

United States District Court
For the Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

THOMAS M. SEARS,)	Case No.: 11-CV-1876-LHK
)	
Plaintiff,)	
v.)	ORDER GRANTING DEFENDANT’S
)	MOTION FOR SUMMARY
HOUSING AUTHORITY OF THE COUNTY)	JUDGMENT, DENYING PLAINTIFF’S
OF MONTEREY, et al.,)	MOTION FOR LEAVE TO FILE
)	FOURTH AMENDED COMPLAINT
Defendants.)	
)	
)	

Plaintiff Thomas Sears (“Sears”) brings this action against his former employer, Monterey County Housing Authority Development Corporation (“HDC”) for wrongful termination in violation of public policy, violation of Cal. Labor Code § 1102.5, and retaliation in violation of the False Claims Act (“FCA”), 31 U.S.C. § 3730(h)(1). Before the Court are Defendant HDC’s Motion for Summary Judgment, *see* ECF No. 250, and Plaintiff Sears’ Motion for Leave to File a Fourth Amended Complaint, *see* ECF No. 264. Both motions are fully briefed. Pursuant to Civil Local Rule 7-1(b), the Court finds these matters appropriate for resolution without oral argument and hereby VACATES the hearings on these Motions set for April 10, 2014, at 1:30 p.m. The Court, having considered the record in this case, applicable law, and parties’ briefs, GRANTS HDC’s Motion for Summary Judgment and DENIES Sears’ Motion for Leave to File a Fourth Amended Complaint for the reasons stated below.

1 **I. BACKGROUND**

2 **A. Factual Background**

3 In October 2006, the Housing Authority of the County of Monterey (“HACM”) hired Sears
4 as a Senior Construction Manager and Deputy Director of Development for HDC, a nonprofit that
5 had not yet launched. *See* ECF No. 268 (“Sears Opp. Decl.”) ¶ 5. In or around June 2010, Sears
6 officially transferred to HDC, as the entity became independent of HACM. ECF No. 253 (“Warren
7 Decl.”) ¶ 6. Starla Warren, who recruited Sears at HACM, was Sears’ supervisor at HDC. Sears
8 Opp. Decl. ¶¶ 4-5.

9 In early 2009, while he was still at HACM, Sears “began noticing and speaking out against
10 practices which [he] felt were unlawful and in violation of state and federal regulations.” *Id.* ¶ 9.
11 These alleged violations included: (1) bid-fixing in violation of HUD federal procurement
12 regulations, in connection to three different HDC development projects; (2) falsifying estimates on
13 applications for federal HUD funding; (3) creating fraudulent documents on applications for state
14 funding; (4) violations of the Fair Housing Act; and (5) commingling of funds. *Id.* ¶¶ 27-56. Sears
15 contends that he reported the aforementioned legal violations to Warren. *Id.*

16 Sears asserts that his relationship with Warren began to change as a result of his vocal
17 complaints. *Id.* ¶ 11. Sears felt that Warren wanted him out of HDC, and that because she was
18 newly empowered with the authority to fire him after HDC’s split from HACM, Warren engaged in
19 a deliberate campaign to “paper” Sears by giving Sears several reprimands and warnings, and
20 placing Sears on administrative leave. *Id.* ¶ 22.

21 The first of these reprimands took place in July 2010, shortly after HDC became an
22 independent entity from HACM. *Id.* ¶ 13. Sears then complained to John Curro (“Curro”), a
23 construction manager consultant, and Warren, about what Sears perceived to be bid-fixing in
24 connection to two development projects. *Id.* ¶¶ 12, 14. Sears went on a two-week vacation, and
25 upon his return, received a letter from Warren stating that Sears would be terminated within five
26 working days. *Id.* ¶ 15. Sears was placed on administrative leave from July 19, 2010 to August 27,
27 2010, with a “Preliminary Notice of Proposed Termination Action.” *Id.*

1 Sears argues that the preliminary termination notice was retaliation for his vocal complaints
2 of bid-fixing. Opp. at 10. HDC’s notice, however, detailed four reasons for HDC’s preliminary
3 decision to terminate Sears: (1) Sears prepared tax credit applications that were unreadable and had
4 to be re-done by other HDC employees; (2) Sears improperly stored documents on an external hard
5 drive; (3) Sears failed to develop a budget for permit fees in a timely fashion and did not obtain the
6 necessary signatures for the permits’ submission, jeopardizing the application; and (4) Sears
7 mismanaged architectural contracts, which caused a time crunch in the application process and
8 required two contracts to be re-written and re-executed. Warren Decl. ¶ 7. Sears filed a timely
9 appeal, and while the hearing officer found deficiencies in Sears’ performance, the officer
10 concluded that Sears’ conduct did not merit termination. *Id.* ¶ 8; Sears Opp. Decl. ¶ 16.
11 Importantly, the second basis regarding storage of information on an external hard drive echoed
12 Warren’s previous warnings to Sears. In March 2010, Warren reprimanded Sears for not placing
13 files on the shared drive. Warren Decl. Ex. E. At that time, Warren and Sears had discussed that
14 Sears’ external hard drive would be used for drawings and photos only. *Id.*; Sears Opp. Decl. Ex. F,
15 at 2.

16 While Sears was on administrative leave, HDC employees had to access Sears’ HDC
17 computer to find HDC documents. Warren Decl. ¶ 11. HDC employees discovered voluminous
18 amounts of non-HDC-related business documents. *Id.* Specifically, the employees discovered
19 business documents related to EnTech, Inc., a corporation of which Sears and his wife, were
20 officers, and numerous documents such as “passports of foreign nationals, one billion dollars in
21 ‘Treaty of Versailles gold certificates,’ ‘gold certificates issued by the Sultanate of Sulu and North
22 Borneo,’ . . . offshore bank account documents” and wire transfers. Warren Decl. Ex. F. HDC
23 discovered several emails relating to EnTech business that were addressed to and from Sears’ HDC
24 email address, and included his title and workplace email signature. Warren Decl. ¶ 13.

25 Shortly after returning to work, on August 27, 2010, Warren gave Sears a written reprimand
26 for violation of HDC’s Information Security and Conflict of Interest Policies and HDC’s Standards
27 of Conduct. Warren Decl. ¶ 15. Warren placed Sears on a “Corrective Action Plan,” asking for
28

1 Sears to improve his time management, limit personal calls and emails, develop a system for
2 organizing assignments, and be a good team player. Sears Opp. Decl. ¶ 17; Sears Opp. Decl. Ex. I.
3 Sears felt that he was greeted by a “hostile and discriminatory” work environment, and engaged an
4 attorney to direct HDC to address multiple concerns. Sears Opp. Decl. ¶ 19. On August 30, 2010,
5 moreover, Sears sent a letter to the California Tax Credit Allocation Committee regarding
6 HACM’s violation of HUD bid procedures. *Id.* ¶ 20.

7 HDC hired CSI Human Resources Group (“CSI”) in September 2010 to investigate Sears’
8 complaints. *Id.* ¶ 19; Warren Decl. ¶ 9. CSI’s investigation into Sears’ work environment
9 substantiated some of Sears’ allegations, but rejected other allegations. ECF No. 251 (“Torres
10 Decl.”) Ex. A. For example, Sears complained about being issued a company phone, when HDC's
11 previous policy had been to reimburse employees for work-related usages of their personal phone.
12 *Id.* at 5. Sears stated that he was left with a cell phone contract that he could not cancel without
13 incurring fees, and all of his business contacts had his previous number. *Id.* at 12. CSI found that
14 Sears’ allegation was accurate. *Id.* at 14. Sears also complained that his external hard drive was
15 taken away, which contained important data needed to perform his work duties. *Id.* at 5. CSI found
16 that Sears’ allegation was true. *Id.* at 14. Finally, Sears alleged that Warren had ordered staff to not
17 give Sears keys to his desk and the back door. *Id.* at 2. CSI substantiated this complaint. *Id.* at 14.

18 CSI did not substantiate Sears’ allegation that HDC’s staff had been told not to
19 communicate with him, at risk of losing their jobs. *Id.* at 1, 13. None of the employees CSI
20 interviewed corroborated Sears’ claim. *Id.* at 13. CSI also did not find truth in Sears’ allegation that
21 Warren had been disparaging him in the community, stating that Sears provided no specific
22 evidence to support this claim. *Id.* Sears also alleged that Warren ordered Sears to not speak to Paul
23 Davis, a personal friend. *Id.* at 2. CSI found that Sears had taken Warren’s direction out of context,
24 as Paul Davis was an architect working on a project from which Sears had been removed. *Id.* at 13.
25 Warren’s order was limited to communicating with Davis as it relates to the project. *Id.* CSI also
26 found that Sears provided no evidence to support his assertion that he was demoted to projects not
27 befitting his educational background or experience, or that HDC was piling on unreasonable
28

1 amounts of work. *Id.* at 13-14.

2 Sears also complained that Warren stated that he would be reviewed every two weeks for
3 90 days, arguing that this was a double standard without reasonable justification. *Id.* at 2. CSI did
4 not find evidence of disparate treatment or a “double standard.” *Id.* at 14. Sears also alleged that
5 after Warren’s promotion to CEO and President of HDC, Warren suddenly found fault with Sears’
6 performance, even though nothing was brought to his attention prior to July 19, 2010. *Id.* at 2.
7 Warren responded that she had been Sears’ supervisor for years and had verbally coached him in
8 the past on his performance. *Id.* at 6. CSI did not draw any conclusion as to this allegation. *Id.* at
9 14.

10 Importantly, during the course of the investigation, female HDC employees reported that
11 Sears made inappropriate sexual comments in the workplace. Warren Decl. ¶ 10. Accordingly, CSI
12 conducted a second investigation inquiring specifically into the sexual harassment claims. *Id.* In the
13 second investigation, CSI learned that Sears had thrown a piece of candy at a female employee’s
14 cleavage, frequently made comments about a temporary co-worker’s chest and stared at her breasts,
15 told co-workers that he was a “boob guy,” and took pictures of a co-worker’s breasts, zoomed in,
16 and showed the picture to another employee. Warren Decl. Ex. D. Moreover, Warren Reed, a
17 business partner of HDC, reported that Sears had made an inappropriate sexual comment about a
18 female non-HDC employee during a construction meeting. Warren Decl. ¶ 21; ECF No. 252-2
19 (“Reed Decl.”) Ex. A.

20 On September 16, 2010, Warren gave Sears a formal reprimand based on the findings of the
21 second CSI investigation and placed Sears on administrative leave. Sears Opp. Decl. ¶ 21; Warren
22 Decl. ¶ 16. Three days later, on September 19, 2010, members of HDC and HACM’s board
23 received a message from Sears’ business associate, Charles Miller, at their personal email address.
24 Warren Decl. ¶ 17. That same day, several board members received phone calls at their homes
25 from Miller. *Id.* The next day, another one of Sears’ business associates, Michael Hinrich, wrote
26 HDC’s board threatening to sue. *Id.* ¶ 18. One week later, Miller emailed the board threatening to
27 sue as well. *Id.* ¶ 19.

1 While on administrative leave, Sears claims he “remained committed to getting someone to
2 take seriously the abuse, waste, and unlawful activities that [Warren] and HDC were engaged in.”
3 Sears Opp. Decl. ¶ 23. Sears addressed HDC and HACM’s boards on September 27, 2010, urging
4 the boards to investigate violations of HUD, HACM, and HDC procurement regulations. *Id.*

5 On October 4, 2010, Warren notified Sears of Warren’s decision to terminate Sears’
6 employment at HDC. Warren Decl. ¶ 21. Pursuant to this notification, Sears was terminated that
7 same day. Sears Opp. Decl. ¶ 24. Warren asserts that she based her decision on Sears’ failures to
8 comply with policies and standards, his engagement in inappropriate sexual conduct with HDC
9 employees and third parties, and his poor work performance. Warren Decl. ¶ 21.

10 On October 14, 2010, ten days after he was terminated, Sears sent a written complaint to
11 HUD’s Office of the Inspector General (“OIG”). Sears Opp. Decl. ¶ 42. The complaint included
12 information about the reprisal he had discussed with OIG over the phone, the script from his
13 address to the Board of Commissioners, which occurred after his initial call, and information about
14 additional developments since their first conversation. Sears Opp. Decl. Ex. Q. HUD OIG
15 investigators later met with Sears and eventually concluded that there was some merit to Sears’
16 allegations that HDC did not properly follow HUD protocol. Sears Opp. Decl. ¶ 57. However,
17 Sears alleges that he “never received any information about investigations into his complaints of
18 retaliation or reprisal first made in September 2010.” ECF No. 208 (“TAC”) ¶ 29. Plaintiff also
19 “never received from HUD OIG an explanation of a decision not to conduct an investigation into
20 his complaints of retaliation or reprisal.” *Id.*

21 **B. Procedural History**

22 Plaintiff and his wife, Brenda L. Stealy Sears, appearing *pro se*, filed a complaint on April
23 19, 2011 against HACM, HDC, Warren, and approximately two-dozen other defendants. ECF No.
24 1. Eighteen defendants moved to dismiss several of the Sears’ claims in five separate motions to
25 dismiss. *See* ECF Nos. 53, 56, 61, 64, 91. On February 3, 2012, Judge Armstrong, to whom the
26 case was assigned, granted all five motions to dismiss with partial leave to amend. *See* ECF No.
27 158.

1 On March 5, 2012, Sears,¹ represented by counsel, filed a First Amended Complaint against
2 HACM, HDC, Warren, the County of Monterey, and CSI. *See* ECF No. 159. Sears also filed a
3 motion to change venue from Oakland, where Judge Armstrong is located, to San Jose. *See* ECF
4 No. 160. Four days after filing the FAC, on March 9, 2012, Sears voluntarily dismissed then-
5 Defendant County of Monterey. *See* ECF No. 163. On April 11, 2012, Sears filed a Second
6 Amended Complaint asserting seven causes of action against defendants HACM, HDC, and
7 Warren. *See* ECF No. 176. CSI was no longer included as a defendant. *See id.* Judge Armstrong
8 granted Sears’ motion to transfer on May 10, 2012, and the case was transferred to San Jose and
9 assigned the undersigned Judge. *See* ECF No. 181.

10 After the case was transferred, Sears voluntarily dismissed, with prejudice, his first cause of
11 action for violation of California Labor Code Section 1102.5 against HACM, as well as his fourth
12 through seventh causes of action against all remaining defendants. *See* ECF No. 187. Sears
13 subsequently dismissed HACM altogether. *See* ECF No. 203. The Court set a case schedule on
14 August 29, 2012. *See* ECF No. 189. Under that case schedule, fact discovery was set to close on
15 April 25, 2013 with expert discovery to close on June 6, 2013. *See id.*

16 On August 31, 2012, HDC and Warren filed a motion to dismiss the Second Amended
17 Complaint. *See* ECF No. 190. In this motion, HDC and Warren sought to dismiss Sears’ (1) first
18 cause of action to the extent it alleges a violation of California Labor Code Section 1102.5, which
19 prohibits an employer from retaliating against an employee for providing information of alleged
20 illegal conduct to law enforcement agencies; and (2) second cause of action alleging whistleblower
21 retaliation in violation of American Recovery and Reinvestment Act (“ARRA”). *Id.*

22 On January 23, 2013, this Court granted HDC and Warren’s motion to dismiss with leave to
23 amend because Plaintiff failed to exhaust his administrative remedies. *See* ECF No. 207. The Court
24 noted that Sears filed complaints over the internet with the HUD OIG alleging violations by
25 HACM, HDC, and Warren “[b]efore October 4, 2010” and “in or about September to November
26 2010.” *Id.* at 9. The Court, however, dismissed the ARRA claim because the SAC “fail[ed] to show
27

28 ¹ Sears’ wife is no longer a party to the case. *See* ECF No. 159.

1 that Plaintiff filed a complaint with the HUD Inspector General regarding the alleged retaliation, a
2 requirement if Plaintiff is to show Plaintiff exhausted his administrative remedies.” *Id.* at 10.

3 However, the Court granted Sears leave to amend as to the ARRA claim to allow Sears to allege
4 facts showing that Sears filed a complaint with the HUD Inspector General alleging whistleblower
5 retaliation. *Id.*

6 On February 11, 2013, Sears filed his TAC against HDC and Warren. *See* ECF No. 208.
7 Sears alleged the following causes of action: (1) violation of California Labor Code Section 1102.5
8 and for wrongful termination in violation of public policy based on the aforementioned violation of
9 Section 1102.5 (against HDC), *see* TAC ¶¶ 39-40; (2) whistleblower retaliation in violation of the
10 ARRA (against HDC and Warren), *see* TAC ¶¶ 47-55; and (3) whistleblower retaliation in
11 violation of the False Claims Act (against HDC), *see* TAC ¶¶ 56-63.

12 On February 22, 2013, HDC and Warren moved to dismiss the second cause of action—
13 whistleblower retaliation in violation of ARRA—on the grounds that Sears failed to exhaust his
14 administrative remedies as to this claim. *See* ECF No. 209-1. On April 3, 2013, the Court extended
15 the deadline for discovery (both fact and expert) to September 12, 2013. *See* ECF No. 218. The
16 Court granted Defendants’ motion to dismiss with prejudice on August 22, 2013, because Sears
17 had not adequately alleged exhaustion despite several opportunities to do so. *See* ECF No. 230.
18 This effectively dismissed Defendant Warren from the case, since the ARRA cause of action was
19 the only cause of action to which she was a defendant. The first cause of action (for violation of
20 Section 1102.5 and wrongful termination in violation of public policy) and third cause of action
21 (for False Claims Act retaliation) survived the various motions to dismiss. The Court then granted
22 stipulations to continue the discovery deadlines through February 13, 2014. *See* ECF No. 232.

23 On February 25, 2014, HDC filed its Motion for Summary Judgment. ECF No. 250. On
24 March 13, 2014, Sears filed an Opposition to HDC’s Motion for Summary Judgment. ECF No.
25 267.² On March 14, 2014, Sears filed an Ex Parte Motion to deem the Opposition as timely filed,

26
27 ² In connection with Sears’ Opposition, Sears filed an Objection to Defendant’s Evidence
28 Submitted in Support of its Motion for Partial Summary Judgment. *See* ECF No. 270. Local Rule
7-3(a) provides that all evidentiary objections “to [a] motion must be contained within the brief of
memorandum.” Accordingly, the Court OVERRULES Sears’ evidentiary objections that are not

1 which HDC has opposed.³ *See* ECF Nos. 288, 293, 296. On March 20, 2014, HDC filed a Reply in
2 support of its Motion for Summary Judgment. *See* ECF No. 298.

3 On March 7, 2014, three weeks after the close of discovery and on week after a dispositive
4 motion had been filed, Sears filed a Motion for Leave to File a Fourth Amended Complaint,
5 seeking to add a cause of action for defamation against HDC and to re-add Starla Warren (who had
6 been dismissed as a party on August 22, 2013) as a defendant. *See* ECF No. 264. On March 19,
7 2014, HDC filed an Opposition to Sears' Motion for Leave to Amend. *See* ECF No. 297. On
8 March 21, 2014, Sears filed a Reply in support of his Motion for Leave to Amend. *See* ECF No.
9 300.

10 **II. LEGAL STANDARD**

11 **A. Motion for Summary Judgment**

12 Summary judgment is appropriate if, viewing the evidence and drawing all reasonable
13 inferences in the light most favorable to the nonmoving party, there are no genuine disputed issues
14 of material fact, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a);
15 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is "material" if it "might affect the
16 outcome of the suit under the governing law," and a dispute as to a material fact is "genuine" if

17
18 raised in the Opposition. In its Reply in support of the Motion for Summary Judgment, HDC raises
19 several evidentiary objections to exhibits introduced by Sears in support of his opposition. To the
20 extent the Court relies upon particular evidence, the Court addresses HDC's objections in the
21 Discussion section. *See supra* Section III.

22 ³ In the Ex Parte Motion, Sears' counsel contends that various declarations in support of the
23 Opposition, which were filed on March 14, 2014, were untimely by a couple of hours due to
24 problems with electronic case filing. *See* ECF No. 288. HDC opposes Sears' Ex Parte Motion on
25 the grounds that the deadline to file the Opposition was March 11, 2014, not, as Sears' counsel
26 believes, March 13, 2014. *See* ECF No. 293. In a Reply, Sears' counsel suggests that HDC
27 deliberately filed its Motion for Summary Judgment early to prejudice Sears. *See* ECF No. 296.
28 HDC has the better of the arguments. The Court's Case Management Order, ECF No. 249, set the
last day to file dispositive motions as February 27, 2014. In fact, HDC filed its Motion for
Summary Judgment on February 25, 2014. This was within HDC's rights. The Opposition was due
fourteen days from the date of the Motion, which would have been March 11, 2014. *See* Civil L. R.
7-3(a). HDC, when it filed its Motion, appropriately docketed the deadline for Opposition as March
11, 2014. *See* ECF No. 250 ("Responses due by 3/11/2014"). Nonetheless, the Court GRANTS
Sears' Ex Parte Motion for a three day extension. HDC has suffered no prejudice from the
untimely filing. This Court issued an order to ensure that HDC would have seven days from the
date of the untimely Opposition to file HDC's Reply, which is the time period the Local Rules
contemplate. *See* ECF No. 295. Further, the Court finds that it would be unfair to preclude Sears
from responding to a dispositive motion because of his counsel's error.

1 there is sufficient evidence for a reasonable trier of fact to decide in favor of the nonmoving party.
2 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “If the evidence is merely colorable, or
3 is not significantly probative,” the court may grant summary judgment. *Id.* at 249-50 (citation
4 omitted). At the summary judgment stage, the Court “does not assess credibility or weigh the
5 evidence, but simply determines whether there is a genuine factual issue for trial.” *House v. Bell*,
6 547 U.S. 518, 559-60 (2006).

7 The moving party has the burden of demonstrating the absence of a genuine issue of fact for
8 trial. *Celotex*, 477 U.S. at 323. To meet its burden, “the moving party must either produce evidence
9 negating an essential element of the nonmoving party’s claim or defense or show that the
10 nonmoving party does not have enough evidence of an essential element to carry its ultimate
11 burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos., Inc.*, 210 F.3d 1099,
12 1102 (9th Cir. 2000) (citation omitted). Once the moving party has satisfied its initial burden of
13 production, the burden shifts to the nonmoving party to show that there is a genuine issue of
14 material fact. *Id.* at 1103.

15 **B. Leave to Amend**

16 Under Federal Rule of Civil Procedure 15(a), a party may amend its complaint “once as a
17 matter of course at any time before a responsive pleading is served.” Fed. R. Civ. P. 15(a).
18 Thereafter, a party may amend only by leave of the court or by written consent of the adverse
19 party. *Id.* Rule 15(a), however, instructs that “leave shall be freely given when justice so requires.”
20 *Id.*; *see also Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003).

21 Leave to amend should be granted where there is no “undue delay, bad faith or dilatory
22 motive on the part of the movant, repeated failure to cure deficiencies by amendments previously
23 allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and]
24 futility of the amendment [.]” *See Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 532 (9th
25 Cir. 2008) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)); *Zucco Partners, LLC v. Digimarc*
26 *Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009).

27 Ultimately, the grant or denial of an opportunity to amend is within the discretion of the
28

1 district court. *Foman*, 371 U.S. at 182 (“district court may properly deny leave to amend but
2 outright refusal to grant leave without any justifying reason is not an exercise of discretion”);
3 *Eminence Capital*, 316 F.3d at 1051-52 (underlying purpose of Rule 15 is to “facilitate decision on
4 the merits, rather than on the pleadings or technicalities”). The district court has particularly broad
5 discretion to deny leave to amend where plaintiff has previously amended the complaint. *Allen v.*
6 *City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990); accord *Sisseton-Wahpeton Sioux Tribe v.*
7 *United States*, 90 F.3d 351, 356 (9th Cir. 1996) (denying leave to amend complaint where the
8 plaintiff conceded that the proposed amendments are similar to the existing claims already asserted
9 in the second amended complaint).

10 **III. DISCUSSION**

11 **A. False Claims Act Claim**

12 HDC argues that it is entitled to summary judgment as to Sears’ FCA claim because: (1)
13 Sears has not introduced evidence to establish a *prima facie* case of retaliation; (2) HDC had
14 legitimate non-retaliatory reasons for terminating Sears; and (3) Sears has not introduced evidence
15 to demonstrate that HDC’s explanation for terminating Sears is mere pretext for impermissible
16 retaliation. Mot. at 18-24. Sears argues that HDC’s discrimination against residents or beneficiaries
17 of federal HUD funds, engaging in improper practices relating to the bidding process for certain
18 HACM housing projects, and creating false documents all constitute making false claims to the
19 federal government. Opp. at 12; *see also* Sears Opp. Decl. Furthermore, Sears alleges that HDC
20 had knowledge of his belief that the conduct alleged constituted a false claim, and that Sears was
21 terminated in retaliation for his protected activity. Opp. at 12. In its Reply, HDC responds that
22 Sears did not present evidence with regard to the issue of pretext, which is dispositive of his
23 retaliation claim. Reply at 3. As explained below, the Court agrees with HDC.

24 “Congress added 31 U.S.C. § 3730(h) to the FCA in 1986 to protect ‘whistleblowers,’ those
25 who come forward with evidence their employer is defrauding the government, from retaliation by
26 their employer.” *U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261, 1269 (9th Cir. 1996). The FCA
27 protects employees from being “discharged, demoted, . . . or in any other manner discriminated
28

1 against in the terms and conditions of employment . . . because of lawful acts done by the
2 employee . . . in furtherance of an [FCA] action . . . , including investigation for, initiation of,
3 testimony for, or assistance in an [FCA] action. . . .” 31 U.S.C. § 3730(h). An FCA retaliation
4 claim requires proof of three elements: “1) the employee must have been engaging in conduct
5 protected under the Act; 2) the employer must have known that the employee was engaging in such
6 conduct; and 3) the employer must have discriminated against the employee because of her
7 protected conduct.” *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1060 (9th
8 Cir. 2011).

9 The Ninth Circuit has not expressly determined whether the *McDonnell-Douglas* burden-
10 shifting analysis utilized by the courts in analyzing retaliation claims under Title VII of the Civil
11 Rights Act also applies to whistleblowing claims under the FCA. *See McDonnell-Douglas Corp. v.*
12 *Green*, 411 U.S. 792 (1973). However, many other courts have extended the *McDonnell-Douglas*
13 framework to FCA retaliation claims. *See Harrington v. Aggregate Indus. Ne. Region, Inc.*, 668
14 F.3d 25, 30-31 (1st Cir. 2012) (collecting cases); *see also U.S. ex rel. Berglund v. Boeing Co.*, 835
15 F. Supp. 2d 1020, 1040 (D. Or. 2011); *Neighorn v. Quest Health Care*, 870 F. Supp. 2d 1069, 1092
16 (D. Or. 2012). Moreover, in other contexts, the Ninth Circuit has imported Title VII doctrine to the
17 FCA retaliation context. *Moore v. Cal. Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 847-48
18 (9th Cir. 2002) (conduct does not constitute “retaliation” under the FCA unless it would be
19 sufficient to constitute an adverse employment action under Title VII).

20 The Court will therefore apply the *McDonnell-Douglas* balancing analysis here. Under that
21 analysis, Sears bears the initial burden of establishing a *prima facie* case for retaliation under the
22 FCA. That is, Sears must make an initial showing as to the three elements described in *Cafasso*
23 (protected activity, employer knowledge, and causation). *Balmer v. HCA, Inc.*, 423 F.3d 606, 613
24 (6th Cir. 2005) *abrogated in part on other grounds by Fox v. Vice*, 131 S. Ct. 2205 (2011) (noting
25 that a *prima facie* case of FCA retaliation requires evidence that the plaintiff engaged in protected
26 activity, that the defendant knew of the exercise of plaintiff’s protected rights, that defendant took
27 an employment action adverse to plaintiff, and that there was some causal connection between the
28

1 protected activity and the adverse employment action); *see also Harrington*, 688 F.3d at 31-32
2 (holding that to clear the “low bar” required to establish a *prima facie* case, plaintiff must present
3 evidence as to the protected activity element, the knowledge element, and the causation element).
4 If Sears makes this *prima facie* showing, the burden of production shifts to HDC to articulate a
5 legitimate, non-retaliatory explanation for the adverse employment action. *Berglund*, 835 F. Supp.
6 2d at 1040. If HDC successfully rebuts the inference of retaliation, the burden of production shifts
7 back to Sears to demonstrate that HDC’s proffered explanation is merely a pretext for
8 impermissible retaliation. *Id.*

9 In the instant case, the Court need not reach whether Sears establishes a *prima facie* case,
10 because Sears fails to raise a material factual dispute as to pretext. Accordingly, the Court will
11 assume for purposes of this Motion that Sears has established a *prima facie* case. *See Vasquez v.*
12 *Cnty. of L.A.*, 349 F.3d 634, 642 (9th Cir. 2003) (“[E]ven assuming that [plaintiff] could establish
13 his *prima facie* case, his claim would fail because he could not show that [defendant’s] reason was
14 a pretext for discriminatory intent.”). The Court thus begins by describing the evidence of HDC’s
15 non-discriminatory reasons for terminating Sears, and then turns to the evidence of pretext.

16 **1. Non-Discriminatory Reason for Termination**

17 Once a plaintiff establishes a *prima facie* case of discrimination, the burden shifts to the
18 employer to offer a legitimate, non-retaliatory reason for the adverse employment
19 decision. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000). This burden is
20 one of production, not persuasion. *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 509 (1993).
21 HDC argues that Sears was terminated for several non-retaliatory reasons: Sears’ (1) sexual
22 harassment of female co-workers; (2) use of work computer to conduct personal business; (3)
23 disclosure of confidential contact information; and (4) poor work performance. Mot. at 13-16. The
24 Court will address these reasons for termination in further detail.

25 **a) Sexual Harassment**

26 HDC provides evidence indicating that both HDC employees and HDC’s business partners
27 raised concerns about Sears’ engaging in unprofessional, inappropriate sexual conduct. HDC
28

1 contends that two female HDC employees raised concerns about inappropriate sexual comments by
2 Sears during CSI's initial investigation of Sears' working conditions, which was prompted by Sears
3 himself. Sears Opp. Decl. ¶ 19; Torres Decl. ¶ 2. CSI interviewed the two female employees and
4 found that Sears had thrown a piece of candy at a female employee's cleavage, frequently made
5 comments about a temporary co-worker's chest and stared at her breasts, told co-workers that he
6 was a "boob guy," and took pictures of a co-worker's breasts, zoomed in, and showed the picture to
7 another employee. Torres Decl. Ex. B. at 20-24. The interviewed employees also made reference to
8 an incident where Sears stared at the breasts of a co-worker who was walking up the stairs and
9 tightening the strings to her blouse. *Id.* at 20, 22. Sears laughed when the co-worker told him,
10 "That's disgusting. You didn't have to stand there watching, you could have walked over to your
11 desk." *Id.* at 20. As a result of this conduct, CSI concluded that Sears had engaged in inappropriate
12 conduct. *Id.* at 19.

13 Moreover, in September 2010, Warren Reed, one of HDC's business partners, wrote HDC
14 an email stating that during a construction meeting, Sears made a "few inappropriate and
15 unprofessional comments regarding a woman's physical characteristics, which were sexual in
16 nature." Reed Decl. ¶ 2. Reed noted that "other [female] staff who were present . . . did also
17 mention . . . that [Sears'] comments made them very uncomfortable." Reed Decl. Ex. A.

18 As courts have long recognized, this type of sexual harassment is a legitimate, non-
19 retaliatory reason for termination. *See Byrnes v. Lockheed Martin Corp.*, 257 Fed. App'x 34, 35
20 (9th Cir. 2007); *Wade v. Roper Indus.*, No. 13-3885, 2013 WL 6732071, at *4 (N.D. Cal. Dec.
21 30, 2013); *Kraus v. Presidio Trust Facilities Div./Residential Mgmt. Branch*, 704 F. Supp. 2d 859,
22 867 (N.D. Cal. 2010). The Court therefore finds that HDC has met its burden of production as to
23 the sexual harassment rationale for Sears' termination.

24 **b) Use of Work Computer for Business**

25 While Sears was on administrative leave in July and August 2010, HDC employees
26 accessed Sears' workplace computer to look for documents. Warren Decl. ¶ 11. HDC discovered
27 business documents related to EnTech, Inc., a corporation of which Sears and his wife, were
28

1 officers, and numerous documents such as “passports of foreign nationals, one billion dollars in
2 ‘Treaty of Versailles gold certificates,’ ‘gold certificates issued by the Sultanate of Sulu and North
3 Borneo,’ . . . offshore bank account documents” and wire transfers. Mot. at 14; Warren Decl. Ex. F.
4 HDC discovered several emails relating to EnTech business that were addressed to and from Sears’
5 HDC email address, and included his title and workplace email signature. Warren Decl. ¶ 13. This
6 gave HDC the impression that Sears was utilizing workplace computers for personal business, in
7 violation of their HDC Information Security and Conflict of Interest Policies. Mot. at 15. HDC
8 states that because Sears used his HDC work email address, the emails gave the impression of
9 being sanctioned by HDC or affiliated with HDC’s official business. *Id.*; Warren Decl. ¶¶ 13-14.
10 Furthermore, because government agencies regularly audit HDC in connection with HDC’s receipt
11 of state and federal funding, Sears’ emails “could create an impression of impropriety by HDC and
12 could force HDC to use its limited resources, not in providing low income housing, but explaining
13 why such documents were on its computers.” Mot. at 15; Warren Decl. ¶ 14.

14 Misuse of workplace computers or resources is generally a legitimate, non-retaliatory
15 reason for termination. *See Coons v. Secretary of U.S. Dep’t of Treasury*, 383 F.3d 879, 887 (9th
16 Cir. 2004); *Twymon v. Wells Fargo Co.*, 462 F.3d 925, 935 (8th Cir. 2006). The Court therefore
17 finds that HDC has met its burden of production with regard to the misuse of workplace computers
18 rationale for terminating Sears’ employment.

19 **c) Disclosure of Confidential Contact Information**

20 HDC placed Sears on administrative leave for a second time on September 16, 2010.
21 Warren Decl. ¶ 16. Three days later on September 19, 2010, HDC and HACM board members
22 received an email from Charles C. Miller, who represented himself to be Sears’ business associate
23 and a consultant to Sears’ corporation, EnTech Inc. *See* ECF No. 250-3 (“Styles Decl.”); 251-2
24 (“Williams Decl.”); 252-1 (“Espinoza Decl.”). The emails were sent to the board members’ private
25 email addresses. Styles Decl. ¶ 2; Williams Decl. ¶ 2; Espinoza Decl. ¶ 2. Miller’s email stated that
26 EnTech had been “slandered” by Warren, that Warren’s action had the “possibility to affect a \$932
27 million transaction which would attach liability to [Monterey County Housing Authority,] HDC
28

1 and all directors personally,” and demanded a board meeting the next day “to mitigate damages any
2 further.” Styles Decl. Ex. A. Styles, Williams, and Espinoza all received phone calls on the
3 weekend from Miller at their home phone numbers. Styles Decl. ¶ 2; Williams Decl. ¶ 2; Espinoza
4 Decl. ¶ 2. These phone numbers were made available to HDC, but were expected by the board
5 members to be kept confidential. Styles Decl. ¶ 3; Williams Decl. ¶ 3; Espinoza Decl. ¶ 3.

6 On September 20, 2010, another business associate of Sears, Michael Hinrich, wrote the
7 HDC board threatening to sue for Warren’s allegedly slanderous comments about his company.
8 Warren Decl. Ex. P. One week later on September 27, 2010, Miller sent an email to the board
9 titled “Failure to Act, Notice of Suit,” that threatened a lawsuit against the board for failure to
10 mitigate injuries to EnTech, and gave the board 72 hours to “attempt corrections and mitigate the
11 compounding and accumulating damages if possible.” Williams Decl. Ex. B. Styles, Williams, and
12 Espinoza all stated that Miller’s communications with the board were concerning, given that these
13 communications threatened HDC. Styles Decl. ¶ 5; Williams Decl. ¶ 5; Espinoza Decl. ¶ 5.

14 The HDC board members’ email addresses and phone numbers were confidential, and
15 Sears was not authorized to disclose this information. Warren Decl. ¶ 17. Warren stated that she
16 was concerned that the threatening emails could jeopardize funding for HDC and force HDC to
17 expend resources defending against litigation. *Id.* ¶ 20. Warren was also concerned that this would
18 reflect poorly on HDC during a government audit. *Id.*

19 The disclosure of confidential information is a legitimate, non-retaliatory basis for
20 termination. *Duncan v. U.S. Sec’y of Labor*, 69 Fed App’x 822, 823 (9th Cir. 2003); *Mitchell v.*
21 *Superior Ct. of Cal. Cnty. of San Mateo*, 312 Fed. App’x 893, 895 (9th Cir. 2009). The Court
22 therefore finds that HDC has met its burden of production as to the disclosure of confidential
23 information rationale for Sears’ termination.

24 **d) Poor Work Performance**

25 HDC had documented examples of Sears’ poor work performance. In March 2010, Warren
26 reprimanded Sears for not placing files on the shared drive and admonished Sears that Sears should
27 use his external hard drive only for drawings and photos. Warren Decl. Ex. E; Sears Opp. Decl. Ex.
28

1 F, at 2. On July 19, 2010, HDC issued a “Preliminary Notice of Proposed Termination Action” that
2 detailed multiple issues with Sears’ preparation of tax credit applications for two development
3 projects, including creating illegible documents, not placing documents on networked drives for
4 other employees, and delays in soliciting necessary information from municipalities. Warren Decl.
5 Ex. A; Warren Decl. ¶ 7. The notice stated that Sears’ “job performance over the past couple of
6 years has been reaching an unacceptable level.” Warren Decl. Ex. A. Sears was immediately put on
7 administrative leave until August 27, 2010. Warren Decl. ¶ 8, 11. Sears appealed from the July 19,
8 2010 notice and was ultimately not terminated. Warren Decl. ¶ 8.

9 Two of HDC’s development partners also expressed an unwillingness to work with Sears.
10 The executive director of the Housing Authority of the City of Paso Robles wrote an email to HDC
11 on August 23, 2010, requesting that Sears not be assigned to work on a specific development
12 project. ECF No. 250-4 (“Corella Decl.”) Ex. A. Paul Davis, an architect working with HDC on
13 various development projects, wrote HDC an email on August 26, 2010, stating “it was
14 uncomfortable . . . having conversations with [Sears] regarding the projects I’m involved with. . . .
15 I think it would be best for the design team to continue on without [Sears] involved.” ECF No. 252
16 (“Davis Decl.”) Ex. A.

17 The Court finds that HDC has met its burden of production as to the poor job performance
18 rationale for Sears’ termination.

19 2. Pretext

20 A plaintiff can demonstrate that a defendant’s proffered reasons for a challenged action are
21 pretextual if the plaintiff introduces “sufficient evidence to create a genuine issue as to whether
22 retaliation was the real motive underlying his dismissal.” *Harrington*, 668 F.3d at 31. A plaintiff
23 must present “specific, substantial evidence of pretext” to defeat a motion for summary judgment.
24 *Johnson v. Lockheed Martin Corp.*, No. 11-1140, 2012 WL 2917944, at *8 (N.D. Cal. July 17,
25 2012). “[W]eaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the
26 employer’s proffer” can give rise to an inference of pretext, as well as deviations from standard
27 procedures and close temporal proximity between the employee’s termination and employee’s
28

1 whistleblowing. *Harrington*, 668 F.3d at 33 (quoting *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323
2 (10th Cir. 1997)); cf. *Coszalter v. City of Salem*, 320 F.3d 968, 977 (9th Cir. 2003) (noting that
3 with regard to temporal proximity, there is no bright line rule for how much time is considered to
4 be “too long” to support an inference of retaliation). To avoid summary judgment, a plaintiff must
5 produce sufficient evidence for a reasonable factfinder to conclude that each of the employer’s
6 proffered nondiscriminatory reasons is pretextual. See *Chapman v. AI Transport*, 229 F.3d 1012,
7 1037 (11th Cir. 2000); *Ghosh v. Indiana Dep’t of Env’tl. Mgmt.*, 192 F.3d 1087, 1092 (7th Cir.
8 1999).

9 In this case, Sears makes three arguments for why the non-retaliatory reasons proffered by
10 HDC are pretextual: (1) there was a close “temporal proximity” between his whistleblower
11 comments and the adverse employment actions taken by HDC; (2) Sears was a victim of “disparate
12 treatment” as compared to other employees; and (3) CSI’s investigation into the workplace
13 conditions at HDC was biased against him. Sears Opp. Decl. ¶¶ 11, 18, 19, 24; Opp. at 11. Sears
14 addresses the misuse of workplace computers and sexual harassment allegations, but does not
15 directly address the disclosure of confidential information or the poor job performance described
16 by HDC. The Court will address each of Sears’ theories in turn.

17 **a) Temporal Proximity**

18 First, Sears offers a “temporal proximity” argument to support an inference of pretext.
19 Sears alleges that Warren knew of Sears’ complaints of HDC’s “unlawful conduct and violations of
20 federal procurement regulations” and subjected him to adverse actions “within months” of his
21 protected activities. Opp. at 12.

22 Sears states that he began to speak out against practices that he believed were unlawful or in
23 violation of federal regulations “early in 2009.” Sears Opp. Decl. ¶ 9. For example, in June 2009,
24 Sears allegedly complained to Richard Russo, Manager of the HACM Force Account, of bid-fixing
25 in connection with a copper electrical wiring project at one of HDC’s developments. *Id.* ¶ 32. Sears
26 contends that this bid-fixing was in violation of HUD’s regulations. *Id.* ¶ 33.

27 Sears alleges that a similar bid-fixing incident took place in July 2010. Sears states that he
28

1 had a long-planned two week vacation from July 3, 2010 to July 18, 2010. *Id.* ¶ 13. Immediately
2 prior to the vacation, Sears protested to Warren and John Curro, a consultant working with HDC,
3 that he felt that HDC was engaging in bid-fixing with regards to two development projects, which
4 would violate HUD regulations. *Id.* ¶¶ 14, 37. Sears notes that HDC’s initial decision to place him
5 on administrative leave, pending an appeal of HDC’s preliminary notice to terminate, occurred the
6 day after he returned from vacation. *Id.* ¶ 15. Sears’ appeal was successful, and he was reinstated to
7 his former position with the same compensation as before. *Id.* ¶ 16. However, after returning from
8 administrative leave on August 27, 2010, Sears received a “Welcome Back” letter that reduced his
9 responsibilities and a formal reprimand for his employment record. *Id.* ¶ 17.

10 Sears states, “At this point [August 27, 2010], I had not even worked a month with HDC, so
11 it is unclear how [Warren] would have ‘so much data’ on my negative performance.” *Id.* ¶ 18.
12 Sears also voiced his concerns about HDC’s alleged procurement violations to the HDC board of
13 directors on September 27, 2010, and HDC terminated his employment approximately one week
14 later. *Id.* ¶¶ 24, 40.

15 Sears’ argument as to temporal proximity misrepresents the record. Sears expresses
16 incredulity at how Warren would have accumulated extensive negative data on his work
17 performance in August 2010 when “[he] had not even worked a month with HDC.” *Id.* ¶ 18. This
18 statement ignores that Sears had been working at HACM since October 2006, and that HDC is
19 simply the former development unit of HACM. Warren Decl. ¶ 6. This unit broke off from HACM
20 in June 2010 after HDC was incorporated as its own non-profit entity. *See* Sears Opp. Decl. Ex. A
21 (indicating that his supervisor at HACM was also Starla Warren); Sears Opp. Decl. Ex. D. There
22 was a complete continuity of operations in staff, directors, job assignments, and compensation
23 between the former development department at HACM and its new form, HDC. Warren Decl. ¶ 6;
24 Sears Opp. Decl. Ex. D. Sears’ attempt to cast doubt on HDC’s ability to develop an extensive
25 employment record by narrowing the relevant time period of review to the less than four months
26 between June 28, 2010 (the date of Sears’ transfer to HDC) to October 4, 2010 (the date of Sears’
27 termination) is disingenuous. Sears Opp. Decl. ¶¶ 13, 24. The more relevant time period is from
28

1 October 2006 to October 2010, a four-year period.

2 Importantly, Sears also fails to establish the temporal linkage between many of his
3 whistleblowing activities and his termination. Sears allegedly engaged in protected activity since
4 2009, *see id.* ¶ 9, but does not introduce any evidence that links his 2009 bid-fixing complaint, *see*
5 *id.* ¶ 32, to Warren’s decision to terminate him a year later in October 2010. Moreover, his
6 complaints to the HUD OIG in August 2010 and October 2010 and his complaints to the HDC
7 board in September 2010, *see id.* ¶¶ 40, 41, all postdated Warren’s decision to place Sears on
8 administrative leave on at least one occasion for poor performance in July 2010, and in some cases,
9 after Warren’s decision to place Sears on administrative leave for a second occasion after the CSI
10 investigation in September 2010. *Id.* ¶ 15. Sears cannot allege retaliation for whistleblower activity
11 made after an adverse employment decision had already been rendered. *See Ferretti v. Pfizer Inc.*,
12 No. 11-4486, 2013 WL 140088, at *15 (N.D. Cal. Jan. 10, 2013) (“The proximity requirement is
13 met where a series of adverse employment actions begins shortly *after* a plaintiff engages in
14 protected activity.” (emphasis added)).

15 Finally, Sears’ most persuasive example of “temporal proximity” is completely undermined
16 by his own evidence. Sears seems to contend that the triggering event for HDC’s adverse
17 employment actions was his complaint to Warren and Curro in July 2010 about bid-fixing for two
18 development projects right before his vacation in early July 2010. *Id.* ¶ 15. Sears emphasizes that
19 he received the preliminary notice of termination “the day after my return from vacation.” *See id.*
20 However, this obscures that Warren issued the termination notice as a direct result of Sears’
21 failures to adequately complete important state funding applications prior to departing for this
22 “long-planned” vacation. Sears Opp. Decl. Ex. E; Sears Opp. Decl. ¶ 13. Neither the preliminary
23 notice from Warren, nor Sears’ appeal, makes any reference to bid-fixing or retaliation. Sears Opp.
24 Decl. Ex. E; Sears Opp. Decl. Ex. F. Instead, both the preliminary notice and response detail and
25 dispute specific problems that arose during Sears’ vacation with regard to organization and
26 accessibility of the project files, illegibility of the prepared documents, problems with budget
27 calculations, and Sears’ failure to solicit necessary information from municipal partners. Sears
28

1 Opp. Decl. Ex. E; Sears Opp. Decl. Ex. F. The preliminary notice further states that HDC had
2 reprimanded Sears for his lack of organization and failure to make project files accessible in the
3 past. Sears Opp. Decl. Ex. E; Warren Decl. Ex. E. The notice and response introduced by Sears in
4 support of his Opposition do not create a genuine issue of material fact as to whether HDC's
5 rationale for taking adverse employment actions against Sears was legitimate and non-retaliatory.

6 For the reasons discussed above, the Court concludes that Sears has failed to raise a genuine
7 issue of material fact as to his "temporal proximity" theory.

8 **b) Disparate Treatment**

9 Sears argues that HDC's retaliatory motive is evidence from the disparate treatment he
10 received in comparison to his co-workers. Opp. at 10. Evidence demonstrating disparate treatment
11 by an employer is probative of pretext. *Vasquez v. Cnty of L.A.* 349 F.3d 634, 641 (9th Cir. 2003).
12 Individuals are similarly situated when they have similar jobs and display similar conduct. *Id.* at
13 641. Sears specifically asserts that other co-workers misused workplace computers and engaged in
14 unprofessional, inappropriate sexual behavior in the workplace. Sears' disparate treatment
15 argument fails, as the evidence in support of each argument fails to create a genuine issue of
16 material fact for the reasons stated below.

17 **(1) Misuse of Workplace Computers**

18 With regard to the misuse of workplace computers, Sears introduces deposition testimony
19 "of two other colleagues establish[ing] that they regularly checked their personal emails during
20 office hours." Opp. at 11.⁴ In reviewing the record, Sears appears to be referring to the depositions
21 of HDC employees Carolina Sahagun and Kimmy Nguyen. Gaspar Decl. Ex. E ("Sahagun
22 Depo."); Gaspar Decl. Ex. F ("Nguyen Depo.").⁵ Sahagun admits to having Sears burn a CD with
23

24 ⁴ HDC moves to strike Exhibits A and C-K to the Gaspar declaration, which are voluminous
25 deposition transcripts, arguing that Sears' failure to cite specific pages and lines "makes it difficult,
26 if not impossible, for HDC to assert any objections to this evidence." While the Court is loathe to
27 accept such vague citations from Sears' counsel, the Court DENIES HDC's request to strike these
28 exhibits, as striking such documents would completely undermine Sears' ability to defend against
the instant motion.

⁵ Sears makes general reference to exhibits filed with a declaration from his attorney, Erika M.
Gaspar, but gives no direct citation or further clarification as to what evidence he is relying upon to
support his assertion. Opp. at 11.

1 pictures with her son, and admits to sending personal emails at work during her lunch break.
2 Sahagun Depo. 81:15-22; 84:13-19. Nguyen also admits to checking personal emails while at
3 work, though it is not clear from Nguyen’s deposition whether she checked emails during breaks or
4 during work hours. Nguyen Depo. 40:8-41:10. Sears also seems to introduce evidence suggesting
5 that Sahagun conducted non-HDC business at the workplace. Specifically, it appears that Sahagun,
6 in her capacity as a notary public, notarized documents for Sears’ EnTech, Inc. business. Sahagun
7 Depo. 51:4-7.

8 The Court is not persuaded that this evidence creates a genuine issue of material fact for
9 two reasons. First, the record does not support Sears’ contention that Sears’ actions were similar to
10 that of Nguyen and Sahagun. While Sears was on administrative leave, HDC discovered hundreds
11 of pages of personal business documents. Warren Decl. ¶ 11. This included passports of foreign
12 nationals, gold certificates, silver certificates allegedly worth millions of dollars in the Philippines,
13 offshore bank account documents, and wire transfers. *Id.*; Warren Decl. Ex. F. These documents
14 are entirely unconnected to HDC business, and HDC was concerned that “third parties could easily
15 conclude that Sears was transacting HACM/HDC business.” Warren Decl. ¶ 13. Sahagun and
16 Nguyen’s checking personal emails do not implicate the same concerns of an appearance of
17 impropriety to third parties.

18 Unlike Sahagun’s and Nguyen’s actions, which did not clearly violate any workplace
19 policy, Sears’ conduct violates multiple clear HDC policies, such as the Conflict of Interest Policy
20 and HDC Standard of Conduct. *Id.* ¶ 15; Warren Decl. Ex. H, I, J.⁶ The Conflict of Interest Policy
21 required Sears to not engage in outside business without prior disclosure to HDC. Warren Decl. Ex.
22 I. Finally, the Standards of Conduct prohibited the unauthorized use of office equipment, and
23 prohibited any conduct that would reflect adversely on HDC. Warren Decl. Ex. J. Sears denies
24 knowing about the existence of these policies, *see* Sears Opp. Decl. ¶ 21, but does not introduce
25 evidence to refute that HDC’s board adopted these policies in 2009, and these policies applied to

26 _____
27 ⁶ In addition, HDC’s Information Security Policy forbids the use of HDC computer resources to
28 conduct personal business. Warren Decl. Ex. G. The record is clear that Sears violated this policy
as well, though the record is not clear as to whether Nguyen’s checking of personal emails at work
violated these policies as well.

1 all employees. Warren Decl. Ex. K; Warren Decl. ¶ 15.

2 Second, Sears' misuse of workplace computers implicated HDC much more strongly than
3 did any of Nguyen or Sahagun's personal uses. The deposition testimony does not establish that
4 Nguyen's or Sahagun's emails or notarizations were being conducted during business hours. In
5 contrast, emails found on Sears' workplace computer show that Sears sent non-HDC business
6 emails during work hours from his HDC email. Warren Decl. Ex. F, at 18, 32; ECF No. 259 at 16-
7 20. These emails featured his HDC business contact information and title in his email signature
8 block. *Id.* The Court finds that Sears has not established pretext with regard to HDC's rationales for
9 termination because the evidence does not indicate that Sahagun and Nguyen are similarly situated
10 to Sears in their misuse of workplace resources. *See Vasquez*, 349 F.3d at 641 (requiring similar
11 conduct to establish disparate treatment).

12 (2) Sexual Harassment

13 The Court is also not persuaded by Sears' disparate treatment argument with regard to
14 sexual harassment in the workplace. Sears argues that "sexual jokes and comments were accepted
15 as the norm and not taken seriously short of a formal complaint." Opp. at 11. Again, Sears appears
16 to be relying upon the depositions of HDC employees Sahagun and Nguyen to support his
17 assertions. The depositions, however, demonstrate either no recollection or outright denials of
18 inappropriate, sexually tinged behavior or comments between Sahagun, Nguyen, and other
19 employees. Sahagun Depo. 90:22-91:18, 92:22-93:23; Nguyen Depo. 23:2-5, 17-23. For example,
20 Sahagun testifies that she would give coworkers a hug goodbye before leaving for a long weekend,
21 but that she stopped giving Sears hugs "when he got out of hand." Sahagun Depo. 74:16-75:2.
22 Sahagun noted that the coworkers attended many out-of-office, after hours events at bars, but could
23 not recall an instance that involved strippers. Sahagun Depo. 91:2-18. Sahagun did not allege that
24 any events took place at HDC or during work hours. Sahagun admitted to pulling a male co-
25 worker's arm hair and touching the co-worker's arm, but denied pinching his nipples. Sahagun
26 Depo. 92:4.

27 Nguyen, on the other hand, testified that she organized a birthday party for a HACM

1 employee in 2009 that featured strippers, but that event took place at a local tavern and does not
2 appear to have been funded by HDC/HACM or organized by Warren or other management level
3 employees. Nguyen Depo. 37:16-38:18. Nguyen was further asked at the deposition about a picture
4 of her bare chest, which was in Sears' possession and which Nguyen contends that she never texted
5 to Sears. Nguyen Depo. 44:14-45:12, 46:1-47:8. Sahagun testified that she had not previously seen
6 this picture of Nguyen. Sahagun Depo. 92:22-93:12.

7 The Court finds that none of the evidence in the record creates a genuine issue of material
8 fact with regard to HDC's decision to terminate Sears on sexual harassment grounds for two
9 reasons. First, Sears' conduct was much more severe than that of Nguyen or Sahagun. Taking the
10 evidence in the light most favorable to Sears, Sahagun testified that she gave hugs to co-workers,
11 touched a male co-worker's arm, and pinched a male co-worker's arm hair. Nguyen testified that
12 she helped organize an off-site birthday party for a former co-worker at a local tavern, and the
13 party involved strippers. None of these actions clearly violates HDC's Sexual Harassment Policy.
14 HDC's Sexual Harassment Policy states that sexual harassment can include "visual conduct such as
15 leering," "sexual innuendo," "sexual jokes," and "graphic verbal commentaries about an
16 individual's body." In contrast, Sears' conduct, as stated in the CSI reports, runs afoul of this
17 Policy. Warren Supp. Decl. Ex. W. Sears reportedly took photos of a woman's chest, made
18 repeated comments about a temporary employee's breasts, threw candy into female co-worker's
19 cleavage, and stared at a co-worker's chest as she was walking up the stairs. Warren Decl. Ex. D.
20 All of Sears' actions took place in the workplace, *see id.*, whereas Nguyen's organization of the
21 birthday party—which is the most plainly sexual behavior introduced by Sears—explicitly took
22 place off-site. Nguyen Depo. 37:16-38:18. Accordingly, the conduct of Nguyen and Sahagan was
23 not similar to that of Sears. *Vasquez*, 349 F.3d at 641 (requiring similar conduct to establish
24 disparate treatment).

25 Second, Sears' inappropriate conduct implicated not only HDC itself, but also an outside
26 HDC business partner. Reed Decl. ¶ 2. Reed, an executive for property management company John
27 Stewart Company, alleged that Sears made "very inappropriate and unprofessional comments"
28

1 regarding a John Stewart Company female employee’s body. Reed Decl. Ex. A. Reed stated that he
2 told Sears that his comments were inappropriate, and he also reported this incident to HACM staff.
3 *Id.* Reed reported that other John Stewart employees at the meeting felt uncomfortable because of
4 Sears’ comments. *Id.* Sears offers no evidence to refute the serious charges raised in Reed’s email.

5 HDC’s evidence indicates that Sears’ behavior not only created a threatening atmosphere in
6 the workplace, but also represented HDC poorly in its dealings with partners. Sears introduces no
7 evidence to establish that Warren’s reliance on the CSI report and Reed’s email, among other
8 factors, in making her decision to terminate Sears was mere pretext. The Court further notes that
9 failure to take the sexual harassment allegations raised in the CSI reports and in Reed’s email and
10 the CSI report could have opened HDC to liability under Title VII. *See Swenson v. Potter*, 271 F.3d
11 1184, 1192 (“If the employer fails to take corrective action after learning of an employee's sexually
12 harassing conduct, or takes inadequate action that emboldens the harasser to continue his
13 misconduct, the employer can be deemed to have ‘adopt[ed] the offending conduct and its results,
14 quite as if they had been authorized affirmatively as the employer's policy.’”). The Court thus holds
15 that Sears has failed to create a genuine issue of material fact as to HDC’s decision to terminate
16 Sears due to sexual harassment complaints.

17 **c) Biased Investigation**

18 Finally, Sears challenges the impartiality of the CSI investigation into HDC in September
19 2010, an investigation that was prompted by Sears’ belief that he was met with a “hostile and
20 discriminatory work environment and was not provided the tools to adequately do [his] job.” Sears
21 Opp. Decl. ¶ 19. Sears asserts that his beliefs about bias and partiality “were confirmed” when a
22 second investigation was conducted and resulted in a finding that Sears engaged in inappropriate
23 sexual comments and behavior. *Id.*

24 However, the record points to the opposite conclusion. The CSI interviewers, not HDC
25 employees, were the ones who prompted the additional investigation into Sears’ allegedly making
26 sexually inappropriate comments. Torres Decl. ¶ 3. Specifically, the first CSI report indicates that
27 Sahagun stated that Sears “demeans women” and that Sears “is [not] a worthy representative of the
28

1 agency because of his inappropriate comments.” *Id.* Moreover, as discussed above, CSI’s first
2 investigation reached even-handed conclusions, substantiating some of Sears’ complaints. Torres
3 Decl. Ex. A. For example, the first CSI report found that Warren did take away Sears’ personal
4 keys to his desk, and issued him a HDC cell phone, instead of reimbursing him for work-related
5 usage of his personal cell phone. Warren Decl. Ex. C. The report clearly outlined Sears’ complaints
6 and HDC’s responses to each claim, and provided employee interviews to substantiate CSI’s
7 conclusions. *Id.*

8 CSI’s report of the second investigation on Sears’ sexual harassment claims also appeared
9 to be fair. CSI’s report indicated that one of the employees who made the sexual harassment
10 allegations was reluctant to discuss the subject because she “felt bad” for Sears and “did not want
11 to get him in trouble.” Torres Decl. Ex. B. However, Sears mischaracterizes CSI’s conclusion at
12 the end of the second investigation by stating that “[CSI] found no evidence of sexual harassment,
13 and that there were no complaints of sexual harassment.” Opp. at 11. In fact, the CSI report states,
14 “[CSI concludes] that Sears has made inappropriate comments of a sexual nature as recorded in the
15 written statements of [Sears’ two female co-workers].” Torres Decl. Ex. B, at 19.

16 CSI’s even-handed and well-substantiated reports give no indication of bias. Rather, the
17 report provides a reliable assessment of Sears’ performance at HDC, and Warren reasonably
18 concluded that, based on the CSI reports, Sears’ conduct amounted to sexual harassment as defined
19 by HDC’s Sexual Harassment Policy. ECF No. 298-2 (“Warren Supp. Decl.”) ¶ 2; Warren Decl. ¶
20 21.⁷ Specifically, HDC’s Sexual Harassment Policy states that sexual harassment can include
21 “visual conduct such as leering,” “sexual innuendo,” “sexual jokes,” and “graphic verbal
22 commentaries about an individual’s body”— all behaviors that are consistent with the allegations
23 contained in the CSI reports. Warren Supp. Decl. Ex. W. Sears does not introduce any evidence to
24 indicate collusion between CSI and HDC or bias on the part of CSI, and thus, has not demonstrated
25

26 ⁷ Sears seems to make the argument that CSI was somehow in collusion with HDC. Sears Opp.
27 Decl. ¶ 19. However, Sears argues in his Opposition that CSI “repeatedly informed” Starla Warren
28 that there were no complaints of sexual harassment, and Sears asserts that CSI and Warren
disagreed as to Sears’ sexual harassment allegations. Opp. at 11. Sears’ own argument appears to
contradict his allegations of bias in CSI’s investigation. *Id.*

1 a genuine issue of material fact as to his bias claims in the CSI investigation. *See Johnson*, 2012
2 WL 2917944, at *8.

3 Accordingly, for the reasons discussed above, HDC’s motion for summary judgment is
4 GRANTED as to Plaintiff’s FCA retaliation claim.

5 **B. Supplemental Jurisdiction**

6 Sears’ FCA claim is the only claim that presents a federal question. Having granted
7 summary judgment on that claim, the Court must determine whether to exercise supplemental
8 jurisdiction over Sears’ remaining state law claims under 28 U.S.C. § 1367(c)(3). Where “all
9 federal-law claims are eliminated before trial, the balance of factors to be considered under the
10 pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point
11 toward declining to exercise jurisdiction over the remaining state-law claims.” *Sanford v.*
12 *MemberWorks, Inc.*, 625 F.3d 550, 561 (9th Cir. 2010) (quoting *Carnegie–Mellon Univ. v. Cohill*,
13 484 U.S. 343, 350 n.7 (1988)). Because that is the case here, the balance of factors points toward
14 declining to exercise jurisdiction over Sears’ remaining claims, which are all based on state law,
15 and the Court DISMISSES Sears’ remaining claims without prejudice.

16 **C. Leave to Amend**

17 On March 7, 2014, Sears filed a Motion for Leave to File a Fourth Amended Complaint.
18 *See* ECF No. 264. In his Motion, Sears seeks to add a state law defamation claim against HDC, and
19 to re-add Starla Warren as a named defendant to the defamation claim. *Id.* at 3. The Court DENIES
20 Sears’ Motion for Leave to File a Fourth Amended Complaint, because the Court has already
21 declined to exercise supplemental jurisdiction over Sears’ state law claims. Filing a Fourth
22 Amended Complaint to add additional state law claims would therefore be futile.

23 **IV. CONCLUSION**

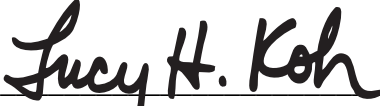
24 For the foregoing reasons, the Court GRANTS Defendant’s Motion for Summary Judgment
25 as to Sears’ False Claims Act claim. The Court declines to exercise supplemental jurisdiction over
26 Sears’ remaining claims, which are all based on state law, pursuant to 28 U.S.C. § 1367(c)(3) and
27

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

therefore DISMISSES these claims without prejudice. Finally, the Court DENIES Plaintiff's Motion for Leave to File a Fourth Amended Complaint. The Clerk shall close the case file.

IT IS SO ORDERED.

Dated: April 7, 2014



LUCY H. KOH
United States District Judge