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NO. 89377-2

SUPREME COURT OF THE STATE OF WASHINGTON

KATHRYN SCRIVENER,

Petitioner,

v.

CLARK COLLEGE,

Respondent.

RESPONDENT'S ANSWER TO WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION'S AMICUS CURIAE MEMORANDUM

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I. INTRODUCTION

The Court should deny review because there is no conflict presented by the substantively identical articulations of the pretext standard by the Court of Appeals in this case and in *Rice v. Offshore Systems, Inc.*[1] Further, the Court of Appeals' conclusion in this case that general comments affirming a commitment to, and a desire to increase, diversity do not constitute evidence of discrimination warranting a jury trial does not raise an issue of substantial public interest. Amicus Washington Employment Lawyers Association's ("WELA") arguments in support of review in this case are almost wholly duplicative of those raised by Petitioner Kathryn Scrivener. The one new argument advanced by WELA—a request that this Court overturn the "stray remarks doctrine"—is based on a misreading of the California authority it is based upon, has not been raised by any party to this litigation to date, and does not warrant review in this case. Accordingly, this Court should deny review.

II. ARGUMENT

A. WELA's Request That This Court Overturn The "Stray Remarks Doctrine" Is Without Legal Support

The one issue WELA raises that is wholly unique from those raised by Ms. Scrivener is a request that this Court overturn the "stray

[1] 167 Wn. App. 77, 272 P.3d 865 (2012), *review denied*, 174 Wn.2d 1016, 281 P.3d 687 (2012).

remarks doctrine." Amicus Br. at 10. As an initial matter, the Court should decline to consider this argument because it is being raised solely by amicus and is being raised for the first time on appeal. RAP 2.5(a), 9.12; *State v. Taylor*, 150 Wn.2d 599, 603 n.2, 80 P.3d 605 (2003) ("We do not, however, address issues raised only by amicus."). More fundamentally, however, WELA's argument on this point is based on misconceptions regarding what the "stray remarks doctrine" is, what the Court of Appeals held in this case, and what the California Supreme Court held in *Reid v. Google, Inc.*[2]

1. The Law Recognizes That Not All Statements Regarding A Protected Class Give Rise To An Inference Of Discriminatory Intent

Given that WELA does not clearly identify the "stray remarks doctrine" that it seeks to overturn, some background is necessary. The "stray remarks doctrine" is not actually a "doctrine" at all. It is simply an application of the common sense proposition that not all statements regarding a protected class are equally probative of discriminatory intent. As this Court held in *Hill v. BCTI Income Fund-I*,[3] evidence that raises only a weak inference of discriminatory intent is insufficient to avoid summary judgment:

[2] 50 Cal. 4th 512, 235 P.3d 988 (2010).

[3] 144 Wn.2d 172, 23 P.3d 440 (2001), *overruled on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214, 228, 137 P.3d 844 (2006).

> [A]n employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. To hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review under [CR 50], and we have reiterated that trial courts should not treat discrimination differently from other ultimate questions of fact.

Hill, 144 Wn.2d at 184-85 (quotation marks and emphasis omitted).

Courts have had no problems applying this general principle to statements that allegedly demonstrate discriminatory intent. For example, in *Griffith v. Schnitzer Steel Industries, Inc.*,[4] an individual not employed by the defendant asked the Mormon plaintiff, "Why are you running this yard? You're not Jewish." *Id.* at 445-46. The Court of Appeals held that this comment was insufficient to avoid summary judgment on a religious discrimination claim because the individual making the comment was not involved in the decision to fire the plaintiff. *Id.* at 457. In contrast, in *Rice*, 167 Wn. App. 77, a manager "frequently referred to [the plaintiff] as an 'old goat' in front of other employees, [said] 'you're too old to stay on the job,' and repeatedly tried to shift [the plaintiff's] job duties to a younger employee[.] These comments continued throughout 2006 and

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[4] 128 Wn. App. 438, 115 P.3d 1065 (2005), *review denied*, 156 Wn.2d 1027, 133 P.3d 473 (2006).

2007, when [the manager] fired [the plaintiff]." *Id.* at 81. The Court of Appeals held that the plaintiff's age discrimination claim should survive summary judgment in such circumstances. *Id.* at 92-93.

Thus, when considering whether a statement gives rise to an inference of discriminatory intent, courts consider the circumstances of the comment, including factors such as (a) whether the comment evidences discriminatory animus,[5] (b) whether the person who made the comment was involved in the allegedly discriminatory decision,[6] (c) whether the comment was directed at the plaintiff's qualifications as an employee,[7] and (d) the comment's proximity in time to the allegedly discriminatory decision.[8] This is the legal context within which Dr. Branch's comments regarding diversity are to be analyzed.

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[5] *Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 71, 90, 98 P.3d 1222 (2004) ("Without evidence about the context of the remark, it is impossible to know whether it is related to Domingo's termination, whether Walsh innocently made the comment in an unrelated context, or said it as a joke.").

[6] *Griffith*, 128 Wn. App. at 457 ("Neu was an employee of a competitor and neither Neu nor the competitor had control over Griffith's employment."); *Domingo*, 124 Wn. App. at 89-90 ("Generally, age-related comments by non-decision makers are not material in showing an employer's decision was based on age discrimination.")

[7] *Griffith*, 128 Wn. App. at 458 ("Griffith had to establish a nexus between the jokes and his employment by demonstrating that the jokes were probative of how Schnitzer Steel viewed Griffith as an employee."); *Kirby v. City of Tacoma*, 124 Wn. App. 454, 467 n.10, 98 P.3d 827 (2004) (holding that comments "unrelated to the decision process" were insufficient to give "rise to an inference of discriminatory intent" (quotation marks omitted)), *review denied*, 154 Wn.2d 1007, 114 P.3d 1198 (2005).

[8] *Domingo*, 124 Wn. App. at 90 (noting that allegedly discriminatory remark was made three months prior to the challenged employment action).

2. The Court Of Appeals In This Case Properly Held That Comments Affirming A Commitment To, And A Desire To Increase, Diversity Do Not Give Rise To An Inference Of Discriminatory Intent

The Court of Appeals in this case held that Dr. Branch's comments affirming a commitment to, and a desire to increase, diversity did not give rise to an inference of discriminatory intent for several reasons. First, the comments did not evidence discriminatory animus.[9] Second, the comments did not relate to Ms. Scrivener's qualifications for the position at issue.[10] Third, the comments were proximately distant in time from the challenged decision.[11] In short, other than being made by the decisionmaker at issue, these comments satisfied no other factor supporting an inference of discriminatory intent. Any contrary conclusion would deter employers from making statements expressing a commitment to diversity, which would deter such support and would be contrary to public policy.[12]

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[9] *Scrivener v. Clark College*, 176 Wn. App. 405, 415, 309 P.3d 613 (2013) (The comments concerned "seeking younger talent to balance the college's faculty demographics and to bring diverse perspectives to the college faculty[.]").

[10] *Id.* (The comments "cannot be directly tied to Scrivener or the English department hirings.").

[11] *Id.* at 416 ("Like *Domingo*, here Branch's comment occurred months before he filled the English positions.").

[12] *See* RCW 41.06.530(2)(a) (referencing "the state's policy of valuing and managing diversity in the workplace"); Executive Order 12-02 ("[I]t is the policy of Washington State to proactively build a diverse, inclusive, and culturally competent workforce[.]"); *see also* RCW 1.20.100 ("[I]t shall be the policy of the state of Washington to welcome and encourage the presence of diverse cultures and the use of diverse languages in business, government, and private affairs in this state."); GR 12.1 (identifying "promot[ing] diversity" as a goal of the WSBA).

WELA contends that the Court of Appeals held these comments were insufficient to avoid summary judgment solely because they did not relate to Ms. Scrivener's qualifications for the positions at issue. Amicus Br. at 10. As indicated above, however, this is incorrect because the Court of Appeals also relied upon the fact that the comments did not demonstrate any discriminatory animus and were proximately distant in time from the challenged hiring decision.

Further, WELA's argument that the Court of Appeals' decision conflicts with federal authority that an inference of discrimination is present when "a decisionmaker makes a discriminatory remark against a member of the plaintiff's class," Amicus Br. at 10, puts the cart before the horse. Dr. Branch's comments affirming a commitment to, and a desire to increase, diversity do not evidence any animus against any group and are not "discriminatory remarks." In the federal case WELA relies upon, the employer's comments were plainly derogatory towards women, making clear that that case has no bearing on this case.[13] Further, the College has cited several cases holding that comments similar to those at issue in this

[13] *See Dominguez-Curry v. Nevada Trans. Dep't.*, 424 F.3d 1027, 1038 (9th Cir. 2005) ("This evidence includes [the decisionmaker's] sexist comments that 'he wished he could get men to do [women employees'] jobs,' that 'women have no business in construction,' that 'women should only be in subservient positions,' that he 'would never work for a woman,' and his comment, 'if you girls were men, you would know that.'").

case do not give rise to an inference of discriminatory intent,[14] and WELA has cited no contrary authority.

3. The California Supreme Court Disapproved Of An Evidentiary Rule That Is Not The Law In Washington And Is Not At Issue In This Case

The holding of the California Supreme Court in *Reid v. Google Inc.*,[15] has no bearing on this case. WELA's assertion that "the California Supreme Court unanimously abolished the stray remarks doctrine" in *Reid*, Amicus Br. at 10, overstates the holding of that case. In *Reid*, the California Supreme Court rejected "strict application of the stray remarks doctrine, as urged by Google," which "would result in a court's categorical exclusion of evidence even if the evidence was relevant." 50 Cal. 4th at 539. Google had argued that comments that either are made by

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[14] *Bissett v. Beau Rivage Resorts Inc.*, 442 Fed. Appx. 148, 152-53 (5th Cir. 2011) (holding that statements that employer "value[s] diversity and consider[s] it an important and necessary tool that will enable us to maintain a competitive edge," and that employer "is committed to maintaining a workforce that reflects the diversity of the community" were not evidence of pretext.); *Plumb v. Potter*, 212 Fed. Appx. 472, 477 & 481 (6th Cir. 2007) (holding that comment of "that's what we need in the VMF, a little more diversity" was not evidence of pretext); *Altizer v. City of Roanoke*, No. 02-484, 2003 WL 1456514, at *4 (W.D. Va. 2003) ("Gaskins' concern about the lack of diversity in the Department's ranks is not evidence of discriminatory animus. Nor is the fact that Gaskins thought it important to recruit and prepare minorities for promotion. That evidence says nothing about Gaskins willingness to promote a candidate *because* that candidate is an African-American. In fact, the expression of those concerns may have the salutary effect of an announcement that a predominately white, male institution will conduct itself as an equal opportunity employer."), *aff'd*, 78 Fed. Appx. 301 (4th Cir. 2003). Where they are not inconsistent with Washington law, federal authorities are persuasive authority in interpreting Washington employment discrimination law. *Hill v. BCTI*, 144 Wn.2d at 180. Citation to unpublished federal opinions is permitted. GR 14.1(b); Fed. R. App. P. 32.1. Pursuant to GR 14.1, a copy of *Altizer* is attached to Respondent's Answer to Petition for Review.

[15] 50 Cal. 4th 512, 235 P.3d 988 (2010).

co-workers and nondecisionmakers, or are unrelated to the employment decision at issue should be inadmissible *per se*. *Id.* at 538. As indicated above, this is not the law in Washington and this is not the position advocated for by the College. Unsurprisingly, the California Supreme Court rejected Google's position.

Instead, the California Supreme Court held that discriminatory remarks should be considered in context, with all of the evidence in the record. *Id.* at 538. In doing so, that court affirmed the "'common-sense proposition' that a slur, in and of itself, does not prove actionable discrimination." *Id.* at 541. "But when combined with other evidence of pretext, an otherwise stray remark may create an ensemble that is sufficient to defeat summary judgment." *Id.* at 542 (quotation marks, alterations, and emphasis omitted). This is consistent with the law in Washington and this is consistent with what the Court of Appeals did in this case.

WELA implies that *Reid* means that any comments regarding a protected class preclude summary judgment. That argument lacks merit. As indicated above, the California Supreme Court itself recognized that even a slur does not automatically preclude summary judgment. Further,

courts have considered *Reid* in the context of cases involving allegedly discriminatory remarks and have granted summary judgment regardless.[16]

In summary, neither WELA's request to overturn the "stray remarks doctrine" nor the California Supreme Court's decision in *Reid* warrant granting review in this case.

B. There Is No Conflict In The Law That Ms. Scrivener Was Required To Provide Evidence Of Pretext To Survive Summary Judgment

The pretext standard articulated by the Court of Appeals in this case is the same standard that has been articulated in at least 11 other Washington cases—*including Rice*—over the past 20 years.[17] As a result, WELA's suggestion that the Court of Appeals' reliance upon this standard in this case constitutes "clear error," Amicus Br. at 5, is simply incorrect.

[16] *See, e.g.*, *Korte v. Dollar Tree Stores, Inc.*, No. 12-541, 2013 WL 2604472, at **13-14 (E.D. Cal. June 11, 2013) (applying California law, considering *Reid*, and granting summary judgment in age discrimination case despite comments such as employees being "too old and stupid," "too old school," and "not going to change"); *Holtzclaw v. Certainteed Corp.*, 795 F. Supp. 2d 996, 1013-14 (E.D. Cal. 2011) (applying California law, considering *Reid*, and granting summary judgment in age discrimination case despite comments regarding plaintiff's age and suggestions that he retire). Pursuant to GR 14.1, a copy of *Korte* is attached to this brief.

[17] *Fulton v. State*, 169 Wn. App. 137, 161, 279 P.3d 500 (2012); *Rice*, 167 Wn. App. at 89-90; *Hollenback v. Shriners Hospitals for Children*, 149 Wn. App. 810, 824, 206 P.3d 337 (2009); *Dumont v. City of Seattle*, 148 Wn. App. 850, 867, 200 P.3d 764 (2009), *review denied*, 166 Wn.2d 1025, 217 P.3d 336 (2009); *Griffith*, 128 Wn. App. at 447; *Kirby*, 124 Wn. App. at 467; *Domingo*, 124 Wn. App. at 88; *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 619, 60 P.3d 106 (2002); *Chen v. State*, 86 Wn. App. 183, 190, 937 P.2d 612 (1997), *review denied*, 133 Wn.2d 1020, 948 P.2d 387 (1997); *Kuyper v. State*, 79 Wn. App. 732, 738-39, 904 P.2d 793 (1995), *review denied*, 129 Wn.2d 1011, 917 P.2d 130 (1996); *Sellsted v. Washington Mutual Savings Bank*, 69 Wn. App. 852, 859 n.14, 851 P.2d 716 (1993), *review denied*, 122 Wn.2d 1018, 863 P.2d 1352 (1993), *overruled on other grounds by Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 898 P.2d 284 (1995).

Further, WELA's argument that this standard fails to account for evidence that discrimination was a "substantial" factor, rather than a "but for" factor is also incorrect. Such evidence could relate to the issue of whether the articulated reasons for the challenged employment decision "were not really motivating factors," which is one way to demonstrate pretext.[18] Finally, WELA has cited no case where comments regarding diversity, such as those made by Dr. Branch in this case, were sufficient to defeat summary judgment. This is not surprising because, as indicated above, permitting plaintiffs to premise liability upon such statements would deter them, undermining Washington's public policy of promoting diversity.[19] In short, the Court of Appeals' articulation of the pretext in this case does not present a conflict between cases, was not clear error, and does not warrant review in this case.

C. The Court of Appeals' Proper Application Of The Burden-Shifting Analysis, Which Ms. Scrivener Consented To, Does Not Raise Any Issue Of Substantial Public Interest

Recognizing that this Court's opinion in *Hill v. BCTI Income Fund-I*[20] required the application of the burden-shifting analysis to this case, as it does for all discrimination cases where the plaintiff lacks direct evidence of discrimination, WELA asks this Court to grant review in order

[18] *Rice*, 167 Wn. App. at 89-90.

[19] *See* RCW 41.06.530(2)(a); Executive Order 12-02; *see also* RCW 1.20.100; GR 12.1.

[20] 144 Wn.2d 172, 23 P.3d 440 (2001).

to overturn this rule. Amicus Br. at 7. ("This rule of law is outdated and should be reconsidered."). As an initial matter, this issue is being improperly raised for the first time on appeal, as Ms. Scrivener agreed before the trial court that the burden-shifting analysis applies. RAP 2.5(a), 9.12; CP at 92.

More fundamentally, however, the authority WELA relies upon in making this request is not relevant to this issue. Relying upon *Desert Palace v. Costa*, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003), WELA broadly states, "Federal law has evolved significantly since the Court last addressed this issue." Amicus Br. at 2, 7-8. Yet *Desert Palace* had nothing to do with the issues in this case.

Desert Palace concerned the interpretation of the federal Civil Rights Act of 1991. The Civil Rights Act of 1991 amended Title VII to permit a plaintiff to prevail on a discrimination claim when discrimination was only a "motivating" factor, rather than a "but for" factor, in an employment decision. 539 U.S. at 93-95. When discrimination was only a "motivating" factor, however, plaintiffs' remedies were more limited than when discrimination was a "but for" factor. *Id.* The question in *Desert Palace* was whether a plaintiff was required to provide direct evidence of discrimination in order to be able to rely upon the lower "motivating" factor standard, or if a plaintiff could rely upon

circumstantial evidence instead. *Id.* at 95-98. The United States Supreme Court held that a plaintiff did not need to provide direct evidence of discrimination in order to rely upon the lower "motivating" factor standard at trial. *Id.* at 101.

As should be clear from this summary, *Desert Palace* has no relevance to this case. It addressed a statutory provision in Title VII, for which there is no analogue under Washington law, that offers different remedies to plaintiffs for different levels of causation. It concerned jury instructions and the ultimate burden a plaintiff faces in proving liability, not the appropriate analysis on summary judgment. It did not even reference the burden-shifting analysis that applies on summary judgment, much less change the law regarding it. In fact, federal courts continue to apply the burden shifting analysis on summary judgment to discrimination claims based on circumstantial evidence.[21] In short, the United States Supreme Court's interpretation of a federal statute for which there is no Washington analogue and which addresses issues unrelated to those raised by this case does not warrant review in this case.

[21] *See, e.g.*, *Delos Santos v. Potter*, 371 Fed Appx. 746, 747 (9th Cir. 2010) ("We evaluate ADEA and Title VII claims based on circumstantial evidence through the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)."); *Glass v. Intel Corp.*, 345 Fed. Appx. 254, 255 (9th Cir. 2009) ("The district court also correctly applied the *McDonnell Douglas* test to his claims based on circumstantial evidence.").

III. CONCLUSION

To the extent WELA raises any arguments that are not duplicative of those raised by Ms. Scrivener, those arguments are not supported by the law. Accordingly, this Court should deny the petition for review.

RESPECTFULLY SUBMITTED this 20th day of December, 2013.

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CERTIFICATE OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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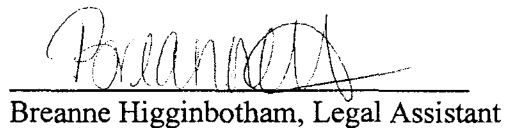

Breanne Higginbotham, Legal Assistant

Appendix A

Only the Westlaw citation is currently available.

United States District Court,
E.D. California.
Eugene KORTE, Plaintiff,
v.
DOLLAR TREE STORES, INC., Defendant.

No. CIV. S-12-541 LKK/EFB.
June 11, 2013.

Robert P. Biegler, Biegler Law Firm, Sacramento, CA, for Plaintiff.

Lisa Kathleen Horgan, Littler Mendelson, San Francisco, CA, for Defendant.

ORDER
LAWRENCE K. KARLTON, Senior District Judge.

***1** Plaintiff Eugene Korte sues defendant Dollar Tree Stores, Inc., alleging: (i) failure to comply with wage and hour laws, (ii) failure to provide proper wage statements, (iii) failure to pay wages due at termination, (iv) retaliatory termination, and (v) age discrimination. The first four causes of action are pled under the California Labor Code; the fifth under California's Fair Employment and Housing Act. According to Dollar Tree, Korte "is a discharged member of a decertified class of current and former Dollar Tree employees who worked as Store Managers at California retail store locations between 12/24/2004 and 5/26/2009 and who raised wage and hour claims challenging their exempt classification." [FN1] (Notice of Removal, ECF No. 1, at 1.)

FN1. The decertification order is available at *Cruz v. Dollar Tree Stores, Inc.,* Nos. 07-2050/07-4012, 2011 WL 2682967, 2011 U.S. Dist. LEXIS 73938 (N.D.Cal. Jul.8, 2011) (Conti, J.).

Korte filed suit in Sacramento County Superior Court on December 8, 2011. The case was removed to this court on February 29, 2012. Dollar Tree now moves for summary judgment, or in the alternative, partial summary judgment.

The motion came on for hearing on May 28, 2013. For the reasons set forth below, the court will grant Dollar Tree partial summary judgment as to certain of Korte's claims.

I. FACTS

The following facts are undisputed or sufficiently uncontroverted.

Korte began working for Dollar Tree in 1999. (Defendant's Statement of Undisputed Facts ("DSUF") 4, ECF No. 34.) From May 10, 2007 until his termination in April 2011, Korte was the Store Manager and/or the Z Manager [FN2] of at least four different Dollar Tree stores in the Sacramento region. (DSUF 5; Plaintiff's Response to Defendant's Statement of Undisputed Facts ("PR-DSUF") 5, ECF No. 39.) Store Managers, in turn, are supervised by District Managers. (DSUF 1, 2.) Dollar Tree classifies Store Managers and District Managers as exempt from overtime compensation, while Assistant Store Managers and all other retail store employees (termed "Associates," most of whom work part-time schedules) are classified as non-exempt. (DSUF 3.)

FN2. A Z Manager is a Store Manager without a store assignment. (DSUF 4.) The parties do not discuss the differences between these two positions in any detail, and the differences do not appear material to this motion; accordingly, the remainder of this order will simply describe Korte's position with Dollar Tree during the 2007-2011 period as "Store Manager."

A Store Manager is the highest-level manager at each Dollar Tree location. (DSUF 6.) Korte's du-

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ties as Store Manager included recruiting, hiring, supervising, evaluating, and disciplining employees; planning staffing and work schedules; ordering merchandise; deciding how to display merchandise (within company guidelines); and training future Store Managers. (DSUF 9–12, 19–20, 25, 28, 34, 40; PR–DSUF 40.) Although he was in charge of his store location, Korte could not make certain decisions, such as adding hours to employees' schedules or discharging employees, without authorization by the District Manager and/or Dollar Tree's Human Resources department. (DSUF 7, 12, 27; PR–DSUF 12, 27.)

Dollar Tree expected Store Managers to spend the majority of their time on management tasks and to delegate non-management tasks. (DSUF 43, 44.) This expectation was communicated to Store Managers in various ways, including performance evaluations, a Store Manager job description, and various documents setting forth company policies and procedures. (DSUF 44.) Korte was aware of Dollar Tree's expectation as to how he should structure his time. (DSUF 43.)

*2 Store Managers were to submit electronic certifications each week confirming that they had spent at least 50% of their time on exempt tasks. (DSUF 96.) If a Store Manager was unable to make this certification, (s)he was required to set out the reasons why (s)he could not do so. (Id.) Korte acknowledges that Dollar Tree never suggested that he should be anything but truthful in filling out the certifications, and he maintains that he was truthful in completing them. (DSUF 98–100.)

Dollar Tree maintains a formal non-discrimination and non-harassment policy ("Policy"). (DSUF 52.) The Policy forbids discrimination and/or harassment on the basis of sex, race, sexual orientation, pregnancy, religion, national origin, age, disability, and any other status protected by law. (DSUF 53.) The Policy specifically prohibits "verbal comments about an individual's body" and "unwelcome physical behavior such as ... touching." (DSUF 54.) The Policy is found in an employee handbook, which Korte distributed to new employees. (DSUF 52, 55.) Korte also attended at least three company trainings on sexual harassment. (DSUF 61.) Korte understood that the Policy prohibited discrimination and sexual harassment, and that as Store Manager, he was obliged to enforce the Policy. (DSUF 58.)

In 2002, Dollar Tree received reports that Korte had inappropriately touched female employees, including putting an arm around a female associate's shoulders and pulling her towards him to talk to her, as well as pinching another female associate on the arm. Dollar Tree also received a report that Korte had commented on the placement of keys on a necklace in relation to a female employee's breasts. Korte was disciplined by Dollar Tree for this inappropriate behavior. (DSUF 62.) He was also directed to review Dollar Tree's sexual harassment policy and given a written warning that further sexual harassment complaints would result in disciplinary action, up to and including termination. (DSUF 64.)

In August and September 2007, shortly after Korte became Store Manager in Roseville, California, Dollar Tree received reports from several of his female subordinates that he had made inappropriate remarks about their bodies, pinched one female associate's waist, run his finger down the side of another female associate's neck, and touched a third female associate's elbow. (DSUF 67.) After the complaints were investigated by Dollar Tree's Regional Human Resources Manager, Korte's District Manager warned Korte regarding his inappropriate behavior. He was transferred to another store. (DSUF 69.)

In June 2009, Dollar Tree again received a complaint from a female employee regarding inappropriate behavior by Korte. (DSUF 70.) She complained that Korte did several things that made her feel uncomfortable: he invaded her space (despite being informed that she did not like people too close to her), whispered in her ear, followed her when she would try to move away, and told her that

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she "still drive[s][him] crazy." (DSUF 71.) Korte was again counseled regarding inappropriate behavior and warned to stay away from the associate in question. (DSUF 72.)

*3 In March 2011, Dollar Tree received a Department of Fair Employment and Housing ("DFEH") Complaint of Discrimination filed by a former employee, Laura Gaines, alleging that Korte had subjected her to sexual harassment. Gaines complained that Korte commented on her appearance inappropriately, told her that she should wear her Dollar Tree apron with nothing underneath, and made inappropriate comments when she would bend over. (DSUF 74.)

After receipt of the DFEH Complaint, Dollar Tree's Director of Human Resources and its Regional Human Resources Manager met with Korte to discuss Gaines's sexual harassment allegations. (DSUF 75.) Korte was subseqently suspended; Dollar Tree claims this was due to the DFEH complaint, while Korte contends it was due to age discrimination and retaliation. (DSUF 77; PR–DSUF 76.) Dollar Tree ultimately entered into a monetary settlement with Gaines, which resolved the administrative complaint. (DSUF 79.)

After an investigation was concluded, Korte was terminated on April 18, 2011 for "conduct unbecoming an officer of the Company due to inappropriate behavior," both based on his conduct towards Gaines and in the context of the history of complaints against him. (DSUF 81.) Korte contends that his termination was due to age discrimination and retaliation. (PR–DSUF 80.)

Dollar Tree moves for summary judgment or partial summary judgment in its favor.

II. STANDARD RE: SUMMARY JUDGMENT

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *Ricci v. DeStefano,* 557 U.S. 557, 586, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009) (it is the movant's burden "to demonstrate that there is 'no genuine issue as to any material fact' and that they are 'entitled to judgment as a matter of law' "); *Walls v. Central Contra Costa Transit Authority,* 653 F.3d 963, 966 (9th Cir.2011) (same).

Consequently, "[s]ummary judgment must be denied" if the court "determines that a 'genuine dispute as to [a] material fact' precludes immediate entry of judgment as a matter of law." *Ortiz v. Jordan,* 562 U.S. ––––, 131 S.Ct. 884, 891, 178 L.Ed.2d 703 (2011), *quoting* Fed.R.Civ.P. 56(a); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,* 657 F.3d 936, 942 (9th Cir.2011) (same).

Under summary judgment practice, the moving party bears the initial responsibility of informing the district court of the basis for its motion, and "citing to particular parts of the materials in the record," Fed.R.Civ.P. 56(c)(1)(A), that show "that a fact cannot be ... disputed." Fed.R.Civ.P. 56(c)(1); *In re Oracle Corp. Securities Litigation,* 627 F.3d 376, 387 (9th Cir.2010) ("The moving party initially bears the burden of proving the absence of a genuine issue of material fact") (citing *Celotex v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

A wrinkle arises when the non-moving party will bear the burden of proof at trial. In that case, "the moving party need only prove that there is an absence of evidence to support the nonmoving party's case." *Oracle Corp.,* 627 F.3d at 387.

*4 If the moving party meets its initial responsibility, the burden then shifts to the non-moving party to establish the existence of a genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 585–86, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Oracle Corp.,* 627 F.3d at 387 (where the moving party meets its burden, "the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial"). In doing so,

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the non-moving party may not rely upon the denials of its pleadings, but must tender evidence of specific facts in the form of affidavits and/or other admissible materials in support of its contention that the dispute exists. Fed.R.Civ.P. 56(c)(1) (A).

The court's function on a summary judgment motion is not to make credibility determinations or weigh conflicting evidence with respect to a disputed material fact. *See T.W. Elec. Serv. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987).

"In evaluating the evidence to determine whether there is a genuine issue of fact," the court draws "all reasonable inferences supported by the evidence in favor of the non-moving party." *Walls,* 653 F.3d at 966. Because the court only considers inferences "supported by the evidence," it is the non-moving party's obligation to produce a factual predicate as a basis for such inferences. *See Richards v. Nielsen Freight Lines,* 810 F.2d 898, 902 (9th Cir.1987). The opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts.... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita,* 475 U.S. at 586–87 (citations omitted).

III. ANALYSIS

A. Request for Judicial Notice

Dollar Tree has requested that the court take judicial notice of six documents filed in support of its motion. (ECF No. 35.) The court will not rule on the request for judicial notice, as it did not rely on these documents in reaching its decision herein.

B. Evidentiary Objections

"In general, only admissible evidence may properly be considered by a trial court in granting summary judgment." *Hollingsworth Solderless Terminal Co. v. Turley,* 622 F.2d 1324, 1335 n. 9 (9th Cir.1980).

Dollar Tree has filed objections to 46 statements in a declaration filed by Korte in support of his opposition to this motion. (ECF No. 45.) The majority of these statements do not bear on the court's decision herein, and therefore Dollar Tree's objections to them need not be addressed. The court need only decide evidentiary objections that are material to its ruling. *Norse v. City of Santa Cruz,* 629 F.3d 966, 973 (9th Cir.2010). Any pertinent evidentiary objections will be addressed as they arise.

I turn now to the substance of Dollar Tree's motion.

B. Motion for Summary Judgment

As the court is sitting in diversity, it decides this motion under California's substantive law. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

1. Was Korte an exempt employee?

***5** The dispositive question as to many of the issues raised in this motion is whether Korte was exempt from California law governing overtime pay, meal periods, rest breaks, itemized wage statements, and waiting time penalties (the latter for wages not paid upon termination). Dollar Tree contends that Korte, as a Store Manager, was exempt from these protections, and that consequently, it should be granted summary judgment on these claims.

a. Standard for exemption

California law requires that all employees receive overtime compensation and authorizes civil actions to recover unpaid overtime. Cal. Lab.Code §§ 510, 1194.

The California Industrial Welfare Commission ("IWC"), a state agency established in 1913, promulgated regulations in the form of "wage orders," which governed employment matters such as maximum hours of work and overtime pay. *Indus. Welfare Comm' n. v. Superior Court,* 27 Cal.3d 690, 700, 166 Cal.Rptr. 331, 613 P.2d 579 (1980); Cal.

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Lab.Code § 70. "The IWC's wage orders, although at times patterned after federal regulations, also sometimes provide greater protection than is provided under federal law ...." *Ramirez v. Yosemite Water Co., Inc.,* 20 Cal.4th 785, 795, 85 Cal.Rptr.2d 844, 978 P.2d 2 (1999); 29 U.S.C. § 218(a). In issuing its wage orders, "the IWC acted in a quasi-legislative capacity. Although the IWC was defunded effective July 1, 2004, its wage orders remain in effect." *Johnson v. Arvin–Edison Water Storage Dist.,* 174 Cal.App.4th 729, 735, 95 Cal.Rptr.3d 53 (2009) (internal citations omitted).

Cal. Lab.Code § 515(a) authorized the IWC to "establish exemptions [subject to certain qualifications] from the requirement that an overtime rate of compensation be paid ... for executive, administrative, and professional employees ...." As statutory protections for overtime pay are to be liberally construed, any "exemptions from statutory mandatory overtime provisions are narrowly construed." *Ramirez,* 20 Cal.4th at 794, 85 Cal.Rptr.2d 844, 978 P.2d 2. Application of the exemptions is "limited to those employees plainly and unmistakably within their terms." *Nordquist v. McGraw–Hill Broad. Co.,* 32 Cal.App.4th 555, 38 Cal.Rptr.2d 221 (1995). Further, "the assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption." *Ramirez,* 20 Cal.4th at 794–5, 85 Cal.Rptr.2d 844, 978 P.2d 2.

IWC Wage Order No. 7, which regulates wages, hours, and working conditions in California's mercantile industry (and therefore applies to Dollar Tree), exempts from overtime pay requirements "persons employed in administrative, executive, or professional capacities." Cal.Code Regs. tit. 8, § 11070(1)(A). The executive exemption, at issue in this motion, applies to any employee:

(a) whose duties and responsibilities involve the management of the enterprise in which he is employed, or of a customarily recognized department or subdivision thereof;

(b) who customarily and regularly directs the work of two or more other employees therein;

*6 (c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight;

(d) who customarily and regularly exercises discretion and independent judgment;

(e) who is primarily engaged in duties which meet the test of the exemption; and

(f) whose monthly salary is equivalent to no less than two times the state minimum wage for full-time employment.

Cal.Code Regs. tit. 8, § 11070(1)(A)(1)(a)-(f).

For our purposes, the critical requirement lies in subsection (e): was Korte "primarily engaged in duties which meet the test of the exemption"? The IWC defines "primarily" as "more than one-half the employee's work time." IWC Wage Order No. 7–2001, § 2(K). The applicable regulation provides that, in making this determination, "[t]he work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work. considered." Cal.Code Regs. tit. 8, § 11070(1)(A)(1)(e). But courts are not just to make a quantitative evaluation in determining whether the exemption applies. Rather:

A trial court [must inquire] into the *realistic* requirements of the job. In so doing, the court should consider, first and foremost, how the employee actually spends his or her time. But the trial court should also consider whether the employee's practice diverges from the employer's realistic expectations, whether there was any concrete expression of employer displeasure over an employee's substandard performance, and whether these expressions were themselves realistic

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given the actual overall requirements of the job.

Ramirez, 20 Cal.4th at 802, 85 Cal.Rptr.2d 844, 978 P.2d 2 (emphasis in original). This test seeks to account for attempts, by either side, to game a purely-quantitative system: the employer who tries to avoid paying overtime "by fashioning an idealized job description [with] little basis in reality", and the employee who falls "below the 50 percent mark due to his own substandard performance." *Id.*

Dollar Tree, as the employer, "bears the burden of proving the employer's exemption." *Id.* at 794–5, 85 Cal.Rptr.2d 844, 978 P.2d 2. And on summary judgment, it "bears the [initial] burden of proving the absence of a genuine issue of material fact" as to the exemption's existence. *Oracle* Corp., 627 F.3d at 387.

b. Korte's evidence

Whether the executive exemption applies to Korte turns not only on the undisputed facts, but also on statements in Korte's declaration, submitted in opposition to this motion. I have considered Dollar Tree's evidentiary objections to the relevant paragraphs of the declaration, and set forth those statements which appear to be free of appropriate objection:

• While a Store Manager, up until the time of my termination in April 2011, I was required to undertake the freight duties at my store, as I did not have a Freight Manager. (Plaintiff's Declaration in Opposition to Defendant's Motion for Summary Judgment ("Korte Decl.") ¶ 18, ECF No. 38.)

*7 • I requested that a Freight Manager be assigned to my store, or, that I be given the authority to hire a Freight Manager from outside Dollar Tree. (Korte Decl. ¶ 18.)

• I was instructed by management not to do the freight function, but not provided the means (bodies) to make that happen. (Korte Decl. ¶ 18.)

• I was not able to submit said certification on many, if not most weeks, while I was a Store Manager (2007–2011), because I was doing primarily non-exempt duties. (Korte Decl. ¶ 28.)

• As was noted earlier herein, I did not have a freight manager and thus was required to do the freight duties at my store. (Korte Decl. ¶ 28.) FN3

FN3. As explained, this portion of the opinion deals only with evidentiary objections. Clearly, the plaintiff's assertion of requirement is factually in dispute.

• I also performed many other non-exempt functions, including, but not limited to, stocking shelves, moving merchandise, and checking out customers. (Korte Decl. ¶ 28.)

• I received calls from many in Dollar Tree management, including, but not limited to, Patricia Doss at corporate, a Dollar Tree attorney who described herself as a compliance manager, Market Manager Carlos Hernandez and District Manager Melissa Ruzyla, Sacramento Compliance Manager Julia Giddens, Human Resources Manager for Northern California Candance [*sic*] Camp, all had conversations with me about my non compliance. All expressed concern that I was non compliant. (Korte Decl. ¶ 29.)

• I was never provided with the freight manager. (Korte Decl. ¶ 29.)

c. Dollar Tree's initial showing

Dollar Tree "bears the [initial] burden of proving the absence of a genuine issue of material fact" as to whether Korte is subject to the executive exemption. *Oracle Corp.,* 627 F.3d at 387.

Dollar Tree contends that Korte qualified for the executive exemption because it "realistically expected that [he] would be primarily engaged in exempt duties as a store manager." (Memorandum of Points and Authorities in Support of Motion for

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Summary Judgment and/or Partial Summary Judgment ("Motion") 16:21–23, ECF No. 33.) It communicated this expectation to him "both through the certification process and through the inquiries he received when he responded that he was not performing managerial duties over 50% of the time." (Motion 17:7–10.) When Korte explained that he spent more than 50% of his time on non-managerial duties because he lacked a Freight Manager, Dollar Tree instructed him to train one of his Assistant Store Managers to be the Freight Manager. (Motion 17:11–13.) In light of these facts, according to Dollar Tree, Korte was evading the exemption "by failing to adhere to Dollar Tree's clearly communicated expectations" and "due to his own substandard performance." (Motion 17:17–18, 17:23.) The company cites *Ramirez* for the proposition that "an employee who is supposed to be engaged in [exempt] activities during most of his working hours and falls below the 50 percent mark due to his own substandard performance should not thereby be able to evade a valid exemption." 20 Cal.4th at 802, 85 Cal.Rptr.2d 844, 978 P.2d 2. Dollar Tree's argument, essentially, is that Korte spent more than 50 percent of his time on non-exempt functions because he failed to meet the company's realistic expectations for job performance.

***8** These averments, and the evidence proffered in support, are sufficient to meet Dollar Tree's initial burden on summary judgment.

d. Korte's demonstration of a genuine issue of material fact

The burden now shifts to Korte, who must now establish that there is a genuine issue of material fact as to whether he was an exempt employee. Korte alleges that, during the relevant weeks, he was performing primarily non-exempt functions: "I was not able to submit said certification [that I had spent more than 50% of my work time on exempt duties] on many, if not most weeks, while I was a Store Manager (2007–2011), because I was doing primarily nonexempt duties." (Korte Decl. ¶ 28.) This statement satisfies Korte's burden as to the quantitative factor under the exemption, *i.e.,* that there were weeks in which he spent more than 50% of his time doing non-exempt work.

What remains is the inquiry prescribed by the California Supreme Court as to "whether the employee's practice diverges from the employer's realistic expectations, whether there was any concrete expression of employer displeasure over an employee's substandard performance, and whether these expressions were themselves realistic given the actual overall requirements of the job." *Ramirez,* 20 Cal.4th at 802, 85 Cal.Rptr.2d 844, 978 P.2d 2.

Korte disputes Dollar Tree's contention that he spent more than 50 percent of his time on non-exempt functions because he failed to meet the company's realistic expectations for job performance. He argues that "Dollar Tree management's displeasure with [his] non compliance was not realistic, given the fact [that he] had informed them on multiple occasions of his need for a Freight Manager in order to comply." (Plaintiff's Points and Authorities in Opposition to Defendant's Motion for Summary Judgment ("Opposition") 5:6–8.) In support, he cites paragraph 18, 28, and 29 of his declaration, which are largely reproduced above under the heading "Korte's evidence." But these paragraphs are insufficient to rebut Dollar Tree and create a genuine issue of material fact, as they fail to explain why Korte did not simply train one of his Assistant Store Managers to be a Freight Manager, as Dollar Tree directed.

Nonetheless, Korte's deposition transcript, relied upon by Dollar Tree, contains the following exchange. The highlighted passages are those cited by Dollar Tree in support of its motion:

Q. he instruction from Dollar Tree[,] from Melissa Ruzylo, your superior, was to train one of your existing assistant store managers to be the freight manager, correct?

A. Yes. And I asked her—

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Q. And you resisted that because you didn't think it was possible?

A. No, I did not resist it. I asked her to transfer one of those people out and transfer somebody else in that I could make a freight manager.

Q. You said, "I don't think I can make any of these freight managers," correct? You resisted that direction. Your judgment was they couldn't be freight managers?

*9 A. My judgment was correct.

(Deposition of Eugene Korte 179:24–180:13, ECF No. 33–6.)

While it is undisputed that Korte "was instructed to train one of his [Assistant Store Managers] to be the Freight Manager" (DUSF 45), here, Korte is claiming that these expectations were unrealistic because, in his judgment, the Assistant Store Managers under his supervision could not fulfill the Freight Manager function. Arguably, his assertion gives rise to a genuine issue of material fact, *i.e.,* whether, in directing Korte to train one of his assistant store managers to perform the freight manager function, Dollar Tree's expectations were "realistic given the actual overall requirements of the job." *Ramirez,* 20 Cal.4th at 802, 85 Cal.Rptr.2d 844, 978 P.2d 2. Korte was of the view that these expectations were not realistic given his staff's capabilities. Korte's deposition testimony therefore provides "sufficient evidence supporting the claimed factual dispute ... to require a judge or jury to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv.,* 809 F.2d at 630. Accordingly, summary judgment must be denied as to whether Korte was exempt from California's overtime laws.

Dollar Tree has also moved for summary judgment on Korte's claims for violations of California's meal period, rest break, itemized wage statement, and waiting time statutes, on the grounds that his exempt status moots these claims. As Korte has demonstrated that a genuine dispute exists as to whether he fell under the executive exemption, the court must deny Dollar Tree summary judgment on these claims as well.

2. Can Korte make out a claim for retaliation?

Korte contends that Dollar Tree terminated him in retaliation for his filing of certifications showing that he spent a majority of his time on non-exempt functions, and for his communications with his superiors regarding this fact. Korte argues that, by simultaneously directing him to spend the majority of his time on exempt activities, while failing to provide him with the staff necessary to achieve this goal, Dollar Tree implicitly encouraged him to lie about his duties on his weekly certifications, and thereby participated in a violation of state wage and hour law. (Opposition 7:2–22.)

Korte's retaliation claims are brought under the First Amendment, as well as under Cal. Lab.Code §§ 98.6 and 1102.5.[FN4] Dollar Tree is granted partial summary judgment on the First Amendment claim, as Korte concedes this point. (Opposition 3:9–10.)

FN4. In his Opposition, Korte argues, in passing, that his retaliation claim is also actionable as a violation of California's public policy, citing *Rojo v. Kliger,* 52 Cal.3d 65, 276 Cal.Rptr. 130, 801 P.2d 373 (1990) (granting leave to amend to plead a cause of action for wrongful discharge in violation of public policy). However, Korte has failed to plead this cause of action in his complaint. Having previously granted him leave to amend (ECF No. 18), the court declines to do so again.

Dollar Tree raises two lines of defense to Korte's Labor Code claims. First, it contends that they are barred for failure to exhaust administrative remedies, and second, that they are not cognizable under either Labor Code provision cited. Suffice it to say that there is no binding precedent on these questions, and courts remain sharply divided on all

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of them.[FN5]

FN5. For opinions holding that plaintiffs need not exhaust administrative remedies before suing under the California Labor Code, *see Creighton v. City of Livingston,* No. CV–F–08–1507–OWWSMS, 2009 WL 3246825, 2009 U.S. Dist. LEXIS 93720 (E.D.Cal. Oct.7, 2009) (Wanger, J.) ("Exhaustion of administrative remedies before the Labor Commissioner before filing suit for statutory violations of the Labor Code is not required under California law"); *Turner v. San Francisco,* 892 F.Supp.2d 1188, 1202 (N.D.Cal.2012) (Chen, J.) ("The Court finds that exhaustion under § 98.7 is not required before bringing a civil action under §§ 98.6 and 1102.5 "). For opinions holding otherwise, *see Dolis v. Bleum USA, Inc.,* No. 11–CV–2713–TEH, 2011 WL 4501979, 2011 U.S. Dist. LEXIS 110575 (N.D.Cal. Sep.28, 2011) (Henderson, J.) (barring § 1102.5(c) claim for failure to exhaust administrative remedies with the Labor Commissioner); *Ferretti v. Pfizer Inc.,* 855 F.Supp.2d 1017, 1024 (N.D.Cal.2012) (Koh, J.) (same).

For opinions holding that the California Labor Code does not provide a right of action to employees who allege retaliation after complaining to their private-sector employers, *see Hollie v. Concentra Health Servs., Inc.,* No. C 10–5197–PJH, 2012 WL 993522, 2012 U.S. Dist. LEXIS 40203 (N.D.Cal. Mar.23, 2012) (Hamilton, J.) ("[T]he court finds as a matter of law that neither the verbal/e-mail protests, nor the protests 'by conduct,' were activities protected under § 98.6 "); *Weingand v. Harland Fin. Solutions,* No. C–11–3109–EMC, 2012 WL 3537035, 2012 U.S. Dist. LEXIS 114651 (N.D.Cal. Aug.14, 2012) (Chen, J.) (dismissing § 98.6 retaliation claim where "[p]laintiff merely allege[d] that he complained of his employer's conduct within the company itself"). For an opinion holding otherwise, *see Muniz v. United Parcel Serv., Inc.,* 731 F.Supp.2d 961, 970 (N.D.Cal.2010) (Wilken, J.) (holding that refusal to accede to employer's alleged practice of hiding wage-and-hour violations could give rise to a claim under § 98.6).

Nevertheless, even if Korte can clear these hurdles, Dollar Tree must still be granted summary judgment on the retaliation claims.

***10** In addressing claims of employer retaliation, California courts apply the burden-shifting approach articulated by the U.S. Supreme Court in *McDonnell–Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). In order to establish a prima facie case, the plaintiff employee must demonstrate that: 1) the employee engaged in protected activity; 2) the employer subjected the employee to an adverse employment action; and 3) there was a causal link between the protected activity and the adverse employment action. *Muniz v. United Parcel Service, Inc.,* 731 F.Supp.2d 961, 969 (N.D.Cal.2010) (Wilken, J.). Once the plaintiff has established a prima facie case, the defendant employer is required to offer a legitimate, nondiscriminatory reason for the adverse employment action. *Patten v. Grant Joint Union High School Dist.,* 134 Cal.App.4th 1378, 1384, 37 Cal.Rptr.3d 113 (2005). The burden then shifts back to the plaintiff to show that the explanation given by the employer for the adverse employment action is "mere pretext." *Id.*

The critical factor, in the court's view, is whether Korte can make out a prima facie case for causation. The record does not reveal any direct evidence of a causal link between Korte's failure to certify that he was spending the majority of his time on exempt tasks, and his subsequent termina-

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tion. And while causation may be inferred from temporal proximity, "[t]he cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close.' " *Clark County School Dist. v. Breeden,* 532 U.S. 268, 273, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001).

What the record demonstrates is that Korte spent years filing certifications of his non-exempt status and discussing the issue with management, all without being subjected to adverse action. His declaration provides, "I was not able to submit said certification on many, if not most weeks, while I was a Store Manager (2007–2011), because I was doing primarily non-exempt duties ... [F]or much of the relevant period, up to the time of my termination in April 2011, I did not have a freight manager and thus was required to do the freight duties at my store." (Korte Decl. ¶ 28.) While he communicated with numerous superiors regarding the certification issue, there is no evidence that, as April 2011 approached, these communications grew more frequent or that he was given warnings of any kind. Rather, matters seem to have continued apace.[FN6] Accordingly, the court cannot infer causation based on temporal proximity.

> FN6. For example, Dollar Tree has submitted Korte's performance evaluation for 2009/2010. Korte received the following comments in the area of Personnel Management:
>
> [Korte] currently has 3 [Assistant Store Managers] under his management, yet he has not trained any of the three to be a Merchandise Manager. Instead of doing so, he continues to manage the freight processing procedures himself. To alleviate undo [*sic*] pressure to conduct Store Manager functions in conjunction with the freight processing, I would like to see [Korte] give ownership of the Merchandise Manager to one of his ASM's and train them appropriately. (Exhibit I to Declaration of David McDearmon in Support of Motion for Summary Judgment, ECF No. 33–3.)
>
> The signatures of Korte's managers on this document are dated June 7, 2010. The court cannot infer causation from a subjunctive statement ("I would like to see ...") made some ten months before Korte's termination.

What did change in April 2011 was that Dollar Tree entered into a monetary settlement with a former employee whom Korte was alleged to have harassed and who had filed a DFEH complaint about his behavior. Korte had been the subject of sexual harassment complaints for going on nine years, but it appears that this was the first time the company incurred any financial liability as a result of his conduct. Korte was terminated that same month. Korte's termination appears causally linked to this incident, rather than to the certifications he had been filing for four years.

***11** As Dollar Tree has shown "an absence of evidence to support [Korte's] case" for retaliatory termination, based on lack of evidence of causation, the burden now shifts to Korte to "designate specific facts demonstrating the existence of genuine issues for trial." *Oracle Corp.,* 627 F.3d at 387. This he fails to do. While Korte argues that he was suspended and then terminated for retaliatory reasons, he has not introduced a single fact to support that position. He does allege that the DFEH sexual harassment complaint had "no merit," that he "was informed, by Dollar Tree management and counsel, that they also felt [the] claims to be without merit," and that the matter "was ultimately settled for what was termed by Dollar Tree management and counsel as 'nuisance value.' " (Korte Decl. ¶ 23.) But none of this demonstrates that his termination was the result of repeatedly certifying that the majority of his work hours were spent on non-exempt functions. His statement that "I believe that Dollar Tree

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terminated me because I would not 'certify' that I was performing exempt functions for over 50% of my work day" (id.) is conclusory and has no evidentiary weight. Nor can the court infer that Korte suffered a retaliatory termination, for Korte has failed to produce a factual predicate on which to base for such an inference. *See Richards,* 810 F.2d at 902.

In short, the record, taken as a whole, could not "lead a rational trier of fact to find for" Korte. *Matsushita,* 475 U.S. at 586–87. Summary judgment will therefore be entered for Dollar Tree on the retaliation claim.

3. Can Korte seek punitive damages in this lawsuit?

Partial summary judgment must also be entered on Korte's prayer for punitive damages, as the prayer is derivative of his retaliation claim. (First Amended Complaint 8, ECF No. 19.)

3. Has Korte made out a claim for age discrimination?

Korte contends that Dollar Tree unlawfully terminated him due to his age. The California Fair Employment and Housing Act ("FEHA") outlaws employment discrimination against individuals over forty. Cal. Gov't Code §§ 12926(b), 12940. "California has adopted the three-stage [*McDonnell Douglas*] burden-shifting test established by the United States Supreme Court for trying claims of discrimination, including age discrimination, based on a theory of disparate treatment." *Guz v. Bechtel National, Inc.,* 24 Cal.4th 317, 354, 100 Cal.Rptr.2d 352, 8 P.3d 1089 (2000). Under this 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 non-discriminatory 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 a discriminatory motive.

Llamas v. Butte Cmty. Coll. Dist., 238 F.3d 1123, 1126 (9th Cir.2001).

***12** At trial, Korte would bear the burden of proof to show age discrimination. Accordingly, at summary judgment, Dollar Tree "need only prove that there is an absence of evidence to support [Korte's claim]." *Oracle Corp.,* 627 F.3d at 387. To achieve this, Dollar Tree may show "either that (1) plaintiff could not establish one of the elements of the FEHA claim or (2) there was a legitimate, nondiscriminatory reason for its decision to terminate plaintiff's employment." *Dep't of Fair Emp't and Hous. v. Lucent Technologies,* 642 F.3d 728, 745 (9th Cir.2011) (internal citations and brackets omitted).

To prove his FEHA claim, Korte must demonstrate that (1) he suffered an adverse employment action, such as termination; (2) at the time of the adverse action, he was over the age of 40; (3) at such time, he was performing his job competently; and (4) some other circumstance suggests discriminatory motive. *See Guz,* 24 Cal.4th at 355, 100 Cal.Rptr.2d 352, 8 P.3d 1089. "While the plaintiff's prima facie burden is not onerous, he must at least show actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a prohibited discriminatory criterion." *Id.* (internal citations and quotations omitted).

There appears little question that the first two elements are satisfied: Korte was terminated on April 18, 2011, at the age of 58. (DUSF 83.)

Korte next claims that he was performing his job competently at the time he was terminated. His declaration provides:

> I always performed my job duties in an exemplary manner. This is confirmed in my evaluations which were always between "meets expectations" and "exceeds expectations." I did not receive any evaluations which were "below expectations" and/or "needs improvement." This

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was true even in those years when a sexual harassment claim had been made. (Korte Decl. ¶ 30.)

On this basis, he argues that "[t]here are no facts which indicate that Korte did not perform his job function adequately or that Dollar Tree did not consider Korte to be performing his job function adequately." (Opposition 5.)

Dollar Tree's evidentiary objections to Korte's statement are not well taken. It is true that, taken alone, the assertion "I always performed my job duties in an exemplary manner" would be conclusory and therefore insufficient to support Korte's opposition. *Angel v. Seattle–First Nat. Bank,* 653 F.2d 1293, 1299. But Korte bases his assertion (writing "This is confirmed ...") on the statements in his evaluations; these statements are non-hearsay, as they were both made by and offered against Dollar Tree. Fed.R.Evid. 801(d) (2). Dollar Tree's objection on best evidence rule grounds, Fed.R.Evid. 1002, also fails because "an event may be proved by nondocumentary evidence"—in this case, Korte's perceptions—"even though a written record of it was made." Advisory Committee's Notes on Fed.R.Evid. 1002 (1972). Finally, Korte's statement is relevant, as it makes his assertion of competence more probably than it would otherwise be, and competence is a necessary element of his prima facie case under FEHA.

***13** The question then becomes whether Korte can be said to have made out a prima facie case that he was performing his job duties competently when he was terminated, given that he had been repeatedly disciplined for violations of Dollar Tree's sexual harassment policy, and, according to Dollar Tree, he was terminated over the final incident of harassment.

Let us assume, *arguendo,* that Korte has made out a prima facie case on this element.

Nevertheless, he cannot establish the final element of his case, that some other circumstance suggests he was discriminated against based on his age.

In his declaration, Korte identifies the following statements made by Dollar Tree management that he claims demonstrate bias against older workers:

a. Regional Director Cindy Ray, referring to a Dollar Tree employee, stated he was "old thinking" with "old habits" and was "too old, too stupid and missed too much time."

b. District Manager Paul Massey stated, in 2007, regarding 2 store managers, Connie Vischer and Jerry Littell, that they had "been around forever", that they were old and too stupid to run the business and needed to go.

c. Market Manager Carlos Hernandez said concerning Jerry Littell in December 2010, "why can't people get this done ... Are they too stupid or too old to comply?"

d. Regional Director Matt Rodriguez said of employee Jim Wackford that Wackford had to go as he was "too old and stupid" to change his ways.

e. Zone Manager Jim Dunaway said of Wackford that he was "too old school" and "not going to change."

f. Regional Manager Rodriguez said of District Manager Spuinuzzi that he had "a 99 cent store mentality", that he was "too old and stupid to change to the ways of Dollar Tree."

g. Market Manager Hernandez said of Store Manager Connie Vischer that she would not be returning to her earlier training duties and would be "better off just retiring." (Korte Decl. ¶ 38.)

In the context of employment discrimination suits, such statements are termed "stray remarks," *i.e.,* "statements by nondecisionmakers, or statements by decisionmakers unrelated to the decision process itself." *Price Waterhouse v. Hopkins,* 490 U.S. 228, 277, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). Under federal antidiscrimination law, such remarks are largely deemed irrelevant, and their as-

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sertion is insufficient to withstand summary judgment. *Reid v. Google, Inc.*, 50 Cal.4th 512, 536–7, 113 Cal.Rptr.3d 327, 235 P.3d 988 (2010) (summarizing cases). California, by contrast, takes a "totality of the circumstances" approach to stray remarks: in evaluating FEHA claims, courts should consider stray remarks along with all of the other evidence in the record to determine whether the remarks "create an ensemble that is sufficient to defeat summary judgment." *Id.* at 539, 541, 542, 113 Cal.Rptr.3d 327, 235 P.3d 988 (internal quotation and citation omitted). For example, in *Reid*, an age discrimination case, the plaintiff survived summary judgment because his evidence of stray remarks was accompanied by incriminating emails, statistical evidence of discrimination by the employer, the plaintiff's demotion to a nonviable position before termination, and evidence of changed rationales by the employer for the plaintiff's termination. *Id.* at 545, 113 Cal.Rptr.3d 327, 235 P.3d 988. Moreover, many of the stray remarks in *Reid* concerned the plaintiff personally. *Id.* at 536, 113 Cal.Rptr.3d 327, 235 P.3d 988.

***14** By contrast, Korte has nothing beyond the stray remarks (none of which concern him) to buttress his allegations of age discrimination. His only other allegation concerning age discrimination reads, "I do not believe th[e] Gaines complaint had anything to do with my termination. I believe I was terminated because of my age." (Korte Decl. ¶ 23). This statement is conclusory and lacks any evidentiary foundation. Korte provides no evidence to demonstrate that age played a role in his termination other than the stray remarks listed above. As such, his statement is inadmissible under Fed.R.Evid. 602.

Korte does argue that "[t]he [Gaines] matter was ultimately settled for what was termed by Dollar Tree management and counsel as 'nuisance value' " and "[n]o one from Dollar Tree ever told me that they believed Ms. Gaines [*sic*] claims to be credible and/or with merit," (Korte Decl. ¶ 23). Nonetheless, he proffers no evidence "from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a prohibited discriminatory criterion." *Guz,* 24 Cal.4th at 355, 100 Cal.Rptr.2d 352, 8 P.3d 1089.

In sum, even when considered with the other evidence presented by Korte, the stray remarks he documents are insufficient to make out a prima facie case that age discrimination played a role in his termination.

Accordingly, Dollar Tree is granted partial summary judgment on Korte's claim of age discrimination under FEHA.

D. Request to Seal

Pursuant to Local Rule 141, Dollar Tree requests that the court seal more than two dozen documents filed in support of this motion. (Notice of Request to Seal, ECF No. 32.) It also moves to seal two lines in its Memorandum of Points and Authorities, two undisputed facts, and two paragraphs of a supporting declaration. (Id.)

Korte does not oppose the sealing request. Nevertheless, Dollar Tree bears the burden of demonstrating that the requested sealing order should issue.

1. Standard re: Sealing of Records

Courts have long recognized a "general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). "Unless a particular court record is one 'traditionally kept secret,' a 'strong presumption in favor of access' is the starting point." *Kamakana v. City and Cnty. of Honolulu,* 447 F.3d 1172, 1178 (9th Cir.2006) (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir.2003)). In order to overcome this strong presumption, a party seeking to seal a judicial record must articulate justifications for sealing that outweigh the historical right of access and the public policies favoring disclos-

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ure. *See id.* at 1178–79.

The Ninth Circuit has determined that the public's interest in non-dispositive motions is relatively lower than its interest in trial or a dispositive motion. Accordingly, a party seeking to seal a document attached to a non-dispositive motion need only demonstrate "good cause" to justify sealing. *Pintos v. Pac. Creditors Ass'n,* 605 F.3d 665, 678 (9th Cir.2010) (applying "good cause" standard to all non-dispositive motions because such motions "are often unrelated, or only tangentially related, to the underlying cause of action") (internal quotation marks and citation omitted).

***15** Conversely, "the resolution of a dispute on the merits, whether by trial or summary judgment, is at the heart of the interest in ensuring the 'public's understanding of the judicial process and of significant public events.' " *Kamakana,* 447 F.3d at 1179 (quoting *Valley Broad. Co. v. U.S. Dist. Court for Dist. of Nev.,* 798 F.2d 1289, 1294 (9th Cir.1986)). Accordingly, a party seeking to seal a judicial record attached to a dispositive motion or one that is presented at trial must articulate "compelling reasons" in favor of sealing. *See id.* at 1178. "The mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records." *Id.* at 1179 (citing *Foltz,* 331 F.3d at 1136). "In general, 'compelling reasons' ... exist when such 'court files might have become a vehicle for improper purposes,' such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets." *Id.* (citing *Nixon,* 435 U.S. at 598).

Under the "compelling reasons" standard, a district court must weigh "relevant factors," base its decision "on a compelling reason," and "articulate the factual basis for its ruling, without relying on hypothesis or conjecture." *Pintos,* 605 F.3d at 679 (quoting *Hagestad v. Tragesser,* 49 F.3d 1430, 1434 (9th Cir.1995)). "[S]ources of business information that might harm a litigant's competitive standing" often warrant protection under seal. *Nixon,* 435 U.S. at 598. But "the party seeking protection bears the burden of showing specific prejudice or harm will result if no [protection] is granted." *Phillips v. Gen. Motors Corp.,* 307 F.3d 1206, 1210–11 (9th Cir.2002). Consequently, that party must make a "particularized showing of good cause with respect to any individual document." *San Jose Mercury News, Inc. v. U.S. Dist. Court, N. Dist. (San Jose),* 187 F.3d 1096, 1103 (9th Cir.1999). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning" are insufficient. *Beckman Indus., Inc. v. Int'l Ins. Co.,* 966 F.2d 470, 476 (9th Cir.1992) (quoting *Cipollone v. Liggett Group, Inc.,* 785 F.2d 1108, 1121 (3rd Cir.1986)).

2. Dollar Tree's boilerplate justifications for sealing

With respect to most of the documents and information it seeks to seal, Dollar Tree has completely failed to make any "showing [of] specific prejudice or harm," *Phillips,* 307 F.3d at 1210–11, or a "particularized showing of good cause," *San Jose Mercury News,* 187 F.3d at 1103.

Much of Dollar Tree's Request to Seal repeats the following boilerplate:

> [The document] ... contains confidential and proprietary information regarding Dollar Tree's [BOILERPLATE 1]. In the highly competitive retail industry, the confidentiality of information that relates to Dollar Tree's [BOILERPLATE 2] is critical to maximize the company's competitive advantage. Disclosure of such information would be detrimental to Dollar Tree's financial and competitive interests. Cal. Civ.Code §§ 3426.1; 3426.5.FN7 Dollar Tree's request to seal these exhibits is narrowly tailored given that the exhibit cannot be redacted in a meaningful way, and no less restrictive means exist to achieve the overriding interest in protecting the confidentiality of the information.

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FN7. Cal. Civ.Code § 3426.1 defines various terms, including "trade secret," under California's implementation of the Uniform Trade Secrets Act. Cal. Civ.Code § 3426.5 directs courts to "preserve the secrecy of an alleged trade secret by reasonable means ...."

***16** In place of [BOLERPLATE 1], Dollar Tree uses one or more of the following phrases: "business model"; "human resources policies"; "human resources practices"; "operational policies"; "operational procedures"; "ordering processes"; "pay practices"; and "store budgets." In place of [BOILERPLATE 2], Dollar Tree deploys one or more of the following phrases: "compensation structure"; "human resources policies"; "human resources practices"; "operational procedures"; "proprietary business model"; and "proprietary operational procedures." (The supporting Declaration of Lisa K. Horgan is similarly robotic.) As a result, the court determines that defendant has failed to articulate a factual basis for sealing the requested documents unless the court relies on hypothesis or conjecture—which it declines to do. *Pintos,* 605 F.3d at 679

As a result, the court finds that Dollar Tree has simply failed to demonstrate a compelling reason to seal the following: Exhibits A, B, C, D, E, F, G, H, I, J, and L to the Declaration of David McDearmon in Support of Motion for Summary Judgment ("McDearmon Declaration"), ECF No. 33–3), Exhibits D, O, P, Q, R, U, V, and W to the Declaration of Maureen McClain in Support of Motion for Summary Judgment ("McClain Declaration"), ECF No. 33–6), and paragraphs 5 & 6 of the Declaration of Jeff Whitemore in Support of Motion for Summary Judgment ("Whitemore Declaration"), ECF No. 33–4).

Dollar Tree also seeks to justify redaction (rather than wholesale sealing) of certain documents using nearly identical boilerplate. Accordingly, the court finds that Dollar Tree has failed to demonstrate good cause for redacting the following: Exhibits L, M, N to the McClain Decl., lines 5:26 and 17:27–18:1 of the Memorandum of Points and Authorities in Support of Motion for Summary Judgment (ECF No. 33), and undisputed facts nos. 50 & 51 (ECF No. 34).

3. Third-party employees' personal information

What remains are documents that, to one degree or another, contain information identifying individuals who are not parties to this lawsuit. Some of this is personal information (such as names, dates of birth, and signatures) that obviously increases individuals' risk of identity theft; sealing or redaction is obviously warranted, as this information has no relevance to the outcome of this lawsuit. Many other documents concern Dollar Tree employees' allegations of sexual harassment. This information is obviously relevant to a number of Dollar Tree's defenses, which weighs in favor of unsealing; yet the court is also sensitive to the fact that employees who report sexual harassment in the workplace (in and of itself a courageous act, in the court's view), yet do not commence legal proceedings, surely do not intend their complaints to become public knowledge. With these considerations in mind, each of the documents Dollar Tree seeks to seal are now considered in turn.

Exhibit A to the Declaration of Candace Camp in Support of Motion for Summary Judgment ("Camp Declaration", ECF No. 33–2) consists of emails that include some discussion of an employee's medical conditions. Dollar Tree seeks to seal the entire exhibit, on the grounds that "[t] he individual's circumstances are discussed in detail, making it easy to identify the individual even if the name is redacted." This concern for the employee's privacy rights is warranted. However, portions of the email are relevant to Korte's contention that he could not train his employees to perform certain non-exempt functions. An appropriate compromise is redaction of the employee's name, the dates of the employee's medical appointments, and the two medical conditions referenced.

***17** Exhibits B, D, and E to the Camp Declara-

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tion contain handwritten notes about employees' complaints regarding Korte's alleged sexual harassment. Exhibits C and F to the Camp Declaration are statements made by employees about their interactions with Korte. While Dollar Tree seeks to seal these exhibits in their entirety, the court finds that this solution is overbroad, given that there appears to be no personal identifying information about the employees beyond their names, and in one instance, in Exhibit B, an employee's phone number. Accordingly, these exhibits should be filed with employees' names (other than Korte's) and any phone numbers redacted.

Exhibit A to the Whitemore Declaration contains twenty-four employees' names, dates of hire, dates of birth, store assignments, and titles. Dollar Tree seeks to seal this exhibit in its entirety. Sealing, rather than redaction, appears appropriate, for if all identifying information were redacted, this document would convey virtually no information to the reader.

Exhibits H and I to the McClain Declaration are sign-in sheets from Dollar Tree's District Manager and Store Manager Sexual Harassment Trainings. This document may be filed with all employees' names and signatures, other than Korte's, redacted.

Exhibit K to the McClain Declaration is a statement by an employee detailing Korte's alleged sexual harassment of her. It contains numerous identifying details about the employee, and as such, may be filed under seal.

Exhibit S to the McClain Declaration is an employee's performance review, and Exhibit T thereto is an email discussing an employee's management training. In each instance, Dollar Tree seeks only to redact the individual employee's name. Such redaction is narrowly-tailored and appropriate under the circumstances.

Note that if, during future proceedings herein, either party introduces the redacted or sealed information into evidence, the court is likely to revisit this order and direct that the relevant records be filed in unredacted or unsealed form.

IV. CONCLUSION

The court orders as follows:

[1] Defendant's motion for summary judgment is DENIED.

[2] Defendant's motion for partial summary judgment is DENIED as to plaintiff's claims for overtime compensation, compensation for meal and rest breaks, failure to provide itemized wage statements, and waiting time penalties.

[3] Defendant's motion for partial summary judgment is GRANTED as to plaintiff's claims for retaliation under the First Amendment, retaliation under Cal. Lab.Code §§ 98.6 and 1102.5, age discrimination under the California Fair Employment and Housing Act, and as to plaintiff's prayer for punitive damages.

[4] Defendants are DIRECTED to file Exhibits A–F to the Camp Declaration, and Exhibits H, I, S, and T to the McClain Declaration, each redacted according to the instructions above, no more than seven (7) days after entry of this order.

[5] Defendants are DIRECTED to file under seal Exhibit A to the Whitemore Declaration and Exhibit K to the McClain Declaration no more than seven (7) days after entry of this order.

***18** [6] As to all other documents that defendant sought to file under seal or in redacted form, defendant's request is DENIED. Defendant is to file unsealed and unreadacted versions of these documents no more than seven (7) days after entry of this order.

IT IS SO ORDERED.

E.D.Cal.,2013.
Korte v. Dollar Tree Stores, Inc.
Slip Copy, 2013 WL 2604472 (E.D.Cal.)

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END OF DOCUMENT

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From: Higginbotham, Breanne (ATG) <BreanneH@ATG.WA.GOV>
Sent: Friday, December 20, 2013 4:00 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: sdmcculloch@sdmlaw.net; jneedle@wolfenet.com; Lanese, Christopher (ATG)
Subject: Scrivener v. Clark College - 89377-2 - Filing
Attachments: ACMemoResponse.pdf

Attached please find a filing for *Scrivener v. Clark College*, case number 89377-2.

Christopher Lanese, WSBA No. 38045

360-586-6300

ChristopherL@atg.wa.gov

<<ACMemoResponse.pdf>>