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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

SAMI MITRI,

Plaintiff,

v.

**WALGREEN CO., INC. dba
WALGREENS, and DOES 1 to 20,
inclusive,**

Defendants.

1:10-cv-538 AWI SKO

**ORDER ON DEFENDANT’S
MOTION FOR SUMMARY
JUDGMENT**

(Doc. No. 14)

This case was removed from the Fresno County Superior Court on the basis of diversity. Plaintiff Sami Mitri (“Mitri”) alleges one cause of action against his former employer, Defendant Walgreen Company, Inc. (“Walgreens”). Mitri alleges a single California state law cause of action for wrongful termination in violation of public policy. Walgreens now moves for summary judgment. For the reasons that follow, Walgreens’s motion will be denied.

FACTUAL BACKGROUND¹

Walgreens is a national retailer and pharmacy chain. DUMF 1. Walgreens employs

¹“DUMF” refers to Defendant’s Undisputed Material Fact, and “PUMF” refers to Plaintiff’s Undisputed Material Fact. “DRPUMF” refers to Defendant’s Response to Plaintiff’s Undisputed Material Fact. Additionally, the parties together have submitted nearly 200 proposed “undisputed material facts.” To resolve this motion, it is not necessary to address every proposed undisputed fact. To the extent that an undisputed fact is not utilized, the fact is either unsupported by the cited evidence or unnecessary to the resolution of this motion.

1 pharmacists and other pharmacy employees who fill customer prescriptions. DUMF 2. Mitri
2 began working for Walgreens as a pharmacist in 1996, and was later promoted to a pharmacy
3 manager in the Fresno District. See DUMF 3. Throughout his employment, Mitri regularly
4 worked as a pharmacist at a number of Walgreens's stores in and around the area of Fresno,
5 California, i.e. "the Central Valley." See id.; PUMF 4. Mitri was employed by Walgreens as an
6 at-will employee. See id. When Mitri was terminated on January 8, 2010, Mitri was the
7 pharmacy manager at a Walgreens store in Fresno, California. See PUMF 3.

8 At the time of his termination, Mitri was employed as a "non-exempt" employee. DUMF
9 4. This meant that Mitri was compensated on an hourly basis, and was entitled to overtime pay
10 for any hours worked in excess of eight hours per day, or forty hours per week. See id. Mitri's
11 regular pay rate as a Pharmacy Manager was \$64.75 per hour, and his overtime pay was \$97.13
12 per hour. See DUMF 5.

13 In 2006, Mitri worked 1,118 hours of overtime in addition to his regular shifts. DUMF 6.
14 In 2007, Mitri worked 1,014.5 hours of overtime in addition to his regular shifts. See id.
15 However, much of this overtime was affirmatively scheduled and involved a new store where
16 there were only 2 pharmacists who worked 10 hours shifts, and worked a 7 days on, 7 days off
17 schedule. See Mitri Depo. 132:8-134:5; PUMF 127. In 2008, Mitri worked 500 hours of
18 overtime due in large part to a change in work schedules. See Mitri Depo. 133:4-10.

19 Beginning in 2008, Walgreens in the Fresno District undertook an effort to reduce
20 expenses, including the amount of overtime worked by all employees. DUMF 7. As part of this
21 effort, Walgreens's managers were encouraged to monitor the overtime of all employees, and to
22 ensure that employees did not work beyond their scheduled shifts. See id. At least as early as
23 2008, Walgreens Fresno District Manager Robert Guillen ("Guillen") spoke to Mitri on several
24 occasions about the importance of Mitri adhering to Mitri's scheduled shifts. See DUMF 8.
25 However, Adrian Olivares ("Olivares"), the Walgreens store manager at Mitri's last store, was
26 never told to monitor Mitri's hours. PUMF 156. Prior to August 2010, Olivares "never did" and
27 "never had to" monitor the pharmacists' hours. See Olivares Depo. 78:19-79:8; PUMF 157.
28 Olivares's policy was to leave it to the pharmacists to decide what was required for customer

1 service. See PUMF 158. Pharmacists stayed past their closing “occasionally,” but Olivares
2 didn’t pay attention to it prior to receiving an e-mail in August 2010, and his practice had been
3 not to tell the pharmacists to go home. See PUMF 159.

4 In early 2008, Mitri made a claim to Walgreens that he had worked “off the clock” for
5 hours for which he had not been paid. DUMF 9. On February 8, 2008, Walgreens and Mitri
6 entered into a “General Release Agreement” (the “Release”) by which Walgreens paid Mitri a
7 sum of money in return for a full release of any and all claims, known and unknown, existing as
8 of February 8, including any claims for work “off the clock,” i.e. without recording the time that
9 Mitri worked/working while not clocked in. See DUMF 10; PUMF 117; PUMF 118. The
10 Release stated in part:

11 Walgreens’s policies prohibit an employee from working before he or she has
12 ‘clocked in’ on his or her timecard. By signing this [Release], Mitri
13 acknowledges that he understands this policy and agrees that in the future he will
14 work at times when he has been scheduled to work and has clocked in. Mitri
15 further understands and acknowledges that the failure to do so could result in
16 discipline, up to and including termination.

17 PUMF 118; DRPUMF 118. As part of the Release, Mitri also was told to record all of his hours.
18 PUMF 119. Mitri asked Walgreens Senior Attorney Chris Murray (“Murray”) if there were
19 exceptions to this portion of the release.² See Mitri Depo. 91:12-19. Murray responded that
20 “emergencies happen,” and that sometime during the emergencies Mitri should get the
21 permission or approval of the supervisor or someone over Mitri. See id. at 91:20-25.

22 In April 2009 (and at various times thereafter), Mitri raised complaints about what he
23 believed to be improper or fraudulent billing practices by pharmacy employees that could
24 constitute Medicare fraud. See DUMF 26; PUMF’s 46, 47. Mitri was concerned about the use
25 of “old fashioned IOU labels” (hereinafter “IOU labels”), which is a practice used to bill the full
26 amount for partially filled prescriptions.³ See PUMF 72; Warinner Depo. 34:25-35:23.

25 ²Murray was a senior attorney in Employee Relations for Walgreens, where his duties included counseling
26 Walgreens’ managers about employment decisions. PUMF 16.

27 ³Creating an IOU label shows as a complete fill on the system, while telling the patient that they are owed
28 additional pills/medicine. See PUMF 73. These labels fool Walgreens’s system into billing the insurance company
for the full prescription, and is fraudulent. See PUMF 74. Through the billing process, there was an economic
incentive for the pharmacists to fool the billing system with the IOU labels. See PUMF’s 75-77.

1 Specifically, a pharmacist partially fills a prescription, but bills for the entire prescription after
2 creating a label that shows the amount that is “owed” to the customer. PUMF 71. Mitri reported
3 his concerns to various officers of Walgreens, and was advised to contact either Loss Prevention,
4 his store manager, or the Pharmacy Supervisor Chris Scalzitti.⁴ See PUMF’s 48-49. Based on
5 what he was taught in a recent training program, and because he was concerned that Scalzitti was
6 responsible for the type of improper billing at issue, Mitri contacted Loss Prevention. See PUMF
7 50. Mitri also reported the fraud to Walgreens Market Vice President Robert Hasty.⁵ See
8 PUMF 54. Mitri was placed in touch with Loss Prevention Supervisor Lisa Warinner.⁶ See id.
9 Mitri also made a complaint to the Department of Health and Human Services and to the
10 California Department of Health Care at the end of April or first half of May 2009. PUMF 70.
11 Scalzitti is unsure of the timeline, but he knew that Mitri had raised the issue of IOU labels in
12 March, April, or May. See PUMF 56. However, Scalzitti testified that he would have known
13 prior to May 11 that Mitri had come to Walgreens about the IOU labels. See Scalzitti Depo.
14 27:19-23.

15 On May 6, 2009, Mitri attended a conference call while on vacation. See Mitri Depo.
16 266:2-14; Mitri Depo. Ex. 12. Mitri did not identify himself on the call because he joined after
17 the roll had been taken. PUMF 105. Mitri learned about the call from his pharmacy technician,
18 and believed that his store manager, Viviana Lares, wanted him to participate. See PUMF’s 104,
19 106. The notice for the conference call was for “all” pharmacy managers, and two weeks
20 previously, Lares asked Mitri to attend a conference call on Mitri’s day off. See PUMF 107.
21 There was no written policy prohibiting off-duty pharmacists from attending such calls. PUMF
22 108. After the call, Mitri spoke to Lares and explained that he did not want to be paid, but that
23

24 ⁴As the Pharmacy Supervisor for the Central Valley of California, Scalzitti was Mitri’s immediate
25 supervisor. PUMF 12.

26 ⁵Hasty was the supervisor of District Manager Guillen. PUMF 15.

27 ⁶At all relevant times, Walgreens had in place policies that required prescriptions be billed accurately, and
28 that prohibited any type of fraudulent billing. DUMF 25. Walgreens’s policies encouraged employees to report any
concerns regarding pharmacy operations, including billing practices. See id. These policies also stated that
employees will not be subjected to retaliation for raising such concerns. See id.

1 he wanted her to know that he was on the call so that he couldn't get in trouble for "working off
2 the clock." PUMF's 109, 115. Mitri was concerned about "working off the clock" because of
3 the Release, which prohibited him from working off the clock. PUMF 116. Lares told him to
4 call on Saturday when she did payroll. PUMF 110. Lares did not recommend that any action be
5 taken against Mitri for the call. PUMF 111. Lares was not aware that there were any issues with
6 Mitri's clocking in, and she recognized that Mitri did his best to increase profits. PUMF 113.

7 On May 11, 2009, Mitri was given a final written warning (the "Final Written Warning").
8 See Mitri Depo. Ex. 12. Mitri, Scalzitti, and Guillen were present at the meeting where the Final
9 Written Warning was given. See id. Under the "Basis for Discipline" section of the Final
10 Written Warning, it reads "Violation of Company Policies & Procedures." See id. Under the
11 "explanation of the reason for the discipline" section, it reads:

12 On May 6th, [Mitri] attended a conference call while on vacation. When roll call
13 was conducted, [Mitri] failed to identify himself as present on the call. After the
14 call concluded, [Mitri] called his store manager asking to be paid.

15 In addition, you have previously received clear instruction from the District
16 Manager and Pharmacy Supervisor that you are not to work beyond your
17 scheduled shift. Despite the prior warning, you have continued to clock in before
18 the start of your shift and continue working beyond your scheduled shift.

19 Your conduct in working off the clock and working beyond your scheduled shift
20 goes against Walgreens policies and procedures and creates liability for the
21 company. We realize that emergency situations sometimes will arise that require
22 you to work beyond your scheduled shift; or to perform work for the benefit of
23 Walgreens before you have checked in. In those or any other situations in which
24 you believe that you need to take action that violates our policies and procedures
25 you must get approval from the Pharmacy Supervisor, District Manager, or Store
26 Manager. Any further unauthorized violations of Walgreens policies or
27 procedures will result in your immediate termination.

28 Id. The Final Written Warning was signed by Scalzitti, Guillen, and Mitri.⁷ See id. Under the
"optional employee response to discipline" section, Mitri responded: "I was not on the
conference call [until] after roll was taken. Mrs. Lares said that I should call her Saturday AM &
she would figure it out then." Id. Neither Scalzitti nor Guillen explained any concerns over
reducing overtime, rather, they only mentioned "liability." PUMF 121. Mitri asked at the
meeting what the Final Written Warning meant by "come in early." See Mitri Depo. 125:22-

⁷Lares never learned that Mitri had been written up for the conference call. PUMF 112.

1 126:10. Scalzitti answered that Mitri could “come in approximately 10 to 15 minutes early to
2 prepare for the opening of your shift as well as have your coffee.” Id. Mitri also asked what to
3 do if a customer came in 5 minutes prior to closing. See id. at 126:24-127:13. Scalzitti replied
4 that Mitri was to e-mail him (Scalzitti), and that if Mitri did not hear back, then Mitri was not to
5 stay. See id. So Mitri understood Scalzitti’s response to mean that Mitri could not stay beyond
6 the shift unless Scalzitti responded with approval to an e-mail. See id. Mitri also told Scalzitti
7 that other pharmacists hadn’t worked their scheduled shifts, but Scalzitti said that they were not
8 there to discuss anyone other than Mitri and that he did not know about other pharmacists. See
9 PUMF 144; Mitri Depo. 241:9-24.

10 Walgreens has a written “progressive discipline policy” for employees. See Scalzitti
11 Depo. Ex. 51. The policy states that it is not a contract of employment between Walgreens and
12 its employees. Id. Nevertheless, the policy states that rules and standards are to be
13 communicated to employees. Id. The policy states that “Employees must be disciplined in a fair
14 and consistent manner for similar violations of policy or rules.” Id. The policy states that, in
15 most instances, an employee should not be terminated for a single misdeed or failure to meet a
16 standard, unless the employee engaged in “serious misconduct.”⁸ Id. The policy states that, in
17 cases in which immediate termination is not called for, the following steps “should” be followed:
18 counseling (verbal warning), written warning, final written warning or suspension, and discharge.
19 Id. Finally, the policy indicates that the showing of favoritism or “the uneven application” of the
20 various forms of discipline must be avoided. Id.

21 Scalzitti indicated that he was trained to document whatever disciplinary action is taken.
22 See Scalzitti Depo. 40:20-25. However, Scalzitti did not see any written documentation that
23 indicated that Mitri had been given any warning for working beyond his shift before issuing the
24 Final Written Warning. See id. at 42:7-12. Scalzitti testified that he relied on what Murray and
25 Guillen told him about Mitri prior to the Final Written Warning. See id. at 42:13-22. However,
26 Mitri had never been warned prior to the Final Written Warning about working beyond his

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28 ⁸The policy lists several examples of “serious misconduct” that justifies immediate termination. See
Scalzitti Depo. Ex. 51. None of Mitri’s purported violations justified immediate termination. PUMF 98.

1 schedule. PUMF 101.⁹

2 After the Final Written Warning, Mitri had concerns that Scalzitti may have been
3 indicating that Mitri should work off the clock, and he made further inquiries with Walgreens.
4 See Mitri Depo. 136:20-137:11. Murray responded to Mitri’s concerns in a May 27, 2009, letter.
5 See Mitri Depo. Ex. 16. Murray indicated in part that Walgreens supported the discipline issued,
6 i.e. the issuance of the Final Written Warning. See id. Murray said that Mitri was permitted to
7 remain 10 to 15 minutes after his shift if it was necessary to take care of customers, and so long
8 as Mitri either e-mailed Scalzitti or let his store manager know that Mitri had worked past the
9 shift. See PUMF 131. Similarly, in June 2009, Mitri met with Hasty and Pharmacy Director
10 Robbie Jacobs. DUMF 16. During that meeting, it was discussed again what action Mitri should
11 take if he was working with a customer at the end of his shift. Id. Mitri testified that Jacobs and
12 Hasty told him to “go ahead and take care of the customer, and then e-mail [Scalzitti] or your
13 store manager or the three people that were listed on the [Final Written Warning].” Id. When
14 asked whether he needed to advise either the store manager, or Scalzitti, or Guillen if he had
15 stayed 10 or 15 minutes after his shift to help a customer, Mitri responded, “And I always did,
16 and in most cases, it was the manager on duty at the store as I was clocking out.”¹⁰ Mitri Depo.
17 147:3-9.

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19 ⁹Walgreens disputes PUMF 101 by arguing that it is contrary to three undisputed pieces of evidence. See
20 DRPUMF 101. First, Walgreens states that Mitri had been told by Scalzitti’s predecessor to do a “better job” at
21 “sticking to” his scheduled shifts. See Mitri Depo. 123:18-24. However, there are no further details provided.
22 Mitri testified that he was “asked,” not warned, and it is unknown what is meant by “sticking to.” Moreover, there is
23 no evidence that this incident constituted a formal verbal warning. Second, Walgreens relies on the Release.
24 However, the Release came about as a result of claims made by Mitri for working “off the clock,” and the language
25 of the Release appears to be geared to “working off the clock.” In fact, the portion of the Release quoted by
26 Walgreens omits words. Walgreens quotes the Release as follows: “in the future [Mitri] will work at times when he
27 has been scheduled to work . . .” DRPUMF 101. The full quote without omitted words reads, “in the future [Mitri]
28 will work at times when he has been scheduled to work and *has clocked in.*” PUMF 118 (emphasis added). It is not
at all clear that the Release deals with “working beyond the scheduled shift,” i.e. clocking in early and/or clocking
out late. Finally, Walgreens relies on DUMF 11 and the assertion that Mitri had a conversation with Murray wherein
Murray told Mitri to get permission from his supervisor if he had to work beyond his shift. However, DUMF 11
relies on Mitri’s deposition, and the cited deposition excerpt deals with Mitri asking Murray about the Release.
Specifically, Mitri asked if there were exceptions to the Release and what to do in emergencies, to which Murray
replied that Mitri was to get permission. See Mitri Depo. 90:8-91:25. DUMF 11, as worded, is unsupported by the
cited evidence. Accordingly, PUMF 101 is not sufficiently disputed for purposes of this motion.

¹⁰On five occasions between June 13, 2009, and November 27, 2009, Mitri sent e-mails to Scalzitti that
Mitri was required to work beyond his shift to help a customer, and Scalzitti approved. See PUMF 17.

1 In June 2009, Warinner investigated the invoices that Mitri had supplied in connection
2 with Mitri's complaints of billing/Medicare fraud through the use of IOU labels. See PUMF's
3 51-52. By June 2, 2009, Scalzitti knew that Mitri had produced IOU labels to Warinner. PUMF
4 60. Scalzitti then did a "sweep" for such labels. PUMF 61. Scalzitti also learned in the Summer
5 of 2009 that Mitri had met with Hasty about Medicare fraud. PUMF 62.

6 Mitri's billing fraud claims were determined to be founded. See Warinner Depo. 34:22-
7 24. Warinner's investigation initially found problems with 6 stores, but Warinner later learned
8 that 12 out of the 30 stores that Warinner investigated had problems with IOU labels. See
9 PUMF's 80-81. Walgreens instituted several remedies based on what it discovered as a result of
10 Mitri's complaints. PUMF 82. Walgreens required new training for pharmacists regarding
11 partially filling prescriptions and the impropriety of IOU labels, and ordered that payment be
12 reversed for any prescription that had involved a "partially filled" order. See DUMF 28; PUMF
13 83; Malusa Depo. 14:20-15:3.

14 In the Fall of 2009, Mitri advised Warinner that he had found further examples of IOU
15 labels in the Visalia store. See PUMF 63. In September 2009, Mitri showed Guillen evidence of
16 the improper IOU labels, although Guillen did not understand that the labels constituted billing
17 fraud. See PUMF 65. In October 2009, Scalzitti was told by Warinner that Mitri found more
18 labels. See PUMF 64; DRPUMF 64.

19 On December 15, 2009, Mitri sent an e-mail to Guillen and Scalzitti. See Mitri Depo.
20 Ex. 36. Mitri stated that he wanted to talk about a training course on medicare fraud and waste
21 that Walgreens was requiring its store and pharmacy managers to take. See id.

22 On December 26, 2009, Scalzitti received an e-mail from Mitri which stated that Mitri
23 saw "things done against company policy with regards to Medicare and Medicaid fraud, waste,
24 and abuse at every store that I work at," and that Mitri had "specific examples" of his concern.
25 PUMF 32. Mitri's concern at that time was that he had to complete a Walgreens training
26 program on "Medicare Fraud, Waste and Abuse Training" no later than December 31, 2009.
27 PUMF 33. Specifically, Mitri was concerned that by signing off on that training, he would be
28 acknowledging that he did not know of any violations of policy or insurance fraud, when in fact

1 he did know of such fraud. See id. Although Scalzitti acknowledged that completing the
2 program was “extremely important,” and also knew that Mitri was concerned about affirming his
3 compliance with Walgreens’s fraud policy while the investigation into Medicare fraud was on-
4 going, neither Guillen nor Scalzitti contacted Mitri to discuss his concerns. PUMF 35.

5 On December 28, 2009, Scalzitti sent an e-mail reply to Mitri. See Mitri Depo. Ex. 36.
6 Scalzitti apologized for not getting back with Mitri sooner, and stated that Scalzitti had spoken to
7 Employee Relations and that they were coordinating with Loss Prevention to address Mitri’s
8 complaint. See id. However, despite Scalzitti stating that “we are” coordinating with Loss
9 Prevention, see id., Warinner could not recall ever receiving Mitri’s December e-mails, even
10 though she had investigated Mitri’s prior fraud claims and was investigating Mitri’s Fall 2009
11 complaints. See Warinner Depo. 75:25-76:11. Nevertheless, Scalzitti contacted Murray about
12 Mitri’s medicare fraud complaint prior to sending the December 28 reply e-mail. See PUMF 39.
13 By December 30, 2009, Scalzitti believed that Mitri’s complaint had started an investigation.
14 PUMF 40.

15 On December 30, 2009, Warinner met with Mitri to discuss the additional evidence of
16 IOU labels that Mitri had gathered. See PUMF 66. Warinner expressed surprise that the issue
17 had not been resolved by the actions that Walgreens had taken in June. PUMF 67. She told
18 Mitri that Walgreens might have to investigate, and asked Mitri to send her an e-mail detailing
19 his information. See id. Warinner also told Mitri that it was not Mitri’s “job to report an
20 example of fraudulent billing . . . to the government.” Mitri Dec. ¶ 6.¹¹ Mitri sent the e-mail to
21 Warinner, but he never heard back. See PUMF 68. The concerns that Mitri raised with

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23 ¹¹Walgreens objects that Paragraph 6 is a “sham declaration” in that the paragraph directly contradicts
24 deposition testimony. In order for a declaration to be struck as a “sham,” the inconsistency between the deposition
25 and the subsequent affidavit “must be clear and unambiguous.” Van Asdale v. International Gaming Tech., 577 F.3d
26 989, 998-99 (9th Cir. 2009). At page 63 of his deposition, the following question and answer occurred: “Q: At any
27 time, did any supervisor at Walgreens tell you that if you witness a policy violation or a violation of a law, you
28 should not report it to anyone? A: Because you said ‘anyone,’ the answer . . . to your question is, no, I was never
told that.” Mitri Depo. 63:3-7. The Court is not convinced that the declaration is unambiguously inconsistent. First,
it is unknown whether the question is aimed at Mitri’s supervisors, and it does not appear that Warinner was Mitri’s
supervisor. Second, and more importantly, Mitri qualified his answer by emphasizing that the question used the term
“anyone.” Use of the term “anyone,” at least by a non-lawyer, could well refer to a living person instead of a
governmental agency. Pages 61 and 62 were not submitted, so the Court has no further context for the question. As
the evidence stands, the Court cannot strike Paragraph 6 as a sham. See Van Asdale, 577 F.3d at 998-99.

1 Warinner in December were the same concerns that he had raised with her in April. See PUMF
2 69.

3 In late December 2009/early January 2010, following completion of the holiday season,
4 Scalzitti declares that he reviewed the time records for numerous pharmacy employees, including
5 Mitri, to determine their level of overtime and compliance with shift schedules. See Scalzitti
6 Dec. ¶ 4. Based on his review, Scalzitti concluded that Mitri worked beyond his shift without
7 authorization on numerous occasions. See id. Walgreens’s time records indicate that, from
8 October 27, 2009, to January 1, 2010, there were 20 instances when Mitri either clocked in 10
9 minutes or more early, or stayed 10 minutes or more beyond his scheduled shift.¹² See DUMF
10 22. The most common entry on the time records is 10 minutes. See PUMF 91. Of the 20
11 instances, 10 involved Mitri clocking in 10 to 15 minutes early. See DRPUMF 150. Two
12 instances when Mitri clocked in 42 minutes early and 19 minutes early had been approved by the
13 store manager. See PUMF 153; Mitri Depo. 218:10-219:6. Also, two of the instances had been
14 when the store manager, Olivares, had asked Mitri to come in early (once in November and once
15 in December). See PUMF 151.

16 Mitri has declared that the times he worked before or after his schedule between October
17 31, 2009, through January 1, 2010, were done with the knowledge of the store manager or the
18 assistant store manager who was acting as the store manager in the store manager’s absence. See
19 Mitri Dec. ¶ 3.¹³ Generally, as he was leaving the store, Mitri would tell either the store manager
20 or the assistant store manager that he had stayed late to help a customer, and he was never told
21 that he did not have permission to work late. See id. Mitri declared that he had been told by
22 Walgreens that he would be complying with the policy about working late if he was taking care

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24 ¹²The 20 occasions total 248 minutes, which is about \$450 at Mitri’s regular pay rate. See PUMF 93.

25 ¹³Walgreens objects that Paragraph 3 is a “sham” because Mitri testified at page 225 of his deposition that
26 “it’s possible” that he asked permission from the manager on those dates. In order for a declaration to be struck as a
27 “sham,” the inconsistency between the deposition and the subsequent affidavit “must be clear and unambiguous.”
28 Van Asdale, 577 F.3d at 998-99. At Page 147 of his deposition, Mitri indicated that he “always” advised either the
store manager, Scalzitti, or Guillen that he had worked passed his shift. See Mitri Depo. 147:3-9. Mitri testified that
he would usually tell the manager that he had stayed late to help a customer as he (Mitri) was clocking out. See id.
This is perfectly consistent with Paragraph 3. As the evidence stands, the Court cannot find that Paragraph 3 is a
sham. See Van Asdale, 577 F.3d at 998-99.

1 of a customer and let someone, including the store manager, know that he had worked late. See
2 id.; see also Mitri Depo. 147:3-9; PUMF 131; DUMF 16.

3 Discussions between Guillen, Hasty, Murray, and Scalzitti about Mitri's termination first
4 started a day or two before January 5, 2010. PUMF 21. On January 6, 2010, Scalzitti e-mailed
5 Murray a list of the 20 instances that Mitri had clocked in early or stayed late. See PUMF 31. As
6 part of their collaborative discussions, Guillen, Hasty, Murray, and Scalzitti discussed the subject
7 of Mitri making a complaint of Medicare fraud. See PUMF's 17, 41. Guillen, Hasty, Murray,
8 and Scalzitti each declared that they concluded that Mitri's reports of fraud did not excuse the
9 apparent violation of the Final Written Warning. See Guillen Dec. ¶ 6; Hasty Dec. ¶ 2; Murray
10 Dec. ¶ 2; Scalzitti Dec. ¶ 8. On January 5, 2010, or early on January 6, 2010, the decision to
11 terminate Mitri was made collaboratively as part of discussions between Guillen, Hasty, Murray,
12 and Scalzitti. PUMF 20. Walgreens's basis for terminating Mitri was that Mitri had purportedly
13 worked "beyond his schedule without authorization or approval" in violation of the Final Written
14 Warning. See DUMF 32; PUMF 86; DRPUMF 86. Scalzitti testified that the decision to
15 terminate Mitri was based on the facts identified in the January 6 e-mail, Mitri's history, and the
16 Final Written Warning. See PUMF 88.

17 On January 6, 2010, Mitri was notified by Scalzitti and Guillen that he was being
18 suspended. See Mitri Depo. 234:17-235:18. Mitri was not told why he was being suspended,
19 rather he was simply told that he was under investigation and that he was to clock out, leave the
20 store, and speak to no one who worked for Walgreens until he heard from Scalzitti and/or
21 Guillen. See id. at 235:16-236:1. The suspension occurred one week after Mitri gave Loss
22 Prevention some labels that evidenced medicare fraud. See id. at 234:12-13. Further, Scalzitti
23 did not start investigating Mitri for "working beyond his scheduled hours" until after Scalzitti
24 received Mitri's December 26, 2009 e-mail, which indicated that Mitri had evidence of medicare
25 fraud occurring at Scalzitti's stores. See PUMF 23.

26 At some point, Murray asked Scalzitti to check with the store manager to see if Mitri was
27 authorized to work beyond schedule. See PUMF 29. Olivares prepared a written statement dated
28 January 8, 2010, in which Olivares stated that: (1) he asked Mitri to come in early on two

1 occasions, (2) he never asked Mitri to stay late, (3) sometime in November Mitri asked to stay
2 late, (4) he could remember 1 or 2 other times in which Mitri asked to stay late because the
3 pharmacy was busy, and (5) any other time that Mitri came in early or stayed late was without
4 approval. See Scalzitti Dec. Ex. B. Olivares’s statement was provided to Murray. See PUMF
5 29. Mitri was not interviewed as part of the investigation that led to the termination. PUMF 163.

6 On January 8, 2010, Mitri was notified of his employment termination. PUMF 18. Mitri
7 was told that he had deviated from his scheduled shifts. PUMF 87. At the time of his
8 termination, Mitri was not given an opportunity to answer the claims made against him or to
9 provide information. PUMF 164. Instead, when Mitri sought the opportunity to explain his
10 position, Scalzitti raised his voice and told Mitri that he wanted to get it over with. See id.

11 12 **SUMMARY JUDGMENT FRAMEWORK**

13 Summary judgment is appropriate when it is demonstrated that there exists no genuine
14 issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.
15 Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Fortyune v.
16 American Multi-Cinema, Inc., 364 F.3d 1075, 1080 (9th Cir. 2004). The party seeking summary
17 judgment bears the initial burden of informing the court of the basis for its motion and of
18 identifying the portions of the declarations (if any), pleadings, and discovery that demonstrate an
19 absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986);
20 Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007). A fact is “material” if it
21 might affect the outcome of the suit under the governing law. See Anderson v. Liberty Lobby,
22 Inc., 477 U.S. 242, 248-49 (1986); United States v. Kapp, 564 F.3d 1103, 1114 (9th Cir. 2009).
23 A dispute is “genuine” as to a material fact if there is sufficient evidence for a reasonable jury to
24 return a verdict for the non-moving party. Anderson, 477 U.S. at 248; Freecycle Sunnyvale v.
25 Freecycle Network, 626 F.3d 509, 514 (9th Cir. 2010).

26 Where the moving party will have the burden of proof on an issue at trial, the movant
27 must affirmatively demonstrate that no reasonable trier of fact could find other than for the
28 movant. Soremekun, 509 F.3d at 984. Where the non-moving party will have the burden of

1 proof on an issue at trial, the movant may prevail by presenting evidence that negates an essential
2 element of the non-moving party's claim or by merely pointing out that there is an absence of
3 evidence to support an essential element of the non-moving party's claim. See James River Ins.
4 Co. v. Schenk, P.C., 519 F.3d 917, 925 (9th Cir. 2008); Soremekun, 509 F.3d at 984; Nissan Fire
5 & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1105-06 (9th Cir. 2000). If a moving party fails
6 to carry its burden of production, then "the non-moving party has no obligation to produce
7 anything, even if the non-moving party would have the ultimate burden of persuasion." Nissan
8 Fire, 210 F.3d at 1102-03. If the moving party meets its initial burden, the burden then shifts to
9 the opposing party to establish that a genuine issue as to any material fact actually exists. See
10 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Nissan Fire, 210
11 F.3d at 1103. The opposing party cannot "rest upon the mere allegations or denials of [its]
12 pleading' but must instead produce evidence that 'sets forth specific facts showing that there is a
13 genuine issue for trial.'" Estate of Tucker v. Interscope Records, 515 F.3d 1019, 1030 (9th Cir.
14 2008) (quoting Fed. R. Civ. Pro. 56(e)).

15 The opposing party's evidence is to be believed, and all reasonable inferences that may be
16 drawn from the facts placed before the court must be drawn in favor of the opposing party. See
17 Anderson, 477 U.S. at 255; Matsushita, 475 U.S. at 587; Stegall v. Citadel Broad, Inc., 350 F.3d
18 1061, 1065 (9th Cir. 2003). Nevertheless, inferences are not drawn out of the air, and it is the
19 opposing party's obligation to produce a factual predicate from which the inference may be
20 drawn. See Sanders v. City of Fresno, 551 F.Supp.2d 1149, 1163 (E.D. Cal. 2008); UMG
21 Recordings, Inc. v. Sinnott, 300 F.Supp.2d 993, 997 (E.D. Cal. 2004). "A genuine issue of
22 material fact does not spring into being simply because a litigant claims that one exists or
23 promises to produce admissible evidence at trial." Del Carmen Guadalupe v. Agosto, 299 F.3d
24 15, 23 (1st Cir. 2002); see Galen v. County of Los Angeles, 477 F.3d 652, 658 (9th Cir. 2007);
25 Bryant v. Adventist Health System/West, 289 F.3d 1162, 1167 (9th Cir. 2002). Further, a
26 "motion for summary judgment may not be defeated . . . by evidence that is 'merely colorable' or
27 'is not significantly probative.'" Anderson, 477 U.S. at 249-50; Hardage v. CBS Broad. Inc., 427
28 F.3d 1177, 1183 (9th Cir. 2006). Additionally, the court has the discretion in appropriate

1 circumstances to consider materials that are not properly brought to its attention, but the court is
2 not required to examine the entire file for evidence establishing a genuine issue of material fact
3 where the evidence is not set forth in the opposing papers with adequate references. See
4 Simmons v. Navajo County, 609 F.3d 1011, 1017 (9th Cir. 2010); Gordon v. Virtumundo, Inc.,
5 573 F.3d 1040, 1058 (9th Cir. 2009); Southern Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885,
6 889 (9th Cir. 2003); Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1031 (9th Cir.
7 2001). If the nonmoving party fails to produce evidence sufficient to create a genuine issue of
8 material fact, the moving party is entitled to summary judgment. Nissan Fire, 210 F.3d at 1103.

9 10 DEFENDANT'S MOTION

11 Defendant's Argument

12 Walgreens argues that Mitri cannot make a *prima facie* case of retaliatory discharge. The
13 undisputed facts do not establish any causal connection between Mitri's pharmacy billing
14 complaints and his termination. Instead, the facts show that he was warned verbally and in
15 writing that he could not work beyond his scheduled shift without prior approval, and these
16 warnings were prior to his billing complaints. Mitri does not dispute that he worked beyond his
17 shift on 20 occasions without obtaining approval from the appropriate supervisors.

18 Even if Mitri could make a *prima facie* case, Walgreens states that they had a legitimate
19 reason for termination. Walgreens made management decisions to reduce business expenses and
20 warned Mitri about working beyond his schedule. In May 2009, Mitri received a final written
21 warning because, despite prior warnings, Mitri was continuing to work beyond his shift. The
22 Final Written Warning told Mitri that he had to obtain approval to work beyond schedule from
23 either the District Manager, the Pharmacy Supervisor, or the Store Manager. The Final Written
24 Warning also stated that any further unauthorized violations would result in immediate
25 termination. Scalzitti determined that between October 27, 2009, and January 1, 2010, Mitri
26 violated the Final Written Warning about 20 times. Therefore, Mitri was terminated because of
27 his repeated violations of the Final Written Warning.

28 Further, Mitri cannot establish pretext. Mitri was counseled about the importance of

1 adhering to his shift well before he complained about billing practices. Mitri cannot establish
2 that he was treated differently from any similarly situated employee. Walgreens has disciplined
3 at least six other Fresno District employees for working beyond their shifts by issuing verbal
4 warnings and final written warnings. While none of these employees were fired, unlike Mitri
5 they did not violate their final written warnings. At the time of Mitri's termination, Walgreens
6 had terminated at least seven Fresno District employees for violating final written warnings.
7 Also, while two Pharmacy Managers were disciplined in 2010 for improper billing practices,
8 Walgreens took no disciplinary action against the employees who complained about the improper
9 billing. Also, while temporal proximity may support a *prima facie* case of causation, without
10 more it cannot establish pretext. Since Mitri has no other evidence, temporal proximity is
11 insufficient. Finally, any argument that Mitri might make that Walgreens erred and got the facts
12 wrong is insufficient. An employer may fire an employee based on erroneous facts, it just may
13 not fire an employee based on retaliatory animus, and there is no evidence of retaliatory animus.
14 Thus, there is no evidence that disputes that Mitri was terminated for violating the Final Written
15 Warning by working beyond his schedule.

16 *Plaintiff's Opposition*

17 Mitri argues that the evidence establishes a *prima facie* case. With respect to causation,
18 timing alone can be sufficient. Here, there was a short period of time between Mitri telling
19 Scalzitti that Mitri had specific examples of billing fraud, and Mitri's termination. This timing
20 alone sufficiently establishes causation under the *prima facie* case.

21 In addition to the timing of the termination, Mitri argues that other evidence indicates
22 causation. First, there is no dispute that the decision makers had knowledge of Mitri's reports,
23 and they considered Mitri's whistleblowing as part of their decision to terminate. Second, Mitri
24 was treated differently from other pharmacists with respect to warnings, e-mail approval, and
25 termination associated with working beyond schedule. Third, Walgreens failed to follow their
26 own disciplinary procedures with Mitri because he was not given a warning for working beyond
27 his schedule prior to the Final Written Warning. Fourth, Walgreens has inconsistent positions
28 regarding how much time Mitri could work beyond his schedule. Relatedly, Walgreens included

1 instances in the January 6 e-mail that were within the parameters set by Scalzitti and other
2 Walgreens officers for working beyond schedule. Fifth, Walgreens did not investigate whether
3 Mitri was authorized by his store manager to work off schedule until after the termination
4 decision. Sixth, Walgreens was not even-handed in its rules regarding working beyond schedule.
5 Seventh, that Olivares did not know that Mitri was violating a “working off schedule” policy or
6 that he knew that Mitri had been fired for “working off schedule” implies that there really was no
7 policy about “working off schedule” until it was applied to Mitri. Finally, Walgreens’s argument
8 begs the question of why it waited until the end of December/beginning of January to check
9 Mitri’s time records. In other words, why did Walgreens wait seven months after the Final
10 Written Warning to check on Mitri?

11 Mitri also argues that Walgreens has failed to meet its burden of providing a legitimate,
12 non-discriminatory reason for the termination. Walgreens has provided no evidence concerning
13 the reasons why it decided to investigate and terminate Mitri only after it had knowledge that
14 Mitri had specific instances of billing fraud.

15 Finally, Mitri argues that there is a triable issue of fact whether Walgreens’s explanation
16 is pretext. Mitri argues *inter alia* that the timing of the termination and Walgreens’s knowledge
17 of Mitri’s complaints, along with lower evaluation scores and the evidence discussed under the
18 *prima facie* showing of causation, establish pretext.

19 Legal Standard

20 Under California law, an employer who terminates an employee for a reason that
21 contravenes a fundamental public policy is subject to tort liability. Tameny v. Atlantic Richfield
22 Co., 27 Cal.3d 167, 176 (1980). “The central assertion of a claim of wrongful termination in
23 violation of public policy is that the employer’s motives for terminating the employee are so
24 contrary to fundamental norms that the termination inflicted an injury sounding in tort.” Roby v.
25 McKesson Corp., 47 Cal.4th 686, 702 (2009). “Tort claims for wrongful discharge typically
26 arise when an employer retaliates against employee for: (1) refusing to violate a statute, (2)
27 performing a statutory obligation, (3) exercising a statutory right or privilege, or (4) reporting an
28 alleged violation of a statute of public importance.” Turner v. Anheuser-Busch, Inc., 7 Cal.4th

1 1238, 1256 (1994).

2 When a plaintiff alleges retaliatory employment termination as a claim for wrongful
3 termination in violation of public policy, California follows the burden-shifting analysis of
4 *McDonnell Douglas Corp. v Green*, 411 U.S. 792 (1973). See *Nielsen v. Trofholz Techs., Inc.*,
5 750 F.Supp.2d 1157, 1164 (E.D. Cal. 2010); *Loggins v. Kaiser Permanente Inter'l.*, 151
6 Cal.App.4th 1102, 1108-09 (2007). In the first phase, the plaintiff bears the burden of
7 establishing a *prima facie* case of retaliation. See *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal.4th
8 1028, 1042 (2005); *Loggins*, 151 Cal.App.4th at 1109. A plaintiff makes a *prima facie* case of
9 retaliation by showing that: (1) he engaged in a protected activity, (2) the defendant subjected
10 him to an adverse employment action, and (3) there was a causal link between the two.
11 *Yanowitz*, 36 Cal.4th at 1042. The timing between the plaintiff engaging in protected conducted
12 and the defendant terminating employment may indicate a sufficient causal connection. See
13 *Loggins*, 151 Cal.App.4th at 1112; *Morgan v. Regents of University of Cal.*, 88 Cal.App.4th 52,
14 69 (2001). However, the plaintiff must present evidence that the employer was aware that the
15 plaintiff engaged in the protected activity. *George v. California Unemployment Ins. Appeals Bd.*,
16 179 Cal.App.4th 1475, 1491 (2009); *Morgan*, 88 Cal.App.4th at 70.

17 If the plaintiff meets his burden of establishing a *prima facie* case, the burden shifts to the
18 employer to offer a legitimate, nonretaliatory reason for the termination. See *Yanowitz*, 36
19 Cal.4th at 1042. “A reason is ‘legitimate’ if it is facially unrelated to prohibited bias, and which
20 if true, would thus preclude a finding of discrimination.” *Reid v. Google, Inc.*, 50 Cal. 4th 512,
21 520 n.2 (2010); *Guz v. Bechtel National, Inc.*, 24 Cal.4th 317, 358 (2000). If the employer
22 produces a legitimate reason for the adverse employment action, the presumption of retaliation
23 drops out of the picture. *Yanowitz*, 36 Cal.4th at 1042.

24 “If the employer meets this burden, the [plaintiff] then must show that the employer’s
25 reasons are pretexts for discrimination, or produce other evidence of intentional discrimination.”
26 *Reid*, 50 Cal.4th at 520 n.2; *Guz*; 24 Cal.4th at 356; see also *Yanowitz*, 36 Cal.4th at 1042. As
27 has been recently explained:

28 A plaintiff may establish pretext either directly by persuading the court that a

1 discriminatory reason more likely motivated the employer or indirectly by
2 showing that the employer's proffered explanation is unworthy of credence.
3 Godwin, 150 F.3d at 1220. If a plaintiff uses circumstantial evidence to satisfy
4 this burden, such evidence "must be specific" and "substantial." Id. at 1221. "An
5 employee in this situation can not simply show the employer's decision was
6 wrong, mistaken, or unwise." Morgan v. Regents of the Univ. of Cal., 105 Cal.
7 Rptr. 2d 652, 670 (Cal. Ct. App. 2000). "Rather, the employee must demonstrate
8 such weaknesses, implausibilities, inconsistencies, incoherencies, or
9 contradictions in the employer's proffered legitimate reasons for its action that a
10 reasonable factfinder could rationally find them unworthy of credence . . . and
11 hence infer that the employer did not act for the . . . non-discriminatory reasons."
12 Id.

13 Department of Fair Empl. & Hous. v. Lucent Techs., Inc., - - - F.3d - - - , 2011 U.S. App. LEXIS
14 8484, *39-*40 (9th Cir. 2011). "In appropriate cases, evidence of dishonest reasons, considered
15 together with the elements of the *prima facie* case, may permit a finding of prohibited bias."
16 Guz, 24 Cal.4th at 356.

17 Discussion

18 Because the parties agree that the *McDonnell-Douglas* framework applies to Mitri's
19 single cause of action, the Court will address each phase of the *McDonnell-Douglas* framework.

20 1. Prima Facie Case

21 Walgreens only challenges the third prong of the *prima facie* showing. However, Mitri
22 has met his burden of establishing a causal connection.

23 There is no dispute that on December 26, 2009, Walgreens received Mitri's e-mail and
24 was therefore aware that Mitri was again making complaints about IOU labels and stating that he
25 had specific evidence. See PUMF's 32-33. Mitri met with Warinner about the additional IOU
26 labels on December 30, 2009. See PUMF 33. Mitri also provided Loss Prevention with
27 additional evidence concerning IOU labels. See Mitri Depo. 234:12-13. Moreover, Hasty,
28 Guillen, Murray, and Scalzitti discussed Mitri's reports/complaints as part of their meetings
concerning Mitri's termination. See PUMF 41. This shows knowledge of protected activity.
See George, 179 Cal.App.4th at 1491; Morgan, 88 Cal.App.4th at 69-70. Further, there is a very
short amount of time between Mitri's December 26 e-mail and his termination (13 days), and an
even shorter period of time between the date Mitri produced the labels and his termination (9
days). Mitri was suspended on January 6, which is only 7 days from the date that Mitri produced

1 the labels to Loss Prevention. See Mitri Depo. 234:12-14. In some cases, timing and knowledge
2 can establish a sufficient causal link for purposes of the *prima facie* case. See Loggins, 151
3 Cal.App.4th at 1012; Morgan, 88 Cal.App.4th at 69-70; see also Villiarimo v. Aloha Island Air,
4 Inc. 281 F.3d 1054, 1065 (9th Cir. 2002). The Court believes this to be such a case. The timing
5 of Mitri’s termination relative to Mitri’s December complaints and reporting, combined with
6 Walgreens’s knowledge, is sufficient to show a causal connection for the *prima facie* phase. See
7 id. Summary judgment on this theory is inappropriate.

8 2. Nondiscriminatory Reason

9 Under the second phase of the *McDonnell Douglas* framework, Walgreens has met its
10 burden. Walgreens states that it terminated Mitri because he violated the Final Written Warning
11 on numerous occasions by “working beyond schedule,” i.e. clocking in early or clocking out late.
12 See DUMF32; DRPUMF 86; Guillen Dec. ¶ 6; Hasty Dec. ¶ 2; Murray Dec. ¶ 2; Scalzitti Dec. ¶
13 8. This is a facially legitimate, non-discriminatory reason. See Guz, 24 Cal.4th at 358.

14 3. Pretext

15 Viewing the evidence in the light most favorable to Mitri and making all reasonable
16 inferences in his favor as the non-moving party, see Stegall, 350 F.3d at 1065, the totality of the
17 evidence produced is sufficient to create a genuine, material dispute regarding pretext.

18 First, as discussed above with respect to the *prima facie* phase, Walgreens had knowledge
19 of Mitri’s reports, and there is a very short period of time between Mitri’s December 26 e-mail,
20 Mitri’s December 30 meeting with Loss Prevention, and Mitri’s termination on January 8, 2010.
21 See Arteaga v. Brink’s, Inc., 163 Cal.App.4th 327, 353-54 (2008) (noting that the temporal
22 proximity evidence established in a *prima facie* may still have relevance in the pretext phase).

23 Second, the timing of Scalzitti’s investigation of Mitri is significant. There were at least
24 two months, the end of October to the end of December, where Scalzitti apparently did not look
25 into Mitri’s time keeping.¹⁴ If Walgreens was indeed concerned with the overtime that Mitri was
26 keeping, it would seem that Mitri’s time schedules would have been reviewed prior to the

27
28 ¹⁴Indeed, Walgreens has presented no evidence regarding how often, if ever, it checked Mitri’s time records
after issuing the Final Written Warning.

1 December 26 e-mail. Instead, Scalzitti began investigating Mitri only after the December 26 e-
2 mail.¹⁵ See PUMF 23. Similarly, it is unclear whether there was coordination with Loss
3 Prevention, even though Scalzitti's December 28 e-mail to Mitri indicated that there would be
4 such coordination.¹⁶ See Mitri Depo. Ex. 36; Warinner Depo. 75:25-76:11. Instead of following
5 up on billing/Medicare fraud or speaking to Mitri about the fraud or doing another "sweep" as he
6 had done in June, it appears that Scalzitti contacted Murray, reviewed Mitri's time records, and
7 then e-mailed Murray concerning Mitri potentially violating the terms of the Final Written
8 Warning. In other words, the evidence suggests that instead of investigating possible fraud,
9 Scalzitti investigated possible avenues of terminating Mitri.

10 Third, when Mitri met with Warinner on December 30, he was told that it was not his job
11 to report fraud to the government. See Mitri Dec. ¶ 6. This suggests hostility to whistleblowing.

12 Fourth, the failure of a company to follow its own policies may show pretext or an
13 improper motive. See Porter v. California Dept. of Corrections, 419 F.3d 885, 896 (9th Cir.
14 2005); see also Trustees of Cal. State Univ. v. Public Emp't Relations Bd., 6 Cal.App.4th 1107,
15 1124 (1992). There is no dispute that Mitri's conduct did not justify immediate termination. See
16 PUMF 98. However, contrary to Walgreens's progressive disciplinary system, it does not appear
17 that Mitri was given a formal verbal warning or a formal written warning about clocking in
18 early/staying late prior to the Final Written Warning.¹⁷ See PUMF 101; Scalzitti Dep. Ex. 51. It

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20 ¹⁵It is true that Scalzitti declared that he reviewed Mitri's time records as part of his regular course of
21 business. See Scalzitti Dec. ¶ 4. However, considering the timing of the investigation and the other evidence
22 presented, a jury will have to assess the evidence and make its own determination regarding the investigation of
23 Mitri's time keeping.

24 ¹⁶However, there is no dispute that Mitri did in fact meet with Warinner on December 30, 2009.

25 ¹⁷Walgreens states that a prior manager asked Mitri to do a better job about sticking to his schedule. See
26 DRPUMF 101; PUMF 103. As discussed above, however, there is no evidence that this constituted a formal verbal
27 warning, and it certainly does not constitute a formal written warning. Walgreens also contends that, in the Release,
28 Mitri agreed that, "in the future he will work at times when he has been scheduled to work and *has clocked in.*"
PUMF 118 (emphasis added). However, the Release dealt with working off the clock. The cited portion of the
Release does not deal with clocking in early or staying clocked in late. There is no evidence that the Release was
intended to address clocking in prior to schedule or staying late. Finally, Walgreens states that Guillen spoke to
Mitri on several occasions about the importance of adhering to the scheduled shifts. See DUMF 8. However, there
is no evidence regarding what Guillen said, the context of the statements, or whether Guillen's statements were
intended to be formal verbal warnings. Further, Scalzitti stated that discipline was to be documented, see Scalzitti
Depo. 40:20-25, yet there is no documentation provided that Guillen disciplined Mitri through a verbal warning.

1 is true that the progressive disciplinary system is not a contract of employment with employees.
2 Nevertheless, the system is part of a formal written Walgreens policy, and that policy states that
3 the progressive system should be used when immediate termination is not justified. See Scalzitti
4 Depo. Ex. 51. Instead of following the intermediate steps with Mitri, Walgreens bypassed steps
5 and went directly to a final written warning. Further, the Final Written Warning was issued less
6 than one month after Mitri's first complaint about IOU labels in April 2009. The timing of the
7 Final Written Warning in relation to Mitri's complaints, the apparent failure of Walgreens to
8 follow its progressive disciplinary policy, and the use of the Final Written Warning to justify
9 Mitri's termination (again after Mitri made complaints concerning IOU labels) is significant.

10 Fifth, it appears that Walgreens largely relied on the January 6 e-mail from Scalzitti to
11 terminate Mitri's employment. However, accepting Mitri's allegations as true, none of the
12 instances included in the January 6 e-mail reflect violations of the Final Written Warning. Fully
13 half of the documented occurrences come within the 10 to 15 minute window that Scalzitti
14 expressly gave to Mitri in which to clock in early. See DRPUMF 150; Mitri Depo. 125:22-
15 126:10. Scalzitti also included instances in which Olivares requested that Mitri come in early or
16 in which Olivares had approved Mitri working beyond schedule. See PUMF's 151, 153; Scalzitti
17 Dec. Ex. A; Mitri Depo. 218:10-219:6. Moreover, in those instances where Mitri clocked out
18 late, Mitri testified that he told either the store manager or the assistant store manager who was
19 acting in the store manager's stead that he had stayed late to help a customer.¹⁸ See Mitri Depo.
20 147:3-9; Mitri Dec. ¶ 3. This would appear to be in compliance with what Walgreens told Mitri
21 to do. See DUMF 16; PUMF 131; Mitri Depo. 125:22-126:10. It is true that simply showing
22 that the factual basis for termination is erroneous does not necessarily show pretext. See Diaz v.
23 Eagle Produce, Ltd., 521 F.3d 1201, 1214 n.7 (9th Cir. 2008); Guz, 24 Cal.4th at 358; Arteaga,
24 163 Cal.App.4th 327 at 344. However, considering what Scalzitti included in the e-mail and
25 what he and other Walgreens officers had told Mitri, the nature and accuracy of the January 6 e-
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27 ¹⁸Walgreens argues that Mitri was never told that he could tell an assistant manager. However, Walgreens
28 has presented no evidence that telling the assistant manager when the store manager was unavailable was improper.
In fact, telling the assistant manager when the store manager is absent seems to be a logical and natural thing to do.

1 mail is significant. See Guz, 24 Cal.4th at 356.

2 Sixth, it has been recognized that an “employer’s failure to interview witnesses for
3 potentially exculpatory information evidences pretext.” Nazir v. United Airlines, Inc., 178
4 Cal.App.4th 243, 280 (2009). Here, Mitri was never questioned or asked to give an explanation
5 for the occurrences identified by Scalzitti in the January 6 e-mail. When Mitri was suspended on
6 January 6, he was told that he was under investigation (though not for what) and that he was to
7 talk to no one from Walgreens until after Scalzitti and/or Guillen spoke with him. See Mitri
8 Depo. 235:16-236:1. However, there is no indication that anyone from Walgreens undertook any
9 effort to question Mitri about the instances of clocking in early or staying late. Instead, the
10 decision to terminate was reached on January 5 or 6, a statement was obtained from Olivares on
11 January 8, Mitri was terminated on January 8, and Mitri was prevented from answering the
12 claims against him when he was terminated. See PUMF’s 8, 18, 164; Scalzitti Dec. Ex. B. If
13 Mitri had been interviewed to obtain his side of the story, such an interview would have led to
14 his explanations regarding what he was told by Scalzitti about clocking in 10 to 15 minutes early,
15 would have led to specific instances in which approval by Olivares was obtained, would have led
16 to a determination regarding what exactly Mitri had been told from the various Walgreens
17 officers about obtaining approval and/or staying late, and would have likely led to the interview
18 of the assistant store manager(s). The evidence presented suggests that interviewing Mitri more
19 likely than not would have led to the discovery of exculpatory information.¹⁹ Under the totality
20 of the circumstances of this case, the failure to interview Mitri is significant.²⁰

21 Walgreens argues in part that its conduct towards others who have reported fraud, as well
22 as its discipline of other employees, indicates that it did not retaliate against Mitri. However, the
23 evidence is insufficient to undermine Mitri’s evidence. Walgreens’s evidence indicates that

24 _____
25 ¹⁹The Court is by no means holding that an employer is always required to interview an employee prior to
26 disciplining or terminating that employee. Nor is the Court holding that an employer must follow “best practices” in
27 its human resources decisions. Nevertheless, given the unique facts and circumstances of this particular case, the
28 Court believes that the failure to interview Mitri/get Mitri’s side of the story is significant.

²⁰As outlined above, Mitri makes other arguments regarding pretext. However, since the evidence that the
Court has expressly discussed is sufficient to establish pretext, it is unnecessary to address Mitri’s additional
arguments at this time.

1 Walgreens disciplined seven employees in 2010 (including Mitri) for working beyond shift. See
2 DUMF 33. However, there are no further facts or details provided regarding these instances of
3 discipline. As such, there is no way for the Court to determine whether these instances are
4 similar to Mitri's particular situation, including whether the disciplined employees had been told
5 similar things as Mitri about clocking in early and staying late. Walgreens's evidence also
6 indicates that Walgreens investigated two reports of improper billing practices, determined the
7 complaints were founded, and did not discipline the reporting employees. See DUMF 35.
8 However, there is no evidence regarding the nature of the billing complaints. Finally,
9 Walgreens's evidence indicates that in 2010, Walgreens terminated seven other employees for
10 violating the terms of a Final Written Warning. However, there is no evidence concerning the
11 nature of these warnings or these terminations. Again, there is no way for the Court to determine
12 whether these instances are similar to Mitri's particular situation.

13 In sum, viewing the evidence in the light most favorable to Mitri as the non-moving
14 party, the totality of the evidence is sufficient to create a genuine issue of disputed material fact
15 as to whether Walgreens's reason for the termination was pretext.

17 CONCLUSION

18 Walgreens has two bases for moving for summary judgment on Mitri's sole cause of
19 action for wrongful discharge in violation of public policy.

20 With respect to Walgreens's contention that Mitri cannot establish a *prima facie* case, the
21 evidence is to the contrary. The evidence establishes that Walgreens had knowledge of Mitri's
22 complaints about Medicare/billing fraud through use of IOU labels. Further, Mitri was
23 terminated less than two weeks after he again raised the problem of IOU labels. This evidence
24 provides a sufficient causal connection. Therefore, summary judgment on this basis is
25 inappropriate.

26 With respect to Walgreens's contention that Mitri cannot show pretext, the Court cannot
27 agree. As discussed above, the timing of Mitri's complaints relative to his termination, being
28 told that it is not his job to report fraud to the government, the apparent failure of Walgreens to

1 follow its progressive disciplinary system, the timing of the Final Written Warning, the failure of
2 Walgreens to interview Mitri, the timing of Scalzitti's investigation of Mitri, and the inaccuracy
3 of January 6 e-mail in light of the various things told to Mitri about clocking in early/staying late
4 together constitute substantial evidence of pretext. That is, the evidence tends to undermine
5 whether Walgreens actually terminated Mitri for violating the terms of the Final Written
6 Warning. A reasonable trier of fact could consider this evidence and find that Walgreens's non-
7 retaliatory reason is not true, and that the termination was the result of retaliatory animus.
8 Therefore, summary judgment on this basis is inappropriate.

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10 Accordingly, IT IS HEREBY ORDERED that Walgreens's motion for summary
11 judgment is DENIED.

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13 IT IS SO ORDERED.

14 Dated: June 3, 2011

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17 CHIEF UNITED STATES DISTRICT JUDGE
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