S266001

No. 19-55802

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALLEN LAWSON,

Appellant-Appellant

v.

PPG ARCHITECTURAL FINISHES, INC.,

Defendant-Appellee.

On Appeal from the United States District Court, Central District of California
Case No.: 8:18-cv-00705-AG-JPR
Honorable Andrew J. Guilford

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WALLEN LAWSON,

Plaintiff,

vs.

PPG ARCHITECTURAL FINISHES, INC.,

Defendant.

Case No.: 8:18-cv-00705-AG-JPR

SECOND AMENDED COMPLAINT FOR DAMAGES

DEMAND FOR JURY TRIAL

Plaintiff Wallen Lawson states as follows:

NATURE OF THE ACTION

1. This action arises from Defendant PPG Architectural Finishes, Inc.'s unlawful treatment of Plaintiff Wallen "Wally" Lawson, who worked for PPG Architectural Finishes as a Territory Manager ("TM"), merchandizing PPG Architectural Finishes' architectural paint products in Lowe's home improvement stores. PPG Architectural Finishes engaged in a pattern of unethical and illegal conduct towards Lawson. First, it directed him to "mistint" paint, which as set forth below, amounts to stealing from PPG Architectural Finishes' customer, Lowe's. Next, it consistently required him to work substantial hours "off the clock" in violation of the Fair Labor Standards Act ("FLSA") and the California Labor Code, for which he is entitled to unpaid overtime wages and liquidated damages under the FLSA. Finally, Defendant illegally fired Lawson on September 6, 2017 in violation of Cal. Labor Code Section 1102.5, prohibiting retaliation against whistleblowers, after Lawson reported its directive to mistint paint to the company's ethics hotline.

THE PARTIES

2. Plaintiff Wallen Lawson is an adult individual residing at 13404 Verona, Tustin, California 92782. Lawson was employed by PPG Architectural Finishes as a TM and was fired from employment with PPG on September 6, 2017. He covered Lowe's stores in the vicinity of Orange County, California.

3. Defendant PPG Architectural Finishes, Inc. ("PPG") is a Pennsylvania corporation with its principal place of business located in Pittsburgh, Pennsylvania. Defendant maintains its Corporate Headquarters at 400 Bertha Lamme Dr., Cranberry Township, PA 16066. At all relevant times, PPG has continuously been an employer engaged in interstate commerce and/or the production of goods for commerce, within the meaning of the FLSA, 29 U.S.C. §§ 206(a) and 207(a).

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over Plaintiff's FLSA claims under 29 U.S.C. § 216(b) and 28 U.S.C. § 1331. This Court has supplemental jurisdiction over the subject matter of Lawson's California state law claims, under 28 U.S.C. 1367(a), because they are so intertwined with the FLSA claims as to form part of the same case or controversy.

5. This Court has jurisdiction over the Defendant, because Defendant is an entity having sufficient minimum contacts with the Central District of California so as to render the exercise of jurisdiction over the Defendant by this Court consistent with traditional notions of fair play and substantial justice.

6. Venue is proper in this district under 28 U.S.C. § 1391.

7. This Court is empowered to issue a declaratory judgment under 28 U.S.C. §§ 2201 and 2202.

FACTUAL BACKGROUND

A. PPG retaliated against Plaintiff Lawson for reporting the company's

improper practices

8. Sometime in spring of 2017, Clarence Moore, the Regional Manager to whom Lawson reported, conducted a conference call during which he instructed Lawson and the other TMs in his region to "mistint" gallons of PPG Architectural Finishes' "RescueIt" product at Lowe's stores.

9. Like other paints, RescueIt is shipped to Lowe's stores in a neutral-colored base formula, and then tinted to the color of the customer's preference using a tinting machine at the store's paint counter. If a can of paint is accidentally tinted to the wrong color (i.e. "mistinted"), or a customer does not pick up an order, the tinted paint is placed on a clearance rack and sold at a deep discount—for pennies on the dollar.

10. Upon information and belief, according to an agreement between PPG Architectural Finishes and Lowe's, Lowe's can demand that PPG Architectural Finishes repurchase paint that is not sold within a requisite period of time. If a gallon of paint is mistinted, however, it is considered sold to Lowe's and PPG Architectural Finishes cannot be forced to repurchase it. Further, because the price that Lowe's pays PPG Architectural Finishes for the paint is higher than that for which it sells mistinted paint on the clearance rack, Lowe's takes a loss on all mistinted paint sold on the clearance rack.

11. At the time Moore instructed his TMs to mistint paint, RescueIt was not selling well and PPG Architectural Finishes expected Lowe's to make a demand that it buy back unsold product.

12. Moore instructed his TMs that mistinting should be done "on the down-low." He suggested that they offer to cover the paint desk for Lowe's associates when they went on lunch or break, and to use that time to surreptitiously mistint paint.

13. Moore further instructed his TMs that if caught, they should say that a customer ordered the paint but did not appear to pick it up.

14. On subsequent conference calls, Moore would ask his TMs how many gallons they were able to mistint, and some TMs would boast about the extent of their mistinting.

15. Lawson was understandably disturbed by these directives, and refused to mistint paint. He called PPG's ethics hotline to report the scheme on April 18, 2017. This resulted in Lawson being interviewed by PPG Investigator David Duffy.

16. On July 6, 2017, Moore sent the following text message to his TMs:

Effective immediately!! !! Please do not mistint

Rescue It product any more.

17. Moore proceeded to unfairly score Lawson's market walk evaluations in order to give him failing scores, starting with Lawson's July 13, 2017 market walk. Moore engaged in the same practice with Lawson's final

market walk in late-August 2017. The scores were not based on measurable benchmarks and were entirely left to Moore's arbitrary discretion.

18. After two such market walks, Moore fired Lawson on September 6, 2017.

19. Perhaps realizing that his scoring of Lawson's market walks might not withstand scrutiny, Moore came up with a second justification for Lawson's firing, contending that Lawson had falsified his training records to make it appear that he was doing more work than he actually was. This justification was fabricated by Moore in order to conceal his true reasons for terminating Lawson.

20. During Lawson's termination meeting, Moore was present and an HR representative, Andy Mayhew, was on the phone. Lawson explained that he believed the firing was in retaliation for his reporting the mistinting scheme.

21. Instead of treating Lawson as a protected whistleblower whom he had a duty to protect, Mayhew said that he did not want to hear about this and abruptly got off the phone.

22. Based upon Lawson's conversations with other TMs, other regions were also directed by their RMs to mistint RescueIt product. It is therefore believed to be a scheme that emanated from a higher level in PPG Architectural Finishes.

B. PPG Architectural Finishes forced Lawson to work "off the clock"

23. PPG Architectural Finishes manufactures paints and stains for consumer use and sold paints and stains under the registered trade name, "Olympic" at Lowe's stores throughout the country.

24. PPG Architectural Finishes employed TMs, including Lawson, as retail merchandising clerks—responsible for inventory management, event and brand marketing and product training within assigned Lowe's stores in designated geographic regions.

25. As a result of prior class-wide overtime federal court litigation involving the TMs, the TMs were properly classified as FLSA non-exempt on January 1, 2012.[1]

26. Therefore, during the relevant time period, Lawson was properly classified as FLSA non-exempt.

27. In the process of reclassifying the TMs as non-exempt, PPG Architectural Finishes enacted a policy and practice whereby TMs are paid for forty straight-time hours and five overtime hours per week. TMs were at all relevant times expected to complete their job duties in these forty-five hours per week.

28. In reality, it took most TMs a minimum of 50-55 hours per week to complete their job duties. This was true of Lawson.

[1] See *Seymour v. PPG Architectural Finishes, Inc.* 09-CV-01707-JFC (W.D. Pa.).

29. In April of 2016, PPG Architectural Finishes began requiring TMs to complete merchandising tasks listed on monthly action plans ("MAPs"). This included both in-store tasks and building displays, which usually had to be performed at home. This drastically increased the TMs' workload.

30. At the same time, Lowe's increased pressure on PPG Architectural Finishes to have TMs work more hours in each store.

31. If TMs did not complete all of their job duties, including those listed on the month's MAP, they faced repercussions ranging from low ratings on their market walk reviews, to loss of bonuses and raises, to termination.

32. PPG engaged in various machinations to discourage Lawson from submitting more than 45 hours per week, regardless of his actual hours worked. For example, Lawson was told by his regional managers:

a. *"Just get it done"*

b. *"Sometimes you have to make sacrifices"*

c. *"Tough"*

33. Some TMs who attempt to record more than 45 hours in a work-week without authorization were subject to discipline. While TMs could seek leave to work extra hours, these requests were disfavored and often denied. TMs were actively discouraged from making them.

FIRST CAUSE OF ACTION
[Violation of Cal. Labor Code § 1102.5]

34. Lawson re-alleges and incorporates by reference the allegations contained in the paragraphs above as if fully set forth herein.

35. California Labor Code § 1102.5(a), prohibits employers from discharging, retaliating, or in any manner discriminating against an employee for disclosing information to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance, if the employee has reasonable cause to believe that the information discloses a violation of state or federal law, or a violation or noncompliance with a state or federal rule or regulation.

36. Labor Code § 1102.5(c), prohibits employers from retaliating against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

37. Lawson complained to PPG's ethics hotline that he was instructed by his Regional Manager, Moore, to mistint paint in Lowe's stores. Because mistinting the paint amounted to theft from Lowe's, it violated California law.

38. In retaliation for reporting his employer's unlawful conduct and practices to the employer's ethics hotline, and for opposing and refusing to participate in what he reasonably believed to be unlawful conduct by his

employer, PPG Architectural Finishes terminated Lawson's employment, citing unfounded allegations that Lawson had falsified his training roster.

39. As a proximate result of Defendant's actions, Plaintiff has suffered and continues to suffer damages in an amount according to proof.

SECOND CAUSE OF ACTION
[Wrongful Termination in Violation of Public Policy]

40. Lawson re-alleges and incorporates by reference the allegations contained in the paragraphs above as if fully set forth herein.

41. Under California law, no employee, whether an at-will employee, or employee under a written or other employment contract, can be terminated for a reason that is in violation of a fundamental public policy. California courts have interpreted a fundamental public policy to be any articulable constitutional, statutory, or regulatory provision that is concerned with a matter affecting society at large rather than a purely personal or proprietary interest of the employee or employer. The public policy must be fundamental, substantial, and well established at the time of Plaintiff's discharge.

42. It was and is the public policy of the State of California, as set forth in California Labor Code § 1102.5, that an employer may not retaliate or in any manner discriminate against an employee for making an oral or

written complaint regarding illegal activity to a governmental agency or their employer.

43. Lawson was discharged from his employment on the pretext that he falsified his roster. In fact, PPG's decision to terminate Lawson's employment was motivated in substantial part by Lawson's complaint to his employer about his manager's directive to mistint paint, which amounted to theft from Lowe's, and for Lawson's refusal to participate in the illegal activity.

44. In terminating Lawson for these reasons and under the circumstances alleged herein, Lawson believes and alleges that PPG violated the fundamental public policies embodied in section 1102.5 of the California Labor Code.

As a proximate result of PPG's actions, Plaintiff has suffered and continues to suffer damages in an amount according to proof.

THIRD CAUSE OF ACTION
[Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*]

45. Lawson re-alleges and incorporates by reference the allegations contained in the paragraphs above as if fully set forth herein.

46. PPG Architectural Finishes has been, and continues to be, an employer engaged in interstate commerce and/or the production of goods for commerce, within the meaning of the FLSA, codified at 29 U.S.C. § 201, *et seq*.

47. PPG Architectural Finishes employed Lawson within the meaning of

the FLSA.

48. PPG Architectural Finishes had a policy and practice of refusing to pay any compensation, including straight time and overtime compensation, to Lawson for hours worked in excess of forty-five hours per workweek, and discouraging him from reporting such hours.

49. While Lawson typically worked fifty-five hours per week, he was actively discouraged by his regional managers, including Moore, from reporting more than forty-five hours per week.

50. At the same time, PPG Architectural Finishes' management knew that TMs, including Lawson, regularly found it necessary to work far more than forty-five hours per workweek in order to accomplish all of their job expectations.

51. As a result of PPG Architectural Finishes' willful failure to compensate Lawson for all the hours worked, at a rate not less than one and one-half times the regular rate of pay for work performed in excess of forty hours in a workweek, PPG Architectural Finishes violated the FLSA, including §§ 207(a)(1) and 215(a).

52. As a result of PPG Architectural Finishes' active discouragement of Lawson from recording more than 45 hours per workweek, PPG Architectural Finishes has failed to make, keep and preserve records with respect to Lawson sufficient to determine the wages, hours, and other conditions and practices of employment in violation of the FLSA, including §§ 211(c) and 215(a).

53. The foregoing conduct, as alleged, constitutes a willful violation of the FLSA within the meaning of the statute, 29 U.S.C. § 255(a).

54. Lawson is entitled to recover from PPG Architectural Finishes his unpaid wages, as well as overtime compensation, an additional amount – equal to the unpaid wages and overtime – as liquidated damages, reasonable attorneys' fees, and costs and disbursements of this action, under § 216(b) of the FLSA.

55. Lawson also requests further relief as described below.

FOURTH CAUSE OF ACTION
[Cal. Labor Code §§ 510, 558, and 1194 *et seq.*, and Wage Order No. 7-2001]

56. Lawson re-alleges and incorporates by reference the allegations contained in the paragraphs above as if fully set forth herein.

57. During the statute of limitations period, PPG Architectural Finishes required Lawson to work in excess of eight hours per workday and forty hours per workweek. However, PPG Architectural Finishes failed to fully pay the overtime wages that Lawson earned.

58. California Labor Code § 510 and the applicable Wage Order require that an employer compensate all work performed by an employee in excess of eight hours per workday and forty hours per workweek, at one and one-half times the employee's regular rate of pay.

59. California Labor Code § 1194 states that any employee receiving less than the applicable legal overtime compensation is entitled to recover in a

civil action the unpaid balance of the full amount of his overtime compensation, including interest thereon, reasonable attorneys' fees, and costs of suit.

60. During all relevant times, PPG Architectural Finishes knowingly and willfully failed to pay overtime earned and due to Lawson. PPG Architectural Finishes' conduct deprived Lawson of full and timely payment for all overtime hours worked in violation of the California Labor Code.

61. Lawson also requests further relief as described below.

FIFTH CAUSE OF ACTION
Failure to Reimburse for Business Expenses
[California Labor Code § 2802]

62. Lawson re-alleges and incorporates by reference the allegations contained in the paragraphs above as if fully set forth herein.

63. California Labor Code § 2802 provides that "[a]n employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties."

64. In order to discharge his duties, Lawson incurred necessary and reasonable expenses that were not reimbursed by PPG Architectural Finishes.

65. Lawson incurred these expenses because he had to use his home internet to fulfill his duties. PPG Architectural Finishes did not pay any portion of this cost.

66. PPG Architectural Finishes has violated and continues to violate Wage Order No. 7, Labor Code § 2802, and *Cochran v. Schwan's Home Service, Inc*., 228 Cal.App.4th 1137 (Cal. App. 2014) because TMs must use their home

internet to perform their job duties and PPG Architectural Finishes fails to reimburse the TMs a reasonable percentage of their internet bill.

67. PPG Architectural Finishes' conduct deprived Lawson of these reimbursements.

68. Lawson also requests further relief as described below.

SIXTH CAUSE OF ACTION
Unfair Competition Law Violations
[Cal. Business & Professions Code § 17200 et seq.]

69. Lawson re-alleges and incorporates by reference the allegations contained in the paragraphs above as if fully set forth herein.

70. California Business & Professions Code § 17200 et seq. prohibits unfair competition in the form of any unlawful, unfair, deceptive, or fraudulent business practices.

71. PPG Architectural Finishes committed unlawful, unfair, deceptive, and/or fraudulent acts as defined by the California Business & Professions Code, § 17200. PPG Architectural Finishes' unlawful, unfair, deceptive, and/or fraudulent business practices include, without limitation, failing to pay overtime wages, failing to timely pay all wages earned, failing to keep required payroll records, and failure to reimburse for business expenses, in violation of California law and/or the FLSA.

72. As a result of this unlawful and/or unfair and/or fraudulent business practice, PPG Architectural Finishes reaped unfair benefits and illegal profits at the expense of Lawson.

73. PPG Architectural Finishes must disgorge these ill-gotten gains and restore Lawson all wrongfully withheld wages, including, but not limited to overtime compensation.

74. Lawson also requests further relief as described below.

PRAYER FOR RELIEF

WHEREFORE, Lawson respectfully requests that this Court grant the following relief:

i. Issuance of a declaratory judgment that the practices complained of herein are unlawful under the FLSA and California law;

ii. Enjoin PPG Architectural Finishes from violating the FLSA and California law as alleged above;

iii. Award of back pay and benefits, front pay and benefits, compensatory damages, emotional distress, punitive damages, and civil penalty arising from Lawson's claims for retaliation and wrongful discharge;

iv. Award of unpaid wages, as well as all overtime compensation, due under the FLSA and California law;

v. Award of liquidated damages as a result of PPG's willful failure to pay for all wages and overtime compensation due under the FLSA;

vi. Award of damages in the amount of unreimbursed business expenses;

vii. Award of pre-judgment and post-judgment interest;

viii. Award of costs and expenses of this action, together with reasonable attorneys' and expert fees; and,

ix. Such other relief as this Court deems just and proper.

JURY TRIAL DEMANDED

Plaintiff Lawson demands a trial by jury on claims so triable.

Dated: November 28, 2018

Respectfully submitted,

HKM Employment Attorneys LLP

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	SACV 18-00705 AG (JPRx)	Date	June 17, 2019
Title	WALLEN LAWSON V. PPG ARCHITECTURAL FINISHES, INC.		

Present: The Honorable	ANDREW J. GUILFORD	
Melissa Kunig	Not Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	

Proceedings: **[TENTATIVE] ORDER REGARDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

This is an employment dispute between Plaintiff Wallen Lawson and his former employer, Defendant PPG Architectural Finishes, Inc. Plaintiff asserts the following six claims: (1) retaliation in violation of California Labor Code Section 1102.5; (2) wrongful termination in violation of public policy; (3) unpaid wages in violation of the Fair Labor Standards Act; (4) unpaid wages in violation of California Labor Code Sections 510, 558, and 1194 *et seq*. and Wage Order No. 7-2001; (5) failure to reimburse business expenses in violation of California Labor Code Section 2802; and (6) violations of California's Unfair Competition Law ("UCL"). (*See generally* Second Amended Compl., Dkt. No. 37.) Defendant now moves for summary judgment. (*See generally* Mot., Dkt. No. 57-1.)

The Court GRANTS Defendant's motion for summary judgment. The Court will separately sign and file Defendant's proposed judgment.

1. BRIEF BACKGROUND

Defendant "manufactures and sells interior and exterior paints, stains, caulks, repair products, adhesives and sealants for homeowners and professionals." (Mot. at 2.) Defendant sells its products through its own retail stores and through other retailers like The Home Depot, Menards, and Lowe's. (*Id.*)

In June 2015, Plaintiff began working for Defendant as a Territory Manager ("TM"). (Defendant's Statement of Uncontroverted Facts ("SUF"), Dkt. No. 57-2 at 2.) Plaintiff

claims his duties included "merchandizing Olympic paint and other PPG products in Lowe's home improvement stores in Orange and Los Angeles counties" and "ensur[ing] that PPG displays are stocked and in good condition", among other things. (Plaintiff's Statement of Disputed Facts ("SDF"), Dkt. No. 58-1 at 1.)

As a TM, Plaintiff reported directly to a Regional Sales Manager ("RSM"). (Mot. at 2.) During most of the events at issue here, Plaintiff reported to RSM Clarence Moore. (*Id.*) RSM Moore in turn reported to Divisional Manager ("DM") Sean Kacsir. (*Id.*)

According to Defendant, a TM's performance was measured using two metrics: "the [TM's] ability to meet monthly sales goals" and the TM's score on company "Market Walks". (SUF at 4, 6.) Market Walks worked like this. RSMs and TMs would visit several stores within the TM's assigned territory "and walk through the store to ensure TMs [were] building relationships with Lowe's employees, PPG product is properly placed throughout the store, and TMs are training and helping customers." (*Id.* at 7.) Based on their performance during Market Walks, TMs would be scored on a five-category spectrum ranging from to "unsuccessful" to "exceptional". (*Id.* at 9.)

Between October 2016 and August 2017, Plaintiff participated in six Market Walks. (*See* SUF at 10-12, 15, 23-24, 61, 66.) Plaintiff's first Market Walk earned him an "exceptional" score. (*Id.* at 10.) Plaintiff's second and fifth Market Walks earned him a "marginal" score. (*Id.* at 12, 61.) And Plaintiff's remaining Market Walks earned him an "unsuccessful" score. (*Id.* at 15, 24, 66.) All but the first Market Walk were conducted with RSM Moore. (*Id.* at 10.) Among other things, RSM Moore said Plaintiff struggled with training Lowe's associates, completing PPG product demonstrations and displays, and establishing relationships with key Lowe's staff members. (*Id.* at 17, 24.)

Further, for the year leading up to March 2017, Plaintiff missed his monthly sales goals eight times. (*Id.* at 19.) This, along with Plaintiff's Market Walk scores, caused Plaintiff to be placed on a Performance Improvement Plan ("PIP") in April 2017. (*Id.* at 20; *see also* Mot. at 7-8.) Among other things, the PIP required Plaintiff to earn a Market Walk score of "successful" by the time the PIP expired in July 2017. (SUF at 40). Plaintiff failed to do so. (*Id.* at 61) Defendant nevertheless extended Plaintiff's PIP by thirty days since Plaintiff had shown some signs of improvement. (*Id.* at 63.) RSM Moore also supported extending the PIP "because he

recognized that he had not been able to check-in with Plaintiff as frequently as intended" during the progression of Plaintiff's PIP. (*Id.* at 64.) But after Plaintiff received an "unsuccessful" Market Walk score in August 2017, RSM Moore and DM Kascir recommended Plaintiff be terminated. (*Id.* at 67, 71.) Plaintiff was then terminated on September 6, 2017. (*Id.* at 72.)

Amid all this, something else was happening. Plaintiff claims that, beginning in April 2017, RSM Moore started instructing TMs to "mis-tint" Defendant's paint products at Lowe's stores. (SDF at 8-9.) According to Plaintiff, mis-tinting forced Lowe's to place the mis-tinted paint "on an 'oops' rack next to the paint desk and [sell it] at a deep discount." (Opp'n at 4.) This in turn allowed Defendant to avoid buying back unsold inventory from Lowe's. (*Id.* at 3.)

Plaintiff disagreed with this practice. (SDF at 13-14.) So on April 18, 2017, Plaintiff filed an anonymous report using Defendant's web-based confidential ethics reporting portal about the alleged directive to mis-tint Defendant's paint products. (*Id.* at 13.) Shortly after filing this report, Plaintiff also told RSM Moore over the phone that Plaintiff believed mis-tinting was wrong and that there was "no way" Plaintiff was going to participate in it. (*Id.* at 14.) Defendant says it followed up with the anonymous reporter to request more information. (Mot. at 7.) But because Defendant never heard back, Defendant closed the investigation. (*Id.*.)

Then on June 15, 2017, Plaintiff submitted another anonymous complaint through the online ethics reporting portal. (SDF at 15.) That complaint also expressed concerns about RSM Moore's alleged directives to TMs to mis-tint paint. (*Id.*) After this second report was filed, Defendant's compliance department contacted Plaintiff to ask if Plaintiff would speak with David Duffy, Defendant's Senior Manager of Investigations and Corporate Security. (*Id.*) Plaintiff agreed and provided his personal cell phone number. (*Id.*) So on June 28, 2017, Duffy and Plaintiff spoke about the mist-tinting allegations. (SUF at 15, 47.) That conversation led John Dalton, PPG's Forensic Audit and Loss Prevention Specialist, to interview RSM Moore about the alleged mis-tinting. (*Id.* at 50-51.) During that interview, Dalton told RSM Moore to discontinue the practice and to text his TMs to tell them to immediately stop mis-tinting Defendant's paint products, among other things. (SDF at 18.)

The investigation ultimately ended with RSM Moore being warned about his actions. (SDF at 25.) But RSM Moore continued to supervise Plaintiff and oversee Plaintiff's Market Walks. (*See id.* at 28-29.)

Plaintiff believes RSM Moore knew Plaintiff reported his misconduct. (*See* Opp'n at 13.) Plaintiff further believes that this motivated RSM Moore to give Plaintiff poor scores on his July and August 2017 Market Walks, and eventually recommend Plaintiff be terminated. (*Id.*) Accordingly, Plaintiff claims he was improperly retaliated against for anonymously reporting RSM Moore's actions. (*Id.*)

Based on these and other facts, Plaintiff filed this case asserting the following six claims: (1) retaliation in violation of California Labor Code Section 1102.5; (2) wrongful termination in violation of public policy; (3) unpaid wages in violation of the Fair Labor Standards Act; (4) unpaid wages in violation of California Labor Code Sections 510, 558, and 1194 *et seq*. and Wage Order No. 7-2001; (5) failure to reimburse business expenses in violation of California Labor Code Section 2802; and (6) violations of California's UCL. (*See generally* Compl.) Defendant now moves for summary judgment.

2. LEGAL STANDARD

Summary judgment is appropriate where the record, read in the light most favorable to the non-moving party, shows that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). Material facts are those necessary to the proof or defense of a claim, as determined by reference to substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," based on the issue. *See id.* In deciding a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party "is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249–50.

The burden is first on the moving party to show an absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party satisfies this burden either by showing an

absence of evidence to support the nonmoving party's case when the nonmoving party bears the burden of proof at trial, or by introducing enough evidence to entitle the moving party to a directed verdict when the moving party bears the burden of proof at trial. *See Celotex*, 477 U.S. at 325; *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000). If the moving party satisfies this initial requirement, the burden then shifts to the nonmoving party to designate specific facts, supported by evidence, showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324.

3. ANALYSIS

3.1 Plaintiff's First Claim for Retaliation

Plaintiff's first claim is based on the allegation that Plaintiff was retaliated against for anonymously reporting the mis-tinting of Defendant's paint products, and for refusing to mis-tint paint products himself. (*See* SAC ¶¶ 37-38.) Plaintiff brings this claim under California Labor Code Section 1102.5, which generally prohibits employers from retaliating against employees who disclose information that the employee reasonably believes is illegal. *See* Cal. Labor Code § 1102.5(b). Section 1102.5 also prohibits retaliation "against an employee for refusing to participate in an activity that would result in a violation of state or federal statute . . . ." *Id.* at § 1102.5(c).

Section 1102.5 claims are governed by the burden-shifting framework outlined by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Ferretti v. Pfizer Inc.*, No. 11-CV-04486, 2013 WL 140088, at *10 (N.D. Cal. Jan. 10, 2013). Under this framework, the burden is first on the plaintiff to establish a prima facie claim of retaliation. *McDonnell Douglas*, 411 U.S. at 802. If the plaintiff establishes a prima facie claim, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its actions. *Id.* If the defendant is successful, the burden shifts back to the plaintiff to show that the defendant's stated reason is in fact pretext. *Id.* at 804.

Relying on this framework, Defendant makes two arguments in favor of summarily adjudicating Plaintiff's first claim. First, Defendant argues Plaintiff fails to present a prima facie case of retaliation. (Mot. at 15-16.) Second, Defendant argues Plaintiff doesn't provide

sufficient evidence that Defendant's proffered reason for terminating Plaintiff is pretextual. (*Id.* at 16-19.) For clarity, the Court separately addresses these arguments.

3.1.1 Whether Plaintiff Makes a Prima Facie Case of Retaliation

To establish a prima facie case for retaliation under California Labor Code Section 1102.5, Plaintiff must show: (1) he engaged in protected activity, (2) he was later subjected to adverse employment action, and (3) there was a causal link between the two. *See Morgan v. Regents of University of Cal.*, 88 Cal. App. 4th 52, 69 (2000). Defendant here focuses on the third element, arguing that Plaintiff fails to show a causal link since "there is no evidence" that the "decision makers[, which include RSM Moore and DM Kascir,] had *any* knowledge that Plaintiff submitted two anonymous complaints until *after* Plaintiff filed [t]his lawsuit." (Mot. at 16.)

It's true that, to establish a causal link, Plaintiff must offer evidence showing his "employer was aware that [Plaintiff] had engaged in . . . protected activity." *Morgan*, 88 Cal. App. 4th at 70 (quoting *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982). But Plaintiff provides such evidence here. Indeed, Plaintiff points to various facts in the record that could lead a reasonable jury to conclude RSM Moore knew Plaintiff was responsible for reporting the mis-tinting. (*See* Opp'n 11-14.) Most convincingly, Plaintiff points to the following. After Plaintiff filed the June 2017 report, RSM Moore was interviewed about the alleged mis-tinting. During that interview, RSM Moore was told several things that could've led him to deduce that one of his fourteen TMs reported his conduct. Specifically, RSM Moore was instructed to immediately text all his TMs to order them to stop mis-tinting paint. (SDF at 18.) RSM Moore was also directed to have his TMs re-read Defendant's Global Code of Ethics. (*Id.*) And because Plaintiff had previously told RSM Moore that mis-tinting was unethical and that there was "no way" Plaintiff was going to participate in it, a reasonable jury could also conclude RSM Moore pegged Plaintiff as the most likely reporter. (*See id.* at 14.)

Still, Defendant insists Plaintiff fails to show a causal link because RSM Moore wasn't aware that any complaints about him were filed, and so RSM Moore couldn't have known Plaintiff reported his alleged misconduct. (Reply at 3.) In support, Defendant says RSM Moore testified that he thought the June 2017 investigation was initiated to review expensed-out paint, not because a TM had reported the alleged mis-tinting. (SUF at 55.) But Plaintiff submits evidence that tends to undermine the credibility of this testimony. (*See* Opp'n at 14-

15.) And regardless, RSM Moore's statements don't eliminate the possibility that he could've later deduced Plaintiff reported his alleged misconduct. Consequently, a jury trial is required to determine whether RSM Moore knew Plaintiff was responsible for reporting the mis-tinting allegations. Plaintiff therefore sufficiently states a prima facie case of retaliation under California Labor Code Section 1102.5.

3.1.2 Whether Plaintiff Presents Sufficient Evidence of Pretext

Since Plaintiff has established his prima facie case, the burden shifts to Defendant to articulate some "legitimate, nonretaliatory reason" for terminating Plaintiff. *See McDonnell Douglas*, 411 U.S. at 802. Defendant carries this burden here. Defendant asserts Plaintiff was fired for "fail[ing] to meet the performance expectations set forth in the PIP." (Mot. at 16.) And Defendant offers sufficient evidence to support this assertion. As Defendant points out, the PIP required Plaintiff to earn a "successful" score on his July 2017 Market Walk, which Plaintiff failed to do. (SUF at 40, 61). Still, Defendant extended Plaintiff's PIP for an additional thirty days allowing Plaintiff one more opportunity on his August 2017 Market Walk to improve his score. (*Id.* at 63.) But Plaintiff scored poorly on this Market Walk too, leading Defendant to terminate Plaintiff. (*Id.* at 67, 71.) Defendant thus articulates a legitimate, nondiscriminatory reason for firing Plaintiff.

The burden now shifts back to Plaintiff to submit evidence showing Defendant's proffered reason is pretextual. *See McDonnell Douglas*, 411 U.S. at 802. Plaintiff may accomplish this "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). Where evidence of pretext is purely circumstantial, it must also be "specific and substantial" to survive summary judgment. *See Villiarmo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002) (citing *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998)).

Plaintiff fails to raise triable issues of fact regarding pretext. To show pretext, Plaintiff first cites his declining Market Walk scores, calling the decline between his October 2016 and August 2017 Market Walk scores "inexplicable" and suggesting that a reasonable jury could "interpret this sudden drop as the product of a highly subjective and unfair paper trial designed to mask [a] retaliatory purpose". (*See* Opp'n at 16.) But in between the October 2016

and August 2017 Market Walks, Plaintiff had four other Market Walks, three of which indisputably occurred before Plaintiff participated in any protected activities. (*See* SUF at 12, 15, 24). And on those three Market Walks, Plaintiff received an "unsuccessful" score twice and a "marginal score" once. (*See id.*) Thus, the record makes clear Plaintiff consistently performed poorly on his Market Walks with RSM Moore even before Plaintiff reported RSM Moore's alleged misconduct. The fact that Plaintiff received one "excellent" score in October 2016 doesn't change this conclusion. So the progression of Plaintiff's Market Walk scores is insufficient to create triable issues concerning pretext.

The same is true for Plaintiff's other evidence of pretext. Plaintiff says certain "inconsistencies" in the way RSM Moore evaluated Plaintiff's August 2017 Market Walk suggests pretext. (Mot. at 17.) For example, Plaintiff asserts RSM Moore failed to award Plaintiff bonus points for having more product placements in Lowe's stores than required. (SDF at 40.) Plaintiff also claims RSM Moore "docked [Plaintiff] five points" for failing to clock out once despite a company policy saying points shouldn't be deducted unless a TM fails to clock out multiple times. (*Id.* at 41.) But Plaintiff offers no evidence that these alleged "inconsistencies" or deviations impacted Plaintiff's Market Walk score in an outcome-determinative way. *Cf. Diaz v. Eagle Product, Ltd.*, 521 F.3d 1201, 1214 (9th Cir. 2008) (finding sufficient evidence of pretext to survive summary judgment where the employer didn't consider the factor that weighed most heavily against termination). Plaintiff also fails to offer evidence that RSM Moore's purported deviations violated some well-established company policy or practice. *Cf. id.* (noting that "[d]eviation from *established* policy or practice may be evidence of pretext." (emphasis added) (quoting *Brennan v. GTE Govt. Sys. Corp.*, 150 F.3d 21, 29 (1st Cir. 1998))). Plaintiff doesn't, for example, offer evidence that other RSMs abide strictly by Defendant's scoring guidelines. Nor does Plaintiff offer evidence that RSM Moore scored Plaintiff differently from how he'd scored any other TM in the same category. Plaintiff thus fails to show RSM Moore's alleged scoring "inconsistencies" constitute the kind of "specific and substantial" circumstantial evidence of pretext required to survive summary adjudication. *See Villiarmo*, 281 F.3d at 1062 (citing *Godwin*, 150 F.3d at 1222).

Plaintiff's last attempt to show pretext focuses on Defendant's reasons for firing Plaintiff, claiming that these reasons "shifted" over time, suggesting that "[Defendant] knew its reasons were not genuine . . . ." (Opp'n at 18.) Specifically, Plaintiff says RSM Moore changed his justification for implementing Plaintiff's PIP by initially saying the PIP was necessary to

address Plaintiff's sales numbers but then later saying the PIP was meant to help Plaintiff's "unfairly low [Market Walk] scores" and other problems in Plaintiff's performance. (*Id.*) But Plaintiff's conclusion about the "shifting" justifications for the PIP isn't adequately supported by the record. For starters, Defendant has consistently maintained that the PIP was appropriate partially because Plaintiff repeatedly failed to achieve his monthly sales goal. (SUF at 21, 38-40.) But regardless, the PIP's very terms encompassed Plaintiff's overall performance as a TM, including improving Plaintiff's sales numbers *and* Plaintiff's Market Walk scores. (*See id.* at 39-40.) This means RSM Moore's "shifting" justifications aren't internally inconsistent or conflicting, and thus don't show pretext. *See Villiarimo*, 281 F.3d at 1063 (explaining that, to show pretext, the reasons for termination must not only be shifting but also be inconsistent or conflicting). Further, "[t]he decision to put Plaintiff on a PIP was ultimately made by Human Resources". (*See* SUF at 22.) So RSM Moore's justifications for the PIP are somewhat irrelevant to the question of pretext. Plaintiff therefore fails to create triable issues regarding pretext, necessitating summary adjudication on Plaintiff's first claim.

The Court GRANTS summary adjudication on Plaintiff's first claim.

3.2 Plaintiff's Second Claim for Wrongful Termination

The Court now turns to Plaintiff's second claim for wrongful termination in violation of public policy. Among other things, this claim requires Plaintiff to prove that his termination "was substantially motived by a violation of public policy". *Nosal-Tabor v. Sharp Chula Vista Medical Center*, 239 Cal. App. 4th 1224, 1235 (Cal. Ct. App. 2015) (quoting *Yau v. Allen*, 229 Cal. App. 4th 144, 154 (Cal. Ct. App. 2014)). Plaintiff here argues Defendant's actions meet this test because, under Section 1102.5, it's public policy that "an employer may not retaliate . . . against an employee for making an oral or written complaint regarding illegal activity . . . to their employer." (SAC at ¶ 42.) Plaintiff's second claim thus depends entirely on the sufficiency of Plaintiff's retaliation claim. But because the Court summarily adjudicated Plaintiff's retaliation claim in the previous section, Plaintiff's second claim for wrongful termination must also be summarily adjudicated in Defendant's favor.

The Court GRANTS summary adjudication on Plaintiff's second claim.

3.3 Plaintiff's Third and Fourth Claims for Unpaid Wages

Plaintiff's third and fourth claims for unpaid wages arise under the Fair Labor Standards Act ("FLSA") and California law. *See* 29 U.S.C. § 201, *et seq.*; Cal. Labor Code §§ 510, 558, 1194, *et seq*. These claims are based on Plaintiff's allegations that Plaintiff "regularly found it necessary" to work more than forty-five hours per week, and that Defendant "had a policy and practice of refusing to" compensate Plaintiff for these excess hours. (SAC at ¶¶ 48, 50, 56.)

Defendant argues Plaintiff's unpaid wages claims fail because Plaintiff can't show Defendant knew Plaintiff was working off-the-clock without compensation. (Mot. at 21-23.) It's true that, under the FLSA, an employer is only liable for failure to pay overtime wages if the employer knew or should have known that the employee was working overtime. *See Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981). California law imposes the same requirement. *See White v. Starbucks Corp.*, 497 F. Supp. 2d 1080, 1083 (N.D. cal. 2007) ("To prevail on his off-the-clock claim, [Plaintiff] must prove that [Defendant] had actual or constructive knowledge of the alleged off-the-clock work." (citing *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 585 (2000))); *see also Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1051 (2012) ("[L]iability is contingent on proof [Defendant] knew or should have known off-the-clock work was occurring."). Thus, to avoid summary adjudication, Plaintiff must raise triable issues regarding whether Defendant knew or should've known about Plaintiff's alleged overtime.

Plaintiff fails to do so here. The only evidence Plaintiff submits to show Defendant had the requisite actual or constructive knowledge consists of two paragraphs in Plaintiff's own declaration. Those paragraphs state the following. First, Plaintiff declares that, when he asked his former RSM how to account for his time, he was told "sometimes you need to make sacrifices"—a statement Plaintiff "interpreted" to mean overtime was required. (Decl. of Wallen Lawson ("Lawson Decl."), Dkt. No. 58-2 at ¶ 14.) Second, Plaintiff declares he told RSM Moore that he had been working off-the-clock, and RSM Moore responded by saying, "[N]ow that you have told me, I have to write you up." (*Id.* at ¶ 15.) Plaintiff believes that, in making this comment, RSM Moore was implicitly instructing Plaintiff to continue working overtime without telling anyone. (*Id.*) But neither of these statements create triable issues regarding whether Defendant knew Plaintiff was working overtime without pay. For one,

these statements seem to directly contradict Plaintiff's sworn deposition testimony. (*See, e.g.*, SUF at 93.) This is particularly a problem since Plaintiff fails to corroborate these statements with any other supporting evidence. *See F.T.C. v. Neovi, Inc.*, 604 F.3d 1150, 1159 (9th Cir. 2010) ("[A court] need not find a genuine issue of fact if, in its determination, the particular declaration was 'uncorroborated and self-serving.'"). And second, Defendant's evidence, which is largely undisputed, proves Defendant couldn't have known Plaintiff was working off-the-clock without pay. The Court finds the following evidence decisive. Defendant maintained a policy that TMs couldn't work overtime without prior approval from their RSM, and that TMs were required to accurately record all the time they worked each day—including any off-the-clock hours. (SUF at 84.) TMs also had to "carefully review [their] time entries and certify that the reported hours [were] accurate . . . ." when accounting for their time. (*Id.*) Yet Plaintiff concedes he was never denied a request to work overtime, never told not to record his overtime hours, and never denied payment for overtime hours he *did* record. (*Id.* at 87-90.) Given all this, a reasonably jury couldn't conclude Defendant knew Plaintiff was working unrecorded, unapproved overtime hours without compensation. *See Forrester*, 646 F.2d at 414 ("[W]here an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation of the [FLSA].")

Still, Plaintiff contends Defendant discouraged accurate time reporting, and that this in turn raises a genuine dispute about Defendant's knowledge. (Opp'n at 22-23.) But this argument is also unavailing. Why? Because Plaintiff bases this argument on his subjective interpretation about what hidden meanings lie beneath the statements in his declaration. (*See* Lawson Decl. at ¶¶ 14-15). And baseless speculation of this nature fails to sufficiently show Defendant discouraged Plaintiff from reporting his overtime, as Plaintiff haphazardly suggests. *Cf. Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1028 (9th Cir. 2001) ("A plaintiff's belief that a defendant acted from an unlawful motive, without evidence supporting that belief, is no more than speculation or unfounded accusation about whether the defendant really did act from an unlawful motive. To be cognizable on summary judgment, evidence must be competent.") Plaintiff's third and fourth claims for unpaid wages must therefore be summarily adjudicated in Defendant's favor.

The Court GRANTS summary adjudication on Plaintiff's third and fourth claims.

3.4 Plaintiff's Fifth Claim for Failure to Reimburse Business Expenses

Plaintiff's fifth claim for failure to reimburse business expenses is based on Plaintiff's allegation that "[i]n order to discharge his duties, [Plaintiff] incurred necessary and reasonable expenses that were not reimbursed by [Defendant]." (SAC at ¶ 64.) More specifically, Plaintiff asserts "[he] incurred these expenses because he had to use his home internet to fulfill his duties" and Defendant didn't pay "any portion of this cost." (*Id.* at ¶ 65.)

California Labor Code Section 2802(a) "requires an employer to [reimburse] its employees for expenses they necessarily incur in the discharge of their duties." *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554, 558 (2007); *see also* Cal. Labor Code § 2802(a). An employer's duty to reimburse is only triggered if it "either know[s] or [has] reason to know that the employee has incurred an expense." *Stuart v. RadioShack Corp.*, 641 F.Supp. 2d 901, 904 (N.D. Cal. 2009); *see also Cochran v. Schwan's Home Serv., Inc.*, 228 Cal. App. 4th 1137, 1140-41 (Cal. Ct. App. 2014). Further, whether an expense is "necessary" depends on "the reasonableness of the employee's choices." *Gattuso*, 42 Cal. 4th at 568.

Defendant first argues Plaintiff's failure to reimburse claim fails because Plaintiff "admitted [Defendant] provided him with a company iPhone and a company tablet" that allowed Plaintiff to access the internet from home using his mobile hotspot. (Mot. at 20.) This, according to Defendant, indisputably shows Plaintiff's home internet expenses weren't necessary to the discharge of his duties, causing these expenses to fall outside the scope of Section 2802(a). But Plaintiff insists that his home internet expenses are reimbursable because "it was reasonable for [him] to use his home internet for work" since his home internet had "faster connection and [was] more convenient than using his [mobile hotspot]." (Opp'n at 21.) Essentially, this argument suggests Plaintiff's home internet costs should be reimbursed simply because it was easier for Plaintiff to use his home internet than his company-provided mobile hotspot. Plaintiff cites no caselaw to support this argument. And without any supporting authority, the Court isn't convinced convenience alone makes an expense reasonable or necessary under Section 2802(a). Summary adjudication on Plaintiff's fifth claim is thus appropriate.

But there's another reason why Plaintiff's fifth claim should be summarily adjudicated. As Defendant correctly points out, Plaintiff also fails to offer evidence sufficiently showing

Defendant knew or had reason to know Plaintiff was using his home internet to complete his job duties. Indeed, the only evidence Plaintiff offers to support this assertion is one statement in his own declaration that reads, "I know that many territory managers complained that they were going to continue using their home internet and that they felt that [Defendant's] failure to . . . reimburse[ ] was unfair." (Lawson Decl. at ¶ 13.) Notably, Plaintiff doesn't say who these TMs are, who these complaints were made to, or when these complaints were made. Without these basic details, and without any other evidence showing Defendant knew its employees were using their home internet for work purposes, a reasonable jury couldn't conclude that Defendant had a duty to reimburse Plaintiff for his home interest costs. *See F.T.C. v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997) ("A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact.").

The Court GRANTS summary adjudication on Plaintiff's fifth claim.

3.5 Plaintiff's Sixth Claim for Violation of California's UCL

Plaintiff's sixth claim alleges Defendant violated California's UCL by "failing to pay overtime wages, failing to timely pay all wages earned, failing to keep required payroll records, and failure to reimburse for business expenses". (SAC at ¶ 71.) Plaintiff's UCL claim is thus predicated on Plaintiff's third through fifth claims. Because the Court already determined these other claims must be summarily adjudicated in Defendant's favor, the same is true for this claim.

The Court GRANTS summary adjudication on Plaintiff's sixth claim. Because this disposes of Plaintiff's last surviving claim, summary judgment is appropriate. The Court GRANTS summary judgment.

4. DISPOSITION

The Court GRANTS Defendant's motion for summary judgment. The Court will separately sign and file Defendant's proposed judgment.

Any arguments not addressed in this lengthy order either weren't convincing or didn't need to be addressed at this time.

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