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9 UNITED STATES DISTRICT COURT
10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
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12 STEVEN D. STEIN,
13 Plaintiff,

14 v.

15 TRI-CITY HEALTHCARE DISTRICT, a
16 California healthcare district; LARRY B.
17 ANDERSON, an individual,
18 Defendants.

Case No.: 3:12-CV-2524-BTM-BGS

**ORDER DENYING DEFENDANTS
TRI-CITY HEALTHCARE
DISTRICT'S AND LARRY B.
ANDERSON'S MOTIONS FOR
PARTIAL SUMMARY
JUDGMENT**

19 Defendants Tri-City Healthcare District and Larry B. Anderson have moved for
20 partial summary judgment. For the following reasons, Defendants' motions are
21 DENIED.
22

BACKGROUND

23 Plaintiff Steven D. Stein ("Stein") is the former Senior Vice President of Legal
24 Affairs and Chief Compliance Officer for Tri-City Healthcare District ("Tri-City").
25 He has sued his former employer and its Chief Executive Officer, Larry B. Anderson
26 ("Anderson"), for violation of his civil rights; disability discrimination; retaliation;
27 breach of contract; intentional infliction of emotional distress; harassment; false light;
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1 and blacklisting. The parties are familiar with the facts giving rise to this litigation and
2 the Court need not detail them further at this time.

3 **LEGAL STANDARD**

4 A motion for summary judgment will be granted “if the movant shows that
5 there is no genuine dispute as to any material fact and the movant is entitled to
6 judgment as a matter of law.” Fed. R. Civ. P. 56(a); accord Anderson v. Liberty
7 Lobby, Inc., 477 U.S. 242, 247-48 (1986). The moving party bears the burden of proof
8 and “must produce either evidence negating an essential element of the nonmoving
9 party's claim or defense or show that the nonmoving party does not have enough
10 evidence of an essential element to carry its ultimate burden of persuasion at trial.”
11 Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102 (9th Cir. 2000)
12 (citation omitted); see also Cleotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (“[T]he
13 plain language of Rule 56(c) mandates the entry of summary judgment . . . against a
14 party who fails to make a showing sufficient to establish the existence of an element
15 essential to that party's case, and on which that party will bear the burden of proof at
16 trial.”). When ruling on a summary judgment motion, the court must view all
17 inferences drawn from the underlying facts in the light most favorable to the
18 nonmoving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S.
19 574, 587 (1986) (citation omitted).

20 **ANALYSIS**

21 Tri-City contends it is entitled to partial summary judgment because Plaintiff
22 cannot establish essential elements of his federal and state retaliation claims. Tri-City
23 also argues that Stein’s case impermissibly relies on privileged and confidential
24 information. Anderson argues that he is entitled to partial summary judgment because
25 Plaintiff cannot establish essential elements of his claims for violation of his right to
26 due process, intentional infliction of emotional distress, retaliation, and punitive
27 damages. The Court will address each of these arguments in turn.

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I. Stein’s 31 U.S.C. § 3730 Retaliation Claim against Tri-City

Tri-City argues that Stein cannot establish that Tri-City had notice that Stein was engaged in protected activity under the FCA, and thus it could not have retaliated against him for taking such actions.

The FCA imposes liability on “any person who . . . knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval [to the United States government].” 31 U.S.C. § 3729. Additionally, the FCA’s anti-retaliation provision states that “[a]ny employee . . . shall be entitled to all relief necessary to make that employee . . . whole, if that employee . . . is discharged . . . because of lawful acts done by the employee . . . in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.” 31 U.S.C. § 3730(h)(1).

The Ninth Circuit has held that “[a]n FCA retaliation claim requires proof of three elements: 1) the employee must have been engaging in conduct protected under the Act; 2) the employer must have known that the employee was engaging in such conduct; and 3) the employer must have discriminated against the employee because of her protected conduct.” United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1060 (9th Cir. 2011) (internal quotation marks and citation omitted).

Tri-City’s argument is limited to the second element: notice. “The standard for notice . . . is flexible: the kind of knowledge the defendant must have mirrors the kind of activity in which the plaintiff must be engaged.” United States ex rel. Williams v. Martin-Baker Aircraft Co., 389 F.3d 1251, 1260 (D.C. Cir. 2004) (internal quotation marks and citation omitted). In this case, Plaintiff alleges he was undertaking efforts to prevent a violation of the FCA, thus he must show that Tri-City knew about his efforts.

However, many of the Circuit Courts of Appeal have held that when an employee’s job duties include providing information or advice regarding compliance

with regulations or laws, the bar for proving the employer knew about the employee's protected activities is higher than it would be for a conventional employee. This is because compliance employees are presumed to be acting in accordance with their job duties. To prove that their employer knew the employee was engaging in protected conduct, plaintiffs must show that they went beyond their normal job duties. See Maturi v. McLaughlin Research Corp., 413 F.3d 166, 172-73 (1st Cir. 2005); Williams, 389 F.3d at 1260-61; Yuhasz v. Brush Wellman, 341 F.3d 559, 567 (6th Cir. 2003); Brandon v. Anesthesia & Pain Mgmt. Assocs., 277 F.3d 936, 945 (7th Cir. 2002); Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176, 191-93 (3d Cir. 2001); Eberhardt v. Integrated Design & Constr., Inc., 167 F.3d 861, 868-69 (4th Cir. 1999); United States ex rel. Ramseyer v. Century Healthcare Corp., 90 F.3d 1514, 1522-23 (10th Cir. 1996); Robertson v. Bell Helicopter Textron, Inc., 32 F.3d 948, 951-52 (5th Cir. 1994).

While the Ninth Circuit has not directly addressed this issue, the Court finds the reasoning of the other Courts of Appeal to be persuasive and adopts it. A compliance officer like Stein must prove that he went beyond his normal job duties to show that his employer knew he was engaging in protected activities. Williams, 389 F.3d at 1261 (“[W]hen an employee acts outside his normal job responsibilities or alerts a party outside the usual chain of command, such action may suffice to notify the employer that the employee is engaging in protected activity.”).

Stein's employment agreement outlined his job duties:

(i) managing and directing the Medical Center's day-to-day legal and compliance program requirements with high level oversight over Medical Center's risk management program, provided that the day-to-day operations of the risk management program will be the direct responsibility of Medical Center' Risk Manager;

(ii) oversee the assignment of legal work to outside counsel;

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1 (iii) to advise the Chief Executive Officer, the Board and
2 responsible Board committees regarding legal and
3 compliance issues; and

4 (iv) such other duties as may be agreed upon from time to
5 time by Chief Executive Officer and Executive.

6 (“Stein Decl.” Exhibit A, Employment Agreement § 4.1).

7 The agreement further provided that Stein had “direct line reporting to the Chief
8 Executive Officer and dotted line reporting to the Chair of the Board and Audit and/or
9 Compliance Committee of the Board.” (*Id.*). Plaintiff elaborated that he reported to the
10 CEO on a “day-to-day” basis, but “also had an obligation to the audit committee and
11 the board on compliance issues . . . when we had meetings.” (Doc. 240-3, Declaration
12 of Robert Mahlowitz (“Mahlowitz Decl.”) Exhibit A, Deposition of Steven Stein
13 (“Stein Depo.”) 51:6-14).

14 As an attorney and Tri-City’s Chief Compliance Officer, any legal advice Stein
15 gave within the normal course of his duties was not sufficient to put Tri-City on notice
16 that Stein was engaged in protected activity, even if he warned that particular actions
17 violated the False Claims Act or other federal laws. *See Robertson*, 32 F.3d at 952
18 (finding no notice where “the record contains no evidence that [the plaintiff]
19 expressed any concerns to his superiors other than those typically raised as part of a
20 contract administrator’s job” and “[the plaintiff’s] actions were consistent with the
21 performance of his duty.”). *But see Eberhardt*, 167 F.3d 868-69 (employee tasked with
22 internal investigation of fraud put employer on notice by characterizing conduct as
23 illegal and recommending defendant obtain counsel). Stein’s job duties included day-
24 to-day reporting to Anderson on compliance issues. Accordingly, his reports to
25 Anderson that particular actions would violate the FCA (Stein Decl. ¶¶ 6-8) did not
26 put Defendants on notice that Stein was engaged in protected activity.

27 However, Plaintiff has also advanced evidence that he acted outside his normal
28 duties and chain of command. For example, Stein reported his belief that several of

the proposed transactions would lead to violations of the False Claims Act to not only Anderson, but also to Chief Operating Officer Casey Fatch, Jeff Segal, and outside counsel Mary Norvell. (*Id.*). Stein also raised his concerns again during the March 2, 2012 executive meeting, which included Anderson, Casey Fatch, Kathy Naylor, Sharon Shultz, Alex Yu, and Allison Borkenheim. (*Id.* at ¶ 11; Stein Depo. 290:8-15). Moreover, Stein also sought a meeting with Tri-city Board of Directors members Charlene Anderson and George Coulter to discuss potential FCA violations, but his request for a meeting was denied.¹ (Stein Decl. ¶ 9).

Based on the foregoing, a reasonable jury could find that Stein's multiple reports outside his usual chain-of-command went beyond his normal day-to-day duties and put Tri-City on notice that Stein was making efforts to prevent a violation of the FCA. Defendant has not carried its burden of showing that Plaintiff cannot prove that Tri-City knew about Stein's protected activity. Summary judgment on this basis is denied.

II. Stein's Cal. Labor Code § 1102.5 Retaliation Claim against Tri-City

Tri-City contends that it is entitled to partial summary judgment on Stein's California retaliation claims because (1) Plaintiff cannot establish that his allegedly protected conduct went beyond his job duties, (2) Plaintiff failed to disclose information to a government or law enforcement agency, and (3) Plaintiff failed to exhaust his administrative remedies.

1. Stein's activities and job duties

From January 1, 2004, to December 31, 2013, Cal. Labor Code § 1102.5 provided that "[a]n employer may not retaliate against an employee for disclosing

¹ While Stein's job duties did require him to report compliance issues to the Chair of the Board and Audit and Compliance Committee of the Board, it appears that his "dotted-line" reporting responsibility only arose at Board meetings. (Stein Decl. Exhibit A, Employment Agreement § 4.1; Stein Depo. 51:6-14). In this case, Stein allegedly sought to meet with several Board members on his own initiative, outside his normal duties and chain of command.

1 information to a government or law enforcement agency, where the employee has
2 reasonable cause to believe that the information discloses a violation of state or
3 federal statute” However, the plaintiff must also show that their disclosure of
4 information went beyond their normal job duties. See, e.g., Edgerly v. City of
5 Oakland, 211 Cal. App. 4th 1191, 1207 (2012); Lukov v. Schindler Elevator Corp.,
6 2012 WL 5464622. at *6 (N.D. Cal. Nov. 8, 2012).²

7 Defendant contends that there is no evidence that Stein acted outside his job
8 duties when he reported his concerns of potential illegality. However, for the same
9 reasons discussed in the previous section, the Court rejects this argument. There is
10 sufficient evidence on which a reasonable jury could conclude that Stein went outside
11 his normal duties and chain of command when he reported his concerns to the Chief
12 Operating Officer, outside counsel, and others, and sought a special meeting with
13 several members of the Board of Directors to discuss potential FCA violations.

14 2. Disclosure to a Government or Law Enforcement Agency

15 During the relevant time, Cal. Labor Code § 1102.5 protected employees from
16 retaliation for disclosures of a violation of law, but only if they made the disclosure to
17 a government or law enforcement agency.³ California courts interpreted the statute to
18 allow employees of government entities to disclose violations of law to their own
19 employer and qualify for whistleblower protection. Edgerly, 211 Cal. App. 4th at
20 1199.

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23 ² The California Labor Code was amended after the facts giving rise to this case.
24 Effective January 1, 2014, § 1102.5(b) now protects disclosures “regardless of
whether disclosing the information is part of the employee's job duties.”

25 ³ § 1102.5(b) has since been amended to also protect disclosures “to a person with
26 authority over the employee or another employee who has the authority to investigate,
27 discover, or correct the violation or noncompliance, or for providing information to, or
28 testifying before, any public body conducting an investigation, hearing, or inquiry.”

1 Tri-City maintains that at least one California appellate court, Mize-Kurzman v.
2 Marin Cmty. Coll. Dist., 202 Cal. App. 4th 832, 857-58 (2012), has suggested that an
3 employee may obtain whistleblower protection from disclosing a violation of law to
4 their own government employer only if the supervisor or employer they disclose to is
5 not the suspected wrongdoer.

6 The Court is not persuaded that California's whistleblower protection laws are
7 subject to such limitation. First, the Mize-Kurzman court was focused on whether
8 information passed along to a supervisor in the normal course of duties qualified for
9 protection under the statute. The court ultimately held that "where the supervisor is
10 *not* the alleged wrongdoer . . . , it cannot categorically be stated that a report to a
11 supervisor in the normal course of duties is not a protected disclosure." Defendant is
12 attempting to apply the court's analysis from one issue (whether disclosure consistent
13 with one's job duties qualifies for protection) to another issue (whether a public
14 employee's report to their own employer qualifies for protection). Defendant does not
15 justify this cross-application and the Court rejects it.

16 Furthermore, Cal. Labor Code § 1102.5(e) expressly provided that "[a] report
17 made by an employee of a government agency to his or her employer is a disclosure of
18 information to a government or law enforcement agency." The statute imposes no
19 limitation on this language that would support Defendant's theory that the public
20 employer must have clean hands.

21 Moreover, even if the Court agreed that Stein was required to disclose a
22 violation of law to a government entity not the subject of that disclosure, Stein's
23 attempt to report his concerns to the Board of Directors would qualify. While
24 Anderson and the other executives of Tri-City would be implicated in the allegedly
25 unlawful transactions, the transactions had not yet occurred when Stein disclosed them
26 and the Board had not ratified or endorsed the transactions. Accordingly, the Court
27 finds that Plaintiff has advanced sufficient evidence to establish that he disclosed
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1 violations of law to his own public employer and that such disclosures qualify for
2 protection under Cal. Labor Code § 1102.5(b).

3 3. Exhaustion of Administrative Remedies

4 Tri-City argues that Plaintiff must establish that he exhausted his administrative
5 remedies before pursuing a claim for retaliation under California's whistleblower
6 protection laws. In 2012, Cal. Labor Code § 1102.5 was silent as to whether
7 administrative exhaustion was required. The California Supreme Court suggested in
8 2005 that exhaustion may be required. See Campbell v. Regents of the Univ. of
9 California, 35 Cal.4th 311, 329 (2005). As of January 1, 2014, the labor code was
10 amended to state that "[a]n individual is not required to exhaust administrative
11 remedies or procedures in order to bring a civil action under any provision of this
12 code, unless that section under which the action is brought expressly requires
13 exhaustion of an administrative remedy." Cal. Labor Code § 244(a). See also §
14 98.7(g) ("In the enforcement of this section, there is no requirement that an individual
15 exhaust administrative remedies or procedures.").

16 The Ninth Circuit has found that these amendments clarify pre-existing law and
17 are thus applied retroactively to claims which accrued prior to their effective date.
18 Reynolds v. City & Cnty. of San Francisco, 12-16042, 2014 WL 2211677, at *2 (9th
19 Cir. May 29, 2014) (unpublished). Cal. Labor Code § 1102.5 contains no exhaustion
20 requirement. Accordingly, the Court holds that Cal. Labor Code §§ 98.7(g) and 244(a)
21 apply retroactively to Stein's claim and finds that he was not required to exhaust
22 administrative remedies before filing suit. Tri-City's motion for partial summary
23 judgment on this basis is denied.

24 III. Stein's Reliance on Privileged and Confidential Information

25 Tri-City argues that Plaintiff cannot prove either of his retaliation claims
26 because the alleged basis for Plaintiff's termination was his legal advice to Tri-City,
27 and the content of such advice is subject to the attorney-client privilege and California
28 ethical rules governing disclosure of confidential client information.

1 The Court is persuaded that Plaintiff will be able to prove the essential elements
2 of his retaliation claims without disclosing the content of communications subject to
3 the attorney-client privilege. Moreover, if Plaintiff does seek to admit privileged or
4 confidential information into evidence, the Court has at its disposal a variety of tools
5 to prevent public disclosure of that information, including sealing the courtroom and
6 transcripts and instructing the jury. See Gen. Dynamics Corp. v. Superior Court, 7
7 Cal.4th 1164, 1170, 1191 (1994). Partial summary judgment on this basis is denied.

8 **IV. Stein's 42 U.S.C. § 1983 Civil Rights Claim against Anderson**

9 Anderson argues he is entitled to partial summary judgment because (1) there is
10 no proof that Anderson was involved in the denial of Stein's rights, (2) he is entitled
11 to qualified immunity, and (3) he is a redundant defendant.

12 **1. Anderson's Involvement in the Denial of Stein's Due Process Rights**

13 To establish that Anderson is liable in an individual capacity for a violation of
14 Stein's right to a pre-termination hearing, Plaintiff must show that Anderson either
15 "participated in or directed the violations" of his rights, Taylor v. List, 880 F.2d 1040,
16 1045 (9th Cir. 1989), or that he "set in motion a series of acts by others, or knowingly
17 refused to terminate [such acts], which he knew or reasonably should have known,
18 would cause others to inflict the constitutional injury," Levine v. City of Alameda,
19 525 F.3d 903, 907 (9th Cir. 2008).

20 Anderson argues there is no evidence that he was involved in the denial of
21 Stein's rights. Anderson contends that he ceased his involvement after March 3, 2012
22 and "there was a handoff, a clear handoff, and other people took over with my
23 permission, my blessing." (Doc. 206-2 Declaration of George Rikos ("Rikos Decl.")
24 Exhibit 5, Deposition of Larry Anderson 68:17-20).

25 Stein contends that there is a dispute of material fact as to Anderson's
26 involvement in his termination. First, Stein alleges that he never resigned and was
27 effectively terminated by Anderson directly on March 2, 2012, when Anderson sent
28 him a letter purporting to accept his resignation, (Stein Decl. Exhibit D), and arranged

1 for Stein's access to Tri-City's computer network to be cut off, (Mahlowitz Decl.
2 Exhibit B, Deposition of Larry Anderson ("Anderson Depo.") 74:25-75:5).

3 Second, Stein argues that even if his termination did not occur until Tri-City
4 sent him the March 22 termination letter (Stein Decl. Exhibit H), there is
5 circumstantial evidence that Anderson oversaw the issuance of the March 22 letter and
6 Stein's termination: Anderson was the CEO of Tri-City and only executive senior to
7 Stein (Anderson Depo. 23:20-24:6); Anderson knew that Kathleen Naylor, the Vice
8 President of Human Resources who signed the March 22 letter, had no experience
9 terminating employees at public entities or providing due process rights and had only
10 been working at Tri-City for a few weeks (Anderson Depo. 105:2-106:17; Mahlowitz
11 Decl. Exhibit E, Deposition of Kathleen Naylor ("Naylor Depo.") 9:6-11, 78:8-12);
12 Naylor testified that she signed the letter, but did not develop its content, which was
13 provided by to her by Tri-City attorney Allison Borkenheim (Naylor Depo. 48:11-
14 50:6); Naylor's supervisor, Casey Fatch, allegedly told Naylor to work directly with
15 Anderson on the termination letter (Mahlowitz Decl. Exhibit C, Deposition of Casey
16 Fatch ("Fatch Depo.") 21:10-22:4, 45:15-24); and Tri City's current Vice President of
17 Human Resources, Esther Beverly, testified that Anderson approved the internal
18 reporting documentation for Stein's termination (Mahlowitz Decl. Exhibit I,
19 Deposition of Esther Beverly ("Beverly Depo.") 65:9-67:3). If this evidence is
20 credited, a jury could reasonably conclude that Anderson was directly involved Stein's
21 March 22 termination without notice or hearing.

22 Third, even if Anderson was not directly involved in the March 22 termination,
23 there is evidence he set in motion acts which he knew or should have known would
24 cause Stein to be terminated without notice or hearing. Anderson knew that Naylor
25 had no experienced involving due process rights and that she was a new to her job, but
26 the matter was nonetheless entrusted to her. On these facts, a reasonable jury could
27 find that Anderson failed to provide proper supervision of his subordinates and that he
28 knew or should have known that Stein's rights would be violated. Anderson's

1 apparent indifference stands in contrast to the care exercised by supervisors in other
2 cases where Courts found no liability. See, e.g., Levine, 525 F.3d at 907 (“[Defendant]
3 forwarded [plaintiff’s] letter requesting a pretermination hearing to [the director of
4 human resources] and expressly told her to ensure that [plaintiff’s] due process rights
5 were respected.”).

6 Based on the foregoing, the Court finds that Plaintiff has advanced sufficient
7 evidence to establish that Anderson was either directly involved in, or set in motion
8 acts resulting in, Stein’s termination without notice and hearing and thus violated
9 Stein’s constitutional right to pre-termination notice and hearing. Anderson’s motion
10 for partial summary judgment on this basis is denied.

11 2. Qualified Immunity

12 Anderson contends that, even if he did violate Stein’s rights, he is nonetheless
13 protected by qualified immunity because he acted reasonably under the circumstances.
14 “Under the defense of qualified immunity, a government official is immune from civil
15 damages unless his conduct violates a clearly established right of which a reasonable
16 person would have known.” Levine, 525 F.3d at 906 (citation omitted). Courts
17 consider two factors to determine if an official is entitled to qualified immunity:
18 “First, . . . whether the official violated a constitutional right. Second, . . . whether the
19 right was clearly established such that a reasonable official would [have] known that
20 he was engaging in unlawful conduct.” Id. (citations omitted).

21 Once the defense is invoked, the plaintiff bears the burden of proving that the
22 right in question was clearly established. Brewster v. Bd. of Educ. of Lynwood
23 Unified Sch. Dist., 149 F.3d 971, 977 (9th Cir. 1998) (citation omitted). For a right to
24 be clearly established, “[t]he contours of the right must be sufficiently clear that a
25 reasonable official would understand that what he is doing violates that right.” Id.
26 (citation omitted). Thus, the Court must consider not only whether the generalized
27 right to pre-termination notice and hearing existed in the abstract in March 2012, but
28 also whether that right was clearly applicable to Stein’s separation from Tri-City. See

1 Id. “In other words, courts adjudicating claims of qualified immunity must look not to
 2 constitutional guarantees themselves but to the various doctrinal tests and standards
 3 that have been developed to implement and to administer those guarantees.” Id.
 4 (citation omitted). If the application of a right to a particular set of facts is ambiguous,
 5 then even an official who ultimately violated the plaintiff’s rights will be entitled to
 6 qualified immunity. Id. (“If officers of reasonable competence could disagree on the
 7 issue whether a chosen course of action is constitutional, immunity should be
 8 recognized.” (citation omitted)).

9 i. Whether Anderson Violated Stein’s Rights

10 The Supreme Court has explained that “[a]n essential principle of due process is
 11 that a deprivation of life, liberty, or property be preceded by notice and opportunity
 12 for hearing appropriate to the nature of the case.” Cleveland Bd. of Educ. v.
 13 Loudermill, 470 U.S. 532, 542 (1985). Accordingly, when an employee “has a
 14 constitutionally protected property interest in his employment,” there must be “some
 15 kind of hearing prior to . . . discharge.” Id. The Loudermill Court found that a public
 16 employee had a property interest in continuing employment when a state statute
 17 provided he could only be dismissed for cause. Id. at 538–39, 546. See also Walker v.
 18 City of Berkeley, 951 F.2d 182, 183 (9th Cir. 1991) (“[C]ivil servant who, under City
 19 regulations, could be terminated only for cause . . . had a property interest in her
 20 employment that entitled her to due process protection.”). A property interest in
 21 continued employment can also be created by contract. See, e.g., San Bernardino
 22 Physicians' Servs. Med. Grp., Inc. v. San Bernardino Cnty., 825 F.2d 1404, 1408 (9th
 23 Cir. 1987) (“constitutionally protectible entitlement may arise from contractual
 24 language providing for discharge from employment only for cause.”); Vanelli v.
 25 Reynolds Sch. Dist. No. 7, 667 F.2d 773, 777 (9th Cir. 1982) (“employee dismissed
 26 during the term of a one-year contract and in breach of its provisions has a legitimate
 27 claim of entitlement and a property interest in continued employment.”).

28 In this case, Stein’s employment agreement with Tri-City provided that

1 “[t]he Company shall employ Executive, under this agreement, starting on the
 2 Effective Date, and shall continue unless terminated as provided for under the terms of
 3 this Agreement.” (Stein Decl. Exhibit A, Employment Agreement ¶ 2). Under the
 4 agreement, Stein could be terminated for cause (Id. at ¶ 6.10), or without cause (Id. at
 5 ¶ 6.12). If Stein was terminated without cause, he was entitled to sixty days’ notice of
 6 intent to terminate and continued compensation and benefits during that period. (Id. at
 7 ¶ 6.12(a)). The Ninth Circuit has characterized such an employment agreement as
 8 “hybrid,” insofar as they allow for both with-cause and without-cause termination, and
 9 the without-cause termination provision entitles the employee to a limited period of
 10 continued employment during which he or she can only be terminated for cause. Fed.
 11 Deposit Ins. Corp. v. Henderson, 940 F.2d 465, 476 (9th Cir. 1991). Hybrid
 12 agreements, such as the agreement between Stein and Tri-City, create a limited but
 13 cognizable property interest which is protected by the Constitution and which cannot
 14 be taken without due process. Id.

15 The Court finds that there is sufficient evidence to establish that Stein had a
 16 cognizable property interest in continued employment at Tri-City based on his
 17 employment agreement’s without-cause-termination and sixty-days-notice provisions;
 18 that this property interest was protected by the due process clause; that Tri-City
 19 terminated Stein either on March 2, 2012, or March 22, 2012, without pre-termination
 20 notice and hearing in violation of Stein’s rights to due process; and that Anderson
 21 either personally directed Stein’s termination without due process or that he set in
 22 motion acts by others which he knew or should have known would result in Stein’s
 23 termination without due process. The Court must now determine whether Stein’s
 24 rights were clearly established when he was terminated.

25 ii. Whether Stein’s Rights were Clearly Established

26 A public official is only liable for the deprivation of an individual’s rights if
 27 those rights were clearly established at the time of the deprivation. Levine, 525 F.3d at
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1 906. Plaintiff must show that the contours of the right to pre-termination notice and
2 hearing were clearly applicable to his situation. Brewster, 149 F.3d at 977.

3 The right to pre-termination notice and hearing for public employees who could
4 only be dismissed for cause was clearly established as early as 1985 in Loudermill,
5 470 U.S. at 538-39. Moreover, in 1991 the Ninth Circuit applied this right to
6 situations, like Stein's, where the plaintiff has a hybrid employment contract that
7 provides for both at-will and for-cause termination. Fed. Deposit Ins. Corp., 940 F.2d
8 at 476.

9 Defendant contends that, given the unique factual situation of this case --
10 wherein a reasonable official could have concluded that Stein had resigned -- it was
11 not clearly established that Stein was entitled to pre-termination notice and hearing.
12 Anderson's argument does have some merit. The Court previously determined that
13 whether Stein resigned or was terminated is a dispute of material fact that will have to
14 be resolved at trial. A public official facing Stein's sudden departure from the March
15 2, 2012 meeting, his statement that he was leaving, and his removal of some of his
16 possessions from his office, could reasonably conclude that Stein had resigned. (Stein
17 Depo. 299:4-24, 306:5-13, 310:9-15). Under this premise, there would be no need to
18 provide pre-termination notice and hearing because there had been no termination.

19 However, even if it was reasonable to believe that Stein had resigned at first,
20 Stein contested that notion almost immediately. After leaving the office on March 2,
21 Stein sent an e-mail to Tri-City's Director of Occupational Health and Wellness
22 requesting the forms required to obtain a medical leave. (Stein Depo. 305:8-10;
23 Mahlowitz Decl. Exhibit G, Deposition of Rudy Gastelum ("Gastelum Depo.") 6:20-
24 22, 15:2-16). When he received Anderson's letter purporting to accept his resignation,
25 he promptly e-mailed Anderson, made it clear that he had not resigned, and he gave
26 Anderson the option of approving his leave or terminating him under his employment
27 agreement. (Stein Decl. ¶13; Stein Decl. Exhibit E). By the time the March 22
28 termination letter was sent, it was abundantly clear that Stein did not believe he

1 resigned and that he expected to be granted leave or terminated. In this context, a
2 reasonable public official would understand that the well-established right to per-
3 termination notice and hearing applied to Stein. Anderson's involvement in Stein's
4 termination without notice and hearing at this point violated clearly established rights.
5 Accordingly, the Court finds that Anderson is not entitled to qualified immunity and
6 denies summary judgment on this basis.

7 3. Redundant Defendant

8 Anderson argues that he is a redundant defendant because he is liable, if at all,
9 only in an official capacity and that Tri-City is the real party-in-interest. Generally,
10 "[a]n official capacity suit against a municipal officer is equivalent to a suit against the
11 entity. When both a municipal officer and a local government entity are named, and
12 the officer is named only in an official capacity, the court may dismiss the officer as a
13 redundant defendant." Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Cnty. Sheriff
14 Dept., 533 F.3d 780, 799 (9th Cir. 2008). However, in this case, Plaintiff has brought
15 suit against Anderson in his personal capacity based on his direct involvement in
16 Stein's termination without due process or, alternatively, his failure to supervise his
17 subordinates, resulting in Stein's termination without due process. Anderson is not a
18 redundant defendant and thus cannot be dismissed on this basis.

19 V. Stein's Emotional Distress Claim against Anderson

20 Anderson contends that Stein's claim for intentional infliction of emotional
21 distress ("IIED") must fail as a matter of law because Plaintiff cannot establish the
22 required elements of the offense.

23 To prevail on an IIED claim under California law, Stein must prove "(1)
24 outrageous conduct by the defendant; (2) the defendant's intention of causing or
25 reckless disregard of the probability of causing emotional distress; (3) the plaintiff's
26 suffering severe or extreme emotional distress; and (4) actual and proximate causation
27 of the emotional distress by the defendant's outrageous conduct." Terice v. Blue Cross
28 of California, 209 Cal.App.3d 878, 883 (1989) (citation omitted).

1 1. Outrageous Conduct

2 Conduct is only “outrageous” if it is “so extreme as to exceed all bounds of that
3 usually tolerated in a civilized society.” Id. (citation omitted). Generally, “mere
4 insults, indignities, threats, annoyances, petty oppressions, or other trivialities” will
5 not rise to the level of being outrageous conduct for purposes of an IIED claim. Fisher
6 v. San Pedro Peninsula Hospital, 214 Cal.App.3d 590, 617 (1989). Similarly,
7 termination from employment and other routine management activity will not
8 normally support an IIED claim, “even if an improper motivation is alleged.” Janken
9 v. GM Hughes Electronics, 46 Cal.App.4th 55, 80 (1996).

10 However, California courts have recognized that a violation of a fundamental
11 civil right protected by law can be, by its very nature, “outrageous conduct” that
12 “exceeds all bounds of decency usually tolerated by a decent society.” Id. at 618
13 (holding sexual harassment by an employer can constitute outrageous conduct);
14 accord Barsell v. Urban Outfitters, Inc., 2009 WL 1916495, at *6-7 (C.D. Cal. July
15 01, 2009) (holding disability discrimination can constitute outrageous conduct and
16 noting that “intentional infliction of emotional distress claims . . . can be brought
17 where the distress is engendered by an employer's illegal discriminatory practices.”
18 (internal quotation marks and citations omitted)); Kovatch v. California Cas. Mgmt.
19 Co., 65 Cal.App.4th 1256, 1278 (1998) (holding sexual orientation harassment by an
20 employer can constitute outrageous conduct), overruled on other grounds, Aguilar v.
21 Atlantic Richfield Co., 25 Cal.4th 826, 853 n.19 (2001).

22 Plaintiff reasons that Anderson discriminated against him on the basis of his
23 medical disability contrary to the Americans with Disabilities Act and California’s
24 Fair Employment and Housing Act. Stein began to suffer from a gastrointestinal
25 disorder in 2010, later diagnosed as Irritable Bowel Syndrome (“IBS”). Stein
26 informed Anderson of his condition in 2010. (Stein Decl. ¶ 4; Stein Decl. Exhibit B).
27 Stein began to work from home when his IBS was particularly difficult, but Anderson
28 directed him to cease doing so in February 2012. (Stein Decl. ¶ 5b). While meeting

1 with Anderson shortly thereafter, Stein again explained his condition and asked to be
 2 allowed to work a part-time or flexible schedule, but Anderson refused and warned
 3 Stein that he could hire a healthy healthcare attorney. (*Id.*). Stein interpreted this
 4 statement to mean that Anderson would terminate him if his IBS condition continued.
 5 (*Id.*) Stein also witnessed what he perceived to be threats of disability discrimination
 6 directed at other employees by Anderson during his time at Tri-City. (*Id.* at ¶¶ 5a, c,
 7 d). After leaving the March 2 executive meeting and returning home, Stein asked Tri-
 8 City's Director of Occupational Health and Wellness to send him the required
 9 paperwork so he could request medical leave. (Stein Decl. ¶ 11; Stein Decl. Exhibit C;
 10 Stein Depo. 305:8-10; Gastelum Depo. 6:20-22, 15:2-16). Later that day, Anderson
 11 sent Stein a letter that purported to accept Stein's resignation. (Stein Decl. ¶ 12; Stein
 12 Decl. Exhibit D). Anderson also arranged for Stein's access to the computer network
 13 to be cut off. (Stein Decl. ¶ 12; Anderson Depo. 74:25-75:5).

14 Based on the foregoing evidence, a jury could reasonably find that Anderson
 15 discriminated against Stein by failing to provide reasonable accommodation and
 16 terminating him on the basis of his IBS medical condition contrary to the Americans
 17 with Disabilities Act and California's Fair Employment and Housing Act, and that this
 18 conduct was accordingly outrageous and beyond the bounds of a civilized society.

19 2. Intention of Causing or Reckless Disregard of Causing Emotional Distress

20 Defendant maintains that there is no evidence that he intended to cause Plaintiff
 21 to suffer emotional distress. A plaintiff seeking to prevail on an IIED claim must also
 22 establish that the defendant intended to cause the plaintiff to suffer emotional distress,
 23 or that he or she recklessly disregarded the risk of causing such distress. *Terice*, 209
 24 Cal.App.3d at 883.

25 Based on the previously discussed evidence of discrimination, the Court finds
 26 that there is a dispute of material act as to whether Anderson intended to cause
 27 Plaintiff emotional distress. A reasonable jury could infer from those facts that
 28

1 Anderson intended his discrimination to cause Stein emotional harm, or recklessly
2 disregarded the risk that his discrimination would have such harm.

3 3. Severe or Extreme Emotional Distress

4 To succeed on a claim for emotional distress under California law, Stein must
5 be able to show that he suffered “severe or extreme emotional distress.” Terice, 209
6 Cal.App.3d at 883. This requires Plaintiff to show “more than the stress of everyday
7 life.” Su v. M/V S. Aster, 978 F.2d 462, 474 (9th Cir. 1992) (citing Spurrell v.
8 Bloch, 40 Wash.App. 854, 863 (1985) (“one sleepless night, tears, loss of appetite,
9 and anxiety” did not “demonstrate mental or emotional distress.”); Lawson v. Boeing
10 Co., 58 Wash.App. 261, (1990) (“depression, loss of appetite, libido and energy,
11 sleeplessness, and increased headaches . . . are not signs of distress above that level
12 which is a fact of life and do not constitute severe emotional distress”)).

13 Stein has advanced evidence that, in the wake of his termination, he suffered
14 anxiety and panic attacks, which included shaking, trembling, racing heart, and racing
15 thoughts. (Stein Depo. 368:21-369:3, 370:9-13). Stein testified that he rarely or never
16 left his house from March 2 to 19, 2012. (Id. at 372:4-8). He sought medical treatment
17 for his distress. (Id. at 369:4-19). Based on these facts, a jury could find that Stein’s
18 distress went beyond the stress of everyday life and was sufficiently severe or extreme
19 to enable an IIED claim. The Court concludes there is a dispute of material fact as to
20 this issue, which precludes summary judgment.

21 4. Actual and Proximate Causation

22 Finally, Defendant contends that Plaintiff has presented no evidence that
23 Anderson’s conduct caused Stein’s emotional distress. To prevail on an IIED claim,
24 the fourth and final element the plaintiff must establish is that there is “actual and
25 proximate causation of the emotional distress by the defendant's outrageous conduct.”
26 Terice, 209 Cal.App.3d at 883. Based on the nature of Anderson’s alleged
27 discrimination against Stein and also the close temporal nexus between Stein’s
28 termination and his emotional distress, the Court finds that there is sufficient evidence

1 in the record on which a jury could find that Anderson's conduct was both the actual
2 and proximate cause of Stein's emotional distress.

3 In summary, the Court finds that Plaintiff has advanced sufficient evidence to
4 establish each of the four elements for an IIED claim against Anderson. Summary
5 judgment on this basis is denied.

6 **VI. Stein's 31 U.S.C. § 3730 Retaliation Claim against Anderson**

7 Defendant argues that Stein cannot demonstrate any actionable conduct by
8 Anderson in support of Stein's claim for retaliatory discrimination under the False
9 Claims Act. An FCA retaliation claim requires proof that (1) the plaintiff engaged in
10 protected activity, (2) the defendant knew about plaintiff's protected activity, and (3)
11 the defendant discriminated against plaintiff because of his or her protected activity.
12 Cafasso, 637 F.3d at 1060.

13 **1. Stein's Protected Activity**

14 Defendant argues that Stein fails to allege that he engaged in protected activity.
15 The FCA protects employees from retaliation for "lawful acts done by the employee
16 . . . in furtherance of an action under this section or other efforts to stop 1 or more
17 violations of this subchapter." Generally, "[v]iolations of laws, rules, or regulations
18 alone do not create a cause of action under the FCA. It is the false *certification* of
19 compliance which creates liability when certification is a prerequisite to obtaining a
20 government benefit." United States ex rel. Hopper v. Anton, 91 F.3d 1261, 1266 (9th
21 Cir. 1996).

22 Plaintiff has advanced evidence that he believed several transactions Tri-City
23 was considering would constitute violations of various federal laws, would ultimately
24 result in Tri-City violating the False Claims Act, and that he warned multiple people
25 inside and outside Tri-City of his concerns. (Stein Decl. ¶¶ 6-8). Plaintiff further
26 explained at oral argument that Stein believed Tri-City would need to certify that it
27 was in compliance with the federal laws he believed were about to be violated to
28 obtain federal funds, and that such false certification would violate the False Claims

1 Act. The Court finds that there is sufficient evidence in the record to conclude that
2 Stein was engaged in “efforts to stop 1 or more violations” of the FCA, which is
3 protected activity under the FCA’s anti-retaliation provision.

4 2. Anderson’s Knowledge that Stein was Engaged in Protected Activity

5 Anderson maintains that he had no knowledge that Stein was engaged in
6 protected activity because any warnings and legal advice he provided were part of his
7 job duties as Vice President of Legal Affairs and Chief Compliance Officer. This
8 argument is similar to Tri-City’s and the Court rejects it on the same grounds. There is
9 sufficient evidence in the record to conclude that Anderson knew about Stein’s efforts
10 to prevent violations of the FCA based on his communications outside his usual chain
11 of command. Anderson knew that Stein had reported some of his concerns to Jeff
12 Segal, who complained to Anderson about Stein’s interference. (Stein Decl. ¶8).
13 Anderson also knew that Stein raised his concerns regarding one of the transactions at
14 the executive meeting on March 2, 2012. (*Id.* at ¶ 11; Stein Depo. 290:8-15). A jury
15 could also infer that, as CEO, Anderson would have learned of Stein’s
16 communications with Casey Fatch, Mary Norvell, and his attempt to meet with
17 several members of the Board of Directors. (Stein Decl. ¶¶ 6-8). This conduct put
18 Anderson on notice that Stein was acting outside his normal job duties to prevent
19 violations of the FCA.

20 3. Causal Relationship between Stein’s Acts and Termination

21 Defendant argues that, absent evidence that he knew Stein was engaged in
22 protected activity, it would be impossible for him to retaliate against Stein. Moreover,
23 Defendant maintains that Stein has advanced no evidence of a causal relationship
24 between Plaintiff’s activities and his termination. Finally, Anderson argues that Stein
25 was not terminated at all, but rather resigned, and thus plaintiff cannot prove that he
26 was terminated in retaliation for his activities.

27 To prevail on his retaliation claim, Stein must show that Anderson
28 “discriminated against plaintiff because of his or her protected activity.” *Cafasso*, 637

1 F.3d at 1060. As discussed above, there is sufficient evidence in the record to establish
2 that Anderson knew about Stein's efforts to prevent one or more violations of the
3 False Claims Act. Additionally, the temporal proximity between Stein's efforts to
4 prevent violations of the FCA in February and March 2012 and his termination in
5 March 2012 are sufficient to give rise to an inference of causation. Finally, the Court
6 has previously found that there is a dispute of material fact as to whether Stein
7 resigned or was terminated. If a jury finds that he was terminated, it could ultimately
8 conclude that he was terminated in retaliation for his protected activities.

9 In summary, the Court finds that Plaintiff has advanced sufficient evidence to
10 establish each of the requisite elements for an FCA retaliation claim against Anderson.
11 Anderson's motion for partial summary judgment on this basis is denied.

12 **VII. Stein's Punitive Damages Claim against Anderson**

13 Plaintiff is seeking punitive damages against Anderson for his federal civil
14 rights, IIED, falselight, and blacklisting claims. Plaintiff also sought punitive damages
15 against Anderson for his FCA retaliation claim in his First Amended Complaint, but
16 he now concedes that he cannot and withdraws that claim. Defendant argues that
17 Plaintiff cannot establish his entitlement to punitive damages.

18 **1. Punitive Damages for Plaintiff's Federal Civil Rights Claim**

19 "[I]t is well-established that a jury may award punitive damages under section
20 1983 either when a defendant's conduct was driven by evil motive or intent, or when it
21 involved a reckless or callous indifference to the constitutional rights of others." Dang
22 v. Cross, 422 F.3d 800, 807 (internal quotation marks and citation omitted). Plaintiff's
23 § 1983 claim is premised on Anderson's alleged denial of Stein's right to pre-
24 termination notice and hearing. The Court has found sufficient evidence to allow
25 Plaintiff's § 1983 claim to go forward, including evidence that Anderson intentionally
26 terminated Plaintiff without notice or hearing on March 2, 2012, by purporting to
27 accept his resignation and cutting off his access to Tri-City's computer network. Based
28 on the previously discussed evidence of Stein and Anderson's conflicts and

1 deteriorating relationship culminating in Anderson's outburst at the March 2 meeting
2 (Stein Depo. 296:1-297:1), a jury could reasonably infer that Anderson's motive in
3 violating Stein's rights was to punish him for his disability and/or his efforts to
4 prevent violations of the FCA. This would provide a sufficient basis for a finding of
5 evil motive or intent.

6 Alternatively, there is also evidence that Anderson was indifferent to Plaintiff's
7 right to due process, as demonstrated by Anderson turning Stein's termination over to
8 others, and in particular Kathleen Naylor, who was a new employee with no
9 experience terminating public employees and protecting due process rights. Based on
10 these facts, a reasonable jury could find that Anderson knew or should have known
11 that a violation of Stein's rights was probable, and that Anderson thus possessed the
12 requisite "reckless or callous indifference" to Stein's constitutional right to due
13 process. Accordingly, Plaintiff is entitled to seek punitive damages for his § 1983
14 claim at trial.

15 2. Punitive Damages for Plaintiff's IIED Claim

16 Plaintiff's entitlement to punitive damages for his California IIED claim is
17 governed by state law. See Central Office Tel. v. AT&T Co., 108 F.3d 981, 993 (9th
18 Cir. 1997), rev'd on other grounds, 524 U.S. 214, 228 (1998). To obtain punitive
19 damages under California law, the plaintiff must establish "by clear and convincing
20 evidence that the defendant has been guilty of oppression, fraud, or malice." Cal. Civ.
21 Code § 3294(a); see also Basich v. Allstate Ins. Co., 87 Cal.App.4th 1112, 1121
22 (2001) ("[O]n a motion for summary adjudication with respect to a punitive damages
23 claim, the higher evidentiary standard applies. If the plaintiff is going to prevail on a
24 punitive damages claim, he or she can only do so by establishing malice, oppression
25 or fraud by clear and convincing evidence.").

26 Plaintiff argues that Defendant's conduct was malicious. Malice is defined by §
27 3294(c) as "conduct which is intended by the defendant to cause injury to the plaintiff
28 or despicable conduct which is carried on by the defendant with a willful and

conscious disregard of the rights or safety of others.”

The basis of Plaintiff’s IIED claim is Anderson’s allegedly intentional termination of Plaintiff on the basis of his medical condition. The Court has previously found that there is sufficient evidence for Plaintiff’s IIED claim to advance based on Anderson’s disparaging comments to Stein and others, his refusal to accommodate Stein, his termination of Stein shortly after Stein requested the documents he would need to seek medical leave, and Stein’s subsequent emotional distress. Based on these same facts, a jury could reasonably find by clear and convincing evidence that Anderson acted with malice in so much as he intended “to cause injury to the plaintiff.” Alternatively, if the jury found that Anderson was liable for IIED based on his “reckless disregard of the probability of causing emotional distress,” Terice, 209 Cal.App.3d at 883, then it could also find by clear and convincing evidence that Anderson engaged in “a willful and conscious disregard of the rights or safety of others.” The Court concludes that Stein is entitled to seek punitive damages for his IIED claim at trial.

3. Punitive Damages for Plaintiff’s Falselight and Blacklisting Claims.

Plaintiff’s entitlement to punitive damages on his falselight and blacklisting claims is also a question of California law governed by Cal. Civ. Code § 3294(a). However, the Court has stayed discovery on these claims until the Ninth Circuit resolves Defendants’ appeal of the Court’s denial of their Anti-SLAPP motion. (Doc. 166). Accordingly, the Court finds that summary judgment is inappropriate at this time and denies Defendant’s motion for partial summary judgment on this issue without prejudice. See Fed. R. Civ. P. 56(d)(1).

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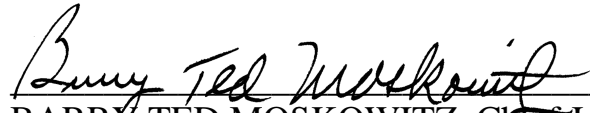
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CONCLUSION

For the foregoing reasons, Defendants' motions for summary judgment (Docs. 181, 184) are DENIED.

IT IS SO ORDERED.

Dated: August 27, 2014


BARRY TED MOSKOWITZ, Chief Judge
United States District Court