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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GARY GOETHE,

No. 2:07-cv-01945-MCE-GGH

Plaintiff,

v.

MEMORANDUM AND ORDER

STATE OF CALIFORNIA,
DEPARTMENT OF MOTOR VEHICLES,

Defendant.

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Presently before the Court is a Motion for Summary Judgment, or alternatively, summary adjudication of issues, brought by Defendant California Department of Motor Vehicles ("Defendant"). For the reasons set forth below, the Motion will be granted in part and denied in part.¹

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¹ Because oral argument will not be of material assistance, the Court orders this matter submitted on the briefs. E.D. Cal. Local Rule 230(g).

1 **BACKGROUND**

2
3 On September 29, 2006, Plaintiff filed Charge of
4 Discrimination number 555-2006-01115 ("Charge") with the Equal
5 Employment Opportunity Commission ("EEOC"). Def.'s Undisputed
6 Fact ("DUF") No. 1. Plaintiff checked boxes on the Charge
7 indicating that while he was employed by Defendant he was subject
8 to discrimination based on "race" and "retaliation." He stated
9 the pertinent facts as follows in that Charge:

10 I was hired on or about November 30, 1987. My
11 current job title is Staff Services Manager I in the
12 Business Consulting Group.

13 In or about 1995, I filed a discrimination lawsuit
14 against Respondent. Since winning my lawsuit, I have
15 been denied numerous promotions and lateral transfers.
16 These include:

17 On or about March 6, 2006: Manager V, Customer
18 Service/Technology and Manager V, Program Support
19 Manager. On or about May 24, 2006: Manager V
20 International Registration Plan Policy Section Manager.
21 On or about June 15, 2006: Manager V, Revenue and
22 Compliance Unit. All the selectees for the above
23 positions were Caucasian.

24 On or about August 21, 2006: Manager V, Motor
25 Carrier Permit Policy Section Manager. The selectee
26 for this position is Black, but she has never
27 complained of discrimination, to my knowledge.

28 In or about April 2006, I was denied a lateral
transfer to Staff Services Manager I FOD Sacramento
Headquarters Staff, Position number 438-4800-001,
Bulletin number 2-06-0400. The selectee was Caucasian.

I believe I have been discriminated against
because my race, Black, and for engaging in protected
activity.

26 See DUF Nos. 2-5; Pl.'s Dep., 4/18/09, Ex. 15. At Plaintiff's
27 request, the EEOC issued a Right-to-Sue Notice on August 9, 2007.

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1 In addition to those facts alleged in his EEOC Charge,
2 Plaintiff avers in his Second Amended Complaint that after
3 settling his 1995 lawsuit, he applied for 41 lateral transfers or
4 promotional opportunities between 1998 and 2000, yielding only
5 two interviews. (Pl.'s Second Am. Compl. ¶ 11.) Plaintiff
6 further contends that in November 2000, he approached his
7 Department Director about his alleged disparate treatment.
8 Subsequently, he was promoted to his current position. Id. at
9 ¶ 12. Plaintiff states that since his promotion, he has applied
10 for 40 additional transfers and/or promotions and has been
11 denied. Id. at ¶ 13.

12 Based on these claims, Plaintiff alleges five causes of
13 action in his Second Amended Complaint: 1) Disparate Impact
14 Discrimination in violation of Title VII of Civil Rights Act of
15 1964, 42 U.S.C. § 2000e-2(a); 2) Disparate Treatment
16 Discrimination in violation of Title VII of Civil Rights Act of
17 1964, 42 U.S.C. § 2000e-2(a); 3) Retaliation for Engaging in a
18 Protected Activity in violation of Title VII of Civil Rights Act
19 of 1964, 42 U.S.C. § 2000e-3(a); 4) Racial Discrimination and
20 Retaliation in violation of 42 U.S.C. § 1981; 5) Conspiracy to
21 Interfere with Civil Rights in violation of 42 U.S.C. § 1985.
22 (Pl.'s Second Am. Compl. P. 5-10.)

23 On February 25, 2010, Defendant filed its current Motion for
24 Summary Judgment. In support of its Motion, Defendant submits
25 declarations of selected individuals who state that an applicant
26 more qualified than Plaintiff received each position.

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1 If the moving party meets its initial responsibility, the
2 burden then shifts to the opposing party to establish that a
3 genuine issue as to any material fact actually does exist.
4 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
5 585-87 (1986); First Nat'l Bank v. Cities Serv. Co., 391 U.S.
6 253, 288-89 (1968).

7 In attempting to establish the existence of this factual
8 dispute, the opposing party must tender evidence of specific
9 facts in the form of affidavits, and/or admissible discovery
10 material, in support of its contention that the dispute exists.
11 Fed. R. Civ. P. 56(e). The opposing party must demonstrate that
12 the fact in contention is material, i.e., a fact that might
13 affect the outcome of the suit under the governing law, and that
14 the dispute is genuine, i.e., the evidence is such that a
15 reasonable jury could return a verdict for the nonmoving party.
16 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 251-52
17 (1986); Owens v. Local No. 169, Assoc. of W. Pulp and Paper
18 Workers, 971 F.2d 347, 355 (9th Cir. 1987). Stated another way,
19 "before the evidence is left to the jury, there is a preliminary
20 question for the judge, not whether there is literally no
21 evidence, but whether there is any upon which a jury could
22 properly proceed to find a verdict for the party producing it,
23 upon whom the onus of proof is imposed." Anderson, 477 U.S. at
24 251 (quoting Improvement Co. v. Munson, 81 U.S. 442, 448 (1871)).

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1 As the Supreme Court explained, "[w]hen the moving party has
2 carried its burden under Rule 56(c), its opponent must do more
3 than simply show that there is some metaphysical doubt as to the
4 material facts Where the record taken as a whole could not
5 lead a rational trier of fact to find for the nonmoving party,
6 there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at
7 586-87.

8 In resolving a summary judgment motion, the evidence of the
9 opposing party is to be believed, and all reasonable inferences
10 that may be drawn from the facts placed before the court must be
11 drawn in favor of the opposing party. Anderson, 477 U.S. at 255.
12 Nevertheless, inferences are not drawn out of the air, and it is
13 the opposing party's obligation to produce a factual predicate
14 from which the inference may be drawn. Richards v. Nielsen
15 Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985),
16 aff'd, 810 F.2d 898 (9th Cir. 1987).

18 ANALYSIS

19 A. Summary Adjudication of Plaintiff's Sex Discrimination 20 Claim is Granted.

21 To establish subject matter jurisdiction over a Title VII
22 claim, a Plaintiff must have exhausted his administrative
23 remedies by filing a timely charge with the EEOC. 42 U.S.C.
24 section 2000e-5(b); B.K.B. v. Maui Police Dep't, 276 F.3d 1091,
25 1099 (9th Cir. 2002). "The administrative charge requirement
26 serves the important purposes of giving the charged party notice
27 of the claim and 'narrow[ing] the issues for prompt adjudication
28 and decision.'"

1 Park v. Howard Univ., 71 F.3d 904, 907 (D.C. Cir. 1995) (quoting
2 Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 472 n. 325
3 (D.C. Cir. 1976)).

4 The permissible scope of a Title VII civil action is limited
5 to the scope of the administrative complaint and the EEOC
6 investigation. B.K.B., 276 F.3d at 1100. The court "construe[s]
7 the language of EEOC charges 'with the utmost liberality since
8 they are made by those unschooled in the technicalities of formal
9 pleading.'" Id. at 1100 (quoting Kaplan v. Int'l Alliance of
10 Theatrical & Stage Employees, 525 F.2d 1354, 1359 (9th Cir.
11 1975)). However, "[a]llegations of discrimination not included
12 in plaintiff's administrative charge may not be considered by a
13 federal court unless the new claims are 'like or reasonably
14 related' to the allegations contained in the EEOC charge."
15 B.K.B., 276 F.3d at 1100 (quoting Green v. Los Angeles County
16 Superintendent of Schs., 883 F.2d 1472, 1475-76 (9th Cir. 1989)).

17 With these principles in mind, we consider the claims of the
18 Plaintiff. Here, Plaintiff failed to check the box for "sex"
19 discrimination in his EEOC charge. In the narrative portion of
20 the charge, Plaintiff explains that he was denied opportunities
21 because he was "Black" and in retaliation for filing suit.
22 Nothing in the charge gives Defendant any notice that a claim for
23 sex discrimination is being made. Accordingly, Plaintiff has
24 failed to exhaust his administrative remedies as to any sex
25 discrimination claim. Therefore, this Court lacks subject matter
26 jurisdiction to adjudicate that portion of his lawsuit.
27 Defendant's motion for summary adjudication with respect to the
28 alleged sex discrimination is granted.

1 **B. Summary Adjudication for Plaintiff's Claims in**
2 **Paragraphs 11 and 13 of his Second Amended Complaint is**
3 **Granted.**

4 The same analysis applied above extends to Plaintiff's claim
5 that he applied for and did not receive 41 positions aside from
6 the five positions, as identified in his EEOC charge, that he
7 claims were wrongfully awarded to others between March and August
8 of 2006. Specifically, in paragraph 11 of the Second Amended
9 Complaint, Plaintiff states for the first time that he "submitted
10 no fewer than 41 job applications from 1998 to 2000 for lateral
11 transfers or promotional opportunities. These efforts yielded
12 just two interviews." (Pl.'s Second Am. Compl. ¶ 11.) Plaintiff
13 further alleges that Plaintiff "repeatedly applied for lateral
14 transfer and promotions within the [DMV]." Id. at ¶ 13.
15 Moreover, despite submitting approximately an additional 40
16 applications for lateral transfers or promotional opportunities
17 after he was finally promoted in 2000, Plaintiff claims that
18 Defendant has "consistently and systematically refused to
19 transfer or promote" him. Id.

20 These two additional claims, which together identify some 81
21 additional instances of alleged discrimination, were not
22 adequately raised in Plaintiff's EEOC charge. The EEOC charge
23 discretely refers to lost promotional opportunities in 2006 only,
24 and nowhere alludes to dozens of other instances of claimed
25 discrimination occurring up to six to eight years beforehand. In
26 his EEOC charge, Plaintiff specifically identified only five
27 Manager V positions and one SSM I lateral transfer in 2006.

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1 Plaintiff has failed to exhaust his administrative remedies in
2 attempting to substantially broaden the time and scope of the
3 alleged discrimination against him. In the absence of that
4 exhaustion, this Court lacks subject matter jurisdiction over the
5 vastly amplified charges that Plaintiff now attempts to levy in
6 his Second Amended Complaint. Defendant's motion for summary
7 adjudication with respect to the additional instances of
8 discrimination alleged in paragraphs 11 and 13 of the Second
9 Amended Complaint is therefore granted.

10
11 **C. Summary Adjudication of Plaintiff's Claim that the DMV**
12 **Denied him Five Manager Promotions because he is Black**
13 **is Denied.**

14 Under the McDonnell-Douglas test for assessing Title VII
15 discrimination claims, the plaintiff can establish a prima facie
16 case by showing: (1) he belonged to a protected class, (2) he was
17 performing according to his employer's legitimate expectations
18 (3) he suffered an adverse employment action, and (4) some
19 indication of a discriminatory motive, such as similarly
20 qualified individuals being treated more favorably. McDonnell
21 Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973).

22 Once plaintiff establishes a prima facie case of
23 discrimination, the burden shifts to the defendant to articulate
24 a legitimate nondiscriminatory reason for the adverse employment
25 action. McDonnell Douglas, 411 U.S. at 802-803.

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1 If defendant meets its burden in that regard, the burden shifts
2 back to plaintiff to establish that defendant's proffered reason
3 was a pretext for discrimination. See St. Mary's Honor Ctr. v.
4 Hicks, 509 U.S. 502 (1993).

5 "The ultimate burden of persuading the trier of fact that
6 the defendant intentionally discriminated against the plaintiff
7 remains at all times with the plaintiff." Id. at 507 (quoting
8 Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253
9 (1981)). Moreover, the "amount that must be produced in order to
10 create a prima facie case is very little." Sischo-Nownejad v.
11 Merced Comm. Coll. Dist., 934 F.2d 1104, 1111 (9th Cir. 1991).

12 Defendant does not take issue with Plaintiff's ability to
13 state a prima facie case. Therefore, the burden shifts to the
14 Defendant to articulate a legitimate nondiscriminatory reason for
15 the adverse employment action.

16 Defendant asserts it is entitled to summary judgment on
17 Plaintiff's claim that the DMV denied him five Manager V
18 positions based on his race because it offers legitimate
19 nondiscriminatory reasons for not selecting Plaintiff for the
20 positions. Defendant sets forth declarations of ten current and
21 former DMV employees involved in the selection process. Each
22 declaration details the process by those evaluators assigned a
23 numerical value to each candidate. The declarations uniformly
24 articulate a nondiscriminatory reason for the fact that a
25 candidate other than Plaintiff was selected. Some positions were
26 filled with applicants who had more experience, while others were
27 selected because they were more familiar with the particular type
28 of work encompassed within the positions at issue.

1 Defendant DMV has also submitted the job opportunity bulletins to
2 which Plaintiff responded, along with and the completed scoring
3 sheets for the positions Plaintiff interviewed. This information
4 satisfies Defendant's obligation to present a legitimate, non-
5 discriminatory reason for not selecting Plaintiff under the
6 McDonnell Douglas framework. The burden thus shifts back to the
7 Plaintiff to demonstrate that the reason articulated is
8 pretextual.

9 "A plaintiff can prove pretext in two ways: (1) indirectly,
10 by showing that the employer's proffered explanation is 'unworthy
11 of credence' because it is internally inconsistent or otherwise
12 not believable, or (2) directly, by showing that unlawful
13 discrimination more likely motivated the employer." Noyes v.
14 Kelly Services, 488 F.3d 1163, 1170 (9th Cir. 2007) (quoting
15 Chuang v. Univ. of Cal. Davis, Bd. Of Trustees, 225 F.3d 1115,
16 1127 (9th Cir. 2000)). "All of the evidence [as to pretext] -
17 whether direct or indirect- is to be considered cumulatively."
18 Id. (quoting Raad v. Fairbanks N. Star Borough Sch. Dist., 323
19 F.3d 1185, 1194 (9th Cir. 2003)). Moreover, "[a] plaintiff may
20 discredit an employer's proffered reason by demonstrating such
21 weaknesses, implausibilities, inconsistencies, incoherencies, or
22 contradictions in the employer's proffered legitimate reason for
23 its action that a reasonable factfinder could rationally find
24 that reason unworthy of credence." Bowden v. Potter, 308 F.
25 Supp. 2d 1108, 1119 (N.D. Cal. 2004). "In addition a plaintiff
26 may demonstrate pretext by showing that the employer treated
27 similarly situated employees outside the plaintiff's protected
28 class more favorably." Id. at 1119-20.

1 Plaintiff first rebuts the evidence offered by Defendant
2 with statistical data. Plaintiff states that from "1987 to 2007,
3 there were a total of four African-American males in middle
4 management positions out of approximately 500 middle managers" at
5 DMV headquarters in Sacramento. (Pl.'s Opp'n to Mot. for Summ. J.
6 9:5-7 (citing Pl.'s Dec. ¶ 6.)). Additionally, he states that
7 "[o]f the five persons promoted to Manager V, four are white, and
8 one is an African-American female." Id. at 9:14-15 (citing Pl.'s
9 Dec. ¶ 15.). This statistical information can and does support
10 an inference of pretext. See, e.g., Noyes, 488 F.3d at 1173.²

11 Additionally, Plaintiff alleges facts that warrant
12 determination by a jury. Plaintiff states that he is better
13 qualified than the five persons promoted. (Pl.'s Opp. to Mot.
14 for Summ. J. at 10:15 (citing Pl.'s Dec. ¶ 16-23.)). He contends
15 that contrary to the declarations submitted by Defendant, he had
16 knowledge either or superior to the individuals selected for
17 certain Manager V positions. Id. A determination as to who is
18 the more qualified candidate is ultimately a factually intensive
19 question best resolved by a jury.

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22
23 ² The Court notes that Defendant has filed objections to
24 certain portions of Plaintiff's declaration submitted in support
25 of his Opposition to this Motion, including objections to the
26 portions of that Declaration cited in both this paragraph and the
27 next paragraph. Despite those objections, however, Plaintiff may
28 unquestionably attest to his own perceptions and/or observations
while employed at the DMV. Defendant's objections to those
portions of Plaintiff's Declaration cited herein are accordingly
denied. The Court need not rule on the other portions of
Plaintiff's Declaration not relied upon in reaching its decision
in this matter and declines to do so.

1 See, e.g., Barefield v. Bd. of Trs. of Cal. State Univ.,
2 Bakersfield, 500 F. Supp. 2d 1244 (E.D. Cal. 2007) (“[I]t is not
3 the role of this Court to determine who was the most qualified,
4 but only to determine if there is a genuine issue of fact for
5 trial.”); Lyons v. England, 307 F.3d 1092, 1117 (9th Cir. 2002)
6 (“[W]hether appellants were as qualified as any of the promotion
7 recipients is a factually intensive question best resolved by the
8 jury.”).

9 Plaintiff has raised an issue of fact that he may have been
10 as qualified, or even more qualified, than the candidates
11 selected for promotion. Plaintiff has thus provided sufficient
12 evidence to raise a triable issue of fact that Defendant’s
13 proffered reason may be pretextual. Therefore, Defendant’s
14 motion for summary adjudication with respect to Plaintiff’s race
15 discrimination claim is denied.

16
17 **D. Summary Adjudication of Plaintiff’s Claim that the DMV**
18 **Denied him a Lateral Transfer Because he is Black is**
19 **Granted.**

20 Plaintiff’s EEOC charge alleges that Plaintiff was “denied a
21 lateral transfer to Staff Services Manager I FOD Sacramento
22 Headquarters Staff, Position number 438-4800-001, Bulletin number
23 2-06-0400.” DUF No. 57. Defendant argues that Plaintiff cannot
24 state a prima facie case for discrimination given the fact that
25 the advertised SSM I position was cancelled and the position
26 abolished.

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1 On March 15, 2006, the SSM I position, 438-4800-001, was
2 advertised through bulletin number 2-06-0400. The position
3 advertised, however, was canceled that same day. DUF Nos. 58-59.
4 Defendant contends that the position was abolished to establish
5 position number 024-4800-003. Plaintiff does not allege that he
6 applied for this new position.

7 Plaintiff argues that even though he applied for a position
8 that was literally cancelled the same day it was posted, he was
9 still "rejected" for that position for purposes of establishing a
10 discriminatory adverse employment action. While Plaintiff
11 admittedly received no letter indicating that he was unqualified
12 or that another candidate had been chosen, he persists in
13 maintaining that the cancellation constitutes a discriminatory
14 rejection. This is nonsensical. The Defendant cancelled the job
15 bulletin the same day that it was posted. Not only did the
16 Defendant not select a candidate over the Plaintiff, it also
17 appears certain that Defendant failed to even consider the
18 Defendant's application since the position was abolished the same
19 day it was posted.

20 Plaintiff nonetheless argues that "the position remained
21 open until it was filled by someone of Plaintiff's
22 qualifications." (Pl.'s Opp'n to Def.'s Mot. for Summ. J. 13:18-
23 19.) Plaintiff alleges the position was filled by Jill D.
24 Ledden, a non African-American female. As evidence of this fact,
25 Plaintiff cites to a Deposition in which a DMV employee, Babette
26 Williams, states that Ms. Ledden was in fact hired.

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1 However, in the same deposition, Ms. Williams admits, consistent
2 with Defendant's version of events as enumerated above, that the
3 DMV position applied for by Plaintiff had in fact been "dropped"
4 for workload reasons. See Williams Dep., 6/09/09, 48:14-49:5.
5 Thus, the evidence Plaintiff cites actually supports Defendant's
6 claim that the cancellation of the position had nothing to do
7 with Plaintiff.

8 Given that the Plaintiff has failed to rebut Defendant's
9 evidence with any information demonstrating adverse employment
10 action or some other circumstance indicating a discriminatory
11 motive, Defendant's motion for summary adjudication of
12 Plaintiff's claim that the DMV denied him a lateral transfer
13 because of his color must be granted.

14
15 **E. Summary Adjudication of Plaintiff's Retaliation Claim**
16 **Based on his EEOC Lawsuit is Granted.**

17 In order to establish a viable retaliation claim, Plaintiff
18 must demonstrate: (1) that he engaged in protected activity,
19 (2) that his employer was aware of the activity, (3) that he
20 suffered an adverse employment action, and (4) that there was a
21 causal connection between the protected activity and the adverse
22 employment action. Raad, 323 F.3d at 1197, see also Yanowitz v.
23 L'Oreal USA, Inc., 36 Cal. 4th 1028, 1042 (2005).

24 Plaintiff's retaliation claim does not survive summary
25 adjudication because Plaintiff cannot make out a prima facie case
26 of retaliation. Specifically, Plaintiff cannot establish that
27 the relevant decision makers knew of Plaintiff's protected
28 activity.

1 Plaintiff alleges that he was denied the five Manager V
2 positions and a SMM I transfer in retaliation for his filing a
3 discrimination suit against the DMV during 1995. Following the
4 said charge, the EEOC and the DMV conducted an investigation.
5 During the course of its investigation, the DMV found that it had
6 no information or records regarding Plaintiff's protected
7 activity which occurred eleven years before the EEOC charge was
8 filed. See Ruiz Decl. ¶ 13; Ex. A, p. 3. This was probably
9 because the DMV only retains documents for five years. Id.
10 Additionally, the hiring managers for each of the five positions
11 Plaintiff applied to have submitted declarations. Each hiring
12 partner declares that he or she was not aware of Plaintiff's 1995
13 discrimination suit against the DMV. Plaintiff does not offer
14 any evidence to rebut these statements.

15 Plaintiff also alleges that "as a result of [the 1995
16 lawsuit] and subsequent complaints, Defendant has retaliated
17 against Plaintiff." (Pl.'s Second Am. Compl. ¶ 10.) (emphasis
18 added). In support of this allegation, Plaintiff claims that in
19 February 2006 he complained to the DMV Deputy Director that he
20 was being treated unfairly and that on June 18, 2006, Plaintiff
21 submitted a grievance to the DMV for discrimination. (Pl.'s Decl.
22 ¶¶ 7 & 10.) Additionally, on September 29, 2006, Plaintiff filed
23 a charge of discrimination with the EEOC. Both filing a complaint
24 with the EEOC and making informal complaints to a supervisor are
25 protected activities. Ray v. Henderson, 217 F.3d 1234, 1240,
26 n. 3 (9th Cir. 2000). However, in his 2006 EEOC charge, the one
27 upon which this lawsuit is based, the only protected activity
28 Plaintiff identified was his 1995 discrimination lawsuit.

1 Plaintiff therefore failed to exhaust his administrative remedies
2 with respect to any additional retaliation claims. Thus,
3 Defendant's motion for summary adjudication with respect to
4 Plaintiff's claim for retaliation must also be granted.

5
6 **CONCLUSION**

7
8 For the reasons stated above, Defendant's Motion for Summary
9 Judgment (Docket No. 69) as to Plaintiff's claims in their
10 entirety is DENIED. Summary adjudication is GRANTED, however,
11 with respect to Plaintiff's sex discrimination and retaliation
12 claims, his additional claimed instances of discrimination as
13 alleged in paragraphs 11 and 13 of the Second Amended Complaint,
14 and his claim that he was discriminated against by virtue of the
15 2006 cancelled lateral transfer. Summary adjudication is DENIED
16 as to Plaintiff's claims that he was discriminated against due to
17 his race in being passed over for transfer and/or promotional
18 opportunities in 2006. Because the resolution of those claims
19 involves the weighing of disputed issues of material fact, this
20 lawsuit must proceed to trial on that basis.

21 IT IS SO ORDERED.

22 Dated: May 6, 2010

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25 _____
26 MORRISON C. ENGLAND, JR.
27 UNITED STATES DISTRICT JUDGE
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