

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUL 18 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MUHAMMAD TOURE,

No. 18-55961

Plaintiff-Appellant,

D.C. No. 5:16-cv-01983-RGK-SHK

v.

MEMORANDUM*

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
R. Gary Klausner, District Judge, Presiding

Submitted July 15, 2019**

Before: SCHROEDER, SILVERMAN, and CLIFTON, Circuit Judges.

Muhammad Toure appeals pro se from the district court's judgment in his federal employment action. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *DB Healthcare, LLC v. Blue Cross Blue Shield of Ariz., Inc.*, 852

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

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F.3d 868, 873 n.5 (9th Cir. 2017) (dismissal under Fed. R. Civ. P. 12(b)(1) and 12(b)(6)); *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2011) (summary judgment). We affirm.

The district court properly granted summary judgment on Toure's retaliation claims because Toure failed to raise a genuine dispute of material fact as to whether his 48-day suspension was in response to protected conduct, or as to whether his 60-day suspension was pretextual. *See Learned v. City of Bellevue*, 860 F.2d 928, 932 (9th Cir. 1988) ("[O]pposed conduct must fairly fall within the protection of Title VII to sustain a claim of unlawful retaliation."); *see also Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997) (granting summary judgment because, although "the timing of the[] events suffice[d] to establish a minimal *prima facie* case of retaliation, it d[id] nothing to refute" the employer's stated legitimate reasons for disciplining the plaintiff)).

The district court properly dismissed Toure's Fourteenth Amendment claims, and his Title VII discrimination and harassment claims, because Toure failed to allege facts sufficient to state a plausible claim. *See Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir. 2010) (although pro se pleadings are to be construed liberally, a plaintiff must present factual allegations sufficient to state a plausible

claim for relief); *see also Vasquez v. County of Los Angeles*, 349 F.3d 634, 640-42 (9th Cir. 2003) (setting forth prima facie cases of discrimination and harassment under Title VII); *Douglas v. Cal. Dep't of Youth Auth.*, 271 F.3d 812, 817 (9th Cir. 2001) (“States are protected by the Eleventh Amendment from suits brought by citizens in federal court.”).

The district court did not abuse its discretion by denying Toure’s motion to file a second amended complaint because allowing Toure to add defendants who had previously been dismissed due to Toure’s failure to serve them would have been prejudicial, and because his other proposed amendments failed to state a claim. *See Griggs v. Pace Am. Grp., Inc.*, 170 F.3d 877, 879-80 (9th Cir. 1999) (setting forth standard of review and explaining that the district court may deny leave to amend for “bad faith, undue delay, prejudice to the opposing party, and/or futility”).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MUHAMMAD TOURE,

Plaintiff,

v.

**CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION,**

Defendant.

Case No. 5:16-cv-01983-RGK (SHK)

FINAL JUDGMENT

IT IS HEREBY ADJUDGED AND DECREED:

1. Judgment is entered in favor of Defendant CDCR and Plaintiff shall take nothing, and
2. Each party shall bear its own costs.

Dated: June 14, 2018

Jay Klausner

Judge of the United States District
Court, Central District of California

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APPENDIX B

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[Proposed] Order

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 5:16-01983-RGK-SHK

Date June 12, 2018

Title *Muhammad Toure v. California Department of Corrections and Rehabilitation*Present: The Honorable R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE

Sharon L. Williams Not Reported N/A

Deputy Clerk Court Reporter / Recorder Tape No.

Attorneys Present for Plaintiff: Attorneys Present for Defendant:

Not Present Not Present

Proceedings: (IN CHAMBERS) Order Re: Defendant's Motion for Summary Judgment
(DE 54)**I. INTRODUCTION**

In this action, pro se Plaintiff Muhammad Toure ("Toure") alleges that the California Department of Corrections and Rehabilitation ("CDCR") suspended him in retaliation to his involvement in protected activity, in violation of Title VII of the Civil Rights Act. Presently before the Court is CDCR's Motion for Summary Judgment. Toure filed an opposition sixteen days late. For the following reasons, the Court **GRANTS** CDCR's Motion.

II. FACTUAL BACKGROUND

The following facts are undisputed.

Toure is employed with CDCR as a Muslim Chaplain at Chuckawalla Valley State Prison and Ironwood State Prison. CDCR has initiated disciplinary action against Toure several times.

In 2008, CDCR issued Toure a Letter of Instruction after Toure issued prayer rugs to inmates without following CDCR procedure.

In 2014, CDCR served Toure with a Notice of Adverse Action after Toure denied an inmate the ability to participate in religious activities in violation of CDCR policy and procedure. He was suspended for 12 workdays without pay.

On March 20, 2015, Toure filed a contract grievance in which he complained that CDCR had refused to pay him for time spent supervising institutional workers, in violation of his employment contract. After a grievance conference, the Ironwood State Prison warden denied Toure's request for supervisory pay on April 10, 2015.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. 5:16-01983-RGK-SHK

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In October 2015, CDCR served Toure with another NOAA, this time imposing a 36-workday suspension for misconduct including overfamiliar conduct with an inmate's family.

On July 30, 2015, CDCR served Toure with another NOAA, which was later withdrawn in favor of a First Amended NOAA issued on January 4, 2016. The First Amended NOAA imposed the 48-workday suspension challenged in Toure's operative complaint. CDCR imposed the suspension in response to Toure's accessing areas of the prison without approval, failing to checkout or use a Personal Alarm Device, failing to have inmates processed on and off facilities by custody staff, and misappropriating state property. The California State Personnel Board upheld the suspension.

On June 10, 2016, Toure filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging racial discrimination, religious discrimination, and retaliation in violation of Title VII.

On August 30, 2016, CDCR served Toure with an NOAA imposing the 60-day workday suspension challenged in Toure's operative complaint. According to the NOAA, the suspension stemmed from Toure's inefficiency, inexcusable neglect of duty, insubordination, willful disobedience, and other failures of good behavior under Government Code § 19572. The NOAA went on to note various acts of misconduct, including failing to properly check out a Personal Alarm Device, failing to sign in and out of the prison, and leaving 50 inmates unattended after locking them in a visiting room. The NOAA further noted the 12-day, 36-day, and 48-day suspensions previously issued against Toure.

Toure's original complaint followed on September 16, 2016.

III. JUDICIAL STANDARD

Under Federal Rule of Civil Procedure ("Rule") 56, summary judgment is proper only where "the movant shows there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party must cite to materials in the record to establish that a fact cannot be genuinely disputed. Fed. R. Civ. P. 56(c). On issues where the moving party does not have the burden of proof at trial, the moving party is required only to show that there is an absence of evidence to support the non-moving party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Upon such showing, the court may grant summary judgment "on all or part of the claim." Fed. R. Civ. P. 56(a)-(b).

To defeat a summary judgment motion, the non-moving party must affirmatively present specific evidence sufficient to create a genuine issue of material fact for trial. *See Celotex Corp.*, 477 U.S. at 324. The non-moving party may not merely rely on its pleadings or on conclusory statements. Fed. R. Civ. P. 56(e). Nor may the non-moving party merely attack or discredit the moving party's evidence. *Nat'l*

**UNITED STATES DISTRICT COURT
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Union Fire Ins. Co. v. Argonaut Ins. Co., 701 F.2d 95, 97 (9th Cir. 1983). The materiality of a fact is determined by whether it might influence the outcome of the case based on the contours of the underlying substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Disputes over such facts amount to genuine issues if a reasonable jury could resolve them in favor of the nonmoving party. *Id.* All justifiable inferences must be drawn in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Nevertheless, summary judgment may be granted if the opposing evidence “is merely colorable or is not significantly probative.” *Anderson*, 477 U.S. at 249 (internal citations omitted).

IV. DISCUSSION

Retaliation claims are analyzed under the “shifting burdens” test articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987). Under *McDonnell Douglas*, the plaintiff must first establish a prima facie case of retaliation. *Lowe v. City of Monrovia*, 775 F.2d 998, 1005 (9th Cir. 1985) (citing *McDonnell Douglas*, 411 U.S. at 802–05). To establish a prima facie case of retaliation, the plaintiff must show that “(1) he engaged or was engaging in activity protected under Title VII, (2) the employer subjected him to an adverse employment decision, and (3) there was a causal link between the protected activity and the employer’s action.” *Yartzoff*, 809 F.2d at 1375. If the plaintiff successfully makes a prima facie case, it creates a presumption of retaliation and shifts the burden to the defendant to articulate a legitimate, non-retaliatory reason for the challenged action. *Id.* If the defendant satisfies this burden, the plaintiff must show that the reason is pretextual. *Id.* A defendant can prevail at summary judgment by showing either that the plaintiff cannot establish one of the elements of his prima facie case, or that there was a legitimate reason for the challenged action. *Dep’t of Fair Emp’t & Housing v. Lucent Techs., Inc.*, 642 F.3d 728, 745 (9th Cir. 2011).

Toure’s retaliation claim is based on the 48-day and 60-day suspensions that CDCR issued against him. Toure alleges that CDCR issued the 48-day suspension in retaliation to a contract grievance in which Toure complained of CDCR’s failure to compensate him for time spent supervising inmate workers. He alleges that CDCR issued the 60-day suspension in retaliation to a complaint he filed with the EEOC in which he accused CDCR of several Title VII violations. As explained below, Toure cannot prove either suspension was retaliatory.

A. 48-Day Suspension

CDCR argues Toure cannot establish a prima facie case of retaliation based on the 48-day suspension because the contract grievance allegedly spurring the retaliation is not protected activity. The Court agrees. There are two types of protected activity. First, opposition to any employment practice that the employee reasonably believed was prohibited under Title VII is protected under the statute’s

UNITED STATES DISTRICT COURT
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CIVIL MINUTES - GENERAL

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“opposition clause.” 42 U.S.C. § 2000e-3; *Trent v. Valley Elec. Ass’n Inc.*, 41 F.3d 524, 526 (9th Cir. 1994). Second, participation in any investigation, proceeding, or hearing under Title VII is protected under the statute’s “participation clause.” 42 U.S.C. § 2000e-3; *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997).

The evidence before the Court shows Toure filed a grievance on March 20, 2015 regarding CDCR’s failure to compensate Toure in accordance with his employment contract. Toure cannot show that his grievance was protected activity because it was not part of a Title VII proceeding and the conduct complained of is not prohibited by Title VII. As such, Toure cannot establish a *prima facie* case of retaliation based on the 48-day suspension.

B. 60-Day Suspension

CDCR argues Toure cannot establish a *prima facie* case of retaliation based on the 60-day suspension because, given prior disciplinary actions and misconduct cited in the NOAA that imposed the suspension, Toure cannot prove but-for causation. Alternatively, CDCR argues it had legitimate reasons for suspending Toure, and Toure lacks evidence that those reasons are merely pretextual. Because the Court finds CDCR’s proffered reason for suspending Toure is legitimate and not pretextual, the Court does not address CDCR’s causation argument.

The NOAA imposing the 60-day suspension identifies the following reasons for his suspension: inefficiency, inexcusable neglect of duty, insubordination, willful disobedience, and other failures of good behavior under Government Code § 19572. The NOAA goes on to detail several violations of CDCR policy on which Toure received specific training: (1) Toure failed to properly check out a Personal Alarm Device, (2) Toure failed to sign in and out of the prison, and (3) Toure left 50 inmates unattended after locking them in a visiting room. It also noted his history of disciplinary action. Toure’s untimely opposition provided no evidence or compelling argument that CDCR’s proffered reasons are merely pretext for retaliation. CDCR articulated legitimate, non-retaliatory reasons for the 60-day suspension. As such, Toure’s retaliation claim fails as a matter of law.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** CDCR’s Motion for Summary Judgment.

IT IS SO ORDERED.

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FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NOV 12 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MUHAMMAD TOURE,

Plaintiff-Appellant,

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION,

Defendant-Appellee.

No. 18-55961

D.C. No. 5:16-cv-01983-RGK-SHK
Central District of California,
Riverside

ORDER

Before: SCHROEDER, SILVERMAN, and CLIFTON, Circuit Judges.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Toure's petition for rehearing en banc (Docket Entry No. 20) is denied.

No further filings will be entertained in this closed case.

APPENDIX C
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**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

**Scott S. Harris
Clerk of the Court
(202) 479-3011**

February 5, 2020

Mr. Muhammad Toure
4206 Santo Tomas Dr., #A
Los Angeles, CA 90008

Re: Muhammad Toure
v. California Department of Corrections and Rehabilitation
Application No. 19A873

Dear Mr. Toure:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kagan, who on February 5, 2020, extended the time to and including April 10, 2020.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by 
Jacob A. Levitan
Case Analyst

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