

United States District Court
Northern District of California

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The following is a tentative order, which has been issued solely to prepare counsel for oral argument. The tentative order does not constitute an opinion of the Court and should not be published or cited for any purpose.

I. INTRODUCTION

In this employer retaliation action arising under Section 6310 of the California Labor Code,¹ Plaintiff and California State Labor Commissioner Julie Su (“Plaintiff”) and Defendant Siemens Industry, Inc. (“Defendant”) have each filed motions for summary judgment. The matter came on for hearing April 9, 2014.

II. BACKGROUND

A. The Parties and Claims

Plaintiff Julie Su, the California State Labor Commissioner, brings this action on behalf of Charles Anderson and Charles Pitschner (“Complainants”) against Defendant Siemens Industry, Inc. (“Defendant”). Anderson and Pitschner were employed by Defendant as part of the crew installing a baggage conveyor system at San Francisco International Airport (“SFO”). Their employment was subsequently terminated after they made job-related safety complaints. Plaintiff now brings this claim under Section 6310 of the California Labor Code (“Section 6310”) for retaliatory termination.

B. Undisputed Facts

Defendant is a subcontractor of general contractor Turner Construction, Inc., which was responsible for renovating Terminal 2 at SFO. Declaration of Jim Smith (“J. Smith Decl.”) ¶ 6, ECF No. 85-21. Defendant employed millwrights from Carpenters’ Union Local 102 to install baggage conveyors in terminal 2 from about mid-2009 until at April 15, 2011. Id.

Defendant hired Complainant Anderson as a foreman in July 2009. Ex. A, Deposition of Charles R. Anderson (“Anderson Dep.”) 49-50, ECF No. 84-1. In September 2009, Defendant hired Complainant Pitschner, Anderson’s son, as a journeyman. Deposition of Charles Richard

¹ All statutory citations hereinafter refer to the Labor Code except where otherwise stated.

1 Pitschner II (Pitschner Dep.), 27, 58, ECF No. 84-2. Anderson’s duties included managing
2 workers, coordinating with other contractors, buying tools and safety equipment, inspecting
3 equipment, and at times overseeing the entire project. Anderson Dep. 71; Second Declaration of
4 Charles R. Anderson (“Anderson 2nd Decl.”) ¶ 15, ECF No. 87-9. Pitschner’s job duties included
5 installing the conveyor as well as filling out daily forklift inspection sheets. Pitschner Dep. 58,
6 257. Both Anderson and Pitschner believed that they, like all employees on the job site, also had a
7 duty to raise safety concerns. Anderson Dep. 131, 231; Pitschner Dep. 214.

8 David Slotta served as Siemens’ superintendent on the project. Deposition of David Slotta
9 (“Slotta Dep.”) 15, ECF No. 84-2. His duties included overseeing the job, scheduling, handling
10 logistics, and ordering supplies. Id. Kelly Scott, Mr. Slotta’s superior and an employee of
11 Siemens, was responsible for managing the project. Id. at 29-30, 35. For the most part, Mr. Scott
12 was not on site at the project. Id. at 109-110.

13 Turner, the general contractor, employed its own personnel on site including site
14 Superintendent Don Peterson and Safety Manager Joel Kellogg. Id. at 17-18.

15 **1. The Safety Complaints to Siemens**

16 Throughout their employment with Siemens, Complainants reported numerous safety
17 concerns to Slotta. Anderson Dep. 216-219; Pitschner Dep. 266, 271-272. Anderson testified that
18 the great majority of the complaints he made to Slotta were met with approval, and that raising
19 safety concerns was part of Anderson’s job. Anderson Dep. 218-219, 231. However, Anderson
20 asserts that when he objected to Slotta’s practice of giving his crew licenses to operate forklifts
21 without providing the requisite training, Slotta disregarded his concerns, at one point telling him to
22 “shut up about it.” Anderson Dep. 152-153, 160. Pitschner likewise objected to this practice.
23 Pitschner Dep. 171-172, 256, 266.

24 **2. The “Near Misses” and Complaints to Turner**

25 In early February, Anderson was informed of two “near misses” on the job site – incidents
26 in which individuals were put at risk, but not actually injured. Anderson Dep. 190, 271. On
27 February 10, two days after the near misses, Anderson was issued a written warning for conduct
28 unrelated to the safety incidents. Anderson Dep. 271; Carney Decl. Ex. G.

1 The next day, on February 11, Anderson approached Turner’s safety manager, Joe
2 Kellogg, told him that Siemens had issued forklift licenses to its workers without giving them
3 training, and asked whether Slotta had told him about the near misses. Slotta Dep. 58; Anderson
4 Dep. 159, 161-162. In response, Kellogg “blew up” saying that he was “tired of all the bullshit”
5 and planned on putting “an end to the drama.” Anderson Dep. 162. Kellogg, in turn, told Slotta
6 what Anderson had reported to him. Su Opp. at 2; Slotta Dep. at 58.²

7 On February 16, Slotta called a meeting of all of the millwrights. Slotta Dep. 126. At that
8 meeting Slotta informed all of the millwrights that he was removing all discipline that they had
9 previously received, and that they were starting over with a clean slate. Slotta Dep. 93-94. During
10 the same meeting Slotta announced that Paul Batsel would be responsible for all paperwork, a task
11 previously assigned to Anderson. Anderson Decl. ¶ 5. Slotta also prohibited anyone from
12 entering either Siemen or Turner’s trailer. Id. ¶ 6. Prior to this meeting, Anderson had regularly
13 entered the trailer as part of his duties as a senior foreman. Id. At the close of the meeting, Slotta
14 told Anderson that he would no longer be attending foremen’s meetings. Id. ¶ 7.

15 On March 12, 2010, less than a month after the meeting, Siemens laid off four workers,
16 including Anderson and Pitschner. Anderson Decl. ¶ 7.

17 **C. Procedural History**

18 Following their discharge, the Union filed grievances on behalf of Complainants seeking
19 reinstatement. Anderson Decl., Ex. A, B. This ultimately led to an arbitration between the Union
20 and Defendant. J. Smith Decl. ¶ 7-8.

21 After two days of proceedings, the arbitrator, Gerald McKay, rendered a decision. Id.
22 ¶ 8-9. The decision awarded Complainants one hundred hours of wages and fringe benefits.
23 Decision and Award of the Arbitrator at 4. The decision also stated that “the decision to lay Mr.
24 Anderson and his son off were done specifically by Mr. Slotta in retaliation for Mr. Anderson’s

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27 ² Plaintiff also cites to page 57 of Slotta’s declaration, but has not provided the Court with that
28 page. Although the point does not appear to be in dispute, and is strongly suggested on page 58 of
Slotta’s Deposition, the Court does not locate any first hand source directly stating that Kellogg
told Slotta about Anderson’s complaint.

1 actions taken against him.” Id.

2 On June 12, 2012, Plaintiff, California Labor Commissioner Julie Su, brought this action in
3 San Francisco Superior Court on behalf of Pitschner and Anderson under California Labor Code
4 Section 6310 seeking back wages and injunctive relief. Su Complaint, ECF No. 1. Defendant
5 then removed the case to this Court pursuant to 28 U.S.C. § 1332. Notice of Removal, ECF No. 1.
6 Anderson filed a petition to intervene, and the Court granted that petition. Order Granting Motion
7 to Intervene, ECF No. 57.

8 Both parties have moved for summary judgment, which motions are now before the Court.
9 Defendant’s Motion for Summary Judgment or in the Alternative Partial Summary Judgment
10 (“Def. MSJ”), ECF No. 83; Plaintiff’s Motion for Partial Summary Judgment or in the Alternative
11 for an Order Treating Specified Facts as Established (“Su MSJ”), ECF No. 85.

12 **D. Legal Standard**

13 Summary judgment is proper when a “movant shows that there is no genuine dispute as to
14 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).
15 “A party asserting that a fact cannot be or is genuinely disputed must support the assertion by”
16 citing to depositions, documents, affidavits, or other materials. Fed. R. Civ. P. 56(c)(1)(A). A
17 party also may show that such materials “do not establish the absence or presence of a genuine
18 dispute, or that an adverse party cannot produce admissible evidence to support the fact.” Fed. R.
19 Civ. P. 56(c)(1)(B). An issue is “genuine” only if there is sufficient evidence for a reasonable
20 fact-finder to find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248–
21 49 (1986). A fact is “material” if the fact may affect the outcome of the case. Id. at 248. “In
22 considering a motion for summary judgment, the court may not weigh the evidence or make
23 credibility determinations, and is required to draw all inferences in a light most favorable to the
24 non-moving party.” Freeman v. Arpaio, 125 F.3d 732, 735 (9th Cir. 1997).

25 Where the party moving for summary judgment would bear the burden of proof at trial,
26 that party bears the initial burden of producing evidence that would entitle it to a directed verdict if
27 uncontroverted at trial. See C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc., 213 F.3d 474,
28 480 (9th Cir. 2000). Where the party moving for summary judgment would not bear the burden of

1 proof at trial, that party bears the initial burden of either producing evidence that negates an
2 essential element of the non-moving party's claim, or showing that the non-moving party does not
3 have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. If
4 the moving party satisfies its initial burden of production, then the non-moving party must produce
5 admissible evidence to show that a genuine issue of material fact exists. See Nissan Fire & Marine
6 Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102–03 (9th Cir. 2000). The non-moving party must
7 “identify with reasonable particularity the evidence that precludes summary judgment.” Keenan v.
8 Allan, 91 F.3d 1275, 1279 (9th Cir. 1996). Indeed, it is not the duty of the district court to “to
9 scour the record in search of a genuine issue of triable fact.” Id. “A mere scintilla of evidence
10 will not be sufficient to defeat a properly supported motion for summary judgment; rather, the
11 nonmoving party must introduce some significant probative evidence tending to support the
12 complaint.” Summers v. Teichert & Son, Inc., 127 F.3d 1150, 1152 (9th Cir. 1997) (citation and
13 internal quotation marks omitted). If the non-moving party fails to make this showing, the moving
14 party is entitled to summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

15 **E. Jurisdiction**

16 The Court has jurisdiction over this action pursuant to 28 U.S.C. 1332.

17 **III. DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

18 Defendant moves for summary judgment on the grounds that Plaintiff cannot show that
19 Complainants engaged in protected activity that resulted in their termination, and therefore she
20 cannot carry her burden of establishing a *prima facie* case of a Section 6310 violation.

21 Defendant’s Motion for Summary Judgment, ECF No. 83 at 13; see Yankowitz, 36 Cal. 4th at
22 1042. Moreover, Defendant contends that Plaintiff’s damages are limited as a matter of law
23 because (1) Plaintiff cannot recover health and welfare benefits, and (2) Plaintiff cannot recover
24 damages beyond the date of completion of the SFO project. Id. at 18, 19, 22.

25 Plaintiff opposes Defendant’s motion, contending that Anderson and Pitschner’s safety
26 complaints qualify as protected activity under Section 6310. ECF No. 87. Plaintiff further
27 contends that employer contributions toward health and welfare benefits are properly included in a
28 damage award, and that recovery beyond the project completion date is proper because Siemens’

1 contract also included post-construction operation and maintenance work. Id. at 19, 23.

2 The Court first addresses Defendant’s argument that Plaintiff cannot show that
3 Complainants were terminated for protected activity, and second addresses Defendant’s argument
4 that the Court should limit Plaintiff’s potential damages.

5 **A. Protected Activity under Section 6310**

6 Section 6310 prohibits an employer from terminating or otherwise discriminating against
7 an employee because the employee has made “any oral or written complaint to . . . his or her
8 employer” about unsafe working conditions or unsafe work practices. Cal. Lab.Code § 6310(a).

9 Courts considering 6310 claims have applied the three-part burden-shifting framework set
10 forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See
11 Yankowitz v. L’Oreal USA, Inc., 36 Cal. 4th 1028, 1042 (2005). Under that test, an employee
12 must first establish a *prima facie* case for retaliation. Yankowitz, 36 Cal. 4th at 1042. Once the
13 employee has established a *prima facie* case, the employer must offer a legitimate, non-retaliatory
14 reason for the adverse employment action to rebut the employee’s claim. Id. If the employer does
15 so, the burden shifts back to the employee to prove retaliatory motive. Id.

16 To establish a prima facie employment retaliation case the Plaintiff must show that: (1) the
17 employee engaged in a “protected activity”; (2) the employer subjected the employee to adverse
18 employment action; and (3) a causal link existed between the protected activity and the adverse
19 action. Yankowitz, 36 Cal. 4th at 1042.

20 Plaintiff raises two categories of safety complaints, which she contends resulted in
21 Complainants’ termination. Su MSJ at 2. The first category are complaints made directly to
22 Defendant Siemens, and the second category are complaints made to Turner, the general
23 contractor. Id. The Court will address these allegations in reverse order.

24 **1. Complaints to Turner**

25 In order to state a claim under Section 6310, a Plaintiff must first show that he engaged in
26 a protected activity. See Id. Specifically, a plaintiff must show that he was discharged or
27 discriminated against because he “[m]ade any oral or written complaint to . . . his or her
28 employer.” Cal. Labor Code § 6310(a)(1).

1 Defendant sets forth three reasons why Anderson’s complaint to Turner was not a
2 protected activity, and therefore does not establish a *prima facie* case. First, Defendant contends
3 that Anderson’s discussion with Turner was not a “complaint,” as that word has been construed by
4 courts interpreting Section 6310. Def. MSJ at 14. Second, Defendant argues that Anderson’s
5 complaints were made in the course of his employment, and for that reason were not a protected
6 activity under Section 6310. Def. MSJ at 13-14. Finally, Defendant contends that the
7 Complainants did not make their Complaints to their employer, as required to state a claim under
8 Section 6310. Def. MSJ at 15.

9 Plaintiff argues that (1) Anderson’s complaint was protected regardless of the language he
10 used to make the complaint; (2) under California law safety complaints made in the scope of
11 employment are protected, and, 3) Turner is a “controlling employer” and is therefore an employer
12 for the purpose of Section 6310, and further, because Anderson’s complaint was conveyed to
13 Siemens, “[i]t can thus be said that Anderson made the complaints to Defendant, though
14 indirectly.”

15 **a. Wording of the Complaint**

16 Defendant notes that when Anderson was asked in deposition about his safety complaint to
17 Turner, he insisted that he had not complained to Turner, but merely asked whether they knew
18 about the safety issues. See Anderson dep. 157 (“Q. ...[Y]ou testified that you went and reported
19 these near misses; correct? A. I didn’t report; I asked a question”); id. at 160 (“Q. . . . [T]he
20 impetus to reporting them was these two near misses; correct? . . . A. . . . I didn’t report them; I
21 went and asked a question . . . of whether or not Dave Slotta had reported them.”). Defendant
22 argues that no relief can be granted to Complainants because Anderson’s comments to Turner
23 were posed as questions, which do not qualify as complaints.

24 In support of its position, Defendant cites Oyarzo v. Toulumne Fire Dist., 955 F. Supp. 2d
25 1038, 1099 (E.D. Cal. 2013). Def. MSJ 15. There, the court held that although the employee
26 “reported the safety violation . . . he never made a ‘complaint’ . . . about those violations” because
27 it was his “responsibility to monitor and address such safety violations . . . and keep [his
28 employer] informed” of them. Id. Accordingly, the court found that his reports did not amount to

1 a protected activity. Id.

2 The Oyarzo court’s reasoning does not support the proposition for which Defendant uses it
3 – i.e., that complaints must take a particular form to fall within the purview of Section 6310.
4 Instead, Oyarzo stands for the proposition that when an employee’s job is to monitor, address and
5 report safety violations, he cannot predicate his Section 6310 claim on the fulfillment of those
6 duties. Id. Defendant offers no further support for its position that a safety complaint must take a
7 particular form to be covered by Section 6310, and the Court finds none.

8 **b. Course of Employment**

9 Defendant next argues that because Anderson was acting within the scope of his job duties
10 when he made safety complaints, his complaints cannot form the basis of a Section 6310 claim.
11 Def. MSJ at 13-14. Defendant cites Lukov v. Schindler Elevator Corp., No. 5:11-cv-00201-EJD,
12 2012 WL 5464622 at *5 (N.D. Cal. Nov. 8, 2012) for this proposition.

13 Lukov’s reasoning is inapposite. In Lukov, the plaintiff’s job entailed servicing elevators
14 at different stores in San Jose “taking trouble calls, performing repairs, communicating with
15 customers, ordering parts, conducting tests and examinations of the equipment, identifying
16 potential safety issues, and certifying that certain standards [we]re met.” Id. at 1. “Part of
17 Plaintiff’s job responsibilities included informing [the California Division of Occupational Safety
18 and Health] of his client’s compliance with the DOSH preliminary order requirements.” Id. at 4.
19 The controversy at the center of the case arose when the plaintiff was “called upon to observe and
20 certify the annual fire safety testing of the Nordstrom elevator.” Id. Upon finding the Nordstrom
21 system was unsafe, the plaintiff refused to certify the elevator and reported the problem to the
22 California Division of Occupational Safety and Health. Id.

23 In Lukove, the court held that the plaintiff did not engage in protected activity where he
24 failed to “allege safety issues concerning *his own* workplace or working conditions.” Id. at 5. The
25 court further observed that “an employee whose job entails assessing compliance with statutes and
26 regulations or reporting to government agencies only engages in protected activity if he or she
27 steps outside of his or her role representing the company by initiating an action or asserting
28 protected rights *against* his or her employer.” Id. at 5 (italics in original).

1 Here, unlike Lukov, it is undisputed that the complaints in question were made *against*
2 Siemens. Moreover, those complaints undeniably concerned Complainants' workplace. Finally,
3 unlike Lukov and other cases following its reasoning, Complainants here were not hired
4 specifically to "assess compliance with statutes and regulations." See id. While Complainants
5 assert that they believed they had a duty to report safety issues on the worksite, this does not
6 qualify them for the narrow exception carved out in Lukov. Practically all workers have at least
7 some duty to report workplace safety issues they observe on the job. But that does not make all
8 workers ineligible to bring a Section 6310 claim. If the exception covered *any* employee who
9 believed that he was required to report safety hazards on his jobsite, the exception would swallow
10 the rule.

11 **c. "His or Her Employer"**

12 Defendant next observes that the complaint for which Anderson contends he was
13 terminated was made to Turner Construction, and that Turner, the general contractor, "was not
14 Anderson's employer." Def. MSJ at 15.³ Accordingly, Defendant argues that Plaintiff's claim
15 fails as a matter of law because Anderson's complaint was not a protected activity under Section
16 6310. To address this argument, the Court must determine the meaning of the phrase "his or her
17 employer," as it is used in Section 6310.⁴

18 The possessive "his or her employer" indicates that Section 6310 is concerned with the
19 employer/employee relationship, and it is in this context that the Court determines whether the
20 general contractor was *Complainants'* employer. However, as a starting point, the Court looks to
21 the definitions contained within the pertinent statutory code.

22 Section 6310 is within Chapter 1 of Part 1 of Division 5 of the California Labor Code,
23 which deals with occupational safety and health. In Section 6304 of this Chapter, the Legislature

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25 ³ Plaintiff does not claim to have made a complaint to "the division, other governmental agencies"
26 or "his or her representative," which are the other avenues through which protected safety
complaints can be made. See Cal. Labor Code § 6310.

27 ⁴ The Court has consulted the Legislative Counsel's notes on the passage of Section 6310 and
28 subsequent amendments, and finds no definition of "his or her employer." Stats. 1973, c. 993, p.
1930, § 59, eff. Oct. 1, 1973; Amended by Stats. 1974, c. 1284 p. 2782, § 9; Stats. 1977, c. 460, p.
1515, § 1; Stats. 1989, c. 1369, § 3, eff. Oct. 2, 1989.

1 has adopted the definition of “employer” contained in Chapter 2 of Part 1 of Division 4, which
2 deals with workers’ compensation and insurance. The Division 4 definition reads, in pertinent
3 part: “‘employer’ means...[e]very person...which has any natural person in service.” Cal. Lab.
4 Code § 3300. Standing alone, this sheds little light on the employer/employee relationship
5 required to state a claim under § 6310.

6 The parties cite no cases deciding whether a general contractor can be considered a
7 particular complainant’s “employer” under Section 6310. However, the Court has located two
8 cases discussing a similar provision, which applies the definition of employer set out in Section
9 6304 and regulates conduct “between an employee and his or her own employer” Cal. Lab. Code
10 § 6304.5. In both cases, the courts interpreted the phrase “his or her own employer” to pertain
11 only to direct employers, and to specifically exclude general contractors. See Spencer v. G.A.
12 MacDonald Constr. Co., 63 Cal App. 3d 836, 860-861 (1976) (holding that a general contractor
13 does not qualify as a plaintiff’s employer where the plaintiff is directly employed by a
14 subcontractor) (superseded on other grounds); accord Elsner v. Uveges, 130 Cal. Rptr. 2d 483,
15 492-493 (2003) (superseded on other grounds). In each case, the employee of a subcontractor
16 brought an action against the general contractor. Spencer, 63 Cal. App. 3d at 836; Elsner, 130 Cal.
17 Rptr. 2d at 483. Both courts held that after Section 6304’s amendment in 1971, the statute was
18 unequivocal that for the purpose of a suit brought by a subcontractor’s employee “a general
19 contractor is no longer an employer within Section 6304.”⁵ Spencer, 63 Cal. App. 3d at 861;
20 Elsner, 130 Cal. Rptr. at 492-493.

21 The Labor Code’s definition of employee provides additional guidance. Section 6304.1
22 defines employee as “every person who is required or directed by any employer to engage in any
23 employment or to go to work or be at any time in any place of employment.” Cal. Labor Code
24 Section 6304.1(a). This strongly suggests that an “employee” is defined by his employer’s direct
25 control over his activities.

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27 ⁵ Prior to the 1971 amendment, Section 3604 read “[e]mployer’ shall have the same meaning as
28 in Section 3300 and shall also include every person having direction, management, control, or
custody of any employment, place of employment, or any employee.”

1 This definition also accords with accepted principles of agency and employment law. In
2 Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992), the Supreme Court held that
3 absent a specific statutory definition, courts should “incorporate traditional agency law principles”
4 unless doing so “would thwart the congressional design or lead to absurd results.” Looking to the
5 Second Restatement of Agency, the Supreme Court identified several indicia of
6 employer/employee relationship pertinent to the instant case, including “the hiring party’s right to
7 control the manner and means” of work, “whether the hiring party has the right to assign
8 additional projects to the hired party,” and “the extent of the hired party’s discretion over when
9 and how long to work.” Id. at 323-324. Significantly, the Supreme Court refers throughout to “the
10 hiring party,” supporting the conclusion that the hiring entity, and not a contractor at one remove
11 from the hiring process, fits the definition of employer. This further corroborates Section 6310’s
12 presumptive application only to the direct employers of the complaining employee.

13 **i. Controlling Employer**

14 Without explaining why the Court should deviate from the statutory definition provided in
15 Section 6304, or distinguishing the authority cited *supra*, Plaintiff argues that the workplace safety
16 regulations at 8 Cal. Code Reg. § 336.10(c) indicate that Turner falls within the scope of Section
17 6310. Su Opp. to Def. MSJ at 10.⁶ 8 C.C.R. § 336.10 lists four categories of employers who may
18 be cited for occupational safety and health violations. One of these categories is the “controlling
19 employer”: “[t]he employer who was responsible, by contract or through actual practice, for safety
20 and health conditions on the worksite; i.e., the employer who had the authority for ensuring that
21 the hazardous condition is corrected.” Id. Plaintiff argues that Turner fits within this category,
22 and notes that under this provision, “[t]he employers listed . . . may be cited regardless of whether
23 their own employees were exposed to the hazard.” Id.

24 This regulation (and the statutory provision that later adopted its language) deal with
25 government-imposed citations for occupational safety and health violations, not the retaliation

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27 ⁶ It is not clear to the Court why Plaintiff cites the regulatory language at 8 Cal. Code Reg. §
28 336.10 rather than the statutory language at Cal. Lab. Code § 6400(b), since they have precisely
the same text. The Court refers to the provision as “Section 336.10/6400(b)” hereinafter.

1 prohibition at issue in this case. For purposes of making companies citeable for safety violations,
2 it addresses the degree of control the entity exercises over the conditions of a worksite. See 8 Cal.
3 Code Reg. § 336.10(c).

4 Unlike the provisions of Section 6400(b), Section 6310 applies a more limited scope of the
5 term “employer.” Section 6310 does not apply to *any* employer, it protects only complaints made
6 to “*his or her* [i.e., the complainants’] employer.” In determining who qualifies as a *particular*
7 worker’s “employer” under Section 6310, Section 336.10/6400(b)’s general definition of an
8 “employer” who can be cited for safety violations is of no assistance. The fact that the
9 government can cite a company for endangering the safety of its subcontractor’s employees does
10 not mean that that employer must be considered those employees’ employer for purposes of
11 Section 6310.

12 **ii. Indirect Complaints**

13 Plaintiff further contends that summary judgment should be denied because Anderson’s
14 complaint to Turner was later conveyed to Siemens, and “thus...Anderson made the complaints to
15 Defendant, though indirectly.” Su Opp. MSJ at 11. Plaintiff cites no legal authority for her
16 “indirect complaint” theory.

17 Indeed, applying an indirect complaint theory of liability to Section 6310 would undermine
18 its requirement that an employee make an “oral or written complaint *to . . . his or her employer.*”
19 Cal. Labor Code § 6310 (italics added). Under Plaintiff’s reasoning, an employer could be held
20 liable based on a complaint made to a *non*-employer, who later relayed the complaint to an
21 employer. This undermines the unambiguous language of the statute. As the statute is written, an
22 “indirect” complaint cannot establish liability under Section 6310.

23 **d. Conclusion**

24 For the foregoing reasons, Defendant is entitled to judgment in its favor as a matter of law
25 as to all claims in this action relating to complaints made to Turner Construction.

26 However, the inquiry does not end here. The Court now considers complaints made
27 directly to Siemens through project manager David Slotta.

28 **2. Complaints to Siemens**

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a. Causation

To establish a *prima facie* employment retaliation case the Plaintiff must show that a causal link existed between the protected activity and the adverse action. Yankowitz, 36 Cal. 4th at 1042. The causation element of a plaintiff’s *prima facie* case requires the employer’s “retaliatory animus [to be] a but-for cause of the employer’s adverse action.” Reeves v. Safeway Stores, Inc., 121 Cal. App. 4th 95, 108 (citations omitted).

It is undisputed that Anderson and Pitschner made safety complaints to Siemens’ superintendent Dave Slotta. Anderson Dep. 216-219; Pitschner Dep. 266, 271-272. Defendant also does not dispute that such complaints constitute protected activity under Section 6310. However, Defendant contends that Complainants have not shown, and cannot show, that their complaints to Siemens resulted in an adverse employment action. Def. MSJ 13, 16; see Yankowitz, 36 Cal. 4th at 1042.

In support of its position, Defendant points to Anderson and Pitschner’s deposition testimony, noting that each Complainant testified that his layoff was solely attributable to the complaint made to Turner. Def. MSJ at 10. The relevant testimony is reproduced below:

Q: . . . The retaliation that you believe was caused to you by Siemens Industry was . . . because you investigated and went to Turner about the near misses?

A: [by Anderson] Correct.

Q: And any other reason?

A: No other reason I can see.

Anderson Dep. 232-233.

A: [Pitschner] . . . I go home to deal with my license plate issues, and when I come back, I’m laid off, and I believe it’s all in retaliation for my father’s actions.

Pitschner Dep. 151. Plaintiff disputes Defendant’s assertion that Anderson’s safety complaint to Turner was the only cause of retaliation. Su Opp. MSJ at 11. Plaintiff observes that “Anderson complained to Slotta several times over the course of months” and that the Turner complaint “was the last in a series” of complaints. Id. Additionally, Plaintiff points to several safety complaints

1 made by Pitschner to Slotta, which elicited rebukes from Slotta. Su MSJ at 4; Pitschner Dep. 280-
2 281, 304-305.

3 The question is whether a reasonable jury could find that, but for the direct complaints to
4 Siemens, Anderson and Pitschner would not have been laid off. See Reeves, 121 Cal. App. 4th at
5 108; Anderson, 477 U.S. at 248-249. The Court addresses this issue as to each Complainant
6 individually.

7 **i. Anderson’s Complaints to Slotta**

8 **(a) Prima Facie Case**

9 Anderson’s deposition testimony reveals numerous complaints that he made directly to
10 Siemens’s superintendent, Slotta. Anderson Dep. 216-219, 152-153. However, when asked
11 whether he believed he was terminated for any of these complaints, Anderson asserted that he was
12 not, and that making these complaints was part of his job. Id. at 218-219, 231. Anderson testified
13 that “Dave [Slotta] approved of every one of those [complaints].” Id. at 219. When pressed on this
14 point, Anderson maintained that only the “near misses and the circumstances surrounding them”
15 played a role in his termination. Id. He then clarified that this included his “investigation” of
16 what caused the collision, and his “talking to the union” and “Turner” about it. Id.⁷

17 Aside from this exchange, Plaintiff cites only one other complaint that Anderson made to
18 Slotta: his objection to Slotta’s failure to train workers regarding safe forklift operations. Id. at
19 152-153, 160. Anderson testified that he made this same complaint “month after month” to no
20 avail. Id. at 160. However, he also testified that, despite these complaints, his relationship with
21 Slotta remained good until he reported the near misses to Turner. Id. at 153.

22 As Defendant observes, none of Anderson’s safety complaints to Siemens were closely
23 followed by adverse employment action. Def. MSJ 13. Rather, his layoff (the only adverse action
24 he claims to have suffered) followed shortly after his complaint to Turner. Moreover, Anderson
25

26 _____
27 ⁷ Following this testimony, Anderson said “that’s the primary reason I was on the layoff.”
28 Anderson Dep. 219. The examiner then asked him, “is there a secondary reason?” Id. The answer
to that question was not provided to the Court. Page 220 of Anderson’s deposition was not
included in the record by either party.

1 himself testified that it was the Turner complaint alone that resulted in his layoff. Anderson Dep.
2 232-233.

3 However, this is not enough to show that there is “no genuine dispute as to any material
4 fact.” Fed R. Civ. P. 56(a). Plaintiff notes that the Turner complaint “was the last in a series” and
5 that Anderson had “complained to Slotta several times over the course of months about the need
6 for forklift training. Su Opp. at 11; Anderson Dep. 160.

7 As Defendant points out, Anderson has made potentially damaging concessions in
8 deposition: that he does not believe he was terminated for any reason except for the complaints he
9 made to Turner. Anderson Dep 232-233. However, there is no indication that Anderson has
10 sufficient personal knowledge of the decision-making process to make his opinion anything more
11 than conjecture. Regardless of Anderson’s expression of belief at deposition, Plaintiff is not
12 precluded from showing that the other complaints preceding the Turner complaint were, standing
13 alone, a but-for cause of Anderson’s termination.⁸

14 In a retaliation case, “[t]he causal link may be established by an inference derived from
15 circumstantial evidence.” Jordan v. Clark, 847 F. 2d 1368, 1376 (9th Cir. 1988). “Evidence of an
16 employer’s knowledge of the employee’s protected activity, where the adverse employment action
17 follows soon after, can be sufficient to support an inference of causation.” Cuevas v. Sky West
18 Airlines, 12-05916 CRB, 2014 WL 595938 at *6 (N.D. Cal. Feb. 14, 2014). Here, the employees’
19 direct supervisor, Slotta, was clearly aware of the protected activity, and was in fact the conduit
20 through which the protected activity was performed.

21 Drawing all inferences in the light most favorable to Anderson, Plaintiff has presented a
22 genuine issue upon which a reasonable fact finder could conclude that but for his repeated

23

24

25 ⁸ In his Declaration, Anderson indicates that Slotta made several threats to fire him prior to the
26 “near misses.” Anderson Decl. ¶ 3-5. However, this assertion directly contradicts his deposition
27 testimony that his job had never been threatened before the prior miss incident. See Anderson Dep. 29
28 (“Q: Did Dave Slotta threaten to fire you at any point in time . . . prior to the near misses incident? A:
No.”) Anderson’s later Declaration does not in any way explain this inconsistency. A party cannot
“create a triable issue of fact, and thus survive summary judgment, merely by contradicting his or her
own sworn deposition testimony with a later declaration.” Disc Golf Ass’n, Inc. v. Champion Discs,
Inc., 158 F. 3d 1002, 1008 (9th Cir. 1998). Accordingly, the Court does not consider this portion of
Anderson’s Declaration.

1 complaints to Slotta in the months leading up to the Turner complaint, Anderson would not have
2 been terminated.

3 **(b) Legitimate Non-Retaliatory Reason**

4 Given that Anderson has made out a *prima facie* case, the burden shifts to Defendant to
5 show that there was a legitimate, non-retaliatory reason for Anderson’s layoff. See Yankowitz, 36
6 Cal. 4th at 1042. Defendant contends that in March, 2010, the SFO project “had progressed to the
7 point that Siemens no longer needed four of the millwrights.” Def. MSJ at 8. In determining who
8 should be laid off, Defendant asserts that Slotta’s supervisor considered production reports
9 provided by Slotta. Id.

10 Defendant asserts that Anderson was the least productive foreman on the site. Def. MSJ at
11 8; Carney Decl. Ex. K. Further, Defendant attaches exhibit H, Slotta’s notes about Anderson,
12 which enumerate a series of complaints having to do with Anderson not being in his work area,
13 directing other crews, and starting rumors. Def. MSJ 8; Carney Decl. Ex. H. Defendant has
14 offered sufficient evidence of a legitimate motive for terminating Anderson to shift the burden
15 back to Plaintiff to demonstrate pretext.⁹

16 **(c) Pretext**

17 “If the employer produces a legitimate reason for the adverse employment action, the
18 presumption of retaliation drops out of the picture and the burden shifts back to the employee.”
19 Yankowitz, 36 Cal. 4th at 1042 (citations and internal quotation marks omitted). At the summary
20 judgment stage, an employee meets this burden if he shows that the employer’s justification for
21 the adverse action is “untrue or pretextual,” or if he produces “evidence that the employer acted
22 [in retaliation], or a combination of the two.” Horn v. Cushman & Wakefield Western, Inc., 72
23 Cal. App. 4th 798, 806 (1999).¹⁰ “Circumstantial evidence of pretext must be specific and
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25 _____
26 ⁹ Defendant also asserts that production reports prepared by another on-site manager, Patrick
27 Grattan, indicate that Slotta was producing “only half as many conveyors as the other foreman on
28 the job,” but no such reports are attached to the record.

¹⁰ The Horn court notes that there is some disagreement about what an employee must do to avoid
summary judgment in the face of a legitimate reason given by his employer, but that its approach
represents the “predominant view.” Horn, 72 Cal. App. 4th at 806.

1 substantial in order to survive summary judgment.” Brown v. City of Tucson, 336 F. 3d 1181,
2 1188 (9th Cir. 2003).

3 Plaintiff’s showing – that Anderson made several complaints in the months leading up to
4 his layoff – is sufficient to create a triable issue of fact regarding pretext, notwithstanding the
5 legitimate reason for termination given by Defendant. See Id.

6 **ii. Pitschner’s Complaints to Slotta**

7 **(a) *Prima Facie* Case**

8 Pitschner testified that he also complained to Slotta about worksite safety. Pitschner Dep.
9 256, 266, 280, 304-305. Pitschner further testified that Slotta rebuked him for making these
10 complaints on three separate occasions. See id. On the first occasion, Pitschner complained about
11 a coworker’s unsafe forklift driving, to which Slotta responded, “[y]ou don’t tell me how to run
12 my crew.” Id. at 280. On the second occasion, Pitschner complained that a worker had left a load
13 on his forklift with the forks in the raised position. Id. at 304-305. This time, Slotta responded,
14 “[y]ou know, all this bullshit and the drama you guys are going through . . . [t]his shit needs to
15 stop.” Id. In the final encounter mentioned by Plaintiff, Pitschner complained to Slotta that he was
16 given a license to operate the forklift, but not any training. Id. at 272. Pitschner expressed concern
17 that if there was an accident someone might find out he had not been trained. Id. Slotta responded,
18 “[i]f it comes out, it’s because you opened your mouth, and if you open your mouth, I’ll get both
19 you and [Anderson] your checks.” Id.

20 In its Motion, Defendant again points the Court to several passages in which Pitschner
21 testified that Siemens took no adverse action against him for the complaints he raised. Id. at 151,
22 319-321. In both of these statements, Pitschner indicated that he believes he was laid off because
23 of his father’s complaint to Turner. Id.

24 However, unlike Anderson, Pitschner contends that his complaints to *Siemens* were
25 repeatedly met with hostility, and that he was even threatened by Slotta that if he let anyone know
26 he had not been given proper forklift training, Slotta would fire him. Pitschner Dep. at 272. A
27 reasonable jury could infer that these complaints were the cause of Pitschner’s termination. Thus,
28 the Defendant has not “negated an essential element” of Plaintiff’s *prima facie* case. See Nissan

1 Fire & Marine Ins. Co., 210 F. 3d at 1102.

2 **(b) Legitimate Non-Retaliatory Reason**

3 Accordingly, the burden remains with Defendant to show that there was a legitimate, non-
4 retaliatory reason for Pitschner’s layoff. See Yankowitz, 36 Cal. 4th at 1042. To that end,
5 Defendant contends that in March, 2010, the SFO project “had progressed to the point that
6 Siemens no longer needed four of the millwrights.” Def. MSJ at 8. In determining who should be
7 laid off, Defendant asserts that Slotta’s supervisor considered production reports provided by
8 Slotta. Id.

9 Defendant contends that Pitschner was a slow worker, and was laid off because he was
10 among the four least productive workers on the site. Slotta Dep. 114. In support of this rationale,
11 Defendant attaches exhibit H, apparently Slotta’s notes about Pitschner and Anderson. Def. MSJ
12 8-9; Carney Decl. Ex. H.¹¹ That exhibit contains one note indicating a slow work pace, two
13 indicating that Pitschner was away from his work area, and three indicating that Pitschner was
14 “starting rumors” or “running rumors.” Id. Additionally, Defendant attaches exhibit K, which
15 shows worker’s production levels in March, 2010. Def. MSJ 8; Carney Decl. Ex. K. This exhibit
16 compares the number of tasks that each worker completed, and indicates that Pitschner completed
17 far fewer than others. See Carney Decl. Ex. K. Defendant has offered sufficient evidence of a
18 legitimate motive for terminating Pitschner to shift the burden back to Plaintiff to demonstrate
19 pretext.

20 **(c) Pretext**

21 “If the employer produces a legitimate reason for the adverse employment action, the
22

23 ¹¹ The precise value of these notes is unclear. They are not authenticated, at least in the underlined
24 portion of Slotta’s deposition that Defendant submitted. Assuming they are in fact Slotta’s notes,
25 however, they appear to be irrelevant. Slotta disclaims any role in deciding to terminate Anderson
26 or Pitschner; he said that Kelly Scott made that decision. Slotta Depo. 113:6-11. Slotta testified
27 that prior to deciding whom to terminate, Scott evaluated, or at least received, Slotta’s weekly
28 production reports regarding Slotta’s crew members. Slotta Depo. 110:7-17. But the production
reports are Exhibit K, not Exhibit H. Thus, if Slotta’s testimony is to be believed, Exhibit H had
nothing to do with Anderson or Pitschner’s termination. Nonetheless, assuming that Scott
reviewed Exhibit K before making the decision to terminate, Defendant has still met its burden of
showing a legitimate, non-retaliatory reason.

1 presumption of retaliation drops out of the picture and the burden shifts back to the employee.”
2 Yankowitz, 36 Cal. 4th at 1042 (citations and internal quotation marks omitted). At the summary
3 judgment stage, an employee meets this burden if he shows that the employer’s justification for
4 the adverse action is “untrue or pretextual,” or if he produces “evidence that the employer acted
5 [in retaliation], or a combination of the two.” Horn v. Cushman & Wakefield Western, Inc., 72
6 Cal. App. 4th 798, 806 (1999).¹² “Circumstantial evidence of pretext must be specific and
7 substantial in order to survive summary judgment.” Brown v. City of Tucson, 336 F. 3d 1181,
8 1188 (9th Cir. 2003).

9 Plaintiff’s showing – that Pitschner made several complaints in the months leading up to
10 his layoff that were severely rebuked by Slotta – is sufficient to create a triable issue of fact
11 regarding pretext, notwithstanding the legitimate reason for termination given by Defendant. See
12 Id. Plaintiff also points to the testimony of George Davis, Pitschner’s foreman in the month
13 leading up to his termination, that Pitschner was a “good worker.” Davis Dep. 31. This too
14 corroborates Plaintiff’s position that his termination was retaliatory, and supports the Court’s
15 conclusion that a genuine dispute of fact remains.

16 **B. Damages**

17 Under Section 6310, an employee “shall be entitled to reinstatement and reimbursement
18 for lost wages and work benefits caused by the acts of the employer.” Cal. Labor Code § 6310(b).

19 Defendant argues that Complainants’ damages are limited as a matter of law in two
20 respects. Def. MSJ at 20, 22. First, Defendant contends that Complainants cannot recover
21 damages beyond the date that the SFO project ended. Id. at 22. Second, Defendant contends that
22 Complainants cannot recover contributions made to the union benefit trust fund because
23 Complainants never received payment of these benefits, and therefore could not have “lost” them.
24 Id. at 20.

25 **1. Project End Date**

26
27 ¹² There is some disagreement about what an employee must do to avoid summary judgment in the
28 face of a legitimate reason given by his employer, but that the Horn court’s approach represents
the “predominant view.” Horn, 72 Cal. App. 4th at 806.

1 There is no dispute that the construction project at SFO ended on or around April 15, 2011.
2 Def. MSJ at 22; Anderson Dep. 84-85. However, Plaintiff contends that Siemens secured a
3 contract for maintenance and operation of the system extending two years beyond the completion
4 of construction, and that Slotta had discussed with Complainants the possibility that they would be
5 retained to perform maintenance work, and later specifically offered them the job. Su Opp. to
6 MSJ at 23; Anderson Dep. 260.

7 Along with its Motion, Defendant submitted the Declaration of Lee Katchen, which
8 Siemens claims is the employee actually “responsible for hiring individuals for the operation and
9 maintenance of the baggage handling system.” Katchen Decl. ¶ 2. Katchen declared that the
10 operation and maintenance job “is a non-union position” and he “did not interview or hire any
11 individuals from the union hiring hall.” Id. ¶ 3. He further stated that he “reviewed the
12 qualifications and work history” of Complainants “and can affirmatively state that even if either
13 had applied for the O&M position or been recommended by David Slotta . . . I would not have
14 hired these individuals . . . as they did not have the necessary qualifications.”^{13, 14} Id. ¶ 4.

15 Moreover, Defendant argues, and Katchen’s Declaration appears to corroborate, that even
16 had Siemens decided to hire Complainants for the maintenance and operation, they would have to
17 have applied for that position because it was separate from the SFO construction job. Def. MSJ at
18

19 ¹³ Even if admitted for their truth, these statements do not establish that there is no triable issue as
20 to whether Complainants would have been hired for the maintenance job. However, Plaintiff does
21 object to Katchen’s assertion that he reviewed the “qualifications and work history of Charles
22 Anderson and Charles Pitschner” and on that basis determined they were unqualified for the
23 maintenance position. Plaintiff’s Objections to Evidence Submitted in Support of Defendant’s
24 Motion for Summary Judgment, ECF No. 88 at 2. Plaintiff objects that Katchen offers “no
25 foundation for or description of any ‘qualifications’ or ‘work history’” of Complainants. Id. The
26 objection is sustained because there is no showing of how Katchen came to know of
27 Complainants’ qualifications or work history. Katchen has not indicated the source of his
28 information about Complainants’ work history. Accordingly, the Court cannot say that the
assertion that Complainants are unqualified is “rationally based on the witness’s perception.” Fed.
R. Evid. 701(a). Presumably he consulted some document to reach his conclusion, but there is no
showing of authentication. Fed. R. Evid. 901. Accordingly, this statement may not be used as
evidence insofar as it pertains to Complainants qualifications.

¹⁴ Unless otherwise indicated, the Court did not consider evidence that was objected to in reaching
its determination, and for that reason does not respond to those objections.

1 22 n. 15. In other words, even if Siemens selected Complainants for the maintenance job, they
2 would have first been laid off from the construction job and then rehired. Id.

3 Plaintiff disputes Katchen’s characterization of Complainants as unqualified, noting their
4 previous experience in similar positions.¹⁵ Su Opp. to MSJ at 24. Ultimately, there are material
5 facts in dispute—first, whether Complainants were qualified for the position, second, whether
6 Slotta ever had the authority to offer them the job. Though Katchen’s declaration is persuasive,
7 the Court must draw all inferences in the light most favorable to the non-moving party. Freeman,
8 125 F. 3d at 735. Resolution of this issue requires a weighing of the evidence, and is therefore
9 appropriate for the jury.

10 Defendant further moves on the ground that Plaintiff is precluded from recovering
11 damages beyond April 15, 2011 by judicial estoppel. Def. MSJ at 23. In the Complaint in this
12 action, Plaintiff states that “the findings of the Director [of Industrial Relations] were adopted by
13 the State Labor Commissioner in Decisions issued March 29, 2012.” ¶ 15. Among those findings
14 was the conclusion that there could be no award of backpay beyond April 2011. Defendant argues
15 Plaintiff should be estopped from arguing to the contrary in this action.

16 Judicial estoppel “precludes a party from gaining an advantage by taking one position and
17 then seeking a second advantage by taking an incompatible position.” Risetto v. Plumbers and
18 Steamfitters Local 343, 94 F. 3d 597, 600-601 (finding judicial estoppel where plaintiff claimed
19 she was unable to perform her job in order to obtain workers’ compensation, and later tried to
20 claim that she had performed her job adequately in order to win damages in a wrongful discharge
21 suit). That is simply not what happened here. Plaintiff gained no advantage in taking the first
22 position; she merely asserted what she then believed to be the end date for damages. Plaintiff has

23 _____
24 ¹⁵ Defendant objects to Anderson’s reference to his son’s qualifications for the maintenance job on
25 the grounds that he lacks foundation and is not competent to testify to the matter under Rule 701,
26 Opinion Testimony by Lay Witnesses. The objection is overruled. Anderson’s declaration
27 indicates what past jobs Pitschner has held, and that he believes the jobs are similar enough to
28 qualify Pitschner for maintenance work on the SFO project. This is Anderson’s opinion, and is
“rationally based” on his perception of what the work entails. Fed. R. Evid. 701(a). That he does
not know the exact criteria of this particular job does not prevent him from offering evidence of
his son’s past positions and his opinion that they qualify him for such work. However, even if this
particular declaration were inadmissible, there is sufficient admissible evidence to create a triable
issue.

1 now explained why she believes that date was incorrect, and damages may be appropriate beyond
2 April 15. This is an issue for the jury to decide.

3 **2. Fringe Benefits**

4 Defendant next contends that Claimants are not entitled to recover fringe benefits as a
5 matter of law. Def. MSJ at 20.

6 In Galindo v. Stoodly Co., 793 F. 2d 1502, 1517-18 (9th Cir. 1986), the Ninth Circuit
7 addressed the issue of whether an employee could be awarded a sum for lost health and medical
8 coverage following a wrongful discharge. The court held that she could not. Id. It reasoned that
9 unless an employee purchases substitute benefits or pays out of pocket medical expenses, she has
10 suffered no measurable loss. Id.

11 Plaintiff argues that Galindo is inapposite because there the court was interpreting federal
12 law, and not California law. It then cites several California cases predating Galindo, which
13 allowed an award for lost medical benefits without any showing of out of pocket expense to the
14 plaintiff. Su Opp. at 17-18. However, in EEOC v. Farmer Bros. Co., 31 F. 3d 891, 902 (9th Cir.
15 1994), the Ninth Circuit, interpreting California law, again affirmed the principle established in
16 Galindo, holding that "lost insurance coverage, unless replaced or unless actual expenses are
17 incurred, is simply not a monetary benefit owing to the plaintiff."

18 This Court is bound by the Ninth Circuit's ruling. Accordingly, it grants Defendant's
19 motion to preclude from any award fringe benefits that Defendant would not have actually
20 received, and did not replace or otherwise pay out of pocket.

21 **IV. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

22 Plaintiff moves for partial summary judgment on three grounds. Su MSJ, ECF No. 85 at
23 10. First, Plaintiff contends that the arbitrator made a factual finding that Complainants were
24 terminated as retaliation for safety complaints made to Turner, and that Defendant should be
25 collaterally estopped from asserting otherwise. Id. Alternatively, Plaintiff argues that the facts in
26 evidence establish a *prima facie* retaliation case, and that Defendant is unable to rebut this charge
27 because he cannot produce any first-hand evidence of a legitimate reason for termination without
28 proffering a sham declaration. Id. at 10-11. Finally, in the event Plaintiff's claims succeed,

1 Plaintiff seeks a finding that Complainants would have been employed until at least November 24,
2 2010 because that was the next time any subsequent lay-offs occurred. Id. at 11.

3 Defendants contend that 1) it is improper to give preclusive effect to only a portion of the
4 arbitrator's findings, and when viewed as a whole those findings do not establish that
5 Complainants were laid off for having made safety complaints; 2) the Court cannot apply
6 collateral estoppel to the arbitrator's findings because those findings did not consider the statute at
7 hand in the present litigation; 3) Defendant can establish a legitimate reason for Complainants'
8 termination, and is not estopped from presenting evidence contrary to what was presented in the
9 arbitration proceeding; and 4) there is no legal or logical support for the proposition that
10 Defendants would not have been laid off until November 24, 2010 absent their safety complaints.

11 **A. Collateral Estoppel**

12 A prior determination will be given collateral estoppel effect where 1) this issue presented
13 is identical to that decided in the former proceeding; 2) the issue was actually litigated and 3)
14 necessarily decided as a part of that litigation; 4) the doctrine is asserted against a party to the
15 former action, or a party in privity; and 5) the former decision is final and was made on the merits.
16 Kelly v. Vons Companies, Inc., 67 Cal.App.4th 1329, 1339 (1998). Courts have applied collateral
17 estoppel to the fact finding of arbitration proceedings, where those facts satisfied all of the
18 elements of collateral estoppel. See e.g. Conner v. Dart Transportation Service, 65 Cal. App. 3d
19 320, 323 (where a fact found in a prior proceeding "negates the existence of a triable issue of fact"
20 in a later proceeding, that fact will be given preclusive effect).

21 Plaintiff first argues that collateral estoppel should apply to the arbitrator's factual findings
22 because those findings are identical to the findings that will be necessary to determine the present
23 issue, and therefore meet the 'identical issue' requirement of collateral estoppel. ECF No. 85 at
24 12-13.

25 The portion of the arbitrator's decision upon which Plaintiff relies reads, in pertinent part:

26 Mr. Anderson and Mr. Pitschner were laid off in retaliation for
27 conduct which Mr. Slotta found to be offensive. The evidence
28 establishes that Mr. Anderson received a written warning from Mr.
Slotta. In retaliation for receiving the written warning, Mr. Anderson

1 reported a number of safety violations committed by Mr. Slotta,
2 including issuing forklift certificates without the requisite training.
3 While Mr. Anderson was aware of these alleged violations for
4 months prior to reporting them, he waited and reported them as a
5 means of retaliation against Mr. Slotta. Mr. Slotta, in turn, retaliated
6 against Mr. Anderson by selecting him and his son for layoff when
7 the opportunity for layoff occurred.

8 J. Smith Decl., Ex. A, Decision and Award of the Arbitrator at 4. Plaintiff contends that this
9 passage establishes that the arbitrator found Complainants were laid off due to Mr. Anderson's
10 reporting safety violations. Su MSJ 13.

11 But Plaintiff seeks to use estoppel here to establish that "complainants were terminated by
12 Defendant in retaliation for Anderson's safety complaints to general contractor Turner
13 Construction." Su MSJ at 10. As discussed above, this is not a legal ground for relief under
14 Section 6310, and accordingly, even if the Court treated the fact as established it is immaterial to
15 this proceeding. See supra

16 **B. Inconsistent Testimony**

17 Plaintiff further contends that Defendant cannot rebut Plaintiff's *prima facie* case because it
18 "cannot meet its burden of providing a legitimate, non-discriminatory" justification "for the
19 terminations" of Anderson and Pitschner. Su MSJ at 22-23. Plaintiff reasons that Defendant is
20 precluded from offering a non-discriminatory reason for its action because Slotta, Complainant's
21 direct supervisor, "denied having anything to do with the terminations" in his deposition, but the
22 arbitrator earlier found that Slotta made the decision to terminate Complainants. Id. at 23; see
23 Decision and Award of Arbitrator at 4.

24 Accordingly, Plaintiff contends that Slotta's deposition statements preclude Defendant
25 from now asserting that Slotta made a non-retaliatory decision to terminate Complainants. Id. at
26 24. At the same time, Plaintiff asserts that Defendant "would be judicially estopped from
27 presenting evidence that someone other than Slotta decided to terminate complainants," because
28 statements made by Slotta's attorney at the June 8, 2010 grievance proceedings acknowledged that
Slotta was the ultimate decision maker. Id. 23-24; see M. Smith Decl., Ex. D, Carpenters
Grievance Proceedings. Ultimately, Plaintiff contends that this leaves Defendant unable to

1 produce any “first hand evidence with regard to the reason for the . . . terminations”. Su MSJ at
2 24.

3 In response, Defendant first contends that Slotta’s attorney’s earlier statement does not
4 preclude Defendant from offering a rebuttal because “a mere offer of proof does not constitute a
5 judicial admission, and this is certainly true where...the statement was made in a prior
6 proceeding.” Def. Opp. at 10 n. 10.

7 Defendant is correct. In BNSF Ry. Co. v. O’Dea, 572 F.3d 785, 793 n.4 (9th Cir. 2009),
8 the Ninth Circuit observed that statements made in prior proceedings are not binding judicial
9 admissions. In other words, Defendant is not precluded from now taking a different position than
10 it took at the administrative hearing. Moreover, as Defendant observes, Slotta did not testify at
11 that hearing; rather, his attorney gave an offer of proof¹⁶. He is not now bound by Siemens’
12 counsel’s offer of proof at the labor arbitration.

13 Defendant further contends that Slotta’s testimony that he did not “ma[k]e the decision” to
14 lay off Anderson and Pitschner is not preclusive of, nor necessarily contradictory to, a showing
15 that there were legitimate reasons for their termination. Contrary to Plaintiff’s assertion that Slotta
16 “denied having anything to do with the terminations,” Defendant notes that Slotta testified that he
17 provided production reports to the decision maker, and that those reports showed Anderson and
18 Pitschner were among the least productive employees on the job. Def. Opp at 10 n.11.

19 Finally, Defendant contends that even if Slotta’s position in his deposition is inconsistent
20 with the testimony of defense witnesses at trial, this does not preclude Defendant from showing it
21 made its decision for legitimate business reasons; rather, “it means the jury would have to decide
22 whether Slotta, or other defense witnesses, are credible.”

23

24

25 ¹⁶ In additionr, Defendant lodges a hearsay objection to Plaintiff’s “seeking to admit an offer of proof
26 made at arbitration by Defendant’s former attorney as evidence.” Defendant’s Objections to Evidence
27 Submitted in Support of Plaintiff’s Motion for Partial Summary Judgment, ECF No. 89-3 at 2. The
28 offer of proof was the out-of-court statement of a third party about what Slotta would say. There is no
assertion that it was part of sworn testimony or subject to cross examination. To the extent that
Plaintiff attempts to use these statements for the truth of the matter asserted, they violate the hearsay
rule and are inadmissible. Fed. R. Evid. 802.

1 Defendant's reasoning is sound. If Slotta now testifies that he was not involved in the
2 decision and Defendant puts on evidence that he was, this merely presents a credibility issue for
3 the jury.

4 **C. Remedy**

5 Finally, Plaintiff contends that there is no genuine dispute that Complainants would
6 have been laid off no earlier than November 24, 2010 had they not been laid off in March of 2010.
7 ECF No. 85 at 24. In support of her claim, Plaintiff notes that no other layoffs occurred before that
8 date, though other workers quit or retired between the March and November layoffs. Id. To that
9 end, Plaintiff asks the Court, for the purpose of establishing damages, set November 24, 2010 as a
10 date before which the Complainants could not have been laid off. Id.

11 Defendant argues that Plaintiff's version of events suffers from a critical logical error. ECF
12 No. 89 at 12. Defendant reasons that,

13 [h]ad Pitschner and Anderson not been laid off when they were, two
14 other employees would have been laid off at that time . . . Thus, the
15 individuals who did remain on the job instead of Anderson and
16 Pitschner (and later quit or got injured), would not have remained on
17 the job in the first place (to quit or get injured). Therefore, if
Anderson and Pitschner were on the job instead of those two other
employees, they could . . . have been laid off.

18 Def. Opp. to Su MSJ at 12. Defendant's point is well taken. Plaintiff has the burden of showing
19 that no set of facts can be proven which would allow a reasonable jury to find that termination
20 before November 24, 2010 was possible. The Court cannot conclude that Plaintiff has established,
21 as a matter of law, that November 24, 2010 represents the earliest possible date Complainants
22 could have been laid off had they not been laid off in March.

23 **IV. CONCLUSION**

24 Defendants' Motion is GRANTED IN PART and DENIED IN PART. Defendant is
25 entitled to judgment in its favor insofar as Plaintiff argues that the Complainants were fired for
26 making safety complaints to personnel of Turner Construction. The motion is denied insofar as it
27 applies to safety complaints Complainants made to Siemens personnel.
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Plaintiff's Motion is DENIED.