

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

AARON C. STEVENSON, et al.,
Plaintiffs,
v.
THE CITY AND COUNTY OF SAN
FRANCISCO, et al.,
Defendants.

No. C-11-4950 MMC

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

Before the Court is the "Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment," filed August 7, 2015, by defendants City and County of San Francisco, San Francisco Fire Department, San Francisco Fire Commission, and Civil Service Commission of San Francisco (collectively, "the City"). Plaintiffs Aaron C. Stevenson ("Stevenson"), Kevin D. Taylor ("Taylor"), Kevin W. Smith ("Smith"), Audry Lee ("Lee") and Kirk W. Richardson ("Richardson") have filed opposition, to which the City has replied. Further, with leave of court, plaintiffs have filed a surreply. Having read and considered the papers filed in support of and in opposition to the motion, the Court deems the matter suitable for decision thereon,¹ and rules as follows.

//

¹The Court took the motion under submission as of December 18, 2015. (See Order, filed December 10, 2015, at 3:12-13.)

1 **BACKGROUND**

2 Plaintiffs, each of whom is African-American and employed or formerly employed by
3 the City in its Fire Department, challenge various employment decisions by the City as
4 discriminatory or retaliatory. On behalf of each said plaintiff, plaintiffs challenge the City’s
5 use of a particular examination that was given for the purpose of creating a list of persons
6 eligible for promotion to the position of H-50 Assistant Chief, as well as the City’s use of
7 that list to promote persons other than plaintiffs. Plaintiffs also challenge the City’s decision
8 not to promote Taylor and Smith to certain other positions. Additionally, plaintiffs allege
9 that Stevenson and Lee were constructively discharged, that Stevenson and Smith were
10 improperly disciplined for rules violations or other conduct at the workplace, that Taylor and
11 Smith were subjected to improper investigations into certain workplace activities, and that
12 Smith was improperly denied a transfer and given a negative evaluation. In each instance,
13 plaintiffs allege that the challenged decisions by the City violated Title VII and the Fair
14 Employment and Housing Act (“FEHA”), and, as to certain of the challenged acts, 42
15 U.S.C. § 1981 and 42 U.S.C. § 1983 as well.

16 **LEGAL STANDARD**

17 Pursuant to Rule 56 of the Federal Rules of Civil Procedure, a “court shall grant
18 summary judgment if the movant shows that there is no genuine dispute as to any material
19 fact and the movant is entitled to judgment as a matter of law.” See Fed. R. Civ. P. 56(a).

20 The Supreme Court’s 1986 “trilogy” of Celotex Corp. v. Catrett, 477 U.S. 317 (1986),
21 Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electric Industrial Co.
22 v. Zenith Radio Corp., 475 U.S. 574 (1986), requires that a party seeking summary
23 judgment show the absence of a genuine issue of material fact. Once the moving party
24 has done so, the nonmoving party must “go beyond the pleadings and by [its] own
25 affidavits, or by the depositions, answers to interrogatories, and admissions on file,
26 designate specific facts showing that there is a genuine issue for trial.” See Celotex, 477
27 U.S. at 324 (internal quotation and citation omitted). “When the moving party has carried
28 its burden under Rule 56[], its opponent must do more than simply show that there is

1 some metaphysical doubt as to the material facts.” Matsushita, 475 U.S. at 586. “If the
2 [opposing party’s] evidence is merely colorable, or is not significantly probative, summary
3 judgment may be granted.” Liberty Lobby, 477 U.S. at 249-50 (citations omitted).
4 “[I]nferences to be drawn from the underlying facts,” however, “must be viewed in the light
5 most favorable to the party opposing the motion.” See Matsushita, 475 U.S. at 587
6 (internal quotation and citation omitted).

7 **DISCUSSION**

8 The City argues it is entitled to summary judgment on each of plaintiffs’ claims,
9 which claims, as stated above, are based on a number of allegedly adverse employment
10 acts. The Court considers in turn each such act and, in particular, whether the City is
11 entitled to summary judgment on the claims alleged by plaintiffs with respect thereto.

12 **A. H-50 Examination and Subsequent Failures to Promote**

13 Plaintiffs challenge the examination given by the City in 2010 for the position of H-50
14 Assistant Chief; plaintiffs also challenge the City’s subsequent use of the results of that
15 examination to fill positions.

16 **1. Facts²**

17 In 2009, the City decided to conduct an examination for the H-50 Assistant Chief
18 position in the Fire Department. (See Hayes-White Decl. ¶ 6; Randle Decl. Ex. A at 44:13-
19 17.) In connection therewith, the City first conducted a “job analysis” (see Randle Decl. Ex.
20 A at 46:16-18), in which the City used Art Kenney (“Assistant Chief Kenney”), “the only
21 incumbent permanent Assistant Chief,” as the “Subject Matter Expert (SME)” (see Johnson
22 Decl. ¶ 11), after which the City’s Department of Human Resources (“DHR”) staff designed
23 the test in “consult[ation]” with Assistant Chief Kenney and with Patrick Gardner (“Deputy
24 Chief Gardner”), the Fire Department’s Deputy Chief of Operations, who supervised the
25 Assistant Chiefs (see id. ¶¶ 5, 15-16). The examination was given in 2010. (See Hayes-
26 White Decl. ¶ 6.) Twenty-three persons, including each plaintiff, took the examination.

27
28 ²The facts set forth in this section, and all further factual statements, are either undisputed or stated in the light most favorable to plaintiffs.

1 (See Johnson Decl. ¶¶ 22, 35, Ex. G.) At that time, Stevenson and Lee each held the
2 position of H-50 Assistant Chief on a “provisional” or “acting” basis (see Hayes-White Decl.
3 ¶¶ 4, 18; Stevenson Decl. ¶¶ 87-89), and the remaining three plaintiffs, Smith, Richardson,
4 and Taylor, each held the position of H-40 Battalion Chief (see Smith Dec. ¶ 4; Richardson
5 Decl. ¶ 4; Taylor Decl. ¶ 5).

6 The first component of the examination was given on August 8, 2010, specifically,
7 the “fire scene simulation exercise” (“FSSE”). (See Randle Decl. Ex. D at 13, 18, 20.) The
8 candidates were given “four different scenarios,” one of which, for example, was a “high
9 rise scenario” (see id. Ex. D at 18); as to each scenario, the candidates were provided with
10 certain “written and visual information,” such as “photos of the fire building,” and each
11 scenario was presented to the candidate “via a recorded audio narration.” (See id.) Each
12 candidate “responded orally to the questions,” the responses were “recorded via digital
13 recorder” (see id.), and a “verbatim transcription of the candidate’s verbal responses to the
14 test questions” was prepared (see id. Ex. D at 24). On October 30, 2010, the candidates
15 took the second component of the examination, specifically, the “supervision and
16 counseling exercise” (“S/PCE”). (See id. Ex. D at 13, 19-20.) In the first step of that
17 exercise, a “role-play,” each candidate played the role of “an Assistant Chief, counseling a
18 Battalion Chief,”³ which role-play was “recorded using a video camcorder”; in the second
19 step of the exercise, each candidate “document[ed] the meeting” in writing.” (See id. Ex. D
20 at 19.)

21 For both exercises, a committee met to “develop the answer (aka scoring) key” (see
22 id. Ex. D at 20), and the scoring keys developed were used during the rating process.⁴ The
23 responses to the FSSE were rated by a team of two, each of whom first made an
24 “independent assessment” after reviewing a “transcription of the candidate’s verbal

25
26 ³The “Battalion Chiefs” were “actors trained to perform the role.” (See id. Ex. D at
20.)

27 ⁴The individuals who rated the responses to the FSSE and S/PCE were “Fire officers
28 in the rank of Battalion Chief or higher from jurisdictions outside San Francisco.” (See id.
Ex. D at 23.)

1 responses to the test questions,” (see id. Ex. D at 23-24), after which the two raters “would
2 confer and reach [a] consensus on the assigned ratings” (see id. Ex. D at 24), and then
3 record the consensus score on a form (see Johnson Decl. ¶ 33). The S/PCE raters
4 “evaluated the counseling session by viewing and listening to the video recording, and
5 evaluated the written documentation of the meeting.” (See id.)⁵

6 Thereafter, each candidate’s score was calculated by the DHR, based on the
7 numbers set forth on the forms completed by the raters. (See id. ¶¶ 2, 35.) Specifically, the
8 DHR “weighted” the “[r]aw scores” and then “converted” the raw scores “to a score on a
9 700-1000 point scale for presentation on [a] candidate eligible list.” (See id. ¶ 35.) Lee
10 scored less than 700 and was not placed on the “eligible list.” (See id.) The remaining 22
11 applicants, including Smith, Taylor, Richardson and Stevenson, were included on the
12 eligible list; Smith, Taylor, Richardson and Stevenson ranked, respectively, 13, 20, 21, and
13 22. (See id. Ex. G.)

14 On December 20, 2010, the H-50 eligible list was “post[ed]” (see id. ¶ 41, Ex. G),
15 and was in effect until January 2015 (see Hayes-White Decl. ¶ 15). During the period of
16 time when the list was in effect, the Fire Department was prohibited by “Civil Service Rules”
17 from filling an H-50 position other than by use of the list. (See id. ¶ 17.) In conformity
18 therewith, the Chief of the Fire Department, Joanne Hayes-White (“Chief Hayes-White”)
19 announced that “effective January 21, 2011, H-50 provisional and acting assignments
20 [would] be rescinded” (see id. Ex. E), and that persons holding such assignments would
21 “revert” to the position they last held on a permanent basis, which, in the case of Stevenson
22 and Lee, was H-40 Battalion Chief (see id. ¶ 18).

23 On January 22, 2011, Stevenson and Lee retired. (See Rolnick Decl. Ex. 6 at 58:2-
24 4, Ex. 8 at 217:20-24.) Also, on January 22, 2011, Chief Hayes-White “assigned the first
25 four candidates on the H-50 list, David Franklin, Kevin Burke, Thomas Siragusa, and
26 Matthew McNaughton, to acting assignments as H-50 Assistant Chiefs” (see Hayes-White

27
28 ⁵Neither party cites any evidence addressing what other steps were taken by the
persons who rated the S/PCE.

1 Decl. ¶ 18), and those promotions became “permanent” on June 11, 2011 (see id. ¶ 19). In
2 July 2011, Chief Hayes-White promoted Tom Siragusa to a different position, and then
3 “assign[ed] Michael Morris, the sixth ranked candidate on the list, as an acting H-50
4 Assistant Chief . . . in place of Tom Siragusa.” (See id. ¶ 22.)⁶ Lastly, on September 7,
5 2011, Chief Hayes-White appointed Robert Postel, who ranked fifth on the eligible list, to a
6 “permanent civil service H-50 Assistant Chief’s position.” (See id. ¶ 21.) David Franklin,
7 Kevin Burke, Thomas Siragusa, Matthew McNaughton, Michael Morris and Robert Postel
8 are “Causasian.” (See Rolnick Decl. Ex. 21 at 10.)

9 **2. Disparate Impact Claims: All Plaintiffs**

10 The Third and Fourth Causes of Action, in which plaintiffs allege, respectively,
11 violations of Title VII and FEHA, include a disparate impact claim based on the City’s use of
12 the examination results to create the eligible list and the City’s subsequent use of the
13 eligible list.

14 **a. Timeliness: Stevenson and Lee**

15 The City argues that Lee’s disparate impact claims are untimely and that
16 Stevenson’s disparate impact claims, to the extent based on challenges to the promotions,
17 likewise are untimely.

18 Title VII and FEHA claims are both subject to two separate statutes of limitations,
19 the first pertaining to when a charge must be submitted to the applicable administrative
20 agency, and the second pertaining to when, after the conclusion of the administrative
21 proceedings, the plaintiff must file a complaint.

22 As to the first limitations period, a Title VII claim is barred if the plaintiff does not
23 submit a charge to the Equal Employment Opportunity Commission (“EEOC”) within 300
24 days of the act of alleged discrimination, see 42 U.S.C. § 2000e–5(e)(1), and a FEHA
25 claim is barred if the plaintiff does not submit a charge to the Department of Fair

26
27 ⁶Michael Morris was employed as an H-50 Assistant Chief until January 2012, when
28 he was promoted to another position. (See id.) The parties do not state whether the H-50
position he vacated was thereafter filled by another individual.

1 Employment and Housing (“DFEH”) within 365 days of the act of alleged discrimination,
2 see Cal. Gov’t Code § 12960(d). As to the second limitations period, a Title VII claim is
3 barred if the plaintiff does not file a complaint within ninety days of the date of the plaintiff’s
4 receipt from the EEOC of a “right-to-sue” letter, see Scholar v. Pacific Bell, 963 F.2d 264,
5 266-67 (9th Cir. 1992) (citing 42 U.S.C. § 2000e-5(f)(1)), and a FEHA claim is barred if the
6 plaintiff does not file a complaint within one year of receiving a right-to-sue letter from the
7 DFEH or within ninety days of receipt from the EEOC of a right-to-sue letter, whichever
8 date is later, see Cal. Gov’t Code § 12965(d)(2).

9 In determining whether a discrimination claim is timely, a court must first “identify[]
10 precisely the unlawful employment practice of which [the plaintiff] complains.” See Lewis v.
11 City of Chicago, 560 U.S. 205, 210-11 (2010) (internal quotation, alteration, and citation
12 omitted). Where, as here, a plaintiff asserts an examination has a disparate impact on a
13 protected class, the plaintiff may challenge the employer’s decision to use the results to
14 create an eligibility list, see id. at 213-24, and/or may challenge the employer’s
15 “implement[ation] [of] that decision down the road,” see id. at 214, i.e., the employer’s “use
16 of [the list] in selecting candidates,” see id. at 213.

17 Here, the FAC alleges disparate impact claims based on both the City’s adoption of
18 the eligible list and the City’s subsequent use thereof (see FAC ¶¶ 47, 51, 62, 151, 155),
19 and plaintiffs, in their opposition, confirm that such claims are raised on behalf of all
20 plaintiffs, including Lee and Stevenson (see Pls.’ Opp. at 7:26 - 8:1). Having identified the
21 practices alleged by Lee and Stevenson as having a disparate impact, the Court next
22 considers the City’s argument that their disparate impact claims are barred by the
23 applicable statutes of limitations.

24 (1) Lee

25 Lee submitted two administrative charges, the first of which was submitted on
26 January 3, 2011. (See Randle Decl. Ex. N, Tab 2 at 1-2.) In said charge, he asserted that,
27 as “an African-American male,” he was “discriminated against (disparate impact and
28 //

1 disparate treatment)”⁷ because the FSSE component of the “promotional examination for
2 the rank of H-50 Assistant Chief” was “not representative of the duties of an H-50 Assistant
3 Chief” and the S/PCE component was “not job related.” (See id. Ex N, Tab 2 at 2.) As no
4 promotions had been made as of the time the charge was submitted, the Court construes
5 the charge as asserting a claim based on the City’s use of the examination results to create
6 the eligible list.

7 The City argues the claim asserted in Lee’s first charge is barred, because, after he
8 received respective right-to-sue letters from the two agencies, he filed his Title VII and
9 FEHA claims after the applicable limitations periods had expired. In support thereof, the
10 City correctly notes that Lee received a right-to-sue letter from the DFEH on January 19,
11 2011 (see Rolnick Decl. Ex. 8 at 216:7-9), and that he filed his Title VII and FEHA claims
12 on May 30, 2012.⁸ Consequently, a disparate impact claim based on the allegation in Lee’s
13 first charge is time-barred if Lee received his right-to-sue letter from the EEOC more than
14 ninety days prior to May 30, 2012. See 42 U.S.C. § 2000e-5(f)(1); Cal. Gov’t Code
15 § 12965(d)(2). As plaintiffs point out, however, the City offers no evidence to show when
16 Lee received a right-to-sue letter from the EEOC,⁹ and, consequently, the City has failed to
17 meet its initial burden to show the disparate impact claim asserted in Lee’s first charge is
18 time-barred. See Payan v. Aramark Management Services Ltd. Partnership, 495 F.3d
19 1119, 1122-23 (9th Cir. 2007) (holding defendant seeking summary judgment on ground
20 plaintiff filed Title VII claim more than ninety days after receipt of right-to-sue letter “bears
21 the burden of proving that the plaintiff filed beyond the limitations period”; finding defendant

23 ⁷Lee also asserted he was subjected to “age” discrimination. (See id. Ex. N, Tab 2
24 at 1.) In the instant action, Lee does not allege an age discrimination claim.

25 ⁸The initial complaint was filed on October 6, 2011. Lee, however, did not become a
26 party until May 30, 2012, when plaintiffs filed their FAC.

27 ⁹The City contends that Lee received a right-to-sue letter from the EEOC “in July
28 2011,” and, to support such assertion, cites “Lee Depo. 216:7-19.” (See Defs.’ Mot. at
14:10-11.) In the cited excerpt, however, Lee testified that he received a right-to-sue letter
from the DFEH dated January 19, 2011, but does not state when he received a right-to-sue
letter from the EEOC. (See Rolnick Decl. Ex. 8 at 216:7-19.)

1 met initial burden where, inter alia, it “offered proof of the right-to-sue letter,” from which
2 “date of receipt” could be calculated).

3 In Lee’s second charge, submitted on February 4, 2012 (see Randle Decl. Ex. N,
4 Tab 2 at 4), he asserted that, as an “African-American male,” he was “discriminated against
5 (disparate impact and disparate treatment)” because the “H-50 Promotional Examination
6 [was] flawed, as it [was] neither valid, job related or reliable” (see id. Ex N, Tab 2 at 5); he
7 further stated that the “latest” challenged “discriminatory” practice occurred on September
8 7, 2011 (see id. Ex. N, Tab 2 at 4). As September 7, 2011, is the last date on which Chief
9 Hayes-White used the list to promote an individual to an H-50 Assistant Chief position (see
10 Hayes-White Decl. ¶ 21), the Court construes the second claim as asserting disparate
11 impact claims based on the City’s use of the list.

12 The City argues the disparate impact claim asserted in Lee’s second charge is
13 untimely because the second charge was submitted to the EEOC and DFEH more than a
14 year after January 22, 2011, the date on which he retired. Plaintiffs, however, do not allege
15 a disparate impact claim based on Lee’s retirement, and, as plaintiffs point out, the City
16 fails to identify the relevance thereof. Consequently, as the second charge was submitted
17 within 300 days of the first challenged promotion,¹⁰ the Court finds the disparate impact
18 claim asserted in Lee’s second charge is not barred by the statute of limitations.¹¹

19 **(2) Stevenson**

20 Stevenson submitted his first of two administrative charges on January 3, 2011,

21 //

22 //

23 //

24 _____
25 ¹⁰The earliest promotion challenged by Lee, as well as by the other plaintiffs,
occurred on May 17, 2011. (See FAC ¶ 51.)

26 ¹¹Given that Lee retired prior to the date on which the earliest challenged promotion
27 occurred, it is not clear how the challenged promotions would constitute independent
28 wrongs committed by the City against Lee. As the City’s argument is that Lee’s disparate
impact claim is untimely, however, the Court does not further address herein such
additional issue.

1 which submission the City does not argue was untimely.¹²

2 Stevenson submitted his second administrative charge on February 14, 2012.
3 Stevenson's second charge, like Lee's second charge, asserts that the H-50 examination
4 was "flawed, as it [was] neither valid, job related or reliable" (see Randle Decl. Ex N, Tab 3
5 at 7), and states the "latest" challenged "discriminatory" practice occurred on September 7,
6 2011 (see id. Ex. N, Tab 3 at 6), i.e., the date on which the last challenged promotion
7 occurred. The City argues the second charge is untimely, as it was submitted more than
8 one year after January 22, 2011, the date on which Stevenson, like Lee, retired. For the
9 reasons stated above with respect to Lee, the Court finds the City's argument
10 unpersuasive; specifically, the City has failed to show the relevance of Stevenson's
11 retirement date, and the second charge was submitted within 300 days of the first
12 challenged promotion.

13 **b. Merits: All Plaintiffs**

14 To establish a racial discrimination claim under a disparate impact theory, the
15 plaintiff has the initial burden to "establish[] a prima facie violation by showing that an
16 employer use[d] a particular employment practice that cause[d] a disparate impact on the
17 basis of race," see Ricci v. DeStefano, 557 U.S. 557, 578 (2000) (internal quotation and
18 citation omitted); a prima facie case is, "essentially, a threshold showing of a significant
19 statistical disparity," see id. at 587. If the plaintiff meets his initial burden, the employer
20 "may defend against liability by demonstrating that the practice is job related for the
21 position in question and consistent with business necessity." See id. at 578 (internal
22 quotation and citation omitted). Lastly, if the employer meets its burden, "a plaintiff may still
23 succeed by showing that the employer refuses to adopt an available alternative

24
25 ¹²In his first charge, Stevenson, like Lee, asserted that, as "an African-American
26 male," he was "discriminated against (disparate impact and disparate treatment)" because
27 the FSSE component of the "promotional examination for the rank of H-50 Assistant Chief"
28 was "not representative of the duties of an H-50 Assistant Chief" and the S/PCE component
was "not job related" (see Randle Decl. Ex N, Tab 3 at 1-2); Stevenson additionally
asserted the "candidate's list was posted on December 20, 2010" (see id. Ex. N. Tab 3 at
3). The Court construes Stevenson's first charge as asserting a claim based on the City's
use of the examination results to create the eligible list.

1 employment practice that has less disparate impact and serves the employer's legitimate
2 needs." See id.; see also Guz v. Bechtel Nat'l, Inc., 24 Cal. 4th 317, 378 (2000) (holding
3 "California courts look to pertinent federal precedent when applying [FEHA]").

4 (1) Significant Statistical Disparity

5 As set forth above, plaintiffs have the initial burden to show a "significant statistical
6 disparity." See Ricci, 557 U.S. at 587.

7 The City, relying on its expert, Christopher Haan, Ph.D. ("Dr. Haan"), contends
8 plaintiffs cannot make the requisite showing. In particular, Dr. Haan opines that "[t]here is
9 no statistical evidence to support the allegation that the [City] promoted White candidates to
10 H-50 Assistant Chief [positions] at a different rate than African-American candidates based
11 on the 2010 H-50 Assistant Chief promotional examination." (See Rolnick Decl. Ex. 17 ¶
12 25.) In their opposition, plaintiffs rely on their expert, Arthur Gutman, Ph.D. ("Dr. Gutman"),
13 who states, "[I]t is my opinion that with a high degree of scientific certainty, the promotion
14 test for the H-50 Assistant Chief position had an adverse impact on Black applicants." (See
15 Randle Decl. Ex. 4 at 17.) The primary reason for the experts' divergent opinions is that
16 the experts employed different testing methods.¹³ Dr. Haan used the "Fisher's Exact" test,
17 the results of which, he states, show no significant statistical disparity (see Rolnick Decl.
18 Ex. 18 at 14), while Dr. Gutman used the "Chi Square" test, the results of which, he states,
19 do show a significant statistical disparity (see Randle Decl. Ex. 4 at
20 14).¹⁴

22 ¹³The discrepancy is also due in part to the experts' use of different variables. In
23 that regard, Dr. Haan's opinion is based on the assumption that the City promoted five
24 individuals to H-50 positions, while Dr. Gutman's opinion is based on the City's having
25 promoted six persons to H-50 positions; specifically, the two experts disagree as to whether
26 the individual who was promoted to the H-50 position that became vacant in July 2011
27 should be counted. Additionally, Dr. Haan's opinion is based on an assumption that four
28 African-Americans were eligible for promotion, while Dr. Gutman assumes there were five
African-Americans so eligible; specifically, the experts disagree as to whether plaintiff Lee
should be included.

¹⁴Dr. Gutman also performed an analysis using the Fisher's Exact test, the results of
which he acknowledged "fall[] just barely short" of showing a statistically significant
disparity. (See id.)

1 The Court finds a triable issue of fact exists as to whether the H-50 examination had
2 a disparate impact on African-Americans. Indeed, a triable issue is illustrated in Dr. Haan's
3 rebuttal report, in which he acknowledges that the results of the Chi Square test show a
4 significant statistical disparity, while the results of the Fisher's Exact test do not (see
5 Rolnick Decl. Ex. 18 at 12), thus presenting a triable issue as to "[w]hich statistical method
6 [is] the most reliable and accurate." See Klein v. Secretary of Transportation, 807 F. Supp.
7 1517, 1522-24 (E.D. Wash. 1992) (observing that, where plaintiff's experts relied on results
8 of "Chi Square test" to opine that employer's selection device had disparate impact on
9 persons over age of fifty whereas defendant's expert relied on results of "Fisher's Exact
10 Test" to opine that device had no such impact, triable issue was presented; concluding,
11 after conducting bench trial, plaintiff established requisite impact).¹⁵

12 Accordingly, as the City has not shown plaintiffs are unable to establish the
13 existence of a significant statistical disparity, the Court next considers whether the City has
14 shown it is undisputed that the H-50 examination was valid and job-related. See Ricci, 557
15 U.S. at 578; see also Albemarle Paper Co. v. Moody, 422 U.S. 405, 430-31 (1975)
16 (discussing use of "validation studies" to determine whether "employment tests are job
17 related").

18 (2) Validation of Examination

19 Where an employer's use of a "selective device," such as an examination, causes a
20 disparate impact on the basis of race, the burden shifts to the employer "to justify the
21 challenged selection device as a business necessity by showing that it is significantly job-
22 related," see Craig v. Los Angeles County, 626 F.2d 659, 662 (9th Cir. 1980), a process
23 known as "validation," see id. (internal quotation and citation omitted). "[T]he Equal
24 Employment Opportunity Commission (EEOC) has issued guidelines defining minimum

25
26 ¹⁵In its reply, the City, in a footnote, states that "[t]o the extent plaintiffs rely on Dr.
27 Gutman's expert reports or testimony, the City objects to and moves to strike such
28 evidence that is not supported by law, standards of practice in his field, or the facts of the
case." (See Defs.' Reply at 9:21-22.) Such objection, if meant as a challenge to Dr.
Gutman's use of the Chi Square test, is not sufficiently developed for the Court to
meaningfully address herein.

1 standards for professionally acceptable validation studies,” see Contreras v. City of Los
2 Angeles, 656 F.2d 1267, 1281 (9th Cir. 1981), including “content validity studies,” see 29
3 C.F.R. § 1607.5A. The “[t]echnical standards for content validity studies” require, inter alia,
4 “a job analysis which includes an analysis of the important work behavior(s) required for
5 successful performance and their relative importance,” see 29 C.F.R. § 1607.14C(2), and a
6 “show[ing] that the behavior(s) demonstrated in the selection process are a representative
7 sample of the behavior(s) of the job in question,” see 29 C.F.R. § 1607.14C(4); see also
8 Association of Mexican-American Educators (“AMAE”) v. California, 231 F.3d 572, 585 n.8
9 (9th Cir. 2000) (noting “content validity studies” show whether content of test “approximates
10 the knowledge, skills, or abilities that an applicant will use on the job”).

11 Here, the City’s expert, Cristina Banks, Ph.D. (“Dr. Banks”), and plaintiffs’ expert, Dr.
12 Gutman, offer differing opinions as to the content validity of the H-50 examination,
13 including, inter alia, (1) whether the job analysis performed by the City was adequate and
14 (2) whether the content of the FSSE component of the examination was representative of
15 the H-50 position. As discussed below, the Court finds a triable issue of fact exists as to
16 those issues.¹⁶

17 (a) Job Analysis

18 The parties’ respective experts disagree as to whether it was appropriate for the City
19 to rely on only one subject matter expert, Assistant Chief Kenney, when conducting the job
20 analysis. In Dr. Gutman’s opinion, “[a] minimum requirement for a suitable job analysis is
21 to have multiple independent raters” so that the ratings “can be examined for interrater
22 reliability” (see Randle Decl. Ex. 4 at 20), and, according to Dr. Gutman, a number of other
23 suitable raters were available (see id. Ex. 5 at 4, Ex. U at 167). By contrast, Dr. Banks
24 opines that, although “having only one SME for a [j]ob [a]nalysis is not ideal in most
25 circumstances,” the City’s decision to use only Assistant Chief Kenney was “the most
26 reasonable option,” as no other person had “sufficient expertise.” (See Rolnick Decl. Ex.

27
28 ¹⁶In light of such finding, the Court does not consider herein whether the disparate
impact claims are triable for additional reasons.

1 19 ¶¶ 20-21).

2 On the present record, the Court cannot conclude that, as a matter of law, Dr.
3 Banks' opinion must be accepted. First, the City has failed to show that a trier of fact could
4 not find Deputy Chief Gardner, who supervised the Assistant Chiefs, was qualified to serve
5 as an SME, see, e.g., Ricci, 557 U.S. at 564, 587 (finding examinations for captain and
6 lieutenant positions in fire department were "job related" where, inter alia, consultant who
7 performed job analyses used "incumbent captains and lieutenants and their supervisors" as
8 SMEs), particularly given that, after the job analysis had been completed, Deputy Chief
9 Gardner "consulted with [DHR] staff during test development to ensure that the test
10 components were realistic simulations of the job" (see Johnson Decl. ¶ 16). Second,
11 assuming Dr. Banks, contrary to Dr. Gutman, is correct that H-50 Assistant Chiefs
12 employed on a non-permanent basis would not be appropriate SMEs if they themselves
13 planned to take the examination, the City has failed to show that three H-50 Assistant
14 Chiefs employed on a non-permanent basis who had indicated they were not going to take
15 the examination, specifically, Johnny Lo, James Barden and Frank Cardinale, were
16 unavailable or unwilling to serve as SMEs.

17 **(b) Linkage**

18 With respect to determining whether the FSSE component of the examination
19 measured the knowledge, skills and abilities the City had identified in the job analysis, a
20 process the parties refer to as "linkage" (see Defs.' Mot. at 25:22; Pls.' Opp. at 26:8), the
21 parties' respective experts disagree as to whether the manner in which the City conducted
22 its linkage analysis was appropriate.

23 After the FSSE component of the examination had been designed, David Johnson
24 ("Johnson"), a Manager in the DHR, and Michael Cerles ("Cerles"), an "analyst" in the DHR
25 (see Johnson Decl. ¶¶ 2, 12, 18), first "reviewed the knowledge area and ability clusters [in
26 the job analysis] to identify the approximate percentage of each cluster that [was] sampled
27 by a test component" (see id. Ex. B at 15), after which the two analysts' respective
28 percentages were "averaged" (see id.), and the averages were then used to determine the

1 “weight” given to the FSSE component of the examination. (See id.) In evaluating the
2 above-described procedure, the experts again disagree.

3 In Dr. Gutman’s opinion, Johnson and Cerles “differed radically with respect to the
4 percentage of KSA [knowledge, skill and ability] clusters that were represented on the
5 [FSSE] simulations.” (See Randle Decl. Ex. 4 at 25.) In that regard, Dr. Gutman
6 performed two separate statistical tests, the results of which, he opines, show “the
7 interrater reliability was extremely low.” (See id.) Specifically, according to Dr. Gutman,
8 the results of a “t-test of independent means revealed that the ratings [given by Johnson
9 and Cerles] were significantly different ($t_{42df}=3.18$; $p = .003$)” and that “Cohen’s Kappa,
10 which is a measure of interrater reliability where zero equals no agreement and 1.00 equals
11 perfect agreement, computed to .064, which is virtually no agreement.” (See id. Ex. 5 at
12 11.) In Dr. Gutman’s opinion, the “disparity by [the] two raters require[d] at least a third
13 rater, if not more, to gain an accurate representation of what the test is measuring.” (See
14 id.) In the absence thereof, Dr. Gutman concludes, the City cannot show “that what the
15 test measured is job related.” (See id. Ex. 4 at 26.)

16 By contrast, Dr. Banks relies on what she states is “an alternative, commonly used
17 measure of inter-rater reliability, a Pearson Product Moment correlation,” the results of
18 which, in Dr. Bank’s opinion, show “a high and statistically-significant correlation for the
19 FSSE ($r=.82$ $p<.001$).” (See Rolnick Decl. Ex. 20 at 11.) Relying on those results, Dr.
20 Banks opines that “the test developers have reliable and valid ratings” (see id.), and,
21 consequently, that “the H-50 Exam is job related” (see id. Ex. 20 at 12). The City, however,
22 fails to show, or even argue, that the measure of inter-rater reliability on which Dr. Banks
23 relies is the sole measure that may be used, and, indeed, as noted, Dr. Banks refers to the
24 measure she employs as an “alternative” measure. (See id. Ex. 20 at 11.)

25 **c. Conclusion: Disparate Impact Claims**

26 Accordingly, for all the reasons discussed above, a triable issue of fact exists as to
27 disparate impact.

28 //

1 **3. Intentional Discrimination: All Plaintiffs**

2 Each of the First through Fourth Causes of Action, in which plaintiffs allege,
3 respectively, violations of 42 U.S.C. § 1981, 42 U.S.C. § 1983, Title VII and FEHA, includes
4 a claim that plaintiffs were subjected to intentional discrimination on the basis of race and
5 color when they did not receive a promotion to the position of H-50 Assistant Chief.

6 Under the burden-shifting procedure set forth in McDonnell Douglas Corp. v. Green,
7 411 U.S. 792, 802 (1973), where, as here, a plaintiff does not offer direct evidence of racial
8 animus, a plaintiff may establish a prima facie case by showing “(1) [he] belongs to a
9 protected class; (2) [he] applied for and was qualified for the position [he] was denied;
10 (3) [he] was rejected despite [his] qualifications; and (4) the employer filled the position with
11 an employee not of plaintiff’s class, or continued to consider other applicants whose
12 qualifications were comparable to plaintiff’s after rejecting plaintiff.” See Dominguez-Curry
13 v. Nevada Transp. Dep’t, 424 F.3d 1027, 1037 (9th Cir. 2005).¹⁷ If the plaintiff establishes
14 a prima facie case, the employer must proffer a legitimate, non-discriminatory reason for its
15 decision, and, if the employer does so, the plaintiff is required to offer evidence to support a
16 finding that the proffered reason is pretextual. See id.

17 Here, the City has proffered a legitimate, non-discriminatory reason for its decisions
18 to promote individuals other than plaintiffs to the subject H-50 Assistant Chief positions.¹⁸
19 Specifically, according to Chief Hayes-White, who made the challenged decisions, she
20 filled the open positions by following Civil Service Rules that required her to fill the positions
21 using only the H-50 eligible list and, in using the list, she selected persons in “rank order,”
22 which procedure is allowed, although not required, under the Civil Service Rules. (See
23 Hayes-White Decl. ¶¶ 14, 16, 17-18, 20, 22.)

24
25 ¹⁷Although McDonnell Douglas involved a Title VII claim, the “McDonnell Douglas
26 framework is fully applicable” to discrimination claims brought under § 1981, see Surrell v.
27 California Water Service Co., 518 F.3d 1097, 1105 (9th Cir. 2008), under § 1983, see St.
Mary’s Honor Center v. Hicks, 509 U.S. 502, 506 n.1 (1993), and under FEHA, see Guz, 24
Cal. 4th at 354.

28 ¹⁸Although the City also contends plaintiffs cannot establish a prima facie case, the
City fails to identify any element thereof as to which plaintiffs lack evidence.

1 As the City has proffered a legitimate, non-discriminatory reason, the burden shifts
2 to plaintiffs to “show pretext either (1) by showing that unlawful discrimination more likely
3 motivated the employer, or (2) by showing that the employer’s proffered explanation is
4 unworthy of credence because it is inconsistent or otherwise not believable.” See
5 Dominguez-Curry, 424 F.3d at 1037. In that regard, plaintiffs do not argue that Chief
6 Hayes-White failed to follow the Civil Service Rules when filling the subject positions.
7 Rather, plaintiffs argue that because the test had a disparate impact on African-Americans,
8 the City should not have used the eligible list all, i.e., that the City should have discarded
9 the results of the examination.

10 As discussed above, plaintiffs have, for purposes of their disparate impact claims,
11 established a triable issue of fact. The existence of such triable issue, however, does not
12 suffice to support a finding of pretext for purposes of an intentional discrimination claim, as
13 “courts only require that an employer honestly believe[] its reason for its actions, even if its
14 reason is foolish or trivial or even baseless.” See Villiarimo v. Aloha Island Air, Inc., 281
15 F.3d 1054, 1063 (9th Cir. 2002) (internal quotation and citation omitted). Here, plaintiffs
16 point to no evidence that the City, and, in particular, Chief Hayes-White, did not “honestly
17 believe” she was acting in accordance with proper Civil Service procedure and that the
18 most qualified individual for a position is the highest scoring applicant, absent some
19 countervailing attribute, such as a disciplinary record. (See Hayes-White Decl. ¶¶ 16, 20);
20 Villiarimo, 281 F.3d at 1063 (holding, where employer stated it terminated plaintiff based on
21 its determination she had violated workplace rule, plaintiff’s evidence that she had not
22 violated rule was insufficient to create triable issue as to pretext, as plaintiff “presented no
23 evidence that [employer] did not honestly believe its proffered reasons”).

24 Accordingly, the City is entitled to summary judgment on plaintiffs’ intentional
25 discrimination claims to the extent such claims are based on plaintiffs’ not having received
26 promotions to the position of H-50 Assistant Chief.

27 //

28 **4. Retaliation: Stevenson, Taylor and Smith**

1 Each of the Ninth through Twelfth Causes of Action, in which plaintiffs allege,
2 respectively, violations of § 1981, § 1983, Title VII and FEHA, includes a claim that the City,
3 when it did not promote Stevenson, Taylor and Smith to an H-50 Assistant Chief position,
4 did so in retaliation for those plaintiffs' having engaged in protected activity.

5 To establish a prima facie case of retaliation, "a plaintiff must prove (1) [he] engaged
6 in a protected activity; (2) [he] suffered an adverse employment action; and (3) there was a
7 causal connection between the two." See Surrell, 518 F. 3d at 1108. "Once established,
8 the burden shifts to the defendant to set forth a legitimate, non-retaliatory reason for its
9 actions; at that point, the plaintiff must produce evidence to show that the stated reasons
10 were a pretext for retaliation." Id.

11 Here, assuming, arguendo, plaintiffs can establish a prima facie case of retaliation,
12 the City, as discussed above with respect to plaintiffs' intentional discrimination claims, has
13 offered a legitimate, non-retaliatory reason for its decisions to promote persons other than
14 plaintiffs to H-50 Assistant Chief positions, and plaintiffs have not shown such decisions
15 were pretextual in nature.

16 Accordingly, the City is entitled to summary judgment on plaintiffs' retaliation claims
17 to the extent such claims are based on plaintiffs' not having received promotions to the
18 position of H-50 Assistant Chief.

19 **5. Failure to Prevent Discrimination: All Plaintiffs**

20 In the Fifth through Eighth Causes of Action, in which plaintiffs allege, respectively,
21 violations of § 1981, § 1983, Title VII and FEHA, plaintiffs assert the City failed to protect
22 them from discrimination. Specifically, plaintiffs allege that after they "received their H-50
23 examination results, [p]laintiffs complained to the [Fire] Department management in various
24 formal and informal fashions" (see FAC ¶¶ 159, 164, 171, 176), and that the City thereafter
25 "failed to take the reasonable steps necessary to prevent discrimination from occurring with
26 respect to [p]laintiffs" (see FAC ¶ 160, 165, 172, 177).

27 //

28 **a. Fifth through Seventh Causes of Action**

1 The City acknowledges that under FEHA, an employer can be held liable for “fail[ing]
2 to take all reasonable steps necessary to prevent discrimination . . . from occurring.” See
3 Cal. Gov’t Code § 12940(k). The City argues, however, that it is entitled to summary
4 judgment to the extent plaintiffs seek relief under § 1981, § 1983, and Title VII for a failure
5 to prevent discrimination, i.e., the Fifth through Seventh Causes of Action, for the reason
6 that no court has recognized such a claim exists under those statutes.

7 In their opposition, plaintiffs concede that a “failure to prevent discrimination, absent
8 a harassment claim, is not recognized under Title VII.” (See Pls.’ Opp. at 6:2-27.)¹⁹ With
9 respect to § 1981 and § 1983, however, plaintiffs argue that two district courts, specifically,
10 in Douglas v. Brookville Area School Dist., 836 F. Supp. 2d 329 (W.D. Pa,2011) and Doe v.
11 Perry Community School Dist., 316 F. Supp. 2d 809 (S.D. Iowa 2004), have recognized
12 claims for failure to prevent discrimination, and that this Court likewise should find such
13 claims cognizable. As set forth below, plaintiffs’ reliance on Douglas and Lee is misplaced,
14 as both cases are markedly distinguishable on their facts.

15 First, contrary to plaintiffs’ argument, neither case considered a claim under § 1981,
16 and, consequently, plaintiffs fail to offer any authority recognizing, independent of a claim
17 for employment discrimination thereunder, a separate claim for relief based on a failure to
18 prevent such discrimination. Next, as explained in Douglas, “[a] plaintiff cannot prevail in
19 an action brought under § 1983 without establishing an underlying violation of a federal
20 constitutional or statutory right.” See Douglas, 836 F. Supp. 2d at 349 (citing City of
21 Rancho Palos Verdes v. Abrams, 544 U.S. 113, 119-20 (2005)). Douglas involved an
22 alleged statutory rape of a student by a teacher, and the court found such allegations, if
23 supported by sufficient evidence, could support a claim based on a substantive violation of
24 the Due Process Clause. See id. at 349-65. Doe involved alleged harassment by other
25 students on the basis of sexual orientation, and the court found such allegations could, if
26 supported by the requisite evidentiary showing, support a claim based on a violation of the

27
28 ¹⁹Plaintiffs do not allege a harassment claim.

1 student's rights under the First Amendment and Equal Protection Clause. See Doe, 316 F.
2 Supp. 2d at 822, 828.

3 Here, by contrast, plaintiffs do not identify, either in the FAC or their opposition, any
4 federal authority requiring an employer to prevent discrimination with respect to
5 employment decisions such as promotions, independent of an employer's obligation not to
6 engage in such discrimination itself. In other words, plaintiffs cannot base a separate
7 § 1983 claim on the City's failure to prevent itself from engaging in discrimination.

8 Accordingly, the City is entitled to summary judgment on the Fifth, Sixth and Seventh
9 Causes of Action.

10 **b. Eighth Cause of Action**

11 **(1) Timeliness: Lee**

12 To the extent the Eighth Cause of Action, in which plaintiffs allege a failure to
13 prevent discrimination in violation of FEHA, is brought on behalf of Lee, the City argues it is
14 entitled to summary judgment, on the asserted ground such claim is time-barred. As
15 discussed above with respect to the Third and Fourth Causes of Action, however, the Court
16 finds the City has failed to show Lee's FEHA claims are time-barred.

17 **(2) Merits: All Plaintiffs**

18 Although the City seeks summary judgment on all claims as brought by all plaintiffs,
19 the City appears to acknowledge that plaintiffs, other than Lee, can proceed on their Eighth
20 Cause of Action. (See Defs.' Mot. at 13:2-6 (citing "Cal. Gov't Code Sec 12940(k);
21 California Civil Jury Instructions 2527; Trujillo v. North County Transit Dist., 63 Cal. App.
22 4th 280, 286 (1998)").)

23 Accordingly, the City has failed to show it is entitled to summary judgment on the
24 Eighth Cause of Action.

25 **B. Constructive Discharge: Stevenson and Lee**

26 In the Thirteenth through Sixteenth Causes of Action, in which plaintiffs assert
27 violations of § 1981, § 1983, Title VII and FEHA, respectively, plaintiffs allege the City
28 "deliberately created working conditions that were designed to make [Stevenson and Lee]

1 feel compelled to resign and due to such compulsion [they] resigned,” and that “race was a
2 motivating factor.” (See FAC ¶¶ 195, 200, 206, 212.)

3 The City argues it is entitled to summary judgment on the ground plaintiffs cannot
4 establish that either Stevenson or Lee resigned due to intolerable working conditions.

5 “Under the constructive discharge doctrine, an employee’s reasonable decision to
6 resign because of unendurable working conditions is assimilated to a formal discharge for
7 remedial purposes.” Pennsylvania State Police v. Suders, 542 U.S. 129, 141 (2004). The
8 conditions must be “sufficiently extraordinary and egregious to overcome the normal
9 motivation of a competent, diligent, and reasonable employee to remain on the job to earn
10 a livelihood and to serve his or her employer.” See Poland v. Chertoff, 494 F.3d 1174,
11 1184 (9th Cir. 2007) (internal quotation and citation omitted). “[A] demotion, even when
12 accompanied by a reduction in pay, does not by itself trigger a constructive discharge.”
13 King v. AC & R Advertising, 65 F.3d 764, 768 (9th Cir. 1995) (internal quotation and citation
14 omitted).

15 Here, as set forth above, it is undisputed that after the H-50 Assistant Chief eligible
16 list was posted, Chief Hayes-White announced that “effective January 21, 2011, H-50
17 provisional and acting assignments [would] be rescinded.” (See Hayes-White Decl. Ex. E.)
18 It is also undisputed that, as a result, Stevenson and Lee would have had to return to the
19 last position each held on a permanent basis, the H-40 Battalion Chief position (see id.
20 ¶ 18), and that, after hearing such announcement, both Stevenson and Lee resigned (see
21 Rolnick Decl. Ex. 6 at 58:2-4, Ex. 8 at 217:20-24.) In addition, the City has submitted
22 deposition testimony by Stevenson and Lee to establish that each such plaintiff resigned,
23 not because of intolerable working conditions, but because each did not wish to work as an
24 H-40 Battalion Chief and, instead, chose to retire in order to obtain a pension based on the
25 salary each had earned as an H-50 Assistant Chief. In particular, Stevenson testified he
26 retired rather than be “demoted back to battalion chief” (see id. Ex. 6 at 58:2-17), and that
27 doing so allowed him to receive a pension based on his salary as an H-50 Assistant Chief
28 (see id. Ex. 6 at 63:10-16); Lee likewise testified that he did not wish to go “back to

1 battalion chief” (see id. Ex. 8 at 217:20-24, Ex. 9 at 234:12 - 235:19), and, instead, decided
2 to “retire at an assistant’s chief’s pay” (see id. Ex. 9 at 236:5-18). Plaintiffs, in their
3 opposition, cite no evidence to the contrary, i.e., evidence to support a finding that
4 Stevenson and/or Lee retired due to “unendurable working conditions.” See Suders, 542
5 U.S. at 141.²⁰

6 Accordingly, as a demotion, even where accompanied by a reduction in pay, does
7 not by itself trigger a constructive discharge, see King, 65 F.3d at 768, the City is entitled to
8 summary judgment on the Thirteenth through Sixteenth Causes of Action.

9 **C. Thirty-Day Suspension: Stevenson**

10 Plaintiffs allege the City wrongfully suspended Stevenson for a period of thirty days,
11 following a finding that Stevenson, while serving on the “Scoring Key Development
12 Committee” (“Committee”), which developed the answer key for the civil service
13 examination for the position of H-30 Captain, had violated confidentiality rules. (See FAC
14 ¶¶ 72-73, 77-78, 84, 88-89.) Although the theory under which plaintiffs seek relief for such
15 suspension is not clearly expressed in the FAC, the Court construes the FAC as alleging
16 the imposition of such suspension constituted intentional discrimination on the basis of race
17 and retaliation, in violation of § 1981, § 1983, Title VII and FEHA.²¹

18 The City argues, inter alia, that it is entitled to summary judgment for the reason it
19 has proffered a legitimate, non-discriminatory and non-retaliatory reason for the
20 suspension. In support thereof, the City relies on Chief Hayes-White’s declaration, in which
21 she states that, after she received a “complaint” from another member of the Committee
22 “regarding an alleged breach of confidentiality by Stevenson,” she requested the matter be
23 investigated (see Hayes-White Decl. ¶ 23), and that, thereafter, she received from Shawn

24
25 ²⁰In their opposition, plaintiffs argue that Stevenson and Lee were “concerned, if not
26 certain, they could not perform the duties of a battalion chief, which requires jumping into
27 the fray of battling a blaze.” (See Pls.’ Opp. at 34:23-25.) Even assuming, arguendo, such
regular duties could be considered unendurable working conditions, however, plaintiffs cite
no evidence to support such assertion.

28 ²¹In their surreply, plaintiffs confirm that they base their municipal liability claims, i.e.,
their claims under § 1981 and § 1983, in part on Stevenson’s suspension.

1 Kelly, a “Senior Investigator” with the City Attorney’s Office, a report finding Stevenson, in
2 violation of a confidentiality agreement he had signed, had discussed an answer on the
3 scoring key with a member of the Fire Department who was not on the Committee. (See
4 id. ¶ 24, Ex. F.) Chief Hayes-White further avers that, in response to the report, she
5 charged Stevenson with violating a workplace rule prohibiting the dissemination of
6 examination questions (see id. ¶ 25, Ex. G), and, on October 11, 2007, the Fire
7 Commission found Stevenson guilty of the charge and imposed the suspension as
8 punishment therefor (see id. Ex. H).

9 The Court finds the reason on which the City relies is non-discriminatory and non-
10 retaliatory. Consequently, as discussed above, the burden shifts to plaintiffs to offer
11 evidence to support a finding that the City’s stated reason is pretextual in nature.

12 In an effort to meet that burden, plaintiffs, referencing the content of the
13 investigator’s report, note that Johnson “testified that Stevenson’s actions had no effect [on]
14 the examination results, as all candidates had completed the examination at the time of
15 Stevenson’s action” and that the investigator “found no damaging effect from Stevenson’s
16 actions.” (See Pls.’ Opp. at 32:12-14.) Plaintiffs offer no evidence, however, to show that
17 Stevenson did not breach his duty of confidentiality in violation of Fire Department rules.
18 To the extent plaintiffs may be arguing that the Fire Commission should not have
19 suspended Stevenson for a breach of confidentiality that did not affect the outcome of the
20 examination, such argument is unavailing. The issue before the Court is not the wisdom of
21 the Fire Commission’s decision, but, rather, whether there exists evidence to support a
22 finding that the Fire Commission’s decision to suspend Stevenson was motivated by race
23 or was in retaliation for protected activity, rather than because Stevenson had violated a
24 workplace rule. See Hernandez v. Spacelabs Medical Inc., 343 F.3d 1107, 1115 (9th Cir.
25 2003) (holding courts “are not concerned with the correctness or wisdom of the reason
26 given for the adverse employment decision, but only with whether the proffered reason was
27 the real reason for [the adverse employment act] and not a pretext for retaliation”) (internal
28 quotation, alterations, and citation omitted); Guz, 24 Cal. 4th at 358 (holding employer’s

1 reason for adverse employment act “need not necessarily have been wise or correct”).

2 Accordingly, the City is entitled to summary judgment on plaintiffs’ claims to the
3 extent such claims are based on Stevenson’s 2007 suspension.

4 **D. Failure to Promote to Assistant Deputy Chief–Department of Training: Taylor**

5 Plaintiffs allege that, in 2011, the City wrongfully failed to promote Taylor to the
6 position of “Assistant Deputy Chief–Department of Training.” (See FAC ¶¶ 108-110.) The
7 Court construes the FAC as alleging such failure to promote constituted intentional
8 discrimination of the basis of race and retaliation in violation of Title VII and FEHA.²²

9 The City argues it is entitled to summary judgment, relying on the above-referenced
10 declaration by Chief Hayes-White. Specifically, Chief Hayes-White avers therein that, in
11 September 2011, she sought candidates for the subject position, that twelve persons
12 including Taylor applied, and that she selected applicant Battalion Chief Jose Velo
13 “because of the breath and depth of his relevant training and certifications obtained outside
14 of the Fire Department” and because “he had previously worked as Training Captain at the
15 Division of Training for several years.” (See Hayes-White Decl. ¶ 27.)

16 The Court finds the reasons stated by Chief Hayes-White are legitimate, non-
17 discriminatory, and non-retaliatory. Consequently, as discussed above, to create a triable
18 issue of fact, plaintiffs are required to submit evidence to support a finding that the stated
19 reasons are pretextual in nature. Plaintiffs, however, fail to address the claim in their
20 opposition, nor has the Court otherwise been pointed to any evidence in support thereof.
21 Under such circumstances, plaintiffs have not shown a triable issue of fact exists.

22 Accordingly, the City is entitled to summary judgment on plaintiffs’ claims to the

24 ²²The City correctly observes that because each named defendant herein is a
25 municipal agency, plaintiffs can only succeed under § 1981 and § 1983 by showing that
26 any violation of said statutes committed by a City employee was “caused by a custom or
27 policy within the meaning of Monell.” See Jett v. Dallas Independent School Dist., 491 U.S.
28 701, 735-36 (1989) (citing Monell v. New York City Dep’t of Social Services, 436 U.S. 658
(1978)). In their surrepley, plaintiffs confirm that they are not basing their municipal liability
claims on Taylor’s failure to be promoted to Assistant Deputy Chief–Department of
Training, nor on any of the other alleged adverse employment acts discussed below. (See
Pls.’ Surrepley at 2:22 - 3:21.)

1 extent such claims are based on Taylor’s failure to receive a promotion to the position of
2 Assistant Deputy Chief–Department of Training.

3 **E. Investigation Into Use of Sick Leave: Taylor**

4 Plaintiffs allege that the City, in 2011, wrongfully investigated Taylor for his “use of
5 [a] sick day on February 25, 2011” (see FAC ¶ 117), which investigation culminated in a
6 finding by Chief Hayes-White that Taylor had not violated any rule (see FAC ¶ 119). The
7 Court construes the FAC as alleging said investigation constituted intentional discrimination
8 of the basis of race and retaliation in violation of Title VII and FEHA.

9 The City argues it is entitled to summary judgment, for the reason that the conduct
10 challenged in the FAC is not an adverse employment action. The Court agrees.
11 Specifically, where an employer conducts an investigation into possible workplace
12 misconduct and no penalty thereafter is imposed, such investigation does not constitute an
13 adverse employment action. See Quantz v. Edwards, 2006 WL 1277093, at *1, 6-7 (W.D.
14 Wash. May 5, 2006) (holding, where no penalty imposed, employer’s internal investigation
15 into “discrepancies on [plaintiff’s] employment application” did not constitute “adverse
16 employment action”), aff’d in relevant part, 264 Fed. Appx. 625, 627 (9th Cir. 2008).

17 Accordingly, the City is entitled to summary judgment on plaintiffs’ claims to the
18 extent such claims are based on the 2011 investigation into Taylor’s use of sick leave.

19 **F. Other Allegedly Adverse Employment Acts: Smith**

20 Plaintiffs allege the City subjected Smith to the following nine assertedly wrongful
21 actions, the first of which occurred in 2004 and the last of which occurred in December
22 2010: (1) in 2004, the City’s failure to promote Smith to the position of H-40 Battalion Chief
23 (see FAC ¶ 123); (2) in 2005, the City’s investigation into whether Smith engaged in “rude
24 behavior towards an elementary school principal during a fire drill,” and ultimate decision
25 not to impose “discipline” (see FAC ¶ 124); (3) after a hearing conducted in 2005, the City’s
26 imposition of a four-day suspension for “failure to wear an air pack into a building under
27 investigation with a hazardous environment,” despite Smith’s denial that he entered the
28

1 building (see FAC ¶ 125);²³ (4) in 2006, the City’s investigation into whether Smith failed to
2 attend a “training course,” and ultimate “exonerat[ion]” of Smith as to the charge (see FAC
3 ¶ 126); (5) in 2007, Smith receipt of “counsel[ing]” for “completing his own injury report
4 form” (see FAC ¶ 127); (6) in 2007, the City’s failure to promote Smith to the position of H-
5 30 Captain (see FAC ¶ 128); (7) on July 19, 2008, the City’s denial of Smith’s “request to
6 work in Division III” (see FAC ¶ 129); (8) in “approximately” March 2009, Assistant Chief
7 Kenney’s “investigat[ion] and reprimand[]” of Smith, after Smith, allegedly acting in
8 conformity with a “customary practice,” directed a captain to “move her personal vehicle”
9 from a parking space Smith wished to use (see FAC ¶ 131);²⁴ and (9) in December 2010,
10 Smith’s receipt of “negative comments in his annual performance appraisal without his
11 knowledge or being informed that those problems existed,” and the evaluator’s subsequent
12 “refus[al] to meet with him” (see FAC ¶ 130). The Court construes the FAC as alleging said
13 acts constituted intentional discrimination of the basis of race and retaliation in violation of
14 Title VII and FEHA.

15 The City argues that plaintiffs’ claims, to the extent based on the above-referenced
16 actions, are barred by the applicable statutes of limitations. The Court agrees.

17 As discussed above, a Title VII claim is barred unless the plaintiff submits a charge
18 within 300 days of the assertedly wrongful act, and a FEHA claim is barred unless the
19 plaintiff submits a charge within 365 days of said act. Smith first raised said claims in a
20 charge he submitted to the EEOC and DFEH on February 22, 2012 (see Randle Decl. Ex.
21 N, Tab 5 at 5, 9-10), a date more than one year after the latest of the above-identified
22
23

24 ²³Although plaintiffs, in the FAC, do not allege the date on which the suspension was
25 imposed, Smith, in his administrative charge submitted to the EEOC, stated he
26 unsuccessfully “appealed” the suspension to the Fire Commission in January 2007. (See
Randle Decl. Ex. N, Tab 5 at 10.) Consequently, the imposition must have occurred
sometime between the 2005 hearing and the January 2007 denial of Smith’s appeal.

27 ²⁴Although the FAC does not state the date on which said incident occurred, Smith
28 provided the month and year in his administrative charge. (See Randle Decl. Ex. N, Tab 5
at 11.)

1 acts.²⁵


2 Accordingly, the City is entitled to summary judgment on plaintiffs' claims to the
3 extent such claims are based on the above-identified nine acts involving Smith.

4 **CONCLUSION**

5 For the reasons stated above, the City's motion for summary judgment is hereby
6 GRANTED in part and DENIED in part. Specifically, with the exception of (1) the disparate
7 impact claims in the Third and Fourth Causes of Action, and (2) the Eighth Cause of Action,
8 the City is entitled to summary judgment and its motion is hereby GRANTED. With respect
9 to (1) the disparate impact claims in the Third and Fourth Causes of Action, and (2) the
10 Eighth Cause of Action, the motion is hereby DENIED.

11 **IT IS SO ORDERED.**

12
13 Dated: January 5, 2016


MAXINE M. CHESNEY
United States District Judge

14
15
16
17
18
19
20
21
22
23
24
25
26 _____
27 ²⁵In their sur-reply, plaintiffs point out that a § 1981 claim, if based on certain of the
28 above-identified acts, would not be barred, given that a four-year statute of limitations
applies to claims under § 1981. In that same filing, however, plaintiffs clarify they do not
base their municipal liability claims, including their claims under § 1981, on any of the
above-identified acts.