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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DAVID HIBBARD, Plaintiff and Appellant, v. CHARTER COMMUNICATIONS, LLC et al., Defendants and Respondents.	D084824 (Super. Ct. No. 37-2022-00021766-CU-WT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Michael Smyth, Judge. Affirmed.

Miracle Mile Law Group, Justin Hanassab, Shaleen Shanbhag, Katherine Shuai and Steven Azizi for Plaintiff and Appellant.

Seyfarth Shaw, Eric M. Steinert, Shardé T. Skahan, Bradley D. Doucette and Kristina Launey for Defendants and Respondents.

INTRODUCTION

David Hibbard sued his employer, Charter Communications, LLC (Charter), for wrongful termination and discrimination based on his age and mental health disability, and other related claims. Hibbard also sued

Charter and his supervisor, Mark Bauknecht, for intentional infliction of emotional distress. Charter and Bauknecht moved for summary judgment, producing evidence Hibbard was terminated after he falsified data and failed to fully admit wrongdoing to his supervisor. The trial court found no triable issue of material fact on all causes of action and granted summary judgment. Our independent review of the record demonstrates the trial court's ruling was correct. We affirm the judgment in all respects.

FACTUAL AND PROCEDURAL BACKGROUND[1]

In September 2006, Time Warner Cable hired Hibbard to work as a field services technician (FST). Hibbard was 41 years old when he was hired as an at-will employee. Charter acquired Time Warner Cable in 2016 and became Hibbard's employer. Starting in 2008, and through April 23, 2021, Hibbard reported to Bauknecht as his immediate supervisor.

Charter fired Hibbard on April 23, 2021. Hibbard claims Charter and Bauknecht illegally terminated him because of his age and mental health disability, and in retaliation for taking a six-month medical leave of absence. By contrast, Charter and Bauknecht claim Hibbard was fired for falsifying test data at customer job sites, misrepresenting his work status, and failing to admit he misrepresented his work status when confronted by Bauknecht. The parties also dispute whether Charter failed to engage in an interactive process with Hibbard and provide a reasonable accommodation for his mental health disability.

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1 Under the governing standard of review, we examine the evidence de novo and our account of the facts is presented in the light most favorable to Hibbard (the nonmoving party) and, where the *evidence* is in conflict, assumes his version of all disputed facts is the correct one. (See *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 470; *Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal.App.4th 994, 999.)

A. *FST Job Duties*

The job of an FST is to install and repair internet, television, and phone equipment for residential customers. FSTs work primarily "in the field" at customer residences, either alone or with a supervisor.

Charter uses a " 'drip routing system' " to assign work and monitor the productivity of its FSTs. To make this system work efficiently, when an FST completes a job at a customer residence, the FST is required to report that status immediately using a GPS-tracking program called TechMobile. TechMobile then assigns the next job based on customer availability and proximity. As acknowledged by Hibbard, the expected procedure for reporting status is "[t]o be on the job when you got to the residence and to be in completed status when you finish[ ] the work." Charter refers to this requirement as "statusing."

One reason Charter gave for terminating Hibbard in 2021 is that he failed to follow the requirements for reporting his work status. It is undisputed that an employee "who misrepresent[s] [his or her] status c[an] be disciplined, including possible termination."

A second reason Charter gave for terminating Hibbard is that he falsified "ONX test results" at two customer residences. When visiting a job site, FSTs are required to conduct a series of tests to measure whether the customer's signal levels are above a certain threshold. First, the FST checks the signal inside the house "behind the TV or behind the cable modem." Second, the FST uses a OneCheck (ONX) meter to check the signal "on the side of the house." Finally, the FST uses the ONX meter to check the signal at "the TAP," which is where the signal originates on the property, either underground or up on top of a utility pole. If any one of these tests measures an "out-of-threshold signal level[ ]," the FST must stay and fix the problem

unless the signal strength is off by a minimal degree. If the signal strength is off by a "fraction of the d[ecibel]," FSTs can "consider the test passed" if they clear it with their supervisor.

FSTs do not like to encounter failing test results at a job site. It can take "an extra hour, two hours, [or] three hours" to identify and fix the problem that is causing a weak signal, and the additional time at the job site can affect their performance metrics. To avoid extra work, and to keep their measured productivity levels up, it is not uncommon for some FSTs to falsify their test results by running duplicate tests at the same location on the job site or by using an attenuator to manipulate the signal strength and achieve a "passing score." Manipulation of ONX tests in this way can be problematic, however, to the extent problems that could have been caught and addressed are left uncorrected at a job site. Leaving the problems unaddressed can result in "rework" in the form of a "repeat trouble call." It is undisputed that an employee who falsifies an ONX test result, "c[an] be subject to corrective action, including termination."

B. *Hibbard's Performance Evaluations from 2008 to 2014*

In 2008, the year Hibbard was first supervised by Bauknecht, Bauknecht evaluated his overall performance as "Excellent" on a six-level scale with "Outstanding" as the highest level. Bauknecht described Hibbard's productivity as "above average," and commented that Hibbard was ranked first in his group for quality assurance and first in his group and first overall for customer service.

From 2009 to 2014, Bauknecht gave Hibbard an overall evaluation of "successfully meets expectations" based on a five-level rating system: (1) "does not meet expectations," (2) "partially meets expectations,"

(3) "successfully meets expectations," (4) "exceeds expectations," and (5) "exceptional."[2] (Capitalization omitted.)

Bauknecht regularly gave Hibbard satisfactory to high marks for technical knowledge and teamwork. These marks were consistent with Hibbard's reputation amongst several of his peers as a "smart technician" and "a valuable team player."

Significant here, however, the evaluations repeatedly criticized Hibbard's productivity and often found he only partially met expectations with respect to that metric. As three examples, in 2009, Bauknecht commented that Hibbard's productivity ranked "23rd overall in the group," and "[w]ith his time in the cable industry and overall experience . . . [he] should be performing at a higher level." In 2013, Bauknecht commented that Hibbard's productivity was "again the lowest on [their] team." In 2014, Bauknecht commented, "I feel that [Hibbard] could, and should be performing at a higher level. He has been doing cable for [quite] a long time. With his experience[,] he should be one of the top performers. [He] just seems to go through the motion to get the work done. He continues to be one of the lowest performers on the team."

During this period, Bauknecht also commented negatively about the amount of time it took Hibbard to move from one job to another. In 2013, Bauknecht specifically commented that Hibbard needed to ensure he used TechMobile to "status correctly when at a job."

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[2] Starting in 2016, and continuing through 2020, the definition of the first four levels changed slightly to (1) "did not achieve expected performance," (2) "partially achieved expected performance," (3) "achieved expected performance, and (4) "exceeded expected performance." (Capitalization omitted.)

C. *Hibbard's 2015 Performance Evaluation*

In 2015, Hibbard's performance evaluation took a turn for the worse. Bauknecht gave him an overall rating of only "[p]artially [m]eets [e]xpectations," the second-lowest option. He found that Hibbard's productivity "[did] [n]ot [m]eet [e]xpectations" and was "one of the lowest in all of San Diego." He again specifically commented that Hibbard needed to "[s]tatus himself correctly" to "help his productivity." Hibbard's self-assessment of his own productivity was also that he did not meet expectations. Bauknecht did give Hibbard a rating of "[s]uccessfully [m]eets [e]xpectations" for teamwork, stating that Hibbard "has always been a team player. He will help anyone on any job." At the end of the evaluation, Bauknecht stated he planned to "work[ ] with [Hibbard] personally to help . . . get him performing at a level [he felt] he should be at."

D. *Hibbard's Leave and Performance Evaluations in 2016*

After meeting with Hibbard on Thursday mornings and arranging for multiple mentors to ride with him in 2016, Bauknecht delivered a series of negative evaluations to Hibbard based on his performance. Hibbard attributes the heightened scrutiny he received from Bauknecht in 2016 to the sick and medical leave he took that year as opposed to his productivity metrics and his negative performance review in 2015.

At the beginning of January, in 2016, Hibbard broke his finger and was absent for six weeks. He used his sick leave until it was exhausted and then, through Charter's third-party claims administration provider, arranged to take short-term disability leave. Approximately six months later, starting August 19, 2016, Hibbard experienced a depressive episode. He asked Bauknecht if he could take medical leave for a week and Bauknecht told him

he needed to use his sick leave. Bauknecht appeared to Hibbard to be irritated by the request.

On November 2, 2016, Bauknecht placed Hibbard on a "performance improvement plan" (PIP). The PIP notice, prepared by Bauknecht, stated, "Throughout the course of the year I have met with you on Thursday[ ]s after the morning meeting. I would address your low performance numbers in just about every measured category. I have had multiple mentors ride out with you to help identify the reasons why your performance is not meeting the minimum acceptable levels in certain key areas. The mentors have also helped to ensure that you are prepared and equipped to perform your duties to the best of your abilities. Although we have coached and assisted you, your productivity[and] whole house check . . . continue to fall below the accepted minimum performance level for your position. You have shown improvement in your rework." The PIP stated Hibbard, to be successful, needed to "[p]roperly use the . . . system for status at all times on all work throughout the day."

On March 2, 2017, Charter issued a "Final Written Warning" (FWW) to Hibbard "for failure to meet acceptable job performance standards." According to the warning notice, prepared by Bauknecht, Hibbard's "overall performance" had not "met the goals set by the company" for the last two years, with productivity as "one main area of concern" and "[r]ework" as "another area of concern." The notice included a chart showing measured performance data for both metrics. As one cause for problematic rework metrics, the notice stated, "You do not evaluate the integrity of the whole house. You have a habit of addressing the single reported issue and not checking the entire home for performance. Your failure to evaluate the whole house is directly related to your poor rework achievements." The notice also

stated Hibbard was "not statusing [him]self correctly . . . by closing out [his] jobs as complete as soon as [he is] finished."

As steps to correct productivity and excessive rework visits, the notice provided, "You are required to visit the [TAP] at each home you visit," and "check levels . . . to avoid a potential repeat visit." It also provided, "You also must ensure that you status yourself correctly, closing out jobs as soon as they are complete, and contact[ ] [your supervisor] if you are in '[a]vailable' status for more than 5 [to] 10 minutes without receiving a new job." The notice concluded, "You must clearly understand . . . that failure to demonstrate immediate and sustained improvement may result in further disciplinary action up to and including dismissal."

According to Hibbard, when delivering the FWW, Bauknecht made the first of three comments comparing him to younger coworkers. Specifically, Bauknecht told him he was "slow," and asked, "Why can't you be like Scott or Shane or Manny? They all get the job done in a fairly decent time."

In Hibbard's 2016 evaluation, which was given to him on March 18, 2017, Bauknecht gave him the lowest overall rating of "[d]id [n]ot [a]chieve [e]xpected [p]erformance." Hibbard's measured productivity average was recorded as "the lowest in the group." In the comment section for "Operational Effectiveness," Bauknecht stated, "We've talked about you not closing jobs when you're done and just sitting on them." In the section addressing "Values," he stated, "Integrity is an area that I feel needs improvement. Several times this year I had to coach you to status correctly and not sit waiting for work. In addition, I have a concern with your attendance." (Boldface omitted.) In the section of the evaluation for employee comments, Hibbard stated, "I admit I stay at job longer than

needed sometimes." He also stated, "Because of my experience, I realize I should be doing much better than my numbers show."

E. *Hibbard's Evaluations from 2017 to 2018*

According to Charter's records, Hibbard's performance markedly improved for two years after he received the FWW. In Hibbard's 2017 evaluation, Bauknecht gave him an overall rating of "[p]artially [a]chieved [e]xpected [p]erformance," but Bauknecht specifically commented that Hibbard had "definitely turned [his] metrics around," and he was "so glad." (Boldface omitted.) He explained the low rating he gave to Hibbard's overall performance reflected that Hibbard had been "really hurt" by the first part of the year when he was in "double digit rework for 3 months," and "[i]t's hard to recover from numbers that high for that long." He further stated, "To get your numbers to where they are now is a big accomplishment," and "I'm impressed with [the] improvement in your productivity, and this needs to continue into 2018." Bauknecht commented that Hibbard had worked on improving the behaviors that had been causing his poor performance. He stated, "[Y]ou have turned every metric around, except your NPS. I think with a little work you can bring this up to meet or even exceed the goal. [¶] To give you an idea[,] you had a write up for attendance and then a [FWW] for your overall performance. Since then[,] you have brought the majority of you[r] metrics to meeting the goals and in some cases beating the goals. [¶] Going the way you are[,] I'm sure that you will be one of the top performer[s] in the truck yard next year."

F. *Hibbard's Evaluations and Medical Leave from 2019 to 2020*

Bauknecht's prediction did not materialize. In December 2019, Bauknecht opened an investigation into Hibbard's "[f]ailure to follow instructions on running [ONX] at every job," and he began drafting a

"Documented Warning" to address Hibbard's performance. The draft corrective action report stated, "I have found that you are not consistently following the required expectations of a [FST], including but not limited to properly completing [ONX tests] at every job." Bauknecht did not finalize or deliver the documented warning to Hibbard, however, because Bauknecht went on a leave of absence from January 2020 until the end of May 2020.

In Hibbard's 2019 evaluation, prepared on December 13, 2019, Bauknecht gave him an overall rating of "[a]chieved [e]xpected [p]erformance," but with a numerical rating of 2.7 out of 5.0. Bauknecht commented that Hibbard's work was "inconsistent," noting that he had "[a] few good months and then a really bad one." Bauknecht further stated Hibbard was "fortunate to finish this year with an overall Tier 3. Rework and productivity are the two main areas of concern. [T]his is a topic that we talk about all the time. With your experience and tenure you should be performing at a much higher level. You need to take ownership of the work that you do. Don't look for reasons to blame other people or things." Hibbard acknowledged, in the written evaluation, "My numbers are not the greatest. I realize that. . . . I can't consistently maintain a good tier level."

According to Hibbard's deposition testimony, Bauknecht told him, during the delivery of his 2019 evaluation, that he was "too slow" and needed to "pick up the pace."[3] In addition, Bauknecht said, "Other guys are doing it

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[3] Bauknecht was on leave of absence from January to May 2020. Hibbard's performance review shows his reviewers were his interim manager, Jose M., and an "[i]ndirect [m]anager," Jeffery N. It is not clear to us whether Bauknecht was present when the evaluation was delivered to Hibbard, perhaps remotely, or whether Hibbard is mistaken about these alleged comments having been made or having been made at this point in time. In accordance with the standard of review, we resolve this question for

without any problems." Hibbard understood this comment to refer to younger employees. And on August 15, 2020, Bauknecht called him a "slacker" for the first time. They were having a conversation about Hibbard's low productivity and Bauknecht said, "How can you bring up your numbers? Every time I'm with you, you do a fantastic job, but why is it so different when I leave you? . . . Dude, you're a slacker."

On August 20, 2020, Hibbard contacted Charter's third-party claim administrator to request a 30-day medical leave of absence because he had been diagnosed with major depressive disorder. The request was granted pursuant to the Family Medical Leave Act.

While Hibbard was on leave, he and Bauknecht both attended a retirement party for a colleague. While at the party, Hibbard told Bauknecht he was being treated for "severe depression and anxiety," but he did not provide details. A few minutes later, Bauknecht's wife came over and said, "Good luck to you. I hope you get this all fixed and worked out soon. Take care of yourself." Based on these comments, Hibbard inferred that Bauknecht told his wife about his depression and was bothered by the disclosure.

On September 15, 2020, Bauknecht contacted Hibbard and learned he had extended his return-to-work date to October 5, 2020. On October 13, Bauknecht and his immediate supervisor, Jon Soseman, learned that Hibbard's leave had been extended again to November 12, 2020. Soseman emailed Bauknecht, "So much for 30 days," and Bauknecht replied, "LOL I know right. I just hope this really helps him. He was really starting to lose

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purposes of our analysis in a light favorable to Hibbard and assume the statements were made remotely or at some other point in time in 2020.

it." In response, Soseman replied, "Fingers crossed." Hibbard's leave was eventually extended until February 28, 2021.

Bauknecht prepared Hibbard's 2020 evaluation on December 8, 2020. He gave him an overall rating of "[p]artially [a]chieved [e]xpected [p]erformance," with a numerical rating of 1.8 out of 5.0. Bauknecht commented that Hibbard's "rework struggled," and gave him a "[d]id [n]ot [a]chieve [e]xpected [p]erformance" rating of 1 out of 5 on his productivity scorecard. Bauknecht commented that, "although [Hibbard] missed a large amount of time during this review period due to being out for a good part of the year, [his] performance in the first half did not meet the requirements of [his] position. [His] rework was consistently elevated and in turn, had the most impact to [his] scorecard rating." The review concluded, "In the review period to come, it is important that [Hibbard] collaborate with leadership to ensure [he is] taking advantage of every opportunity to improve and meet the minimum performance standards for [his] position. To do this, [he] will need to be open-minded and accept constructive criticism."

On January 7, 2021, Bauknecht emailed Soseman about Hibbard's performance issues. Bauknecht informed Soseman that, in December 2019, before he went on leave of absence, he had been investigating Hibbard for failure to perform required ONX tests and working on a draft documented write-up.

Hibbard returned to work on March 3, 2021. Bauknecht delivered his 2020 performance evaluation that same day. According to Hibbard, Bauknecht told him during the delivery of the evaluation that he needed "to start speeding up" because he was "very slow" and "the lowest technician in the truck yard," which Hibbard took to be a comparison to younger technicians.

G. *Hibbard's Request for a Mental Health Disability Accommodation*

A week and a half after returning from leave, on March 23, 2021, Hibbard asked Bauknecht for permission to tele-consult with his psychiatrist once a week during the workday. Hibbard told Bauknecht his psychiatrist was not available on his days off, which were Monday and Tuesday, and he was available only on Wednesday through Friday. A week later, Hibbard reminded Bauknecht about his request and Bauknecht told him to call human resources (HR) and to set up his appointments several weeks in advance.

According to Hibbard, he called his psychiatrist who said he could not schedule appointments several weeks in advance because "[his] availability was limited and constantly changing." Hibbard followed up with Bauknecht about his psychologist's scheduling issues, but, at the time of his deposition, he could not remember exactly how Bauknecht responded.[4] Hibbard acknowledged, however, that he did not contact HR to set up any appointments or discuss other options for an accommodation. It is undisputed that Hibbard knew it was a "human resources decision" whether to grant or deny his request for a medical health accommodation.

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4 At his deposition, Hibbard acknowledged Bauknecht told him to contact HR to schedule his appointments. This testimony contradicts his separate statement of undisputed facts and the declaration he filed in support of his opposition to the motion for summary judgment, in which he states Bauknecht and Soseman said they would contact HR. With no explanation proffered by Hibbard to explain the contradictions, we rely on his deposition testimony. (*Collins v. Hertz Corp.* (2006) 144 Cal.App.4th 64, 79 (*Collins*) [representations in a party's declaration that was prepared to oppose summary judgment were insufficient to defeat the motion when they squarely contradicted the party's prior deposition testimony].)

H. *Charter's Investigation and Termination*

On April 15, 2021, Bauknecht investigated Hibbard by following behind him to two separate job sites. At the first job site, Bauknecht observed Hibbard's testing data showed that two ONX tests had been performed at impossible speeds, with the test inside the house and the test at the TAP reportedly completed "minutes apart." Bauknecht concluded "the signal attenuation between the tests indicated that the signal was manipulated for the [second] test to fall within a passing range."

At the second job site, Bauknecht spoke to the homeowner and discovered the reported power outage had been resolved before Hibbard arrived and that he never went inside the home. Hibbard's testing data nevertheless purported to show tests were performed inside and outside the home. Bauknecht concluded the tests had also been manipulated to achieve a passing range.

Bauknecht also conducted a search of GPS data for Hibbard's work vehicle for the previous week. The data for 18 jobs over the course of four days showed apparent discrepancies between the data and Hibbard's work status as reported to TechMobile. The discrepancies totaled 184 minutes and indicated that Hibbard had not been properly updating his status to show when he completed the jobs.

On April 16, 2021, Bauknecht, Soseman, and a HR manager met with Hibbard to confront him with allegations that he falsified his ONX test results and misrepresented his work status. Hibbard admitted he used an attenuator to cut corners and save time. But he denied misrepresenting his work status; this fact is undisputed.

After the meeting, Charter placed Hibbard on paid administrative leave. Charter terminated him one week later effective April 24, 2021.

According to company records, Charter did not terminate Hibbard for performance issues. Bauknecht, in particular, thought Hibbard was good at his job when he applied himself, and described him as "a smart guy," who "knew how to do the stuff." Charter fired Hibbard for three reasons. He failed to accurately report his ONX test results at several locations, he failed to properly update his work status, and then, when asked about the incidents, he was not forthcoming about failing to properly update his work status.[5] As explained by Soseman to his manager, "I feel as though bringing . . . Hibbard back . . . would send the wrong message to both frontline and leadership members of the Carlsbad team. The culture we are building here starts with integrity. Not only did [Hibbard] falsify his [ONX] and [s]tatusing, when confronted, he admitted to only falsifying his [ONX]. He adamantly denied any wrong[ ]doing pertaining to his status although we can clearly see a pattern of him miss-statusing in GPS reporting."

Following Hibbard's termination, on May 20, 2021, two HR employees reviewed Hibbard's termination for consistency with company practice. Another employee, who had also been caught falsifying ONX data, was given a FWW instead of being terminated. But, the HR employees concluded, the difference in treatment was explained by the other employee's full admission that he had falsified data. According to company "guidance," the "falsification of data automatically escalates [an investigative report] to

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[5] The parties dispute whether Hibbard immediately admitted to falsifying his ONX test results at the April 16, 2021 meeting or whether he admitted he falsified the results only after he was confronted with the data. But they agree he admitted to falsifying the ONX test results at some point during the meeting. By contrast, it is undisputed Hibbard did not admit to falsifying his work status.

FWW." However, "if . . . the employee does not come clean at the time of questioning, the [investigative report] is further escalated to [termination]."

I. *Complaint and Summary Judgment*

Hibbard sued Charter for wrongful termination and related claims in June 2022. The complaint asserted six causes of action arising out of alleged violations of the California Fair Employment and Housing Act (FEHA) (Gov. Code,[6] § 12940), and a cause of action for wrongful termination in violation of public policy. The complaint also asserted a cause of action for intentional infliction of emotional distress against both Charter and Bauknecht. Hibbard asserted Charter violated FEHA by discriminating against him based on his age and mental health disability, by retaliating against him for taking medical leave, and by failing to engage with him and provide him with a reasonable accommodation for his mental health disability.

Charter and Bauknecht moved for summary judgment in December 2023. Hibbard opposed the motion and the defendants filed a reply brief. The trial court granted the motion in full on May 20, 2024, and entered judgment in favor of the defendants on June 12, 2024.

DISCUSSION

Hibbard contends the trial court erred when it summarily adjudicated each of his claims. We disagree.

I.

Evidentiary Rulings

As a threshold matter, Hibbard contends the trial court erred when it sustained the defendants' objections to several statements in the declarations he submitted to support his opposition to summary judgment. Our review is

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6 Undesignated statutory references are to the Government Code.

for abuse of discretion. (*Mackey v. Trustees of California State Univ.* (2019) 31 Cal.App.5th 640, 657.) A trial court abuses its discretion when its decision is predicated on an incorrect understanding of the law. (*People v. Knoller* (2007) 41 Cal.4th 139, 156.) Applying this standard, we find no error in the court's rulings.

First, Hibbard contends the trial court erred when it sustained objections by Charter to (1) a statement in his declaration to the extent he used the word "retaliation" to convey a legal conclusion, and (2) a statement in his declaration that he was "denied accommodation" for his disabilities for the same reason. We disagree. The Evidence Code does not permit testimony that purports to draw a legal conclusion. (Evid. Code, § 801.) Notably, the court did *not* exclude these statements by Hibbard from *all* consideration. It merely stated it would not interpret Hibbard's statements to convey a legal conclusion.

Second, Hibbard contends the trial court erred when it sustained hearsay objections to statements in Hibbard's own declaration about compliments he received from coworkers and customers. The trial court's ruling on this point was also correct. The statements by Hibbard about what other people told him are classic hearsay, subject to no exception. (Evid. Code, § 1200, subd. (a).) To the extent Hibbard sought admission of character evidence about his reputation as a team player, for example, the court did not exclude evidence on this point in declarations from personal knowledge by his co-workers. (See Evid. Code, § 1102, subd. (a) [reputation exception to the hearsay rule].)

Finally, the trial court sustained Charter's objections to testimony by three non-managerial employees about a purported culture of ageism amongst "upper management" and a gradual shift towards the deliberate

targeting of "older technicians for termination." We agree with the court these statements were vague to the extent they purported to describe a policy shift and properly excluded for lack of foundation showing personal knowledge by the declarants. (Evid. Code, §§ 350, 702.)

II.

Standard of Review

"On appeal after a motion for summary judgment has been granted, we review the record de novo." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) By statute, summary judgment may only be granted "if all the papers submitted show that 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).) "Under California's traditional rules, we determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law." (*Guz,* at p. 334.) "Under our de novo standard of review, when reviewing the grant of summary adjudication, we must independently determine the construction and effect of the facts presented to the trial court as a matter of law." (*Zamora v. Security Industry Specialists, Inc.* (2021) 71 Cal.App.5th 1, 38.) "We [also] liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037 (*Yanowitz*).)

III.

No Triable Issue of Fact as to Hibbard's Discrimination and Retaliation Claims

Starting with Hibbard's discrimination and retaliation claims under FEHA, the parties agree the record contains no direct evidence of discrimination or retaliation and the *McDonnell Douglas*[7] test therefore applies to our analysis. Under this three-stage test, the initial burden at trial is placed on the plaintiff to establish a prima facie case of discriminatory or retaliatory action by the employer. (*Guz*, *supra*, 24 Cal.4th at p. 355 [discrimination]; *Yanowitz*, *supra*, 36 Cal.4th at p. 1042 [retaliation].) If the plaintiff establishes a prima facie case, a presumption of discrimination or retaliation arises. (*Guz*, at p. 355; *Yanowitz*, at p. 1042.) The burden then shifts to the employer to rebut the presumption with sufficient evidence that its action was taken "for a legitimate, nondiscriminatory reason." (*Guz,* at pp. 355–356; *Yanowitz*, at p. 1042.) "If the employer sustains this burden, the presumption of discrimination [or retaliation] disappears," and the plaintiff "then [has] the opportunity to attack the employer's proffered reasons as pretexts for discrimination [or retaliation], or to offer any other evidence of discriminatory [or retaliatory] motive." (*Guz,* at p. 356; *Yanowitz*, at p. 1042.) Throughout the case, "[t]he ultimate burden of persuasion on the issue of actual discrimination [or retaliation] remains with the plaintiff." (*Guz*, at p. 356.)

Important here, in summary judgment proceedings, where the employer is the moving party, the first step in the *McDonnell Douglas* analysis is not at issue unless the employer asserts the plaintiff cannot

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7 *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792.

establish a prima facie case. (See *Guz*, *supra*, 24 Cal.4th at pp. 356–357.) Here, Charter challenged Hibbard's ability to establish a prima facie case in the trial court but did not renew that challenge on appeal. We accordingly skip over the prima facie question and start with the second step of the analysis as we address each cause of action asserted by Hibbard for discrimination and retaliation under FEHA.

A. *No Triable Issue of Material Fact to Support Hibbard's Claim That Discriminatory Ageism Motivated His Termination*

As noted, Hibbard asserts Charter illegally discriminated against him based on his age. (§ 12940, subd. (a).) To establish a claim for age discrimination under FEHA, the plaintiff must show he or she (1) was over 40 years old, (2) was qualified for the position sought or was performing competently in the position held, (3) suffered an adverse employment action, and (4) the adverse employment action was based on his or her age. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1002–1003 (*Hersant*).) For purposes of summary adjudication, Charter did not dispute the first three required elements of this cause of action. Charter addressed the fourth element only and contends there is no triable issue of material fact on the question whether there was a causal link between Hibbard's termination and his age.

1. *Charter Satisfied Its Burden to Produce Legally Sufficient Evidence of a Legitimate, Nondiscriminatory Reason for Terminating Hibbard*

Starting with the second stage of the *McDonnell Douglas* test, Charter satisfied its burden of adducing sufficient evidence to demonstrate a facially legitimate reason for terminating Hibbard that had nothing to do with his age. According to Charter's records and testimony by its employees, Hibbard was fired for three reasons: He failed to accurately report his ONX test

results at several locations, he failed to properly update his work status over the course of several days in April 2021, and when asked about these incidents, he was not forthcoming about failing to update his status. It is undisputed that Charter's decision was factually supported by an investigation by Bauknecht at the beginning of April 2021. The parties agree that (1) Bauknecht followed behind Hibbard to two job sites and discovered that Hibbard falsified his ONX test results at the two sites, (2) Bauknecht ran a database search and discovered evidence that Hibbard's GPS records did not match his reported job status over the course of four days at the beginning of April 2021, and (3) Hibbard did not admit he falsified his job status when confronted with the data at a meeting with Bauknecht, Soseman, and a HR manager.

Hibbard further admitted at his deposition that employees who falsify ONX test results or misrepresent their work status "c[an] be subject to corrective action, including termination." There was also evidence that two Charter HR employees reviewed Hibbard's termination for consistency, and determined it complied with company guidance because termination is appropriate when an employee does not "come clean" when questioned about falsifying data.

This showing of reasons was legally sufficient to establish that Hibbard's cause of action for age discrimination under FEHA had no merit. The reasons given by Charter for terminating Hibbard were unrelated to intentional discrimination against him based on his age. The burden accordingly shifts to Hibbard to rebut this facially dispositive showing "by pointing to evidence which nonetheless raises a rational inference that intentional discrimination occurred." (*Guz*, *supra,* 24 Cal.4th at p. 357.) We proceed to the next step.

2. *Insubstantial Evidence of Pretext and Ageism*

To survive summary adjudication at the third stage of the *McDonnell Douglas* test, Hibbard is required to point to evidence "raising a triable issue—i.e., permitting an inference"—that Charter's ostensible reasons for terminating him were a pretext for prohibited age bias. (*Guz*, *supra*, 24 Cal.4th at p. 353.) Hibbard has not succeeded in making this showing.

In arguing there is a triable issue of material fact, Hibbard relies on several theories. He first argues there is an issue of material fact as to whether Charter correctly concluded he misrepresented his status. He maintains that "supposed discrepancies between his work status and the GPS data of his vehicle could be the result of several factors, including technical issues, faulty GPS equipment or mapping software or signal interference." He supports this contention with evidence GPS coverage was spotty in some areas where he worked, which Bauknecht conceded at his deposition. Hibbard asserted at his deposition that it was "highly unlikely that [he] drove off the job site" without updating his status, and claimed, "I just never did that. That wasn't me. However, . . . I could have finished the job, gone into my van, and started it up, and if there was no signal to my . . . phone . . . I would have to drive until I got signal. That's the only way I would leave the job site without closing the job."

We agree with the trial court that Hibbard, in making this argument, misunderstands the question at issue here. "[T]o avoid summary judgment, an employee claiming discrimination must 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. [¶] It is not

enough for the employee simply to raise triable issues of fact concerning whether the employer's reasons for taking the adverse action were sound. What the employee has brought is not an action for general unfairness but for age discrimination." (*Hersant*, *supra*, 57 Cal.App.4th at pp. 1004—1005.)

Here, Bauknecht conceded GPS coverage was "bad" in some areas where the FSTs worked, but explained, in his view, the data showed that Hibbard regularly failed to update his status immediately after finishing a job on a "pretty regular" basis. He explained, "Some of the locations are bad, but, you can see [Hibbard] was all over the system, from Fallbrook to Solana Beach, to Vista, La Costa, Carlsbad. That would be the entire system." This testimony by Bauknecht contradicts Hibbard's testimony that he never left a job site without updating his status unless he needed to drive to an area where there was a signal. It therefore raises a triable issue concerning whether Charter correctly concluded Hibbard misrepresented his work status. But the question presented is whether a trier of fact could reasonably conclude that Bauknecht's stated reasons were so implausible, or so inconsistent or baseless, that it would be reasonable to conclude they were pretextual and used merely to conceal an act of age discrimination. (*Hersant*, *supra*, 57 Cal.App.4th at p. 1009.) We agree with the trial court that a speculative jump would be required to draw such an inference here.

Hibbard next contends there is a reasonable inference that the reasons for his termination were a pretextual screen for age discrimination because the use of attenuators was widespread at Charter and Charter treated him differently than other technicians who were caught using one to falsify test data. He contends Charter also treated him differently than technicians who appeared to be falsifying their work status. Evidence that an employer did not follow its policies and practices, including its treatment of other

employees, may support a finding that the true motive for a challenged employment action was discriminatory animus. (*Cheal v. El Camino Hospital* (2014) 223 Cal.App.4th 736, 743.) But Hibbard is not similarly situated to the FSTs he has selected for comparison.

At the outset, although the use of attenuators may have been widespread, and some technicians got away with it, Hibbard's stated understanding of his job duties, as set forth in his separate statement of undisputed facts, was that an attenuator could be used "to reach passing score *if the test failed by a minimal degree*," not that such use was allowed as a matter of course. There is no dispute that Hibbard and other FSTs were provided with "verbal coaching" that they were ordinarily required to conduct a "whole house check" at each job site to prevent "rework." Hibbard specifically acknowledged at his deposition that "if an employee falsified a premise test result, that employee could be subject to corrective action, including termination."

Regardless, the FSTs Hibbard has identified as receiving different treatment are not similarly situated to him. Instead of being terminated, Mirek A. and Larry J. were given FWWs for falsifying their ONX readings, but they did not misrepresent their work status or fail to admit they misrepresented their work status. And although Jon S. and Lorenzo R. were verbally coached and given a written warning, rather than being terminated, when Charter believed they misrepresented their job status, there is no evidence they also falsified their ONX readings. Hibbard was terminated after he falsified his ONX test data *and* misrepresented his work status *and* failed to admit that he misrepresented his work status when confronted. Hibbard, moreover, had also already been caught engaging in the same behavior. He had already been verbally coached and then given an FWW

several years earlier, in 2017. This evidence of purported disparate treatment is accordingly insufficient to draw a reasonable inference that it was Hibbard's age, and not his wrongdoing and failure to admit wrongdoing, that led to his termination.

Hibbard next contends discriminatory animus can be inferred based on comments made by Bauknecht to him on several occasions. We first observe that Hibbard testified at his deposition that Bauknecht made "[j]ust a couple of comments directed toward my age," and then proceeded to discuss each of the comments. This deposition testimony by Hibbard conflicts with his later declaration in opposition to summary judgment, and his position on appeal, that Bauknecht "regularly harassed [him] with a barrage of ageist insults," and allegedly said, "Why can't you get the job done as fast as the younger guys?" (Boldface omitted.) Absent an explanation for these contradictions, we rely on Hibbard's deposition testimony. (*Collins*, *supra*, 144 Cal.App.4th at p. 79.)

According to that testimony, during the delivery of Hibbard's FWW in 2017, Bauknecht compared him to three workers, who were younger, and asked, "Why can't you be like Scott or Shane or Manny? They all get the job done in a fairly decent time." During his 2019 evaluation, Bauknecht said Hibbard was "too slow" and needed to "pick up the pace," and commented, "Other guys are doing it without any problems." A few days before Hibbard left on medical leave, on August 15, 2020, Bauknecht started calling him a slacker. And during his 2020 evaluation, Bauknecht said Hibbard needed to "start speeding up" because he was "very slow" and "the lowest technician in the truck yard." In addition, Bauknecht reportedly told another FST, Jon , who is also over 40 years old, that he was "slow," and did so in a "patronizing" manner.

In context, and considered under "a totality of circumstances analysis" *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, at page 541, we do not view these comments to present a triable issue that ageism was the true motive behind Hibbard's termination. From 2009 to 2016, and then again in 2019 and 2020, Hibbard's evaluations document low productivity metrics as compared to his colleagues and the company's stated productivity goals. It is clear from the evaluations that these metrics were measured objectively by Charter's job-tracking software, not by a subjective standard, much less by a discriminatory one. It is accordingly clear that Hibbard was objectively much slower than the other FSTs on his team. It was Bauknecht's job as Hibbard's supervisor to monitor his performance and to discuss and address problems with his productivity. Given this context, Bauknecht's comments that Hibbard was too slow compared to his coworkers does not present a triable issue that age was a motivating factor behind his termination.[8]

Finally, Hibbard points to evidence that Charter hired three employees who were under the age of 40 while he was on medical leave as probative that his termination was motivated by age, but he provides no context with which to evaluate this information. We do not know how many technicians work at Charter's "Carlsbad location," we do not know Charter's employment needs for the location during that period, and we do not know who else, whether older or younger than 40, applied for the positions. We do not even know whether Charter may have also hired older technicians during this period. In

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[8] Statements reportedly made by a different supervisor to a different FST—that he was an " 'old school' " technician and needed to " 'step it up' "—lack foundation and sufficient probative value to reasonably draw an inference, alone or in conjunction with other evidence, that Charter terminated Hibbard for age-related reasons. (Boldface omitted.)

cases "where alleged numerical favoritism of younger workers arose within an extremely small employee pool, courts have [generally] rejected any consequent inference of intentional bias on grounds, among others, that the sample was too minuscule to demonstrate a statistically reliable discriminatory pattern." (*Guz*, *supra*, 24 Cal.4th at p. 367.) Hibbard has not provided us with enough information about Charter's decision to hire these three employees to infer discriminatory animus.

For all of these reasons, we conclude the evidence of animus toward Hibbard based on age is too insubstantial to sustain a rational inference that Charter discriminated against him in violation of FEHA.

B. *No Triable Issue of Material Fact to Support Hibbard's Claim That Disability Discrimination Motivated His Termination*

As noted, Hibbard asserts Charter illegally discriminated against him based on a medical disability. (§ 12940, subd. (a).) To establish a claim for disability discrimination under FEHA, the plaintiff must show "(1) he suffers from a disability; (2) he is otherwise qualified to do his job; and (3) he was subjected to adverse employment action because of his disability." (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 344–345 [cleaned up].)

For purposes of summary adjudication, the parties here did not dispute the first two elements. They agree that Hibbard suffered from a disability—severe depression and anxiety—and that he was otherwise qualified to do his job. The parties dispute whether there is a triable issue of material fact as to the third element, that Charter allegedly terminated Hibbard because of his disability.

As discussed, Charter made a showing of legitimate reasons for Hibbard's termination that is legally sufficient to establish that Hibbard's cause of action for disability discrimination under FEHA had no merit.

Hibbard accordingly has the burden to rebut this facially dispositive showing. (*Guz*, *supra,* 24 Cal.4th at p. 356.) He has not met that burden.

Hibbard acknowledged at his deposition that Bauknecht made no comments at all about his disability. He testified only that he was irritated that Bauknecht appeared to have told his wife that he was suffering from severe depression, and, referring to his termination, that he "believe[d] . . . mental health did play a little part in it." A plaintiff's " 'suspicions of improper motives . . . primarily based on conjecture and speculation' are not sufficient to raise a triable issue of fact to withstand summary judgment." (*Kerr v. Rose* (1990) 216 Cal.App.3d 1551, 1564.) The trial court correctly granted summary adjudication on Hibbard's cause of action for disability discrimination.

C. *No Triable Issue of Material Fact to Support Hibbard's Claim That Illegal Retaliation Motivated His Termination*

Hibbard asserts Charter illegally retaliated against him for requesting a six-month medical leave of absence and an accommodation at work to tele-consult with a psychologist. (§ 12940, subd. (m)(2).) To establish a claim for retaliation under FEHA, the plaintiff must show "(1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." (*Yanowitz*, *supra*, 36 Cal.4th at p. 1042.) Again, Charter challenges only the third required element to establish a cause of action, namely, whether there was a causal link between Hibbard's protected activity and his termination.

Hibbard's evidence of retaliation is insufficient to present a triable issue of material fact in rebuttal to Charter's showing there was no causal link between his requests for accommodation of his disability. Hibbard

asserts the combination of the timing of his 2020 evaluation and termination, the email correspondence between Bauknecht and Soseman about his medical leave, and the termination of two other employees allegedly while on medical leave or shortly after returning from leave demonstrates that Charter's true motive in firing him was retaliatory. We are not persuaded.

Starting with the timing of the delivery of Hibbard's 2020 evaluation, Bauknecht drafted the evaluation in December 2020, and it was delivered to Hibbard on the same day he returned from medical leave, March 3, 2020. This timing—the preparation of the evaluation in December and the delivery of the evaluation in February or March—was consistent with the preparation and delivery of Hibbard's evaluations going back for more than a decade. The timing of this event, which was no different than any other year, therefore lacks probative value on the question of whether Hibbard was terminated in retaliation for taking medical leave.

The timing of the investigation that led to Hibbard's termination is also not reasonably susceptible of being causally linked to Hibbard's request for medical leave or request for time at work to consult with a psychiatrist. As noted, Hibbard returned from leave on March 3, 2020, and he requested an accommodation to see a psychiatrist on March 23, 2020. Bauknecht investigated Hibbard by following him to two job sites on April 15, 2021. Significantly, however, this was a renewed investigation. Bauknecht originally began investigating Hibbard's compliance with ONX testing *in December 2019*. The original investigation was discontinued while Bauknecht was on a leave of absence and while Hibbard was on medical leave. It is well documented—in documents Hibbard submitted in opposition to summary judgment—that the original investigation was based on Hibbard's performance in 2019 and specifically addressed his repeated failure

to perform required ONX tests. This was long before Hibbard requested any accommodations for his depression and anxiety.

Next, although " 'me too' " declarations are generally admissible to support FEHA, we find the particular declarations submitted by Hibbard in support of his opposition to summary judgment to be irrelevant and lacking foundation. (*Johnson v. United Cerebral Palsy/Spastic Children's Foundation* (2009) 173 Cal.App.4th 740, 767 [" 'me too' " declarations may be relied upon to support FEHA claims when relevant and probative].) We agree with the trial court that the termination of Lorenzo while he was on medical leave is so facially distinct from Hibbard's circumstances it lacks relevance. Lorenzo worked for a different supervisor, not Bauknecht, and he tested positive for opioid use while he was on leave. And Hibbard has not provided us with sufficient context with which to evaluate or infer anything at all about the termination of Jon.

Finally, the isolated remark in email correspondence between Soseman and Bauknecht is also insufficient, in our view, to present a triable issue as to whether Hibbard was fired because he requested medical leave. As noted, Soseman emailed Bauknecht, "So much for 30 days," and Bauknecht replied, "LOL I know right. I just hope this really helps him. He was really starting to lose it." In response, Soseman replied, "Fingers crossed." This single remark, at best, raises only a "weak suspicion" of illegal animus toward Hibbard's decision to take medical leave, which is insufficient as a matter of law to rebut Charter's showing it had a nonretaliatory explanation for terminating him.[9] (*Guz*, *supra*, 24 Cal.4th at pp. 369–370.)

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9 In his opening brief, Hibbard notes that Bauknecht commented in his 2016 evaluation that Bauknecht had " 'a concern with [his] attendance' " because he " 'used 118 hours [of sick leave] which [was] more than almost anyone in [the] group.' " (Italics omitted.) He also recounts that he "took sick

For the reasons stated, we conclude the evidence as a whole is insufficient to permit a rational inference that Charter terminated Hibbard in retaliation for engaging in protected activity.[10]

IV.

No Triable Issue of Material Fact as to the Remaining Causes of Action

We agree with the trial court that Hibbard's remaining causes of action present no triable issue of material fact. Starting with Hibbard's remaining FEHA claims, employers who are aware of an employee's disability are required to make reasonable accommodations to enable the employee to perform essential job duties. (§ 12940, subd. (m).) "The elements of a reasonable accommodation cause of action are (1) the employee suffered a disability, (2) the employee could perform the essential functions of the job

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leave to recover from a knee injury" in December 2016 and was reprimanded by Charter for exceeding "his sick leave balance by just three hours." In our de novo review of the record, we observe that, from 2009 to 2016, Bauknecht regularly questioned Hibbard's use of sick time in the section of the evaluation form that addresses employee "Integrity." We nevertheless also observe that Hibbard's claim against Charter is limited to FEHA retaliation for taking medical leave and requesting a medical accommodation. He has not asserted a claim against Charter for retaliation under Labor Code section 246.5. This provision was enacted in 2014 and became effective on January 1, 2015. (Stats. 2014, ch. 317, § 3.) It prohibits retaliation and discrimination against an employee for "using accrued sick days" and "attempting to exercise the right to use accrued sick days." (Lab. Code, § 246.5, subd. (c)(1).) Because he makes no argument regarding Labor Code section 246.5, we do not consider whether Charter may have illegally retaliated against Hibbard for use of his sick days.

[10] Because we conclude there was insufficient evidence of discrimination and retaliation as a matter of law, Hibbard's claims for failure to prevent discrimination and retaliation, and for wrongful termination in violation of public policy, also fail as a matter of law. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 288—289.)

with reasonable accommodation, and (3) the employer failed to reasonably accommodate the employee's disability." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 373.) When discussing accommodation requests, employers and employees are further required to engage in an interactive process, and this can be an independent basis for liability for the employer. The FEHA specifically makes it "an unlawful employment practice . . . [¶] . . . [¶] [f]or an employer . . . to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." (§ 12940, subd. (n).)

Hibbard's claims for failure to accommodate and failure to engage in the interactive process fail as a matter of law because he admitted at his deposition that Bauknecht told him to contact HR and he did not do so. When discussing potential requests for accommodation, both employer *and employee* are required to engage in the interactive process and "keep communications open." (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 971 [cleaned up].) Hibbard admitted he knew HR had decision-making authority over his request. His failure to follow through with Bauknecht's instruction to contact HR is fatal to his claim.

Finally, the elements of a cause of action for intentional infliction of emotional distress are "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050 [cleaned up].) We observe nothing in the record that rises

to the level of the type of conduct that is required to sustain a claim for this intentional tort. The conduct must be so "extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Id.* at pp. 1050—1051 [cleaned up].) Without citations to the record, Hibbard asserts Bauknecht "acted intentionally and unreasonably" when he allegedly "disparaged" Hibbard about his age and "mocked" his accommodation requests. Much more is required to maintain a cause of action for intentional infliction of emotional distress.

DISPOSTION

The judgment is affirmed. Charter and Bauknecht are awarded costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

DO, J.

WE CONCUR:

O'ROURKE, Acting P. J.

KELETY, J.