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3 UNITED STATES DISTRICT COURT
4 NORTHERN DISTRICT OF CALIFORNIA
56
7 CHRISTIAN RUIZ BAPTISTE,

8 Plaintiff,

No. C 12-5209 PJH

9 v.

**ORDER DENYING MOTION TO
VACATE JUDGMENT AND AMEND
ORDER**

10 LIDS; HAT WORLD, INC.; et al.,

11 Defendants.
12 _____/

13 Before the court is the motion of plaintiff Christian Ruiz Baptiste pursuant to Federal
14 Rule of Civil Procedure 59(e) for an order vacating the February 5, 2014 final judgment and
15 amending the order granting summary judgment for the defendants. Having read the
16 parties' papers and carefully considered their arguments and the relevant legal authority,
17 the court hereby DENIES the motion.

18 Rule 59(e) gives district courts "considerable discretion" when considering motions
19 to alter or amend judgments. Turner v. Burlington N. Santa Fe R.R., 338 F.3d 1058, 1063
20 (9th Cir. 2003). However, this is "an extraordinary remedy, to be used sparingly in the
21 interests of finality and conservation of judicial resources." Kona Enters., Inc. v. Estate of
22 Bishop, 229 F.3d 877, 890 (9th Cir. 2000) (citations and quotations omitted).

23 "Judgment is not properly reopened absent highly unusual circumstances, unless
24 the district court is presented with newly discovered evidence, committed clear error, or if
25 there is an intervening change in the controlling law." Weeks v. Bayer, 246 F.3d 1231,
26 1236 (9th Cir. 2001) (citations and quotations omitted). In addition, Rule 59(e) cannot be
27 used to raise arguments that could reasonably have been made earlier in the litigation.
28 Kona Enters., 229 F.3d at 890.

1 Plaintiff seeks reconsideration on all three grounds set forth in Rule 59(e) – that
2 newly discovered evidence supports a reasonable inference of racial animus and pretextual
3 firing; that the court erred by applying outdated legal standards; and that an intervening
4 change in the controlling law makes clear that defendant Michael Somoon can be
5 considered the decisionmaker with regard to plaintiff's termination, or at a minimum that it
6 raises a disputed question of fact. In addition, he identifies several questions which he
7 asserts raise disputed issues of fact that preclude summary judgment.

8 1. Newly-discovered evidence

9 First, plaintiff contends that newly-discovered evidence provides support for an
10 inference of racial animus and pretextual firing. This evidence consists of documents
11 attached to the declaration of plaintiff's counsel Derek Decker, and also includes
12 declarations by Dr. Stephen M. Raffle and Beth De Lima.

13 Plaintiff filed this action on October 9, 2012. The original fact discovery cut-off date
14 was set for September 30, 2013, and the deadline for hearing summary judgment motions
15 was set for December 4, 2013. At the parties' request, the court later extended the fact
16 discovery deadline to October 21, 2013, and the hearing deadline for summary judgment
17 motions to December 11, 2013. Only defendants filed motions for summary judgment.

18 The documents attached to the Decker Declaration were obtained pursuant to
19 subpoena from the San Francisco Police Department (SFPD) and the Office of Citizen
20 Complaints (OCC), and from OSH (Somoon's former employer). According to Decker,
21 although subpoenas were originally served on the SFPD in June 2013, the responsive
22 documents were not produced by the SFPD and the OCC until after October 2013, with the
23 production continuing into early December 2013.

24 Decker asserts that the records obtained from the SFPD show that on October 29,
25 2008, Somoon called 911 and reported a citizen's arrest was in progress, and that an "adult
26 male" was resisting the arrest and there was no security. According to Decker, this
27 resulted in the 911 call being given a high priority. Decker claims that the fact of this 911
28 call contradicts Somoon's deposition testimony and the testimony of the responding

1 officers, all of whom (according to plaintiff) stated that there was no crime in progress, that
2 Somoon was not attempting a citizen's arrest, that there was no arrest for plaintiff to resist,
3 and that plaintiff was cooperative. (Decker does not attach or reference any of this
4 testimony, and the court was unable to locate it in the record.) Decker also notes that
5 plaintiff testified in his deposition that the officers were hostile and that they wrenched his
6 arm behind his back (which testimony the court did cite in the order granting defendants'
7 motion). Plaintiff asserts that the fact of the 911 call shows that plaintiff was telling the truth
8 and that Somoon was lying.

9 According to plaintiff, the documents produced by OSH show that "multiple
10 complaints" were made against Somoon at OSH, "including complaints relating to racially
11 motivated statements" against African-Americans. Decker asserts that his office repeatedly
12 attempted to contact Sally Deremer, one of the individuals who complained about Somoon,
13 but was unable to do so until January 21, 2014. Decker has included a declaration from
14 Ms. Deremer, detailing her complaints about Somoon, and stating that she found his
15 comments "personally offensive."

16 Dr. Raffle is a psychiatrist who was retained by plaintiff's counsel. He examined
17 plaintiff on December 6, 2013, and has provided a report dated December 19, 2013. In that
18 report, he concludes that plaintiff suffers from post-traumatic stress disorder, major
19 depressive disorder, alcohol use disorder, hoarding disorder, attention-deficit/hyperactivity
20 disorder, panic disorder, and hypersomnolence disorder. He asserts that all these
21 disorders, with the exception of the ADHD, arose after plaintiff was terminated from his
22 position at Hat World. The bulk of Dr. Raffle's report purports to recount a version of all the
23 encounters between plaintiff and Somoon, and to offer a psychiatric analysis of the effect of
24 these encounters on plaintiff's psyche.

25 Ms. De Lima is a certified "Professional in Human Resources" who owns a
26 consulting company. She was retained by plaintiff's counsel, and has provided what
27 appears to be an expert report in which she offers her opinion as to the adequacy of the
28 investigation conducted by Hat World into the events that led to plaintiff's termination. She

1 finds the investigation to have been inadequate, under standards set forth by the Society
2 for Human Resource Management. She does not say when she was retained, but her
3 declaration/report) is dated December 20, 2013.

4 The court finds that reconsideration is not warranted on this ground. In short, the
5 evidence that plaintiff claims is "newly discovered" is not. Evidence is not newly discovered
6 for purposes of a Rule 59(e) motion if it was available prior to the district court's ruling. See
7 Ybarra v. McDaniel, 656 F.3d 984, 998 (9th Cir. 2011). That is, for a court to grant a Rule
8 59(e) motion based on new evidence, a litigant "must show that the evidence was
9 discovered after the judgment, that the evidence could not be discovered earlier with due
10 diligence, and that the newly discovered evidence is of such a magnitude that had the court
11 known of it earlier, the outcome would likely have been different." Dixon v. Wallowa
12 County, 336 F.3d 1013, 1022 (9th Cir. 2003)).

13 Under this standard, none of the declarations plaintiff has submitted constitute
14 "newly discovered" evidence, as each item of supposed new evidence was entirely within
15 plaintiff's control, or accessible to him using reasonable diligence, well before the hearing
16 on the summary judgment motions. In addition, prior to filing the present motion on March
17 5, 2014 – a full month after the judgment was entered – plaintiff's counsel never informed
18 the court that he had obtained "new evidence" that he wanted the court to consider.

19 With regard to the documents attached to the Decker Declaration, the SFPD/OCC
20 and OSH documents were in plaintiff's possession prior to the December 11, 2013 hearing,
21 and in any event, plaintiff knew about the SFPD's involvement years ago, and was aware of
22 Ms. Deremer's identity and her complaint as early as September 30, 2013.

23 With regard to the Raffle Declaration, if plaintiff's counsel believed a declaration from
24 a retained psychiatrist would help plaintiff's case, nothing prevented counsel from
25 identifying Dr. Raffle as an expert and commissioning the report prior to the briefing on the
26 summary judgment motion. Moreover, Dr. Raffle conducted his evaluation of plaintiff prior
27 to the December 11, 2013, hearing.

28 With regard to the DeLima Declaration, plaintiff has not shown he could not have

1 located Ms. DeLima prior to the summary judgment motion briefing. He deposed Hat
2 World's HR manager Ms. Baird several months before he filed his opposition to defendants
3 motion, and if he believed an HR "expert" was required to rebut Ms. Baird's testimony, he
4 should have retained Ms. DeLima in time to include her opinions in his opposition to the
5 summary judgment motions.

6 Finally, plaintiff has not shown that this "new evidence" would change the outcome
7 here. He has not established that it is relevant or material, that it is substantively different
8 from much of the evidence available in the record, or that it is of such magnitude that it
9 would in any way change the court's analysis or ultimate ruling. The SFPD record of the
10 911 call does not (as plaintiff suggests) indicate that Somoon used the term "citizen's
11 arrest." The only statement attributed to Somoon is "Resisting. Adult male to go," which is
12 not inconsistent with Somoon's testimony that he asked plaintiff to prepare a written
13 statement but plaintiff was resisting.

14 As for the declarations, the declaration by Ms. Deremer is irrelevant and immaterial,
15 as she is not African-American, the statement that another employee "likes black guys" is
16 not suggestive of racial animus, the alleged incidents occurred at a different employer, and
17 defendants had no opportunity to cross-examine Ms. Deremer. While Somoon's comments
18 and actions, as reported, could certainly be viewed as inappropriate, verging on sexual
19 harassment, they do not suggest racial animus. Moreover, according to Somoon, Ms.
20 Deremer is white.

21 The declaration by Dr. Raffle (that plaintiff suffered emotional distress as a result of
22 Somoon's alleged conduct) does not contradict the fact that plaintiff testified he felt
23 comfortable at Hat World, and that he declined his former manager's offer to move to
24 another company. Moreover, defendants were never provided with an opportunity to cross-
25 examine Dr. Raffle. Similarly, defendants were never provided with an opportunity to
26 cross-examine Ms. DeLima, and in addition, her opinions are arguably subject to a
27 challenge under Federal Rule of Evidence 702 and Daubert v. Merrell Dow
28 Pharmaceuticals, Inc., 509 U.S. 579 (1993) (which defendants did not have an opportunity

1 to present to the court).

2 2. Commission of clear error

3 Second, plaintiff asserts that the judgment should be vacated because the court
4 applied outdated legal standards, thereby committing reversible error. Plaintiff asserts that
5 he is not required to submit direct evidence in order to survive summary judgment, and that
6 he is entitled to have circumstantial evidence of discriminatory animus considered
7 independent of McDonnell Douglas. He contends that under Costa v. Desert Palace, 299
8 F.3d 838, 850 (9th Cir. 2002), which was affirmed by the Supreme Court in Desert Palace,
9 Inc. v. Costa, 539 U.S. 90 (2003), he is required to show only that a protected characteristic
10 was a "motivating factor" in the adverse action – or, that in opposing defendants' motion, he
11 needed only to provide evidence sufficient to raise a triable issue as to whether race was a
12 "motivating factor."¹

13 Plaintiff also complains that the court improperly applied a "heightened standard" to
14 plaintiff's circumstantial evidence of pretext – arguing that the standard is no longer that
15 such evidence must be "specific and substantial," but that this "vestigial language from the
16 case law has been both harmonized and superceded." He cites Cornwall v. Electra Cent.
17 Credit Union, 439 F.3d 1018, 1029 (9th Cir. 2006), where the Ninth Circuit stated that post-
18 Desert Palace and Costa, "specific, substantial" evidence can be interpreted to mean only
19 evidence sufficient to raise a genuine issue of material fact on summary judgment.

20 In plaintiff's view, any post-Costa and post-Desert Palace citation to the "specific and
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22 ¹ Plaintiff did not mention either the Ninth Circuit's opinion in Costa or the Supreme
23 Court's opinion in Desert Palace in his opposition to Genesco/Hat World's motion. He did
24 mention Costa in his opposition to Somoon's motion, citing to the "motivating factor" language.

25 Plaintiff includes a somewhat lengthy "mixed-motive" analysis, which he also did in his
26 opposition to the motions for summary judgment. However, because Hat World did not assert
27 a "mixed-motive" defense, the court's order granting defendants' motions did not evaluate
28 whether Hat World had mixed motives for terminating plaintiff. Here, plaintiff argues that
defendants offered a "mixed-motive" defense because in response to his largely circumstantial
evidence that race was motivating factor in his termination, they simply offered a non-
discriminatory reason for the firing. He claims he should have been allowed to proceed past
summary judgment because he provided evidence showing that race was a motivating factor,
even though other factors may also have motivated the defendants.

1 substantial" standard by the Ninth Circuit "can only be construed as a sign of lingering
2 confusion." He asserts that because this court stated that circumstantial evidence
3 supporting pretext must be "specific and substantial," it necessarily improperly discounted
4 the evidence of pretext that he presented.² Plaintiff argues that the question of pretext thus
5 comes down to an issue credibility, which cannot be resolved on summary judgment – and
6 that in accepting Somoon's version of events, the court made an improper credibility
7 determination.

8 The court finds that reconsideration is not warranted on this ground, as plaintiff has
9 not established that the court committed any clear error by applying "outdated" or
10 "superceded" legal standards. "Clear error" for purposes of a motion for reconsideration
11 occurs when "the reviewing court on the entire record is left with a definite and firm
12 conviction that a mistake has been committed." Smith v. Clark County Sch. Dist., 727 F.3d
13 950, 955 (9th Cir. 2013) (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395
14 (1948)).

15 Here, plaintiff appears to be asserting that the court ignored direct evidence of racial
16 animus, and failed to properly consider the claims under the McDonnell Douglas shifting
17 burdens analysis. The court disagrees. The court correctly analyzed the meaning of direct
18 evidence, and also properly evaluated plaintiff's claims using the McDonnell Douglas
19 framework. Direct evidence of employment discrimination is evidence which, if believed,
20 proves the fact of discriminatory animus without inference or presumption. See Coghlan v.
21 American Seafoods Co. LLC, 413 F.3d 1090, 1095 (9th Cir. 2005). The discriminatory
22 animus must be related to the unlawful employment decision. See Shelley v. Geren, 666
23 F.3d 599, 615 (9th Cir. 2012).

24 Here, the court found that plaintiff had presented no evidence showing that he was
25 terminated based on race. Rather, plaintiff pointed to isolated, vague, and stray comments,
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27 ² It appears that this evidence is Somoon's statement to HR that plaintiff had stolen
28 hats, which plaintiff claims was a "manufactured charge" – notwithstanding that it is undisputed
that he admitted having taken hats out of the store.

1 none of which were made by anyone in Hat World's HR Department, and none of which
2 was made at the time of his termination or tied directly to his termination.

3 In Desert Palace, where the Supreme Court for the first time considered "the effect
4 of the 1991 Act on jury instructions in mixed-motive cases," id., 539 U.S. at 98, the Court
5 held that in Title VII cases generally, direct and circumstantial evidence should be treated
6 alike, noting that "[c]ircumstantial evidence is not only sufficient, but may also be more
7 certain, satisfying, and persuasive than direct evidence," id. at 100. Plaintiff argues that
8 because the Supreme Court has held that no heightened showing is required for
9 circumstantial evidence, this court erred by finding that plaintiff had failed to establish
10 pretext by "specific and substantial" circumstantial evidence.

11 While it is true that the court stated in the order that "plaintiff has not provided direct
12 evidence showing that he was terminated based on his race," the court also found that
13 "[t]he evidence is undisputed that Ms. Baird was the decisionmaker – not Somoon – and
14 there is no evidence that Ms. Baird or anyone else in HR was motivated by racial animus."
15 Feb. 5, 2014 Order at 17-18 (emphasis added). The court did not distinguish here as
16 between direct and circumstantial evidence, but rather simply found that there was no
17 evidence of racial animus on the part of the decisionmakers.

18 Further, the court correctly applied the McDonnell Douglas shifting-burdens analysis,
19 finding that defendants had met their burden of articulating a legitimate, nondiscriminatory
20 reason for the termination, and that plaintiff had not met his ultimate burden of presenting
21 evidence sufficient to raise a triable issue as to whether Hat World terminated him based
22 on his race. The court did not apply a "heightened standard" to circumstantial evidence –
23 the fact is that there was no evidence that Hat World terminated plaintiff based on race, and
24 the evidence actually showed that plaintiff admitted taking hats out of the store, which he
25 knew was against company policy. Nor did the court address any "mixed-motive" defense.

26 The "direct evidence" and McDonnell Douglas analyses are proper and have
27 consistently been applied in the Ninth Circuit following Desert Palace. See, e.g., McGinest
28 v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004) (when opposing a motion for

1 summary judgment in a disparate treatment case, a plaintiff may proceed by using the
2 McDonnell-Douglas framework, or alternatively, may simply present direct or circumstantial
3 evidence demonstrating that a discriminatory reason more likely than not motivated the
4 adverse action).

5 Moreover, while the Ninth Circuit has questioned the "specific and substantial"
6 requirement, see Davis v. Team Elec. Co., 520 F.3d 1080, 1091 (9th Cir. 2008); Cornwell,
7 439 F.3d at 1030-31, it has also continued to rely on that test for evaluating circumstantial
8 evidence of pretext, see, e.g., Anthoine v. North Central Counties Consortium, 605 F.3d
9 740, 753 (9th Cir. 2010); E.E.O.C. v. The Boeing Co., 577 F.3d 1044, 1049 (9th Cir. 2009);
10 Meyoyer v. Chassman, 504 F.3d 919, 930-31 (9th Cir. 2007); Nilsson v. City of Mesa, 503
11 F.3d 947, 953-55 (9th Cir. 2007).

12 3. Intervening change in controlling law

13 Third, plaintiff argues that summary judgment should be vacated based on the
14 Supreme Court's decision in Vance v. Ball State Univ., 133 S.Ct. 2434 (2013). In Vance,
15 the Court held that, for purposes of determining vicarious liability in workplace harassment
16 claims under Title VII, a "supervisor" is an individual who is "empowered by the employer to
17 take tangible employment actions against the victim." Id. at 2439. The Court defined
18 "tangible employment action" as "a significant change in employment status, such as hiring,
19 firing, failing to promote, reassignment with significantly different responsibilities, or
20 decision causing a significant change in benefits." Id. at 2442-43 (citation and quotations
21 omitted). The Court rejected the "nebulous definition" advocated by the EEOC's
22 Enforcement Guidance, which tied supervisor status to "the ability to exercise significant
23 direction over another's work." Id. at 2443.

24 In his motion, plaintiff quotes an excerpt from the Vance decision, where the Court
25 explained,

26 If an employer does attempt to confine decisionmaking power to a small
27 number of individuals, those individuals will have a limited ability to exercise
28 independent discretion when making decisions and will likely rely on other

1 workers who actually interact with the affected employee. . . . Under those
2 circumstances, the employer may be held to have effectively delegated the
3 power to take tangible employment actions to the employees on whose
4 recommendations it relies.

5 Id. at 2452. However, this comment was made in the context of a harassment claim, and
6 the specific question of when employers are liable for harassment by supervisors.

7 The court finds that plaintiff has identified no intervening change in the law that
8 warrants reconsideration. The decision in Vance was issued on June 24, 2013, which
9 plaintiff characterizes as "just prior to the summary judgment motion filing," but which in fact
10 was more than three months before the defendants filed their motions for summary
11 judgment.

12 Moreover, it is not on point. Plaintiff is attempting to extrapolate from Vance's
13 definition of "supervisor" for purposes of determining whether an employer can be held
14 vicariously liable for harassment under Title VII in order to argue that Somoon's
15 recommendation that plaintiff be discharged transformed him into a "decisionmaker"
16 notwithstanding the undisputed testimony that Ms. Baird made the decision to terminate
17 plaintiff. However, the dispute in Vance involved allegations of harassment, and the legal
18 issue resolved was one that had been left open in a prior Supreme Court case – who
19 qualifies as a supervisor (for purposes of alleging vicarious liability) in a Title VII case for
20 workplace harassment.

21 4. Disputes of material fact

22 Finally, plaintiff asserts that disputed issues of fact exist with regard to four
23 questions, such that summary judgment was not warranted – (i) the question whether
24 Somoon's use of "nigger" and his remarks that plaintiff "dressed ghetto," was a "lazy thug,"
25 and that "you people all steal" showed racial animus or were instead stray, race-neutral
26 comments; (ii) the question whether Somoon had a race-based motivation for the adverse
27 employment action (plaintiff's termination); (iii) the question whether there was a non-
28 discriminatory reason for terminating plaintiff; and (iv) the question whether Somoon or HR
terminated plaintiff.

1 Plaintiff contends that the first and second questions require an assessment of
2 Somoon's intent and motivation, which cannot be resolved on summary judgment; that the
3 third question involves the "mixed-motive" defense, which plaintiff claims has been raised
4 by defendants here; and that the fourth question is controlled by Vance, and that the
5 identity of the actual decisionmaker (HR or Somoon) is a question of fact.

6 For the reasons stated above and in the order granting defendants' motion for
7 summary judgment, the court finds that none of these questions raises a disputed issue of
8 fact, sufficient to warrant reconsideration of the summary judgment order. Accordingly,
9 plaintiff's motion must be DENIED.

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11 **IT IS SO ORDERED.**

12 Dated: April 28, 2014



PHYLLIS J. HAMILTON
United States District Judge

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