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

JOHN NICHOLS, aka JACK NICHOLS,)
)
 Plaintiff,)
)
 v.)
)
 COUNTY OF SACRAMENTO, CHERYL)
 CRESON, STEVEN PEDRETTI, KEITH)
 FLOYD, GEORGIA COCHRAN, CARL)
 MOSHER, THOR LUDE, HAROLD BIXLER,)
 and JOHN HALLIMORE,)
)
 Defendants.)
)

2:07-cv-02759-GEB-EFB
ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

On December 23, 2009, Defendants filed a motion for summary judgment on all of Plaintiff's claims, or in the alternative, seek summary adjudication of Plaintiff's claims. Instead of filing an opposition, Plaintiff filed an *ex parte* motion to continue the hearing on Defendants' motion, essentially requesting an extension to file his opposition, which was granted. (See Docket No. 49-56.) Plaintiff subsequently filed his opposition to Defendants' motion on February 22 and 23, 2010. This opposition does not comply with the local rule requiring Plaintiff to include a response to Defendants' statement of undisputed facts, and contains unauthenticated exhibits and argument that does not cite facts. Plaintiff subsequently filed a request on February 26, 2010, for a 4-day extension of time to file an untimely separate statement of disputed facts, another affidavit, and Plaintiff's amended declaration. (See Docket Nos. 70-73.) Defendants countered arguing the request should be denied, but that "[i]f the

1 court . . . allow[ed] another late filing by Plaintiff, . . . that the
2 court issue a further briefing schedule to permit Defendants to file a
3 Reply brief to the new material.” (Id. 1:24-26.) Plaintiffs’ second
4 untimely filing has been considered. Further briefing by Defendants
5 is unnecessary since Plaintiff has failed to controvert Defendants’
6 evidence with specific facts.

7 **I. BACKGROUND**

8 **a. Plaintiff’s Allegations**

9 Plaintiff alleges four claims in his Complaint, all of which
10 arise from termination of his employment with the County of Sacramento
11 Building Inspection Division. Plaintiff alleges in his first claim
12 that Defendants County of Sacramento (“County”), Cheryl Creson
13 (“Creson”), Steven Pedretti (“Pedretti”), and Keith Floyd (“Floyd”)
14 violated his First Amendment rights by “terminating Plaintiff’s
15 employment with the County” for “report[ing] the [D]efendants’ illegal
16 activities . . . to the Sacramento County Grand Jury, as well as to
17 other County representatives and law enforcement officials.” (Compl. ¶
18 26.) Plaintiff alleges in his second claim that Defendants County,
19 Creson, Pedretti, and Floyd conspired to violate Plaintiff’s First
20 Amendment rights. (Id. ¶ 32.) Plaintiff alleges in his third claim
21 that all Defendants knew of the conspiracy to deprive Plaintiff of his
22 First Amendment rights and neglected to prevent deprivation of
23 Plaintiff’s rights. (Id. ¶ 38.) Lastly, Plaintiff alleges Defendants
24 violated California Labor Code Section 1102.5 by “retaliat[ing]
25 [against] [P]laintiff’s reporting of illegal and corrupt activities .
26 . . .” (Id. ¶ 44.)

27 **b. Summary Judgment Factual Record**

28 “Near the end of 2003, [Pedretti], Director of the

1 Department of County Engineering and Administration, contacted
2 management consultant, Pamela Hurt-Hobday ("Hobday"), to work with the
3 Building Inspection Division to improve communication amongst the
4 employees, and to create more collegial working environment.

5 (Statement of Undisputed Fact ("SUF") ¶ 1.) "As part of her work,
6 Hobday met with and interviewed employees of all levels within
7 Building Inspection." (Id. ¶ 2.) "Sometime at the end of 2003 or
8 beginning of 2004, Hobday reported to Pedretti concerns that there
9 were various improprieties and potentially illegal activity occurring
10 within the Division regarding relations between building inspectors
11 and contractors and developers." (Id. ¶ 3.) "In an effort to uncover
12 the truth, Hobday was encouraged to continue meeting with staff and
13 conducting interviews." (Id. ¶ 4.) "Around the same period, Plaintiff
14 contacted [Floyd], Deputy Counsel for Sacramento County, with concerns
15 he had related to the personnel reviews occurring in the Municipal
16 Services Agency at that time." (Id. ¶ 5.) "In December of 2003,
17 [Plaintiff] went to Floyd with concerns regarding the workplace
18 practices of then Principal Building Inspectors, Barry Hutchens
19 ["Hutchens"] and Doug Ladd ["Ladd"], specifically related to alleged
20 special considerations being given to contractors that might be
21 contributors to a charitable organization run by them known as 'The
22 Red Tag Breakfast Club.'" (Id. ¶ 6.) Plaintiff "also informed Floyd
23 that during this time with the Building Inspection Division he had
24 received gifts from contractors." (Id. ¶ 7.) "Specifically, Nichols
25 admitted to three incidents of accepting gifts from contractors: one
26 involved receipt of a new washing machine and dryer; another involved
27 receipt of the cost of a vacation to Hawaii for he and his family; and
28 the third involved the installation of a new concrete driveway at his

1 residence." (Id. ¶ 8.) Plaintiff counters what he received were
2 loans, not gifts. (Pl's Response to SUF ¶ 8; Forncrook Aff. ¶¶ 2, 3,
3 4, 5; Saca Aff. ¶¶ 2, 3, 4, Silva Aff. ¶ 3).

4 "On January 2, 2004, . . . Pedretti and Floyd met with
5 Plaintiff at County Counsel's office to discuss Plaintiff's concerns
6 relating to Hutchens and Ladd, and his receipt of gifts from
7 contractors." (Id. ¶ 9.) "At this time, Plaintiff revealed he had not
8 included the received gifts in the required Statement of Economic
9 Interest in violation of County policy." (Id. ¶ 10.) "Upon Plaintiff
10 informing . . . Pedretti of the violations of his job duties and
11 improprieties with various contractors, Pedretti actually encouraged
12 Plaintiff to come forward and tell what he knew." (Id. ¶ 56.)
13 "Although Plaintiff inquired as to the status of his employment after
14 making the report, Pedretti could not guarantee what action would be
15 taken in response." (Id. ¶ 11.) "The manager of Human Resources,
16 defendant Georgia Cochran ["Cochran"] was contacted to pursue a
17 further investigation of the issues reported by Plaintiff." "Upon
18 further review, it was determined that none of the gifts Plaintiff
19 receive[d] from contractors appeared on any Statement of Economic
20 Interest Form." (Id. ¶ 13.)

21 Further, "[i]n March 2004, Plaintiff directed a subordinate
22 employee to issue a building permit in violation of Building
23 Inspection Division procedures, without getting proper approvals and
24 without collecting the required fees." (Id. ¶ 14.) "Also in March
25 2004, Plaintiff directed a subordinate to issue a permit for a project
26 in the city of Rancho Cordova without proper approval, in violation of
27 a directive from management." (Id. ¶ 15.)

28 "Based on the foregoing actions of Plaintiff, [Creson],

1 Administrator of the Sacramento County Municipal Services Agency
2 approved a six (6) month demotion of plaintiff from Supervising
3 Building Inspector to Building Inspector II." (Id. ¶ 16.) "A Notice
4 of Proposed Disciplinary Action for demotion was prepared, issued and
5 served on Plaintiff on July 14, 2004." (Id. ¶ 17.) "An Order of
6 Disciplinary Action for a six (6) month demotion was effective
7 September 1, 2004." (Id. ¶ 18.) "Plaintiff does not dispute that some
8 type of discipline was justified following his admittance of violating
9 county policy regarding reporting gifts on his conflict of interest
10 statement, but merely felt the discipline was too harsh." (Id. ¶ 49.)
11 "Plaintiff appealed the discipline to the Civil Service Commission,
12 which upheld the demotion." (Id. ¶ 19.) As a result, [Plaintiff] was
13 demoted to the position of Building Inspector II, and assigned to work
14 at the Building Inspection Division office at 827 9th Street." (Id. ¶
15 20.) "Due to leave taken by Plaintiff the terms of the demotion had
16 to be amended twice resulting in Plaintiff's demotion lasting until
17 September 2005." (Id. ¶ 21.)

18 It was later learned that "[i]n August 2004, Plaintiff
19 [also] attempted to renew an existing permit for work at his personal
20 residence without undergoing the proper procedure or paying the proper
21 fees." (Id. ¶ 22.) "The request for renewal was submitted to the
22 Chief Building Inspector, . . . Bixler . . . with a written note
23 indicating that a manager in the Building Inspection Division had
24 approved and signed off on the renewal." (Id. ¶ 23.) "Upon further
25 investigation, Bixler discovered that the wrong type of permit was
26 issued for the work done, and that Plaintiff's subordinate, John
27 Richardson, issued this improper permit in July 2003." (Id. ¶ 24.)
28 "The issue was reported to the Human Resources department for further

1 investigation." (Id. ¶ 25.) "The investigation confirmed the
2 improper action and use of his position by Plaintiff." (Id. ¶ 26.)

3 "Plaintiff returned to his position as Supervising Building
4 Inspector in September 2005" and was "provided a new duty statement
5 which eliminated the managerial responsibilities that were previously
6 part of the position prior to Plaintiff's demotion," but Plaintiff's
7 position "maintained the same title, pay and benefits." (Id. ¶¶ 27-
8 29.)

9 "In September 2005, Defendant Mosher started as Director of
10 County Engineering." (Id. ¶ 30.) "After learning of Plaintiff's
11 various transgressions and his employment history, Mosher determined
12 that Plaintiff should be terminated from his position." (Id. ¶ 32.)
13 Defendant Mosher made the decision to terminate Plaintiff." (Id. ¶
14 46.) "Defendants Pedretti and Lude, who had been employed . . . with
15 the Building Inspection Division longer than Mosher, agreed that
16 termination was the proper discipline." (Id. ¶ 33.) "Defendant Creson
17 approved the decision to demote Plaintiff." (Id. ¶ 45.) Defendants
18 Creson, Pedretti, Floyd, Bixler, and Hallimore did not "ha[ve] the
19 authority, nor made the decision, to terminate Plaintiff." (Id. ¶ 47.)

20 "Human Resources prepared a Notice of Proposed Disciplinary
21 Action for the dismissal of Plaintiff based upon the improper issuance
22 and renewal of the permit for work on his residence in addition to his
23 prior employment history." (Id. ¶ 34.) "Plaintiff was served with the
24 Notice on November 15, 2005, and was immediately placed on
25 administrative leave." (Id. ¶ 35.) "The Order for Disciplinary Action
26 for dismissal was issued on January 9, 2006." (Id. ¶ 37.) "Plaintiff
27 appealed the decision but then dismissed the appeal." (Id. ¶ 38.)

28 "Plaintiff claims that he was terminated as a consequence

1 for disclosing corruption to the Grand Jury." (Id. ¶ 39.) "However,
2 [Defendants Pedretti, Mosher, Cochran, and Floyd] were not aware that
3 Plaintiff filed a complaint with the Grand Jury or that he testified
4 before the Grand Jury at the time that any employment decision or
5 disciplinary action was taken." (Id. ¶ 40.) Further, Bixler and
6 Hallimore declare they "have never been made aware of the specific
7 content of any testimony by [Plaintiff] before the Grand Jury." (Id.;
8 Ex. 14, 9, Ex. 15, 7.) Plaintiff counters that "Bixler was aware of
9 the Grand Jury Testimony." (Pl's Response to SUF ¶ 40.) Plaintiff
10 supports this assertion with a declaration from Bill McDowell
11 ("McDowell"), a "supervising building inspector by Sacramento County
12 from 1999 until 2006," who "worked as one of the commercial field
13 supervisors with [Plaintiff] during that time and after [Plaintiff's]
14 demotion." (McDowell ¶ 1.)

15 McDowell declares that [p]rior to [his own]
16 testimony before the Grand Jury, . . . Bixler asked
17 [him] why [Plaintiff] complained to the Grand Jury.
18 [McDowell] responded that [Plaintiff] had told
19 [him] that he thought the managers were trying to
20 cover up the Red Tag Scandal by silencing
21 [Plaintiff]. Because of this question, it was
22 apparent that . . . Bixler was already aware that
23 [Plaintiff] had complained about this illegal
24 activity to the Grand Jury.

25 (Id. ¶ 8)

26 Defendants object to paragraph 8 of McDowell's
27 declaration on the grounds of relevancy, arguing that "[a]ny
28 statements made by Mr. Bixler concerning Plaintiff's . . . the grand
jury [testimony] is not relevant, as the undisputed facts establish
that Bixler was not involved in the decision to terminate
[Plaintiff.]" (Def's Obj. ¶ 2) Defendants' objection is overruled
since Plaintiff has shown Bixler may have know of Plaintiff's
testimony before the Grand Jury.

1 "Plaintiff admits that [he] did not inform any
2 management employee with the County of Sacramento that he was
3 intending to, or that he in fact did, testify before the Grand Jury
4 prior to his termination." (Id. ¶ 41.) "Plaintiff admits that he did
5 not tell any manager or supervisor, nor any defendant, that he was
6 testifying before the grand jury." (Id. ¶ 50.) "Plaintiff further
7 admits that he has no basis for his allegations that the content of
8 his testimony before the Grand Jury was somehow told or leaked to any
9 defendants" by Mary Ose from the Sacramento Bee; "Plaintiff's
10 accusations that [Mary Ose] leaked information regarding his testimony
11 to [Hobday] who then leaked it to [D]efendants is based purely on
12 [Plaintiff's] experience and feeling without any actual evidence; he
13 has no information to verify this belief." (Id. ¶¶ 42; 55.)
14 "Plaintiff does not have any information that any named defendant
15 knows what he testified to before the Grand Jury." (Id. ¶ 61.)

16 "In October 2005 . . . Mosher . . . testified before the
17 Grand Jury as part of a presentation regarding the operations of
18 Building Inspection Division as part of an investigation instigated by
19 the Grand Jury" and "[a]t no time . . . bec[a]me aware that any
20 employees were called to testify before the Grand Jury as witnesses."
21 (Id. ¶¶ 43-44.) Further, "Plaintiff has no information that any
22 Sacramento County employee who testified before the Grand Jury was
23 terminated thereafter." (Id. ¶ 62.)

24 "Plaintiff's only basis for his claim that Cheryl Creson
25 intimidated and coerced witnesses not to testify before the grand jury
26 was that she was the director and was in charge." (Id. ¶ 59.)
27 "Plaintiff admits that although he believes all the defendants were
28 involved in the decision to demote him, he doesn't 'really have any

1 proof of that.'" (Id. ¶ 58.) Plaintiff's only basis for asserting
2 that any of the defendants intimidated and coerced witnesses from
3 testifying before the grand jury is by virtue of their positions in
4 the County." (Id. ¶ 60.)

5 "At no time did [Defendants Creson, Pedretti, Floyd,
6 Cochran, Bixler, [or] Hallimore] conspire with any County of
7 Sacramento employee, or any other of the defendants, to demote or
8 terminate Plaintiff." (Id. ¶ 48.) "Plaintiff's sole basis for
9 believing the[re] was a conspiracy to have him terminated is an email
10 from . . . Cochran instructing various management employees in the
11 Municipal Services Agency not to respond to an email from Plaintiff,
12 but to instead allow one individual to handle any response." (Id. ¶
13 57.)

14 **II. LEGAL STANDARDS**

15 Summary judgment is appropriate if "the pleadings, the
16 discovery and disclosure materials on file, and any affidavits show
17 that there is no genuine issue as to any material fact and that the
18 movant is entitled to judgment as a matter of law." Fed.R.Civ.P.
19 56(c). Thus, the party moving for summary judgment bears the initial
20 burden of demonstrating the absence of a genuine issue of material
21 fact for trial. Celotex Corp. v. Catrett, 477 U.S., 317, 323 (1986).
22 If this burden is satisfied, "the non-moving party must set forth, by
23 affidavit or as otherwise provided in Rule 56, specific facts showing
24 that there is a genuine issue for trial." T.W. Elec. Serv., Inc. v.
25 Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987)
26 (quotations and citation omitted) (emphasis omitted). Summary
27 judgment is properly granted "against a party who fails to make a
28 showing sufficient to establish the existence of an element essential

1 to that party's case, and on which that party will bear the burden of
2 proof at trial . . . since a complete failure of proof concerning an
3 essential element of the nonmoving party's case necessarily renders
4 all other facts immaterial." Celotex, 477 U.S. at 322-23.

5 Defendants request that the Court take judicial notice
6 of a complaint Plaintiff filed in the Superior Court of California
7 against the County, Pedretti, and Does 1 through 50, on June 9, 2006,
8 ("State Complaint"). Since Defendants have not shown how the State
9 Complaint is relevant to this action, this request is denied.

10 Defendants also request that judicial notice be taken of Plaintiff's
11 request for dismissal of the State Complaint on November 9, 2007
12 ("Plaintiff's Request for Dismissal"). However, Defendants failed to
13 attach the Plaintiffs' Request for Dismissal to their motion.
14 Therefore, this request is also denied.

15 III. ANALYSIS

16 Defendants Creson, Pedretti, and Floyd seek summary judgment
17 on Plaintiff's First Amendment claim arguing they did not make the
18 "decision, nor had the authority, to terminate Plaintiff." (Mot.
19 8:23-9:8; Reply 3:8-14.) Further, the County seeks summary judgment
20 on Plaintiff's First Amendment claim because arguing that Mosher, the
21 County employee responsible for Plaintiff's termination, terminated
22 Plaintiff for the "legitimate business reasons, [of] not the reporting
23 . . . allegedly illegal activity." (Mot. 6:28-8:22; 11:17-20; Reply
24 4:24-8:3.)

25 For Plaintiff to establish a First Amendment retaliation
26 claim, Plaintiff must show:

- 27 (1) [he] spoke on a matter of public concern;
28 (2) [he] spoke as a private citizen . . . ; (3)
**[his] protected speech was a substantial or
motivating factor in the adverse employment action;**

1 (4) . . . the state had an adequate justification
2 for treating the employee differently from other
3 members of the general public; and (5) . . . the
state would have taken the adverse employment
action even absent the protected speech.

4 Huppert v. City of Pittsburg, 574 F.3d 696, 702 (9th Cir. 2009) (citing
5 Eng v. Cooley, 552 F.3d 1062, 1070 (9th Cir. 2009)).

6 Even assuming, *arguendo*, that Plaintiff's testimony before
7 the Grand Jury satisfies the first two prongs of the above analysis
8 for protected speech, Plaintiff has failed to controvert Defendants'
9 evidence with specific facts showing that a genuine issue of material
10 fact exists on the issue whether Plaintiff's "protected speech was a
11 substantial or motivating factor in [his termination]." Id.

12 Defendants uncontroverted evidence shows that
13 Defendants Creson, Pedretti, and Floyd did not "ma[k]e the decision,
14 to terminate Plaintiff.'" (SUF ¶ 47). Further, "Plaintiff admits that
15 although he believes all the defendants were involved in the decision
16 to demote him, he doesn't 'really have any proof of that.'" (Id. ¶
17 58.) Therefore, Defendants Creson, Pedretti, and Floyd's motion for
18 summary judgment is granted on Plaintiff's First Amendment retaliation
19 claim.

20 The County's exposure to liability on Plaintiff's First
21 Amendment retaliation claim depends on whether Mosher made an unlawful
22 decision to terminate Plaintiff. Plaintiff does not dispute that
23 "[a]t the time [Mosher] issued the Proposed Order of Disciplinary
24 Action for Dismissal on November 9, 2005, [Mosher] had no knowledge
25 that [Plaintiff] filed a complaint with, or testified before, the
26 Grand Jury." (Id. ¶ 40, Ex. 12, ¶ 13).

27 Moreover, Plaintiff admits "[he] did not inform any
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1 management employee with the County of Sacramento," "supervisor, nor
2 any defendant, that he was testifying before the [G]rand [J]ury."
3 (Id. ¶¶ 41, 50.) "Plaintiff further admits that he has no basis for
4 his allegations that the content of his testimony before the Grand
5 Jury was somehow told or leaked to any defendants." (Id. ¶¶ 42; 55.)
6 "Plaintiff does not have any information that any named defendant
7 knows what he testified to before the Grand Jury," other than what he
8 says about McDowell being aware of some issues. (Id. ¶ 61.) Plaintiff
9 also concedes that his "only basis for asserting that any of the
10 defendants intimidated and coerced witnesses from testifying before
11 the grand jury is by virtue of their positions in the County." (Id. ¶
12 60.) "Plaintiff admits that although he believes all the defendants
13 were involved in the decision to demote him, he doesn't 'really have
14 any proof of that.'" (Id. ¶ 58.)

15 Since Plaintiff has failed to introduce any evidence
16 that his protected speech was a substantial motivating factor in any
17 adverse employment action he allegedly experienced, Defendant County's
18 motion for summary judgment is granted on Plaintiff's First Amendment
19 retaliation claim. See Nelson v. Pima Community College, 83 F.3d
20 1075, 1080 (9th Cir. 1996) (affirming an order of a summary judgment
21 for the defendant on a wrongful retaliation claim where the plaintiff
22 submitted evidence that she had engaged in protected speech and that
23 she was subsequently told not to come back to work but did not
24 introduce any evidence of a link between the two events); Thomas v.
25 Douglas, 877 F.2d 1428, 1433-34 (9th Cir. 1989) (affirming an order of
26 a summary judgment for the defendant on a wrongful retaliation claim
27 because the claimant failed to offer evidence that his protected
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1 speech was a substantial motivating factor in his employer's refusal
2 of his request for a transfer).

3 Further, Plaintiff's claim against Defendants Creson,
4 Pedretti, Floyd, and the County for conspiracy to violate Plaintiff's
5 civil rights and Plaintiff's claim against all Defendants for neglect
6 to prevent violation of Plaintiff's civil rights fail, since
7 Plaintiff's First Amendment retaliation claim upon which these claims
8 depend, fails. Therefore, Defendants are also granted summary
9 judgment on Plaintiff's second and third claims.

10 Defendants Creson, Pedretti, Floyd, and the County also seek
11 summary judgment on Plaintiff's California Labor Code claim, arguing
12 that Plaintiff cannot prove all the elements of this claim. (Mot.
13 18:18-20:15.) Plaintiff alleges that Defendants Creson, Pedretti,
14 Floyd, and the County violated California Labor Code section 1102.5
15 ("Section 1102.5") by terminating Plaintiff in retaliation for
16 "[P]laintiff's reporting of illegal and corrupt activities within the
17 [County's] Municipal Services Agency." (Compl. ¶¶ 43-47.)

18 To establish a prima facie case for retaliation
19 under Section 1102.5, an employee must show (1)
20 that he engaged in protected activity, (2) that he
21 was thereafter subjected to an adverse employment
22 action by his employer, and (3) **that there was a
causal link between the protected activity and the
adverse employment action.**

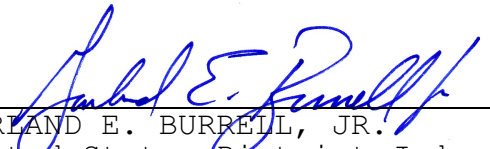
22 Love v. Motion. Indus., 309 F.Supp. 2d 1128, 1134 (N.D. Cal.
23 2004) (emphasis added) (citing Morgan v. Regents of University of
24 California, 88 Cal.App.4th 52, 69 (2000)). Since Plaintiff has failed
25 to controvert Defendants' evidence showing that no causal link exists
26 between Plaintiff's protected speech and Plaintiff's termination,
27 Defendants Creson, Pedretti, Floyd, and the County's motion for
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1 summary judgment on Plaintiff's California Labor Code claim is
2 granted.

3 **IV. CONCLUSION**

4 For the stated reasons, Defendants' summary judgment motion
5 is granted. Judgment shall be entered for Defendants, and this action
6 shall be closed.

7 Dated: May 3, 2010

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11 GARLAND E. BURRELL, JR.
12 United States District Judge
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