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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Ian Day,

10 Plaintiff,

11 v.

12 City of Phoenix, an Arizona municipality,

13 Defendant.
14

No. CV-22-00177-PHX-DGC

ORDER

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16 Plaintiff Ian Day asserts a free speech retaliation claim against the City of Phoenix
17 pursuant to 42 U.S.C. § 1983. Doc. 26. Defendant has filed a motion to dismiss under
18 Rule 12(b)(6) of the Federal Rules of Civil Procedure. Doc. 29. The motion is fully
19 briefed. Docs. 30, 32. The Court will deny Plaintiff’s request for oral argument because
20 it rules in his favor.

21 **I. Background.**

22 Plaintiff has filed three versions of his complaint. The operative version is his
23 second amended complaint, filed on June 8, 2022. *See* Doc. 26.

24 In 2015, Plaintiff was hired by Defendant as a senior water quality inspector in the
25 environmental services division of the Defendant’s water department. Doc. 26 ¶ 26. The
26 following facts are taken from his second amended complaint.

27 In late 2018, while participating in an investigation of a business named Closed
28 Loop Recovery, Plaintiff discovered blatant violations of environmental law and learned

1 that his supervisors had disregarded the violations during prior inspections. *Id.* ¶¶ 29-36.
2 In March 2019, Plaintiff discovered unlawful storage of toxic waste at Far West Supply,
3 but he was pressured by his supervisors to shut down the inquiry and issue a false report.
4 When he refused, he received recriminations and accusations from his supervisors. *Id.*
5 ¶¶ 37-50. Over the next six months, Plaintiff continued to uncover issues within the water
6 department involving collusion, incompetence, or improper behavior by City employees
7 and called these to the attention of his supervisors, but he earned only criticism. *Id.* ¶¶ 49-
8 50, 53-58, 63-64-78, 81, 84-86, 90, 102-106.

9 When his supervisors failed to act, Plaintiff escalated his reports to higher City
10 officials, including City Manager Edward Zuercher, and outside of his chain of command
11 to the City’s Office of Environmental Programs and the City of Phoenix Integrity
12 Committee, of which Zuercher was a member and ultimate policymaker. *Id.* These reports
13 resulted in no change.

14 As a result, Plaintiff contacted the Arizona Department of Environmental Quality
15 in March 2019. *Id.* ¶ 37. Seven months later Plaintiff shared his concerns with an Arizona
16 State Senator’s office. *Id.* ¶ 110. In December 2019, he reported his concerns to the U.S.
17 Environmental Protection Agency (*id.* ¶ 114), and in May 2020 to the Arizona Attorney
18 General (*id.* ¶ 115).

19 Plaintiff claims that Defendant retaliated against him beginning in September 2019
20 for reporting to these outside individuals and entities. The retaliation included coaching
21 sessions, disciplinary “notices of inquiry,” negative performance reviews, suspension, a
22 cease-and-desist order directing him to end his communications, administrative leave, and
23 his ultimate termination in April 2021. *Id.* ¶¶ 79, 98, 107, 116-17, 120, 122, 136-39, 150.

24 **II. Legal Standard.**

25 Under Rule 12(b)(6), the well-pled factual allegations of the complaint are taken as
26 true and construed in the light most favorable to Plaintiff. *See Cousins v. Lockyer*, 568
27 F.3d 1063, 1067 (9th Cir. 2009). A complaint that sets forth a cognizable legal theory will
28 survive a motion to dismiss if it contains “sufficient factual matter, accepted as true, to

1 ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
2 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial
3 plausibility when the plaintiff pleads factual content that allows the court to draw the
4 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing
5 *Twombly*, 550 U.S. at 556). Although the plausibility standard requires “more than a sheer
6 possibility that a defendant has acted unlawfully[.]” it “is not akin to a ‘probability
7 requirement[.]’” *Id.*

8 **III. Discussion.**

9 Municipalities and local government units are considered persons under § 1983 and
10 may be liable for causing a constitutional deprivation. *Monell v. Dep’t of Soc. Servs. of*
11 *City of New York*, 436 U.S. 658, 691 (1978); *Long v. Cnty. of Los Angeles*, 442 F.3d 1178,
12 1185 (9th Cir. 2006). But a municipality “cannot be held liable solely because it employs
13 a tortfeasor – or, in other words, a municipality cannot be held liable under [§ 1983] under
14 a *respondeat superior* theory.” *Monell*, 436 U.S. at 691; see *Ulrich v. City & Cnty. of San*
15 *Francisco*, 308 F.3d 968, 984 (9th Cir. 2002) (same).

16 **A. Deprivation of a Constitutional Right.**

17 Plaintiff claims Defendant deprived him of his First Amendment right to engage in
18 protected speech. Defendant argues, “[a]s a preliminary matter,” that Plaintiff has not
19 alleged a deprivation of his First Amendment rights because he has not provided sufficient
20 facts to support his claim that multiple city employees conspired against him. Docs. 29 at
21 4-5; 32 at 2. This argument misses the mark. To state a First Amendment retaliation claim
22 against a government employer, a complaint must show that (1) the employee engaged in
23 constitutionally protected speech, (2) the employer took an adverse employment action,
24 and (3) the speech was the motivating factor for the adverse employment action. *Marable*
25 *v. Nitchman*, 511 F.3d 924, 929 (9th Cir. 2007). Defendant does not dispute that Plaintiff’s
26 reports were constitutionally protected or that it took disciplinary action against him.

27 Defendant does contend that Plaintiff fails to allege any connection between his
28 protected activities and the discipline. Doc. 29 at ¶¶ 12-13; 32 at 3-4, 9-10. A complaint

1 may sufficiently plead causation by showing “proximity in time between the protected
2 speech and the alleged retaliation.” *Ulrich*, 308 F.3d at 980. Plaintiff alleges that
3 Defendant’s retaliatory actions started three months after his first instance of protected
4 speech and continued as he made additional complaints. Doc. 26 ¶¶ 51, 107, 117, 129,
5 132. Temporal proximity between protected conduct and adverse actions can sufficiently
6 suggest that a plaintiff’s speech motivated adverse employment actions. *See Coszalter v.*
7 *City of Salem*, 320 F.3d 968, 977-78 (9th Cir. 2003) (finding three to eight months “easily
8 within a time range to support an inference of retaliation and declining to adopt either a
9 “per se too long” or “per se short enough” rule); *Allen v. Iranon*, 283 F.3d 1070, 1078 (9th
10 Cir. 2002 (“[A]n eleven-month gap in time is within the range that has been found to
11 support an inference that an employment decision was retaliatory.”); *Peyton v. Smith*, No.
12 5:19-CV-05871-EJD, 2022 WL 1215193 (N.D. Cal. Apr. 25, 2022) (finding that the
13 plaintiff adequately pled a causal connection when the alleged adverse employment action
14 occurred in the two months following the protected speech). Plaintiff has adequately pled
15 a causal link between his protected conduct and his discipline.¹

16 **B. Final Policymaker’s Ratification.**

17 Among other grounds, a municipality may be liable under § 1983 when a final
18 policymaker of the municipality knowingly ratifies retaliatory actions taken by
19 subordinates. *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1143 (9th Cir. 2012); *Menotti v.*
20 *City of Seattle*, 409 F.3d 1113, 1147 (9th Cir. 2005). Plaintiff alleges that City Manager
21 Edward Zuercher held final policymaking authority for Defendant and that he knowingly
22 ratified the disciplinary actions of others. Defendant does not dispute that Zuercher was a
23 final policymaker. Plaintiff alleges (1) Zuercher was a member of Defendant’s Integrity
24 Committee (Doc. 26 ¶ 49) to which Plaintiff brought his allegations of misconduct (*id.*
25 ¶¶ 49, 57-58, 64, 73, 86); (2) the Committee improperly closed Plaintiff’s complaint,
26 “outed him” to his supervisors (i.e., reported to them that he had made the complaints), and

27 ¹ Defendant’s reply brief places considerable emphasis on the fact that Plaintiff asserted
28 the same adverse events in a Title VII claim filed administratively after his termination,
that is now time-barred. Doc. 32 at 3-4. But Defendant never explains why the adverse
events cannot give rise both to Title VII discrimination and § 1983 retaliation claims.

1 assisted the very employees whom Plaintiff had accused of improper retaliation against
2 him (*id.* ¶¶ 60-61, 92-93, 109, 113, 148); (3) Plaintiff reached out directly to Zuercher and
3 asked him to intervene in the situation, advising Zuercher that he was the whistleblower
4 who had reported to the State Senate, that his misconduct allegations had not been
5 adequately investigated, and that he was suffering retaliation by his supervisors as a result
6 (*id.* ¶ 130); (4) Zuercher assured Plaintiff that he would have an independent attorney
7 investigate Plaintiff's claims (*id.* ¶ 131); and (5) the day after Plaintiff was terminated he
8 again asked Zuercher to intervene, but Zuercher did not respond (*id.* ¶ 153).

9 These allegations, taken as true and construed in Plaintiff's favor, show that
10 Zuercher personally knew of Plaintiff's protected conduct and the discipline imposed on
11 him; participated in the Committee that failed to protect Plaintiff's constitutional rights;
12 either reviewed an independent investigation that uncovered these facts or failed to institute
13 the investigation as he promised Plaintiff; and, with all of this knowledge, knowingly
14 permitted the retaliatory discipline to go forward. These facts sufficiently state a claim
15 against Defendant based on its final policymaker's ratification of the violation of Plaintiff's
16 constitutional rights.

17 To establish liability by ratification, Plaintiff must show that the policymaker
18 approved a subordinate's decision and the basis for it. *City of St. Louis v. Praprotnik*, 485
19 U.S. 112, 127 (1988). "The policymaker must have knowledge of the constitutional
20 violation and actually approve of it." *Lytle v. Carl*, 382 F.3d 978, 987 (9th Cir. 2004).
21 Ratification may be shown through the policymaker's active role in the constitutional
22 violation. *Id.* (finding ratification because an assistant superintendent "actively
23 participated in the disciplin[ing]" of a plaintiff by requesting all related documents, acting
24 as liaison with outside counsel, and collaborating with others on the specific sanctions);
25 *Hammond v. Cnty. of Madera*, 859 F.2d 797, 803 (9th Cir. 1988), *abrogated on other*
26 *grounds by Wood v. Ostrander*, 851 F.2d 1212 (9th Cir. 1988) (finding ratification because
27 a municipal board "actively participated in the deprivation of [the plaintiffs'] property
28 rights" by accepting and approving related documents). Plaintiff has adequately alleged

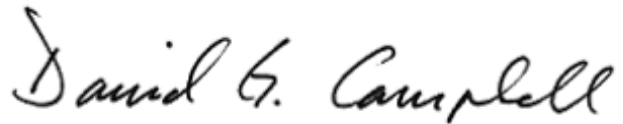
1 that Zuercher was actively involved during his discipline. And as noted earlier, the
2 temporal proximity of the discipline to Plaintiff's protected conduct is sufficient to show
3 causation. Facts developed during discovery may cast a different light on these allegations,
4 but for now they are sufficient for the Court "to draw the reasonable inference that the
5 defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

6 Defendant relies on *Gillette v. Delmore*, 979 F.2d 1342, 1348 (9th Cir. 1992), to
7 argue that "the mere fact that the City Manager did not overrule the discipline cannot form
8 the basis of municipal liability under section 1983." Doc. 29 ¶ 10-11. But *Gillette*
9 concerned a final policymaker's "overrul[ing] the unconstitutional discretionary acts of
10 subordinates," not the policymaker's active role in the decision. 979 F.2d at 1348.

11 Plaintiff alleges other grounds for Defendant's liability and the parties make other
12 argument in their briefs, but the foregoing discussion is sufficient to show that Plaintiff's
13 second amended complaint must survive Defendant's motion to dismiss. The Court will
14 address Plaintiff's claims in more detail if Defendant moves for summary judgment at the
15 close of discovery.

16 **IT IS ORDERED** that Defendant's motion to dismiss (Doc. 29) is **denied**.

17 Dated this 14th day of October, 2022.

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David G. Campbell
22 Senior United States District Judge
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