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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF CALIFORNIA

7
8 JAMES LEWIS, et al.,
9 Plaintiffs,
10
11 v.
12 CITY OF FRESNO, et al.,
13 Defendants.

1:08-cv-01062-OWW-GSA
MEMORANDUM DECISION RE:
DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT AGAINST JONATHAN
PIERRO (Doc. 74)

14
15 I. INTRODUCTION.

16 Jonathan Pierro ("Plaintiff") proceeds with this action
17 pursuant to 42 U.S.C. 1983 and California Government Code § 12900.

18 Defendants filed a motion for summary judgment on May 9, 2011.
19 (Doc. 74). Plaintiff filed opposition on June 6, 2011. (Doc. 86).
20 Defendants filed a reply on June 13, 2011. (Doc. 92)

21 II. FACTUAL BACKGROUND.

22 Plaintiff is an African American police officer who previously
23 served as a recruit and cadet with the Fresno Police Department
24 ("Department").

25 Plaintiff entered the Department's Patrol Training Program
26 ("Program") on January 9, 2007. Plaintiff was supervised by Kirk
27 Pool ("Pool"). Brett Vestal ("Vestal") was assigned as Plaintiff's
28 training officer.

1 In March 2007, Plaintiff reported to Pool's office at the
2 directive of Vestal. Pool told Plaintiff he did not believe
3 Plaintiff was going to successfully complete the training program
4 and suggested that Plaintiff resign and take a non-sworn position.
5 Plaintiff declined. Pool gave Plaintiff a written homework
6 assignment to be completed in the next 48 hours. Plaintiff failed
7 to complete the assignment. Vestal was upset that Plaintiff did
8 not complete the homework assignment and told him to call Pool.
9 Plaintiff alleges that he called Pool in Vestal's presence and left
10 a message when Pool did not answer. Vestal accused Plaintiff of
11 not having called Pool. Plaintiff received a Documented Oral
12 Reprimand for failing to complete the homework assignment. After
13 this incident, Plaintiff sought the assistance of a union
14 representative, sergeant James Lewis ("Lewis"), who intervened on
15 Plaintiff's behalf and caused Plaintiff to be assigned to a new
16 training officer.

17 Plaintiff reported to the Department's Southeast Division in
18 May 2007 to begin training with officer Jason Jones ("Jones").
19 Plaintiff saw Jones conversing with Vestal at some point.
20 Plaintiff alleges that Jones micro-managed his conduct and
21 displayed a hostile attitude similar to Pool and Vestal's.

22 In July 2007, Jones took Plaintiff downtown to participate in
23 an emergency board evaluation. After the evaluation, Jones relayed
24 to Plaintiff that he had scored "better than expected" on the
25 evaluation. Plaintiff failed the examination, however. Plaintiff
26 was subsequently assigned to his "sixth white training officer,"
27 Damon Kurtz ("Kurtz"). (Opposition at 5). After Kurtz, Plaintiff
28 was assigned to yet another training officer, Derrick Avila. On

1 his second day under Avila, Plaintiff was demoted to Cadet II.
2 Plaintiff believed his time with Avila was the "most valuable."
3 (Id.).

4 Plaintiff on a subsequent occasion fell asleep on duty at a
5 hospital while guarding a prisoner who was handcuffed to a hospital
6 bed. Plaintiff was allowed to resign rather than being terminated
7 after the hospital incident.

8 **III. LEGAL STANDARD.**

9 Summary judgment/adjudication is appropriate when "the
10 pleadings, the discovery and disclosure materials on file, and any
11 affidavits show that there is no genuine issue as to any material
12 fact and that the movant is entitled to judgment as a matter of
13 law." Fed. R. Civ. P. 56(c). The movant "always bears the initial
14 responsibility of informing the district court of the basis for its
15 motion, and identifying those portions of the pleadings,
16 depositions, answers to interrogatories, and admissions on file,
17 together with the affidavits, if any, which it believes demonstrate
18 the absence of a genuine issue of material fact." *Celotex Corp. v.*
19 *Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265
20 (1986) (internal quotation marks omitted).

21 Where the movant will have the burden of proof on an issue at
22 trial, it must "affirmatively demonstrate that no reasonable trier
23 of fact could find other than for the moving party." *Soremekun v.*
24 *Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). With
25 respect to an issue as to which the non-moving party will have the
26 burden of proof, the movant "can prevail merely by pointing out
27 that there is an absence of evidence to support the nonmoving
28 party's case." *Soremekun*, 509 F.3d at 984.

1 discrimination are (1) the employee's membership in a
2 classification protected by the statute; (2) discriminatory animus
3 on the part of the employer toward members of that classification;
4 (3) an action by the employer adverse to the employee's interests;
5 (4) a causal link between the discriminatory animus and the adverse
6 action; (5) damage to the employee, and (6) a causal link between
7 the adverse action and the damage. *Mamou v. Trendwest Resorts,*
8 *Inc.*, 165 Cal. App. 4th 686, 713 (Cal. Ct. App. 2008).

9 **1. Discrimination Claim**

10 FEHA's discrimination provision addresses only explicit
11 changes in the "terms, conditions, or privileges of employment."
12 *Roby v. McKesson Corp.*, 47 Cal. 4th 686, 706 (Cal. 2010) (citing
13 (§ 12940(a)). In the case of an institutional or corporate
14 employer, the institution or corporation itself must have taken
15 some official action with respect to the employee, such as hiring,
16 firing, failing to promote, adverse job assignment, significant
17 change in compensation or benefits, or official disciplinary
18 action. *Id.*

19 Plaintiff identifies three adverse employment actions taken
20 against him: (1) the Documented Oral Reprimand issued by Pool; (2)
21 his demotion to Cadet II; and (3) his forced resignation.
22 Plaintiff provides no direct evidence that any of the adverse
23 actions he complains of were motivated by race, and does not allege
24 circumstances sufficient to support an inference of discrimination
25 under the McDonald Douglas framework, except that all but one of
26 his training officers were Caucasian.

27 With respect to Plaintiff's homework assignment and the
28 related Documented Oral Reprimand, it is undisputed that the non-

1 African American trainees received such assignments. (Doc. 86-1,
2 Plaintiff's Response to DUMF No. 12). It is also undisputed that
3 the basis for Plaintiff's Documented Oral Reprimand was his failure
4 to timely complete the assignment and for lack of effort, and that
5 Pool has given Documented Oral Reprimands for similar conduct on
6 other occasions to non-African American officers in training.
7 (Doc. 86-1, Plaintiff's Response to DUMF Nos. 13, 14).¹ Plaintiff
8 provides no evidence sufficient to support a reasonable inference
9 that Pool harbored racial animus towards African Americans, or that
10 his issuance of the reprimand to Plaintiff was motivated by racial
11 discrimination. There are valid reasons for the reprimand based on
12 Plaintiff's failure to complete the assignment.

13 Pool was also responsible for Plaintiff's demotion to Cadet
14 II. (Doc. 86-1, Plaintiff's Response to DUMF No. 19). Plaintiff
15 does not dispute that the motivation for Pool's decision was to
16 allow Plaintiff more time to improve and for Plaintiff to motivate
17 himself to be more successful in the training program. (Doc. 86-1,
18 Plaintiff's Response to DUMF No. 20). There is no evidence that
19 Pool harbored racial animus toward Plaintiff. Nor is there any
20 evidence aside from the fact of race that support an inference of
21 racism on Pool's part.

22 As to Plaintiff's forced resignation, it is undisputed that
23 Sergeant Grove and Captain Maroney, an African-American,
24 recommended Plaintiff's termination from employment, and that
25 Captain Belluomini offered resignation in lieu of termination as an
26 accommodation to Plaintiff. (Doc. 86-1, Plaintiff's Response to

27
28 ¹ Plaintiff lodges an evidentiary objection to DUMF No. 14 on the grounds that
it is conclusory. DUMF No. 14 is based on Pool's testimony.

1 DUMF Nos. 24, 25). The record is devoid of any evidence that any
2 of the decision makers involved in the decision to terminate
3 Plaintiff were motivated by racial discrimination.² As Plaintiff
4 has not provided a scintilla of admissible evidence that any of the
5 adverse employment actions he complains of were motivated even in
6 part by racial discrimination, summary judgment on Plaintiff's FEHA
7 discrimination claim is GRANTED.³

8 **2. Retaliation Claim**

9 In order to establish a prima facie case of retaliation under
10 FEHA, a plaintiff must show (1) he or she engaged in a "protected
11 activity," (2) the employer subjected the employee to an adverse
12 employment action, and (3) a causal link existed between the
13 protected activity and the employer's action. *Yanowitz*, 36 Cal.
14 4th at 1142.

15 It is undisputed that there is no evidence that the adverse
16 employment actions Plaintiff alleges in the complaint were carried
17 out by individuals with knowledge of Plaintiff's purported
18 complaint regarding racial discrimination. Plaintiff concedes that
19 (1) the individuals involved in the Documented Oral Reprimand were
20 not aware that Plaintiff had complained about racial
21

22 ² Plaintiff's response to DUMF No. 29 avers "while [Pool, Vestal, and Jones] were
23 not decision-makers, their input was part of the decision making" that culminated
24 in the decision to terminate Plaintiff. The fact that decision makers may have
25 considered Pool, Vestal, and Jones' opinions of Plaintiff's performance in
26 reaching their decision to terminate Plaintiff is insufficient to render Pool,
Vestal, and Jones "direct and important participant[s]" in the decision making
process. See *DeJung v. Superior Court*, 169 Cal. App. 4th 533, 552 (Cal. Ct. App.
2008) (discussing "cats paw" doctrine).

27 ³ Plaintiff contends that another officer referred to Jones and Vestal as
28 "Nazis;" even assuming the truth of the implication Plaintiff seeks to derive
from this hearsay statement, there is no evidence pertaining to the relevant
decision makers.

1 discrimination; (2) the individuals involved in Plaintiff's transfer
2 to Police Cadet were not aware that Plaintiff had complained about
3 racial discrimination; and (3) the individuals involved in offering
4 Plaintiff the option to resign in lieu of being terminated were not
5 aware that Plaintiff had complained about racial discrimination.
6 (Doc. 86-1, Plaintiff's Response to DUMF Nos. 33-35). There is no
7 basis for this claim. Summary judgment on Plaintiff's retaliation
8 claim is GRANTED.

9 **B. Federal Claims**

10 Plaintiff's opposition does not oppose any of Defendants'
11 arguments concerning entitlement to summary judgment on Plaintiff's
12 federal claims.

13 **1. Section 1981 Claim**

14 Plaintiff's section 1981 claim is predicated on Plaintiff's
15 allegation that Defendants Pool and Dyer discriminated against
16 Plaintiff on the basis of race. (Complaint at 18).⁴ Plaintiff
17 concedes Chief Dyer had no personal involvement in any alleged
18 adverse action against Plaintiff and thus has no claim against Dyer
19 under section 1981. (Doc. 86-1, Plaintiff's Response to DUMF No.
20 1).

21 The same summary judgment test applies in both the section
22 1981 and FEHA contexts. *E.g.*, *Lawson v. Reynolds Indus.*, 264 Fed.
23 Appx. 546, 549 n.2 (9th Cir. 2008) (unpublished) (citing *Manatt v.*
24 *Bank of Am., NA*, 339 F.3d 792, 801 (9th Cir. 2003) (§ 1981) and
25 *Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1284
26 (9th Cir. 2001) (FEHA)). Because the factual basis for Plaintiff's

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28 ⁴ The Complaint also asserts a 1981 claim against Defendant Farmer, however, Plaintiff voluntarily dismissed this claim on April 21, 2011. (Doc. 71).

1 section 1981 claim is the same as the basis for his FEHA
2 discrimination claim, Defendant's motion for summary judgment on
3 Plaintiff's section 1981 claim against Dyer and Pool is GRANTED for
4 the same reasons stated above. See, e.g., *Peralta v. City & County*
5 *of San Francisco*, 2011 U.S. App. LEXIS 8383 *2 (9th Cir. 2011)
6 (unpublished) (noting that summary judgment was appropriate on both
7 FEHA claims and section 1981 claims where Plaintiff failed to
8 establish a prima facie case of discrimination).

9 **2. Section 1985 Claim**

10 To establish a § 1985(3) conspiracy claim, the plaintiff must
11 show: "(1) the existence of a conspiracy to deprive the plaintiff
12 of the equal protection of the laws; (2) an act in furtherance of
13 the conspiracy; and (3) a resulting injury." *Scott v. Ross*, 140
14 F.3d 1275, 1284 (9th Cir. 1998); accord *Hernandez v. City of*
15 *Vancouver*, 277 Fed. Appx. 666, 671 (9th Cir. 2009) (unpublished)
16 (citing *Scott*).

17 The Complaint asserts a section 1985 claim against Dyer,
18 Farmer, Pool, Vestal, and Jones. Plaintiff has dismissed his 1985
19 claim with respect to Dyer. (Doc. 71). It is undisputed that
20 Pool, Vestal, and Jones never made any agreement to take action
21 against Plaintiff based on his race, nor is there any evidence of
22 racial discrimination by any of these Defendants. (Doc. 86-1
23 Plaintiff's Response to DUMF No. 27). There is no evidence
24 concerning Defendants Dyer and Farmer. Summary judgment on
25 Plaintiff's section 1985 claim is GRANTED.

26 **3. Section 1983 Claim**

27 The complaint alleges that "initiation and prosecution of
28 disciplinary action as to Plaintiff and ultimately his termination

1 were violations of Plaintiff's due process Fourteenth Amendment
2 rights." Due process protections are implicated when government
3 action deprives a citizen of a protected liberty or property
4 interest. See, e.g., *Lawson v. Umatilla County*, 139 F.3d 690, 692
5 (9th Cir. 1998). Under the federal constitution, at-will employees
6 possess no protected property rights and therefore are not entitled
7 to due process before being terminated. *Id.* (citing *Portman v.*
8 *County of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993)). There
9 were valid non-discriminatory reasons for Plaintiff's termination.

10 Plaintiff has no viable section 1983 claim. Summary judgment is
11 GRANTED.

12 **ORDER**

13 For the reasons stated, IT IS ORDERED:

- 14 1) Summary judgment on Plaintiff's FEHA claims is GRANTED;
15 2) Summary judgment on Plaintiff's federal claims is GRANTED;
16 and
17 3) Defendants shall submit a form of order consistent with
18 this memorandum decision within five (5) days of electronic
19 service of this decision.

20 IT IS SO ORDERED.

21 **Dated: July 13, 2011**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE