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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MARK LOVEWELL, Plaintiff and Appellant, v. STANFORD FEDERAL CREDIT UNION et al. Defendants and Respondents.	H043768 (Santa Clara County Super. Ct. No. 112CV219901)

Appellant Mark Lovewell was the chief financial officer (CFO) and chief investment officer (CIO) for respondent Stanford Federal Credit Union (SFCU) from 2000 to 2011. He was terminated from SFCU after respondent Joan Opp, SFCU's chief executive officer (CEO), claimed his performance was deficient. Following his termination, Lovewell sued SFCU and Opp, alleging breach of contract, age discrimination, tortious discharge in violation of public policy, breach of the covenant of good faith and fair dealing, conversion, intentional infliction of emotional distress, defamation, and intentional interference with contractual relations.[1] The trial court granted respondents' motions for summary adjudication as to all of Lovewell's causes of action, except for the causes of action for breach of the covenant of good faith and fair

[1] The causes of action were alleged against SFCU only, except for the causes of action for defamation and intentional interference with contractual relations, which were alleged against SFCU and Opp.

dealing and conversion. Thereafter, Lovewell voluntarily dismissed these two remaining claims and judgment was entered in respondents' favor.

On appeal, Lovewell argues the trial court erred by granting respondents' motions for summary adjudication. He argues he presented evidence demonstrating there were triable issues of material fact as to each of his claims. As explained below, we find his contentions lack merit and affirm the judgment.

BACKGROUND[2]

1. *Lovewell's Employment and Employment Agreement with SFCU*

In April 2000, Lovewell applied for employment with SFCU. At the time he submitted his employment application, he acknowledged on the application form that if he was hired, he would be employed at will, and his employment could be terminated "with or without cause, and with or without notice." That same month, Lovewell was offered the CFO position at SFCU. When he was hired, Lovewell was given a memorandum of employment explaining that SFCU could terminate his employment "at any time for any reason not prohibited by law." The memorandum, which contained details including Lovewell's starting date, his compensation, SFCU's reimbursement of relocation costs, and some of his benefits, was signed and dated by Lovewell.

In June 2000, Lovewell signed an acknowledgment indicating that he had received SFCU's employee handbook. The acknowledgment further stated that his employment would forever be "at will" as described in the handbook. SFCU's handbook described SFCU's policy to indefinitely employ all credit union employees at will, with the sole

[2] On appeal, Lovewell argues the trial court erred in granting summary adjudication of his claims for breach of contract, employment discrimination, tortious discharge in violation of public policy, defamation, intentional interference with contractual relations, and intentional infliction of emotional distress. We focus our recitation of the evidence to the facts underlying those claims.

exception of employees with written employment agreements signed by the employee and president of the credit union that provided otherwise.

SFCU's employee handbook detailed its employee discipline policy. The handbook explained that SFCU can discipline any employee whose performance is unsatisfactory or whose job related conduct is unacceptable. The handbook also stated that SFCU "may" take disciplinary steps such as issuing a written warning to an employee, suspending an employee, or discharging an employee. Immediate termination was also an option available to SFCU management.

In 2004, Lovewell applied for and received a below-market-rate residential mortgage loan under a SFCU employee program. Lovewell signed a document acknowledging that if his employment with SFCU were terminated, the mortgage would convert to a market-rate mortgage.

In February 2006, Lovewell signed a confidentiality agreement with SFCU. The agreement specified that it did not in any way restrict SFCU's right to terminate Lovewell's employment for any time, "for any reason or for no reason." The agreement also contained language stating that employees needed to sign the agreement in order to remain employed at SFCU or become employed by SFCU, explaining that the agreement was to be signed "in return for [the employee's] new or continued employment." Lovewell signed another confidentiality agreement in February 2011 that did not contain language reaffirming his status as an at-will employee.

According to Lovewell, SFCU had a progressive disciplinary policy of oral and written warnings, probation, and, as a last step, termination of employment. SFCU's personnel and grievance policy described SFCU's employment relationship with its employees as at-will, but "[t]o attempt to improve an employee's performance, the Credit Union often uses progressive warning steps." The policy clarified that corrective steps

are flexible, and "[a]ny or all of the steps may be utilized" within SFCU's "sole discretion depending upon the individual circumstances involved."

SFCU's bylaws, dated January 24, 2001, provided that "[n]otwithstanding any other provision in these bylaws, any Director, Committee Member, officer, or employee of this Credit Union may be removed from office by the affirmative vote of a majority of the members present at a special meeting called for the purpose, but only after an opportunity has been given him to be heard." The "members" referenced in the bylaws are the general members of SFCU, not merely the Board of Directors, which consists of seven specific SFCU members.

2. *Lovewell's Prior Disciplinary History*

In 2006, an SFCU employee reported to management that Lovewell had violated SFCU's policies. Following an investigation, Lovewell was placed on probation for six months. The investigation concluded that Lovewell had engaged in actions that were perceived to be a request for a subordinate to present false information for Lovewell's personal benefit.

In 2009, Lovewell was again investigated by SFCU after it was discovered that he had received a personal loan from another SFCU employee, Steven Weiler. Weiler had complained to SFCU management after Lovewell failed to make timely loan payments to him. Lovewell's loan delinquency was reported to former SFCU CEO John Davis, who indicated he knew about the loan. Davis said he would handle the issue, and it is unclear if any disciplinary steps were taken.

3. *Lovewell's Salary Increases and Bonuses*

During his tenure at SFCU, Lovewell received pay increases and various bonuses. By 2008, Lovewell's base salary had increased to $230,000 after he negotiated a $40,000 mid-year salary increase. In 2008, Lovewell also negotiated with then-CEO Davis for an advance payment of his expected $57,000 year-end bonus. Lovewell agreed that if he

voluntarily left SFCU before the year passed, he would repay the bonus. At that time, he signed an agreement reiterating that his employment with SFCU would remain on an "at-will basis" but also agreeing to an employment commitment of one year beginning July 10, 2008. Sometime after 2008, Lovewell presented an example of an employee retention agreement and gave it to Davis. Lovewell claimed he had discussions with Davis about employee retention contracts, and Davis expressed to Lovewell his concern about keeping SFCU's senior management team together. There is no evidence that Davis ever expressly acted on or adopted the proposed agreement.

In 2009, Lovewell received another mid-year salary increase and secured an advance of his $60,000 bonus. In September 2009, he again signed a written agreement with SFCU agreeing that he would remain employed with SFCU for six months but also acknowledging that his employment would remain at-will.

4. *Lovewell's Application for CEO of SFCU and Opp's Hiring*

In 2009 or 2010, Lovewell applied for the position of CEO of SFCU to succeed Davis, who was leaving his role at SFCU. Lovewell was not selected as a finalist for the position, and Opp was ultimately chosen as SFCU's new CEO. Lovewell expressed dissatisfaction at losing the CEO position to Opp.

5. *Lovewell's Working Relationship with Opp and Discovery of Potential Noncompliance Issues with SFCU's Loans*

As CEO, Opp was Lovewell's superior at SFCU. Opp's working relationship with Lovewell was not particularly harmonious. While Opp and Lovewell worked together, Opp told him she was unhappy with his failure to meet deadlines for deliverables. Opp also told Lovewell that she did not believe he had been forthcoming with information, and she was dissatisfied with his handling of certain securities transactions in March 2011.

In Lovewell's May through December 2010 performance review, Opp said she had found it challenging to receive timely responses from Lovewell on certain assigned projects and deliverables. Opp rated Lovewell's initiative as a 2.5 on a scale from 1 to 6, with 4 defined as meeting the standards of performance for the position. Opp also indicated she had concerns with Lovewell's performance in the following areas: (1) Opp saw there was a $500,000 increase in expense for the "PSCU rewards program" and determined there were several errors in reporting that Lovewell should have been able to discover with his experience, (2) Lovewell did not timely submit the 2011 budget, (3) Lovewell did not timely submit SFCU's internal asset review (IAR) policy, (4) Opp was concerned with the growing concentration of "USDA 'whole loans' " on SFCU's balance sheet, and (5) Opp was concerned about some of the securities Lovewell had purchased. Opp, however, rated Lovewell's job knowledge, work performance/quality of work, and communication skills as "exceeding" or "meeting" standards for the CFO position.

Lovewell disputed the veracity of Opp's concerns about his deliverables. First, Lovewell claimed he had researched the issue with the PSCU rewards program, and later submitted a report to Opp summarizing his findings. SFCU met with PSCU officials in December 2010, and the officials validated Lovewell's analysis. Moreover, Lovewell claimed the 2011 budget had been timely submitted and blamed the perceived delay on late reports provided by outside vendors. Lovewell also explained that the IAR policy was delayed because another SFCU employee had not completed certain updates that were his responsibility. Another deliverable, a variance report, was not mandated by SFCU policy, required certain software that was not operational until April 2011, and coincided with the time that Lovewell's father had a heart attack and was in the hospital. Lovewell asserted that Opp herself had given him permission to go out of town to visit his father, so she knew he would not be available at that time.

Lovewell, however, admitted in an e-mail to Opp that he "blew it" by not scheduling consistent internal asset review meetings. In another e-mail, Lovewell admitted that the 2011 budget process was "dragging." Likewise, with respect to the internal asset review policy, Opp e-mailed Lovewell and indicated she had wanted to see a revised IAR policy in time for the board of directors (Board) February meeting, but since Lovewell had not completed that task it had to be "pulled . . . from" the agenda. Lovewell replied to Opp's e-mail, stating: "[i]f it's coming up short in you[r] view, understood."

Opp also believed that Lovewell had increased SFCU's balance of USDA whole loans contrary to her wishes. According to Opp, SFCU's balance of USDA whole loans increased from $237 million in September/October 2010 to $252 million in January 2011. Lovewell had explained that the increase happened after he had mistakenly anticipated $10 million to $15 million in prepayments that did not occur. Opp was skeptical of Lovewell's explanation, because in the months preceding January 2011 the highest prepayment amount was $6.1 million. Lovewell, however, insisted the highest prepayment amount in the months preceding January 2011 was $11.1 million in August 2010. Lovewell later insisted that Opp was unfamiliar with USDA loans, and her concerns about the USDA loans lacked merit. Moreover, he disputed Opp's representation of SFCU's balance of USDA loans, which he claimed was $221 million to $222 million in September/October 2010 and $233 million in December 2010.

Opp cited other instances where Lovewell apparently ignored her directives. For example, Opp discouraged Lovewell from making sales for short-term profits. Opp, however, later found there were securities sold in December 2010 that did not appear on the November trial balance report. Lovewell told Opp that the securities purchase was not a short-term purchase. Lovewell said he had purchased the securities but canceled the purchase after he saw that SFCU's liquidity had dropped. Opp did not believe

Lovewell's explanation, because SFCU had $57 million in cash in January 2011, and Lovewell had purchased several other securities after the transaction in question.

In January 2011, Opp claimed she told Lovewell during a meeting that she did not have full trust or confidence in him. Lovewell, however, believed that Opp told him only that confidence was important, not that she had *lost* confidence in him. Opp did not bring her concerns about the short-term securities transaction to SFCU's asset liability management committee (ALCO) or Board.

In February 2011, Lovewell learned about a potential noncompliance issue with SFCU's loans during a meeting with SFCU's senior vice president/chief lending officer, Brian Thornton. The issue arose from SFCU's use of certain software to produce loan documents, which may not have generated documents containing all of the language required by lending rules and regulations. According to Lovewell, Opp rejected his suggestion to involve other staff to investigate the issue and requested that Lovewell not report the issue to the vice president of compliance, SFCU's Board, or SFCU's supervisory committee.

While the investigation into SFCU's possible noncompliant loan documents continued, Lovewell e-mailed Opp and Thornton asking for an update about the problem and expressing his belief that SFCU's Board, supervisory committee, and outside auditors should be alerted. Thornton replied to the e-mail and said he was confident SFCU did not have a compliance issue, and he and Opp did not believe updating the supervisory committee, board, or auditors was warranted. SFCU had assigned Gordana Macesic-Papic, an SFCU employee, to investigate whether SFCU's loan documents complied with rules and regulations. Macesic-Papic sampled some of the loans that originated during the time period in question and found no issues.

On March 3, 2011, Opp e-mailed Thornton asking if they had finished reviewing the loan noncompliance issue. Thornton replied, stating that Macesic-Papic had reviewed

the problem and had concluded that SFCU was in full compliance. Thornton had copied Lovewell on the e-mail. Lovewell replied, "That is great to hear," and "[t]hanks for the time spent—it [*sic*] good risk management."

Lovewell, however, claimed he later learned that Macesic-Papic had limited her review to fixed loans and did not review all types of loans. As a result, he remained concerned about SFCU's loan documentation. According to Lovewell, he discussed the issue with Thornton and Opp, and Thornton said he believed the investigation was sufficient and undertaking a third-party investigation would be costly. Lovewell characterized Opp as hostile when he expressed his unease over the issue.

According to respondents, Opp and Thornton did not agree with Lovewell that the issue needed to be reported to SFCU's auditors but did not expressly tell him not to report it. Later that week, Lovewell met with SFCU's auditors. Lovewell signed a management representation letter for the auditors dated March 31, 2011, asserting that to the best of his knowledge there were no legal violations or any other liabilities that should be disclosed in SFCU's financial statements. Lovewell, however, claimed in his declaration that he had reported the loan noncompliance issue to Paul Blanke, chairman of SFCU's supervisory committee, and to SFCU's auditors. In his declaration, Lovewell further insisted he told Opp that he had reported the issue.

Lovewell's declaration, however, contradicted his earlier deposition. During his deposition, Lovewell was asked if he had told Opp that he had reported the issue to outside auditors, and Lovewell responded, "I do not recall specifically telling her that, no." Lovewell recalled only that he told Opp that he reported "everything" to the auditors. When asked if he had told Opp that he had reported the issue to Blanke, Lovewell responded, "I don't recall reporting to Ms. Opp that I reported that specifically to Mr. Blanke."

Opp continued to have difficulties with Lovewell. In a meeting in March 2011, Opp expressed concerns with Lovewell's performance. She also raised concerns about Lovewell's lack of visibility during SFCU's business hours and certain recent securities transactions he had executed. After Opp questioned Lovewell about the transactions, Lovewell told Opp he had prepared a memorandum detailing the transaction. Later, Opp learned that Lovewell had backdated the memorandum he wrote supporting the transaction.

Opp had another meeting with Lovewell to discuss her concerns, and the meeting became heated. According to Opp, Lovewell acknowledged that he had backdated the memorandum. Lovewell, however, later maintained that he completed the memorandum before the transactions in questions settled. Lovewell claimed Opp accused him of entering the transactions not for SFCU's benefit but to enrich their broker with sales commissions. Lovewell disputed Opp's accusations and insisted that she had made miscalculations and had misread certain reports. After the meeting, Lovewell sent Opp an e-mail acknowledging he had made errors and apologizing for becoming emotional during the meeting.

Despite her concerns over Lovewell's behavior, Opp did not discuss the securities transactions at issue with SFCU's ALCO committee or Board. In fact, at the April 2011 board meeting, SFCU's Board reviewed and approved the disputed March transactions.

6. *Lovewell's Termination*

Concerned over Lovewell's performance, Opp decided to terminate Lovewell's employment with SFCU. On May 3, 2011, Opp recommended to SFCU's Board that Lovewell be terminated. That same day, the Board adopted Opp's recommendation and terminated Lovewell effective May 16, 2011. On May 16, 2011, SFCU informed Lovewell that he had been terminated, effective immediately.

Thereafter, SFCU offered Lovewell a severance agreement. A provision of the severance agreement requested that Lovewell make himself available to SFCU and provide his skills, knowledge, and services to ensure a smooth transition in exchange for $140,000. There is no indication that Lovewell accepted the terms of the severance agreement, or that SFCU was required to offer Lovewell a severance agreement upon his termination. At the time he was terminated, Lovewell claimed that nobody on SFCU's Board had ever expressed any concerns or criticisms of his work. Lovewell was 50 years old at the time he was discharged.

7. *Lovewell's Loan with a Former SFCU Employee*

After Lovewell was terminated, Opp received a letter from a law firm representing Weiler, the SFCU employee that had loaned money to Lovewell. The letter made serious allegations against Lovewell, including the following: he had abused his position to induce Weiler to lend him money by promising a guaranteed 10 percent rate of return in a year; he had used another subordinate to draft the promissory note using SFCU software; he had later defaulted on the note, creating a precarious and awkward situation for Weiler; and, after years of not making payments on the note, Lovewell had agreed to a new note in October 2009 including accrued interest that he subsequently defaulted on. The letter demanded that SFCU repay Lovewell's debts to Weiler, including attorney fees, and threatened to sue if SFCU did not comply.

Shortly after receiving this letter, Opp had a business lunch with Mike Juratovac, a recruiter with O'Rourke & Associates, a company specializing in placing candidates with credit unions. Lovewell was presently using O'Rourke & Associates to help secure a new credit union position, and SFCU had retained O'Rourke & Associates to help recruit a new CFO. Opp claimed that during her meeting with Juratovac, she shared with him her concerns about the letter she had received from Weiler's attorneys and how she thought Weiler's accusations might affect Lovewell's ability to obtain a fidelity bond

(referred to by the parties as Lovewell's "bondability"), which is required for certain credit union employees. Opp did not specifically recall using the term "bondability," but she acknowledged it was possible she did use that term. Opp said she did not describe the specifics of Weiler's allegations to Juratovac, only that there might be information that could detrimentally affect Lovewell's ability to get a fidelity bond.

Juratovac had a different recollection of the conversation, remembering that Opp commented that she hoped Lovewell did not sue SFCU, because a lawsuit against SFCU might disclose certain information that could affect his bondability. After meeting with Opp, Juratovac e-mailed his superior, Gene O'Rourke, and told him he believed "there are issues [with Lovewell] that resulted with his termination." During a deposition, Juratovac explained that he did not interpret Opp's statement to mean that Lovewell had done anything illegal while at SFCU or that he was otherwise untrustworthy. According to Juratovac, bondability can be affected by an individual's challenging credit situation, bankruptcy, or loan delinquency. Juratovac expressed his belief, based on his conversation with Opp, that Opp wanted Lovewell to find a new position.

Even after Opp shared her concerns about Lovewell to Juratovac, O'Rourke & Associates continued to present Lovewell as a CFO candidate to other credit unions. Juratovac said that Opp's statement caused him some concern but did not affect his decisions concerning Lovewell's candidacy for employment positions. Juratovac acknowledged that he did not present Lovewell for CEO positions, but he explained he made this decision not because of Opp's statement but because of his own experience and understanding of the qualifications those types of positions require.

According to O'Rourke & Associates, the company never entered into a written contract with Lovewell and never received any fees or consideration from Lovewell. O'Rourke & Associates claimed that its clients were the credit unions, not the individual candidates they placed, and the credit unions were the ones who paid them recruiter fees.

Lovewell, on the other hand, asserted that he had an agreement with O'Rourke & Associates.

Opp was later called as a reference for Lovewell. When contacted, she said she was not at liberty to discuss Lovewell because of his pending lawsuit. She said, however, that she wanted Lovewell to find another position. Opp also said the reason Lovewell left SFCU was that he was not a good fit, and she did not comment about his alleged performance issues.

In August 2011, SFCU paid Lovewell's debt to Weiler in exchange for Weiler's assignment of the note to SFCU. Lovewell subsequently made several payments on the loan to SFCU but later stopped.

8. *Mortgage Overpayment*

After Lovewell's termination, he continued to pay his mortgage through SFCU. His payments eventually resulted in an overpayment of $340.81, which SFCU applied to his principal mortgage balance without his consent. Lovewell discovered the overpayment issue in August 2011 and attempted to communicate with SFCU's real estate department. He later mentioned the overpayment issue to Thornton, who said he was aware of the problem. Lovewell presented no evidence that Opp was aware of the overpayment issue or was involved in SFCU's decision to apply the overpayment to his outstanding principal mortgage balance.

9. *SFCU's New CFO*

Ultimately, SFCU hired a new CFO to replace Lovewell, Trent McIlhaney. McIlhaney was a licensed certified public accountant (CPA) in California and Texas and had both a bachelor's degree and a master's degree in accounting. Before his employment with SFCU, McIlhaney had 13 years of experience working for credit unions. He had last worked as the executive vice president-chief financial officer for Bay Federal Credit Union. McIlhaney was 13 years younger than Lovewell.

Opp claimed she was unsure of Lovewell's age at the time he was terminated. During a later deposition, Lovewell admitted he had no facts or knowledge to indicate Opp's decision to terminate his employment was based on his age.

10. *Procedural Background*

Lovewell filed a lawsuit against respondents on March 2, 2012. He later filed a first amended complaint on July 17, 2013. On November 5, 2013, Lovewell filed a second amended complaint alleging causes of action for (1) breach of contract for continued employment, (2) employment discrimination, (3) tortious discharge in violation of public policy (age discrimination), (4) tortious discharge in violation of public policy, (5) breach of the implied covenant of good faith and fair dealing, (6) conversion, (7) intentional infliction of emotional distress, and (8) defamation. The causes of action were alleged against SFCU only, except for the cause of action for defamation, which was alleged against SFCU and Opp.

Respondents moved for summary adjudication of Lovewell's causes of action for breach of contract for continued employment, employment discrimination, tortious discharge in violation of public policy (age discrimination), tortious discharge in violation of public policy, conversion, and intentional infliction of emotional distress. The trial court granted respondents' motion as to all of Lovewell's causes of action except for the conversion cause of action.

On November 20, 2014, Lovewell filed a third amended complaint alleging an additional cause of action for intentional interference with contractual relations against both SFCU and Opp. After Lovewell filed his third amended complaint, respondents moved for summary adjudication of Lovewell's causes of action for defamation and intentional interference with contractual relations. The trial court granted SFCU's motion in its entirety.

Thereafter, Lovewell dismissed his remaining causes of action, a cause of action for breach of the implied covenant of good faith and fair dealing and a cause of action for conversion. Judgment was entered in respondents' favor.

DISCUSSION

On appeal, Lovewell challenges the trial court's orders granting summary adjudication of his claims for breach of contract, employment discrimination, tortious discharge in violation of public policy, defamation, intentional interference with contractual relations, and intentional infliction of emotional distress. After our independent review, we find summary adjudication of Lovewell's claims was appropriate.

1. *Standard of Review*

A party may move for summary adjudication of one or more causes of action if there are no triable issues of material fact or there is an absolute defense to a cause of action. (Code Civ. Proc., § 437c, subd. (f)(1).) We review an order granting summary adjudication de novo. (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 858 (*Serri*).)

"In undertaking our independent review, we apply the same three-step analysis used by the trial court. First, we identify the issues framed by the pleadings. Second, we determine whether the moving party has established facts justifying judgment in its favor. Finally, in most cases, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable issue of material fact." (*Serri*, *supra*, 226 Cal.App.4th at pp. 858-859.)

We review the evidence in the light most favorable to the nonmoving party (Lovewell), and we resolve evidentiary doubts or ambiguities in his favor. (*Serri*, *supra*, 226 Cal.App.4th at p. 859.)

2. *Breach of Contract*

On appeal, Lovewell argues the trial court erroneously granted summary adjudication of his breach of contract claim. He alleges he had an implied employment contract with SFCU that guaranteed SFCU would not discharge him without good cause and fair warning. Lovewell argues that the existence of an implied contract can be inferred from the signed confidentiality agreements he had with SFCU, SFCU's progressive disciplinary policy, his tenure at SFCU, and his salary and bonus history. Lovewell claims that his termination, which was based on performance issues that he characterizes as meritless, breached the implied employment contract. As we explain, we find no merit in Lovewell's claims, because he signed express written agreements providing he was employed at will. As a result, even if SFCU did not have good cause to terminate Lovewell's employment, there was no breach of contract.

a. **Implied Contracts and The Presumption of At-will Employment**

In California, there is a statutory presumption of at-will employment. (*Guz v. Bechtel National, Inc*. (2000) 24 Cal.4th 317, 350 (*Guz*).) Labor Code section 2922 provides that "[a]n employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month." The presumption of at-will employment, however, can be overcome by evidence of an implied agreement that employment will continue for an indefinite period unless there is some event, such as the employer's dissatisfaction with the employee's performance, or the existence of good cause for the employee's termination. (*Foley v. Interactive Data Corp*. (1988) 47 Cal.3d 654, 680 (*Foley*).)

However, an implied contract *cannot* override the existence of an express written contract to the contrary. It is well established that " ' "[t]here cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different

results." [Citations.] The express term is controlling even if it is not contained in an integrated employment contract. [Citation.] Thus, . . . [an] at-will agreement preclude[s] the existence of an implied contract requiring good cause for termination.' " (*Starzynski v. Capital Public Radio, Inc.* (2001) 88 Cal.App.4th 33, 38.)

b. **Lovewell's Express At-will Agreements with SFCU Preclude The Existence of a Contrary Implied Contract**

Based on these settled legal principles, we conclude Lovewell's assertion that he had an implied employment contract is meritless and cannot raise a triable issue of material fact. It is undisputed that Lovewell signed multiple written agreements acknowledging that his employment was at will. First, he signed an employment application in April 2000 acknowledging he would be employed at will if he was hired by SFCU. Later, when Lovewell was hired by SFCU, he signed a memorandum of employment that explained that SFCU could terminate his employment at any time for any reason not prohibited by law—describing in plain terms that his employment with SFCU was at will. In June 2000, Lovewell signed an acknowledgment indicating he had received SFCU's employee handbook, which contained a provision requiring him to acknowledge that his employment would forever be at will as described in the handbook. Lovewell did not submit evidence of a superseding written agreement abrogating the at-will terms of his employment. These express agreements control and preclude the existence of an implied contract with contrary terms. (*Starzynski v. Capital Public Radio, Inc.*, *supra*, 88 Cal.App.4th at p. 38.)

Lovewell rejects established precedent and argues that the existence of signed employment documents containing at-will provisions is merely a *factor* to be considered when determining whether an employee's employment is at will and is not determinative of an employee's status. Citing *Guz*, *supra*, 24 Cal.4th at pages 339 through 340, and *Foley*, *supra*, 47 Cal.3d at page 681, Lovewell claims that the existence of an implied

contract should be decided by looking at the employee's surrounding circumstances, not just written agreements. Lovewell, however, misreads *Guz* and *Foley*, and neither of those cases supports his position.

In *Guz*, the employee did not have a signed, express employment agreement specifying at-will employment; the employer had a policy in its personnel handbook that specified that all employees could be terminated at the employer's option. (*Guz*, *supra*, 24 Cal.4th at p. 339.) The employee had acknowledged he knew the policy applied to him, but there was no evidence the employee had signed the handbook, expressly agreeing to the at-will term. The employer, however, argued that any implied contract to the contrary was negated because of the disclaimer in the handbook. (*Ibid*.) *Guz* rejected the employer's argument, finding that the employer's stated policy did not necessarily foreclose the existence of an implied employment contract. In other words, at-will provisions found in employee handbooks, manuals, or other memoranda do not always overcome other evidence of an employer's contrary intent to form an implied employment contract. (*Ibid*.) *Guz*, however, went on to explain that disclaimers such as the one found in the employer's handbook was evidence that could be considered when determining whether the employer's and employee's respective conduct had created an implied contract restricting the employer's ability to terminate the employment relationship at will. (*Guz*, *supra*, 24 Cal.4th at p. 339.)

Guz is distinguishable, because in that case there was no express written agreement that was *signed* by the employee. Here, in addition to the provision mandating at-will employment found in SFCU's handbook (which Lovewell signed), Lovewell had an express, signed employment memorandum acknowledging that he was hired on an at-will basis. Thus, Lovewell's reliance on *Guz* is erroneous. In fact, there is language in *Guz* that reaffirms the principle that express written contracts control. *Guz* acknowledged that cases have concluded that "an at-will provision in an *express written agreement*,

signed by the employee, *cannot* be overcome by proof of an implied contrary understanding." (*Guz*, *supra*, 24 Cal.4th at p. 340, fn. 10.)

Lovewell's reliance on *Foley* is also misplaced. Lovewell argues that *Foley* held that the nature of an implied contract must be determined from the "totality of the circumstances." (*Foley*, *supra*, 47 Cal.3d at p. 681.) Lovewell interprets this principle to mean that a written agreement is but one of *many* circumstances that must be considered when determining whether an implied contract exists. Lovewell's interpretation of *Foley* is flawed. The general principle espoused in *Foley* dictates that in the absence of an express written or oral employment agreement to the contrary, the existence of an implied employment contract can be inferred from certain factors, such as the employer's personnel policies, the employee's longevity of service, or communications by the employer to the employee reflecting reassurances of continued employment. (*Id*. at pp. 677-681.) *Foley* did not hold that an express employment agreement creating an at-will relationship can be subordinated to an implied employment contract with different terms.

Lastly, we find no merit in Lovewell's attempts to distinguish the cases relied upon by respondents. In their respondent's brief, respondents cite *Agosta v*. *Astor* (2004) 120 Cal.App.4th 596 (*Agosta*), *Faigin v*. *Signature Group Holdings*, *Inc*. (2012) 211 Cal.App.4th 726 (*Faigin*), and *Dore v*. *Arnold Worldwide*, *Inc*. (2006) 39 Cal.4th 384 (*Dore*) to support their assertion that express written agreements containing at-will provisions cannot be overcome by proof of an implied contrary understanding. Lovewell's attempts to distinguish these cases instead misinterpret them.

For example, Lovewell claims that *Agosta* construed the factors set forth under *Foley*, *supra*, 47 Cal.3d 654 and determined that the plaintiff did not have an implied contract. Contrary to Lovewell's claims, *Agosta* did not mention the *Foley* factors and did not discuss whether an implied contract existed. *Agosta* determined that there cannot

be a valid express contract *and* an implied contract embracing the same subject but requiring different results. (*Agosta*, *supra*, 120 Cal.App.4th at p. 604.)

Lovewell also insists that the decision in *Faigin*, *supra*, 211 Cal.App.4th 726, supports his claim. He argues that in *Faigin*, the court determined that the plaintiff employee had an implied contract for continued employment because the employee had provided some consideration to his employer in exchange for his continued employment. Lovewell thus argues that, as in *Faigin*, his promise to keep SFCU information confidential should be considered for his continued employment, which in turn tends to show he was *not* an at-will employee. *Faigin*, however, does not support Lovewell's position. The employee in *Faigin* had a written employment contract with his employer that stated a fixed employment term and did *not* specify whether the employment was at will. (*Id*. at p. 739.) Thus, *Faigin* determined that the employee's express, written agreement was not inconsistent with an implied agreement that the employer would not terminate employment absent good cause and went on to analyze whether an implied agreement existed. (*Id*. at pp. 739-742.) Here, Lovewell signed multiple written agreements specifying that his employment was at will. These express agreements *would* be contradicted by an implied contract that specifies that termination of the employment relationship can be made only for good cause.

Lastly, Lovewell argues *Dore* supports his position, because its ruling made it clear that in certain situations express at-will contracts may be ambiguous when considered with other evidence. In *Dore*, the employee signed a letter that his employment was "at will," defining "at will" to mean the employer could terminate the employee's employment " 'at any time.' " (*Dore*, *supra*, 39 Cal.4th at p. 389.) The California Supreme Court found the trial court correctly determined the written agreement was unambiguous and found the employee's proffered extrinsic evidence did

not render the letter ambiguous on whether he could be terminated for cause. (*Id*. at pp. 392-393.)

Lovewell attempts to argue that unlike the contract at issue in *Dore*, the express employment agreements he signed with SFCU should be considered ambiguous when viewed in light of the extrinsic evidence he has submitted. Lovewell, however, raises this issue for the first time in his reply brief. In Lovewell's opening brief he did not argue that the express written contracts were ambiguous in some way. We need not consider new issues that are first raised in his reply brief. (*Reichardt v*. *Hoffman* (1997) 52 Cal.App.4th 754, 764.)

Moreover, even if we were to consider Lovewell's claim on the merits, we would reject it. Lovewell argues that ambiguity can be inferred from SFCU's bylaws, which he claims precludes at-will termination. SFCU's bylaws, dated January 24, 2001, provided that "[n]otwithstanding any other provision in these bylaws, any Director, Committee Member, officer, or employee of this Credit Union may be removed from office by the affirmative vote of a majority of the members present at a special meeting called for the purpose, but only after an opportunity has been given him to be heard." We fail to see how this provision specifically requires SFCU to have good cause to terminate Lovewell. Moreover, Lovewell was not terminated in the manner specified in this provision—he was not fired following a majority vote of SFCU members at a special meeting. Lovewell cites no other provision of SFCU's bylaws that imply or expressly state that his employment is anything but at will.

Lovewell's claim that ambiguity is created by his signed confidentiality agreements with SFCU is similarly unavailing. In particular, Lovewell points to the 2011 confidentiality agreement he signed with SFCU, which omitted language indicating that his employment was at will. Language acknowledging that his employment was at will had been included in his previous 2006 confidentiality agreement. Lovewell argues the

omission of the at-will language from his 2011 confidentiality agreement implies that his employment was no longer at will. The 2011 agreement, however, merely stated that Lovewell was agreeing to adhere to the confidentiality agreement in exchange for his "new or continued employment." The language in the confidentiality agreement does not logically support an inference that it was a promise not to terminate him without good cause. We also reject Lovewell's assertion that *failing* to reiterate an express at-will agreement, which he had previously acknowledged in the prior 2006 confidentiality agreement and his signed employment memorandum as we have described, logically implies that SFCU no longer considered his employment to be at will.

In sum, we conclude that the express written agreements signed by Lovewell indicating that his employment was at will (the employment memorandum, the acknowledgment of the personnel handbook) was unambiguous and Lovewell's evidence to the contrary does not compel a contrary conclusion.

Therefore, we find there is no triable issue of material fact with respect to Lovewell's cause of action for breach of contract. Evidence of an implied contract that contradicts the terms of a signed, written employment agreement is not admissible. (*Tomlinson v. Qualcomm, Inc.* (2002) 97 Cal.App.4th 934, 944.) Based on this determination, we need not reach the merits of Lovewell's arguments that the factors set forth in *Foley* indicate there is an implied contract prohibiting respondents from terminating him absent good cause. We also need not reach his claim that there is a triable issue of material fact that he was not terminated for good cause. Since the undisputed evidence demonstrates Lovewell was an at-will employee, respondents did not need good cause to terminate him.

3. *Age Discrimination*

Lovewell's third cause of action alleged he was terminated due to his age in violation of public policy in violation of the Fair Employment and Housing Act (FEHA)

(Gov. Code, § 12900 et seq.). On appeal, Lovewell argues he demonstrated there were triable issues of material fact with respect to this cause of action, because a reasonable trier of fact could find respondents' stated reasons for his termination were implausible and inconsistent, giving rise to an inference that his termination was pretextual and based on his age. As we explain in detail below, we disagree. We find Lovewell did not meet his burden to provide specific, substantial evidence that his termination was motivated by a discriminatory animus.

a. **The *McDonnell Douglas* Framework and Principles Underlying Age Discrimination Claims**

In cases alleging employment discrimination, we analyze the trial court's decision on a motion for summary adjudication using the burden-shifting framework established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792. (*Serri*, *supra*, 226 Cal.App.4th at p. 860.) The three-step test described in *McDonnell Douglas* "reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained." (*Guz*, *supra*, 24 Cal.4th at p. 354.)

Under the first step of the *McDonnell Douglas* framework, the plaintiff presents a prima facie case of retaliation. The components of a prima facie case may vary, but it typically requires evidence that "(1) [the plaintiff] was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory [or retaliatory] motive." (*Guz*, *supra*, 24 Cal.4th at p. 355.) A plaintiff who satisfies this prima facie showing shifts the burden to the employer to dispel the

presumption of retaliation, which it may do by articulating a legitimate, nonretaliatory reason for the challenged employment action. (*Id.* at pp. 355-356.) Once the employer satisfies its burden, the presumption of retaliation disappears. The third step of the *McDonnell Douglas* framework gives the plaintiff the opportunity "to attack the employer's proffered reasons as pretexts for discrimination [or retaliation], or to offer any other evidence of discriminatory [or retaliatory] motive." (*Id.* at p. 356.)

In the summary judgment context, " 'the employer, as the moving party, has the initial burden to present admissible evidence showing either that one or more elements of plaintiff's prima facie case is lacking or that the adverse employment action was based on legitimate, nondiscriminatory factors.' " (*Serri*, *supra*, 226 Cal.App.4th at p. 861.)

If the employer meets this initial burden, the plaintiff must " 'demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with discriminatory [or retaliatory] *animus*, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination [or retaliation] or other unlawful action.' " (*Serri*, *supra*, 226 Cal.App.4th at p. 861.) " ' "Circumstantial evidence of ' "pretense" must be "specific" and "substantial" in order to create a triable issue with respect to whether the employer intended to discriminate [or retaliate]' on an improper basis." ' " (*Husman v. Toyota Motor Credit Corp*. (2017) 12 Cal.App.5th 1168, 1182.)

An employee can make a prima facie case of age discrimination if the employee shows: (1) he or she was 40 years or older at the time of the adverse employment action, (2) an adverse employment action was taken against him or her, (3) at the time of the adverse employment action he or she was satisfactorily performing his job, and (4) the employee was replaced by someone significantly younger. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997.)

b. **Lovewell Does Not Meet His Secondary Burden Under the *McDonnell Douglas* Framework**

Here, the trial court concluded that Lovewell was able to sufficiently demonstrate a prima facie case of age discrimination. Based on our independent review, we agree with the trial court's assessment. Lovewell presented evidence that he was 50 years old at the time of his termination, and his performance, based on his recent performance evaluation, was largely satisfactory. Moreover, he presented evidence that he was replaced with someone significantly younger, as McIlhaney, SFCU's replacement CFO, was 13 years his junior at the time he was hired.

The trial court, however, also concluded that respondents had met their burden to present admissible evidence that Lovewell was terminated based on legitimate, nondiscriminatory factors. We agree with the trial court's conclusion. Respondents set forth specific facts outlining the reasons why Opp believed Lovewell's performance was deficient: Lovewell purportedly backdated a memorandum explaining trades that had already occurred, he made trades even after Opp cautioned him against doing so, he was late in turning in projects and deliverables, Opp did not believe some of Lovewell's explanations for actions he took or the mistakes he made, and Opp believed someone with Lovewell's experience should have caught certain errors that he did not notice.

Under *McDonnell Douglas*, the burden then shifted to Lovewell to demonstrate that a triable issue of material fact existed by providing specific, substantial evidence that Opp's stated reasons for his termination were pretextual, or that Opp acted with discriminatory animus based on his age. (*Serri*, *supra*, 226 Cal.App.4th at p. 861.)

Lovewell claims he met this burden by demonstrating that Opp's stated reasons for his termination were incoherent and inconsistent, generating an inference that the real reason he was terminated was discriminatory. Lovewell's declaration explained in detail why he believed Opp's concerns about his performance were illusory. "[E]vidence that the employer's claimed reason [for the employee's termination] is *false*—such as that it

conflicts with other evidence, or appears to have been contrived after the fact—will tend to suggest that the employer seeks to conceal the real reason for its actions, and this in turn support an inference that the real reason was unlawful." (*Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 715.) However, "an inference of intentional discrimination cannot be drawn solely from evidence, if any, that the [employer] lied about its reasons. The pertinent statutes do not prohibit lying, they prohibit discrimination." (*Guz*, *supra*, 24 Cal.4th at pp. 360-361.)

Showing that Opp did not have legitimate concerns about Lovewell's job performance supports a rational inference that Opp was hiding the true reasons for terminating him. However, it does *not* by itself support a rational inference that the true reason for terminating Lovewell was because of his *age*, which is the basis of Lovewell's cause of action alleging a violation of FEHA. In fact, Lovewell did not submit any evidence suggesting Opp was motivated by his age when she terminated him. Lovewell even admitted in his own deposition that he had no facts or knowledge to indicate that Opp's decision to terminate his employment was based on age. Lovewell merely argues that because Opp *may* have lied about her reasons for firing him, there is an inference that she did so because she discriminated against him on the basis of his age. This inference is purely speculative and does not create a triable issue of material fact.

Lovewell insists discrimination can be inferred from the fact that his work experience was superior to McIlhaney's. Discrimination can be inferred if a younger candidate with inferior qualifications is hired. However, "the disparity [in qualifications must] be substantial to support an inference of discrimination." (*Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 675.) Based on the undisputed evidence, Lovewell's qualifications cannot be reasonably be viewed as " ' "vastly superior," ' " which is what is required to support a finding of pretext. (*Id.* at p. 677.)

McIlhaney was a Certified Public Accountant, while Lovewell was not. Moreover, McIlhaney had previously held the position of CFO at another credit union.

Lovewell attempts to recharacterize his own experience as better than McIlhaney's. He argues he has more years of experience than McIlhaney, he managed larger portfolios than McIlhaney managed, he was more familiar than McIlhaney with USDA whole loans, and Opp had previously asked him to speak to congressional staff about issues concerning credit unions, further demonstrating his superior qualifications. This is insufficient to demonstrate age discrimination, because "an employee's subjective personal judgments of his or her competence alone do not raise a genuine issue of material fact." (*Horn v. Cushman & Wakefield Western*, *Inc*. (1999) 72 Cal.App.4th 798, 816.) This argument is entirely a subjective claim by Lovewell that his work experience was qualitatively better, which is insufficient.

Lastly, Lovewell argues the trial court erroneously focused on McIlhaney's supposedly superior educational background. We disagree. McIlhaney's academic degrees (a bachelor's and a master's degree) were logically considered by the court when it evaluated McIlhaney's qualifications in the context of Lovewell's age discrimination claim. The trial court's assertion—that in terms of education, McIlhaney was more qualified than Lovewell—did not mischaracterize the evidence. Nor does the trial court's order on respondents' motion for summary adjudication indicate it *only* looked to McIlhaney's educational credentials when it rendered its decision on Lovewell's age discrimination claim. The trial court noted McIlhaney's credentials but determined that no triable issue of material fact existed because Lovewell himself failed to present any evidence that he was discriminated against based on age.

Ultimately, we agree with the trial court's determination and conclude Lovewell fails to meet his secondary burden under the *McDonnell Douglas* framework to provide specific, substantial evidence that a discriminatory animus motivated Opp to terminate

his employment. As a result, summary adjudication of this claim was properly granted in respondents' favor.

4. *Tortious Discharge in Violation of Public Policy*

For his cause of action of tortious discharge in violation of public policy, Lovewell alleged he was terminated after he reported to the chairman of SFCU's supervisory committee, Paul Blanke, and SFCU's outside auditors that some of SFCU's loans might not fully comply with lending regulations.[3] Lovewell argues he satisfied his burden to demonstrate there was a triable issue of material fact on this claim, because he provided evidence from which a trier of fact could infer that Opp terminated him in retaliation for disclosing the issue. We disagree and find Lovewell's claim to be without merit.

a. **General Principles Underlying Tortious Discharge Claims**

The cause of action for tortious discharge in violation of public policy arises from an exception to the general rule that an employee can be terminated at will by an employer, absent an employment contract to the contrary. (Lab. Code, § 2922 [presumption of at-will employment].) This general rule is subject to a limitation that recognizes that a tort action may lie when termination of employment violates a fundamental public policy. (*Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 932; *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 176-179.)

A cause of action for tortious discharge in violation of public policy is established by proof of the following elements: the employee was employed by the employer, the employer terminated the employee, the termination was substantially motivated by a reason that violates public policy, and the termination caused the employee harm. (*Yau v. Allen* (2014) 229 Cal.App.4th 144, 154.)

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[3] In his complaint, Lovewell also alleged he was retaliated against after he reported to Blanke that SFCU's board chairman had impermissibly retained her husband to work on legal issues for SFCU. On appeal, Lovewell does not advance any arguments pertaining to this additional theory of tortious discharge.

b. **No Evidence that Opp Knew Lovewell Reported the Potential Noncompliance Issue to Auditors or SFCU's Supervisory Board**

In Lovewell's case, we conclude the trial court properly granted summary adjudication of this claim, because Lovewell admitted in his own deposition that he did not remember telling Opp that he reported this issue to Blanke or SFCU's auditors.

When asked if he had told Opp that he had reported the issue to auditors, Lovewell responded, "I do not recall specifically telling her that, no." Lovewell only recalled telling Opp that he reported "everything" to the auditors. Later, when asked what he told Opp about what he had reported to Blanke, Lovewell responded, "I don't recall reporting to Ms. Opp that I reported that specifically to Mr. Blanke."

In other words, Lovewell himself conceded he did not remember telling Opp that he had reported the loan noncompliance issue to Blanke or to the outside auditors. Thus, Lovewell is unable to demonstrate a nexus between Opp's termination of his employment and his reporting of the issue. Opp could not have been motivated to retaliate against him for actions she knew nothing about.

We acknowledge that Lovewell's declaration contradicts his earlier deposition testimony, which affirmed that he *did* tell Opp that he had reported the issue to Blanke and to the auditors. These contradictory statements do not create a triable issue of material fact. "[A] party cannot create an issue of fact by a declaration which contradicts his prior discovery responses." (*Shin v. Ahn* (2007) 42 Cal.4th 482, 500, fn. 12; *Whitmire v. Ingersoll-Rand Co*. (2010) 184 Cal.App.4th 1078 [contradictory statement in interrogatory response did not create triable issue of material fact].) Lovewell's declaration does not acknowledge his prior deposition testimony and does not provide any explanation for the contradiction. (*Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 549 [court would not accept a declaration contradicting the declarant's prior statement where the contradiction is unexplained].)

Lovewell, however, maintains there is evidence Opp knew he reported the noncompliance issue to Blanke and to SFCU's auditors, because he had multiple conversations with Opp about reporting the issue and there is evidence Opp and Thornton both attempted to conceal the loan noncompliance from outsiders. To support this claim, Lovewell cites conversations he had with Opp and Thornton where he expressed his concerns about SFCU's investigation into the issue and his belief that SFCU may have violated federal rules and regulations. However, it is undisputed that Lovewell e-mailed Opp and Thornton *after* SFCU internally reviewed the noncompliance issue and stated that he believed the review was "good risk management." It is not rational to infer from this evidence that Opp or Thornton could have been alerted to the fact that Lovewell still intended to report the issue contrary to their wishes. Moreover, Lovewell later signed a management letter to SFCU's auditors affirming that he knew of no potential liabilities. Though we agree with Lovewell that there is evidence that Opp knew he was initially concerned about the potential noncompliance issue, there is no evidence that Opp knew or should have known that Lovewell *continued* to be concerned about the issue after he expressed in his e-mail that he believed SFCU's review of the matter was sufficient and signed the management letter to the auditors indicating he had no concerns.

Lovewell also argues summary adjudication should not have been granted on his tortious discharge claim on the theory that he was terminated as retaliation for reporting the noncompliance issue *internally* to Opp and Thornton, not just to Blanke or to outside auditors. In his reply brief Lovewell argues that his wrongful discharge claim "is premised on, among other things, being fired for repeatedly reporting to *Opp and Thornton* his concerns regarding the potential non-compliance problem and subsequent inadequate investigation." Lovewell then cites *Collier v. Superior Court* (1991) 228 Cal.App.3d 1117, arguing that California law is clear that tortious discharge can occur

when an employee reports violations of law or noncompliance to his or her *employer*, not just to outside parties.

This theory, however, was not pleaded in Lovewell's first, second, or third amended complaint. When reviewing a motion for summary judgment our *first* step is to identify the issues framed by the pleadings. (*Serri*, *supra*, 226 Cal.App.4th at pp. 858-859.) "[T]he scope of the issues to be properly addressed in [a] summary judgment motion" is generally "limited to the claims framed by the pleadings. [Citation.] A moving party seeking summary judgment or adjudication is not required to go beyond the allegations of the pleading, with respect to new theories that could have been [pleaded], but for which no motion to amend or supplement the pleading was brought, prior to the hearing on the dispositive motion." (*Howard v. Omni Hotels Management Corp*. (2012) 203 Cal.App.4th 403, 421.) "The test is whether such a particular theory or defense is one that the opposing party could have reasonably anticipated would be pursued, and whether a request for leave to amend accordingly would likely have been granted . . . ." (*Id*. at p. 422.)

Based on the specific allegations in Lovewell's complaint, we do not believe this particular theory could have been anticipated by respondents. Below, Lovewell's sole theory of liability for his tortious discharge claim was that Opp fired him in retaliation for reporting the issue to Blanke and to SFCU auditors. Lovewell cannot resist summary adjudication on this claim on a theory that he failed to plead. (*Comunidad en Accion v. Los Angeles City Council* (2013) 219 Cal.App.4th 1116, 1125.)

For these reasons, we conclude the trial court properly granted respondents' motion for summary adjudication on this cause of action.

5. *Defamation*

Lovewell's cause of action for defamation alleged that after he was terminated from SFCU, Opp met with Juratovac, a recruiter from O'Rourke & Associates, a

recruiting firm he had recently retained to secure a new credit union position. According to Lovewell, Opp told Juratovac that she hoped Lovewell did not pursue legal action against SFCU for his termination, because there was information that could arise from that lawsuit that could impact Lovewell's bondability. According to Lovewell, the implication of this statement was that he was untrustworthy. Based on the evidence submitted by Lovewell, we disagree with Lovewell that this claim can survive summary adjudication. The undisputed evidence shows that if the statements were made, they were truthful. Moreover, the statements were conditionally privileged under Civil Code section 47, subdivision (b), and Lovewell fails to raise a triable issue of material fact as to whether Opp made the comments with malice.

a. **General Principles Governing Defamation Claims**

The cause of action for defamation requires proof of several elements: " '(a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage.' " (*Taus v. Loftus* (2007) 40 Cal.4th 683, 720.) " ' "[T]he truth of the offensive statements or communication is a complete defense against civil liability, regardless of . . . malicious purpose." ' " (*Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 28 (*Gilbert*).)

b. **Summary Adjudication Was Proper Because the Statements Made by Opp Were True**

A cause of action for defamation requires proof that the declarant made a false statement. Thus if the statements made by Opp were true, Lovewell's cause of action for defamation necessarily fails. (*Gilbert*, *supra*, 147 Cal.App.4th at p. 28.) Here, summary adjudication was properly granted because Opp's statement was truthful.

Before we address the merits of this claim, we first note that the parties dispute the specific contents of the comments made by Opp to Juratovac. According to Opp, she had lunch with Juratovac after she received the letter from Weiler, the former SFCU

employee that had loaned money to Lovewell. Opp claimed she shared her concerns about Weiler's letter and how she thought Weiler's allegations might affect Lovewell's bondability, which is required for certain credit union employees. Opp did not specifically recall using the term "bondability," but she acknowledges it is possible she did use that term. Opp said she did not discuss the particular allegations in the letter, only stating in general terms her concerns over the possibility there might be issues with Lovewell's ability to get a bond.

Juratovac, however, had a different recollection of the conversation, remembering that Opp commented that she hoped Lovewell did not sue SFCU, because information might arise from *that* lawsuit that could affect his bondability. Juratovac's version of events is consistent with the fact that after his meeting with Opp, Juratovac e-mailed his superior, Gene O'Rourke, and told him he believed "there are issues [with Lovewell] that resulted with his termination." Lovewell argues *this* statement by Opp—not *her* version of the statement—constitutes defamation.

When reviewing a motion for summary judgment, we accept as true the facts supported by the opposing party's evidence and the reasonable inferences therefrom. (*Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138, 148.) Thus, we assume Lovewell's version of events is true—that Opp said she hoped Lovewell would not sue SFCU because information might be divulged that could affect his bondability. And assuming Opp made those statements, we must determine whether Lovewell's defamation claim survives respondents' motion for summary adjudication.

Ultimately, the parties' dispute over the exact contents of Opp's statement is not determinative. Despite the disagreement over the specific nature of Opp's comment, the *substance* of her statement was the same in both scenarios. In both Lovewell's and respondents' version of events, Opp told Juratovac that certain information might surface that could possibly affect Lovewell's ability to get a fidelity bond. It is undisputed that

Opp received a letter from attorneys representing Weiler with allegations against Lovewell based on his defaulted loan with Weiler. It is further undisputed that Juratovac himself indicated he understood that an individual's bondability could be affected by challenging credit situations or defaulted loans. In sum, it is undisputed that Opp's statement was truthful.

The truth of Opp's statement is not diminished by her failure to specifically reference Weiler's letter when speaking to Juratovac. Opp explained in her declaration that she did not specifically recount the details of Weiler's allegations or provide details about the allegations. Opp's version of events is consistent with Juratovac's recollection of the conversation. Juratovac did not indicate that Opp provided additional information beyond her generalized statement that some information might arise that could affect Lovewell's bondability. Thus, the evidence detailing the veracity of Opp's statement to Juratovac is consistent.

Moreover, Lovewell's assertion that the statement cannot be true since he *was* able to obtain a fidelity bond is meritless. As respondents note, SFCU settled the matter with Weiler and the allegations set forth in Weiler's letter were never made public through litigation. Additionally, it is undisputed that Opp said there *might* be information forthcoming that could impact Lovewell's bondability. She did *not* say that she definitely knew that Lovewell's bondability would be impacted by information that might be forthcoming.

For these reasons, summary adjudication of Lovewell's defamation cause of action was properly granted in respondents' favor.

c. **Lovewell Fails to Demonstrate Malice and Cannot Overcome the Conditional Privilege Under Civil Code Section 47, Subdivision (c)**

Alternatively, we agree with respondents that even if the statement was false, the conversation between Opp and Juratovac was conditionally privileged under Civil Code

section 47, subdivision (c), and Lovewell fails to raise a triable issue that Opp acted with malice.

Under Civil Code section 47, subdivision (c), privilege "may exist where the communicator and recipient have a common interest and the communication is reasonably calculated to further that interest." (*Kelly v. General Telephone Co*. (1982) 136 Cal.App.3d 278, 284.) Respondents "bear[] the initial burden of establishing that the statement in question was made on a privileged occasion," and, if this burden is satisfied, the burden shifts to Lovewell to demonstrate by a preponderance of the evidence that the statement was made with malice. (*Taus v. Loftus*, *supra*, 40 Cal.4th at p. 721; *Manguso v. Oceanside Unified School Dist*. (1984) 153 Cal.App.3d 574, 580.)

Based on the undisputed facts, we find that respondents carried their initial burden to establish that the statements were made during a privileged occasion. Opp and Juratovac were in a business relationship, as O'Rourke & Associates was assisting SFCU with finding a replacement CFO. Moreover, Opp knew Juratovac and O'Rourke & Associates were presenting Lovewell as a candidate with other credit unions, and Opp knew that issues relating to Lovewell's bondability might affect Lovewell's ability to qualify for these opportunities. Thus, Opp and Juratovac shared a common interest, and the statements were made to further that interest as contemplated by Civil Code section 47, subdivision (c). (See *Williams v. Taylor* (1982) 129 Cal.App.3d 745, 751-752 [conditional privilege applied to conversation between company and two insurance adjusters who referred business to the company].)

Lovewell argues Opp's statements cannot be conditionally privileged, because Opp denied making statements about Lovewell's bondability to Juratovac. Lovewell argues that to assert the defense of conditional privilege, the declarant "must believe the defamatory matters to be true." (*Russell v. Geis* (1967) 251 Cal.App.2d 560, 566.) For example, in *Russell*, the court determined that the conditional privilege did not

exist when the defendant testified that he did not believe the allegedly defamatory statement to be true. (*Id*. at pp. 566-567.) Here, however, Opp made no such assertion. She asserted she did not recall making the *specific* statement that was recounted by Juratovac, which is wholly different than asserting she did not believe the *truth* of such statements. Indeed, as we discussed in the previous section of our opinion, though the parties dispute the exact contents of Opp's statement, Opp herself conceded that she made a generalized statement that certain information might be forthcoming that could impact Lovewell's bondability. Opp never said she believed this statement was false.

The issue thus hinges on whether there is a triable issue of material fact that Opp acted with malice, which is required to defeat the defense of conditional privilege. The requisite malice Lovewell must show is "actual malice," which can be demonstrated by evidence that the declarant was motivated by hatred or ill will or by showing the declarant lacked reasonable grounds to believe the statement was true and thus acted with reckless disregard. (*Noel v*. *River Hills Wilsons*, *Inc*. (2003) 113 Cal.App.4th 1363, 1370.) " '[M]alice focuses upon the defendant's state of mind, not his [or her] conduct.' " (*Ibid*.) Malice, however, is not inferred from the communication itself. (Civ. Code, § 48.) In the context of summary adjudication, since Lovewell bore the burden to prove malice by a preponderance of the evidence, he must provide "evidence that would *require* a reasonable trier of fact to find any underlying material fact more likely than not." (*Aguilar v*. *Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 851 (*Aguilar*).)

Lovewell argues he submitted ample evidence of malice. He argues that he provided evidence of multiple instances where Opp's anger and hostility toward him were evident based on her conduct toward him: (1) Opp persuaded SFCU's board to terminate Lovewell's employment for performance issues that were merely illusory, (2) Opp decided to terminate Lovewell because he refused to take part in her plan to cover up the noncompliance issue, (3) Opp confiscated Lovewell's overpayments of

interest on his home mortgage, which he had obtained through SFCU, and applied the overpayments to his principal outstanding balance without Lovewell's permission, and (4) Opp gave Lovewell a severance agreement with "illusory and unconscionable provisions." Lovewell also claims malice can be inferred from the fact that prior to her meeting with Juratovac, Opp learned that Lovewell had obtained legal counsel to consider suing SFCU.

We believe the evidence cited by Lovewell does not give rise to a rational inference that Opp was motivated by malice when she made the comments at issue. First, we disagree with Lovewell's assertion that there is evidence in the record that tends to show that Opp's concerns about his performance were false and manufactured after the fact. For example, Lovewell argues that Opp criticized him for failing to communicate with her about investments he had made on SFCU's behalf and for entering into transactions contrary to her instructions. Lovewell, however, argues her concerns were contrived, because she never brought up the topic during SFCU's asset/liability committee (ALCO) meetings or Board meetings. In addition, the ALCO and the Board subsequently reviewed and approved Lovewell's prepared financial statements.

Lovewell's evidence does not demonstrate that Opp's concerns were illusory. Opp acknowledged that she did not raise the issue during ALCO and board meetings and explained that she decided to have discussions with Lovewell about her concerns one-on-one as his supervisor. Indeed, Lovewell does not dispute that Opp raised these concerns privately. It would be speculative for us to assume that Opp's decision not to publicly acknowledge her unease about Lovewell's performance suggests that her concerns were not legitimate.

Likewise, Lovewell's argument that Opp was not actually concerned about certain transactions that she perceived as day trades must be rejected for the same reasons. Again, Lovewell insists that Opp's claim that she was concerned about transactions that

she perceived were day trades was erroneous, because the trades were disclosed to the ALCO and SFCU's Board and again Opp raised no concerns or objections. Again, however, Lovewell does not dispute that Opp raised concerns about these transactions to him in private. In an e-mail, Opp questioned Lovewell about the transactions and said she did not believe that Lovewell's explanation that the trades were made due to liquidity concerns with SFCU was honest. Even assuming that Lovewell's explanation for the transactions is valid, it is apparent that Opp was skeptical of his actions and expressed her unease to him.

Lovewell also insists he presented evidence that Opp's critique of his investment strategies was fabricated, citing her previous praise of his knowledge and skill in prior performance reviews. In particular, Lovewell claims Opp's criticisms of his handling of USDA loan transactions was not credible, citing his own explanation for why the transactions were valid and compliant with Opp's directive not to increase the balance of USDA whole loans. Lovewell, however, acknowledges that Opp sent him an e-mail questioning SFCU's USDA whole loan balance. Again, even if we accept Lovewell's assertion that he had legitimate reasons to engage in the transactions as true, the evidence does not give rise to an inference that Opp fabricated her concern over Lovewell's handling of the USDA loan transactions. In fact, the e-mail from Opp confirms that Opp believed Lovewell ignored her directives.

Lovewell further claims malice can be inferred from the fact that Opp characterized him as being untimely with completing projects even though she knew some projects were delayed for reasons not within his control. Respondents, however, submitted evidence, including e-mails, in which Lovewell acknowledged he had failed to timely complete certain tasks. For example, Lovewell admitted in an e-mail to Opp that he "blew it" by not scheduling consistent internal asset review meetings. In another e-mail, Opp asked Lovewell about the 2011 budget, and Lovewell admitted that the

budget process was "dragging." Likewise, with respect to the internal asset review policy, Opp e-mailed Lovewell and indicated she had wanted to see a revised IAR policy in time for the board's February meeting, but since Lovewell had not completed that task it had to be "pulled . . . from" the agenda. Lovewell replied to the e-mail, stating: "[i]f it's coming up short in you[r] view, understood." Again, the evidence does not support a rational inference that Opp's concern over the timeliness of Lovewell's deliverables was pretextual.

Next, Lovewell insists that malice can be inferred from Opp's actions. He argues the evidence suggests Opp terminated him because he refused to comply with her plan to conceal the loan noncompliance issue from auditors. However, as we have already discussed, Lovewell himself admitted in his declaration that he did not remember telling Opp that he reported this issue to SFCU's auditors. Lovewell cannot create a triable issue based on a declaration that contradicts his prior discovery responses absent any explanation for the discrepancy. (*Shin v. Ahn*, *supra*, 42 Cal.4th at p. 500, fn. 12; *Alvis v. County of Ventura*, *supra*, 178 Cal.App.4th at p. 549.) Malice cannot be inferred from actions Opp knew nothing about.

The other evidence of malice cited by Lovewell is based on speculation and does not create a triable issue. " ' "Speculation . . . is not evidence" that can be utilized in opposing a motion for summary judgment.' " (*Advent, Inc. v. National Union Fire Ins. Co. of Pittsburgh* (2016) 6 Cal.App.5th 443, 459.)

First, it would be speculative to infer malice from the fact that Opp learned that Lovewell had retained counsel to evaluate claims arising from his termination from SFCU prior to her meeting with Juratovac. This fact does not reasonably give rise to an inference that Opp's comments to Juratovac were motivated by malice. Likewise, the fact that SFCU applied Lovewell's mortgage overpayments to his outstanding mortgage principal balance does not demonstrate that Opp acted maliciously when she spoke to

Juratovac. There is no evidence that Opp was personally involved in Lovewell's home mortgage with SFCU or was the one who specifically directed the overpayment to be applied to his outstanding principal.

Lastly, SFCU's decision to offer Lovewell a severance package does not logically demonstrate malice. The terms of the severance agreement would have provided Lovewell with severance pay equal to six months of Lovewell's final base salary in the amount of $140,000. Lovewell characterizes this agreement as unconscionable, citing its provision asking him "to cooperate with the orderly transition of his duties and to make himself available, as reasonably needed, without additional compensation, to answer business-related questions by telephone or in person as deemed necessary by [SFCU's] CEO" and to provide "reasonable assistance to [SFCU] should his knowledge or testimony be deemed useful by [SFCU] in pursuing or defending any pending or future legal claims involving [SFCU] and any third party." We fail to see how including such a provision demonstrates that Opp disliked Lovewell. Inferring malice or ill will toward Lovewell from this agreement requires us to exercise our imagination and employ guesswork. Accepting the severance agreement was a voluntary choice on Lovewell's part; there is no evidence SFCU required Lovewell to sign the agreement. In fact, there is no evidence he even accepted the agreement.

In sum, we find Lovewell has failed to raise a triable issue of material fact that Opp made the comments maliciously. He has not provided "evidence that would *require* a reasonable trier of fact to find any underlying material fact more likely than not." (*Aguilar*, *supra*, 25 Cal.4th at p. 851.)

6. *Intentional Interference with Contractual Relations*

Next, Lovewell argues the trial court erroneously granted respondents' motion for summary adjudication of his claim of intentional interference with contractual relations. Lovewell's claim is premised on Opp's allegedly defamatory comments to Juratovac

about his bondability, which Lovewell insists interfered with his contractual relationship with O'Rourke & Associates. We find the court properly granted respondents' motion for summary adjudication, because there is no evidence Lovewell was damaged by Opp's comments to Juratovac.

a. **General Principles Governing Intentional Interference with Contractual Relations**

A cause of action for intentional interference with contractual relations requires the following elements: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.)

b. **Summary Adjudication Was Proper Because There Is No Evidence Lovewell Suffered Damages**

Damages are a required element of a cause of action for intentional interference with contractual relations. Here, Lovewell has not raised a triable issue of material fact on this cause of action, because he cannot demonstrate he was damaged by Opp's comment to Juratovac about his bondability.

Lovewell argues he has submitted evidence showing he suffered damages, citing portions of Juratovac's deposition. In his deposition, Juratovac indicated that Opp's comments to him "left a question around [Lovewell's] departure and whether that might have an impact on, you know, our ability to kind of move forward with him as a candidate." Juratovac also asserted that Opp's comments "gave [him] some caution."

Juratovac's statements, however, do not demonstrate that Opp's statements caused Lovewell harm. In fact, Juratovac claimed he considered Opp's comments but continued to move forward with Lovewell as a CFO candidate. He explained he presented Lovewell as a CFO candidate and not a CEO candidate not because of Opp's comments,

but because of his own experience and understanding of what a CEO position entailed. Moreover, Juratovac insisted that O'Rourke & Associates continue to refer Lovewell for multiple job recruitments, despite his own personal reservations and lingering questions about what Opp might have meant when she made her statement.

Having put forth no evidence that he suffered damages due to the alleged interference with contractual relations, we find the trial court correctly granted summary adjudication of this claim in respondents' favor.[4]

7. *Intentional Infliction of Emotional Distress*

Lastly, Lovewell argues respondents' actions inflicted great emotional harm and stress, and the trial court erroneously granted summary judgment in respondents' favor on his cause of action for intentional infliction of emotional distress. We reject Lovewell's contentions. Respondents' actions do not rise to the level of extreme or outrageous conduct as required for a claim of intentional infliction of emotional distress.

a. **General Principles of Intentional Infliction of Emotional Distress**

"To establish an intentional infliction claim, the plaintiff must show ' " ' (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.' " ' " (*Delfino v. Agilent Technologies*, *Inc*. (2006) 145 Cal.App.4th 790, 808.) The conduct contemplated must be " 'so extreme as to exceed all bounds of that usually tolerated in a

[4] Preliminarily, respondents argue that summary adjudication of this claim was also proper because it is undisputed that there was no valid contract between Lovewell and O'Rourke & Associates. We disagree. Lovewell's declaration claims that he had "an agreement" with O'Rourke & Associates. Viewing the evidence in the light most favorable to Lovewell, there is a triable issue as to the existence of a valid contract. Nonetheless, Lovewell's cause of action still fails because he has not raised a triable issue as to the existence of damages.

civilized community.' " (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209.) Insulting language, without more, is not considered outrageous conduct, nor are threats or other annoyances. (*Delfino*, *supra*, at p. 809.)

b. **There Is No Evidence Respondents' Conduct was Extreme or Outrageous**

Here, we have already concluded that there is no triable issue as to any of Lovewell's claims on appeal. Even viewed in the light most favorable to Lovewell, the evidence does not demonstrate that respondents' conduct was extreme or outrageous. The evidence demonstrates that Lovewell was discharged as the CFO of a company, and Opp subsequently made comments to a recruiter that may have disparaged Lovewell yet did not cause him actual harm. This conduct is not sufficient to raise a triable issue of intentional infliction of emotional distress. Thus, summary adjudication of this claim was appropriate.

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

Elia, J.

WE CONCUR:

Greenwood, P.J.

Grover, J.

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