**UNITED STATES DISTRICT COURT**

**FOR THE CENTRAL DISTRICT OF CALIFORNIA**

RICK ESPINDOLA, an individual,

Plaintiff,

v.

WISMETTAC ASIAN FOODS, INC.; and DOES 1 TO 20, inclusive,

Defendants.

Case No. 2:20-cv-03702-JWH-Ex

**ORDER GRANTING THE MOTION FOR SUMMARY JUDGMENT OF DEFENDANT WISMETTAC ASIAN FOODS, INC. [ECF No. 27]**

## I. INTRODUCTION

Plaintiff Rick Espindola filed his Complaint commencing this action on April 22, 2020. In his Complaint, Espindola asserts the following eight claims for relief against Defendant Wismettac Asian Foods, Inc.: (1) Age Discrimination; (2) Disability Discrimination; (3) Failure to Provide Accommodation; (4) Failure to Engage in an Interactive Process; (5) Failure to Prevent Discrimination; (6) Retaliation; (7) Wrongful Termination in Violation of Public Policy; and (8) Intrusion into Private Affairs.

Before the Court is the motion of Wismettac for summary judgment.[1] The Court conducted a hearing on the Motion on October 29, 2020. After considering the papers filed in support of and in opposition to the Motion,[2] as well as the arguments of counsel at the hearing on the Motion, the Court **GRANTS** the Motion in its entirety, for the reasons explained herein.

## II. LEGAL STANDARD

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). When deciding a motion for summary judgment, the Court construes the evidence in the light most favorable to the non-moving party. *Barlow v. Ground*, 943 F.2d 1132, 1135 (9th Cir. 1991). However, "the

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[1] Def.'s Mot. for Summ. J. (the "Motion") [ECF No. 27].

[2] The Court considered the following papers in ruling on the Motion: (1) the Motion; (2) Def.'s Evid. in Supp. of the Motion [ECF No. 27-2]; (3) Pl.'s Opp'n to the Motion (the "Opposition") [ECF No. 34];(4) Pl.'s Separate Statement of Disputed Material Facts (the "Pl. SDMF")[ECF No. 35];(5) Pl.'s Compendium of Evidence in Opp'n to the Motion [ECF No. 36]; (6) Decl. of Rick Espindola in Supp. of the Opposition (the "Espindola Decl.") [ECF No. 37]; (7) Decl. of Miles Prince in Supp. of the Opposition (the "Prince Decl.") [ECF No. 38]; (8) Pl.'s Evidentiary Objs. to Def.'s Evid. in Supp. of the Motion (the "Pl. Objections") [ECF No. 39]; (9) Def.'s Reply (the "Reply") [ECF No. 42]; (10) Def.'s Resp. to the Pl. SDMF (the "Def. SDMF") [ECF No. 43]; (11) Def.'s Response to Pl.'s Evidentiary Objections [EFC No. 44]; and (12) Def.'s Evidentiary Objs. to Evid. Submitted in Opp'n to the Motion (the "Def. Objections") [ECF No. 45].

mere existence of ***some*** alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no ***genuine*** issue of ***material*** fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (emphasis in original). The substantive law determines the facts that are material. *Id.* at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* Factual disputes that are "irrelevant or unnecessary" are not counted. *Id.* A dispute about a material fact is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

Under this standard, the moving party has the initial burden of informing the district court of the basis for its motion and identifying the portions of the pleadings and record that it believes demonstrate the absence of an issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the non-moving party bears the burden of proof at trial, the moving party need not produce evidence negating or disproving every essential element of the non-moving party's case. *Id.* at 325. Instead, the moving party need only prove there is an absence of evidence to support the nonmoving party's case. *Id.*; *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). Put another way, the moving party must show that "under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson*, 477 U.S. at 250.

If the moving party sustains its burden, the non-moving party must then show that there is a genuine issue of material fact that must be resolved at trial. *Celotex*, 477 U.S. at 324. "This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence." *In re Oracle Corp. Sec. Litig.*, 627 F.3d at 387 (citing *Anderson*, 477 U.S. at 252). And the non-moving party must make this showing on all matters placed at issue by the

motion as to which the non-moving party has the burden of proof at trial. *Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 252.

## III. FACTS

### A. Rulings on Evidentiary Objections

#### 1. Wismettac's Evidentiary Objections[3]

Wismettac objects to portions of the declaration that Espindola filed in support of his Opposition to the Motion, on the ground that the objected-to portions of Espindola's declaration contradict Espindola's deposition testimony. "The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony." *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991). This rule applies only to "sham" testimony "that flatly contradicts earlier testimony in an attempt to 'create' an issue of fact and avoid summary judgment." *Id.* at 267. Accordingly, before excluding testimony under this rule, "the district court must make a factual determination that the contradiction" is a "sham." *Id.*

In view of the foregoing, the Court **SUSTAINS** Wismettac's evidentiary objections and **STRIKES** Espindola's testimony as follows:

- Wismettac's evidentiary objection to ¶ 33:25–28[4] is **SUSTAINED**, as a sham declaration. *Kennedy*, 952 F.2d at 266–67. Espindola testifies in his declaration as follows: "I told Gormley the nature of my condition was degenerative, in that the longer it went untreated, the worse it would get. I told him that having suspended treatment after the DHR call, the pain was now intolerable."[5] This testimony flatly contradicts Espindola's earlier deposition testimony, where, in response to a question asking whether Espindola provided Gormley with "any more detail" "other

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[3] *See generally* Def. Objections; *see also* Reply 4:21–6:10.

[4] *See* Reply 6:5–8.

[5] Espindola Decl. ¶ 33:25–28.

than telling [Gormley] that he [*i.e.*, Espindola] had chronic back pain," Espindola unequivocally responded "No."[6] Accordingly, particularly in the absence of any explanation for the complete reversal in Espindola's testimony, the Court finds that this portion of Espindola's declaration is a sham. *Kennedy*, 952 F.2d at 267.

Wismettac's remaining evidentiary objections are **OVERRULED.**

**2. Espindola's Evidentiary Objections**[7]

Espindola objects to portions of the evidence and declarations that Wismettac submitted in support of its Motion. The Court **SUSTAINS** Espindola's evidentiary objections and **STRIKES** the testimony as follows:

- Espindola's evidentiary objection to ¶ 6 of the Declaration of Martin Pocs[8] is **SUSTAINED** as improper speculation. Fed. R. Evid. 602.
- Espindola's evidentiary objection to ¶ 11 of the Declaration of Daryl Gormley[9] is **SUSTAINED** as speculation and improper legal conclusion. The statement is also an improper lay opinion. Fed. R. Evid. 701 & 702.
- Espindola's evidentiary objection to ¶ 3 of the Declaration of Toshiyuki Nishikawa[10] is **SUSTAINED**, with respect to the statement "[i]t is my understanding that marijuana remains illegal under federal law," as speculation and improper legal conclusion. The statement is also an improper lay opinion. Fed. R. Evid. 701 & 702.

Espindola's remaining evidentiary objections are **OVERRULED**.

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[6] Decl. of Wesley Kruger in Supp. of the Motion (the "Kruger Decl.") [ECF No. 27-2], Ex. 16 (Excerpts of Dep. of Rick Espindola (the "Espindola Dep.")) at 67:9–13.

[7] *See generally* Pl. Objections.

[8] Decl. of Martin Pocs in Supp. of the Motion (the "Pocs Decl.") [ECF No. 27-2].

[9] Decl. of Daryl Gormley in Supp. of the Motion (the "Gormley Decl.") [ECF No. 27-2].

[10] Decl. of Toshiyuki Nishikawa in Supp. of the Motion (the "Nishikawa Decl.") [ECF No. 27-2].

**B. Undisputed Facts**

Unless specifically noted, the following material facts are sufficiently supported by admissible evidence and are uncontroverted:

Wismettac is a North American importer, wholesaler, and distributor of Asian food products, and it is based in Santa Fe Springs, California.[11] In 2018, Wismettac retained a recruitment firm, DHR International, to search for a qualified candidate for the Division Vice President of Imports position at Wismettac.[12] DHR contacted Espindola as a candidate for that position in May 2018.[13] Wismettac's CEO, Daryl Gormley, interviewed Espindola in August 2018, and Wismettac offered Espindola the position shortly thereafter.[14]

Gormley emailed Espindola an initial offer letter on October 1, 2018.[15] Espindola made a few revisions to the initial offer, including by adding terms for housing accommodations and the payment of his anticipated move from Florida to California, and Espindola returned the offer letter to Gormley.[16] Gormley accepted Espindola's revisions and sent Espindola a (revised) final offer letter on October 9, 2018, which Espindola signed and returned the following day.[17]

The final offer letter provided that Espindola's employment with Wismettac was to begin on December 3, 2018.[18] It also included an at-will employment provision (among other terms), and it advised Espindola that he would be subject to the policies set forth in the Wismettac Employee

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11 Pl. SDMF ¶ 1.

12 *Id.* at ¶ 2.

13 *Id.* at ¶ 3.

14 *Id.* at ¶ 5.

15 *Id.* at ¶ 7.

16 *Id.* at ¶¶ 8 & 9.

17 *Id.* at ¶¶ 9 & 10.

18 *Id.* at ¶ 55.

Handbook.[19] Wismettac did not, however, provide Espindola with a copy of the Employee Handbook at that time, nor did Espindola request a copy.[20]

The Employee Handbook contained a provision entitled "Pre-employment drug testing," which states that "[a]ll employees are subject to a pre-employment drug test at the time of hire."[21] Although the final offer letter that Espindola signed referenced the policies contained in the Employee Handbook, the letter did not specifically reference the preemployment drug testing policy, nor did it explicitly state that the preemployment drug test was a condition on the offer of employment.[22]

In mid-November 2018, DHR contacted Espindola to schedule Espindola's preemployment drug screening,[23] which was the first time the drug test was specifically discussed with Espindola.[24] Espindola informed DHR that Espindola could not submit to the test before he arrived in California because he had "contractors in [his] home" that week and because he "was going overseas to visit [his] aged mother."[25] Accordingly, the test was postponed.[26] A few days

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[19] *Id.* at ¶ 11.

[20] *Id.* at ¶ 15. The Court finds that the evidence that Espindola submitted is not sufficient to create a genuine dispute of material fact. *Anderson*, 477 U.S. at 248. Specifically, Espindola cites paragraph 14 of his declaration in an attempt to create a disputed material fact; however, Espindola's testimony does not controvert the facts that Wismettac did not provide a copy of the Employee Handbook and that Espindola did not request a copy. *See* Espindola Decl. ¶ 14. Rather, Espindola's declaration merely explains ***why*** he did not request a copy of the Employee Handbook. *See id.*

[21] Pl. SDMF ¶ 12.

[22] Def. SDMF ¶ 57. The Court finds that the evidence that Wismettac submitted is not sufficient to create a genuine dispute regarding the fact that the final offer letter did not ***explicitly state*** that completion of the preemployment drug test was a condition of employment. *Anderson*, 477 U.S. at 248.

[23] Pl. SDMF ¶ 17.

[24] Def. SDMF ¶ 61. The Court finds that the evidence that Wismettac submitted concerning this fact is not sufficient to create a genuine dispute. *Anderson*, 477 U.S. at 248.

[25] Pl. SDMF ¶ 20.

[26] *Id.* at ¶ 21. Although there is a claimed dispute concerning whether Espindola agreed to the test and regarding certain statements attributed to the

later, around November 19 or 20, 2018, Espindola consulted with his physician to obtain a medical marijuana card in Florida.[27] Prior to December 3, 2018 (Espindola's first day at Wismettac), Espindola never informed anyone at DHR or Wismettac that he used marijuana.[28]

The day before Espindola began his employment with Wismettac, Espindola completed Wismettac's "Personnel Information Sheet," on which he indicated that he was not "disabled."[29] Espindola completed the remaining onboarding paperwork the next day (his first day at Wismettac) with a representative from Wismettac's Human Resources Department.[30] Espindola's onboarding paperwork included, among other documents, the "Employee Consent to Drug/Testing" form and the Employee Handbook, both of which Espindola signed.[31]

After his meeting with Human Resources, Espindola expressed his concern about the drug test to Gormley.[32] During that conversation, Espindola disclosed for the first time that he had "chronic back pain"[33] and that he was "prescribed" and used marijuana to treat that condition.[34] Espindola did not,

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DHR representative, there is no dispute with respect to the material fact that the test was postponed (or did not occur) until Espindola arrived in California.

[27] *Id.* at ¶ 25.

[28] *Id.* at ¶ 19.

[29] *Id.* at ¶ 27. The Court finds that the evidence that Espindola submitted is not sufficient to create a genuine dispute. *Anderson*, 477 U.S. at 248. Specifically, Espindola cites paragraph 24 of his declaration in support of the claimed dispute. However, Espindola's testimony does not controvert the material fact that Espindola marked the box in the Personnel Information Sheet indicating that he did not have a disability. *See* Espindola Decl. ¶ 24; Konishi Decl. ¶ 7 and Ex. 9 (Wismettac "Personnel Information Sheet" completed by Espindola).

[30] Pl. SDMF ¶ 29.

[31] *Id.* at ¶ 30.

[32] *Id.* at ¶ 31.

[33] *Id.* at ¶ 32.

[34] *Id.* at ¶ 33.

however, provide any additional details or documentation (such as a doctor's note or medical records) to substantiate the nature of his condition or to explain any limitations on his ability to perform his job duties.[35]

On December 4, 2018, the Florida Department of Health approved Espindola's application to use medical marijuana and issued Espindola a medical marijuana card.[36] Espindola forwarded the approval to Gormley that same day.[37] The next day, Gormley suspended Espindola's preemployment drug test so that Gormley could confirm with Wismettac's Senior Vice President, Toshiyuki Nishikawa, that Wismettac required every prospective employee to complete the test.[38] Wismettac asked DHR to suspend Espindola's drug screening on December 6, 2018.[39] On Friday, December 7, 2018, Nishikawa confirmed that Wismettac requires all prospective employees to complete the preemployment

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[35] *Id.* at ¶ 34. The Court finds that the evidence that Espindola submitted is not sufficient to create a genuine dispute. *Anderson*, 477 U.S. at 248. The evidence that Espindola cites does not create any genuine dispute regarding the material fact that, other than his Florida medical marijuana card (which does not, itself, contain any information about Espindola's purported underlying condition), Espindola did not provide Gormley with any additional detail or medical documentation beyond Espindola's statement that he suffered from chronic back pain. Moreover, the cited portions of Gormley's deposition testimony do not create a genuine dispute regarding the fact that Espindola did not provide any specific information about the nature of his condition or any limitations on Espindola's ability to perform his work. *See* Pl. Excerpts of Deposition of Daryl Gormley (the "Pl. Gormley Dep.") [ECF No. 38-4] 56:9–12, 57:13–16, 57:24–58:1, & 63:23–64:2.

[36] Pl. SDMF ¶ 36.

[37] *Id.* at ¶ 37. The Court finds that the evidence that Espindola submitted is not sufficient to create a genuine dispute regarding the material fact that Espindola forwarded a copy of the Florida approval to Gormley. *Anderson*, 477 U.S. at 248.

[38] Pl. SDMF ¶ 42. The Court finds that the evidence that Espindola submitted is not sufficient to create a genuine dispute regarding the material fact that Gormley decided to suspend the drug test in order to consult with Wismettac's management. *Anderson*, 477 U.S. at 248. The cited portions of Espindola's declaration do not controvert this fact.

[39] Pl. SDMF ¶ 43. The Court finds that the evidence that Espindola submitted is not sufficient to create a genuine dispute regarding the material fact that Wismettac informed DHR that DHR could suspend the drug test. *Anderson*, 477 U.S. at 248.

drug test.[40] On Monday, December 10, 2018, Wismettac proceeded with Espindola's drug screening,[41] which included a test for the presence of cannabinoids.[42]

A few days later, Wismettac received an "Employer Notification of Safety Sensitive Job Restriction," which indicated that Espindola tested positive for marijuana.[43] Wismettac terminated Espindola's employment on December 13, 2018, for the stated reason that Espindola failed the preemployment drug test.[44] Espindola's termination was memorialized in an Employment Termination Notice dated December 14, 2018.[45]

## IV. DISCUSSION

Wismettac moves for summary judgment with respect to each of Espindola's claims. The Court addresses each claim in turn.

### A. Wrongful Termination Claims

Espindola asserts two claims for wrongful termination based upon discrimination against his membership in two protected classes. In his first claim Espindola alleges that he was wrongfully terminated because of his age,[46] and in his second claim Espindola alleges that he was wrongfully terminated due

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[40] Pl. SDMF ¶ 44. The Court finds that the evidence that Espindola submitted is not sufficient to create a genuine dispute. *Anderson*, 477 U.S. at 248.

[41] Pl. SDMF ¶ 45.

[42] *Id.* at ¶ 47.

[43] *Id.* at ¶¶ 48 & 50. Espindola disputes this fact, in part, with respect to whether the drug test was a "preemployment" drug test. However, the Court finds that there is no genuine dispute regarding the material facts that the notification was issued and that it showed that Espindola tested positive. Moreover, Espindola acknowledged having used marijuana before the drug test. *Id.* at ¶ 33 (undisputed that "Plaintiff's December 3, 2018, conversation with Gormley was the first time he disclosed to anyone at Wismettac that he was 'prescribed' and used marijuana to alleviate his [chronic back] pain").

[44] *Id.* at ¶¶ 49 & 91.

[45] *Id.* at ¶ 50.

[46] *See* Compl. (the "Complaint") [ECF No. 1] ¶¶ 39–46.

to a disability.[47] The California Fair Employment and Housing Act (the "FEHA") prohibits employment discrimination on both bases. Cal. Gov't Code § 12940(a).

California law adopts the three-stage burden-shifting test for discrimination claims established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Sandell v. Taylor–Listug, Inc.*, 188 Cal. App. 4th 297, 307 (2010) (citing *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317, 354–56 (2000)). This framework applies to wrongful termination claims based upon age and disability discrimination. *See Guz*, 24 Cal. 4th at 354–56 (2000)*; Sandell*, 188 Cal. App. 4th at 307; *Nielsen v. Trofholz Technologies, Inc.*, 750 F. Supp. 2d 1157, 1164 (E.D. Cal. 2010), *aff'd*, 470 F. App'x 647 (9th Cir. 2012). Under the *McDonnell Douglas* burden-shifting test:

> [A] plaintiff must first establish a prima facie case of discrimination. If the plaintiff establishes a prima facie case, the burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its employment decision. Then, in order to prevail, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory.

*Lowe v. City of Monrovia*, 775 F.2d 998, 1005 (9th Cir. 1985) (citing *McDonnell Douglas*, 411 U.S. at 802–05). In other words, under the *McDonnell Douglas* framework, "[i]f the employer presents admissible evidence either that one or more of plaintiff's *prima facie* elements is lacking, or that the adverse employment action was based on legitimate, nondiscriminatory factors, the

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[47] *See id.* at ¶¶ 47–54.

employer will be entitled to summary judgment . . . ." *Arteaga v. Brink's, Inc.*, 163 Cal. App. 4th 327, 344 (2008).

**1. Age Discrimination (First Claim for Relief)**

To establish a *prima facie* claim for age discrimination, Espindola must show that (1) he was over the age of 40; (2) he suffered an adverse employment action; (3) he was performing satisfactorily at the time of the adverse action; and (4) he suffered an adverse action under circumstances that infer unlawful discrimination. *See Sandell*, 188 Cal. App. 4th at 321.

Here, Espindola cannot establish the requisite causal connection between the adverse employment action by Wismettac and Espindola's age. Specifically, it is undisputed that during Espindola's brief tenure at Wismettac, no Wismettac employee ever made any comments about Espindola's age.[48] Furthermore, as explained in detail the section that follows, the Court finds that Wismettac has sustained its burden to establish a legitimate non-discriminatory reason for its decision to terminate Espindola. And, in this regard, Espindola has not submitted any evidence showing that the circumstances of his termination give rise to an inference of unlawful discrimination, "*i.e.*, evidence that [he] was replaced by someone significantly younger . . . ." *Sandell*, 188 Cal. App. 4th at 321.[49]

Accordingly, Wismettac has sustained its burden to show that it is entitled to summary judgment on Espindola's first claim for relief.

**2. Disability Discrimination (Second Claim for Relief)**

To establish a *prima facie* claim for disability discrimination, Espindola must show that (1) he suffered from a disability or was regarded as suffering from a disability; (2) he could perform the essential duties of his job with or

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[48] Pl. SDMF ¶ 51.

[49] Espindola does not even address the claim for age discrimination in his Opposition to the Motion. *See generally* Opposition.

without reasonable accommodations; and (3) he was subjected to an adverse employment action because of the disability or the perceived disability. *Id.* at 310; *Brundage v. Hahn*, 57 Cal. App. 4th 228, 236 (1997).

**a. Disability**

The first element requires Espindola to demonstrate that his physical impairment qualifies as a "disability" under the FEHA. That statute defines the term "physical disability" as any "physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss" that both affects an enumerated body system, such as the neurological or musculoskeletal system, and "limits a major life activity." Cal. Gov't Code § 12926(m)(1). A physiological disorder or disease "limits a major life activity" if "it makes the achievement of the major life activity difficult." *Id.* at § 12926(m)(1)(B)(ii). The statute further clarifies that whether an individual's disability "limits a major life activity" is determined "without regard to mitigating measures such as medications . . . or reasonable accommodations unless the mitigating measure itself limits a major life activity." *Id.* at § 12926(m)(1)(B)(i).

In deciding whether a plaintiff's limitation(s) makes him "disabled" under the FEHA, "the proper comparative baseline is either the individual without the impairment in question or the average ***unimpaired*** person." *E.E.O.C. v. United Parcel Service, Inc.*, 424 F.3d 1060, 1071 (9th Cir. 2005) (emphasis in original), *cited with approval in Arteaga*, 163 Cal. App. 4th at 345–46. "For example, several [Fair Employment and Housing Commission] decisions rely on medical evidence that demonstrates a limitation relative to the individual's own unimpaired state." *Id.*

Espindola contends that "chronic back pain" is a qualified disability under the FEHA.[50] Wismettac, on the other hand, contends that Espindola's

[50] Opposition 18:13–19:16.

disclosure of "chronic back pain," without more, is not enough to establish that Espindola suffered from an actual or perceived disability in December 2018.[51] Wismettac also relies on Espindola's express denial that he had any "disability" on the Personnel Information Sheet.[52] The Court finds that, in the context of the facts and evidence at bar, "chronic back pain" is not a qualified disability under the FEHA.

The decision of the California Court of Appeal in *Arteaga* is instructive. In that case, the plaintiff alleged that his employment was wrongfully terminated after he informed the defendant that he was "feeling a combination of 'pain' and 'numbness' in his arms, fingers, shoulders, and feet" and that he was experiencing "a lot of stress." *Id.* at 337. The trial court granted summary judgment in favor of the employer. *Id.* at 340. The California Court of Appeal affirmed, holding that Arteaga's claim for disability discrimination failed as a matter of law because he could not establish an actual disability and because the defendant terminated Arteaga's employment for legitimate, nondiscriminatory reasons. *Id.* at 341.

Regarding the former finding, the Court of Appeal explained that Arteaga did not have an "***actual*** disability . . . because his symptoms did not make the performance of his job duties difficult as compared to his unimpaired state or to a normal or average baseline." *Id.* at 346 (citation omitted) (emphasis in original). The court reasoned that symptoms of "pain," such as those reported by Arteaga, are often subjective; therefore, a report of such symptoms, without additional detail or supporting documentation, is not sufficient to establish a qualifying disability under the FEHA. *Id.* at 346–47. Arteaga did not "say what

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[51] Motion 10:14–13:25.

[52] *See id.*

kind of pain he experienced,"[53] nor did he "indicat[e] the degree of pain, such as minor, mild, moderate, severe, intense, extreme, or unbearable." *Id.* at 347. Instead, Arteaga merely reported that he was experiencing general symptoms of pain. *Id.* Therefore, the court held, "a reasonable employer would conclude that Arteaga's pain was not disabling." *Id.*

Here, it is undisputed that Espindola disclosed only that he had "chronic back pain." Similar to *Arteaga*, Espindola did not provide any additional details regarding his specific "physiological disease, disorder, [or] condition" or, significantly, how his condition "limit[ed] a major life activity." *See* Cal. Gov't Code § 12926(m)(1). *Cf. Arteaga*, 163 Cal. App. 4th at 347. Furthermore, Espindola did not provide any supporting documentation, such as medical records or a doctor's note, to substantiate the nature of his purported physical disability or any consequent restrictions or limitations on his ability to perform his work.[54] *Cf. E.E.O.C.*, 424 F.3d at 1071 (in deciding whether an

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[53] "[F]or example, tingling, aching, burning, stinging, stabbing, or throbbing." *Arteaga*, 163 Cal. App. 4th at 347.

[54] *See* Pl. SDMF ¶ 34. Although Espindola contends that this fact is disputed, the Court finds that the evidence that Espindola submitted is not sufficient to create a genuine dispute. *See Anderson*, 477 U.S. at 248 (a genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party"). Specifically, in claiming that this fact is disputed, Espindola cites to testimony from his deposition. *See* Pl. SDMF ¶ 34. However, Espindola's testimony confirms that, aside from telling Gormley that he had "chronic back pain," Espindola ***did not*** disclose to Gormley any additional details. *See* Espindola Dep. 67:9–13. Espindola further testified that he did not provide any medical records or a doctor's note to Gormley; Espindola provided Gormley with only Espindola's Florida medical marijuana card. *Id.* at 67:14–19. In this regard, the December 4, 2018, communication from the Florida Department of Health, which Espindola forwarded to Gormley, does not contain any substantive information regarding, for example, Espindola's underlying medical condition or the criteria that the Florida Department of Health used in deciding to issue a medical marijuana card to Espindola. *See* Gormley Decl. ¶ 8, Ex. 3. That leaves only Espindola's characterization and summary of the documents that the Florida Department of Public Health purportedly reviewed which, as a matter of law, in the absence of the underlying records, is not enough to create a genuine dispute regarding whether Espindola suffered from a "physical disability" in December 2018. *See Arteaga*, 163 Cal. App. 4th at 347 ("An employer does not have to accept an employee's subjective belief that he is disabled.").

employee is "disabled," some decisions "rely on medical evidence that demonstrates a limitation relative to the individual's own unimpaired state"); *Arteaga*, 163 Cal. App. 4th at 347.

To the contrary, the undisputed evidence shows that Espindola indicated on the Personnel Information Sheet that he did not have any disability. Espindola also did not provide any explanation or detail concerning how his chronic back pain limited his ability to work.[55] In this regard, it is undisputed that Espindola "worked everyday [*sic*] fulltime in the office"[56] and completed multiple substantive projects[57] during his short tenure at Wismettac. Thus, there is no evidence in the record that Espindola's alleged condition limited his ability to work.

Espindola cites *Colmenares v. Braemer Country Club, Inc.*, 29 Cal. 4th 1019 (2003), and *Spitzer v. The Good Guys, Inc.*, 80 Cal. App. 4th 1376 (2000), in support of his argument that "chronic back pain" constitutes a "disability" under the FEHA. However, neither case supports the proposition that "chronic back pain," in the absence of specific details about the nature of the condition, qualifies as a disability under the FEHA.

In *Colmenares*, the plaintiff sustained a back injury while he was employed by the defendant. *Colmenares*, 29 Cal. 4th at 1023. Consequently, "under doctor's orders," the plaintiff "was given only light duties." *Id.* When the defendant terminated the plaintiff's employment—almost six years after the plaintiff's injury—the plaintiff filed a claim for wrongful termination, in which the plaintiff alleged that "his termination violated the FEHA because it was based on his physical disability, namely, a 'chronic back injury.'" *Id.* The trial court granted summary judgment on the ground that the plaintiff failed to

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55 Pl. SDMF ¶¶ 34 & 35.

56 Def. SDMF ¶ 80.

57 *Id.* at ¶¶ 81 & 82.

establish that his disability "substantially" limited a major life activity. *Id.* The California Supreme Court reversed, holding that the FEHA requires a plaintiff to establish only that his condition "limited (as opposed to substantially limited) the plaintiff's ability to participate in major life activities." *Id.* at 1019, 1030–31.

A notable distinction exists between *Colmenares* and the instant case: in *Colmenares*, the fact that the plaintiff had a back condition was established through medical and other documentation, *see id.* at 1023–24; thus, the only question was whether the plaintiff had to show that his condition "substantially limited" or merely "limited" a major life activity, *id.* Here, in contrast, the question is whether Espindola's mere statement that he had a "chronic back condition"—by itself, without any supporting documentary evidence such as medical records or "doctor's orders," *cf. id.* at 1023—is sufficient to establish a *prima facie* case that Espindola suffered from a "disability" under the FEHA or that Wismettac otherwise perceived that Espindola suffered from such a disability. Thus, Espindola's reliance on *Colmenares* is not persuasive.

The other case upon which Espindola relies, *Spitzer*, is similarly distinguishable. The question presented in *Spitzer* was whether the defendant failed to make a reasonable accommodation for the plaintiff's ***known*** disability, not whether the plaintiff had a qualifying disability in the first instance. *Spitzer*, 80 Cal. App. 4th at 1383 ("Respondent concedes appellant has a physical disability within the meaning of the FEHA."). Indeed, the plaintiff's disability in *Spitzer*—degenerative disc disease (discogenic spondylosis)—was extensively documented, including records showing that the plaintiff received therapeutic and pharmacologic treatment for several years, ***while*** she was employed by the defendant. *Id.* at 1379–80. Furthermore, the plaintiff submitted numerous requests for accommodations over a period of several years before her termination. *See id.* at 1380–82. For example, on at least two occasions before she was terminated, the plaintiff submitted a written request for a medical leave

of absence, supported by a note from her treating physician explaining the need for the requested leave. *Id.* at 1381–82.[58]

The contrast between *Spitzer* and the present case is stark. Here, there is no evidence that Espindola suffered from a disability such as degenerative disc disease, nor is there any evidence that Espindola's purported condition affected his ability to work. Moreover, Espindola has not produced any evidence (in the current proceeding or at the time that he notified Wismettac of his back pain), such as a doctor's note or medical records, to show that he suffered from an actual or perceived disability in December 2018. Finally, there is no evidence that Espindola tendered a "specific request" for an accommodation to Wismettac. *Cf. Spitzer*, 80 Cal. App. 4th at 1381–82 (the plaintiff submitted multiple written requests for medical leave, supported by doctor's notes that explained the plaintiff's condition and the basis for the requested accommodation).

In sum, although the cases upon which Espindola relies generally involve plaintiffs with back injuries, they do not support Espindola's argument that "chronic back pain," without more, qualifies as a disability under the FEHA. To the contrary, in view of the evidence of the respective plaintiffs' disabilities in *Colmenares* and *Spitzer*, those cases underscore that, in the absence of specific details or corroborating documentation, "[a]n employer does not have to accept an employee's subjective belief that he is disabled." *Arteaga*, 163 Cal. App. 4th at 347.

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[58] In addition, the court in *Spitzer* recognized (albeit in the context of deciding whether the defendant failed to provide a reasonable accommodation) that "[t]he employee bears the burden of giving the employer notice of the disability," *id.* at 1385 (quoting *Prillman v. United Air Lines, Inc.*, 53 Cal. App. 4th 935, 950 (1997)) (quotations omitted), and that an employee "whose disability is not apparent is . . . obliged to tender a specific request for a necessary accommodation," *id.* at 1384 (citing *Miller v. National Cas. Co.*, 61 F.3d 627, 630 (8th Cir. 1995)).

In view of the foregoing, the Court concludes that Espindola's claim that he "suffered from a medical condition that made certain everyday tasks unusually difficult,"[59] is conclusory and subjective; therefore, it is not sufficient to create a genuine dispute regarding the question of whether Espindola suffered from a qualified disability in December 2018. As in *Arteaga*, the Court finds that based upon the undisputed facts and evidence, a reasonable employer would conclude that Espindola's pain was not disabling. Furthermore, for the same reasons, the Court finds that Espindola cannot establish that Wismettac perceived him as disabled.[60] *Cf. id.* at 350–52.

**b. Wismettac Has Produced Evidence of a Legitimate Nondiscriminatory Reason for Espindola's Termination**

Even if Espindola could establish that he suffered from a qualified disability, Espindola cannot overcome the substantial evidence produced by Wismettac that Espindola was terminated for a legitimate, nondiscriminatory reason. Under the *McDonnell Douglas* burden-shifting test, if the plaintiff establishes a *prima facie* case for disability discrimination, then the burden shifts to the defendant to show a legitimate, nondiscriminatory reason for the plaintiff's termination. *Lowe*, 775 F.2d at 1005. If the defendant sustains its burden, then the plaintiff must demonstrate that the employer's proffered reason for the adverse employment decision is a mere pretext for a discriminatory motive. *Id.*

In this regard, the plaintiff "cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether

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[59] Def. SDMF ¶ 100.

[60] Espindola claims that "on no less than three occasions" Espindola made Gormley aware of his condition. *See* Opposition 19:18–20:4. However, for the reasons explained in this section, the Court finds that Espindola's three vague statements referencing "chronic back pain" and "chronic back issues" are not sufficient to create a genuine dispute regarding whether Espindola was disabled or was perceived as disabled by Wismettac.

discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." *Hersant v. Department of Social Services*, 57 Cal. App. 4th 997, 1005 (1997) (quoting *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994)). Rather, the plaintiff must demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them 'unworthy of credence,' [citation], and hence infer 'that the employer did not act for the [the asserted] non-discriminatory reasons.'" *Id.* (quoting *Fuentes*, 32 F.3d at 765) (citations and quotation marks omitted).

Wismettac contends that Espindola's failure of his preemployment drug test is a legitimate nondiscriminatory reason for terminating Espindola's employment.[61] Espindola, in response, maintains that the drug test was both illegal and pretextual. According to Espindola, to be lawful, a "preemployment" drug test must be an express condition of the offer of employment.[62] Here, Espindola argues, the offer of employment was not expressly conditioned upon the completion of the preemployment drug test. Therefore, the drug test was illegal. The taint of illegality, according to Espindola, underscores that Wismettac used the test as a pretext for firing him due to his disability. In this regard, Espindola points to the fact that the drug test occurred after he began his employment and the day after he told Gormley about his chronic back pain.[63]

Under California law, employers are legally permitted to condition employment upon the completion of a preemployment drug screening. *Ross v. RagingWire Telecommunications, Inc.*, 42 Cal. 4th 920, 924 (2008) ("an employer

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[61] Motion 14:14–15:5.

[62] *See* Opposition 6:17–12:22.

[63] *See id.*

may require preemployment drug tests and take illegal drug use into consideration in making employment decisions"). Where, as in this case, the employer has a uniform policy requiring employees to complete a preemployment drug test as a condition of employment, the fact that the employee has notice of that condition, coupled with the result of the test, is determinative.[64]

In *Ross*, the California Supreme Court explained that because an employer may lawfully "condition an offer of employment ***on the results*** of a medical examination[,]" employers may constitutionally require preemployment drug screening. *Ross*, 42 Cal. 4th at 927 (emphasis added). The court in *Ross* drew upon another seminal decision on this point, *Loder v. City of Glendale*, 14 Cal. 4th 846 (1997), which held that "[a]s a general matter, a job applicant reasonably must anticipate that a prospective employer may require that he or she undergo a preemployment medical examination before the hiring process is complete." *Loder*, 14 Cal. 4th at 897; *see also Ross*, 42 Cal. 4th at 927 (quoting *Loder*, 14 Cal. 4th at 883) (the plaintiff failed to cite any "authority indicating that an employer may not reject a job applicant if it lawfully discovers that the applicant currently is using illegal drugs or engaging in excessive consumption of alcohol").

Espindola relies on a series of California cases affirming the constitutionality of preemployment drug screening where the screening was an

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[64] *See also Hind v. Superior Court*, 66 Cal. App. 4th 28, 31 (1998) ("a job applicant may be required to undergo a drug test as a condition of employment"); *Wilkinson v. Times Mirror Corp.*, 215 Cal. App. 3d 1034, 1051 (1989) (recognizing that employers have a legitimate interest in excluding individuals whose drug use may affect their performance and that preemployment drug screening was lawful where the employer "asks job applicants to consent to a urinalysis which tests for alcohol and other drugs as a condition of a job offer, given the notice provided to prospective employees of the testing program").

express condition within the offer of employment.[65] *See, e.g.*, *Hind*, 66 Cal. App. 4th at 32–34; *Wilkinson*, 215 Cal. App. 3d at 1051. However, the fact that the offers of employment in those cases were expressly conditioned upon the completion of a preemployment drug test does not mean that, as a categorical rule, the drug test ***must be*** an express condition of the employment offer in order to be lawful. And Espindola does not cite any authority that supports that proposition.

Relatedly, *Hind* is also determinative of Espindola's argument that the drug test was unlawful because it was administered after Espindola began working for Wismettac. In *Hind*, the court affirmed the constitutionality of a suspicion-free, preemployment drug test even though the defendant conceded that the test was administered after the plaintiff was already an employee. *See Hind*, 66 Cal. App. 4th at 32–34. Indeed, that court specifically held that "a job applicant, who requests and receives a delay in submitting to the preemployment drug test permitted by *Loder* until after the start of employment, may not evade the employer's testing requirement postemployment on the ground the applicant thereby became an 'employee' and is, consequently, immune from such testing." *Id.* at 34.

As in *Hind*, here it is undisputed that Espindola received notice of Wismettac's preemployment drug screening policy before his employment started and that Wismettac universally requires preemployment drug screening as a condition of employment. *See also Wilkinson v. Times Mirror Corp.*, 215 Cal. App. 3d 1034, 1048–49 (1989) (affirming a preemployment drug test where the employer's policy was "specifically to ***inform*** job applicants that a job offer with the company is conditioned on consent to drug testing" and where the plaintiffs, in fact, received that notification). Espindola even requested and

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[65] *See id.* at 6:3–16.

received a delay of that test until after beginning his employment with Wismettac.[66] The instant case thus fits squarely with *Hind*.

Therefore, based upon the undisputed facts and evidence, Wismettac has sustained its burden to establish a legitimate nondiscriminatory reason for Espindola's termination (*i.e.*, because Espindola failed the preemployment drug test), and Espindola has failed to show that there is a triable dispute.

Accordingly, Wismettac is entitled to summary judgment on Espindola's first and second claims for relief.

**B. Failure to Provide Accommodation (Third Claim for Relief) and Failure to Engage in an Interactive Process (Fourth Claim for Relief)**

Espindola's third and fourth claims for relief share common legal elements. *See Moore v. Regents of Univ. of Cal.*, 248 Cal. App. 4th 216, 242 (2016) ("While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other."). Accordingly, the Court addresses these claims together.

California law makes it unlawful for employers "to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee" unless the employer demonstrates that the requested accommodation would impose an undue hardship. Cal. Gov't Code § 12940(m). A claim for failure to accommodate has three essential elements: "(1) the plaintiff has a disability covered by the FEHA; (2) the plaintiff is a qualified individual (*i.e.*, he or she can perform the essential functions of the position); and (3) the employer failed to reasonably accommodate the plaintiff's disability." *Wilson v. County of Orange*, 169 Cal. App. 4th 1185, 1192 (2009).

Employers have an additional duty under the FEHA to engage in a "timely, good faith, interactive process . . . in response to a request for

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[66] Pl. SDMF ¶ 20 (undisputed that "Plaintiff stated he could not submit to the test before he arrived in California in December . . . .").

reasonable accommodation by an employee or applicant with a ***known*** physical or mental disability or ***known*** medical condition." Cal. Gov't Code § 12940(n) (emphasis added). The burden is on the employee to initiate the statutory process, and the employer's obligation to engage in the interactive process arises only when the employer becomes aware of a need to consider an accommodation. *See Gelfo v. Lockheed Martin Corp.*, 140 Cal. App. 4th 34, 62 & n.22 (2006). A claim for failure to engage in an interactive process has four essential elements: (1) the plaintiff had a disability that was known to the defendant; (2) the plaintiff requested that the defendant make a reasonable accommodation; (3) the plaintiff was willing to participate in an interactive process to determine whether a reasonable accommodation could be made; and (4) the defendant failed to engage in a timely good faith interactive process. *See* Jud. Council Cal. Civ. Jury Instruction 2546 (2021).

Here, as explained in the preceding section, the Court finds that Espindola cannot establish that he suffered from a "disability" under the FEHA. Therefore, Espindola cannot establish the first element of his claim for failure to accommodate or his claim for failure to engage in the interactive process.

Putting aside for the moment the Court's analysis and conclusion with respect to the "disability" element, the Court would also find that Espindola's request to take prescription opioid pills while at work was not a specific request for an accommodation.[67] Under California law, a reasonable accommodation is any "modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired." *Swanson v. Morongo Unified School Dist.*, 232 Cal. App. 4th 954, 968–69 (2014) (quotation marks omitted). Such accommodations include "[j]ob restructuring, part-time or

[67] *See* Motion 19:5–23; Opposition 20:6–21:21.

modified work schedules, reassignment to a vacant position, . . . and other similar accommodations for individuals with disabilities." *Id.* (quoting Cal. Gov't Code § 12926(p)). Espindola does not cite any authority to support the proposition that a request to take prescription opioid pills constitutes a request for an accommodation under the FEHA.[68] In addition, Wismettac did not have any obligation to engage in the interactive process prior to Espindola passing his preemployment drug test. *See Moore*, 248 Cal. App. 4th at 243 ("The point of the interactive process is to find reasonable accommodation for a disabled employee . . . in order to ***avoid*** the employee's termination." (emphasis in original)). This reasoning applies equally to Espindola's argument that Wismettac failed to engage in an interactive process with respect to his use of marijuana.[69]

Accordingly, Wismettac has sustained its burden to show that it is entitled to summary judgment on Espindola's third and fourth claims for relief.

**C. Retaliation (Sixth Claim for Relief)**

To establish a *prima facie* claim for retaliation under the FEHA, Espindola must show that (1) he engaged in a "protected activity"; (2) Wismettac subjected Espindola to an adverse employment action; and (3) there is a causal link between the protected activity and the adverse employment action. *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1042 (2005). Here, Espindola

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[68] Espindola's reliance on Justice Kennard's dissenting opinion in *Ross* is not persuasive. Although that opinion states that "the FEHA may require an employer to accommodate a disabled employee's doctor-approved medical use of other substances that potentially could impair job performance," that statement is dicta (in a dissent). *See Ross*, 42 Cal. 4th at 941–42 (Kennard, J., concurring and dissenting). Espindola does not cite any other authority to support the proposition that a request to take prescription opioids, without more, constitutes a request for an accommodation under the FEHA, nor has the Court's own research revealed any such authority.

[69] Opposition 22:19–26. In addition, as explained in the preceding sections, an employer may lawfully require a preemployment drug screening, and Wismettac has established that it terminated Espindola because he failed his preemployment drug screening.

claims that Wismettac terminated his employment "in retaliation for Espindola claiming a physical disability that would have restricted his work activities in the future and for which he sought a legally mandated accommodation."[70]

Because the Court finds that Wismettac is entitled to summary judgment on Espindola's claim for disability discrimination and Espindola's claim for failure to provide accommodation, Espindola's claim for retaliation also fails. Furthermore, because the Court finds that Wismettac sustained its burden to establish a legitimate non-discriminatory reason for Espindola's termination, Espindola cannot establish a causal connection between his (purported) request for accommodation and Wismettac's decision to terminate his employment. *See Coons v. Secretary of U.S. Dept. of Treasury*, 383 F.3d 879, 887 (9th Cir. 2004) (affirming summary judgment because the plaintiff failed to establish the requisite causal connection for retaliation and the defendant established a legitimate non-discriminatory reason for the adverse employment action); *Trotter v. Gates*, 288 F. App'x 398 (9th Cir. 2008) (to similar effect).

Accordingly, Wismettac is entitled to summary judgment on Espindola's sixth claim for relief.

**D. Failure to Prevent Discrimination (Fifth Claim for Relief), Wrongful Termination in Violation of Public Policy (Seventh Claim for Relief), and Intrusion into Private Affairs (Eighth Claim for Relief)**

There is no cognizable claim for failure to prevent discrimination if "there has been a specific factual finding that no such discrimination . . . actually occurred . . . ." *Trujillo v. N. Cnty. Transit Dist.*, 63 Cal. App. 4th 280, 288–89 (1998). Therefore, summary judgment is appropriate on a claim for failure to prevent discrimination where a district court finds that there is no triable dispute with respect to the plaintiff's claim for discrimination. *Pascual v. Boeing*

[70] Complaint ¶ 79.

*Company*, 700 F. App'x 646, 646–47 (9th Cir. 2017) (citing *Trujillo*, 63 Cal. App. 4th at 288–89). Accordingly, here, because the Court finds that Wismettac is entitled to summary judgment on Espindola's claims for age discrimination and disability discrimination, Wismettac is also entitled to summary judgment on Espindola's fifth claim for relief for failure to prevent discrimination.

Similarly, summary judgment is appropriate where a plaintiff's claim for wrongful termination in violation of public policy is based upon an anti-discrimination law (like the FEHA) and the plaintiff fails to raise a triable dispute regarding the discrimination claim. *Sanders v. Arneson Prods., Inc.*, 91 F.3d 1351, 1354 (9th Cir. 1996); *Pascual*, 700 F. App'x at 646–47. Accordingly, Wismettac is entitled to summary judgment on Espindola's seventh claim for relief.

Finally, because the Court finds that Wismettac's preemployment drug test was constitutional (as explained in the preceding sections), Espindola cannot establish a *prima facie* claim for intrusion into private affairs. *See Loder*, 14 Cal. 4th at 886–87 & 897–98. Espindola's claim for intrusion into private affairs also fails because, putting aside the issue of whether a preemployment drug test must be an express condition of the offer of employment to be lawful, it is undisputed that Espindola consented to the drug test. *See Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1, 40 (1994) (whether a legally recognized privacy interest is present is a question of law, and a defendant may overcome such a claim by pleading and establishing consent as an affirmative defense). Accordingly, Wismettac is entitled to summary judgment on Espindola's eighth claim for relief.

## V. CONCLUSION

For the reasons set forth above, the Court hereby **ORDERS** as follows:

1. Wismettac's Motion is **GRANTED** in its entirety.

2. Judgment shall issue in accordance with this Order.

**IT IS SO ORDERED.**

Dated: April 28, 2021

John W. Holcomb
UNITED STATES DISTRICT JUDGE