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28UNITED STATES DISTRICT COURT
For the Northern District of California

UNITED STATES DISTRICT COURT
Northern District of California
San Francisco Division

CHARLES BREWER,

No. C 12-02363 LB

Plaintiff,

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

v.

GENERAL NUTRITION CORPORATION,

[Re: ECF No. 52]

Defendant.

INTRODUCTION

In this action, plaintiff Charles Brewer has sued his former employer, General Nutrition Corporation (“GNC”), for race discrimination, age discrimination, and retaliation. *See* Complaint, ECF No. 1.¹ GNC moves for summary judgment on all of Mr. Brewer’s claims and his request for punitive damages. *See* Motion, ECF No. 52. The court held a hearing on the matter on April 3, 2014. 4/3/2014 Minute Order, ECF No. 69. Upon consideration of the applicable legal authority, evidence submitted, and arguments of the parties in their papers and at the hearing, the court **GRANTS** GNC’s motion with respect to all of Mr. Brewer’s claims.

STATEMENT

I. THE PARTIES

Defendant GNC is a nationwide retailer of nutritional supplements and vitamins. Reidy

¹ Citations are to the Electronic Case File (“ECF”) with pin cites to the electronically-generated page numbers at the top of the document.

1 Declaration, ECF No. 57 ¶ 3. On January 29, 2010, Mr. Brewer, a black male who at that time was
2 57 years old, applied for a job at GNC. Joint Statement of Undisputed Facts (“JSUF”), ECF No. 51
3 ¶¶ 1, 4. He was interviewed by Carol Owens, the then-manager of GNC’s store in Mountain View,
4 California (the “Mountain View Store”), and she hired him to work there as a part-time sales
5 associate. JSUF ¶¶ 2-3. He began work for GNC on February 22, 2010. JSUF ¶ 2. Later, he
6 became a full-time assistant manager. JSUF ¶ 8. At all relevant times, he was an at-will employee.
7 Reidy Declaration ¶ 4, Ex. C.

8 **II. GNC’S RELEVANT EMPLOYEE POLICIES**

9 GNC has written policies against harassment and discrimination that are distributed to
10 employees at the commencement of their employment. Reidy Declaration ¶ 8. Its Employee
11 Handbook, which Mr. Brewer received, contains written policies prohibiting discrimination and
12 harassment. Reidy Decl. ¶ 8, Exs. E & F. GNC’s “Prohibition Against Harassment” policy clearly
13 identifies harassment and discrimination based on race, disability, age, etc. as being illegal and
14 against company policy. Employees who are subjected to, or even aware of, discrimination or
15 harassing conduct, are instructed to report the conduct to the Employee Relations Department of the
16 Corporate Human Resources Department at 1-800-678-0867. *Id.* This “hotline” number is posted at
17 every GNC store. GNC’s retail stores also have Retail Operations Manuals (both in a hard copy and
18 available on the store’s electronic portal) which include specific policies prohibiting discrimination
19 and harassment and include a Code of Conduct that applies to all employees. *Id.* ¶ 9, Ex. G.

20 GNC, as a national retailer, also has uniform policies and procedures related to most aspects of
21 the employment relationship, including store operations. In relevant part, the Employee Handbook
22 includes requirements that sales associates’ time always must be recorded exactly as it has occurred.
23 Work schedules are determined by management and must be flexible to ensure adequate store
24 coverage at all times. *Id.* ¶ 10, Ex. E. In addition, the Retail Operations Manual contains specific
25 provision as to Staffing and Wages and states that deliberate falsification of time is cause for
26 disciplinary action. *Id.*

27 All GNC associates have the ability to purchase GNC product at a discount. *Id.* ¶ 11, Ex. I. All
28 employee purchases, however, must be rung through a register, and all products purchased for

1 consumption must be rung before consumption. *Id.* As set forth in Section 40 of the Disciplinary
2 Guidelines of the Retail Operations Manual, failure to pay for a product prior to consumption is
3 grounds for immediate dismissal. *Id.*, Ex. J.

4 **III. MR. BREWER'S POSITIONS, WORK LOCATIONS, AND MANAGERS**

5 Mr. Brewer was employed by GNC for approximately 16 months. He began work as a part-time
6 associate at the Mountain View Store on February 22, 2010. JSUF ¶¶ 2, 5. While there, he was
7 managed by Ms. Owens. JSUF ¶ 3. In December 2010, Mr. Brewer was transferred to GNC's store
8 in Palo Alto, California (the "Palo Alto Store"). JSUF ¶ 5. At the Palo Alto Store, Mr. Brewer was
9 managed by Brian Lebreton. JSUF ¶ 6. On May 1, 2011, Mr. Brewer was promoted to the position
10 of full-time assistant manager and both Mr. Brewer and Mr. Lebreton were transferred to GNC's
11 store located at the Hillsdale Mall in San Mateo, California (the "Hillsdale Store"). JSUF ¶ 8. Mr.
12 Brewer's employment was terminated a few weeks later on May 19, 2011. JSUF ¶ 16. Before the
13 events surrounding his termination (discussed below), Mr. Brewer had no previous employment
14 disciplinary actions taken against him. Brewer Declaration, ECF No. 63-5 ¶ 4.

15 **IV. MR. BREWER'S COMPLAINTS ABOUT RACIALLY DEROGATORY COMMENTS**

16 Mr. Brewer asserts that from the day he started at the Mountain View Store, Ms. Owens made
17 several derogatory comments about certain races. He says that on the day he was hired, Ms. Owens
18 told him that "she was never about black people" and that she did not have any black friends.
19 Pradmore Declaration, ECF No. 63-1, Ex. 3 ("Brewer Depo.") at 45:23-24. He also says that Ms.
20 Owens told him on at least ten occasions that black and Hispanic individuals buy certain GNC
21 products to cleanse their urine to pass drug-screening tests and two or three times that black and
22 Hispanic individuals purchase a product called Inositol to mix it with cocaine before they sell it. *Id.*
23 at 40:22 - 42:15, 47:10 - 48:1, 89:21-25. Once, when a white man purchased Inositol, Mr. Brewer
24 asked Ms. Owens, "What do you think he is using it for?" *Id.* at 41:11-16. She did not respond; she
25 did not express a belief that white people buy Inositol to use to mix with cocaine. *Id.* In addition,
26 Mr. Brewer says that on two or three occasions Ms. Owens told him that black men are "big and
27 stocky"; he thinks that she meant this to imply that black men are intimidating. *Id.* at 43:1 - 44:24.
28 He also says that on one occasion when a bucket of protein power was missing, Ms. Owens said that

1 either the “Hispanic guy” or “the black guy” took it, even though she did not see them take it. *Id.* at
2 49:4 - 51:25, 90:16 - 91:18. He further says that Ms. Owens told him that she doesn’t bother asking
3 black or Hispanic customers for their email addresses because “black people don’t use email” and
4 Hispanic individuals do not have email addresses because they are here illegally. *Id.* at 52:8-18,
5 89:4-18.

6 Mr. Brewer says that he told Ms. Owens on several occasions that her comments were racist,
7 offensive, and unlawful. *Id.* at 41:15-42:15, 43:5-24, 48:9-17. On September 22, 2010, Regional
8 Sales Director Michelle Murray visited the Mountain View Store and said to Mr. Brewer, “I heard
9 that you were going to sue.” *Id.* at 43:13-24. Mr. Brewer explained to Ms. Murray that he never
10 told Ms. Owens that he was going to sue; instead, he told Ms. Owens that her numerous racial slurs
11 were offensive. Brewer Declaration, ECF No. 63-4 ¶ 6. There is no indication in the record that
12 GNC ever investigated any of Mr. Brewer’s complaints about Mr. Owens’s comments.

13 **V. MR. BREWER’S COMPLAINTS ABOUT GNC’S WAGE-AND-HOUR VIOLATIONS**

14 Mr. Brewer says that he complained to Ms. Owens, Mr. Lebreton, and Ms. Murray about wage-
15 and-hour violations he suffered. Brewer Depo. at 65:17 - 69:25, 78:1 - 79:20. He does not specify
16 when he made these complaints. Specifically, Mr. Brewer says that he complained about being
17 required to work off-the-clock when he had to take deposits from the store to the bank after his shift
18 had ended and about not being reimbursed for mileage. *Id.* at 65:17 - 79:20. He says that he even
19 sent a letter to Ms. Murray expressing his concerns in this regard. *Id.* at 66:12-19. This letter,
20 however, is not in the record. He says that in response these individuals told him that this is the way
21 it had always been done. *Id.* at 79:3-15.

22 **VI. MR. BREWER’S TERMINATION**

23 On May 11, 2011, Crystal Fenech, apparently a GNC manager of one of the stores that Mr.
24 Brewer worked at², contacted Shannen Stenner, GNC’s regional loss prevention investigator, and
25

26 ² It is not clear who Ms. Fenech is. In its motion, GNC states that Ms. Fenech was “the
27 manager who had worked at the store which was being managed by Lebreton/Brewer.” Motion,
28 ECF No. 2 at 11. According to the evidence submitted, Mr. Brewer did not become an assistant
manager until May 1, 2011, when he was transferred to the Hillsdale Store. GNC also states that
“two of Ms. Fenech’s former employees (now working for Lebreton/Brewer)” complained to GNC’s

1 told her that Kyrolos Elgendy and Boris Abarca, two employees working at the Hillsdale Store,
2 claimed that Mr. Lebreton and Mr. Brewer violated GNC's policies. JSUF ¶ 9.1³; *see also*
3 Stennerson Decl., ECF No. 56 ¶ 6, Ex. A (Ms. Stennerson's investigation file). Ms. Stennerson
4 began an investigation. Stennerson Decl. ¶ 7. She first spoke with Mr. Elgendy. He told her that he
5 saw Mr. Lebreton change Mr. Brewer's hours to reflect that Mr. Brewer has been at the Hillsdale
6 Store and working when actually Mr. Brewer was not there. *Id.* Mr. Elgendy also said that he had
7 been working in the store on May 8, 2011 and that Mr. Brewer, who also scheduled to work that
8 day, arrived at 1:30 p.m. and changed his time to reflect an arrival time of 11:30 a.m. *Id.* Ms.
9 Stennerson also spoke with Boris Abcara. He told her that on May 11, 2011, Mr. Brewer had
10 offered to clock him in earlier than he was able to arrive and asked Mr. Abcara if he would clock
11 Mr. Brewer out a half hour after Brewer was going to leave. *Id.* ¶ 8. Mr. Abcara also told Ms.
12 Stennerson that Mr. Brewer had taken both a returned, non-saleable product and a trial size bottle of
13 Oxy-elite. *Id.* Mr. Abcara also provided a written statement to Ms. Stennerson memorializing his
14 statements. *Id.*, Ex. B.

15 On May 12, 2011, Ms. Stennerson spoke with Mr. Lebreton. He admitted to violating GNC's
16 policy about keeping accurate time records. *Id.* ¶ 9, Ex. C. After this conversation, Mr. Lebreton
17 was put on suspension pending further investigation. JSUF ¶ 10. Sometime thereafter⁴, he was
18 terminated. JSUF ¶ 11.

19 On May 13, 2011, Ms. Stennerson spoke with Mr. Brewer. JSUF ¶ 12. This conversation was
20 held in the presence of a senior store manager Elizabeth Naranjo. *Id.* During the conversation, Mr.
21 Brewer claimed that he had clocked in and out only to take breaks that he had not taken because he
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23 loss prevention department about Mr. Brewer's and Mr. Lebreton's conduct. Together, these
24 statements suggest that Ms. Fenech managed the Hillsdale Store before Mr. Lebreton and Mr.
25 Brewer were transferred to it and that Ms. Fenech no longer worked at the Hillsdale Store once Mr.
26 Lebreton and Mr. Brewer started working there. GNC does not make this explicit, though.

27 ³ The parties' joint statement of undisputed facts contains two paragraphs numbered as
28 "Paragraph 9." *See* JSUF, ECF No. 51 at 2-3. To cite to these two paragraphs, then, the court will
refer to the first one as Paragraph 9.1 and the second one as Paragraph 9.2.

⁴ The parties did not state that date on which Mr. Lebreton was terminated.

1 thought he was helping the company by recording the actual time he worked. Stennerson
2 Declaration ¶ 10. He also claimed that he was permitted to take the Oxy-elite because a sales
3 promotion related to the product was over. *Id.* He denied taking any other product. JSUF, Ex. H;
4 *see also* Brewer Depo. at 34:25 - 35:5. Ms. Stennerson stated that Mr. Brewer became loud during
5 this conversation, but Mr. Brewer denies this. JSUF, Ex. H; Brewer Depo. at 34:20-21. Later, Mr.
6 Brewer wrote a statement summarizing the information he provided during the interview, and it
7 included in the loss prevention report. JSUF ¶ 13, Ex. H; Stennerson Declaration ¶ 11; Brewer
8 Depo. at 35:15-20. Ms. Naranjo also prepared a statement summarizing the interview. JSUF ¶ 14,
9 Ex. H. After this conversation, Mr. Brewer was put on suspension pending further investigation.
10 JSUF ¶ 15.

11 After her conversation with Mr. Brewer, Ms. Stennerson determined that the Oxy-elite product
12 that Mr. Brewer took was a promotional “gift with purchase” item valued at \$7.99 which would be
13 “zeroed out” on the register if purchased with another item. Stennerson Declaration ¶ 12. Thus, by
14 taking that item, Mr. Brewer had taken an item valued at \$7.99 and did not run it through the
15 register, in violation of GNC’s policy. *Id.* As Mr. Brewer denied taking the returned, non-saleable
16 product, Ms. Stennerson made no determination about this claim. *Id.* Ms. Stennerson also reviewed
17 Mr. Brewer’s time records and determined that on May 1, 2011 he had clocked in at 1:00 p.m. but
18 his time was adjusted to reflect a clock-in time of 11:30 a.m. *Id.*

19 After conducting her investigation, Ms. Stennerson concluded that Mr. Brewer had
20 impermissibly taken a product without paying for it and had clocked an hour and a half of time that
21 he did not work. *Id.* These conclusions are reflected in the Loss Prevention Report she prepared.
22 *Id.*, Ex. A. She reported the conclusions to Human Resources. *Id.*

23 Sometime after his May 13, 2011 conversation with Ms. Stennerson, Mr. Brewer prepared a
24 statement, addressed to Bill Roller, an inventory manager for GNC, regarding the investigation.
25 Kuniak Declaration, ECF No. 55, Ex. A; Brewer Depo at 36:21 - 37:8. In it, Mr. Brewer says Ms.
26 Stennerson’s attitude was unpleasant and that her investigation was biased, subjective, and coercive.
27 *See* Kuniak Declaration, Ex. A. He also reiterates his argument that the changes to his hours were
28 correct, as many of them were to reflect lunches and breaks that were not taken earlier in the day.

1 *See id.* He also mentioned his complaints about having to work off-the-clock and not being
2 reimbursed for expenses. *See id.* He did not mention any of his complaints about race or age
3 discrimination. *See id.*

4 On May 18, 2011, it appears he tried to email the statement to Marianne Wagner, an employee in
5 GNC's Human Resources department, but he sent his email to marion-wagner@gnc-hq.com, which
6 is not her email address, rather than to marianne-wagner@gnc-hq.com, which is. *Id.*, Ex. A. He
7 copied Ms. Murray and James Inlow, another employee in GNC's Human Resources department.
8 *Id.*, Ex. A. His email also states that he mailed copies of the statement to her for delivery to Tony
9 Kuniak, GNC's Director of Loss Prevention, Lorri Murphy, GNC's Corporate Loss Prevention
10 Manager, and Mr. Roller. *Id.*, Ex. A. Mr. Roller received the statement, but he forwarded it to Ms.
11 Stennerson's supervisor because he (Mr. Roller) did not supervise her and would not have been
12 involved with a loss prevention investigation that did not involve store inventory or conversion.
13 Roller Declaration, ECF No. 54 ¶ 3. Mr. Kuniak does not recall receiving it, and he also states that
14 Lorri Murphy could not have received because she had not been employed by GNC since July 31,
15 2009. Kuniak Declaration ¶¶ 2, 4.

16 As a result of the investigation, and based upon Ms. Stennerson's conclusion that Mr.
17 Brewer impermissibly took product, as well as an hour and a half of time, Mr. Brewer was
18 terminated on May 19, 2011 for "violation of company policy." JSUF ¶ 16; Reidy Declaration ¶ 12,
19 Ex. K (Employee Separation Report). The decision to terminate Brewer was communicated to him
20 by Ms. Murray. JSUF ¶ 17. There does not appear to be any evidence in the record, however, that
21 Ms. Murray had anything to do with the making of that decision. In fact, there does not even appear
22 to be any evidence in the record about who decided to terminate him.

23 At no time during his conversation with Ms. Stennerson (and Ms. Naranjo) did Mr. Brewer tell
24 Ms. Stennerson that he had made complaints about not getting reimbursed for making bank deposits
25 or for gas expenses, or that he had complained about, or been subject to, racial discrimination.
26 Stennerson Declaration ¶ 11. Mr. Lebreton also did not tell Ms. Stennerson that Mr. Brewer had
27 ever complained that he had not been reimbursed for business expenses or otherwise had not been
28 paid for wages which were owed, or had otherwise been racially harassed. *Id.* ¶ 14. Ms. Stennerson

1 did not speak to Ms. Murray during the course of her investigation, and in fact she never spoke to
2 Ms. Murray about Mr. Brewer in any respect either before or after her investigation. *Id.* Ms.
3 Stennerson also did not speak with Mr. Inlow about Mr. Brewer other than to tell him the results of
4 the loss prevention investigation. *Id.*

5 **VII. MR. BREWER’S ADMINISTRATIVE COMPLAINTS**

6 On June 3, 2011, a few weeks after he was terminated, Mr. Brewer filled out a “Pre-Complaint
7 Questionnaire - Employment” for California’s Department of Fair Employment and Housing
8 (“DFEH”). Germaise Declaration, Ex. H (“DFEH Records”), ECF No. 53-2 at 27-28. In that
9 questionnaire, Mr. Brewer expressed his wish to complain against GNC and Ms. Stennerson based
10 on his belief that he was discriminated against because of his race, sex, and age. *Id.* at 27. Mr.
11 Brewer marked from a list that the discriminatory treatment was his suspension and termination. *Id.*
12 Significantly, he did not mark that the discriminatory treatment was harassment (even though that
13 was one of the choices). *Id.* It appears he was interviewed about his claims---race, sex, and age
14 discrimination---by someone at DFEH a few days later. *Id.* at 29-33, 41. The next month, on July
15 27, 2011, a DFEH employee mailed Mr. Brewer an unsigned copy of his formal complaint. *Id.* at
16 38-39. Mr. Brewer signed it on August 4, 2011 and returned it, and it was assigned as DFEH #
17 E201112M0181-00-ase. *Id.* at 17. It also was filed with the federal Equal Employment Opportunity
18 Commission and assigned as EEOC # 37AB108708. *Id.* This complaint listed sex and age as the
19 basis for discrimination but did not list race as a basis. *Id.* In the complaint, Mr. Brewer alleged that
20 he had been differentially treated “[f]rom May 13, 2011 to present,” and that a younger female
21 coworker had also made changes to her time cards but was not suspended. *Id.* Notice of this
22 complaint being filed was provided by DFEH to GNC by letter dated August 10, 2011. *Id.* at 23-24.
23 On September 9, 2011, DFEH informed Mr. Brewer that based upon its investigation, it was unable
24 to conclude that a violation occurs. *Id.* at 18. Accordingly, DFEH closed the case. *Id.* DFEH’s
25 letter served as Mr. Brewer’s right-to-sue notice. *Id.*

26 Mr. Brewer filed a second complaint with DFEH. Among the DFEH records submitted, there is
27 a complaint by Mr. Brewer against GNC for race discrimination and retaliation that is dated
28 November 1, 2011. *Id.* at 9. Although it contains no substantive allegations, Mr. Brewer did mark

1 from a list that his complaint is based on his termination and retaliation. *Id.* Significantly, he did
2 not mark that his complaint is based on harassment or failure to prevent to discrimination. *Id.* It
3 was assigned as DFEH # E201112M5478-00. *Id.* This complaint was never served on GNC,
4 however, and instead DFEH closed the case that same day (November 1, 2011) and issued Mr.
5 Brewer a right-to-sue notice. *Id.* at 10-12.

6 **VIII. THIS ACTION’S PROCEDURAL HISTORY**

7 Mr. Brewer filed his complaint on May 10, 2012---less than one year after he was investigated
8 and terminated by GNC. Complaint, ECF No. 1. He brings the following seven claims: (1)
9 retaliation in violation of California Labor Code §§ 98.6, 98.7, and 230; (2) retaliation in violation of
10 California public policy; (3) wrongful termination in violation of California public policy; (4) race
11 discrimination in violation of California’s Fair Employment and Housing Act (“FEHA”), Cal. Gov’t
12 Code § 12940 *et seq.*; (5) race discrimination in violation of California public policy; (6) failure to
13 prevent race discrimination in violation of FEHA; and (7) age discrimination in violation of FEHA.
14 *See id.* GNC answered the complaint on July 10, 2012, Answer, ECF No. 3, and the parties
15 conducted full discovery. All parties have consented to the undersigned’s jurisdiction. Consent
16 (Mr. Brewer), ECF No. 6; Consent (GNC), ECF No. 7.

17 On February 27, 2014, GNC filed a motion for summary judgment. Motion, ECF No. 52.⁵ Mr.
18 Brewer filed an opposition on March 13, 2013. Opposition, ECF No. 63. GNC filed a reply and
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21 ⁵ GNC also filed a request asking the court to take judicial notice of Mr. Brewer’s complaint
22 in this action. Request for Judicial Notice, ECF No. 58-1. Because the complaint is already filed in
23 the docket for this action, it is unnecessary for the court to take judicial notice of it. *See Johnson v.*
24 *Haight Ashbury Med. Clinics, Inc.*, No. C-11-02052-YGR, 2012 WL 629312, at *1 (N.D. Cal. Feb.
25 27, 2012) (denying a request for judicial notice “because it is unnecessary to take judicial notice of
26 documents in the record in this action”); *Martinez v. Blanas*, No. 2:06-cv-0088 FCD DAD (PC),
27 2011 WL 864956, at *1 n.1 (E.D. Cal. Mar. 10, 2011) (“Defendant’s request for judicial notice of
28 the second amended complaint will be denied as unnecessary. The second amended complaint and
its exhibits are a part of the record in this action.”); *Patoc v. Lexington Ins. Co.*, No. 08-01893 RMW
(PVT), 2008 WL 3244079, at *1 n.3 (N.D. Cal. Aug. 5, 2008) (“Because this complaint is already
before the Court as an exhibit to the Notice of Removal, the Court does not need to take judicial
notice of this complaint.”); *see also Jackson v. Med. Bd. of Cal.*, 424 Fed. Appx. 670, 670 (9th Cir.
Mar. 25, 2011). GNC’s request therefore is denied.

1 objections to some of Mr. Brewer’s evidence on March 20, 2014.⁶ Reply, ECF No. 64; Objections
2 to Brewer Declaration, ECF No. 64-2; Objections to Bruns Declaration, ECF No. 64-3; Objections
3 to Neal Declaration, ECF No. 64-4; Objections to Pradmore Declaration, ECF No. 64-5. Finally, on
4 April 2, 2014, Mr. Brewer filed an additional declaration in support of his opposition, and GNC filed
5 a motion to strike that declaration the same day. Truong Declaration, ECF No. 67; Motion to Strike,
6 ECF No. 68.⁷ The court held a hearing on the matter on April 3, 2014. 4/3/2014 Minute Order, ECF
7 No. 69.

8 ANALYSIS

9 I. LEGAL STANDARD

10 Summary judgment is proper if the pleadings, the discovery and disclosures on file, and
11 affidavits show that there is no genuine issue as to any material fact and the moving party is entitled
12 to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S.
13 242, 247-48 (1986). Material facts are those that may affect the outcome of the case. *See id.* at 248.
14 A dispute about a material fact is genuine if there is sufficient evidence for a reasonable jury to
15 return a verdict for the non-moving party. *See id.* at 248-49.

16 The party moving for summary judgment has the initial burden of identifying those portions of
17 the pleadings, discovery and disclosures on file, and affidavits that demonstrate the absence of a
18 genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “In
19 considering a motion for summary judgment, the court may not weight the evidence or make
20 credibility determinations, and is required to draw all inferences in a light most favorable to the non-
21 moving party.” *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997).

22 When the nonmoving party has the burden of proof at trial, the moving party need point out only
23 “that there is an absence of evidence to support the nonmoving party’s case.” *Id.* at 325. If the
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26 ⁶ As seen below, because Mr. Brewer’s claims all fail for reasons independent of his
27 arguments and the evidence that GNC objects to, the court need not rule on GNC’s evidentiary
objections. They are moot.

28 ⁷ Again, as seen below, because Mr. Brewer’s claims all fail for reasons independent of his
arguments and the Truong Declaration, the court denies GNC’s motion to strike as moot.

1 moving party meets this initial burden, the non-moving party must go beyond the pleadings and – by
2 its own affidavits or discovery – set forth specific facts showing a genuine issue for trial. *See* Fed.
3 R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
4 U.S. 574, 586-87 (1986). Thus, summary judgment is proper against a non-moving party who “fails
5 to make a showing sufficient to establish the existence of an element essential to that party’s case,
6 and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322. If the non-
7 moving party does not produce evidence to show a genuine issue of material fact, the moving party
8 is entitled to summary judgment. *See id.* at 323. The mere existence of a “scintilla” of evidence in
9 support of the non-moving party’s position is not sufficient. The non-moving party has the burden
10 of establishing sufficient evidence on each element of his case so that the finder of fact could return
11 a verdict for him. *Anderson*, 477 U.S. at 249. To meet this burden, the nonmoving party must come
12 forward with admissible evidence. Fed. R. Civ. P.56(e).

13 **II. MR. BREWER’S DISCRIMINATION CLAIMS**

14 **A. The *McDonnell Douglas* Burden-Shifting Test**

15 In federal and state employment actions alleging discrimination based on a disparate treatment
16 theory, summary judgment motions are analyzed under the three-step burden-shifting framework
17 established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See, e.g., Chuang v.*
18 *University of California Davis*, 225 F.3d 1115, 1123-24 (9th Cir. 2000) (citing *McDonnell Douglas*);
19 *Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267, 270 (9th Cir. 1996) (applying *McDonnell*
20 *Douglas* to FEHA claims); *Guz v. Bechtel Nat’l Inc.*, 24 Cal. 4th 317, 354 (2000) (same). This
21 standard has been applied to claims of discrimination based on age, *see Nesbit v. Pepsico, Inc.*, 994
22 F.2d 703, 704 (9th Cir. 1993), and race, *see Moran v. Selig*, 447 F.3d 748, 753 (9th Cir. 2006).
23 First, the plaintiff has the initial burden under the statute of establishing a prima facie case for
24 discrimination. Second, if the plaintiff establishes a prima facie case, the burden of production shifts
25 to the employer to articulate a “legitimate, nondiscriminatory reason” for the employment decision.
26 Third, if the employer offers a nondiscriminatory reason, the burden returns to the plaintiff to show
27 that the articulated reason is a “pretext” for discrimination. *McDonnell*, 411 U.S. at 802–04.

1 **B. Mr. Brewer’s Age Discrimination Claim**

2 Mr. Brewer brings a claim for age discrimination in violation of FEHA. To state a prima facie
3 case of age discrimination, Mr. Hamilton must show that he (1) is a member of a protected class
4 (here, that he was at least 40 years old); (2) was performing his job satisfactorily; (3) was
5 discharged; and (4) either was replaced by a substantially younger employee with equal or lesser
6 qualifications or was discharged under circumstances giving rise to an inference of discrimination.
7 *See Nesbit*, 994 F.2d at 704. The proof necessary for a plaintiff to establish a prima facie case is
8 “minimal” and need not even rise to the level of a preponderance of the evidence. *See Avila v.*
9 *Continental Airlines*, 165 Cal. App. 4th, 1237, 1246 (2008) (citing *Wallis v. J.R. Simplot Co.*, 26
10 F.3d 885, 889 (9th Cir. 1994)).

11 GNC argues that Mr. Brewer has not shown that he was performing his job satisfactorily (the
12 second element) or that he either was replaced by a substantially younger employee with equal or
13 lesser qualifications or was discharged under circumstances giving rise to an inference of
14 discrimination (the fourth element). *See Motion*, ECF No. 52 at 24-25. And in its reply, GNC
15 points out that Mr. Brewer fails to address GNC’s arguments in this regard. *See Reply*, ECF No. 64
16 at 7. This is true: in his opposition, of his FEHA discrimination claims, Mr. Brewer addresses only
17 the ones related to race discrimination. *See Opposition*, ECF No. 63 at 17-19. Moreover, the court
18 has neither seen nor been pointed to any evidence in the record about who replaced Mr. Brewer after
19 he was terminated, let alone any evidence about the age of his replacement. In short, Mr. Brewer
20 has failed to make a prima facie showing of an age discrimination claim, and he does not attempt to
21 argue otherwise. Accordingly, the court **GRANTS** GNC’s motion for summary judgment with
22 respect to Mr. Brewer’s claim for age discrimination.

23 **C. Mr. Brewer’s Race Discrimination Claims**

24 Mr. Brewer also brings race discrimination in violation of FEHA and California public policy
25 and for failure to prevent discrimination in violation of FEHA. Mr. Brewer’s claims appear to based
26 upon two theories: first, that he was terminated because of racial animus, and second, that he was
27 subjected to a hostile work environment. *See Complaint*, ECF No. 1 ¶¶ 38-40, 46-47; *see also*
28 *Opposition*, ECF No. 63 at 5 (mentioning a hostile work environment as well as his termination).

1 Although Mr. Brewer combined these two theories in his claims (rather than alleging them as
2 separate claims), the court discusses each theory below.

3 **1. Mr. Brewer’s Discriminatory Termination Claim**

4 As an initial matter, GNC argues that Mr. Brewer did not exhaust his administrative remedies
5 with respect to his FEHA claims. It is true that Mr. Brewer must have done so. As the Ninth Circuit
6 has explained:

7 “In order to bring a civil action under FEHA, the aggrieved person must exhaust
8 the administrative remedies provided by law.” *Yurick v. Superior Court*, 209 Cal.
9 App. 3d 1116, 1121, 257 Cal. Rptr. 665 (1989); *accord Romano v. Rockwell Int’l,*
10 *Inc.*, 14 Cal. 4th 479, 492, 59 Cal. Rptr. 2d 20, 926 P.2d 1114 (1996). Exhaustion in
11 this context requires filing a written charge with DFEH within one year of the alleged
12 unlawful employment discrimination, and obtaining notice from DFEH of the right to
13 sue. *Romano*, 14 Cal. 4th at 492, 59 Cal. Rptr. 2d 20, 926 P.2d 1114; *Okoli v.*
14 *Lockheed Technical Operations Co.*, 36 Cal. App. 4th 1607, 1613, 43 Cal. Rptr. 2d
15 57 (1995); *Martin v. Lockheed Missiles & Space Co.*, 29 Cal. App. 4th 1718, 1724,
35 Cal. Rptr. 2d 181 (1994). The scope of the written administrative charge defines
the permissible scope of the subsequent civil action. *Yurick*, 209 Cal. App. 3d at
1121–23, 257 Cal. Rptr. 665. Allegations in the civil complaint that fall outside of
the scope of the administrative charge are barred for failure to exhaust. These
procedural requirements, as with all provisions of FEHA, are to “be construed
liberally for the accomplishment of the purposes [of FEHA].” Cal. Gov’t Code §
12993(a). Those purposes include the elimination of employment discrimination. §
12920.

16 *Rodriguez v. Airborne Express*, 265 F.3d 890, 896-97 (9th Cir. 2001) (footnote omitted).

17 Here, GNC argues that Mr. Brewer “did not identify an racially inappropriate comments by
18 Carol Owens in any timely administrative charge.” Motion, ECF No. 52 at 19. “Instead,” GNC
19 goes on, “Mr. Brewer claimed that Shannen Stenneron had discriminated against him on his age
20 and sex (a claim which is not even asserted in the Complaint) because a younger African American
21 employee had made changes to her time car and had not been suspended.” *Id.* Mr. Brewer responds
22 by simply pointing out that he filed, within one year of his termination, two complaints with
23 DFEH—one on August 4, 2011 and one of November 1, 2011---and received right-to-sue notices for
24 both of them. *See* Opposition, ECF No. 63 at 14. He also points out that his second complaint---the
25 one filed on November 1, 2011---alleged that GNC discriminated against him on the basis of race.
26 *Id.*

27 The court finds that Mr. Brewer has demonstrated that he exhausted his administrative remedies
28 with respect to his termination. As the court recounted above, in his complaint Mr. Brewer filled out

1 a “Pre-Complaint Questionnaire - Employment” in which he expressed his wish to complain against
2 GNC and Ms. Stennerson based on his belief that he was discriminated against because of his race,
3 sex, and age, he marked from a list that the discriminatory treatment was his suspension and
4 termination, and he was interviewed about those claims. For some reason, his complaint omitted
5 race as a basis for discrimination. In any case, Mr. Brewer’s second complaint included a claim for
6 race discrimination, and although it contains no substantive allegations, Mr. Brewer did mark from a
7 list that his complaint is based on his termination and retaliation. In its reply, GNC suggests that this
8 is not good enough “as to the claimed racially inappropriate statements of Carol Owens because he
9 did not identify a single such statement” in those complaints, *see* Reply, ECF No. 4 at 14, but that is
10 an argument directed at Mr. Brewer’s hostile work environment claim, not his termination claim.
11 Mr. Brewer clearly raised race discrimination in his initial DFEH interview and actually included it
12 in his second DFEH complaint, and he clearly stated that the discriminatory event was his
13 termination. To the extent that his race discrimination claims are based upon his termination, they
14 are “within the scope of the administrative investigation ‘which can reasonably be expected to grow
15 out of the charge of discrimination.’” *Rodriguez*, 265 F.3d at 896 (citing *Sandhu v. Lockheed*
16 *Missiles & Space Co.*, 26 Cal. App. 4th 846, 858-59 (Cal. Ct. App. 1994) (adopting this “like or
17 reasonably related” standard)). Accordingly, the court finds that Mr. Brewer exhausted his
18 administrative remedies with respect to his race discrimination claims insofar as they are based on
19 his termination.

20 Thus, the court moves on to consider the merits of Mr. Brewer’s claims. To state a prima facie
21 case of race discrimination, Mr. Brewer must show that: (1) he is a member of a protected class; (2)
22 he was qualified for his position; (3) he experienced an adverse employment action; and (4)
23 similarly situated individuals outside his protected class were treated more favorably, or other
24 circumstances surrounding the adverse employment action give rise to an inference of
25 discrimination. *See, e.g., McDonnell Douglas*, 411 U.S. at 802; *Fonseca v. Sysco Food Services of*
26 *Arizona, Inc.*, 374 F.3d 840, 847 (9th Cir. 2004).

27 Mr. Brewer contends that the McDonnell Douglas burden-shifting test does not apply to his
28 FEHA race discrimination claims because he has presented direct evidence of discrimination. *See*

1 Opposition, ECF No. 63 at 17-18. Indeed, California courts do distinguish between FEHA
2 discrimination actions where a plaintiff presents direct evidence of discrimination and those where a
3 plaintiff presents indirect evidence. As one court has explained:

4 In employment discrimination cases under FEHA, plaintiffs can prove their cases
5 in either of two ways: by direct or circumstantial evidence. (*Guz, supra*, 24 Cal. 4th
6 at p. 354, 100 Cal. Rptr.2d 352, 8 P.3d 1089.) When a plaintiff proffers
7 circumstantial evidence, California courts apply the three-stage burden-shifting test
8 established by the United States Supreme Court for trying claims of employment
9 discrimination . . . based on a theory of disparate treatment. (*Ibid.*, citing *McDonnell*
10 *Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668
11 (*McDonnell Douglas*).

12 However, California has also adopted the rule that “the *McDonnell Douglas* test
13 is inapplicable where the plaintiff presents direct evidence of discrimination. . . .”
14 (*Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal.App.4th 1133, 1144, 29
15 Cal. Rptr. 3d 144 (*Trop*), quoting *Trans World Airlines, Inc. v. Thurston* (1985) 469
16 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed.2d 523 (*Trans World*)). The *Trans World*
17 court reasoned that “[t]he shifting burdens of proof set forth in *McDonnell Douglas*
18 are designed to assure that the ‘plaintiff [has] his day in court despite the
19 unavailability of direct evidence.’ [Citation.]” (*Trans World, supra*, 469 U.S. at p.
20 121, 105 S.Ct. 613, italics added.) Thus, there is no need to engage in this
21 burden-shifting analysis where there is direct evidence of discriminatory animus.
22 (*Trop, supra*, 129 Cal. App. 4th at pp. 1144–1145, 29 Cal. Rptr. 3d 144.)

23 Direct evidence is evidence which, if believed, proves the fact of discriminatory
24 animus without inference or presumption. Comments demonstrating discriminatory
25 animus may be found to be direct evidence if there is evidence of a causal
26 relationship between the comments and the adverse job action at issue. (*Trop, supra*,
27 129 Cal. App. 4th at pp. 1146–1149, 29 Cal. Rptr. 3d 144.)

28 *DeJung v. Superior Court*, 169 Cal. App. 4th 533, 549-50 (Cal. Ct. App. 2008) (footnote omitted).

Here, Mr. Brewer argues only that Ms. Owens’s numerous comments (recounted above) are
“direct evidence of [Ms.] Owens’[s] racial animus against African Americans.” *Id.* at 17-18. But as
GNC points out in both in its motion and reply, Mr. Brewer has not shown that Ms. Owens had
anything to do with Ms. Stennerson’s investigation or his termination. *See* Motion, ECF No. 52 at
23; Reply, ECF No. 64 at 17. And, to the extent that Ms. Murray knew about his complaints about
Ms. Owens, he has not shown that Ms. Murray had anything to do with Ms. Stennerson’s
investigation or his termination (aside from simply informing of the fact of it). Indeed, as the court
mentioned earlier, Mr. Brewer has not even shown who at GNC actually made the decision to
terminate him. GNC, on the other hand, produced evidence that neither Mr. Brewer nor Mr.
Lebreton said anything to Ms. Stennerson about Ms. Owens’s comments, and that Ms. Stennerson

1 did not speak to Ms. Murray during the course of her investigation, and in fact she never spoke to
2 Ms. Murray about Mr. Brewer in any respect either before or after her investigation. Moreover, Mr.
3 Brewer did not mention Ms. Owens’s comments in his statement addressed to Bill Roller and which
4 he tried to send to numerous GNC employees.

5 In sum, Mr. Brewer claims that his termination was due to racial animus demonstrated by Ms.
6 Owens, but he fails to show that Ms. Owens had anything to do with his termination or that anyone
7 who might have had anything to do with his termination knew about these comments or his
8 complaints about them. Without evidence of these things, the court finds that Mr. Brewer has not
9 met his burden to show a prima facie case of race discrimination. Accordingly, the court **GRANTS**
10 GNC’s motion for summary judgment with respect to Mr. Brewer’s claim for race discrimination in
11 relation to his termination.

12 **2. Mr. Brewer’s Hostile Work Environment Claim**

13 GNC again contends that Mr. Brewer did not exhaust his administrative remedies, but this time
14 the court agrees. As the court described above, while Mr. Brewer filed two DFEH complaints,
15 neither of them relates to the comments Ms. Owens made when he worked for her from February
16 2010 through December 2010. For his first complaint, Mr. Brewer filled out a “Pre-Complaint
17 Questionnaire - Employment” and stated that he was discriminated against because of his race, sex,
18 and age, but he marked from a list that the discriminatory treatment was his suspension and
19 termination and did not mark that the discriminatory treatment was harassment (even though that
20 was one of the choices). And in the complaint that resulted from that questionnaire, he alleged that
21 he had been differentially treated “[f]rom May 13, 2011 to present,” which does not encompass any
22 of the time he worked for Ms. Owens. For his second complaint, Mr. Brewer stated that he was
23 subjected to race discrimination and retaliation, and he marked from a list that his complaint was
24 based on his termination and retaliation. Significantly, he did not mark that his complaint is based
25 on harassment or failure to prevent to discrimination. Moreover, in neither of his complaints does he
26 ever mention anything about Ms. Owens’s comments or any other conduct that created a hostile
27 work environment. Mr. Brewer’s general citation in his opposition to his two complaints does not
28 overcome these deficiencies. Accordingly, the court finds that Mr. Brewer did not exhaust his

1 administrative remedies with respect to his FEHA hostile work environment claim.

2 Even if he had, and even after considering the evidence in the light most favorable to him, the
3 court finds that Ms. Owens’s comments were not sufficiently severe or pervasive to create a hostile
4 work environment under the applicable law.⁸ FEHA makes harassment illegal and requires an
5 employer to take immediate and appropriate action against it. Cal. Gov’t Code § 12940(j)(1).
6 California courts apply federal decisions interpreting Title VII to analyze FEHA racial harassment
7 claims. *Etter v. Veriflo*, 67 Cal. App. 4th 457, 464 (Cal. Ct. App. 1998). A plaintiff may prove
8 racial harassment by demonstrating that an employer has created a hostile or abusive work
9 environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65-67 (1986). To prevail on a hostile
10 workplace claim premised on race, a plaintiff must show: (1) that he or she was subjected to verbal
11 or physical conduct of a racial nature; (2) that the conduct was unwelcome; and (3) that the conduct
12 was sufficiently severe or pervasive to alter the conditions of the plaintiff’s employment and create
13 an abusive work environment. *Vasquez v. County of Los Angeles*, 349 F.3d 634, 642 (9th Cir.
14 2003); *Fisher v. San Pedro Peninsula Hospital*, 214 Cal. App. 3d 590, 608 (Cal. Ct. App. 1989)
15 (adopting same standard for harassment claims under FEHA). A plaintiff must show that the work
16 environment was abusive from both a subjective and an objective point of view. *Fuller v. City of*
17 *Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995). Whether the workplace is objectively hostile must be
18 determined from the perspective of a reasonable person with the same fundamental characteristics as
19 the plaintiff. *Id.* In determining whether a work environment is hostile or abusive, the court must
20 consider all of the circumstances. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). This may
21 include “the frequency of the discriminatory conduct; its severity; whether it is physically
22 threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes
23 with an employee’s work performance.” *Id.* Although the “mere utterance of an . . . epithet which

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26 ⁸ A court may grant summary judgment on a FEHA harassment/hostile work environment
27 claim on the basis that no reasonable jury could find the defendant’s conduct severe or pervasive.
28 *See, e.g., Kortan v. California Youth Authority*, 217 F.3d 1104 (9th Cir. 2000) (affirming summary
judgment in favor of employer on this basis); *Yoshimoto v. O’Reilly Auto., Inc.*, Nos. C 10-5438
PJH, C 11-3119 PJH, 2013 WL 6446249 (N.D. Cal. Dec. 9, 2013) (granting summary judgment in
favor of employer on this basis).

1 engenders offensive feelings in an employee” does not alter the employee’s terms and conditions of
2 employment sufficiently to create a hostile work environment, “when the workplace is permeated
3 with ‘discriminatory intimidation, ridicule, and insult,’” such an environment exists. *Meritor*, 477
4 U.S. at 65, 67. Neither “simple teasing,” “offhand comments,” nor “isolated incidents” alone
5 constitute a hostile work environment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).
6 Further, “even if a hostile working environment exists, an employer is only liable for failing to
7 remedy harassment of which it knows or should know.” *Fuller*, 47 F.3d at 1527.

8 GNC argues in its motion and reply that Mr. Brewer has not shown that Ms. Owens’s comments
9 were sufficiently severe or pervasive to support a claim for racial harassment. *See* Motion, ECF No.
10 52 at 19-22; Reply, ECF No. 64 at 15-16. To briefly recount, Mr. Brewer says that Ms. Owens, over
11 the course of the 10 months that he worked for her, told him that “she was never about black
12 people”; she did not have any black friends; black and Hispanic individuals (as opposed to white
13 individuals) buy certain GNC products to cleanse their urine to pass drug-screening tests and
14 purchase a product called Inositol to mix it with cocaine before they sell it; black men are “big and
15 stocky”; and “black people don’t use email” and Hispanic individuals do not have email addresses
16 because they are in the United States illegally. And, when a bucket of protein power was missing,
17 Ms. Owens said that either the “Hispanic guy” or “the black guy” took it, even though she did not
18 see them take it.

19 As one court in this district has described, “[s]uccessful claims of hostile work environment
20 include harsh and, generally, repetitive verbal abuse.” *Lockett v. Bayer Healthcare*, No. C 05-03978
21 CRB, 2008 WL 624847, at *9 (N.D. Cal. Mar. 3, 2008) (citing *Kang v. U. Lim Am., Inc.*, 296 F.3d
22 810, 817 (9th Cir. 2002) (finding that a Korean plaintiff suffered national origin harassment where
23 the employer verbally and physically abused the plaintiff because of his race); *Nichols v. Azteca*
24 *Rest. Enters.*, 256 F.3d 864, 872-73 (9th Cir. 2001) (finding a hostile work environment where a
25 male employee was called “faggot” and “fucking female whore” by co-workers and supervisors at
26 least once a week and often several times per day); *Anderson v. Reno*, 190 F.3d 930 (9th Cir. 1999)
27 (finding a hostile work environment where a supervisor repeatedly referred to the employee as
28 “office sex goddess,” “sexy,” and “the good little girl” and where he humiliated the employee in

1 public by drawing a pair of breasts on an easel while the employee was making a presentation and
2 then told the assembled group that “this is your training bra session,” and where the employee
3 received vulgar notes and was patted on the buttocks and told she was “putting on weight down
4 there”); *Draper v. Coeur Rochester*, 147 F.3d 1104, 1109 (9th Cir. 1998) (finding hostile work
5 environment where plaintiff's supervisor made repeated sexual remarks to her, told her of his sexual
6 fantasies and desire to have sex with her, commented on her physical characteristics, and asked over
7 a loudspeaker if she needed help changing her clothes).

8 Here, Ms. Owens’s comments fall short of the conduct described in numerous Ninth Circuit
9 opinions where no hostile work environment was found. *See Manatt v. Bank of Am.*, 339 F.3d 792
10 (9th Cir. 2003); *Vasquez*, 349 F.3d at 642-44 (9th Cir. 2003) (finding no hostile environment
11 discrimination where the employee was told that he had “a typical Hispanic macho attitude,” that he
12 should work in the field because “Hispanics do good in the field” and where he was yelled at in front
13 of others); *Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1111 (9th Cir.2000) (finding no hostile work
14 environment where the supervisor referred to females as “castrating bitches,” “Madonnas,” or
15 “Regina” in front of plaintiff on several occasions and directly called plaintiff “Medea”); *Sanchez v.*
16 *City of Santa Ana*, 936 F.2d 1027, 1031, 1036-37 (9th Cir. 1990) (affirming the district court’s
17 decision that no reasonable jury could have found a hostile work environment despite allegations
18 that the employer posted a racially offensive cartoon, made racially offensive slurs, targeted Latinos
19 when enforcing rules, provided unsafe vehicles to Latinos, did not provide adequate police backup
20 to Latino officers, and kept illegal personnel files on plaintiffs because they were Latino)). For
21 instance, in *Manatt v. Bank of America*, the plaintiff, who was a Chinese American, overheard a
22 number of conversations in which fellow employees used the phrase “China man” and referred to
23 “communists” and “rickshaws.” 339 F.3d at 795. She was mocked by her coworkers, who “pulled
24 their eyes back with their fingers in an attempt to imitate or mock the appearance of Asians.” *Id.*
25 She also was told that her pronunciation of the word “Lima” was “ridiculous,” was asked to repeat
26 the pronunciation for others to hear, and had her co-workers explain her pronunciation by saying
27 “that's because she’s a China woman.” *Id.* at 795-96. While the Ninth Circuit said it was “troubled”
28 by the comments and “racially offensive” acts of the plaintiff’s coworkers, given that the incidents

1 occurred only a few times over two and a half years and were directed at her only rarely, it found
2 that the actions of the plaintiff’s coworkers generally fell into the “simple teasing” and offhand
3 comments” category of non-actionable discrimination because it was not severe or pervasive enough
4 to alter the conditions of her employment. *Id.* at 798-99. Accordingly, the Ninth Circuit upheld the
5 district court’s grant of summary judgment in favor of the defendant. *Id.* at 795.

6 Here, while Ms. Owens made racially insensitive comments on a handful of occasions, her
7 comments simply do not rise to the level required under the applicable case law. They were less
8 severe than those described in *Manatt*, were offensive utterances rather than physical threats or
9 comments intended to humiliate Mr. Brewer, and there is no evidence suggesting that they
10 unreasonably interfered with his work performance. In short, from the evidence presented, the court
11 does not believe that Mr. Brewer’s workplace was permeated with discriminatory intimidation,
12 ridicule, and insult. Instead, Ms. Owens sometimes made comments that engendered offensive
13 feelings but did not alter Mr. Brewer’s terms and conditions of employment sufficiently to create a
14 hostile work environment. Accordingly, the court **GRANTS** GNC’s motion for summary judgment
15 with respect to Mr. Brewer’s claim for a hostile work environment. And because his claim for
16 failure to prevent discrimination is based upon his race and age discrimination claims, and all of
17 those claims fail, the court also **GRANTS** GNC’s motion for summary judgment with respect to Mr.
18 Brewer’s claim for failure to prevent discrimination.

19 **III. MR. BREWER’S RETALIATION AND WRONGFUL TERMINATION CLAIMS**

20 Mr. Brewer also brings claims for retaliation in violation of the California Labor Code and for
21 retaliation and wrongful termination in violation of California public policy. Because Mr. Brewer’s
22 retaliation and wrongful termination claims all are based upon his complaints about GNC’s wage-
23 and-hour violations, the court addresses all three claims together below.

24 GNC argues that Mr. Brewer cannot make out a prima facie case or show that its reasons for
25 terminating him were pretextual. *See* Motion, ECF No. 52 at 17-18; Reply, ECF No. 8-14. “When a
26 plaintiff alleges retaliatory employment termination either as a claim under the FEHA or as a claim
27 for wrongful employment termination in violation of public policy, and the defendant seeks
28 summary judgment, California follows the burden shifting analysis of [*McDonnell Douglas*] to

1 determine whether there are triable issues of fact for resolution by a jury.” *Loggins v. Kaiser*
2 *Permanente Int’l*, 151 Cal. App. 4th 1102, 1108-09 (Cal. Ct. App. 2007) (citing *Caldwell v.*
3 *Paramount Unified School Dist.*, 41 Cal. App. 4th 189, 202-03 (Cal. Ct. App. 1995). In the first
4 stage, the “plaintiff must show (1) he or she engaged in a ‘protected activity,’ (2) the employer
5 subjected the employee to an adverse employment action, and (3) a causal link existed between the
6 protected activity and the employer’s action.” *Id.* (citing *Yanowitz v. L’Oreal USA, Inc.*, 36 Cal. 4th
7 1028, 1042 (2005). If the employee successfully establishes these elements, the burden shifts to the
8 employer to provide evidence that there was a legitimate, nonretaliatory reason for the adverse
9 employment action. *Id.* (citing *Morgan v. Regents of Univ. of Cal.*, 88 Cal. App. 4th 52, 68 (2000)).
10 If the employer meet its burden, the presumption of retaliation “drops out of the picture,” and the
11 burden shifts back to the employee to provide “substantial responsive evidence” that the employer’s
12 proffered reasons were untrue or pretextual. *Id.* (quoting *Yanowitz*, 36 Cal. 4th at 1042, and *Martin*
13 *v. Lockheed Missiles & Space Co.*, 29, Cal. App. 4th 1718, 1735 (Cal. Ct. App. 1994)) (internal
14 citation and quotation marks omitted). *See also Vasquez*, 349 F.3d at 646 (9th Cir. 2003) (applying
15 the same standard).

16 In his opposition, Mr. Brewer contends that he has made a prima facie case because he has
17 shown (by way of Judge Gonzales Rogers’s certification of a related class action against GNC for
18 wage-and-hour violations) that his complaints about wage-and-hour violations was reasonable. *See*
19 *Opposition*, ECF No. 63 at 15-16. He then says, without citation, that Ms. Murray retaliated against
20 him for making these complaints when she terminated him. *Id.* at 16.

21 This does not suffice to meet his burden. Most obviously, Mr. Brewer has completely failed to
22 provide evidence showing a causal link between his complaints about wage-and-hour violations and
23 his termination. As the court described above, Mr. Brewer testified at his deposition that he
24 complained to Ms. Owens, Mr. Lebreton, and Ms. Murray about the wage-and-hour violations he
25 suffered. He did not specify when he made these complaints. There is no evidence suggesting that
26 any of these individual had anything to do with the decision to terminate Mr. Brewer. Mr. Brewer
27 does not contend that Ms. Owens or Mr. Lebreton contributed to the decision to terminate him. And
28 although the decision to terminate Brewer was communicated to him by Ms. Murray, there is no

1 evidence in the record that Ms. Murray had anything to do with making that decision. In fact, there
2 does not even appear to be any evidence in the record at all about who decided to terminate him.
3 Without knowing who made the decision to terminate him, Mr. Brewer cannot show that that person
4 had any knowledge about his wage-and-hour violation complaints and that there was a link between
5 the decision to terminate him and that those complaints. Moreover, at no time during his
6 conversation with Ms. Stennerson (and Ms. Naranjo) did Mr. Brewer tell Ms. Stennerson that he had
7 made complaints about not getting reimbursed for making bank deposits or for gas expenses. Mr.
8 Lebreton also did not tell Ms. Stennerson that Mr. Brewer had ever complained that he had not been
9 reimbursed for business expenses or otherwise had not been paid for wages which were owed. And
10 Ms. Stennerson did not speak to Ms. Murray during the course of her investigation, and in fact she
11 never spoke to Ms. Murray about Mr. Brewer in any respect either before or after her investigation.⁹

12 In short, Mr. Brewer fails to show that anyone having anything to do with his termination knew
13 about his wage-and-hour violation complaints. Without some evidence about this, he cannot show
14 that there was a causal relationship between his complaints and his termination. The court finds that
15 he has not made his required prima facie showing. Accordingly, the court **GRANTS** GNC's motion
16 for summary judgment with respect to Mr. Brewer's claims for retaliation and wrongful termination.

17 CONCLUSION

18 Based on the foregoing, the court **GRANTS** GNC's motion for summary judgment with respect
19 to all of Mr. Brewer's claims.¹⁰

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21 ⁹ In his opposition, Mr. Brewer also argues that GNC's reasons for terminating him were
22 pretextual. *See* Opposition, ECF No. 63 at 16-17. Because the court concludes that he did not meet
23 his prima facie case, the analysis does not even get here. Nonetheless, the court does state that it
24 finds Mr. Brewer's argument that the temporal proximity between his wage-and-hour complaints
25 and his termination suggests pretext is unpersuasive. First, in his deposition testimony, Mr. Brewer
26 never specified when he complained to Ms. Owens, Mr. Lebreton, and Ms. Murray about these
27 violations. To the extent that he contends that he made complaints three months before being
terminated, *see id.* at 16, there is nothing in the record to support this. While he did testify to
complaining to his superiors in February 2011 about resolving a pay check issue, *see* Brewer Depo.
at 94:1-23, this did not have anything to do with wage-and-hour violations.

28 ¹⁰ Because the court grants GNC's motion with respect to all of Mr. Brewer's substantive
claims, the court need not address GNC's arguments that he should not be able to seek punitive

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IT IS SO ORDERED.

Dated: April 4, 2014



LAUREL BEELER
United States Magistrate Judge

damages. *See* Motion, ECF No. 25-28; Reply, ECF No. 17-20.