UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JAY FLEMING,

Plaintiff,

v.

PURCELL PAINTING AND COATINGS SOUTHWEST, INC., a Washington Corporation doing Business in the State of California as PURCELL P&C, LLC; et al.,

Defendants.

No. 2:13-cv-01720-KJM-EFB

ORDER

Defendant Purcell Painting and Coatings Southwest moves for summary judgment. (Def.'s Corrected Mot. Summ. J., ECF No. 29.) Plaintiff Jay Fleming opposes the motion. (Pl.'s Opp'n to Def.'s Mot., ECF No. 39.) On October 10, 2014, the court heard arguments on the motion for summary judgment. Robin Perkins appeared for plaintiff Fleming, and Paul Dayton appeared for defendant Purcell Painting. After considering the parties' arguments and supplemental authority disclosed by defendant, the court grants the motion in part and denies it in part.

In the sections below, when the parties agree a fact is undisputed, the court refers to their agreement rather than to the portions of the record supporting the agreement. When the facts are disputed, the court notes the disagreement and cites to the supporting record. The court

cites only relevant evidence and does not resolve objections unless necessary. Any objections to evidence cited here are overruled; several objections are addressed separately below.

I. EVIDENTIARY OBJECTIONS

A court may consider evidence on summary judgment as long as it is "admissible at trial." *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003). Admissibility depends not on the evidence's form, but on its content. *Block v. City of L.A.*, 253 F.3d 410, 418–19 (9th Cir. 2001) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). The party seeking admission of evidence "bears the burden of proof of admissibility." *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1004 (9th Cir. 2002). If the opposing party objects to the proposed evidence, the party seeking admission must direct the court to "authenticating documents, deposition testimony bearing on attribution, hearsay exceptions and exemptions, or other evidentiary principles under which the evidence in question could be deemed admissible . . . ." *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 385–86 (9th Cir. 2010). However, courts are sometimes "much more lenient" with the affidavits and documents of the party opposing summary judgment. *Scharf v. U.S. Atty. Gen.*, 597 F.2d 1240, 1243 (9th Cir. 1979).

The court addresses four objections in detail. First, Fleming objects to the February 10, 2012, email from Fleming to Dave Purcell thanking Purcell for his support during Fleming's removal from the Three Bridges Project. (Dayton Decl. Ex. M, ECF No. 31-1.) He contends the email is hearsay, lacks foundation, was made without personal knowledge, and calls for a legal conclusion. The court overrules the objection. "[E]mails written by a party are admissions of a party opponent and admissible as non-hearsay under Fed. R. Evid. 801(d)(2)." *In re Homestore.com, Inc. Sec. Litig.*, 347 F. Supp. 2d 769, 781 (C.D. Cal. 2004). A review of the undisputed facts and the email's contents shows it was made with Fleming's personal knowledge and calls for no legal conclusions.

Second, Fleming objects to the April 10, 2012 email from Ben Bear to Dave Purcell confirming Purcell's assessment that Fleming was a "bright young man" and deserved a raise. (Purcell Decl. Ex. B, ECF No. 22.) He contends the statement is hearsay and lacking in personal knowledge and foundation. The court overrules this objection because Dave Purcell's

statements are not offered for their truth, but as evidence of his belief regarding Fleming's professional performance. *Wagner v. Cnty. of Maricopa*, 747 F.3d 1048, 1053 (9th Cir. 2013) ("The [hearsay] bar applies only when the statements are offered to prove the truth of the fact underlying the memory or belief."). Neither does a review of the record or the email suggest any lack of foundation or personal knowledge.

Third, Fleming objects to the October 5, 2012, email from Purcell Painting's CFO to its attorney, asking the attorney about terminating the Vancouver office lease. (Dayton Decl. Ex. T, ECF No. 31-1.) Fleming contends the statement is hearsay and irrelevant. The email includes several parts. First, its subject line reads "HELP! Just signed a lease for Vancouver this week, executed it, and Ben just quit." The body includes two sentences: first "Dave now wants to shut down that office," and second, "Any ideas how to approach the property management company?" The email is not admissible to show what Dave Purcell had said on a particular date, but is admissible to show the declarant's excitement and the nature of any emergency under the "well-known exception to the hearsay exclusionary rule." *United States v. Hills*, 455 F.2d 504, 505 (9th Cir. 1972) (per curiam). *See also Yang v. Mendoza-Powers*, No. 05-417, 2009 WL 257036, at *3 (E.D. Cal. Feb. 4, 2009) (applying Fed. R. Evid. 803(2) to a written statement), *report and recommendation adopted sub nom. Bee Yang v. Mendoza-Powers*, No. 05-417, 2009 WL 1156460 (E.D. Cal. Apr. 29, 2009). The email is admissible evidence of the declarant's "state of mind," and an "intent, or plan" to escape a lease on a particular date. Fed. R. Evid. 801(1), (3). The email also is admissible to show Purcell Painting personnel formed the intent to avoid continuing the lease on October 5, 2012, their reaction to learning the office would be closed, and the circumstances driving that reaction. *Id.* It is relevant to show whether Purcell Painting intended to close the office to retaliate against Fleming or based on a legitimate intent.

Fourth, Purcell Painting objects to Fleming's statement that Bill Carver told them Dave Purcell was "pissed" and was closing the Vancouver office because Fleming was suing Dave Purcell. (Perkins Decl. Ex. A, Fleming Dep. 144:13–146:12, ECF No. 41.) Purcell Painting argues the statement is inadmissible hearsay. The statement is an example of hearsay within hearsay. *See* Fed. R. Evid. 805. At the first layer, Dave Purcell's statement to Bill Carver

is the statement of a party opponent and excluded from the hearsay rule. Fed. R. Evid. 801(d)(2). But at the second layer, Carver's statement to Fleming that Dave Purcell was "pissed" and closing the office in retaliation for Fleming's lawsuit does not fall within an exception or exclusion. The words were offered out of court, and to be relevant, must be offered to show Dave Purcell was actually "pissed" and would truly close the Vancouver office in retaliation for the lawsuit. Rule 803(3) does not except the statement because it did not describe the mental state of the declarant, Bill Carver, but rather that of Dave Purcell. Finally, Rule 801(d)(2) does not except the statement as that of a party opponent. Carver was a Purcell Painting employee, but an employee's statement must have been made "by a person whom the party authorized to make a statement on the subject," Fed. R. Evid. 801(d)(2)(C), or "by [Purcell Painting's] . . . employee on a matter within the scope of that relationship and while it existed," Fed. Evid R. 801(d)(2)(D).

Fleming, the statement's proponent, bears the burden to show its admissibility. *Pfingston*, 284 F.3d at 1004. Fleming testified in his deposition that Carver gave him "notification," on a Sunday, that Purcell Painting would close the Vancouver office. (Perkins Decl. Ex. A, Fleming Dep. 145:19–24, ECF No. 41.) Fleming testified, "Bill Carver told me that Dave was pissed at me and just going to run everything out of the Tukwila office. And he was pissed at me because I was suing him and that he was coming down to close the office on Monday morning." (*Id.* at 146:2–6.) These facts are insufficient to show Carver had Purcell Painting's authorization to make the statement, made it on behalf of Purcell Painting, or made it in his capacity as an employee and supervisor, and Fleming has made no argument to satisfy his burden that this exclusion may apply. *See Jaramillo v. Colo. Judicial Dep't*, 427 F.3d 1303, 1314 (10th Cir. 2005) ("In order for a statement to qualify as an admission of a party opponent, the speaker 'must be involved in the decisionmaking process affecting the employment action involved.'" (quoting *Aliotta v. Nat'l R.R. Passenger Corp.*, 315 F.3d 756, 762 (7th Cir. 2003))); *Pfingston*, 284 F.3d at 1004 (excluding a statement as outside the scope of Rule 801(d)(2)(D) because the proponent had not provided evidence the declarant's job duties had anything to do with the statement in question); *Harris v. Itzhaki*, 183 F.3d 1043, 1054 (9th Cir. 1999) ("Federal Rule of Evidence . . . 801(d)(2)(D) requires the proffering party to lay a foundation to show that

an otherwise excludable statement relates to a matter within the scope of the agent's employment."); 5 Weinstein's Fed. Evid. § 801.33[2][c] (2d ed.) ("In [cases of employment discrimination] many courts have held that the declarant must be among the persons who made the employment decisions in question . . . ."). Because Fleming has the burden to show the statement is admissible, and he has not, the objection is sustained.

II. FACTUAL RECORD

Purcell Painting hired Jay Fleming in July 2011 to work as a project site manager cleaning and painting three bridges in California (the Three Bridges Project). (Def.'s Resp. to Pl.'s Separate Statement of Material Facts at 2 ¶ 2, ECF No. 37.) Purcell Painting, in turn, had been hired as a subcontractor by Santa Margarita Construction Corporation (SMCC), the general contractor for CalTrans. (*Id.* at 2 ¶ 3.) On January 27, 2012, Fleming received written complaints from two Purcell Painting employees, who objected to racially discriminatory remarks made by the SMCC Vice President of Operation, John Brukiewicz. (Pl.'s Opp'n to Def.'s Separate Statement of Material Facts ¶ 17, ECF No. 42.) Fleming immediately passed these complaints to his supervisor at Purcell Painting, Ben Bear, and to a CalTrans employee, Bill Brooks. (Def.'s Resp. to Pl.'s Separate Statement of Material Facts at 4 ¶ 8, ECF No. 37.) The parties dispute the significance of Fleming's delivery of these complaints to CalTrans. (*Id.*; Pl.'s Opp'n to Def.'s Separate Statement of Material Facts ¶ 20, ECF No. 42.)

On January 28, 2012, SMCC issued notice of several contract violations and invoked a clause in its contract with Purcell Painting to remove Fleming from the job site. (Def.'s Resp. to Pl.'s Separate Statement of Material Facts at 4 ¶ 11, ECF No. 37.) That same day, Fleming emailed Dave Purcell, president of Purcell Painting, describing discrepancies in SMCC's alleged violations. (*Id.* at 5 ¶ 13.) Dave Purcell sent a letter to SMCC requesting Fleming stay on the job site and describing SMCC's actions as retaliatory. (Pl.'s Opp'n to Def.'s Separate Statement of Material Facts ¶ 31, ECF No. 42; Dayton Decl. Ex. K, at 1, ECF No. 31-1). On February 1, Fleming emailed Ben Bear, suggesting he be transferred to Purcell Painting's Vancouver office, where he could manage the Three Bridges Project remotely. (Dayton Decl. Ex. A, Fleming Dep. at 108:19–109:3, ECF No. 31.) The parties dispute whether Fleming's move to

Vancouver cost him wages he would have earned if he had stayed on the Three Bridges jobsite. (Def.'s Resp. to Pl.'s Separate Statement of Material Facts at 6 ¶ 19, ECF No. 37; Pl.'s Opp'n to Def.'s Separate Statement of Material Facts ¶¶ 39, 42, ECF No. 42.)

On February 10, 2012, Fleming sent an email to Dave Purcell thanking Purcell for his support during Fleming's removal from the Three Bridges Project. (Dayton Decl. Ex. M, ECF No. 31-1.) After two months of Fleming's managing the Three Bridges Project from Vancouver, Purcell praised Fleming's work and agreed to give Fleming a raise and a bonus if the project were completed below budget. (Purcell Decl. Ex. B, ECF No. 32.) Nevertheless, as the project continued, the tenor of Fleming and Dave Purcell's relationship "completely declined." (Def.'s Resp. to Pl.'s Separate Statement of Material Facts at 6 ¶ 20, ECF No. 37.) On August 8, 2012, Dave Purcell called Fleming, said that he was tired of Fleming's excuses, and demanded Fleming stop complaining about his removal from the California jobsite. (*Id.* at 7 ¶¶ 21, 22; Perkins Decl., ECF No. 41 at 44 (unmarked exhibits).)

On October 4, 2012, Fleming mailed a demand letter to Dave Purcell, outlining various employment claims against Purcell Painting. (Def.'s Resp. to Pl.'s Separate Statement of Material Facts at 7 ¶ 23, ECF No. 37.) On October 5, Ben Bear, the Vancouver Office Manager, submitted his resignation notice and Purcell Painting began exploring options for closing the Vancouver office. (Moynan Decl. Ex. C, ECF No. 36; Dayton Decl. Ex. T, ECF No. 31-1). Fleming's attorney agreed at the hearing on this motion that Fleming's October 4, 2012 letter could not have reached Dave Purcell before October 5. On November 5, 2012, Purcell Painting closed its Vancouver office and terminated Fleming. (Pl.'s Opp'n to Def.'s Separate Statement of Material Facts ¶ 50, ECF No. 42.)

Fleming filed a complaint in this court on August 20, 2013, alleging violations of section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e-3(a) (Title VII), the California Fair Employment and Housing Act, Cal. Gov't Code § 12940(h) (FEHA), and California Labor Code section 1102.5 (section 1102.5). (Pl.'s Compl. ¶¶ 22, 27, 34, ECF No. 1.) Fleming also alleged wrongful termination in violation of public policy and intentional infliction of emotional distress. (*Id.* ¶¶ 39, 45). He has exhausted all administrative remedies with the

California Department of Fair Housing and Employment and the Equal Employment Opportunity Commission. (*Id.* ¶¶ 19, 20.) Purcell Painting filed this corrected motion for summary judgment on September 5, 2014. (ECF No. 29.) Fleming responded on September 29, 2014 (ECF No. 39), and Purcell Painting replied on October 3, 2014 (ECF No. 46).

III. STANDARD

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

The moving party bears the initial burden of showing the district court "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The burden then shifts to the nonmoving party, which "must establish that there is a genuine issue of material fact . . . ." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986). In carrying their burdens, both parties must "cit[e] to particular parts of materials in the record . . . ; or show [] that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1); *see also Matsushita*, 475 U.S. at 586 ("[the nonmoving party] must do more than simply show that there is some metaphysical doubt as to the material facts"). Moreover, "the requirement is that there be no *genuine* issue of *material* fact . . . . Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 247–48 (emphasis in original).

In deciding a motion for summary judgment, the court draws all inferences and views all evidence in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587–88; *Whitman v. Mineta*, 541 F.3d 929, 931 (9th Cir. 2008). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine

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issue for trial.'" *Matsushita*, 475 U.S. at 587 (quoting *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)).

IV. DISCUSSION

A. Title VII

Under Title VII, an employer may not discriminate against any individual because "he has opposed any practice made an unlawful employment practice by this subchapter, or because he has . . . participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C § 2000e-3(a). To establish a prima facie claim for retaliation under Title VII, a plaintiff must show (1) the employee engaged in a protected activity, (2) the employer subjected the employee to an adverse action, and (3) a causal link exists between the protected activity and the employer's action. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1124 (9th Cir. 2004). If a prima facie retaliation claim is established, the "burden shifting" scheme described in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies. *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1066 (9th Cir. 2003), *as amended* (Jan. 6, 2004). "[T]he requisite degree of proof necessary to establish a prima facie case for Title VII . . . claims on summary judgment is minimal." *Coghlan v. Am. Seafoods Co. LLC.*, 413 F.3d 1090, 1094 (9th Cir. 2005) (internal quotations omitted).

Under *McDonnell Douglas*, once the plaintiff makes out a prima facie case of retaliation, "the burden shifts to [the defendant] to articulate a legitimate, non-discriminatory reason for the adverse employment action." *Manatt v. Bank of Am., N.A.*, 339 F.3d 792, 800 (9th Cir. 2003). If the defendant articulates such a reason, the plaintiff "bears the ultimate burden of demonstrating that the reason was merely a pretext for a discriminatory motive." *Stegall*, 350 F.3d at 1066. If there is no direct evidence of discrimination, the plaintiff "must proffer 'specific' and 'substantial' evidence of pretext" to overcome a summary judgment motion. *Id.*

Fleming essentially alleges three theories of retaliation under Title VII: first, his reporting the SMCC conduct in January, followed by his immediate removal from the jobsite at SMCC's direction; second, his reporting SMCC's discriminatory conduct in January, followed by his termination by Purcell in late 2012; and third, his demand letter to Purcell in October,

followed by Purcell Painting's decision to close the Vancouver office and terminate him. The court first considers, for each theory of retaliation, the three parts of a prima facie case: a protected activity, adverse action, and causation. Then the court determines whether Purcell Painting has presented a legitimate, nondiscriminatory reason for the alleged adverse action, and if so, whether that legitimate reason is mere pretext.

1. Protected Activity

As a preliminary matter, Fleming did not engage in protected activity under the participation clause of Title VII. *See* 42 U.S.C. § 2000e-3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has . . . participated in any manner in an investigation, proceeding, or hearing under this subchapter."). The purpose of that clause is to protect employees who "utilize[] the tools provided by Congress to protect [their] rights." *Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990). Accordingly, conduct under the participation clause is only protected if the conduct is part of a Title VII proceeding, such as an Equal Employment Opportunity Commission hearing. *Id.* Although Fleming urges the court to interpret the participation clause broadly (Pl.'s Opp'n to Def.'s Mot. at 7, ECF No. 39), there is no evidence that a proceeding under Title VII occurred or that the plaintiff participated in such a proceeding.

Beyond the participation clause, under Title VII, an employee engages in protected conduct when he or she opposes an unlawful employment practice of his or her employer. 42 U.S.C § 2000e-3(a). Opposition must be toward an employer, not a third party. *Folkerson v. Circus Circus Enters.*, 107 F.3d 754, 755 (9th Cir. 1997). Opposition carries its ordinary meaning, "to resist or antagonize . . . to contend against; to confront; resist; withstand." *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271, 276, (2009) (alteration in original) (internal quotation marks and citations omitted). Informal complaints to an employer constitute a protected activity under Title VII. *Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493, 506 (9th Cir. 2000). Two actions may be protected activity here. First, on January 27, 2012, Fleming reported the discriminatory conduct of an SMCC employee to

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CalTrans (Pl.'s Opp'n to Def.'s Mot. at 8, ECF No. 39), and second, in October 2012, Fleming sent a demand letter to Dave Purcell (*id.* at 8-9). The court considers each possibility in turn.

a) Protected Activity in January

The first element of a Title VII prima facie case requires essentially a dual showing: first, that the employee "opposed" conduct; and second, that the discriminatory conduct opposed was the employer's or could be imputed to it. *See Folkerson*, 107 F.3d at 755. As described above, "opposition" means "to resist . . . to contend against; to confront." *Crawford*, 555 U.S. at 276. It is undisputed that Fleming received complaints from two Purcell Painting employees and delivered them to CalTrans in January. (Pl.'s Opp'n to Def.'s Separate Statement of Material Facts ¶ 17, ECF No. 42.) The parties dispute the significance of this act under Title VII and whether it would constitute a protected activity. (Def.'s Resp. to Pl.'s Separate Statement of Material Facts at 4 ¶ 8, ECF No. 37.) As opposition under Title VII carries its ordinary meaning, a reasonable trier of fact could find Fleming's acts on January 27 constituted opposition.

To be protected, however, Fleming's actions must also have been directed at his employer's unlawful practice. *Folkerson*, 107 F.3d at 755. John Bruckewicz was not a Purcell Painting employee, so Purcell Painting did not directly engage in an unlawful employment practice when Bruckewicz made discriminatory remarks. Under certain circumstances, however, "the discriminatory acts of persons other than the employer will be imputed to the employer constituting an unlawful employment practice of the employer." *Id.* In order to impute the discriminatory acts to the employer, the employee must show that the employer "ratified or acquiesced" in the discriminatory conduct. *Id.* at 756. The employee need only show his or her "reasonable belief" that the employment practice opposed was prohibited under Title VII. *Trent v. Valley Elec. Ass'n Inc.*, 41 F.3d 524, 526 (9th Cir. 1994). Here, Fleming had a reasonable belief that SMCC's conduct violated Title VII. But to make out a prima facie case, Fleming must also provide evidence to show Purcell Painting ratified or acquiesced in SMCC's harassment. *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Cir. 1978) ("[N]ot every act by an employee in

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opposition to . . . discrimination is protected. The opposition must be directed at an unlawful employment practice of an employer, not an act of discrimination by private individual.").

In *Trent*, the Ninth Circuit imputed the discriminatory conduct of a subcontractor to the plaintiff's employer. 41 F.3d at 527. The plaintiff's employer brought the subcontractor to the workplace to teach a safety class, one the employer required the plaintiff to attend. *Id.* at 525. The plaintiff complained to her employer, but the employer took no action to remove the plaintiff from the discriminatory environment. *Id.* The Ninth Circuit held it was reasonable for the plaintiff to believe she would be protected from discrimination while attending the required class and found she had sufficiently opposed the conduct by reporting it to her employer. *Id.* at 526.

Recently in *Tamosaitis v. URS Inc.*, the Ninth Circuit has decided the case of an employee who brought a claim under 42 U.S.C. § 5851(b)(4), a whistleblower provision of the Energy Reorganization Act. 771 F.3d 539, 543 (9th Cir. 2014). The employer had contracted with a third party and the Department of Energy to complete a waste treatment plant at a former nuclear weapons production facility. *Id.* at 544. The employer transferred the plaintiff at the demand of the third party after plaintiff "brought a fifty-point list of environmental and safety concerns" to a meeting with the third party and emailed several project consultants about his concerns. *Id.* at 544–55. The employer stipulated the plaintiff had engaged in protected activity and was retaliated against because of the protected activity. *Id.* at 552. The Ninth Circuit cited *Folkerson* to hold that the employer ratified the third party's retaliation by transferring the plaintiff. *Id.* at 554.

Fleming contends he opposed discrimination by reporting the conduct of someone other than his employer, directed toward other employees, and reported the conduct to someone other than his employer. He has not directly argued SMCC's discriminatory conduct should be imputed to Purcell Painting; rather, he contends that he engaged in a protected activity by reporting the comments of an SMCC employee to CalTrans, and later to his Purcell Painting Supervisor. (Pl.'s Opp'n to Def.'s Mot. at 8, ECF No. 39.)

Despite the absence of a clear argument for imputation in Fleming's briefing, the court must draw all reasonable inferences in his favor. *Matsushita*, 475 U.S. at 587–88. Fleming

reported that an SMCC employee discriminated against two of his coworkers. SMCC later demanded Fleming be removed. Dave Purcell at first protested and suggested SMCC's demand appeared retaliatory, but then removed Fleming nonetheless. Whether this removal was at Fleming's suggestion and whether SMCC's demand was in fact retaliatory are questions a reasonable trier of fact may resolve in favor of either party. Summary judgment is not proper.

Folkerson may plausibly be read to contradict this result. In *Folkerson*, the Ninth Circuit held the Title VII plaintiff "must show sufficient facts to impute the actions of the [third party] to her employer." 107 F.3d at 756. It concluded on the record before it that the plaintiff had not met this burden. *Id.* Although the plaintiff was terminated, the court did not conclude the adverse act, termination, was sufficient evidence of the employer's ratification or acquiescence. *Id.* at 755–56. From this holding, one might conclude a plaintiff may not use evidence of an adverse action to meet the requirement of the first element of a Title VII prima facie case, opposition to the employer's action. But more than the plaintiff's termination was in evidence in *Folkerson*. There, the casino had taken "reasonable steps to ensure [the plaintiff's] safety from customer harassment," and the plaintiff had responded to the third party's sexual harassment with violence. *Id.* at 756. The Ninth Circuit's holding in *Tamosaitis* resolves *Folkerson's* ambiguity. Citing *Folkerson*, the *Tamosaitis* court concluded that a transfer, despite knowledge of a retaliatory motive, supported a reasonable inference that the employer ratified the third party's acts. 771 F.3d at 554.

In summary, Fleming has provided sufficient evidence to allow a reasonable inference that Purcell Painting ratified or acquiesced in SMCC's discriminatory conduct, and that he opposed this conduct.

b) Protected Activity in October

Fleming's October 4, 2012 demand letter is a second possible instance of protected activity. Protected activity includes the informal expression of opposition to alleged unlawful employment practices of the employer including verbal complaints to a supervisor. *See Passantino*, 212 F.3d at 506; *Folkerson*, 107 F.3d at 755. In his October 4, 2012 demand letter, Fleming outlines his allegations of retaliation and opposes his removal from the jobsite. (Perkins

Decl. unmarked exhibits, at 57–59, ECF No. 41.) No imputation is necessary here because the letter opposes an alleged unlawful employment practice, namely retaliation by termination, by the employer Purcell Painting, rather than a third party's discrimination. As a result, it is sufficient that Fleming had a reasonable good faith belief in his retaliation claim. *Trent*, 41 F.3d at 526. Because the letter warns of a possible lawsuit, it constitutes an expression of opposition to defendant's conduct. Fleming engaged in protected activity by sending the demand letter on October 4.

2. Adverse Action

Fleming presents two possible adverse actions: first, his removal from the jobsite, which allegedly resulted in lost income; and second, termination of his employment. (Pl.'s Opp'n to Def.'s Mot. at 8–9, ECF No. 39.) The Ninth Circuit "take[s] an expansive view" of adverse actions under Title VII. *Ray v. Henderson*, 217 F.3d 1234, 1241 (9th Cir. 2000). "[A]ny adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity" is actionable under Title VII. *Id.* at 1242–43 (declining to adopt the more restrictive "materially affects the terms and conditions of employment" standard as preclusive of adverse actions such as retaliatory job references).

Fleming contends his removal from the Three Bridges jobsite was an adverse action. (Pl.'s Opp'n to Def.'s Mot. at 9, ECF No. 39.) A removal or transfer is an adverse action because other employees could be deterred from reporting similar conduct out of fear of removal and possibly lost wages. *See Ray*, 217 F.3d at 1242–43 (defining "adverse employment action" to include "lateral transfers, unfavorable job references, and changes in work schedules"). Although Purcell Painting does not dispute Fleming was removed from the Three Bridges job site (Def.'s Resp. to Pl.'s Separate Statement of Material Facts at 6 ¶ 17, ECF No. 37), it does dispute whether Fleming lost any income as a result of moving to Vancouver. (*Id.* at 12 ¶ 19.) This disagreement creates a factual dispute the court cannot resolve at this stage. *Anderson*, 477 U.S. at 250. The court makes the appropriate inference, in favor of Fleming as the non-moving party, and assumes he suffered an adverse action under Title VII. *Matsushita*, 475 U.S. at 587–88.

With respect to the second possible adverse action, Fleming's termination is an "ultimate employment action" constituting an adverse action. *See Ray*, 217 F.3d at 1242. Purcell Painting does not dispute that on November 4, 2012 plaintiff was laid off. (Def.'s Resp. to Pl.'s Separate Statement of Material Facts at 13 ¶ 24, ECF No. 37.)

In summary, both Fleming's removal from the jobsite and his termination are adverse employment actions here.

3. Causal Relationship

"Title VII retaliation claims must be proved according to traditional principles of but-for causation. . . . This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Univ. of Texas Sw. Med. Cent. v. Nassar*, __ U.S.___, 133 S. Ct. 2517, 2533 (2013). "Causation sufficient to establish the third element of the prima facie case may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision." *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987). Although causation is construed broadly at the summary judgment stage, timing alone is not always sufficient. The adverse action must occur "fairly soon" after the employee's protected expression. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) (holding eighteen months was too long to support an inference of causation).

Fleming must describe a causal link between each instance of protected activity and each adverse action. Here there are two alleged instances of protected activity and two alleged adverse actions. First, Fleming has established the required causal link between his January 2012 reports and his removal from the California jobsite, but not to his later termination. Second, Fleming has established a sufficient causal link between his demand letter and termination.

a) Causal Links to January Protected Conduct

Assuming Fleming engaged in protected activity in January 2012, he must establish a connection to his removal from the California jobsite. Purcell Painting does not

dispute Fleming was removed from the jobsite on or about January 30. (Def.'s Resp. to Pl.'s Separate Statement of Material Facts at 6 ¶ 17, ECF No. 37.) This close proximity in time, coupled with the court's obligation to construe causation broadly, establishes an inference that Fleming was removed in retaliation for reporting discriminatory conduct. *Cf. Yartzoff*, 809 F.2d at 1376.

Fleming has not, however, established a causal nexus over the nine month gap between the time he reported discriminatory conduct, at the end of January, and his termination, in early November. *Villiarimo*, 281 F.3d at 1065 (citing with approval several cases from other circuits in which periods between protected activity and adverse action ranging from four to eight months were too long to establish a causal nexus without additional evidence). This is especially true in light of the fact that Dave Purcell agreed to give Fleming a raise and praised his work in an email in April 2012, which was more than two months after Fleming reported the discrimination to CalTrans. (Purcell Decl. Ex. B, ECF No. 22.)

Fleming contends his deteriorating relationship with Dave Purcell, encapsulated in a belligerent August 2012 phone call, demonstrates the required causal nexus. (Pl.'s Opp'n to Def.'s Mot. at 10, ECF No. 39.) The substance of the August phone call, although vulgar and demeaning, does not support a finding of retaliation. Fleming must establish that but for his report of discrimination, he would not have been terminated in later 2012. *See Nassar*, 133 S. Ct. at 2533. Nothing in the phone call suggests this connection or allows any inference of retaliation. Dave Purcell may have been unjustifiably angry and verbally explosive, but Fleming only describes Dave Purcell's statements in the context of Fleming's performance as project manager. (Perkins Decl. unmarked exhibits, ECF No. 41 at 44.) According to Fleming's description of the phone call, Dave Purcell brought up Fleming's removal from the jobsite only to the extent Fleming complained about it, and not to say he, Dave Purcell, sought to retaliate for Fleming's reporting discrimination, or even that he cared about the alleged discrimination. (*Id.*) Fleming, in fact, testified that he did not believe Dave Purcell cared about his report of discriminatory conduct. (Dayton Decl. Ex. A, Fleming Dep. at 163:19–21, ECF No. 31.) No evidence supports

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a causal chain between Fleming's January reports and November termination, and Fleming has not established this third element of his prima facie case.

b) Causal Link to October Protected Conduct

On the other hand, because only one month elapsed between October 4, 2012, and Fleming's termination on November 5, 2012, Fleming has established his prima facie case for purposes of this motion.

4. Nondiscriminatory Motive and Pretext

Once a plaintiff establishes a prima facie case under Title VII, the burden shifts to the defendant to provide evidence of a non-retaliatory motive. *Manatt*, 339 F.3d at 800. If a legitimate reason for the adverse action is established, the burden switches back to the plaintiff to provide specific evidence that the legitimate reason is mere pretext. *Stegall*, 350 F.3d at 1066.

In the first instance, Fleming's transfer in early 2012, Purcell Painting contends its contract with SMCC required it to comply with SMCC's request to remove Fleming from the jobsite. (Def.'s Corrected Mot. Summ. J. at 15–16, ECF No. 29.) Fleming offers no evidence to show Purcell Painting's pointing to the contract is pretextual, and only submits that a clause in a private contract should not permit illegal retaliation. (Pl.'s Opp'n to Def.'s Mot. at 11, ECF No. 39.) That said, an employer who argues it has no choice but to transfer an employee at the demand of a third party has not necessarily provided evidence of a non-retaliatory motive. *Tamosaitis*, 771 F.3d at 552-53 (citing *Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602, 609 (9th Cir. 1982) and *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981)). Purcell Painting's contract with SMCC allowed SMCC to remove a Purcell Painting employee if SMCC "determine[d] that [Purcell Painting] or any persons under employ of [Purcell Painting] are conducting themselves in a manner deemed to be unacceptable to the operations of the Project . . . ." (Def.'s Corrected Mot. Summ. J. 10:1–4, ECF No. 29.) A reasonable trier of fact could conclude that a purely retaliatory demand to remove Fleming does not fall within this definition, and that reporting discrimination is not "unacceptable to the operation" of the Three Bridges Project. *See also Tamosaitis*, 771 F.3d at 553–54. Thus Purcell Painting has not met its burden to show a legitimate motive, and summary judgment cannot be granted on this claim.

In the second instance, Fleming's termination in late 2012, Purcell Painting contends it closed its Vancouver office and terminated Fleming following the resignation of Ben Bear, its office manager, and not to retaliate against Fleming. (Def.'s Corrected Mot. Summ. J. at 16, ECF No. 29.) At the October 10, 2014, hearing on this motion, Fleming's attorney conceded Fleming's demand letter reached Purcell after Purcell Painting formulated an intent to close its Vancouver office, where Fleming worked at the time. Thus it is undisputed Purcell Painting intended to close the Vancouver office because the office manager, Ben Bear, resigned, not because of a lawsuit. (Dayton Decl. Ex. T, ECF No. 31-1 (email from Purcell Painting's CFO to Purcell Painting's attorney asking attorney about getting out of Vancouver office lease).) Fleming has offered no direct or specific evidence these explanations are pretext. The October demand letter arrived after Purcell Painting had decided to close the office. And as discussed above, Fleming's August phone call with Dave Purcell shows only that the two had a poor working relationship, that Dave Purcell was not satisfied with Fleming's performance, and that Purcell believed Fleming used his transfer as an excuse for poor performance. Because Fleming did not provide any specific evidence that his removal was mere pretext, his case for retaliation, whether based on the January reports or the October demand letter, does not meet the requirements of Title VII. *Stegall*, 350 F.3d at 1066. Summary judgment must be granted on this claim.

5. Summary

There are genuine disputes of material fact as to whether (1) Fleming engaged in protected conduct by reporting Bruckewicz's conduct to CalTrans, (2) his transfer was an adverse employment action, (3) Fleming's opposition was the cause of his transfer, and (4) whether Purcell Painting had a legitimate motivation to transfer Fleming. Purcell Painting's motion is denied as to the Title VII claim related to Fleming's January 2012 reports of discrimination and his removal from California. Fleming has not established a causal link between his January reports and his later termination, however, and he has not put forward specific and substantial evidence that Purcell Painting's explanation of its legitimate motives to close the Vancouver

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office were mere pretext. Purcell Painting's motion for summary judgment on the Title VII claim must be granted as to these claims.

B. FEHA

California courts generally look to the federal courts' interpretation of Title VII for guidance when interpreting the FEHA. *See Kohler v. Inter-Tel Technologies*, 244 F.3d 1167, 1172 (9th Cir. 2001) (collecting California authorities). "Lawsuits claiming retaliatory employment termination in violation of FEHA are analogous to federal Title VII claims." *Flait v. North American Watch Corp*., 3 Cal. App. 4th 467, 475 (1992). An analysis under the FEHA therefore mirrors that described above under Title VII. Purcell Painting's motion for summary judgment is granted and denied to the same extent.

C. California Labor Code Section 1102.5

As a preliminary matter, Fleming did not specify in his pleadings which subsection of California Labor Code section 1102.5 Purcell Painting allegedly violated. (Pl.'s Opp'n to Def.'s Mot. at 7, ECF No. 39; Pl.'s Compl. ¶ 34, ECF No. 1.) At the hearing, Fleming conceded subsection (a) was inapplicable. To the extent Fleming alleges a violation of section 1102.5(a), the court grants summary judgment.

California Labor Code section 1102.5(b) provides, "An employer . . . shall not retaliate against an employee for disclosing information . . . to a government or law enforcement agency . . . if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute . . . ." Section 1102.5(b) should be construed consistently with its broad purpose of "encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation." *McVeigh v. Recology San Francisco*, 213 Cal. App. 4th 443, 468, 471 (2013).

California courts require section 1102.5(b) plaintiffs to satisfy the same three elements as Title VII plaintiffs: the plaintiff must show he or she (1) engaged in a protected activity, (2) suffered an adverse employment action, and (3) show a causal link between the protected activity and adverse action. *Jadwin v. County of Kern*, 610 F. Supp. 2d 1129, 1152 (E.D. Cal. 2009) (citation omitted); *Patten v. Grant Joint Union High Sch. Dist.*, 134 Cal. App.

4th 1378, 1384 (2005). If a plaintiff establishes a prima facie case, a court also follows the same burden-shifting process as in a Title VII case. *Mokler v. County of Orange*, 157 Cal. App. 4th 121, 138 (2007). The defendant must provide a legitimate reason for the adverse action, and the plaintiff may rebut that showing with specific evidence that the justification was mere pretext. *Id.*

An employee engages in protected activity under section 1102.5(b) when he or she "discloses to a *governmental agency* reasonably based suspicions of illegal activity." *Jadwin*, 610 F. Supp. 2d at 1153 (*citing Mokler*, 157 Cal. App. 4th at 138) (emphasis in *Jadwin*). As a threshold matter, the court finds that CalTrans is a government agency. Plaintiff asserted this fact in his opposition (Pl.'s Opp'n to Def.'s Mot. at 7, ECF No. 39), and defendant does not dispute it. Whereas Title VII requires a plaintiff show he or she opposed an employer's unlawful employment practice, section 1102.5 does not. Section 1102.5(b) casts a wider net, protecting an employee whenever the employee reports his or her employer's unlawful conduct, conduct of third parties, and conduct of contractors. *See McVeigh*, 213 Cal. App. 4th at 471.

Here, Fleming engaged in protected activity under section 1102.5(b) when he reported unlawful discrimination to CalTrans. This is all section 1102.5(b) requires. *Jadwin*, 610 F. Supp. 2d at 1153. The court is not persuaded otherwise by Purcell Painting's reference to the *Patten v. Grant Union High School District*, 134 Cal. App. 4th 1378, 1384 (2005). In *Patten*, the school principal reported complaints of inappropriate conduct by teachers to the school district's administration. *Id.* at 1382, 84. The court held this was not protected conduct because "the disclosures indisputably encompassed only the context of internal personnel matters involving a supervisor and her employee, rather than the disclosure of a legal violation." *Id.* at 1384–85. Here, Fleming was not SMCC's employee, and Fleming reported discrimination to a government agency, CalTrans, which was not his employer. This is not a *Patten*-like case involving mere "personnel matters" in which the plaintiff, defendant, and all the actors worked for the same employer.

The court's analysis regarding the remaining portions of the prima facie case for retaliation under section 1102.5(b) mirrors the Title VII analysis above. However, because Fleming's report to CalTrans satisfies only section 1102.5(b)'s requirements for protected

activity, Fleming may proceed only on claims arising from that report, and only with regard to his transfer.

D. Termination in Violation of Public Policy

"[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." *Tameny v. Atl. Richfield Co.*, 27 Cal. 3d 167, 170 (1980). The elements of a prima facie case of termination in violation of public policy are (1) an employer-employee relationship, (2) a termination or other adverse employment action, (3) the termination's violation of public policy, (4) a legal causal relationship between the adverse action and the plaintiff's damages, and (5) damages of sufficient nature and extent. *Scott v. Solano Cnty. Health & Soc. Servs. Dep't*, 459 F. Supp. 2d 959, 967 (E.D. Cal. 2006) (citing *Holmes v. General Dynamics Corp.*, 17 Cal. App. 4th. 1418, 1426 (1993)). The policy in question "must involve a matter that affects society at large rather than a purely personal or proprietary interest of the plaintiff or employer." *Gilmore v. Union Pac. R. Co.*, 857 F. Supp. 2d 985, 986 (E.D. Cal. 2012), *recons. denied in part*, No. 09-2180, 2012 WL 3205233 (E.D. Cal. Aug. 2, 2012), *overruled on other grounds by Green v. Ralee Eng. Co.*, 19 Cal. 4th 66, 80 n.6 (1998). The policy underlying a discharge claim may be based in federal statutory or administrative law. *Green*, 19 Cal. 4th at 87–88.

As in a Title VII case, a plaintiff alleging wrongful termination in violation of public policy must establish his prima facie case by showing "(1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action." *Miller v. AmeriGas Partners, L.P.*, No. 12-2974, 2014 WL 1096705, at *6 (E.D. Cal. Mar. 19, 2014) (citations and internal quotation marks omitted), *recons. denied*, 2014 WL 3362368 (July 8, 2014). Similarly, "[w]hen a plaintiff alleges retaliatory employment termination . . . as a claim for wrongful employment termination in violation of public policy, and the defendant seeks summary judgment, California follows the burden shifting analysis of *McDonnell Douglas Corp*

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v. Green to determine whether there are triable issues of fact for resolution by a jury." *Loggins*, 151 Cal. App. 4th at 1108-09 (citation omitted).

"Wrongful termination cases typically arise when an employer retaliates against an employee for refusing to violate a statute, . . . [for] exercising a statutory right, or [for] reporting an alleged violation of a statute of public importance." *Gould v. Maryland Sound Indus., Inc.*, 31 Cal. App. 4th 1137, 1147 (1995), *as modified* (Feb. 9, 1995). There is no question a termination in retaliation for reporting discriminatory conduct violates public policy. *Garcia v. Rockwell Internat. Corp.*, 187 Cal. App. 3d 1556, 1561 (1986), *abrogated on other grounds by Gantt v. Sentry Ins.*, 1 Cal. 4th 1083 (1992).

Here, Purcell Painting concedes Fleming was terminated. (Def.'s Corrected Mot. Summ. J. at 17–18, ECF No. 29.) Purcell Painting does not address the existence of an employer-employee relationship between itself and Fleming, whether the termination in November was the legal cause of Fleming's damages, or the nature and extent of Fleming's damages from his November termination. (*Id.*) But because Fleming has not established his report of discriminatory conduct or demand letter caused his termination, and because he has not offered sufficient evidence of pretext, the court grants Purcell Painting's motion for summary judgment as to this claim.

E. Intentional Infliction of Emotional Distress

The elements of a claim for intentional infliction of emotional distress are: "(1) extreme and outrageous conduct by the defendant with the intent of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." *Wynes v. Kaiser Permanente Hospitals*, 936 F. Supp. 2d 1171, 1194 (E.D. Cal. 2013) (citing *Christensen v. Superior Court*, 54 Cal. 3d 868, 903 (1991)). The employer's conduct must be more than "mere profanity, obscenity, or abuse, without circumstances of aggravation . . . ." *Yurick v. Superior Court*, 209 Cal. App. 3d 1116, 1128 (1989). The conduct must normally be so extreme and outrageous as to go "beyond all possible bonds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized

community." *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal. 3d 493, 499 n.5 (1970) (quoting Restatement (Second) of Torts § 46 com. d (1965)). Moreover, "even where improper motivation underlies personnel management decisions, the remedy is not in an IIED claim, but in a suit against the employer for discrimination." *Wynes*, 936 F. Supp. 2d at 1194.

Here, Fleming has not pointed to any evidence beyond Dave Purcell's insults and indignities on one noted occasion. He has not offered any evidence of Purcell Painting's "outrageous conduct beyond the bounds of human decency," *Alcorn*, 2 Cal. 3d at 499 n.5, no evidence he suffered extreme emotional distress, and no evidence Purcell Painting's conduct caused his distress. The motion for summary judgment as to this claim is also granted.

V. CONCLUSION

For the foregoing reasons, the court GRANTS Purcell Painting's motion for summary judgment in part and DENIES it in part:

(1) Purcell Painting's motion is DENIED as to the Title VII, FEHA, and section 1102.5(b) claims arising from Fleming's January 2012 reports of discrimination and his transfer from the Three Bridges Project; and

(2) Purcell Painting's motion is GRANTED as to all other claims.

IT IS SO ORDERED.

DATED: December 29, 2014.

UNITED STATES DISTRICT JUDGE