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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Joseph E. Rubino,

NO. C 08-00696 JW

Plaintiff,

**ORDER DENYING DEFENDANT ACME
BUILDING MAINTENANCE’S MOTION
FOR SUMMARY JUDGMENT WITHOUT
PREJUDICE TO BE RENEWED**

v.

ACME Building Maintenance, et al.,

Defendants.

I. INTRODUCTION

Joseph Rubino (“Plaintiff”), in *pro per*, brings this action against Defendants ACME Building Maintenance (“ACME”), Spansion, Inc. (“Spansion”) and GCA Service Group of Texas L.P., Inc. (collectively, “Defendants”), alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*¹

¹ On October 17, 2008, Plaintiff filed a Second Amended Complaint without leave from the Court to do so. (See Docket Item No. 102.) The Second Amended Complaint contained causes of action for violations of 42 U.S.C. §§ 2000e, *et seq.*, and 42 U.S.C. § 1981. (*Id.*) On December 15, 2008, the Court granted Defendant Spansion’s motion to dismiss with leave to amend, and ordered Plaintiff to file an amended complaint no later than January 15, 2009. (See Docket Item No. 104.) On January 15, 2009, Plaintiff filed his subsequent Second Amended Complaint, stating claims under 42 U.S.C. §§ 2000e, *et seq.*, only. (Second Amended Complaint at 1, hereafter, “SAC,” Docket Item No. 105.) Although Plaintiff’s Second Amended Complaint fails to include a cause of action under 42 U.S.C. § 1981 and is confusingly captioned as “Spansion’s Portion,” the Court treats Plaintiff’s January 15, 2009 pleading as his operative pleading pursuant to its December 15, 2008 Order.

1 Presently before the Court is Defendant ACME's Motion for Summary Judgment.² The
2 Court conducted a hearing on June 8, 2009. Based on the papers submitted to date and oral
3 argument, the Court DENIES Defendant ACME's Motion for Summary Judgment.

4 **II. BACKGROUND**

5 **A. Undisputed Facts**

6 On May 22, 2005, Plaintiff began employment with Defendant ACME as a Maintenance
7 Technician.³ While employed by ACME, Plaintiff performed work for Defendant Spansion through
8 a service agreement between ACME and Spansion. (Sohn Decl., Ex. B at 46.) In July 2006,
9 Plaintiff received a power point slide listing "General Mechanics-2" under the heading "Future
10 Openings. Must be filled by Q4'06." (Sohn Decl., Ex. D.)

11 Plaintiff attempted on three occasions, between July and October 2006, to apply for a
12 position with Spansion as a General Mechanic by submitting his resume to what he believed to be
13 Spansion's Human Resources office. (Sohn Decl., Ex. B at 208.) Although Plaintiff was aware that
14 he could apply for jobs at Spansion on the internet, he never did. (Sohn Decl., Ex. B at 187-88,
15 197.) On November 14, 2006, Plaintiff submitted a 30-day notice of his resignation. (Sohn Decl.,
16 Ex. E.) On November 20, 2006, Plaintiff informed his supervisor, Angel Zamora, that he would not
17 be returning to work. (Sohn Decl., Ex. F.)

18 **B. Procedural History**

19 On January 30, 2008, Plaintiff filed this law suit. (See Docket Item No. 1.) On June 5, 2008,
20 the Court granted Defendant Spansion's motion to dismiss and Plaintiff's motion for leave to amend.
21 (See Docket Item No. 74.) On June 19, 2008, Plaintiff filed a first amended complaint. (See Docket
22 Item No. 76.) Following a June 30, 2008 Case Management Conference, the Court referred Plaintiff

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24 ² (Defendant ACME Building Maintenance's Notice of Motion and Motion for Summary
25 Judgment or, in the Alternative, Partial Summary Judgment, hereafter, "Motion," Docket Item No.
110.)

26 ³ (Declaration of David D. Sohn in Support of Defendant ACME Building Maintenance's
27 Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment, Ex. A, hereafter,
"Sohn Decl.," Docket Item No. 111.)

1 to the Federal Pro Bono Project for the Northern District of California. (See Docket Item No. 84.)
2 Plaintiff has since continued to prosecute this action *pro se*.

3 On December 15, 2009, the Court granted Defendant Spansion’s motion to dismiss with
4 leave to amend. (See Docket Item No. 104.) In its December 15, 2008 Order, the Court explained
5 that Plaintiff’s allegations did not make clear that Spansion was a joint employer of Plaintiff or who
6 controlled the various aspects of his employment. On January 15, 2009, Plaintiff filed his Second
7 Amended Complaint against Defendants, alleging that Defendants discriminated against Plaintiff
8 because he is white in violation of Title VII. (See Docket Item No. 105.) On March 16, 2009,
9 Defendant Spansion filed a Notice of Commencement of Bankruptcy Proceedings and of Automatic
10 Stay, notifying the parties and the Court that it filed a voluntary petition for relief under 11 U.S.C.
11 §§ 101, *et seq.* (See Docket Item No. 108.) Accordingly, this case was automatically stayed as to
12 Spansion pursuant to 11 U.S.C. § 362.

13 Presently before the Court is Defendant ACME’s Motion for Summary Judgment.

14 **III. STANDARDS**

15 Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and
16 admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any
17 material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P.
18 56(c). The purpose of summary judgment “is to isolate and dispose of factually unsupported claims
19 or defenses.” Celotex v. Catrett, 477 U.S. 317, 323-24 (1986).

20 The moving party “always bears the initial responsibility of informing the district court of the
21 basis for its motion” Id. at 323. “The judgment sought should be rendered if the pleadings, the
22 discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as
23 to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
24 56(c). The moving party “bears the initial responsibility for informing the district court that there is
25 an absence of evidence to support the nonmoving party’s case.” Id. at 325. The non-moving must
26 then “present some evidence establishing each element of [his] claims on which [he] would bear the
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1 burden of proof at trial.” Smolen v. Deloitte, Haskins & Sells, 921 F.2d 959, 963 (9th Cir. 1990)
2 (quotations omitted). Conclusory allegations unsupported by factual data are insufficient to defeat a
3 summary judgment motion. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

4 When evaluating a motion for summary judgment, the court views the evidence through the
5 prism of the evidentiary standard of proof that would pertain at trial. Anderson v. Liberty Lobby
6 Inc., 477 U.S. 242, 255 (1986). The court draws all reasonable inferences in favor of the non-
7 moving party, including questions of credibility and of the weight that particular evidence is
8 accorded. See, e.g., Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 520 (1992). The court
9 determines whether the non-moving party’s “specific facts,” coupled with disputed background or
10 contextual facts, are such that a reasonable jury might return a verdict for the non-moving party.
11 T.W. Elec. Serv. v. Pac. Elec. Contractors, 809 F.2d 626, 631 (9th Cir. 1987). In such a case,
12 summary judgment is inappropriate. Anderson, 477 U.S. at 248. However, where a rational trier of
13 fact could not find for the non-moving party based on the record as a whole, there is no “genuine
14 issue for trial.” Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

15 **IV. DISCUSSION**

16 Defendant ACME moves for summary judgment on the following grounds: (1) Plaintiff has
17 failed to exhaust his administrative remedies; (2) Plaintiff cannot establish a prima facie case of
18 racial discrimination because he was not subject to an adverse employment action; and (3) Plaintiff
19 cannot establish a prima facie case of racial discrimination because he cannot show that similarly
20 situated employees were treated differently.⁴ (Motion at 1.) The Court considers each issue in turn.
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24 ⁴ ACME also contends that Plaintiff cannot pursue a claim for discrimination based on the
25 “perception” of his race. (Motion at 1.) Plaintiff, however, clarifies in his Opposition that “though
26 perception played some of the role of Defendants [sic] action the suit is based on they descriminated
27 [sic] against me because of my race etc.” (Plaintiff’s Opposition to Defendant’s Motion for
Summary Judgment at 3-4, 42-44, hereafter, “Opposition,” Docket Item No. 115.) Thus, the Court
declines to address whether Plaintiff’s claim can be properly based on Defendant ACME’s
“perception” of his race.

1 **A. Exhaustion of Administrative Remedies**

2 At issue is whether Plaintiff has exhausted his administrative remedies.

3 A plaintiff is required to exhaust his administrative remedies before filing a Title VII claim
4 by either filing a timely charge with the Equal Employment Opportunity Commission (“EEOC”), or
5 by making such a filing with the appropriate state agency. Freeman v. Oakland Unified School
6 District, 291 F.3d 632, 636 (9th Cir. 2002). If an employee seeks judicial relief for claims not listed
7 in an original administrative filing, he “nevertheless may encompass any discrimination like or
8 reasonably related to the allegations of the [administrative] charge.” Oubichon v. North American
9 Rockwell Corporation, 482 F.2d 569, 571 (9th Cir. 1973). A court’s subject matter jurisdiction
10 extends over all allegations provided in an administrative filing and those “which can reasonably be
11 expected to grow out of the charge of discrimination.” Freeman, 291 F.3d at 636 (internal
12 quotations omitted). The allegations of an administrative filing are to be read with the “utmost
13 liberality.” B.K.B. v. Maui Police Department, 276 F.3d 1091, 1100 (9th Cir. 2002).

14 Here, ACME contends that Plaintiff failed to exhaust his administrative remedies because the
15 “particulars” of Plaintiff’s complaint filed with the California Department of Fair Employment and
16 Housing and EEOC do not mention ACME. (Motion at 6.) Although Defendant is correct that
17 Plaintiff’s brief recitation of the “particulars” surrounding the alleged discrimination does not
18 mention ACME by name, ACME is listed as one of Plaintiff’s employers who discriminated against
19 him. There is no dispute that on one of Plaintiff’s administrative complaints, he lists “Spancion
20 Incorporated, LLP/ACME Building Maintenance” as employers who discriminated against Plaintiff.
21 (Sohn Decl., Ex. G.) It is also not disputed that Plaintiff’s second EEOC complaint states that
22 Plaintiff “was hired by ACME . . . to work at [Spancion] in 2005.”⁵ Finally, subsequent right-to-sue
23 letters from the EEOC to show that ACME was copied on its November 6, 2007 letter. (Id.)

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27 ⁵ (Declaration of Joseph E. Rubino in Opposition to Defendant ACME’s Motion for
28 Summary Judgment, Ex. 28, Docket Item No. 116.)

1 would have felt compelled to resign.” Penn. State Polic v. Suders, 542 U.S. 129, 141 (2004). The
2 Ninth Circuit has explained that

3 [a] constructive discharge occurs when the working conditions deteriorate, as a result
4 of discrimination, to the point that they become sufficiently extraordinary and
5 egregious to overcome the normal motivation of a competent, diligent, and reasonable
6 employee to remain on the job to earn a livelihood and to serve his or her employer.

7 Poland v. Chertoff, 494 F.3d 1174, 1184 (9th Cir. 2007) (internal quotations omitted); see also
8 Hardage, 427 F.3d at 1185.

9 In this case, Plaintiff does not offer evidence showing that similarly situated employees were
10 treated differently, or that the terms of his employment deteriorated sufficiently that his resignation
11 is effectively a constructive discharge. However, with respect to adverse employment actions,
12 Plaintiff contends that he was not only constructively discharged, but because of his race, he was not
13 given raises, overtime pay, benefits or breaks that he was entitled to. (Opposition at 3, 14, 42-44.)
14 Defendant ACME fails to address these alleged conduct. Although Plaintiff’s Opposition is difficult
15 to comprehend, Plaintiff also appears to suggest that further discovery will allow him to show that
16 ACME undertook these actions because of his race, and show that Hispanic ACME employees
17 received preferential treatment.⁶ (Id. at 39, 42.)

18 In addition, the Court finds that certain issues remain that must be addressed by the parties
19 before summary judgment is appropriate. For example, the terms of Plaintiff’s employment with
20 ACME and Spansion are unclear. The Court cannot decipher the relationship between Defendants
21 ACME and Spansion, or which of them controlled the aspects of Plaintiff’s employment at issue in
22 this case. Without an understanding of these issues, the Court cannot determine who is Plaintiff’s
23 “employer” with respect to his Title VII claims, whether certain conduct allegedly undertaken by
24 Spansion should be imputed to ACME, or whether Plaintiff suffered an adverse employment action.
25 Thus, the Court finds that Defendant ACME’s Motion for Summary Judgment is premature.

26 Accordingly, the Court DENIES Defendant ACME’s Motion for Summary Judgment.

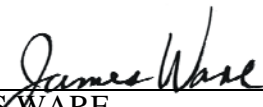
27 ⁶ There is currently no deadline for the close of discovery.

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V. CONCLUSION

The Court DENIES Defendant ACME's Motion for Summary Judgment without prejudice to be renewed after the close of discovery. The Court will separately issue a Scheduling Order setting a deadline for the close discovery and for filing subsequent dispositive motions.

Dated: July 15, 2009



JAMES WARE
United States District Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

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9 **Dated: July 15, 2009**

Richard W. Wieking, Clerk

10 **By: /s/ JW Chambers**
11 **Elizabeth Garcia**
12 **Courtroom Deputy**