

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

TIMOTHY PRUITT,

Plaintiff,

v.

GENENTECH, INC., a Delaware
Corporation; and DOES 1-10,
inclusive,

Defendants.

No. 2:17-cv-00822-JAM-AC

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT
GENENTECH'S MOTION TO DISMISS &
MOTION TO STRIKE**

17

18

19

20

21

22

23

24

25

26

27

28

Plaintiff Timothy Pruitt brings a number of state and federal claims against Genentech, Inc., ("Genentech") and DOES 1-10 (collectively, "Defendants"). Genentech now moves to dismiss two of those claims, moves to strike Pruitt's injunctive relief request, and moves to strike all DOE defendants. Mot., ECF No. 4. Pruitt concedes striking DOE defendants, but opposes everything else. Opp'n, ECF No. 12. For reasons explained below, the Court GRANTS in part and DENIES in part Genentech's motion.¹

¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for July 11, 2017. In deciding this motion, the Court takes as true all well-pleaded facts in the operative complaint.

1 I. BACKGROUND

2 Pruitt sues Defendants for allegedly violating several state
3 and federal employment laws. See generally Compl., ECF No. 1
4 (attached to Notice of Removal as Ex. A). He brings ten causes
5 of action. The first three concern various Fair Employment and
6 Housing Act ("FEHA") violations, including disability
7 discrimination (claim one), race discrimination (claim two), and
8 retaliation (claim three). See id. at 9-10. Pruitt also brings a
9 California whistleblower claim (claim four). See id. at 11. He
10 sues Defendants for two California Family Rights Act ("CFRA")
11 violations—interference (claim five) and retaliation (claim six).
12 See id. at 11-12. Pruitt also brings federal claims, suing
13 Defendants for Federal and Medical Leave Act ("FMLA")
14 interference (claim seven) and retaliation (claim eight). See
15 id. at 12-13. Pruitt sues for wrongful termination in violation
16 of public policy (claim nine). See id. at 13. And, finally,
17 Pruitt sues for defamation (claim ten). See id. at 13-14.

18 Now before the Court is Genentech's motion to dismiss
19 Pruitt's whistleblower and defamation claims, to strike Pruitt's
20 injunctive relief request, and to strike references and
21 allegations concerning DOE defendants. See generally Mot.

22 II. OPINION

23 A. Whistleblower Claim

24 Pruitt's whistleblower claim against Genentech alleges
25 Genentech retaliated against him for alerting human resources
26 ("HR") about Genentech employees' discriminatory conduct—
27 specifically, that his supervisors Dan Williams and Steve Graeff
28 discriminated against him. See id. ¶¶ 11, 13, 24.

1 Genentech moves to dismiss this claim for two reasons.
2 First, to the extent Pruitt's claim arises from any failure to
3 promote him, Genentech contends this is time barred. See Reply,
4 ECF No. 14, at 1-3. Second, to the extent Pruitt's claim arises
5 from his termination, Genentech argues Pruitt fails to state a
6 claim. See Mot. at 3-4 Pruitt opposes Genentech's motion,
7 arguing that the limitations period is 3 years, making his
8 whistleblower claim timely. See Opp'n at 6.

9 1. Statute of Limitations

10 A plaintiff must file his Labor Code § 1102.5 claim within
11 one year of the retaliatory act. See Delgado v. MillerCoors
12 LLC, No. CV 16-5241 DMG (ASx), 2017 WL 1130165, at *4 (C.D. Cal.
13 Mar. 16, 2017) (citing Wilden v. Cty. of Yuba, No. 2:11-cv-
14 02246-JAM-GGH, 2012 WL 12526820 (E.D. Cal. Mar. 1, 2012)).
15 Because Pruitt seeks civil penalties, see Compl. at 14, the one-
16 year statute of limitations applies, as this is an "action upon
17 a statute for a penalty," Cal. Civ. Proc. Code § 340(a). See
18 also Cal. Lab. Code § 1102.5(f). Pruitt alleges two bases for
19 his whistleblower claim—failure to promote and termination. See
20 Compl. ¶ 56. Each must fall within the one-year limitations
21 period.

22 As to the failure-to-promote basis for Pruitt's
23 whistleblower claim, it is time barred. Pruitt alleges
24 Genentech failed to promote him in December 2015, see id. ¶¶ 20,
25 56, so he had until December 2016 to bring this claim. But he
26 waited until March 10, 2017 to file suit, see id. at 1, more
27 than one year after the alleged retaliatory act, rendering the
28 claim time barred, see Delgado, 2017 WL 1130165 at *4.

1 To the extent Pruitt's whistleblower claim arises from his
2 termination, it falls within the limitations period. Genentech
3 terminated Pruitt on July 27, 2016, see Compl. ¶¶ 27, 56, so he
4 had until July 27, 2017 to file this claim. He did so on March
5 10, 2017. See generally Compl. Yet Genentech maintains the
6 allegations supporting this claim—conversations Pruitt had with
7 HR—are too remote because they occurred several years before
8 Pruitt filed this suit. See Mot. at 4, n.1. The Court rejects
9 this argument, for the statute of limitations runs from the time
10 of the alleged retaliatory act—not from the alleged protected
11 activity. See Delgado, 2017 WL 1130165 at *5. Pruitt's
12 termination on July 27, 2016 is the operative date.

13 In sum, to the extent Pruitt's whistleblower claim derives
14 from any failure to promote, the Court finds it is time barred
15 and dismisses it with prejudice. But, as to the termination
16 basis for Pruitt's whistleblower claim, the Court finds it is
17 timely.

18 2. Stating a California Whistleblower Claim

19 While Genentech's statute of limitations argument fails in
20 part, Genentech contends that this claim should still be
21 dismissed because Pruitt has not sufficiently stated a
22 whistleblower claim. To do that, Pruitt "must show (1) [he]
23 engaged in a protected activity, (2) [his] employer subjected
24 [him] to an adverse employment action, and (3) there is a causal
25 link between the two." Derby v. City of Pittsburg, No. 16-cv-
26 05469-SI, 2017 WL 713322, at *11 (N.D. Cal. Feb. 23, 2017).
27 Genentech contends Pruitt's claim is impermissibly vague. See
28 Mot. at 3-4. Pruitt maintains his claim is sufficiently pled.

1 See Opp'n at 4-6. As discussed below, the Court agrees with
2 Pruitt.

3 a. Protected Activity

4 "To constitute a protected activity pursuant to section
5 1102.5, a disclosure must be 'to a person with authority over
6 the employee or another employee who has the authority to
7 investigate, discover, or correct the violation or
8 noncompliance.'" Smiley v. Hologic, Inc., No. 16-cv-158-WQH-
9 MDD, 2017 WL 1354787, at *9 (S.D. Cal. Apr. 12, 2017). HR
10 representatives are persons of authority. See Evenfe v. Esalen
11 Inst., No. 15-cv-05457-LHK, 2016 WL 3965167, at *4 (N.D. Cal.
12 July 24, 2016) (concluding plaintiff engaged in protected
13 activity when she told HR personnel "she was not being paid for
14 her medical assistance work, in violation of Cal. Labor Code
15 section 1194").

16 Genentech says the basis for Pruitt's whistleblower claim
17 is unclear, highlighting Pruitt's failure to specify "who, when,
18 and what he allegedly 'disclosed' to an individual covered by
19 section 1102.5." See Mot. at 4. Pruitt disagrees, arguing he
20 informed HR about being discriminated against and this violated
21 federal and state law. See Opp'n at 5.

22 The Court agrees with Pruitt, but for slightly different
23 reasons. He identifies several federal and state anti-
24 discrimination and medical leave laws he claims Genentech
25 violated. See Compl. ¶¶ 33-53 (FEHA), 60-73 (CFRA), 74-86
26 (FMLA). Pruitt also delineates the factual basis for his
27 whistleblower claim. See, e.g., Compl. ¶ 11 ("Pruitt told
28 Genentech's human resources representative . . . that he felt

1 Mr. Williams was holding him to a different standard based on
2 his race."); ¶ 13 ("Pruitt expressed his concern to human
3 resources that the performance review was in retaliation for his
4 prior [race] discrimination complaint against Mr. Williams.");
5 ¶ 24 ("In early June 2016, Mr. Pruitt complained to human
6 resources that he was being discriminated against. [He] told
7 the Senior Manager of Employee Relations that Mr. Graeff
8 subjected his work to more scrutiny and held him to a higher
9 standard than his white coworkers."). These allegations show
10 Pruitt told HR about alleged FEHA race discrimination and
11 retaliation violations.

12 In his opposition to this motion, Pruitt attempts to add
13 additional legal bases for his whistleblower claim. See Opp'n
14 at 5 (citing Title VII, CFRA, and FMLA). None of these bases
15 appear in his complaint, which mentions only FEHA discrimination
16 and retaliation violations; it says nothing about Pruitt
17 informing HR about Genentech's alleged medical leave violations.
18 Pruitt cannot now, in his opposition brief, add more legal bases
19 for his whistleblower claim. See Arres v. City of Fresno, No.
20 CV F 10-1628 LJO SMS, 2011 WL 284971, at *18 (E.D. Cal. Jan. 26,
21 2011) ("[A] complaint is judged based on its allegations, not
22 new facts or claims raised in [a Rule 12(b)(6)] opposition.").

23 In short, the Court finds Pruitt engaged in protected
24 activity, but only as to the alleged FEHA race discrimination
25 and retaliation violations Pruitt reported to HR. The Title
26 VII, CFRA, and FMLA violations Pruitt listed in his opposition
27 brief cannot comprise the legal basis for his whistleblower
28 claim. See Thomsen v. Sacramento Metro. Fire Dist., No. 2:09-

1 CV-01108 FCD/EFB, 2009 WL 8741960, at *16 (E.D. Cal. Oct. 20,
2 2009).

3 b. Adverse Action

4 Pruitt sufficiently alleges an adverse action. He says
5 Genentech terminated him, see Compl. ¶¶ 27, 56, and termination
6 is an adverse employment action, see Ferretti v. Pfizer Inc.,
7 No. 11-CV-04486, 2013 WL 140088, at *10 (N.D. Cal. Jan. 10,
8 2013).

9 c. Causal Link

10 That leaves the third and final element of a whistleblower
11 claim: A causal link between protected activity and adverse
12 action. See Derby, 2017 WL 713322 at *11. Genentech contends
13 Pruitt cannot establish this connection because years passed
14 between his 2012 reports to HR and his 2016 termination. See
15 Reply at 2 n.2. Pruitt emphasizes he spoke to HR one month
16 before Genentech terminated him, so he has alleged a sufficient
17 causal connection. See Opp'n at 5.

18 The law supports Pruitt's position. "The causal link may
19 be established by an inference derived from circumstantial
20 evidence, 'such as the employer's knowledge that the [employee]
21 engaged in protected activities and the proximity in time
22 between the protected action and allegedly retaliatory
23 employment decision.'" Smiley, 2017 WL 1354787 at *8. Pruitt
24 has done just that. One month before Genentech terminated
25 Pruitt, he, once again, told HR his managers were discriminating
26 against him. See Compl. ¶¶ 24, 27. Genentech's reliance on
27 Arkens does not alter this Court's conclusion: There, the court
28 held that 14 months' time between protected activity and an

1 adverse action was too remote to establish a causal link, Arkens
2 v. Cty. of Sutter, Civ. No. 2:16-951 WBS KJN, 2016 WL 5847036,
3 at *16 (E.D. Cal. Oct. 6, 2016); here, only one month passed,
4 see Compl. ¶¶ 24, 27. Genentech cites no case showing one month
5 is too remote.

6 Equally important, Genentech was well aware of Pruitt's
7 reports to HR. See, e.g., Compl. ¶ 12 (after receiving reports
8 from Pruitt that he was being racially discriminated against, an
9 "[HR] employee directed [Dan] Williams to amend the performance
10 counseling document"). This solidifies Pruitt's position, for
11 "[e]ssential to a causal link is evidence that the employer was
12 aware that the plaintiff had engaged in the protected activity."
13 Smiley, 2017 WL 1354787 at *8. Additionally, Williams attended
14 the meeting when Graeff terminated Pruitt. See Compl. ¶ 27.
15 See also Ferretti, 2013 WL 140088 at *10 ("[I]t is sufficient
16 that at least one of the persons responsible for making each
17 adverse employment decision [knew] Plaintiff had engaged in
18 protected activity.").

19 In sum, Pruitt sufficiently alleges protected activity,
20 adverse action, and causation, putting Genentech on notice of
21 the whistleblower claim against it. The Court therefore denies
22 Genentech's motion to dismiss Pruitt's § 1102.5 whistleblower
23 claim, however, this claim arises only from Pruitt's termination
24 (and not any alleged failure to promote) and only the alleged
25 FEHA violations reported to HR—race discrimination and
26 retaliation—comprise the basis for this claim.

27 B. Defamation Claim

28 Pruitt also sues Genentech for defamation, contending

1 Genentech defamed him by saying he stole a sandwich. See Compl.
2 at 8-9, 13-14. Genentech moves to dismiss this claim, arguing
3 Pruitt fails to meet defamation's heightened pleading standard.
4 See Mot. at 5-6. Pruitt asserts he need only pled the
5 "substance of" the allegation and has done that. See Opp'n at
6 9.

7 To state a defamation claim, a plaintiff must show the
8 defendant made a false and unprivileged publication to a third
9 person that had a tendency to injure the plaintiff with respect
10 to his occupation, office, profession, trade, or business. See
11 Williams v. Salvation Army, No. 2:14-cv-06138-ODW(PJWx), 2014 WL
12 6879936, at *2 (C.D. Cal. Dec. 4, 2014) (citing Cal. Civ. Code
13 §§ 44-47). "Under California law, the 'defamatory statement
14 must be specifically identified, and the plaintiff must plead
15 the substance of the statement.'" Jones v. Thyssenkrupp
16 Elevator Corp., No. C-05-3539 EMC, 2006 WL 680553, at *5 (N.D.
17 Cal. Mar. 14, 2006) (citation omitted). This means the
18 complaint must reference "the speakers of the defamatory
19 communications, the recipients, the timing, or the context in
20 which they were made, sufficient to provide [the defendant]
21 notice of the issues" to prepare a defense. See Jones, 2006 WL
22 680553 at *6 (citing *Okun v. Superior Court (Maple Properties)*,
23 29 Cal. 3d 442 (1981)).

24 Pruitt's complaint lacks the requisite specificity. For
25 starters, the factual basis for his defamation claim is unclear.
26 Pruitt cites two contexts in which Genentech allegedly made the
27 defamatory comment: During a meeting with Graeff and Williams,
28 see Compl. ¶ 26, and at some unknown time by some unidentified

1 employee to some other unidentified employees some time before
2 Genentech terminated him, see id. ¶ 29. Notwithstanding the
3 confusion as to which context Pruitt's defamation claim is
4 grounded upon, his complaint contains other fatal defects. For
5 instance, Pruitt makes conclusory allegations. See id. ¶¶ 94-95
6 ("Defendant made this statement maliciously, out of hatred or
7 ill will toward Plaintiff This statement was a
8 substantial factor in causing harm to Plaintiff's trade,
9 profession, occupation, and/or reputation."). Conclusory
10 allegations do not satisfy defamation's heightened pleading
11 standard. See Williams, 2014 WL 6879936 at *2.

12 Moreover, Pruitt's use of the phrase "on information and
13 belief" raises a red flag:

14 Where, as here, some of the allegations are
15 qualified with the phrase and others are
16 not, a reasonable inference arises that it
17 is intended as caveat, to provide additional
18 protection should plaintiff be unable to
19 prove any of the factual allegations. It
20 thus creates a further inference that
21 plaintiff likely lacks knowledge of
22 underlying facts to support the assertion,
23 and is instead engaging in speculation to an
24 undue degree.

21 Delphix v. Actifo, Inc., No. C 13-4613 RS, 2014 WL 4628490, at
22 *2 (N.D. Cal. Mar. 19, 2014) (patent infringement action).

23 Pruitt uses this phrase for his defamation claim, see Compl.
24 ¶ 29, but not for any other claim. Indeed, the key allegation,
25 "[o]n information and belief . . . Defendant told several of its
26 employees that it terminated Mr. Pruitt for stealing," raises
27 questions: Who made the statement? Who heard it? When?

28 Additionally a conditional privilege presumptively applies

1 to this claim. "Because an employer and its employees have a
2 common interest in preserving morale and job efficiency, an
3 employer's statements regarding the reasons for termination of
4 another employee generally are privileged." Williams, 2014 WL
5 6879936 at *3 (citation omitted). "To defeat this conditional
6 privilege, a plaintiff must specifically allege malice," meaning
7 he "must allege detailed facts showing defendant's ill will
8 towards him." Jones, 2006 WL 680553 at *6. Pruitt has not done
9 so. Instead, he merely alleges "Defendant told several of its
10 employees that it terminated Mr. Pruitt for stealing," Compl.
11 ¶ 29, and adds the conclusory allegation that "Defendant made
12 this statement maliciously, out of hatred or ill will toward
13 [him]," Id. ¶ 94. This does not suffice.

14 In short, Pruitt fails to provide Genentech adequate
15 "notice of the issues" to prepare a defense, and so fails to
16 state a claim. Jones, 2006 WL 680553 at *6. This illustrates
17 why defamation, a "historically disfavored" action, has a "more
18 stringent" pleading standard. See id. Nevertheless, the Court
19 is not convinced there are no set of facts upon which Pruitt
20 could state a defamation claim and, so, dismisses it with leave
21 to amend. See Navarro v. Block, 250 F.3d 729, 732 (9th Cir.
22 2001).

23 C. Injunctive Relief

24 Pruitt seeks injunctive relief, Compl. at 14, but Genentech
25 asks this Court to strike the request, contending that Pruitt
26 lacks Article III standing to make it, see Mot. at 6. Pruitt
27 believes a recent California Supreme Court case gives him the
28 requisite standing. See Opp'n at 10 (citing Harris v. City of

1 Santa Monica, 56 Cal. 4th 203 (2013)). “To have standing to
2 bring a claim for relief, a plaintiff must show that [he] has
3 (1) suffered an injury that (2) was caused by the defendant and
4 (3) is likely to be redressed by the relief [he] seeks.” Walsh
5 v. Nevada Dep’t of Human Res., 471 F.3d 1033, 1036-37 (9th Cir.
6 2006). The parties dispute whether Pruitt has met the
7 redressability prong.

8 The Court concludes Pruitt has not. The Ninth Circuit
9 makes clear a former employee lacks standing to seek injunctive
10 relief when the complaint says nothing about the plaintiff’s
11 intent to return to work. See id. at 1037. See also Achal v.
12 Gate Gourmet, Inc., 114 F. Supp. 3d 781, 818 (N.D. Cal. 2015)
13 (“[A] former employee lacks standing to seek injunctive relief
14 on an employment discrimination claim—at least where he or she
15 is not seeking reinstatement—because the former employee ‘would
16 not likely benefit’ from any such relief.”) (citing Walsh, 471
17 F.3d at 1037).

18 Pruitt, however, argues that this Court should not read
19 Walsh so broadly. He attempts to distinguish Walsh from the
20 case here, arguing that Walsh is limited to ADA claims, whereas
21 this case concerns FEHA claims, and so is more analogous to
22 Harris. See Opp’n at 10.

23 Pruitt is mistaken. Harris simply says “a court may grant
24 injunctive relief where appropriate to stop discriminatory
25 practices.” Id. at 234 (citation omitted). But “[t]he fact
26 that FEHA allows a court to order injunctive relief does not
27 alter the standing analysis.” Achal, 114 F. Supp. 3d at 818.
28 This makes sense, for the Ninth Circuit in Walsh “held that a

1 former employee lacks standing to seek injunctive relief on an
2 employment discrimination claim, see id. (emphasis added), which
3 encompasses both ADA and FEHA claims, as both are employment
4 discrimination claims. Stated another way, for purposes of
5 Article III standing, Pruitt's distinction between ADA and FEHA
6 claims is a distinction without a difference. The Court
7 therefore strikes Pruitt's injunctive relief request.

8 D. DOE Defendants

9 Pruitt also sues DOE defendants. See Compl. at 1.
10 Genentech asks this Court to strike "references and allegations
11 related to Doe defendants." See Mot. at 6. Pruitt does not
12 oppose. See Opp'n at 11. The Court therefore strikes these
13 defendants, dismissing them without prejudice.

14 III. ORDER

15 For the reasons set forth above, the Court GRANTS in part
16 and DENIES in part Genentech's motion to dismiss and motion to
17 strike.

18 If Pruitt elects to amend his complaint, he shall file his
19 first amended complaint within twenty days from the date of this
20 Order. No new causes of action may be included in the first
21 amended complaint. Genentech's responsive pleading is due within
22 twenty days thereafter.

23 But if Pruitt elects not to amend his complaint, Genentech
24 shall file its answer to the complaint within thirty days from
25 the date of this Order, and the case will proceed on the
26 following remaining claims:

- 27 1. FEHA disability discrimination (claim one);
- 28 2. FEHA race discrimination (claim two);

- 1 3. FEHA retaliation (claim three);
- 2 4. § 1102.5 whistleblower claim, limited to Pruitt's
- 3 termination after complaining to HR about Genentech's alleged
- 4 FEHA race discrimination and retaliation violations (claim four);
- 5 5. CFRA interference (claim five);
- 6 6. CFRA retaliation (claim six);
- 7 7. FMLA interference (claim seven);
- 8 8. FMLA retaliation (claim eight); and
- 9 9. Wrongful termination in violation of public policy
- 10 (claim nine).

11 IT IS SO ORDERED.

12 Dated: August 23, 2017

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE