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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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JUAN ESPINOZA,
Plaintiff,
v.
CITY OF TRACY, R. LEON
CHURCHILL, and DOES 1 through
40 inclusive,
Defendants.

CIV. NO. 2:15-751 WBS KJN
MEMORANDUM AND ORDER RE: MOTION
TO DISMISS

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Plaintiff Juan Espinoza filed this action against the City of Tracy ("the City"), City Chief of Police Gary Hampton, and City Manager R. Leon Churchill, alleging unconstitutional discharge and retaliation under 42 U.S.C. § 1983. (Compl. (Docket No. 1).) Plaintiff has dismissed Hampton from this action. (Docket No. 24.) The City and Churchill (collectively

1 "defendants") are the only remaining defendants. Defendants now
2 move to dismiss plaintiff's Complaint pursuant to Federal Rule of
3 Civil Procedure 12(b)(6). (Defs.' Mot. (Docket No. 22).)

4 I. Factual and Procedural History

5 Plaintiff worked for the City's police department from
6 1995 to July 29, 2013. (Compl. ¶ 1.) In 2009, the City
7 initiated two investigations against plaintiff--one for alleged
8 discrimination, and another for alleged failure to report an in-
9 custody death to the City's Chief of Police. (Id. ¶¶ 18, 20.)
10 Plaintiff "complained formally and informally about the
11 investigation[s]," alleging that the City: (1) "brought false
12 accusations" against him; (2) "refused to surrender
13 investigation, notes, tapes, and other requested materials so
14 [that he] could defend himself"; (3) "destroyed evidence"; (4)
15 "failed to promote [him] to acting Chief" during the
16 investigations despite his becoming the "most senior of all sworn
17 command officers" at that time; and (5) kept his investigations
18 open for more than one year despite "clear [statutory] mandates"
19 that they "be officially closed" after one year. (Id. ¶¶ 18-19,
20 27.) Plaintiff alleges that the City "failed to prove any
21 misconduct" on his part from the investigations. (Id. ¶ 27.)

22 In March 2011, Plaintiff sued the City, Churchill,¹ and
23 other City executives in the California Superior Court, alleging
24 that they violated various provisions of the California Public
25

26 ¹ Churchill was allegedly "one of the primary policy
27 makers for the City" during the time plaintiff was being
28 investigated and responsible for the decision to place plaintiff
on leave. (Compl. ¶ 5, 21, 37.) Plaintiff sues Churchill in his
"individual and official capacities." (Id. ¶ 5.)

1 Safety Officers Procedural Bill of Rights Act ("PBRA") by
2 investigating him, keeping his investigations open for more than
3 one year, and subjecting him to adverse employment action during
4 that time. (See id. ¶¶ 2-3; Defs.' Request for Judicial Notice
5 ("RJN") Ex. 1, State Ct. Compl. (Docket No. 23).²)

6 While the state litigation was ongoing, plaintiff
7 became aware "that a conflict of interest likely existed" as to
8 the City's counsel--Liebert Cassidy Whitmore ("Liebert")--because
9 Liebert was representing the City in the state action while
10 separately engaging in "ex parte communications with [him] about"
11 an unrelated matter that he was working for the City on. (Compl.
12 ¶ 34; RJN Ex. 3, Order Denying Pl.'s Mot. to Disqualify Counsel.)
13 Plaintiff filed a motion to disqualify Liebert from the state
14 case on April 3, 2013. (Compl. ¶ 35.) The day after he filed
15 the motion, the City placed him on indefinite administrative
16 leave. (Id. ¶¶ 36, 39.)

17 After remaining on leave for nearly four months,
18 plaintiff resigned from the Tracy Police Department. (Id. ¶ 54.)
19 Plaintiff dismissed his state action without prejudice on
20 September 3, 2014. (RJN Ex. 6, Request for Dismissal at 1.)

21 On April 6, 2015, plaintiff filed the present action.
22 (Compl.) In contrast to his state action, plaintiff's federal
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24 ² The court takes judicial notice of Exhibits 1 through 9
25 attached to defendants' Request for Judicial Notice, as such
26 documents are on file with the California Superior Court. See
27 U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.,
28 971 F.2d 244, 248 (9th Cir. 1992) (federal courts "may take
notice of proceedings in other courts, both within and without
the federal judicial system, if those proceedings have a direct
relation to matters at issue").

1 action does not raise any PBRA claims. Instead, it brings a 42
2 U.S.C. § 1983 claim, alleging that the City and Churchill
3 violated plaintiff's "First, Fourth, and/or Fourteenth
4 Amendment[]" rights by "discriminati[ng]" against him,
5 "retaliati[ng]" against him, denying him "due process," and
6 denying him "Equal Protection of the Law" during his
7 investigations and the state litigation. (Id. ¶¶ 49-50.)
8 Plaintiff does not allege that he is a member of any protected
9 class, but claims that he was a victim of "nepotism and
10 favoritism permeating the City . . . while Churchill was City
11 Manager." (Id. ¶ 29.) Defendants now move to dismiss
12 plaintiff's Complaint under Rule 12(b)(6). (Defs.' Mot.)

13 II. Legal Standard

14 On a motion to dismiss for failure to state a claim
15 under Rule 12(b)(6), the court must accept the allegations in the
16 pleadings as true and draw all reasonable inferences in favor of
17 the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974),
18 overruled on other grounds by Davis v. Scherer, 468 U.S. 183
19 (1984); Cruz v. Beto, 405 U.S. 319, 322 (1972). To survive a
20 motion to dismiss, a plaintiff must plead "only enough facts to
21 state a claim to relief that is plausible on its face." Bell
22 Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

23 "While a complaint attacked by a Rule 12(b)(6) motion
24 to dismiss does not need detailed factual allegations, a
25 plaintiff's obligation to provide the 'grounds' of his
26 'entitle[ment] to relief' requires more than labels and
27 conclusions" Twombly, 550 U.S. at 555 (citation
28 omitted). "Threadbare recitals of the elements of a cause of

1 action, supported by mere conclusory statements, do not suffice,”
2 and “the tenet that a court must accept as true all of the
3 allegations contained in a complaint is inapplicable to legal
4 conclusions.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

5 The “plausibility” standard, “asks for more than a
6 sheer possibility that a defendant has acted unlawfully,” and
7 where a plaintiff pleads facts that are “merely consistent with a
8 defendant’s liability,” the facts “stop[] short of the line
9 between possibility and plausibility.” Id. (quoting Twombly, 550
10 U.S. at 557). “[D]etermining whether a complaint states a
11 plausible claim is context-specific, requiring the reviewing
12 court to draw on its experience and common sense.” Id. at 663–64
13 (citing Twombly, 550 U.S. at 556).

14 III. Discussion

15 Section 1983 “provides a cause of action against any
16 person who, under color of state law, deprives an individual of
17 federal constitutional rights.” Suit v. City of Folsom, No.
18 2:16-00807 WBS AC, 2016 WL 4192437, at *2 (E.D. Cal. Aug. 8,
19 2016).

20 With respect to plaintiff’s Fourth Amendment claim, the
21 Complaint makes no mention of any search, seizure, or invasion of
22 privacy that took place at any time during plaintiff’s
23 investigations or at any other time. Plaintiff alleges that the
24 City brought false accusations against him and kept his
25 investigations open for longer than it should have, but such
26 allegations do not in themselves suggest that there was a search,
27 seizure, or invasion of plaintiff’s privacy. Accordingly,
28 plaintiff has not stated a Fourth Amendment claim.

1 Plaintiff's First Amendment claim is also deficient.
2 To state a First Amendment claim in the public employment
3 context, a public employee must allege that he "spoke on a matter
4 of public concern." Karl v. City of Mountlake Terrace, 678 F.3d
5 1062, 1068 (9th Cir. 2012). "To address a matter of public
6 concern, the content of the . . . speech must involve 'issues
7 about which information is needed or appropriate to enable the
8 members of society to make informed decisions about the operation
9 of their government.'" Desrochers v. City of San Bernardino, 572
10 F.3d 703, 710 (9th Cir. 2009) (internal citation omitted).
11 "[S]peech that deals with 'individual personnel disputes and
12 grievances' and that would be of 'no relevance to the public's
13 evaluation of the performance of governmental agencies' is
14 generally not of 'public concern.'" Id. (internal citation
15 omitted).

16 The "public concern" requirement applies in both
17 employment speech cases and in cases where the employee seeks
18 First Amendment protection for bringing litigation against his
19 employer. Rendish v. City of Tacoma, 123 F.3d 1216, 1220 (9th
20 Cir. 1997) ("[A] public employee's litigation must involve a
21 matter of public concern in order to be protected by either the
22 Petition Clause or the Speech Clause of the First Amendment.").

23 Plaintiff alleges that defendants violated his First
24 Amendment rights by denying him a promotion and placing him on
25 administrative leave after he brought state court litigation
26 against the City for its handling of his investigations. (Compl.
27 ¶ 25-26, 40, 47.) The subject matter of plaintiff's state court
28 litigation, however, does not concern any "issues about which

1 information is needed or appropriate to enable the members of
2 [the public] to make informed decisions about the operation of
3 their government." Instead, it concerns only plaintiff's
4 personal disagreement with how the City and Churchill handled his
5 investigations and treated him while the investigations were
6 ongoing. Because these issues amount only to "individual
7 personnel disputes and grievances," they do not constitute
8 protected speech under the First Amendment. Plaintiff may well
9 have valid retaliation claims under other provisions of state or
10 federal law, but he has not raised those provisions here.

11 Plaintiff also alleges that defendants violated his
12 First Amendment rights by placing him on leave after he brought a
13 motion to disqualify Liebert from the state court litigation.
14 (Id. ¶ 47.) He argues that the motion was protected speech
15 because it "address[ed] the integrity of the legal profession, a
16 matter of public concern." (Pl.'s Opp'n at 9 (Docket No. 26).)
17 It is evident from plaintiff's Complaint, however, that the
18 motion was brought as part of a litigation strategy to hamper the
19 City's defense in the state court case. The Complaint mentions
20 nothing about the public's interest in connection with the
21 motion. That the motion was brought under the California Rules
22 of Professional Conduct, which makes a reference to "protect[ing]
23 the public," see CA ST RPC Rule 1-100(A), is unavailing. See
24 Desrochers, 572 F.3d at 711 ("[T]he fact that speech contains
25 passing references to public safety[,] incidental to the message
26 conveyed weighs against a finding of public concern." (internal
27 citation omitted)). Accordingly, plaintiff's 'motion'
28 allegations fail to amount to a First Amendment claim as well.

1 Plaintiff's Fourteenth Amendment claim is vague and
2 difficult to decipher. It appears to be based on the same
3 adverse employment actions that plaintiff bases his First
4 Amendment claim on: denial of a promotion during his
5 investigations, and placement on administrative leave after he
6 brought state court litigation against defendants. Plaintiff
7 alleges two violations of the Fourteenth Amendment: an equal
8 protection violation and a substantive due process violation.
9 (Compl. ¶¶ 49, 50.)

10 "To state a claim under 42 U.S.C. § 1983 for a
11 violation of the Equal Protection Clause of the Fourteenth
12 Amendment a plaintiff must show that the defendants acted with an
13 intent or purpose to discriminate against the plaintiff based
14 upon membership in a protected class." Barren v. Harrington, 152
15 F.3d 1193, 1194 (9th Cir. 1998). Plaintiff has not alleged
16 membership in any protected class. His Complaint merely states
17 that he "was subjected to selective enforcement of the
18 disciplinary process" due to "nepotism and favoritism permeating
19 the City." (Compl. ¶¶ 27, 29.) He cites no case, and the court
20 is not aware of any case, holding that "nepotism and favoritism"
21 give rise to an equal protection claim. See Lanier v. Fresno
22 Unified Sch. Dist., No. 1:09-CV-1779 AWI SKO, 2014 WL 346561, at
23 *6 (E.D. Cal. Jan. 30, 2014) ("42 U.S.C. § 2000d . . . protects
24 only against those forms of bias that are prohibited by the
25 Fourteenth Amendment. Thus there is no protection under section
26 2000d for bias arising from nepotism, personal preference,
27 familiarity or friendship."). Accordingly, plaintiff has not
28 stated an equal protection claim.

1 “To establish a substantive due process claim, a
2 plaintiff must, as a threshold matter, show a government
3 deprivation of life, liberty, or property.” Nunez v. City of Los
4 Angeles, 147 F.3d 867, 871 (9th Cir. 1998). “[T]he absence of
5 any claim by the plaintiff that an interest in liberty or
6 property has been impaired is a fatal defect in [his] substantive
7 due process argument.” Id. (quoting Jeffries v. Turkey Run
8 Consol. Sch. Dist., 492 F.2d 1, 4 (7th Cir. 1974)). The Ninth
9 Circuit has held that “expectancy in a promotion [is not] a
10 property interest” unless it is guaranteed “from an independent
11 source such as state law.” Id. at 872. “Until someone actually
12 receives a promotion, or at least a binding assurance of a
13 forthcoming promotion, he cannot claim a property interest in the
14 promotion.” Id. at 873.

15 Plaintiff alleges that the City “failed to promote
16 [him] to acting Chief” during his investigations despite the fact
17 that he had become the “most senior of all sworn command
18 officers” during that time. (Compl. ¶¶ 19, 30.) This failure,
19 according to plaintiff, was “in violation of past practice.”
20 (Id. ¶ 19.) “Past practice,” however, is not sufficient to
21 establish a property interest under Ninth Circuit precedent. See
22 Nunez, 147 F.3d at 873. Plaintiff cites no statute, regulation,
23 or contractual term entitling him to a promotion once he became
24 the most senior officer. The court is not aware of any such
25 statute, regulation, or term. See id. at 872 (“In California,
26 the terms and conditions of public employment are generally fixed
27 by the statute, rules or regulations creating it, not by contract
28 (even if one is involved). No such law creates a property

1 interest in a promotion." (internal citations and quotation marks
2 omitted)). Accordingly, plaintiff has not stated a claim that
3 the City violated his Fourteenth Amendment rights by failing to
4 promote him during his investigations.

5 Plaintiff may have a property interest in his job as a
6 police officer, however. See id. at 871 ("[O]ne's actual job as
7 a tenured civil servant is property."); see also Dorr v. Butte
8 Cty., 795 F.2d 875, 876 (9th Cir. 1986) ("Under California law, a
9 'permanent employee,' dismissible only for cause, has 'a property
10 interest in his continued employment which is protected by due
11 process.'" (quoting Skelly v. State Pers. Bd., 15 Cal. 3d 194,
12 207-08 (1975))). He alleges that the City deprived him of that
13 interest when it placed him on indefinite administrative leave,
14 thus constructively terminating him. (Compl. ¶ 40.)

15 Even assuming that defendants deprived plaintiff of a
16 property interest by constructively terminating him, plaintiff
17 has not alleged that the deprivation occurred without due
18 process. The "essential principle of due process is that a
19 deprivation of life, liberty, or property 'be preceded by notice
20 and opportunity for hearing appropriate to the nature of the
21 case.'" Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542
22 (1985) (quoting Mullane v. Central Hanover Bank & Trust Co., 339
23 U.S. 306, 313 (1950)). "[A] public employee with a property
24 interest in his continued employment must be provided with 'oral
25 or written notice of the charges against him, an explanation of
26 the employer's evidence, and an opportunity to present his side
27 of the story.'" Walls v. Cent. Contra Costa Transit Auth., 653
28 F.3d 963, 968 (9th Cir. 2011) (quoting Cleveland Bd. Of Educ.,

1 470 U.S. at 546). The hearing for termination of public
2 employment "need not be elaborate." Id. So long as the
3 "individual [has] the opportunity to be heard before he is
4 deprived" of his job, the employer has satisfied the "root"
5 requirement of due process. Id.

6 Plaintiff does not allege that he was denied notice or
7 opportunity to be heard before he resigned from the Tracy Police
8 Department. To the contrary, his Complaint alleges that the City
9 notified him that he was being placed on leave because he
10 disclosed, in his motion to disqualify, "confidential material
11 pertaining to two, other peace officers."³ (Compl. ¶ 37.) The
12 Complaint also alleges that while "[o]n indefinite suspension,
13 Plaintiff proceeded through the [City's] administrative process,"
14 indicating that he availed himself of the City's grievance
15 procedure before resigning. (Compl. ¶ 39.) That the City placed
16 plaintiff on leave before providing him a hearing is not itself a
17 violation of due process. See Abel v. City of Algona, 348 F.
18 App'x 313, 315 (9th Cir. 2009) (declining to find "due process
19 right to a hearing before [police officers] are put on leave");
20 Dias v. Elique, 436 F.3d 1125, 1132 (9th Cir. 2006) (holding the
21 same). Accordingly, plaintiff has not stated a claim that the
22 City violated his Fourteenth Amendment rights by placing him on

23
24 ³ Plaintiff states that the reason given for his
25 suspension was "pre-textual." (Compl. ¶ 58.) That the reason
26 may have been pre-textual, however, does not change the fact that
27 the City gave him notice. And, as explained supra, the other
28 reasons plaintiff cites for the City's hostility towards him--
favoritism, nepotism, and retaliation for his suing the City over
personal concerns--do not trigger constitutional protections.
They may trigger protections under other provisions of state or
federal law, but plaintiff has not raised such provisions here.

1 administrative leave.

2 For the reasons discussed above, the court will dismiss
3 plaintiff's Complaint without prejudice.

4 IT IS THEREFORE ORDERED that defendants' Motion to
5 dismiss plaintiff's Complaint be, and the same hereby is,
6 GRANTED. Plaintiff's Complaint is DISMISSED WITHOUT PREJUDICE.

7 Plaintiff has twenty days from the date this Order is
8 signed to file an amended complaint, if he can do so consistent
9 with this Order.

10 Dated: November 15, 2016



11 WILLIAM B. SHUBB
12 UNITED STATES DISTRICT JUDGE
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