

1 failed to show good cause for reopening discovery, he was given an opportunity to supplement
2 the evidence offered in opposition. Plaintiff was given until March 9, 2017, to file an amended
3 affidavit with additional citations to and copies of any additional evidence he might have to
4 support the statements contained in the affidavit. Dkt. # 65 at 2. Plaintiff either misunderstood or
5 ignored the Court's order: he served discovery requests on defendants and third-parties. Dkt.
6 # 66 and 68. When defendants objected, plaintiff began filing letters requesting a conference
7 regarding the discovery dispute. Dkt. # 69 and 75. Defendants filed a motion for protective
8 order. Dkt. # 70. On March 9, 2017, plaintiff filed an amended affidavit in response to the initial
9 motion for summary judgment. Dkt. # 91.

10 This order resolves defendants' motion for summary judgment (Dkt. # 26), the motion to
11 strike plaintiff's answer (Dkt. # 67), and the motion for protective order (Dkt. # 70). In ruling on
12 the summary judgment motion, the Court has considered Dkt. # 26-32 (motion), Dkt. # 44, 80-
13 91, and 94 (opposition), and Dkt. # 49-52 (reply). The Court has not considered the untimely and
14 unauthorized "answer" filed on February 3, 2017.

15 Plaintiff asserts claims of failure to accommodate, race discrimination,¹ retaliation,
16 wrongful discharge, negligent infliction of emotional distress, and outrage. Summary judgment
17 is appropriate when, viewing the facts in the light most favorable to plaintiff, there is no genuine
18 issue of material fact that would preclude the entry of judgment as a matter of law. Defendants
19 "bear[] the initial responsibility of informing the district court of the basis for [their] motion"
20 (Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)) and "citing to particular parts of materials
21 in the record" that show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)).
22 Once defendants have satisfied that burden, they are entitled to summary judgment unless
23 plaintiff identifies specific evidence and facts giving rise to a genuine issue for trial. Celotex
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25 ¹ In the complaint, plaintiff asserts claims of "disparate treatment on the basis of plaintiff's race,
26 disability and handicap." Dkt. # 1 at 9. Plaintiff has not offered any evidence or argument in support of a
disability or handicap discrimination claim.

1 Corp., 477 U.S. at 324. The Court will “view the evidence in the light most favorable to the
2 nonmoving party . . . and draw all reasonable inferences in that party’s favor.” Krechman v.
3 County of Riverside, 723 F.3d 1104, 1109 (9th Cir. 2013). Although the Court must reserve for
4 the jury genuine issues regarding credibility, the weight of the evidence, and legitimate
5 inferences, the “mere existence of a scintilla of evidence in support of the non-moving party’s
6 position will be insufficient” to avoid judgment. City of Pomona v. SQM N. Am. Corp., 750
7 F.3d 1036, 1049 (9th Cir. 2014); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). In
8 addition, plaintiff may not avoid summary judgment simply by filing an affidavit that disputes
9 his own prior statements and omissions or contains nothing more than conclusory allegations
10 unsupported by factual data. See Nelson v. City of Davis, 571 F.3d 924, 927-28 (9th Cir. 2009);
11 Hansen v. U.S., 7 F.3d 137, 138 (9th Cir. 1993). In short, summary judgment should be granted
12 where plaintiff fails to offer evidence from which a reasonable jury could return a verdict in his
13 favor. FreecycleSunnyvale v. Freecycle Network, 626 F.3d 509, 514 (9th Cir. 2010).

14 Having reviewed the memoranda, declarations, and exhibits submitted by the parties² and
15 having considered the evidence in the light most favorable to plaintiff, the Court finds as
16 follows:

17 I. BACKGROUND

18 Plaintiff is a former Overlake Hospital Medical Center employee who worked as a PC
19 analyst under the supervision of defendant Elizabeth Glithero. In April 2014, plaintiff injured his
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21 ² Defendants’ request to strike portions of plaintiff’s response affidavit (Dkt. # 44) is GRANTED
22 in part and DENIED in part. Statements about which plaintiff has personal knowledge (such as the
23 exertional requirements of his job) and arguments regarding what the evidence shows (such as the date
24 on which plaintiff’s computer was removed) have been considered. However, statements that are
25 conclusory and unsupported by underlying facts (such as the assertion that plaintiff “endured
26 harassment, stalking, false accusations and antagonizing remarks” for a four year period), statements
that are not supported by the underlying documents (including certain characterizations of the
investigative report), statements that constitute hearsay (such as what Joseph Wolfgram and Howard
Binner said), and statements about which plaintiff has no personal knowledge (such as the subjective
motivations of others) have not been considered.

1 back. When he notified Ms. Glithero that he may have ruptured a disk and needed a few days off
2 from work, Ms. Glithero passed the information on to human resources. Dkt. # 83-5. When
3 plaintiff again requested time off for the same injury, Overlake provided information regarding
4 the Family Medical Leave Act and forms that needed to be completed before plaintiff would be
5 allowed to return to work. Dkt. # 82-7. Plaintiff raised questions about taking FMLA leave with
6 the director of information services, in particular the fact that Ms. Glithero had taken it upon
7 herself to initiate the FMLA process. Dkt. # 44-8. Nevertheless, he submitted a leave of absence
8 request (Dkt. # 29-1 at 4) and physical assessment form from his physician that limited plaintiff
9 to light work until June 1, 2014 (Dkt. # 29-1 at 6-7). Ms. Glithero determined that plaintiff could
10 not perform his job within the limitations specified by his doctor and that there was no light
11 work available. Plaintiff was placed on FMLA leave and paid his full salary until he was cleared
12 to return to work. Other than his concerns regarding the process, plaintiff did not voice any
13 objection to paid FMLA leave at the time.

14 On or about December 8, 2014, Ms. Glithero noticed a device, called a wireless dongle,
15 connected to plaintiff's work station. Plaintiff confirmed that he used the device to connect his
16 computer to the public WiFi and sometimes used it to watch television. Ms. Glithero was
17 concerned because plaintiff already had internet access through Overlake's secure network. In
18 consultation with the director of IT services, Tracy Smith, Ms. Glithero had the computer
19 confiscated and analyzed. On December 9, 2014, the internal examiner issued a report
20 concluding that plaintiff had accessed websites that violated Overlake's internet usage
21 agreement, had utilized the device to circumvent Overlake's auditing programs, had likely
22 downloaded copyrighted materials, and may have "compromised Overlake Hospital's network
23 by bridging our publicly accessible wireless network with our HIPAA regulated private
24 network." Dkt. # 28-1 at 2. Plaintiff called in sick on December 10th. When he returned to work
25 the next day, plaintiff told Ms. Glithero that her accusations of wrongdoing were false, that she
26 was treating him with a degree of racial bias, that he was going to complain to human resources,

1 and that he would sue her and Overlake. Dkt. # 44 at 10. Plaintiff lodged a race discrimination
2 complaint with human resources. Dkt. # 31 at ¶ 2.

3 On December 18, 2014, plaintiff met with Jennifer Garrepy in human resources (“HR”).
4 Plaintiff thought they were going to discuss the complaint he had made against Ms. Glithero
5 during the previous week, but Ms. Garrepy made clear that the topic was plaintiff’s use of the
6 wireless dongle. Dkt. # 27-1 at 53-55. Plaintiff insisted on filing a grievance against Ms.
7 Glithero and refused to answer questions about the use of the dongle, maintaining that he did not
8 understand what the issue was. Ms. Garrepy insisted that they focus on the potential misuse of
9 corporate assets and prevented plaintiff from leaving the office, at one point putting one hand on
10 the door and pushing him back into the room with the other. Dkt. # 27-1 at 56-58. When plaintiff
11 forced his way out of the office, Ms. Garrepy called for Lisa Morten, the HR director. Ms.
12 Morten was dismissive of plaintiff’s claim that he felt threatened by Ms. Garrepy, but promised
13 to investigate his complaints and get back to him. Dkt. # 44 at 14-15. That day, plaintiff had his
14 wife contact the Equal Employment Opportunity Commission (“EEOC”) to file a complaint
15 “because [he] was being retaliated against and . . . had just been assaulted by an HR
16 representative” Dkt. # 44 at 15.

17 On December 22, 2014, plaintiff met with Stephanie Banuelos from HR and Mr. Smith.
18 Dkt. # 44 at 16. In response to questions regarding his use of the wireless dongle, plaintiff again
19 claimed that he did not know what the investigation was about and refused to answer questions.
20 Dkt. # 31 at ¶ 3. The same conversation occurred in another meeting that afternoon with Ms.
21 Banuelos, Mr. Smith, and Ms. Morten. *Id.* When Ms. Banuelos and Mr. Smith met with plaintiff
22 on December 29th, he requested copies of Overlake policies regarding recording meetings,
23 employee rights, etc. Dkt. # 31 at ¶ 4. Ms. Banuelos agreed to provide the documents, but placed
24 plaintiff on administrative leave. *Id.* A fourth meeting was scheduled at which the documents
25 were provided along with a letter answering questions that were not addressed in written
26 policies. Dkt. # 31 at ¶ 5. Despite being warned that refusal to respond to questions regarding his

1 use of a wireless dongle would result in termination for insubordination, plaintiff persisted. Id.
2 He was fired effective December 31, 2014. Dkt. # 44-34.

3 Plaintiff filed this lawsuit on November 1, 2015. He asserts that Overlake failed to
4 accommodate his disability, that Overlake and Ms. Glithero discriminated against him because
5 of his race, that Overlake and Ms. Glithero retaliated against him, that he was wrongfully
6 discharged, and that defendants caused him emotional distress. Plaintiff also alleges that his co-
7 worker, Adam Daar, negligently and/or intentionally inflicted emotional distress. On five
8 occasions, plaintiff was offended when Mr. Daar made comments or watched YouTube videos
9 regarding news items that depicted violence against or disrespect toward minorities. These
10 interactions are described more fully below.

11 II. DISCUSSION

12 A. Failure to Accommodate

13 Plaintiff argues that Overlake failed to accommodate his back injury in the spring of 2014
14 when it provided paid FMLA leave rather than a light duty assignment. In order to establish a
15 *prima facie* case of failure to accommodate, plaintiff must show that “(1) the employee had a
16 sensory, mental, or physical abnormality that substantially limited his or her ability to perform
17 the job; (2) the employee was qualified to perform the essential functions of the job in question;
18 (3) the employee gave the employer notice of the abnormality and its accompanying substantial
19 limitations; and (4) upon notice, the employer failed to affirmatively adopt measures that were
20 available to the employer . . .to accommodate the abnormality.” Davis v. Microsoft Corp., 149
21 Wn.2d 521, 532 (2003) (quoting Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 192-93 (2001)).³
22 Plaintiff argues that he was fully capable of performing the tasks set forth in Overlake’s
23 description of the PC Analyst position. Dkt. # 44-12 and 44-13. It is undisputed, however, that
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25 ³ Prior to 2007, the employee also had to show that the measures were “medically necessary,”
26 but that requirement was abrogated by statute, as recognized in Johnson v. Chevron U.S.A., Inc., 159
Wn. App. 18, 29-30 (2010).

1 plaintiff's back injury prevented him from accomplishing the tasks he was expected to perform
2 in the PC Analyst role. He twice requested time off because the job aggravated his back injury.
3 Ms. Glithero's determination that the job could not be performed without exceeding the
4 ergonomic and physical limitations imposed by plaintiff's doctor is supported by both her
5 familiarity with the actual demands of the job and plaintiff's repeated requests for time off to
6 give his back a chance to heal.

7 Plaintiff's main argument is that Overlake should have found a light duty assignment for
8 him rather than placing him on paid FMLA leave. An employee is not entitled to his preferred
9 accommodation, however. Pulcino v. Fed. Express Corp., 141 Wn.2d 629, 643 (2000). Rather,
10 an employer must provide a reasonable accommodation for the disability. Snyder v. Med. Serv.
11 Corp., 98 Wn. App. 315, 326 (1999). The specific facts of this case allow a finding as a matter of
12 law that Overlake reasonably accommodated plaintiff's disability. Plaintiff had twice attempted
13 to perform the PC Analyst tasks only to find that they hurt his back. Although plaintiff was
14 cleared to perform desk jobs, Ms. Glithero had no such work available. Plaintiff was provided
15 the accommodation he had twice requested – time off from work – and was granted full pay
16 during his absence. There is no evidence that his three week leave caused a diminution in
17 accrued benefits or other working conditions. Plaintiff cannot establish a *prima facie* case of
18 failure to accommodate.

19 **B. Race Discrimination**

20 Plaintiff claims that Overlake and Ms. Glithero discriminated against him because of his
21 race when they forced him to take FMLA leave and terminated his employment. To avoid
22 summary judgment on his disparate treatment claim, plaintiff must present evidence from which
23 a reasonable jury could find “an adverse employment consequence and discriminatory intent by
24 [her] employer.” Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 767 (1998). In order to raise an
25 inference of discriminatory intent, plaintiff may rely on direct evidence of the employer's intent
26 or may utilize the burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411

1 U.S. 792, 802 (1973). Vasquez v. County of Los Angeles, 349 F.3d 634, 640 (9th Cir. 2003);
2 Kastanis v. Educational Employees Credit Union, 122 Wn.2d 483, 491 (1993).

3 With regards to the decision to place plaintiff on FMLA leave rather than give him a light
4 duty assignment, plaintiff has failed to show that he suffered an adverse employment action. As
5 noted above, plaintiff was paid his full salary during his three weeks of leave, and there is no
6 evidence that his benefits or other conditions of employment suffered because he was on FMLA
7 leave. State and federal anti-discrimination laws require an actual adverse employment action,
8 such as a demotion or adverse transfer, and are not triggered by a workplace change that is
9 merely inconvenient or unwanted. Chuang v. Univ. of Cal. Davis, 225 F.3d 1115, 1126 (9th Cir
10 2000). See Alonso v. Qwest Commc'ns Co., LLC, 178 Wn. App. 734, 746 (2013) (“An adverse
11 employment action involves a change in employment conditions that is more than an
12 inconvenience or alteration of one’s job responsibilities, such as reducing an employee’s
13 workload or pay.”). Nor has plaintiff linked his FMLA leave to race discrimination in any way.
14 At various points in his response, plaintiff says that the leave was “a retaliatory tool” and/or was
15 “done by Ms. Glithero of her own accord for only reasons she would know.” Dkt. # 44 at 6 and
16 22. There is no indication that Ms. Glithero or Overlake chose to accommodate plaintiff’s
17 disability through a leave of absence because of his race.

18 With regards to his termination, plaintiff offers no direct evidence of discrimination
19 toward African-Americans on the part of Overlake or Ms. Glithero. “Direct evidence is evidence
20 which, if believed, proves the fact [of discriminatory animus] without inference or presumption.”
21 Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1221 (9th Cir. 1998) (alteration in original).
22 Plaintiff has not identified any clearly racist statements or actions that would suggest, without
23 the need for inference, that these defendants were motivated by discriminatory animus.
24 Dominguez-Curry v. Nev. Transp. Dept., 424 F.3d 1027, 1038 (9th Cir. 2005). Thus, plaintiff
25 must raise an inference of discrimination utilizing the McDonnell Douglas analysis for both his
26 state and federal claims.

1 Under McDonnell Douglas, plaintiff must show that he is a member of a protected class,
2 he was qualified for his position, he experienced an adverse employment action, and “similarly
3 situated individuals outside [the] protected class were treated more favorably, or other
4 circumstances surrounding the adverse employment action give rise to an inference of
5 discrimination.” Peterson v. Hewlett-Packard Co., 358 F.3d 599, 603 (9th Cir. 2004). Plaintiff is
6 African American, he was qualified for his position, and he was terminated. He has therefore
7 established the first three elements of a *prima facie* case. Plaintiff has not, however, provided
8 any evidence that similarly-situated non-African Americans were treated more favorably in
9 similar circumstances. “[I]ndividuals are similarly situated when they have similar jobs and
10 display similar conduct.” Vasquez v. County of Los Angeles, 349 F.3d 634, 641 (9th Cir. 2003).
11 See also Washington v. Boeing Co., 105 Wn. App. 1, 13-14 (2000). Plaintiff has not identified
12 any other employee with secure network access who used a wireless dongle to access the public
13 WiFi system at Overlake, nor has he identified any other employee who refused to answer
14 questions during an investigation of potential wrongdoing. The evidence in the records simply
15 does not raise an inference that race played a part in plaintiff’s termination.

16 Even if a *prima facie* case of discrimination were established, defendants have articulated
17 a legitimate, non-discriminatory reason for the termination: plaintiff refused to participate in an
18 investigation of conduct that, at least on its face, appeared to be contrary to Overlake’s policies
19 and procedures. Any possible inference of discrimination raised by the *prima facie* showing
20 therefore drops from the picture. Coleman v. Quaker Oats Co., 232 F.3d 1271, 1282 (9th Cir.
21 2000). In order to stave off summary judgment, plaintiff must show that a triable issue of fact
22 exists regarding the veracity of defendants’ explanation for the adverse action. He could do so by
23 introducing evidence that Overlake’s explanations are unworthy of credence or by affirmatively
24 showing that a discriminatory reason more likely motivated the employer than the articulated
25 non-discriminatory reasons. Nicholson v. Hyannis Air Serv., Inc., 580 F.3d 1116, 1126-27 (9th
26 Cir. 2009); Scrivener v. Clark College, 181 Wn.2d 439, 446 (2014).

1 Plaintiff essentially argues that his termination was unjustified because his initial use of
2 the wireless dongle was authorized, there was no actual breach of Overlake's secured network
3 and/or patient records, and the investigative report overstates the amount of work time plaintiff
4 spent surfing the internet. Whatever the merits of these arguments, plaintiff gave up his
5 opportunity to explain his actions to human resources when he refused to participate in the
6 investigation. Plaintiff's underlying assumption -- that he was fired for using a wireless dongle --
7 is incorrect. Rather, he was fired for refusing to answer questions about his use of the device
8 during the employer's investigation of potential wrongdoing. Dkt. # 29-1 at 2.⁴ Plaintiff has not
9 provided any evidence from which a reasonable jury could conclude that Overlake's explanation
10 for the termination decision was false or that race discrimination motivated his termination.

11 **C. Retaliation**

12 The basis for plaintiff's retaliation claim is not entirely clear. In the complaint, plaintiff
13 alleges that Ms. Glithero falsely accused him of using an unauthorized dongle in retaliation for
14 his complaints of race and disability discrimination and failure to accommodate. Dkt. # 1 at
15 ¶¶ 26-27. The fact that plaintiff had a wireless dongle attached to his work computer is not in
16 dispute, however. Nor does the record support an inference that the dongle investigation or
17 plaintiff's termination were prompted by complaints of discrimination or failure to
18 accommodate. Taking the evidence in the light most favorable to plaintiff, the following
19 complaints were made:

20 1. After watching a YouTube video involving an African American woman with
21 defendant Daar, plaintiff complained to Mr. Daar that he was confusing lack of opportunity with

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23 ⁴ In the complaint, plaintiff asserts that he never refused to answer questions about his use of a
24 wireless dongle. Dkt. # 1 at ¶ 31. The record does not support such an assertion. At various times,
25 plaintiff insisted that he did not know what the investigation was about, wanted specific procedures used
26 during interviews (recording, third-party witnesses, *etc.*), demanded production of information and
documents, and/or refused to answer questions until his complaints of retaliation and assault were
investigated. The result was a series of meetings in which plaintiff refused to answer questions regarding
the use of a wireless dongle.

1 stupidity. Mr. Daar apologized. Dkt. # 27-1 at 47-48.

2 2. After Mr. Daar made a comment about plaintiff having to run through Ferguson,
3 Missouri, with his hands up in the air, plaintiff lectured his co-worker regarding his lack of
4 sensitivity. He also complained to Ms. Glithero, who said she would talk to Mr. Daar about it.
5 Mr. Daar subsequently apologized. Dkt. # 27-1 at 49-52.

6 3. On May 2, 2014, plaintiff contacted Ms. Glithero's boss to discuss Ms. Glithero's
7 decision to refer his medical leave requests to HR for an FMLA determination. Dkt. # 44-8. At a
8 meeting with Ms. Glithero, plaintiff accused her of "trying to make [him] use all [his paid time
9 off] so that [he] could not go on vacation that summer and trying to force [him] on FMLA so that
10 [he] could exhaust that and ultimately she could fire [him]." Dkt. # 44 at 6.⁵ Plaintiff apparently
11 believed Ms. Glithero was using FMLA as a retaliatory tool.

12 4. On May 12, 2014, plaintiff filed a complaint with the Seattle District Office of the
13 Department of Labor alleging wage fraud, violations of the Americans with Disabilities Act, and
14 retaliation. Dkt. # 44-45.

15 5. Shortly after the wireless dongle investigation began, plaintiff complained to human
16 resources that Ms. Glithero's accusations were false and racially motivated. Dkt. # 31 at ¶ 2;
17 Dkt. # 44 at 10.

18 6. On December 18, 2014, plaintiff reported to both the human resources director and the
19 EEOC that Ms. Garrepy had assaulted him. Dkt. # 44 at 14.

20 To make a *prima facie* showing of retaliation, plaintiff must show that (a) he engaged in
21 statutorily protected activity, (b) there was an adverse employment action, and (c) retaliation was
22 causally connected to or a substantial factor motivating the adverse action. Raad v. Fairbanks N.

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24 ⁵ This version of events is the most favorable to plaintiff. His affidavit lacks clarity: it is possible
25 that plaintiff is recounting two separate conversations, one between himself and Mr. Smith and the other
26 between Mr. Smith and Ms. Glithero. If that is the case, there would be no admissible evidence
regarding the latter conversation and no basis on which to conclude that Ms. Glithero knew that plaintiff
was accusing her of wrongdoing in relation to the FMLA leave.

1 Star Borough Sch. Dist., 323 F.3d 1185, 1196-97 (9th Cir. 2003); Kahn v. Salerno, 90 Wn. App.
2 110, 128-29 (1998). Once plaintiff makes the initial showing, the burden shifts to defendant to
3 articulate a legitimate, non-retaliatory reason for the adverse employment action. Ray v.
4 Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000); Renz v. Spokane Eye Clinic, P.S., 114 Wn.
5 App. 611, 618 (2002). Plaintiff bears the ultimate burden of persuasion and must present
6 evidence that raises an inference of retaliation to withstand a motion for summary judgment.

7 Plaintiff cannot satisfy the elements of a *prima facie* case with regards to most of his
8 complaints. First, the accusation that Ms. Garrepy assaulted plaintiff is not statutorily protected
9 activity. The statutes at issue are aimed at the prevention of discrimination in the workplace, and
10 this complaint does not constitute opposition to employment practices forbidden by Title VII or
11 the Washington Law Against Discrimination. Alonso v. Qwest Comm'ns Co., LLC, 178 Wn.
12 App. 734, 754 (2013). Second, although proximity in time between the protected activity and the
13 adverse employment action can raise an inference of causal connection, the employer must be
14 aware of the statutorily protected complaint for a rebuttable presumption of retaliation to arise.
15 Currier v. Northland Servs., Inc., 182 Wn. App. 733, 747 (2014); Yartzoff v. Thomas, 809 F.2d
16 1371, 1376 (9th Cir. 1987). At the time Ms. Glithero initiated the wireless dongle investigation,
17 she was unaware of plaintiff's first and fourth complaints. Plaintiff had not yet made his fifth
18 and sixth complaints: they could not, therefore, have motivated the dongle investigation.
19 Similarly, there is no indication that the individuals who made the decision to terminate
20 plaintiff's employment were aware of his first or fourth complaints, or that they knew he had
21 lodged a complaint with the EEOC.

22 There is evidence that could support findings (a) that Ms. Glithero knew of Mr. Daar's
23 Ferguson comment and of his complaints regarding the award of FMLA leave when she initiated
24 the dongle investigation and (b) that human resources and/or Mr. Smith were aware that plaintiff
25 had accused Ms. Glithero of race discrimination and/or retaliation when they decided to
26 terminate plaintiff's employment. Nevertheless, plaintiff's retaliation claim fails as a matter of

1 law. The inference of retaliatory motive that arises from the temporal proximity between
2 plaintiff's complaints and the investigation/termination⁶ has been rebutted by the legitimate, non-
3 retaliatory reasons articulated by the employer. The evidence shows that plaintiff had a wireless
4 dongle on his work computer and that he admitted using it to connect to the public WiFi and
5 watch TV. Dkt. # 27-1 at 23-24. Ms. Glithero, in consultation with Mr. Smith, decided that
6 additional information was required and arranged for a data security analyst to examine
7 plaintiff's computer. The investigation report shows that Ms. Glithero's concerns were
8 warranted and that plaintiff's use of the wireless dongle violated a number of Overlake policies.
9 Plaintiff offers nothing other than temporal proximity to overcome the admitted facts that
10 justified investigation or to support his hypothesis that Ms. Glithero was motivated by plaintiff's
11 complaint against Mr. Daar or his objections to the way his medical leave was converted to
12 FMLA leave six months before.

13 With regards to plaintiff's termination, plaintiff is essentially arguing that, by accusing
14 Ms. Glithero of racial bias or retaliation after the investigation into the wireless dongle began, he
15 immunized himself from any adverse action that would otherwise attend his conduct. That is not
16 the law. The fact that an adverse employment action occurred after a complaint was lodged is
17 "immaterial" when the employer was already contemplating the action. Clark County Sch. Dist.
18 v. Breedon, 532 U.S. 268, 272 (2001) (that an employer proceeds "along lines previously
19 contemplated, though not yet definitively determined, is no evidence whatever of causality.").
20 The investigation, which had already begun when plaintiff complained to HR about Ms.
21 Glithero's motives, proceeded to completion, resulting in plaintiff's termination. Plaintiff's
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23 ⁶ The causation analysis differs under Title VII and the Washington Law Against Discrimination.
24 The United States Supreme Court has adopted a "but for" standard of causation for Title VII retaliation
25 claims. Univ. of Tex. Sw. Med. Ctr. v. Nassar, __ U.S. __, 133 S. Ct. 2517, 2534 (2013). "Washington
26 law imposes a looser standard, evaluating whether retaliation was a 'substantial factor' motivating the
discharge." Knutson v. Wenatchee Sch. Dist. # 246, 2015 WL 4456245, at *19 (Wn. App. July 21,
2015) (citing Allison v. Hous. Auth., 118 Wn.2d 79, 95-96 (1991)).

1 refusal to answer questions regarding his use of the wireless dongle or to otherwise participate in
2 the investigation beyond merely showing up for schedule meetings is a legitimate, non-
3 retaliatory reason for the termination that rebuts the *prima facie* showing. Plaintiff has not
4 established pretext and has not raised a triable issue of fact on his retaliation claim.

5 **D. Wrongful Discharge**

6 For the reasons discussed above, plaintiff's termination did not violate the Washington
7 Law Against Discrimination. Plaintiff offers no other theory in support of his wrongful discharge
8 claim.

9 **E. Emotional Distress Claims**

10 Defendants seek dismissal of plaintiff's negligent infliction of emotional distress and
11 outrage claims on a number of grounds. Plaintiff acknowledges that his documentary evidence
12 does not prove his emotional distress claims. Dkt. # 44 at 17. He provides no other response to
13 defendants' motion other than to suggest that defendants have the burden of disproving the
14 existence of any distress. *Id.* ("How can the defense speak of my emotional issues when they
15 have no contact with me on a daily basis? The only people who can attest to my emotional state
16 are my family and close friends who have supported me during this most difficult time.").
17 Plaintiff has not provided any evidence of injury associated with the negligent infliction of
18 emotional distress, and the Court finds that the facts of this case cannot support a claim of
19 outrage.

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1 **III. CONCLUSION**

2 For all of the foregoing reasons, the Court GRANTS defendants' motion for summary
3 judgment (Dkt. # 26) and GRANTS defendants' motion to strike (Dkt. # 67). Defendants'
4 motion for protective order (Dkt. # 70) is GRANTED in part and DENIED in part. Discovery is
5 closed and defendants are entitled to a protective order, but the Court declines to award
6 expenses. The Clerk of Court is directed to enter judgment in favor of defendants and against
7 plaintiff.

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9 Dated this 24th day of April, 2017.

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11 _____
12 Robert S. Lasnik

13 United States District Judge
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