

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

PETER TENERELLI, an individual,  
Plaintiff,  
v.  
RITE AID CORPORATION; and DOES 1  
through 100, inclusive,  
Defendants.

No. 2:17-CV-01011-JAM-EFB

**ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT**

This case arises from Rite Aid's termination of Peter Tenerelli, a Pharmacy District Manager who had worked for Rite Aid for 34 years. Plaintiff Peter Tenerelli ("Tenerelli" or "Plaintiff") alleges he was unlawfully fired because of his age and his reporting of drug inventory discrepancies. Defendant Rite Aid Corporation (together with Rite Aid Hdqtrs. Corp., "Rite Aid" or "Defendant") maintains it fired Tenerelli for making threats of violence in the workplace. Defendant moves for summary judgment on all claims. Mot., ECF No. 16-1. Tenerelli opposes the motion. Opp'n, ECF No. 17.

For the reasons set forth below, this Court GRANTS Defendant's motion.<sup>1</sup>

---

<sup>1</sup> This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for April 2, 2019.

1 I. FACTS AND PROCEDURAL BACKGROUND

2 Defendant Rite Aid Corporation is a retail drug store chain  
3 incorporated in Delaware and with its principal place of business  
4 in Pennsylvania. Notice of Removal, ECF No. 1, at 4-5.

5 Plaintiff Peter Tenerelli worked for Rite Aid for over 34  
6 years. Undisputed Facts (UF), ECF No. 17-1, ¶ 1. He began  
7 working for Rite Aid in June 1982 as a pharmacist in Washington  
8 state. Id. ¶ 2. At the time of his termination on December 8,  
9 2016, Tenerelli worked as a Pharmacy District Manager in Rite  
10 Aid's Ranch Cordova, California District Office. Id. ¶ 4.

11 During the week of November 27, 2016, Tenerelli made a  
12 comment to his coworker, Christopher Morris, about the use of a  
13 gun at work. UF ¶¶ 24, 35, 43. On December 5, 2016, Morris  
14 shared Tenerelli's comment from the prior week with Human  
15 Resource District Manager Kristy Foster-Potts, and the next day  
16 reported the comment to his supervisor, West Coast Divisional  
17 Asset Protection Director Michelle Jones. Id. ¶¶ 27-28. On  
18 December 6, 2016, Morris provided a written statement to Jones  
19 detailing his recollection of Tenerelli's comment: "Pete entered  
20 the office that I was in and closed the door . . . He began the  
21 conversation by stating, 'I'm only telling you this because I  
22 like you. If you are ever in this office and you hear the sound  
23 of a metal slide going back (as he was motioning to load an  
24 assault rifle), that's your cue to get out of the that backdoor  
25 over there within 5-10 seconds!' He then went on to say, 'I'm  
26 starting at the office over there', as he pointed to the Regional  
27 Admin's office. He then said, 'After that, I'll be working my  
28 way down that back wall.' " Id. ¶¶ 31-32.

1 That same day, on December 6, 2016, Jones and Pharmacy  
2 Regional Vice President Steve Barney interviewed Tenerelli at a  
3 Starbucks next to the Rancho Cordova District Office, during  
4 which Tenerelli gave his side of the story. UF ¶¶ 33-34. In the  
5 interview, Tenerelli admitted to Jones and Barney that he made a  
6 comment to Morris about shooting himself, but not any coworkers.  
7 Id. ¶ 35. Jones' statement from her interview with Tenerelli  
8 provides "Peter stated to us that he did have a conversation in  
9 the office 'that if you ever heard a clicking sound, (mimicked  
10 the sound of a gun), don't bother calling 911. I have given in  
11 to the cruel cruel world.' " Id. ¶ 37.

12 That night, as requested, Tenerelli provided a written  
13 statement to Jones and Barney which included: "I jokingly stated  
14 that if he [Morris] heard a click or bang in my office not to  
15 call 911 and do not resuscitate me stating 'good bye cruel  
16 world'." Id. ¶ 43. In the written statement, Tenerelli further  
17 explained his comment: "I stated this completely in levity in  
18 response to my being overworked . . . Never at any time would I  
19 harm myself or others. These comments were never specific and I  
20 was just poking fun at myself." Tenerelli Written Statement, ECF  
21 No. 16-5, at 15. Tenerelli was aware that Rite Aid had policies  
22 related to violent and threatening behavior in the workplace and  
23 understood that engaging in violent and threatening behavior in  
24 the workplace was a serious matter that would not be tolerated.  
25 UF ¶¶ 16-20.

26 Roger Ceballos, Rite Aid's Senior Director of Human  
27 Resources, reviewed and relied on Morris' and Tenerelli's written  
28 statements, along with Jones' statement from her interview of

1 Tenerelli in making the decision to terminate Tenerelli's  
2 employment. UF ¶ 47. Ceballos made the decision to terminate  
3 Tenerelli because his admitted comments violated Rite Aid's  
4 workplace violence policy and standards of conduct. Id. ¶ 49.  
5 Ceballos had no knowledge of any discrimination against  
6 Tenerelli, nor had Tenerelli reported any such discrimination to  
7 Ceballos. Id. ¶¶ 52-53. Similarly, Ceballos was not aware  
8 Tenerelli had raised any issues with anyone else at Rite Aid  
9 about the accuracy of drug inventory reporting, including on DEA  
10 Form 106s, nor had Tenerelli raised such concerns to Ceballos.  
11 Id. ¶¶ 57-58. Tenerelli, who was an at will employee, was  
12 terminated effective December 8, 2016. UF ¶¶ 1, 5.

13 On April 6, 2017, Tenerelli filed a Complaint against Rite  
14 Aid in the Superior Court of the State of California, County of  
15 Sacramento (Case No. 34-2017-00210709), bringing six causes of  
16 action: (1) Wrongful Termination in Violation of a Public Policy;  
17 (2) Violation of the California Whistleblower Protection Act and  
18 California Government Code § 1102.5(c); (3) Discrimination based  
19 on Age in Violation of California Government Code § 12940(a);  
20 (4) Breach of Implied Covenant of Good Faith and Fair Dealing;  
21 (5) Breach of Employment Contract; (6) and Intentional Infliction  
22 of Emotional Distress. EFC No. 1 at 16-29. On May 15, 2017,  
23 Rite Aid removed the case to federal court on the basis of  
24 diversity jurisdiction. Notice of Removal at 3.

25 On March 5, 2019, Rite Aid moved for summary judgment on all  
26 six causes of action. Mot., ECF No. 16-1. Tenerelli opposed the  
27 motion. Opp'n, ECF No. 17.

28 ///

II. OPINION

A. Age Discrimination

To defeat a claim of age discrimination on a motion for summary judgment, an employer must show that (1) the plaintiff could not establish one of the elements of his FEHA claim or (2) there was a legitimate, nondiscriminatory reason for its decision to terminate the plaintiff's employment. Lawler v. Montblanc N. Am., LLC, 704 F.3d 1235, 1242 (9th Cir. 2013) (citing Dep't of Fair Emp't & Hous. v. Lucent Techs., Inc., 642 F.3d 728, 745 (9th Cir. 2011)). If the employer meets its burden, the discharged employee must then raise a triable issue of material fact as to whether the employer's proffered reason for the termination was mere pretext for unlawful discrimination. Lucent Techs., 642 F.3d at 746.

1. Prima Facie Case

Tenerelli carries the initial burden of establishing a prima facie case of age discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). To state a prima facie age discrimination case under FEHA, Tenerelli must establish that: (1) he was a member of a protected class (i.e., 40 years of age or older); (2) he was performing competently in the position he held; (3) he suffered an adverse employment action, such as termination; and (4) some other circumstance suggests a discriminatory motive. Santillan v. USA Waste of California, Inc., 853 F.3d 1035, 1043 (9th Cir. 2017). It is undisputed that Tenerelli has satisfied the first, second, and third elements. Mot. at 12. The parties also agree there is no direct evidence of age discrimination. Opp'n at 4.

1 Tenerelli has failed to put forward circumstances suggesting  
2 a discriminatory motive in his termination. Roger Ceballos, Rite  
3 Aid's Senior Director of Human Resources, made the decision to  
4 terminate Tenerelli based on his admitted comment about shooting  
5 a gun in the office. UF ¶¶ 42-44, 47-49. Tenerelli never  
6 reported any age discrimination to Ceballos. Id. ¶ 52. Nor is  
7 there any evidence - only pure speculation by Tenerelli - that  
8 Ceballos had knowledge of age-related comments directed towards  
9 Tenerelli. Id. ¶¶ 53, 78-83. "[S]tray remarks that are  
10 unconnected to employment decisionmaking" do not support a FEHA  
11 discrimination claim. Harris v. City of Santa Monica, 56 Cal.  
12 4th 203, 231 (Cal. 2013).

13 2. Legitimate, Nondiscriminatory Reason

14 Tenerelli's claim of age discrimination also fails because  
15 Rite Aid has articulated a legitimate, nondiscriminatory reason  
16 for the termination. McDonnell Douglas, 411 U.S. at 802.  
17 Tenerelli admitted, in a written statement provided to Rite Aid,  
18 to commenting about shooting a gun at work which, even if made in  
19 jest and directed at himself, was a violation of Rite Aid's  
20 workplace violence policy and standards of conduct. UF ¶¶ 42-44,  
21 49. It is undisputed that Tenerelli's admission to making this  
22 comment, along with statements from Christopher Morris and  
23 Michelle Jones regarding the comment, served as the basis for  
24 Tenerelli's termination. UF ¶¶ 32, 35-37, 47-49.

25 3. Pretext

26 Where an employer provides a legitimate, nondiscriminatory  
27 reason for the adverse employment action, the burden shifts back  
28 to the employee to show that the employer's proffered reason was

1 simply a pretext for discrimination. McDonnell Douglas, 411 U.S.  
2 at 804. Tenerelli fails to establish Rite Aid's reason for  
3 terminating him was pretextual. Indeed, it is undisputed that  
4 Rite Aid's reason for terminating Tenerelli was his admitted  
5 statement regarding shooting a gun at work. UF ¶¶ 35-37, 42-44,  
6 47-49. Tenerelli's argument that "Mr. Ceballos was not working  
7 in a bubble and in fact may have had significant information that  
8 would influence his decision to terminate" is pure speculation,  
9 and comes nowhere close to the "specific" and "substantial"  
10 circumstantial evidence needed to create a genuine issue of  
11 material fact as to pretext. Cornwell v. Electra Cent. Credit  
12 Union, 439 F.3d 1018, 1029 (9th Cir. 2006).

13 4. Conclusion

14 Thus, this Court grants summary judgment to Rite Aid on  
15 Tenerelli's third cause of action for age discrimination under  
16 FEHA. Moreover, to the extent this age discrimination claim is  
17 also brought under the ADEA, summary judgment is likewise  
18 warranted. Shelley v. Geren, 666 F.3d 599, 607 (9th Cir. 2012).

19 B. Retaliation

20 To establish a prima facie case of retaliation a plaintiff  
21 must demonstrate (1) he engaged in a protected activity, (2) his  
22 employer subjected him to an adverse employment action, and  
23 (3) there is a causal link between the two. Mokler v. Cty. of  
24 Orange, 157 Cal. App. 4th 121, 138 (Cal. Ct. App. 2007).

25 Tenerelli alleges he reported, to people he believed to be  
26 members of upper management, that, based on certain drug  
27 inventory discrepancies, he thought the DEA Form 106s he was  
28 filling out and signing had the potential to be inaccurate.

1 UF ¶¶ 85, 88. Setting aside whether that reporting constitutes a  
2 protected activity under California Labor Code § 1102.5 (see UF  
3 ¶¶ 84-97), the undisputed facts show no causal link between this  
4 activity and Tenerelli's termination. The decisionmaker on  
5 Tenerelli's termination, Roger Ceballos, was not aware of any  
6 concerns Tenerelli raised about allegedly inaccurate DEA Form  
7 106s or any other similar reports. UF ¶¶ 50, 57-58. Tenerelli's  
8 contention that "Mr. Ceballos is not isolated from others" (Opp'n  
9 at 7) is insufficient to create a genuine issue of material fact  
10 as to a causal link.

11 Thus, this Court grants summary judgment to Rite Aid on  
12 Tenerelli's second cause of action for retaliation under  
13 California Labor Code § 1102.5. Moreover, to the extent the  
14 retaliation claim is brought under the California Whistleblower  
15 Protection Act (California Government Code § 8547.8), summary  
16 judgment is warranted because Tenerelli was not a state employee.  
17 McKinney v. Apollo Grp., Inc., Case No. 07-cv-2373-WQH-CAB, 2010  
18 WL 11442914, at \*13 (S.D. Cal. Jan. 28, 2010).

19 C. Wrongful Termination in Violation of Public Policy

20 A claim for wrongful termination in violation of public  
21 policy is a derivative claim which "requires a showing that there  
22 has been a violation of a fundamental public policy embodied in  
23 statute." Merrick v. Hilton Worldwide, Inc., 867 F.3d 1139, 1150  
24 (9th Cir. 2017). Because Tenerelli's age discrimination and  
25 retaliation claims fail as a matter of law, his derivative claim  
26 of wrongful termination necessarily fails as well.

27 Thus, this Court grants summary judgment to Rite Aid on  
28 Tenerelli's first cause of action.



1 D. Breach of Employment Contract and Breach of Implied  
2 Covenant of Good Faith and Fair Dealing

3 “[T]here is a statutory presumption that employment is  
4 terminable at will . . .” Eisenberg v. Alameda Newspapers, Inc.,  
5 74 Cal. App. 4th 1359, 1386 (Cal. Ct. App. 1999); Cal. Labor Code  
6 § 2922. Tenerelli argues “it can be inferred” from his 34 years  
7 of employment with Rite Aid that he “had a reasonable belief that  
8 he would only be terminated for good cause.” Opp’n at 8.

9 Contrary to Tenerelli’s unsupported assertion, it is undisputed  
10 that he was an at-will employee and he never received anything  
11 in writing from Rite Aid changing that status. UF ¶¶ 5, 15.  
12 Thus, because Tenerelli was an at-will employee, his breach of  
13 contract claim fails as a matter of law. Guz v. Bechtel Nat.  
14 Inc., 24 Cal. 4th 317, 339-344 (Cal. 2000) (agreeing that “an  
15 employee’s mere passage of time in the employer’s service, even  
16 where marked with tangible indicia that the employer approves the  
17 employee’s work, cannot alone form an implied-in-fact contract  
18 that the employee is no longer at will.”) (emphasis in original).

19 Moreover, a terminated at-will employee cannot assert a  
20 claim for breach of the implied covenant of good faith and fair  
21 dealing. Horn v. Cushman & Wakefield W., Inc., 72 Cal. App. 4th  
22 798, 819-820 (Cal. 1999) (affirming dismissal of implied covenant  
23 claim by at-will employee because “[w]here there is no underlying  
24 contract there can be no duty of good faith arising from the  
25 implied covenant”). As with his breach of contract claim,  
26 Tenerelli’s breach of implied covenant claim fails.

27 Thus, this Court grants summary judgment to Rite Aid on  
28 Tenerelli’s fourth and fifth causes of action.

1 E. Intentional Infliction of Emotional Distress

2 California recognizes a cause of action for intentional  
3 infliction of emotional distress (IIED) when: (1) there is  
4 extreme and outrageous conduct by the defendant with the  
5 intention of causing, or reckless disregard of the probability of  
6 causing, emotional distress; (2) the plaintiff suffers severe or  
7 extreme emotional distress; and (3) the defendant's outrageous  
8 conduct is the actual and proximate causation of the emotional  
9 distress. Lawler, 704 F.3d at 1245.

10 Tenerelli's IIED claim fails as a matter of law. Tenerelli  
11 contends the "combination of the age harassment, the excessive  
12 workload, and the stress of trying to protect the company from  
13 their own policies built a level of stress that needed to be  
14 released" and that his "very mellow release in light of the  
15 stressors was to make a single comment" which "lead to the  
16 outrageous act of termination." Opp'n at 9. But a termination  
17 of employment alone is not sufficient to satisfy the standard for  
18 extreme and outrageous conduct. Janken v. GM Hughes Elecs.,  
19 46 Cal. App. 4th 55, 80 (Cal. Ct. App. 1996) ("A simple pleading  
20 of personnel management activity is insufficient to support a  
21 claim of intentional infliction of emotional distress, even if  
22 improper motivation is alleged."); see also Lawler, 704 F.3d at  
23 1245-1246. Moreover, distress from personnel decisions like the  
24 assignment of an excessive workload or termination would fall  
25 within the scope of workers' compensation, not IIED. Miklosy v.  
26 Regents of Univ. of California, 44 Cal. 4th 876, 902 (Cal. 2008).

27 Thus, this Court grants summary judgment to Rite Aid on  
28 Tenerelli's sixth cause of action.


1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

III. ORDER

For the reasons set forth above, Defendant's Motion for Summary Judgment is GRANTED in its entirety. ECF No. 16.

IT IS SO ORDERED.

Dated: April 18, 2019



JOHN A. MENDEZ,  
UNITED STATES DISTRICT JUDGE