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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

IVANA MULDREW and DARREN HISE,

1:09-cv-00023-OWW-DLB

Plaintiffs,

MEMORANDUM DECISION REGARDING
DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT AGAINST PLAINTIFF
HISE (Doc. 23)

v.

COUNTY OF FRESNO, et al.,

Defendants.

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I. INTRODUCTION.

Plaintiff Darren Hise ("Plaintiff") is proceeding with this civil rights action against Defendants the Country of Fresno and Kenneth Taniguichi ("Defendants") pursuant to 42 U.S.C. §§ 1981, 1983, and 28 U.S.C. § 1331. Plaintiff also asserts state law claims.

Defendants filed a motion for summary judgment on Plaintiff's claims on May 20, 2010. (Doc. 23). Plaintiff filed opposition to Defendant's motion for summary judgment on June 14, 2010. (Doc. 28).

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II. FACTUAL BACKGROUND.

Plaintiff commenced employment as a defense investigator with the Fresno County Public Defender's Office ("PDO") in 2000. (PUMF 1). In 2003, Plaintiff was promoted to "Senior Defense

1 Investigator," a supervisory position that was essentially the top
2 investigative position within the PDO. (PUMF 2).

3 **Plaintiff's Leave Request**

4 On April 2008, Plaintiff submitted a request for time off for
5 the week of April 14-18. Taniguichi reviewed the request and
6 believed that Plaintiff failed to complete the request by not
7 identifying the type of leave requested. Taniguichi denied the
8 first day of leave requested and provided a note to Plaintiff
9 directing him to see his supervisor regarding the remaining leave
10 requested. Plaintiff sought an explanation regarding the initial
11 denial of leave and spoke to Taniguichi. (Opposition, Ex. 1 at
12 273). During the discussion, Taniguichi asked Plaintiff what his
13 requested medical leave was for. (Id. at 274). Plaintiff
14 responded that Taniguichi did not have a right to know, and that
15 Plaintiff would contact his union representative as recourse for
16 denial of the leave. (Id. at 274). Plaintiff then left
17 Taniguichi's office, prompting Taniguichi to go out into the hall
18 and yell for Plaintiff to return. (Id. at 275). Taniguichi
19 approached Plaintiff in the common area and repeated his query
20 about Plaintiff's leave request, and Plaintiff continued to assert
21 that Taniguichi was not entitled to know. (Id. at 276).
22 Ultimately, Plaintiff and Taniguichi returned to his office,
23 quarreled over their respective rights for a few more minutes, and
24 ultimately reached a resolution whereby Plaintiff did not reveal
25 the reasons for his leave request but was granted the full leave
26 requested. (Id. at 279-281).

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1 **Muldrew's Complaint**

2 In June 2008, one of Plaintiff's co-workers, Ivana Muldrew,
3 returned to work at the PDO's office after having been on leave for
4 several weeks. (PUMF 12). Muldrew told Plaintiff that she felt
5 that her supervisor, Celica Alderete, was unfairly assigning
6 Muldrew excess work in order to set her up for failure. (PUMF 17).
7 Plaintiff did not have a good relationship with Alderete and had
8 witnessed Alderete use profanity and slam doors. (PUMF 18).
9 Plaintiff told Muldrew that he agreed that Alderete's conduct was
10 hostile and designed to set Muldrew up for failure. (PUMF 17).

11 On July 18, 2008, Plaintiff signed a letter authored by
12 Muldrew which detailed Alderete's treatment of Muldrew and also
13 alleged other unprofessional conduct on Alderete's part. (PUMF
14 19). The letter was addressed to the the PDO. Plaintiff alleges
15 that he signed the Muldrew's letter in order to prompt the County
16 to investigate and respond to Alderete's conduct toward Muldrew as
17 well as "racial issues" Plaintiff perceived were being caused by
18 Alderete.¹ (PUMF 19). On July 24, 2008, Muldrew submitted a
19 discrimination complaint form to the County's Labor Relations
20 Division with the Junly 18 letter attached. Muldrew checked the
21 boxes "race" and "color" on the discrimination complaint form.

22 Charlotte Tilkes and Deborah Harper interviewed Plaintiff in
23 connection with Muldrew's complaint in August 2008. Hise confirmed
24 Muldrew's complaints to Tilkes and Harper. Plainitff also

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26 ¹ Plaintiff contends that "Alderete was and is a very vocal proponent of
27 Hispanics, and openly and frequently lobbied for promotions of Hispanic employees
28 and for additional pay for Spanish speaking investigators." Plaintiff further
contends that "Aldrete's advocacy reached a point of racial preference" and that
Aldrete's "advocacy frequently occurred during meetings with...supervising
attorneys." (PUMF 5).

1 confirmed that Muldrew had been subjected to criticism by an
2 attorney in the PDO, Marguerita Martinez, that Plaintiff believed
3 was not based upon Muldrew's work performance. Finally, Plaintiff
4 indicated that Alderete's close relationship with Assistant Public
5 Defender Elizabeth Diaz ("Diaz") affected employees' willingness to
6 "cross" Alderete. Plaintiff was told that he was not to discuss
7 his interview, and that it would remain confidential. (PUMF 20).

8 Approximately a week after Plaintiff's interview with Tilkes
9 and Harper, Diaz, Plaintiff's supervisor, Diaz, asked to meet with
10 Plaintiff and questioned him about Alderete's problems with
11 Muldrew. Plaintiff felt uncomfortable because he felt Diaz was
12 trying to learn what Plaintiff had told Tilkes and Harper. (PUMF
13 21). The following day, on August 21, 2008, Plaintiff contacted
14 Tilkes and Harper to discuss his concerns regarding his meeting
15 with Diaz. During Plaintiff's meeting with Tikles and Harper, they
16 became defensive and asked Plaintiff if he was accusing them of
17 divulging the substance of their prior interview of Plaintiff.
18 Plaintiff wanted to leave the meeting, but Harper insisted that he
19 stay. Harper and Tilkes tried to give Plaintiff paperwork to file
20 a complaint, but Plaintiff declined. (PUMF 22). Plaintiff
21 eventually left the meeting, and shortly after 3 p.m., he saw
22 Harper and Tilkes walking to Starbucks. Plaintiff contends he did
23 not say or do anything to Harper or Wilkes. (PUMF 23).

24 Plaintiff left work at 4:15 p.m. on the day of his second
25 meeting with Tilkes and Harper. Shortly after leaving, Plaintiff
26 recieved a call from Ron Perring, the Chief Attorney for Major
27 Crimes at the PDO, asking him to return to work to speak with
28 Kenneth Taniguchi. (PUMF 24). Plaintiff returned to work and was

1 met by Taniguchi, Jim Dockery, and Gary Shinaver. Plaintiff was
2 told he was being put on administrative leave and was directed to
3 hand over his keys and ID. Taniguchi instructed Plaintiff not to
4 go into or near the Dependency Office, the Courts, Crocker
5 Building, Plaza Building, or Juvenile Hall. Plaintiff asked for a
6 letter stating the reasons for Taniguchi's decision, but Taniguchi
7 declined. (PUMF 25).

8 Taniguchi sent an email to all PDO employees advising them to
9 have no contact with Plaintiff. (PUMF 26). On August 24, 2008,
10 Taniguchi sent a letter to Plaintiff advising him that he was
11 placed on paid administrative leave and reiterating that Plaintiff
12 was not to have contact with employees of the PDO or to be present
13 at PDO facilities. (PUMF 27).

14 **III. LEGAL STANDARD.**

15 Summary judgment/adjudication is appropriate when "the
16 pleadings, the discovery and disclosure materials on file, and any
17 affidavits show that there is no genuine issue as to any material
18 fact and that the movant is entitled to judgment as a matter of
19 law." Fed. R. Civ. P. 56(c). The movant "always bears the initial
20 responsibility of informing the district court of the basis for its
21 motion, and identifying those portions of the pleadings,
22 depositions, answers to interrogatories, and admissions on file,
23 together with the affidavits, if any, which it believes demonstrate
24 the absence of a genuine issue of material fact." *Celotex Corp. v.*
25 *Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265
26 (1986) (internal quotation marks omitted).

27 Where the movant will have the burden of proof on an issue at
28 trial, it must "affirmatively demonstrate that no reasonable trier

1 of fact could find other than for the moving party." *Soremekun v.*
2 *Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). With
3 respect to an issue as to which the non-moving party will have the
4 burden of proof, the movant "can prevail merely by pointing out
5 that there is an absence of evidence to support the nonmoving
6 party's case." *Soremekun*, 509 F.3d at 984.

7 When a motion for summary judgment is properly made and
8 supported, the non-movant cannot defeat the motion by resting upon
9 the allegations or denials of its own pleading, rather the
10 "non-moving party must set forth, by affidavit or as otherwise
11 provided in Rule 56, 'specific facts showing that there is a
12 genuine issue for trial.'" *Soremekun*, 509 F.3d at 984. (quoting
13 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct.
14 2505, 91 L. Ed. 2d 202 (1986)). "A non-movant's bald assertions or
15 a mere scintilla of evidence in his favor are both insufficient to
16 withstand summary judgment." *FTC v. Stefanich*, 559 F.3d 924, 929
17 (9th Cir. 2009). "[A] non-movant must show a genuine issue of
18 material fact by presenting affirmative evidence from which a jury
19 could find in his favor." *Id.* (emphasis in original). "[S]ummary
20 judgment will not lie if [a] dispute about a material fact is
21 'genuine,' that is, if the evidence is such that a reasonable jury
22 could return a verdict for the nonmoving party." *Anderson*, 477
23 U.S. at 248. In determining whether a genuine dispute exists, a
24 district court does not make credibility determinations; rather,
25 the "evidence of the non-movant is to be believed, and all
26 justifiable inferences are to be drawn in his favor." *Id.* at 255.

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1 **IV. DISCUSSION.**

2 **A. Plaintiff's Fourth Cause of Action Under 42 U.S.C. § 1981 and**
3 **California Government Code 12900 et seq.**

4 Plaintiff alleges that Defendant County of Fresno ("the
5 County") took adverse employment action against him in retaliation
6 for Plaintiff's corroboration of Muldrew's complaint against
7 Alderete. (Complaint at 10). Plaintiff alleges that the adverse
8 action taken against him was motivated in substantial part by
9 attitudes hostile to African-Americans. (Id.).

10 **1. Section 1981**

11 Section 1981 prohibits retaliatory action motivated by racial
12 discrimination. *E.g. Surrell v. Cal. Water Serv.*, 518 F.3d 1097,
13 1107 (9th Cir. 2008); *London v. Coopers & Lybrand*, 644 F.2d 811,
14 818 (1981) (distinguishing retaliation based on racial animus from
15 other types of retaliatory action). To establish a prima facie
16 case of retaliation, a plaintiff must prove (1) she engaged in a
17 protected activity; (2) she suffered an adverse employment action;
18 and (3) there was a causal connection between the two. *Surrell*,
19 518 F.2d at 1108 (citation omitted). Once a plaintiff has
20 established a prima facie case, the burden shifts to the defendant
21 to set forth a legitimate, non-retaliatory reason for its actions;
22 at that point, the plaintiff must produce evidence to show that the
23 stated reasons were a pretext for retaliation. *Id.* A municipal
24 entity may be held liable for the discriminatory actions of its top
25 decision-maker. *Menotti v. City of Seattle*, 409 F.3d 1113, 1147
26 (9th Cir. 2005).

27 The complaint alleges that the County retaliated against
28 Plaintiff for corroborating Muldrew's claim that Alderete was

1 discriminating against her on the basis of race. (Complaint at 9-
2 10). Specifically, the complaint alleges:

3 54. Defendant County was aware of the racial motivation
4 of Celia Alderete and its disparate effect upon Plaintiff
5 Muldrew, yet failed and refused to correct Alderete's
6 aforesaid conduct, thereby ratifying the same.

7 55. Defendant County's removal of Plaintiff Hise from his
8 office, and the manner in which it occurred and his being
9 ostracized from co-workers were in retaliation for Hise's
10 corroboration of Plaintiff Muldrew's complaints and were
11 intended to and did have a chilling
12 effect on other employees so as to prevent others from
13 coming forward or confirming Plaintiff Muldrew's reports
14 of discrimination, harassment and retaliation.

15 56. Defendant County's placing of Plaintiff Hise on
16 administrative leave pending investigation was motivated
17 in substantial part by attitudes hostile to
18 African-Americans; that Defendant Taniguchi was
19 responsible for such acts and decisions and ratified all
20 of the acts necessary to achieve the same.

21 57. Defendants used and/or allowed official policies,
22 procedures and/or practices to retaliate against
23 Plaintiff Hise on the basis of his association with and
24 support of Plaintiff Muldrew in violation of the
25 Fourteenth Amendment to the United States Constitution,
26 42 USC § 1981, and California Government Code section
27 12900, et. seq, prohibitions against racial discrimination
28 and retaliation.

(Complaint at 9-10).

19 The record contains evidence sufficient to permit a rational
20 jury to conclude that Plaintiff engaged in a protected activity by
21 supporting Muldrew's claim of racial discrimination during his
22 interview with Tilkes and Harper. (Hise Dec. at 4; MSJ, Ex. O).
23 The report prepared by Tilkes and Harper concerning Muldrew's
24 discrimination claim includes a section entitled "Background,"
25 which provides, in pertinent part:

26 On July 24, 2008, Ivana Muldrew...filed a formal
27 discrimination complaint alleging that her
28 supervisor...Celia Aldrete...has discriminated against
her and created a hostile work environment...¶ In her
written complaint, Ivana Muldrew alleges discrimination

1 on the basis of race, color, retaliation, and hostile
2 work environment. During the course of this
3 administrative review, it was discovered that Ivana
4 Muldrew had filed a discrimination complaint with the
5 U.S. Equal Employment Opportunity Commission (EEOC)...The
6 EEOC complaint includes allegation including [sic] racial
7 discrimination...

8 (MSJ, Ex. O). Another section of the Tilkes and Harper report
9 entitled "Interview Darren Hise -August 7, 2008, 2:00pm, Summary
10 (Muldrew Witness)" recounts Plaintiff's interview, in pertinent
11 part, as follows:

12 Darren's discussion in this interview included...
13 allegations currently under EEOC investigation and not
14 subject to this review...¶ Darren spent a great deal of
15 the interview explaining the same history and issues that
16 Ivana had stated during her interview, none of which were
17 subject [sic] of this administrative review...Because of
18 the focus of his story and how closely it paralleled
19 Ivana's, Darren was asked if he had discussed with Ivana
20 her interview on August 5th, he stated he had not
21 discussed her interview.

22 (MSJ, Ex. O at 7).

23 Plaintiff has met the first requirement of stating a prima
24 facie claim under section 1981 by presenting evidence that he
25 engaged in a protected activity when he corroborated Mudlrew's
26 claims of discrimination during the interview with Tilkes and
27 Harper. (Id.). Plaintiff has also met the second requirement of
28 stating a prima facie section 1981 claim by presenting evidence
that he suffered adverse employment action; it is undisputed that
Plaintiff was placed on administrative leave on August 21, 2008.²

² In opposition to Defendant's motion for summary judgement, Plaintiff suggests that Taniguichi's decision to demote Plaintiff in March 2009 also constituted retaliatory action. (Opposition at 5). However, the complaint unequivocally alleges that the adverse employment action taken against Plaintiff was the decision to place Plaintiff on administrative leave. It is axiomatic that Plaintiff's complaint, filed in January 2009, could not have been based on retaliatory action that had not yet occurred; i.e. the March 13, 2009 demotion notice.

1 (MSJ, Ex. B, Taniguichi Dec. at 2; Hise Dec. at 5; Hise Dec. Exs.
2 2A, 2B). Whether a causal connection existed between Plaintiff's
3 protected activity and his placement on administrative leave is
4 subject to a factual dispute.

5 There is evidence on the record sufficient to permit a
6 rational jury to conclude that at the time Taniguichi decided to
7 place Plaintiff on leave, Taniguichi was aware that Plaintiff
8 supported Muldrew's claim of racial discrimination. Taniguichi
9 reviewed Muldrew's July 24, 2008 discrimination complaint, which
10 included Plaintiff's signature. (Taniguichi Dec. at 4).
11 Taniguichi also reviewed an EEOC complaint filed by Muldrew in
12 February of 2008. (Id). Before placing Plaintiff on
13 administrative leave, Taniguichi reviewed memos prepared by Tilkes
14 and Harper regarding what had happened during Plaintiff's August
15 21, 2008 interview Tilkes and Harper. (Id. at 3). Taniguichi's
16 knowledge regarding Muldrew's various discrimination complaints,
17 his knowledge that Plaintiff had signed Muldrew's July 18 letter,
18 and his knowledge that Plaintiff had been interviewed in connection
19 with Muldrew's July 24 complaint support a rational inference that
20 Taniguichi knew Plaintiff was supporting Muldrew's claims of racial
21 discrimination at the PDO when he placed Plaintiff on
22 administrative leave.

23 Defendants' purported non-discriminatory reason for placing
24 Plaintiff on administrative leave is also subject to a factual
25 dispute. According to Taniguchi, Plaintiff was placed on leave due
26 to his conduct during his August 21, 2008 meeting with Tilkes and
27 Harper, as well as other blemishes on Plaintiff's employment
28 record. (Taniguichi Dec. at 3). In a report prepared by Harper

1 following the August 21 meeting, Harper stated that Plaintiff
2 became aggressive and caused Harper to fear for her personal
3 safety. (MSJ, Ex. S). However, Plaintiff contests Harper's
4 version of the August 21 meeting, and a reasonable jury could
5 accept Plaintiff's version of the facts and conclude that
6 Taniguichi's reliance on Tilkes and Harper's account of the August
7 21 meeting was a pretext for retaliation. (Opposition, Ex. 1 at
8 182-85). Accordingly, questions of fact preclude summary judgement
9 on Plaintiff's retaliation claim.

10 **2. California Government Code section 12900 et seq.**

11 The complaint fails to specify the nature of Plaintiff's claim
12 under California's Fair Housing and Employment Act. However, the
13 allegations contained in the section of the complaint entitled
14 "Fourth Cause of Action: Discrimination, Retaliation" clearly
15 pertain to section 12940(h), which provides that it shall be an
16 unlawful employment practice

17 for any employer, labor organization, employment agency,
18 or person to discharge, expel, or otherwise discriminate
19 against any person because the person has opposed any
20 practices forbidden under this part or because the person
has filed a complaint, testified, or assisted in any
proceeding under this part.

21 Cal. Gov. Code § 12940(h). As discussed above, factual disputes
22 preclude summary judgment on Plaintiff's federal retaliation claim.
23 For the same reasons, Defendants are not entitled to summary
24 judgment on Plaintiff's state-law retaliation claim.

25 **B. Plaintiff's Claim Under 29 U.S.C. § 2615(A) (1) and California**
26 **Government Code 12945.2**

27 The complaint alleges that Taniguichi violated 29 U.S.C. §
28 2615(a)(1) and California Government Code 12945.2 by asking

1 Plaintiff to divulge medical information and subsequently
2 reprimanding Plaintiff for failing to comply with his requests.
3 (Complaint at 11-12). Section 2615(a)(1) provides:

4 It shall be unlawful for any employer to interfere with,
5 restrain, or deny the exercise of or the attempt to
6 exercise, any right provided under this title [29 USCS §§
7 2611 et seq.].

8 An employer may not discourage an employee from taking FMLA leave.
9 *Xin Liu v. Amway*, 347 F.3d 1125, 1134-35 (9th Cir. 2003). Like the
10 FMLA, California Government Code section 12945.2 confers rights to
11 family and personal medical leave. California Government Code
12 12945.2(1) provides:

13 It shall be an unlawful employment practice for an
14 employer to refuse to hire, or to discharge, fine,
15 suspend, expel, or discriminate against, any individual
16 because of any of the following:

17 (1) An individual's exercise of the right to family care
18 and medical leave provided by subdivision (a).

19 (2) An individual's giving information or testimony as
20 to his or her own family care and medical leave, or
21 another person's family care and medical leave, in any
22 inquiry or proceeding related to rights guaranteed under
23 this section.

24 The elements of a cause of action under California Government Code
25 section 12945.2(1) as follows: (1) the defendant was an employer
26 covered by CFRA; (2) the plaintiff was an employee eligible to take
27 CFRA leave; (3) the plaintiff exercised her right to take leave for
28 a qualifying CFRA purpose; and (4) the plaintiff suffered an
adverse employment action, such as termination, fine, or
suspension, because of her exercise of her right to CFRA leave.
Dudley v. Dep't of Transp., 90 Cal. App. 4th 255, 262 (Cal. Ct.
App. 2001).

1 At oral argument, Plaintiff's counsel conceded that Plaintiff
2 ultimately received all the medical leave he requested, and that
3 summary judgment should be granted as to Plaintiff's claims under
4 the FMLA and California Government Code section 12945.2.
5 Accordingly, Defendants' motion for summary judgment on the fifth
6 cause of action asserted in the complaint is GRANTED.

7 **ORDER**

8 For the reasons stated, IT IS ORDERED:

9 1) Defendants' motion for summary judgment on Plaintiff
10 Hise's fourth cause of action for retaliation under 42
11 U.S.C. § 1981 and Cal. Gov. Code § 12900 is DENIED;

12 2) Defendants' motion for summary judgment on Plaintiff
13 Hise's fifth cause of action under 29 U.S.C. § 2615(a)(1)
14 and Cal. Gov. Code § 12945.2 is GRANTED; and,

15 3) Defendants shall submit a form of order consistent with
16 this Memorandum Decision within five (5) days following
17 electronic service of this decision.

18 IT IS SO ORDERED.

19 **Dated: August 10, 2010**

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE