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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

ANTHONY V. NIGRO,

Plaintiff,

vs.

SEARS, ROEBUCK and CO.,

Defendant.

CASE NO. 11cv1541-MMA (JMA)

**ORDER GRANTING DEFENDANT  
SEARS, ROEBUCK, and CO.’S  
MOTION FOR SUMMARY  
JUDGMENT**

[Doc. No. 16]

22 Plaintiff Anthony V. Nigro is a former employee of Defendant Sears, Roebuck and Co.  
23 (“Sears”). He suffers from a serious medical condition which caused him to take extended medical  
24 leaves of absence during his term of employment. Sears ultimately terminated his employment due  
25 to job abandonment. Nigro filed suit against Sears alleging three disability discrimination claims  
26 pursuant to California’s Fair Employment and Housing Act, Cal. Gov’t Code § 12900 *et seq.*, and  
27 wrongful termination in violation of public policy. Sears moves for summary judgment as to  
28 Nigro’s four causes of action. For the reasons set forth below, the Court **GRANTS** Sears’ motion.

**PLAINTIFF'S CLAIMS**

1  
2 Plaintiff worked at Sears as a maintenance technician from May 20, 2007 until the  
3 purportedly wrongful termination of his employment on August 5, 2009. *Complaint* ¶ 1. Despite  
4 his medical condition, Plaintiff claims he was able to perform his job satisfactorily with reasonable  
5 accommodations from Sears, including changing his start time from 6:00 a.m. to 9:00 a.m., giving  
6 him time off for medical appointments, and time off when his condition worsened. *Id.* ¶ 7.

7 According to Plaintiff, as a result of a change in management personnel, Plaintiff's requests  
8 for accommodation were denied and Sears refused to engage in any interactive process. *Id.* ¶ 8.  
9 Between December 2008 and May 2009, Plaintiff alleges he requested several times to start his shift  
10 late or for time off to attend medical appointments, and management denied those requests without  
11 any interaction or conversation. *Id.* In May 2009, Sears denied Plaintiff's request to interview for a  
12 different position as an accommodation for his medical condition.

13 On June 8, 2009, Plaintiff's direct supervisor, Jason Foss, approved Plaintiff's request for  
14 time off as an accommodation for his medical condition. *Id.* On July 23, 2009, while on approved  
15 leave, Plaintiff received a letter from Larry Foerster, the store manager and Foss' supervisor,  
16 claiming that Plaintiff had failed to provide Sears with the information necessary to remain off work,  
17 and as a result Plaintiff's employment would be terminated in two days if he did not contact Sears.  
18 *Id.* Plaintiff alleges he had been in contact with Sears on a regular basis, and he provided Sears with  
19 the requested information on the same day he received the letter from Foerster. Despite complying  
20 with Foerster's request, Sears terminated Plaintiff's employment on August 5, 2009. *Id.*

21 Based on these allegations, Plaintiff filed suit against Sears in May 2011. Plaintiff claims  
22 that Sears discriminated against him based upon his medical condition and disability by terminating  
23 his employment while he was on approved medical leave as an accommodation for his disability. *Id.*  
24 ¶ 23. Plaintiff also claims that Sears failed to accommodate his disability, failed to engage in the  
25 interactive process with Plaintiff to determine effective reasonable accommodations for Plaintiff's  
26 disability, and wrongfully terminated Plaintiff's employment in violation of public policy. *Id.* ¶¶ 13,  
27 18, 27.

28 ///

**RELEVANT FACTS**

1  
2 The Court finds the following material facts to be undisputed.<sup>1</sup> Anthony Nigro suffers from  
3 ulcerative colitis, an intestinal disease and a chronic, serious medical condition.<sup>2</sup> Nigro disclosed  
4 this fact during his initial interview for a maintenance position at Sears. In May 2007, Nigro began  
5 working at the Sears store in Carlsbad, California as a Quality Maintenance Assistant (“QMA”).  
6 Nigro’s job duties required him to perform physical labor, such as replacing floor tiles, changing air  
7 conditioning filters on the roof of the store, and moving steel racks of merchandise.

8 In August 2007, Nigro asked for and received a transfer into a Quality Maintenance  
9 Technician position, which required him to travel and perform maintenance at five stores in San  
10 Diego County. Several months later, Nigro asked to return to his former QMA position at the  
11 Carlsbad store. According to Nigro, he was suffering from a flare-up in his condition and traveling  
12 between stores was difficult. He needed to be near a restroom at all times. In December 2007,  
13 Nigro resumed his maintenance duties at the Carlsbad store. In order to accommodate Nigro’s  
14 condition, his direct supervisor, assistant store manager Jason Foss, allowed him to start his shift at  
15 9:00 a.m. rather than 6:00 a.m. during flare-ups, when Nigro would often experience intestinal  
16 distress late at night.

17 At some point in early 2008, Nigro asked to be transferred into a warehouse position which  
18 required less physical labor than his maintenance position. Nigro believed he could control his  
19 condition better if he performed less physical labor; however, he did not obtain or present a  
20 physician’s recommendation to that effect. Sears placed another employee with warehouse  
21 experience in the position.

22 In March 2008, Nigro had to take a leave of absence due to a severe flare-up in his condition.  
23

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24 <sup>1</sup> All facts are taken from Sears’ Separate Statement of Undisputed Material Facts [Doc. No. 16-  
25 2], Nigro’s Response and Separate Statement [Doc. No. 18-1], Sears’ Reply and Response [Doc. No.  
26 21-1], and the evidentiary sources referenced therein, particularly the transcript of Nigro’s deposition  
[Doc. No. 16-3, Ex. A; Doc. No. 19, Ex. C], unless otherwise cited. The parties agree that these facts  
are not reasonably in dispute, unless otherwise noted.

27 <sup>2</sup> “Ulcerative colitis is an inflammatory bowel disease (IBD) that causes long-lasting  
28 inflammation in part of your digestive tract” and “can be debilitating and sometimes can lead to  
life-threatening complications.” See <http://www.mayoclinic.com/health/ulcerative-colitis/DS00598> (last  
visited 7/24/2012).

1 Nigro was out of work for at least three months. In December 2008, Nigro interviewed for a  
2 position as assistant auto manager at the Carlsbad store. Nigro believed it would be an easier  
3 position for him to fill given his medical condition. Sears hired Nigro for the position, which he  
4 held for two weeks before stepping down voluntarily to return to his maintenance position. Shortly  
5 thereafter, Nigro experienced a severe flare-up of his condition and took an approved medical leave  
6 of absence until he was able to return to work on May 4, 2009. During his leave of absence, Nigro  
7 experienced problems with his pay and his benefits were cancelled. He remained in regular contact  
8 with various individuals at Sears regarding the situation.

9 In May 2009, Nigro's doctor cleared him to return to work without any restrictions. When  
10 Nigro returned to the Carlsbad store, Jason Foss remained his direct supervisor, but Sears had hired  
11 a new store manager, Larry Foerster. Nigro inquired with Foss about transferring into a lead  
12 position in the tool department; however, Foss advised Nigro that Foerster did not approve the  
13 transfer. Nigro contacted Sears' regional facilities manager, Gary Clements, and asked to be  
14 transferred out of the Carlsbad store. Clements did not respond to Nigro's request. During this  
15 time, Nigro continued to experience problems with his pay and benefits. Because of these issues,  
16 Nigro was unable to afford some of his medications and his condition worsened.

17 On Friday, June 5, 2009, Nigro had to leave work early due to the flare-up of his condition.  
18 Nigro spoke with Foss that afternoon and explained that he was sick and needed to go home. Foss  
19 approved and Nigro left work. On Monday, June 8, 2009, Nigro called the Sears attendance line and  
20 left a message indicating he would be out until at least Thursday, June 18, 2009. Nigro called the  
21 attendance line again on Monday, June 22, 2009, and left a message indicating he would be out until  
22 Monday, June 29, 2009. Throughout the month of June, Nigro remained in regular contact with  
23 various individuals at Sears regarding the continuing problems with his pay and benefits. At some  
24 point during that month, Sears transferred Foss to the Escondido store and he was no longer Nigro's  
25 direct supervisor. On June 29, 2009, Nigro spoke to Larry Foerster on the telephone about his  
26 condition and his continuing problems with getting paid. The exact words exchanged between the  
27 two men are in dispute. Generally, they discussed his pay issues and his medical condition. Nigro  
28 claims that he advised Foerster that he thought he might be able to return to work by July 25, 2009 if

1 he could start his shifts late. Nigro further contends that Foerster told Nigro that he would not be  
2 accommodated. Foerster denies making any such statement.

3 On or about July 22, 2009, Sears' corporate human resources line ("88Sears") instructed the  
4 store to send Nigro a letter advising him that his employment would be terminated for job  
5 abandonment if he did not contact the store. On July 23, 2009, Foerster sent Nigro a letter, noting  
6 his absences, asking him to contact Foerster within two days and stating that the failure to do so  
7 would result in "termination for job abandonment." Nigro received the letter the next day, Friday,  
8 July 24, 2009, and on that same day he brought paperwork to Sears, which he left with a clerical  
9 employee to give to Genevieve Petty in the Human Resources department. Petty was on vacation  
10 when Nigro dropped off the paperwork and she did not receive the paperwork until she returned  
11 from vacation more than a week later. Nigro did not leave any paperwork with Foerster directly,  
12 and did not speak with Foerster that day.

13 On Tuesday, July 28, 2009, Nigro sent an email asking Sears to change his status in the  
14 system to "terminated" and mail his final check to him. Nigro did not know whether Foerster or  
15 Petty had seen his response to the July 23 letter before he sent the July 28 email announcing he  
16 considered his employment terminated. Nigro sent the July 28 email because he wanted to get  
17 money out of his retirement investment account and believed he had to be terminated in order to do  
18 so. In response to the July 28 email, assistant store manager Anthony Haggard called 88Sears and  
19 was advised that Nigro's employment termination should be processed as of July 29, 2009. On  
20 August 5, 2009, Petty coded Nigro's termination as "job abandonment."

## 21 LEGAL STANDARD

### 22 *1. Summary Judgment*

23 Summary judgment is appropriate only where the record, read in the light most favorable to  
24 the non-moving party, indicates that "there is no genuine issue as to any material fact and . . . the  
25 moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp.*  
26 *v. Catrett*, 477 U.S. 317, 323-24 (1986). Material facts are those necessary to the proof or defense  
27 of a claim, as determined by reference to substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.  
28 242, 248 (1986). A factual issue is genuine "if the evidence is such that a reasonable jury could

1 return a verdict for the nonmoving party.” *Id.* In deciding a motion for summary judgment, “[t]he  
2 evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his  
3 favor.” *Id.* at 255.

4 The burden initially is on the moving party to demonstrate an absence of a genuine issue of  
5 material fact. *Celotex*, 477 U.S. at 323. If, and only if, the moving party meets its burden, then the  
6 non-moving party must produce enough evidence to rebut the moving party’s claim and create a  
7 genuine issue of material fact. *Id.* at 322-23. If the non-moving party meets this burden, then the  
8 motion will be denied. *Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc.*, 210 F.3d 1099, 1103 (9th  
9 Cir. 2000). The moving party’s burden may also be met by showing that there is an absence of  
10 evidence to support the non-moving party’s case. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d  
11 528, 531 (9th Cir. 2000). Once the moving party has met its initial burden, Rule 56 requires the  
12 non-moving party to go beyond the pleadings and identify facts which show a genuine issue for trial.

### 13 DISCUSSION

#### 14 ***I. Employment Discrimination***

15 Nigro alleges that Sears terminated his employment due to his disability, in violation of the  
16 California Fair Employment and Housing Act (“FEHA”), Cal. Gov’t Code §§ 12900-12996. FEHA  
17 makes it an unlawful employment practice to discharge a person from employment, or to  
18 discriminate against a person in the terms, conditions, or privileges, of employment, because of a  
19 physical or mental disability. *Id.* § 12940(a). To establish a prima facie case of employment  
20 discrimination based upon disability, Nigro must demonstrate that (1) he is disabled under FEHA;  
21 (2) he was qualified to perform the essential duties of his position with or without reasonable  
22 accommodation; and (3) Sears subjected him to an adverse employment action because of his  
23 disability. *Avila v. Continental Airlines, Inc.*, 165 Cal. App. 4th 1237, 1246 (2008); Cal. Gov’t Code  
24 § 12940(a).

25 “When entertaining motions for summary judgment in employment discrimination cases  
26 arising under state law, courts sitting in diversity must apply the McDonnell Douglas  
27 burden-shifting scheme as a federal procedural rule.” *Zeinali v. Raytheon Co.*, 636 F.3d 544, 552  
28 (9th Cir. 2011) (internal quotation and citation omitted). Under McDonnell Douglas, “the employee

1 must first establish a prima facie case of discrimination.” *Id.* If the employee is successful, “the  
2 employer must articulate a legitimate, nondiscriminatory reason for the challenged action.” *Id.*  
3 Finally, “if the employer satisfies this burden, the employee must show that the reason is  
4 pretextual[,] either directly by persuading the court that a discriminatory reason more likely  
5 motivated the employer or indirectly by showing that the employer’s proffered explanation is  
6 unworthy of credence.” *Id.*

7 Sears does not contest that Nigro has a disability due to his ulcerative colitis. However,  
8 Sears argues that Nigro cannot establish a prima facie case of discrimination because he was not  
9 qualified to perform the essential duties of his position which included attending work on a regular  
10 basis. Section 12940 of California’s Government Code prohibits discrimination in employment on  
11 account of disability, but not when “the employee, because of his or her physical or mental  
12 disability, is unable to perform his or her essential duties even with reasonable accommodations . .  
13 ..” Nigro bears the burden to demonstrate that he was able to perform the essential functions of his  
14 job, with or without reasonable accommodation. *Green v. State*, 42 Cal. 4th 254, 262 (2007).

15 Sears asserts, and Nigro admits, that when he experienced a severe flare-up of his colitis, he  
16 could not work at all. An employee who is “unable to come to work on a regular basis . . . [is]  
17 unable to satisfy any of the functions of the job in question, much less the essential ones.” *Halperin*  
18 *v. Abacus Tech. Corp.*, 128 F.3d 191, 198 (4th Cir. 1997).<sup>3</sup> As such, Sears argues that Nigro was not  
19 qualified to perform his job with or without a reasonable accommodation. Nigro counters that even  
20 during a severe flare-up he could perform his job with the reasonable accommodation of a medical  
21 leave of absence. A reasonable accommodation can include a finite leave, whether paid or unpaid,  
22 provided it is likely that the employee will be able to perform his or her duties at the end of the  
23 leave. *Hanson v. Lucky Stores, Inc.*, 74 Cal. App. 4th 215, 226 (1999); *see Humphrey v. Mem’l*  
24 *Hosps. Ass’n*, 239 F.3d 1128, 1135-1136 (9th Cir. 2001) (leave of absence may be a reasonable  
25 accommodation of an employee’s disability, and when a leave of absence would permit the  
26 employee to perform the essential functions of the job upon his or her return to work, the employee

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27  
28 <sup>3</sup> Because California courts rely on federal discrimination cases to interpret FEHA, all analysis  
pertaining to the ADA also pertains to FEHA. *See Brundage v. Hahn*, 57 Cal. App. 4th 228, 235 (1997);  
*see also Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267, 271 (9th Cir. 1996).

1 is otherwise qualified); *Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1109 (9th Cir. 2008)  
2 (providing disability leave is evidence of reasonable accommodation). Here, Nigro has established  
3 that he was able to perform the essential functions of the QMA position with or without  
4 accommodation. After each medical leave of absence, his physician cleared him to return to work  
5 without any limitations, and he in fact returned to work and performed his duties. When Nigro  
6 experienced less severe flare-ups of his colitis, he was able to perform his duties with the reasonable  
7 accommodation of a later start time. And when Nigro returned to work in May 2009, he was able to  
8 perform his duties without the accommodation of a later start time.

9         With respect to the third element, Nigro suffered an adverse employment action when Sears  
10 terminated his employment. However, Nigro must also establish the requisite causal relationship  
11 between the termination and his disability. In order to survive a motion for summary judgment,  
12 Nigro's "evidence must relate to the motivation of the decision makers to prove, by non-speculative  
13 evidence, an actual causal link between prohibited motivation and termination." *See King v. United*  
14 *Parcel Service, Inc.*, 152 Cal. App. 4th 426, 433 (2007). A "plaintiff's subjective beliefs in an  
15 employment discrimination case do not create a genuine issue of fact," however, "nor do  
16 uncorroborated and self-serving declarations." *See id.*

17         Nigro's evidence of discrimination is either speculative, inadmissible hearsay, or supported  
18 only by his own self-serving declaration. Nigro cites to several pieces of evidence which he claims  
19 demonstrate Sears' discriminatory animus. For example, Nigro claims that in May 2009, District  
20 Facilities Manager Alan Kamisugu told Plaintiff not to worry about his pay issues because according  
21 to District General Manager Chris Adams, "you're not going to be here anymore." *See Plaintiff's*  
22 *Opposition*, Doc. No. 18, 11. And during their June 29 phone conversation, Nigro claims Foerster  
23 told him that "[i]f you're going to stick with being sick, it's not helping your situation. It is what it  
24 is. You're not getting paid, and you're not going to be accommodated." *Id.* The source of this  
25 evidence is Nigro's own self-serving testimony and the intent ascribed to these statements by Nigro  
26 is speculative.

27         Nigro also claims that Jason Foss was "punished by Sears" for allowing Nigro to go home  
28 sick on June 5, 2009; however, this is pure speculation. Nigro cites to Jason Foss' testimony that



1 after an attempted accommodation involving a job transfer for Nigro failed, District General  
2 Manager Chris Adams said, referring to Nigro, "I'm done with that guy." This is inadmissible  
3 hearsay. Nigro also points to the fact that Sears had its Loss Prevention Department watching him  
4 "in order to find any policy violations that could be used to justify his termination." This too is  
5 unsupported speculation. Simply put, Nigro fails to put forth any admissible, non-speculative  
6 evidence of Sears' discriminatory animus other than his own self-serving testimony. As such, he  
7 fails to establish a prima facie case of discrimination.

8 Even if Nigro could make out a prima facie case, Sears had a legitimate, non-discriminatory  
9 reason for terminating his employment: failure to comply with Sears' attendance and leave policies  
10 resulting in job abandonment. Nigro asserts he did not abandon his job, but rather Sears terminated  
11 his employment while he was on a "medical leave" approved by his direct supervisor, Jason Foss. It  
12 is undisputed that Foss allowed Nigro to go home from work early on June 5, 2009 because Nigro  
13 was sick:

14 Q. Just prior to your transfer to the Escondido store from the Carlsbad store, did  
15 Mr. Nigro come to you and ask you for time off from work as a result of his  
16 medical condition, colitis?

17 A. Just prior to my transfer? Yes.

18 Q. What was your response to that request?

19 A. Like I said, I believe it was the last day or so, and he came to me. He wasn't  
20 getting paid. It was a stressful time for him. He was sick. And he basically  
21 said that, "I'm sick. I'm not going to be able to come in." And I said, "You  
22 have got to do what you have to do to take care of yourself."

21 *Foss Depo.*, 55. During his deposition, Foss further confirmed that he approved Nigro's  
22 request for time off due to illness, but differentiated "time off" from "leave":

23 Q. So you approved his request to take time off from work?

24 A. Yeah, I mean, **if he had to take time off, he had to go out**, you know?

25 Q. Did you have to get approval from Genevieve Petty for that request?

26 A. He would have had to file the paperwork, you know, just like it's done every  
27 time. And **then the benefits department would be the one that would  
28 approve his leave.**

28 Q. Did anyone ever talk to you, upper management, about approving that request  
to Mr. Nigro to take time off?

1           A.     I don't – no, I don't think there was anybody that contacted me about that.  
2 *Foss Depo.*, 56 (emphasis added). In addition, Foss testified that while he had the authority to  
3 accommodate employees, he did not have sole discretion to approve a medical leave of absence:

4           Q:     Okay. What was your understanding based on your training from Sears as to what  
5 your responsibility was with respect to employees making a request for  
6 accommodation?

7           A:     Most accommodations, we can go ahead and handle most of those situations  
8 depending on what it is in the store. It comes into, you know, leaves of absence or  
9 something like that, we have to get in contact with [88]Sears to get direction.

10 *Id.*, 26. Thus, Nigro's assertion that he was terminated while on approved "medical leave" is not  
11 supported by his direct supervisor's own testimony on the issue.

12           In contrast, the evidence demonstrates that Nigro provided the necessary paperwork to Sears  
13 with respect to his official medical leaves of absence in Spring 2008 and Winter/Spring 2009. In  
14 both instances, Nigro's treating physician completed a form entitled "California Leave Medical  
15 Certification Form: Associate's Own Condition," and provided details regarding Nigro's condition  
16 and the expected term of incapacitation due to his condition. *Nigro Depo.*, Exs. 13, 18. However,  
17 there is no evidence in the record that Nigro provided any similar paperwork to Sears with respect to  
18 his time off work in Summer 2009. Nigro points out that on July 2, 2009, his physician completed  
19 the required form for Nigro to claim disability insurance benefits from the state of California, and  
20 that Genevieve Petty and Foerster became aware of his application for benefits shortly thereafter.  
21 *Nigro Depo.*, Ex. 40. At the end of July, when Nigro finally delivered paperwork to Sears, he  
22 included a doctor's note and a copy of the state disability insurance benefits application. But there is  
23 no record of Nigro requesting certification for an official medical leave of absence, as he had done  
24 twice in the past. Rather, the evidence demonstrates that Nigro simply called in sick throughout the  
25 month of June, and in July applied directly with the state for disability benefits.

26           Sears' attendance policy makes it clear that calling in sick involves a different protocol than  
27 taking an official medical leave of absence. The attendance policy signed by Nigro on May 7, 2007,  
28 provides in pertinent part:

Associates must call a store-specific phone number, as soon as possible, to report an  
absence or tardy. This information will be used to plan for how we will satisfy our  
customers during the associate's absence, as well as to better understand the reasons  
for an associate absence.

1 ( . . . )

- 2 1. An associate who has an unexcused absence from work for two consecutive  
3 days, without notifying Sears via the defined call-in process, is subject to  
4 immediate termination.
- 5 2. For illness absences of 7 consecutive days or more, associates are required  
6 to provide a physician's release to return to work.
- 7 3. Full-time associates absent 7 consecutive days or more due to illness are  
8 required to call MetLife at 1-888-868-3997. MetLife determines  
9 compensability and verifies the need to be absent.

10 *Vance Decl.*, Ex. B. Although Nigro appears to have complied with the attendance policy at least  
11 intermittently during June 2009, there is no evidence in the record to suggest that Nigro complied  
12 with this policy at all during July 2009 until the end of the month when he received the termination  
13 warning letter in the mail. At that point, by the terms of its attendance policy as set forth above,  
14 Sears was already entitled to terminate Nigro's employment immediately for failing to comply with  
15 the company's policy. Instead of doing so, Sears gave Nigro the opportunity to present the  
16 necessary documentation to excuse his absence from work during the month of July. Nigro  
17 attempted to do so, but once again failed to comply with the company's instructions regarding how  
18 and to whom he should provide the information. Rather than contact Foerster directly, as instructed  
19 in the July 23 warning letter, Nigro dropped off paperwork for Petty exclusively, who was on  
20 vacation and did not see the paperwork until over a week later. The termination of Nigro's  
21 employment due to job abandonment may have been avoidable if Nigro had complied fully with  
22 Sears' attendance policy and/or taken the necessary steps to request and obtain an official medical  
23 leave of absence. However, he did neither, resulting in Sears' determination that he had abandoned  
24 his position.

25 In sum, Sears has provided a legitimate reason for Nigro's termination and Nigro has  
26 provided no evidence that his failure to comply with the company's attendance and leave policies  
27 was just a pretext to terminate his employment because of his disability. *See Dumas v. New United*  
28 *Motor Mfg., Inc.*, 305 Fed. Appx. 445 (9th Cir. 2008) (finding no showing of pretext when employee  
violated company policy by failing to get permission for leave of absence). Accordingly, Nigro's  
claim of disability discrimination under FEHA fails as a matter of law and the Court **GRANTS**

1 Sears' motion for summary judgment as to this claim.

2 **2. Failure to Accommodate**

3 Nigro alleges that Sears violated FEHA by "fail[ing] to make reasonable accommodation for  
4 the known physical or mental disability of an . . . employee." Cal. Gov't Code § 12940(m). "The  
5 elements of a failure to accommodate claim are (1) the plaintiff has a disability under FEHA, (2) the  
6 plaintiff is qualified to perform the essential functions of the position, and (3) the employer failed to  
7 reasonably accommodate the plaintiff's disability." *Scotch v. Art Inst. of Cal.-Orange Cnty., Inc.*,  
8 173 Cal. App. 4th 986, 1009-10 (2009).

9 As noted above, the parties do not dispute that ulcerative colitis qualifies as a physical  
10 disability under FEHA. With regard to the second prong of the test, an individual is qualified if he is  
11 capable of performing the essential functions of the job with or without reasonable accommodation.  
12 Cal. Gov't Code § 12940(a)(1); *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996).  
13 Sears argues that Nigro was not qualified to perform the functions of the QMA position. For the  
14 reasons set forth above, the Court finds that Nigro was qualified to perform the essential functions of  
15 the QMA position. However, Nigro fails to put forth sufficient evidence to demonstrate that Sears  
16 failed to reasonably accommodate his disability.

17 A reasonable accommodation is "a modification or adjustment to the workplace that enables  
18 the employee to perform the essential functions of the job held or desired." *Nadaf-Rahrov v.*  
19 *Neiman Marcus Grp., Inc.*, 166 Cal. App. 4th 952, 974 (2008). It involves "job restructuring,  
20 part-time or modified work schedules . . . and other similar accommodations for individuals with  
21 disabilities." Cal. Gov't Code § 12926(n)(2); Cal. Code Regs. tit. 2 § 7293.9(a)(2). A temporary  
22 leave of absence is considered a reasonable accommodation under FEHA. *See Hanson*, 74 Cal.  
23 App. 4th at 225 (stating that finite leave can constitute a reasonable accommodation if it is likely the  
24 employee will eventually return to work). "Holding a job open for a disabled employee who needs  
25 time to recuperate or heal is in itself a form of reasonable accommodation and may be all that is  
26 required where it appears likely that the employee will be able to return to an existing position at  
27 some time in the foreseeable future." *Jensen v. Wells Fargo Bank*, 85 Cal.App.4th 245, 263 (2000).

28 Looking at the evidence in the light most favorable to Nigro, there are insufficient facts to

1 conclude that Sears refused to provide Nigro with a reasonable accommodation. Nigro must be able  
2 to convince a reasonable fact finder that Sears refused to accommodate him. By Nigro's own  
3 admission, he was accommodated through May 2009. Sears accommodated Nigro by holding his  
4 position for him during his extended leaves of absence and by allowing him to modify his work  
5 schedule. *See, e.g., Surrell v. Cal. Water Serv. Co.*, 518 F.3d 1097, 1109 (9th Cir. 2008) (providing  
6 disability leave is evidence of reasonable accommodation). Sears accommodated Nigro when he  
7 asked to be placed back at the Carlsbad store, rather than traveling between multiple stores, due to  
8 his condition.

9 Nigro asserts that when he returned to work on May 4, 2009 after his second extended leave  
10 of absence, Larry Foerster refused to accommodate him. This allegation is the essence of Nigro's  
11 claim. According to Nigro and his direct supervisor Jason Foss, Foerster indicated during a meeting  
12 with Foss regarding Nigro's pay issues that Nigro would no longer be allowed to start his shift three  
13 hours late. Employer dissatisfaction, however, without any other evidence of failure to  
14 accommodate, is insufficient to establish a reasonable accommodation claim under FEHA. *See*  
15 *Hanson*, 74 Cal. App. 4th at 225. Furthermore, Nigro testified during his deposition that when he  
16 returned to work in May he never spoke directly with Foerster about his start time. And regardless,  
17 Foss always allowed Nigro to start his shift late when necessary and advised Nigro he would  
18 continue to do so despite Foerster's purported statement to the contrary.

19 During the month of May, Nigro was able to start his shift at the regular time, but had he  
20 required an accommodation, Foss had advised Nigro that he would continue to allow Nigro to start  
21 his shift late. As his direct supervisor, Foss had the discretion to allow the change in schedule and  
22 make this accommodation. Foerster confirmed this during his deposition:

23 Q. If Mr. Nigro needed to make some kind of request for, let's say, a medical leave as a  
24 result of his medical condition, would the procedure be for him to bring that request  
to his direct supervisor, Jason Foss?

25 A. The proper procedure would have been to bring it to either Jason Foss or Genevieve  
26 Petty.

27 *Foerster Depo.*, 16. Moreover, Nigro admitted that during May he was able to start his shift at the  
28 regular time and did not need or request the accommodation of a later start time.

1 Nigro was further accommodated after he returned to work when Foss allowed him to leave  
2 early on June 5, 2009 due to his condition. Nigro called in sick for the rest of the month of June,  
3 without complaint from anyone at Sears. And Foss was never questioned or reprimanded for  
4 allowing Nigro to take the time off. As Foss testified during his deposition:

5 Q. Did you ever get in trouble for granting that request for Mr. Nigro in the June 2009  
6 time frame to take time off from work?

7 A. No, I never got in trouble for it.

8 Q. Do you think that had anything to do with your transfer from the Carlsbad store to the  
9 Escondido store? When I say that, that is, approving the time off request in June  
10 2009?

11 A. I don't think it had so much to do with that. I think it had more to do with stepping in  
12 and talking about the pay and objecting to that.

13 *Foss Depo*, 56.

14 Thus, despite any actual or perceived irritation on Foerster's part, Nigro was allowed to start  
15 his shift late when necessary, was granted two extended medical leaves of absence, was offered a  
16 different position, and took time off when he was sick. There are no triable issues of fact with  
17 respect to Nigro's failure to accommodate claim. Accordingly, the Court **GRANTS** Sears' motion  
18 for summary judgment as to this claim.

### 19 **3. Failure to Engage in the Interactive Process**

20 Nigro alleges that Sears failed to engage in an "interactive process" as required by FEHA. It  
21 is an unlawful employment practice "[f]or an employer . . . to fail to engage in a timely, good faith,  
22 interactive process with the employee . . . to determine effective reasonable accommodations, if any,  
23 in response to a request for reasonable accommodation by an employee . . . with a known physical . .  
24 . disability . . . ." Cal. Gov't Code § 12940(n); *see also Barnett v. U.S. Air, Inc.*, 228 F.3d 1105,  
25 1114 (9th Cir. 2000), vacated on other grounds, *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).  
26 "Both sides must communicate directly, exchange essential information and neither side can delay  
27 or obstruct the process." *Id.* at 1114-15. In general, "it is the responsibility of the individual with a  
28 disability to inform the employer that an accommodation is needed." *Spitzer v. The Good Guys,*  
*Inc.*, 80 Cal. App. 4th 1376, 1384 (2000). "[I]t is the employee's initial request for an  
accommodation which triggers the employer's obligation to participate in the interactive process of

1 determining one. If the employee fails to request an accommodation, the employer cannot be held  
2 liable for failing to provide one.” *Id.* (quotation and citations omitted); *King v. United Parcel Serv.,*  
3 *Inc.*, 152 Cal. App. 4th 426, 443 (2007) (employer cannot be expected to read employee’s mind and  
4 is ordinarily not liable for an accommodation of which it had no knowledge).

5 Here, the undisputed evidence establishes that the informal interactive process broke down  
6 because of Nigro’s failure to continue engaging in good faith discussions with Sears. *See Dep’t of*  
7 *Fair Emp’t & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 743 (9th Cir. 2011) (holding that the  
8 employer could not be liable for failure to engage in the interactive process where the employee  
9 caused the breakdown in that process). With the exception of Jason Foss, Nigro never spoke  
10 directly to anyone at Sears while he was working there regarding his medical condition and any  
11 accommodation he needed as a direct result of that condition. Genevieve Petty, one of the two  
12 primary individuals at Sears responsible for handling employee accommodation requests, testified  
13 that Nigro never explained to her the details of his medical condition, or provided a physician’s note  
14 regarding the need for any specific accommodations. *Petty Depo.*, 180. In fact, Nigro’s physician  
15 testified that Nigro did not discuss the need for accommodation at his job until he commenced this  
16 litigation. *Murad Depo.*, 34-35.

17 When Plaintiff complained about his job in emails to upper management and inquired about  
18 being transferred to a different store, he never mentioned that it was because he needed any type of  
19 accommodation for his disability. For example, Nigro sent an email to Chris Adams, an individual  
20 in upper management, on May 22, 2009, requesting a meeting regarding how he was “being treated  
21 in the work place, LOA, medical benefits, and retaliation.” *Nigro Depo.*, Ex. 27. Nigro did not  
22 indicate in the email that he wanted to discuss accommodations for his disability. Nigro sent an  
23 email on June 10, 2009 to Gary Clements, also in upper management. *Id.*, Ex. 30. In the email,  
24 Nigro complained that he was being asked to perform tasks outside the scope of the QMA job  
25 description. *Id.* Nigro also complained that he was not receiving his salary, and expressed his  
26 opinion that his skills could be put to better use if Sears transferred him to a different district. *Id.*  
27 Nigro did not mention his disability or his need for accommodation.

28 Once again, the essence of Nigro’s claim hinges on his allegation that Larry Foerster refused

1 to accommodate him. However, Foerster testified that he had no idea that Foss had been allowing  
2 Nigro to start his shift late as an accommodation for Nigro's medical condition. *Foerster Depo.*, 16.  
3 Nigro concedes that he did not speak directly with Foerster regarding his disability or his need for  
4 accommodation until the two men spoke on the phone on June 29, 2009, after Nigro had been out  
5 sick for over three weeks. Even if the Court assumes that Nigro's account of that phone  
6 conversation is accurate, he cannot establish based on that conversation alone that Sears failed to  
7 engage in the interactive process with him. Sears had already permitted him to take weeks off due to  
8 his illness. Sears was accommodating him. *See Krieg v. U.S. Foodservice, Inc.*, 2011 WL 4344568,  
9 at \*7 (N.D. Cal. Sept. 14, 2011) (dismissing plaintiff's claim when evidence showed that employer  
10 already provided a reasonable accommodation). Accordingly, the Court **GRANTS** Sears' motion  
11 for summary judgment as to this claim.

12 **4. Wrongful Termination in Violation of Public Policy**

13 Finally, Nigro alleges that Sears wrongfully terminated his employment in violation of public  
14 policy. To establish a claim for wrongful termination in violation of public policy under California  
15 law, Nigro must show: (1) the existence of a public policy and (2) a nexus between the public policy  
16 and the termination of his employment. *Turner v. Anheuser-Busch, Inc.*, 7 Cal. 4th 1238, 1253  
17 (1994). Although "disability discrimination can form the basis of a common law wrongful discharge  
18 claim," *City of Moorpark v. Super. Ct.*, 18 Cal. 4th 1143, 1161 (1998), Nigro's claim for disability  
19 discrimination, and each of his other claims, have been adjudicated in Sears' favor. Therefore,  
20 Nigro cannot prevail on his claim for wrongful termination in violation of public policy and the  
21 Court **GRANTS** summary judgment in favor of Sears as to this claim.

22 **CONCLUSION**

23 Based on the foregoing reasons, the Court **GRANTS** Sears' motion for summary judgment.  
24 The Clerk of Court is instructed to enter judgment in accordance herewith and terminate this action.

25 **IT IS SO ORDERED.**

26 DATED: November 28, 2012

27 

28 Hon. Michael M. Anello  
United States District Judge