

1 THE HONORABLE JOHN C. COUGHENOUR

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7 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 YOUSEF M. BILBEISI,

10 Plaintiff,

11 v.

12 SAFEWAY INC.,

13 Defendant.

CASE NO. C22-0876-JCC

ORDER

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15 This matter comes before the Court on Defendant's motion for summary judgment (Dkt.
16 No. 28). Having thoroughly considered the parties' briefing and the relevant record, and having
17 taken oral argument under advisement, the Court hereby GRANTS the motion for the reasons
18 explained herein.

19 **I. BACKGROUND**

20 This case arises from Plaintiff's employment with Defendant Safeway. Plaintiff started
21 working for Defendant around July 2016. (Dkt. No. 29-3 at 3.) Plaintiff then failed to report to
22 work on September 30, October 3, and October 4, 2018. (Dkt. Nos. 29-3 at 82–84, 128; 29-5 at
23 8–9.) Under Defendant's "Absentee and Tardiness" policy, "[a]ny employee who is absent for
24 three consecutive days and fails to notify Management shall be presumed as having quit the job."
25 (Dkt. No. 29-3 at 108.) According to Defendant's Human Resources representative, Plaintiff's
26 employment was terminated because of these unexcused absences. (Dkt. No. 29-5 at 9.) On

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1 October 9, 2018, Plaintiff brought a doctor’s note to support the absences. (Dkt. Nos. 29-5 at 9;
2 29-3 at 90–91, 129–32.) According to Plaintiff, he also came to the store and told two other
3 employees that he was sick. (Dkt. No. 29-3 at 86–88, 92–93.) Plaintiff also received eleven
4 Corrective Action Notices (“CANs”) during the course of his employment. (Dkt. No. 29-3 at
5 117–28.) These notices document instances of tardiness, failure to perform job tasks, and
6 confrontations with coworkers. (*Id.*)

7 Prior to his termination, Plaintiff alleges that he requested religious accommodations
8 during Ramadan but was denied. (Dkt. No. 1-1 at 3–4.) However, there is no record of any
9 request for accommodations. (Dkt. Nos. 29-3 at 106; 29-4 at 21, 29-5 at 14.) Plaintiff was
10 permitted to attend mosque during Ramadan. (Dkt. No. 29-3 at 60–61.) He also received
11 assistance from coworkers to avoid handling alcohol, per his request. (*Id.* at 64–68.) Although,
12 he did have to handle alcohol on occasion during Ramadan when his coworkers were
13 unavailable. (*Id.* at 67.) That being said, none of Plaintiff’s coworkers could recall an instance
14 where Plaintiff was forced to handle alcohol. (Dkt. Nos. 29-4 at 21–22; 29-8 at 14; 29-6 at 15–
15 16.)

16 Following his termination, Plaintiff filed the instant suit in state court, alleging Defendant
17 took adverse action against him because of his race and/or religion. (Dkt. No. 1-1.) Defendant
18 removed the case based on diversity jurisdiction.¹ (Dkt. No. 1.) Defendant now moves for
19 summary judgment. (Dkt. No. 28.) Plaintiff opposes.² (Dkt. No. 32.)

21 ¹ The Court previously remanded the case after Plaintiff asserted that he would add a diversity-
22 destroying defendant. However, Plaintiff failed to do so, and the case was then removed again.
23 The Court outlined the full procedural history to this point in a previous order, and will not
repeat it here. (*See* Dkt. No. 17.)

24 ² Although Plaintiff’s response brief was untimely, the Court granted Plaintiff’s motion for relief
25 from the deadline. (Dkt. No. 48.) However, Plaintiff improperly raises additional substantive
26 arguments in a surreplies and additional declarations and filings. (Dkt. Nos. 37, 38, 39, 40, 41.)
The Court will not consider the additional substantive arguments made in those documents, as
they should have been included in Plaintiff’s response brief. *See* LCR 7(b)(2).

1 **II. DISCUSSION**

2 **A. Legal Standard**

3 “The court shall grant summary judgment if the movant shows that there is no genuine
4 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
5 Civ. P. 56(a). In making such a determination, the Court must view the facts and justifiable
6 inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Anderson v.*
7 *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Once a motion for summary judgment is properly
8 made and supported, the opposing party “must come forward with ‘specific facts showing that
9 there is a *genuine issue for trial.*’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.
10 574, 587 (1986) (emphasis in original) (quoting Fed. R. Civ. P. 56(e)). A genuine issue cannot be
11 found if the only evidence presented is “uncorroborated and self-serving testimony.” *Villiarimo*
12 *v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (citations omitted).

13 **B. Disparate Treatment**

14 First, Defendant argues Plaintiff fails to support his claim of disparate treatment based on
15 his religion or race. (Dkt. No. 28 at 11–17.) Washington courts apply the *McDonnell*
16 *Douglas/Burdine* burden shifting framework for disparate treatment cases under the Washington
17 Law Against Discrimination (“WLAD”).³ *Hines v. Todd Pac. Shipyards Corp.*, 112 P.3d 522,
18 529 (Wash. Ct. App. 2005). Under that framework, Plaintiff must establish a *prima facie* case of
19 wrongful discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). To do
20 so, he must establish that (1) he belongs to a protected class; (2) he was qualified for the
21 position; (3) he experienced an adverse employment action; and (4) similarly situated individuals
22 outside his protected class were treated more favorably. *Peterson v. Hewlett-Packard Co.*, 358
23 F.3d 599, 603 (9th Cir. 2004) (citing *McDonnell Douglas Corp.*, 411 U.S. at 804).

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25 ³ Plaintiff previously amended his complaint to include only state law claims. *Bilbeisi v.*
26 *Safeway*, Case No. C20-0535-JCC, Dkt. No. 24 (W.D. Wash. 2020). Because this Court has
subject matter jurisdiction under 28 U.S.C. § 1332, it applies Washington substantive law. *See*
Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

1 Here, Plaintiff fails to establish a *prima facie* case of discrimination. Although he shows
2 that he is a member of a protected class and that he experienced an adverse employment action,
3 he does not present evidence that he was treated differently than similarly situated individuals
4 outside his protected class.⁴ Plaintiff's only evidence in support is a statement by a former
5 coworker, Michael Mugozi. (Dkt. No. 32 at 1–2) (citing Dkt. No. 33-2). However, Mr. Mugozi
6 testified during a deposition that he never agreed to or signed a written statement. (Dkt. No. 29-8
7 at 11–14.) Defendant alleges this statement was fabricated by Plaintiff. (Dkt. No. 35 at 5.) Even
8 if the Court were to accept the statement, it only generally states “[m]ore senior employees were
9 not reprimanded to the same extent as [Plaintiff] for any infractions in store policy.” (Dkt. No.
10 33-2 at 2.) This single, general statement is insufficient to support Plaintiff's claim that he was
11 treated differently. Because Plaintiff fails to put forth evidence that he was treated differently, his
12 claim for disparate impact fails.⁵

13 C. Failure to Accommodate Religious Practices

14 Next, Defendant argues Plaintiff's claim that he was denied a religious accommodation
15 fails. (Dkt. No. 35 at 6–7.) To establish such a claim, Plaintiff must show that “(1) he or she had
16 a bona fide religious belief, the practice of which conflicted with employment duties; (2) he or
17 she informed the employer of the beliefs and the conflict; and (3) the employer responded by
18 subjecting the employee to threatened or actual discriminatory treatment.” *Kumar v. Gate*
19 *Gourmet Inc.*, 325 P.3d 193, 203 (Wash. 2014) (citing cases).

20 Here, Plaintiff acknowledges he knew that Defendant has a religious accommodation

21 ⁴ Regarding the second prong, although Defendant presents evidence that Plaintiff received
22 various write-ups for job-related behavior, nothing on the record indicates Plaintiff was
23 unqualified to perform the job.

24 ⁵ Even if Plaintiff were to establish a *prima facie* case, the burden would shift to Defendant to
25 articulate a legitimate, non discriminatory reason for its conduct. *Vazquez v. Cnty. of Los*
26 *Angeles*, 349 F.3d 634, 640 (9th Cir. 2003). Defendant has shown the reason for Plaintiff's
CANs and termination were his behavior and violation of the absentee policy. The burden would
then shift back to Plaintiff to show such reasons are “mere pretext,” which he fails to do. *See*
McDonnell Douglas Co., 411 U.S. at 802–04.

1 policy, but never formally requested accommodations. (Dkt. Nos. 29-3 at 13, 106; 29-10 at 2.)
2 And Defendant presents evidence that Plaintiff never made the request. (*See* Dkt. Nos. 29-4 at
3 21; 29-5 at 14.) Plaintiff again relies on Mr. Mugozi’s declaration, which states “[i]t is to my
4 knowledge and witness that [Plaintiff] was denied a reasonable accommodation for his religion.”
5 (Dkt. No. 33-2 at 2.) But this statement, from an employee who was not in charge of the
6 accommodation process is insufficient alone to support Plaintiff’s assertion that he requested an
7 accommodation.

8 Accordingly, Plaintiff fails to establish a genuine issue of fact regarding informing his
9 employer of a need for a religious accommodation. And, on this basis, his claim for failure to
10 accommodate fails.

11 **D. Retaliation**

12 Defendant argues Plaintiff presents no evidence to support his claim of retaliation. To
13 establish a claim of retaliation under the WLAD, Plaintiff “must show (1) he engaged in a
14 statutorily protected activity, (2) the employer took an adverse action against the employee, and
15 (3) there is a causal connection between the employee’s activity and the employer’s adverse
16 action.” *Boyd v. State, et. al.*, 349 P.3d 864, 869 (Wash. Ct. App. 2015) (citing cases). Here, the
17 adverse action against Plaintiff was his termination for missing three consecutive shifts. Because
18 Plaintiff fails to provide evidence supporting his contention that he requested an accommodation,
19 it is unclear what activity Defendant would be retaliating against. For this reason, Plaintiff fails
20 to show any causal connection between his firing and any statutorily protected activity.

21 Therefore, his claim for retaliation must also fail.

22 **E. Hostile Work Environment**

23 Defendant next argues Plaintiff fails to provide sufficient evidence to establish genuine
24 issues of fact regarding his claim of a hostile work environment. To establish such a claim,
25 Plaintiff must show that harrasment “(1) was unwelcome, (2) was because he is a member of a
26 protected class, (3) affected the terms and conditions of his employment, and (4) was imputable

1 to his employer.” *Davis v. Fred’s Appliance, Inc.*, 287 P.3d 51, 57 (Wash. Ct. App. 2012).
2 Harrassment may be imputed to an employer if (a) the harasser is an owner, partner, corporate
3 officer or manager, or (b) the harasser is the plaintiff’s supervisor or co-worker and the employer
4 knew or should have known about the harrassment and failed to take corrective action. *Id.* at 59.

5 Plaintiff alleges he faced harassment and a hostile work environment, based on various
6 altercations he had with other employees. (Dkt. No. 1-1 at 4–6.) But he fails to provide evidence
7 that any of these incidents occurred because of his status as a member of a protected class. At
8 best, Plaintiff alleges one instance where a coworker stated “F*** your prayer” to him. (Dkt. No.
9 29-3 at 33.) But he provides no evidence beyond self-serving testimony that this occurred.⁶ And
10 even if he did present such evidence, Plaintiff fails to show that this was more than a one-off
11 incident or that such conduct can be imputable to Defendant. *See Johnson v. Riverside*
12 *Healthcare System, LP*, 534 F.3d 1116, 1122 (9th Cir. 2008) (“A hostile work environment, by
13 its ‘very nature involves repeated conduct’”) (quoting *Nat’l R.R. Passenger Corp. v. Morgan*,
14 536 U.S. 101, 115 (2002)).

15 Accordingly, Plaintiff’s claim of a hostile work environment fails.

16 **F. Defamation**

17 Finally, Defendant argues that Plaintiff cannot support his defamation claim. To do so,
18 plaintiff must prove (1) a false statement, (2) an unprivileged communication, (3) fault, and (4)
19 damages. *Herron v. KING Broad. Co.*, 776 P.2d 98, 101 (Wash. 1989). He must also show the
20 statement at issue was published to someone other than himself. *Pate v. Tyee Motor Inn, Inc.*,
21 467 P.2d 301, 302 (Wash. 1970). And there is a qualified privilege for intracorporate
22 communications, which are not “published” for purposes of defamation. *Doe v. Gonzaga Univ.*,
23 24 P.3d 390, 397 (Wash. 2001), *rev’d on other grounds*, 536 U.S. 273 (2002). This privilege may
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25 ⁶ A genuine issue cannot be found if the only evidence presented is “uncorroborated and self-
26 serving testimony.” *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002)
(citations omitted).

1 be lost, however, if Plaintiff can show the statement was made with actual malice. *Id.* at 398
2 (citing *Caruso v. Local Union No. 690*, 730 P.2d 1299, 1303 (Wash. 1987)). To prove actual
3 malice, a party must establish the speaker knew the statement was false, or acted with a high
4 degree of awareness of the statement’s probable falsity. *Story v. Shelter Bay Co.*, 760 P.2d 368,
5 373 (Wash. 1988).

6 Plaintiff alleges that information contained in the CANs is false and harms his reputation.
7 But as an initial matter, it is undisputed that the CANs are intracorporate communications
8 created during the course of business and not available to non-employees. (Dkt. Nos. 28 at 23; 32
9 at 7.) Plaintiff states, without support, that actual malice “is clear and don’t [sic] need to be
10 proven, any reasonable jury can clearly see that defendant did act in actual malice” (Dkt.
11 No. 32 at 7.) In the main CAN at issue, Plaintiff was written up for making numerous
12 inappropriate comments including, “telling Danny he can’t speak to him because he’s gay.” (Dkt.
13 No. 33-3.) Plaintiff points to Danny Wilcox’s deposition testimony, where he states “I don’t
14 remember that occurring at all, anything like that.” (Dkt. No. 33-5 at 1.)

15 Labeling something as rooted in actual malice does not make it so. Defendant presents
16 evidence that Renato Millo, who drafted the CAN, remembers Wilcox relaying the message.
17 (Dkt. No. 33-4 at 1.) And Plaintiff’s presented evidence, even if accepted as true, does not prove
18 that Mr. Millo or any other employee of Defendant knew the statement was false or acted with
19 reckless disregard to the truth. Rather, it appears Mr. Millo documented the information relayed
20 to him at the time.

21 Because the communications at issue were intracorporate communications, and because
22 Plaintiff fails to provide any evidence supporting actual malice, the defamation claim fails as a
23 matter of law.⁷

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25 ⁷ Even if Plaintiff could show actual malice, it is unclear what damages would arise from the
26 publication of the CAN. He argues the information may damage his reputation, but it is unclear
how a future employer would obtain the information. (Dkt. No. 32 at 8–9.)

1 **III. CONCLUSION**

2 Finding no genuine disputes as to any material facts, Defendant’s motion for summary
3 judgment (Dkt. No. 28) is GRANTED, and Plaintiff’s claims are DISMISSED.

4 DATED this 7th day of June 2023.

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8 John C. Coughenour
9 UNITED STATES DISTRICT JUDGE
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