2922.) This statute creates " ' "a presumption of at-will employment if the parties have made no express oral or written agreement specifying the length of employment or the grounds for termination. The presumption may, however, be overcome by evidence that despite the absence of a specified term, the parties agreed that the employer's power to terminate would be limited in some way, e.g., by a requirement that termination be based only on 'good cause.' " ' " (*Horn, supra,* 72 Cal.App.4th at p. 818.) Such an agreement may be implied from " ' " 'the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.' " ' " (*Ibid.*)

To show an implied agreement only to terminate him for cause, Udell cites oral assurances from Tsuchibe, his own years of service, his promotions and merit raises, his understanding of his employment status, and the lack of an "at-will" policy. We will assume without deciding this evidence could have raised a triable issue of fact as to the existence of an implied agreement because

the undisputed evidence showed he was terminated for good cause. " 'Good cause' in the context of implied employment contracts is defined as: '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.' " (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 872.) Udell claims his termination lacked good cause because it was motivated by discrimination. As we have explained, Udell did not rebut defendants' evidence that his termination was motivated by his failure to make Kenko International profitable. He does not contend that fell short of good cause for his termination, so summary judgment on these claims was proper.

DISPOSITION

The judgment is affirmed. Respondents are awarded costs on appeal.

BIGELOW, P. J.

WE CONCUR:

RUBIN, J.

GRIMES, J.