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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TOM FALEY, Plaintiff and Appellant, v. FERRELLGAS, INC., Defendant and Respondent.	D081184 (Super. Ct. No. 37-2020-00005068-CU-WT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Eddie C. Sturgeon, Judge. Affirmed.

Singleton Schreiber, Benjamin I. Siminou, Harini P. Raghupathi, Jonna D. Lothyan; Lurtz Legal, and Marshall R. Lurtz for Plaintiff and Appellant.

Jackson Lewis, Nicky Jatana, Amanda G. Papac and Dylan B. Carp for Defendant and Respondent Ferrellgas, Inc.

Tom Faley was fired from his position as a district manager at Ferrellgas, Inc., a propane gas company that services residential and institutional customers. Faley brought suit against Ferrellgas for retaliation

under the Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.), failure to prevent retaliation under FEHA, retaliation under Labor Code section 1102.5, wrongful termination against public policy, and intentional and negligent infliction of emotional distress.

Faley based his claims on Ferrellgas's proposed firing of another employee Faley supervised, Jesse Lamkin. Based on Faley's involvement, Ferrellgas decided not to terminate Lamkin. Two months after the proposed firing of Lamkin, however, Faley was terminated from the company. Faley contends his termination was retaliation for vouching for Lamkin. Ferrellgas asserts Faley's firing was not related to Lamkin and that he was fired as a result of longstanding performance issues.

After discovery, Ferrellgas brought a successful motion for summary judgment against Faley. The trial court found that Faley failed to show that Ferrellgas's "legitimate, documented non-retaliatory reasons" for terminating his employment were mere pretext and that no triable issue of fact was raised as to Faley's claims for retaliation. The trial court also found Faley's claims for intentional and negligent infliction of emotional distress were not actionable because nothing in the record gave "rise to the sort of 'outrageous, or 'despicable' conduct" necessary to support those causes of action and that they were barred by the exclusivity provisions of the Workers' Compensation Act. After its order granting summary judgment, the court entered judgment in favor of Ferrellgas on all of Faley's claims.

On appeal, Faley asserts the court erred because triable issues of fact remain as to whether Ferrellgas had a retaliatory motive for his termination. He also contends the court used the wrong legal standard for his retaliation claim under Labor Code section 1102.5, requiring reinstatement of that cause of action. Finally, with respect to his emotional distress claims, Faley asserts

they are not barred by workers' compensation exclusivity, and that triable issues of fact remain with respect to the claims.[1] For reasons we explain, we reject Faley's arguments and affirm the judgment in favor of Ferrellgas.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Ferrellgas's business is the transportation and installation of propane gas, a hazardous material regulated by the United States Department of Transportation (DOT). Faley was hired by Ferrellgas as a driver on November 3, 2016. Ferrellgas contends that at all times, Faley's employment was at-will. The parties do not dispute that he could be dismissed for failing to follow the company's safety rules. The following year, Ferrellgas promoted Faley to the job of service technician, and increased his responsibility to include propane tank installation.

A. *Faley's Performance As District Manager*

During Faley's employment, Denise Whisman was the general manager of Ferrellgas's service center in San Diego (where Faley worked), and oversaw the center's operations and employees. Two district managers reported to Whisman. On March 11, 2018, Faley was promoted to one of the district manager positions and in this role was directly supervised by Whisman. In his deposition, Faley testified that after this promotion his duties remained mostly the same through April 2019 because of staffing shortages, so he was unable to complete his new management duties. The documents submitted

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1 Faley does not raise any argument of error with respect to his claim for wrongful termination against public policy.

2 "Consistent with our standard of review of orders granting summary judgment, we will recite the historical facts in the light most favorable to [Faley] as the nonmoving party." (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 81 (*Light*).)

in support of Ferrellgas's motion for summary judgment show that Whisman communicated frequently with Faley about his poor performance as a manager from the time he entered the role until his termination in July 2019.

In June 2018, e-mails between Faley and Whisman document Faley's deficiencies (primarily with customer and employee communication) and their back and forth to provide Faley with adequate training for his new role and to manage the work effectively. Additional e-mails between Whisman and Faley in July and August identified a communication problem with a customer and Faley missing an interview for a potential new hire and failing to communicate his absence to the candidate.

In August 2018, Faley underwent his first performance review as district manager with Whisman. Whisman reported that Faley was deficient in two areas, customer retention and business growth, and was meeting expectations in three others. With respect to growing the business, Whisman stated that Faley was doing fine given the short length of time in the role but that Faley needed to improve his use of personal business tools, like e-mail and calendar reminders, to improve safety documentation and to make the job easier. In her overall summary, Whisman indicated that the next winter would be challenging for Faley, with a "steep learning curve," but she would support him through it.

In October 2018, Whisman sent Faley a lengthy e-mail chastising him for contacting his employees after hours. She indicated she had received several complaints from his subordinates, and warned him he needed to limit communications to employees who were on-call. The following month, Whisman sent Faley another lengthy e-mail, that followed a discussion, identifying safety concerns with propane tanks and other problems with

Faley's management. The e-mail proposed the implementation of various procedures to ensure compliance with the company's standards.

In December, an e-mail from Whisman to Faley questioned him about another employee's work hours, and Faley acknowledged his failure to communicate with Whisman. The same month, Whisman counseled Faley about the appearance of the building he managed and criticized Faley for not adequately training his team to deal with these issues. The following month, e-mails between Whisman and Faley detailed a personnel problem and Faley's inability to manage his team and his administrative responsibilities. In March 2019, Whisman counseled Faley on his failure to reconcile his company credit card charges; Whisman warned Faley that this was the last reminder before the card would be revoked. Whisman sent Faley another warning about credit card reconciliation on April 1, 2019.

The same day, Whisman sent Faley an e-mail stating she was "following up on things to make sure you develop good work habits and that your job ends up smoother and less chaotic." The e-mail expressed clear frustration with Faley's performance as manager and with his communication about problems. Whisman also expressed her desire to train Faley to improve as a manger. Faley asserts that Whisman assured him that her involvement was not meant as a criticism, but only assistance to help him "get a handle on the new position." To support this assertion, he points to a statement made by Whisman in a meeting in March or April 2019 with another employee who worked under Faley, who expressed frustration with the turnover in the district manager position. According to Faley, Whisman told the employee that Faley had "done a pretty good job" and she thought she found "the right guy to fill the position."

B. *Lamkin's Performance and Proposed Termination*

Ferrellgas hired Lamkin as a driver on July 1, 2016. On April 29, 2019, Lamkin sent a message to Robert Haynes, a senior employee relations generalist, alleging he was being harassed by the officer's logistics supervisor, Rebecca Ortega, and that Whisman was protecting Ortega because of their personal relationship, which had created a negative and hostile work environment. Lamkin wrote that Ortega was providing him and other drivers with inefficient and difficult routes for deliveries that wasted hours of time. Lamkin also alleged that Whisman displayed preferential treatment to women in hiring for positions in the office. Lamkin's letter noted that he had brought these issues to Haynes's attention in February 2019, and that Haynes had responded that Lamkin was not a member of protected class and that Ortega could not harass him because she was not his manager. Lamkin testified in his deposition that Haynes contacted him the day after he sent the message and that Haynes brushed aside his concerns with respect to Ortega. Lamkin said that instead of dealing with the issue, Haynes referred him to Ray Galan, Ferrellgas's west region vice president and Whisman's direct supervisor, to deal with his concerns about Ortega and Whisman.

Lamkin met with Galan in the following days. Galan told Lamkin that he believed Ortega would not be with the company much longer and that he would ensure Ortega improved. After Lamkin's e-mail, Haynes spoke with Whisman around May 2, 2019, and asked her to gather statements from two other employees in the office, Vanessa Stepho and Rhonda Sparks, about their interactions with Lamkin. The following day, Galan, Haynes, Whisman, and Ferrellgas's corporate counsel, Jordan Burns, decided to terminate Lamkin.

On May 6, 2019, Sparks submitted a statement to Whisman, stating that Lamkin had been "quizzing her on [Ortega's] whereabouts" and asking her why he had not been hired for the customer service position occupied by Ortega. Stepho also e-mailed a statement to Whisman on May 6. She stated that Lamkin had overheard an argument she had with Ortega and he wanted to know if Ortega was bullying her. Stepho told Lamkin that Ortega was not bullying her. Several days later, Lamkin showed Stepho his e-mail to Haynes, which mentioned her name, and she told him she did not want anything to do with the e-mail. Finally, Stepho requested that Lamkin not be informed of her statement because she feared getting on his bad side and that he made her feel uncomfortable.

The same day, Haynes sent an e-mail to Whisman, copying Galan, Mary Lentz, the company's highest human resources official; a payroll specialist; and Faley, with instructions for terminating Lamkin on May 7, 2019. According to Faley, within a few minutes of receiving the e-mail from Haynes, Whisman visited him in his office. Faley testified that he asked Whisman what was going on with Lamkin and stated he did not understand. Whisman responded "You need to get on the manager team, and we need to

discuss this."[3] Faley testified that Whisman also told him that "managers have each other's backs."

According to Faley, three hours after this meeting on May 6, Whisman sent him an e-mail stating that Galan was coming to their office the next day to talk about the situation. The next morning, Faley e-mailed Haynes, copying Whisman and Galan, to vouch for Lamkin as his direct supervisor. Faley wrote that Lamkin had regularly volunteered for extra shifts, handled demanding customers, consistently exceeded expectations, and recruited other reliable employees to the company. Faley also wrote, "If HR is aware of justifiable grounds for termination and support of it without undue exposure to the company I understand, but I am unaware of any documented violations that would warrant his termination. If such documentation measures have taken place and the employee has been treated fairly and the company has acted appropriately then I would appreciate your guidance on how to address this with our teammates in order to avoid similar circumstances in the future. My concern is for the welfare of the company and its employees which ultimately leads to success and the satisfaction of our clients."

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[3] Faley's deposition testimony about this meeting on May 6, 2019 and a meeting the following day is somewhat unclear. He first stated that during the May 6, 2019 meeting he asked Whisman what was going on with Lamkin, and Whisman responded Lamkin was being terminated because he was trying to start a union, harassing female employees in the office, and threatening not to work on-call shifts, and she thought Lamkin was preparing to sue the company. Faley then clarified that this exchange took place during the next day's meeting. Later, he explained that at the May 6 meeting with Whisman, she told Faley about Lamkin's letter alleging he was discriminated against by Ortega and that he responded that he thought Lamkin was being retaliated against for making that claim. According to Faley, Whisman responded, "This is happening. There's nothing we can do to stop it. Corporate legal has determined that he's probably suing the company. And it's better to get rid of him now."

Whisman was angry when she received Faley's e-mail. She called Faley into her office and said something to the effect of, "What the fuck did you do?" She also stated she could not protect him from "corporate." According to Faley, he responded that he did not understand why Lamkin was being terminated and that he believed Lamkin was being retaliated against for his e-mail to the company's human resources officials. Faley said he did not understand why he, as Lamkin's direct supervisor, was not looped into the decision to fire Lamkin. Whisman told Faley that he wasn't included because he was in a safety meeting in El Centro and Yuma, and Whisman did not want to bother him. Faley testified in this deposition that after this meeting, he felt that Whisman understood his concerns about firing Lamkin, and that Whisman told Faley that Lamkin would not be terminated at that time.

After the meeting, Whisman sent an e-mail to Lentz, Haynes, and Galan stating that she had spoken with Faley and she believed Lamkin "became frustrated with a few issues and [Faley had not been there] to address them," so Lamkin acted out. She explained that she thought that Stepho might have been "actually working both sides of this because she wants to be seen in a favorable light to management" and that Stepho may have been talking with Lamkin about Ortega. She said that Faley admitted he had mishandled the situation and that she thought that Lamkin's employment could be salvaged. The management team agreed that they should not move forward with Lamkin's termination and that Galan would

assess the situation when he was in the office the following day. As a result of Faley's intervention, Ferrellgas changed its decision to fire Lamkin.[4]

C. *Faley's Continued Performance Issues*

As planned, Galan came to the office the following day, May 8, 2019. He met with Whisman and Faley separately. According to Faley, Galan met with him briefly after his meeting with Whisman and asked Faley why he "stabbed [Whisman] in the back?" According to Faley, the conversation ended right after this comment because Lamkin arrived and Galan turned his attention to meeting with the drivers. Faley said after the meeting, some of the drivers told him that Galan had said he knew "[Faley] was the problem" and that they were working on it.

That evening, Faley attended a dinner with Galan, Whisman, and Sparks. According to Faley, at this dinner, Galan told Whisman that she had made a mistake by allowing Ortega to work from home, that Whisman needed to stop interfering with Faley's management, and that Lamkin "seems like a great employee, who we want to help prosper and grow into a better career."

According to Faley, after this dinner, Whisman did not return to the office for a week and a half. Faley testified he was optimistic during this absence that the work culture was improving. When Whisman returned to the office, Faley said he started to receive warnings for paperwork not being completed and for drivers not being in the correct trucks. In an e-mail to Faley on May 18, 2018, Whisman criticized Faley's spelling in his internal communications.

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4 Three months later, Ferrellgas promoted Lamkin to the position of service technician and gave him a raise. Lamkin left the company voluntarily the following July.

On June 14, 2019, Whisman sent an e-mail to Haynes about Faley suggesting that Faley should be put on a performance plan and written up for failing to show up for work the previous day. Whisman's e-mail outlined various problems with Faley's performance, including scheduling meetings with his drivers and technicians, but failing to let office staff know that customer visits would be delayed as a result; failing to keep his credentials for the DOT up to date and to ensure his staff was doing the same; failing to reconcile charges on his credit card; and failing to show up for work because he had overslept.

On June 17, 2019, Whisman provided Haynes with a long list of items for the performance improvement plan (PIP). The list included keeping up with administrative and documentation tasks in a timely manner, responding to staff and customers in a timely manner, ensuring confidential information is kept in the proper place, improved organization and communication with scheduling, and other tasks directed to ensuring compliance with safety guidelines. Faley received his next annual review and the PIP around the same time. The PIP was signed by Faley and Whisman on June 25, 2019, and the documentation for the annual review is dated June 26, 2019.

In the annual review, Whisman rated Faley as falling below expectations in each category. She wrote he struggled with "[p]rioritizing work load, meeting deadlines and not maintaining company standards in numerous areas." She pointed out several areas where safety documentation was not completed on time and noted that Faley failed to effectively communicate, which resulted in poor customer service and inefficiency for other staff members. Whisman also noted that some of Faley's safety problems with truck maintenance "have been serious and [Faley] has been coached on numerous instances, where company standards continue to not be

followed." The review noted that Whisman put together a PIP "to help [Faley] improve" and "hopefully get him on track to meeting standards for the position." She also stated that Faley often allowed things "to become out of control" and then needed to drop everything else to catch up.

Whisman's PIP memo issued Faley a serious warning. It stated the "purpose of this memorandum is to provide you with a written notice of my concerns regarding your handling of specific responsibilities associated with your District Manager position. We have had conversations over the past several months about these ongoing issues including, leadership ineffectiveness, unsafe workplace practices, and timely communications with drivers. We are now at a point that these items need to be formally addressed."

The document then outlined five specific areas of concern where Faley's performance was unacceptable: Trucks and driver compliance, safety compliance, timely and effective communications, information security, and purchasing credit card reconciliations. In each category, Whisman set forth specific expectations for Faley and actions to be taken to improve performance. The PIP stated that Faley should be prepared to update Whisman on a daily basis, and to meet the expectations set forth in the plan. The PIP also stated, "further deficiencies in performance or any non-compliance with company policies and procedures may result in further disciplinary action, up to and including termination." Both Faley and Whisman signed the PIP on June 25, 2019.

After the PIP was implemented, Faley's performance continued to falter.[5] On July 1, 2019, despite telling the other district manager he entered required safety information into the company's files, e-mails showed he failed to do so and had also failed to enter maintenance information about a truck for multiple months. On July 2, 2019, Whisman sent an e-mail to Haynes, copying Galan and Lentz, stating that since going over the PIP additional "serious issues" with Faley's performance had come to light. Whisman also stated that she and Galan had decided to move forward with terminating Faley, which they planned to do on July 11, 2019.

On July 8, 2019, Whisman sent Haynes an e-mail stating that Faley had told her he had updated the company's system with safety documentation, but when she checked it had not been completed. The e-mail also outlined an issue with a new hire that had not been properly trained by Faley and a dangerous situation involving the employee that had occurred at the loading dock for the propane trucks. Whisman stated that when she checked the documentation for the employee, multiple required certifications were missing. The next day, Whisman and Faley exchanged e-mails about the new hire, who Faley permitted to start work without completing the safety certifications.

Haynes responded to Whisman by asking her if she wanted to suspend Faley until his termination on July 11, 2019. Whisman replied that because Faley was in El Centro, she preferred to wait for him to return to San Diego to collect company property. On July 10, Haynes sent Whisman termination

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[5] Faley testified that after he received his performance review, Whisman called him to her office every day to criticize and berate him. He stated he could not complete his work because Whisman required him to get her permission to leave the office. Faley believed that Whisman "was gunning for" him and threatening his job.

instructions for a meeting set with Faley for the next day. The meeting took place as scheduled. The other district manager and Whisman were present, and Haynes was on the phone. Whisman told Faley he was being terminated for performance reasons. Faley asked if he could stay on as a driver or technician, since the problems were related to his management. Whisman said no, and shortly after Faley was escorted from the premises.

The following day, Faley was hired by Ferrellgas's competitor, AmeriGas. During his deposition, Faley stated that before he began working for AmeriGas, Ferrellgas sent him a letter accusing Faley of violating his employment agreement by soliciting another employee to work with him at AmeriGas. Faley also testified he heard that Ferrellgas had contacted AmeriGas to claim that he could not work for AmeriGas because of a non-compete clause in Faley's employment agreement with Ferrellgas.

D. *Present Litigation*

On January 29, 2020, Faley and Lamkin filed their initial complaint against Ferrellgas. The operative first amended complaint (FAC), filed February 13, 2020, asserts twelve causes of action. Faley brought ten claims against Ferrellgas: Retaliation under FEHA; failure to prevent retaliation under FEHA; retaliation under Labor Code section 1102.5; unpaid overtime wages; failure to provide accurate wage statements; waiting time penalties; unfair competition; wrongful termination in violation of public policy; intentional infliction of emotional distress (IIED); and negligent infliction of

emotional distress (NIED). The FAC's prayer for relief also sought punitive damages.[6]

After discovery, Ferrellgas moved for summary judgment. With respect to Faley's claim of retaliation in violation of FEHA, Ferrellgas argued he could not establish retaliation because Ferrellgas had legitimate, non-retaliatory reasons for terminating him and Faley could not show those reasons were pretextual. Ferrellgas asserted Faley's claims for failure to prevent retaliation and retaliation under the Labor Code failed for the same reasons. It argued Faley's emotional distress claims could not proceed to trial because they were based only on personnel management activities that did not constitute "outrageous conduct as a matter of law." Likewise, Ferrellgas asserted Faley's request for punitive damages was not actionable because there was no evidence of "oppression, malice or fraud."

Faley opposed the motion for summary judgment. On the FEHA retaliation and the failure to prevent retaliation claims, Faley argued he had established a prima facie case of retaliation and that triable issues of fact existed regarding whether Ferrellgas's proffered reasons for the termination were pretextual, and retaliation for Faley speaking in favor of Lamkin was the true motive. With respect to the Labor Code retaliation claim, Faley asserted that Ferrellgas had misrepresented the applicable law, confusing the more deferential standard available under FEHA with the more stringent Labor Code standard. On the emotional distress claims, Faley asserted that because his termination was accompanied by other despicable conduct, it was

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6 Lamkin brought three causes of action against Ferrellgas under FEHA for discrimination, harassment, and failure to prevent discrimination and harassment. Lamkin also named Whisman and Ortega as additional defendants in his cause of action for harassment. He later dismissed his claim against Ortega.

actionable. Finally, Faley argued there were "copious triable issues" as to whether Whisman was a managing agent for Ferrellgas, who acted with malice, fraud, or oppression, thus supporting his prayer for punitive damages.

The trial court issued a tentative ruling granting Ferrellgas's motion. After a hearing, the court confirmed its tentative. In its order, the court found that Ferrellgas "had legitimate, documented non-retaliatory reasons for terminating his employment that predated the alleged protected activity." "Faley claims he was retaliated against for objecting to Lamkin's termination. However, it is undisputed that [Faley] had received write ups and negative performance reviews … ***prior*** to participating in discussions related to [Lamkin]." The court concluded that Ferrellgas "has articulated and provided evidence to support its legitimate reasons for terminating [Faley] …. That he was terminated shortly after the alleged protected activity is insufficient to create a triable issue of fact that would defeat summary judgment." The trial court found that Faley's causes of action for IIED and NIED were properly dismissed because there was no evidence of outrageous or despicable conduct to support the claims. The court also found Faley's cause of action for NIED was barred by workers' compensation exclusivity.[7]

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7 The trial court found that Faley's wage claims, the sixth, seventh, eighth, and ninth causes of action in the FAC, were barred by claim preclusion or res judicata because they were released as part of a prior class action settlement. Faley does not appeal this aspect of the trial court's decision.

The trial court also granted Ferrellgas's and Whisman's motions for summary judgment against Lamkin. The trial court found Lamkin had provided insufficient evidence to prove actionable harassment or discrimination. Although Lamkin filed a notice of appeal, he did not file a brief, abandoning his claims against Ferrellgas.

After granting Ferrellgas's motion for summary judgment, the trial court entered judgment against Faley and he timely appealed.

DISCUSSION

I

Standard of Review

"The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) "[G]enerally, from commencement to conclusion, the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Id*. at p. 850.) Thus, a defendant moving for summary judgment "bears the burden of persuasion that 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' thereto." (*Ibid*., citing Code Civ. Proc., § 437c, subd. (o)(2).)

" 'Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on that motion. [Citation.] " 'We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained.' " [Citation.] We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.' " (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1249–1250.) We are not bound by the issues decided by the trial court and " ' "should affirm the judgment of the trial court if it is correct on any theory of law applicable to the case, including

but not limited to the theory adopted by the trial court, providing the facts are undisputed." ' " (*Leyva v. Crockett & Co., Inc.* (2017) 7 Cal.App.5th 1105, 1108.)

II

Retaliation and Failure to Prevent Retaliation Under FEHA

A

Faley asserted both retaliation and failure to prevent retaliation claims under FEHA. Government Code Section 12940, subdivision (h) "makes it an unlawful employment practice for an employer 'to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.' " (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1035 (*Yanowitz*).) Likewise, an employer may be liable for its failure to prevent unlawful retaliation. (Gov. Code, § 12940, subd. (k).) " 'When a plaintiff seeks to recover damages based on a claim of failure to prevent [retaliation] she must show three essential elements: 1) plaintiff was subjected to ... [retaliation]...; 2) defendant failed to take *all reasonable steps* to prevent ... [retaliation] ...; and 3) this failure caused plaintiff to suffer injury, damage, loss or harm.' " (*Caldera v. Department of Corrections and Rehabilitation* (2018) 25 Cal.App.5th 31, 43–44.)

We analyze Faley's FEHA retaliation claims under the *McDonnell Douglas* test. Under this test, which was adopted from federal law as set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, the plaintiff must first establish a prima facie case of retaliation. (*Yanowitz, supra*, 36 Cal.4th at p. 1042.) To do so "a 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." (*Ibid.*) "Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation ' " 'drops out of the picture,' " ' and the burden shifts back to the employee to prove intentional retaliation." (*Ibid.*; see also *Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 591 (*Soria*) ["The employer may rebut the [prima facie] presumption by producing evidence that its action was taken for a legitimate, nondiscriminatory reason. If the employer discharges this burden, the presumption of discrimination disappears."].) The employee meets that burden by presenting " 'substantial responsive evidence' that the employer's proffered reasons were untrue or pretextual." (*Loggins v. Kaiser Permanente Internat.* (2007) 151 Cal.App.4th 1102, 1109.)

"The central issue is ... whether the evidence as a whole supports a reasoned inference that the challenged action was the product of discriminatory or retaliatory animus. The employer's mere articulation of a legitimate reason for the action cannot answer this question; it can only dispel the presumption of improper motive that would otherwise entitle the employee to a judgment in his favor. Thus, citing a legitimate reason for the challenged action will entitle the employer to summary judgment only when the employee's showing, while sufficient to invoke the presumption, is too weak to sustain a reasoned inference in the employee's favor.' " (*Light, supra*, 14 Cal.App.5th at p. 94, italics omitted; see also *Soria, supra*, 5 Cal.App.5th at p. 591 [" '[A]n employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is

insufficient to permit a rational inference that the employer's actual motive was discriminatory.' "]; *id.* at p. 594 ["Generally in cases involving affirmative adverse employment actions, pretext may be demonstrated by showing ' "the proffered reason had no basis in fact, the proffered reason did not actually motivate the discharge, or, the proffered reason was insufficient to motivate discharge." ' "]; *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 309 (*Sandell*) [" ' "Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. These include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case ...." ' "].)

Critically here, "a mere temporal relationship between an employee's protected activity and the adverse employment action, while sufficient for the plaintiff's prima facie case, cannot create a triable issue of fact if the employer offers a legitimate, nonretaliatory reason for the adverse action." (*Light, supra*, 14 Cal.App.5th at p. 94.) "Moreover, plaintiff's subjective beliefs in an employment discrimination [or retaliation] case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations. [Citations.] And finally, plaintiff's evidence must relate to the motivation of the decision makers to prove, by nonspeculative evidence, an actual causal link between prohibited motivation and termination." (*King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433–434 (*King*).)

B

Faley asserts that he established a prima facie case for retaliation based on his opposition to Lamkin's firing (the protected activity), his termination (the adverse employment action), and the fact that his termination took place less than two months after he opposed Lamkin's firing

(the causal link). Ferrellgas does not dispute that Faley satisfied this first hurdle under the *McDonnell Douglas* test to establish a prima facie case. The parties also agree that Ferrellgas established it had neutral, non-retaliatory reasons for terminating Faley based on his performance record and failure to satisfy the PIP. The parties diverge on the third component of the test, i.e. the existence of triable issues of material fact as to whether these reasons were pretextual and the firing was actually intentional retaliation.

"A plaintiff may prove his or her [retaliation] case by direct or circumstantial evidence or both." (*Soria, supra*, 5 Cal.App.5th at p. 591.) Faley asserts both direct and circumstantial evidence show the reasons Ferrellgas has given for his firing were pretextual. With respect to direct evidence, Faley argues statements that Whisman made to him on May 6 and 7, 2019, and that Galan made on May 8, in conjunction with his e-mail to them early on May 7, are direct evidence that Ferrellgas had a retaliatory motive for his termination. Specifically, Faley points to Whisman's statements on May 6, just after they both received the e-mail from Haynes with firing instructions for Lamkin, that he "need[ed] to get on the manager team" and that "managers have each other's backs," and her statements the following day, after Whisman received Faley's e-mail vouching for Lamkin, asking Faley, "What the fuck did you do?" and stating "I don't know if I can protect your job from corporate." Similarly, Faley points to Galan asking him on May 8 why he had stabbed Whisman in the back. Faley argues that from these statements, and his e-mail questioning the decision to terminate Lamkin, a jury could infer that Whisman and Galan fired him two months later because he intervened to prevent Lamkin's termination.

Ferrellgas responds that this evidence does not show that its decision to fire Faley based on his undisputed ongoing performance issues was

pretextual. With respect to Galan's comment on May 8, Ferrellgas asserts no inference of retaliatory motive can be drawn from the statement because there is no evidence that Galan was aware that Faley had engaged in protected activity since Faley's May 7 e-mail did not explicitly state that Faley thought Lamkin's proposed firing was retaliation. Rather, Faley only asserted that he did not think Lamkin should be fired because he was a good employee and Faley was not aware of any conduct by Lamkin that would support his termination. Similarly, Ferrellgas argues Faley's statements to Whisman on May 6 and 7, and his e-mail on May 7, do not raise a triable issue of fact concerning pretext, because none of these statements made clear that Faley thought Lamkin's proposed firing was retaliation. Further, Ferrellgas argues that even if Faley's statements and e-mail were protected because they sought to prevent a retaliatory firing of Lamkin, no evidence connects those statements to Faley's termination two months later.

In response to Ferrellgas, Faley points to his deposition testimony that during the May 6 meeting he did express his concern that Lamkin's proposed firing was retaliation for Lamkin's complaints about Ortega. Faley also asserts that while his May 7 e-mail did not explicitly state he thought the proposed firing was retaliation, the statements that he believed the firing was not justifiable support such an inference. Further, he argues that he was clear in his interaction with Whisman on May 7 that he thought Lamkin's proposed firing was retaliatory.

Even if Faley made clear to Whisman and Galan that he thought Lamkin's termination was retaliatory, and thus engaged in the protected conduct of reporting unlawful activity, this evidence does not show that Faley's own termination in July was related to that conduct. The evidence shows that Whisman and Faley had a difficult relationship prior to the

protected conduct, that the relationship did not improve after, and that Faley had significant, ongoing performance issues. Because this tension was consistent before and after Faley spoke in favor of Lamkin, no strong inference of retaliation can be drawn from the comments made by Whisman and Galan after Faley's May 7 e-mail. (See *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 353 (*Arteaga*) ["temporal proximity alone is not sufficient to raise a triable issue as to pretext" especially "where the employer raised questions about the employee's performance *before*" the protected conduct occurred "and the subsequent termination was based on those performance issues"].)

Faley looks to several cases to support his argument that Galan and Whisman's statements before and after his May 7 e-mail were direct evidence of a retaliatory motive. None, however, support reversal. In *Sandell, supra*, 188 Cal.App.4th 297, the plaintiff alleged he was discriminatorily fired based on his disability. After the trial court entered summary judgment in favor of the employer, this court reversed, concluding that the plaintiff had offered sufficient evidence to raise a triable issue of fact as to whether the employer's proffered justification—poor performance—was pretext. (*Id.* at p. 302.)

In support of its position on appeal, the employer asserted "that 'all of [the plaintiff's] performance evaluations document multiple problems and concerns.' " (*Sandell, supra*, 188 Cal.App.4th at p. 315.) The Court of Appeal rejected this claim, because its "review of the record [did] not support this assertion." (*Ibid.*) Rather, the evidence presented by the parties in support and opposition to summary judgment showed an evidentiary conflict about the plaintiff's performance. (*Id.* at p. 319.) Unlike *Sandell*, Faley's evidence raises no true conflict about his performance. While his first review determined he was meeting expectation in three areas, the overall sentiment

expressed was concern for Faley's performance. Further, documentation before and after the review showed Faley consistently struggled to meet expectations in his role as district manager. Faley does not seriously contest these facts. He points only to his satisfactory performance in his job before being promoted to district manager.

Sandell is also distinguishable because the plaintiff's superior had made direct comments to him that if he did not recover fully from a stroke (the basis of his disability) the company "had the right to fire … or demote" him and his superior had " 'asked [the plaintiff] when [he] was going to get rid of the cane and when [he] was going to drop the dramatization.' " (*Sandell, supra*, 188 Cal.App.4th at p. 319.) Faley presents no comparable direct evidence of an improper motive by Ferrellgas. Rather he argues that from Whisman's and Galan's comments, a jury might infer Ferrellgas's decision to terminate him was motivated by retaliatory animus. These comments, however, are not sufficient to "permit a rational inference that the employer's actual motive was" retaliatory. (*Soria, supra*, 5 Cal.App.5th at p. 591.)

Moore v. Regents of University of California (2016) 248 Cal.App.4th 216 also reversed summary judgment in favor of an employer where there was direct evidence of discriminatory animus because of the plaintiff's disability. In *Moore*, the plaintiff's superior contacted the organization's human resources department and asked, "what she should do about employees 'with *adverse* health issues' " and specifically the plaintiff's adverse health condition. (*Id*. at pp. 240–241.) The superior also directly told the plaintiff she had been in touch with human resources to "ask how to handle [the plaintiff] as a *liability to the department*." (*Id*. at p. 241.) Here, Faley

provided no direct evidence to support his assertion that his termination was motivated by his protected conduct.[8]

Faley next argues that significant circumstantial evidence bolsters his allegation of retaliation. He points to five types of evidence: temporal proximity, an inference of pretext based on Whisman's identity as both the subject of Lamkin's discrimination complaint and the supervisor who decided to terminate Faley, Ferrellgas's failure to follow its own policy in its termination of him, a pattern of systematic retaliation by Ferrellgas, and his " 'praiseworthy' performance" prior to his protected conduct. We agree with Ferrellgas that the trial court correctly concluded this evidence did not create a triable issue of material fact as to whether Ferrellgas's stated reason for terminating Faley was pretext.

As discussed, the chronology of events alone is not sufficient to show a triable issue of material fact that Ferrellgas's termination of Faley was retaliatory. (See *Arteaga, supra*, 163 Cal.App.4th at pp. 334–335 ["Although temporal proximity, by itself, may be sufficient to establish a prima facie case of discrimination or retaliation, it does not create a triable fact as to pretext once the employer has offered evidence of a legitimate, nonprohibited reason for its action."].) "This is especially so where," like here, "the employer raised questions about the employee's performance *before* he engaged in protected activity, and the subsequent discharge was based on those performance issues." (*Ibid*.)

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8 Faley's reliance on *Santiago-Ramos v. Centennial P.R. Wireless Corp.* (1st Cir. 2000) 217 F.3d 46 is likewise misplaced. This federal case reversed summary judgment of an employment discrimination lawsuit where there was significant evidence of a discriminatory motive for the plaintiff's termination because of pervasive statements made to the plaintiff by her superiors about her inability to handle her responsibilities because she was a mother. (*Id*. at pp. 55–56.) This case bears no resemblance to the facts here.

Likewise, Whisman's role as both the subject of Lamkin's discrimination claim and Faley's direct supervisor is not sufficient alone to raise a triable issue of material fact as to whether Faley was fired in retaliation for supporting Lamkin. In *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467—which Faley cites to support this assertion—the plaintiff's supervisor was both the "issuer of the offensive sexual remarks" to another female employee that the male plaintiff sought to prevent, and "the sole person charged with the decision to terminate [the plaintiff's] employment." (*Id.* at p. 479.) The plaintiff in *Flait* directly complained to his supervisor that the supervisor's offensive remarks to female subordinates were unacceptable. (*Id.* at pp. 471–472.) A short time later, the plaintiff was terminated despite a longstanding, outstanding performance record with the company. (*Id.* at p. 471.) Given these facts, the Court of Appeal held the plaintiff had raised triable issues of material fact as to whether the firing was retaliation for the plaintiff's attempt to prevent sexual harassment. (*Id.* at p. 480.) In contrast, the record here shows that Faley had longstanding job performance issues. Further, and contrary to Faley's assertion, the evidence established that Whisman did not have authority to fire Faley without the consent of both Galan and Haynes.[9]

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9 The other case that Faley cites in support of this argument, *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, bears no resemblance to this case. In *Sada*, the appellate court reversed the trial court's order granting summary judgment of the plaintiff's racial discriminatory hiring claim where the hiring manager expressed explicit racial animus towards the plaintiff. The hiring manager refused to consider the plaintiff's application for a permanent nursing position, despite her stellar performance record as a registry nurse, based on her nationality. (*Id.* at pp. 146–147.) No similar evidence about Ferrellgas's motive for Faley's termination, showing the company's performance based rational was mere pretext, exists here.

Faley next argues that because Ferrellgas follows progressive discipline, and generally allowed employees 30 to 90 days to improve once they are placed on a PIP, his termination just two weeks after his PIP was implemented was evidence of retaliation. However, the evidence that Faley relies on, the deposition testimony of Lentz, Ferrellgas's director of employee relations, does not show Ferrellgas had a fixed policy that was not followed. Rather, Lentz testified that the company used progressive discipline, but because of the dangerous nature of the company's business a step-by-step progression was not always followed. Instead, the company implemented various disciplinary measures, ranging from verbal warnings to PIPs, on a case-by-case basis. Further, Whisman repeatedly communicated with Faley about his performance deficiencies throughout his time in the district manager position.

Faley's fourth and fifth categories of evidence also fail to support his argument that triable issues of material fact remain with respect to whether Ferrellgas's stated reason for his termination was pretext. He argues that Ferrellgas "engaged in a 'pattern of systematic retaliation.' " Faley, however, relies only on Lamkin's *proposed* firing to support this assertion. Because Lamkin was not fired, and remained with the company for over a year after he complained about Ortega and Whisman, this evidence does not show, as Faley contends, "successive, intertwined acts of retaliation."

Likewise, Faley's contention that he generally exhibited " 'praiseworthy' performance before a protected action" is not supported by the evidence he cites. Ferrellgas does not dispute Faley's assertion that he performed well as a driver and service technician. Faley states that once he was promoted to district manager, Whisman "praised him for 'doing a great job' and expressed appreciation for his leadership style." As Ferrellgas points

out, however, it was not Whisman who praised Faley, but another employee who worked under Faley during a meeting with that employee and Whisman about the employee's merit salary increase. This is not evidence that Whisman abruptly changed her position later that year. In addition, Faley's recounting of his performance in the year between his first and second annual reviews is not supported by the record before this court. (See *King, supra*, 152 Cal.App.4th at p. 433 ["plaintiff's subjective beliefs in an employment [retaliation] case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations"].) That record shows ongoing performance issues starting with the first review, throughout the ensuing months before Faley's asserted protected activity, and continued, serious deficiencies thereafter, including after the PIP was instituted.

Faley argues that because he disputes that the initial annual performance review was negative, he has a raised triable issues of material fact as to the reasons for his termination. The performance review itself, however, identifies clear deficiencies in Faley's work, particularly with his communication with other staff members and customers. Faley also argues that because he testified that Whisman's treatment of him worsened after he vouched for Lamkin, triable issues of fact remain. We disagree with Faley's characterization of this evidence as well. The testimony he cites shows that Whisman was concerned about specific performance issues, unrelated to Lamkin. The record makes plain that Faley had longstanding performance issues before the asserted protected activity and that those performance

issues remained after, resulting in his termination.[10] Faley's unsubstantiated testimony about Whisman's treatment of him after he intervened on Lamkin's behalf does not raise a triable issue of fact with respect to whether Ferrellgas's termination of him was retaliatory.

Faley also argues that the trial court applied the wrong standard to its analysis of this claim. He argues that the court applied a but-for standard of causation, requiring Faley to prove Ferrellgas would not have fired him had he not spoken in favor of Lamkin. There is no support for this assertion in the trial court's order. Rather, the court concluded that there were no triable issues of material fact with respect to whether "an actual causal link [existed] between prohibited motivation and termination." (*King, supra*, 152 Cal.App.4th at pp. 433–434.) Further, as discussed, the issue is reviewed by this court de novo. Thus, even if the trial court's decision was based on the

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10 Faley looks to *Soria, supra*, 5 Cal.App.5th 570, to argue that there was a triable issue of material fact concerning his performance before he engaged in protected activity. In *Soria*, the court held that summary judgment of the plaintiff's FEHA discrimination claim based on physical disability was error where the justification given by the employer for her termination, tardiness, was contradicted by the plaintiff's recent performance reviews. The record showed that the plaintiff had been consistently tardy, "two to three times a week," during her 10 years with the employer, but that such tardiness had never resulted in discipline in the past. (*Id.* at p. 596.) Further, the most recent performance review contained no suggestion of such a problem and instead showed that "[o]ther than the single negative comment about preparation time, which Soria appeared to have rectified, the entire review was positive." (*Ibid.*) Faley provides no similar evidence undermining Ferrellgas's stated rationale for his termination.

Faley also cites *Blalock v. Metals Trades* (6th Cir. 1985) 775 F.2d 703. This case bears no relation to the issue presented here. In *Blalock* the court held summary judgment of the plaintiff's discrimination claim was improper because there was significant *direct* evidence showing the plaintiff had been terminated from his job because of religious differences with his employer. (*Id.* at pp. 708–709.)

wrong standard, that fact is irrelevant. (See *Jimenez v. County of Los Angeles* (2005) 130 Cal.App.4th 133 ["it is well settled that on appeal following summary judgment the trial court's reasoning is irrelevant, and the matter is reviewed on appeal de novo"].)

Faley concedes that the viability of his claims for failure to prevent retaliation under FEHA "rise and fall with his underlying FEHA retaliation claim." Accordingly, the trial court's order granting summary judgment of Faley's retaliation and failure to prevent retaliation claims under FEHA are affirmed.

III

Retaliation Under Labor Code Section 1102.5, Subdivision (b)

A

Faley next challenges the trial court's decision to grant summary judgment of his claim for retaliation under Labor Code section 1102.5, subdivision (b). This statute provides that an employer "shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance ... if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties." (Lab. Code, § 1102.5, subd. (b).)

As the parties correctly point out, claims for retaliation under this Labor Code provision are subject to a different analysis than those under FEHA. "We instead look to [Labor Code] section 1102.6, which 'provides the

governing framework.' (*Lawson* [*v. PPG Architectural Finishes, Inc.* (2022)] 12 Cal.5th [703,] 718 [(*Lawson*)].) To sum up the statute's requirements: 'First, it places the burden on the plaintiff to establish, by a preponderance of the evidence, that retaliation for an employee's protected activities was a contributing factor in a contested employment action. ... Once the plaintiff has made the required showing, the burden shifts to the employer to demonstrate, by clear and convincing evidence, that it would have taken the action in question for legitimate, independent reasons even had the plaintiff not engaged in protected activity.' (*Ibid.*; see also § 1102.6.)" (*Vatalaro v. County of Sacramento* (2022) 79 Cal.App.5th 367, 379–380 (*Vatalaro*).)

"As the *Lawson* court explained, '[u]nder [Labor Code] section 1102.6, a plaintiff does not need to show that the employer's nonretaliatory reason was pretextual. Even if the employer had a genuine, nonretaliatory reason for its adverse action, the plaintiff still carries the burden assigned by statute if it is shown that the employer also had at least one retaliatory reason that was a contributing factor in the action.' (*Lawson, supra*, 12 Cal.5th at pp. 715–716.)" (*Vatalaro, supra*, 79 Cal.App.5th at p. 379.)

While we "liberally construe plaintiff's [evidentiary] showing and resolve any doubts about the propriety of a summary judgment in plaintiff's favor, plaintiff's evidence remains subject to careful scrutiny. [Citation.] We can find a triable issue of material fact 'if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' " (*King, supra*, 152 Cal.App.4th at p. 433.)

B

As an initial matter, Faley argues that we must reverse the trial court's decision on this claim because the court analyzed it under the *McDonnell*

Douglas test, and not in accordance with Labor Code section 1102.6. In support of this argument, Faley relies on *Scheer v. Regents of the University of California* (2022) 76 Cal.App.5th 904 (*Scheer*). In *Scheer*, the defendant moved to summarily adjudicate the plaintiff's Labor Code section 1102.5 claim under the *McDonnell Douglas* framework, before the Supreme Court clarified the appropriate standard in *Lawson*. (*Scheer*, at p. 914.) The defendants (i.e., the employer) produced evidence to demonstrate they had a legitimate business reason for taking adverse employment action against the plaintiff. (*Scheer*, at pp. 911–912.) The trial court found the plaintiff " 'fail[ed] to meet the burden to provide specific and substantial responsive evidence that the employer's proffered reasons were untrue or pretextual' " and granted the defendants' motion for summary judgment. (*Ibid.*)

On appeal, the defendants argued the court should review the case under the newly established *Lawson* framework (i.e., through application of Labor Code section 1102.6) and affirm the judgment on appeal. (*Scheer, supra*, 76 Cal.App.5th at p. 914.) The *Scheer* court declined and, instead, held that, "[b]ecause the moving papers failed to employ the applicable framework prescribed by Labor Code section 1102.6, the [defendants] failed to meet their initial burden in moving to summarily adjudicate" the plaintiff's whistleblower retaliation cause of action. (*Scheer,* at pp. 914, 915.) *Scheer* explained, "[o]ur role as an appellate court is to review the trial court's order on the motion the [defendants] actually made in the trial court, not to rule in the first instance on whether the [defendants] are entitled to summary adjudication on the ... cause of action in light of the Labor Code section 1102.6 framework." (*Scheer*, at p. 915.)

A different approach was taken by the Third District in *Vatalaro, supra*, 79 Cal.App.5th 367. As in *Scheer*, in *Vatalaro*, the trial court granted

the defendant's motion for summary judgment of the plaintiff's Labor Code section 1102.5 claim utilizing the *McDonnell Douglas* test and, while appeal of the judgment was pending, *Lawson* was decided. (*Vatalaro, supra*, 79 Cal.App.5th at p. 371.) The appellate court authorized supplemental briefing to discuss the effect of *Lawson* on the appeal and thereafter affirmed the judgment. (*Vatalaro, supra*, at pp. 383–384.) *Vatalaro* held that the defendant's evidence of a legitimate business reason for taking adverse employment action against the plaintiff met the "clear and convincing" standard provided in Labor Code section 1102.6, and that the plaintiff had failed to raise a triable issue. (*Vatalaro*, at pp. 383–384.) Thus, even though the defendant presented its motion for summary judgment utilizing the *McDonnell Douglas* framework, *Vatalaro* determined the defendant's evidence was sufficient to meet the standard set forth in Labor Code section 1102.6 and *Lawson*. (*Ibid.*)

We agree with Ferrellgas that the better course in this case is the one taken in *Vatalaro*. Here, as in *Vatalaro*, the parties had ample opportunity to brief the appropriate analysis on appeal. Further, the issue was raised by Faley in the trial court in his opposition to the motion for summary judgment. Unlike the plaintiff in *Scheer*, Faley was not prevented from asserting any argument or evidence to support his position and he does not argue he would have relied on any additional evidence if the correct standard was asserted by Ferrellgas in its moving papers. In short, Faley was not prejudiced such that reversal on this procedural basis is necessary. (See *Freeman v. Sullivant* (2011) 192 Cal.App.4th 523, 528 ["There is no presumption of prejudice. [Citations.] Instead, the burden to demonstrate prejudice is on the appellant."]; *Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963 ["we cannot presume prejudice and will not reverse the

judgment in the absence of an affirmative showing there was a miscarriage of justice"].)

On the merits, Faley asserts that (1) he adequately established his intervention in Lamkin's firing was a contributing factor in his termination and (2) Ferrellgas did not demonstrate, "by clear and convincing evidence, that it would have taken the action in question for legitimate, independent reasons even had [Faley] not engaged in protected activity.' " (*Vatalaro, supra*, 79 Cal.App.5th at pp. 379–380.) Ferrellgas responds that, even under this more demanding standard, Faley's claim under Labor Code section 1102.5, subdivision (b) was properly dismissed. We agree with Ferrellgas.

Assuming without deciding that Faley met his initial burden to show his protected conduct was a factor in his termination, Ferrellgas satisfied its burden of demonstrating by clear and convincing evidence that it would have terminated Faley for legitimate, independent reasons even if he had not intervened in Lamkin's proposed termination. Faley has not carried his burden on summary judgment of establishing a triable issue of material fact on this issue. As discussed, the record establishes that Faley's 2018 performance review identified several areas of needed improvement, that he continuously faced scrutiny for various organizational and safety problems in the ensuing months before he intervened in Lamkin's situation, that his 2019 performance review showed he was falling below expectations in all areas, that the PIP was implemented as a result of his deficiencies, and that Faley made serious safety errors even after the PIP was signed.

Considering these and other facts in the record, we agree with Ferrellgas that this "evidence would require a reasonable factfinder to find it 'highly probable' that" Ferrellgas's decision to terminate Faley "would have occurred for legitimate, independent reasons" even if Faley had not spoken

out about Lamkin. (*Vatalaro, supra*, 79 Cal.App.5th at p. 386.) Because Ferrellgas met its burden under Labor Code section 1102.6 to show that it would have terminated Faley for legitimate, performance-based reasons, the trial court properly granted summary judgment on this claim.

C

Emotional Distress Claims

As Ferrellgas points out, to the extent that Faley's IIED and NIED claims are premised on his FEHA claims, they fall with those claims. Faley argues that the claims are viable to the extent that they are based on Ferrellgas's conduct after his termination. Specifically, Faley points to his allegation that Ferrellgas accused him of soliciting another Ferrellgas employee to join him at his new employer and that Ferrellgas contacted his new employer and asserted Faley was in violation of a non-compete clause in his employment contract with Ferrellgas.

"A cause of action for intentional infliction of emotional distress exists when there is ' " ' "(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." ' " ' [Citations.] A defendant's conduct is 'outrageous' when it is so ' " 'extreme as to exceed all bounds of that usually tolerated in a civilized community.' " ' [Citation.] And the defendant's conduct must be ' "intended to inflict injury or engaged in with the realization that injury will result." ' " (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1050–1051.)

Further, "[a]n essential element of [an IIED] claim is a pleading of outrageous conduct beyond the bounds of human decency. [Citations.]

Managing personnel is not outrageous conduct beyond the bounds of human decency, but rather conduct essential to the welfare and prosperity of society. A simple pleading of personnel management activity is insufficient to support a claim of intentional infliction of emotional distress, even if improper motivation is alleged. If personnel management decisions are improperly motivated, the remedy is a suit against the employer for discrimination." (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 80 (*Janken*).)

We agree with Ferrellgas that the conduct alleged by Faley does not give rise to any triable issue of material fact that Ferrellgas's conduct was so extreme and outrageous that it would support a claim for IIED. Further, the record before this court contains only Faley's unsubstantiated statements that it occurred. He alleges an e-mail was sent to his new employer threatening litigation for hiring Faley, but provides no citation to such document, and in his deposition, Faley stated that Ferrellgas apologized for the accusation that Faley had solicited another employee once the employee clarified to Ferrellgas that he was *not* solicited by Faley. Finally, there is no indication that Ferrellgas's threat about the non-compete clause had any effect on Faley. Rather, it is undisputed that Faley continued to work at Amerigas thereafter and he provides no evidence of emotional or other injury as a result of Ferrellgas's conduct. In sum, Faley's allegations of misconduct by Ferrellgas do not show any action that was "outrageous ... beyond the

bounds of human decency" that would necessitate a trial on Faley's IIED claim.[11] (*Janken, supra*, 46 Cal.App.4th at p. 80.)

Faley has also not shown the court erred by summarily adjudicating his NIED cause of action. " '[T]he negligent causing of emotional distress is not an independent tort, but the tort of negligence. [Citation.] The traditional elements of duty, breach of duty, causation, and damages apply. [¶] Whether a defendant owes a duty of care is a question of law. Its existence depends upon the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability.' " (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1072.) To state a claim for NIED, the plaintiff must allege these elements, particularly a negligent act by the defendant that caused harm. Here, Faley bases his claim for NIED solely on Ferrellgas's intentional employment acts. He makes no claim that Ferrellgas acted

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11 The two cases Faley cites in support of his claims involve allegations of misconduct far more severe than those alleged by Faley. In *Toney v. State of California* (1976) 54 Cal.App.3d 779, the plaintiff obtained a jury verdict on his claim of IIED based on his termination by Fresno State University and conduct by Fresno State that resulted in the cancellation of a job offer by another university, both of which the jury found were motivated by racial discrimination. (*Id*. at p. 782.) On appeal, Fresno State did not challenge the jury's finding of outrageous conduct by the defendant and, thus, the court's decision does not address the issue. (*Id*. at p. 787.) In *Huber v. Standard Ins. Co.* (9th Cir. 1988) 841 F.2d 980, a federal case we are not bound to follow, the defendant company fired the plaintiff, whose performance record was stellar, without any notice and prevented the plaintiff from receiving his pension in violation of its prior policy to allow employees in similar positions to vest. The Ninth Circuit agreed this was sufficient evidence to allow the claim to proceed to trial. (*Id*. at pp. 986–987.) The conduct at issue in *Toney* and *Huber* is far more severe than that alleged by Faley.

negligently. Accordingly, the trial court's dismissal of this claim was not error.[12]

DISPOSITION

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

McCONNELL, P. J.

WE CONCUR:

DO, J.

CASTILLO, J.

12 Because we affirm the trial court decision granting summary judgment, we do not reach Faley's arguments concerning punitive damages.