

1
2
3
4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF CALIFORNIA

6 DAVID F. JADWIN, D.O.,

7 Plaintiff,

8 v.

9 COUNTY OF KERN; PETER BRYAN (BOTH
10 individually and in his former
11 capacity as Chief Executive Of Kern
12 Medical Center); IRWIN HARRIS,
M.D.; and DOES 1 through 10,
inclusive,

13 Defendants.

1:07-CV-00026-OWW-DLB

MEMORANDUM DECISION AND
ORDER RE DEFENDANTS' AND
PLAINTIFF'S CROSS-MOTIONS
FOR SUMMARY JUDGMENT OR, IN
THE ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT

14 I. INTRODUCTION

15 Before the court are cross-motions for summary judgment or, in
16 the alternative, partial summary judgment, brought by Plaintiff
17 David F. Jadwin, D.O. ("Plaintiff") and, collectively, by
18 Defendants County of Kern ("County"), Peter Bryan ("Bryan") and
19 Irwin Harris ("Harris"), M.D., on all eleven claims in Plaintiff's
20 Second Amended Complaint. The following background facts are taken
21 from the parties' submissions in connection with the motions and
22 other documents on file in this case.¹
23
24
25
26

27 ¹ In support of their cross-motions for summary judgment or,
28 in the alternative, partial summary judgment, the parties submitted
over 3000 pages of materials.

1 II. BACKGROUND

2 This case arises out of Plaintiff's former employment with
3 Kern County. Plaintiff worked at the Kern Medical Center ("KMC"),
4 an acute care teaching hospital owned and operated by the County.
5 As of October 2000, Plaintiff, a pathologist, served as the Chair
6 of KMC's Pathology Department. According to his employment
7 contract with the County, his chairmanship was a full-time
8 position. Throughout his employment, while undoubtedly dedicated
9 to his work, Plaintiff engaged in several disagreements and/or
10 confrontations with his fellow colleagues on a variety of issues.
11 For example, in August 2003, during a conversation with another
12 physician, Plaintiff grabbed the physician's necktie and pulled him
13 into the hallway. Plaintiff apologized for this incident.

14 Plaintiff's lawsuit stems from the events surrounding his
15 eventual removal from his chairmanship position and the non-renewal
16 of his employment contract with the County. The following events
17 are central:

18 (1) On July 10, 2006, upon the recommendation of Bryan,
19 KMC's then Chief Executive Officer, the Joint Conference
20 Committee ("JCC") voted to remove Plaintiff from his
21 chairmanship. This vote came after Plaintiff had taken
22 a medical leave of absence.

23 (2) Subsequently, in light of his removal from the
24 chairmanship, Plaintiff executed an amendment to his
25 employment contract which reduced his base salary.

26 (3) After working for the County under this amended
27 agreement, Plaintiff was involuntarily placed on paid
28 administrative leave pending resolution of a personnel

1 matter. Plaintiff remained on paid administrative leave
2 until his employment contract expired, and the County did
3 not renew Plaintiff's employment agreement.

4 Plaintiff attributes these events - his removal from the
5 chairmanship and the associated reduction in salary, his
6 involuntary paid administrative leave, and the non-renewal of his
7 contract - to illegal motives which violate several state and
8 federal employment laws.

9 A. The Removal From The Chairmanship And Preceding Events

10 On October 24, 2000, Plaintiff signed an employment contract
11 with the County. The term of Plaintiff's employment was set to
12 expire on November 30, 2006. On October 5, 2002, Plaintiff
13 executed a second employment contract which called for a term
14 ending October 4, 2007. The contract provided that, as a Core
15 Physician, Plaintiff must perform certain services as set forth in
16 Exhibit A. According to Exhibit A, Plaintiff, in his role as
17 Pathology Chairman, was expected to serve as the medical director
18 for the anatomic pathology service and clinical laboratories at
19 KMC, and report to the KMC Medical Director. Exhibit A explains
20 that "[t]his is a full-time position requiring 48 hours of service,
21 on average, per week." (Doc. 266 at 27.)

22 On October 12, 2005, Plaintiff presented at an intra-hospital
23 conference called the "Tumor Conference." According to Plaintiff,
24 his presentation dealt with the medical appropriateness of a
25 proposed radical hysterectomy for a KMC patient. Plaintiff
26 believed the proposed hysterectomy was based on inaccurate
27 pathology reports from outside reviewers and Plaintiff suggested
28 that internal review of such outside work be conducted.

1 Following the conference, Harris, Chief Medical Officer,
2 received three letters of dissatisfaction from physicians who were
3 in attendance - Drs. Scott Ragland, Jennifer Abraham, and Bill
4 Taylor. In a letter dated October 17, 2005, Plaintiff was informed
5 that his "repeated misconduct at the Tumor Conference on October
6 12, 2005 was noted by numerous attendants, three of which have
7 written letters of their dissatisfaction, which will be entered
8 into your medical staff file. You exceeded your time reasonably
9 allotted for the presentation of pathologic findings, you ignored
10 the requests of the leader of the conference to be brief, and you
11 became so detailed in trying to make your political point, that you
12 lost the audience and failed to meet the teaching objective of the
13 conference for the benefit of the residents." (Doc. 266 at 129.)
14 Plaintiff did not believe that the criticism was justified.

15 A few months later, Plaintiff took a leave of absence in the
16 form of a reduced work schedule. (Doc. 278 at 23). In a letter to
17 Bryan dated January 9, 2006,² Plaintiff requested a leave of
18 absence in light of "depression" he had developed as a result of
19 alleged professional mistreatment and harassment:

20 During the past five years I have performed impeccable
21 service for KMC each and every day. Virtually every
22 interaction I have had with hundreds of KMC associates
23 has been professional, respectful and courteous. I have
24 always performed or tried to perform my duties in a
25 virtuous and ethical manner. I have received high
26 performance ratings from staff and residents on
27 departmental evaluations.

28 Over the past several years I have been the victim of
professional mistreatment by a few members of the medical

2 The letter is actually incorrectly dated January 9, "2005."
According to Plaintiff, it is supposed to be dated January 9,
"2006." (Pl. Dep. Vol. II. 496:9-20.) No party disputes this fact.

1 staff. You are aware of these instances, as they have
2 been discussed during multiple hospital leadership
3 meetings and during our one-to-one meetings. I do not
4 consider these to be directly as a result of
5 communication failures on my part, but rather
6 inappropriate harassment by a small group [of]
7 individuals. I believe this harassment is in response
8 to the many quality management issues that I have raised.

9 This harassment has led me [sic] develop depression and
10 insomnia that has impacted my health and work. Although
11 I enjoy much of my work at KMC, it is not possible for me
12 to continue to work under this form of harassment. These
13 issues largely have gone unresolved for years in spite of
14 multiple requests from me for action. The most recent
15 issue involving the October Oncology Conference is to
16 date still unresolved.

17 This form of harassment is unacceptable and must be
18 resolved quickly. I therefore request administrative
19 leave with pay until this issue is resolved. It is my
20 wish to resolve this issue immediately, and I request
21 that you correct this hostile environment immediately.

22 (Doc. 266 at 133.) It is undisputed that, on January 9, 2006,
23 Plaintiff asked Bryan to allow Plaintiff to work part-time and at
24 home while Plaintiff was recovering from his disabling depression.

25 (Doc. 278 at 28.)

26 On January 13, 2006, Plaintiff's psychiatrist, Paul Riskin,
27 completed a form entitled "Certification of Health Care Provider
28 Medical Leave of Absence." The form states that Plaintiff's
medical condition or need for treatment commenced on "12-16-05" and
the "probabl[e] duration of medical condition or need for
treatment" is "2-3 mo." Plaintiff's probable return date was listed
as "3-16-06." (Doc. 270 at 4.) On the form, Riskin identified his
practice as "psychiatry" and certified that Plaintiff had a serious
health condition. (*Id.*) He wrote that "it is my hope that 1-2 work
days should be a reasonable schedule for a period of 2-3 months"
and "Patient should work 1-2 days per week." (*Id.*) From the facts,

1 it remains unclear whether the County actually received this form
2 on January 13, 2006.

3 On or about March 2, 2006, Plaintiff submitted a "Kern County
4 Personnel Department Request For Leave Of Absence" form on which
5 Plaintiff checked the box "Initial Request." (Doc. 270 at 6.) He
6 requested a leave of absence from "12-16-05" to "3-15-06." (Id.)
7 Under the section entitled "Mandatory Leave FMLA/CFRA" Plaintiff
8 requested "Intermittent-Employee" leave. (Id.) He indicated that
9 he had a physician's note.

10 In a letter entitled "DESIGNATION OF LEAVE (Serious Health
11 Condition of Employee-Intermittent)," dated March 2, 2006, Sandra
12 Chester from Human Resources ("HR") informed Plaintiff that HR had
13 been notified of his request for leave and, as HR understood it,
14 Plaintiff intended for his leave to commence on December 16, 2005,
15 and end on March 15, 2006. (Doc. 259-6 at 6.) The letter also
16 stated that "[b]ased on the information available to us, it appears
17 that you are eligible for a leave under FMLA/CFRA. Unless we
18 provide you with information that your leave has not been approved
19 or that we are withdrawing our FMLA/CFRA designation, the requested
20 leave will count against your FMLA/CFRA entitlement." (Id.) On
21 March 13, 2006, Plaintiff's request for leave was approved, i.e.,
22 Plaintiff's Request For Leave Of Absence form was marked as
23 "approved" and signed. (Doc. 259-6 at 5.) It is undisputed that
24 Plaintiff took a reduced schedule CFRA medical leave from December
25 16, 2005, to March 15, 2006. (Doc. 278 at 23.)

26 On the day he was due back, March 16, 2006, Plaintiff wrote an
27 e-mail to Bryan with the subject line "Leave of Absence." (Doc. 265
28 at 39.) In his e-mail, Plaintiff stated he would be taking a few

1 more months of leave:

2 I will be taking you (sic) suggestion and take 2 to 3
3 more months of leave. I am scheduled to have surgery on
4 March 22, 2006 with a several week recovery time. I hope
5 that appropriate LT coverage has been scheduled to assist
6 Phil and Savita with the service work. It is quite
7 demanding and they both appeared to be overworked when I
8 last saw them.

9 (*Id.*) In a letter dated April 20, 2006, Chester informed Plaintiff
10 that his "Intermittent Leave of Absence expired on March 15, 2006.

11 . . . [T]o extend your leave, you . . . need to complete the
12 enclosed Request for Leave of Absence form and return it to the
13 Human Resources Office, no later than Tuesday April 25, 2006."

14 (*Doc. 259-6 at 10.*)

15 In response, Plaintiff submitted a Request For Leave Of
16 Absence form dated April 26, 2006. (*Doc. 259-6 at 11.*) Plaintiff
17 checked the box for "Extension Request" and requested a leave of
18 absence extension from "3/15/06" to "9-15-06" with a return date of
19 "9-16-06." (*Id.*) Plaintiff indicated he was requesting FMLA/CFRA
20 leave for "non-Job Related/Illness or Disability" and had an
21 accompanying physician's note. (*Id.*)

22 Plaintiff's accompanying physician's note, another
23 "Certification of Health Care Provider Medical Leave of Absence"
24 form completed by Riskin, is dated April 26, 2006. (*Doc. 259-6.*)
25 Riskin wrote that, "[t]his employee is unable to work full time and
26 requires part-time or less to avoid worsening of his serious
27 medical condition." (*Id.*) Riskin estimated that Plaintiff would
28 need "weekly doctor's visits" and "treatment for 6 Mo. to one
year." (*Id.*)

On April 28, 2006, Plaintiff had a meeting with Bryan, Karen
Barnes (County Counsel) and Steve O'Conner from HR about

1 Plaintiff's leave of absence. Bryan composed an Officer Memorandum
2 (dated April 28, 2006) purportedly summarizing the meeting. In the
3 memorandum, Brian states:

4 I provided you [Plaintiff] with the summary of your
5 medical leave history (see attached). This packet
6 contained the calculations and policies related to how
7 the County of Kern handles medical leaves. In essence,
8 you have 137 hours available to be taken before you hit
9 the 480-hour limitation. Medical Leaves also run for a
10 maximum of six months so this criterion sets June 16,
11 2006 as the last day available to you under this status.
12 You said that you did not have any questions and I
13 referred you to Human Resources, Steve O'Conner, should
14 you have any questions about how to interpret the leave
15 provisions.

16 You also mentioned that you were scheduled to work on
17 Monday May 1, 2006 and asked if I wanted you to be
18 present. You also indicated that from that day, you
19 would be out until further notice. I left the option of
20 working on Monday to you and asked that you coordinate
21 with Dr. Dutt about coverage. I also mentioned that
22 after Monday it would be preferable for you not to have
23 an intermittent work schedule and it would be easier on
24 the department to just have you on leave until your
25 status is resolved.

26 Finally, I said that by June 16, 2006 you needed to give
27 me your decision about your employment status. Your
28 options were to either return full time or resign your
position. As chairman, your department and the hospital
needs you here full time. You indicated that you
understood the deadline.

29 (Doc. 259-6 at 15.) The parties dispute whether Bryan, in
30 Plaintiff's words, "forced" Plaintiff to take full-time leave after
31 May 1, 2006, or whether Bryan proposed full-time leave. At his
32 deposition, Bryan testified as follows regarding the conversion of
33 Plaintiff's leave from part-time to full-time:

34 Q. Okay. So you made the decision that Dr. Jadwin
35 should be on intermittent work schedule, instead, to
36 full-time leave, correct?

37 A. No, what I indicated [in his memorandum] was it
38 would be preferable, which infers a decision.

1 Q. Okay.

2 A. And if I am not mistaken, Dr. Jadwin made a decision
3 not to be present.

4 Q. Okay.

5 A. There was no dialogue back from Dr. Jadwin that
6 said, no, I still want to continue the intermittent
7 schedule that I recall.

8 Q. At the meeting or otherwise?

9 A. Correct.

10 Q. Okay. You didn't say either way, actually, whether
11 he wanted to go on full-time leave or not, did he?

12 A. Not to my recollection.

13 (Bryan Dep. 250:15-251:6.) Plaintiff recalls the situation a bit
14 differently. Plaintiff testified at his deposition that "Bryan
15 told me to stop going on - working on a one-to-two day schedule per
16 week and to make my leave full time so I could exhaust it as soon
17 as possible." (Pl. Dep. Vol. V. 854:24-855-2.) Plaintiff testified
18 that he was allowed part-time leave "until April, when Mr. Bryan
19 told me that he wanted me to go on full-time leave so that I would
20 use my leave faster." (Pl. Dep. Vol. V. 983:23-984:1.)

21 While on full-time leave, in a letter dated May 31, 2006,
22 Plaintiff wrote to Bryan to request an extension of time to make a
23 decision regarding his continued employment:

24 As you know, you have requested that I give you my
25 decision by June 16 as to whether I will be continuing on
26 in or resigning from my position at the hospital.
27 Unfortunately, I underwent sinus surgery in early May
28 which took some time to recover from. Then last Monday,
I suffered a serious fall that fractured my foot and
avulsed a ligament from my ankle.

I would greatly appreciate an extension on the June 16
deadline as my personal circumstances of late simply have
not permitted me to consider and render such an important
decision.

1 (Doc. 259-7 at 2.) In response, Bryan e-mailed Plaintiff on June
2 13, 2006, and sent a hard copy letter on June 14, 2006. The letter
3 reads as follows:

4 I was sorry to hear of your accident. It seems as though
5 it has been one thing after another for you and I can
6 imagine your growing frustration with not being healthy.

7 My response to your request for an extension of leave has
8 two parts to it. First, I will grant you a Personal
9 Necessity Leave of up to 90 days. This is predicated on
10 your providing a physician's note indicating the ailment.
11 This is common practice with the County and I want to
12 make sure that we are consistent in following policy.

13 This extension of leave, however, applies only to your
14 employment status. It does not apply to your appointment
15 as chairman and the associated duty assignments, which
16 brings me to the second part of this extension. You have
17 essentially been out either full - or part-time for the
18 past eight or nine months. You have used all of your
19 vacation and sick time in addition to being in a non-pay
20 status for six months, and while I understand the
21 circumstances, it does not diminish the fact that the
22 Department of Pathology needs a full-time chairman. For
23 this reason, I am going to enact the provisions of the
24 Medical Staff Bylaws, Paragraph 9.6-4, REMOVAL, and
25 rescind your appointment as chairman. I regret that I
26 have to do this but KMC is going through some challenging
27 times and we need a full complement of leaders. Your
28 continued unavailability creates a void that must be
filled. This decision is effective June 17, 2006.

The obvious question that I am sure comes to mind is,
'what does this mean for me?' This essentially means that
should you decide to return to work at KMC either within
this 90-day period or at the end of it, your contract
will be changed to reflect a regular staff pathologist
duty assignment. The amount of time you spend will be
mutually agreeable, but your duties will not include
those of the chairman.

23 (Doc. 259-7 at 3.) In a memorandum he drafted to the JCC dated
24 July 10, 2006, Bryan requested that the Committee endorse his
25 recommendation to rescind Plaintiff's appointment as Chairman of
26 the Pathology Department. Article IX, section 9.7-4 of the KMC
27 bylaws provides that "[r]emoval of a department chair may occur
28

1 with or without cause upon recommendation of the chief executive
2 officer with a majority vote of the Joint Conference Committee."
3 (Doc. 259-3 at 22.) In explaining his recommendation, Bryan wrote,
4 among other things: "This recommendation to rescind Dr. Jadwin's
5 appointment as Chairman, Department of Pathology is based solely on
6 his continued non-availability to provide the leadership necessary
7 for a contributing member of the medical staff leadership group."
8 (Doc. 266-2 at 32.) The Committee endorsed Bryan's recommendation
9 by a majority vote and Plaintiff lost his chairmanship on July 10,
10 2006. (Doc. 266-2 at 29.)

11 **B. Reduction In Salary**

12 Before he returned from his Personal Necessity Leave,
13 Plaintiff signed an amendment to his employment contract. (Doc.
14 259-11 at 10-12.) On September 15, 2006, the County's counsel and
15 Plaintiff's attorney³ communicated regarding the amendment to
16 Plaintiff's employment contract. In an e-mail dated September 15,
17 2006, from Barnes (the County's counsel) to Eugene Lee (Plaintiff's
18 counsel), Barnes attached a copy of the proposed amendment and
19 stated: "As I mentioned, the amendment, which must be approved by
20 the Kern County Board of Supervisors before Jadwin can begin to
21 work, reflects changes to the base salary and the job duties
22 consistent with Dr. Jadwin's change in status from department chair
23 to staff pathologist." (Doc. 267 at 19.)

24 Plaintiff executed an amendment to his employment contract,
25 dated October 3, 2006. (Doc. 259-11 at 10-11.) The end date of
26 his employment term (October 4, 2007) remained unaltered. The

27
28 ³ By then, Plaintiff had retained counsel.

1 amendment did, however, effectuate a reduction in Plaintiff's base
2 salary and a revision of his job duties.

3 C. Paid Administrative Leave And Non-Renewal Of Plaintiff's
4 Contract

5 After executing his amended employment contract and after his
6 Personal Necessity Leave had expired, Plaintiff returned to work
7 as a staff pathologist. Thereafter, Plaintiff, for the first time,
8 reported various concerns he was having to outside authorities,
9 including the Joint Commission on Accreditation of Healthcare
10 Organizations ("JCAHO"), the College of American Pathologists
11 ("CAP"), and the California Department of Health Services ("DHS").
12 (Doc. 272-2 at 5.) These outside reports dealt with a host of
13 issues including "[l]ost and incomplete product chart copies
14 related to blood transfusion" and "[s]torage of calvarium bone
15 flaps for reimplantation in unsafe storage and without state tissue
16 bank license." (See, e.g., Doc. 260-2 at 22.)

17 According to the County, Plaintiff's confrontational behavior
18 after he came back from Personal Necessity Leave was worse than
19 before. (Doc. 262 at 27.) On December 7, 2006, David Culberson, the
20 Interim CEO, sent a hand delivered letter to Plaintiff informing
21 Plaintiff that he was being placed on paid administrative leave
22 effective immediately. (Doc. 259-10 at 39.) The letter indicated
23 that he would remain on paid leave pending resolution of a
24 personnel matter. In a letter to David Culberson dated December
25 13, 2006, Plaintiff informed hospital administration that he had
26 notified outside authorities of alleged violations. (Doc. 265 at
27 79; Doc. 278 at 6.)

28 Plaintiff remained on paid administrative leave for the

1 remainder of his employment term, i.e., until October 4, 2007, and
2 the County did not renew his contract. It is undisputed that, to
3 this day, Plaintiff has not personally received an explanation from
4 Defendants as to why he was placed on administrative leave or why
5 his contract was not renewed despite repeated requests for an
6 explanation. (Doc. 278 at 7.)

7 D. Plaintiff's Lawsuit

8 Before his contract term expired, on January 6, 2007,
9 Plaintiff filed his first Complaint in this action. (Doc. 2.) Five
10 counts alleged violations of the California Fair Employment and
11 Housing Act ("FEHA"), Cal. Gov't Code §§ 12900 et seq, and two
12 counts alleged violations of the Family and Medical Leave Act
13 ("FMLA"), 29 U.S.C. §§ 2601 et seq. After engaging in discovery,
14 Plaintiff filed a Second Amended Complaint and added claims for
15 retaliation under the FEHA and the FMLA on the theory that
16 Plaintiff's employment contract was not renewed because he brought
17 an action against Defendants alleging FEHA and FMLA violations.
18 (Doc. 241.)

19 The operative complaint, Plaintiff's Second Amended Complaint,
20 contains eleven counts. Plaintiff asserts a claim for: (1)
21 retaliation in violation of California Health & Safety Code §
22 1278.5; (2) retaliation in violation of California Labor Code §
23 1102.5; (3) retaliation in violation of the California Moore-Brown-
24 Roberti Family Rights Act ("CFRA"); (4) interference with FMLA
25 rights; (5) a violation/denial of CFRA rights; (6) disability
26 discrimination in violation of the FEHA; (7) a failure to provide
27 reasonable accommodation for an alleged disability (depression) in
28 violation of the FEHA; (8) a failure to engage in the interactive

1 process in violation of the FEHA; (9) a violation of the 14th
2 Amendment's procedural due process clause via 42 U.S.C. § 1983;
3 (10) retaliation in violation of the FMLA; and (11) retaliation in
4 violation of the FEHA. All counts are asserted against the County.
5 Plaintiff's ninth count is asserted against Bryan and Harris.
6 Plaintiff alleges that, pursuant to 28 U.S.C. § 1331, federal
7 question jurisdiction exists over his federal claims and that,
8 pursuant to 28 U.S.C. § 1367, supplemental jurisdiction exists over
9 his state law claims.

10 III. SUMMARY JUDGMENT STANDARD

11 A motion for summary judgment and a motion for partial summary
12 judgment (sometimes called summary adjudication) are governed by
13 the same standards. *California v. Campbell*, 138 F.3d 772, 780-81
14 (9th Cir. 1998); *Costa v. Nat'l Action Fin. Servs.*, No. CIV S-05-
15 2084 FCD/KJM, 2007 WL 4526510, at *2 (E.D. Cal. Dec. 19, 2007).
16 Summary judgment is appropriate when "the pleadings, the discovery
17 and disclosure materials on file, and any affidavits show that
18 there is no genuine issue as to any material fact and that the
19 movant is entitled to judgment as a matter of law." Fed. R. Civ.
20 P. 56©. A party moving for summary judgment "always bears the
21 initial responsibility of informing the district court of the basis
22 for its motion, and identifying those portions of the pleadings,
23 depositions, answers to interrogatories, and admissions on file,
24 together with the affidavits, if any, which it believes demonstrate
25 the absence of a genuine issue of material fact." *Celotex Corp. v.*
26 *Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks
27 omitted).

28 Where the movant will have the burden of proof on an issue at

1 trial, it must "affirmatively demonstrate that no reasonable trier
2 of fact could find other than for the moving party." *Soremekun v.*
3 *Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007); see also
4 *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir.
5 2003) (noting that a party moving for summary judgment on claim as
6 to which it will have the burden at trial "must establish beyond
7 controversy every essential element" of the claim) (internal
8 quotation marks omitted). With respect to an issue as to which the
9 non-moving party will have the burden of proof, the movant "can
10 prevail merely by pointing out that there is an absence of evidence
11 to support the nonmoving party's case." *Soremekun*, 509 F.3d at
12 984.

13 When a motion for summary judgment is properly made and
14 supported, the non-movant cannot defeat the motion by resting upon
15 the allegations or denials of its own pleading, rather the
16 "non-moving party must set forth, by affidavit or as otherwise
17 provided in Rule 56, 'specific facts showing that there is a
18 genuine issue for trial.'" *Id.* (quoting *Anderson v. Liberty Lobby,*
19 *Inc.*, 477 U.S. 242, 250 (1986)). "Conclusory, speculative testimony
20 in affidavits and moving papers is insufficient to raise genuine
21 issues of fact and defeat summary judgment." *Id.*

22 To defeat a motion for summary judgment, the non-moving party
23 must show there exists a *genuine* dispute (or issue) of *material*
24 fact. A fact is "material" if it "might affect the outcome of the
25 suit under the governing law." *Anderson*, 477 U.S. at 248.
26 "[S]ummary judgment will not lie if [a] dispute about a material
27 fact is 'genuine,' that is, if the evidence is such that a
28 reasonable jury could return a verdict for the nonmoving party."

1 *Id.* at 248. In ruling on a motion for summary judgment, the
2 district court does not make credibility determinations; rather,
3 the "evidence of the non-movant is to be believed, and all
4 justifiable inferences are to be drawn in his favor." *Id.* at 255.

5 "[T]he standards upon which the court evaluates the motions
6 for summary judgment do not change simply because the parties
7 present cross-motions." *Taft Broad. Co. v. United States*, 929 F.2d
8 240, 248 (6th Cir. 1991). And simply because the parties present
9 cross-motions for summary judgment does not mean that there must be
10 a winner:

11 The fact that both parties have moved for summary
12 judgment does not mean that the court must grant judgment
13 as a matter of law for one side or the other; summary
14 judgment in favor of either party is not proper if
15 disputes remain as to material facts. Rather, the court
must evaluate each party's motion on its own merits,
taking care in each instance to draw all reasonable
inferences against the party whose motion is under
consideration.

16 *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391
17 (Fed. Cir. 1987) (internal citation omitted).

18 IV. DISCUSSION AND ANALYSIS

19 A. Retaliation - California Health & Safety Code § 1278.5⁴

20 As amended, Section 1278.5 of the California Health & Safety
21 Code provides in pertinent part:

22 (a) The Legislature finds and declares that it is the
23 public policy of the State of California to encourage
24 patients, nurses, members of the medical staff, and other
25 health care workers to notify government entities of
suspected unsafe patient care and conditions. The
Legislature encourages this reporting in order to protect

26 ⁴ Several of Plaintiff's claims under Health & Safety Code §
27 1278.5 are barred as explained in the order on Defendants' motion
28 for judgment on the pleadings. (Doc. 310.) Because at least one
claim remains, discussion and analysis is required.

1 patients and in order to assist those accreditation and
2 government entities charged with ensuring that health
3 care is safe. The Legislature finds and declares that
4 whistleblower protections apply primarily to issues
5 relating to the care, services, and conditions of a
6 facility and are not intended to conflict with existing
7 provisions in state and federal law relating to employee
8 and employer relations.

9 (b)(1) No health facility shall discriminate or
10 retaliate, in any manner, against any patient, employee,
11 member of the medical staff, or any other health care
12 worker of the health facility because that person has
13 done either of the following:

14 (A) Presented a grievance, complaint, or report to
15 the facility, to an entity or agency responsible
16 for accrediting or evaluating the facility, or the
17 medical staff of the facility, or to any other
18 governmental entity.

19 (B) Has initiated, participated, or cooperated in
20 an investigation or administrative proceeding
21 related to, the quality of care, services, or
22 conditions at the facility that is carried out by
23 an entity or agency responsible for accrediting or
24 evaluating the facility or its medical staff, or
25 governmental entity.

26 (2) No entity that owns or operates a health facility, or
27 which owns or operates any other health facility, shall
28 discriminate or retaliate against any person because that
29 person has taken any actions pursuant to this
30 subdivision.

31

32 (d)(2) For purposes of this section, discriminatory
33 treatment of an employee, member of the medical staff, or
34 any other health care worker includes, but is not limited
35 to, discharge, demotion, suspension, or any unfavorable
36 changes in, or breach of, the terms or conditions of a
37 contract, employment, or privileges of the employee,
38 member of the medical staff, or any other health care
39 worker of the health care facility, or the threat of any
40 of these actions.

41 As currently worded, "[t]he statute prohibits retaliation
42 against any employee who complains to an employer or a government
43 agency about unsafe patient care or conditions." *Mendiondo v.*

1 *Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1105 (9th Cir. 2008). To
2 establish a prima facie case of retaliation under § 1278.5, a
3 plaintiff must show that: (1) he engaged in protected activity
4 under the statute; (2) he was thereafter subjected to an adverse
5 employment action; and (3) a causal link between the two. See *id.*

6 1. Retroactive Application Of § 1278.5

7 Plaintiff's briefing in connection with the cross-motions for
8 summary judgment and his opposition brief to Defendants' motion for
9 judgment on the pleadings reveals that Plaintiff is attempting to
10 assert whistleblower claims under the amended version of § 1278.5.

11 Section 1278.5 was amended effective January 1, 2008, well
12 after Plaintiff's employment with the County ended. All of the
13 alleged whistleblowing and retaliation in this case preceded
14 January 1, 2008. In his opposition brief to Defendants' motion for
15 judgment on the pleadings, Plaintiff argued, "[b]oth whistleblower
16 statutes which Plaintiff is suing under - Labor Code § 1102.5 and
17 Health & Safety Code § 1278.5 - expressly provide that an
18 employee's reports to his public employer constitute
19 whistleblowing. H&S § 1278.5(b) (1) (A); Labor C. § 1102.5(e)." (Doc.
20 293 at 5.) Plaintiff's citation to "H&S § 1278.5(b) (1) (A)" is a
21 reference to the new version of the statute. The old version of
22 the statute, which was in effect from January 1, 2000 to December
23 31, 2007, did not contain this section (i.e., (b) (1) (A)). See Cal.
24 Health & Safety Code § 1278.5 (Deering's Supp. 2000).

25 The main substantive provision of Health & Safety Code §
26 1278.5 that existed during Plaintiff's employment with the County
27 reads as follows:

28 No health facility shall discriminate or retaliate in any

manner against any patient or employee of the health facility because that patient or employee, or any other person, has presented a grievance or complaint, or has initiated or cooperated in any investigation or proceeding of any governmental entity, relating to the care, services, or conditions of that facility.

Health & Safety Code § 1278.5(b)(1) (Deering's Supp. 2000). As stated in a previous order, see *Jadwin v. County of Kern*, No. 1:07-CV-00026, 2009 WL 530084-OWW-TAG, at *3 (E.D. Cal. Mar. 2, 2009), a comparison between the old and new version of Health & Safety Code § 1278.5 reveals several textual changes, including:

- The new version prohibits retaliation by an "entity that owns or operates a health facility, or which owns or operates any other health facility" (such as the County) and not just retaliation by the health facility at issue.
- The new version explicitly prohibits retaliation against any "member of the medical staff" or "any other health care worker of the health facility." The old version prohibited retaliation against "any patient or employee of the health facility."
- The new version applies to a "grievance, complaint, or report" presented to a party enumerated in the statute. The old version applies only to a "grievance or complaint."
- The new version of the statute augmented the potential remedies which now (but did not previously) include "any remedy deemed warranted by the court pursuant to this chapter or any other applicable provision of statutory or common law."

In light of the statute's textual changes and their potential impact on this case, the parties were requested to file supplemental briefing to address whether the amended version of the statute applied in this case, and, if not, whether Plaintiff's § 1278.5 claims survived. See *Jadwin*, 2009 WL 530084 at *4. In his supplemental briefing, Plaintiff argues that, notwithstanding all the textual changes, the amended version of § 1278.5 merely clarified the original meaning of the statute and, as such, it can

1 be applied in this case. Citing *Mendiondo*, Plaintiff suggests that
2 the Ninth Circuit has already determined that the amended version
3 of the statute applies to whistleblowing and retaliation that
4 occurred prior to its enactment into law.

5 In essence, in *Mendiondo* a nurse who worked at a hospital
6 complained to the hospital's Chief Executive Officer and a
7 supervisor about unsafe patient care and conditions at the
8 facility. 521 F.3d at 1101. She alleged she was retaliated against
9 for doing so. *Id.* All the alleged whistleblowing and retaliation
10 in that case occurred before the amended version of § 1278.5 went
11 into effect on January 1, 2008. The appellate briefing (2006 WL
12 3623387, 2007 WL 870285, 2007 WL 1407246) also predated January 1,
13 2008. The Ninth Circuit's decision was issued after January 1,
14 2008, and the court applied the amended version of the statute. In
15 *Mendiondo*, the court cited to § "1278.5(b) (1) (A), (g)." 521 F.3d at
16 1105. This is a reference to the new version of the statute as the
17 old version did not contain "(b) (1) (A)."

18 Although the Ninth Circuit apparently applied the new version
19 of the statute in *Mendiondo*, there is no indication that the court,
20 *sub silentio*, determined that the statute contained amendments
21 which merely clarified existing law. Plaintiff's argument to the
22 contrary is erroneous. No party made any such argument in
23 *Mendiondo* so the issue was not before the court.

24 "In deciding the amendment's application, [a court] must
25 explore whether the amendment changed or merely clarified existing
26 law. A statute that merely clarifies, rather than changes,
27 existing law is properly applied to transactions predating its
28 enactment." *Carter v. Cal. Dep't Of Veterans Affairs*, 38 Cal. 4th

1 914, 922 (2006). If an amendment merely clarifies, rather than
2 changes, existing law, applying the amendment to transactions that
3 predate its enactment is not problematic "because the true meaning
4 of the statute has not changed." *In re S.B. v. S.M.*, 32 Cal. 4th
5 1287, 1296 (2004). Indeed, if the amendment merely clarified,
6 rather than changed, existing law, "liability would have existed at
7 the time of the actions" that predate the amendment. *McClung v.*
8 *Employment Dev. Dep't*, 34 Cal. 4th 467, 472 (2004). "An amendment
9 which merely clarifies existing law may be given retroactive effect
10 even without an expression of legislative intent for
11 retroactivity." *Negrette v. Cal. State Lottery Comm'n*, 21 Cal.
12 App. 4th 1739, 1744 (1994). The parties agree that, with respect
13 to the new version of § 1278.5, there is no expression of
14 legislative intent for retroactivity.

15 To determine whether a particular amendment clarified or
16 changed the law, California courts consider whether the prior
17 version of the statute "could not have been properly construed" to
18 include the content of the amendment. *Carter*, 38 Cal. 4th at 924.
19 The Legislature's declaration of what they intended by the prior
20 statute is entitled to consideration, but it is not controlling,
21 and simply stating that an amendment "clarified" the prior statute
22 is not determinative:

23 It is true that if the courts have not yet finally and
24 conclusively interpreted a statute and are in the process
25 of doing so, a declaration of a later Legislature as to
26 what an earlier Legislature intended is entitled to
27 consideration. But even then, a legislative declaration
28 of an existing statute's meaning is but a factor for a
court to consider and is neither binding nor conclusive
in construing the statute. This is because the
Legislature has no authority to interpret a statute. That
is a judicial task. The Legislature may define the
meaning of statutory language by a present legislative
enactment which, subject to constitutional restraints, it

1 may deem retroactive. But it has no legislative authority
2 simply to say what it *did* mean. A declaration that a
3 statutory amendment merely clarified the law cannot be
4 given an obviously absurd effect, and the court cannot
5 accept the Legislative statement that an unmistakable
6 change in the statute is nothing more than a
7 clarification and restatement of its original terms.

8
9 *McClung*, 34 Cal. 4th at 473 (internal citations and quotation marks
10 omitted). At times, material changes in the language of a statute
11 "may simply indicate an effort to clarify the statute's true
12 meaning" such as when "the Legislature promptly reacts to the
13 emergence of a novel question of statutory interpretation."
14 *Carter*, 38 Cal. 4th at 923 (internal quotation marks omitted). The
15 Legislature did not deem the amendment to § 1278.5 as an emergency
16 measure.

17 While the new version of the statute contains numerous textual
18 changes, three of them, which are relevant here, merit discussion.

19 First, the old version of the statute outlawed discrimination
20 or retaliation by a "health facility." The new version of the
21 statute states that "[n]o entity that owns or operates a health
22 facility, or which owns or operates any other health facility,
23 shall discriminate or retaliate against any person because that
24 person has" engaged in protected whistleblowing. § 1278.5(b)(2).
25 In Plaintiff's complaint he alleges, and the evidence shows, that
26 he was employed by the County and worked at KMC, a hospital which
27 is "owned and operated" by the County. KMC, the health facility,
28 is not a named party to this lawsuit. Under the old version of the
statute, the health facility was liable for discrimination and
retaliation. Under the new version, both the health facility (KMC)
and the entity which owns or operates the health facility (the

1 County) can be liable for discrimination and retaliation.

2 Second, the old version of the statute protected "any patient
3 or employee of the health facility" from discrimination or
4 retaliation. In Plaintiff's complaint he alleges, and the evidence
5 shows, Plaintiff was an employee of the County, not of KMC. The
6 new version of the statute protects any "patient, employee, member
7 of the medical staff, or any other health care worker of the health
8 facility" from discrimination or retaliation. As revealed in his
9 pleadings, and the evidence shows, Plaintiff was on the medical
10 staff of KMC.

11 Third, the old version of the statute came into play when an
12 employee or patient of the health facility "presented a grievance
13 or complaint." The new version of the statute applies when a
14 protected party has "presented a grievance, complaint, or report."
15 §1278.5(b)(1)(A) (emphasis added). As alleged in the pleadings,
16 Plaintiff claims he made protected "reports." (Doc. 241 at 31.) In
17 his summary judgment briefing, Plaintiff repeatedly refers to his
18 protected activity in terms of a report.

19 If the aforementioned amendments constitute clarifications to
20 existing law, no problem, in terms of retroactive application, is
21 generated.

22 a. Entities That Own And Operate A Health Facility

23 The old version of the statute said nothing about entities
24 that own or operate a health facility. The text of the old version
25 prohibited a "health facility" from engaging in certain conduct and
26 created liability for the health facility. That the old version
27 only imposed liability on health facilities is further buttressed
28

1 by the introductory section to the bill that created § 1278.5 (the
2 old version). The legislative counsel's digest states:

3 Existing law prohibits certain health facilities, known
4 as long-term health care facilities, from discriminating
5 or retaliating against a patient or employee of those
6 long-term health care facilities because the patient or
7 employee presents a grievance or complaint, or initiates
8 or cooperates in an investigation or proceeding by a
9 governmental entity, relating to the care, services, or
10 conditions at those long-term health care facilities,
11 except as provided. Existing law makes violation of this
12 prohibition subject to a civil penalty of not more than
13 \$10,000.

14

15 *This bill would impose similar prohibitions on health*
16 *facilities other than long-term health care facilities,*
17 *except that violation would be subject to a civil penalty*
18 *of not more than \$25,000 and willful violation would be*
19 *a misdemeanor punishable by a fine of not more than*
20 *\$20,000. By creating a new crime, this bill would impose*
21 *a state-mandated local program.*

22 S.B. 97, 1999 Cal. Legis. Serv. ch. 155. In light of the statute's
23 explicit reference to "no health facility" there is no basis to
24 interpret the old version of the statute to provide that an entity
25 that owns or operates a health facility was, in addition to the
26 "health facility" itself, statutorily liable for discrimination and
27 retaliation under § 1278.5.

28 A report of the Senate Judiciary Committee, dated July 10,
2007, reveals that adding an entity that owns or operates a health
facility to the statute did more than just clarify the original
meaning of the statute: Under the heading "Description" this
report states:

The bill would revise and recast portions of the
whistleblower statute that protects patients and
employees of a health facility from discrimination or
retaliation for complaining about the health facility or
cooperating in the investigation of the health facility

1 by a government entity. These revisions would:

2

3 (4) *extend the prohibition against discrimination or*
4 *retaliation to any entity that owns or operates a health*
5 *facility.*

6 (Emphasis added.) A substantive extension of statutory coverage to
7 include additional parties effectuates a change, not merely a
8 clarification, to the law. See *McClung*, 34 Cal. 4th at 471-74;
9 *Balen v. Peralta Junior College Dist.*, 11 Cal. 3d 821, 828 n.8
10 (1974). Later in the same Committee report under the heading
11 "Background" it states:

12 According to the California Medical Association (CMA),
13 sponsor of AB 632, because physicians are generally not
14 'employees' of a health facility, they do not benefit
15 from the whistleblower protections afforded by Health &
16 Safety Code 1278.5. Thus, when they see problems with
17 patient care beyond their own patients they may actually
18 do nothing about it, for fear of retaliation or
19 discrimination.

20 AB 632 is intended to cure this gap in coverage for
21 whistleblowing in the health care context, and would
22 extend the whistleblower protection further by making an
23 entity that owns or operates a health facility liable for
24 the unlawful acts of the health facility.

25 (Emphasis added.) Again, this passage confirms that adding
26 entities that own and operate a health facility to § 1278.5
27 expanded the statute's substantive scope, not merely clarified its
28 original meaning. Finally, in the same committee report under the
heading "Changes To Existing Law" it states that "[t]his bill would
extend the prohibition against discrimination or retaliation under
1278.5(b) to an entity that owns or operates a health facility."

There is language in other parts of the legislative history

1 which suggest that adding entities that own and operate health
2 facilities to § 1278.5 was a clarification of existing law. A
3 different Senate Committee Report, dated June 13, 2007, states
4 under the heading "Changes To Existing Law":

5 The bill additionally clarifies that the prohibition on
6 discriminatory or retaliatory action by a health facility
7 extends to the facility's administrative personnel,
8 employees, boards, and committees of the board, and
9 medical staff, as well as an entity that owns or operates
10 a health care facility.

11 (Emphasis added.) A court need not accept a statement that an
12 "unmistakable change in the statute is nothing more than a
13 clarification and restatement of its original terms." *McClung*, 34
14 Cal. 4th at 473. Moreover, the other Legislative history detailed
15 above undermines the assertion that extending the scope of the
16 statute to include an entity that owns or operates a health
17 facility was merely a clarification of the statute's original
18 terms.

19 The amended version of the statute prohibits retaliation or
20 discrimination by an entity that owns or operates a health facility
21 and subjects the entity to statutory liability. This amendment to
22 § 1278.5 added to and changed, not merely clarified, existing law.

23 b. Member Of The Medical Staff, Or Any Other Health
24 Care Worker Of The Health Facility

25 Section 1278.5(b)(1) of the old version of the statute
26 prohibited discrimination or retaliation "in any manner against any
27 *patient or employee of the health facility* because that patient or
28 employee, or any other person, has presented a grievance or
complaint, or has initiated or cooperated in any investigation or

1 proceeding of any governmental entity, relating to the care,
2 services, or conditions of that facility." (Emphasis added.)

3 The text makes clear that it protects patients or employees of
4 the health facility. The text also makes clear that it protects
5 patients or employees from discrimination or retaliation not only
6 when they themselves present a grievance or complaint or personally
7 participate in an investigation or proceeding of a governmental
8 entity, but it also protects patients or employees of the health
9 facility from discrimination or retaliation when "any other person"
10 presents a grievance or complaint or participates in an
11 investigation or proceeding of a governmental entity. The added
12 protection provided by "any other person" is quite reasonable. For
13 example, if a patient's spouse submits a protected complaint to a
14 government entity and the health facility retaliates against the
15 patient, the patient has a viable statutory claim. If it were
16 otherwise, a health facility could punish a patient with impunity
17 so long as the patient did not personally present the grievance or
18 complaint or did not personally participate in the investigation or
19 proceeding. The phrase "any other person" comes after the word
20 "because" and, read in context, "any other person" is not
21 describing potential plaintiffs under § 1278.5. The old version of
22 the statute could not have been properly construed as prohibiting
23 discrimination or retaliation against individuals other than those
24 delineated in the statute - patients or employees of the health
25 facility.

26 The amended version of the statute now prohibits
27 discrimination or retaliation against "any patient, employee,
28

1 member of the medical staff, or any other health care worker of the
2 health facility." § 1278.5. In his supplemental briefing,
3 Plaintiff notes that the preamble to the bill which amended §
4 1278.5 "highlights" the amendment's "extension of the [s]tatute's
5 protections to physicians," (Doc. 306 at 4.), i.e., the extension
6 of the statute's protection to members of the medical staff. Yet,
7 Plaintiff takes the position that the extension of protection to
8 members of the medical staff merely clarified the original meaning
9 of the statute. Plaintiff's argument is unpersuasive.

10 The report of the Senate Judiciary Committee, dated July 10,
11 2007, recognized the "gap" in the existing statute's coverage in
12 that it only applied to employees and patients of a health care
13 facility:

14 According to the California Medical Association (CMA),
15 sponsor of AB 632, because physicians are generally not
16 'employees' of a health facility, they do not benefit
17 from the whistleblower protections afforded by Health &
18 Safety Code 1278.5. Thus, when they see problems with
19 patient care beyond their own patients they may actually
20 do nothing about it, for fear of retaliation or
21 discrimination.

19 *AB 632 is intended to cure this gap in coverage for*
20 *whistleblowing in the health care context, and would*
21 *extend the whistleblower protection further by making an*
22 *entity that owns or operates a health facility liable for*
23 *the unlawful acts of the health facility.*

22 (Emphasis added.) In that same Senate committee report, under the
23 heading "Description," it states that the bill to amend § 1278.5
24 would "expand coverage of the whistleblower protections to members
25 of the medical staff (physicians) and other health care workers
26 were are not employees of the health facility[.]" Later in the
27

1 committee report, under the heading "Comment" there is a section
2 entitled "Physicians are not employees; who are 'other health
3 workers' covered by the bill?" In pertinent part, that section
4 reads:

5 SB 97 (Burton), Chapter 155, Statutes of 1999 [which
6 created the old version of § 1278.5] extended the
7 whistleblower protections then available to patients and
8 employees of a long-term health care facility to patients
9 and employees of health facilities (hospitals) for filing
10 a grievance or providing information to a governmental
11 entity regarding care, services, or conditions at the
12 facility. That bill was introduced at the behest of
13 nurses who complained that various forms of
14 discrimination or retaliation were the normal response
15 they received when they reported problems regarding
16 quality of care at their places of employment.

17
18 The legislative findings and declarations contained in SB
19 97 referred to the state's policy of encouraging
20 'patients, nurses, and other health care workers to
21 notify government entities of suspected unsafe patient
22 care and conditions. However, the operative part of the
23 statute that was enacted referred only to whistleblower
24 protections for 'any patient or employee of the health
25 facility' when 'the patient, employee, or any other
26 person has presented a grievance' or complaint about the
27 facility.

28
29 This bill would insert 'members of the medical staff'
30 into the legislative findings and declarations relating
31 to state policy. It would then prohibit a health facility
32 from discriminating or retaliating against 'any patient,
33 employee, member of the medical staff, or any other
34 health care worker of the health facility,' *thus*
35 *expanding the whistleblower protections* of 1278.5 to all
36 health care workers at the facility, including
37 physicians.

38

39 Both CMA [California Medical Association] and the CHA
40 [California Hospital Association] agree that physicians
41 are generally not employees of a hospital.

42 (Emphasis added.) The addition of "members of the medical staff"

1 (and any other health care worker) did not simply clarify the
2 original meaning of the statute - it expanded the protective ambit
3 of the statute to cure a gap in coverage. The "operative" part of
4 the statute only protected employees and patients of the health
5 facility. The amendment expanded the statute's existing
6 substantive reach to now include "members of the medical staff" of
7 the health facility because, generally, physicians are not
8 employees of the hospital (nor patients).

9 Plaintiff argues that the addition of "members of the medical
10 staff" was made in response to California case law, thus suggesting
11 it was a clarifying amendment (Doc. 306 at 4). See *Carter*, 38 Cal.
12 4th at 923 (recognizing that when "the Legislature promptly reacts
13 to the emergence of a novel question of statutory interpretation"
14 this may indicate that an amendment was merely a clarification of
15 the statute's true meaning). Plaintiff's argument is unpersuasive.
16 The legislative history does contain a reference to *Integrated*
17 *Healthcare Holdings, Inc. v. Fitzgibbons*, 140 Cal. App. 4th 515
18 (2006). As explained in an Assembly Committee report dated April
19 10, 2007: "[T]he issue of retaliation appears in several ways. One
20 way is in direct retaliation for a statement made by a physician
21 regarding concerns for quality of care. According to CMA, the most
22 recent example occurred at Western Medical Center Santa Ana, when
23 the new owners . . . sued Michael Fitzgibbons, M.D., a past chief
24 of staff when [he] expressed concerns about the financial viability
25 of the hospital." *Fitzgibbons*, however, did not involve any
26 judicial construction or novel interpretation of § 1278.5. Rather,
27 the legislative history shows that *Fitzgibbons*, and the facts
28

1 surrounding it, brought to light the importance of providing
2 whistleblower protection to physicians and plugging the gap in
3 statutory coverage.

4 Other legislative history materials suggest that by adding
5 "member of the medical staff" to the new version of the statute,
6 the California Legislature believed it was clarifying the existing
7 statute. Plaintiff cites a passage from the Senate Judicial
8 Committee report dated July 10, 2007:

9 According to the CMA, sponsor of AB 632, [Health & Safety
10 Code 1278.5] provides protections to employees and
11 patients and the nebulous term 'or any other person.'
12 Unfortunately, enterprising attorneys have used this
13 section to deny protections for a physician who raised
concerns of poor patient care by correctly stating that
the physician was not an employee or patient. This bill
will prevent that argument from happening again. . . . As
such this section must be clarified and strengthened.

14 A similar passage appears in a Senate Committee report dated June
15 13, 2007:

16 According to the author, existing law does not fully
17 protect physicians and other health professionals from
18 retaliation if they make a complaint or grievance about
19 a health facility. The author states that currently, this
20 protection only applies to patients, employees, and the
21 nebulous term, 'any other person.' The author states that
22 some attorneys have interpreted this to deny protections
23 to physicians and other members of the medical staff
24 because they are not employees or patients of the health
25 facility. Members of the medical staff, which can include
26 physicians and surgeons, podiatrists, opthamologists,
27 pathologists, and radiologists, interact with peer review
28 bodies that establish by-laws and regulations pertaining
to professional conduct. Complaints about quality of care
issues pertaining to health facilities can be raised with
a peer review body, hospital governing board, or
accrediting agency. However, the author and sponsor state
that, in some cases, physicians who raise a complaint to
any of these bodies are not protected under current law
against retaliation and that AB 632 will clarify existing
law to prevent abuses against physicians and other health
professionals.

1 Both of these passages are confusing to the extent that they
2 suggest attorneys were using the term "any other person" to deny
3 protection to physicians and other members of the medical staff.
4 This does not make any sense. It is true, however, that under the
5 old version of the statute, only patients and employees of a health
6 facility were protected from discrimination and retaliation, and if
7 a physician was not an employee of the health facility, he or she
8 did not enjoy coverage. The language "any other person" is not a
9 nebulous reference to a vast sea of potential plaintiffs. Rather,
10 the statute protects a patient or employee of a health facility
11 when either: (i) they themselves present a grievance or complaint,
12 or participate in an investigation or proceeding of a governmental
13 entity; or (ii) when "any other person" presents a grievance or
14 complaint, or participates in an investigation or proceeding of a
15 governmental entity and the patient or employee of the health
16 facility ends up getting discriminated or retaliated against
17 because of such activity. The amendment, by expanding its scope to
18 include a member of the medical staff or any other health care
19 worker of the health facility, does "prevent" the argument that a
20 physician is unprotected by § 1278.5 when he is not an employee of
21 the health facility. This amendment, however, did more than just
22 clarify existing law; it added substantive protection that did not
23 otherwise exist.

24 By expanding the coverage of the statute to include members of
25 the medical staff and other health care workers who are not
26 employees or patients of the health care facility, the amendment
27 changed, not merely clarified, existing law.

1 c. Grievance, Complaint, Or Report

2 The old version of the statute applied to "any grievance or
3 complaint." The new version of the statute applies to "any
4 grievance, complaint, or report." The addition of another category
5 of protected activity effectuated a substantive change in the law.
6 No party contends that adding the term "report" was a meaningless
7 addition to the statute. See *People v. Hudson*, 38 Cal. 4th 1002,
8 1010 (2006) ("As we have stressed in the past, interpretations that
9 render statutory terms meaningless as surplusage are to be
10 avoided."); *S.D. Police Officers Assn v. City of S.D. Civil Serv.*
11 *Comm'n*, 104 Cal. App. 4th 275, 284 (2002) ("In construing a statute
12 we are required to give independent meaning and significance to
13 each word, phrase, and sentence in a statute and to avoid an
14 interpretation that makes any part of a statute meaningless.").

15 There are other textual changes that bear on this case
16 including the addition of "medical staff" as a potential target of
17 whistleblowing activity. But, the preceding analysis is sufficient
18 to demonstrate that, in at least three material respects, the new
19 version of § 1278.5 made substantive changes, not just
20 clarifications, to the statute. Plaintiff was a member of the
21 medical staff at KMC, not one of its employees. He is attempting
22 to assert liability against an owner and operator of a health
23 facility (the County) for retaliation, which allegedly occurred in
24 response to protected activity including "reports" he made. In
25 this case, the provisions discussed above cannot be applied
26 retrospectively. Plaintiff cannot sue under the new version of the
27 statute. Plaintiff's rights are defined by the old version of the
28

1 statute.

2 Plaintiff is an employee of the County and Plaintiff has not
3 created a triable issue that he is an employee of the health
4 facility, KMC. Under the old version of the statute, the health
5 facility was civilly liable for acts of discrimination and
6 retaliation and Plaintiff has not sued the facility. Applying the
7 applicable version of the statute to Plaintiff's claims, summary
8 judgment in favor of the County is warranted. This result
9 underscores the gap in statutory coverage which the California
10 Legislature has resolved.

11 Defendant County's motion for summary judgment with respect to
12 whistleblower liability under § 1278.5 is GRANTED.

13 B. Retaliation - California Labor Code § 1102.5

14 Section 1102.5(b) of the California Labor Code provides in
15 pertinent part:

16 (b) An employer may not retaliate against an employee for
17 disclosing information to a government or law enforcement
18 agency, where the employee has reasonable cause to
19 believe that the information discloses a violation of
20 state or federal statute, or a violation or noncompliance
21 with a state or federal rule or regulation.

22

23 (e) A report made by an employee of a government agency
24 to his or her employer is a disclosure of information to
25 a government or law enforcement agency pursuant to
26 subdivisions (a) and (b).

27 To establish a prima facie case of retaliation under § 1102.5(b),
28 a plaintiff must show: (1) he engaged in protected activity; (2)
his employer thereafter subjected him to an adverse employment
action; and (3) a causal link between the two. *Mokler v. County of*

1 *Orange*, 157 Cal. App. 4th 121, 138 (2007); *Patten v. Grant Joint*
2 *Union High Sch. Dist.*, 134 Cal. App. 4th 1378, 1384 (2005).

3 Plaintiff claims that he was retaliated against for protected
4 whistleblowing regarding PCCs and skull flaps.

5 1. PCCs

6 a. Communications To His "Employer"

7 i. Protected Activity

8 Plaintiff asserts that by letter dated January 9, 2006, he
9 communicated to Bryan regarding KMC's noncompliance with state
10 regulations on blood transfusion related documentation known as
11 product chart copies or PCCs. (Doc. 266 at 134.) In that letter,
12 Plaintiff stated:

13 All transfusion product chart copies must be directed to
14 the blood bank for assessment immediately following
15 transfusion. The problems with incomplete product chart
16 copies have been discussed multiple times with nursing
17 and yourself. As medical director of the blood bank, I
18 have an obligation to ensure that KMC is in compliance
19 with state & federal regulations and AABB accreditation
standards. It is my opinion as blood bank director that
until nursing can otherwise assure that all product chart
copies are properly completed, the blood bank must
perform immediate monitoring of all product chart copies
to ensure completion or corrective action.⁵

20 (*Id.*) A few months later, Plaintiff sent Bryan an e-mail on April
21 17, 2006, with the subject line "Compliance with Regulations."
22 This e-mail discussed deficiencies in the PCCs:

23 Peter:

24 I have completed an analysis of the 57 memos sent to
25 nursing over the past several months detailing
26 deficiencies in product chart copies (PCCs). I have not
received an administrative response to the memos.

27 ⁵ This is the same letter in which Plaintiff noted his
28 "depression and insomnia" and requested administrative leave.

1 These memos detail 34 instances of missing verification
2 signatures, either one or both, required by regulations
and standards.

3 Six PCCs were not located in the chart, a noticeable
4 improvement over past performance.

5 One hundred fifty nine (159) PCCs had one or more other
6 lesser, but still important deficiencies.

7 Two transfusions were not reported on the PCCs or to the
8 blood bank.

9 The five charts reviewed without deficiency by the JCAHO
10 that you cited on April 13th during our meeting is
11 obviously too small a sample.

12 I am extremely concerned about the lack of administrative
13 communication, attention and significant improvement in
14 this area. This is a compliance issue that involves
15 Federal regulations, California regulations and
16 accreditation standards for the JCAHO, CAP and AABB. As
the Medical Director of the Blood Bank I must advise you
again that these deficiencies must be corrected
immediately to meet 100 percent compliance, especially
for verification signatures and lost PCCs. I have
proposed several different strategies over the past
several years for achieving almost immediate results, but
I am unaware that any corrective action has been put into
place.

17 You and I have an ethical and regulatory duty to correct
18 this situation in a timely manner. After multiple
requests for action, I cannot conscientiously sit back
any longer.

19 I therefore request a meeting with yourself, Mr. Barmann,
20 Dr. Kercher, Dr. Harris and me to discuss a resolution
for this dilemma and thereby reduce serious liability for
21 Kern County and KMC.

22 (Doc. 265 at 90.) Plaintiff contends that this communication
23 constituted a protected disclosure and that because of this
24 communication, he was retaliated against.

25 An employee engages in protected activity when he "discloses
26 to a governmental agency reasonably based suspicions of illegal
27 activity." *Mokler*, 157 Cal. App. 4th at 138 (emphasis added)

1 (internal quotation marks omitted); see also § 1102.5(b) (requiring
2 disclosure to "a government or law enforcement agency").

3 As a threshold matter, Plaintiff asserts and Defendants
4 acknowledge that the County employed Plaintiff, and the County is
5 a "government agency" under Labor Code § 1102.5. (Doc. 278 at 8.)
6 Cf. Cal. Gov't Code § 6252(a) (defining "local agency" as including
7 a "county"). Plaintiff further argues that because he was an
8 employee of a government agency (the County), then by virtue of §
9 1102.5(e), disclosures he made to his employer (the County) are
10 disclosures to a government agency under Labor Code § 1102.5(b). By
11 extension, according to Plaintiff, his communications to Bryan and
12 other members of KMC leadership were made to his "employer." Taken
13 facially, the statute requires disclosure to the County and
14 Plaintiff does not explain whether Bryan and others were employed
15 by the County. Nevertheless, because Defendants do not challenge
16 Plaintiff on this point, it is assumed, *arguendo*, that Plaintiff's
17 disclosures were disclosures to the County.

18 An employee engages in protected activity under § 1102.5(b)
19 when he "discloses to a governmental agency *reasonably based*
20 *suspensions of illegal activity.*" *Mokler*, 157 Cal. App. 4th at 138
21 (emphasis added) (internal quotation marks omitted). The employee
22 must "reasonably believe []he was disclosing a violation of state
23 or federal law." *Patten*, 134 Cal. App. 4th at 1386. To have a
24 reasonably based suspicion of illegal activity, the employee must
25 be able to point to some legal foundation for his suspicion -- some
26 statute, rule or regulation which may have been violated by the
27 conduct he disclosed. *Love v. Motion Indus., Inc.*, 309 F. Supp. 2d
28

1 1128, 1135 (N.D. Cal. 2004) (concluding that without citing to "any
2 statute, rule or regulation that may have been violated by the
3 disclosed conduct," plaintiff lacked "any foundation for the
4 reasonableness of his belief").

5 Plaintiff argues that he "reasonably suspected that KMC's
6 ongoing failure to maintain accurate and complete records of
7 patient blood transfusions did not comply with Health & Safety Code
8 § 1602.5, which requires PCC documentation to conform to AABB
9 accreditation standards." (Doc. 272 at 10) (emphasis added.)
10 Section 1602.5 of the Health & Safety Code provides in pertinent
11 part as follows:

12 (a) No person shall engage in the production of human
13 whole blood or human whole blood derivatives unless the
14 person is licensed under this chapter and the human whole
15 blood or human whole blood derivative is collected,
16 prepared, labeled, and stored in accordance with both of
17 the following:

18 (1) The standards set forth in the 13th Edition of
19 'Standards for Blood Banks and Transfusion Services,' as
20 published by the American Association of Blood Banks and
21 in effect on November 15, 1989, or any amendments thereto
22 or later published editions or amendments thereto. These
23 shall be the standards for all licensed blood banks and
24 blood transfusion services in the state.

25 (2) Those provisions of Title 17 of the California Code
26 of Regulations that are continued in effect by
27 subdivision © or that are adopted pursuant to subdivision
28 (b).

22 Plaintiff does not rely on § 1602.5(a)(2) to support his claim;
23 rather, Plaintiff contends that he reasonably believed the PCCs did
24 not comply with 1602.5(a)(1) because they did not adhere to the
25 Standards for Blood Banks and Transfusion Services as published by
26 the American Association of Blood Banks (AABB).

27 Plaintiff has not provided a copy of the AABB standards to
28

1 permit assessment of the reasonableness of his belief that
2 incomplete PCCs violated § 1602.5(a)(1). Plaintiff provides an e-
3 mail, dated May 20, 2005, which he sent to Toni Smith, Chief Nurse
4 Executive at KMC. In this e-mail, Plaintiff recounts a
5 conversation he had with "Holly Rapp, AABB Accreditation Director."
6 (Doc. 265 at 121.) The e-mail (which contains some connected
7 words) states:

8 Telephone Conversation: Holly Rapp, AABB Accreditation
9 Director [telephone number].

10 * California accepts compliance with AABB accreditation
11 standards as fulfilment of California State Regulations
12 regarding blood component therapy

13 * AABB Standards, 23rd Edition (2004) state: The
14 patient's medical record shall include: transfusion
15 order, the name of the component, the donor unit or pool
16 identification number, the date and time of transfusion,
17 pre- and post-transfusion vital signs, the amount
18 transfused, the identification of the transfusionist, and
19 if applicable, transfusion adverse events.

20 * The standards do not define what constitutes the
21 'patient's medical record'.

22 * She stated that the medical record may be construed as
23 records other than the patient's chart.

24 * When I explained the proposal to store the PCC records
25 in the transfusion department, she said that this would
26 be acceptable. In her experience, it is customary for the
27 bloodbank to at least receive a copy of the PCC.

28 * When I explained the problems with misplaced and
incomplete documents, she said that this must be corrected
immediately. If this requires sending all PCCs to the
blood bank in the interim to gain control of the
situation, then this should be done.

(Id.) Defendants do not dispute that Plaintiff had this
conversation with Rapp or that Plaintiff's e-mail accurately
documents the conversation. Defendants include this same e-mail in
their separate statement of undisputed material facts.

Defendants do not specifically challenge Plaintiff's argument
that he had a reasonable belief that incomplete PCCs were unlawful.

1 Rather, Defendants argue that "[a]lthough California Health &
2 Safety Code 1602.5(a) applies to the preparation, labeling, and
3 storage of blood products, violation of 1602.5 was not Plaintiff's
4 original concern. Instead, Plaintiff had argued aggressively with
5 Toni Smith and others that the original copies of all PCCs should
6 be filed and stored in the Pathology Department." (Doc. 276 at 12.)
7 While this may be true, Defendants' argument is not entirely
8 persuasive.

9 To invoke Labor Code § 1102.5(b), Plaintiff must disclose
10 conduct which he reasonably believes is unlawful. Based on his
11 unchallenged conversation with the AABB Accreditation Director,
12 Plaintiff arguably had a reasonable belief that incomplete PCCs
13 violated the AABB standards, which in turn violated Health & Safety
14 Code § 1602.5(a)(1). That Plaintiff suggested a course of action
15 to remedy the situation, or that Plaintiff was motivated by a
16 desire to monitor the PCCs himself in the Pathology Department,
17 does not negate his reasonable belief.

18 ii. Adverse Employment Action And Causal Link

19 Plaintiff argues that after he sent Bryan the April 17, 2006
20 "Compliance with Regulations" e-mail, he was subject to various
21 adverse employment actions which he contends were casually
22 connected to his whistleblowing.

23 Plaintiff argues that his removal from his chairmanship (July
24 10, 2006) which prompted his pay cut, his involuntarily
25 administrative leave (December 7, 2006), and the non-renewal of his
26 contract ("on or around October 4, 2007") were "temporally
27 proximate" to his disclosure of unlawful conduct, and the
28

1 "[p]roximity in time between the disclosure and the adverse action
2 is sufficient to establish the required nexus" or causal link.
3 (Doc. 272 at 14.)

4 To establish a causal link solely with timing evidence, the
5 adverse action must follow "within a relatively short time" after
6 the protected activity. See *Fisher v. San Pedro Peninsula Hosp.*,
7 214 Cal. App. 3d 590, 615 (1989) (internal quotation marks omitted);
8 *Morgan v. Regents Of The Univ. Of Cal.*, 88 Cal. App. 4th 52, 69
9 (2000); see also *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268,
10 273 (2001) (per curiam) ("The cases that accept mere temporal
11 proximity between an employer's knowledge of protected activity and
12 an adverse employment action as sufficient evidence of causality to
13 establish a prima facie case uniformly hold that the temporal
14 proximity must be very close.") (emphasis added) (internal
15 quotation marks omitted).

16 Plaintiff's removal from the chairmanship in July 2006
17 occurred within a few months after the April 2006 e-mail and the
18 associated pay cut followed around five-to-six months later.
19 Plaintiff's timing evidence does not warrant summary judgment in
20 Plaintiff's favor.

21 First, Plaintiff started expressing his "concerns" about the
22 PCCs at least by May 2005 (Doc. 272. at 2.) Yet, there is no
23 indication that after expressing these concerns in May 2005,
24 Plaintiff was disciplined for doing so. Second, Plaintiff's
25 "concerns" were in no way limited to PCCs. During his employment,
26 Plaintiff raised numerous issues to Bryan and others making it
27 difficult to attribute bias toward, or adverse action specific to,
28

1 his complaints about PCCs. Third, Bryan's June 13, 2006 e-mail and
2 follow-up letter on June 14, 2006 in which he informed Plaintiff
3 that he was withdrawing/rescinding Plaintiff's chairmanship came on
4 the heels of, and were responding to, the written request Plaintiff
5 made for additional time to make a decision regarding his continued
6 employment. Bryan indicated that his decision to withdraw/rescind
7 Plaintiff's chairmanship was due to Plaintiff's continued
8 unavailability (not his whistleblowing). Fourth, and relatedly,
9 Plaintiff argues that he has "direct evidence" that he was removed
10 from his chairmanship and his pay was cut because of his extended
11 absences from work. (Doc. 272 at . 15.) To support his FMLA
12 interference claim, Plaintiff relies heavily on statements by
13 Bryan, including that Bryan recommended Plaintiff for removal based
14 on Plaintiff's "unavailability for service because of extended
15 medical leaves" and "solely based on his continued non-availability
16 to provide the leadership necessary for a contributing member of
17 the medical staff leadership group." (*Id.* at 15-16.) Bryan's
18 statements regarding Plaintiff's absenteeism or non-availability do
19 not reflect any bias against Plaintiff for his PCC whistleblowing.

20 Taken together, Plaintiff's prior raising of PCC concerns
21 without apparent retaliation; his numerous professed complaints
22 apart from PCCs; the context in which Bryan's communications to
23 Plaintiff regarding the loss of his chairmanship arose; and
24 Plaintiff's contention that his removal from his chairmanship and
25 pay cut are attributable to his absence from work, all lead to the
26 conclusion that Plaintiff has failed to establish that no
27 reasonable trier of fact could find other than for him on the issue

1 that he was removed from his chairmanship because he made protected
2 disclosures about PCCs. Accordingly, Plaintiff is not entitled to
3 summary judgment.

4 With respect to Defendants' motion, the evidence that
5 Plaintiff relies on to establish his PCC whistleblowing claim is
6 the fact the JCC removal decision in July 2006 occurred within a
7 couple of months after Plaintiff's April 2006 e-mail to Bryan.
8 Apart from this, Plaintiff has not pointed to any evidence which
9 supports his theory that his PCC whistleblowing was a motivating
10 reason behind his removal from the chairmanship. Even assuming
11 Plaintiff's evidence is sufficient to create a prima facie case,
12 Plaintiff's extended absenteeism or non-availability provided a
13 non-retaliatory reason for his removal from the chairmanship (i.e.,
14 a reason other than alleged protected whistleblowing). The burden
15 then shifts to Plaintiff to demonstrate pretext. With respect to
16 his FMLA interference claim, Plaintiff argues that some of his
17 absenteeism prompted the removal. Moreover, he argues that he was
18 forced to take full-time leave so that he would "burn up" his leave
19 entitlements, and then his leave was used against him in the
20 removal decision. (Doc. 275 at 6.) Plaintiff has not shown that
21 his non-availability was merely a pretext for PCC whistleblowing
22 retaliation. Summary judgment in favor of Defendants is warranted
23 on this claim.

24 With respect to the administrative leave and non-renewal of
25 Plaintiff's contract, Plaintiff has failed to create a prima facie
26 case under Labor Code § 1102.5(b). The temporal gap between
27 Plaintiff's April 2006 e-mail and his involuntary administrative
28

1 leave in December 2006 and the non-renewal of his contract on or
2 around October 4, 2007, is too wide to support an inference of
3 causation. See *Cornwell v. Electra Cent. Credit Union*, 439 F.3d
4 1018, 1035 (9th Cir. 2006) (agreeing with the district court and
5 concluding that an eight month gap between the protected activity
6 and the employee's termination "was too great to support an
7 inference" of causation). Summary judgment in favor of Defendants
8 is warranted on this claim.⁶

9
10 ⁶ It is not entirely clear whether Plaintiff also claims that
11 his full-time FMLA leave, which he was allegedly "forced" to take,
12 was an adverse employment action taken in retaliation for his PCC
13 whistleblowing. (See Doc. 272 at 14.) Plaintiff does not dispute
14 that he was eligible to take full-time FMLA leave, and it is
15 doubtful whether requiring an employee to take leave to which he is
16 entitled can be characterized as an adverse employment action. In
17 any event, to the extent Plaintiff asserts that his full-time FMLA
18 leave was an adverse employment action taken because of his PCC
19 whistleblowing, Defendants are entitled to summary judgment on this
20 claim. According to Plaintiff, he had been raising his PCC
21 concerns at least since May 2005 and there is no indication that he
22 was disciplined for doing so. The very same day that Plaintiff
23 sent his "Compliance With Regulations" e-mail, Bryan drafted a
24 memorandum summarizing a meeting he had with Plaintiff a few days
25 earlier. In that memorandum, Bryan acknowledged Plaintiff's
26 positive contributions to the department. (Doc. 266 at 141-42.)
27 Although Plaintiff claims that his "forced" full-time FMLA leave
28 came closely after his PCC e-mail, he actually argues that what
motivated his "forced" full-time FMLA leave was a desire by
Bryan/County to burn up his FMLA leave allotment more rapidly
(which would provide a non-retaliatory reason for the action, i.e.,
a reason other than to retaliate for protected whistleblowing).
There is no indication that the formal meeting he had with Bryan
and others regarding his medical leave status on April 28, 2006,
had anything to do with Plaintiff's PCC whistleblowing.
Plaintiff's doctor's certification dated April 26, 2006, stated
that Plaintiff was "unable to work full-time and requires part-time
or less to avoid worsening of his serious medical condition." (Doc.
270 at 6) (emphasis added.) At the meeting on April 28, 2006,

1 b. Communications To Outside Authorities

2 Plaintiff contends that around Thanksgiving 2006 he blew the
3 whistle to outside agencies regarding PCCs (and other issues).
4 Plaintiff argues that this whistleblowing prompted his involuntary
5 paid administrative leave (December 7, 2006) and the non-renewal of
6 his contract (on or around October 4, 2007).

7 Plaintiff's retaliation claims based on his PCC-related
8 outside whistleblowing and alleged adverse employment action in
9 response thereto, including the paid administrative leave, are
10 barred as explained in the order on Defendants' motion for judgment
11 on the pleadings. Moreover, the temporal gap, almost one year,
12 between the outside whistleblowing (Thanksgiving 2006) and the non-
13 renewal of Plaintiff's employment contract on or around October 4,
14 2007, is too wide to create an inference that the County did not
15 renew Plaintiff's contract because of the PCC whistleblowing.
16 Summary judgment in favor of Defendants is warranted on this claim.

17 2. Skull Flaps

18 Plaintiff argues that he was retaliated against because of his
19 whistleblowing regarding the storage of patient skull flaps - the
20 top part of the human skull - in an unlicensed laboratory freezer.

21 _____
22 Plaintiff was provided with materials regarding his leave
23 availability/calculations and it was during that meeting in which
24 Bryan allegedly told Plaintiff to take full-time leave until his
25 status was resolved. Plaintiff actually took that full-time leave.
26 There is no suggestion that during the meeting or afterwards,
27 Plaintiff voiced an opinion, belief or objection that his full-time
28 leave was in response to his PCC whistleblowing. Based on the
evidence, Plaintiff has not created a triable issue that his
full-time leave represents an adverse employment action taken in
retaliation for his PCC whistleblowing.

1 According to Plaintiff, he "reasonably believed the storage of
2 patient skull caps [or flaps] occurring in an unlicensed laboratory
3 freezer at KMC violated Health & Safety Code 1635.1." (Doc. 272 at
4 18.) Section 1635.1(a) states, "[e]xcept as provided in
5 subdivision (b), every tissue bank operating in California on or
6 after July 1, 1992, shall have a current and valid tissue bank
7 license issued or renewed by the department pursuant to Section
8 1639.2 or 1639.3."

9 Plaintiff points to evidence suggesting that, at times,
10 between fifteen to twenty skull flaps were being stored in a KMC
11 freezer and argues that "given the excessive number of skull flaps,
12 Plaintiff's suspicion that at least some of the flaps would be
13 reimplanted into patients in violation of Health & Safety Code
14 1635.1, was reasonable." (Doc. 272 at 18.)⁷ Without more, evidence
15 that, at times, fifteen to twenty skull flaps were in KMC's
16 freezer, which was apparently an unlicensed freezer, does not lead
17 to the reasonable conclusion that the skull flaps were destined to
18 be re-implanted into patients. Dr. Charles Joseph Wrobel, M.D., a
19 neurosurgeon, testified that he saves skull flaps in the KMC
20 freezer so that he can use them to make a template for a patient,
21 i.e, so that he can "mold a piece of titanium mesh to the right
22 specifications" and later implant the "titanium mesh" (not the
23 skull flap) into the patient. (Wrobel Dep. 18:16-17, 40:13-22.)
24 Despite his professed concern for skull flap storage, Plaintiff
25

26 ⁷ Plaintiff obviously interprets § 1635.1 as requiring a
27 license whenever tissue is stored for later re-implantation into
28 a patient.

1 does not point to any evidence that, during his employment, he
2 asked anyone at KMC for the reason why skull flaps were being
3 stored in the freezer or otherwise investigated where stored skull
4 flaps eventually ended up. Even assuming Plaintiff reasonably
5 believed that KMC had an unlicensed freezer and that some of the
6 stored skull flaps were being re-implanted into patients,
7 Plaintiff's retaliation claim does not survive.

8 Plaintiff's claims based on his skull flap-related outside
9 whistleblowing and alleged adverse employment action in response
10 thereto, including the paid administrative leave, are barred as
11 explained in the order on Defendants' motion for judgment on the
12 pleadings. Moreover, the temporal gap between the outside
13 whistleblowing (Thanksgiving 2006) and the non-renewal of
14 Plaintiff's employment contract on or around October 4, 2007, is
15 too wide to create an inference that the County did not renew his
16 contract because of the skull flap whistleblowing.

17 For the foregoing reasons, summary judgment in favor
18 Defendants on Plaintiff's retaliation claims under § 1102.5(b) is
19 GRANTED.

20 C. FMLA⁸

21 The FMLA creates two "interrelated substantive rights for
22 employees" of covered employers. *Xin Liu v. Amway Corp.*, 347 F.3d
23 1125, 1132 (9th Cir. 2003). First, an employee has the right to
24 take up to twelve weeks of leaves during any twelve-month period
25 for reasons specified by statute. 29 U.S.C. § 2612(a). Second, an

26
27 ⁸ There is no dispute that the County is an employer subject
28 to the FMLA/CFRA.

1 employee who takes FMLA leave has the right, upon return from
2 leave, to be restored to his or her original position or to an
3 equivalent position with equivalent benefits, pay, and other terms
4 and conditions of employment. § 2614(a). To protect these rights
5 and the exercise of them, the FMLA prohibits certain acts. See §
6 2615. In pertinent part, § 2615(a)(1) makes it unlawful for an
7 employer "to interfere with, restrain, or deny the exercise of or
8 the attempt to exercise, any right provided under this subchapter."

9 Plaintiff has asserted two claims arising under § 2615(a)(1),
10 and they are: (i) that his taking of FMLA leave was counted as a
11 negative factor in the County's decision to demote him, cut his
12 pay, and to not renew his contract; and (ii) that his rights under
13 the FMLA were interfered with when Bryan "forced him to take full-
14 time 'personal necessity leave' under the County's leave policy"
15 instead of permitting Plaintiff to continue on a reduced leave
16 schedule. (Doc. 272 at 17-18.)

17 1. FMLA leave as a negative factor

18 Under the FMLA, it is unlawful for an employer to "'use the
19 taking of FMLA leave as a negative factor in employment actions,
20 such as hiring, promotions or disciplinary actions.'" *Bachelder v.*
21 *Am. W. Airlines, Inc.*, 259 F.3d 1112, 1122 (9th Cir. 2001) (quoting
22 29 C.F.R. § 825.220©). Under Ninth Circuit case law, if an
23 employer uses an employee's taking of FMLA leave as a "negative
24 factor" in making "adverse employment decisions," including hiring,
25 promotions or disciplinary actions, the employer interferes with
26 the employee's exercise of FMLA rights in violation of §
27 2615(a)(1). *Id.* at 1122-23; see also *Liu*, 347 F.3d at 1133 n.7 ("In
28

1 this circuit . . . we have clearly determined that § 2615(a)(2)
2 applies only to employees who oppose employer practices made
3 unlawful by FMLA, whereas, § 2615(a)(1) applies to employees who
4 simply take FMLA leave and as a consequence are subjected to
5 unlawful actions by the employer.”) (emphasis omitted); *Foraker v.*
6 *Apollo Group, Inc.*, 427 F. Supp. 2d 936, 940 (D. Ariz. 2006).

7 To establish this type of interference claim under the FMLA,
8 a plaintiff must show that (1) he took “FMLA-protected leave”; and
9 (2) it constituted “a negative factor” in an adverse employment
10 decision. *Bachelder*, 259 F.3d at 1125. A plaintiff “can prove
11 this claim, as one might any ordinary statutory claim, by using
12 either direct or circumstantial evidence, or both. No scheme
13 shifting the burden of production back and forth is required.” *Id.*
14 (internal citations omitted).

15 Defendants represent, and Plaintiff does not challenge, that
16 Plaintiff used up all of his FMLA leave by June 14, 2006. (Doc. 291
17 at 2.) After that, Plaintiff went on non-FMLA Personal Necessity
18 Leave. The issue remains as to whether Plaintiff’s FMLA leave was
19 used as a negative factor in an adverse employment decision.

20 a. Plaintiff’s Motion

21 Plaintiff argues that he has “direct evidence” that his FMLA
22 medical leave was a negative factor in the decision to remove him
23 from his chairmanship and then cut his pay. Plaintiff relies on
24 Bryan’s recommendation letter to the JCC and Defendants’ admission
25 in a Scheduling Conference Order.

26 Bryan’s recommendation letter, dated July 10, 2006, to the JCC
27 began as follows:

1 Under the provisions of paragraph 9.7-4 of the Medical
2 Staff Bylaws (enclosure 1) I recommend that Dr. David
3 Jadwin be removed as Chairman, Department of Pathology.
4 This recommendation is based on Dr. Jadwin's
5 unavailability for service because of extended medical
6 leaves for non-work related ailments.

7 (Doc. 266-2 at 31.) Bryan then gave a chronology of events,
8 including Plaintiff's absences from work while he was on FMLA leave
9 from December 15, 2006 to March 16, 2006, and Plaintiff's full-time
10 FMLA leave starting in May 2006. In the last event in his
11 chronology, Bryan stated:

12 Since the middle of November 2005 Dr. Jadwin has worked
13 only 32% of the hours normally expected of a full time
14 pathologist (enclosure 9). Since my notice of June 14,
15 2006 Dr. Jadwin has made no attempt to contact me
16 concerning my decision to relieve him of his chairman
17 duties nor has he indicated any desire to negotiate a new
18 contract.

19 (Id at 32.) In closing, Bryan wrote:

20 This recommendation to rescind Dr. Jadwin's appointment
21 as Chairman, Department of Pathology is based solely on
22 his continued non-availability to provide the leadership
23 necessary for a contributing member of the medical staff
24 leadership group. KMC must have its key personnel
25 available, and Dr. Jadwin has provided no indication that
26 he is committed to return to work or resume his duties as
27 chairman. Other than his latest written communication
28 requesting an extension of medical leave, Dr. Jadwin has
made no attempt in the last two months to contact me
concerning his employment status or how the Department of
Pathology should be managed during his extended absence.

I therefore request that the Joint Conference Committee
act pursuant to paragraph 9.7-4 of the Medical Staff
Bylaws and, by majority vote, endorse my recommendation
to rescind Dr. Jadwin's appointment as Chairman,
Department of Pathology.

(Id.) In a scheduling Conference Order, Defendants admitted:

19. On or about July 10, 2006, the JCC voted to remove
Plaintiff from his position as Chair of the Pathology
Department at Kern Medical Center.

20. Plaintiff was removed from his position as Chair of

1 the Pathology Department in part because he was neither
2 working full-time nor present in the hospital.

3 (Doc. 29 at 8-9.) Given Bryan's written recommendation, and in
4 light of the scheduling order, it is clear that a reasonable trier
5 of fact could easily conclude that Plaintiff's taking of FMLA
6 protected leave was a negative factor in Bryan's recommendation
7 and, because his recommendation was adopted by the JCC, a negative
8 factor in the JCC's vote as well. Plaintiff's burden *as the moving*
9 *party*, however, does not stop there. Plaintiff must show that no
10 reasonable trier of fact could find other than for him on the issue
11 that his taking of FMLA leave constituted a negative factor in the
12 decision to remove him from his chair position. Plaintiff has not
13 met his burden.

14 In his deposition, Bryan explained his recommendation to the
15 JCC:

16 A. Dr. Jadwin's nonavailability to be present was the
17 primary contributing factor to my recommendation to
remove him as chairman.

18 Q. Okay.

19 A. And evidenced by his request towards the end of his
20 eligible medical leave to, again, extend it for another
medical problem.

21 So he had fully-exhausted his rights and the institution
22 obligation to grant him medical leave.

23 Q. Okay. So to get back to my question, was Dr. Jadwin's
24 medical leave a negative factor in the decision to remove
Dr. Jadwin from chairmanship?

. . .

25 A. No, the medical leave, per say, was not the basis of
26 my recommendation to remove him as Chair.

27 It was his non-availability, his non-presence on the
28 institution - at the institution - that would allow him

1 to effectively carry out his duties.

2 Whether it was medical leave or whatever, he had
3 exhausted his time for over an eight-month period. Not
4 just six months, for eight months, and he had further
5 requested and stated his inability to return to work.
6 That is the basis of it.

7 (Brian Dep. 280:21-281:20) (emphasis added.)

8 Bryan's recommendation letter mentions absences other than
9 those protected by the FMLA, namely Plaintiff's Personal Necessity
10 Leave starting in June 2006. Plaintiff does not challenge
11 Defendants' assertion that Plaintiff had exhausted his FMLA medical
12 leave by the time he went on Personal Necessity Leave in June 2006,
13 and there is no dispute that Plaintiff took that leave. Bryan's
14 recommendation letter stressed that the decision was based "solely
15 on [Plaintiff's] continued non-availability to provide the
16 leadership necessary for a contributing member of the medical staff
17 leadership group. KMC must have its key personnel available, and
18 Dr. Jadwin has provided no indication that he is committed to
19 return to work or resume his duties as chairman." (Doc. 266-2 at
20 32.)

21 Viewing the evidence in a light most favorable to the County
22 (the non-moving party), one reasonable interpretation of the
23 evidence is that Bryan was recommending Plaintiff for removal from
24 his chairmanship because after Plaintiff's FMLA leave, Plaintiff
25 continued to be unavailable and, at the same time, provided no
26 indication that he was committed to return to work or was then
27 interested in performing his chairman duties.⁹ The JCC could,

28 ⁹ Plaintiff cites to language in *Bachelder* where the court
discussed witness testimony indicating that the "likely reason" for

1 without violating the FMLA, use Plaintiff's absence from work after
2 his FMLA leave and any lack of evident commitment to return to work
3 or take on his chairman duties, as the basis for their decision.
4 See *Bachelder*, 259 F.3d at 1125 (recognizing the legitimacy of
5 taking adverse employment action based on absences not protected by
6 the FMLA); *Liston v. Nevada ex rel. Dep't of Bus. & Indus.*, No. 07-
7 16312, 2009 WL 413752, at *1 (9th Cir. Feb. 19, 2009) ("Although an
8 employer may not use FMLA leave as a negative factor in employment
9 decisions, there is no cause of action under the FMLA if the
10 termination results from absences . . . not protected by the . . .
11 [FMLA].") (alteration in original) (internal citation omitted).¹⁰
12 While basing a decision on such considerations may not have been
13 fair - at the time of Bryan's recommendation, Plaintiff was on an

14
15 the plaintiff's termination was "because of her continued
16 unavailability in 1996." 259 F.3d at 1131 n.22 (internal quotation
17 marks omitted). The Ninth Circuit viewed the testimony as evidence
18 supporting the plaintiff's FMLA interference claim. In *Bachelder*
19 there was no question that plaintiff's "continued unavailability"
20 referred to her unavailability when she was on an FMLA leave of
21 absence. Here, by contrast, one reasonable interpretation of
22 Bryan's recommendation is that Plaintiff's "continued non-
23 availability" referred to his post-FMLA unavailability, i.e., his
24 continued non-availability after his FMLA leave had expired.
25 Bryan's mention of Plaintiff's FMLA leaves of absence was
26 historically accurate and does not, by itself, demonstrate
27 prohibited bias. Even though Bryan's statements in his
28 recommendation could be construed differently and in a manner which
suggests prohibited bias, this does not alter the equation. When
considering Plaintiff's motion, the court must construe the
evidence, and draw all reasonable inferences, in favor of the non-
moving party.

¹⁰ District courts are not prohibited from citing unpublished
opinions of the Ninth Circuit issued on or after January 1, 2007.
See Fed. R. App. P. 32.1(a); Ninth Circuit Rule 36-3(b).

1 approved Personal Necessity Leave - whether the JCC's decision was
2 unfair or imprudent is not the inquiry. See *Villiarimo v. Aloha*
3 *Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002) (recognizing
4 that simply because the reason for the adverse action is "foolish
5 or trivial or even baseless" does not create liability where the
6 reason is not unlawful); *Maynard v. City of San Jose*, 37 F.3d 1396,
7 1405 (9th Cir. 1994) ("We do not suggest that the statements [the
8 plaintiff] attributes to the defendants were proper or justified.
9 We note only that the evidence presented by [the plaintiff]
10 indicates the defendants' hostility towards him was not kindled by
11 racial prejudice."); *Green v. Maricopa County Cmty Coll. Sch.*
12 *Dist.*, 265 F. Supp. 2d 1110, 1128 (D. Ariz. 2003) (noting that
13 whether the reason for an adverse employment action was "accurate,
14 wise, or well-considered" is not the inquiry) (internal quotation
15 marks omitted); *Slatkin v. Univ. of Redlands*, 88 Cal. App. 4th
16 1147, 1157 (2001) (recognizing that even a "personal grudge can
17 constitute a legitimate, nondiscriminatory reason for an adverse
18 employment decision") (internal quotation marks omitted).

19 The minutes from the JCC vote do not actually specify whether
20 the voting members considered Plaintiff's FMLA leave as a negative
21 factor or whether it was Plaintiff's post-FMLA unavailability and
22 lack of evident commitment that prompted their action:

23 The committee was advised that, under the medical staff
24 bylaws, a department chair, specifically Dr. Jadwin, may
25 be removed, with or without cause, upon the
26 recommendation of the CEO of the hospital and a majority
27 vote of the voting members of the JCC. Mr. Bryan was
28 asked about what recourse, if any, Dr. Jadwin has if he
is removed as department chair. The committee was
advised that the bylaws do not afford a department chair
any due process rights once he or she is removed from the

1 position. Mr. Bryan emphasized the importance of having
2 a department chair who is available to manage the
3 department and engage with the medical staff and hospital
4 administration at all times. Mr. Bryan then recommended
5 to the committee that Dr. Jadwin be removed as chair of
6 the department of pathology because of his continued
7 unavailability and lack of available leadership. The
8 committee voted on Mr. Bryan's recommendation; there were
9 five affirmative votes and two abstentions. Based on
10 this vote, Dr. Jadwin was removed as chair of the
11 department of pathology effective July 10, 2006. Mr.
12 Bryan collected the packets containing information about
13 Dr. Jadwin at the end of the discussion and vote.

14 Plaintiff has not pointed to deposition testimony or other evidence
15 that affirmatively demonstrates that the majority voters used
16 Plaintiff's taking of FMLA leave as a negative factor in their
17 vote.

18 Plaintiff has not met his burden of proving that no reasonable
19 trier of fact could find other than for him on the issue that his
20 FMLA protected leave was, in fact, a negative factor in the
21 decision to remove him from his chair position.

22 With respect to his pay cut via the amendment to his contract,
23 Plaintiff argues that "because a portion of a KMC department
24 chair's base pay is tied to his chairmanship, Plaintiff's Demotion
25 made the Paycut a foregone conclusion; hence, the JCC vote to
26 demote Plaintiff was effectively a vote to reduce his Base Pay as
27 well." (Doc. 272 at 16.) According to Plaintiff, because his
28 taking of FMLA was a negative factor in the JCC's vote to demote
him, it necessarily follows that the his taking of FMLA leave was
a negative factor in the pay cut decision. As discussed above,
however, Plaintiff has not met his burden, as the moving party, to
establish that no reasonable trier of fact could find other than

1 for him on the first issue. He also has failed to meet his burden
2 on the second issue, i.e., that his taking of FMLA leave was a
3 negative factor in the pay cut decision.

4 Finally, Plaintiff argues that he has direct evidence that his
5 taking of FMLA leave was a negative factor in the decision not to
6 renew his contract. He cites to the testimony of Ray Watson, then
7 Chair of the Board of Supervisors and a member of the JCC:

8 Q. So the question is: You've mentioned that for the
9 nonrenewal one of the reasons was that Dr. Jadwin wasn't
available for work; is that correct or -

10 A. My understanding was that he had - he had been on
11 medical leave, family leave, and had requested even more
12 leave, and that for that reason and the fact that he was
suing us, that we decided not to renew his contract.

13 (Watson Dep. 113:15-23.) Watson's testimony does not warrant
14 summary judgment in favor of Plaintiff.

15 Viewed in a light most favorable to Defendants, Watson's
16 mention of "that reason" can be interpreted as a reference to
17 Plaintiff's request for "even more leave" (a singular reference to
18 the last event in a list) after Plaintiff had exhausted his FMLA
19 medical leave. As discussed above, once an employee exhausts his
20 FMLA leave, the FMLA does not prohibit an employer from basing
21 adverse employment decisions on subsequent absences.¹¹ Plaintiff
22 has not shown that no reasonable trier of fact could find other
23 than for him on the issue of whether his FMLA leave was a negative
24

25
26 ¹¹ Simply because an employee has exhausted his or her FMLA
27 leave does not give the employer the right to then take adverse
28 action against the employee based on the protected FMLA leave
already taken.

1 factor in the decision not to renew his contract.

2 b. Defendants' Motion

3 In their motion, Defendants argue that Plaintiff's removal
4 from the chairmanship was based on legitimate business reasons and
5 there is no evidence that Plaintiff's rights under the FMLA were
6 violated. Defendants' arguments are unpersuasive.

7 As discussed above, in light of Bryan's recommendation letter
8 and the JCC vote which adopted his recommendation, and considering
9 the admission in the scheduling order in Plaintiff's favor, a
10 reasonable jury could conclude that Plaintiff's taking of FMLA was
11 used as a negative factor in the decision to remove him from his
12 chairmanship. A triable issue exists as to whether Plaintiff's
13 FMLA leave was a negative factor in the decision to remove him from
14 his chairmanship and it precludes summary judgment in favor of
15 Defendants.

16 Alternatively, Defendants argue that Plaintiff was not
17 entitled to his FMLA leave from December 16, 2005, to March 15,
18 2006, because Plaintiff did not timely notify the County of his
19 leave request. For several reasons, this argument is unpersuasive.

20 First, this argument flatly contradicts the County's position
21 repeatedly relied on in its motion for summary judgment that
22 Plaintiff exhausted his FMLA leave entitlements by June 2006. The
23 County cannot have it both ways: it cannot argue that Plaintiff
24 exhausted his FMLA leave and then argue that he was never entitled
25 to FMLA leave in the first instance. If Plaintiff was not so
26 entitled, then he should not have exhausted his FMLA leave and he
27 would have theoretically been entitled to more FMLA leave at a
28

1 subsequent time.

2 Second, this argument does not eviscerate Plaintiff's FMLA
3 interference claim. Plaintiff took a second FMLA leave of absence
4 after he submitted a second Request For Leave Of Absence form on
5 April 26, 2006.

6 In his second request (April 26, 2006), Plaintiff asked that
7 his initial leave be extended. Then, after his meeting with Bryan
8 and others on April 28, 2006, he was granted full-time FMLA leave.
9 In fact, documentation suggests that Plaintiff was on FMLA leave at
10 minimum through the "06-09" pay period, which spanned from April
11 29, 2006 through May 12, 2006. (See Lee Decl., Ex. 18 at 0001527.)
12 Defendants' brief concedes that "Plaintiff exhausted his 12 weeks
13 leave [under the FMLA] by June 14, 2006." (Doc. 291 at 2.)
14 Defendants further represent that "[a]ll parties agree Plaintiff
15 completely exhausted his twelve weeks of FMLA and CFRA leave by
16 June, 2006." (Doc. 253 at 8.) It is indisputable that Plaintiff
17 had not exhausted his FMLA leave allotment by the end of his first
18 leave of absence on March 15, 2006. Plaintiff subsequently went on
19 a second full-time FMLA leave. Bryan's recommendation letter to
20 the JCC discusses this second leave. (Doc. 266-2 at 32.) Based on
21 the same evidence above - Bryan's recommendation letter, the JCC
22 vote, and the admission in the scheduling order - a triable issue
23 exists as to whether Plaintiff's FMLA leave, including his second
24 FMLA leave, was one negative factor in the decision to remove
25 Plaintiff from his chairmanship position.

26 Third, even assuming Plaintiff's notification of his need for
27 his first FMLA leave was untimely, the County arguably waived any
28

1 objection to its timeliness. An employer can waive an employee's
2 FMLA notice requirements. See 29 CFR § 825.304; see also 29 CFR §
3 825.302(g); *Killian v. Yorozu Auto. Tenn., Inc.*, 454 F.3d 549, 554
4 (6th Cir. 2006) (recognizing that an employer can waive an argument
5 as to the adequacy or timeliness of the employee's notice, stating
6 "even if [the plaintiff's] notice had been late, [the employer's]
7 only legal recourse would have been either to waive the notice
8 requirement or to delay her leave"); *Bailey v. Miltope Corp.*, 513
9 F. Supp. 2d 1232, 1240 (M.D. Ala. 2007) (recognizing possibility of
10 waiver); *Rodriguez v. Ford Motor Co.*, 382 F. Supp. 2d 928, 934
11 (E.D. Mich. 2005) (same). Generally speaking, waiver is the
12 "voluntary or intentional relinquishment of a known right." *Hecht*
13 *v. Harris, Upham & Co.*, 430 F.2d 1202, 1208 (9th Cir. 1970)
14 (internal quotation marks omitted).¹²

15 The County explicitly, in writing, approved Plaintiff's first
16 "FMLA" leave request. (Doc. 266-2 at 65.) After Plaintiff had
17 taken approved FMLA leave, on April 28, 2006, in a meeting between
18 Plaintiff, Bryan, Steve O'Connor from HR, and Karen Barnes (the
19 County's counsel), Bryan provided Plaintiff with a summary of
20 Plaintiff's medical leave history. This history specifically
21 stated that Plaintiff's "Intermittent LOA began 12/16/05" and the
22 he was "entitled to 480 hrs (FMLA intermittent leave rule)." (Doc.
23 266 at 64) (emphasis added.) This medical leave history ended with
24

25 ¹² The County does not (nor could it seriously) contend that,
26 at the time of Plaintiff's purported late notification, the County
27 had no knowledge of its right to question the timeliness or
28 adequacy of Plaintiff's notification and to take appropriate
action.

1 a calculation of how many hours (of the 480) Plaintiff had left
2 after considering his usage during pay periods spanning from
3 December 2005 to March 2006, i.e., pay period "05-25," which covers
4 12/10/05 to 12/23/05, to pay period "06-07," which covers 04/01/06
5 to 04/14/06. (*Id.*; see also Lee Decl., Ex. 18 at 0001527.)
6 Plaintiff was specifically informed that, based on his medical
7 history, he had "137 hours available to be taken before [he] hit
8 the 480-hour limitation." (Doc. 266-2 at 62.). As Bryan recounted
9 in his recommendation letter to the JCC, "Dr. Jadwin was informed
10 . . . that, at his rate of use, he had only 137 hours of medical
11 leave left available which would take him through June 16, 2006."
12 (Doc. 266 at 32.) Thus, without question, Plaintiff's "FMLA" leave
13 of absence between December 2005 and March 2006 was not only
14 explicitly approved in writing, it was also counted against his
15 FMLA allotment. By explicitly approving of Plaintiff's requested
16 FMLA leave and counting it against his accrued FMLA leave hours, at
17 minimum, there is a triable issue as to whether the County waived
18 its belated challenge to the timeliness of Plaintiff's notice.
19 *Salgado v. CDW Computer Ctrs., Inc.*, No. 97 C 1975, 1998 WL 60779,
20 at *6 (N.D. Ill. Feb. 5, 1998) ("Regardless of whether the request
21 was timely or not, defendant granted permission to take two weeks'
22 leave. Therefore, defendant appears to have waived any possible
23 violation of the initial notice requirements.").¹³

24
25 ¹³ Court have also concluded that when an employer grants FMLA
26 leave, estoppel can bar an employer from later challenging the
27 employee's eligibility for that leave. See, e.g., *Minard v. ITC*
28 *Deltacom Commc'ns, Inc.*, 447 F.3d 352, 359 (5th Cir. 2006);
Woodford v. Cmty. Action of Greene County, Inc., 268 F.3d 51, 57

1 Fourth, in response to Plaintiff's separate statement of
2 undisputed material facts, Defendants "admit" that "Plaintiff
3 requested and took reduced work schedule CFRA medical leave from
4 December 16, 2005 to at least March 15, 2006." (Doc. 278 at 23.)
5 There is no reason why this admission does not apply to Plaintiff's
6 "FMLA" leave as well (especially given that Plaintiff's approved
7 leave request form specifically stated "FMLA" leave).

8 For these reasons, Defendants are not entitled to summary
9 judgment on the ground that, because Plaintiff's notice was
10 untimely, his leave of absence from December 16, 2005, to March 15,
11 2006, was unprotected under the FMLA.¹⁴

12
13 (2nd Cir. 2001); *Sutherland v. Goodyear Tire & Rubber Co.*, 446 F.
14 Supp. 2d 1203, 1210 (D. Kan. 2006); *Allen v. Fort Wayne Foundry*
15 *Corp.*, No. 1:04-cv-60, 2005 WL 2347266, at *9 (N.D. Ind. Sept. 26,
16 2005) (concluding, in a case involving an employee who was
17 terminated for absenteeism, that equitable estoppel barred the
18 employer's argument as to the plaintiff's ineligibility for FMLA
19 leave where the employer had granted, in writing, intermittent FMLA
leave and permitting the employer to later disclaim eligibility in
litigation "would theoretically . . . subject [the employee] to
termination . . . for the twenty-four absences [the employer] told
[him] were FMLA-excused.").

20 ¹⁴ Plaintiff argues that, given his time-sheets in December
21 2005, he did not, in actuality, go on leave at that time.
22 Plaintiff argues that his time-sheets prove that he "was working
23 full-time from December 16, 2005 to January 9, 2005, taking 4 sick
24 days off during the Christmas and New Year holidays, upon
25 conclusion of which Plaintiff timely gave Bryan reasonable notice
26 of his need for medical leave." (Doc. 288 at 5) (citation omitted.)
27 Plaintiff claims that HR just plucked the December beginning date
28 off of Plaintiff's FMLA documentation. In light of the court's
ruling that the County has arguably waived any contention that
Plaintiff failed to give timely notice of his leave, the court need
not consider any additional arguments. In any event, Plaintiff's
additional arguments only create confusion, leaving further triable

1 Defendants are also not entitled to summary judgment on the
2 ground that no triable issue remains as to whether Plaintiff's
3 taking of FMLA leave was a negative factor in the decision not to
4 renew Plaintiff's employment contract. Watson's testimony is the
5 only evidence Plaintiff relies upon to establish that his FMLA
6 leave was a negative factor in the decision not to renew his
7 contract. Defendants argue that Watson was not a decision-maker
8 and his testimony as to the reasons for the non-renewal is nothing
9 more than "after-the-fact speculation." (Doc. 276 at 25.) At his
10 deposition, Watson testified in pertinent part as follows:

11 A. I recall that his contract was - was expiring. I
12 couldn't tell you when, but I - I - I am aware that -
that it was not renewed.

13 Q. Okay. How did you become aware of this nonrenewal?

14 A. That would have been part of the general discussions
15 about his not being present to do his job.

16

17 Q. Sure. Okay. And do you recall who was part - who was
18 in that discussion on the nonrenewal of Dr. Jadwin's
contract?

19 A. The only - the only time any of these things were
20 discussed were in joint conference committee meetings,
and there may have been a time when Mr. Bryan appeared in
closed session with the board.

21 Q. Are you aware that Dr. - and what was the final
22 resolution of this discussion regarding nonrenewal of Dr.
Jadwin's contract? Was there a decision, in fact, not to
23 renew his contract then?

24 A. I don't recall a specific vote being taken, although
25 I imagine it was. I can tell you that I would have
supported that because I didn't feel that he was doing
his job.

26
27 _____
issues.

1 Q. Okay. So you don't recall a specific vote, but there
2 was a decision not to renew his contract then?

3 A. Yes.

4

5 Q. Okay. What about the nonrenewal? I mean, do you
6 recall Dr. Jadwin's physical absence being a reason for
7 his nonrenewal of his contract?

8 A. Well, it could be that. It could be the fact that I
9 think by then he was - probably was suing us. So why
10 would you want to establish a contractual relationship
11 with somebody who's suing you.

12 Q. Okay. Well, he was also suing you at the time of his
13 removal or actually at the time of his - no, he wasn't.
14 He wasn't okay. But I mean, you say why would you
15 establish a contractual relationship with someone who's
16 suing you, right?

17 A. Right.

18 Q. Was that -- does that mean - are you just speculating
19 now, just guessing, or was that a consideration for his
20 nonrenewal.

21 A. Well, I remember it being discussed.

22 Q. Do you recall who was at the discussion?

23 A. It would have been in one of the joint conference -
24 one or more of the joint conference committee meetings
25 along with all the other discussions about him.

26

27 Q. Okay. But you recall it [the non-renewal] being
28 discussed at the JCC meetings.

A. Yes.

. . . .

Q. So the question is: You've mentioned that for the
nonrenewal one of the reasons was that Dr. Jadwin wasn't
available for work; is that correct or -

A. My understanding was that he had - he had been on
medical leave, family leave, and had requested even more
leave, and that for that reason and the fact that he was
suing us, that we decided not to renew his contract.

1 Q. Okay. When you say "we," this is a joint conference
2 committee meeting, correct?

3 A. And it - it probably came up at a closed session of
4 the board of supervisors.

5 Q. As well as a closed session of the JCC?

6 A. Yes.

7 (Watson Dep. 28:9-16; 29:19-30:13; 110:12-111:10; 111:15-17;
8 113:15-111:4.) In a declaration submitted in support of
9 Defendants' motion for summary judgment, Watson explains and
10 directly contradicts his prior sworn deposition testimony:

11 2. On August 25, 2008, Dr. Jadwin's attorney took my
12 deposition. He asked me several times what I knew about
13 the circumstances of Dr. Jadwin's 'termination.' I told
14 him I did not recall any discussions about that. Later in
15 my deposition, he asked me about the expiration of Dr.
16 Jadwin's contract on October 4, 2007. I told him I had
17 learned Dr. Jadwin's contract was expiring in general
18 discussions about Dr. Jadwin's absence from the hospital.
19 I told him I could not recall when those discussions had
20 occurred. He asked me if there had been a decision to not
21 renew Dr. Jadwin's contract. I told him that I did not
22 recall the Joint Conference Committee ever voting on that
23 but I said I 'imagine it was.' He then asked me if there
24 was a decision not to renew his contract and I replied,
25 'Yes.'

26 3. My response was an unfortunate guess. Neither the
27 Joint Conference Committee nor the Board of Supervisors
28 ever made a decision to not renew Dr. Jadwin's contract.
I have no recollection of any such decision. As a county
supervisor, I am accustomed to making decisions and I
assumed, if Dr. Jadwin's contract was not renewed, there
had been a decision to not renew it; however, there was
no such decision.

4. The Board of Supervisors never made any decisions
regarding renewing or not renewing Dr. Jadwin's
employment agreement. I do not know the circumstances
under which Dr. Jadwin's employment agreement expired.

There are several problems with Watson's post-deposition affidavit.

First, Watson's statement that "there was no such decision"

1 and "neither the JCC nor the Board of Supervisors ever made a
2 decision" is wholly conclusory. Second, Watson's subsequent
3 contradictory affidavit does not eliminate his prior inconsistent
4 sworn testimony. "Self-contradiction by the moving party's
5 witnesses may of course create a genuine issue of material fact
6 precluding summary judgment." *Crockett v. Abraham*, 284 F.3d 131,
7 133 (D.C. Cir. 2002). When a witness contradicts himself on a
8 material fact the district court cannot determine which version of
9 the events the ultimate trier of fact will believe. See *Peckham v.*
10 *Ronrico Corp.*, 171 F.2d 653, 658 (1st Cir. 1948). Third, although
11 Watson asserts that "no such decision was made" the County actually
12 admitted in its response to Plaintiff's statement of undisputed
13 material facts that a decision was made not to renew Plaintiff's
14 contract. (Doc. 278 at 7.) Not only does Watson contradict
15 himself, the County also contradicts Watson's affidavit. Fourth,
16 in his affidavit, Watson does not retract his statement that
17 Plaintiff's medical leave, and his request for even more leave, was
18 discussed or "came up" at a meeting. The fact that Plaintiff's
19 medical leave came up in a discussion among a County decision-
20 making body supports Plaintiff's position.

21 Wilson's inconsistent testimony creates a triable issue of
22 fact. When construed in a light most favorable to Plaintiff,
23 Wilson's testimony suggests that Plaintiff's FMLA leave was one
24 negative factor that influenced the admitted decision not to renew
25 Plaintiff's contract. Although Watson's "understanding" may be
26 based partly on statements from members of the JCC and/or the Board
27 of Supervisors, at a minimum, the Board members' statements
28

1 (regardless of their truth) can be used to establish the state of
2 mind (illicit motive or improper purpose) of those members.¹⁵

3 2. "Forced" Personal Necessity Leave

4 An employer interferes with an employee's FMLA rights by
5 "'refusing to authorize FMLA leave'" and "'discouraging an employee
6 from using such leave.'" *Liu*, 347 F.3d at 1134 (*quoting* 29 C.F.R.
7 § 825.220). An employer may also interfere with an employee's
8 rights under the FMLA by mislabeling an employee's leave as
9 "personal leave" or something else when, in reality, the leave
10 qualified as FMLA leave. *Id.* at 1134-35. When an employer fails
11 to properly deem a leave of absence as an FMLA leave, the employee
12 may remain "subject to the control and discretion of [the
13 employer]" in a manner which the employee would not have been had
14 the leave been appropriately deemed as FMLA leave. *Id.* at 1135.

15 Plaintiff appears to raise two FMLA interference claims. On
16 one hand, Plaintiff argues that Dr. Riskin certified that Plaintiff
17 could work part-time. Yet, in Plaintiff's meeting with Bryan on
18 April 28, 2006, "Bryan denied Plaintiff reduced work schedule
19 medical leave and forced him to take full-time 'personal necessity'
20 leave under the County's leave policy." (Doc. 272 at 17-18.) This
21 suggests that the County denied Plaintiff any FMLA leave whatsoever
22 and, instead, forced him to take Personal Necessity Leave. If this
23 is Plaintiff's contention, it does not make sense. Documentation
24

25
26 ¹⁵ Defendants also argue that the non-renewal of Plaintiff's
27 contract did not constitute an adverse employment action. This
28 argument is addressed in connection with Plaintiff's FMLA
retaliation claim.

1 in the record suggests that Plaintiff was on FMLA leave at minimum
2 through the "06-09" pay period, which spanned from April 29, 2006
3 through May 12, 2006. In its briefing, the County submits that
4 "Plaintiff exhausted his 12 weeks leave [under the FMLA] by June
5 14, 2006." (Doc. 291 at 2.) The County further represent that
6 "[a]ll parties agree Plaintiff completely exhausted his twelve
7 weeks of FMLA and CFRA leave by June, 2006." (Doc. 253 at 8.) It
8 appears Plaintiff himself recognized that, by the time he filed a
9 Government Claims Act claim with the County on July 3, 2006, he had
10 taken FMLA/CFRA leave through June 14, 2006. (Doc. 241, Ex. 2.)¹⁶
11 To the extent Plaintiff claims that Defendants did not provide him
12 any FMLA leave and forced him to take Personal Necessity Leave
13 instead, Plaintiff's motion for summary judgment is DENIED.

14 At another place in his briefing, Plaintiff argues that even
15 though he was entitled to continue his part-time FMLA leave, Bryan
16 forced Plaintiff to take "full-time medical leave in April 2006" to
17 "burn up Plaintiff's medical leave entitlement" and this violated
18 the FMLA (and the CFRA). (Doc. 275 at 2).¹⁷ In other words, he was
19 denied his right to take FMLA leave on a reduced schedule. Based on
20

21 ¹⁶ Although Plaintiff only mentioned "CFRA" leave in his
22 Government Claims Act claim, there is no reason to believe this
23 statement does not apply equally to FMLA leave.

24 ¹⁷ Both "intermittent" leave and leave on a "reduced leave
25 schedule" are recognized forms of leave under the FMLA. See 29
26 U.S.C. § 2612(b)(1)-(2). "A reduced leave schedule is a leave
27 schedule that reduces an employee's usual number of working hours
28 per workweek, or hours per workday. A reduced leave schedule is a
change in the employee's schedule for a period of time, normally
from full-time to part-time." 29 C.F.R. § 825.202.

1 the record evidence, this argument is more plausible.

2 To establish this type of interference claim, Plaintiff must
3 show: (1) he is an eligible employee; (2) his employer is an
4 employer under the FMLA; (3) he was entitled to take the FMLA leave
5 at issue; (4) he gave adequate notice of his intention to take the
6 leave; and (5) the defendant denied him, or actually discouraged
7 him from taking, such leave. See *Price v. Multnomah County*, 132 F.
8 Supp. 2d 1290, 1297 (D. Or. 2007); see also *Hurley v. Pechiney*
9 *Plastic Packaging, Inc.*, 2006 WL 708656, No. C 05-05028 JSW, at *3
10 (N.D. Cal. Mar. 16, 2006). "A violation of the FMLA simply requires
11 that the employer deny the employee's entitlement to FMLA leave."
12 *Liu*, 347 F.3d at 1135.

13 Elements (1)-(4) are indisputable. After Plaintiff submitted
14 his FMLA documentation for an extension on his leave (April 26,
15 2006), Plaintiff had his meeting with Bryan and others (April 28,
16 2006) and was then given full-time FMLA leave starting in May 2006.

17 With respect to the fifth element, Defendants did not outright
18 deny FMLA leave. Plaintiff does not argue that he was not entitled
19 to full-time FMLA leave. Plaintiff contends that he was entitled
20 to continue his reduced leave schedule under the FMLA but was
21 denied that right. It does not appear that the Ninth Circuit has
22 addressed this precise claim.

23 The statute provides that it is "unlawful for any employer to
24 interfere with, restrain, or deny the exercise of or the attempt to
25 exercise, any right provided under this subchapter." 29 U.S.C. §
26 2615(a) (emphasis added). Under the FMLA, when a "serious health
27 condition" of the employee makes the employee "unable to perform
28

1 the functions of the position of such employee," the employee has
2 the right to take FMLA leave on an intermittent or reduced leave
3 schedule" but only if such leave is "medically necessary." *Id.* at
4 2612(a) & (b).¹⁸ To take intermittent leave or leave on a reduced
5 leave schedule, "there must be a medical need for leave and it must
6 be that such medical need can be *best accommodated* through an
7 intermittent or reduced leave schedule." 29 CFR § 825.202(b)
8 (emphasis added).¹⁹

9 Plaintiff is not entitled to summary judgment on his claim.
10 The certification from his doctor stated "[t]his employee is unable
11 to work full time and requires part-time or less to avoid worsening
12 of his serious medical condition." (Doc. 270 at 6.) Viewing the
13 evidence in a light most favorable to Defendants, this "or less"
14 statement calls into question whether a reduced leave schedule was
15 the best accommodation for Plaintiff's serious health condition.
16 In addition, under Defendants' version of the events, Plaintiff was
17 not forced to take full-time leave. Bryan indicated it would be
18 preferable to take full-time leave (which Plaintiff does not
19 dispute he was entitled to take) and Plaintiff took the leave
20 without protest. In light of the "or less" doctor's certification,
21 full-time leave was a reasonable option. Plaintiff has not
22 demonstrated that no reasonable trier of fact could find other than
23 for him that he had a right to take leave on a reduced leave
24

25 ¹⁸ No party seriously disputes that Plaintiff had a "serious
26 health condition" under the FMLA - depression.

27 ¹⁹ This requirement was previously embodied in 29 C.F.R. §
28 825.117.

1 schedule which was interfered with.

2 Viewing the evidence in a light most favorable to Plaintiff,
3 Defendant is not entitled to summary judgment on this claim. A
4 triable issue remains as to whether, in the words of Plaintiff, the
5 County really "forced" him to take full-time FMLA leave even though
6 he was entitled to a reduced leave schedule. If Plaintiff can
7 establish that he was entitled to a reduced leave schedule, and if
8 the County nonetheless forced him to take full-time FMLA leave
9 instead, Plaintiff would have been forced to forgo one right he had
10 under the FMLA. See 29 U.S.C. § 2615(a) (making it "unlawful for
11 any employer to interfere with, restrain, or deny the exercise of
12 or the attempt to exercise, any right provided under this
13 subchapter.") 29 U.S.C. § 2615(a) (emphasis added); See *Sista v.*
14 *CDC Ixis North America, Inc.*, 445 F.3d 161, 175 (2nd Cir. 2006)
15 (recognizing that while the FMLA says "nothing about an employer's
16 ability to 'force' an employee to take" FMLA leave, "if the
17 [plaintiff] were able to demonstrate that such a forced leave
18 interfered with, restrained, or denied the exercise or attempted
19 exercise of a right provided under the FMLA, a cause of action
20 might lie."); cf. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S.
21 81, 89-90 (2002) (recognizing that an employee might have a viable
22 interference claim where the employee could take intermittent or
23 full-time leave; however, because the employer failed to notify the
24 employee of her rights under the FMLA, the employee unwittingly
25 takes full-time leave instead of intermittent leave such that she
26 has "no leave remaining for some future emergency."). The County
27 makes no argument that it is permissible under the FMLA for an
28

1 employer to force an employee who is entitled to a reduced leave
2 schedule to take full-time FMLA leave instead. Accordingly,
3 summary judgment in favor of the County on this claim is DENIED.

4 3. Section 2615(b)(1) retaliation claim

5 The FMLA makes it unlawful for any person to "discharge or in
6 any other manner discriminate against any individual because such
7 individual . . . has filed any charge, or has instituted or caused
8 to be instituted any proceeding, under or related to this
9 subchapter." 29 U.S.C. § 2615(b)(1) (emphasis added). To establish
10 a claim under this section, Plaintiff must show that (i) he engaged
11 in the protected activity; (ii) he was subject to adverse
12 employment action; and (iii) this occurred "because" he engaged in
13 the protected activity. *Id.*; cf. *Trent v. Valley Elec. Ass'n Inc.*,
14 41 F.3d 524, 526 (9th Cir. 1994) (articulating the elements of a
15 retaliation claim under the "opposition clause" of Title VII, 42
16 U.S.C. § 2000e-3(a)).

17 a. Protected Activity

18 Plaintiff filed the instant lawsuit against Defendants before
19 his employment contract with the County expired. His original
20 complaint in this action alleged a cause of action under § 2615 of
21 the FMLA. This conduct constituted protected activity under §
22 2615(b)(1).

23 Applying the plain language of the statute, a federal lawsuit,
24 such as the one Plaintiff instituted, is a "proceeding." See
25 Merriam Webster's Online Dictionary [http://www.merriam-](http://www.merriam-webster.com/dictionary/proceeding)
26 [webster.com/dictionary/proceeding](http://www.merriam-webster.com/dictionary/proceeding) (defining "proceeding" as a
27 "legal action") (last visited Apr. 2, 2009); see also *Black's Law*
28

1 Dictionary 1221, 1512 (7th ed. 1999) (defining "proceeding" as,
2 among other things, "[a]ny procedural means for seeking redress from
3 a tribunal or agency"; and defining "tribunal" as "[a] court or
4 other adjudicatory body"). Any proceeding under or related to
5 "this subchapter" is a reference to subchapter "I" which embraces
6 § 2615 of the FMLA. Accordingly, instituting a federal lawsuit
7 that contains an FMLA claim under § 2615 qualifies as "instituting
8 any proceeding, under or related to this subchapter."

9 b. Adverse Employment Action And Causality

10 With respect to the second element, Plaintiff argues that his
11 contract was not renewed because he instituted his federal lawsuit
12 which contained an FMLA claim. Defendants counter with several
13 arguments.

14 First, Defendants argue that the failure to renew a contract
15 that expired on its own terms does not amount to an adverse
16 employment action. This argument is unpersuasive. Numerous courts
17 have recognized, whether explicitly or implicitly, that the non-
18 renewal of a contract can qualify as an adverse employment action.
19 *See Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315,
20 320 (3rd. Cir. 2008) ("The failure to renew an employment
21 arrangement, whether at-will or for a limited period of time, is an
22 employment action, and an employer violates Title VII if it takes
23 an adverse employment action for a reason prohibited by Title VII,
24 such as religious discrimination."); *Mateu-Anderegg v. Sch. Dist.*
25 *Of Whitefish Bay*, 304 F.3d 618, 625 (7th Cir. 2002) (concluding
26 that it is "undisputed that . . . [the plaintiff] suffered an
27 adverse employment action" by virtue of the non-renewal of her
28

1 employment contract); *Kassaye v. Bryant Coll.*, 999 F.2d 603, 607
2 (1st Cir. 1993) (noting that the "act of refusing to renew
3 appellant's employment" may provide the grounds for a Title VII
4 action); *Hernandez-Mejias v. Gen. Elec.*, 428 F. Supp. 2d 4, 8
5 (D.P.R. 2005) ("[W]e agree with the overwhelming majority of courts
6 that non-renewal of an employment contract constitutes an adverse
7 employment action."); *Hicks v. KNTV Television, Inc.*, 160 Cal. App.
8 4th 994, 1004 n.4 (2008) (concluding that because Plaintiff's term
9 contract "expired" and was not "renewed" characterizing the non-
10 renewal as a "termination" was not appropriate; however, the non-
11 renewal qualified as an adverse employment action more
12 appropriately characterized as a "refusal to hire (or rehire)").
13 The non-renewal of Plaintiff's contract can qualify as an adverse
14 employment action.

15 Second, Defendants argue that "no vote on the renewal of the
16 Plaintiff's contract was ever taken." (Doc. 253 at 9.) Defendants
17 seem to suggest that they simply let Plaintiff's contract naturally
18 expire, and no adverse decision to not renew Plaintiff's contract
19 was ever made. It is true that an adverse employment action
20 necessarily implies that, in some sense, the employer "took some
21 action," *Bouman v. Block*, 940 F.2d 1211, 1229 (9th Cir. 1991), and
22 there may be cases in which the natural expiration of a fixed term
23 contract, with no subsequent contract renewal or retention of the
24 employee, does not actually involve any conscious decision or other
25 conduct which could be characterized an adverse employment action.
26 Here, however, the County's argument fails. The County actually
27 admitted in their response to Plaintiff's separate statement of
28

1 undisputed material facts that the County decided not to renew
2 Plaintiff's contract. (Doc. 278 at 7.)

3 Third, Defendants argue that Plaintiff testified at his
4 deposition, which was after his employment with the County had
5 ended, that he did not actually want the precise contract that was
6 in place at the end of his employment to be renewed. Rather,
7 Plaintiff wanted his "original contract" renewed, the one which
8 made him the chair of the pathology department and which did not
9 have the salary reduction component. (Pl. Dep. VI 1025:24-1026:1;
10 1036:20-24.) To whatever extent Plaintiff did not want his
11 employment contract, as amended, to be renewed, this fact does not
12 eliminate liability potential. There is no evidence that the
13 County had actual knowledge, prior to letting Plaintiff's
14 employment contract expire, that Plaintiff did not want his then
15 existing contract to be renewed. The County apparently learned of
16 this only after the fact, during Plaintiff's deposition.
17 Accordingly, the County is not in a position to argue that not
18 renewing Plaintiff's contract is something to which Plaintiff
19 consented and his consent precludes him from now claiming that the
20 non-renewal was an *adverse* employment action. If the County did
21 not renew his then existing employment contract for an unlawful
22 reason, such a non-renewal can create liability. If Plaintiff did
23 not want his amended contract to be renewed, this may possibly
24 impact Plaintiff's ability to recover damages for the non-renewal,
25 but it does not negate the fact that the failure to renew the
26 contract could be illegal.

27 Fourth, Defendants argue that allowing Plaintiff's contract to
28

1 expire and not retaining him further is not an adverse employment
2 action because Plaintiff had "no right to a renewed employment
3 agreement." (Doc. 253 at 6.) Even assuming this is true, this does
4 not preclude a conclusion that the County took an adverse
5 employment action against Plaintiff. An employer's decision not to
6 retain an at-will employee is still an adverse employment action
7 regardless of the fact that the at-will employee never had any
8 right to a renewed employment agreement. *Cf. Hernandez-Mejias*, 428
9 F. Supp. 2d at 8 ("[E]ven at-will employees and job applicants are
10 entitled to Title VII protection.")

11 With respect to the causal connection between the protected
12 activity and the adverse employment action, Plaintiff relies on the
13 testimony of Watson. "[M]y understanding was that [Plaintiff] had
14 - he had been on medical leave, family leave, and had requested
15 even more leave, and that for that reason and *the fact that he was*
16 *suing us*, that we decided not to renew his contract." (Watson Dep.
17 113:15-23) (emphasis added.)

18 For purposes of Plaintiff's motion, Watson's testimony does
19 not sufficiently demonstrate that the decision-makers deciding upon
20 Plaintiff's non-renewal had knowledge that Plaintiff's lawsuit
21 involved his leave rights under the FMLA. To show that the County
22 retaliated against Plaintiff "because" he instituted an action
23 under the FMLA claim, the putative retaliators must have known that
24 he engaged in the protected activity, not just that Plaintiff "was
25 suing us." See *Morgan*, 88 Cal. App. 4th at 70 ("Essential to a
26 causal link is evidence that the employer was aware that the
27 plaintiff had engaged in the protected activity.") (internal
28

1 quotation marks omitted); *Raad v. Fairbanks N. Star Borough Sch.*
2 *Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003) (stating, in a Title VII
3 case, "the plaintiff must make some showing sufficient for a
4 reasonable trier of fact to infer that the defendant was aware that
5 the plaintiff had engaged in protected activity"); *Gifford v.*
6 *Atchison, Topeka & Santa Fe Ry. Co.*, 685 F.2d 1149, 1155 (9th Cir.
7 1982) (recognizing, in a Title VII case, that to have a viable
8 retaliation claim for engaging protected activity, the employee
9 must show "that the employer was aware of the conduct" which
10 constituted protected activity); *Derendinger v. Kiewit Constr. Co.*,
11 272 F. Supp. 2d 850, 855 (D. Alaska 2003) ("Since, by definition,
12 an employer cannot take action because of a factor of which it is
13 unaware, the employer's knowledge that the plaintiff engaged in a
14 protected activity is absolutely necessary to establish . . . [a]
15 prima facie case.") (emphasis added); see also *Amie v. El Paso*
16 *Indep. Sch. Dist.*, No. EP-06-CA-113-DB, 2007 WL 1295800, at *7
17 (W.D. Tex. May 02, 2007) ("However, knowledge must entail actual
18 knowledge that 'protected activity' has taken place, not that
19 Plaintiff had filed an unknown type of lawsuit against EPISD [his
20 employer]"); *Stephens v. City of Topeka, Kan.*, 33 F. Supp. 2d 947,
21 965 (D. Kan. 1999) ("Knowledge of an unidentified lawsuit against
22 a former employer does not satisfactorily show the requisite
23 knowledge. Nothing in the record indicates that defendant knew the
24 lawsuit of plaintiff was based upon discrimination"). This
25 testimony from Watson similarly provides no strong indication that,
26 even if the decision-makers were minimally aware of the protected
27 activity, that it was the FMLA claim, as opposed to Plaintiff's
28

1 combative nature as further exemplified by the fact that he "was
2 suing us," which motivated the decision-makers. Watson's testimony
3 is simply insufficient to warrant summary judgment in Plaintiff's
4 favor on his FMLA retaliation claim.

5 For purposes of Defendants' motion, when construing the
6 evidence in a light most favorable to Plaintiff, the FMLA
7 retaliation claim survives summary judgment. Watson testified that
8 Plaintiff's contract was not renewed, in part, because Plaintiff
9 "was suing us." If Watson and other decision-makers were
10 sufficiently aware that Plaintiff's lawsuit involved protected
11 activity, an inference arises that the protected activity motivated
12 the non-renewal decision.

13 During Watson's deposition, counsel failed to elicit direct
14 testimony from Watson regarding whether he or those discussing or
15 deciding upon the non-renewal were aware, at the time of the non-
16 renewal, that Plaintiff's lawsuit involved allegations concerning
17 his leave rights. In fact, one portion of Watson's testimony
18 demonstrates that he lacked an understanding of the nature of the
19 lawsuit:

20 Q. So do you have an understanding about whether Dr.
21 Jadwin in this lawsuit is claiming retaliation for
22 whistleblowing about patient-care issues and legal
noncompliance issues?

23 A. No, I - I was not aware of that.

24 (Watson Dep. 120:21-25.) To survive summary judgment, Plaintiff
25 "must make *some* showing sufficient for a reasonable trier of fact
26 to infer that the defendant was aware that the plaintiff had
27 engaged in protected activity." *Raad*, 323 F.3d 1197 (emphasis
28

1 added); see also *Dev v. Colt Const. & Dev. Co.*, 28 F.3d 1446, 1458
2 (7th Cir. 1994) (stating, in a Title VII case, that a plaintiff
3 "may rely on circumstantial evidence to establish her employer's
4 awareness of protected expression" and the plaintiff must "produce
5 evidence that would support an inference that Irsay [a decision-
6 maker] was . . . aware" of the "sexual harassment complaints").
7 Here, Plaintiff has barely enough circumstantial evidence of
8 knowledge to survive summary judgment.

9 Watson testified that he was aware of the "Family Medical
10 Leave Act" and the "California Family Rights Act," that Plaintiff
11 took a medical leave of absence, and that Plaintiff had requested
12 "continued leaves of absence." (Watson Dep. 67:7-12; 80:23-24;
13 113:20.) Watson further testified that, with respect to the
14 decision to remove Plaintiff from chairmanship, "we discussed what
15 his rights were under the medical leave act." (Watson Dep. 68:24-
16 25.) From his testimony, an inference arises that Watson and
17 others were aware that Plaintiff's leave rights would be implicated
18 by the removal decision. Moreover, Watson testified that he and
19 others rely on County counsel for information with respect to
20 employment decisions: "Before a personnel decision was made, we
21 would - would be advised by counsel as to whether the employee's
22 rights had been honored." (Watson Dep. 71:7-9.) Watson's testimony
23 suggests that, before the non-renewal decision, Watson and others
24 conferred with a person with specific knowledge of the particulars
25 of Plaintiff's lawsuit (County counsel). At no point in Watson's
26 testimony did he affirmatively disclaim knowledge that Plaintiff's
27 lawsuit concerned his leave rights. Based on Watson's testimony,
28

1 Plaintiff has circumstantial evidence sufficient to raise an
2 inference that he and others who discussed and decided upon the
3 non-renewal were aware that Plaintiff's lawsuit concerned his leave
4 rights. See *Dey*, 28 F.3d at 1458 (noting that, to survive summary
5 judgment, a plaintiff need not prove knowledge of protected
6 activity "by a preponderance of the evidence."). Accordingly,
7 Defendants' motion for summary judgment on the FMLA retaliation
8 claim is DENIED.

9 D. CFRA

10 1. "Retaliation" For Taking CFRA Leave

11 The Ninth Circuit in *Bachelder* and *Liu* rejected the
12 application of the *McDonnell Douglas* burden-shifting framework to
13 an FMLA claim premised on the theory that an employer used an
14 employee's FMLA leave as a negative factor in an adverse employment
15 decision. *Bachelder* and *Liu* also disapproved of labeling such
16 claims as "retaliation" claims. At least some California courts,
17 on the other hand, apply the *McDonnell Douglas* burden-shifting
18 framework to parallel CFRA claims and call them "retaliation"
19 claims. In *Faust v. California Portland Cement Co.*, the court
20 explained:

21 *Dudley v. Department of Transportation* (2001) 90
22 Cal.App.4th 255, 261, addresses the elements of a cause
23 of action for retaliation in violation of the CFRA.
24 *Dudley*, which was guided by the federal law counterpart,
25 sets forth the elements as follows: (1) the defendant was
26 an employer covered by CFRA; (2) the plaintiff was an
27 employee eligible to take CFRA leave; (3) the plaintiff
28 exercised her right to take leave for a qualifying CFRA
purpose; and (4) the plaintiff suffered an adverse
employment action, such as termination, fine, or
suspension, because of her exercise of her right to CFRA
leave. Once an employee establishes a prima facie case,
the employer is required to offer a legitimate,

1 nonretaliatory reason for the adverse employment action.
2 If the employer produces a legitimate reason for the
3 adverse employment action, the presumption of retaliation
4 drops out of the picture, and the burden shifts back to
5 the employee to prove intentional retaliation.

6
7 150 Cal. App. 4th 864, 885 (2007) (internal citations and quotation
8 marks omitted).

9 As the moving party with the burden of proof on his CFRA
10 retaliation claim, Plaintiff must show that no reasonable trier of
11 fact could find against him that because of his CFRA leave, an
12 adverse employment decision was made. Plaintiff must "demonstrate
13 affirmatively (by admissible evidence) that there is no genuine
14 issue of material fact as to each element of [his] claim for
15 relief, entitling [him] to judgment as a matter of law." *Coldwell*
16 *v. County of Fresno*, No. CV-F-07-1131 LJO SMS, 2009 WL 179686, at
17 *3 (E.D. Cal. Jan. 26, 2009).

18 With respect to the first three elements, Defendants admit
19 that Plaintiff took a CFRA leave from December 16, 2005 to March
20 15, 2006. (Doc. 278 at 23.) Defendants also concede that Plaintiff
21 took additional CFRA leave because Defendants acknowledge that
22 Plaintiff exhausted his CFRA leave by June 2006. However, for the
23 reasons discussed above with respect to Plaintiff's FMLA claim,
24 there is a triable issue as to whether Plaintiff was removed from
25 his chairmanship, and as to whether his contract was not renewed,
26 because of his CFRA leave. Accordingly, Plaintiff is not entitled
27 to summary judgment on his CRFA retaliation claim.

28 Defendants are also not entitled to summary judgment on this
CFRA retaliation claim. The nature of Plaintiff's evidence is such

1 that notwithstanding the contention that he was removed from his
2 chairmanship for legitimate reasons - because of his unprotected
3 absence and lack of evident commitment to return to work - a
4 reasonable trier of fact could nonetheless conclude that, because
5 of his CFRA leave, Plaintiff was removed from his chairmanship.
6 The same can be said with respect to the non-renewal of Plaintiff's
7 employment contract. Plaintiff's and Defendants' motions for
8 summary judgement are DENIED.

9 2. Denial Of/Interference With CFRA Leave

10 Under the CFRA, it is unlawful for an employer "to refuse to
11 grant a request" for CFRA leave made by an eligible employee for a
12 qualifying reason. Cal. Gov't Code § 12945.2(a). Plaintiff makes
13 the same claim under the CFRA that he does under the FMLA - that he
14 was "forced" to take full-time leave when he was entitled to a
15 reduced leave schedule. The same conclusions reached above apply
16 equally to this CFRA claim. See *Liu*, 347 F.3d at 1132 n.4
17 (recognizing that leave denial/interference claims under the CFRA and
18 FMLA can be analyzed together "[s]ince CFRA adopts the language of
19 the FMLA and California state courts have held that the same
20 standards apply."). The motions are DENIED.

21 E. Disability Claims

22 Plaintiff raises three FEHA claims related to an alleged
23 disability. Plaintiff asserts that the County accommodated his
24 disability (depression) from December 16, 2005 to April 16, 2006,
25 by providing him with a reduced work schedule. (Doc. 272 at 23.)
26 Plaintiff asserts that he requested an extension of his reduced
27 leave schedule. According to Plaintiff, "[o]n April 18, 2006,
28

1 Bryan refused to accommodate Jadwin's disability" and "[i]nstead he
2 forced him to take full-time leave" and required Plaintiff, upon
3 the cessation of his leave, to return to work full-time. (*Id.*)
4 Plaintiff claims that by failing to permit him to continue with his
5 reduced leave schedule, the County failed to reasonably accommodate
6 his disability in violation of the FEHA. Plaintiff also claims
7 that because he was required or "forced" to take a full-time leave,
8 the County failed to engage in the interactive process. Finally,
9 Plaintiff argues that the County discriminated against him because
10 of his disability in that his removal from the chairmanship and
11 associated pay cut, and the non-renewal of his contract, are
12 attributable to his disability.

13 1. Failure To Make Reasonable Accommodation

14 Under the FEHA, it is unlawful for an employer to "to fail to
15 make reasonable accommodation for the known physical or mental
16 disability of an applicant or employee" unless the accommodation
17 would "produce undue hardship to its operation." Cal. Gov't Code
18 § 12940(m). In order to establish a FEHA claim for failure to make
19 reasonable accommodation, a plaintiff must show that, at the time of
20 the alleged failure, (1) he had a disability of which the employer
21 was aware, (2) he was able to perform the essential functions of
22 the job at issue with or without accommodation, i.e., that he was
23 qualified individual,²⁰ and (3), the employer failed to reasonably
24

25 ²⁰ In cases where a leave of absence may be a reasonable
26 accommodation, the question is not whether the employee can perform
27 the essential functions of the job during the leave period.
28 Rather, the question is whether the leave of absence is likely to
enable the employee, upon his return from leave, to resume

1 accommodate for his disability. *Nadaf-Rahrov v. Neiman Marcus*
2 *Group, Inc.*, 166 Cal. App. 4th 952, 977-79 (2008); *Jensen v. Wells*
3 *Fargo Bank*, 85 Cal. App. 4th 245, 256 (2000); *Diaz v. Fed. Express*
4 *Corp.*, 373 F. Supp. 2d 1034, 1054 (C.D. Cal. 2005).

5 a. Disability

6 In this case, Plaintiff claims his "depression" qualifies as
7 a "mental disability." Under the FEHA, a "mental disability" is
8 defined, in relevant part, as including "any mental or
9 psychological disorder or condition, such as mental retardation,
10 organic brain syndrome, emotional or mental illness, or specific
11 learning disabilities, that limits a major life activity." §
12 12926(i)(1). A "mental disability" includes "chronic or episodic
13 conditions" such as, but not limited to, "clinical depression." See
14 § 12926.1©.

15 Defendants do not seriously dispute that Plaintiff had
16 depression, a mental condition, while working for the County. In
17 his letter to Bryan dated January 9, 2006, Plaintiff noted that he
18 was suffering from "depression and insomnia." (Doc. 266 at 133.)
19 Plaintiff's assertion that he was suffering from depression is
20 corroborated by the forms that Plaintiff's doctor, Dr. Riskin,
21 filled out to qualify Plaintiff for medical leaves. On these
22 forms, Dr. Riskin identified his practice as "psychiatry" and

23 _____
24 performing the essential functions of the job. *Hanson v. Lucky*
25 *Stores, Inc.*, 74 Cal. App. 4th 215, 226 (1999); *Humphrey v. Mem'l*
26 *Hosps. Ass'n*, 239 F.3d 1128, 1135-36 (9th Cir. 2001); *Nunes v. Wal-*
27 *Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999). Working
28 part-time while making a "gradual return to full-time work" can be
a reasonable accommodation. *Pals v. Schepel Buick & GMC Truck,*
Inc., 220 F.3d 495, 498 (7th Cir. 2000).

1 indicated that Plaintiff needed treatment and reoccurring doctor's
2 visits for his condition. (Doc. 270 at 4-6.) Plaintiff's assertion
3 that he was suffering from depression is also corroborated by Dr.
4 Reading, Plaintiff's forensic psychologist, who diagnosed Plaintiff
5 as having a major depressive disorder:

6 Dr. Jadwin developed an Axis I disorder during the course
7 of working at Kern, consisting of a major depressive
8 disorder. This was treated with both psychotherapy and
9 psychotropic medication by Dr Riskin, while he continued
10 to work, initially culminating in a regression of his
11 symptoms and improvement in function by around 2004. He
12 continued to function until the issues arising from the
oncology conference in 2005 led to a further flare up of
his depressive disorder, which had receded but not
resolved at that time. Arising from this and its
aftermath, he encountered a serious recurrence of his
depressive disorder, which has continued to the current
time.

13 (Doc. 269 at 61.) The County does not challenge that Plaintiff's
14 depression qualifies as "any mental . . . disorder or condition"
15 within the meaning of the FEHA. See *Auburn Woods I Homeowners*
16 *Ass'n v. Fair Employment Hous. Comm'n*, 121 Cal. App. 4th 1578,
17 1592-93 (2004) ("Numerous cases under state and federal law have
18 held that depression and its related manifestations can meet the
19 definition of disability under antidiscrimination laws.").

20 Rather than challenge the existence of Plaintiff's depression,
21 Defendants argue that Plaintiff's depression is not recognized
22 under the FEHA because it is a "work-related injury which arose
23 during the course of his employment, not a disability that he
24 brought with him to the job." (Doc. 262 at 13.) Defendants'
25 argument lacks merit. To be "disabled" within the meaning of the
26 FEHA, the employee need not bring the disability with him to the
27 job. A work-caused condition can be a cognizable "disability"

1 under the FEHA. See *City of Moorpark v. Superior Court*, 18 Cal.
2 4th 1143, 1157 (1998) ("Nothing in [the FEHA] suggests that the
3 FEHA only applies to physical or mental disabilities that are
4 unrelated to work.").²¹

6 ²¹ In a related argument, Defendants contend that Plaintiff's
7 disability-related FEHA claims are preempted by California workers'
8 compensation scheme. Defendants argue that workers' compensation
9 provides the exclusive remedy for Plaintiff's disability-related
10 FEHA claims because his disability - depression - was allegedly
11 "caused by working at KMC." (Doc. 253 at 15.) This argument is
12 erroneous. Plaintiff is not seeking damages for his depression.
13 Plaintiff is seeking remedies for violations of the FEHA, which
14 violations (if they occurred) fell outside the compensation
15 bargain. The workers' compensation scheme does not provide the
16 exclusive remedy for Plaintiff's disability-related claims under
17 the FEHA even if his depression arose from the employment
18 relationship. See *City of Moorpark*, 18 Cal. 4th at 1148 ("[W]e
19 consider whether FEHA . . . remedies are available to an employee
20 who has suffered discrimination based on a work-related disability,
21 meaning . . . a disability resulting from an injury arising out of
22 and in the course of the employment that gave rise to the
23 discrimination. We conclude that section 132a does not provide the
24 exclusive remedy . . . and that FEHA . . . remedies are
25 available."); *Ruiz v. Cabrera*, 98 Cal. App. 4th 1198, 1203 (2002)
26 ("[A]n injured worker c[an] pursue a disability discrimination
27 claim under the Fair Employment and Housing Act or a so-called
28 *Tameny* wrongful termination claim even though the disability arose
from an on-the-job injury.") (internal citation omitted); *Bagatti*
v. Dep't of Rehab., 97 Cal. App. 4th 344, 366-68 (2002) (concluding
that the Workers' Compensation Act does not provide the exclusive
remedy for a FEHA failure to accommodate claim, reasoning, in part,
that "[j]ust as discrimination on the basis of disability falls
outside the compensation bargain, so too the employer's commission
of another statutory unlawful employment practice, as defined by
subdivision (m) of section 12940, falls outside the compensation
bargain."). If the County can show that Plaintiff applied for and
obtained some compensation under the workers' compensation scheme,
due to "equitable principles," Plaintiff would not be able to
"recover these [same] damages as part of a subsequent FEHA
proceeding." *City of Moorpark*, 18 Cal. 4th at 1158. No such

1 Alternatively, Defendants argue that Plaintiff's mental
2 condition did not "substantially" limit him in the major life
3 activity of working. Defendants' reliance on the "substantially
4 limits" test from the ADA regime is misplaced. California law does
5 not follow this standard. *Turner v. Ass'n Of Am. Med. Colls.*, 167
6 Cal. App. 4th 1401, 1405-06 (2008) ("[T]he California definition of
7 disability as one that 'limits' a major life activity by making it
8 'difficult' is more inclusive than the ADA's 'substantially limits'
9 standard.").

10 Under California law a mental condition "limits" a major life
11 activity if "it makes the achievement of the major life activity
12 difficult." § 12926(i)(1)(B). This must be determined "without
13 regard to mitigating measures, such as medications, assistive
14 devices, or reasonable accommodations, unless the mitigating
15 measure itself limits a major life activity." § 12926(i)(1)(A).
16 "Major life activities" are to "be broadly construed and shall
17 include physical, mental, and social activities and working." §
18 12926(i)(1)©. With respect to "working," it qualifies as a major
19 life activity "regardless of whether the actual or perceived
20 working limitation implicates a particular employment or a class or
21 broad range of employments." § 12926.1©; see also *EEOC v. United*
22 *Parcel Serv., Inc.*, 424 F.3d 1060, 1073 (9th Cir. 2005). The "FEHA
23 does not require that the disability result in utter inability or
24 even substantial limitation on the individual's ability to perform
25 major life activities. A limitation is sufficient." *United Parcel*

26 _____
27 showing has been made.
28

1 *Service, Inc.*, 424 F.3d at 1071.

2 Plaintiff asserts that his depression made it difficult for
3 him to engage in "the medical work to which he had devoted his
4 life." (Doc. 272 at 19.) "In deciding whether [the employees']
5 limitations . . . make them 'disabled' under FEHA, the proper
6 comparative baseline is either the individual without the
7 impairment in question or the average unimpaired person." *Arteaga*
8 *v. Brink's, Inc.*, 163 Cal. App. 4th 327, 345 (2008) (emphasis and
9 internal quotation marks omitted). An average person can work 40
10 hours in a week, as "40 hours is considered a full work week in our
11 culture." *Arteaga*, 163 Cal. App. 4th at 346 (internal quotation
12 marks omitted). Plaintiff has established that, at the time he
13 sought a continuation of his reduced work schedule, he was limited
14 in the major life activity of working. His doctor's certifications
15 and his taking of leave reveal that his mental condition made it
16 difficult for him to work full-time, which is certainly a
17 "limitation" on working.

18 b. Knowledge

19 Under the FEHA, an impairment such as a mental or physical
20 condition does not by itself qualify as a mental or physical
21 disability under the statute. *Gelfo v. Lockheed Martin Corp*, 140
22 Cal. App. 4th 34, 47 (2006). To constitute a disability, the
23 condition must limit a major life activity of the employee. *Id.*

24 Courts have recognized that the knowledge required to support
25 a disability-related claim varies depending on the context. For
26 reasonable accommodation claims, a showing that the employer knew
27 the employee had some impairment such as a mental or physical
28

1 condition is not enough. The employer must have been aware that the
2 impairment limited the employee in a major life activity. See *Adams*
3 *v. Rice*, 531 F.3d 936, 953-54 (D.C. Cir. 2008) ("If, however, the
4 hypothetical telephone receptionist sought an accommodation from his
5 employer so that he could return to work, the employer would
6 obviously need to know about the employee's claimed hearing
7 limitation" not just the medical condition itself); *Taylor v.*
8 *Principal Fin. Group, Inc.*, 93 F.3d 155, 164 (5th Cir. 1996) ("[I]t
9 is important to distinguish between an employer's knowledge of an
10 employee's disability versus an employer's knowledge of any
11 limitations experienced by the employee as a result of that
12 disability. This distinction is important because the ADA requires
13 employers to reasonably accommodate limitations, not
14 disabilities."); *Avila v. Cont'l Airlines, Inc.*, 165 Cal. App. 4th
15 1237, 1252 (2008) ("[T]he duty of an employer reasonably to
16 accommodate an employee's handicap does not arise until the employer
17 is aware of respondent's disability and physical limitations.")
18 (internal quotation marks omitted).

19 With respect to a disability discrimination claim (which
20 Plaintiff also raises and which will be discussed below), where an
21 adverse employment action is taken because of the employee's
22 condition (e.g., cancer), an employer's actual knowledge of the
23 condition is enough. To be liable, the employer need not know that
24 the condition (of which it has knowledge) sufficiently limits a
25 major life activity.

26 [I]n pure discrimination cases like *Adams's*, an
27 employer's knowledge of the precise limitation at issue
28 is irrelevant; so long as the employee can show that her

1 impairment ultimately clears the statutory hurdle for a
2 disability-i.e., it substantially limited a major life
3 activity-the employer will be liable if it takes adverse
4 action against her based on that impairment.

5 *Adams*, 531 F.3d at 953.

6 If an employer disclaims actual knowledge of the employee's
7 condition, an employer can still be found liable for disability
8 discrimination in cases where knowledge of a disability can be
9 inferred. "Liability for disability discrimination does not require
10 professional understanding of the plaintiff's condition. It is
11 enough to show that the defendant knew of symptoms raising an
12 inference that the plaintiff was disabled." *Sanglap v. LaSalle Bank,*
13 *FSB*, 345 F.3d 515, 520 (7th Cir. 2003). Knowledge of just the
14 symptoms or effects of an otherwise undisclosed condition is not,
15 however, sufficient if those symptoms or effects do not raise an
16 inference that the person is disabled. See *Avila*, 165 Cal. App. 4th
17 at 1249 & n.5 (concluding the employer lacked sufficient knowledge
18 of an employee's physical disability because the hospital forms the
19 employee submitted stated only that the she was hospitalized for
20 three days and unable to work on four work days but did not
21 otherwise indicate that the employee suffered from pancreatitis or
22 any other condition, and for all the employer knew the employee
23 "might have been hospitalized for reasons other than disability");
24 *Brundage v. Hahn*, 57 Cal. App. 4th 228, 237 (1997) (concluding the
25 employer lacked knowledge of the employee's mental disability --
26 manic depressive disorder -- even though the employer knew the
27 employee "had taken a substantial amount of leave for medical
28 appointments" because none of the employee's leave requests "even

1 hinted at any mental disability"); *Hedberg v. Ind. Bell Tel. Co.*,
2 47 F.3d 928, 934 (7th Cir. 1995).

3 For purposes of his accommodation claim, Plaintiff has
4 sufficient evidence that Bryan/County were aware that he had a
5 mental condition and the limits it placed upon his ability to work
6 full-time.

7 Plaintiff's January 9, 2006, letter to Bryan specifically
8 stated that Plaintiff had developed "depression and insomnia." (Doc.
9 266 at 133.) In their response to Plaintiff's statement of
10 undisputed material facts, Defendants concede that "[o]n January 9,
11 2006, Dr. Jadwin had asked Defendant Bryan to allow him to work
12 part-time and at home *while he was recovering from his disabling*
13 *depression.*" (Doc. 278 at 28) (emphasis added.) Defendants also
14 concede that "Bryan admitted knowing that Dr. Jadwin needed leave
15 because of his depression." (Doc. 278 at 27.) In addition to these
16 concessions, Bryan attached Plaintiff's two requests for medical
17 leave to the memorandum he (Bryan) drafted summarizing the meeting
18 on April 28, 2006. (Doc. 266-2 at 9-10.) This demonstrates Bryan
19 had access to some of Plaintiff's leave-related documentation and
20 knew of Plaintiff's medical request for additional leave. Both of
21 his requests for medical leave also noted, on their face, that they
22 were accompanied by a "Physician's Note." (*Id.*). Defendants concede
23 that "Dr. Riskin's certifications stated that Plaintiff needed
24 medical/recuperative leave for depression from December 16, 2005 to
25 September 16, 2006." (Doc. 278 at 27.) These forms indicated that
26 Dr. Riskin's practice was "psychiatry" and recommended that
27 Plaintiff work less than full-time. (Doc. 270 at 4-6.) See *Faust*,

1 150 Cal. App. 4th at 887 (concluding that the employee's submission
2 of a chiropractor's "work status report" stating that the employee
3 was "'unable to perform regular job duties'" created a triable issue
4 as to the employer's knowledge of the employee's physical
5 disability, noting that "an employer knows an employee has a
6 disability when the employee tells the employer about his condition,
7 or when the employer otherwise becomes aware of the condition, such
8 as through a third party or by observation."). Plaintiff has
9 carried his burden of demonstrating that Bryan/County had sufficient
10 knowledge of his disability at the time of his requested
11 accommodation.

12 c. Denial Of A Reasonable Accommodation

13 Plaintiff argues that notwithstanding knowledge of his
14 disability, the County denied him a reasonable accommodation.
15 Plaintiff concedes that the County accommodated his disability for
16 four months, "from December 16, 2005 to April 16, 2006, by providing
17 him with the reduced work schedule medical leave" that he had
18 requested. (Doc. 272 at 23.) Plaintiff argues that he requested an
19 extension of his reduced leave schedule consistent with his
20 psychiatrist's certification. On April 28, 2006, Bryan allegedly
21 refused to grant this request and accommodate Plaintiff's
22 disability. Instead, Bryan allegedly required Plaintiff to take
23 full-time leave until June 16, 2006, the date on which Plaintiff
24 would have apparently exhausted all potential sources of leave
25 entitlement (Doc. 266-2 at 5.) On that date, Plaintiff had to give
26 the County an answer as to whether the would return to work full-
27 time or not. (*Id.*)

1 By classifying his full-time leave - which Bryan allegedly
2 required him to take - as a denial of reasonable accommodation,
3 Plaintiff has overlooked the fact that his full-time leave could
4 have constituted a reasonable accommodation in itself. *Hanson v.*
5 *Lucky Stores, Inc.*, 74 Cal. App. 4th 215, 226 (1999) ("[A] finite
6 leave can be a reasonable accommodation under FEHA, provided it is
7 likely that at the end of the leave, the employee would be able to
8 perform his or her duties."); *Humphrey v. Mem'l Hosps. Ass'n*, 239
9 F.3d 1128, 1135-36 (9th Cir. 2001) (recognizing that a leave of
10 absence may be a reasonable accommodation under the ADA where it
11 "would reasonably accommodate an employee's disability and permit
12 him, upon his return, to perform the essential functions of the
13 job").

14 Whether his full-time leave was a reasonable accommodation is
15 a fact-specific individualized inquiry that takes into account the
16 totality of the circumstances. See *Hanson*, 74 Cal. App. 4th at 228
17 n.11; *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir.
18 1999); *Zukle v. Regents Of The Univ. Of Cal.*, 166 F.3d 1041, 1048
19 (9th Cir. 1999). "In the summary judgment context, a court should
20 weigh the risks and alternatives, including possible hardships on
21 the employer, to determine whether a genuine issue of material fact
22 exists as to the reasonableness of the accommodation." *Nunes*, 164
23 F.3d at 1247. When more than one accommodation is reasonable, it
24 is the employer's prerogative to choose which accommodation will be
25 utilized. *Hanson*, 74 Cal. App. 4th at 228.

26 When confronted with Plaintiff's request for an extension on
27 his leave, besides the course it took, the County could have
28

1 permitted Plaintiff to continue working on a reduced schedule for
2 some period of time, and at least until all his sources of leave
3 (including his entitlements under the FMLA/CFRA) were exhausted.
4 Despite potential alternatives, if the accommodation Plaintiff
5 actually received was a reasonable one, Plaintiff's accommodation
6 claim fails as a matter of law.

7 In light of all the circumstances, there is a genuine dispute
8 as to whether full-time leave was a reasonable accommodation for
9 Plaintiff's disability.

10 In the County's favor, Plaintiff's doctor's certification
11 indicated he needed to work "part-time or less" to avoid worsening
12 of his serious medical condition. (Doc. 270 at 6) (emphasis added.)
13 The certification certainly justified the County in offering full-
14 time leave. If Plaintiff was offered full-time leave and he took
15 it without protest (which the evidence, when construed in a light
16 most favorable to Defendants, suggests), a trier of fact could
17 conclude that full-time leave was a reasonable accommodation.

18 In Plaintiff's favor, the doctor's certification did not
19 explicitly restrict Plaintiff from working altogether - which, if
20 Plaintiff is to be believed, is what Bryan did by requiring him to
21 take full-time leave. The County has not pointed to any concrete
22 evidence that a full-time leave was, actually, better for
23 Plaintiff's disability, and thus more likely to assist his return
24 to full-time employment, than a reduced work schedule. If the
25 County simply forced Plaintiff to take a full-time leave that was
26 not mandated by his doctor nor medically better for Plaintiff in any
27 event, a reasonable jury could conclude that the County's
28

1 accommodation was unreasonable. Even if Plaintiff's full-time leave
2 was not a reasonable accommodation, this alone does not establish
3 Plaintiff's failure to accommodate claim. Plaintiff must create a
4 triable issue that a reasonable accommodation existed which he was
5 denied. *Nadaf-Rahrov*, 166 Cal. App. 4th at 979.

6 Viewing the evidence in the light most favorable to Plaintiff,
7 the County could have permitted Plaintiff to remain on a reduced
8 work schedule leave for some period of time, and at least until his
9 entitlements to leave, including his entitlements under the FMLA and
10 CFRA, ran out. A reduced work schedule leave would have been more
11 consistent with the doctor's certification, which did not explicitly
12 restrict Plaintiff from working altogether, and hence better
13 tailored to Plaintiff's medical needs. Plaintiff also has evidence
14 that working part-time was therapeutic for him and, accordingly,
15 more likely to aid his recovery and return to full-time employment
16 than a forced full-time leave. Viewing the evidence in a light most
17 favorable to Plaintiff, it is at least plausible (although by no
18 means clear) that permitting Plaintiff to continue with his reduced
19 work schedule could have facilitated Plaintiff's return to
20 employment on some level of availability acceptable to the County.
21 See *Hanson*, 74 Cal. App. 4th at 226 ("As long as a reasonable
22 accommodation available to the employer could have plausibly enabled
23 a handicapped employee to adequately perform his job, an employer
24 is liable for failing to attempt that accommodation.") (internal
25 quotation marks omitted); *Nunes*, 164 F.3d at 1247 ("Even an extended
26 medical leave, or an extension of an existing leave period, may be
27 a reasonable accommodation if it does not pose an undue hardship on
28

1 the employer.") (emphasis added). The County has not sufficiently
2 demonstrated that permitting such an arrangement would have caused
3 undue hardship. Accordingly, Plaintiff's reasonable accommodation
4 claim survives Defendants' motion for summary judgment. As
5 discussed above, however, a reasonable trier of fact could conclude
6 that Plaintiff was provided a reasonable accommodation in that he
7 was offered full-time leave and he took it without protest. After
8 his full-time leave ended, Plaintiff requested no further leave for
9 his disability. Accordingly, Plaintiff is not entitled to summary
10 judgment on his reasonable accommodation claim. Both parties'
11 motions on the failure to accommodate claim are DENIED.

12 2. Failure To Engage In The Interactive Process

13 Under the FEHA, it is unlawful for an employer "to fail to
14 engage in a timely, good faith, interactive process with the
15 employee or applicant to determine effective reasonable
16 accommodations, if any, in response to a request for reasonable
17 accommodation by an employee or applicant with a known physical or
18 mental disability or known medical condition." Cal. Gov't Code §
19 12940(n). "I[t] is the employee's initial request for an
20 accommodation which triggers the employer's obligation to
21 participate in the interactive process of determining one." *Spitzer*
22 *v. Good Guys, Inc.*, 80 Cal. App. 4th 1376, 1384 (2000) (internal
23 quotation marks omitted).

24 [T]he interactive process requires communication and
25 good-faith exploration of possible accommodations between
26 employers and individual employees with the goal of
27 identify[ing] an accommodation that allows the employee
28 to perform the job effectively. . . . [F]or the process
to work [b]oth sides must communicate directly, exchange
essential information and neither side can delay or

1 obstruct the process. When a claim is brought for failure
2 to reasonably accommodate the claimant's disability, the
3 trial court's ultimate obligation is to isolate the cause
4 of the breakdown . . . and then assign responsibility so
5 that [l]iability for failure to provide reasonable
6 accommodations ensues only where the employer bears
7 responsibility for the breakdown.

8 *Nadaf-Rahrov*, 166 Cal. App. 4th at 985 (alteration in original)
9 (internal citations and quotation marks omitted). To succeed on an
10 interactive process claim, the employee must show that a reasonable
11 accommodation was available. *Id.* at 985.

12 There can be no dispute that Plaintiff requested to continue
13 working on a reduced schedule. By Plaintiff's account, in response
14 to his request, at the meeting on April 28, 2006, rather than
15 discuss possible accommodations, he was simply told to take a full-
16 time leave which he never requested. Plaintiff has created a
17 genuine dispute of material fact whether a reasonable accommodation
18 existed (which the interactive process could have uncovered). By
19 the County's account, Plaintiff was offered full-time leave, which
20 the County preferred, and Plaintiff took it without protest. On
21 these divergent facts, no party is entitled to summary judgment on
22 Plaintiff's interactive process claim.

23 3. Disability Discrimination

24 Under the FEHA, it is unlawful for an employer "because of" a
25 person's "physical disability, mental disability, [or] medical
26 condition" to "refuse to hire or employ the person" or "to discharge
27 or to bar the person from employment" or to "discriminate against
28 the person in compensation or in terms, conditions, or privileges
of employment." Cal. Gov't Code § 12940(a). To establish a prima

1 facie case of disability discrimination, Plaintiff must show: (1)
2 that he suffered from a disability of which the employer was aware;
3 (2) that, notwithstanding his disability, he could perform the
4 essential functions of his job with or without reasonable
5 accommodation, and (3) that he was subjected to an adverse
6 employment action because of his disability.²² See *Green v. State*,
7 42 Cal. 4th 254, 262, 264 (2007); *Nadar-Rahrov*, 166 Cal. App. 4th
8 at 964; *Finegan v. County of Los Angeles*, 91 Cal. App. 4th 1, 7
9 (2001). To satisfy the third element, among other things, "a
10 plaintiff must prove the employer had knowledge of the employee's
11 disability when the adverse employment decision was made." *Brundage*,
12 57 Cal. App. 4th at 236-37; see also *Avila*, 165 Cal. App. 4th at
13 1248 ("[T]o show that Continental acted with discriminatory intent,
14 plaintiff was required to produce evidence that the Continental
15 employees who decided to discharge him knew of his disability.").

16 Plaintiff asserts that because of his disability, depression,
17 he was removed from his chairmanship and his pay was cut, and his
18 contract was not renewed. Because his FMLA/CFRA leaves of absence
19 were for his depression (also a disability under the FEHA),
20 Plaintiff claims that any adverse decision based on those absences
21 is unlawful disability discrimination. See *Head v. Glacier Nw.*
22 *Inc.*, 413 F.3d 1053, 1065 (9th Cir. 2005) ("[W]e hold that the ADA
23

24 ²² As discussed above, Plaintiff has met his burden of
25 demonstrating that he had a mental condition which limited his
26 ability to work. Plaintiff also has created a triable issue (but
27 not conclusively established) that he could perform the essential
28 functions of his job with or without reasonable accommodation for
his disability.

1 outlaws adverse employment decisions motivated, even in part, by
2 animus based on a plaintiff's disability or request for an
3 accommodation-a motivating factor standard."); *Humphrey*, 239 F.3d
4 at 1139-40 (recognizing that "conduct resulting from a disability
5 is considered to be part of the disability, rather than a separate
6 basis for" an adverse employment action, and giving, as an example,
7 "excessive absenteeism caused by migraine-related absences").
8 Relatedly, Plaintiff argues because permitting him to continue
9 working on a reduced schedule would have been a reasonable
10 accommodation, then demoting Plaintiff for his complete absence from
11 work during his full-time leave - when he would have been there at
12 least part of the time if a reasonable accommodation were given -
13 also constitutes discrimination because of his disability. See
14 *Humphrey*, 239 F.3d at 1140 ("The link between the disability and
15 termination is particularly strong where it is the employer's
16 failure to reasonably accommodate a known disability that leads to
17 discharge for performance inadequacies resulting from that
18 disability."). These issue remain in dispute.

19 a. Removal From The Chairmanship And Pay Cut

20 The evidence shows that Bryan had knowledge of Plaintiff's
21 disability. Because the JCC adopted Bryan's recommendation, Bryan's
22 knowledge of Plaintiff's disability is sufficient (Plaintiff need
23 not separately prove the JCC also had the requisite knowledge at the
24 time of the removal vote). See *Wysinger v. Auto. Club Of S. Cal.*,
25 157 Cal. App. 4th 413, 421 (2007) (recognizing that the "decision
26 maker's ignorance does not categorically shield the employer from
27 liability if other substantial contributors to the decision bore the
28

1 requisite animus" and stating "[b]ecause Kane was a motivating force
2 in the selection, his animus is imputed to ASCS [the employer]").

3 There is a triable issue as to whether it was Plaintiff's
4 absence from work during his protected leaves under the FMLA/CFRA,
5 including his full-time leave, that prompted the removal decision,
6 or whether it was his continued unprotected absence after his
7 protected leave expired which prompted the removal decision.
8 Plaintiff has not sufficiently demonstrated that his absence from
9 work after his full-time leave expired was attributable to his
10 disability. Indeed, it seems Bryan took it upon himself to place
11 Plaintiff on Personal Necessity Leave for reasons unrelated to
12 Plaintiff's depression - Plaintiff avulsed a ligament in his ankle.
13 After his full-time leave ended, Plaintiff requested no further
14 leave for his disability. For these reasons, the County survives
15 Plaintiff's disability discrimination claim. This motion is DENIED.

16 b. Non-renewal

17 To support his claim that the non-renewal of his contract was
18 motivated by his disability, Plaintiff relies on the testimony of
19 Watson:

20 Q. So the question is: You've mentioned that for the
21 nonrenewal one of the reasons was that Dr. Jadwin wasn't
available for work; is that correct or

22 A. My understanding was that he had -- he had been on
23 medical leave, family leave, and had requested even more
24 leave, and that for that reason and the fact that he was
suing us, that we decided not to renew his contract.

25 (Watson Dep. 113:15-23.) Viewing this testimony in a light most
26 favorable to the County, this testimony does not warrant summary
27 judgment in Plaintiff's favor. As discussed above, a reasonable
28

1 interpretation of this testimony is "that reason" was a reference
2 to Plaintiff's non-protected leave after his FMLA/CFRA leave
3 expired. The evidence is insufficient to show that Plaintiff's
4 absence, at that time, was attributable to his depression. It
5 appears Bryan took it upon himself to place Plaintiff on Personal
6 Necessity Leave for reasons unrelated to Plaintiff's depression.
7 Plaintiff actually denies that he requested any further leave of
8 absence from Bryan, whether because of his depression or otherwise,
9 after his full-time leave expired. Because Watson's testimony can
10 be reasonably interpreted as referring to Plaintiff's absence from
11 work at a time when his absence was not attributable to his
12 disability (depression), Plaintiff is not entitled to summary
13 judgment on this disability discrimination claim. This motion is
14 DENIED.

15 With respect to the County's motion for summary judgment,
16 viewing this testimony and other evidence in a light most favorable
17 to Plaintiff, the County is not entitled to summary judgment on this
18 claim. Another reasonable interpretation of Watson's testimony is
19 that Plaintiff's "medical leave," including his full-time leave,
20 motivated, in part, the non-renewal decision. Of course, this alone
21 is not sufficient to establish Plaintiff's disability discrimination
22 claim. To survive summary judgment, Plaintiff must raise a triable
23 issue that Watson and the other decision-makers²³ deciding upon
24 Plaintiff's non-renewal had sufficient knowledge that Plaintiff's
25

26
27 ²³ Bryan retired in September 2006 and did not participate in
28 the non-renewal decision.

1 "medical leave" was attributable to an underlying disability.²⁴

2 At his deposition, when asked about why he supported the
3 removal of Plaintiff from his chairmanship, Watson explained that
4 "he [Plaintiff] wasn't there *mentally* or physically." (Watson Dep.
5 at 16:9) (emphasis added.) When asked about Plaintiff's "emotional
6 health," Watson responded:

7 A. My - my overall impression over the months from
8 hearing verbal reports was that Dr. Jadwin was emotional
9 and irrational, confrontational. I have never observed
10 it. All I could rely on is what I was told.

11

12 Q. What do you understand the term "emotional health" to
13 mean?

14 A. That he [Plaintiff] was highly reactive, highly
15 emotional -

16 Q. Yeah.

17 A. - - and just didn't seem to be rational.

18 Q. Didn't seem to be rational?

19 A. In his - in the way that he was dealing with people.

20 When asked about Plaintiff's medical leave, Watson responded that
21 "I know that he had some medical issues." (Watson Dep. 68:22-25.)
22 (emphasis added.) Watson further explained "From the - my
23 understanding of the way he had been handling him selves - himself
24 and asking for continued leaves of absence, I was under the
25 impression that he really wasn't able to - *to function*, and I really

26 ²⁴ Although Watson, in his declaration, now claims that "no
27 such decision" on the non-renewal was made, the court cannot weigh
28 the evidence and determine which version of the events the trier of
fact is likely to believe. On summary judgment, the court must
analyze the evidence in a light most favorable to the non-moving
party.

1 didn't expect him to come back [after being removed from his
2 chairmanship]." (Watson Dep. 80:22-81:2) (emphasis added.) Finally,
3 when asked specifically about whether he knew Plaintiff had
4 depression, Watson testified as follows:

5 Q. Were you aware that Dr. Jadwin was suffering from
6 depression, that he was a disabled individual?

7 A. His specific diagnosis I was not aware of. I was aware
8 that he seemed to be having some emotional issues of some
9 kind.

10 Q. Okay. And again, when did you - when did you become
11 aware that Dr. Jadwin was having emotional issues of some
12 kind?

13 A. I could not tell you when. I think it was a part of
14 a pattern that had been discussed over many months.

15 (Watson Dep. 85:3-14.)

16 "Liability for disability discrimination does not require
17 professional understanding of the plaintiff's condition. It is
18 enough to show that the defendant knew of symptoms raising an
19 inference that the plaintiff was disabled." *Sanglap*, 345 F.3d at
20 520. Watson's testimony that he was aware Plaintiff was not there
21 "mentally," was "emotional and irrational," was having "emotional
22 issues of some kind[,] " "had some medical issues," that he "was
23 asking for continued leaves of absence" and was thus "under the
24 impression" that Plaintiff "wasn't able to - to function" and that
25 his emotional issues were "part of a pattern that had been discussed
26 over many months" is sufficient to create a triable issue that
27 Watson had the requisite knowledge that Plaintiff's medical leaves
28 of absence were attributable to some underlying mental condition.
Viewed in a light most favorable to Plaintiff, Watson's testimony
also creates an inference that Plaintiff's irrational behavior,

1 "pattern" of emotional issues and leaves of absence were common
2 knowledge and/or discussed among decision-makers such that Watson
3 and any others who participated in the non-renewal decision had
4 sufficient knowledge that Plaintiff's absence from work was
5 attributable to some underlying mental condition. Plaintiff's
6 disability discrimination claim survives summary judgment.
7 Defendant's motion is DENIED.

8 **F. FEHA Retaliation Claim**

9 Under the FEHA, it is unlawful for an employer "to discharge,
10 expel, or otherwise discriminate against any person because the
11 person has opposed any practices forbidden under this part or
12 because the person has filed a complaint, testified, or assisted in
13 any proceeding under this part." Cal. Gov't Code § 12940(h). To
14 establish a prima facie case of retaliation under this section, a
15 plaintiff must show: (1) he engaged in protected activity; (2) he
16 was thereafter subject to adverse employment action; and (3) a
17 causal link between the two. *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal.
18 4th 1028, 1042 (2005); *Mathieu v. Norrell Corp.*, 115 Cal. App. 4th
19 1174, 1185 (2004). "Essential to a causal link is evidence that the
20 employer was aware that the plaintiff had engaged in the protected
21 activity." *Morgan*, 88 Cal. App. 4th at 70 (internal quotation marks
22 omitted).

23 Plaintiff argues that he engaged in protected activity under
24 the FEHA by filing DFEH complaints and his initial federal complaint
25 in this action which contained (and still contains) causes of action
26 under FEHA, including the CFRA. Plaintiff contends that, because
27 of this protected activity, his employment contract was not renewed.
28

1 In support of his theory, Plaintiff relies on the testimony of
2 Watson that "[m]y understanding was that [Plaintiff] had - he had
3 been on medical leave, family leave, and had requested even more
4 leave, and that for that reason and *the fact that he was suing us*,
5 that we decided not to renew his contract." (Watson Dep. 113:15-23)
6 (emphasis added.)

7 Plaintiff's FEHA retaliation claim lacks sufficient evidence
8 to warrant summary judgment in Plaintiff's favor. Watson's
9 testimony does not demonstrate that those discussing and deciding
10 upon Plaintiff's non-renewal were aware that Plaintiff's lawsuit
11 involved his rights under the FEHA, including the CFRA. To
12 demonstrate that the County retaliated against Plaintiff "because"
13 he filed a complaint asserting his rights under the FEHA, the
14 putative retaliators must have at least known that Plaintiff engaged
15 in the protected activity, not just that Plaintiff "was suing us."
16 The testimony from Watson similarly provides no strong indication
17 that, even if the decision-makers were minimally aware of the
18 protected activity, that it was the FEHA claims, as opposed to
19 Plaintiff's combative nature as further exemplified by the fact that
20 he "was suing us," which motivated the decision-makers.

21 While Plaintiff's evidence is not sufficient to warrant summary
22 judgment in his favor, Plaintiff's evidence, when construed in a
23 light most favorable to him, is sufficient to survive Defendants'
24 motion for summary judgment. Watson testified that Plaintiff's
25 contract was not renewed, in part, because Plaintiff "was suing us."
26 As discussed above, for purposes of surviving summary judgment,
27 Plaintiff has just enough evidence to infer that Watson and those
28

1 discussing and deciding upon the non-renewal were aware that
2 Plaintiff had engaged in protected activity, i.e., that his lawsuit
3 concerned his leave rights. Plaintiff's leave rights were (and are)
4 embedded in the FMLA and CFRA, and the later is a part of the FEHA.
5 Accordingly, Defendants' motion for summary judgment is DENIED.

6
7 G. 42 U.S.C. § 1983 Claim - Procedural Due Process

8 Plaintiff's § 1983 is premised on an alleged violation of his
9 procedural due process rights under the Fourteenth Amendment.
10 Specifically, Plaintiff asserts that he was removed from his
11 chairmanship and his pay was cut, he was placed on involuntary paid
12 administrative leave and his contract was not renewed, all without
13 affording him procedural due process under the Fourteenth Amendment.

14 Section 1983 creates a federal cause of action for the
15 deprivation, under color of state law, of rights guaranteed by the
16 United States Constitution. *San Bernardino Physicians Servs. Med.*
17 *Group, Inc. v. County of San Bernardino*, 825 F.2d 1404, 1407 (9th
18 Cir. 1987). There is no dispute that the conduct at issue in this
19 case occurred under the color of state law. (Doc. 278 at 32.)

20 "The County, as a municipality, may be liable under section
21 1983 only if the alleged violation was pursuant to 'official
22 municipal policy.'" *Lake Nacimiento Ranch Co. v. San Luis Obispo*
23 *County*, 841 F.2d 872, 878 (9th Cir. 1987) (quoting *Monell v. Dep't*
24 *Of Soc. Servs.*, 436 U.S. 658, 691 (1978)). The official municipal
25 policy must be the "'moving force' behind the constitutional
26 violation." *Galen v. County of Los Angeles*, 477 F.3d 652, 667 (9th
27 Cir. 2007) (quoting *Monell*, 436 U.S. at 694-95). Individuals may
28

1 be liable under § 1983 only if they, in some manner, are personally
2 involved in the alleged violation. See *Barren v. Harrington*, 152
3 F.3d 1193, 1194 (9th Cir. 1998) (“[P]laintiff must allege facts, not
4 simply conclusions, that show that an individual was personally
5 involved in the deprivation of his civil rights. Liability under §
6 1983 must be based on the personal involvement of the defendant.”);
7 see also *Motley v. Parks*, 432 F.3d 1072, 1081 (9th Cir. 2005) (“A
8 supervisor can be liable under § 1983 if he set[s] in motion a
9 series of acts by others . . . which he knew or reasonably should
10 have known, would cause others to inflict the constitutional
11 injury.”) (internal quotation marks omitted) (alteration in
12 original).

13 “The Fourteenth Amendment protects individuals against the
14 deprivation of liberty or property by the government without due
15 process.” *Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9th
16 Cir. 1993). In this case, Plaintiff claims a deprivation of a
17 property interest. To prevail on his constitutional claim,
18 Plaintiff must establish: “(1) a property interest protected by the
19 Constitution; (2) a deprivation of the interest by the government;
20 and a (3) lack of required process.” *Ulrich v. City of San*
21 *Francisco*, 308 F.3d 968, 974 (9th Cir. 2002).²⁵

22 “[P]roperty interests . . . are not created by the
23 Constitution. Rather they are created and their dimensions are
24 defined by existing rules or understandings that stem from an
25 independent source such as state law-rules or understandings that

26
27 ²⁵ Plaintiff concedes that he “does not allege deprivation of
28 liberty.” (Doc. 275 at 18.)

1 secure certain benefits and that support claims of entitlement to
2 those benefits." *Bd. Of Regents Of State Colls. v. Roth*, 408 U.S.
3 564, 577 (1972). As explained in *Roth*:

4 To have a property interest in a benefit [e.g., a job],
5 a person clearly must have more than an abstract need or
6 desire for it. He must have more than a unilateral
expectation of it. He must, instead, have a legitimate
claim of entitlement to it.

7 *Id.* Although property interests are not created by the federal
8 Constitution, federal constitutional law helps determine whether an
9 asserted interest "rises to the level of a legitimate claim to
10 entitlement protected by the Due Process Clause." *Loehr v. Ventura*
11 *County Cmty. Coll. Dist.*, 743 F.2d 1310, 1314 (9th Cir. 1984)
12 (internal quotation marks omitted).

13 The Fourteenth Amendment's due process guarantee attaches when
14 public employees have a property interest in their continued
15 employment. *Ulrich*, 308 F.3d at 975. To have a protected property
16 interest, "the decision to grant [or take away] the benefit" must
17 be removed "from agency discretion." *Peacock v. Bd. Of Regents Of*
18 *The Univs. & State Colls. Of Az.*, 510 F.2d 1324, 1327 (9th Cir.
19 1975). Thus, "a state law which limits the grounds upon which an
20 employee may be discharged, such as conditioning dismissal on a
21 finding of cause, creates a constitutionally protected property
22 interest" in continued employment. *Dyack v. Commonwealth Of The*
23 *Northern Mariana Islands*, 317 F.3d 1030, 1033 (9th Cir. 2003)
24 (internal quotation marks omitted). On the other hand, where "a
25 state employee serves at will, he or she has no reasonable
26 expectation of continued employment, and thus no property right."
27 *Id.* at 1033; see also *Clements v. Airport Auth. Of Washoe County*,

69 F.3d 321, 331 (9th Cir. 1995). A public employee may (or may not) have a property interest in a specific position, as opposed to a property interest in continued employment generally. See *Stiesberg v. State of California*, 80 F.3d 353, 356-57 (9th Cir. 1996); *Ross v. Clayton County, Ga.*, 173 F.3d 1305, 1307 (11th Cir. 1999); *Shoemaker v. County of Los Angeles*, 37 Cal. App. 4th 618, 632 (1995).

If there is a constitutionally protected property interest at stake, the next question is what process was due in connection with a deprivation of that property interest. See *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("[O]nce it is determined that the Due Process Clause applies, the question remains what process is due") (internal quotation marks omitted). "The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Id.* at 546. If a cognizable property interest is taken away by the government without the requisite due process, a constitutional violation occurs.

1. The County's Alleged Liability

Plaintiff argues that the KMC bylaws, which were incorporated into his employment contract, represent official policy of the County. Defendants do dispute that the bylaws represent official County policy. The bylaws were adopted the County Board of Supervisors. (Doc. 278 at 31.) This is sufficient to make them official policy of the County. See *Lake Nacimiento Ranch Co.*, 841 F.2d at 879 ("The Board of Supervisors may only establish official

1 policy [of the County] by a majority of the supervisors.") (citing
2 Cal. Gov't Code § 25005).

3 Plaintiff's brief suggests he attempts to advance two species
4 of *Monell* liability based upon the bylaws. In his briefing,
5 Plaintiff states:

6 The Bylaws [in effect] provided for extensive due process
7 for core physicians in numerous scenarios like loss of
8 hospital privileges, *but not for* (i) removal of
9 physicians from department chairmanship, (ii) placement
of physicians on administrative leave, or (iii)
nonrenewal of physician employment contracts with
Defendant County.

10 (Doc. 272 at 25) (emphasis added.) From this passage, it appears
11 Plaintiff is claiming that the County's *failure* to have or require
12 terms in the bylaws which provide due process rights in connection
13 with the removal of physicians from department chairmanship, the
14 placement of physicians on administrative leave, or the non-renewal
15 of physician employment contracts, *caused* the alleged constitutional
16 violations in this case. Where the municipal entity's liability is
17 premised on a failure to act, there are specific elements that must
18 be satisfied:

19 To impose liability on a local governmental entity for
20 failing to act to preserve constitutional rights, a
21 section 1983 plaintiff must establish: (1) that he
22 possessed a constitutional right of which he was
23 deprived; (2) that the municipality had a policy; (3)
that this policy 'amounts to deliberate indifference' to
the plaintiff's constitutional right; and (4) that the
policy is the 'moving force behind the constitutional
violation.'

24 *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992) (*quoting City*
25 *of Canton v. Harris*, 489 U.S. 378, 389-91 (1989)); *see also Berry*
26 *v. Baca*, 379 F.3d 764, 767 (9th Cir. 2004). Plaintiff has made no
27 showing, nor even any effort to show, that the County's failure to
28

1 have or require specific provisions in the bylaws to provide due
2 process rights in connection with department chair removals,
3 administrative leaves, or the non-renewal of physician employment
4 contracts amounts to a policy of deliberate indifference to
5 Plaintiff's constitutional rights. Plaintiff's briefing, however,
6 also suggests that he is claiming those responsible for his
7 demotion, his administrative leave, and the non-renewal of his
8 contract "were acting pursuant to the Bylaws" in taking such actions
9 and, by these actions, they violated his due process rights. (Doc.
10 272 at 25.) This type of claim is *not* a failure to act claim; it
11 is a claim that county actors were following the letter of express
12 official policy and, in doing so, deprived Plaintiff of his
13 constitutional rights.

14 a. Removal From The Chairmanship

15 There can be no dispute that the JCC was acting pursuant to the
16 bylaws in removing Plaintiff from his chairmanship. Bryan's
17 memorandum to the JCC stated: "I therefore request that the Joint
18 Conference Committee act pursuant to paragraph 9.7-4 of the Medical
19 Staff Bylaws and, by majority vote, endorse my recommendation to
20 rescind Dr. Jadwin's appointment as Chairman, Department of
21 Pathology." (Doc. 266-2 at 32.) That paragraph of the bylaws reads:

22 9.7-4 REMOVAL

23 Removal of a department chair may occur with or without
24 cause upon the recommendation of the chief executive
25 officer with the majority vote of the Joint Conference
26 Committee.

27 (Doc. 266 at 81.) No party disputes that Bryan was the chief
28 executive officer. With respect to his removal, Plaintiff's due

1 process claim is premised on the theory that he had a cognizable
2 property interest in his chair position, to which part of his base
3 salary was tied, and that he was removed from his position without
4 due process. Plaintiff's argument is erroneous.

5 "No constitutionally protected property interest can exist in
6 the outcome of a decision unmistakably committed . . . to the
7 discretion of the [public entity]." *Ulrich*, 308 F.3d at 976
8 (alteration in original) (internal quotation marks omitted). Where
9 "a state employee serves at will, he or she has no reasonable
10 expectation of continued employment, and thus no property right."
11 *Dyack*, 317 F.3d at 1033. Plaintiff's employment contract with the
12 County explicitly incorporates the bylaws and states that Plaintiff
13 will be employed pursuant to the bylaws:

14 10. EMPLOYMENT STATUS

15 Core Physician shall be employed by the County of Kern
16 pursuant to the terms of this Agreement and the medical
17 staff bylaws of KMC. Core Physician acknowledges that he
18 or she will not be deemed a classified employee, or have
19 any rights or protections under the County's Civil
20 Service Ordinance, rules or regulations.

21 (Doc. 266 at 23.) In addition, Plaintiff's employment contract
22 emphasizes that he will be "governed" by the bylaws.

23 13. MEDICAL STAFF MEMBERSHIP

24 Core Physician will at all times be a member in good
25 standing of the medical staff of Kern Medical Center and
26 governed as such by the medical staff bylaws.

27 (*Id.*) As mentioned above, one of the bylaws explicitly permitted
28 Plaintiff's removal from his chairmanship *with or without cause*.
Accordingly, Plaintiff served in his chair position at-will and thus
had no property interest in his chair position. See *Agosta v. Agor*,

1 120 Cal. App. 4th 596, 604 (2004) ("By definition . . . an express
2 at-will contract allows an employer to sever the . . . relationship
3 with or without cause."). The fact that the removal had to be
4 preceded by Bryan's recommendation, and garner a majority vote, does
5 not change the at-will status of his position or the fact that the
6 voters retained unfettered discretion to remove Plaintiff from his
7 chairmanship. *Cf. Stiesberg*, 80 F.3d at 357.

8 Plaintiff asserts that the bylaws deprived him of due process
9 because his employment contract barred Defendants from "removing
10 Plaintiff from [the] chair [position] or terminating or otherwise
11 modifying the Contract at will, without cause, or without
12 Plaintiff's consent." (Doc. 272 at 27.) In making this argument,
13 Plaintiff ignores the fact that he was employed pursuant to the
14 bylaws, which permitted his removal with or without cause, and
15 instead he focuses on other language in his employment contract.

16 In a section entitled "Termination," Plaintiff's employment
17 contract reads:

18 A. Core Physician may terminate this Agreement, without
19 cause, upon ninety (90) days' prior written notice to
County.

20 B. County may terminate this Agreement at any time for
21 cause. Cause is defined as a violation of administrative
22 policy of the County of Kern or KMC, unsatisfactory
23 clinical performance, failure to meet department
24 accountability or performance standards, or reduction of
need. County may terminate this Agreement upon reduction
of need upon ninety (90) days' prior written notice to
Core Physician.

25 Plaintiff's reliance on this section is unpersuasive for several
26 reasons. First, Plaintiff's removal from a specific position -
27 department chair - did not effectuate a complete "termination" of

1 his employment with the County. Second, and more important, this
2 section does not trump the applicability of the bylaws. Given
3 pertinent rules of contract construction, the bylaws are controlling
4 with respect to Plaintiff's removal from his chairmanship.

5 The employment contract specifically provides that "this
6 Agreement will be construed pursuant to the laws of the State of
7 California." (Doc. 266 at 21.)²⁶ Section 1859 of the California
8 Code of Civil Procedure Provides:

9 In the construction of a statute the intention of the
10 Legislature, and in the construction of the instrument
11 the intention of the parties, is to be pursued, if
12 possible; and when a general and particular provision are
inconsistent, the latter is paramount to the former. So
a particular intent will control a general one that is
inconsistent with it.

13 In California, "under well established principles of contract
14 interpretation, when a general and a particular provision are
15 inconsistent, the particular and specific provision is paramount to
16 the general provision." *Prouty v. Gores Tech. Group*, 121 Cal. App.
17 4th 1225, 1235 (2004); see also *McNeely v. Claremont Mgmt. Co.*, 210
18 Cal. App. 2d 749, 753 (1962). Similarly, under California law,
19 "particular expressions [in a contract] qualify those which are
20 general." Cal. Civ. Code § 3534; see also *Kavruck v. Blue Cross of*
21

22 ²⁶ A few sentences later, the employment contract contains a
23 forum selection clause specifying that the "venue of any action
24 relating to this Agreement shall be in the County of Kern." (Doc.
25 266 at 22.) No federal court sits in Kern County. Rather, the
26 district court with jurisdiction over Kern County sits in Fresno
27 County. The parties seem content on waiving this provision of the
28 employment contract. In any event, this clause does not implicate
subject matter jurisdiction, it is a matter of venue, and neither
party has raised the issue of venue.

1 Cal., 108 Cal. App. 4th 773, 781 (2003) ("In the interpretation of
2 insurance contracts, a specific provision relating to a particular
3 subject will govern in respect to that subject, as against a general
4 provision, even though the latter, standing alone, would be broad
5 enough to include the subject to which the more specific provision
6 relates.").

7 The term in the employment contract discussing "termination"
8 deals with the general cessation of the employment relationship
9 between the parties and grants the County right to terminate the
10 entire relationship for cause. On the other hand, the bylaw
11 provision, which is also a term of Plaintiff's contract, deals
12 specifically with the removal of a department chair from his
13 position and grants the power to remove a department chair at-will.
14 Assuming the termination clause and the bylaw are inconsistent, with
15 respect to the conduct at issue (i.e., the removal), the bylaw is
16 far more specific and particularized than the termination clause.
17 Accordingly, the bylaw controls. See also Restatement (Second) of
18 Contracts § 203 cmt. e (1981) ("If the specific or exact can be read
19 as an exception or qualification of the general, both are given some
20 effect.").

21 The determination that the bylaw controls is also supported by
22 other rules of contract construction. "The preferable approach is
23 to interpret a contract in a manner which will give effect to all
24 of its provisions," *In re Steven A.*, 15 Cal. App. 4th 754, 771
25 (1993), and "where two clauses of an agreement appear to be in
26 direct conflict, it is the duty of the court to reconcile the two
27 clauses to give effect to the whole of the instrument," *In re*

1 *Marriage Of Whitney*, 71 Cal. App. 3d 179, 182 (1977). Here, the
2 termination provision and the bylaw can be reconciled. The
3 employment contract provides in pertinent part:

4 No right or remedy herein conferred on or reserved to the
5 County is exclusive of any other right or remedy herein
6 or by law or equity provided or permitted, but each shall
7 be cumulative of every other right or remedy given
8 hereunder or now or hereafter existing by law or in
9 equity or by statute or otherwise, and may be enforced
10 concurrently from time to time.

11 (Doc. 266 at 23) (emphasis added.) The employment contract confers
12 upon the County the power to terminate the entire employment
13 relationship for cause as defined therein. The County's right of
14 total termination is "cumulative of" and does not exclude the
15 County's separate "right" under the bylaw to remove Plaintiff from
16 his specific chair position at-will. Interpreting the employment
17 contract in such manner reconciles the apparent conflict and gives
18 each provision meaning consistent with rules of contract
19 construction. For the foregoing reasons, the bylaw controls as to
20 the chairmanship removal.

21 Plaintiff also points to other language in his employment
22 contract in an effort to avoid the effect of the bylaw. Plaintiff
23 cites to the provision in his contract on the "Review and Appeal
24 Process" which states that "[r]eview and appeal of the decision to
25 impose corrective action or terminate for cause shall follow the
26 process set forth in the KMC Faculty Practice Board policy and
27 procedure, title Corrective Action and Termination Review Process,
28 or the medical staff bylaws, whichever is applicable." (Doc. 259-4
at 34.) Plaintiff's reliance on this provision is unpersuasive for

1 several reasons.

2 First, there is no evidence that Plaintiff's removal from his
3 chairmanship was taken or designated as a corrective or disciplinary
4 measure, and Plaintiff does not argue otherwise. Nor was
5 Plaintiff's removal from his chairmanship a "termination" of his
6 entire employment contract. Second, this provision imposes no
7 substantive restraints on the County's discretion to remove
8 Plaintiff from his chairmanship. Instead, this section provides
9 Plaintiff with a review and appeal process, as set forth in other
10 documents, from a decision already made. See *Sanchez v. City of*
11 *Santa Ana*, 915 F.2d 424, 428-29 (9th Cir. 1990) ("A governing body
12 does not create a property interest in a benefit merely by providing
13 a particular procedure for the removal of that benefit" or "an
14 avenue to appeal" a decision) (internal quotation marks omitted).
15 Third, this section expressly refers to the "medical staff bylaws"
16 which explicitly permit removal from chairmanship at-will. For
17 these reasons, Plaintiff's reliance on this section is unavailing.

18 Finally, Plaintiff references the provision in his employment
19 contract on modifications which provides that "[t]his Agreement may
20 be modified in writing only, signed by the parties in interest at
21 the time of the modification." (Doc. 266 at 24.) Plaintiff's
22 reliance on this provision is unpersuasive. This provision places
23 no substantive restraints on the County's right to remove Plaintiff
24 from his chairmanship. This provision simply imposes a requirement
25 that any modification to the contract be memorialized in writing.

26 Moving away from the employment contract, Plaintiff argues that
27 the County "has not removed a department chair without cause since
28

1 at least October 2000." (Doc. 272 at 27.) Plaintiff contends that
2 this history creates a "mutually explicit understanding" that he
3 would not removed without cause.

4 In *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) the Supreme
5 Court stated that, for due process purposes, "property" includes a
6 person's interest in a benefit, such as employment, "if there are
7 such rules or mutually explicit understandings that support his
8 claim of entitlement to the benefit and that he may invoke at a
9 hearing." Referencing *Perry* and its "mutually explicit
10 understandings" language, the Supreme Court explained in *Bishop v.*
11 *Wood*, 426 U.S. 341, 344 (1976) (footnotes omitted) that a property
12 interest can be created by an "implied contract":

13 A property interest in employment can, of course, be
14 created by ordinance, or by an implied contract. In
15 either case, however, the sufficiency of the claim of
16 entitlement must be decided by reference to state law.

17 Here, the mere fact that the County has not removed a department
18 chair without cause since at least October 2000 does not demonstrate
19 Plaintiff has a cognizable property interest in his chair position.

20 First, the bylaws permit the removal of a department chair with
21 or without cause. Plaintiff's evidence simply shows conduct in
22 conformity with an express power. Second, "the sufficiency of the
23 claim of entitlement must be decided by reference to state law."
24 *Bishop*, 426 U.S. at 344. Under California law, "[t]here cannot be
25 a valid express contract and an implied contract, each embracing the
26 same subject, but requiring different results." *Camp v. Jeffer,*
27 *Mangels, Butler & Marmaro*, 35 Cal. App. 4th 620, 630 (1995)
28 (internal quotation marks omitted). "The express term is

1 controlling even if it is not contained in an integrated employment
2 contract. Thus, the . . . express at-will agreement preclude[s] the
3 existence of an implied contract requiring good cause for
4 termination." *Tomlinson v. Qualcomm, Inc.*, 97 Cal. App. 4th 943, 945
5 (2002) (internal citation and quotation marks omitted)²⁷; see also
6 *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 337 (2000) ("Where
7 there is no express agreement, the issue is whether other evidence
8 of the parties' conduct has a 'tendency in reason' (Evid.Code, §
9 210) to demonstrate the existence of an actual mutual understanding
10 on particular terms and conditions of employment.") (emphasis
11 added). Here the bylaws, which are a part of an express employment
12 contract Plaintiff signed, permit removal of a department chair at-
13 will. This express agreement is controlling over an implied
14 contract requiring good cause for removal from his chairmanship,
15 which Plaintiff attempts to create by invoking the County's history
16 of not removing department chairs absent cause.

17 For all the reasons discussed above, Plaintiff could be removed
18 from his chairmanship at-will and thus had no cognizable property
19 interest in his chairmanship position. The County is entitled to
20 summary judgment on Plaintiff's claim that his removal from the
21 chairmanship violated Plaintiff's procedural due process rights.
22 The County's motion is GRANTED on this claim.

23 b. Reduction In Pay

24 Plaintiff argues that he a protectible property interest in his
25 base pay and that he was deprived of this interest (at least

26
27 ²⁷ Plaintiff's employment contract was integrated. (See Doc.
28 266 at 25) (setting forth a "Sole Agreement" provision.)

1 partially) without due process when his salary was reduced following
2 his removal from his chairmanship. It is clear that Plaintiff's
3 contract explicitly called for a base salary. (Doc. 266 at 10.) It
4 is equally clear that a public employee can obtain a property
5 interest in his or her earned or guaranteed compensation. *Orloff*
6 *v. Cleland*, 708 F.2d 372, 378 (9th Cir. 1983); *Eguia v. Tompkins*,
7 756 F.2d 1130, 1138 (5th Cir. 1985). Notwithstanding these
8 principles, Plaintiff's argument is erroneous.²⁸

9 Plaintiff had no property interest in his chairmanship
10 position. By extension, he had no property interest in the portion
11 of his base salary tied to his chairmanship. *Cf. Sanchez*, 915 F.2d
12 at 429 (concluding that an employee had a property interest in merit
13 pay because a reduction in merit pay was considered a "demotion"
14 under the applicable city charter, and a demotion was permitted for
15 "certain specified reasons" thus restricting the "City's authority
16 to demote an employee").

17 In support of his argument, Plaintiff cites to minutes from a
18 JCC meeting held on September 2007. During that meeting, while
19 discussing the potential fate of another physician, Dr. Leonard
20 Perez, someone said, "[t]he problem is we have tied a portion of the
21 chair's compensation to that position, that is a property right. Dr.
22 Perez is entitled to due process hearing for this reason." (Doc.
23 277-2 at 225.)²⁹ This unidentified person's conclusory statements

24
25 ²⁸ For *Monell* purposes, it is assumed that the bylaw which
26 permitted Plaintiff's removal from the chairmanship with or without
27 cause was the moving force behind Plaintiff's salary reduction.

28 ²⁹ Dr. Perez was terminated for cause. (Doc. 267-2 at 145.)

1 of law are insufficient to create a genuine dispute. See Fed. R.
2 Civ. P. 56(e)(2) (requiring a party opposing a summary judgment to
3 set forth "specific facts" showing a genuine issue for trial)
4 (emphasis added); *Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097,
5 1103 (9th Cir. 2008) ("Conclusory statements without factual support
6 are insufficient to defeat a motion for summary judgment.").

7 When, as here, an employee has no property interest in
8 continued employment in a position, he cannot have a property
9 interest in his unearned compensation from that position. See
10 *Lillehaug v. City of Sioux Falls*, 788 F.2d 1349, 1352 (8th Cir.
11 1986) (rejecting a City bandmaster's claim that a reduction in his
12 salary violated due process, reasoning "[t]he ordinances and statute
13 make plain that the City Commission may discharge Lillehaug [the
14 bandmaster] by majority vote and without cause. Lillehaug thus has
15 no property interest in his continued employment, nor in any
16 particular term of his employment, such as the level of
17 compensation."). Plaintiff's employment contract called for him to
18 perform the duties of department chair. Plaintiff's expectation
19 that he would continue to be paid for duties he no longer performed
20 is a "unilateral expectation," *Roth*, 408 U.S. at 577, that does not
21 create a property interest.

22 Because Plaintiff had no property interest in his chair
23 position he had no corresponding property interest in the
24 compensation tied to his chairmanship. Plaintiff has not created,
25 or even attempted to create, a triable issue that the reduction in
26 his compensation was unconnected to his chairmanship. (See Doc. 272
27 at 27; Doc. 272-2 at 8.). For these reasons, the County's motion
28

1 for summary judgment is GRANTED on Plaintiff's claim that the
2 reduction in his salary violated Plaintiff's procedural due process
3 rights.

4
5 c. Administrative Leave

6 Plaintiff argues that he had a cognizable property interest in
7 professional fees which he was deprived of when he was placed on
8 administrative leave. These professional fees are separate and
9 apart from his base salary. Plaintiff's employment contract states
10 that his compensation will be "composed of a base salary paid by the
11 County, professional fee payments from third-party payors, and
12 potential other income" (Doc. 266 at 10.) Plaintiff's
13 employment contract further provides that "[p]rofessional fees
14 include all professional fee collections or payments associated with
15 direct patient care by Core Physician." (Doc. 266 at 12.) In other
16 words, in addition to base salary, Plaintiff generated professional
17 fees by performing services. In 2004, Plaintiff's professional fees
18 were \$131,709,; for 2005, they were \$103,444; and for 2006, they
19 were \$28,596. Plaintiff contends that by forcing him onto
20 administrative leave, the County deprived him of a property interest
21 in professional fees.

22 Plaintiff does not point to any provision in the bylaws which
23 discuss administrative leave. To show that Culberson, who put
24 Plaintiff on administrative leave, was acting pursuant to official
25 policy of the County, Plaintiff must point to that official policy.
26 Plaintiff notes that in Defendants' motion for summary judgment they
27 admit that "Plaintiff was placed on paid administrative leave on
28

1 December 7, 2006, pursuant to the Kern County Policy and Procedures
2 Manual." (Stmt of Undisp. Fact. ¶¶41, 41a)." (Doc. 253 at 33.) The
3 section of the Kern County Policy and Procedures Manual (the
4 "Manual") on "Administrative Leave With Pay" reads, in pertinent
5 part, as follows:

6 A department head may place an employee on administrative
7 leave with pay if the department head determines that the
8 employee is engaged in conduct posing a danger to County
9 property, the public or other employees, or the continued
10 presence of the employee at the work site will hinder an
11 investigation of the employee's alleged misconduct or
12 will severely disrupt the business of the department.
13 During the administrative leave, the employee shall be
14 ordered to remain at home and available by telephone
15 during the normally assigned work day. A department head
16 may, if necessary, adjust the employee's work schedule to
17 provide availability during normal business hours, Monday
18 through Friday, 8:00 AM to 5:00 PM. A department head may
19 not order an administrative leave with pay for a period
20 in excess of five assigned workdays within a single pay
21 period without the written authorization of the Employee
22 Relations Officer in the County Administrative Office.

23 (Doc. 259-10 at 40.) For *Moneill* purposes, no party disputes that
24 the County's Manual constitutes an official policy of the County.
25 Plaintiff's employment contract states that he must "comply with all
26 applicable KMC and County policies and procedures." (Doc. 266 at
27 22.) The County obviously takes the position that the Manual
28 applied to Plaintiff's employment. The question remains whether
Plaintiff's administrative leave, pursuant to the Manual, deprived
him of a cognizable property interest in professional fees.

Unquestionably, Plaintiff had a property interest in his
guaranteed base salary (which he was paid in full while on
administrative leave). Plaintiff's asserted property interest in
his professional fees is more problematic. Plaintiff was not

1 guaranteed any specific amount of professional fees, and if he
2 showed up to work, he was not guaranteed that he would earn them -
3 it was up to him to generate independent professional fees.
4 Moreover, the County did not agree to provide source of this
5 compensation - professional fees came from third parties, not the
6 coffers of the County. "An interest that gives rise to an
7 entitlement is always a conditional interest, but not all
8 conditional interests in governmental benefits give rise to
9 entitlements. To create an entitlement, the law must remove the
10 decision to grant the benefit from agency discretion." *Peacock*, 510
11 F.2d at 1327. Because the County was not the source of professional
12 fees, the County was never in a position to make a decision to grant
13 or deny them - whether professional fees were earned was up to
14 Plaintiff. "A mere opportunity to acquire property . . . does not
15 itself qualify as a property interest protected by the
16 Constitution." *Head v. Chi. Sch. Reform Bd. Of Trs.*, 225 F.3d 794,
17 802 (7th Cir. 2000).

18 For these reasons, Plaintiff has not created a triable issue
19 that he had a cognizable property in any unearned professional fees
20 standing alone. This, however, does not preclude Plaintiff from
21 demonstrating that the loss (if provable) of professional fees is
22 economic harm occasioned by the deprivation of some property
23 interest. See *Bordelon v. Chi. Sch. Reform Bd. Of Trs.*, 233 F.3d
24 524, 520 (7th Cir. 2000) (stating, in an employment case, "to
25 recover for a deprivation of a property interest, Bordelon [the
26 employee] must show some economic loss from the Board's actions, or
27 at least establish an identifiable impact on his future income or
28

1 economic benefits.").

2 Plaintiff had a term employment contract giving him a right to
3 be employed as a core physician for five years (from October 5, 2002
4 to October 4, 2007). According to the terms of his contract, his
5 employment relationship could be terminated "at any time for cause."
6 No other part of the contract gave the County the right to terminate
7 his employment relationship without cause. Therefore, Plaintiff had
8 a property interest in his continued employment relationship at
9 least through the remainder of his term. This, however, does not
10 resolve the issue. Plaintiff was continuously employed, albeit on
11 leave, through the remainder of his term. To have a viable claim
12 then, he must demonstrate that his property interest in continued
13 employment included a property right in "active duty," *Deen v.*
14 *Darosa*, 414 F.3d 731, 734 (7th Cir. 2005), or, as the Ninth Circuit
15 has suggested, a "property interest in avoiding placement on
16 administrative leave with pay." *Qualls v. Cook*, 245 F. App'x 624,
17 625 (9th Cir. 2007).

18 Plaintiff has submitted evidence which creates a triable issue
19 that he had such an interest.

20 His employment contract specified that he was subject to "all
21 applicable KMC and County policies and procedures." (Doc. 266 at
22 22.) Once such policy was the Manual which provided that Plaintiff
23 could be placed on paid administrative leave with pay under certain
24 specified circumstances including when "the department head
25 determines that the employee is engaged in conduct posing a danger
26 to County property, the public or other employees, or the continued
27 presence of the employee at the work site will hinder an

1 investigation of the employee's alleged misconduct or will severely
2 disrupt the business of the department." No other provision of
3 Plaintiff's employment contract granted the County the right to
4 place Plaintiff on paid administrative leave. By specifying the
5 grounds on which Plaintiff could be placed on paid administrative
6 leave, and by not contractually providing for any other right to
7 place Plaintiff on paid administrative leave, the County implicitly
8 limited its authority to place Plaintiff on paid leave to the
9 specific reasons. See *Sanchez*, 915 F.2d at 429. A reasonable trier
10 of fact could conclude that this limitation significantly
11 constrained the County's authority, thus supporting a claim that
12 Plaintiff's property right in continued employment included a
13 property right in active duty.

14 Plaintiff's history of professional fee earning, of which the
15 County was aware, further supports a claim that his property right
16 in continued employment included a property right in active duty.
17 A deprivation that leads to only *de minimis* harm does not create an
18 actionable due process claim. *Bordelon*, 233 F.3d at 530 ("[T]o be
19 actionable under the due process clause, the deprivation of a public
20 employee's property interest in continued employment must be more
21 than *de minimis*."). Given Plaintiff's history of professional fee
22 earnings, it cannot be said that his loss of potential professional
23 fees is *de minimis* harm. In addition, given that his contract
24 expressly provided that he could earn professional fees and that his
25 fees would be a part of his total compensation, both Plaintiff and
26 the County certainly envisioned that Plaintiff would be in a
27 position to earn professional fees so that Plaintiff could obtain
28

1 the fruits of his bargain.

2 Finally, there is some California authority that a physician
3 who is employed under a fixed term contract with a County and who
4 is acting lawfully and complying with the terms of his contract
5 cannot be prevented "from performing the duties incumbent on him"
6 for arbitrary reasons. *Grindley v. Santa Cruz County*, 4 P. 390, 393
7 (Cal. 1884). While ancient and in no way dispositive, this case
8 lends support to the position that, by having a fixed term contract
9 with the County with a general property right in continued
10 employment, Plaintiff may have had a concomitant property right in
11 active duty during the term of his employment.

12 For all the reasons set forth above, Plaintiff has created a
13 triable issue (but not conclusively demonstrated) that his property
14 right in continued employment included the property right to active
15 duty such that he would be in a position to earn professional fees.
16 Accordingly, the next inquiry is what process was due in connection
17 with Plaintiff's placement on administrative leave. Here, however,
18 the precise contours of what process was due need not be delineated.
19 Plaintiff did not receive essential attributes of due process.
20 Plaintiff was placed on administrative leave without any explanation
21 as to what he had done or any opportunity to respond. The County's
22 motion is DENIED as to Plaintiff's claim that he was denied
23 procedural due process in connection with his placement on paid
24 administrative leave.

25 d. Non-renewal

26 Plaintiff claims that his property right to continued
27 employment extended beyond the fixed term of his contract and
28

1 included a property interest in a renewed contract. Nothing in his
2 employment contract provides Plaintiff with any expectation that he
3 would have his contract renewed.³⁰ Plaintiff argues instead that
4 there was a "common law of re-employment" pursuant to which he
5 can claim a legitimate entitlement to a renewed contract. In *Roth*,
6 the Supreme Court concluded that a university professor hired under
7 a fixed term contract had no property interest in re-employment
8 because his contract "did not provide for contract renewal absent
9 'sufficient cause.'" 408 U.S. at 578. In fact, it "made no
10 provision for renewal whatsoever." *Id.* In addition, there was not
11 any "state statute or University rule or policy that secured his
12 interest in re-employment or that created any legitimate claim to
13 it." *Id.* In a footnote, however, *Roth* left open the possibility
14 that an employee in such a case may nonetheless be able to establish
15 a property interest in re-employment:

16 To be sure, the respondent does suggest that most
17 teachers hired on a year-to-year basis by Wisconsin State
18 University-Oshkosh are, in fact, rehired. But the
19 District Court has not found that there is anything
20 approaching a 'common law' of re-employment, see *Perry v.*
Sindermann, 408 U.S. 593, at 602, 92 S.Ct. 2694, at 2705,
33 L.Ed.2d 570, so strong as to require University
officials to give the respondent a statement of reasons
and a hearing on their decision not to rehire him.

21 408 U.S. at 578 n.16 (emphasis added). Plaintiff claims that there
22 is an unwritten common law of re-employment fostered by the County
23 with respect to re-employing medical staff who work at KMC. In
24 support of this theory, Plaintiff points to evidence that, since
25

26 ³⁰ The County admits that it made a decision not to renew
27 Plaintiff's contract. (Doc. 278 at 7.) For *Monell* purposes, this
28 is sufficient.

1 October 2000, the County has not renewed the contract of only one
2 other member of the medical staff. (Several other physicians
3 resigned, retired or were terminated.) Plaintiff also points to
4 deposition testimony from Bryan that he regards "core physicians"
5 as "permanent" employees.

6 A. A core physician, as it evolved, was someone who
7 dedicated their time and energies towards Kern Medical
8 Center and generally had teaching, administrative, and
9 clinical duties, and that's how we define a core
10 physician.

11

12 Q. Would you characterize core physicians as being
13 permanent physicians of Kern Medical Center?

14 A. Essentially, that's correct, yes.

15 (Bryan Dep. 38:23-39:2; 39:6-8.) Pursuant to his employment
16 contract, Plaintiff was a "core physician."

17 Plaintiff's evidence is insufficient to create a triable issue
18 that he had a property interest in renewed employment. The fact that
19 Plaintiff and other physicians enjoyed a long history of working for
20 the County does not create a property interest in renewed
21 employment. "Longevity alone does not create a property interest."
22 *Bollow v. Fed. Reserve Bank Of S.F.*, 650 F.2d 1093, 1099 (9th Cir.
23 1981); see also *Guz*, 24 Cal. 4th at 342 ("[L]ongevity, raises and
24 promotions are their own rewards for the employee's continuing
25 valued service; they do not, in and of themselves, additionally
26 constitute a contractual guarantee of future employment security.
27 A rule granting such contract rights on the basis of successful
28 longevity alone would discourage the retention and promotion of
employees.") (emphasis omitted). Similarly, the fact that, in the

1 past, the County may have renewed the employment contracts of most
2 non-retiring, non-terminated, non-resigning physicians does not, by
3 itself, create a property interest in renewed employment. See *Smith*
4 *v. Bd. Of Educ.*, 708 F.2d 258, 264 (7th Cir. 1983) ("The Supreme
5 Court has . . . rejected the argument that a state teacher with a
6 one-year employment contract has a property right in being rehired
7 just because the state has in the past rehired him and most other
8 teachers it employ[]s on a year-to-year basis."). Furthermore,
9 "[t]here is nothing to suggest that the [County] follows any set of
10 standards when it considers whether to rehire a[] [core physician]
11 and that it considers itself bound to apply that same set of
12 standards every time a[] [core physician's] contract is up for
13 renewal." *Smith*, 708 F.2d at 265; see also *Doran v. Houle*, 721 F.2d
14 1182, 1186 (9th Cir. 1983) (declining to find a property interest
15 in the renewal of a permit where "no published criteria for choosing
16 among qualified applicants or *specific standards for determining*
17 *whether to renew a previously issued permit*" existed) (emphasis
18 added). The most that can be inferred from Plaintiff's renewal
19 evidence is that, in the past, the County had been satisfied with
20 the performance of certain of its employees. "That the [County] had
21 been satisfied in the past was, of course, no guarantee that it
22 would always remain so." *Smith*, 708 F.2d at 265. Plaintiff's
23 renewal evidence is insufficient, and Bryan's testimony that core
24 physicians are essentially "permanent" does not change the result.

25 There is no indication that to the County or to Bryan a
26 "permanent" core physician means a physician who, despite having a
27 fixed term contract with no provision on contract renewal, is a
28

1 permanent fixture who can legitimately expect a renewal absent
2 cause. Bryan's brief testimony cannot be imbued with such meaning.
3 Testimony from another core physician with the County - Dr.
4 Shertukde - affirms this point:

5 Q. Okay. So when you become a core physician, you're
6 becoming a permanent physician. Correct?

7 A. That's right.

8 Q. And you get a permanent contract. Correct?

9 A. Yeah.

10 Q. Permanent contract just like yours. Right?

11 A. Yeah.

12 Q. Okay. And then you expect that as a core physician --
13 core physicians expect to continue working at Kern
14 Medical Center for the rest of their careers. Correct?

15 A. No. I think many of them have certain years contract.
16 Like some people, like, you know, heads of
17 departments probably have a five-year contract.

18 Q. Okay.

19 A. Or some people have a four-year contract,
20 people have a three-year contract, things like that.

21 (Shertukde Dep. 206:7-24.) Plaintiff's evidence is insufficient
22 to create a triable issue that the County fostered "anything
23 approaching a 'common law' of re-employment . . . so strong as to
24 require [County] officials to give [Plaintiff] a statement of
25 reasons and a hearing on their decision not to rehire him." *Roth*,
26 408 U.S. at 578 n.16 (emphasis added). Accordingly, the County is
27 entitled to summary judgment on this claim. The County's motion is
28 GRANTED.

1 2. Liability of Individual Defendants

2 a. Bryan

3 Defendant Bryan is sued in his individual capacity and in his
4 official capacity. As discussed above, with respect to the removal,
5 pay cut and non-renewal, there was no constitutional violation as
6 Plaintiff was not deprived of a constitutionally cognizable property
7 interest. Summary judgment in favor of Bryan in his individual and
8 official capacities is warranted on Plaintiff's due process claims
9 insofar as they are based on the removal, pay cut and non-renewal.

10 With respect to Plaintiff's placement on paid administrative
11 leave, Bryan had no personal involvement in that action.
12 Accordingly, to the extent Plaintiff's due process claim is asserted
13 against Bryan in his individual capacity based on Plaintiff's
14 placement on administrative leave, Bryan is entitled to summary
15 judgment in his favor. Plaintiff also asserts an official capacity
16 claim against Bryan "in his official capacity as a member of the
17 JCC." (Doc. 241 at 37.) Bryan had no involvement individually or
18 in his official capacity as a member of the JCC in a decision to
19 place Plaintiff on paid administrative leave. Moreover, an official
20 capacity claim for Plaintiff's placement on paid administrative
21 leave pursuant to the Manual would be redundant of Plaintiff's
22 surviving claim against the County. See *Megargee v. Wittman*, 550 F.
23 Supp. 2d 1190, 1206 (E.D. Cal. 2008). Bryan's motion for summary
24 judgment is GRANTED.

25 b. Harris

26 Harris is sued in his individual capacity only. As discussed
27 above, with respect to the removal, pay cut and non-renewal, there
28

1 was no constitutional violation as Plaintiff was not deprived of a
2 constitutionally cognizable property interest. Summary judgment in
3 favor of Harris is warranted on Plaintiff's due process claims
4 insofar as they are based on the removal, pay cut, and non-renewal.

5 With respect to the placement of Plaintiff on administrative
6 leave there is some evidence that Harris had personal involvement
7 in that decision. Harris has moved for summary judgment on the
8 grounds of qualified immunity.

9 "The doctrine of qualified immunity protects government
10 officials from liability for civil damages insofar as their conduct
11 does not violate clearly established statutory or constitutional
12 rights of which a reasonable person would have known." *Pearson v.*
13 *Callahan*, 555 U.S. ___, 129 S. Ct. 808, 815 (2009) (internal
14 quotation marks omitted). "[Q]ualified immunity operates to ensure
15 that before they are subjected to suit, officers are on notice their
16 conduct is unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)
17 (internal quotation marks omitted). As discussed above, Plaintiff
18 may be able to establish that his constitutional right of continued
19 employment included a right to active duty, or, as the Ninth Circuit
20 has suggested, a "property interest in avoiding placement on
21 administrative leave with pay." *Qualls*, 245 F. App'x at 625. In
22 *Qualls*, the Ninth Circuit declined to affirmatively decide whether
23 such a property interest was cognizable and instead assumed it was
24 and found no violation of the plaintiff's procedural due process
25 rights. *Id.* at 626. Since *Qualls*, it does not appear the Ninth
26 Circuit has revisited the issue and Plaintiff points to no authority
27 suggesting otherwise. Because there is no Ninth Circuit (or Supreme
28

1 Court) authority on point, whatever property interest Plaintiff had
2 in avoiding placement on administrative leave with pay, this
3 interest was not clearly established at the time of the alleged
4 deprivation. With respect to Plaintiff's claim that his placement
5 on paid administrative leave violated procedural due process rights,
6 Harris is entitled to qualified immunity on this claim and thus
7 summary judgment in his favor. See *Wheaton v. Webb-Petett*, 931 F.2d
8 613, 619 (9th Cir. 1991) (concluding that qualified immunity was
9 appropriate where, in light of the current state of the law, "it
10 would not have been apparent to a reasonable official that [the
11 employee] had a property interest in his management service
12 employment."). Harris' motion for summary judgment in his
13 individual capacity is GRANTED.

14 H. Affirmative Defenses

15 Plaintiff seeks summary judgment as to certain of Defendants'
16 affirmative defenses enumerated below. Defendants provided no
17 briefing in support of any of their affirmative defenses. At oral
18 argument on the motion, Defendants' counsel stated that the
19 affirmative defenses were not "at issue." From the lack of briefing
20 and the not "at issue" statement, it appears Defendants have
21 abandoned their affirmative defenses. Notwithstanding the
22 Defendants' apparent concession to the lack of merit in the
23 affirmative defenses, the propriety of granting summary judgment on
24 the affirmative defenses must be analyzed.

25 1. Subject Matter Jurisdiction

26 Defendants' second affirmative defense asserts that this "Court
27 lacks subject matter jurisdiction over Plaintiff's alleged claims
28

1 and should refuse to exercise jurisdiction over Plaintiff's state
2 law claims because they predominate and all the alleged federal
3 claims are insubstantial." (Doc. 246 at 12.) Federal question
4 jurisdiction exists over Plaintiff's remaining federal claims and
5 whether to exercise supplemental jurisdiction is within the court's
6 discretion. Summary judgment on this affirmative defense is
7 GRANTED.

8 2. Peer Review Defense

9 Plaintiff seeks summary judgment on Defendants' third
10 affirmative defense which asserts a form of peer review privilege
11 under California law. The third affirmative defense asserts that
12 the Defendants actions were privileged "in that Defendants' action
13 were in furtherance of medical peer review" (Doc. 246 at
14 12.) As noted by Plaintiff, the Ninth Circuit has not recognized,
15 and has rejected the adoption of, a peer review privilege under
16 federal law. *Agster v. Maricopa County*, 422 F.3d 836 (9th Cir.
17 2005). As stated in *Agster*, "[w]here there are federal question
18 claims and pendent state law claims present, the federal law of
19 privilege applies." *Agster*, 422 F.3d at 839 (citing F. R. Evid. 501
20 advisory committee note, and *Wm. T. Thompson Co. v. Gen Nutrition*
21 *Corp.*, 671 F.2d 100, 104 (3rd Cir. 1982)). Under *Agster*, because
22 the federal law of privilege applies and because federal law does
23 not recognize a peer review privilege, Defendants' peer review
24 privilege defense is unavailing. To the extent Defendants' third
25 affirmative defense asserts a state-law peer review privilege,
26 summary judgment in favor of Plaintiff is GRANTED.

27 3. Immunity

1 Defendants' fourth affirmative defense is that "California
2 Civil Code § 47(a) and (b) immunizes Defendants and each of them
3 from liability." (Doc. 246 at 12.) These sections provide:

4 A privileged publication or broadcast is one made:

5 (a) In the proper discharge of an official duty.

6 (b) In any (1) legislative proceeding, (2) judicial
7 proceeding, (3) in any other official proceeding
8 authorized by law, or (4) in the initiation or course of
9 any other proceeding authorized by law and reviewable
pursuant to Chapter 2 (commencing with Section 1084) of
Title 1 of Part 3 of the Code of Civil Procedure, except
as follows

10 Plaintiff suggests that these sections are inapplicable to statutory
11 causes of action. This proposition is dubious. See *Ribas v. Clark*,
12 38 Cal. 3d 355, 364-65 (1985). Nevertheless because Plaintiff
13 argues and concedes that he is not asserting any claims which would
14 permit the proper invocation of these sections, (Doc. 272 at 32), and
15 given Defendants' silence in response, summary judgment on the
16 fourth affirmative defense is GRANTED.

17 4. "Contributory Negligence"

18 Defendants' fifth affirmative defense is that "during
19 Plaintiff's employment at Kern Medical Center, Plaintiff was
20 arrogant, disagreeable, uncooperative, intimidating, overbearing,
21 self-righteous and unfriendly; that Plaintiff refused to work
22 collaboratively or professionally with the medical staff at Kern
23 Medical Center; that he made unfounded, frivolous and repetitive
24 complaints and criticisms of Kern Medical Center, its policies and
25 procedures; and made unfounded and frivolous complaints against
26 members of the medical staff at Kern Medical center and that
27

1 Plaintiff's behavior contributed to and was the direct and proximate
2 cause of any stresses, disabilities or injuries that Plaintiff
3 believes he sustained." (Doc. 246 at 12.) Plaintiff labels this
4 affirmative defense as "contributory negligence" and then asserts
5 that none of his claims allege negligence. Plaintiff's assumption
6 that this affirmative defense is one for "contributory negligence"
7 is not persuasive.

8 In essence, this affirmative defense asserts that Plaintiff's
9 own behavior caused the injuries he claims. In some instances, this
10 type of defense is not truly an "affirmative defense." For example,
11 if Plaintiff's own behavior caused the adverse employment actions
12 he claims, then his behavior destroyed the alleged causal link
13 between any protected status or activity and any adverse employment
14 action. Causation is an element of Plaintiff's claims the negation
15 of which is not an affirmative defense. This does not mean,
16 however, that summary judgment should be granted.

17 This affirmative defense can be fairly read as pleading the
18 affirmative defenses of unclean hands and/or equitable estoppel,
19 albeit without those discrete labels. "To prevail on an unclean
20 hands defense, the defendant must demonstrate that the plaintiff's
21 conduct is inequitable and that the conduct relates to the subject
22 matter of its claims." *Bros. Records, Inc. v. Jardine*, 318 F.3d
23 900, 909 (9th Cir. 2003). At minimum, the fifth affirmative defense
24 put Plaintiff on fair notice of alleged inequitable conduct on his
25 part and that such conduct related to the subject matter of his
26 claims. Plaintiff does not make any argument or showing that there
27 is no evidence to support an unclean hands theory. Nor does
28

1 Plaintiff argue that this theory is not assertable with respect to
2 any of Plaintiff's claims. Plaintiff has not met his burden at the
3 summary judgment stage and summary judgment on this affirmative
4 defense is DENIED.

5 5. Statute Of Limitations

6 Defendants' sixth affirmative defense is that "Plaintiff's
7 injuries, as alleged in the Second Amended Complaint occurred more
8 than one year before Plaintiff commenced this action and that
9 Plaintiff's claims are, therefore, barred by the statute of
10 limitations established in California Code of Civil Procedure §
11 340." (Doc. 246 at 12.) Defendants's seventh affirmative defense
12 is that Plaintiff's claims are barred by the two-year statute of
13 limitations set forth in California Code of Civil Procedure § 335.1.
14 There is no indication or argument that these statute of limitation
15 apply or that, if they do, Plaintiff has not complied with them.
16 Summary judgment on these affirmative defenses is GRANTED in favor
17 of Plaintiff.

18 6. Administrative Exhaustion

19 Defendants' eighth affirmative defense is that Plaintiff has
20 failed to exhaust his administrative remedies. In their concurrently
21 filed Rule 12© motion for judgment on the pleadings, Defendants
22 explicitly conceded that Plaintiff exhausted his administrative
23 remedies (which they also conceded in discovery). Summary judgment
24 is GRANTED on this affirmative defense in favor of Plaintiff.

25 8. Qualified Immunity

26 Defendants' ninth affirmative defense is that "Defendants and
27 each of them have qualified immunity for each and every claim
28

1 alleged in the Second Amended Complaint." (Doc. 246 at 12.) As
2 discussed above, this affirmative defense is applicable in this
3 case. Summary judgment on this affirmative defense is DENIED.

4 9. Workers' Compensation Preclusion

5 Defendants' tenth affirmative defense is that Plaintiff's
6 "injuries, as alleged in the Second Amended Complaint, arose within
7 the scope of Plaintiff's employment and that Plaintiff's sole and
8 exclusive remedy lies under the California Workers Compensation
9 Act." (Doc. 246 at 13.) As discussed above, this affirmative
10 defense lacks merit. Summary judgment on this affirmative defense
11 is GRANTED in favor of Plaintiff.

12 I. Spoliation

13 In opposition to Defendants' motion for summary judgment,
14 Plaintiff argued that Barbara Patrick, former Chair of the Kern
15 County Board of Supervisors, David Culberson former CEO of KMC, and,
16 Scott Ragland, former President of the medical staff at KMC,
17 destroyed evidence purportedly relevant to Plaintiff's case.
18 Plaintiff did not assert a claim for spoliation of evidence in his
19 second amended complaint. Plaintiff attempts to use the evidence
20 of spoliation to create a negative inference against Defendants in
21 hopes of surviving Defendants' motion for summary judgment. (Doc.
22 275 at 4.). With respect to many claims, Plaintiff has survived
23 Defendants' motion for summary judgment. To the extent his claims
24 fail to survive, Plaintiff has not adequately shown that the
25 infirmity in his claims have a sufficient connection to improper
26 evidence destruction. Accordingly, for purposes of summary
27 judgment, Plaintiff's spoliation argument is unpersuasive and does
28

1 not warrant a denial of summary judgment.

2 J. Evidentiary Objections

3 Plaintiff has filed various evidentiary objections to the
4 evidence submitted by Defendants' in support of their motion for
5 summary judgment. The court granted summary judgment in favor of
6 Defendants on some claims because Plaintiff's evidence failed to
7 create a triable issue. In granting summary judgment in Defendants'
8 favor on the claims specified, no reliance was placed on
9 inadmissible evidence properly objected to by Plaintiff. For these
10 reasons, Plaintiff's evidentiary objections are moot.

11 V. CONCLUSION

12 For the foregoing reasons:

13 1. Summary judgment in favor of Defendants is GRANTED on
14 Plaintiff's claim for a violation of § 1278.5 of the Health & Safety
15 Code. Plaintiff's motion is DENIED.

16 2. Summary judgment in favor of Defendants is GRANTED on
17 Plaintiff's claim for a violation of § 1102.5 of the Labor Code.
18 Plaintiff's motion is DENIED.

19 3. Summary judgment is DENIED for all parties on Plaintiff's
20 claim for interference under the FMLA.

21 4. Summary judgment is DENIED for all parties on Plaintiff's
22 FMLA retaliation claim.

23 5. Summary judgment is DENIED for all parties on Plaintiff's
24 CFRA retaliation claim.

25 6. Summary judgment is DENIED for all parties on Plaintiff's
26 claim for interference with/denial of CFRA rights.

27 7. Summary judgment is DENIED for all parties on Plaintiff's
28

1 FEHA reasonable accommodation claim.

2 8. Summary judgment is DENIED for all parties on Plaintiff's
3 FEHA interactive process claim.

4 9. Summary judgment is DENIED for all parties on Plaintiff's
5 FEHA disability discrimination claim.

6 10. Summary judgment is DENIED for all parties on Plaintiff's
7 FEHA retaliation claim.

8 11. Summary judgment is GRANTED in favor of the County with
9 respect to Plaintiff's § 1983 claim to the extent Plaintiff is
10 asserting a deprivation of due process in connection with his
11 removal from his chairmanship, reduction in pay, and the non-renewal
12 of his contract. The County's motion for summary judgment is DENIED
13 with respect to Plaintiff's § 1983 claim to the extent Plaintiff is
14 asserting a deprivation of due process in connection with his
15 placement on paid administrative leave. The individual defendants'
16 motion for summary judgment is GRANTED on Plaintiff's § 1983 claims.
17 Plaintiff's motion is DENIED.

18 13. Summary judgment on the second affirmative defense is
19 GRANTED in favor of Plaintiff.

20 14. Summary judgment on the third affirmative defense, to the
21 extent it asserts a peer review privilege, is GRANTED in favor of
22 Plaintiff.

23 15. Summary judgment on the fourth affirmative defense is
24 GRANTED in favor of Plaintiff.

25 16. Summary judgment on the fifth affirmative defense is
26 DENIED.

27 17. Summary judgment on the sixth affirmative defense is
28

1 GRANTED in favor of Plaintiff.

2 18. Summary judgment on the seventh affirmative defense is
3 GRANTED in favor of Plaintiff.

4 19. Summary judgment on the eighth affirmative defense is
5 GRANTED in favor of Plaintiff.

6 20. Summary judgment on the ninth affirmative defense is
7 DENIED.

8 21. Summary judgment on the tenth affirmative defense is
9 GRANTED in favor of Plaintiff.

10
11 SO ORDERED

12 Dated: April 8, 2009

13
14 /s/ Oliver W. Wanger
15 Oliver W. Wanger
16 United States District Judge
17
18
19
20
21
22
23
24
25
26
27
28