UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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CHUKWUEMEKA NDULUE,

Plaintiff,

v.

FREMONT-RIDEOUT HEALTH GROUP; LEONARD MARKS; PUSHPA RAMAN; CHERRY ANN WY; ARUM KUMAR; HARRY WANDER; and MAX LINS,

Defendants.

NO. CIV. 2:08-1696 WBS KJM

MEMORANDUM AND ORDER RE: MOTIONS FOR SUMMARY JUDGMENT

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Plaintiff Chukwuemeka Ndulue brought this action alleging that Fremont-Rideout Health Group ("FRHG") and doctors Leonard Marks, Pushpa Raman, Cherry Ann Wy, Arum Kumar, Harry Wander, and Max Lins (the "doctor defendants") unlawfully interfered with his ability to enter into contracts because of his race. Defendants now each move for summary judgment pursuant to Federal Rule of Civil Procedure 56.

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I. Standard

Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is one that could affect the outcome of the suit, and a genuine issue is one that could permit a reasonable jury to enter a verdict in the non-moving party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party moving for summary judgment bears the initial burden of establishing the absence of a genuine issue of material fact and can satisfy this burden by presenting evidence that negates an essential element of the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Alternatively, the moving party can demonstrate that the non-moving party cannot produce evidence to support an essential element upon which it will bear the burden of proof at trial. Id.

Once the moving party meets its initial burden, the non-moving party "may not rely merely on allegations or denials in its own pleading," but must go beyond the pleadings and, "by affidavits or as otherwise provided in [Rule 56,] set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e); Celotex Corp., 477 U.S. at 324; Valandingham v. Bojorquez, 866 F.2d 1135, 1137 (9th Cir. 1989). In its inquiry, the court must view any inferences drawn from the underlying facts in the light most favorable to the nonmoving party, but may not engage in credibility determinations or weigh the evidence.

Anderson, 477 U.S. at 255; Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

II. Evidentiary Objections

"A trial court can only consider admissible evidence in ruling on a motion for summary judgment." Orr v. Bank of Am., NT & SA, 285 F.3d 764, 773 (9th Cir. 2002) (citing Fed. R. Civ. P. 56(e); Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179, 1181 (9th Cir. 1988)). After receiving defendants' objections to plaintiff's evidence supplied in opposition to the motions for summary judgment, the court granted plaintiff an opportunity to resubmit his briefs and evidence to take defendants' evidentiary objections into account. (Docket No. 211.) In response to plaintiff's amended evidence, defendants filed the twenty-nine evidentiary objections now before the court. (Docket No. 220.)

"[T]o survive summary judgment, a party does not necessarily have to produce evidence in a form that would be admissible at trial, as long as the party satisfies the requirements of Federal Rules of Civil Procedure 56." Fraser v. Goodale, 342 F.3d 1032, 1036-37 (9th Cir. 2003) (citing Block v. City of Los Angeles, 253 F.3d 410, 418-19 (9th Cir. 2001)). While much of plaintiff's evidence is presented in a form that is currently inadmissible, such evidence may be evaluated on a motion for summary judgment so long as defendants' objections could be cured at trial. See Burch v. Regents of the Univ. of Cal., 433 F. Supp. 2d 1110, 1119-20 (E.D. Cal. 2006).

Many of defendants' objections are well-taken. Despite being afforded an opportunity by the court to amend his exhibits and declarations to avoid defendants' objections, plaintiff by

and made only minimal changes to his evidence and failed to account for most, if not all, of defendants' objections. It would be obvious to any lawyer that many statements in the Amended Ndulue Declaration are objectionable. For example, the Ndulue Declaration contains several conclusory and argumentative statements that completely lack foundation, such as plaintiff's statement that one defendant's conduct "was just the beginning of [defendant's] campaign to drive [plaintiff] out of town" (Am. Ndulue Decl. at 2:24-25), or that plaintiff was "maliciously given false instructions" by a defendant. (Id. at 4:10.) Several statements in the Ndulue Declaration are also blatantly hearsay, such as plaintiff's contention that "Dr. Joseph Coulter told [plaintiff] that . . . Dr. Wander . . . requested [plaintiff] not be given privileges at the hospital." (Id. at 9:4-10.) See Fed. R. Evid. 802, 805.

Additionally, plaintiff supplied a number of exhibits that are clearly not properly authenticated and are therefore inadmissible. Exhibits EE, GG and HH to the Amended Nguyen Declaration all are statements from women who claim that they were steered away from choosing plaintiff as their child's physician. These statements are not properly authenticated because they are handwritten, unsworn, and are not accompanied by an affidavit from any of the women in question attesting to their authenticity. See Orr v. Bank of Am. NT & SA, 285 F.3d 764, 777 (9th Cir. 2002); Fed. R. Evid. 901.

In the interest of brevity, as defendants are aware of the substance of their objections and the grounds asserted in support of each objection, the court will not review the

substance or grounds of all the objections here. For the purposes of this motion, defendants' objections 2, 4, 7, 15-16, and 25-26 and are overruled. Objections 1, 3, 5-6, 8-14, 17-24, and 27-29 are sustained.

III. Relevant Facts

Defendant FRHG is a non-profit health care organization that operates two hospitals, Fremont Medical Center in Yuba City, California and Rideout Memorial Hospital in Marysville, California. (White Decl. (Docket No. 168) ¶ 3.) FRHG's medical staff is comprised of physicians who have privileges to admit and care for patients at both hospitals. (Id.) The medical staff is a separate entity from FRHG and none of the doctors on the staff are employees of FRHG. (Id. ¶ 11.) Each physician with staff privileges must reapply for privileges every two years. (Id. ¶ 9.)

In 2001, plaintiff applied for privileges to admit and care for patients as a pediatrician at FRHG. (FRHG Zimmerman Decl. Ex. B ("Ndulue Depo. Vol. II") at 212:14-18; Am. Ndulue Decl. (Docket No. 215) ¶ 3; Am. Nguyen Decl. Ex. II.) Plaintiff is a black man who was born in Nigeria. (Am. Ndulue Decl. ¶ 1.) During the process of applying for privileges at FRHG, plaintiff made a call to defendant Marks, who was the Chairman of Pediatrics at FRHG at the time. (Id. ¶ 4.) Marks purportedly told plaintiff that his services were not needed in Yuba City/Marysville area because current pediatricians were having trouble filling their practices and plaintiff would cause more problems by locating to the area. (Id.) When plaintiff told Marks that he still intended to move to the area, Marks allegedly

stated that he would ensure that nobody shared calls with plaintiff. (Id.)

Plaintiff was granted privileges by FRHG later in 2001. (Id. ¶ 3.) Once a doctor is given privileges, he or she must undergo "proctoring" by other physicians in his or her field of specialty to demonstrate that he or she is competent to perform the functions and procedures he or she has sought privileges to perform. (White Decl. ¶ 4.) During the proctoring period, several different doctors in a new member's specialty field are assigned as proctors. (Id.) The proctors may question the doctor's diagnosis, treatment plan, or any other issue involving care, and the doctor must explain his or her decisions. (Id. ¶ 5.) Proctoring is stopped when the doctor has demonstrated his or her competency to the satisfaction of the proctors. (Id. ¶ 6.)

With one exception,[1] plaintiff was the only black pediatrician who worked in Fremont Medical Center and Rideout Memorial Hospital. (Am. Nguyen Decl. Ex. S ("Wy Depo.") at 21:21-22:2.) On plaintiff's first day at FRGH in 2002, Marks gave plaintiff a tour of the hospital. (Am. Ndulue Decl. ¶ 5.) During the tour, Marks told plaintiff that his "ass was on the line" during proctoring. (Id.; Am. Nguyen Decl. Ex. A ("Marks Depo.") at 129:7-14, Ex. C.) Marks was also plaintiff's proctor when plaintiff admitted his first patient to the hospital; a child with neonatal jaundice who had lost thirteen percent of her

[1] For a period of time one other black pediatrician, Dr. Eribo, worked at Fremont Hospital. Dr Eribo was an employee of plaintiff. (Am. Nguyen Decl. Ex. S at 21:21-22:2.)

body weight since birth. (Am. Ndulue Decl. ¶ 6.; Am. Nguyen Decl. Ex. C. at 2.) Marks disagreed with plaintiff's choice of treatment for the patient, contending that plaintiff should have been more concerned about the child's potential dehydration and given her more fluids. (Ndulue Depo. Vol. II at 236:12-15; Am. Ndulue Decl. ¶ 6; Marks's Zimmerman Decl. Ex. D. ("Marks Depo.") 157:15-158:1.) Plaintiff argued that his treatment plan complied with the American Academy of Pediatrics' standards and was appropriate. (Am. Ndulue Decl. ¶ 6.) Marks subsequently told plaintiff that if Marks were plaintiff's chief resident Marks would have thrown him out of the program for poor management. (Id.; Am. Nguyen Decl. Ex. C at 2.)

After this disagreement, Marks spoke with two other doctors about the case to see what method of treatment they believed was appropriate: Dr. Andrew Wurtz, the Chief of Neonatology at Sutter Memorial Hospital, and Dr. Michael Sherman, the Chief of Neonatology at the University of California, Davis Medical Center. (Marks Depo. at 158:8-17.) Plaintiff also spoke with Sherman about the case. (Ndulue Depo. Vol. II at 245:10-247:15.) During this conversation, plaintiff claims that Sherman told him that his treatment plan was adequate and that Marks used the "n-word" to describe plaintiff while discussing the case. (Am. Ndulue Decl. ¶ 6.)

In addition to initial proctoring, a physician's care is subject to ongoing peer review. (White Decl. ¶ 7.) The chief and vice-chief of pediatrics are responsible for peer review and have the ability to make a determination as to whether a doctor's decisions meet appropriate standards of care as part of the

Department of Pediatrics Steering Committee ("Steering Committee"). (Id. ¶¶ 7-8.) The Medical Executive Committee ("MEC") reviews the recommendations from the Steering Committee concerning doctors at Fremont Medical Center and Rideout Memorial Hosptial and may issue sanctions based on the recommendations. During plaintiff's time with FRHG, Marks, Raman, Wy, and Kumar each served as the chief of pediatrics. (Id. ¶ 10.)

In the fall of 2002, plaintiff's treatment of a patient with meningococcemia was referred to the MEC for review by Marks. (Am. Ndulue Decl. ¶ 9; Am. Nguyen Decl. Ex. G.) Plaintiff was the third doctor to see the patient and initially diagnosed him with a different condition. (Am. Ndulue Decl. ¶ 10; Am. Nguyen Decl. Ex. G.) Plaintiff subsequently received a letter from Tracy McCollum, the Quality Management Coordinator of FRHG, questioning plaintiff's management of the case, including his decisions to delay in performing a spinal tap on the patient and not administer a specific antibiotic. (Am. Ndulue Decl. ¶ 10.) Plaintiff sent a response to McCollum defending his treatment on October 21, 2002. (Am. Nguyen Decl. Ex. G.) On November 5, 2002, plaintiff received a letter from Marks indicating that plaintiff's treatment in the case would be up for peer review with the Steering Committee. (Id. Ex. H.) The Steering Committee ultimately found plaintiff's treatment to be deficient and recommended a prospective focused review of 100 of plaintiff's cases where a patient had a fever of over 101 degrees to assess his quality of care. (Id. Ex. I; Am. Ndulue Decl. ¶ 10.) The MEC agreed with this recommendation. (Am. Nguyen Decl. Ex. I.)

After learning of the decision, plaintiff requested a hearing before the MEC to explain his treatment decisions. (Id. Ex. H; Am. Ndulue Decl. ¶ 10.) Plaintiff met with the MEC on December 19, 2002. (Am. Nguyen Decl. Ex. H.) As a result of the meeting, the MEC decided to change the planned focused review of 100 of plaintiff's cases to a review all of plaintiff's cases, excluding normal newborns, until the MEC's February meeting. (Id.) Raman, Wy, Kumar, Wander, Lins, and Marks filed numerous other peer-review-related complaints against plaintiff from 2002 to 2008, charging him with inadequate documentation, unprofessional behavior, and missteps in treatment. (Id. Exs. X, MM, NN, OO, PP, QQ.) Plaintiff was subsequently only granted hospital privileges with FRHG for an additional year, instead of the two-year period normally granted to doctors in good standing. (Am. Ndulue Decl. ¶ 21.)

In addition to his own practice, plaintiff worked as part of FRHG's On-Call Pediatrician ("OCP") service. (Id. ¶ 14.) The OCP is designated as a baby's pediatrician if a mother in labor has not chosen a pediatrician for her child before birth. (White Decl. ¶ 12.) In 2002, defendant Kumar allegedly asked plaintiff if he was "the doctor that is going to take the OCP from us." (Am. Ndulue Decl. ¶ 15.) In early 2003, plaintiff attempted to recruit an associate from outside of FRHG, Dr. Glenn Law, to assist him with the OCP service. (Id. ¶ 11.) Defendant Raman notified plaintiff that FRHG denied Law privileges because he did not meet FRHG's requirement that any doctor out of training for forty-eight months must have assumed primary care for at least six neonatal intensive care patients over the

twenty-four months before his or her application. (Am. Nguyen Decl. Ex. L.) In July 2003, plaintiff hired Dr. Valeriy Chorny to assist him with the OCP service. (Am. Ndulue Decl. ¶ 14.) Chorny was subjected to numerous peer reviews by other FRHG doctors during his time working with plaintiff, including an ad hoc committee created by defendants Raman and Wy to discuss one incident in which Chorny failed to indicate the time on the chart of one of his patients. (Id.) Plaintiff ceased managing the OCP service in 2005.

Plaintiff began hearing comments from his patients' parents that their requests for plaintiff to be assigned as their newborn children's physician were ignored or discouraged by FRHG medical staff. (Am. Ndulue Decl. ¶¶ 24-30.) Under FRHG policy, when a mother appears in labor hospital nurses ask the expectant mother if she has a pediatrician for her baby. (White Decl. ¶ 12.) If the mother has not chosen a pediatrician, the labor and delivery nurses designate the OCP as the baby's pediatrician. (Id.) If the mother indicates a preference for a specific pediatrician, the requested physician is assigned to the baby and is notified when the child is born. (Id.; Am. Nguyen Decl. Ex. Y ("Chambers Depo.") at 13:2-15.) Between 2005 and 2009, at least eleven different women stated that they requested plaintiff as their pediatrician but were either assigned another doctor without explanation or actively discouraged by several of the doctor defendants from using plaintiff as their pediatrician. (Am. Nguyen Decl. Exs. AA-DD, FF.)

On July 23, 2008, plaintiff filed this action against defendants, alleging racial discrimination preventing his right

to contract in violation of 42 U.S.C. § 1981; conspiracy to deprive plaintiff of his constitutional rights in violation of 42 U.S.C. § 1985; tortious interference with prospective business and economic relationships; violations of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200-17210; intentional infliction of emotional distress; negligent infliction of emotional distress; and a request for injunctive relief. (Docket No. 1.) Defendants now move for summary judgment, or in the alternative partial summary judgment, pursuant to Federal Rule of Civil Procedure 56.

IV. Summary Judgment

A. Section 1981 Claim

42 U.S.C. § 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981(a). Section 1981 is the present codification of section 16 of the one-hundred-and-forty-year-old Civil Rights Act of 1870, 16 Stat. 144, which was enacted pursuant to the federal legislative power to enforce the Thirteen Amendment's prohibition of slavery. See Runyon v. McCrary, 427 U.S. 160, 180 (1976); Johnson v. Railway Exp. Agency, Inc., 421 U.S. 454, 459 (1975). The Supreme Court has read § 1981 to prohibit racial discrimination in the making and enforcement of private and governmental contracts against nonwhites and whites alike. See McDonald v. Santa Fe Trail Transp. Corp., 427 U.S. 273, 295 (1976).

While the protection against racial discrimination in § 1981 often overlaps with the protections of Title VII and 42 U.S.C. § 1983, the requirements to bring a § 1981 claim are far more lax and the extent of its protections are far more sweeping. Unlike Title VII, a § 1981 claim does not require a plaintiff to exhaust administrative remedies, allows employers with less than fifteen employees to be sued, entitles plaintiffs to punitive damages, and permits suits against independent contractors and individual employees. See Johnson, 421 U.S. at 460-61. Unlike a suit under § 1983, no state action is required in a § 1981 action and the defendants are not entitled to qualified immunity. Even the state and federal immunities that apply to doctors' participation in medical reviews do not apply in the context of a § 1981 claim. See 42 U.S.C. § 11111(a)(1)(D). It is doubtful that anyone could have imagined the reach and scope that § 1981 would have at the time of its enactment, but nevertheless this court must interpret § 1981 in light of the subsequent rulings of the higher courts.

"Analysis of an employment discrimination claim under § 1981 follows the same legal principles as those applicable in a Title VII disparate treatment case." Fonseca v. Sysco Food Serv. of Ariz., Inc., 374 F.3d 840, 850 (9th Cir. 2004). Typically, this includes the use of the burden-shifting analysis established in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). Metoyer v. Chassman, 504 F.3d 919, 930-31 (9th Cir. 2007); see also Fonseca, 374 F.3d at 850.

Under the McDonnell Douglas framework, "the burden of production first falls on the plaintiff to make out a prima facie

case of discrimination." Coghlan v. Am. Seafoods Co. LLC, 413 F.3d 1090, 1094 (9th Cir. 2005). To establish a prima facie case of discrimination under § 1981 a plaintiff must show that: (i) he was a member of a protected class; (ii) he attempted to contract for certain services; (iii) he was denied the right to contractfor those services; and (iv) a similarly-situated person outside of his protected class was offered the contractual services which were denied to the plaintiff. Ennix v. Stanten, 556 F. Supp. 2d 1073, 1085 (N.D. Cal. 2008) (citing Lindsey v. SLT Los Angeles, LLC, 447 F.3d 1138, 1144 (9th Cir. 2006)).[2] "[I]f the plaintiff satisfies the initial burden of establishing a prima facie case of racial discrimination, the burden shifts to the defendant to prove it had a legitimate non-discriminatory reason for the adverse action. If the defendant meets that burden, the plaintiff must prove that such a reason was merely a pretext for intentional discrimination." Ennix, 556 F. Supp. 2d at 1085.

"[W]hen responding to a summary judgment motion . . . [the plaintiff] may proceed by using the McDonnell Douglas framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated [the defendant]." McGinest

[2] Defendants cite Kirt v. Fashion Bug # 3252, Inc., 495 F. Supp. 2d 957 (N.D. Iowa 2007), for the proposition that the elements of a prima facie case of discrimination under § 1981 require proof of "discriminatory intent on the party of the defendant." Kirt both is not binding on this court and fails to discuss either the application of the McDonnell Douglas framework to a § 1981 claim or what evidence would provide be sufficient to show discriminatory intent on summary judgment. Accordingly, the court will follow the Ninth Circuit's formulation of the prima facie case in a § 1981 claim enumerated in Lindsey and Ennix.

v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004). "When the plaintiff offers direct evidence of discriminatory motive, a triable issue as to the actual motivation of [the defendant] is created even if the evidence is not substantial." Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1221 (9th Cir. 1998); see also Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994).

1. Marks, Wy, and Kumar

Plaintiff has made a prima facie case of discrimination against defendants Marks, Wy, and Kumar by providing both direct and indirect evidence that, taken in a light most favorable to plaintiff, could allow a jury to find that plaintiff was discriminated against. First, because plaintiff is of black Nigerian descent, he is a member of a protected class under § 1981. See Saint Francis College v. Al-Khazraji, 481 U.S. 604, 609 (1987). Second, plaintiff attempted to contract for medical services with patients at Fremont Hospital and Rideout Medical Center and to contract for two-years of clinical privileges with FRHG. Third, plaintiff has provided evidence that he was denied the ability to contract with potential patients when patients were reassigned to other doctors by Wy and Kumar in contravention of hospital policy and when FRHG only extended him one-year of clinical privileges instead of the typical two-year agreement because of complaints against him by Marks. See Ennix, 556 F. Supp. 2d at 1085.

Finally, other doctors with FRHG privileges who were not part of defendants' protected class were given patients who requested plaintiff to be their child's pediatrician against hospital protocol. Plaintiff has also presented evidence that he

was subject to peer review by defendants more frequently than other doctors at the hospital for offenses that other doctors who were not in his protected class regularly committed. As a result of these reviews, plaintiff received a contract for one-year worth of privileges at FRHG instead of the typical two-year contract. Plaintiff has therefore established a prima facie case of discrimination. <u>See</u> <u>Ennix</u>, 556 F. Supp. 2d at 1085.

In response to plaintiff's prima facie case, Marks, Kumar, and Wy solely argue that plaintiff has not provided sufficient evidence such that a jury could find defendants had any discriminatory animus toward plaintiff. However, plaintiff has provided numerous pieces of direct and circumstantial evidence which a jury may find prove defendants' treatment of plaintiff was motivated by discriminatory reasons. Plaintiff has provided direct evidence of discrimination by Marks through testimony that Marks may have referred to plaintiff using the "n-word" and aggressively lodging a disproportionate number of reviews of plaintiff's cases. <u>See</u> <u>Godwin</u>, 150 F.3d at 1221 (citing cases of racial slurs constituting direct evidence of discrimination); <u>Mustafa v. Clark County Sch. Dist.</u>, 157 F.3d 1169, 1180 (9th Cir. 1998) ("[D]iscriminatory remarks are relevant evidence that . . . can create a strong inference of intentional discrimination.").

Plaintiff has also presented evidence that Kumar and Wy took patients that should have been assigned to plaintiff under hospital policy and discouraged patients from using plaintiff as their child's pediatrician. (<u>See</u> Am. Nguyen Decl. Exs. AA, CC.) These actions, which violated hospital policy and specifically

targeted plaintiff and not other non-black similarly-situated doctors, impacted his right to contract and accordingly support an inference that discriminatory reasons motivated defendants' actions. See Wallis, 26 F.3d at 889; see also Chuang v. Univ. of Cal. Davis, Bd. of Trustees, 225 F.3d 1115, 1124 (9th Cir. 2000); Ennix, 556 F. Supp. 2d at 1085. While Marks, Kumar, and Wy uniformly dispute that their actions were motivated by plaintiff's race, such questions of fact are disputed issues for a jury, not the court on summary judgment.

Marks, Kumar, and Wy have failed to produce evidence of a legitimate, nondiscriminatory reason for their conduct, and accordingly have failed the to meet the burden of production necessary to defeat plaintiff's § 1981 discrimination claim on summary judgment under the McDonnell Douglas framework. See Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-55 (1981). Accordingly, the court must deny Marks, Kumar, and Wy's motions for summary judgment on plaintiff's § 1981 claim.

2. Raman

Plaintiff has failed to make a prima facie case of discrimination against defendant Raman. Plaintiff contends that Raman denied him the right to contract at FRHG when she denied privileges to plaintiff's associate, Dr. Law, to frustrate plaintiff's practice as the OCP physician, used the peer review process to "nitpick" at him, and failed to prevent diversion of plaintiff's patients. First, plaintiff has failed to provide any evidence that the denial of Dr. Law's neonatal intensive care privileges deprived plaintiff of the right to contract or hindered his OCP practice. Raman's denial of privileges to Dr.

Law was in accordance with the hospital's policy on the requisite level of experience required to work in neonatal intensive care. (See Am. Nguyen Decl. Ex. L.) While plaintiff argues that other FRHG doctors were not subject to these experience requirements, he has provided no evidence to support this contention aside from a chart that simply lists the names of doctors with neonatal intensive care privileges. (Id. Ex. M.) Plaintiff has also not explained how denial of Dr. Law's neonatal privileges negatively affected his ability to practice. Accordingly, plaintiff has not shown that Raman's rejection of Dr. Law interfered with his right to contract or supports an inference of discrimination.

Second, plaintiff has not provided sufficient evidence that Raman subjected him to excessive levels of peer review that denied him the ability to contract. The only evidence submitted in support of this contention is several letters from Raman to plaintiff that summarize several hospital policies with regard to admissions and bed space for infants with signs of respiratory syncytial virus, remind plaintiff to keep daily notes in patients' charts, discuss plaintiff's treatment of a jaundiced child, and inform plaintiff of a complaint from hospital staff. (Id. Exs. O, X.) There is no evidence that Raman treated plaintiff differently than similarly-situated individuals outside his protected class or lacked a reasonable basis for her complaints. These few letters accordingly do not establish a pattern of "harassment" by Raman such that a reasonable jury could find denied plaintiff the ability to contract with either FRHG or patients, or that Raman's reviews constituted "circumstances giving rise to an inference of discrimination."

Aragon v. Republic Silver State Disposal Inc., 292 F.3d 654, 660 (9th Cir. 2002).

Finally, plaintiff has not supplied any evidence that Raman had any involvement with the diversion of patients from plaintiff. Although Raman was the Chief of Pediatrics at the time, plaintiff has not supplied evidence indicating that Raman was aware of these diversions or actively participated in them. Plaintiff has not produced evidence that he was denied the ability to make and enforce contracts by Raman and accordingly has failed to establish a prima facie case of discrimination against her. See Ennix, 556 F. Supp. 2d at 1085.

3. Lins

Insufficient evidence also exists to establish a prima facie case of discrimination against Lins.[3] Plaintiff submits two pieces of evidence in support of his § 1981 claim against Lins: a series of letters referring to a complaint filed by Lins to the Steering Committee against plaintiff and a declaration from Carmela Pamatz, a former patient of the hospital. First, evidence of one complaint by Lins against plaintiff does not establish a pattern of harassment or serve as evidence that this complaint resulted in the denial of plaintiff's ability to contract for services at the hospital. In fact, the letters submitted to the court do not even indicate that plaintiff was disciplined as a result of Lins's complaint. (See Am. Nguyen

[3] Although plaintiff now contends that Lins is liable for the § 1981 claim, plaintiff claimed that he was "not contending [a § 1981 violation] for [Lins]" in his response to defendants' special interrogatories. (See Lins Zimmerman Decl. (Docket No. 147) Ex. F.)

Decl. Ex. PP.) Plaintiff accordingly has failed to establish Lins's complaint caused plaintiff's inability to contract.

Second, the Pamatz declaration does not establish that Lins diverted patients from plaintiff. In her declaration, Pamatz states that Lins asked her if she had chosen a pediatrician for her newborn child. (Id. Ex. BB ¶ 6.) Pamatz responded that she "did not have a pediatrician" but would likely bring her child to plaintiff in the future. (Id.) Although Pamatz states Lins provided her a business card and offered that "if she wanted to, she could come see him at his clinic," Lins actions were not in contravention of hospital policy because Pamatz stated that she had not yet chosen a physician for her child. (Id.) Unlike Wy or Kumar, Lins did not interfere with plaintiff's right to contract with Pamatz by assigning her child to his care or disparaging plaintiff, but simply offered his assistance to a patient in the future. Accordingly, plaintiff has not provided sufficient evidence to support a prima facie case of discrimination against Lins because plaintiffs has not shown that Lins denied his ability to make and enforce contracts or engaged in conduct evincing discriminatory intent. See Ennix, 556 F. Supp. 2d at 1085.

4. Wander

Plaintiff has provided admissible evidence of two incidents which he argues establish a prima facie case of discrimination against Wander. In the first incident, Wander complained to the MEC in April 2007 that plaintiff had issues with documentation. (See Am. Nguyen Decl. Ex. MM.) This complaint did not result in disciplinary action by the MEC after

it was noted that only twenty percent of doctors at FRHG followed correct documentation procedure. (Id.) The second incident occurred in July 2008, when Wander sent a letter to Kumar asking him to review the chart of an infant treated by plaintiff because plaintiff allegedly ordered treatment for the infant over the phone without examining him, did not arrive at the hospital to view the patient for over an hour and twenty minutes, and had not recorded a physical exam or progress notes on the patient's health. (Id. Ex. NN.)

Neither of these events support a prima facie case of discrimination against Wander. Plaintiff has presented no evidence that Wander's actions resulted in the denial of his ability to enter into contracts. In fact, plaintiff's evidence explicitly indicates that the first of Wander's two complaints did not result in any disciplinary action by the Medical Executive Committee and does not articulate the result of the second. Since does not appear that any discipline occurred as the result of these complaints, the court cannot say that Wander's actions caused plaintiff to lose his ability to contract for two-year privileges with FRHG. There is also no evidence of discriminatory intent on the part of Wander. Plaintiff accordingly has failed to make a prima facie case of discrimination against Wander because the evidence does not establish that Wander acted to impede plaintiff's ability to contract with either patients or FRHG. See Ennix, 556 F. Supp. 2d at 1085.

5. FRHG

Plaintiff's theory of liability against FRHG for his §

1981 claim is that the doctor defendants were agents of FRHG, thereby making FRHG vicariously liability for the doctor defendants' discriminatory actions. A plaintiff may bring a cause of action against an employer for violations of § 1981 based on vicarious liability.[4] Swinton v. Potomac Corp., 270 F.3d 794, 803 n.3 (9th Cir. 2001). An employer can be held vicariously liable for acts of discrimination under § 1981 if the employee accused of discrimination is a supervisor, "authorized to hire, fire, discipline or promote, or at least participate in or recommend such actions . . . ." Miller v. Bank of Am., 600 F.2d 211, 213 (9th Cir. 1979); see also Swinton, 270 F.3d at 803 (citing Nichols v. Azteca Rest. Enters., 256 F.3d 864, 875 (9th Cir. 2001); Ellison v. Brady, 924 F.2d 872, 876 (9th Cir. 1991)).

Plaintiff has provided no evidence that an agency relationship exists between the doctor defendants and FRHG. To the contrary, FRHG has provided a declaration from Chance White, the Vice President of Quality Management for FRHG, stating that the medical staff is a separate entity from FRHG and that none of the doctor defendants are employees of FRHG. (White Decl. ¶¶ 11.) Without evidence that an employer-employee relationship existed between FRHG and the doctor defendants, FRHG cannot be held vicariously liable for the doctor defendants' allegedly

[4] FRHG cites two cases, Meza v. Lee, 669 F. Supp. 325 (D. Nev. 1987) and Howard v. Topeka-Shawnee County Metropolitan Planning Commission, 578 F. Supp. 534 (D.C. Kan. 1983) for the proposition that actions under § 1981 cannot be premised on vicarious liability. However, these cases both hold that municipalities and municipal entities cannot be held vicariously liable for claims under 42 U.S.C. § 1983. Meza and Howard are inapposite because (1) FRHG is not a municipal entity and (2) plaintiff has not brought a claim under § 1983. See Collins v. City of San Diego, 841 F.2d 337, 340 (9th Cir. 1988).

discriminatory actions. See Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 396-97 (1982) (holding that § 1981 does not impose a nondelegable duty such that an employer can be liable for the discriminatory actions of an independent contractor). Since plaintiff has not provided any evidence of independent conduct by FRHG and has not provided evidence that the doctor defendants were supervisors under the control of FRHG, the court must grant FRHG's motion for summary judgment as to plaintiff's § 1981 claim.

B. Section 1985 Claim

Plaintiff's second cause of action alleges that defendants entered a conspiracy to violate his constitutional rights in violation of 42 U.S.C. § 1985(3). To successfully bring a cause of action under § 1985(3), a plaintiff must prove three elements: "(1) the existence of a conspiracy to deprive the plaintiff of equal protection of the laws; (2) an act in furtherance of the conspiracy and (3) a resulting injury." Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1141 (9th Cir. 2000); see also Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1536 (9th Cir. 1992) (quoting United Bhd. of Carpenters & Joiners of Am. v. Scott, 463 U.S. 825, 828-29 (1983)). Furthermore, the plaintiff must identify the deprivation of a legally protected right motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Griffith v. Breckenridge, 403 U.S. 88, 102 (1971); Sever, 978 F.2d at 1536.

1. The Doctor Defendants

To prove the existence of a conspiracy, "an agreement

or 'meeting of the minds' . . . must be shown." <u>Fonda v. Gray</u>, 707 F.2d 435, 438 (9th Cir. 1983). A meeting of the minds "'can be inferred from conduct and need not be proven by evidence of an express agreement.'" <u>Scott v. Ross</u>, 140 F.3d 1275, 1284 (9th Cir. 1998) (quoting <u>Ward v. EEOC</u>, 719 F.2d 311, 314 (9th Cir. 1983). "A claim of conspiracy, being dependent on questions of intent, may not always be amenable to disposition on summary judgment." <u>Fonda</u>, 707 F.2d at 438.

Plaintiff has provided sufficient evidence such that a jury might find that a conspiracy to discriminate against plaintiff existed among Marks, Wy, and Kumar. Plaintiff submitted evidence that Marks, Wy, and Kumar subjected him to heightened levels of scrutiny and review. Dr. Richard Brouette, a doctor with FRHG privileges, testified in his deposition that the peer review process has been used for improper political purposes in the past. (Am. Nguyen Decl. Ex. W ("Brouette Depo.") at 40:6-25, 48:19-24.) Plaintiff also filed declarations from multiple women stating that Kumar and Wy attempted to prevent plaintiff from being assigned as their child's physician in contravention of hospital policy despite the women's requests to the contrary. (<u>See</u> <u>id.</u> Exs. AA, CC-DD, FF.)

Plaintiff also submits evidence that Kumar allegedly told plaintiff that he "cannot fight <u>us</u>, <u>we</u> will ruin your reputation behind your back, even people who don't know you will hate you" and that "every once and a while <u>we</u> will poke you with a stick to teach you who is in charge around here." (Am. Ndulue Decl. ¶¶ 15-16 (emphasis added).) These statements imply that a group of individuals were acting to harass plaintiff. Kumar's

statements, along with the similarities between Marks, Wy, and Kumar's actions, taken in a light most favorable to plaintiff, could allow a jury to find that a conspiracy existed to discriminate against plaintiff and that Marks, Wy, and Kumar acted in furtherance of this conspiracy. See Scott, 140 F.3d at 1284; Fonda, 707 F.2d at 438. Finally, the court has already indicated that sufficient evidence exists to present a triable issue of fact as to whether Marks, Wy, and Kumar discriminated against plaintiff because of racial animus, thereby bringing the conspiracy within the ambit of § 1985(3).

However, plaintiff has not presented sufficient evidence to allow a finding that Lins, Wander, or Raman were members of such a conspiracy against him. Plaintiff has presented no evidence that Lins, Wander, or Raman actively participated in or assisted the actions of Marks, Wy, or Kumar. There is also not the same high degree of similarity between the actions taken by Lins, Wander, and Raman and those taken by the other doctor defendants such that a reasonable jury could infer that Lins, Wander, or Raman acted as part of the alleged conspiracy. Specifically, plaintiff has not presented evidence that Lins, Wander, or Raman subjected him to abnormally high levels of peer review or diverted patients from him in contravention of hospital policy. As previously noted, plaintiff has not also provided evidence that Raman, Lins, or Wander deprived plaintiff of a legally protected right or were motived by racial animus. Since plaintiff has not presented evidence evincing Lins, Wander, or Raman's participation in a common scheme against plaintiff motivated by racial animus, the court

accordingly must grant their motions for summary judgment on plaintiff's § 1985(3) claim. See Ward, 719 F.2d at 314 (holding a defendant was entitled to summary judgment where plaintiff failed "to point to any facts probative of a conspiracy"); see also Griffith, 403 U.S. at 102; Sever, 978 F.2d at 1536.

2. FRHG

While plaintiff has alleged a § 1985(3) claim against Marks, Wy, and Kumar, he has failed to allege any actions by FRHG that support its involvement in the alleged conspiracy or any acts it took to further this conspiracy. Plaintiff argues that FRHG facilitated the doctor defendants' conspiracy by allowing them to use peer review as a tool against him. However, plaintiff has supplied no evidence to indicate that FRHG had oversight over the peer review process, or was even aware that the defendant doctors were acting improperly. There is no evidence to indicate that there was a "meeting of the minds" between FRHG and the defendant doctors. Although FRHG could be vicariously liable for Marks, Wy, and Kumar's actions if the doctor defendants were its employees, as previously noted, plaintiff has not proffered evidence that the doctor defendants were agents of FRHG. See Scott, 140 F.3d at 1284. Accordingly, the court must grant FRHG's motion for summary judgment on plaintiff's § 1985(3) conspiracy claim. See Mustafa, 157 F.3d at 1181.

C. State Law Claims

Plaintiff's Complaint also pleads claims for interference with prospective business and economic relationships, intentional infliction of emotional distress,

negligent infliction of emotional distress, and violation of California's Unfair Competition Law. Plaintiff's Opposition states that plaintiff "would like to proceed only on [his] First and Second Cause [sic] of Action for racial discrimination." (Opp'n (Docket No. 191) at 10 n.1.) Since plaintiff does not oppose summary judgment on these claims, the court will accordingly grant defendants' motions for summary judgment on plaintiff's third through sixth causes of action.

IT IS THEREFORE ORDERED that Marks, Wy, and Kumar's motions for summary judgment be, and the same hereby are, GRANTED as to plaintiff's claims for interference with prospective business and economic relationships, intentional infliction of emotional distress, negligent infliction of emotional distress, and violation of California's Unfair Competition Law and DENIED in all other respects.

IT IS FURTHER ORDERED that FRHG, Raman, Lins, and Wander's motions for summary judgment be, and the same hereby are, GRANTED.

DATED: June 24, 2010

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE