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CENTRAL DISTRICT OF CALIFORNIA
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CENTRAL DISTRICT OF CALIFORNIA
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. HOMESTORE, INC.; MOVE, INC., Defendants.	CASE NO. CV06-1907-ODW (JTLx) ORDER GRANTING MOVE'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On March 29, 2007, the U.S. Equal Employment Opportunity Commission ("Plaintiff") filed this action under Title VII of the Civil Rights Act of 1964 against Defendant Homestore, Inc. -- now known as Move, Inc. ("Move"). Plaintiff claims that Move "has engaged in unlawful employment practices . . . by subjecting Mr. Greg L. Scott ["Scott"] to employment discrimination based on his race, African-American." (FAC at 3.) Specifically, Plaintiff alleges that John Robles ("Robles"), a Move employee, "used derogatory racial slurs toward and in [the presence of Mr. Scott] on a near daily basis." (Opp'n. at 2.) Plaintiff further alleges that Defendant failed to take appropriate measures to prevent or remedy the allegedly hostile work environment. Id.

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Defendant now moves the Court to dispose of the action on summary judgment. Defendant argues that its motion should be granted for the following reasons: (1) the allegedly offensive speech was not "unwelcome" to Scott; (2) the speech was not so severe or pervasive as to alter the conditions of employment; (3) Move did not know, nor should it have known, that Robles harassed Scott; (4) Robles was not a "supervisor" for purposes of Title VII; (5) even if Robles was a "supervisor," Move is entitled to the affirmative defense set forth in Faragher v. City of Boca Raton, 524 U.S. 775 (1998); and (6) the speech was protected by the First Amendment. Alternatively, Defendant argues that partial summary judgment should be granted as to Plaintiff's prayer for injunctive relief and punitive damages.

II. FACTS

Except where otherwise indicated, the following facts are undisputed. Move is an internet-based company with at least fifteen (15) employees. (FAC at 2.) Gregg Scott began working for Move in March 2001, as a Human Resources Information Systems Analyst ("HRIS Analyst"). (UF, 1.)[1] John Robles also began working for Move in March 2001, as a Technical Project Manager. (UF, 2.) The parties dispute Robles' job duties and whether he is a supervisor for purposes of Title VII. At times, Robles would invite Scott to lunch or to go on walks, and other times, Scott would invite Robles. (UF, 20.) Scott attended a work-related Christmas party at Robles' house, (UF, 21.), and they "sent each other multiple, non-work related e-mails, including jokes, links to rap artists, and commentary on racial and political issues." (UF, 23.) Among other things, Scott sent Robles a joke referring to women as "hoes," and often referred to Robles as "man." (UF, 24, 40.)

Robles admits using various permutations of the "N" word "from 2001 until approximately July 2003." (Robles Decl., ¶ 5.) Robles claims, however, that the words were either used while

[1] The Court cites to "Plaintiff's Statement of Uncontroverted Facts in Opposition to Defendants' Motion for Summary Judgment ... ."

discussing rap music and social issues or that they were otherwise fraternal in nature.[2] Plaintiff disputes that Scott and Robles were friends, claiming they were merely coworkers. (Scott Depo. 186:9-15.) Scott admits, however, that he employed a "ploy" with Robles. (Id. at 359:18-19.) ("I didn't like him. But I pretended to like him, and that's what I mean by 'ploy.'") The parties dispute whether Scott ever used the "N" word with Robles.[3]

Scott recalls a few remarks indicative of Robles' alleged harassment. Scott claims that in 2001 or 2002, Robles approached him and Mike Lee, another Move employee, as they were heading to the employee lounge and said: "What is this? A nigger and a chink standing here goofing off. That's grounds to get people fired." (UF, 45, 49.) Scott did not tell Robles he found the remark offensive. (UF, 52.) Scott also claims that at one point in 2002, when Scott told Robles about Scott's heavy work load, tight schedule and how he felt singled out, Robles replied: "Well, you know how it is for niggers." (UF, 53.) Scott also remembers an incident, in the presence of Jennifer Mattern -- a Move HRIS Manager, where Robles greeted him with: "Hey, what's going on, my nigga?" (UF, 54.) Scott disputes that Mattern did not initially react to the comment because she believed Robles and Scott were friends. (Id.) Scott later commented in front of Mattern: "If he says something like that again . . .," but did not finish his sentence. (Id.) When Mattern asked Scott if he wanted her "to talk to somebody about that," Scott replied: "No, not right now." (Id.)

Other than this comment before Mattern, Scott "never complained to anyone in Move management about Robles." (UF, 77.) Scott also "signed verifications in 2002 and 2003 representing that he 'had no reasonable basis to suspect that the Company or any employee had engaged in conduct in violation of the Code of Conduct, including harassment.'" (UF 76; Levin Decl., Exhs. C-F.)

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[2] Robles is Puerto Rican and claims he identified with Scott as a minority. (Robles Decl., ¶ 2.)

[3] A related motion to strike changes to Scott's deposition testimony highlights the parties' dispute. Among other things, Scott changed eight (8) of his answers from "I don't know" to "No." These answers were in response to questions as to whether Scott ever used the "N" word with Robles. The Court struck Scott's changes, as further discussed below, but the dispute persists.

In July 2003, Robles was the Technical Project Manager for a project involving HRIS. Scott also worked on this project. Later that same month, Mr. Kennedy, a department head, called a meeting with Robles and Scott, where Kennedy criticized Scott's performance on the project and insisted that Scott meet certain deadlines. (UF, 8.) The parties dispute whether Robles drafted a memorandum reflecting the substance of this meeting beforehand or whether he merely memorialized the meeting thereafter. (UF, 8, 9.) Scott received the email memo from Robles on July 16, 2003. (UF, 11; Best Decl., Exh. H.) The email was also copied to Mr. Kennedy and Megan Best – a Move Director of Human Resources who was later promoted to Vice President of Human Resources. Two weeks later, Scott filed a Charge of Discrimination with the EEOC. (Id.)

When Move learned about the EEOC charge, Best spoke with Robles about his inappropriate remarks. (UF, 84; Best Decl. ¶ 14.) Best also sent Robles an email memorializing their discussion. (Best Decl. ¶ 14, Exh. J.) Best states that the email memo became part of Mr. Robles' permanent record, but Plaintiff disputes that Move took any formal action. (Id.) Move also transferred Robles to another unit to minimize or eliminate his interactions with Scott. (UF, 82.) After this transfer, Robles "did not engage in any further conduct towards Scott that Scott believed was harassing or offensive." (UF, 85.)

On February 1, 2007, over three years after Scott filed his charge of discrimination with the EEOC, Robles was laid off from his job at Move, along with several other Technical Project Managers. (UF, 96.) While Move was preparing for this case in early 2007, moreover, it discovered that Scott's employment application contained certain falsehoods, including a prior jail stint that was not previously disclosed. Move put Scott on paid administrative leave to investigate the discrepancies. Scott has not been back to Move since, and has filed a second charge with the EEOC, alleging retaliation. (Scott Decl., ¶ 14.) Scott argues that he was put on administrative leave because he refused to accept a $25,000 settlement from Move. Id.

III. DISCUSSION

A. Legal Standards

1. Summary Judgment

Rule 56(c) requires summary judgment for the moving party when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Tarin v. County of Los Angeles, 123 F.3d 1259, 1263 (9th Cir. 1997).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. Celotex Corp v. Catrett, 477 U.S. 317, 323-24 (1986). That burden may be met by "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case." Id. at 325. Once the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify specific facts that show a genuine issue for trial. Id. at 323-34; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1968). "A scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact." Addisu v. Fred Meyer, 198 F.3d 1130, 1134 (9th Cir. 2000).

Only genuine disputes – where the evidence is such that a reasonable jury could return a verdict for the nonmoving party – over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Anderson, 477 U.S. at 248; see also Aprin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 919 (9th Cir. 2001) (the nonmoving party must present specific evidence from which a reasonable jury could return a verdict in its favor).

2. Employment Discrimination Under Title VII

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or

national origin." 42 U.S.C. § 2000e-2(a)(1); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63 (1986). Racial harassment claims under Title VII are reviewed under the same standard as those based on sexual harassment. Faragher, 524 U.S. at 786-87 n.1 (1998); AMTRAK v. Morgan, 536 U.S. 101, 116 (2002). When evaluating a claim of racial harassment based on a hostile work environment, the Court "must determine two things: whether the plaintiff has established that she or he was subjected to a hostile work environment, and whether the employer is liable for the harassment that caused the environment." Little v. Windermere Relocation, Inc., 301 F.3d 958, 966 (9th Cir. 2001).

B. Whether Plaintiff Was Subjected A Hostile Work Environment

To support a racial harassment claim based on a "hostile work environment" theory, a plaintiff must prove that "(1) [he] was subjected to verbal or physical conduct of a [racial] nature, (2) this conduct was unwelcome, and (3) this conduct was sufficiently severe or pervasive to alter the conditions of . . . employment and create an abusive working environment." Id.; Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995).

1. Whether Plaintiff Was Subjected To Verbal Conduct of A Racial Nature

The parties do not dispute that Scott was subjected to racial remarks by Robles. They merely disagree on the seriousness, prevalence and effect of those remarks.

2. Whether The Offensive Speech Was "Unwelcome"

As the Supreme Court noted, "the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact." Meritor, 477 U.S. at 68. The Court went on to add, however, that "[t]he correct inquiry is whether respondent by her conduct indicated that the alleged [harassment was] unwelcome." Id. (emphasis added). Although Scott testified in this case that he was offended by Robles' comments, (Scott Depo. 284:21-2.), the Court finds his conduct more telling.

First, Scott never complained to anyone at Move about Robles' remarks. In fact, he signed "verifications in 2002 and 2003 representing that he 'had no reasonable basis to suspect that the Company or any employee had engaged in conduct in violation of the Code of Conduct, including harassment.'" (UF 76; Levin Decl., Exhs. C-F.) Second, while Scott disputes the extent of their camaraderie, he admits taking walks with Robles and otherwise fraternizing with him. Third, their email exchanges, including Scott's "joke" referring to women as "hoes," also suggest that Robles' remarks were not as unwelcome as Scott alleges. See Meritor, 477 U.S. at 69 ("[I]t does not follow that a complainant's [ ] provocative speech [ ] is irrelevant as a matter of law in determining whether he or she found particular [conduct] unwelcome. To the contrary, such evidence is obviously relevant.").[4]

On the other hand, the Court has found but one occasion where Scott appears to mind Robles' remarks. When Robles greeted Scott in the presence of others with "Hey, what's going on, my nigga?," Scott (later) reacted by saying "If he says something like that again . . .," without finishing his sentence. (UF, 54.) Even this remark, however, is qualified by Scott's conduct. While Scott disputes that Mattern did not immediately react because she thought Scott and Robles were friends, he does not dispute that when Mattern asked him if she should go "talk to somebody about that," he replied "No, not right now." (Id.) In short, Scott's conduct (throughout the record) compels the conclusion that he did not consider Robles' remarks unwelcome.

3. Whether the Speech Was Sufficiently Severe and Pervasive

Move also argues that the use of various permutations of the "N" word "a few times over a two-and-one-half year period certainly does not meet the standard for [ ] conduct so 'severe' or 'pervasive' that it alters the conditions of employment." (Mot. at 3.) However, while it is true that Scott merely remembers a few specific instances on which the offensive word was used, he did add that Robles "used it often." (Scott Depo. 317: 1.) In fact, Robles himself admits that he

[4] The Court also notes that Scott admitted he pretended to like Robles. (Scott Depo. 359:18-19.) While this admission does not necessarily mean that Scott accepted Robles' remarks, it certainly does not advance his cause.

used that sort of language "from 2001 until approximately July 2003," claiming, albeit, that his use of the language was fraternal in nature. (Robles Decl., ¶ 5.)

As the Ninth Circuit observed, moreover, "the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct." Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991). Thus, the more severe the conduct the less pervasive it need be. To this end, the Ninth Circuit has noted that "the word 'nigger', [is] 'perhaps the most offensive and inflammatory racial slur in English, . . . a word expressive of racial hatred and bigotry." Swinton v. Potomac Corp., 270 F.3d 794, 817 (9th Cir. 2001) (citation omitted).

It would seem, in light of the foregoing, that the seriousness of the language and its pervasive use warrant a finding that the alleged harassment altered the conditions of Scott's employment. However, not only must the defendant's allegedly harassing conduct be (objectively) hostile or abusive, but the plaintiff must subjectively perceive the environment as abusive. Harris v. Forklift Sys., Inc., 510 U.S. 17, 17 (1993). As discussed above, Scott did not treat Robles' remarks as unwelcome, inviting the conclusion that the conduct did not alter the conditions of employment. See Id. ("[I]f the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.").[5]

Accordingly, because the Court finds that the conduct was not unwelcome, it is inclined to find that the conduct was not sufficiently severe and pervasive as to alter the conditions of employment and that, therefore, Plaintiff has failed to establish a hostile work environment.

Assuming *arguendo* that Robles' conduct did in fact create a hostile work environment, the Court next considers whether Move should be held liable.

[5] The Court notes that Plaintiff also failed to produce any evidence demonstrating that Robles' remarks created a hostile or abusive work environment.

C. Whether the Defendant Employer Is Liable

To hold the employer liable when coworkers are responsible for creating a hostile work environment, a plaintiff must show that his employer has "been negligent either in discovering or remedying the harassment." Williams v. Waste Mgmt. of Ill., Inc., 361 F.3d 1021, 1029 (7th Cir. 2004). When, on the other hand, the offending employee is a supervisor, an employer is vicariously liable for the hostile environment created by that supervisor. Faragher, 524 U.S. at 780. However, when no "tangible employment action" has been taken, an employer may raise "an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

1. Whether Robles Is A Supervisor

The parties disagree on whether Robles is a "supervisor" for purposes of Title VII. Plaintiff argues he is a supervisor while Defendant contends he is not. If Robles is a supervisor, then Move is vicariously liable without any further showing, unless there was no tangible employment action, thus entitling it to the Faragher/Ellerth affirmative defense. If Robles is not a supervisor, then Plaintiff must show that Move knew, or should have known, of the harassment and negligently failed to remedy it.[6]

The Ninth Circuit has held that "[i]f [a person] engaged in supervision of or had authority over [another], he would qualify as [the latter's] supervisor even if the company did not define his role this way." McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1119 (9th Cir. 2004). Other Circuits have held that vicarious liability under Title VII requires that "the alleged harasser must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties."

[6] Plaintiff apparently realizes that it cannot hold Move liable for the alleged harassment if Robles is only a coworker, insisting instead that he is a supervisor. Plaintiff offers but one instance even remotely suggesting that Move knew, or should have known, about the harassment – the incident before Ms. Mattern. In the Court's opinion, this incident alone is insufficient to show that Move was negligent in discovering or remedying the alleged harassment, especially since Scott specifically told Mattern not to report the incident. Moreover, as described in further detail below, the measures Move had in place to prevent, discover and remedy harassment preclude a finding of negligence for purposes of liability.

Cheshewalla v. Rand & Son Constr. Co., 415 F.3d 847, 850-851 (8th Cir. 2005). Seizing on the Eighth Circuit's language, Defendant argues that Robles did not have the authority to hire, fire, promote or reassign Scott to significantly different duties. The Court does not find that the Ninth Circuit has adopted this test for determining who is a "supervisor" for purposes of Title VII. Accordingly, this Court follows McGinist's formulation.

Initially, it seems that as a project manager, Robles had at least some supervisory role over Scott (and others).[7] Robles admitted in a signed EEOC affidavit, for example, that he was "assigned people to supervise while working on projects" and that he "wrote two performance evaluations." (Robles Decl., Exh. B.) These admissions by Robles arguably bring him within the ambit of the Ninth Circuit's language, which characterizes a supervisor as one who is "engaged in supervision of or ha[s] authority over" another. McGinest, 360 F.3d at 1119 (emphasis added).

Moreover, while Plaintiff insists that Robles is a supervisor for purposes of Title VII, Move is willing to so concede for purposes of this motion. Move argues, however, that its motion for summary judgment should still be granted because it is entitled to the Faragher/Ellerth affirmative defense.

2. Defendant Is Entitled to the Faragher/Ellerth Affirmative Defense

When no "tangible employment action" has been taken, an employer may raise "an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998). The Faragher/Ellerth affirmative defense requires: (1) "that the employer exercised reasonable care to prevent and correct promptly any [racially] harassing behavior"; and (2) "that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Nichols v. Azteca Rest. Enters., 256 F.3d 864, 877 (9th Cir. 2001) (quoting Ellerth, 524 U.S. at 765). Whether the employer has a stated anti-harassment policy is relevant to the first element of the defense. Id. And, an employee's unreasonable failure to use a complaint procedure

[7] It is not clear from the record before the Court how frequently, or for how long, Robles supervised others in his role as a Technical Project Manager.

provided by the employer will normally satisfy the employer's burden under the second element of the defense. Id.

i. Scott Did Not Suffer a Tangible Employment Action

As articulated by the Supreme Court, a tangible employment action is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Ellerth, 524 U.S. at 761. Plaintiff argues that Scott suffered tangible employment action when he was put on paid administrative leave "due to his participation in this lawsuit." (Opp'n at 12, fn 4.) The Court disagrees; putting Scott on paid administrative leave in early 2007 does not constitute a tangible employment action in this case.

First, those courts addressing the issue have found that placing an employee on paid leave does not constitute an adverse employment action. See Sharp v. AT&T, 2000 U.S. Dist. LEXIS 9708 (N.D. Cal. 2000) ("[R]equiring an employee to take a paid leave does not constitute adverse action."); Creggett v. Tosco Ref. Co., 2001 U.S. Dist. LEXIS 20765 (N.D. Cal. 2001) ("Plaintiff cites no authority indicating that, under California law, placing an employee on paid leave constitutes an adverse employment action.").

Second, Move argues that, while it place Scott on paid leave, it did so to investigate false information it discovered in Scott's employment application while preparing for this lawsuit. (UF, 91.) The Ninth Circuit has held that "even if a tangible employment action occurred, an employer may still assert the affirmative defense if the tangible employment action 'was unrelated to any harassment or complaint thereof.'" Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 959 (9th Cir. 2004) (quoting Nichols, 256 F.3d at 877.).[8] Plaintiff does not dispute that Scott's application contained false information, but claims that Move put him on paid leave because he refused "Move's $25,000 to settle." (UF, 91, 93.) Thus, Plaintiff argues that Move's proffered

[8] The Court notes that although the information prompting Move's decision to place Scott on paid leave was discovered during preparations to defend the complaint, the employment action "was unrelated to any harassment or complaint thereof."

reason for placing Scott on paid leave (to investigate the falsity of Scott's employment application) is a mere pretext.

To this end, the Ninth Circuit has noted that when a defendant offers a legitimate, non-discriminatory reason for an adverse employment action, the burden shifts to the plaintiff to show that the employer's proffered reason was a pretext. Tarin v. County of Los Angeles, 123 F.3d 1259, 1264 (9th Cir. 1997). However, while Plaintiff's "burden at the summary judgment stage is not great," he cannot simply rely on generalized allegations. Warren v. City of Carlsbad, 58 F.3d 439, 443 (9th Cir. 1995). "He must produce evidence of facts that either directly show a discriminatory motive or show that the [defendant's explanation] is not credible." Id. Plaintiff fails on both counts.

Other than Scott's unsupported belief that Move put him on paid leave because he refused the alleged settlement offer, Plaintiff presents no facts to show that Move's proffered reason was a pretext. As the Ninth Circuit noted, "conclusory allegations unsupported by factual data will not create a triable issue of fact." Marks v. United States, 578 F.2d 261, 263 (9th Cir. 1978) (citation omitted); see also 10B Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2738 ("ultimate or conclusory facts and conclusions of law, as well as statements made on belief or 'on information and belief,' cannot be utilized on a summary-judgment motion. Similarly, the mere re-argument of a party's case or the denial of an opponent's allegations will be disregarded."). As discussed above, Plaintiff admits that Scott's employment application contained false information, satisfying the credibility prong.

Accordingly, the Court finds that Scott was not subjected to any tangible employment action and turns to the merits of Move's affirmative defense.[9]

[9] The Court notes that since filing his Charge of Discrimination with the EEOC in 2003, Scott has received three pay-raises, increasing his salary from $74,000 to $84,000. Scott also acknowledges that his benefits were not reduced when he was placed on paid administrative leave. (UF, 87, 95.)

ii. Defendant Exercised Reasonable Care To Prevent and Correct The Allegedly Harassing Behavior

Plaintiff argues that Defendant cannot invoke the affirmative defense set forth in Faragher and Ellerth because Defendant failed to set "institutional standards until approximately 2003 when it issued a written policy as a Code of Conduct – a code of conduct that is to the presence [sic] wholly inadequate under *Faragher's* standard." (Opp'n at 13.) This contention stands in stark contrast to Plaintiff's admission that "[t]hroughout Scott's employment at Move [since 2001], there [had] been at all times in effect a policy prohibiting discrimination, harassment, and retaliation, including a comprehensive procedure for investigating complaints . . . ." (UF, 61.)[10] Plaintiff also argues that "Move's one-line [anti-harassment] policy" does not meet the requirements enumerated by the Ninth Circuit in Nichols; namely, that the policy should "(1) define [racial] harassment; (2) set forth a reporting procedure; (3) state[ ] that employees who violate the policy will be disciplined; and (4) assure[ ] employees that no reprisals would be made against them solely for making a complaint of [racial] harassment." 256 F.3d at 877. Plaintiff's contentions are baseless.

First, as the Supreme Court pointed out in Faragher, "proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, [but it] . . . may appropriately be addressed in any case when litigating the first element of the defense." 524 U.S. at 807. In this regard, the Supreme Court noted that, unlike "the employer of a small workforce who might expect that sufficient care to prevent tortious behavior could be exercised informally," "those responsible for city operations" should have anti-harassment policies. Id. at 808-09 (emphasis added). Thus, it is not necessarily a foregone conclusion that Move must have had a sophisticated anti-harassment policy in place to avoid liability in this case.[11]

[10] Plaintiff merely contends that the policy was not comprehensive and that Move did not properly enforce it. (Id.) Beside these conclusory allegations, however, Plaintiff offers no evidence to prove its contention.

[11] Neither side offered any evidence as to the size and structure of Move.

Move implemented numerous (formal and informal) measures to prevent, discover and correct harassing behavior. For example, Plaintiff does not deny that a "policy prohibiting discrimination, harassment and retaliation initially was published in the Employee Handbook, but was later published as part of the Code of Conduct."[12] (UF, 64.) Nor does Plaintiff dispute that "[s]ince at least 2001, Move has provided the Employee Handbook and Code of Conduct to newly hired employees and collect[ed] acknowledgments that employees have read both documents." (UF, 67.) In fact, Move provided these materials to employees, including Scott, on an annual basis. (UF, 71.) Move also "posted at various locations in the workplace posters explaining the laws prohibiting discrimination...." (UF, 72.) Move even collected signed verifications from Scott in 2002 and 2003 representing that "he had no reasonable basis to suspect that the Company or any employee had engaged in conduct in violation of the Code of Conduct, including harassment." (UF, 76.)

In addition to setting up these measures to discover and prevent harassment, Move also tried to correct the alleged harassment in this case. While Plaintiff disputes that Ms. Mattern did not react when Robles greeted Scott with "Hey, what's going on, my nigga?" because she thought they were friends, it admits that she asked Scott "if he want[ed] her 'to go talk to somebody about that.'" (UF, 54.) Scott, however, replied "No, not right now." (Id.) Moreover, shortly after Move learned of Scott's Charge of Discrimination with the EEOC, it investigated the allegations and Ms. Best met with Robles to discuss his inappropriate remarks. (UF, 82, 84.) Ms. Best also sent Robles an email memorializing their talk, which she claims was placed in Robles' permanent file. (Best Decl. ¶ 14, Exh. J.) Plaintiff denies that Move took any formal action against Robles, but acknowledges that Ms. Best spoke with him regarding his remarks. (UF, 82, 84.) Finally, Move transferred Robles to another unit "to minimize or eliminate his work interaction with Scott."

[12] Plaintiff also concedes that the "2000 - 2001 [Handbook] does contain an adequate policy," but that the 2002 - 2003 Code of Conduct "is wholly inadequate under *Faragher*'s standards." (Sec. Amend. P & A at 13.)

(UF, 82.) Move's actions succeeded in protecting Scott from Robles' allegedly harassing conduct. (UF, 85.)[13]

Second, even if Move must have had a formal anti-harassment policy to avoid liability under Faragher, the Court strongly disagrees with Plaintiff's characterization of Defendant's "one-line policy."[14] (Sec. Amend. P & A at 13.) Move had a comprehensive policy in place, which included the elements enumerated in Nichols. Plaintiff admitted that much with regard to the 2001 policy. (Sec. Amend. P & A at 13.) Moreover, in her declaration, Megan Best states that during her employment with Move, from 1999 until 2004, "there was at all times a policy prohibiting discrimination, harassment, and retaliation, including a comprehensive procedure for investigating complaints." (Best Decl., ¶ 2.)[15] Ms. Best explains that the policy was initially "published in the Employee Handbook, but was later published as part of the Code of Conduct." Ms. Best attached properly authenticated copies of the Employee Handbook and the Code of Conduct to her declaration.[16]

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[13] These measures, needless to say, clearly satisfy the Ninth Circuit's language (in the context of harassment by other employees) that the "employer's corrective measures must be reasonably calculated to end the harassment." Freitag v. Ayers, 468 F.3d 528, 539-40 (9th Cir. 2006) (internal quotations and citation omitted); c.f. Fuller v. City of Oakland, 47 F.3d 1522, 1528 (9th Cir. 1995) ("The fact that harassment stops is only a test for measuring the efficacy of a remedy, not a way of excusing the obligation to remedy.").

[14] Defendant argues that Plaintiff's mischaracterization of Move's "one-line policy" (among other things) warrants sanctions. Although the Court is perplexed by Plaintiff's mischaracterization of the evidence, it will not impose sanctions in this case. While under the former version of Rule 11 sanctions were mandatory if a violation was found, see, e.g. Golden Eagle Distributing Corp. v. Burroughs Corp. (9th Cir. 1986), the Court may now refrain from imposing sanctions even if a violation has clearly occurred. Committee Notes on Amendments to Federal Rules of Civil Procedure, 146 FRD 401, 587 (1993).

[15] As discussed above, Plaintiff admits that "[t]hroughout Scott's employment at Move, there [had] been at all times in effect a policy prohibiting discrimination, harassment, and retaliation, including a comprehensive procedure for investigating complaints ..." (UF, 61.) Plaintiff contends without any support, however, that the policy was not comprehensive and that Move did not properly enforce it. (Id.)

[16] Plaintiff contends that the exhibits are not properly authenticated and that they are inadmissible hearsay. The Court disagrees. As to hearsay, the Court notes that the exhibits are not introduced to prove the truth of the matter asserted, but to demonstrate the existence of the policy, and its contents. Additionally, as further discussed below, the exhibits were properly authenticated.

After reviewing some of the relevant exhibits, the Court is satisfied that the policy does in fact (1) define harassment; (2) set forth a reporting procedure; (3) state that employees who violate the policy will be disciplined; and (4) assure employees that "[n]o adverse employment action will be taken against any employee making a good faith report of alleged harassment." (Best Decl., Exs. A-G.)[17]

Thus, the Court finds that Move exercised reasonable care to prevent and promptly correct any racially harassing behavior.

iii. Scott Unreasonably Failed To Take Advantage Of Move's Measures

Plaintiff does not seriously dispute that Scott failed to complain to anyone at Move about Robles' remarks. (UF, 77.) In an effort to impute liability to Move, however, Plaintiff asserts that Mattern "was present on at least one occasion when Robles referred to Scott as a . . . 'nigga.'" (Id.) As discussed above, Scott's interaction with Mattern does not help Plaintiff. If anything, the incident further illustrates Scott's failure to take advantage of Move's formal and informal measures. After all, when Mattern asked Scott if he would like her to report the incident, he said "No." (Scott Depo. 325:19-22.)[18]

Accordingly, the Court finds that Scott unreasonably failed to take advantage of Defendant's preventative and corrective measures. See Ellerth, 524 U.S. at 765 ("[E]mployee's failure to use a complaint procedure provided by the employer will normally satisfy the employer's burden under the second element of the [affirmative] defense.").

[17] Referring to a cautionary clause in Move's policy, Plaintiff argues that Move disavowed itself of responsibility for its employees' harassment in the work place, rendering its anti-harassment policy ineffective. The Court does not perceive how a provision warning employees that they may be held personally responsible for harassment undermines the anti-harassment policy. To the contrary, such a provision appears to command the attention of employees wishing to avoid personal liability.

[18] Moreover, Scott "signed verifications in 2002 and 2003 representing that he "had no reasonable basis to suspect that the Company or any employee had engaged in conduct in violation of the Code of Conduct, including harassment." (UF 76.) While the Court does not take these signed and undisputed verifications to mean that Scott was in fact not harassed (or even that he admits not being harassed), they do, however, exemplify Scott's absolute failure to take advantage of Move's measures.

SCANNED

IV. MOVE'S MOTION TO STRIKE CHANGES TO SCOTT'S TESTIMONY

Move seeks to strike Plaintiff's purported "corrections" to Scott's deposition testimony. Plaintiff first points out that neither Scott nor Plaintiff's counsel reserved the right to correct the record during the deposition, as required by Rule 30.[19] Defendant also argues that the corrections are a sham designed to stave off summary judgment.[20] Plaintiff rejoins that the corrections are proper because Scott sought to correct his testimony during the deposition, but Defendant's counsel told him that he could do so later. (Object. at 2-3; Scott Depo., 9:21-22, 402: 16-18.) Plaintiff also argues that although Scott made more revisions "than most witnesses," they were all proper, even the "substantive" changes. (Id. at 5-6.) The court finds that some of Plaintiff's changes fall well outside the scope of Rule 30's contemplation, and that the rest are unnecessary.

Some of Scott's changes are more accurately characterized as contradictions than corrections. For example, Scott consistently changes his answers from "I don't recall" to "No." (Scott Depo., 181:13-23; 189:11-25.) As the Ninth Circuit noted, "Rule 30(e) is to be used for corrective, and not contradictory, changes." Hambleton Bros. Lumber Co. v. Balkin Enters., 397 F.3d 1217, 1224-1226 (9th Cir. 2005). Accordingly, these changes are stricken. Scott also attempts to add substantive information to his testimony. See, e.g., (Scott Depo. 287:7-15.) Such changes are also impermissible. Id. at 1225-26 (Deposition answers are not a "take home exam."); Teleshuttle Technologies, LLC v. Microsoft Corp., 2005 U.S. Dist. LEXIS 34284 (N.D. Cal 2005) ("[C]hanges are improper because they attempt to add substantive information."). Finally, Plaintiff admits that most changes "are relatively minor revisions that restate [Scott's] previous answer[s]." (Opp'n at 7.) The Court finds these corrections

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[19] The deposition officer's certificate, as prescribed by Rule 30(e) and subdivision (f)(1), expressly states that "a request has not been made by, or on behalf of, the witness to review, correct and sign the transcript of these proceedings." (Wasserman Decl., Exh. D.) While the Court finds the officer's certification that Scott did not reserve the right to review the transcript damning, it does not strike the changes because of his counsel's failure to properly assert his right. They are stricken on other grounds.

[20] The Court does not rely on the disputed corrections (or most of the underlying testimony) in granting Defendant's motion for summary judgment.

unnecessary and orders them stricken, along with the impermissible changes, to avoid any confusion.

Thus, Defendant's motion to strike the changes to Scott's deposition testimony is GRANTED.[21]

V. PLAINTIFF'S EVIDENTIARY OBJECTIONS[22]

1. Authentication Of The Employee Handbook And Code of Conduct/Hearsay

Plaintiff argues that the Employee Handbook and the Code of Conduct should not be considered by the Court on summary judgment because they constitute hearsay evidence, and because Ms. Best failed to properly authenticate them. The Court disagrees. For documents to be considered on summary judgment, they "must be authenticated by and attached to an affidavit that meets the requirements of 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence." Canada v. Blain's Helicopters, Inc., 831 F.2d 920, 925 (9th Cir. 1987); see also Orr v. Bank of America, 285 F.3d 764, 773-74 (9th Cir. 2002) (explaining that authentication is a condition precedent to admissibility and that documents accompanying a summary judgment motion may be authenticated in any manner permitted by Federal Rule of Evidence 901(b) or 902); 10A Wright, Miller & Kane, Federal Practice and Procedure § 2722. Defendant presented the declaration of Megan Best, who was hired in 1999 as Move's Manager of Human Resources, and was later promoted to Vice President of Human Resources. (Best Decl., ¶ 1.)[23] Ms. Best stated that during her employment with Move, from 1999 until 2004, "there was at all times a policy prohibiting discrimination, harassment, and retaliation, including a comprehensive procedure for

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[21] The Court notes that these changes, sixty-seven (67) in all, were made after Defendant filed its motion for summary judgment. See Hambleton Bros., 397 F.3d at 1226, n. 6 (Court was "troubled" by the timing of the changes – after a motion for summary judgment was filed, and by their extensive nature.).

[22] Those objections not specifically discussed here were either directed at evidence unnecessary to the resolution of the present motion or are otherwise overruled.

[23] The Court notes that Ms. Best's declaration meets the requirements of Fed. R. Civ. P. 56(e).

investigating complaints." (Id., ¶ 2.) Ms. Best explained that the policy was initially "published in the Employee Handbook, but was later published as part of the Code of Conduct." (Id.) Ms Best also declared that "true and correct copies" of the Employee Handbook and the Code of Conduct are attached to her declaration. (Id., ¶ 4, Exhs. A-G.)

Ms. Best's declaration properly authenticated the documents. Authentication "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). By way of illustration only, Rule 901 states that the "[t]estimony of [a] witness with knowledge . . . that a matter is what it is claimed to be" is one way to authenticate a document. Fed. R. Evid. 901(b)(1). Not only does Ms. Best state, upon personal knowledge, that the matter is what it purports to be, but as a Manager of Human Resources (and later Vice President), Ms. Best is certainly a "witness with knowledge."

Accordingly, the Court properly considers the Employee Handbook and the Code of Conduct in this proceeding for summary judgment.

2. Plaintiff's Motion to Strike Defendant's Declarations

Plaintiff also seeks to strike the declarations attached to Defendant's motion for summary judgment. Specifically, Plaintiff seeks to strike the declarations of Robles, Carol Brummer, and Mark Thompson because they did not appear at their duly noticed depositions. Plaintiff's request is DENIED.

Rule 37(d) provides that "[i]f a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just," including striking the evidence.

First, Plaintiff forgets that Robles no longer works for Move. Accordingly, he cannot be compelled to appear for a deposition by notice alone. See Fed. R. Civ. P. 30 (A party can be deposed on notice, whereas the deposition of a non-party witness may have to be compelled by

subpoena.). See also 8A Wright, Miller & Marcus, Federal Practice & Procedure: Civil 2d § 2103, pp. 36-37 ("Except where the employee has been designated by the corporation under Rule 30(b)(6)," or is an officer, director, or managing agent, "an employee is treated in the same way as any other witness," and "his or her presence must be obtained by subpoena rather than notice."). Second, Robles is not a party for purposes of Rule 37(d), and his failure to appear cannot be imputed to Move. Thus, the court will not strike Robles' declaration.

Additionally, because the Court does not consider Brummer and Thompson's declarations, it need not address Plaintiff's request to strike them. It nonetheless bears noting, however, that Plaintiff does not allege that they are officers, directors, managing agents, or persons designated under Rule 30(b)(6) or 31(a) to testify on behalf of Move.

VI. CONCLUSION

For the reasons discussed above, the Court finds that there is no genuine issue as to any material fact and that Move is entitled to judgment as a matter of law. Accordingly, Move's Motion for Summary Judgment is GRANTED. Move's motion to strike the corrections to Scott's deposition transcripts is also GRANTED. Move's motion for sanctions is DENIED, however, and its motion for partial summary judgment is DENIED as moot.

IT IS SO ORDERED.

Dated: 5/30/'07

OTIS D. WRIGHT

HON. OTIS D. WRIGHT II
United States District Judge