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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID GLEN BROWN,
Plaintiff,
v.
CONTRA COSTA COUNTY, et al.,
Defendants.

Case No. 12-cv-01923-VC

**ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT**

Re: Dkt. No. 144

INTRODUCTION

David Brown, a former member of the Contra Costa County District Attorney's Office, sued the County, District Attorney Mark Peterson, and two former colleagues in the office – Douglas MacMaster and Karen Zelis – for discrimination, retaliation, and harassment based on his race. Before the case was reassigned to this Court, Judge Hamilton dismissed most of the claims contained in Brown's fifth amended complaint, namely, his Section 1981 race discrimination and retaliation claims, his Section 1983 equal protection claim, and his claim against the County for municipal liability. *See* Doc. No. 88. Brown's only remaining claim against the defendants is for racial harassment under Section 1981. The Court now grants summary judgment for the defendants on that claim.

BACKGROUND

Viewed in the light most favorable to the plaintiff, the evidence pertaining to the remaining claim is as follows:

David Brown is an attorney who worked for the Contra Costa District Attorney's Office from July 1986 through July 2011, when he left for medical reasons. He subsequently retired in February 2013. Brown is African-American. Douglas MacMaster and Karen Zelis are attorneys

1 who worked for the District Attorney's Office during much of the same period. MacMaster and
2 Zelis identify as Caucasian and African-American, respectively. Mark Peterson was elected
3 District Attorney in 2010 and took office in 2011. Peterson is Caucasian.

4 Brown and Zelis were friends between 1986 and 2010. A few times over the years, while
5 they were friends, Zelis mentioned to Brown that she did not trust or like African-American men.
6 Doc. No. 148-1, Depo. of Brown at 241. At the time, Brown did not interpret her comments as
7 applying to him; he did not believe she meant to convey that she did not trust him personally.
8 Depo. of Brown at 233, 241, 432. On a couple of occasions, Zelis commented to others that
9 Brown could not be found at work because he was at the movies. Depo. of Brown at 433-34.

10 In 2002, Brown was having a conversation with a supervisor and a junior attorney when
11 MacMaster approached and interrupted. MacMaster said something to the effect of, "If we did
12 that, the next thing Brown would be asking is 'where da white women at!'" The parties dispute the
13 context for MacMaster's remark, but Brown testified that the comment was unrelated to the
14 conversation he was having with the other two attorneys. Brown reported the incident to
15 MacMaster's supervisor, Paul Sequiera, who had a talk with MacMaster and told him the comment
16 was inappropriate. Depo. of Brown at 44-45. After this, Brown had little contact with
17 MacMaster. Fifth Am. Compl. ¶ 29.

18 In 2004, Brown was promoted by then-District Attorney Robert Kochly to serve as a
19 Senior Deputy District Attorney, a policymaking position on the management team. There were
20 five Senior Deputy District Attorneys; Brown was the only African-American. Then, when
21 Peterson was preparing to take office in late 2011, he demoted all five Senior Deputy District
22 Attorneys, including Brown, to install his own management team, as is customary when a new
23 District Attorney is elected. Peterson promoted MacMaster, Zelis, and Tom Kensok, among
24 others, to the Senior Deputy positions. Peterson broke the news of the demotion to Brown in
25 December 2010 in a private meeting with Zelis present. Peterson had been advised by the County
26 Counsel's Office to have a third person present in all his meetings with the outgoing Senior
27 Deputies. Zelis only observed the meeting with Brown; she did not speak. Brown was reassigned
28 to the Mental Health/Sexually Violent Predators Unit.

1 In March 2011, MacMaster contacted Deputy County Counsel Janet Holmes to request that
2 the County defend Brown in a civil lawsuit filed against him relating to his work in the District
3 Attorney's Office. Holmes responded to MacMaster and Brown, in an email, with information
4 about how to proceed, including instructions for locating a particular County administrative
5 bulletin. Brown subsequently found the bulletin, while MacMaster had been unable to find it.
6 MacMaster later emailed Holmes: "You burst my bubble. Before I read this, I was both impressed
7 and amazed at David's ability to find Admin Bulletin 118.2. I had to ask Cherie Mathisen in our
8 office how to accomplish that." Doc. No. 146, Ex. A. Brown was included on this email. Brown
9 replied to MacMaster, explaining that he did not appreciate MacMaster expressing an opinion
10 about "my knowledge or ability to research an issue to those either inside or especially outside the
11 office." He said he found it "unnecessary and unprofessional," and he was "extremely
12 embarrassed." Brown did not at the time suggest that MacMaster's remark was racially motivated
13 or that he found it racially offensive. MacMaster apologized to Brown, and separately asked
14 Peterson to consider Brown's email an official complaint and to investigate it. Peterson assigned
15 Kensok to do that. Kensok was part of Peterson's management team; he was also friends with
16 MacMaster. MacMaster was not disciplined. On other occasions, MacMaster commented that he
17 was three or four times the lawyer Brown was and made other disparaging remarks about Brown's
18 competence and work ethic.

19 In July 2011, Peterson transferred Brown from his position in the Mental Health Unit to a
20 position in the Juvenile Unit. Prior to this transfer, all attorneys in the District Attorney's Office
21 were asked to complete a questionnaire regarding attorney assignments. In response to the
22 question whether he preferred to stay in his current unit or be transferred, Brown answered "don't
23 care." He also wrote that his biggest accomplishment in the Mental Health Unit was "cleaning up
24 mess left by my predecessors." MacMaster delivered the news of the transfer to Brown, stating
25 that the reason for the transfer was that Brown was "unhappy" in Mental Health. Brown asserts in
26 his fifth amended complaint that this was pretextual and the transfer was actually racially
27 motivated. But in a prior version of his complaint, Brown described the Mental Health Unit as "a
28 post in 'Siberia' for attorneys who are being punished." And in deposition, Brown testified that he

1 does not believe Peterson reassigned him from the Mental Health Unit because of his race. Depo
2 at 331.

3 In preparation for the transfer, and at Brown's request, Dan Cabral, who was the
4 supervising attorney for the Juvenile Unit, organized a meeting with Brown and Barry Grove,
5 another attorney scheduled to start with Brown in the Juvenile Unit. During the meeting, Cabral
6 stated that he'd had a previous meeting with Peterson, MacMaster, and Kensok, in which they
7 suggested he not assign any sexual assault cases to Grove and that he give the gang cases to
8 Melissa Smith (another attorney transferring into the unit who was not present at the meeting).
9 Cabral also mentioned something in reference to Brown. Brown asked Cabral to repeat what they
10 said about him, which Cabral refused to do. When Brown continued to ask Cabral what they said
11 about him, Cabral responded that he misspoke. Brown then accused him of lying and stood up to
12 leave the meeting, at which point Cabral ordered him to stay, saying loudly "David come back to
13 the table" and then, "David, don't leave the room, or I'm going to write you up." Brown left the
14 meeting anyway. Doc. No. 148-3, Reporter's Transcript of Audio Interview of David Brown at 3-
15 6.

16 Two days later, on July 8, 2011, Cabral and MacMaster met with Brown to discuss the
17 previous meeting, and gave Brown a "counseling memo" that they prepared in response. Cabral
18 had informed MacMaster, Kensok, and Peterson of what happened at the meeting and requested
19 that the incident be documented. The resulting counseling memo described the meeting, and also
20 included, at Peterson's request, mention of Brown's failure to attend the entirety of a "State of the
21 Office" meeting at which attendance by all attorneys was required. The memo was not a formal
22 disciplinary action, but directed Brown to "behave courteously and professionally, with all
23 supervisors and coworkers, at all times," to "follow all of our rules and procedures," to comply
24 with directives given by supervisors, and to attend all office meetings and stay until the meeting
25 concludes. It is evident from the transcript of the July 8 meeting that Brown interrupted Cabral
26 and MacMaster frequently and insisted on ending the meeting prematurely. It is undisputed that
27 Brown was not present for the entire State of the Office meeting; Brown testified that he left three
28 times.

1 employee's work performance." *Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 642 (9th Cir.
2 2003) (quoting *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270-71 (2001)). "The working
3 environment must both subjectively and objectively be perceived as abusive." *Id.* (quoting *Brooks*
4 *v. City of San Mateo*, 229 F.3d 917, 923 (9th Cir. 2000)).

5 On the surface, most of the conduct about which Brown complains has nothing to do with
6 his race. For example, MacMaster's email to Jan Holmes, which Brown perceived as denigrating
7 his abilities as a lawyer, contained no suggestion of racial animus. The statements by Zelis about
8 Brown going to the movies during work hours contained no indication of racial hostility. There is
9 no hint that MacMaster's decision to request a continuance of Brown's trial was racially motivated.
10 There is nothing to suggest that Zelis objected to Brown's testimony at the Merit Board hearing
11 because he is African-American. Nor is there any evidence that Peterson considered race when he
12 demoted his predecessor's Senior Deputies (including Brown) and replaced them with his own
13 management team. And in his own deposition, Brown testified that he did not believe Peterson's
14 decision to move him from the Mental Health Unit to the Juvenile Unit was based on race.

15 Lacking any actual evidence that these incidents were racially motivated, Brown appears to
16 argue that a jury could *assume* they were racially motivated based on the few instances in which
17 the record indicates the issue of race did come up during his 27-year tenure at the office. To be
18 sure, facially neutral incidents are part of the totality of circumstances a court should consider in
19 assessing a hostile work environment claim. But there must be a basis for inferring that the
20 facially neutral incidents were in fact race-based. *Cf. Gutierrez v. Sodexo, Inc.*, 2014 WL
21 3725343, at *2 (N.D. Cal. July 24, 2014) (citing cases). And in this case, the incidents Brown
22 identifies provide no basis for drawing such an inference.

23 First, Brown complains that MacMaster sent an email to a few colleagues with video files
24 of Saturday Night Live digital shorts, and asserts that one of those videos ("I'm on a Boat")
25 degraded African-Americans. But even if that could be considered an objectively reasonable
26 interpretation of the digital short, MacMaster did not send it directly to Brown (indeed, Brown was
27 out of the office on disability leave at the time). Second, Brown complains that Zelis stated she
28 did not trust or like African American men, but he also testified that he did not believe Zelis's

1 distrust or dislike extended to him, and he further testified that they were friends at that time.
2 Third, Brown complains of MacMaster's "where da white women at" remark from 2002, which
3 was ten years before he filed his lawsuit. These few incidents over a 27-year period, even viewed
4 in the most negative possible light, cannot support a conclusion that the other things that happened
5 to Brown during his tenure at the office (such as his transfer to the Juvenile Unit, MacMasters's
6 negative comments about his lawyering skills, or Zelis's comment that he went to the movies
7 during work hours) were grounded in racial hostility. Therefore, a reasonable jury could not
8 conclude that Brown operated in a work environment in which racial hostility was so severe and
9 pervasive as to effectively alter the conditions of his employment. *See, e.g., Manatt*, 339 F.3d at
10 799 (finding that two isolated incidents and other offhand remarks, which occurred over the course
11 of a year-and-a-half, although racially insensitive and offensive, did not give rise to a hostile work
12 environment claim); *Vasquez*, 307 F.3d at 884 (finding that harassing remarks made over a period
13 of more than one year, only two of which were racial in nature, did not create a hostile work
14 environment). Finally, it bears repeating that, to make out a claim for racial harassment, a plaintiff
15 must present evidence not only that he was subjected to a racially hostile work environment from
16 an objective standpoint, but that he subjectively viewed himself as operating in such an
17 environment. As discussed already, Brown has not presented evidence that could show from an
18 objective standpoint that he operated in a racially hostile work environment. Moreover, Brown's
19 testimony, if anything, undermines the argument that he subjectively perceived himself as
20 operating in such an environment. In addition to testifying that he was happy at the office, Brown
21 applied to be Peterson's Chief Deputy – the number two person in the office – after he filed this
22 lawsuit. Asked about this in his deposition, Brown testified that he believes he could work
23 effectively with MacMaster and Zelis, which seems contrary to any subjective belief that he was
24 operating in a severely abusive work environment.

CONCLUSION

25 Because there is no evidence from which a reasonable jury could conclude that the
26 defendants' conduct created a racially hostile working environment for Brown, the motion for
27 summary judgment is granted.
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IT IS SO ORDERED.

Dated: December 15, 2014



VINCE CHHABRIA
United States District Judge

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID GLEN BROWN,
Plaintiff,
v.
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Defendants.

Case No. [12-cv-01923-VC](#)

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 12/15/2014, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

David Glen Brown
2254 Palmer Circle
Fairfield, CA 94534

Dated: 12/15/2014

Richard W. Wieking
Clerk, United States District Court



By: _____
Kristen Melen, Deputy Clerk to the
Honorable VINCE CHHABRIA