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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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8 HERBIE MARTIN,

9 Plaintiff,

10 v.

11 CITY OF MILL CREEK, *et al.*,

12 Defendants.

NO. C18-0781RSL

ORDER GRANTING IN PART
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

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14 This matter comes before the Court on "Defendants' Motion for Summary Judgment
15 Dismissal of Plaintiff's Complaint." Dkt. # 16. Mr. Martin alleges that his application for
16 appointment to the City of Mill Creek City Council was rejected in February 2018 because of his
17 race and/or because he engaged in protected activities in 2015, 2017, and 2018. In his complaint,
18 Mr. Martin cites to statutes and common law causes of action related to discrimination,
19 retaliation, defamation, and intentional interference with business expectancy. Defendants are
20 the City of Mill Creek, the six City Council members who selected another applicant for
21 appointment to the open Council position, and the City Manager who developed the process for
22 interviewing, nominating, and voting on the applicants. They seek dismissal of all of Mr.
23 Martin's claims on the grounds of absolute legislative immunity, lack of evidence of unlawful
24 activity, and the separation of powers doctrine. They argue that some of the claims asserted are
25 subject to dismissal because there is no employer-employee relationship between Council
26 members and any of the defendants, plaintiff failed to file a tort claim before pursuing his state

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28 ORDER GRANTING IN PART DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT - 1

1 law causes of action, and the statutory limitations periods have run.

2 Summary judgment is appropriate when, viewing the facts in the light most favorable to
3 the nonmoving party, there is no genuine issue of material fact that would preclude the entry of
4 judgment as a matter of law. The party seeking summary dismissal of the case “bears the initial
5 responsibility of informing the district court of the basis for its motion” (Celotex Corp. v.
6 Catrett, 477 U.S. 317, 323 (1986)) and “citing to particular parts of materials in the record” that
7 show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)). Once the moving
8 party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to
9 designate “specific facts showing that there is a genuine issue for trial.” Celotex Corp., 477 U.S.
10 at 324. The Court will “view the evidence in the light most favorable to the nonmoving party . . .
11 and draw all reasonable inferences in that party’s favor.” Krechman v. County of Riverside, 723
12 F.3d 1104, 1109 (9th Cir. 2013). Although the Court must reserve for the jury genuine issues
13 regarding credibility, the weight of the evidence, and legitimate inferences, the “mere existence
14 of a scintilla of evidence in support of the non-moving party’s position will be insufficient” to
15 avoid judgment. City of Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1049 (9th Cir. 2014);
16 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). Factual disputes whose resolution
17 would not affect the outcome of the suit are irrelevant to the consideration of a motion for
18 summary judgment. S. Cal. Darts Ass’n v. Zaffina, 762 F.3d 921, 925 (9th Cir. 2014). In other
19 words, summary judgment should be granted where the nonmoving party fails to offer evidence
20 from which a reasonable jury could return a verdict in its favor. FreecycleSunnyvale v. Freecycle
21 Network, 626 F.3d 509, 514 (9th Cir. 2010).

22 Having reviewed the memoranda, declarations, and exhibits submitted by the parties¹ and
23 taking the evidence in the light most favorable to Mr. Martin, the Court finds as follows:

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26 ¹ The Court has considered Mr. Martin’s separate and untimely “Motion not Dismissal of Civil
27 Action” [sic] as an opposition to defendants’ motion for summary judgment.

1 **A. Legislative Immunity and the Separation of Powers Doctrine**

2 Defendants argue that they are entitled to absolute legislative immunity from suit (see
3 Bogan v. Scott-Harris, 523 U.S. 44, 49 (1998)), and that the separation of powers doctrine
4 precludes the judiciary from inquiring into their motives in selecting an applicant other than Mr.
5 Martin (see Tenney v. Brandhove, 341 U.S. 367, 377 (1951)). To the extent there is a distinction
6 between the two shields, they both protect legislators from liability for their legislative activities.
7 The question, then, is whether the City Council members were acting in a legislative capacity
8 when they evaluated applications and selected John Steckler for appointment to the open
9 Council position.

10 “[N]ot all governmental acts by a local legislator, or even a local legislature, are
11 necessarily legislative in nature.” Cinevision Corp. v. City of Burbank, 745 F.2d 560, 580 (9th
12 Cir. 1984). Officials seeking absolute immunity have the burden of showing that immunity is
13 justified by the governmental function at issue: acts that are administrative or executive in nature
14 are entitled to lesser protections. Trevino v. Gates, 23 F.3d 1480, 1482 (9th Cir. 1994). “Whether
15 an act is legislative turns on the nature of the act,” and the Court cannot rely on allegations (or
16 even fact-finding) regarding the legislators’ subjective intent when “resolving the logically prior
17 question of whether their acts were legislative.” Bogan, 523 U.S. at 54.

18 Defendants identify the relevant acts as interviewing applicants, voting until a single
19 candidate obtained majority support, and appointing the successful applicant to the City Council.
20 Dkt. # 16 at 6. Personnel decisions are generally administrative in nature unless they are made in
21 the context of budget legislation which has the impact of creating, eliminating, or redefining
22 municipal positions. Alexander v. Holden, 66 F.3d 62, 65-66 (4th Cir. 1995). See also Almonte
23 v. City of Long Beach, 478 F.3d 100, 107 (2nd Cir. 2007) (“A personnel decision is
24 administrative in nature if it is directed at a particular employee or employees, and is not part of
25 a broader legislative policy.”); Smith v. Lomax, 45 F.3d 402, 404 (11th Cir. 1995) (finding that
26 “voting on the appointment of a Board clerk is not the sort of broad ‘legislative’ activity that is
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1 typically associated with grants of absolute immunity.”). The mere fact that defendants engaged
2 in the activity of voting in order to select a new council member does not render their conduct
3 immune from suit or otherwise outside the purview of judicial review. See Cinevision, 745 F.2d
4 at 579 (rejecting argument that “a legislative act is one in which the body votes”). Defendants
5 may be entitled to qualified immunity from liability under § 1983 if their conduct did not violate
6 clearly-established federal rights (Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)), but they have
7 not shown that absolute legislative immunity is appropriate in the circumstances presented here.

8 **B. Employment-Based Claims**

9 Local elected officials and appointees on the policy making level are not “employees”
10 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(f), or the Age Discrimination
11 in Employment Act of 1967 (“ADEA”), 29 U.S.C. § 630(f). Plaintiff cannot, therefore, assert
12 discrimination or retaliation claims under those statutes.

13 Defendants argue that, although the Americans with Disabilities Act (“ADA”) does not
14 expressly exclude elected officials or policy-making appointees from its reach, the Court should
15 look to common law to determine whether a City Council member is “employed” by the City
16 and therefore an “employee.” As the Seventh Circuit has noted, the ADA’s definition of
17 “employee” as one who is employed by an employer “is vague and circular,” necessitating resort
18 to the common law test for determining who is and is not an employee. Bluestein v. Central Wis.
19 Anesthesiology, S.C., 769 F.3d 944, 951 (7th Cir. 2014). The Supreme Court presumes that
20 when Congress uses the term “employee” without adequately defining it, Congress intends “to
21 describe the conventional master-servant relationship as understood by the common-law agency
22 doctrine,” with “the common-law element of control [as] the principle guidepost.” Clackamas v.
23 Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 445, 448 (2003). Defendants point out,
24 and plaintiff does not dispute, that City Council members are not subject to the control of the
25 City or each other in the performance of their legislative functions. The Court therefore finds
26 that they are not “employed” by the City for purposes of the ADA.

1 **C. No Evidence of Unlawful Activity**

2 Defendants assert that “[t]he undisputed evidence demonstrates Plaintiff was afforded a
3 fair and equal opportunity to seek appointment to the vacant seat on the Mill Creek City Council
4 through a legislative process mandated by State law.” Dkt. # 16 at 11. Plaintiff alleges, however,
5 that he is African American, that he was qualified for the Council position, and that the Council
6 members, acting in their official capacities, chose a white applicant instead. These allegations
7 are uncontested and, as in the Title VII context, are sufficient to raise a prima facie inference of
8 racial discrimination. See Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 88 (2nd Cir.
9 2015). Defendants make no effort to show what legitimate, non-discriminatory considerations
10 prompted their decision not to hire Mr. Martin or to otherwise rebut plaintiff’s prima facie case.
11 Defendants’ reliance on the process mandated by state law is unavailing where plaintiff’s
12 Section 1983 claim is based on the theory that defendants exercised their discretion under that
13 process in a discriminatory manner.

14 With regards to Rebecca Polizzotto, however, there is no indication that she had any role
15 in the decision-making that plaintiff alleges was discriminatory. As the then-City Manager, Ms.
16 Polizzotto made recommendations regarding the process to be used in selecting an applicant for
17 the open City Council position. Because plaintiff has not challenged the process or otherwise
18 presented facts that could support a claim of discrimination against Ms. Polizzotto, his claims
19 against her will be dismissed.

20 **D. State Law Tort Claims**


21 Based on the existing record, it appears that plaintiff failed to file a tort claim with the
22 City of Mill Creek before filing this lawsuit. His failure to comply with the condition precedent
23 set forth in RCW 4.96.020 requires dismissal of the state tort claims. Troxell v. Rainier Pub. Sch.
24 Distr. No. 307, 154 Wn.2d 345 (2005).

1 **E. Statute of Limitation**

2 Defendants, relying on a reference to an event that occurred in 2015, argue that one or
3 more unspecified claims are barred by a three-year statute of limitations. This argument is not
4 well-taken. The complaint unambiguously alleges and is based on unlawful conduct occurring in
5 2018. The reference to a 2015 complaint to the Equal Employment Opportunity Commission is
6 part of plaintiff's retaliation claim: it is one of the protected activities that he believes prompted
7 the 2018 retaliatory failure to hire. There is no limitations problem where plaintiff filed suit
8 within months of the allegedly discriminatory appointment decision.²

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10 For all of the foregoing reasons, defendants' motion for summary judgment (Dkt. # 16)
11 and plaintiff's motion opposing dismissal (Dkt. # 22) are GRANTED in part and DENIED in
12 part. Plaintiff's claims under Title VII, the ADEA, the ADA, and state tort law are DISMISSED,
13 as is his Section 1983 claim against defendant Rebecca Polizzotto. Plaintiff's Section 1983 claim
14 against the other defendants may proceed.

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17 Dated this 10th day of April, 2019.

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19 _____
20 Robert S. Lasnik
21 United States District Judge

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26 ² Because plaintiff's Title VII claim will be dismissed for the reasons discussed in Section B of
27 this Order, the Court need not determine whether plaintiff's failure to file a charge with the agency
precludes his Title VII claim.