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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MICHAEL GURRIERI,
Plaintiff,
v.
CARMINA DURAN,
Defendant.

Case No.: 15-CV-1674 W (BLM)

**ORDER DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT [DOC. 54]**

Pending before the Court is a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 filed by Defendant Carmina Duran. [Doc. 54.] Plaintiff Michael Gurrieri opposes. [Doc. 56.] The Court decides the matter on the papers submitted without oral argument pursuant to Civil Local Rule 7.1(d)(1). For the reasons discussed below, the Court **DENIES** Defendant's motion.

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1 **I. BACKGROUND**

2 In April of 2014, Plaintiff Michael Gurrieri began working at the San Diego
3 Unified School District (“SDUSD”) on a probationary basis as an Internal Investigator,
4 reporting to Defendant Carmina Duran. (*See FAC* [Doc. 14] ¶¶ 1, 22; *Gurrieri Depo.*
5 [Doc. 54-2, Exh. 1] 47:10–12.)

6 Shortly thereafter, Gurrieri began investigating a complaint by parents of a student
7 at Green Elementary School, which alleged that one male kindergarten student had
8 sexually assaulted another in a school bathroom. (*See FAC* [Doc. 14] ¶¶ 27–31.) The
9 parents’ complaint further alleged that the principal of Green Elementary, one Bruce
10 Ferguson, had “failed to follow district policy/procedures in handling” the matter. (*See*
11 *Citizen Compl.* [Doc. 55-22, Exh. P].) As a result, it alleged, Ferguson had created an
12 unsafe environment that allowed further physical harm to come to the child in question.
13 (*See id.*)

14 Gurrieri began the investigation in May of 2014 and finished a draft investigative
15 report about four months later, in September of that year. (*See FAC* [Doc. 14] ¶¶ 31–32;
16 *Draft Investigative Report* [Doc. 55-24, Exh. R].) The First Amended Complaint
17 (“FAC”) alleges that Gurrieri’s draft contained “allegations pertaining to other incidents
18 of sexual harassment/assault and [Principal] Ferguson’s negligence and/or misconduct[,]”
19 which Duran directed him to delete in later versions of the report. (*FAC* [Doc. 14] ¶¶ 39–
20 45.) According to the FAC, Gurrieri objected to these instructions, stated his belief that
21 Ferguson should be further investigated and even disciplined, and then objected when the
22 school district decided not to discipline Ferguson. (*Id.* [Doc. 14] ¶¶ 46–48, 50, 65.) The
23 FAC further alleges that Gurrieri complained to Duran about the school district’s
24 investigative and management policies and also its past decision not to terminate an
25 abusive high school coach. (*Id.* [Doc. 14] ¶¶ 77, 80.) Finally, the FAC alleges that
26 Gurrieri offered his opinion that the office where he worked within the school district
27 tended to disfavor certain groups of students in its investigations. (*See id.* [Doc. 14] ¶¶
28 77–79.)

1 In either September or October of 2014,¹ Gurrieri and Duran met for the first time
2 to discuss Duran’s concerns with Gurrieri’s performance at work. The FAC alleges that
3 on October 20 of that year, Duran told Gurrieri that he needed to improve. (*See FAC*
4 [Doc. 14] ¶ 87.) He allegedly wrote back to her two days later, requesting written
5 feedback. (*See id.* [Doc. 14] ¶ 88.) Gurrieri was terminated the next day, on October 23,
6 2014. (*Duran Decl.* [Doc. 54-3] ¶ 6; *Thede Decl.* [Doc. 54-4] ¶ 4.) Gurrieri apparently
7 never received any written feedback prior to his termination. (*See Gurrieri Depo.* [Doc.
8 55-5–8, Exh. E] 308.)

9 Gurrieri brought this action on July 28, 2015. (*Compl.* [Doc. 1].) The FAC alleges
10 violation of Gurrieri’s First Amendment rights through retaliation pursuant to 42 U.S.C. §
11 1983. (*FAC* [Doc. 14] ¶¶ 98–107.)

12

13 **II. LEGAL STANDARD**

14 Summary judgment is appropriate under Rule 56 when the moving party
15 demonstrates the absence of a genuine issue of material fact and entitlement to judgment
16 as a matter of law. See Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322
17 (1986). A fact is material when, under the governing substantive law, it could affect the
18 outcome of the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A
19 dispute about a material fact is genuine if “the evidence is such that a reasonable jury
20 could return a verdict for the nonmoving party.” Id.

21 A party seeking summary judgment always bears the initial burden of establishing
22 the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The moving
23 party can satisfy this “burden of production” in two ways: (1) by presenting evidence that
24 negates an essential element of the nonmoving party’s case; or (2) by demonstrating that
25 the nonmoving party failed to make a showing sufficient to establish an element essential
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28 ¹ Duran testified that she met with Gurrieri on September 3 and again on October 6 and 20 to discuss
these concerns. (*Duran Depo.* [Doc. 55-9–10] 66.)

1 to that party’s case on which that party will bear the burden of proof at trial. See id. at
2 322–25; Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc., 210 F.3d 1099, 1102–03
3 (9th Cir. 2000) (explaining relevant burden-shifting terminology). “Disputes over
4 irrelevant or unnecessary facts will not preclude a grant of summary judgment.” T.W.
5 Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir. 1987).

6 “[T]he district court may limit its review to the documents submitted for the
7 purpose of summary judgment and those parts of the record specifically referenced
8 therein.” Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1030 (9th Cir.
9 2001). Therefore, the Court is not obligated “to scour the record in search of a genuine
10 issue of triable fact” Keenan v. Allen, 91 F.3d 1275, 1279 (9th Cir. 1996) (citing
11 Richards v. Combined Ins. Co., 55 F.3d 247, 251 (7th Cir. 1995)).

12 If the moving party meets its initial burden of production on the motion, the
13 nonmoving party cannot defeat summary judgment merely by demonstrating “that there
14 is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co., Ltd. v.
15 Zenith Radio Corp., 475 U.S. 574, 586 (1986); Triton Energy Corp. v. Square D Co., 68
16 F.3d 1216, 1221 (9th Cir. 1995) (citing Anderson, 477 U.S. at 252) (“The mere existence
17 of a scintilla of evidence in support of the non-moving party’s position is not
18 sufficient.”). Rather, the nonmoving party must “go beyond the pleadings and by her
19 own affidavits, or by ‘the depositions, answers to interrogatories, and admissions on file,’
20 designate ‘specific facts showing that there is a genuine issue for trial.’ ” Celotex, 477
21 U.S. at 324 (quoting Fed. R. Civ. P. 56).

22 When making this determination, the court must view all inferences drawn from
23 the underlying facts in the light most favorable to the nonmoving party. See Matsushita,
24 475 U.S. at 587. “Credibility determinations, the weighing of evidence, and the drawing
25 of legitimate inferences from the facts are jury functions, not those of a judge” ruling on a
26 motion for summary judgment. Anderson, 477 U.S. at 255.

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1 **III. DISCUSSION**

2 **A. Duran Meets her Burden of Production on the Motion.**

3 The Ninth Circuit “follow[s] a sequential five-step inquiry to determine whether an
4 employer impermissibly retaliated against an employee for engaging in protected
5 speech.” Ellins v. City of Sierra Madre, 710 F.3d 1049, 1056 (9th Cir. 2013) (citing Eng
6 v. Cooley, 552 F.3d 1062, 1070 (9th Cir. 2009)). “ ‘First, the plaintiff bears the burden of
7 showing: (1) whether the plaintiff spoke on a matter of public concern; (2) whether the
8 plaintiff spoke as a private citizen or public employee; and (3) whether the plaintiff’s
9 protected speech was a substantial or motivating factor in the adverse employment
10 action.’ ” Id. (quoting Robinson v. York, 566 F.3d 817, 822 (9th Cir. 2009)). “Next, if
11 the plaintiff has satisfied the first three steps, the burden shifts to the government to
12 show: (4) whether the state had an adequate justification for treating the employee
13 differently from other members of the general public; and (5) whether the state would
14 have taken the adverse employment action even absent the protected speech.” Id.
15 (quoting Robinson, 566 F.3d at 822). Defendant’s motion addresses only the first three
16 steps of the foregoing analysis. (*Def.’s Mot.* [Doc. 54-1].)

17 Duran identifies five categories of statements she contends constitute Gurrieri’s
18 exercise of his First Amendment rights for which he now seeks redress against Duran.
19 First, Gurrieri wrote an investigative report that allegedly contained findings of
20 misconduct on the part of Principal Ferguson—Duran then instructed Gurrieri to remove
21 these findings, instructions to which Gurrieri objected. (*See Def.’s Mot.* [Doc. 54-1]
22 3:20–4:13, 7:2–9:7; *FAC* [Doc. 14] ¶¶ 32–44.) Second, Gurrieri offered his opinion that
23 both Principal Ferguson and a baseball coach should be terminated—per the *FAC*, the
24 former for negligence and being intoxicated during work hours, and the latter for
25 physically abusing students. (*See id.* [Doc. 54-1] 4:14–21, 9:8–10:9; *FAC* [Doc. 14] ¶¶
26 35, 77.) Third, Gurrieri objected to the school district’s policies and procedures,
27 apparently as to expulsion of students. (*See id.* [Doc. 54-1] 4:22–5:6, 10:10–11:10.)
28 Fourth, Gurrieri told Duran of his belief that people living south of Interstate 8 received

1 inferior treatment in investigations relative to their counterparts living north of that
2 freeway. (*See id.* [Doc. 54-1] 5:7–16, 11:11–12:11.) Fifth and finally, Gurrieri told a
3 coworker—but not Duran—that he agreed with that coworker’s belief that the school
4 district tended to favor minorities in its hiring practices. (*See id.* [Doc. 54-1] 5:17–22,
5 12:12–13:9; *Gurrieri Depo.* [Doc. 55-5–8, Exh. E] 285.)

6 As a preliminary matter, Gurrieri may not seek redress for statements about which
7 there is no evidence Duran was aware, as such statements logically could not have been a
8 substantial or motivating factor in the termination decision. (*See Gurrieri Depo.* [Doc.
9 55-5–8, Exh. E] 285 (containing an admission on the part of Gurrieri that he “didn’t
10 think” he actually ever told anyone else about his agreement with his coworker’s belief).)
11 See Ellins, 710 F.3d at 1056. Thus, without any evidence to show that Duran knew about
12 Gurrieri’s complaint as to the district’s hiring practices, the fifth category of speech
13 cannot serve as a basis for a retaliation cause of action against her. See id.

14 15 **1. Whether Gurrieri Spoke on Matters of Public Concern**

16 Of the remaining four categories, Duran contends that two of them did not relate to
17 matters of public concern—the second type of statement, concerning the possibility of
18 discipline as to the principal and the basketball coach, and the third, regarding his
19 objection to the district’s expulsion policies. (*See Def.’s Mot.* [Doc. 54-1] 9:8–10:9,
20 10:10–11:10.)

21 “Speech involves a matter of public concern when it can fairly be considered to
22 relate to ‘any matter of political, social, or other concern to the community.’” Johnson v.
23 Multnomah Cty., Or., 48 F.3d 420, 422 (9th Cir. 1995) (quoting Connick v. Myers, 461
24 U.S. 138, 146 (1983)). “Whether an employee’s speech addresses a matter of public
25 concern must be determined by the content, form, and context of a given statement, as
26 revealed by the whole record.” Connick, 461 U.S. at 147–48.

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1 **a) Gurrieri’s Opinions as to the Continued Employment of**
2 **Dr. Ferguson and a Baseball Coach**

3 First, Duran contends that Gurrieri’s opinions as to the employment status of the
4 school principal and the basketball coach relate only to “a [p]rivate [p]ersonnel [m]atter”
5 and not any issue of concern to the public. (*See Def.’s Mot.* [Doc. 54-1] 9:8–10:9.)

6 Her evidence stops well short of establishing the absence of a genuine dispute on
7 this point. The citations in both the introductory and the argument section of Defendant’s
8 motion point only to four pages in Gurrieri’s deposition and one paragraph in Duran’s
9 declaration, which together show that he did offer his opinion that these two individuals
10 should be terminated. (*See Def.’s Mot.* [Doc. 54-1] 4:14–21, 9:8–10:9 (citing *Gurrieri*
11 *Depo.* [Doc. 54-2, Exh. 1] 79, 80, 82, 271; *Duran Decl.* [Doc. 54-3] ¶ 7).) However, the
12 cited evidence provides little or no context for Gurrieri’s opinions, nor does it offer any
13 hint as to what Gurrieri’s investigations might have unveiled that could have caused him
14 to believe the circumstances justified termination. Because Duran does not delve beyond
15 the most cursory evaluation of Gurrieri’s statements on this topic, she does not show the
16 absence of a genuine dispute of fact as to the private character of the speech in question.
17 See Fed. R. Civ. P. 56; Celotex, 477 U.S. at 322.

18
19 **b) Gurrieri’s Objection to District Policies**

20 Second, Duran contends that Gurrieri spoke on an internal matter when he
21 discussed the district’s policies, which ostensibly made it difficult to conduct
22 investigations. (*See Def.’s Mot.* [Doc. 54-1] 4:22–5:6, 10:10–11:10.) She cites to pages
23 43, 263, 312, and 313 of Gurrieri’s deposition to support this assertion. (*Id.*) Duran
24 simply does not provide enough evidence about what policies Gurrieri discussed. Pages
25 312 and 313 of Gurrieri’s deposition seem to indicate that the policies had to do with the
26 expulsion of students. (*Gurrieri Depo.* [Doc. 54-2] 312–13.) But beyond that, there is
27 little information in Defendant’s cited evidence as to the subject matter of Gurrieri’s
28 complaints on this topic. As such, Duran does not demonstrate the absence of a genuine

1 dispute of material fact as to the private character of the policies in question. See Fed. R.
2 Civ. P. 56; Celotex, 477 U.S. at 322.

3
4 **2. Whether Gurrieri’s Speech Occurred through Performance of his**
5 **Official Responsibilities**

6 Next, Duran contends that Gurrieri made three types of statements as an employee,
7 not as a private citizen—the first category listed above in Part III.A, *supra*, concerning
8 Duran’s draft report and his objections to deletions from it, the third category, comprising
9 his objections to school district policies, and the fourth category, on his opinion that
10 people living south of Interstate 8 received inferior treatment in investigations. (*See*
11 *Def.’s Mot.* [Doc. 54-1] 7:2–9:7, 10:10–11:10, 11:11–12:11.)

12 “When a citizen enters government service, the citizen by necessity must accept
13 certain limitations on his or her freedom.” Garcetti v. Ceballos, 547 U.S. 410, 418 (2006)
14 (citing Waters v. Churchill, 511 U.S. 661, 671 (1994)). “Government employers, like
15 private employers, need a significant degree of control over their employees’ words and
16 actions; without it, there would be little chance for the efficient provision of public
17 services.” Id.

18 At the same time, the Court has recognized that a citizen who works for the
19 government is nonetheless a citizen. The First Amendment limits the ability
20 of a public employer to leverage the employment relationship to restrict,
21 incidentally or intentionally, the liberties employees enjoy in their capacities
22 as private citizens.

23 Id. at 419. “The Court’s decisions, then, have sought both to promote the individual and
24 societal interests that are served when employees speak as citizens on matters of public
25 concern and to respect the needs of government employers attempting to perform their
26 important public functions.” Id. at 420.

27 Put another way, courts must strike a balance between two competing interests: (1)
28 the need for efficiency in providing public services that might be compromised by an

1 employee speaking out in such a way as to “contravene governmental policies or impair
2 the proper performance of governmental functions[.]” Garcetti, 547 U.S. at 419; and (2)
3 the need “to ensure that citizens are not deprived of fundamental rights by virtue of
4 working for the government[.]” Id.; Connick, 461 U.S. at 147.

5 The operative rule, as stated by the United States Supreme Court in Garcetti, is as
6 follows: “the First Amendment does not prohibit managerial discipline based on an
7 employee’s expressions made pursuant to official responsibilities.” 547 U.S. at 424.
8 “The proper inquiry [in determining whether a particular expression was made pursuant
9 to official responsibilities] is a practical one[;]” the Court makes its decision on what an
10 employee is actually expected to do as part of his or her role, not by reference to job
11 descriptions that could be made unnecessarily broad to shield a government employer
12 from liability. See id. at 410, 424–25. “Guiding principles” to be considered in
13 determining the scope of an employee’s job duties include: (1) “whether . . . the
14 employee confined his communications to his chain of command[.]” which is “relevant,
15 if not necessarily dispositive[;]” (2) “the subject matter of the communication[.]” such as
16 whether or not the expression was of a routine nature; and (3) whether or not the
17 employee was speaking out “in direct contravention to his supervisor’s orders[.]” Dahlia
18 v. Rodriguez, 735 F.3d 1060, 1074–75 (9th Cir. 2013).

19
20 **a) Deletions from Gurrieri’s Report, and his Objections to**
21 **Them**

22 Duran contends that Gurrieri’s written report and his subsequent objections to edits
23 to it were expressions pursuant to Gurrieri’s official responsibilities that cannot support a
24 First Amendment retaliation cause of action. (*See Def.’s Mot.* [Doc. 54-1] 7:2–26.)

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1 Although Duran’s evidence shows that Gurrieri was responsible for creating an
2 investigative report,² she does not demonstrate the absence of a genuine dispute as to
3 whether the deletions from his report or his objections to them all concerned subject
4 matter to which Gurrieri was actually assigned. Indeed, Duran’s motion appears to
5 concede just the opposite—that Gurrieri’s draft included extraneous allegations
6 pertaining to matters to which he was not assigned, matters he alleged “paint[ed] a bigger
7 picture of the problem that [was] going on at Green [Elementary]” but that Duran
8 contends “had no bearing on the complaint made by Student E.” (*See Gurrieri Depo.*
9 [Doc. 54-2] 135–36; *Def.’s Mot.* [Doc. 54-1] 2:8–19, 7:9–13.) If the subject matter of the
10 deletions truly had no bearing on Gurrieri’s official responsibilities in preparing the
11 report, his speech on this topic may have also taken place outside those responsibilities.
12 See Garcetti, 547 U.S. at 424; Dahlia, 735 F.3d at 1074–75.

13 Furthermore, one of the pages cited in this portion of Gurrieri’s motion³ indicates
14 that he may have voiced his concerns about his direction to delete portions of his report to
15 someone who may have been outside his chain of command, one Samantha Clabaugh.
16 (*See Def.’s Mot.* [Doc. 54-1] 7:13 (citing *Gurrieri Depo.* [Doc. 55-5–8, Exh. E] 319
17 (“[Question]: Who did you complain to about removing the allegations from the report? .
18 . . [Answer]: Miss Duran. Possibly Samantha Clabaugh.”) Duran’s motion does not
19 address Gurrieri’s statements to Ms. Clabaugh. (*See Def.’s Mot.* [Doc. 54-1] 3:20–4:13,
20 7:2–9:7.) Ms. Clabaugh’s position in the school district is unclear from Defendant’s
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24 ² (*See Gurrieri Depo.* [Doc. 54-2, Exh. 1] 43–44 (containing admissions on the part of Gurrieri that his
25 job entailed “conduct[ing] investigations[,]” “review[ing] documentation[,]” “obtain[ing] corroborating
26 or disproving documentation or other information based on information . . . received in witness
27 interviews[,]” “mak[ing] factual conclusions” from that information, and “report[ing] the information . .
28 . found in . . . investigations[.]”)

³ Strangely, though Gurrieri cites page 319 of Gurrieri’s deposition in argument, he does not attach it to
the motion itself. (*See Def.’s Mot.* [Doc. 54-1] 7:13.)

1 cited evidence, as is the issue of whether any discussions with her on this topic were of a
2 routine nature for someone in Gurrieri's position. See Dahlia, 735 F.3d at 1074–75.

3 In sum, Defendant does not demonstrate the absence of a genuine dispute of
4 material fact as to whether the deletions from Gurrieri's report, or his objections to them,
5 were all pursuant to his official responsibilities. See Fed. R. Civ. P. 56; Celotex, 477
6 U.S. at 322; Garcetti, 547 U.S. at 424–25.

7
8 **b) Gurrieri's Objections to School District Policies**

9 Duran contends that Gurrieri's objections to school district policies were
10 expressions pursuant to his official responsibilities that cannot support a First
11 Amendment retaliation cause of action. (*See Def.'s Mot.* [Doc. 54-1] 10:10–11:10.)

12 As discussed above in Part III.A.1., *supra*, there is little evidence cited in Duran's
13 motion as to the subject matter of the school district policies to which Gurrieri ostensibly
14 objected. (*See Def.'s Mot.* [Doc. 54-1] 10:10–11:10 (citing *Gurrieri Depo.* [Doc. 54-2]
15 312).) Page 312 of Gurrieri's deposition, to which Duran cites in this part of the motion,
16 contains testimony to the effect that he offered his complaints to "PSLs." (*Id.*) Duran
17 does not explore who these PSLs were, whether they were in Gurrieri's chain of
18 command, or whether his communications with them were routine for someone in his
19 role. (*See id.*) See Dahlia, 735 F.3d at 1074–75. As such, she does not show the absence
20 of a genuine dispute of material fact as to whether the objections voiced to them were
21 pursuant to his official responsibilities. See Fed. R. Civ. P. 56; Celotex, 477 U.S. at 322;
22 Garcetti, 547 U.S. at 424–25.

23
24 **c) Gurrieri's Opinion that People Living South of Interstate 8**
25 **Received Inferior Treatment in Investigations**

26 Third and finally, Duran contends that Gurrieri's complaint regarding people living
27 south of Interstate 8 receiving inferior treatment "[a]rose in the [s]cope of" his duties.
28 (*Def.'s Mot.* [Doc. 54-1] 11:26–12:2.)

1 Duran supports this argument with only two sentences comprising five lines of
2 text, together with a citation to page 43 of Gurrieri's deposition, which appears to have
3 little to do with this topic. (*See Def.'s Mot.* [Doc. 54-1] 11:26–12:2 (citing *Gurrieri*
4 *Depo.* [Doc. 54-2, Exh. 1] 43.)) However, the introductory paragraph of Duran's
5 argument on this topic cites pages 281–82 of Gurrieri's deposition, which contains the
6 following language:

7 [Question:] Okay. Any - - did you have any objections with regard to Ms.
8 Donovan or Ms. Duran or anyone else with regard to the . . . investigation?
9

10 [Answer:] I guess the only thing that would be that in this instance, like I
11 said, it seemed like people that live below the 8, which was told to me, the 8
12 was more economically poor people, it seemed like they got the backseat
13 compared to people who had more money such as a Scripps Ranch or La
14 Jolla, Loma Portal, and everybody else was put on the back burner, you
15 know. *And I talked about that with Carmina and Albert*, and it just seemed
16 like any time something came in at a school like that, it seemed like it wasn't
17 as important as a Loma Portal, which we had investigation at [sic], or a
18 Scripps Ranch.

19 (*Gurrieri Depo.* [Doc. 54-2] 281:16–282:4 (emphasis added); *see Def.'s Mot.* [Doc. 54-1]
20 5:7–16.) Duran never identifies Albert, nor does she explore his relationship with
21 Gurrieri. (*See Def.'s Mot.* [Doc. 54-1] 5:7–16, 11:26–12:2.) Thus, she leaves it unclear
22 whether Albert was in Gurrieri's chain of command, or whether communicating with him
23 was routine for someone in Gurrieri's role. See *Dahlia*, 735 F.3d at 1074–75.

24 As such, Duran does not show the absence of a genuine dispute of material fact as
25 to whether Gurrieri's expressions regarding the socioeconomic focus of investigations
26 were all pursuant to his official responsibilities. See Fed. R. Civ. P. 56; *Celotex*, 477
27 U.S. at 322; *Garcetti*, 547 U.S. at 424–25.

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1 **3. Whether Gurrieri’s Speech was a Substantial or Motivating**
2 **Factor in his Termination**

3 To maintain a First Amendment retaliation cause of action, Plaintiff bears the
4 burden of showing that the speech in question was a “substantial or motivating factor” in
5 an “adverse employment action[.]” Ellins, 710 F.3d at 1056; Eng, 552 F.3d at 1071
6 (internal quotation omitted).

7 There are three ways a plaintiff can demonstrate “that retaliation was a substantial
8 or motivating factor behind a defendant’s adverse employment actions.” Coszalter v.
9 City of Salem, 320 F.3d 968, 977 (9th Cir. 2003) (citing Keyser v. Sacramento City
10 Unified School District, 265 F.3d 741, 751–52 (9th Cir. 2001)). “First, a plaintiff can
11 introduce evidence regarding the ‘proximity in time between the protected action and the
12 allegedly retaliatory employment decision,’ from which a ‘jury logically could infer [that
13 the plaintiff] was terminated in retaliation for his speech.’ ” Id. (quoting Keyser, 265
14 F.3d at 751). “Second, a plaintiff can introduce evidence that ‘his employer expressed
15 opposition to his speech, either to him or to others.’ ” Id. (quoting Keyser, 265 F.3d at
16 751). “Third, the plaintiff can introduce evidence that ‘his employer’s proffered
17 explanations for the adverse employment action were false and pre-textual.’ ” Id.
18 (quoting Keyser, 265 F.3d at 752).

19 Duran represents that there is no evidence to support the inference that Gurrieri’s
20 statements were a substantial or motivating factor in his termination. (*See Def.’s Mot.*
21 [Doc. 54-1] 7:2–12:11.) As Gurrieri will bear the burden on this issue at trial, see Ellins,
22 710 F.3d at 1056, Duran need not produce evidence herself to support this assertion. See
23 Celotex, 477 U.S. at 323. Indeed, based solely on Duran’s representations and the
24 evidence she does cite, it would appear that the third element of Gurrieri’s cause of action
25 lacks factual support. See Ellins, 710 F.3d at 1056. As such, Duran meets the burden of
26 production on her motion. See Nissan Fire & Marine Ins. Co., 210 F.3d at 1102–03. The
27 burden now shifts to Gurrieri “to go beyond the pleadings and by her own affidavits, or
28 by the ‘depositions, answers to interrogatories, and admissions on file,’ designate

1 ‘specific facts showing that there is a genuine issue for trial.’ ” Celotex, 477 U.S. at 324
2 (quoting Fed. R. Civ. P. 56).
3

4 **B. Gurrieri Shows the Presence of a Genuine Issue of Material Fact.**

5 The Argument section of Gurrieri’s opposition contains no evidentiary citations.
6 (*See Pl. ’s Opp’n* [Doc. 56] 17–25.) This is so despite the fact that he submitted 1,590
7 pages of evidence alongside his opposition and provided myriad citations to it in the
8 introductory portion of that document. (*See id.* [Doc. 56] 1–16; *Pl. ’s Exhs.* [Docs. 55-1–
9 39].) Nevertheless, this oversight on the part of his attorneys need not interfere with
10 consideration of his opposition brief. Although “[t]he court need consider only the cited
11 materials [in deciding a motion for summary judgment], . . . it may consider other
12 materials in the record.” Fed. R. Civ. P. 56(c)(3).

13 Gurrieri identifies the following evidence as the basis for a genuine factual dispute
14 as to Duran’s motivation in the decision to terminate his employment.

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1 First, he points to the temporal proximity between the submission of his
2 investigative report and his termination. (*See Pl. 's Opp'n* [Doc. 56] 22:22–23:2.) See
3 Coszalter, 320 F.3d at 977. Gurrieri submitted the 34-page draft investigative report on
4 September 8, 2014. (*Draft Report* [Doc. 55-24, Exh. R].)⁴ He was terminated about six
5 weeks later, on October 23, 2014. (*See Termination Letter* [Doc. 34, Exh. BB].) Even
6 for someone who had only been a probationary employee since April of 2014⁵, the
7 proximity of Gurrieri's investigative report and his termination suggests retaliatory
8 animus. See Coszalter, 320 F.3d at 977.

9 Second, he points to the following evidence that the stated reasons for his
10 termination were pretextual. (*See Pl. 's Opp'n* [Doc. 56] 23–25.) According to Gurrieri's
11 termination letter, Duran had “concluded that [Gurrieri had] not met the requirements of
12 [his] job description of Internal Investigator.” (*See Termination Letter* [Doc. 55-34, Exh.
13 BB].)

14 Duran testified in deposition that Gurrieri's work was “substandard”—ostensibly
15 over a period of five months, nearly his entire employment period. (*Duran Depo.* [Doc.
16 55-9–10, Exh. F] 237.) In connection with the instant motion she further declares as
17 follows:

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19
20 ⁴ Duran's hearsay and foundation objections to Exhibit R are overruled.
(*See Def. 's Objs.* [Doc. 61-1] 7.)

21 Duran does not show that the report is introduced for the truth of any of the statements contained
22 therein. Thus, she does not show that it falls within the definition of hearsay. See F.R. Evid. 801.

23 Duran provides no cogent reasoning as to why the declaration of Gurrieri's attorney, Mr. Mark Radi, is
24 insufficient to support a finding that Mr. Radi has personal knowledge about the contents of an
25 investigative report his client drafted—especially when the report in question is at the core of his client's
26 case. See F.R. Evid. 901 (“To satisfy the requirement of authenticating or identifying an item of
27 evidence, the proponent must produce evidence sufficient to support a finding that the item is what the
28 proponent claims it is.”), 602 (“A witness may testify to a matter only if evidence is introduced
sufficient to support a finding that the witness has personal knowledge of the matter”) This would
seem to be implicit, given Mr. Radi's agency relationship with his client, the report's author.

⁵ Parties do not dispute this point. (*See Def. 's Mot.* [Doc. 54-1] 1:22; *Pl. 's Opp'n* [Doc. 56] 2:26–28.)

1 Throughout his employment, Mr. Gurrieri struggled to perform his job
2 adequately. Because of this, I provided him with extensive verbal
3 counseling on how to improve his performance. I worked to support and
4 help Mr. Gurrieri to enable him to remain in his position, and told him he
5 needed to put in effort to improve. I also offered to review his caseload with
6 him on a daily basis. Despite these efforts, Mr. Gurrieri failed to adequately
7 improve, or even demonstrate a willingness to do so. Mr. Gurrieri did not
8 complete his investigations in a thorough, objective, or timely manner, and
9 he routinely created poorly written reports.

10 (*Duran Decl.* [Doc. 54-2] ¶ 5.) Further, Ms. Acacia Thede, Human Resources Director
11 for the school district, testified that at some point prior to Gurrieri’s termination, she and
12 Duran “began to talk about more formal methods of documenting her concerns in
13 [Gurrieri’s] performance[.]” (*Thede Depo.* [Doc. 55-15, Exh. I] 101.)

14 Yet at least according to his own testimony, Gurrieri received no negative feedback
15 in writing throughout his entire time working with the school district. (*See Gurrieri*
16 *Depo.* [Doc. 55-5–8, Exh. E] 308.) Duran has produced no evidence of negative written
17 feedback. Ms. Thede could not remember if Duran ever disciplined Gurrieri. (*Thede*
18 *Depo.* [Doc. 55-15, Exh. I] 101.) Duran has filed nothing that would reflect any such
19 discipline having taken place. In short, there seems to be a lack of any written or
20 documentary evidence as to Gurrieri’s poor performance.

21 This appears to contradict evidence that the school district required written
22 evaluations of employees as a matter of policy—including once before the end of the
23 sixth month. (*See School District Admin. Procedure No. 7520* [Doc. 55-30, Exh. X]
24 *C.5.a*; *Duran Depo.* [Doc. 55-9–10, Exh. F] 61 (confirming that this procedure would
25 apply to the evaluation of Gurrieri).) Gurrieri ended his first sixth months without the
26 completion of any scheduled evaluation. (*See Duran Depo.* [Doc. 55-9–10, Exh. F] 62–
27 63.) The district’s written policy also clarifies how an employee may be evaluated on an
28 unscheduled basis:

1 An unscheduled report for an employee may be prepared at any time by
2 his/her supervisor. Such evaluation reports may be used to provide a record
3 of . . . a marked deterioration . . . in employee performance.

4 (*Id.* [Doc. 55-30, Exh. X] C.6.) This allows an employee to request a review if he or she
5 is concerned about his or her performance:

6 [A]ny employee who has reason to question any aspect of his/her
7 performance evaluation report, or who is concerned about conditions of
8 employment or any other matter affecting employee morale, has the right to
9 request a review of his/her case at any time by the superintendent or the
10 designee.

11 (*Id.* [Doc. 55-30, Exh. X] C.8.) Yet in what would seem to contravene district policy,
12 Gurrieri never had the opportunity to review a performance evaluation—or, apparently,
13 to review written feedback of any kind. Instead, the district simply fired him. (*See*
14 *Termination Letter* [Doc. 34, Exh. BB].)

15 Moreover, Gurrieri’s draft investigative report itself suggests pretext. (*See Draft*
16 *Report* [Doc. 55-24, Exh. R].) Duran testified that Gurrieri “did not complete his
17 investigations in a thorough . . . manner” and displayed a “defeatist attitude towards
18 improving his performance[.]” (*Duran Decl.* [Doc. 54-3] ¶¶ 5–6.) Yet his draft report is
19 thirty-four pages long and contains detailed accounts of nineteen witness interviews.
20 (*See Draft Report* [Doc. 55-24, Exh. R].) There is room for a genuine dispute as to the
21 thoroughness of Gurrieri’s work, which relates to the question of whether the reasons
22 given for his termination were pretextual. See Coszalter, 320 F.3d at 978 (“Whether an
23 adverse employment action is intended to be retaliatory is a question of fact that must be
24 decided in the light of the timing and the surrounding circumstances.”).

25 Because “a reasonable jury could return a verdict for the nonmoving party” as to
26 whether Gurrieri’s speech was a substantial or motivating factor for the adverse
27 employment action, he meets his responsive burden of demonstrating a genuine dispute
28 of material fact. See Coszalter, 320 F.3d at 977; Anderson, 477 U.S. at 248.

1 **IV. CONCLUSION & ORDER**

2 For foregoing reasons, a genuine dispute of material fact exists, and summary
3 judgment would be inappropriate. See Fed. R. Civ. P. 56; Celotex, 477 U.S. at 324–25.

4 Defendant’s motion is **DENIED**. [Doc. 54.]

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6 **IT IS SO ORDERED.**

7 Dated: April 5, 2017

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10 Hon. Thomas J. Whelan
11 United States District Judge
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