UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO.: 6:21-cv-312-JA-LRH

SANDRA KUBA,

Plaintiff,

v.

DISPOSITIVE MOTION

DISNEY FINANCIAL SERVICES, LLC,

Defendant.
_____/

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW

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INTRODUCTION

Pursuant to Fed. R. Civ. P. 56 and Local Rule 3.01, Defendant Disney Financial Services, LLC ("DFS") moves for an order granting summary judgment, or in the alternative, partial summary judgment, against Plaintiff Sandra Kuba ("Kuba" or "Plaintiff") on the grounds that there is no genuine dispute as to any material fact, and that DFS is entitled to judgment as a matter of law on the five counts against it in the complaint for violation of the anti-retaliation provisions of the Sarbanes-Oxley Act, 18 U.S.C. §1514A ("SOX") (Count I), the Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. §78u-(h) ("DFA") (Count II), the California False Claims Act, Cal. Gov't Code §12650 ("CFCA") (Count III), and the Florida Whistleblower Act, Fla. Stat. § 448.101 ("FWA") (Count IV), and for violation of the Equal Pay Act, 29 U.S.C. § 206(d) ("EPA") (Count V).

Kuba had a long history of accusing co-workers of mistreatment, incompetence, taking credit for her work, and violation of her family care leave rights. In May 2017, Kuba accused a co-worker of "screaming" at her and "talking down to her to the point of abuse." When her manager met with her to get the details of what had happened, Kuba changed her story and said the employee had used a "tone." Nevertheless, a few days later, Kuba filed a formal complaint with the Employee Relations department, again accusing the employee of screaming at and being abusive towards her. Employee Relations assigned Marisa Dye ("Dye") to investigate. As that investigation was getting underway, Kuba accused a manager in another department of "bullying" her, and accused unspecified employees in that department of issuing coupon codes

"off the cuff" to "anyone who asked for them."

After three interviews with Kuba, reviewing documents she had submitted in support of her complaint, and interviewing the accused employees and other witnesses, Dye concluded not only that there was no merit to Kuba's complaints, but also that her accusations against her co-workers were not made in good faith in violation of company policy. After consulting with the head of Employee Relations ("ER"), Dye recommended termination of Kuba's employment to Tracy Willis ("Willis"), the Vice President of Controllership, the organization in which Kuba worked. After hearing from Dye and her leader about the reasons for their recommendation, reviewing Dye's written investigation summary, and discussing the matter with her recently appointed successor, Andrew Widger ("Widger"), Willis and Widger jointly made the decision to terminate Kuba's employment.

Kuba subsequently filed this lawsuit. Kuba's first four claims are founded on the theory that she was fired in retaliation for "blowing the whistle" on DFS's alleged lack of internal accounting controls, resulting in overstatement of company revenues and underpayment of sales tax in California. The DFA claim fails as a matter of law because it is indisputable that Kuba did not contact any government agency to report the alleged violations until *after* the termination decision was made. The CFCA claim is fatally defective because that law expressly excludes California tax-related claims from its coverage, and in any event, the law does not apply outside of California. Furthermore, with respect to all four retaliation claims, Kuba has not produced and cannot produce a scintilla of evidence that would permit a rational inference that her

speculation about a lack of internal accounting controls, buried amongst her accusations against co-workers, was a contributing factor in her termination, let alone that it was the sole, *but for* reason for her termination. Kuba likewise has produced zero evidence establishing that she was paid less than any similarly situated male employee as she must prove to maintain her EPA claim. Kuba's "evidence" in support of her claims consists of nothing more than subjective belief, speculation, and conclusory allegations, which are insufficient to avoid summary judgment.

In stark contrast to Kuba's complete lack of evidence of causation for her termination and alleged unequal pay are the following undisputed and indisputable facts,[1] which dispose of all her claims:

- Under company policy, employees have multiple avenues for raising concerns or complaints internally, but all such complaints must be made in *good faith*;
- Kuba was aware of the good faith complaint requirement at all times during her employment, and understood that this meant she was required to have a reasonable basis for making a complaint about others;
- After interviewing Kuba three times, reviewing documents, and interviewing four other individuals, Dye concluded that Kuba's accusations against her co-worker, the manager in another department, and unspecified employees in the Advisory & Assurance department ("A&A") were not made in good faith, and as a result, she, and her leader, Tracy Healy ("Healy"), recommended termination of Kuba's

[1]Evidentiary cites for all of these facts are set forth in the Statement of Uncontroverted Material Facts.

employment;

- Willis and Widger, who were at the time three management layers above Kuba and who had no day-to-day interaction with her, carefully considered Dye's investigation summary and reasons for her recommendation, honestly believed that Kuba had not made the accusations against her co-workers in good faith, and based on this belief, made the decision to terminate Kuba's employment;
- 10 months before the decision to terminate her employment, Kuba sent an email to the President of Walt Disney World ("WDW"), in which she shared her opinions about accounting errors being made by three departments while expressing that she might be blamed for the errors; and she sent another email to the WDW President a month before the termination decision was made, in which she accused unspecified individuals in A&A of giving out codes to anyone who wanted one and also shared her opinion on internal accounting controls, SOX, segregation of duties, and ethics;
- Kuba's statements about alleged accounting errors in the first, and about internal controls, SOX, segregation of duties, and ethics in the second, of the emails to the WDW President accusing others of carelessness and tarnishing her reputation were not a factor in the decision of Willis and Widger to terminate Kuba's employment;
- Kuba did not contact any government agency to report any alleged violations of law or regulation at DFS until *after* the decision to terminate her employment had been made, and decision-makers Willis and Widger did not believe she was about

to go to any government agency to make a complaint; and

- Kuba was paid more than one of the two male comparators she has identified in support of her equal pay claim, and the other alleged comparator had significantly more years of service as a senior financial analyst and better performance ratings than Kuba.

In sum, Kuba has no evidence creating a genuine dispute of material fact as to any of her retaliation claims. There likewise is no evidence creating a genuine dispute of material fact as to Kuba's EPA claim.

The Court should grant this motion and enter judgment in favor of DFS.[2]

STATEMENT OF UNCONTROVERTED MATERIAL FACTS

No material fact is or can be disputed. The material facts relied upon herein are from Kuba's own sworn deposition testimony or are facts established through other testimony that she has admitted she has no evidence to contradict.[3]

A. The Nature of DFS's Business and Kuba's Position in the Revenue Operations Department

DFS provides financial services to Walt Disney Parks and Resorts, U.S., Inc. ("WDPR"). SB Dec. 3. Kuba was hired by DFS in 1999 as a financial analyst at the

[2] *See Celotex v. Catrett*, 477 U.S. 317, 322 (1986); *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990) ("A mere scintilla of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party.") (citations omitted).

[3] In support of its Motion, DFS files transcripts of (or excerpts thereof), and relevant exhibits to, the depositions of Kuba (SK), Marisa Dye (MD), Scott Leingang (SL), Tracy Willis (TW), and Andrew Widger (AW) (each followed by page and line number), and the declarations of Shana Bawek (SB Dec.), Quandra Love (QL Dec.), Tracy Willis (TW Dec.), and Andrew Widger (AW Dec.) (each followed by paragraph number).

Walt Disney World Resort in Florida. SK 186:22-187:6. In 2013, she was promoted to senior financial analyst and became part of the Lodging Team in the Revenue Operations department, which handles revenue operations for WDW in Orlando, the Aulani Resort & Spa ("Aulani") in Hawaii, and dining and tour reservations for WDW, Aulani, and Disneyland Resort in Anaheim, California. SK 201:4-25.

In July 2016, Kuba's immediate supervisor was Andrew Eun, and Quandra Love ("Love") was her second level supervisor. SK 169:1-2; QL Dec. 3. Eun left DFS in November 2016, and Love became Kuba's immediate supervisor at that time. SK 105:19-23; QL Dec. 3. During this period, Kuba's third level supervisor was Michael Hazelwood, a Director in Revenue Operations. QL Dec. 2. Hazelwood was replaced by Andrew Howlett in approximately March 2017. *Id.* Revenue Operations was part of the Controllership group of DFS. Willis was the Vice President of Controllership and Kuba's third or fourth level supervisor at different points until the end of July 2017, when Widger replaced her. SK 169:5-13; TW 14:23-15:2; TW Dec. 2; AW 7:18-20.[4] Additional accounting teams and A&A also reported to Willis, and later to Widger. TW 12:3-13.[5]

Kuba never worked in the company's tax department and she did not have any responsibilities for tax reporting or access to any state tax filings. SK 205:5-22; 207:2-

[4]Willis was transferred to a new position in California in May 2017, but also maintained her responsibilities for the Controllership group until the end of July 2017, when Widger relocated to Florida. TW 14:23-15:2; AW Dec. 2.

[5]A&A was responsible for fraud detection and prevention. TW 12:9-11.

12. Kuba also never had any responsibilities for preparing or reviewing the company's financial statements or SEC filings. SK 207:22-210:5.

B. The Policy Requiring Internal Complaints to be Made in Good Faith

DFS provides multiple avenues for employees to raise concerns or complaints. SB Dec. Ex. 16 at p. 10. These include discussing the matter with their immediate manager and to progressively higher levels of management, contacting the Human Resources department, or calling the "Guideline," a toll-free telephone number to an intake center to which employees may make complaints anonymously. *Id*. Company policy requires any such complaints to be made in good faith. *Id.; see also id.* at p.9; SK 220:17-221:4, Ex. 6 at p.4. Throughout her employment, Kuba understood the requirement that internal complaints were to be made in good faith. SK 226:4-14. Kuba also understood that this requirement meant that DFS would determine whether the employee had a reasonable basis for making a report. SK 226:18-21.

C. Kuba's Long History of Making Accusations Against Co-Workers and Superiors

During the period 2002 through 2012, Kuba accused her immediate supervisor of interfering with her rights under the federal Family and Medical Leave ("FMLA"), accused co-workers of taking credit for her work, and complained about her performance evaluations. SK 52:3-56:22. On September 29, 2016, immediately after receiving her annual performance review, Kuba submitted a complaint to Employee Relations ("ER"), accusing her manager of giving her an annual rating lower than she felt she deserved, treating her differently because she had taken FMLA time off, and

paying her less than she deserved. SB Dec. Ex. 4. That same day, Kuba supplemented her complaint, claiming that the performance review improperly blamed her for errors made in configuring California sales tax, that she was not valued by the company, and that they just wanted to "get rid of the FMLA girl." SB Dec. Ex. 4. Kuba concluded, stating that she would:

> not sign [a performance review] where I have been blamed for things I did not do nor will I keep silent against injustice. You will use this as another example of my negativism, but I call it Freedom of Speech which is part of the First Amendment of the Bill of Rights of the U.S. Constitution ratified on December 15, 1791.

Id. Later that night, Kuba emailed WDW President, George Kalogridis, complaining about the alleged 2012 "shut down" of the "code admin task force" and expressing fear she would be wrongly blamed for errors being made by unspecified individuals in the A&A, Currency Operations, and Financial Systems departments. SK 76:13-77:1, Ex. 1.[6]

ER assigned Shana Bawek ("Bawek") to investigate Kuba's allegations about the performance rating, compensation, and inference with her FMLA rights. SK 92:1-94:9. Kuba's allegations of accounting errors were investigated by the Corporate

[6]In approximately 2004, a cross functional group of employees in the Controllership group was given responsibilities for mapping and issuing accounting codes for transactions that were paid for with coupons, referred to as "coupon codes" and "charge codes," depending on the transaction. SK 196:14-197:21 Kuba referred to this group as the "task force" or "Code Admin," and referred to herself the "Code Administrator." SK Ex. 1. In 2012, Kuba was directed by her manager to share the code administration responsibilities with other teams in Revenue Operations, and thereafter, she repeatedly referred to this direction as "shutting down the task force." SK 198:1-3; SB Dec. Ex. 5 at DEF007065.

Management Audit department ("MA"). SK 85:7-87:19; 97:11-21; SL 12:5-11.[7] Bawek concluded her investigation in June 2017 and found no merit to Kuba's accusations. MD Ex. 13; SB Dec. 8, Ex. 9.

D. Kuba's 2017 Accusations Against Co-Workers

In January 2017, Kuba sent a series of emails to Bawek that criticized individuals in the A&A and Financial Systems departments, and again complained about FMLA issues. SB Dec. 6, Ex.7. On May 9, 2017, Kuba sent an email to Love, titled "meet the real Sandy Kuba," in which she complained about being overworked and attributed her performance issues to having Asperger's, which was sent to Bawek. SB Dec.7, Ex. 8.

On May 23, 2017, Kuba accused Channing Kalso ("Kalso"), Kuba's former subordinate, of screaming at her. SK 232:2-233:20, Ex.7; SK 227:21-228:24. Kuba escalated the Kalso incident to her manager (Love), and told Love that she (Kuba) had to "FMLA" herself out because of it. QL Dec. 4, Ex. 1. Love immediately met with Kuba, consulted ER as to how to best handle the situation, and also followed up with her during their weekly 1:1. SK 241:21-24; QL Dec. 4. Kuba acknowledged to Love that Kalso had not really "screamed," but had used a "tone," and Love believed the issue was resolved. *Id*. On June 1 and 2, 2017, Kuba sent more emails to Love, claiming she never received thanks from anyone, was overworked, and was having to

[7]MA investigates allegations of accounting irregularities and other matters. SL 8:3-9. All MA investigations are under the direction of the company's legal department and results of the investigations are provided to the legal department so that it can provide legal advice to the company. SL 11:22-12:1.

do other people's work. QL Dec. 5, Ex. 2.

On June 2, 2017, Kuba contacted ER and reported the May 23 Kalso "screaming" incident. SK 242:20-243:14, Ex. 9. Kuba also accused Kalso of talking down to her "very badly – to the point of abuse" (and attached two 2014 emails as examples of this), adding that "AS USUAL" she was having to do all the work and it is "[n]o wonder people call me Cinderella in the building." *Id.* Dye was assigned to investigate and promptly reached out to Kuba to schedule a meeting. SK 244:2-7. The meeting was scheduled for June 19, 2017. SK 121:1-4; SB Dec. 11.

In the interim, on June 6, 2017, Kuba emailed Bawek again, reiterating that others in the department were lazy and incompetent, and that she would "not tolerate another set up" like the one that had allegedly taken place 14 years earlier.[8] SB Dec. 12, Ex. 14. In addition, on June 15, 2017, Kuba emailed Bawek and Dye, as well as Leingang in MA, accusing unspecified individuals in A&A of having "played Code Administrator. They came up with a [coupon] code off the cuff." SK 251:4-23, Ex. 10. This accusation related to a free lunch coupon given in an employee recognition activity called "Magic Backstage." *Id.*

E. The Magic Backstage Lunch Coupon Mistake

In June 2017, the WDPR Cast (employee) Activities, Recognition & Experience department sponsored an employee recognition activity that involved a drawing for a give-away of two gift baskets that included a $70 lunch coupon. SK Ex. 10, p.8. One

[8]Kuba had been placed on a Performance Development Plan in March 2003 that had long been completed. SB Dec. 2.

of Kuba's direct reports was one of the winners. SK 252:9-25. The winner noticed that her name was not on the coupon and that the coupon code was incorrect, meaning that the value of the free lunch would be logged against the wrong account. SK Ex. 10. She brought this to Kuba's attention. SK 253:1-24. Kuba sent an email inquiring about how the coupon code had been issued, and was told that A&A had been asked to provide the code, and that the A&A employee who provided the code was filling in for others and mistakenly gave a code in the wrong numerical range. SK 255:1-25, Ex. 10. Kuba knew that this was a simple mistake. SK 257:12-15.

On June 16, 2017, Danette Martin ("Martin"), a Senior Manager in A&A, who had been added into the email chain, asked Kuba for the correct coupon code range to prevent an error from occurring in the future. SK, Ex. 11, p. 3. Kuba never responded to her. SK 265:9-17.

On Sunday, June 18, 2017, the day before Dye was scheduled to interview Kuba about her complaints against Kalso, Kuba forwarded the "Magic Backstage Winner Information" email chain of the prior two weeks to Kalogridis with an email to him in which she claimed that "this Manager in [A&A] and her team" were giving out codes to anyone who wanted them. Kuba also mentioned internal accounting controls, SOX, segregation of duties, and ethics. SK Ex. 11. A few minutes later, Kuba forwarded the email chain, including her email to Kalogridis, to Dye and Bawek, stating:

> I blame ER and HR for a lot of this. You helped to hold me down with little to no raises, promotions, and bogus 90-day plans so that I am too low in the organization to fight any of this . . . That is one reason why Danette Martin

> feels she can bully me and run rough shot over me with setting up codes. She knew fully well who to contact for a code. My leader has been bringing her into meetings about the new form and system I have been building for Code Admin. Danette Martin and her Team could have easily contacted me, but instead decided to take it over. In addition, A&A taking credit for my work in the past has already been established.

SK 273:25-275:5, Ex.12. Based on the June 18 emails, Dye added to her investigation Kuba's accusations of bullying by Martin and that members of Martin's team had been "handing out [coupon] codes to anyone who wants them." MD 22:8-23:25. Dye did not investigate, nor was it the role of ER to investigate, Kuba's comments about internal accounting controls, SOX, segregation of duties, and ethics. MD 24:1-18. Such matters are within the province of MA, not ER. MD 19:17-20:1.

F. Dye's Investigation of Kuba's Complaints and Her Self-Initiated Investigation of Whether Kuba's Accusations Were Made in Good Faith

Dye met with Kuba as planned on June 19, 2017. MD 63:3-5, Ex. 7. She had two follow-up interviews with Kuba. MD, Ex. 7. Dye also interviewed Kalso and Martin, as well as Love and witness Richard Caverly. MD Ex. 7. After hearing Kuba's responses to her questions during the first interview and follow-up, as well as speaking with other witnesses, Dye became concerned about Kuba's behavior in making the accusations. MD 15:24-16:9. Dye discussed her concerns with her leader, and thereafter, proceeded to look into those concerns as well. MD 91:11-92:1. Dye concluded that Kuba's complaints about Kalso and Martin were without merit, and also concluded that those accusations, as well as her accusation that the A&A team was giving out coupon codes to anyone who wanted one, were not made in good faith

or with any reasonable basis. Dye discussed her findings with her leader before preparing a written report summarizing them. MD 151:16-20.

G. The Decision to Terminate Kuba's Employment

Dye submitted a written summary of her investigation findings to Willis and met with her on July 14, 2017, to discuss them. MD 26:11-18, Ex. 1. In that meeting, Dye and her leader, Tracy Healy, who also attended, recommended termination of Kuba's employment. *Id*. Willis discussed the recommendation with Dye and Healy (MD 151:13-18), she reviewed Dye's written summary of findings, and she told Dye and Healy that she would take their recommendation under advisement and would get back to them with a final decision. TW 16:7-24. Willis conferred with Widger later that day and the two of them decided to terminate Kuba's employment. They found the investigation to have been thorough, and based on the investigation findings, they honestly believed that Kuba had not made the accusations against her co-worker and the manager and employees of A&A in good faith as required by company policy, and that her actions warranted termination. TW Dec. 5; AW Dec. 4; SK 332:19-333:11.

Kuba's references to accounting errors in her September 29, 2016 email to Kalogridis, and to "internal controls," "SOX," "segregation of duties," and "ethics" in her June 18, 2017 email to Kalogridis and Leingang were not a factor in the decision of Willis and Widger to terminate Kuba's employment. The only thing in the June 18 email that was a factor in their decision was Kuba's statement that Martin and her team were giving out codes "to anyone who wants one," which they believed to be untrue based on their own knowledge of A&A's responsibilities and the Magic

Backstage email string forwarded to Kalogridis, which showed that there had been a simple mistake. TW Dec. 7; AW Dec. 6. When Willis and Widger made the termination decision they did not know or suspect that Kuba had gone or would go to any government agency to report alleged violation of law at DFS. *Id*.

Kuba went on a medical leave of absence from late July 2017 until mid-September 2017. SK 313:15-20. Widger and Human Resources department employee Sandy Ramjattan-Grant informed Kuba of her termination on September 21, 2017. SK 321:13-14.

H. Kuba's Report to the SEC and Her Post-Termination DFA Complaint

Kuba first contacted a government agency (the SEC) about matters at DFS on August 2, 2017. SK 336:18-23. In October 2017, after her termination, Kuba filed an administrative complaint for violation of the DFA with OSHA. SK 382:4-21, Ex. 18. On January 19, 2018, OSHA responded that, based on the evidence, it had concluded that "your protected activity was not the contributing factor in the unfavorable personnel action in the complaint." SK 383:4-384:5, Ex. 19 at p. 2. Kuba voluntarily withdrew her OSHA complaint and OSHA closed its case on July 25, 2018. Kuba Ex. 21.

I. Kuba's Pay As Compared to Her Male Co-Workers

There were two male senior financial analysts in the Revenue Operations department at the time Kuba worked there, Tom Fair and Danny Vidales. SK 393:16-25; 394:1-2. Vidales was paid *less* than Kuba. SB Dec. 10. Fair was paid more, but had

many more years tenure than Kuba in the senior financial analyst position. SB Dec. Ex. 9; SK 395:10-18. In fact, Kuba reported to Fair for a period before she was promoted to senior financial analyst. SK 200:7-10. Fair also had consistently higher annual performance ratings than Kuba. SB Dec. 9; Ex. 3 at 6479; SK 400:8-402:16.

MEMORANDUM OF LAW

I. KUBA'S FIRST COUNT FAILS AS A MATTER OF LAW BECAUSE THERE IS NO EVIDENCE ESTABLISHING RETALIATION IN VIOLATION OF SOX

A two-part allocation of proof applies to SOX retaliation claims. First, the plaintiff must establish a *prima facie* case. To satisfy this burden, "a plaintiff must show, by a preponderance of the evidence, that '(i) the employee engaged in a protected activity or conduct, (ii) the [employer] knew or suspected, actually or constructively, that the employee engaged in the protected activity; (iii) the employee suffered an unfavorable personnel action; and (iv) the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action." *Thomas v. Tyco Int'l Mgt. Co.,* 416 F. Supp. 3d 1340, 1357 (S.D. Fla. 2019) (granting summary judgment for employer on SOX retaliation claim). If the plaintiff satisfies this burden, the burden then shifts to the employer to demonstrate by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected activity. *Id.*

A. There is No Evidence Establishing Kuba's Prima Facie Case

Without admitting any liability or that it engaged in any acts that violated any law, rule or regulation, DFS is not contesting that some statements in Kuba's emails

dated September 29, 2016 to Kalogridis and June 18, 2017 to Kalogridis and Leingang qualify as protected activity for purposes of her SOX claim.[9] In addition, it is undisputed that Kuba suffered an adverse employment action–termination of employment. However, Kuba has not produced and cannot produce any evidence establishing that her statements about accounting errors, internal controls, SOX, segregation of duties, and ethics were a contributing factor in the decision of Willis and Widger to terminate her employment. Willis and Widger have testified that these references were not a factor in their decision to terminate Kuba's employment. *See* Facts, Section G above. Moreover, Kuba admitted at her deposition that she has no evidence to dispute that Willis and Widger honestly believed she acted without good faith in accusing Kalso and Martin of mistreating her and A&A of handing out codes to whomever wanted them, and that this lack of good faith warranted her termination:

> Q. Do you have anything that you believe shows that Ms. Willis and Mr. Widger did not honestly believe that your accusations and behavior in the way that you made the accusations against Ms. Kalso and Advisory & Assurance warranted your termination?
>
> * * *
>
> THE WITNESS: I can't say one way or the other what, you know, they were thinking.

SK 332:19-333:11.

[9]However, DFS maintains that the first paragraph of the June 18 email ("This Manager in Advisory & Assurance and her team are not setting up codes. They are simply giving 4-digit numbers to anyone who wants one") is *not* protected activity, and that Willis and Widger honestly believed that those accusations, and the ones about Kalso and Martin, were not made in good faith and warranted her termination. In addition, DFS contends that Kuba has not produced evidence of protected activity as required in connection with her DFA and CFCA retaliation claims.

Any attempt by Kuba to create the illusion that her protected activity statements in the two emails were a contributing factor by arguing that the decision to terminate her employment was made a month after her June 18, 2017 email to Kalogridis and Leingang is a red herring. It is indisputable that Kuba had made similar accusations for years, and sent the first "whistleblowing" email to Kalogridis fully 10 months *before* the decision to terminate her employment. *See* Facts, Section C, above, and evidence cited. The Supreme Court has established a demanding standard for reliance on temporal proximity alone to establish a *prima facie* case, requiring the events to be "very close" in time. *See Clark Cty. School Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001) (rejecting temporal proximity argument where adverse employment actions took place three and four months after alleged protected activity). No reasonable jury could conclude that Willis would not retaliate after Kuba's alleged whistleblowing activity in September 2016, but then suddenly decide to retaliate against her after the June 2017 email to Kalogridis and Leingang, and convince Widger to go along with her.

Furthermore, it is well established in the Eleventh Circuit that "[i]ntervening acts of misconduct can break any causal link between the protected conduct and the adverse employment action." *Henderson v. FedEx Express*, 442 F. App'x 502, 506 (11th Cir. 2011) (affirming summary judgment for employer); *Hall v. Teva Pharmaceutical USA, Inc.*, 214 F. Supp. 3d 1281, 1288-89 (S.D. Fla. 2016) (granting summary judgment and applying intervening acts doctrine to retaliation claim under SOX). Here, Dye completed her investigation and ER recommended Kuba's termination for making accusations against co-workers without good faith in violation of company

policy *after* Kuba's June 2017 email to Kalogridis and Leingang. *See* Fact Sections F and G, above, and evidence cited. Thus, Kuba's own actions sever any causal connection she may attempt to establish through an alleged temporal proximity.

B. There is No Genuine Dispute of Material Fact as to DFS's Satisfaction of Its Burden of Proof

Leaving aside Kuba's complete lack of evidence establishing a *prima facie* case, it is indisputable that Willis and Widger would have made the same decision regardless of Kuba's alleged protected activity. *See* Facts, Section G, above, and evidence cited. While Kuba may argue that the decision was based on a sloppy or incomplete investigation by Dye, such conclusory assertions will not allow her to avoid summary judgment. The evidence establishes that Willis and Widger honestly believed Kuba's actions warranted her termination, and Kuba has conceded she cannot dispute this. SK 332:19-333:11.

Johnson v. Stein Mart, Inc., 440 F. App'x 795 (11th Cir. 2011) is on point. In that case, the court affirmed summary judgment for the employer on the plaintiff's SOX whistleblower retaliation claim where the evidence established that the employee would have been terminated for performance reasons regardless of her protected activity. The court rejected the plaintiff's argument that the employer was "incorrect" in its assessment: "'It is well settled . . . that for an employer to prevail, the jury need not determine that the employer was correct in its assessment of the employee's performance; it need only determine that the defendant in good faith believed plaintiff's performance to be unsatisfactory.'" *Id.* at 802, *citing Moore v. Sears, Roebuck*

& Co., 683 F.2d 1321, 1323 n.4 (11th Cir. 1982). The honest belief of Willis and Widger that Kuba had violated the requirement to make internal complaints in good faith is dispositive of her SOX claim.

II. KUBA'S SECOND COUNT CANNOT WITHSTAND SUMMARY JUDGMENT BECAUSE SHE WAS NOT A DFA "WHISTLEBLOWER" WHEN THE TERMINATION DECISION WAS MADE

To qualify as a whistleblower for purposes of protection under the DFA anti-retaliation provision, the plaintiff must make a report to the SEC. *See Digital Realty Trust, Inc. v. Somers*, __ U.S. __, 138 S. Ct. 767, 777 (2018). Kuba's DFA claim is fatally defective because she was not a "whistleblower" when the decision to terminate her employment was made. The termination decision was made on or about July 14, 2017, well before Kuba made her report to the SEC on August 2, 2017. *See* Facts, Sections G and H, and evidence cited. There is no genuine issue of material fact relating to Kuba's second count for violation of the DFA for this reason alone.

Even assuming Kuba could qualify as whistleblower under the DFA, summary judgment as to this claim nevertheless would be required. The order and allocation of proof for a DFA claim and a FWA claim are the same, and, as demonstrated in Section IV below, Kuba has not produced and cannot produce any evidence establishing a *prima facie* case of FWA whistleblower retaliation, let alone evidence establishing that her alleged protected activity was the sole, *but for* cause of her termination.

III. SUMMARY JUDGMENT IS REQUIRED AS TO KUBA'S THIRD COUNT FOR RETALIATION IN VIOLATION OF THE CFCA FOR MULTILPLE REASONS

A. The Alleged Violation Identified by Kuba is Not Covered by the CFCA

The sole basis for Kuba's claim for whistleblower retaliation under the CFCA is that DFS allegedly violated California's "Sales and Use Tax Law" by failing to remit the proper amount of sales tax to the State of California because of its alleged underreporting of revenues. *See* Complaint, ¶¶ 25, 60. However, the CFCA expressly does not cover underreporting and underpayment of sales taxes: "This section does ***not*** apply to claims, records, or statements made under the Revenue and Taxation Code." Cal. Gov't Code § 12651(f) (emphasis added).[10] *See Wilson ex. Rel. State Bd. of Equalization v. Farmers Ins. Exchange*, 2007 WL 1113332, *3 (Cal. Ct. App. 2d Dist. Apr. 16, 2007) (affirming dismissal of CFCA claim based on alleged violation of tax laws because of CFCA exclusion of tax claims). Kuba's third count fails for this reason alone.

B. The CFCA Claim Separately Fails for a Lack of Jurisdiction and Evidence

Leaving aside the CFCA tax bar, California courts "presume the [California] Legislature did not intend a statute to be operative, with respect to occurrences outside the state . . . unless such intention is clearly expressed or reasonably to be inferred 'from the language of the act or from its purpose, subject matter, or history.'" *Oman v.*

[10]The regulation of sales and use taxes in California is governed by Section 6203 of the California Revenue and Taxation Code.

Delta Airlines, Inc., 889 F.3d 1075, 1080 (9th Cir. 2018), *quoting N. Alaska Salmon Co. v. Pillsbury*, 162 P. 93, 94 (1916). Nothing in the CFCA provides for extraterritorial application of the law. Accordingly, the Court also lacks jurisdiction over Kuba's third count.

Moreover, there is no genuine issue of material fact as to the CFCA claim. The CFCA is modeled on the federal False Claims Act ("FCA"). *See John Russo Indus. Sheet Metal, Inc. v. City of Los Angeles*, 29 Cal. App. 5th 378 (2018). The three-part order and allocation of proof in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), applies to FCA cases. *See, e.g., Sears v. Hous. Auth. of Monterey*, 2014 WL 1369594, *7 (N.D. Cal. Apr. 7, 2014). That framework is: (1) the plaintiff must produce evidence establishing a *prima facie* case; (2) if she does so, the employer must articulate a legitimate, non-retaliatory reason for the adverse employment action; and (3) if it does so, the plaintiff must prove that the proffered reason is false and that the real reason for the adverse employment action is unlawful retaliation, *i.e.*, that the adverse employment action would not have occurred *but for* the plaintiff's protected activity. *McDonnell Douglas*, 411 U.S. at 802. To establish a *prima facie* case, Kuba must present evidence of protected activity under the CFCA, that DFS knew of Kuba's alleged protected activity, that she was subjected to an adverse employment action, and that there was a causal connection between the protected activity and the adverse employment action. *Sears*, 2014 WL 1369594 at *24. Kuba has not produced and cannot produce any evidence establishing a *prima facie* case, let alone pretext.

The CFCA protects employees from retaliation for investigating or trying to stop violations of the CFCA. *See* Cal. Gov't Code § 12653(a). Even if the tax bar did not exist, there is zero evidence that Kuba investigated or tried to stop the presentation of any false tax claim to the State of California. Indeed, Kuba admitted that she had no responsibilities for state tax filings and her September 2016 and June 2017 emails mention nothing about California sales tax at all, let alone that false tax reporting was being presented to the State of California. *See* Facts, Sections A, C and E, and evidence cited. There also is no evidence that Willis and Widger knew about any California tax-related alleged protected activity by Kuba. Thus, there could not possibly be any causal connection between her termination and any such alleged protected activity. Finally, even if Kuba could establish a *prima facie* case, DFS unquestionably has articulated a legitimate non-retaliatory reason for her termination–Willis and Widger honestly believed that she had made accusations against coworkers without good faith in violation of company policy. As discussed above in connection with Kuba's SOX claim, Kuba has no evidence establishing that any protected activity by her was even a contributing factor, let alone the sole, *but for* reason for her termination.

IV. KUBA'S FOURTH COUNT IS WITHOUT MERIT BECAUSE THERE IS NO EVIDENCE ESTABLISHING RETALIATION IN VIOLATION OF THE FWA

The *McDonnell Douglas* order and allocation of proof also applies to retaliation claims under the FWA and the DFA. *See Hall v. Teva Pharmaceutical USA, Inc.*, 214 F. Supp. 3d 1281, 1288-89 (S.D. Fla. 2016). Kuba bears the burden of proof of establishing a *prima facie* case of retaliation. *Id*. If she does so, DFS must articulate a

legitimate non-retaliatory reason for its action. Kuba then bears the ultimate burden of proving that the articulated reason for her termination is false and that the real reason is unlawful retaliation. *Id.*; *see also Chaudhry v. Adventist Health System Sunbelt, Inc.*, 305 So. 3d. 809, 817 (Fla. 5th DCA 2020) (adopting "*sole*" or *'but for*'" test for FWA retaliation claims); *Lapham v. Walgreen Co.,* 2021 WL 716630 (M.D. Fla. Jan. 14, 2021) (granting summary judgment to employer on motion for reconsideration under FWA; while plaintiff may have shown that protected activity was a motivating factor, her poor performance was an "independent, non-retaliatory basis for her termination"); *Mitchem-Green v. MHM Health Professionals, Inc.,* 2022 WL 1122858, *4 (11th Cir. Apr. 15, 2022) (affirming summary judgment to employer under FWA where plaintiff could not show that the reason for firing her was false or that retaliation was the real reason).

As with the SOX claim, DFS is not contesting that some statements in Kuba's September 2016 and June 2017 emails qualify as protected activity for purposes of her FWA claim. Nor is it disputed that she suffered an adverse employment action. However, like her SOX claim, Kuba has not produced and cannot produce any evidence establishing a causal connection between any protected activity statements in the emails and the decision of Willis and Widger to terminate her employment. *See* Facts, Section G and evidence cited, and Argument Section I, above. As explained in Section III, above, there is no question that DFS has articulated a legitimate non-retaliatory reason for Kuba's termination, and Kuba has admitted she has no evidence disputing that Willis and Widger honestly believed that her accusations and behavior in the way that she made them against Kalso, Martin and unspecified employees in

A&A warranted her termination. SK 332:19-333:11. Kuba's speculation and conclusory assertions do not satisfy her burden of proving that her alleged protected activity was the *but for* cause of her termination. Thus, there is no genuine issue of material fact allowing her to avoid summary judgment in connection with her FWA claim.

V. THE FIFTH COUNT FOR VIOLATION OF THE EPA FAILS FOR A LACK OF EVIDENCE

A two-part proof model applies to EPA claims. First, the plaintiff must establish a *prima facie* case by producing evidence that the employer "paid employees of opposite genders different wages for equal work for jobs which require equal skill, effort, and responsibility, and which are performed under similar working conditions." *Hornsby-Culpepper v. Ware*, 906 F.3d 1302, 1313 n.8 (11th Cir. 2018). If the plaintiff establishes a *prima facie* case, the employer must prove that the pay differential was due to a factor other than sex. *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1532-1533 (11th Cir. 1992).

To establish a *prima facie* case, Kuba must show that the "job content" (the skill, effort and responsibility required) of the job positions occupied by her and the male alleged comparators are "substantially equal." *See Lima v. Fla. Department of Children and Families and David Wilkins*, 2014 WL 11352891 at *4 (M.D. Fla. Nov. 13, 2014) ("a *general* similarity . . . is not enough"). Similarity of job title alone is insufficient under the EPA. *Id.* Kuba has not produced and cannot produce any evidence establishing substantial similarity of work between her and the two male alleged

comparators (Fair and Vidales) she has identified. Instead, she relies on nothing more than the fact that all three had the same job title and the conclusory allegation that they all did the same work. This is insufficient to create a genuine issue of material fact as to her EPA claim.

But even if Kuba could establish a *prima facie* case, summary judgment is still warranted because, as a matter of law, any pay differential is due to a factor other than sex, *i.e.*, it is indisputable that Vidales was paid less than Kuba and that Fair had substantially more years of experience as a senior financial analyst and consistently better performance ratings in that job. *See* Facts, Section I, above, and evidence cited. Furthermore, Kuba has not produced and cannot produce any evidence establishing that the reasons for Fair being paid more than Kuba–his greater tenure in the job and better performance ratings–are "pretextual or offered as a post-event justification . . ." *Hornsby-Culpepper*, 906 F.3d at 1314.

CONCLUSION

There is no genuine issue of material fact allowing Kuba to avoid summary judgment in connection with any of her five counts. This motion should be granted.

WHEREFORE, DFS respectfully requests summary judgment in its favor, an award of fees and costs, and such other relief as the Court deems just and proper.

Dated this 6th day of May, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of May, 2022, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will automatically send notification of such filing to the following: Frank M. Malatesta, Esq. of MALATESTA LAW OFFICE, frank@malatestalawoffice.com; staff@malatestalawoffice.com, counsel for Plaintiff.

/s/ Mary Ruth Houston
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