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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

EDWARD MAYES,

Plaintiff,

v.

KAISER FOUNDATION HOSPITALS, et
al.,

Defendant.

No. 2:12-cv-1726 KJM EFB

ORDER

This case was on calendar on March 28, 2014 for a hearing on defendants' motion for summary judgment. Pamela Price appeared for plaintiff Edwards Mayes (plaintiff or Mayes); Seth Neulight appeared for defendants Kaiser Foundation Hospital (Kaiser), Wanetta McGriff (McGriff), Janitress Nathaniel (Nathaniel) and Sherie Ambrose (Ambrose) (collectively defendants). After considering the parties' arguments, the court GRANTS the motion for summary judgment.

I. PROCEDURAL BACKGROUND

On May 14, 2012, plaintiff Edward Mayes filed an action in Solano County Superior Court alleging several causes of action stemming from his termination from employment at Kaiser Permanente Hospital in Vallejo. ECF No. 1 at 7-18. Defendants removed the action to this court on June 28, 2012. ECF No. 1.

1 On July 10, 2012, plaintiff filed a demand for a jury trial and on August 7, 2012, filed a
2 first amended complaint. ECF No. 7. Thereafter the parties stipulated to plaintiff's filing a
3 second amended complaint (SAC), which was filed on September 21, 2012 ECF Nos. 10-12.
4 Defendants moved to dismiss the SAC on October 19, 2012. ECF No. 16. The court granted the
5 motion on January 9, 2013, giving plaintiff leave to file an amended complaint.

6 Plaintiff filed his Third Amended Complaint on January 29, 2013. It contains five claims:
7 (1) retaliation in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3) against
8 all defendants; (2) race and gender discrimination in violation of California Government Code §
9 12940, *et seq.* against Kaiser; (3) failure to prevent discrimination in violation of California law
10 against Kaiser; (4) race discrimination in violation of 42 U.S.C. § 1981; and (5) race and gender
11 discrimination in violation of 42 U.S.C. § 2000e-2 (Title VII) against Kaiser. ECF No. 24.

12 II. STANDARD FOR A SUMMARY JUDGMENT MOTION

13 A court will grant summary judgment "if . . . there is no genuine dispute as to any material
14 fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The
15 "threshold inquiry" is whether "there are any genuine factual issues that properly can be resolved
16 only by a finder of fact because they may reasonably be resolved in favor of either party."
17 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).¹

18 The moving party bears the initial burden of showing the district court "that there is an
19 absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S.
20 317, 325 (1986). The burden then shifts to the nonmoving party, which "must establish that there
21 is a genuine issue of material fact . . ." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
22 U.S. 574, 585 (1986). In carrying their burdens, both parties must "cit[e] to particular parts of
23 materials in the record . . .; or show [] that the materials cited do not establish the absence or
24 presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to
25 support the fact." FED. R. CIV. P. 56(c)(1); *see also Matsushita*, 475 U.S. at 586 ("[the
26

27 ¹ Rule 56 was amended, effective December 1, 2010. However, it is appropriate to rely on cases
28 decided before the amendment took effect, as "[t]he standard for granting summary judgment remains
unchanged." FED. R. CIV. P. 56, Notes of Advisory Comm. on 2010 amendments.

1 nonmoving party] must do more than simply show that there is some metaphysical doubt as to the
2 material facts”). Moreover, “the requirement is that there be no genuine issue of material fact . . .
3 . Only disputes over facts that might affect the outcome of the suit under the governing law will
4 properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 247-48 (emphasis in
5 original).

6 In deciding a motion for summary judgment, the court draws all inferences and views all
7 evidence in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587-88;
8 *Whitman v. Mineta*, 541 F.3d 929, 931 (9th Cir. 2008). “Where the record taken as a whole
9 could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue
10 for trial.’” *Matsushita*, 475 U.S. at 587 (quoting *First Nat’l Bank of Arizona v. Cities Serv. Co.*,
11 391 U.S. 253, 289 (1968)).

12 A court may consider evidence as long as it is “admissible at trial.” *Fraser v. Goodale*,
13 342 F.3d 1032, 1036 (9th Cir. 2003). “Admissibility at trial” depends not on the evidence’s form,
14 but on its content. *Block v. City of L.A.*, 253 F.3d 410, 418-19 (9th Cir. 2001) (citing *Celotex*
15 *Corp.*, 477 U.S. at 324). The party seeking admission of evidence “bears the burden of proof of
16 admissibility.” *Pfingston v. Ronan Eng’g Co.*, 284 F.3d 999, 1004 (9th Cir. 2002). If the
17 opposing party objects to the proposed evidence, the party seeking admission must direct the
18 district court to “authenticating documents, deposition testimony bearing on attribution, hearsay
19 exceptions and exemptions, or other evidentiary principles under which the evidence in question
20 could be deemed admissible” *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 385-86 (9th Cir.
21 2010). However, courts are sometimes “much more lenient” with the affidavits and documents of
22 the party opposing summary judgment. *Scharf v. U.S. Atty. Gen.*, 597 F.2d 1240, 1243 (9th Cir.
23 1979).

24 III. EVIDENTIARY OBJECTIONS

25 Defendants have lodged eighty-one objections to the plaintiff’s evidence in opposition to
26 summary judgment. The court will not address any relevance objections: because it may rely
27 only on relevant evidence in addressing the motion, its citation to evidence subject to a relevance
28 objection means the objection has been overruled. *Burch v. Regents of Univ. Of Cal.*, 433 F.

1 Supp. 2d 1110, 1119 (E.D. Cal. 2006) (stating that relevance objections are redundant because a
2 court cannot rely on irrelevant facts in resolving a summary judgment motion). Moreover, the
3 court will resolve other objections only to the extent it finds the disputed evidence has any
4 bearing on the issues before it. *Schwarz v. Lassen Cnty. ex rel. the Lassen Cnty Jail*, No. 2:10-
5 cv-3048 MCE CMK, 2013 WL 5425102, at *13 (E.D. Cal. Sep. 27, 2013) (stating that extensive
6 evidentiary objections undercut the goals of judicial efficiency and avoiding costly litigation).
7 Moreover, “[o]n motions with voluminous objections, ‘it is often unnecessary and impractical for
8 a court to methodically scrutinize each objection and give a full analysis of each argument
9 raised.’” *Olenicoff v. UBS AG*, No. SACV 08-1029 AG (RNBx), 2012 WL 1192911, at *7 (C.D.
10 Cal. Apr. 1, 2012) (quoting *Capitol Records, LLC v. BlueBeat, Inc.*, 765 F. Supp. 2d 1198, 1200
11 n.1 (C.D. Cal. 2010)). “This is especially true where, as here, many of the objections did not
12 actually dispute the essential facts at issue, but instead merely kick up some evidentiary dust.” *Id.*
13 In this case, defendants do not dispute many of plaintiff’s facts, though characterizing them as
14 immaterial, but then raise evidentiary objections. In those instances, when the court finds the fact
15 to be material, the court takes defendants at their word that the fact is undisputed and declines to
16 add to the dust cloud.

17 Finally, as many of the objections are “‘boilerplate recitations of evidentiary principles or
18 blanket objections without analysis applied to specific items of evidence,’” the court will not
19 “scrutinize each objection and give it a full analysis.” *Stonefire Grill, Inc. v. FGF Brands, Inc.*,
20 ___ F. Supp. 2d ___, 2013 WL 6662718, at *4 (C.D. Cal. Aug. 16, 2013) (quoting *Doe v. Starbucks,*
21 *Inc.*, No. 08-0582, 2009 WL 5183773, at *1 (C.D. Cal. Dec. 18, 2009)).

22 Defendants object to the statement in Mayes’ declaration that according to Kaiser’s
23 medication policy, delays in administering medication would not be treated as errors if there was
24 no harm to the patient. Declaration of Edward Mayes, ECF No. 67 ¶ 55. As Mayes neither
25 attaches the policy to his declaration or otherwise refers the court to the place in the record where
26 the referenced portion of the policy may be found, the court sustains the objection. *See Carmen*
27 *v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001) (stating the court is not
28 required to comb through record to find a reason to deny summary judgment); *Sch. Dist. No. 1J*,

1 *Multnomah Cnty., Or. v. ACandS*, 5 F.3d 1255, 1261 (9th Cir. 1993) (citing former Rule 56(e)
2 and finding district court did not abuse its discretion in refusing to consider declarations referring
3 to documents not attached); *see also* FED. R. EVID. 1001 (“To prove the content of a writing. . .
4 the original writing . . . is required. . .”). Attorney Stoller does attach a copy of a medication
5 policy to his declaration; that policy provides in part that “delays in medication administration for
6 scheduled medications without patient harm shall not be considered medication errors. . . .”
7 Declaration of John W. H. Stoller, Ex. J, ECF No. 73-10at 3 (MAR 2611R, with an effective date
8 of 2/10 and an approval date of 1/13). The policy has an approval date of January 2013. *Id.*; *see*
9 Declaration of Seth Neulight, Ex. 19, ECF No. 63-7 (MAR policy 2611, effective 2/10 without
10 language in MAR 2611R attached to Stoller declaration). Because it is not clear the policy
11 plaintiff references was in force during Mayes’ employment, the court will not consider it.

12 Defendants also object to a series of emails, acknowledging they are authenticated but
13 claiming they are hearsay. ECF No. 78-1 ¶ 76. However, as the emails are from Kaiser
14 employees, they are not hearsay. FED. R. EVID. 801(d)(2)(D).

15 Defendants object to Exhibit G to Attorney Stoller’s declaration. Although Stoller
16 identifies the document as exhibit 53 to Marta Hudson’s deposition, there is no indication she
17 created it. ECF No. 78-1 at 69. The objection is sustained.

18 Defendants object to several portions of the declaration of Registered Nurse Mary
19 Ransbury, plaintiff’s expert, retained to give expert opinions on plaintiff’s nursing practices.
20 Declaration of Mary Ransbury, ECF No. 68 ¶¶ 1, 4. Ransbury opines, among other things, that
21 “[a]s to the claims of Patient VK, that Mr. Mayes did not administer the prescribed medications
22 on March 9, 2011, I determined that the patient’s number was scanned into the Kaiser-Vallejo
23 system via the patient’s wristband. It would have been impossible for Mr. Mayes to scan the
24 patient’s number from the wristband and not administer a dose of medication.” *Id.* ¶ 13.

25 Defendants object that the statement lacks foundation. ECF No. 78-1 ¶ 55. This objection is
26 sustained, as Ransbury does not explain how scanning a wristband translates into certainty that
27 medication was administered. *United States v. Various Slot Machines*, 658 F.2d 697, 700 (9th
28 Cir. 1981) (“[I]n the context of a motion for summary judgment, an expert must back up his

1 opinion with specific facts.”); *Morford v. Wal-Mart Stores*, No. 2:09-cv-02251 RLH-PAL, 2011
2 WL 2313648, at *7 (D. Nev. June 9, 2011) (stating that an expert opinion must be supported by
3 an adequate basis in relevant facts).

4 Plaintiff asks the court to take judicial notice of Kaiser’s settlement of two cases alleging
5 overtime violations. ECF No. 71. Although the one of the settlements was reached close in time
6 to the actions involving plaintiff, there is no showing anyone involved in the instant case was
7 aware of them. The court declines to take judicial notice of these settlements.

8 IV. UNDISPUTED FACTS

9 When the parties agree a fact is undisputed, the court refers to their agreement rather than
10 to the portions of the record supporting the agreement. When the facts are disputed, the court
11 notes the disagreement and cites to the supporting record. The court does not cite to any facts that
12 are irrelevant to resolution of the pending motion.

13 Kaiser, a health care provider, owns and operates a hospital in Vallejo, California, the
14 locus of this action. TAC ¶ 3. Kaiser maintains electronic medical records for its patients using
15 “HealthConnect,” a computer database. HealthConnect assigns a unique medical record number
16 (MRN) to each patient and contains the patient’s medication administration record (MAR), listing
17 all the patient’s prescribed medications and the physician’s instructions for the administration of
18 the medications. Defs.’ Reply to Pl.’s Response to Statement of Undisputed Facts, ECF No. 80
19 ¶ 7.² HealthConnect contains an electronic flow sheet, which is an hourly record of patient care.
20 *Id.* ¶ 12. Nurses are required to enter the patient’s height, weight, vital statistics and pain
21 assessments into the flow sheet to create a record of the patient’s health during a particular shift.
22 *Id.*

23 Under Kaiser’s policy, before administering medication, a nurse is required to document
24 the patient’s pain level in the MAR and check for physician’s instructions, which must be

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26 ² Defendants’ response to plaintiff’s statement of undisputed facts is part of ECF No. 80, as is their reply
27 to plaintiff’s response to their facts. The court refers to the latter with a reference to the document and the
28 number of the cited paragraph. To distinguish the two documents, the court cites to defendant’s response
to plaintiff’s statement of facts by ECF number, page number and then paragraph number.

1 followed. *Id.* ¶¶ 8, 10, 11. In addition, anyone administering medication must document in the
2 MAR the medication given, dosage, manner of administration, and time given or the reason the
3 medication was not given. *Id.* ¶ 9.

4 Medication is stored in and dispensed from a Pyxis MedStation, which cannot be accessed
5 without a code. *Id.* ¶ 13. When a nurse dispenses medication from the Pyxis, the systems
6 records the name of the employee, the name of the patient for whom the medication is dispensed,
7 the name, dose and quantity of the medication, and the date and time of removal. *Id.*

8 ¶ 14. This information is included in a “Pandora report” periodically generated by Kaiser. *Id.*
9 ¶ 15.

10 Kaiser required its nurses to follow written policies and procedures on the administration
11 of medication. *Id.* ¶ 16. Kaiser Policy No. 2611 requires a nurse to document all medications
12 given or not given and the patient’s response in the MAR. *Id.* ¶ 18. Kaiser Policy No. 2409
13 requires a nurse to assess a patient’s pain by asking the patient to rate the pain, to conduct pain
14 assessments when a patient is admitted and at least once during each shift, and to document the
15 effectiveness of pain intervention within sixty minutes of administering pain medications. *Id.*
16 ¶ 21. Policy 500.10 requires that medications removed from Pyxis but not used must be
17 discarded and treated as pharmaceutical waste, or “wasted,” with the waste witnessed by another
18 nurse and documented. *Id.* ¶ 23.³

19 Kaiser has adopted “MedRite” guidelines which outline a step-by-step process for nurses
20 to administer medications. *Id.* ¶ 25. Under these guidelines, a nurse must first review the
21 patient’s MAR, then verify the time the patient is to receive the specific drug, verify that the
22 medication he has removed from the Pyxis is the right medication for the right patient in the
23 correct dose and manner of administration (*i.e.* oral or intravenous delivery of the medication)
24 before giving the medication to the patient. *Id.* ¶ 28.

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26 _____
27 ³ Plaintiff claims this undisputed fact about the policy requiring the disposal of unused medication is
28 disputed, but cites only to Mayes’ own declaration; the page and line cited do not address the medication
policy. Declaration of Edward Mayes, ECF No. 67 ¶ 42. Plaintiff does not cite to any other evidence in
support of his claimed dispute.

1 Kaiser's policy against violence in the workplace prohibits acts or threats of violence and
2 intimidation, defined as behavior which has the purpose or effect of causing fear. *Id.* ¶ 30.

3 Although Mayes disputes this, he cites only to a portion of his declaration that does not refer to
4 the policy. ECF No. 67 ¶ 33.

5 Finally, Kaiser's Principles of Responsibility (POR) required nurses to act with a high
6 degree of professionalism, to involve patients in their own care, to demonstrate a commitment to
7 ethics and integrity, and to be truthful and honest. ECF No. 80 ¶ 31.

8 Edward Mayes, an African American, is a registered nurse who worked for Kaiser from
9 2006 until his discharge on July 1, 2011. ECF No. 80 ¶ 1. At the time of his discharge, he
10 worked on the night shift on the 5 East Medical-Surgical Unit at Kaiser's Vallejo hospital. *Id.* In
11 2010 and 2011 he reported directly to Assistant Nurse Manager Gina Runas and to Department
12 Managers Wanetta McGriff and, later, Marta Hudson. McGriff and Hudson reported to Clinical
13 Adult Services Director Janitress Nathaniel. *Id.* ¶¶ 4-5. McGriff and Nathaniel are African
14 American; Hudson and Administrative Services Director Sherie Ambrose are Caucasian, and
15 Runas is Filipina. *Id.* ¶ 6. Ginger Bonnar, Human Resources Consultant, provided guidance to
16 Nathaniel on human resources issues regarding Mayes's employment. Declaration of Janitress
17 Nathaniel, ECF No. 63-5 ¶ 4.

18 Mayes has not heard any racist remarks from Runas, Bonnar, McGriff, Nathaniel, Hudson
19 or Ambrose and has no reason to believe they are biased against African-Americans. ECF No.
20 80 ¶ 107. He also has never heard them make derogatory comments about male nurses. *Id.*
21 ¶ 110. Mayes disputes this, relying on his belief he was assigned to care for a particular patient
22 because he was a large male, but this does not suggest discriminatory animus. Moreover, his
23 belief does not raise a genuine issue of disputed fact. *See Alpert v. United States*, 481 F.3d 404,
24 409 (6th Cir. 2007) (stating that a statement based on the affiant's belief does not satisfy Rule
25 56(e)'s requirement of personal knowledge); *Friedel v. City of Madison*, 832 F.2d 965, 974 (7th
26 Cir. 1987) (stating that assertions based on belief "cannot serve to raise a genuine dispute on a
27 question of material fact").

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1 The patient Mayes was assigned to care for was “FW,” a large paraplegic man. ECF No.
2 80 at 36 ¶¶ 2, 6. Mayes complied with physician’s orders that FW be given three showers a
3 week, even though it sometimes took Mayes between one and two hours to shower the patient.
4 *Id.* at 36-37 ¶¶ 1, 8.

5 On November 5, 2010, McGriff forwarded an email from Administrative House
6 Supervisor Annette Hall to Runas about an allegation by nurse Patty Donahue that Mayes had not
7 given patient “M A-F” pain medication. *Id.* ¶ 46. McGriff asked Runas to investigate. *Id.*

8 Mayes was a union representative and on November 8, 2010, he and others raised
9 concerns with Kaiser management about alleged timecard alterations resulting in the denial of
10 overtime pay to nurses. *Id.* ¶ 33. Neither Nathaniel, McGriff, Ambrose nor Hudson attended this
11 November 8 meeting and did not otherwise learn that Mayes had complained about the alteration
12 of timecards. *Id.* ¶¶ 39, 41. Ginger Bonnar, Michelle Camicia, and Gail Sims were present on
13 Kaiser’s behalf. ECF No. 67 ¶ 24.

14 On November 11, 2010, Mayes and his union representative met with Runas about the
15 complaint Donahue had relayed. ECF No. 80 ¶ 47. Ultimately Kaiser’s records showed Mayes
16 had given medication to patient M A-F. *Id.* at 40 ¶ 23.

17 The next day, Mayes asked to speak privately with Donahue and said she should have
18 looked at the patient’s MAR and the Pyxis before reporting to the managers. *Id.* ¶¶ 48-49. He
19 did not yell at Donahue or prevent her from leaving the room. *Id.* at 40 ¶ 25. Donahue later told
20 Chief Nursing Officer Eleanor Louie Mayes had confronted her. *Id.* ¶ 50.

21 On November 16, 2010, during a records review with the pharmacist, Nathaniel noted
22 Mayes had dispensed 3 mg of Dilaudid from the Pyxis apparently without a corresponding
23 physician’s order. *Id.* ¶ 51. She decided to put Mayes on paid investigatory suspension, *id.* ¶ 52,
24 and so sent an email to Ignacio Ronald Collins, Mayes’ union representative, informing him of
25 the suspension, with a copy to Ginger Bonnar. *Id.* at 42 ¶ 34.

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1 The next day, Nathaniel resolved the apparent discrepancy⁴ concerning the Dilaudid, but
2 found other instances of Mayes' apparent violation of the medication administration policy; the
3 review showed Mayes dispensed medication from the Pyxis before clocking in at least nine times
4 between October 21 and November 12, 2010. *Id.* ¶¶ 54-55. Nathaniel also learned that in
5 September 2010 a patient complained that Mayes had not administered the patient's pain
6 medication, even though he had put something in the IV. *Id.* ¶ 58. Runas had investigated but
7 was unable to determine whether the patient had received his medication. *Id.* ¶ 59.

8 Nathaniel and Ambrose met with Mayes and his union representative on November 18
9 and 22, 2010; McGriff attended the latter meeting. *Id.* ¶¶ 56-57. At the latter meeting, they had
10 information Mayes had accessed the Pyxis machine ten times before starting his shift and that
11 nine of those instances were for transactions related to patient FW. *Id.* at 44 ¶ 42. Mayes said he
12 sometimes answered FW's need for treatment before he clocked in. ECF No. 67 ¶ 41. Also at
13 the latter meeting, Nathaniel, Ambrose and McGriff had information Mayes administered
14 medications within one minute after removing them from the Pyxis, as shown by time differences
15 between withdrawal from the Pyxis and the time of administration as reflected in the Health
16 Connect system. ECF No. 80 at 44 ¶ 45.

17 While Mayes was on suspension, Donahue told Nathaniel that Mayes had confronted her
18 on November 12 and said several times "Now I know what kind of nurse you are." *Id.* ¶ 63.
19 Donahue felt harassed or intimidated and was not comfortable working with Mayes. *Id.* Mayes
20 disputes these facts, but cites only to his declaration in which he says he told Donahue the patient
21 was a drug seeker and also said only once he "knew what type of nurse she was now." ECF No.
22 67 ¶ 32. Whether Mayes repeated the phrase to Donahue or not is not a significant dispute.
23 Nathaniel believed Mayes had intimidated Donahue. ECF No. 80 ¶ 66. Nathaniel concluded
24 Mayes had violated the policy on workplace violence. *Id.* ¶ 67.

25 ⁴ A Pyxis discrepancy occurs when the medication in the machine does not match the inputs of
26 medication withdrawals, returns or wastes. ECF No. 67 ¶ 59. The machine has a touch screen
27 and when the proper command is selected the appropriate drawer will open. *Id.* ¶ 60. If the
28 medication is returned, the nurse must push the "return" button, which will also open the drawer.
Id. If the medication is wasted, the nurse must push the "waste" button and place the medication
in a designated drawer in the machine or in the sharps disposal box. *Id.* ¶¶ 60-61.

1 In December 2010, members of Kaiser’s management, including Ginger Bonnar,
2 exchanged emails about Mayes’ termination. ECF No. 80 at 48 ¶ 61. Also in December Bonnar
3 received a draft of the termination letter for Mayes and was asked to send it to “legal and labor
4 relations.” ECF No. 80 at 47 ¶ 56. Bonnar also participated in a conference call discussing
5 Mayes’s termination. *Id.* at 48 ¶ 60.

6 After further investigation, Nathaniel also concluded Mayes had violated Kaiser’s policies
7 on medication administration, pain assessment and management, and workplace violence as well
8 as the POR and on January 6, 2011, she placed Mayes on a five-day suspension without pay and
9 gave Mayes a plan of correction. *Id.* ¶¶ 73-75.

10 On January 7, 2011, Bonnar and Nathaniel met with Mayes, and he and his union entered
11 into a two-year Last Chance/Return to Work Agreement (LCA), which provided that Mayes must
12 comply fully with Kaiser’s policies on medication administration, pain assessment and
13 management and the POR and that any failure to do so would result in immediate termination of
14 his employment. *Id.* ¶¶ 74, 77.

15 On March 9, 2011, Mayes dispensed 10 ml of codeine liquid, a controlled substance, but
16 administered only half to the patient. *Id.* ¶ 78. Although he claimed to have wasted the
17 remainder, he neither documented the waste nor had another nurse witness it. *Id.* ¶ 79. Mayes
18 disputes this, but he says only that the Pyxis dispensed the medication in 10 ml doses only, that he
19 gave the patient the proper dose, that he documented other instances of waste, and that the policy
20 said wasting non-controlled substances did not need to be witnessed. ECF No. 67 ¶ 67. None of
21 this raises a genuine dispute as to this fact. This failure to document the waste violated the
22 medication administration policy. ECF No. 80 ¶ 81.

23 In March 2011 patient VK complained Mayes had not given him a dose of Dilaudid even
24 though Mayes had recorded having done so in the patient’s MAR. *Id.* ¶ 82. Mayes failed to note
25 his pain assessment in VK’s flow sheet before and after administering the medication as required
26 by policy. *Id.* ¶¶ 82-83. Marta Hudson interviewed VK about this claim and then called
27 Nathaniel and Bonnar. *Id.* at 51 ¶¶ 79-80.

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1 On March 21, 2011, Mayes dispensed and then either returned or wasted two 10 mg
2 tablets of Percocet for patient WM without having first reviewed the patient's physician order,
3 which had changed. *Id.* ¶¶ 84-85. Hudson, Bonnar, and Nathaniel interviewed Mayes about the
4 waste discrepancy on March 29, 2011 and Nathaniel directed Mayes to resolve the discrepancy.

5 In twenty-two separate instances between April 1, 2011 and May 14, 2011, Mayes
6 dispensed both oral and intravenous narcotics for the same patient within minutes and recorded
7 giving both doses to the patient; in each of those cases, the physician's order specified delivery of
8 narcotics either orally or intravenously; in none of those cases did Mayes confirm with the doctor
9 that he could employ two methods of administering narcotics. *Id.* ¶¶ 87-89. Mayes did not have
10 discretion under his nursing license to deviate from physician orders when dispensing medication.
11 *Id.* ¶ 90.

12 Hudson identified twenty-nine other nurses who administered both oral and intravenous
13 narcotics for the same patient within an hour and recommended they be asked about their
14 rationale for administering oral and IV medications within sixty minutes of each other; Hudson
15 could not recall whether these nurses were disciplined. ECF No. 80 at 56 ¶¶ 101-102; *see*
16 Declaration of John Stoller, Ex. H, ECF No. 73-8 at 1-2; Ex. D, Deposition of Marta Hudson,
17 ECF No. 73-4 at 17: 7-14. Hudson's report identifies these nurses by name but not by race. *Id.*

18 On May 18, 2011, Kaiser put Mayes on paid investigatory leave. *Id.* ¶ 86. In a
19 memorandum dated July 1, 2011, Kaiser advised Mayes his employment was being terminated
20 because of his continued failure to comply with policies and the terms of the LCA. *Id.* ¶ 94.

21 Mayes filed a grievance and ultimately pursued arbitration. ECF No. 80 ¶¶ 95-98. The
22 arbitrator denied the grievance, finding Mayes had violated the terms of the LCA by failing to
23 abide by Kaiser's policies on medication administration, pain assessment and patient's rights. *Id.*
24 ¶ 104.

25 V. FLSA RETALIATION

26
27 Under 29 U.S.C. § 215(a)(3), it is unlawful for an employer "to discharge or in any
28 manner discriminate against any employee because such employee has filed any complaint or

1 instituted or caused to be instituted any proceeding under this chapter” This provision
2 protects employees “who complain about violations to their employers” *Lambert v.*
3 *Ackerley*, 180 F.3d 997, 1004 (9th Cir. 1999) (en banc). “[S]o long as an employee
4 communicates the *substance* of his allegations to his employer (e.g., that the employer has failed
5 to pay adequate overtime . . .) he is protected by § 215(a)(3).” *Id.* at 1008 (emphasis in original).

6 There are two ways a plaintiff may show FLSA retaliation. In a mixed motive case, when
7 the plaintiff has produced evidence the adverse action is based on both protected and unprotected
8 activities, he must show the protected activities were a substantial factor in the employer’s actions
9 by demonstrating “the adverse actions would not have been taken ‘but for’ the protected
10 activities.” *Knickerbocker v. City of Stockton*, 81 F.3d 907, 911 (9th Cir. 1996). In a dual or
11 mixed motive cases, “it is the defendant’s affirmative burden to prove that it would have taken the
12 adverse action if the proper reason alone existed.” *Id.*; *see also Contreras v. Corinthian Vigor*
13 *Ins. Brokerage, Inc.*, 103 F. Supp. 2d 1180, 1185 (N.D. Cal. 2000).

14 When a plaintiff relies on circumstantial evidence to show that the employer’s adverse
15 employment action was retaliatory, the court analyzes the case under the burden-shifting scheme
16 of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 804 (1973). Under *McDonnell*
17 *Douglas*, a plaintiff establishes a prima facie case by showing he engaged in an activity protected
18 by the FLSA, he suffered an adverse employment action subsequent to the protected activity, and
19 a causal connection between the protected activity and the employment action. *Contreras*, 103 F.
20 Supp. 2d at 1184; *see McBurnie v. City of Prescott*, 511 F. App’x. 624 at n. 2 (9th Cir. 2013)
21 (unpublished) (suggesting but-for causation is applicable not only to dual motive retaliation
22 claims). If plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a
23 legitimate reason for its action. *Contreras*, 103 F. Supp. 2d at 1184; *Schemkes v. Jakob Transp.*
24 *Servs., LLC*, No. 2:12-CV-1158 JCM CWH, 2014 WL 825947, at *4 (D. Nev. Mar. 3, 2014). If
25 the employer does so, the burden shifts back to plaintiff to produce evidence that the employer’s
26 reasons are pretextual. *Id.*

27 Defendants do not challenge plaintiff’s claim that his participation as a union
28 representative in the November 8, 2010 meeting about overtime constitutes protected activity

1 under the FLSA. They also acknowledge that temporal proximity between the protected
2 activity—the November 8 meeting—and an adverse employment action—the beginning of the
3 investigation of Donahue’s claims about Mayes and patient M A-F on November 10—may give
4 rise to an inference of a causal link. *See Schemkes*, 2014 WL 825947, at *4 (“The fact that
5 plaintiff’s termination occurred less than two weeks after he initiated his FLSA action creates an
6 inference of a causal relationship between plaintiff’s initial FLSA claim and his termination”);
7 *see also Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003),
8 *amended on denial of reh’g*, No. 00-35999, 2003 WL 21027351 (9th Cir. May 8, 2003) (stating
9 that temporal proximity between protected activity and adverse action may give rise to inference
10 of retaliation).

11 Defendants argue, however, that none of those involved in the investigation that lead to
12 plaintiff’s suspension and ultimately to his termination were aware of his participation in the
13 November 8 meeting and that Ginger Bonnar, the Human Resources consultant who attended
14 meeting, did not participate in the investigation or make any decision to discipline or terminate
15 plaintiff but rather only reviewed notes from the investigatory meetings. They point to Bonnar’s
16 testimony that she was not involved in the investigation and did not play any decision-making
17 role in the events and also Janitress Nathaniel’s statement that Bonnar provided only “guidance
18 from time to time on human resources issues pertaining to Mr. Mayes’ employment” but “did not
19 initiate or make” any of the decisions relating to the investigation and ultimate termination of
20 plaintiff. Declaration of Seth Neulight, Ex. 2, ECF No. 63-6 at 149: 7-9; Nathaniel Decl., ECF
21 No. 63-5 ¶ 4.

22 Plaintiff argues that Bonnar provided HR advice to each of the managers involved in his
23 termination and said each of these managers were Bonnar’s “clients.” ECF No. 70. He cites to
24 Bonnar’s deposition testimony, attached as exhibit B to Attorney Stoller’s declaration. However,
25 the portion he cites is not included in that exhibit. He also disputes the fact of Bonnar’s limited
26 involvement by relying on his own declaration that on January 7, 2011, Bonnar and Nathaniel
27 gave him a memorandum concerning a five-day suspension without pay for violating the

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1 medication administration, pain assessment and management, and violence in the workplace
2 policies as well as the principles of responsibility. Mayes Decl., ECF No. 67 ¶ 50.

3 In *Staub v. Proctor Hospital*, the Supreme Court said that if a supervisor undertakes an act
4 motivated by a discriminatory bias that is intended to cause and does proximately cause an
5 adverse employment action, then the employer is liable under the cat's paw theory of liability.
6 131 S.Ct. 1186, 1194 (2011); *see also Poland v. Chertoff*, 494 F.3d 1174, 1182 (9th Cir. 2007)
7 (stating that a subordinate's bias can be imputed to an independent decision maker who acts
8 against plaintiff based on the influence of or involvement by the biased subordinate). In this
9 case, to establish cat's paw liability, plaintiff would have to show that in response to plaintiff's
10 protected activity, Bonnar set in motion the investigation and ultimate termination and that she
11 influenced or was involved in the decision-making process. *Cafasso, U.S. ex rel v. Gen.*
12 *Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1061 (9th Cir. 2011). Although his burden of
13 establishing the prima facie case is not onerous, *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d
14 1080, 1091 (9th Cir. 2001), he has not raised any dispute over the question whether Bonnar set
15 the investigation in motion, whatever her involvement in the later stages of the decision-making.
16 *Cafasso*, 637 F.3d at 1061.

17 However, even if the court assumes the evidence of Bonnar's participation in the later
18 stages of the proceedings satisfies plaintiff's prima facie case, Kaiser has proffered legitimate
19 non-retaliatory reasons for the initial suspension and ultimate termination: it asserts it initially
20 took action because plaintiff violated several of Kaiser's policies, including the policy against
21 violence in the workplace and the policy regarding medication administration, and ultimately
22 terminated plaintiff for his failure to abide by policies regarding medication administration and
23 pain assessment as required by the LCA. This is sufficient. *See Bodett v. CoxCom, Inc.*, 366 F.3d
24 736, 744-45 (9th Cir. 2004) (stating that a facial violation of the company's harassment policy
25 satisfied the company's burden); *Kodwavi v. Intercontinental Hotels Grp. Res., Inc.*, ___ F. Supp.
26 2d ___, 2013 WL 4737328, at *10 (N.D. Cal. Sep. 3, 2013) (stating employer satisfied burden by
27 providing evidence that employee was discharged for violating company policy by assaulting and
28 threatening an employee); *Nicholson v. West Penn Allegheny Health Sys.*, Civil Action No. 06-

1 0814, 2007 WL 3120275 (W.D. Pa. Oct. 23, 2007), *aff'd*, 297 F. App'x 157 (Oct. 21, 2008)
2 (unpublished) (employer satisfied its burden by presenting evidence it terminated plaintiff for
3 violating terms of the last chance agreement).

4 Plaintiff suggests these are not legitimate reasons because the Pyxis policy does not
5 mention discipline for improper wasting of medications and the investigation was flawed because
6 he was never interviewed about Donahue's claim nor was patient FW interviewed about
7 plaintiff's medication practice. ECF No. 70 at 14-15. Nathaniel says she undertook an
8 investigatory meeting with Mayes about the workplace violence issue before suspending him.
9 Declaration of Seth Neulight, Ex. 3, Deposition of Jaintress Nathaniel, ECF No. 63-6 at 169:1-7.
10 Mayes contends he was not interviewed about the incident with Donahue. ECF No. 67 ¶ 34.
11 This dispute is not material, however, as it does not suggest the reason for the discharge was not
12 legitimate. Moreover, the fact that the arbitrator found plaintiff's discharge to be proper "is
13 highly probative of the absence of discriminatory intent in that termination." *Smith v. United*
14 *Parcel Serv.*, No. C 03-04646 CRB, 2006 WL 733467, at *3 (N.D. Cal. Mar. 22, 2006) (quoting
15 *Collins v. New York City Transit Auth.*, 305 F.3d 113, 119 (2d Cir. 2002)). Defendants have
16 borne their burden of proffering a legitimate, non-retaliatory reason for the suspension and
17 dismissal.

18 The burden now returns to plaintiff to show the articulated reason is a pretext directly "by
19 persuading the court that a discriminatory reason more likely motivated the employer or indirectly
20 by showing that the employer's proffered explanation is unworthy of credence." *Villiarimo v.*
21 *Aloha Island Air*, 281 F.3d 1054, 1062 (9th Cir. 2002) (quoting *Chuang v. Univ. of Cal. Davis,*
22 *Bd. of Trs.*, 225 F.3d 1115, 1123 (9th Cir. 2000)). Plaintiff must show more than that the
23 employer's justification is false because "courts only require that an employer honestly believed
24 its reason for action, even if its reason is foolish or trivial or even baseless." *Villiarimo*, 281 F.3d
25 at 1063 (internal citation and quotation marks omitted). The employee must meet the employer's
26 evidence with "specific, substantial evidence of pretext." *Wallis v. J.R. Simplot Co.*, 26 F.3d
27 885, 890 (9th Cir. 1994) (quoting *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983)).

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1 The evidence as to pretext, whether direct or indirect, must be considered cumulatively. *Chuang*,
2 225 F.3d at 1129.

3 Direct evidence includes discriminatory or retaliatory statements or actions by the
4 employer. *Munoz v. Mabus*, 630 F.3d 856, 865 (9th Cir. 2010); *Godwin v. Hunt Wesson, Inc.*,
5 150 F.3d 1217, 1221 (9th Cir. 1998) (“Direct evidence is evidence, which if believed, proves the
6 fact of [discriminatory animus] without inference or presumption.”) (quoting *Davis v. Chevron*,
7 *U.S.A., Inc.*, 14 F.3d 1082, 1085 (5th Cir. 1994)) (alteration in original). Plaintiff has provided no
8 direct evidence that retaliatory animus motivated the decision. Even if the court were to take
9 judicial notice of Kaiser’s two settlements of overtime lawsuits, this would not provide direct
10 evidence of animus because plaintiff has presented nothing suggesting any of the decision-makers
11 in this case were aware of them.

12 Deviations from protocol and procedural irregularities may give rise to an inference of
13 pretext. *Porter v. Cal. Dep’t of Corr.*, 419 F.3d 885, 896 (9th Cir. 2005). Plaintiff argues the
14 policy regarding violence in the workplace requires a “Threat Management Plan,” and a follow up
15 plan but none was utilized in connection with Donahue’s complaint about plaintiff’s behavior.
16 ECF No. 70 at 14. The policy does require a threat management plan, but the plan as defined is a
17 general approach to preventing violence in the workplace, not a response to a specific act that an
18 employee experiences as intimidating. *See* Declaration of Seth Neulight, Ex. 17, ECF No. 63-7 at
19 114. Plaintiff argues he was not interviewed about the incident and, as noted, there is a dispute in
20 the evidence on this point. The policy does call for “prompt, thorough, factual and coordinated
21 investigation of all reports,” *id.*, at 115 (emphasis in original), but nothing in the policy mandates
22 an interview with the alleged perpetrator. This evidence is not specific, substantial evidence of
23 pretext.

24 Similarly, plaintiff asserts Nathaniel did not speak to FW about plaintiff’s practices even
25 though plaintiff explained he accessed the Pyxis before clocking in in order to address FW’s
26 needs. ECF No. 70 at 15. He has not shown, however, that an investigation into a nurse’s Pyxis
27 practices would include interviews with patients.

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1 Plaintiff asserts that utilizing both oral and intravenous narcotics was a common practice
2 on the unit as a way of treating break-through pain. ECF No. 67 ¶ 69. His expert witness, Mary
3 Ransbury, also avers that using both an oral tablet of pain medication and an intravenous dose
4 close in time is a common practice for break-through pain. Declaration of Mary Ransbury, ECF
5 No. 68 ¶ 7. Ransbury reviewed an Activity Report generated from the Pyxis on the 5-East
6 Medical-Surgical Unit and noted that “multiple users . . . practiced administering medication in a
7 similar method as Mr. Mayes.” *Id.* ¶ 10. She also found at least one instance where a nurse had
8 administered only a portion of a prescribed medication and several instances of patients receiving
9 medication without proper documentation. *Id.* ¶ 11.

10 Although Ransbury’s declaration provides some heft to plaintiff’s showing, it ultimately is
11 not enough. Ransbury asserts that other nurses administered both oral and intravenous pain
12 medication to the same patient within a short period of time, but nothing in her declaration shows
13 this administration conflicted with physician orders. Moreover, even if these instances were
14 violations, there is no evidence in the record addressing whether these nurses were disciplined.
15 Indeed, that Hudson reviewed the medication records and assembled a list of nurses whose
16 practices were to be investigated suggests that defendants’ investigation of Mayes was not a
17 pretext.

18 Viewed cumulatively, plaintiff has not presented sufficient evidence of pretext to defeat
19 summary judgment.

20 VI. FEHA AND TITLE VII DISCRIMINATION CLAIMS AND SECTION 1981 CLAIMS

21 Plaintiff alleges the evidence shows he was treated differently from his non African-
22 American female co-workers who ignored the doctor’s orders for giving showers to FW and yet
23 were not disciplined. He also argues Caucasian employees who violated the Workplace Violence
24 policy were not held accountable and disciplined as he was.

25 Under Title VII of the Civil Rights Act (Title VII), 42 U.S.C. § 2000e-2(a)(1), it is
26 unlawful for an employer “to discharge any individual . . . because of such individual’s race,
27 color, religion, sex, or national origin. . . .” Under the FEHA, it is illegal for an employer to
28 discriminate against an employee “in compensation or in terms, conditions, or privileges of

1 employment” on the basis of race, color, or national origin. CAL. GOV’T CODE § 12940(a). Also
2 under the FEHA, it is unlawful for an employer “to fail to take all reasonable steps necessary to
3 prevent discrimination and harassment from occurring.” CAL. GOV’T CODE § 12940(k).

4 42 U.S.C. § 1981 states in relevant part that “[a]ll persons within the jurisdiction of the
5 United States shall have the same right . . . to equal benefit of all laws . . . as is enjoyed by white
6 citizens. . . .” To establish such a claim, a plaintiff must show he is the member of a racial
7 minority, the defendant intended to discriminate, and the discrimination concerned one or more of
8 the activities listed in the statute (e.g., make and enforce contracts, sue and be sued, give
9 evidence). *Dutra v. BFA Waste Sys. of N. Am., Inc.*, No. 12–cv–03338 NC, 2013 WL 2950662, at
10 *3 (N.D. Cal. June 14, 2013).

11 The *McDonnell Douglas* framework generally applies to plaintiff’s FEHA and Title VII
12 claims. *Metoyer v. Chassman*, 504 F.3d 919, 941 (9th Cir. 2007); *see also Wills v. Superior*
13 *Court*, 195 Cal. App. 4th 143, 159 (2011) (quoting *Guz v. Bechtel Nat’l, Inc.*, 24 Cal. 4th 317,
14 354 (2000)); *Loggins v. Kaiser Permanente Int’l*, 151 Cal. App. 4th 1102, 1108-09 (2007). There
15 is, however, a difference in a FEHA claim: when a defendant-employer moves for summary
16 judgment in a FEHA case, the burden is reversed. *Dep’t of Fair Emp’t & Hous. v. Lucent Techs.,*
17 *Inc.*, 642 F.3d 728, 745 (9th Cir. 2011); *see also Kelly v. Stamps.com Inc.*, 135 Cal. App. 4th
18 1088, 1097–98 (2005) (citing *Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 850–51 (2001)).
19 Thus, the moving defendant bears the initial burden to “show either that (1) plaintiff [can] not
20 establish one of the elements of the FEHA claim or (2) there [is] a legitimate, nondiscriminatory
21 reason” for its actions. *Lucent*, 642 F.3d at 745.

22 Plaintiff alleges female nurses were not disciplined for failing to give FW showers, but his
23 only support is his belief that none of the females, who were worried about bacteria from FW’s
24 open ulcers, provided showers when he was absent. At the hearing, counsel also argued that
25 plaintiff was the only nurse to care for FW but again there is no proof of this in the record.
26 Plaintiff’s belief is insufficient proof of discriminatory treatment.

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1 He also offered the declaration of union representative Roland Collins, who says he has
2 represented people accused of violations of the workplace violence policy. Declaration of Roland
3 Collins, ECF No. 69 ¶ 19. He says, for example, that Timothy Squire, a Caucasian male, punched
4 someone but yet was not required to sign an LCA; and Peter Ribarik, a Caucasian/Japanese nurse
5 shouted at a female nurse but was not disciplined at all. Both of these employees worked on 5-
6 East and were in the same supervisory chain as plaintiff. *Id.* Similarly, Carthon Johnson, an
7 African-American male nurse, assigned to the 4th floor tele-med unit, was required to take anger-
8 management classes as the result of a claim he had assertively raised concerns about his shift
9 assignments. *Id.* ¶ 20.

10 None of this establishes a prima facie case of race plus gender discrimination or rebuts
11 Kaiser's showing of a legitimate reason for the discharge, described above, as plaintiff has not
12 shown the employees allegedly receiving more favorable treatment "are similarly situated . . . in
13 all material respects." *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006). Others are "'similarly
14 situated' when they have similar jobs and display similar conduct." *Vasquez v. Cnty. of Los*
15 *Angeles*, 349 F.3d 634, 641 (9th Cir. 2003) (finding comparators not similarly situated when they
16 "did not engage in problematic conduct of comparable seriousness"). "Courts 'require that the
17 quantity and quality of the comparator's misconduct be nearly identical to prevent courts from
18 second-guessing employers' reasonable decisions and confusing apples with oranges.'" *Day v.*
19 *Sears Holding Corp.*, 930 F. Supp. 2d 1146, 1163 (C.D. Cal. 2013) (quoting *Manicca v. Brown*,
20 171 F.3d 1364, 1368 (11th Cir. 1999)).

21 Here, plaintiff has not pointed to evidence that Caucasians who were not disciplined for
22 alleged workplace violence were alleged to have violated other policies. Nevertheless, there is
23 evidence in the record that Ribarik and Squire were investigated for administering narcotics both
24 orally and intravenously within a sixty minute period. ECF No. 73-8 at 1-2. This evidence
25 ultimately does not show plaintiff could establish a prima facie case of discrimination. Although
26 Mayes, Squire and Ribarik all were alleged to have violated both the violence in the workplace
27 policy and the medication policy, there is no indication how many times Squire and Ribarik
28 administered medications both orally and intravenously, whereas there is evidence that Mayes

1 administered medications by both delivery processes twenty-one times after he had signed his
2 LCA agreeing not to do so. ECF No. 80 ¶¶ 87-89. These comparators are not sufficiently similar
3 to support plaintiff's claim of discrimination. And when there is no viable claim of
4 discrimination, there is no claim for failure to prevent discrimination. *Northrop Grumman Corp.*
5 *v. Workers' Comp. Appeals Bd.*, 103 Cal. App. 4th 1021, 1035 (2002); *Ruiz v. Sysco Corp.*, No.
6 09-CV-1824-H (MDD), 2011 WL 3300098, at *6 (S.D.Cal. July 29, 2011). Moreover, as he has
7 not established discrimination, he has not shown he will succeed on his § 1981 claim.

8 IT IS THEREFORE ORDERED that:

- 9 1. Defendants' motion for summary judgment, ECF No. 63, is granted; and
- 10 2. This case is closed.

11 DATED: June 2, 2014.

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15 UNITED STATES DISTRICT JUDGE
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