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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JAMES J. STEGMAIER,

Plaintiff,

v.

CITY OF RENO, ex rel., its RENO POLICE
DEPARTMENT, a government entity, et
al.,

Defendants.

Case No. 3:13-cv-00461-MMD-VPC

ORDER

(Def's Motion to Dismiss, or Alternatively,
for Summary Judgment – dkt. no. 66)

I. SUMMARY

This case involves an employment dispute. Before the Court is Defendant City of Reno's Motion to Dismiss for Lack of Subject Matter Jurisdiction, or Alternatively, for Summary Judgment ("Motion"). (Dkt. no. 66.) The Court has considered Plaintiff James J. Stegmaier's response ("Opposition") (dkt. no. 67) and Defendant's reply (dkt. no. 69). For the reasons discussed below, the Motion is denied.

II. BACKGROUND

The Court recites the relevant factual background in its August 13, 2015 Order (dkt. no. 64) and will not repeat the facts here except where necessary.

The Complaint asserted ten claims for relief stemming from allegations of sexual harassment and a hostile work environment. (Dkt. no. 1.) In response to Defendant's motion, the Court dismissed nine of the claims for relief and granted Plaintiff leave to file an amended complaint with respect to those claims. (Dkt. nos. 31, 33.) The Court permitted Plaintiff's retaliation claim (third claim for relief) to "proceed on the theory that

1 Chief Pitts' decision to support termination of Plaintiff was caused by Plaintiff's reporting
2 of the pornographic video emailed to Plaintiff by Sgt. Myers." (Id. at 13.)

3 Plaintiff then filed a First Amended Complaint ("FAC"), asserting eight claims for
4 relief. (Dkt. no. 45.) Defendant moved to dismiss the FAC, except for the retaliation
5 claim. (Dkt. no. 57.) On August 13, 2015, the Court issued an order striking the FAC's
6 third, fifth, and sixth claims for relief and dismissing with prejudice the FAC's first, fourth,
7 and eighth claims for relief. (Dkt. no. 64.) Accordingly, the FAC's remaining claims for
8 relief are as follows: (1) retaliation pursuant to 42 U.S.C. § 2000e-3 (now second claim
9 for relief) and (2) negligent infliction of emotional distress (seventh claim for relief).

10 Defendant now moves to dismiss the FAC for lack of subject matter jurisdiction.
11 Alternatively, Defendant moves for summary judgment on the FAC's two remaining
12 claims for relief.¹

13 **III. DISCUSSION**

14 **A. Motion to Dismiss**

15 **1. Legal standard**

16 Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a defendant to seek
17 dismissal of a claim or action for lack of subject matter jurisdiction. Dismissal under Rule
18 12(b)(1) is appropriate if the complaint, considered in its entirety, fails to allege facts on
19 its face that are sufficient to establish subject matter jurisdiction. In re Dynamic Random
20 Access Memory (DRAM) Antitrust Litig., 546 F.3d 981, 984-85 (9th Cir. 2008). Although
21 the defendant is the moving party in a motion to dismiss brought under Rule 12(b)(1), the
22 plaintiff is the party invoking the court's jurisdiction. As a result, the plaintiff bears the
23 burden of proving that the case is properly in federal court. See In re Ford Motor
24 Co./Citibank (S.D.), N.A., 264 F.3d 952, 957 (9th Cir. 2001) (citing McNutt v. Gen.
25 Motors Acceptance Corp., 298 U.S. 178, 189 (1936)).

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27 ¹ Although filed outside of the dispositive motion deadline, Defendant's Motion is
28 timely because Defendant was granted leave to re-file a motion for summary judgment
within 45 days after the issuance of the ruling on the second motion to dismiss. (Dkt. no.
55.)

1 **2. Analysis**

2 Defendant contends that the Court lacks subject matter jurisdiction over Plaintiff's
3 retaliation claim because Plaintiff failed to exhaust his state administrative remedies
4 pursuant to the Local Government Employee-Management Relations Act ("Act"), codified
5 in NRS Chapter 288. Specifically, Defendant argues that retaliation is a "prohibited
6 practice" under NRS § 288.270(1) and any claim must be submitted to the Local
7 Government Employee-Management Relations Board ("EMRB") pursuant to NRS §
8 288.280 to be determined administratively before any judicial review. Defendant insists
9 that because Plaintiff never filed a claim with the EMRB, he failed to exhaust his
10 administrative remedies thereby depriving the Court of subject matter jurisdiction.

11 A plain reading of NRS § 288.270(1) does not support Defendant's argument.
12 Notably, Defendant fails to identify or explain which subsection of the statute
13 encompasses Plaintiff's retaliation claim. NRS § 288.270(1)(d), the only subsection that
14 covers retaliatory-type conduct, prohibits a local government employer from
15 "discharg[ing] or otherwise discriminat[ing] against any employee because the
16 employee" either (1) "signed or filed an affidavit, petition or complaint or [gave] any
17 information or testimony" under Chapter 288, or (2) formed, joined or participated in an
18 employee organization. The EMRB's administrative authority extends only to those
19 claims that fall within the scope of Chapter 288. NRS § 288.110(2) ("The Board may
20 hear and determine any complaint arising out of the interpretation of, or performance
21 under, the provisions of this chapter" by a local government employer).

22 Here, the FAC alleges that Defendant retaliated against Plaintiff in violation of
23 Title VII, a federal anti-discrimination law. The FAC does not allege that Defendant
24 retaliated against Plaintiff because he participated in any union activity or in a
25 proceeding under Chapter 288. As such, Plaintiff's retaliation claim does not involve a
26 prohibited practice under NRS § 288.270(1) and therefore falls outside of the EMRB's

1 scope of authority.² See e.g., *Flores v. Clark Cty.*, EMRB Case No. A1-045990, Item No.
2 737, 2010 WL 5647671, at *1 (Nov. 15, 2010) (holding EMRB did not have jurisdiction
3 over retaliation claim not based on protected activity arising under Chapter 288).
4 Accordingly, the Court denies Defendant’s request for dismissal for lack of subject matter
5 jurisdiction.³

6 **B. Motion for Summary Judgment**

7 **1. Legal standard**

8 “The purpose of summary judgment is to avoid unnecessary trials when there is
9 no dispute as to the facts before the court.” *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*,
10 18 F.3d 1468, 1471 (9th Cir. 1994). The party seeking summary judgment bears the
11 burden of informing the court of the basis for its motion, along with evidence showing the
12 absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317,
13 323 (1986). In evaluating a summary judgment motion, a court views all facts and draws
14 all inferences in the light most favorable to the nonmoving party. *Kaiser Cement Corp. v.*
15 *Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

16 In determining summary judgment, a court applies a burden-shifting analysis. A
17 moving party without the ultimate burden of persuasion at trial has “both the initial
18 burden of production and the ultimate burden of persuasion on a motion for summary
19 judgment.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir.
20 2000). To carry its burden of production, “the moving party must either produce evidence
21 negating an essential element of the nonmoving party’s claim or defense or show that
22

23 ² Additionally, although not raised here, the Court questions whether Title VII
24 would preempt the Act to the extent that its provisions conflict with the federal law. See
California Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 281 (1987).

25 ³ To the extent Defendant also moves for dismissal on the basis that Plaintiff
26 failed to file this lawsuit within 90 days after receiving the right to sue notice (see dkt. no.
27 66 at 6 n. 6), it is not properly brought under Rule 12(b)(1) because it is an attack on the
28 FAC, rather than on the Court’s jurisdiction. Moreover, it appears that Plaintiff did file this
lawsuit within the statute of limitations period. Plaintiff received the right to sue notice on
May 31, 2013 and filed this lawsuit on August 26, 2013—87 days later.

1 the nonmoving party does not have enough evidence of an essential element to carry its
2 ultimate burden of persuasion at trial.” Id. To carry its burden of persuasion, “the moving
3 party must persuade the court that there is no genuine issue of material fact.” Id. If the
4 moving party fails to carry its initial burden of production, “the nonmoving party has no
5 obligation to produce anything, even if the nonmoving party would have the ultimate
6 burden of persuasion at trial.” Id. at 1102-03.

7 If the moving party satisfies Rule 56’s requirements, the burden shifts to the party
8 resisting the motion to “set forth specific facts showing that there is a genuine issue for
9 trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The nonmoving party
10 “may not rely on denials in the pleadings but must produce specific evidence, through
11 affidavits or admissible discovery material, to show that the dispute exists,” *Bhan v. NME*
12 *Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and “must do more than simply show
13 that there is some metaphysical doubt as to the material facts.” *Orr v. Bank of Am.*, 285
14 F.3d 764, 783 (9th Cir. 2002) (internal citations omitted).

15 **2. Analysis**

16 **a. Retaliation**

17 Title VII makes it unlawful for an employer to discriminate against any employee
18 “because [the employee] has opposed any practice made an unlawful employment
19 practice by [Title VII].” 42 U.S.C. § 2000e-3(a). To establish a prima facie case of
20 retaliation, a plaintiff must show that: (1) the plaintiff engaged in a protected activity; (2)
21 he suffered an adverse employment action; and (3) a causal link exists between these
22 two events. *Villiarimo v. Aloha Island Air, Inc.* 281 F.3d 1054, 1064 (9th Cir. 2002).

23 Defendant contends that the only adverse employment action Plaintiff
24 experienced was being placed on administrative leave in April 2012. According to
25 Defendant, Plaintiff’s July 2012 resignation was not equivalent to an adverse
26 employment action (i.e. termination) because it was voluntary. However, Plaintiff
27 contends that he was constructively discharged when Chief Pitts decided to support
28 Plaintiff’s termination allegedly because Plaintiff attended an interview with internal

1 affairs to report Sgt. Myers' harassment.⁴ Constructive discharge, if shown, can be an
2 adverse employment action for purposes of establishing a Title VII retaliation claim. See
3 *Jordan v. Clark*, 847 F.2d 1368, 1377 n. 10 (9th Cir. 1988). Defendant points to no
4 record evidence, nor provides any argument, either negating Plaintiff's allegation or
5 demonstrating that Plaintiff will be unable to show at trial that he was constructively
6 discharged. Defendant had the opportunity during discovery to develop evidence
7 concerning Plaintiff's allegation of constructive discharge and should have presented the
8 evidence with this Motion to the extent that it supports its position. See *Nissan Fire &*
9 *Marine Ins. Co.*, F.3d at 1105 ("A moving party may not require the nonmoving party to
10 produce evidence supporting its claim or defense simply by saying that the nonmoving
11 party has no such evidence.").

12 As to causation, "when adverse employment decisions are taken within a
13 reasonable period of time after complaints of discrimination have been made, retaliatory
14 intent may be inferred." *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212
15 F.3d 493, 507 (9th Cir. 2000). Defendant does not dispute that Plaintiff complained of
16 the pornographic video Sgt. Myers allegedly emailed to Plaintiff in June 2012.⁵ Thus,
17 taking the evidence in the light most favorable to Plaintiff, no more than one month
18 lapsed between Plaintiff's complaint and his alleged constructive discharge, which can
19 be a sufficiently reasonable amount of time to support an inference of causation. See
20 *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) (finding sufficient evidence of
21 causation existed when adverse actions occurred less than three months after employee
22 complained).

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24 ⁴ As noted in the Court's August 13, 2015 Order, it is still not exactly clear when
25 Plaintiff filed an official complaint regarding the pornographic video Sgt. Myers allegedly
26 emailed to Plaintiff. (See dkt. no. 64 at 5 n. 6.) However, it appears that Plaintiff filed the
complaint sometime before his "forced" resignation.

27 ⁵ Because neither party provides any argument as to whether Plaintiff's complaint
28 regarding the pornographic video qualifies as a protected activity, the Court will presume
for the purposes of this order that it does.

1 Accordingly, Defendant fails to meet its initial burden on summary judgment. On
2 that basis, the Court denies Defendant’s Motion as to the retaliation claim.

3 **b. Negligent infliction of emotional distress**

4 To recover for negligent infliction of emotional distress (“NIED”) under Nevada
5 law, a plaintiff must establish that he either suffered a physical impact or “serious
6 emotional distress causing physical injury or illness.” See *Olivero v. Lowe*, 995 P.2d
7 1023, 1026-27 (Nev. 2000). Here, Defendant argues that Plaintiff cannot prove his NIED
8 claim because he produced no evidence during discovery to establish the physical
9 manifestation requirement. In response, by verified Opposition,⁶ Plaintiff reiterates the
10 allegations contained in the FAC—that he saw counselors and was prescribed
11 medication for symptoms of emotional distress—and argues that Defendant fails to offer
12 any evidence showing that the claim lacks merit.

13 Viewing the evidence in the light most favorable to Plaintiff, there are genuine
14 issues of material fact as to the physical manifestation requirement. Plaintiff provides
15 evidence indicating that the symptoms of his emotional distress were serious enough
16 that he received medical treatment. Although Defendant may be correct that Plaintiff did
17 not produce documentary proof of his alleged treatment, Plaintiff’s statements based on
18 his personal knowledge are sufficient to survive a motion for summary judgment.

19 To the extent that Defendant moves for summary judgment on the basis that
20 Plaintiff committed a discovery violation, this is not sufficient to support summary
21 judgment. See, e.g., *Villagomes v. Lab. Corp. of Am.*, 783 F. Supp. 2d 1121, 1129 (D.
22 Nev. 2011). Accordingly, the Court denies Defendant’s Motion as to the NIED claim.

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25 ⁶ Statements in a verified opposition can be competent evidence on summary
26 judgment if the “contentions are based on personal knowledge and set forth facts that
27 would be admissible in evidence, and where [the party] attest[s] under penalty of perjury
28 that the contents of the motions or pleadings are true and correct.” *Jones v. Blanas*, 393
F.3d 918, 923 (9th Cir. 2004); see also *Lew v. Kona Hosp.*, 754 F.2d 1420, 1423 (9th
Cir. 1985). Here, Plaintiff attached a verification to his Opposition attesting under penalty
of perjury the contents based on his personal knowledge are true. (Dkt. no. 67 at 6.)

1 **IV. CONCLUSION**

2 The Court notes that the parties made several arguments and cited to several
3 cases not discussed above. The Court reviewed these arguments and cases and
4 determines that they do not warrant discussion as they do not affect the outcome of the
5 Motion.

6 It is therefore ordered that Defendant's Motion to Dismiss for Lack of Subject
7 Matter Jurisdiction, or Alternatively, for Summary Judgment (dkt. no. 66) is denied.

8 DATED THIS 22nd day of April 2016.

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MIRANDA M. DU
UNITED STATES DISTRICT JUDGE