THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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| DOMINIQUE KEIMBAYE,<br><br>Plaintiff,<br>v.<br><br>KAISER PERMANENTE OF BELLEVUE MEDICAL CENTER and KAISER FOUNDATION HEALTH PLAN OF WASHINGTON,<br><br>Defendants. | CASE NO. C18-1782-JCC<br><br>ORDER |

This matter comes before the Court on Defendant Kaiser Foundation Health Plan of Washington's[1] motion for summary judgment (Dkt. No. 23). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motion for the reasons explained herein.

## I. BACKGROUND

Plaintiff was employed as an Anesthesia Technician at Defendant's Ambulatory Surgery Center from January 1, 2017, to June 14, 2017. (*See* Dkt. Nos. 25 at 1–2, 25-10 at 2.) Plaintiff worked in the surgery center's operating room, where he assisted patients under general

[1] Defendant states that "'Kaiser Permanente of Bellevue Medical Center' is not a legal entity." (Dkt. No. 23 at 1 n.1.)

anesthesia while surgery was performed, and in the pain clinic, where he worked with chronic pain patients. (Dkt. No. 25 at 2.) As an Anesthesia Technician, Plaintiff's job duties included "assuring adequate inventory, cleaning and maintaining equipment, coordinating repairs/maintenance of equipment, troubleshooting problems with anesthesia equipment, assisting providers with difficult intubation, [and] communicating with patients and their family." (*Id.*; *see* Dkt. No. 25-1 at 2–7.)

During Plaintiff's employment by Defendant, members of Defendant's staff reported several issues with Plaintiff's performance of his job duties. On March 18, 2017, Dr. Daniela C. Stafie and Dr. Susana Su discussed Plaintiff's failure to properly set up a fiberoptic scope, which resulted in Dr. Su having to abandon an airway rescue to troubleshoot the equipment herself. (*See* Dkt. Nos. 25 at 2, 25-2 at 2–3.) Although the patient was unharmed, Plaintiff's failure raised substantial patient safety concerns and led Defendant to schedule a training for its operating room employees, give Plaintiff additional training, and take Plaintiff "off the more complex cases." (Dkt. No. 25 at 2–3.)

On March 28, 2017, Erin Cooper, a Certified Registered Nurse Anesthetist ("CRNA") employed by Defendant, was working with Plaintiff when an issue arose with the electrocardiogram ("EKG") tracing for a patient. (*See* Dkt. Nos 25 at 3, 25-3 at 2–4.) The EKG was failing to properly trace and "there was a specific issue with artifact and a secondary V lead tracing popping up that was specific to" the EKG's "module/box attached to the monitor." (Dkt. No. 25-3 at 3.) According to Cooper, Plaintiff repeatedly attempted the same troubleshooting step to no avail. (*See* Dkt. Nos. 25 at 3, 25-3 at 3.) Cooper eventually asked Plaintiff to retrieve a new module, and he did so. (*See* Dkt. No. 25-3 at 3.) Shortly thereafter, Jewel Hagan, another CRNA employed by Defendant, encountered the same unique issue in an EKG in another patient's room; Cooper believed that Plaintiff had swapped the faulty EKG module for another instead of taking the faulty module out of circulation. (*Id.*) When asked about the incident, Plaintiff denied having changed out the faulty EKG module in the first place. (*Id.*)

On March 31, 2017, Hagan was assisting with a surgery when she noticed that the pulse oximeter was malfunctioning. (Dkt. No. 25-4 at 2.) Hagan asked Plaintiff "to 'bring me a whole new pulse oximeter cable'" but Plaintiff brought "just the finger probe." (*Id.*) After a new cable was eventually obtained, Hagan asked Plaintiff if he had taken the faulty cable out of circulation, to which Plaintiff replied, "No, I tried it on myself and it worked." (*Id.*) Hagan explained to Plaintiff that the faulty cable had to be taken out of circulation to ensure patient safety and to avoid spending time on future troubleshooting. (*Id.*)

On April 4, 2017, Plaintiff sent Defendant an email stating that he intended to resign his position and that Defendant should begin looking for a replacement. (Dkt. Nos. 25 at 3, 25-5 at 3–4.) When Defendant offered to provide Plaintiff with an improved orientation to cure his performance issues, Plaintiff stated that he did not feel appreciated or respected while employed by Defendant. (*See* Dkt. No. 25-5 at 3) ("For Dr. Stafie to go as far as to tell the girls that she does not like me or does not want me in her room and would tell Dr. [Hugh] Allen to fire me because I'm too slow, it's not appreciative and supportive to me."). When Dan Perrow, Defendant's Senior Director in Care Delivery, heard of Plaintiff's email, he stated that he "want[ed] to do all we can to support [Plaintiff] and help him have a successful career with" Defendant. (*Id.* at 2.)

On April 11, 2018, Sheila Waddle, Plaintiff's supervisor, Perrow, and Dr. Allen discussed Plaintiff's performance issues. (*See* Dkt. No. 25-6 at 2–4.) Dr. Allen stated that Plaintiff lacked the level of communication skills necessary for his position, and Waddle noted that Dr. Stafie felt "that [Plaintiff] could be a safety risk due to his poor performance." (*Id.* at 2–3.) Nonetheless, the parties agreed that Plaintiff would be given additional time to improve his performance. (*See id.*; Dkt. No. 25 at 4.)

On April 18, 2017, Hagan reported additional problem with Plaintiff's job performance. (*See* Dkt. No. 25-7 at 2.) Hagan's concerns including Plaintiff's failure to restock important drugs, failure to properly assist with placement of an oral endotracheal tube, failure to replace a

used blade between cases, failure to adequately prioritize his work tasks, and premature disposal of drugs before the patient was out of the operating room or cleared by the anesthesia provider. (*See id.*; Dkt. No. 25 at 4.)

Given Plaintiff's intent to resign and his poor job performance, Defendant issued a job posting for Plaintiff's position. (*See* Dkt. No. 25 at 4.) On April 25, 2017, Plaintiff emailed Waddle to reiterate his intent to resign and to notify her that he had been getting offers with better pay and benefits. (Dkt. No. 25-11 at 2.) Because Defendant's pain clinic was short-staffed at the time, Waddle responded that Defendant hoped that Plaintiff could work for an additional 30 days while Defendant searched for his replacement. (*Id.*; Dkt. No. 25 at 4.) Ultimately, Plaintiff agreed to continue to work in the pain clinic through June 2017 pending his resignation. (Dkt. Nos. 25 at 4, 25-8 at 2.)

On May 25, 2017, Hagan reported further issues with Plaintiff's job performance, including his failures to "appreciate the importance of induction and securing the airway as being the top priority when he was assisting" Hagan and to properly prioritize other tasks while assisting. (Dkt. No. 25-9 at 4.) Following Hagan's report, Dr. Stafie, Dr. Allen, and Waddle discussed appropriate next steps. Dr. Stafie noted that "since [Plaintiff] started working, the anesthesia providers had multiple concerns to the point that if he were part of a sentinel event," a situation where Plaintiff's mistakes contributed to the loss of a patient, it "would be difficult to explain." (Dkt. Nos. 25 at 4, 25-9 at 3.) Dr. Stafie, Dr. Allen, and Waddle agreed that while Plaintiff had been told earlier that he would be working for an additional 30 days, it would be best for patient safety if Plaintiff was let go earlier. (*See* Dkt. No. 25-9 at 1–4.)

On June 1, 2017, Plaintiff signed a resignation letter which stated that his last date of working for Defendant would be June 2, 2017, and that his effective resignation date would be June 14, 2017. (Dkt. No. 25-10 at 2.) Prior to June 1, 2017, Plaintiff consistently stated that he planned to resign. (*See* Dkt. Nos. 25 at 5, 25-11 at 2–4.)

On October 1, 2017, Plaintiff filed an Equal Employment Opportunity Commission

("EEOC") complaint. (*See* Dkt. No. 27 at 14.) Plaintiff alleged that Dr. Stafie subjected him to disparate treatment because "she criticized my performance and spoke poorly of me to coworkers," that Plaintiff believed he had been discriminated against based on his race, color, and national origin, and that he complained to Waddle in April 2017. (*See* Dkt. No. 27 at 14.) On September 18, 2018, following an evidentiary review, the EEOC found that it "was unable to establish a violation of its statutes as [Plaintiff] had alleged in [his] charge" and dismissed Plaintiff's EEOC complaint. (*See* Dkt. No. 1-1 at 1–2.)

On December 11, 2018, Plaintiff, proceeding *pro se*, filed his complaint in this action. (*See* Dkt. No. 1.) Plaintiff's complaint alleges that Defendant discriminated against him based on his race, color, and national origin, retaliated against him, and subjected him to a hostile work environment. (*See id.* at 15–17.) Plaintiff further asserts that Defendant was negligent in its supervision, hiring, and training of employees and both intentionally and negligently inflicted emotional distress upon Plaintiff. (*Id.* at 17–18.) Defendant moves for summary judgment. (Dkt. No. 23.)

## II. DISCUSSION

### A. Conceded Claims

Defendant moves for summary judgment on all of Plaintiff's claims. (*See generally* Dkt. No. 23.) In his response, Plaintiff, now represented, "concedes the claims of negligent infliction of emotional distress; negligent supervision/hiring/failure to properly train; and intentional infliction of emotional distress." (Dkt. No. 26 at 1.) Accordingly, Defendant's motion for summary judgment is GRANTED as to these claims.

### B. Legal Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that may affect the outcome of the case, and a dispute about a material fact is genuine if there is sufficient evidence for a reasonable jury to return a

verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986). In deciding whether there is a genuine dispute of material fact, the court must view the facts and justifiable inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Id.* at 255. The court is therefore prohibited from weighing the evidence or resolving disputed issues in the moving party's favor. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014).

"The moving party bears the initial burden of establishing the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102–03 (9th Cir. 2000). But once the moving party properly supports its motion, the nonmoving party "must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). Ultimately, summary judgment is appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

Washington courts have stated that summary judgment "should rarely be granted in employment discrimination cases," *Sangster v. Albertson's, Inc.*, 991 P.2d 674, 677 (Wash. Ct. App. 2000), and the Ninth Circuit has stated that "very little evidence" is needed "to survive summary judgment in a discrimination case, because the ultimate question is one that can only be resolved through a searching inquiry—one that is most appropriately conducted by the factfinder, upon a full record," *Lowe v. City of Monrovia*, 775 F.2d 998, 1005 (9th Cir. 1985), *as amended*, 784 F.2d 1407 (9th Cir. 1986) (internal quotations omitted). But a plaintiff must offer more than "uncorroborated and self-serving" testimony to create "'a sufficient disagreement to require submission to a jury.'" *Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996) (quoting *Anderson*, 477 U.S. at 251–52).

**C. Disparate Treatment**

Title VII and the WLAD make it unlawful for an employer to discriminate on the basis of several protected classes, including race, national origin, and color. 42 U.S.C. § 2000e–2(a)(1); Wash. Rev. Code § 49.60.180. A plaintiff may establish a *prima facie* case of discrimination either through "a presumption arising from the factors such as those set forth in *McDonnell Douglas*, or by more direct evidence of discriminatory intent." *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998), *as amended* (Aug. 11, 1998); *see Blackburn v. State*, 375 P.3d 1076, 1080 (Wash. 2016) (noting that "Washington courts often look to federal case law on Title VII when interpreting the WLAD").

"Direct evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption." *Godwin*, 150 F.3d at 1221 (quoting *Davis v. Chevron, U.S.A., Inc.*, 14 F.3d 1082, 1085 (5th Cir.1994)). If a plaintiff lacks direct evidence, courts look to the *McDonnell Douglas* burden-shifting framework to analyze both Title VII and WLAD discrimination claims. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973) (Title VII claim); *Hines v. Todd Pac. Shipyards Corp.*, 112 P.3d 522, 529 (Wash. Ct. App. 2005) (WLAD claim). To establish a *prima facie* case under Title VII, a plaintiff must show that (1) he is a member of a protected class, (2) he performed his job satisfactorily, (3) he suffered an adverse employment action, and (4) the defendant treated him differently from a similarly-situated employee who does not belong to the same protected class. *See Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1028 (9th Cir. 2006). And under the WLAD, the plaintiff must show that: (1) he belongs to a protected class; (2) he was treated less favorably in the terms or conditions of his employment (3) than a similarly situated, non-protected employee, and (4) the plaintiff and the non-protected comparator were doing substantially the same work. *See Washington v. Boeing Co.*, 19 P.3d 1041, 1048 (Wash. Ct. App. 2000).

If the plaintiff establishes his *prima facie* case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action. *See McDonnell Douglas*, 411 U.S.

at 802–04; *Hines*, 112 P.3d at 529. If the defendant does so, the plaintiff must then prove, by a preponderance of the evidence, that the reason asserted by the defendant is a mere pretext. *See McDonnell Douglas*, 411 U.S. at 802–04; *Hines*, 112 P.3d at 529.

Here, Plaintiff asserts that he has direct evidence of unlawful discrimination, citing his deposition testimony and his EEOC complaint. (Dkt. No. 26 at 3–4.) In his deposition, Plaintiff stated that his coworker Vira Feltsan told him in April or May 2017 that Dr. Stafie had asked Plaintiff's coworkers, "Which part of Africa is he from?" (Dkt. No. 27 at 9–10; *see* Dkt. No. 1 at 6.) When pressed about why he did not mention the incident prior to filing his EEOC complaint in October 2017, Plaintiff stated that he verbally told Waddle in her office around April or May 2017. (Dkt. No. 27 at 10.)

Plaintiff also stated that Dr. Stafie "favored two anesthesia techs over me . . . because she can easily communicate with those two techs in her own language, so I'm kind of like . . . discriminated . . . she favored them over me." (*Id.* at 12.)[2] Plaintiff elaborated, saying that "[e]ven though they are doing, like, things that are annoying that are not—she should yell at them or she should . . . own it and be professional, treating us equally. I was not treating—I was not treated fairly as the other two techs." (*Id.*)

Plaintiff has not offered evidence corroborating his deposition testimony and his allegations in his EEOC complaint, such as contemporaneous documentary evidence of Dr. Stafie's alleged question about his country of origin or evidence of her alleged preferential treatment of Plaintiff's coworkers. (*See* Dkt. Nos. 26 at 2, 4; 27 at 5–14.)[3] Standing alone,

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[2] In his complaint, Plaintiff stated that Dr. Stafie is from Romanian and speaks Romanian and Moldavian. (*See* Dkt. No. 1 at 4–5.) Plaintiff alleges that Dr. Stafie "admires and treats the two white female Techs better especially Ms. Machela Palanchuk who speaks the same language as Dr. Daniela Stafie because Ms. Machela Palanchuk is Moldavian and Romanian." (*Id.* at 6.)

[3] In his April 5, 2017 email to Waddle, Plaintiff stated that Feltsan informed him that Dr. Stafie told other staff "that she does not like [Plaintiff] or does not want [Plaintiff] in her room and would tell Dr. Allen to fire me because I'm too slow . . ." (Dkt. No. 25-5 at 3.) Plaintiff's email does not mention any discussion of Plaintiff's race or county of origin.

Plaintiff's self-serving and uncorroborated testimony and allegations are insufficient to create a genuine dispute of fact that requires submission to a jury. *See Kennedy*, 90 F.3d at 1481. Moreover, Plaintiff's reliance on Feltsan's alleged statement regarding Dr. Stafie's question about Plaintiff's country of origin is misplaced: such a statement is clearly hearsay that cannot overcome a motion for summary judgment. *See Urbina v. Gilfilen*, 411 F.2d 546, 547–48 (9th Cir. 1969); *Walker v. Boeing Corp.*, 218 F. Supp. 2d 1177, 1191–92 & 1192 n.9 (C.D. Cal. 2002) (collecting cases). Thus, Plaintiff has not offered direct evidence of discrimination under Title VII or the WLAD. *See Godwin*, 150 F.3d at 1221; *Blackburn*, 375 P.3d at 1080.

Plaintiff has not argued that he is able to establish discrimination under Title VII or the WLAD using the *McDonnell Douglas* burden-shifting framework. (*See* Dkt. No. 26 at 4.) Nor could he. Defendant has submitted substantial evidence of Plaintiff's poor performance of his job duties, including his failure to effectively troubleshoot faulty equipment, his failure to take faulty equipment out of circulation, and his failure to effectively assist with procedures. (*See generally* Dkt. Nos. 25, 25-1—25-4, 25-6—25-7, 25-9.) Plaintiff has not offered evidence showing that he was in fact ably performing his job duties. (*See* Dkt. Nos. 26 at 4, 27 at 5–15.)[4] Therefore, Plaintiff cannot establish the job performance element of a *prima facie* case of discrimination under *McDonnell Douglas* or establish that Defendant's legitimate, non-discriminatory reason for accepting his resignation was pretextual. *Cornwell*, 439 F.3d at 1028; *Hines*, 112 P.3d at 529.

In sum, Plaintiff has not offered direct evidence of discrimination or established a claim for unlawful discrimination by satisfying the burden-shifting framework set forth in *McDonell Douglas*. *See Godwin*, 150 F.3d at 1220; *Blackburn*, 375 P.3d at 1080. Therefore, Defendant's motion for summary judgment is GRANTED as to Plaintiff's disparate treatment claims arising under Title VII and the WLAD.

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[4] During his deposition, Plaintiff stated that Cooper and Hagan had made "false allegations" against him regarding his poor job performance at the behest of Dr. Stafie. (*See* Dkt. No. 24-1 at 13.) When pressed, Plaintiff stated that he did not have any evidence that Dr. Stafie had asked Cooper and Hagan to make false allegations against him. (*Id.* at 13–15.)

**D. Retaliation**

Title VII and the WLAD prohibit an employer from retaliating against a person who engages in protected activities. *See* 42 U.S.C. § 2000e-5; Wash. Rev. Code § 49.60.210. To prevail on a retaliation claim under both Title VII and the WLAD, a plaintiff must show that he was engaged in a protected activity, that he suffered an adverse employment action, and that there is a causal connection between the protected activity and the adverse employment action. *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 965 (9th Cir. 2004); *Lodis v. Corbis Holdings, Inc.*, 292 P.3d 779, 786 (Wash. Ct. App. 2013).

Title VII and the WLAD require the same showings under the first two elements. *See Ellorin v. Applied Finishing, Inc.*, Case No. 12-1932-JRL, Dkt. No. 51 at 31 (W.D. Wash. 2014). Making an informal complaint to a supervisor about racial discrimination may satisfy the first element. *See Knight v. Brown*, Case No. C10-0753-JLR, Dkt. No. 85 at 40–41 (W.D. Wash. 2011). To satisfy the adverse action prong "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which . . . means it might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (internal quotations omitted). To establish causation under Title VII, a plaintiff must show that his protected activity was a "but-for" cause of the adverse employment action. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2521 (2013). Under the WLAD, a plaintiff must merely show that the protected activity was a "substantial factor" in the employer's decision to take the adverse employment action. *Allison v. Housing Auth. of City of Seattle*, 821 P.2d 34, 42–43 (1991).

Causation may be established with "circumstantial evidence, such as the employer's knowledge that [the plaintiff] engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment action." *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987). "But timing alone will not show causation in all cases; rather, in order to support an inference of retaliatory motive, the termination must have occurred fairly

soon after the employee's protected expression." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) (internal quotations omitted).

If the plaintiff establishes a *prima facie* case of retaliation, the burden shifts to the defendant to offer legitimate, non-retaliatory reasons for the adverse employment action. *See Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464–65 (9th Cir. 1994); *Short v. Battle Ground Sch. Dist.*, 279 P.3d 902, 911 (Wash. Ct. App. 2012). If the defendant does so, the burden shifts to the plaintiff to show that the proffered reasons are pretextual. *Steiner,* 25 F.3d at 1465; *Short*, 279 P.3d at 912.

Here, in response to Defendant's motion for summary judgment Plaintiff asserts that he engaged in protected activity when he informed Waddle of the discriminatory treatment, that he was forced to resign, and that the fact he was released two months after his report "establishes a clear causal inference." (Dkt. No. 26 at 5.) Plaintiff thus asserts that he "has established a prima facie case for retaliation and defendants' motion for summary judgment should be denied." (*Id.*)

The Court is skeptical of Plaintiff's assertion that he has established a *prima facie* case of retaliation under either Title VII or the WLAD. As discussed above, Plaintiff's claim of discrimination rests on his uncorroborated and self-serving testimony and EEOC allegations concerning an isolated question about his country of origin and Dr. Stafie's purported preference for working with employees who spoke her native language. *See supra* Section II.C. Plaintiff relies solely on temporal proximity and Defendant's purported knowledge of his report, which are not necessarily sufficient to satisfy the causation element under either Title VII or the WLAD. *See Drottz v. Park Electrochemical Corp.*, 2013 WL 6157858, slip op. at 14–16 (D. Ariz. 2013); *Allison*, 821 P.2d at 42–43. And Plaintiff's claim that he was forced to resign is belied by the allegations in his complaint and evidence in the record. (*See* Dkt. Nos. 1 at 14–15; 25 at 3, 5; 25-5 at 3–4; 25-11 at 2–4; 27 at 15.)

Nonetheless, the Court need not decide those issues. As discussed above, Defendant has submitted substantial evidence of Plaintiff's poor performance of his job duties, which were

repeatedly noted by his coworkers and supervisors and raised significant patient safety concerns. (*See generally* Dkt. Nos. 25, 25-1—25-4, 25-6—25-7, 25-9.) Plaintiff has not addressed his burden of establishing that Defendant's legitimate, non-retaliatory reason for accepting Plaintiff's resignation was pretextual or offered evidence showing the same. (*See* Dkt. Nos. 26 at 4, 24-1 at 13–15, 27 at 5–15.) Therefore, even if Plaintiff has established a *prima facie* case of retaliation under Title VII and the WLAD, he has not carried his burden of showing that Defendant's legitimate, non-retaliatory reason for accepting his resignation was pretextual. *See Steiner*, 25 F.3d at 1465; *Short*, 279 P.3d at 912. Accordingly, Defendant's motion for summary judgment is GRANTED as to Plaintiff's claims of unlawful retaliation under Title VII and the WLAD.

**E. Hostile Work Environment**

Hostile work environment claims arising under Title VII and the WLAD are analyzed under the same framework following Washington's adoption of the test set forth by the Supreme Court in *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 (2002). *See Antonius v. King County*, 103 P.3d 729, 737 (Wash. 2004). Thus, to prevail on a hostile work environment claim premised on race under Title VII or the WLAD, the plaintiff must show: "(1) that he was subjected to verbal or physical conduct of a racial . . . nature; (2) that the conduct was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive work environment." *Vasquez v. City of Los Angeles*, 349 F.3d 634, 642 (9th Cir. 2003), *as amended* (Jan. 2, 2004). The court examines "all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* (quoting *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270–71 (2001)). The "environment must both subjectively and objectively be perceived as abusive." *Id.* (quoting *Brooks v. City of San Mateo*, 229 F.3d 917, 923 (9th Cir. 2000)). "Simple teasing, offhand comments, and isolated incidents

(unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Manatt v. Bank of Am., NA*, 339 F.3d 792, 798 (9th Cir. 2003) (internal alterations and quotations omitted). Ninth Circuit caselaw establishes a high burden to finding a hostile work environment. *See id.* at 798–99 (collecting cases).

Although Plaintiff does not explicitly concede his hostile work environment claim, his response to Defendant's motion for summary judgment is silent as to this claim. (*See generally* Dkt. No. 26.) And the record shows that Defendant is entitled to summary judgment in its favor on this ground. As discussed above, Plaintiff has only asserted two instances of racial discrimination: Dr. Stafie's alleged question about his country of origin and Dr. Stafie's purported favoring of employees who spoke her native languages. *See supra* Section II.C. Plaintiff has not offered evidence showing that either instance of alleged discrimination was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive work environment, especially given the high bar set by Ninth Circuit case law. *See Vasquez*, 349 F.3d at 642; *Manatt*, 339 F.3d at 798–99. Therefore, Defendant's motion for summary judgment is GRANTED as to Plaintiff's hostile work environment claim.

## III. CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment (Dkt. No. 23) is GRANTED and Plaintiff's claims are DISMISSED with prejudice.

DATED this 26th day of May 2020.

John C. Coughenour
UNITED STATES DISTRICT JUDGE