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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KENNETH M. GREGORY,

Plaintiff,

No. C 09-1800 PJH

v.

**ORDER GRANTING DEFENDANT’S
SUMMARY JUDGMENT**

CITY AND COUNTY OF SAN
FRANCISCO, et al.,

Defendants.

_____ /

Before the court is defendant’s motion for summary judgment. Having read all the papers submitted and carefully considered the relevant legal authority, the court hereby GRANTS defendant’s motion, for the following reasons.

BACKGROUND

A. Background Allegations

Plaintiff is a black male who was employed by defendant San Francisco General Hospital (“Hospital”), in the Department of Food & Nutrition as a food service worker, from December 7, 2006 to January 10, 2007. See Complaint, ¶¶ 8, 11. Plaintiff alleges that defendant Hospital, along with defendant City and County of San Francisco (“the City”), established and maintained a pattern and practice of employment discrimination and disparate treatment against African American individuals with respect to their equal employment opportunities. See id., ¶ 14. To that end, although plaintiff attempted to carry out all the functions of his position in a responsible and competent manner, he – unlike non-Black probationary employees – alleges that he was not given a fair opportunity to be successful and to complete his training period. Id., ¶¶ 10, 12. Plaintiff further alleges that he was terminated in violation of his statutory rights to be free of employment discrimination

United States District Court
For the Northern District of California

1 based on race. Complaint, ¶ 9.

2 Plaintiff filed the instant action against the Hospital and the City on April 24, 2009.¹
3 Although the complaint pleads two distinct “causes of action,” properly read, it sets forth
4 three claims: (1) declaratory relief; (2) violation of California’s Fair Employment and
5 Housing Act (FEHA); and (3) unlawful discrimination in violation of the Civil Rights Act of
6 1866. See Complaint, ¶¶ 17-26.

7 B. Procedural History

8 The court held its initial case management conference (“CMC”) on August 20, 2009.
9 Plaintiff appeared in pro per, and the City also made an appearance. At that CMC, the
10 court set a deadline of February 26, 2010 for completion of discovery, and a deadline of
11 April 14, 2010 for hearing dispositive motions.

12 Following the initial CMC, the City duly attempted to pursue discovery by taking
13 plaintiff’s deposition. The City scheduled plaintiff’s deposition four times – on February 3,
14 9, and 17th, and on April 13, 2010. For the February 3 deposition, plaintiff called on the
15 day of the deposition to cancel. For the second and third deposition attempts on February
16 9 and 17th, plaintiff called the day before the deposition to cancel. For the fourth deposition
17 on April 13, plaintiff called the week before to request that it be rescheduled. The City
18 refused, however, due to the then pending summary judgment deadline of April 14. The
19 afternoon of the deposition, plaintiff called and said that he would not appear.

20 While these discovery efforts were underway, plaintiff sought and received two
21 discovery deadline extensions. Plaintiff sought the first on February 11, 2010, after he
22 failed to appear for his first two noticed deposition dates. The court granted the request on
23 February 17 (after plaintiff had already cancelled his third deposition appearance),
24 continuing the discovery cutoff until April 26, and the dispositive motion deadline to June
25 30.

26 Plaintiff sought a second extension of the discovery deadline on April 7, 2010 and

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28 ¹ Defendant Hospital was officially terminated from the action on August 6, 2010.

1 the court granted this second extension on April 16 (three days after plaintiff had already
2 refused to attend his fourth and last deposition). The court gave the parties until May 26 for
3 a discovery cutoff deadline, and until July 30 for the filing of dispositive motions. The court
4 also expressly ordered plaintiff “to submit to his deposition no later than April 23, 2010, or
5 face sanctions, including possible dismissal of his case.” On June 7, 2010, the City filed a
6 notice with the court indicating that plaintiff had duly appeared for his deposition.

7 On June 25, 2010, the City filed the instant motion for summary judgment. On July
8 9, plaintiff filed a so-called opposition to the motion, which in substance constituted a
9 request for a continuance pursuant to Federal Rule of Civil Procedure 56(f). As grounds for
10 the continuance, plaintiff indicated that he had filed a motion to compel, and that he
11 required the information referenced in the motion to compel in order to present his
12 opposition. On July 16, 2010, the City filed its reply in support of the motion for summary
13 judgment, noting plaintiff’s failure to make an appropriate showing under Rule 56(f) and
14 also noting plaintiff’s failure to act diligently in seeking any discovery.

15 On August 6, 2010, the court issued an order denying plaintiff’s Rule 56(f) request in
16 part and granting it in part. The court denied the motion for failure to satisfy Rule 56(f)
17 standards. However, the court granted plaintiff’s request for a continuance, on grounds
18 that plaintiff’s motion to compel further discovery was pending before the Magistrate Judge.
19 The court then instructed plaintiff to file his opposition to the summary judgment motion
20 within two weeks of either the Magistrate Judge’s denial of the motion to compel, or the
21 production of compelled discovery in the event the motion to compel was granted. Plaintiff
22 was also expressly instructed in the court’s order that no further continuances would be
23 granted, and that no further requests for a continuance could be filed.

24 On August 13, the Magistrate Judge granted in part plaintiff’s motion to compel and
25 ordered further production by defendant. On August 27, this court issued a scheduling
26 order, instructing plaintiff to file his opposition to the summary judgment motion no later
27 than September 15, with a reply brief to be filed by the City no later than September 22.

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1 On September 13, plaintiff did not file an opposition brief, but instead filed yet
2 another motion for enlargement of time, in which plaintiff sought additional time to file what
3 he referred to as his “motion for summary judgment.”

4 On September 15, the court issued an order construing plaintiff’s motion as a
5 request for further time in which to file his opposition brief to the pending motion for
6 summary judgment, and then granted plaintiff’s request for one last continuance,
7 notwithstanding the court’s prior edict prohibiting future continuances. The court then
8 instructed plaintiff to file his opposition no later than October 13, 2010, with the City to file
9 its reply no later than October 20. The court further instructed plaintiff that this continuance
10 would be the last continuance granted, and that in the event plaintiff missed his October 13
11 deadline for filing his opposition, “the court will adjudicate defendant’s motion on the basis
12 of the papers already filed by plaintiff in the action.”

13 Plaintiff duly filed an opposition to defendant’s summary judgment motion on
14 October 13. The City timely filed its reply brief. Defendant’s motion is now before the court
15 for final resolution.

16 DISCUSSION

17 A. Legal Standard

18 Summary judgment is appropriate when there is no genuine issue as to material
19 facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.
20 Material facts are those that might affect the outcome of the case. Anderson v. Liberty
21 Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is “genuine” if there
22 is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id.

23 A party seeking summary judgment bears the initial burden of informing the court of
24 the basis for its motion, and of identifying those portions of the pleadings and discovery
25 responses that demonstrate the absence of a genuine issue of material fact. Celotex Corp.
26 v. Catrett, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof
27 at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other
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1 than for the moving party. Southern Calif. Gas. Co. v. City of Santa Ana, 336 F.3d 885,
2 888 (9th Cir. 2003).

3 On an issue where the nonmoving party will bear the burden of proof at trial, the
4 moving party can prevail merely by pointing out to the district court that there is an absence
5 of evidence to support the nonmoving party's case. Celotex, 477 U.S. at 324-25. If the
6 moving party meets its initial burden, the opposing party must then set forth specific facts
7 showing that there is some genuine issue for trial in order to defeat the motion. See Fed.
8 R. Civ. P. 56(e); Anderson, 477 U.S. at 250.

9 B. Legal Analysis

10 The only issue before the court is whether summary judgment on plaintiff's two race
11 discrimination claims is warranted. Plaintiff asserts claims under California's Fair
12 Employment and Housing Act ("FEHA"), codified at Government Code § 12940 et seq.; and
13 the Civil Rights Act of 1866, codified at 42 U.S.C. § 1981. Defendant moves for summary
14 judgment on grounds that neither claim has merit.

15 As a preliminary matter, the court notes that plaintiff's opposition to the City's motion
16 does not directly address the merits of the City's motion. While plaintiff cites the correct
17 legal principles underlying his race discrimination claims on summary judgment, plaintiff
18 fails to substantively oppose defendant's motion with any citations or reference to the
19 evidentiary record in the case. Plaintiff furthermore submits only one declaration, which
20 declaration primarily contains a short recitation of the discovery efforts undertaken by
21 plaintiff in the action, and which only briefly mentions the existence of "five former
22 employees" who "may" in the future write a declaration testifying to the harassment and
23 discrimination these employees purportedly experienced while employed at San Francisco
24 General's food services department. See generally Declaration of Kenneth Gregory ISO
25 Opp. MSJ ("Gregory Decl."). Perhaps in acknowledgment of his largely inadequate
26 response to the merits of defendant's motion, plaintiff's opposition brief requests "further
27 discovery in order to present a prima facie case of employment discrimination." See Opp.
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1 Br. at 3. Plaintiff asserts that he is not trained in matters of law, and that he did not seek
2 the discovery he now believes he should have sought. Id. at 2.

3 The court declines to grant plaintiff a further continuance in order to re-open
4 discovery that has now closed, in order to attempt to present a more coherent opposition
5 brief. The court has provided plaintiff with several extensions of time throughout the course
6 of the instant litigation, including two extensions of the discovery deadline, and two
7 extensions of time in which to draft an opposition brief to the City's motion. These
8 extensions have been granted notwithstanding what appears to be plaintiff's own failure to
9 diligently prosecute the instant action in a timely fashion – by, for example, rescheduling his
10 own deposition four different times (until the court ordered him to submit to his deposition
11 or risk sanctions) and declining to diligently pursue adequate discovery despite being
12 granted two separate extensions of the discovery deadline by the court. In view of the
13 court's prior grant of plaintiff's repeated requests for more time, and plaintiff's own role in
14 failing to prosecute the action diligently, the court does not find that an additional
15 continuance would serve the interests of justice. Indeed, a further continuance and re-
16 opening of discovery would only serve to prejudice the City, in view of the nearly six months
17 during which the instant motion has been pending. Thus, and as was made clear to plaintiff
18 in the court's September 15, 2010 order, the court will proceed to adjudicate the merits of
19 the City's motion on the basis of the papers submitted to the court.

20 Turning to the merits of defendant's motion, it is well-established that analysis of an
21 employment discrimination claim under both FEHA and § 1981 follows the same legal
22 principles as those applicable in a Title VII discrimination case. See Metoyer v. Chassman,
23 504 F.3d 919, 930 (9th Cir.2007)(setting forth section 1981 discrimination requirements);
24 Guz v. Bechtel Nat'l, Inc., 24 Cal. 4th 317, 354 (2000)(California courts look to pertinent
25 federal precedent when applying California states); see also Surrell v. Cal. Water Serv. Co.,
26 518 F.3d 1097, 1103 (9th Cir. 2008). Those legal principles in turn require adherence to
27 the same test for establishing an inference of intentional discrimination as set forth in
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1 McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); see also Yee v. Dept. of Environ.
2 Serv., Multnomah County, 826 F.2d 877, 880-81 (9th Cir.1987). Under the familiar
3 McDonnell Douglas framework, a plaintiff has the initial burden of establishing a prima facie
4 case of racial discrimination. If the plaintiff satisfies this initial burden, the burden shifts to
5 the defendant to prove it had a legitimate non-discriminatory reason for the adverse action.
6 If the defendant meets that burden, the plaintiff must then prove that such a reason was
7 merely a pretext for intentional discrimination. See, e.g., Lindsey v. SLT L.A., LLC, 447
8 F.3d 1138, 1144 (9th Cir.2006).

9 Here, the City targets plaintiff's allegations that the City is liable for race
10 discrimination under either FEHA or section 1981. Defendant argues that proof of each
11 fails under the relevant McDonnell Douglas burden-shifting approach, thereby warranting
12 summary judgment in defendant's favor. Additionally, it asserts that summary judgment as
13 to the City is warranted due to plaintiff's failure to establish an issue of fact as to Monell
14 liability.

15 To establish his initial prima facie case of race discrimination, plaintiff must show
16 that: (1) he is a member of a protected class; (2) he was qualified for his position; (3) he
17 experienced an adverse employment action; and (4) similarly situated individuals outside
18 his protected class were treated more favorably, or other circumstances surrounding the
19 adverse employment action give rise to an inference of discrimination. See, e.g., Fonseca
20 v. Sysco Food Services of Arizona, Inc., 374 F.3d 840, 847 9th Cir. 2004); McDonnell
21 Douglas Corp., 411 U.S. 792 at 802. Only then does the burden shift to defendants to offer
22 their "legitimate, nondiscriminatory reason for the adverse employment action." Lyons v.
23 England, 307 F.3d 1092, 1112 (9th Cir.2002).

24 Here, the court's analysis begins – and ends – with plaintiff's prima facie case.
25 Defendant appears, as an initial matter, to concede that plaintiff successfully meets the first
26 and third prongs of the above McDonnell Douglas test. The City does not dispute that
27 plaintiff is African American, and that he was, in fact, released from his probationary
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1 position as a food service worker. As such, plaintiff can establish that he is a member of a
2 protected class, and that he suffered some adverse employment action. See, e.g., Saint
3 Francis College v. Al-Khazraji, 481 U.S. 604, 612-13 (1987)(protected classes are those
4 identifiable because of their ancestry or ethnic characteristics); Woodson v. Int'l Business
5 Machines, 2006 WL 1195453, *4-5 (N.D. Cal. 2006)(defining adverse action as a
6 substantial change in the terms and conditions of employment that can include a “reduction
7 in an employee’s potential for career advancement”).

8 Plaintiff fails, however, to meet the second and fourth prongs of the McDonnell
9 Douglas test. He has failed to establish either that he was performing according to
10 defendant’s legitimate expectations, or that other employees with qualifications similar to
11 his own were treated more favorably. Indeed, plaintiff fails to introduce even minimal
12 evidence – aside from his own so-called declaration – that might prove that his job
13 performance met defendant’s legitimate expectations. Such evidence might normally
14 consist of positive performance reviews, admissions by the employer, or even expert
15 testimony as to an employer’s legitimate expectations for the job at issue, and an analysis
16 of the plaintiff’s performance in light of those expectations. Similarly, with respect to
17 whether similarly situated employees not in his protected class were treated more
18 favorably, plaintiff has provided no evidence of such, nor has he provided declarations from
19 other employees or supervisors or even statistical evidence on this issue. As for plaintiff’s
20 own declaration, it is wholly insufficient to give rise to an inference of discrimination as it
21 fails to include any factual testimony relevant to any of the legal issues before the court.

22 The City, moreover, has come forward with evidence affirmatively indicating that
23 plaintiff was not performing in accordance with the City’s legitimate expectations. See, e.g.,
24 Declaration of Jose Reineres ISO MSJ (“Reineres Decl.”), ¶¶ 6-7, 9; id., Ex B; Declaration
25 of Natalia Covacha ISO MSJ (“Covacha Decl.”), ¶¶ 5-6; id., Exs. A-B.

26 In sum, plaintiff’s lack of evidence fails to create a material dispute of fact with
27 respect to a prima facie case of discrimination.

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1 Indeed, even if plaintiff had been able to come forward with evidence of a prima
2 facie case of discrimination, defendant’s submitted declarations also provide evidence of
3 legitimate and nondiscriminatory reasons for its decision to release plaintiff from his role of
4 food service worker during his probationary period. As defendant notes, plaintiff’s
5 supervisors witnessed plaintiff failing to abide by health rules applicable to food service
6 workers, improperly handling food carts, refusing to sign a training log, and behaving in a
7 belligerent fashion when confronted about such failings. See Reineres Decl., ¶¶ 5-10;
8 Covacha Decl., ¶¶ 5-6.

9 In sum, although minimal evidence is sufficient to establish a prima facie case,
10 “when evidence to refute the defendant’s legitimate explanation is totally lacking, summary
11 judgment is appropriate.” Lindsey v. SLT L.A., LLC, 447 F.3d at 1148 (internal quotation
12 marks omitted). Here, plaintiff’s evidentiary showing is entirely deficient, and fails on both
13 counts – it establishes neither a prima facie case, nor pretext. Thus, summary judgment is
14 GRANTED in defendant’s favor as to this theory of liability.

15 The court also finds that summary judgment is warranted as to plaintiff’s claims on
16 grounds that plaintiff has failed to demonstrate that the City has a policy and practice of
17 discrimination. The City itself can only be held liable for the actions of its employees (i.e.,
18 those in the Department of Food & Nutrition at San Francisco General), if plaintiff satisfies
19 the principles of Monell liability. See, e.g., Monell v. Dept. of Social Serv. of New York, 436
20 U.S. 658, 690 (1987)(holding that liability against municipality under § 1983 can only attach
21 when a local government’s policy or custom is responsible for inflicting injury at the hands
22 of one of its employees); United Federation of African Am. Contractor v. Oakland, 96 F.3d
23 1204, 1215 (9th Cir. 1996)(applying Monell analysis to suit against municipalities pursuant
24 to § 1981). Here, plaintiff has submitted no evidence – let alone referenced any –
25 establishing the existence of any official municipal policy. Thus, plaintiff has failed to raise
26 any disputed facts on the issue of the City’s Monell liability. Summary judgment is therefor
27 appropriate in defendant’s favor on this issue. See, e.g., Okoro v. City of Oakland,

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1 California, 233 Fed. Appx. 639, 641 (9th Cir. 2007)(absence of the “essential elements of
2 municipal liability under 42 U.S.C. §§1983 and 1981 is fatal to [plaintiff’s] case”).

3 In view of the foregoing findings, the court finds it unnecessary to resolve the City’s
4 additional argument with respect to plaintiff’s inability to allege a contract with the City
5 pursuant to section 1981.

6 C. Conclusion

7 For the foregoing reasons, the court hereby GRANTS defendant’s motion for
8 summary judgment.

9
10 **IT IS SO ORDERED.**

11 Dated: December 20, 2010



PHYLLIS J. HAMILTON
United States District Judge