

THE HONORABLE JOHN C. COUGHENOUR

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JON FLOWERS,

Plaintiff,

v.

FRED HUTCHINSON CANCER RESEARCH
CENTER,

Defendant.

CASE NO. C17-0989-JCC

ORDER

This matter comes before the Court on Defendant’s motion for summary judgment (Dkt. No. 52) and Plaintiff’s motion to compel (Dkt. No. 60). Having thoroughly considered the parties’ briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES Defendant’s motion for summary judgment and GRANTS in part and DENIES in part Plaintiff’s motion to compel (Dkt. No. 60) for the reasons explained herein.

I. BACKGROUND

Plaintiff Jon Flowers (“Flowers”) began working for Defendant Fred Hutchinson Cancer Research Center (“Fred Hutch”) in 2001. (Dkt. No. 56 at 1.) Flowers was initially hired as an Employee Relations Specialist in the Human Resources (“HR”) Department, but was eventually given the title of Employee Relations Supervisor. (*Id.* at 2.) In that role, Flowers briefly supervised another employee in 2004, but thereafter never supervised anyone else again. (*Id.*;

1 Dkt. No. 54 at 2.)

2 From his hire until 2012, Flowers was supervised by Kim Williams (“Williams”). (Dkt.
3 No. 54 at 1–2.) While Williams liked Flowers personally, she became increasingly disappointed
4 with his work performance. (*Id.* at 2.) Around 2011, Williams recommended to Fred Hutch’s
5 Vice President of HR, Han Nachtrieb (“Nachtrieb”) that Flowers be terminated because of his
6 poor performance.¹ (*Id.* at 3.) Nachtrieb did not follow Williams’ recommendation because he
7 liked Flowers and wanted him to succeed. (Dkt. No. 56 at 2.) Instead, Nachtrieb tried to find
8 other opportunities for Flowers to succeed at Fred Hutch. (*Id.*)

9 Not long after Williams left Fred Hutch in 2012, Nachtrieb oversaw the reorganization of
10 the HR Department. (*Id.*) As part of the reorganization, several teams—including Employee
11 Relations and the Employee Service Center—were consolidated into a single Employment Team.
12 (*Id.*) Nachtrieb chose the Employee Service Center’s manager, John Bartley (“Bartley”), to be
13 the manager of the consolidated Employment Team. (*Id.* at 3–4.) During the reorganization,
14 Flowers told Nachtrieb that he was interested in becoming an “Employee Relations Manager”
15 within the consolidated department. (*Id.*; Dkt. No. 39 at 2.) Nachtrieb informed Flowers that
16 Bartley had been given the Employment Manager position, and that the new team would not
17 include a separate Employee Relations Manager. (Dkt. No. 56 at 3–4.)

18 Following the reorganization, Bartley was in line to be Flowers’ direct supervisor. (Dkt.
19 Nos. 55 at 2–3; 56 at 4.) Bartley was aware of Flowers’ reported performance deficiencies and
20 told Nachtrieb that if these issues continued, he would “performance manage” Flowers, which
21 could result in his termination. (Dkt. No. 55 at 3.) Nachtrieb decided to directly supervise
22 Flowers because he did not want him to be terminated. (Dkt. No. 56 at 4.) Nachtrieb hoped that
23 he could mentor Flowers out of his Employee Relations role and into another opportunity either
24 in another department at Fred Hutch or with a different employer. (*Id.*)

25
26 ¹ Nachtrieb states that Williams recommended to him that Flowers be terminated for
unsatisfactory performance in mid-2010. (Dkt. No. 56 at 2.)

1 In August 2012, Nachtrieb and Flowers completed a “Combined Performance Appraisal
2 and Professional Development Plan.” (*Id.* at 14–21.) The document both assessed Flowers’
3 performance during the prior year and outlined opportunities for professional development over
4 the coming year. (*Id.*) Nachtrieb’s assessment of Flowers’ performance was generally positive.
5 (*Id.*) Flowers had never previously received a written performance evaluation during the decade
6 he was supervised by Williams. (Dkt. No. 66 at 2.) Under the heading “Suggestions for
7 Improvement,” Nachtrieb wrote: “Jon and I have discussed the development of his leadership
8 abilities and his exploration of roles and career possibilities as a way of creating [sic] for his
9 desired growth into leadership and management.” (Dkt. No. 56 at 19.) Nachtrieb later
10 characterized this document as a “go to grow” plan.² (*Id.* at 4.)

11 In October 2012, Nachtrieb and Flowers began having weekly one-on-one meetings. (*Id.*
12 at 5.) Nachtrieb states that the meetings were instituted to “assist Mr. Flowers transition to a
13 position for future success, and to meet his career goals.” (*Id.*) Flowers states that the meetings
14 started after he complained to Nachtrieb about experiencing a hostile work environment created
15 by various colleagues. (Dkt. No. 66 at 2.) It is undisputed that during their meetings, Nachtrieb
16 and Flowers discussed his professional development, as well as Flowers’ concerns about co-
17 workers treating him with disrespect and hostility. (Dkt. Nos. 56 at 5–6; 66 at 2.)

18 In early 2013, Flowers took part in various professional development opportunities, such
19 as attending a conference to learn more about Fred Hutch’s Organizational Development Team.
20 (Dkt. No. 56 at 5–6.) These opportunities were intended to expose Flowers to different job
21 opportunities at Fred Hutch; however, according to Nachtrieb and others, Flowers showed little
22 interest in these other work areas. (*Id.*; Dkt. No. 57 at 3.) Throughout 2013, Flowers remained in
23 his job as an Employee Relations Supervisor and continued to express to Nachtrieb that he
24 wanted to be promoted to the role of Employee Relations Manager. (Dkt. No. 56 at 6.) Because

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26 ² The term “go to grow” is not used in any of the employment documents that deal with
Flowers’ time at Fred Hutch.

1 that role did not exist, and because Flowers appeared unhappy with his current position,
2 Nachtrieb decided it was time to separate Flowers from Fred Hutch. (*Id.* at 7.) In July 2013,
3 Nachtrieb and Bartley state that they decided to tell Flowers that he must find a new job by
4 October 1, 2013. (Dkt. Nos. 55 at 6, 56 at 7.)

5 Before Nachtrieb acted on this plan, Flowers complained that he thought he was
6 experiencing racial discrimination at Fred Hutch. (*Id.* at 29–30.) In an email to Nachtrieb sent on
7 July 23, 2013, Flowers expressed frustration about not being considered to manage the Employee
8 Relations Team and that “without any other logical explanation for this treatment, I can only
9 conclude that it is because of my race.” (*Id.* at 29.) Flowers further stated that he would be
10 making a formal complaint with an independent agency. (*Id.* at 30.) On September 26, 2013,
11 Flowers filed a complaint with the Equal Employment Opportunity Commission (“EEOC”).
12 (Dkt. No. 53-1 at 84.)

13 In September 2013, Fred Hutch hired a third-party, Janice Clusserath (“Clusserath”), to
14 investigate Flowers’ Equal Employment Opportunity (“EEO”) complaint. (Dkt. No. 58 at 2.) As
15 part of her investigation, Clusserath interviewed several current and former employees in the HR
16 Department, including Flowers, Nachtrieb, Bartley, and Williams. (Dkt. No. 56 at 36.) On
17 November 5, 2013, Clusserath provided Fred Hutch with her written findings, in which she
18 concluded that Flowers’ discrimination claims were unfounded. (*Id.* at 45–46.) Clusserath’s
19 report also detailed some of Flowers’ supposed work performance issues. (*Id.* at 39–40.)

20 After receiving Clusserath’s report, Nachtrieb decided to revert back to his plan to
21 separate Flowers by a date certain. (*Id.* at 9.) On November 14, 2013, Nachtrieb and Fred
22 Hutch’s Chief Operating Officer (“COO”) Myra Tanita (“Tanita”) met with Flowers, provided
23 him the findings of Clusserath’s report, and informed him that he would be separated. (*Id.*)
24 Flowers was officially separated on November 17, 2013. (*Id.* at 10.) Flowers responded by filing
25 a second EEO complaint for retaliation. (Dkt. No. 53-1 at 88.)

26 Flowers brought this lawsuit charging Fred Hutch with disparate treatment and retaliation

1 under Title VII of the Civil Rights Act (“Title VII”), 42 U.S.C. §§ 2000e-2(a), 2000e-3, as well
2 as violation of The Older Workers Benefit Protection Act (“OWBPA”), 29 U.S.C. § 626(f). The
3 Court granted Fred Hutch’s motion for judgment on the pleadings regarding Flowers’ OWBPA
4 claim and motion for partial summary judgment on Flowers’ disparate treatment claim. (*See* Dkt.
5 Nos. 22, 44.) Fred Hutch now moves for summary judgment on Flowers’ remaining claim of
6 retaliation in violation of Title VII.³

7 **II. DISCUSSION**

8 **A. Flowers’ Motion to Compel**

9 Flowers asks the Court to compel Fred Hutch to perform a second Federal Rule of Civil
10 Procedure 30(b)(6) deposition because Fred Hutch’s designated corporate representative,
11 Nachtrieb, was unable to answer questions regarding two subtopics during the first deposition.
12 (Dkt. No. 60 at 1.) Fred Hutch objects to the motion to compel arguing, among other things, that
13 Nachtrieb provided adequate answers at the deposition. (Dkt. No. 62 at 1.)

14 Pursuant to Federal Rule of Civil Procedure 30(b)(6):

15 [A] party may name as the deponent a public or private corporation, a partnership,
16 an association, a governmental agency, or other entity and must describe with
17 reasonable particularity the matters for examination. The named organization must
18 then designate one or more officers, directors, or managing agents, or designate
19 other persons who consent to testify on its behalf; and it may set out the matters on
20 which each person designated will testify The persons so designated shall
21 testify as to the matters known or reasonably available to the organization.

22 Fed. R. Civ. P. 30(b)(6). As one court has noted, a corporation has “a duty to make a
23 conscientious, good-faith effort to designate knowledgeable persons for Rule 30(b)(6)

24 ³ After Fred Hutch filed its reply brief, Flowers filed a notice of supplemental authority
25 with two accompanying declarations. (*See* Dkt. Nos. 70–72.) These filings are improper. A
26 notice of supplemental authority is only allowed to “bring to the court’s attention relevant
authority issued after the date the party’s last brief was filed.” W.D. Wash. Local Civ. R. 7(n).
None of the case law contained in Flowers’ notice meets this criteria. (*See* Dkt. No. 70.)
Moreover, there was no basis in the Local or Federal Rules for Flowers to file the accompanying
declarations, which respond to issues raised in Fred Hutch’s motion for summary judgment.
(Dkt. Nos. 71, 72.) Therefore, the Court STRIKES Flowers’ notice of supplementary authority
and accompanying declarations (Dkt. Nos. 70–72) and disregards them on summary judgment.

1 depositions and to prepare them to fully and unequivocally answer questions about the designated
2 subject matter.” *Starlight International, Inc. v. Herlihy*, 186 F.R.D. 626, 638 (D. Kan. 1999).

3 Flowers asserts that Fred Hutch did not sufficiently prepare Nachtrieb for his deposition
4 because he was unable to answer questions regarding (1) why Fred Hutch selected Clusserath to
5 perform the investigation into Flowers’ discrimination complaint and (2) what Fred Hutch
6 communicated to Clusserath about the investigation, including the purpose, scope, and goals of
7 the investigation. (Dkt. Nos. 60 at 6, 64 at 9.)

8 Nachtrieb provided adequate answers to questions regarding why Fred Hutch selected
9 Clusserath to perform the investigation. Nachtrieb testified that Fred Hutch hired Clusserath after
10 Flowers made his complaint and declined to participate in a mediation. (Dkt. No. 64 at 19.)
11 Nachtrieb testified that Tanita made the ultimate decision to select Clusserath and was not sure if
12 other investigators were proposed. (*Id.* at 20.) Nachtrieb stated that he recommended Clusserath
13 because she had been an “HR professional, previously been at Nordstroms, which was well
14 thought of from an HR standpoint as well, had done other investigations, was well thought of in
15 the HR community.” (*Id.* at 21.) Although, Nachtrieb was not sure if Clusserath was asked for
16 her resume, he responded that it was Fred Hutch’s practice to conduct such due diligence. (*Id.* at
17 22.) Flowers has not demonstrated with specificity how Nachtrieb’s answers to questions
18 regarding why Fred Hutch selected Clusserath were inadequate.

19 Flowers has demonstrated, however, that Nachtrieb did not provide adequate answers to
20 questions regarding what Fred Hutch communicated to Clusserath about the investigation. The
21 following exchange took place during the Rule 30(b)(6) deposition:

22 **Counsel:** And so what did the Center communicate to Ms. Clusserath was the
23 objective of the investigation?

24 **Nachtrieb:** So because I was not involved, I can’t tell you with full clarity what
25 that was, but I can tell you what the typical behavior would have been and I’m sure
26 occurred.

Counsel: Okay. But that’s speaking generally and not in this specific instance?

1 **Nachtrieb:** Yes.

2 **Counsel:** So you don't know specifically what it was that was communicated to
3 the investigator about the purpose of the investigation?

4 **Nachtrieb:** No. But I can tell you that that is how we handle those things and having
5 worked for Myra for many years, I'm quite sure that that's what would have been
6 done.

7 (Dkt. No. 64 at 22–23.) Nachtrieb was not able to answer questions regarding what Fred Hutch
8 communicated to Clusserath about the investigation and suggested that Tanita would have been
9 able to answer. In other words, had Nachtrieb consulted with Tanita prior to the Rule 30(b)(6)
10 deposition, he likely would have been able to provide an answer to these questions. Fred Hutch
11 suggests that it did not have a duty to produce Tanita for the deposition or have Nachtrieb
12 consult with her because she is no longer employed with Fred Hutch. (Dkt. No. 62 at 4.)
13 However, a corporation is not relieved “of the duty to prepare a properly educated Rule 30(b)(6)
14 designee,” just because it no longer employs a person with relevant knowledge. *Great Am. Ins.*
15 *Co. of N.Y. v. Vegas Const. Co.*, 251 F.R.D. 534, 541 (D. Nev. 2008).

16 Because Fred Hutch failed to adequately prepare Nachtrieb to answer questions about
17 Fred Hutch's communications with Clusserath regarding the purpose, scope, and goals of the
18 investigation, the Court will consider Nachtrieb's answers to those questions as binding on Fred
19 Hutch at summary judgment—in other words, that Fred Hutch does not know what it
20 communicated to Clusserath about the purpose, scope, and goals of the investigation.
21 Additionally, at trial Fred Hutch will be precluded from having Nachtrieb or any other
22 organizational representative provide testimony regarding Fred Hutch's communications with
23 Clusserath regarding the scope, purpose, or goals of the investigation.⁴ The exclusion of
24 evidence is an appropriate sanction, given the nature of the violation. *See Fed. R. Civ. P.*
25 *37(b)(2)(ii)* (allowing district courts to “prohibit[] the disobedient party from supporting or

26 ⁴ The Court's order does not preclude Clusserath from testifying about her
communications with Fred Hutch regarding the purpose, scope, and goals of the investigation.

1 opposing designated claims or defenses, or from introducing designated matters in evidence.”).

2 The Court denies Flowers’ request for a second Rule 30(b)(6) deposition and for an
3 award of costs and expenses. Ordering a second Rule 30(b)(6) deposition would be a misuse of
4 resources because Flowers would only need to ask Fred Hutch’s designated representative a few
5 questions. The exclusion of evidence is a more narrowly tailored remedy. Moreover, the Court
6 does not believe that Nachtrieb was so ill-prepared that an award of expenses or other monetary
7 sanctions is appropriate. Flowers provided Fred Hutch with over 30 topics and subtopics in
8 preparation for its Rule 30(b)(6) deposition, but has only identified one subtopic that Nachtrieb
9 was actually unprepared to answer. Given this, and that the Court has only partially granted
10 Flowers’ motion to compel, the Court DENIES Flowers’ request for an award of expenses. *See*
11 Fed. R. Civ. P. 37(a)(5)(C) (where discovery motion is granted in part and denied in part the
12 district court *may* apportion the reasonable costs for the motion).

13 Flowers’ motion to compel is GRANTED in part and DENIED in part. At trial, Fred
14 Hutch will be precluded from having Nachtrieb or any other organizational representative
15 provide testimony regarding Fred Hutch’s communications with Clusserath regarding the scope,
16 purpose, or goals of the investigation.

17 **B. Summary Judgment Standard**

18 “The court shall grant summary judgment if the movant shows that there is no genuine
19 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
20 Civ. P. 56(a). In making such a determination, the Court must view the facts and justifiable
21 inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Anderson v.*
22 *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Once a motion for summary judgment is properly
23 made and supported, the opposing party “must come forward with ‘specific facts showing that
24 there is a *genuine issue for trial.*’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.
25 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). Material facts are those that may affect the
26 outcome of the case, and a dispute about a material fact is genuine if there is sufficient evidence

1 for a reasonable jury to return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248–49.
2 Ultimately, summary judgment is appropriate against a party who “fails to make a showing
3 sufficient to establish the existence of an element essential to that party’s case, and on which that
4 party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

5 **C. Flowers’ Retaliation Claim**

6 Title VII prohibits retaliation against an employee engaging in an activity protected by
7 the statute, such as filing an EEO complaint. 42 U.S.C. § 2000e-3(a); *see Poland v. Chertoff*, 494
8 F.3d 1174, 1180 (9th Cir. 2007). District courts use a three-step burden-shifting framework to
9 determine whether a Title VII retaliation claim should survive summary judgment. *Surrell v. Cal.*
10 *Water Serv. Co.*, 518 F.3d 1097, 1105 (9th Cir. 2008). Under this framework, the plaintiff must
11 first establish a *prima facie* case of retaliation, which requires proof that: (1) the plaintiff
12 engaged in a protected activity; (2) suffered an adverse employment action; and (3) a causal
13 connection between the two. *Bergene v. Salt River Project Agric. Improvement and Power Dist.*,
14 272 F.3d 1136, 1140–41 (9th Cir. 2001). If the plaintiff establishes a *prima facie* case, “the
15 burden shifts to the defendant to set forth a legitimate, non-retaliatory reason for its actions.” *Id.*
16 The plaintiff must then produce evidence to show that the stated reasons were a pretext for
17 retaliation. *Id.*

18 1. Prima Facie Case of Retaliation

19 At the summary judgment stage, the degree of proof necessary to establish a *prima facie*
20 case for a Title VII retaliation claim “is minimal and does not even need to rise to the level of a
21 preponderance of the evidence.” *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994). It
22 is undisputed that Flowers has established the first two elements of his *prima facie* case: he
23 engaged in a protected activity when he filed a discrimination complaint with the EEOC, and
24 suffered an adverse employment action when he was subsequently separated by Fred Hutch.
25 (Dkt. Nos. 64 at 2–4, 67 at 44); (*see* Dkt. No. 52 at 16) (“Fred Hutch does not dispute that
26 Flowers can establish the first and second elements of his [retaliation] claim.”). Therefore, the

1 Court need only determine whether Flowers has made a *prima facie* showing of a causal link
2 between his decision to file an EEO complaint and his subsequent termination.

3 To show the necessary causal link, an employee must demonstrate that taking part in the
4 protected activity was the “but-for cause” of the employer’s adverse action. *See Univ. of Tex. Sw.
5 Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013). This requires showing that the unlawful
6 retaliation would not have occurred absent the plaintiff engaging in a protected activity. *Stilwell
7 v. City of Williams*, 831 F.3d 1234, 1246–47 (9th Cir 2016) (citing *Nassar*, 570 U.S. at 362). A
8 plaintiff may establish causation with “circumstantial evidence, such as the employer’s
9 knowledge that [he or she] engaged in protected activities and the proximity in time between the
10 protected action and the allegedly retaliatory employment decision.” *Yartzoff v. Thomas*, 809
11 F.2d 1371, 1376 (9th Cir. 1987). In *Yartzoff*, the Ninth Circuit held that a plaintiff made a *prima
12 facie* showing of causation where his employer took adverse actions less than three months after
13 the plaintiff filed an administrative complaint, two weeks after the charge was first investigated,
14 and less than two months after the investigation ended. *Id.*

15 Here, there is sufficient temporal proximity between Flowers’ discrimination complaint
16 and his separation from Fred Hutch to support a *prima facie* showing of causation. Flowers first
17 told Nachtrieb that he was going to file a discrimination complaint with an outside agency in an
18 email sent on July 23, 2013. (Dkt. No. 56 at 29–30) (Flowers: “I am uncomfortable with
19 continuing to feel this way and would like to put this to rest by having an independent agency
20 hear and potentially investigate the concerns that I have expressed over the years.”). Flowers
21 eventually filed his EEO complaint on September 26, 2013. (Dkt. No. 53-1 at 84.)

22 Fred Hutch responded to Flowers’ complaint by hiring Clusserath to conduct an
23 investigation into his claims. (Dkt. No. 67 at 40–42.) Clusserath conducted her investigation
24 from September 27, 2013 to October 18, 2013. (Dkt. No. 56 at 36.) On November 5, 2018,
25 Clusserath published the findings of her investigation, which she sent to Tanita. (*Id.* at 35.) On
26 November 14, 2018, Tanita and Nachtrieb met with Flowers, provided him a copy of

1 Clusserath’s report, and informed him that he would be separated from Fred Hutch.⁵ Flowers
2 was officially separated on November 17, 2018. (*Id.* at 10.)

3 Based on this timeline, Fred Hutch terminated Flowers less than four months after he first
4 indicated he would file a discrimination complaint, less than two months after he filed his EEO
5 Complaint and Clusserath began her investigation, and less than two weeks after Fred Hutch
6 received the results of the investigation. The Court finds it notable that Fred Hutch informed
7 Flowers he would be separated on the same day it provided him with the results of the
8 investigation—an investigation that was ostensibly undertaken because Flowers had complained
9 about discrimination in the workplace. Viewing the timing of events in the light most favorable
10 to Flowers, a reasonable trier of fact could conclude that Flowers’ complaint—which caused
11 Fred Hutch to launch its investigation—precipitated his termination. *See Coszalter v. City of*
12 *Salem*, 320 F.3d 968, 977–78 (9th Cir. 2003) (“[d]epending on the circumstances, three to eight
13 months is easily within a time range that can support an inference of retaliation.”)

14 Fred Hutch argues that Flowers cannot establish but-for causation because Nachtrieb had
15 already decided to separate Flowers prior to the filing of his EEO complaint. (Dkt. No. 56 at 7.)
16 If the undisputed evidence demonstrated that Fred Hutch was planning to terminate Flowers
17 prior to his complaint, the Court agrees that Flowers could not establish but-for causation. *See*
18 *Knight v. Brown*, 797 F. Supp. 2d 1107, 1135 (W.D. Wash. 2011), *aff’d*, 485 F. App’x 183 (9th
19 Cir. 2012) (finding that temporal proximity alone is insufficient to infer retaliation where
20 employer had already proposed terminating plaintiff prior to his discrimination complaint); *see*
21 *also Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001) (“Employers need not suspend
22 previously planned transfers upon discovering that a Title VII suit has been filed, and their

23 ⁵ At the meeting, Fred Hutch offered Flowers two options for leaving the company. He
24 could either remain on payroll until early 2014 to look for another job, or resign immediately
25 with a three months’ severance. (Dkt. No. 56 at 9–10.) Both options required Flowers to release
26 any claims against Fred Hutch. (*Id.*) Fred Hutch quibbles about whether its conduct amounted to
a “termination” of Flowers; however, in its deposition, Fred Hutch admitted that it “separated
[Flowers’] employment,” and that Flowers did not consent to the separation. (Dkt. No. 67 at 44.)

1 proceeding along lines previously contemplated, though not yet definitively determined, is no
2 evidence whatever of causality.”). The Court must decide, then, whether there is a genuine
3 dispute of material fact regarding whether Fred Hutch had decided to terminate Flowers prior to
4 his EEO complaint.

5 In a declaration in support of summary judgment, Nachtrieb states that “in mid-July 2013
6 we decided on a plan to expressly inform Mr. Flowers that he needed to find another job, and to
7 do so by October 1, 2013.” (Dkt. No. 56 at 7.) Bartley similarly states that he and Nachtrieb
8 decided in early July 2013 that Flowers had to find employment elsewhere. (Dkt. No. 55 at 6.)
9 During their July 23, 2013 meeting, Nachtrieb says that he “expressly told Mr. Flowers that he
10 needed to find a job outside the organization.” (*Id.*) Nachtrieb further states that he had planned
11 to tell Flowers during the meeting that he would be separated from Fred Hutch by a date certain,
12 but that “our conversation became a bit sidetracked,” and “I did not communicate the October 1
13 deadline to Mr. Flowers.” (*Id.*)⁶ Fred Hutch also points to an email exchange between Nachtrieb
14 and Flowers, following their July 23 meeting, in which Flowers wrote “[a]lthough I appreciate
15 your offer to help me find employment as an ER Manager elsewhere, I have not expressed an
16 interest in doing so.” (*Id.* at 28.)

17 In response, Flowers offers sufficient evidence to create a genuine dispute of material fact
18 regarding whether Fred Hutch intended to terminate him prior to his discrimination complaint. In
19 a declaration in opposition to summary judgment, Flowers states that he and Nachtrieb “never
20 discussed employment opportunities outside [Fred Hutch] during our weekly meetings, and Mr.
21 Nachtrieb never presented this as something I was required to pursue.” (Dkt. No. 66 at 2.) As for
22 the email exchange, Flowers’ comment that he appreciated Nachtrieb’s offer to help him find
23 employment elsewhere was made in response to an email from Nachtrieb that stated “I believe

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25 ⁶ Fred Hutch points to notes Nachtrieb purportedly created from the July 23, 2013
26 meeting with Flowers, which state that Nachtrieb informed Flowers that he needed to seek
employment elsewhere. (Dkt. No. 56 at 32–33.) The Court disregards these notes because they
are hearsay, and Fred Hutch has not provided any exception that would make them admissible.

1 you are qualified for an ER manager role somewhere. I would like to help you find one, because
2 I believe you deserve one. There simply isn't a position here.” (Dkt. No. 56 at 29.) Moreover,
3 Nachtrieb's email was in response to Flowers' email that stated he would be filing a formal
4 discrimination complaint. (*Id.*) Viewed in the light most favorable to Flowers, this evidence
5 suggests Nachtrieb did not tell Flowers that he needed to find another job prior to his EEO
6 complaint.

7 2. Fred Hutch's Non-Retaliatory Reason

8 After the plaintiff establishes a *prima facie* case of retaliation, the burden of production
9 shifts to the defendant to articulate a legitimate, non-retaliatory explanation for the adverse
10 employment action. *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000). Fred Hutch has
11 articulated a legitimate, non-retaliatory explanation for its decision to separate Flowers.
12 Nachtrieb asserts that Fred Hutch separated Flowers because he was unhappy with his role as an
13 Employee Relations Supervisor and wanted a position—Employee Relations Manager—that did
14 not exist in the HR Department. (Dkt. No. 56 at 6.) Nachtrieb and Bartley further state that the
15 “go to grow” plan was unsuccessful and “did not result in Mr. Flowers seeking and finding
16 employment elsewhere.” (Dkt. Nos. 55 at 6, 56 at 6.) Nachtrieb states that his efforts to mentor
17 Flowers into another role in the organization were unsuccessful, and thus Flowers “needed to
18 find another job.” (*Id.* at 7.) According to Nachtrieb, he had decided to separate Flowers in July
19 2013, but put the plan on hold once Flowers made his EEO complaint. (*Id.*) Once Clusserath
20 completed her investigation, and determined that Flowers' discrimination claims were
21 unfounded, Nachtrieb decided to return to the previously adopted plan of “setting a timeline for
22 the separation of Flowers.” (*Id.* at 9.)

23 Based on the foregoing, Fred Hutch has met its burden of production to produce a non-
24 retaliatory reason for its decision to separate Flowers.

25 3. Flowers' Evidence of Pretext

26 Once an employer provides a non-retaliatory reason for its adverse employment action,

1 the plaintiff must put forth evidence that suggests the proffered reason was pretextual. *Manatt v.*
2 *Bank of Am.*, 339 F.3d 792, 801 (9th Cir. 2003). A plaintiff can demonstrate pretext “either
3 directly by persuading the court that a discriminatory reason more likely motivated the employer
4 or indirectly by showing that the employer’s proffered explanation is unworthy of credence.”
5 *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981); *Dominguez-Curry v. Nev.*
6 *Transp. Dep’t*, 424 F.3d 1027, 1037 (9th Cir. 2005). If a plaintiff uses circumstantial evidence to
7 satisfy this burden, such evidence “must be specific” and “substantial.” *Godwin v. Hunt Wesson,*
8 *Inc.*, 150 F.3d 1217, 1221–22 (9th Cir. 1998).

9 Flowers has provided specific and substantial circumstantial evidence that, when viewed
10 in the light most favorable to him, would allow a reasonable trier of fact to conclude that Fred
11 Hutch’s reason for terminating him was pretextual.

12 Flowers asserts that Fred Hutch has offered shifting rationales for why he was separated.
13 (Dkt. No. 65 at 17–18.) During the EEOC investigation into Flowers’ discrimination claim, Fred
14 Hutch emphasized Flowers’ performance issues in its decision to separate him. (*See* Dkt. No. 67
15 at 145–46.) As part of that investigation, Nachtrieb also stated that his intent behind the efforts to
16 provide Flowers with professional development opportunities in 2013 were made “with the
17 understanding that there simply was not a future for Mr. Flowers at the Center.” (*Id.* at 146.)

18 Conversely, Fred Hutch has articulated different reasons for why Flowers was separated
19 during the litigation of this case. In an answer to an interrogatory regarding the information
20 relied upon to terminate Flowers, Fred Hutch stated that Flowers was separated because he
21 “sought to obtain an Employee Relations Manager position at the Center that did not exist.”
22 (Dkt. No. 67 at 61.) In his declaration, Nachtrieb suggests that Flowers was separated because he
23 was unhappy in his role of Employee Relations Supervisor and wanted a management position
24 that did not exist. (Dkt. No. 56 at 6.) In its motion for summary judgment, Fred Hutch states that
25 it decided to part ways with Flowers “so that he could find another opportunity consistent with
26 his skills and desire for a management position.” In its Rule 30(b)(6) deposition, Fred Hutch

1 stated that Flowers’ “performance and his unhappiness were factors in the decision to end his
2 employment.” (Dkt. No. 67 at 46–47.)

3 The Court can infer pretext when an employer provides different and inconsistent reasons
4 for taking an adverse employment action. *See Aragon v. Republic Silver State Disposal Inc.*, 292
5 F.3d 654, 661 (9th Cir. 2002). A reasonable trier of fact could draw an inference that Fred
6 Hutch’s stated reasons for terminating Flowers—his poor performance, his unhappiness with his
7 position, his failure to expand into another role, and his desire for a management position—are
8 not necessarily consistent with one another.

9 That is especially true because there appears to be a genuine dispute of fact regarding
10 Flowers’ work performance. Although Williams, Bartley, and Nachtrieb have provided
11 declarations outlining Flowers’ unsatisfactory work performance, his 2012 written Performance
12 Appraisal paints a different picture. In what is the only written evaluation either party has
13 provided as evidence, Nachtrieb agreed with Flowers’ own positive assessment of his
14 performance, writing:

15 I have received considerable good feedback about Jon’s handling of issues and
16 projects. Of particular remark is the layoff of a number of staff in Animal Health.
17 It was well orchestrated, and done in a respectful, open manner – and in a way that
18 despite the inherent negative act, set a good tone for the staff and at the Center. The
19 new Vet / manager is super appreciative of Jon’s partnership and assistance. On a
20 number of occasions, Leslie Sandberg, speaking for VIDD, has voiced appreciation
to me for Jon’s work on multiple issues. Jon has a great way with people that is
disarming, genuine, respectful, and in the moment. Much appreciate him as a
colleague.

21 (Dkt. No. 56 at 17.) The written evaluation does not include any feedback that appears to reflect
22 negatively on Flowers’ performance. (*Id.* at 14–21.) While Nachtrieb states that he “drafted Mr.
23 Flowers’ performance appraisal so that it would not be an impediment for Mr. Flowers achieving
24 employment elsewhere,” his written appraisal is at odds with his later negative assessment of
25 Flowers’ performance and with his suggestion that Flowers had no future at Fred Hutch. (*See*
26 Dkt. Nos. 56 at 4–5, 67 at 146.) Reports of Flowers’ poor performance are also inconsistent with

1 the fact that he received merit-based pay increases each year he worked at Fred Hutch. (Dkt. No.
2 67 at 68–77.)

3 Flowers also points to circumstantial evidence that Fred Hutch used the investigation into
4 his discrimination claims to highlight performance issues in order to provide a basis for his
5 termination. (Dkt. No. 65 at 13–16.) While Clusserath’s written report makes specific findings
6 about each of Flowers’ discrimination claims, it also contains significant detail about his
7 supposed work performance issues. (Dkt. 56 at 39–40.) In response to an interrogatory asking
8 about Flowers’ performance in relation to applicable performance standards, Fred Hutch stated
9 “Plaintiff’s performance at the Center, as relevant to this litigation, is described in pages 5–6 of
10 the report by Ms. Janice Clusserath.” (Dkt. No. 67 at 62.)

11 As the Court has already noted regarding Flowers’ motion to compel, Fred Hutch was
12 unable to answer questions at its deposition about what it told Clusserath the purpose, scope, and
13 goals of her investigation were. *See supra* Part II.A. Moreover, Nachtrieb suggested that
14 Clusserath’s investigation could help to show Flowers that he would need to seek employment
15 elsewhere. (*See* Dkt. No. 56 at 7) (“Given that the last nine months had not successfully moved
16 the discussion forward, I welcomed a third party to investigate the issues Mr. Flowers had raised
17 as it could help communicate to Mr. Flowers our efforts to further his career at Fred Hutch or
18 somewhere else.”)

19 When considering the above evidence, a reasonable trier of fact could conclude that Fred
20 Hutch’s stated reason for separating Flowers was a pretext for retaliation. That is particularly
21 true in light of the temporal proximity between Flowers’ discrimination complaint and his
22 separation from Fred Hutch. *See supra* Part II.C.1. At the very least, there are genuine disputes
23 of material fact, as described above, that preclude summary judgment. Therefore, Fred Hutch’s
24 motion for summary judgment (Dkt. No. 52) is DENIED.

25 **D. Punitive Damages**

26 Fred Hutch additionally asks the Court to preclude Flowers from seeking punitive

1 damages at trial. As a general matter, plaintiffs may recover punitive damages as part of a Title
2 VII retaliation claim if they can demonstrate that the defendant “engaged in a discriminatory
3 practice or discriminatory practices with malice or with reckless indifference to [plaintiff’s]
4 federally protected rights.” 42 U.S.C. § 1981a. However, the United States Supreme Court has
5 limited the circumstances in which an employer can be held vicariously liable for punitive
6 damages based on the discriminatory actions of its employees. *Kolstad v. Am. Dental Ass’n*, 527
7 U.S. 526, 545 (1999). In *Kolstad*, the Court held that “in the punitive damages context, an
8 employer may not be vicariously liable for the discriminatory employment decisions of
9 managerial agents where these decisions are contrary to the employer’s good-faith efforts to
10 comply with Title VII.” *Id.* (citation and internal quotation marks omitted). The limitation does
11 not apply “when the corporate officers who engage in illegal conduct are sufficiently senior to be
12 considered proxies for the company.” *Passantino v. Johnson & Johnson Consumer Prod., Inc.*,
13 212 F.3d 493, 517 (9th Cir. 2000).

14 Fred Hutch asserts that it took good faith efforts to comply with Title VII and that the
15 employees who separated Flowers—Nachtrieb and Tanita—were not sufficiently senior as to be
16 considered proxies for the company. (Dkt. No. 69 at 9–10.) The Court concludes that there are
17 remaining factual issues that must be resolved before it can rule on the issue of punitive
18 damages. For example, it is not entirely clear where Nachtrieb and Tanita fit within Fred Hutch’s
19 organizational hierarchy. Nor is it totally clear what role Tanita played in separating Flowers.
20 Based on the current record, Fred Hutch has not met its burden to demonstrate that Flowers is
21 precluded from seeking punitive damages at trial. Therefore, Fred Hutch’s motion is DENIED
22 without prejudice, and the Court will reconsider this issue at trial.

23 **III. CONCLUSION**

24 For the foregoing reasons, Defendant’s motion for summary judgment (Dkt. No. 52) is
25 DENIED. Plaintiff’s motion to compel (Dkt. No. 60) is GRANTED in part and DENIED in part.

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1 DATED this 16th day of November 2018.

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5 John C. Coughenour
6 UNITED STATES DISTRICT JUDGE
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