

United States District Court
For the Northern District of California

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

CHRISTOPHER BUCHANAN,
Plaintiff,
v.
GENENTECH, INC.,
Defendant.

No. 09-01454 CW
ORDER GRANTING
DEFENDANT'S
MOTION FOR
SUMMARY JUDGMENT

In this employment discrimination case, Plaintiff Christopher Buchanan sues Defendant Genentech for race discrimination. Defendant has filed a motion for summary judgment arguing that Plaintiff's claims are not supported by admissible evidence. Defendant asserts that the decisions not to promote Plaintiff and, later, to terminate him, were supported by legitimate non-discriminatory reasons. Plaintiff opposes the motion. Having considered all of the papers filed by the parties and oral argument on March 5, 2009, the Court GRANTS Defendant's motion.

BACKGROUND

Plaintiff began working for Genentech in the Single Point of Contact Division (SPOC) as a data reimbursement specialist in 2004. SPOC provided assistance to Genentech's patients in getting

1 reimbursed by insurance companies for Genentech's
2 biopharmaceuticals. SPOC was divided into various teams according
3 to Genentech's brands of medications. Plaintiff was employed on
4 the team for Raptiva, a psoriasis medication. In 2006, Genentech
5 restructured its teams and, instead of working on a team aligned
6 with a particular drug, Plaintiff and all other data reimbursement
7 specialists were transferred to the Reporting Analytics Team. This
8 team was led by Norm Bartlett, the team manager, who reported to
9 Kerry Slattery, the senior Manager of Quality, Process and Training
10 (QPT). Plaintiff's new title was data analyst and his primary
11 function was to produce reports, respond to data queries and assist
12 business analysts. A business analyst's primary function was to
13 interface with internal Genentech clients to develop strategies for
14 business plans. Data analysts were classified as E1 employees,¹
15 whereas business analysts were E2s, E3s and E4s.

16 In his 2006 annual review, Plaintiff received a "partially
17 meets expectation" evaluation of his overall performance.
18 Richardson Decl., Exh. C at 15.² Plaintiff's review noted that he
19 "can sometimes have a lackadaisical attitude about priorities that
20 can be very frustrating. At times, he seems to have no sense of
21 urgency about his work and deadlines." Id. at 12. As a specific
22 example, one of Plaintiff's job duties was to produce daily data

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24 ¹E1 indicates the first level of overtime exempt employees.
25 The higher the number associated with "E," the more responsibility
and seniority an employee had.

26 ²An employee's overall performance was rated on a five-measure
27 scale: does not meet expectations, partially meets expectations,
meets expectations, exceeds expectations and exceptional
28 performance.

1 reports from an outside vender, Harte-Hanks, which collected data
2 from pharmacies and customer lists to provide networking
3 opportunities for patients. During 2006, Plaintiff failed to run
4 the daily Harte-Hanks reports on several occasions. Although
5 Plaintiff does not dispute his failure to run daily Harte-Hanks
6 reports, he disagrees that he deserved a "partially meets
7 expectations rating." In the self-assessment area of the review,
8 he rated himself as "meets expectations." He stated that the
9 comments in his review about the Harte-Hanks reports failed to
10 "adequately address the ~250 times that this very manual, multi-
11 step, multi-product feed was completed correctly throughout the
12 2006 year. A number of times, there were issues with the vender's
13 system, but due to the automated error handling system at the
14 vender this incorrectly reflected poorly upon me." Id. at 16.

15 In 2007, Genentech sought to hire two business analysts in the
16 QPT division. Plaintiff applied for the position but was not
17 selected. Instead, Bartlett hired two already-established E3
18 business analysts, Dina Ciarlo and Amanda Carlson (both white),
19 from other groups within Genentech. Bartlett agreed to help
20 identify ways that Plaintiff could "grow into the more advanced
21 Business Analyst role." Bartlett Decl. ¶ 3. Bartlett informed
22 Plaintiff about an organization-wide project which analyzed all
23 positions at Genentech to ensure that all job salaries and duties
24 were similar to those in the industry. This process was known as
25 the Career Pathing Initiative (CPI) and was conducted by
26 Genentech's Human Resources Department. Slattery told Plaintiff
27 that if he performed well in the first quarter of 2008, he would

1 receive a promotion to the position of a business analyst.

2 In January, 2008, Plaintiff began reporting to Danielle
3 Sheehan, who had been a lead business analyst in the QPT group and
4 was promoted to a supervisor position in 2007. In the spring of
5 2008, Sheehan left her supervisor position and Slattery took over
6 direct supervision of all analysts, including Plaintiff. However,
7 because Bartlett had supervised Plaintiff for most of 2007, he
8 wrote Plaintiff's 2007 performance review. Bartlett gave Plaintiff
9 an overall rating of "meets expectations," which was higher than
10 the previous year's "partially meets expectations," but not as high
11 as Plaintiff's self-evaluation for 2007 of "exceeds expectations."
12 Richardson Decl., Exh. A, Buchanan Dep. 139:24-140:5. Although
13 Bartlett did not have authority to determine whether Plaintiff
14 would receive a raise for his performance in 2007, he advocated to
15 his supervisors that Plaintiff should receive a "higher-than-
16 expected bonus in 2007 because of the technical work he had done
17 during the year." Bartlett Decl. ¶ 19. Plaintiff's raise was
18 eventually approved by Bartlett's supervisors. Id.

19 Throughout the first several months of 2008, Plaintiff
20 expressed concern about his 2007 performance review. He met with
21 Slattery and Bartlett on at least two occasions, and he separately
22 met with Slattery for several weeks in a row to discuss the review.
23 Plaintiff wrote a formal rebuttal to the review and Slattery
24 eventually referred this issue to Genentech's Employee Relations
25 Department, which investigates employees' concerns about
26 performance reviews. After investigating the matter, the
27 department concluded that the performance review was fair and had

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1 been conducted in accordance with Genentech policy.

2 On April 21, 2008, Slattery offered Plaintiff a promotion to
3 the position of business analyst and a five percent pay raise.
4 Richardson Decl., Exh. A 148:8-10, 161:7-162:11, Exh. 14.
5 Plaintiff declined the promotion because he believed that, even
6 with the five percent pay raise, his work was undervalued. He
7 wanted to be sure that he was fairly compensated for his work, and
8 Slattery told him that, if he accepted the pay raise, he would not
9 find out the results of the CPI and whether his current job was
10 compensated at a rate close to that of employees similarly situated
11 in the industry. Id. at 163-165.

12 At some point after Plaintiff declined the promotion, he met
13 with Bartlett and Sheehan to discuss particular aspects of his job
14 duties. Plaintiff stated that he was asked to perform work that
15 required "higher technical knowledge than [he] was hired to do."
16 Id. 86:1-5. With respect to a particular project known as the data
17 feed project or the "BioOnc project," Plaintiff had to add oncology
18 data to the Harte-Hanks report. Plaintiff believed that this
19 additional work required technical expertise above his level. Id.
20 at 114-115. Plaintiff asked to be removed from the project because
21 "it was getting very, very technical." Id. at 114. On May 19,
22 Slattery notified Plaintiff by email that he was removed from that
23 project. Even though Plaintiff had asked to be removed from this
24 project, he responded to Slattery's notification by stating, "I
25 want clarification on the reasoning as to why I am being pulled off
26 this project after investing substantial work hours, weekends and
27 my Christmas break into this." Richardson, Exh. L. Slattery

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1 responded that they would discuss the issue in person during a
2 "project debrief" later in the week. Id. The following day,
3 Plaintiff emailed Harte-Hanks directly and wrote,

4 All,

5 I am no longer working on this project as my
6 priorities have changed once again. Either Norm
Bartlett or Kerry Slattery can give further insight as
to continuation of this project.

7 Id., Exh. M. Slattery told Plaintiff that this email was "not
8 appropriate," and that the two would discuss it further in a one-
9 on-one meeting. Slattery was concerned that this email suggested
10 to Harte-Hanks and other clients copied on the email that nobody
11 was in charge of the project. Plaintiff responded, "This email is
12 absolutely appropriate." He also stated, "What is also
13 inappropriate is your email where you try to distance yourself from
14 this poor decision." Slattery Decl., Exh. E. Slattery concluded
15 that Plaintiff's tone in these emails was "insubordinate."
16 Slattery Decl. ¶ 20.³

17 In a later meeting in which Slattery and Plaintiff discussed
18 Plaintiff's upcoming projects, Slattery asked Plaintiff to provide
19 support to business analysts on their projects. On May 30, 2008,
20 Plaintiff emailed the business analysts and Slattery the following:

21 All,

22 As part of my new and improved job duties, Kerry tells
23 me that I am to solicit work from each of you. So consider
24 me as your friendly neighborhood field slave begging for
work to buy new patches for my pants. If you have any
tasks/work/manual labor/minstrel shows for me to complete,

25 ³To the extent that the Court relied upon evidence to which
26 the parties objected, the objections are overruled. The Court did
27 not rely on any inadmissible evidence in reaching its decision. To
the extent the Court did not rely on evidence to which the parties
objected, the objections are overruled as moot.

1 please relay that to me and/or Kerry.
2 Richardson Decl., Exh. N. Slattery believed that this email
3 violated Genentech's policies and operating procedures because it
4 was insubordinate, failed to reflect dignity and respect and
5 contained offensive language. Slattery claimed that it also
6 violated Genentech's anti-harassment policy that prohibits the use
7 of racially charged language in the workplace.

8 On June 2, 2008, Slattery gave Plaintiff a misconduct notice.
9 The notice stated that Plaintiff "demonstrated unacceptable
10 workplace behavior by sending an email to [his] colleagues using
11 unprofessional language." Richardson Decl., Exh. O. It noted
12 that, in addition to the email, he used unprofessional language in
13 a meeting with Slattery when he characterized the work he was
14 assigned as "manual labor."⁴ The notice stated that Plaintiff's
15 email was a "direct violation of the Non-Harassment Policy located
16 in Genentech's Good Operating Procedures (GOP) which states:
17 Prohibited unlawful harassment includes, but is not limited to, any
18 of the following behavior: Verbal conduct such as epithets,
19 derogatory jokes or comments" Id. The notice stated that
20 the email was also a "direct violation of the Employment Behavior
21 guidelines located in the Genentech's Good Operating Procedures
22 which states: 'Avoid any establishment or activity that a
23 reasonable participant might find offensive or intimidating.'"
24 Plaintiff was required to apologize in writing and in person to

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26 ⁴The notice also states that, at this meeting, Plaintiff
27 referred to the work assigned to him as "negro field hand work."
28 Plaintiff denies making this comment and Defendant does not rely on
this comment in its motion.

1 Slattery and every recipient of his May 30 email. Id. Plaintiff
2 never apologized to these individuals. Richardson Decl., Exh. A at
3 202-03.

4 On June 30, 2008, Slattery and James Deslonde from the human
5 resources department met with Plaintiff to discuss the results of
6 the Career Pathing Initiative (CPI). The CPI concluded that the
7 work of a data analyst should be transferred to the Corporate
8 Information Technology Services Division of Genentech and that
9 Plaintiff should be considered a business analyst. Slattery and
10 Deslonde decided that Plaintiff would be an E2 business analyst and
11 that his current salary was in line with this classification.
12 Richardson Decl., Exh. A at 229-231.

13 Soon after his meeting with Slattery and Deslonde, Plaintiff
14 went on vacation for three weeks. When he returned, a problem
15 arose with the Harte-Hanks report. Slattery asked Plaintiff to
16 describe what happened and to provide a plan of action to ensure
17 that the problem would not happen again in the future. Plaintiff
18 responded, "Kerry, it's obvious that you have little idea what we
19 are talking about." Richardson Decl., Exh. Q.

20 A few days later, on July 30, 2008, Plaintiff met with
21 Slattery and Laura Chavaree, Slattery's supervisor, to discuss
22 Plaintiff's mid-year review. The review detailed Plaintiff's acts
23 of insubordination, including his refusal to abide by the terms of
24 the misconduct notice. The review stated, "Overall, Chris['s] tone
25 and language in emails and meetings with his manager and other team
26 members is unprofessional and at times insubordinate. In meetings,
27 he has repeatedly raised his voice, interrupted, disagreed with
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1 feedback and used intimidating and threatening language.”

2 Richardson Decl., Exh. T at 5.

3 Plaintiff challenged the accuracy of the report and stated
4 that the comments in it “represent a personal attack and do not
5 make any mention to the quality or technical nature of my
6 projects.” Chavaree Decl., Exh. A at 7. Slattery and Chavaree
7 decided that Plaintiff was too difficult to manage and, on August
8 5, 2008, they terminated him for insubordination.

9 Plaintiff claims that, while both were working for Genentech,
10 Bartlett made several racist comments to him. On one occasion,
11 when Plaintiff was talking about his children and girlfriend (to
12 whom he referred by name and not as his “girlfriend”), Bartlett
13 asked Plaintiff if he was married. Plaintiff thought this question
14 was racist because it derived from the “assumption that black men
15 have out-of-wedlock children.” Id. at 60-61. On another occasion,
16 during one of the weekly meetings between Bartlett and Plaintiff in
17 which Plaintiff’s weekly tasks were discussed, Bartlett said to
18 Plaintiff, “There’s something about you that I cannot put my finger
19 on” and “I have a bias against you and your work.” Id. at 62.
20 Bartlett claims that this comment was made in the context of
21 discussing his bias of analyzing issues from a highly technical
22 perspective. Plaintiff cannot recall when either of these comments
23 was made, but believes that the marriage comment was made within
24 the first six months of reporting to Bartlett as his supervisor.
25 Id. at 59, 63. Plaintiff presents evidence that he discussed the
26 “bias” comment in a meeting with Bartlett and Slattery on June 30,
27 2008. Rogers Decl., Exh. 1, Buchanan Dep., Exh. 29.

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1 Plaintiff alleges seven causes of action under federal and
2 California law, including race discrimination, retaliation, and
3 failure to prevent race discrimination and retaliation, under both
4 Title VII and the Fair Employment and Housing Act (FEHA) and a
5 California common law claim of wrongful termination in violation of
6 public policy premised on these statutory claims. Plaintiff
7 complains of Defendant's (1) failing to promote him to business
8 analyst and (2) terminating him. Defendant now moves for summary
9 adjudication of all claims made against it.

10 LEGAL STANDARD

11 Summary judgment is properly granted when no genuine and
12 disputed issues of material fact remain, and when, viewing the
13 evidence most favorably to the non-moving party, the movant is
14 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
15 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
16 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
17 1987).

18 The moving party bears the burden of showing that there is no
19 material factual dispute. Therefore, the court must regard as true
20 the opposing party's evidence, if supported by affidavits or other
21 evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815
22 F.2d at 1289. The court must draw all reasonable inferences in
23 favor of the party against whom summary judgment is sought.
24 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
25 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d
26 1551, 1558 (9th Cir. 1991).

27 Material facts which would preclude entry of summary judgment
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1 are those which, under applicable substantive law, may affect the
2 outcome of the case. The substantive law will identify which facts
3 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
4 (1986).

5 Where the moving party does not bear the burden of proof on an
6 issue at trial, the moving party may discharge its burden of
7 production by either of two methods:

8 The moving party may produce evidence negating an
9 essential element of the nonmoving party's case, or,
10 after suitable discovery, the moving party may show that
11 the nonmoving party does not have enough evidence of an
12 essential element of its claim or defense to carry its
13 ultimate burden of persuasion at trial.

14 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d
15 1099, 1106 (9th Cir. 2000).

16 If the moving party discharges its burden by showing an
17 absence of evidence to support an essential element of a claim or
18 defense, it is not required to produce evidence showing the absence
19 of a material fact on such issues, or to support its motion with
20 evidence negating the non-moving party's claim. Id.; see also
21 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990); Bhan v.
22 NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If the
23 moving party shows an absence of evidence to support the non-moving
24 party's case, the burden then shifts to the non-moving party to
25 produce "specific evidence, through affidavits or admissible
26 discovery material, to show that the dispute exists." Bhan, 929
27 F.2d at 1409.

28 If the moving party discharges its burden by negating an
essential element of the non-moving party's claim or defense, it

1 must produce affirmative evidence of such negation. Nissan, 210
2 F.3d at 1105. If the moving party produces such evidence, the
3 burden then shifts to the non-moving party to produce specific
4 evidence to show that a dispute of material fact exists. Id.

5 If the moving party does not meet its initial burden of
6 production by either method, the non-moving party is under no
7 obligation to offer any evidence in support of its opposition. Id.
8 This is true even though the non-moving party bears the ultimate
9 burden of persuasion at trial. Id. at 1107.

10 DISCUSSION

11 Although Plaintiff has filed several causes of action, his
12 claims can be separated into two categories, discrimination claims
13 and retaliation claims. The Court addresses the discrimination
14 claims first.

15 I. Discrimination Claims

16 Defendant moves for summary adjudication of Plaintiff's
17 discrimination claims on the grounds that Plaintiff (1) offered no
18 evidence suggesting that Defendant acted with a discriminatory
19 motive and (2) failed to rebut Defendant's legitimate, non-
20 discriminatory reasons for failing to promote him and terminating
21 him.

22 A. Applicable Law

23 In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973),
24 and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248
25 (1981), the Supreme Court established a burden-shifting framework
26 for evaluating the sufficiency of plaintiffs' evidence in
27 employment discrimination suits. The same burden-shifting

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1 framework is used when analyzing claims under FEHA. Bradley v.
2 Harcourt, Brace & Co., 104 F.3d 267, 270 (9th Cir. 1996) (FEHA).
3 Within this framework, plaintiffs may establish a prima facie case
4 of discrimination by reference to circumstantial evidence; to do
5 so, plaintiffs must show that they are members of a protected
6 class; that they were qualified for the position they held or
7 sought; that they were subjected to an adverse employment decision;
8 and that they were replaced by someone who was not a member of the
9 protected class or that the circumstances of the decision otherwise
10 raised an inference of discrimination. St. Mary's Honor Ctr. v.
11 Hicks, 509 U.S. 502, 506 (1993) (citing McDonnell Douglas and
12 Burdine). Once plaintiffs establish a prima facie case, a
13 presumption of discriminatory intent arises. Id. To overcome this
14 presumption, defendants must come forward with a legitimate, non-
15 discriminatory reason for the employment decision. Id. at 506-07.
16 If defendants provide that explanation, the presumption disappears
17 and plaintiffs must satisfy their ultimate burden of persuasion
18 that defendants acted with discriminatory intent. Id. at 510-11.

19 To survive summary judgment, plaintiffs must then introduce
20 evidence sufficient to raise a genuine issue of material fact as to
21 whether the reason the employer articulated is a pretext for
22 discrimination. Plaintiffs may rely on the same evidence used to
23 establish a prima facie case or put forth additional evidence. See
24 Coleman v. Quaker Oats Co., 232 F.3d 1271, 1282 (9th Cir. 2000);
25 Wallis v. J.R. Simplot Co., 26 F.3d 885, 892 (9th Cir. 1994).
26 However, "in those cases where the prima facie case consists of no
27 more than the minimum necessary to create a presumption of
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1 discrimination under McDonnell Douglas, plaintiff has failed to
2 raise a triable issue of fact." Wallis, 26 F.3d at 890.

3 Plaintiffs can provide evidence of "pretext (1) indirectly, by
4 showing that the employer's proffered explanation is unworthy of
5 credence because it is internally inconsistent or otherwise not
6 believable, or (2) directly, by showing that unlawful
7 discrimination more likely motivated the employer." Raad v.
8 Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1194 (9th Cir.
9 2003) (citation and internal quotation marks omitted). When
10 plaintiffs present indirect evidence that the proffered explanation
11 is a pretext for discrimination, "that evidence must be specific
12 and substantial to defeat the employer's motion for summary
13 judgment.'" EEOC v. Boeing Co., 577 F.3d 1044, 1049 (9th Cir.
14 2009) (quoting Coghlan v. Am. Seafoods Co. LLC, 413 F.3d 1090, 1095
15 (9th Cir. 2005)). When plaintiffs proffer direct evidence that the
16 defendants' explanation is a pretext for discrimination, "very
17 little evidence" is required to avoid summary judgment. Boeing,
18 577 F.3d at 1049.

19 The Ninth Circuit has instructed that district courts must be
20 cautious in granting summary judgment for employers on
21 discrimination claims. See Lam v. Univ. of Hawai'i, 40 F.3d 1551,
22 1564 (9th Cir. 1994). ("We require very little evidence to
23 survive summary judgment' in a discrimination case, 'because the
24 ultimate question is one that can only be resolved through a
25 "searching inquiry"-- one that is most appropriately conducted by
26 the factfinder'" (quoting Sischo-Nownejad v. Merced Cmty. Coll.
27 Dist., 934 F.2d 1104, 1111 (9th Cir. 1991)).

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1 B. Analysis

2 The Court separately analyzes Defendant's decision not to
3 promote Plaintiff and its decision to terminate him.

4 Plaintiff's discriminatory failure to promote claim is without
5 merit. He challenges his non-promotion in March, 2007 when he was
6 not selected for the E3 positions that went to two white Genentech
7 employees. At the time Plaintiff applied for the positions, he was
8 an E1 level employee, and the two employees who got the positions
9 were already E3 level employees. Thus, Plaintiff was less
10 qualified for the positions for which he applied and he presents no
11 evidence of a prima facie case related to these positions.
12 Similarly, Plaintiff presents no evidence that the reasons
13 Defendant gave for its decision not to promote him to an E3
14 position were pretextual.

15 Plaintiff also asserts that Defendant discriminated against
16 him in the manner that it handled his application "for a releveling
17 of his position." Opp. at 10. However, Plaintiff did not "apply"
18 for any releveling of his position. The Court assumes that
19 Plaintiff is referring to the CPI, in which the human resources
20 department analyzed every job title to determine if employees were
21 accurately categorized and compensated consistent with industry
22 standards. Although Plaintiff does not clearly state his claim, it
23 appears that he is arguing that he should have been releveled
24 before the results of the CPI were concluded. However, Plaintiff
25 does not present any evidence that anyone at Genentech frustrated
26 the CPI process or his attempt to be releveled during this process.
27 Further, Plaintiff has not presented any evidence that he lost

1 compensation or job opportunities because he was not relevelled
2 earlier.

3 Plaintiff also complains that he was not given any assignments
4 which would have allowed him to develop and showcase his skills and
5 put him in a position for a promotion, but he never asked for such
6 assignments. To the contrary, he asked to be removed from an
7 assignment that he felt was too technical. In sum, Plaintiff has
8 not presented evidence that any employee at Genentech failed to
9 promote him because of his race.

10 Defendant does not dispute that Plaintiff's evidence
11 establishes a prima facie case of discrimination with respect to
12 the termination decision. See Motion at 15-16; Reply at 4. It is
13 also undisputed that the decision-makers on his termination were
14 Slattery and Chavaree. Further, Plaintiff does not dispute that
15 Defendant met its burden to articulate a legitimate, non-
16 discriminatory reason for his termination, which was Plaintiff's
17 insubordination and unprofessional misconduct. Instead, Plaintiff
18 asserts that these reasons were merely a pretext for the real
19 reason for discharging him, his race. However, Plaintiff does not
20 identify any evidence which would allow a jury to make a reasonable
21 inference that the reasons given for the decision to terminate him
22 were pretextual. Plaintiff points to a few incidents during
23 meetings when Slattery slowly moved her chair in the direction away
24 from him. Plaintiff does not provide any context or further
25 descriptions of these meetings. On its own, moving a chair away
26 from an individual during a meeting does not imply race
27 discrimination. Further, it is undisputed that Slattery met with
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1 Plaintiff on numerous times without such chair-moving activity.

2 Plaintiff also claims that the fact that Slattery was "an
3 extremely difficult person to communicate with" led him to believe
4 that she was discriminating against him because of his race. Opp.
5 at 4. However, Plaintiff does not suggest that it was more
6 difficult for him to communicate with Slattery because he is
7 African American. The evidence Plaintiff relies on to support his
8 argument is a few minutes of Slattery's deposition during which she
9 interacted with Plaintiff's counsel, who is white. This evidence
10 does not suggest racial discrimination. Plaintiff also argues that
11 Slattery exhibited a racial bias against him after he declined the
12 promotion. However, there is simply no evidence of this.

13 Plaintiff suggests that Bartlett harbored a racial bias
14 against Plaintiff and that Bartlett supplied "false information"
15 about Plaintiff to Slattery. Yet, Plaintiff does not identify any
16 false information Bartlett provided to Slattery that led to
17 Plaintiff's termination.

18 Plaintiff points to Bartlett's comments during a discussion
19 about his work performance as evidence of his racial bias.
20 Bartlett made the following comments: "There's something about you
21 that I cannot put my finger on" and "I have a bias against you and
22 your work." Richardson Decl., Exh. A at 62. Although Bartlett was
23 not involved in the decision to terminate Plaintiff, these comments
24 are relevant because Plaintiff and Bartlett discussed them with
25 Slattery, who was involved in the termination decision. Plaintiff
26 argues that these comments were racist because Bartlett used the
27 word "you" to refer to Plaintiff. Richardson Decl., Exh A. at 68.

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1 Although a strange comment to make to someone when discussing work
2 performance, by itself, a comment about having a bias against
3 another person does not establish racial bias. Similarly,
4 Bartlett's question to Plaintiff about whether he was married does
5 not lend itself to an inference of race discrimination.⁵

6 Plaintiff does not present any evidence that Chavaree, who
7 ultimately approved Slattery's recommendation to terminate
8 Plaintiff, exhibited any racial bias against him. In sum, because
9 Plaintiff has not pointed to any evidence that the reasons given
10 for his termination were pretextual, his discrimination claim based
11 on his termination fails.

12 Plaintiff's speculation that his failure to receive a
13 promotion or his termination was motivated by race discrimination
14 does not constitute "specific, substantial evidence" that
15 Defendant's actions were discriminatory. Steckl, 703 F.2d at 393.
16 Plaintiff has not established a prima facie case for his failure to
17 promote claim and he has not identified for the Court evidence
18 sufficient to raise a genuine issue of material fact as to whether
19 the reasons Defendant articulated for either his non-promotion or
20 his termination are a pretext for discrimination. Thus, the Court
21 grants Defendant summary adjudication as to Plaintiff's race
22 discrimination claims.

23 II. Retaliation Claim

24 In order to establish a prima facie claim for retaliation, a
25 plaintiff must show that (1) he engaged in protected activity,

26 _____
27 ⁵Plaintiff has not presented any evidence that Slattery or
28 Chavaree had any knowledge of the marriage comment.

1 (2) the employer subjected him to an adverse employment decision,
2 and (3) there was a causal link between the protected activity and
3 the employer's action. Passantino v. Johnson & Johnson Consumer
4 Prods., Inc., 212 F.3d 493, 506 (9th Cir. 2000). The protected
5 activity must be some sort of protest or opposition to unlawful
6 employment discrimination directed against the employee. Moyo v.
7 Gomez, 40 F.3d 982, 984 (9th Cir. 1994). In determining whether
8 conduct is protected, a court must balance "the purpose of [Title
9 VII] to protect persons engaging reasonably in activities opposing
10 . . . discrimination, against Congress' equally manifest desire not
11 to tie the hands of employers in the objective selection and
12 control of personnel." Wrighten v. Metropolitan Hospitals, 726
13 F.2d 1346, 1355 (9th Cir. 1984) (quotation marks and citations
14 omitted). "An employee's opposition activity is protected only if
15 it is 'reasonable in view of the employer's interest in maintaining
16 a harmonious and efficient operation.'" O'Day v. McDonnell Douglas
17 Helicopter Co., 79 F.3d 756, 763 (9th Cir. 1996) (quoting Silver v.
18 KCA, Inc., 586 F.2d 138, 141 (9th Cir. 1978).

19 Plaintiff argues that, after he declined the April 21, 2008
20 promotion to business analyst, Slattery retaliated by taking
21 projects away from him. However, this does not amount to evidence
22 that Slattery's actions were in retaliation for any protected
23 activity. Plaintiff's declination of the promotion was not
24 protected activity under Title VII or FEHA. The evidence
25 establishes that Slattery took away work from Plaintiff only in
26 response to Plaintiff's request to be removed from highly technical
27 projects.

1 Plaintiff also claims that Slattery took work away from him in
2 response to his internal complaints about racial discrimination.
3 Plaintiff met with a human resources representative in May or June,
4 2008 to discuss Bartlett's comments about having a bias against
5 him. However, by this time, the projects had already been taken
6 away from Plaintiff. Therefore, even if Plaintiff's complaint to
7 the human resources representative was protected activity and the
8 decision to reduce his workload was an adverse action, the alleged
9 retaliation cannot have been caused by the meeting with the human
10 resources representative.

11 Lastly, Plaintiff argues that his May 30 "field slave" email
12 was protected activity. Plaintiff relies on Wrighten v.
13 Metropolitan Hospitals. 726 F.2d 1346. Wrighten, an African-
14 American nurse, believed that her hospital employer had instituted
15 policies that compromised the care of African-American patients.
16 After making internal complaints to hospital administrators, she
17 held a news conference to voice her concerns. She was later
18 terminated and she sued for retaliation. The Ninth Circuit held
19 that, because Wrighten met with the affirmative action officer and
20 hospital president several times before taking her complaint
21 public, her comments during the news conference were protected.
22 Id. at 1355.

23 This case is distinguishable. Wrighten clearly engaged in
24 protected activity. In contrast, it is not clear that Plaintiff's
25 email, with its sarcastic tone and inappropriate remarks in the
26 context of asking for work projects, can even be read to be a
27 complaint about race discrimination. Plaintiff himself did not
28

1 consider his email to be "racially charged," and he cannot recall
2 whether, when writing the email, he considered it to be a complaint
3 of race discrimination. Richardson Decl., Exh. A at 210. He did
4 not follow up his email with any complaint to the human resources
5 department. Rather, a human resources representative contacted
6 Plaintiff to discuss the email and its ramifications.

7 Further, unlike Wrighten's activity, Plaintiff's email
8 directly violated Genentech's policies prohibiting racially
9 inappropriate communications in the workplace. Title VII protects
10 "reasonable attempts to contest an employer's discriminatory
11 practice; it is not an insurance policy, a license to flaunt
12 company rules" O'Day, 19 F.3d at 763-64. Plaintiff's
13 email was not a "reasonable attempt" to challenge a discriminatory
14 act of Genentech. See Matima v. Celli, 228 F.3d 68, 79 (2d Cir.
15 2000) ("unseemly confrontations between [employee] and supervisors"
16 not protected); Miller v. American Family Mut. Ins. Co., 203 F.3d
17 997, 1009 (7th Cir. 2000) (holding that an employee who called her
18 supervisor incompetent and a political hack "had a right to engage
19 in protected conduct without fear of retaliation, but when she says
20 something obviously inappropriate and unprotected, she is not
21 insulated from being fired."). Like any employer, Genentech "has a
22 strong interest in maintaining employee morale, and in discouraging
23 this sort of behavior." O'Day, 19 F.3d at 763.

24 Plaintiff argues that the email was protected activity because
25 it was not "disruptive" of Genentech's business operations. For
26 support, he cites Hochstadt v. Worcester Foundation for
27 Experimental Biology, 545 F.2d 222, 230 (1st Cir. 1976), and

1 Matima, 228 F.3d at 81. Neither of these cases stands for the
2 proposition that all non-disruptive activity is protected. Nothing
3 in the law precludes Genentech from enforcing its legitimate
4 policies and counseling Plaintiff for writing an email that
5 violated these policies. Therefore, the Court concludes that
6 Plaintiff's email was not protected activity.

7 Further, even if the email were protected, Plaintiff has not
8 presented evidence that there was a causal link between it and
9 Defendant's decision to terminate him. Plaintiff was terminated
10 for his continued insubordinate conduct after writing the email.
11 The notice of misconduct issued to him in response to his email
12 required him to apologize for the email. He refused to do so.
13 Further, in the weeks after sending the email, he continued to
14 challenge Slattery's authority and was increasingly difficult to
15 manage. For instance, in response to a request to address a
16 problem with the Harte-Hanks reports, Plaintiff told Slattery that
17 she did not know what she was talking about. He also refused to
18 meet Slattery in her office and accused her of needing to have
19 Bartlett act as a bodyguard in a meeting. Richardson Decl., Ex. A,
20 258:12-19; Exs. Q, S. Without a causal link, Plaintiff has not
21 established a prima facie case for retaliation.

22 In sum, Plaintiff has not presented evidence that he was
23 terminated for engaging in protected activity. Accordingly,
24 Plaintiff's retaliation claim fails.

25 III. Punitive Damages

26 In California, a plaintiff may seek punitive damages if, in an
27 action not arising from a breach of contract, "it is proven by

1 clear and convincing evidence that the defendant has been guilty of
2 oppression, fraud, or malice." Cal. Civ. Code § 3294(a). A
3 corporate employer may not be held liable for such damages arising
4 from the acts of an employee unless "an officer, director, or
5 managing agent of the corporation . . . had advance knowledge of
6 the unfitness of the employee and employed him or her with a
7 conscious disregard of the rights or safety of others or authorized
8 or ratified the wrongful conduct for which the damages are awarded
9 or was personally guilty of oppression, fraud, or malice." Id.
10 § 3294(b). Managing agents are "those corporate employees who
11 exercise substantial independent authority and judgment in their
12 corporate decisionmaking so that their decisions ultimately
13 determine corporate policy." White v. Ultramar, Inc., 21 Cal. 4th
14 563, 567 (1999). These are policies that "affect a substantial
15 portion of the company and that are the type likely to come to the
16 attention of corporate leadership." Roby v. McKesson Corp., 47
17 Cal. 4th 686, 714 (2009). Whether employees exercise sufficient
18 authority is determined on a case-by-case basis. White, 21 Cal.
19 4th at 567.

20 Because Genentech is a corporate employer, Plaintiff must
21 satisfy the requirements of section 3294(b). He asserts that
22 Chavaree's conduct satisfied section 3294(b) because she is a
23 managing agent with "the authority to terminate employees" and she
24 was "the highest authority available to Mr. Buchanan." Opp. at 12-
25 13. Whether "a supervisor is a managing agent within the meaning
26 of Civil Code section 3294 does not necessarily hinge on their
27 level in the corporate hierarchy." Myers v. Trendwest Resorts,

1 Inc., 148 Cal. App. 4th 1403, 1437 (2007) (citation and internal
2 quotation marks omitted). "Rather, the critical inquiry is the
3 degree of discretion the employees possess in making decisions that
4 will ultimately determine corporate policy." Id. (citation and
5 internal quotation marks omitted). Defendant presents evidence
6 that Chavaree does not have any power to "set or alter any of
7 Genentech's policies applicable to all employees." Chavaree Decl.
8 ¶ 20. Plaintiff does not present any evidence to the contrary and
9 offers no probative evidence as to this inquiry. Consequently, he
10 cannot seek punitive damages based on a theory that Chavaree was a
11 managing agent who acted maliciously against him or who ratified
12 the actions of others who acted maliciously against him.

13 CONCLUSION

14 For the foregoing reasons, the Court grants Defendant's motion
15 for summary judgment. The clerk shall enter judgment and Plaintiff
16 shall bear Defendant's costs.

17 IT IS SO ORDERED.

18
19 Dated: 08/31/10



CLAUDIA WILKEN
United States District Judge