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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

DARLENE DOTSON,)	1:09-CV-1325 AWI GSA
)	
Plaintiff,)	
)	ORDER ON DEFENDANTS’
v.)	MOTION FOR SUMMARY
)	JUDGMENT
COUNTY OF KERN, GREG GAUSE,)	
BILL DRAKOS, LISA GAVEN-CRUSE,)	
RICK ERICKSON, FELICIA SKAGGS,)	
and DOES 1 through 30,)	(Doc. No. 28)
)	
Defendants.)	

This is an employment discrimination case brought by Plaintiff Darlene Dotson (“Dotson”) against her employer Defendant Kern County (“the County”) and fellow County employees Bill Drakos (“Drakos”) and Felicia Skaggs (“Skaggs”).¹ Dotson alleges causes of action under 42 U.S.C. § 2000e *et seq.* (“Title VII”) and California Government Code § 1200 *et seq.* (the California Fair Employment and Housing Act – “FEHA”). Defendants now move for summary judgment on all remaining claims in this case.² For the reasons that follow, the Court will grant Defendants’ motion and close this case

¹On October 27, 2009, the Court dismissed all claims against County employees Greg Gause, Rick Erickson, and Lisa Gavin-Cruse. See Court’s Docket Doc. No. 15.

²On November 17, 2010, the Court granted summary judgment in favor of the County on the second (racial discrimination under Title VII), third (racial discrimination under FEHA), sixth (gender discrimination under Title VII), and seventh (gender discrimination under FEHA) causes of action. The basis for summary judgment on these claims was the failure to file a timely administrative complaint as required by Title VII and FEHA. See Court’s Docket Doc. No. 27 at 7:10-9:18.

1 **FACTUAL BACKGROUND**³

2 Dotson began her employment with the County in 1999 as a Substance Abuse Specialist 1
3 (“SAS 1”). In that capacity, Dotson counseled with drug-dependent adults. Dotson worked, and
4 continues to work, in the County’s Mental Health Department.

5 Dotson filed a charge with the EEOC on October 23, 2007. See DUMF 2. Under the
6 “Discrimination Based On” section of the October 2007 Charge, only the box for “retaliation” is
7 marked. See Defendants’ Ex. B. Under the “Particulars” section of the October 2007 Charge, it
8 reads: “(I) In or around August 2006, I filed an internal complaint alleging racial and sexual
9 harassment [against Greg Gause]. In or around June 2007, I received a less than favorable
10 performance evaluation. I have been an employee of the county since November 1999. (II) No
11 reason was given for the less than favorable performance evaluation. (III) I believe I have been
12 discriminated against in retaliation for having participated in a protected activity in violation of
13 Title VII” Id.

14 The offensive conduct of Greg Gause towards Dotson occurred between January 2006
15 and August 2006. DUMF 5. Gause was removed from the Mental Health Court team on August
16 30, 2006. Id. Lisa Gavin-Cruse (“Gavin-Cruse”), Dotson’s supervisor during the Gause
17 incident, declared that she believed that Dotson had done the right thing in complaining about
18 Gause. See Gavin-Cruse Dec. ¶ 5. After August 30, 2006, there were no further incidents of
19 sexual harassment, racial discrimination, or other inappropriate behavior between Gause and
20 Dotson. Id. Dotson did not file with the EEOC or DFEH a charge of discrimination or
21 harassment pertaining to comments made by Gause within one year of the alleged comments by
22 Gause. DUMF 6.⁴

23
24 ³DUMF refers to “Defendants’ Undisputed Material Fact.” Also, in opposing some of the DUMF’s, Dotson
25 cites portions of her complaint. However, in opposing summary judgment, reliance on the allegations of complaint is
26 insufficient. Estate of Tucker v. Interscope Records, 515 F.3d 1019, 1030 (9th Cir. 2008). Instead, actual evidence
27 must be submitted. Id. The mere citation to the complaint’s allegations creates no dispute. Id. Additionally, Dotson
has cited to page 48 of her deposition and to the declaration of Jessica Chavaria. However, as Defendants rightly
point out, see Court’s Docket Doc. No. 32 at 5:1 & n.1, 7:16-20, Dotson did not file or otherwise provide these
pieces of evidence. As such, Chavaria’s declaration and page 48 of Dotson’s deposition are not part of this motion.

28 ⁴Dotson disputes this claim by stating that she complained to Kern County employees. DUMF 6 is clearly
and expressly limited to the EEOC and DFEH. DUMF 6 is not disputed.

1 On April 7, 2008, Dotson filed a second charge with the EEOC. See DUMF 3. Under
2 the “Particulars” section of the April 2008 Charge, it reads: “(I) On October 23, 2007, I filed a
3 charge of discrimination with the EEOC . . . wherein I alleged differential treatment in retaliation
4 for have [sic] participated in a protected activity. From on or about November 9, 2007, and
5 continuing until the present, I have been harassed, transferred, repeatedly questioned about my
6 certification, denied accommodation for my disabilities, denied Continuing Education Units, and
7 denied a promotion to SAS II. (II) No reason has been given for this treatment. (III) I believe I
8 have been discriminated against in retaliation for having participated in a protected activity and
9 my disabilities in violation of Title VII . . . and Title I of the Americans with Disabilities Act.”

10 See Defendant’s Ex. C.

11 In 2007, the Mental Health Court team was required to move its physical location to a
12 facility known as Westwind due to the need to consolidate services as a result of budget cuts.
13 DUMF 15. In late September/early October 2007, Dotson told her supervisors that she did not
14 want to transfer to Westwind due to the presence there of individuals with whom she had
15 experienced conflicts earlier in her career. See DUMF 16; Defendants Ex. J. Dotson was told by
16 her superiors that if she did not want to transfer with her team to Westwind, she would need to
17 transfer to another team. DUMF 17. Dotson told her superiors that she did not want to transfer
18 to the ACT team due to travel and work hour requirements for the job. DUMF 18. To honor her
19 request to not be assigned to Westwind or the ACT team, Dotson was transferred to the Green
20 Gardens facility after her previous team transferred to Westwind. See DUMF 19. Dotson’s
21 supervisors at Green Gardens, Drakos, Skaggs, and Terry Parks (“Parks”), did not know that
22 when Dotson came to work at Green Gardens that she had made previous complaints about
23 Gause. See DUMF 24; Drakos Dec. ¶¶ 2-3 ; Parks Dec. ¶ 2; Skaggs Dec. ¶ 2.⁵

24
25 ⁵Dotson argues that, given the information in her personnel file and the common way in which information
26 is spread, it is inconceivable that Drakos, Parks, and Skaggs did not know about her complaints against Gause. See
27 Court Docket Doc. No. 30-1 at 6:25-7:8. This response creates no genuine dispute. First, there is no evidence
28 whatsoever regarding Dotson’s personnel file, including what is in it, or when or even if Drakos, Parks, and Skaggs
reviewed the file. Second, Dotson cites to her Exhibits D and E, which are the August 28, 2006, and September 1,
2006, internal grievances related to Gause’s conduct. The mere existence of these grievances does not show
knowledge by Drakos, Parks, and Skaggs, especially since they were not the supervisors when the grievances were
filed. Finally, Dotson relies on the declaration of her attorney in which he summarizes statements made by a Kern
County attorney about Dotson. See Kodam Dec. ¶ 3. The statements were made during a mandatory worker’s

1 In November 2007, an issue arose regarding Dotson's work schedule at Green Gardens.
2 See Plaintiff's Ex. F. Drakos initially refused Dotson's request to work a 9/80 schedule. See
3 DUMF's 23; Plaintiff's Ex. F. Dotson was not allowed to work a 9/80 schedule for
4 approximately one to two pay periods, that is two to four weeks, while her supervisors verified
5 the medical need for a 9/80 schedule. DUMF 23.⁶ The decision to initially disallow the 9/80
6 schedule was made by Drakos. Id. On November 29, 2007, Dotson wrote a letter to Dr. Terleski
7 (a deputy director of the Mental Health Department) about not being allowed to work under the
8 9/80 schedule. See Plaintiff's Ex. F. Dotson also submitted a letter from Dr. Cousin dated
9 November 29, 2007, which stated that Dotson was to work a 9/80 schedule. See Defendants' Ex.
10 F. Skaggs eventually authorized the 9/80 work schedule. DUMF 23. Drakos's initial refusal to
11 allow Dotson to work a 9/80 schedule had nothing to do with any complaints she had made
12 against anyone and was not retaliatory. DUMF 25.⁷ Although Drakos from time to time would
13 approve temporary alternative work schedules, he did not approve of 9/80 work schedules
14 because, in his experience, individuals under the 9/80 schedule were not as productive. See
15 Drakos Dec. ¶ 2. At the time Dotson requested to work under the 9/80 schedule, Skaggs was

16
17 compensation settlement conference. Id. The declaration indicates that the Kern County attorney said that Dotson
18 was a troublemaker, files multiple complaints, and makes things up in her head. Id. Dotson's counsel states that it
19 seemed to him that the Kern County attorney had knowledge beyond the worker's compensation claim. See id. This
20 evidence is not helpful. The statements were in an unrelated matter and in an adversarial context. Further, the
21 statements say nothing about gender, race, or disability complaints, and they in no way indicate that Drakos, Skaggs,
22 or Parks had knowledge of Dotson's complaints. There is no connection between the attorney's statements and this
23 case or the knowledge of Drakos, Skaggs, and Parks. Since Dotson has failed to submit any evidence that indicates
24 that Drakos, Skaggs, and Parks knew of Dotson's complaints, DUMF 24 is undisputed.

25 ⁶Plaintiff disputes this DUMF by arguing that, since a note had previously been provided, Drakos's actions
26 can only be explained by a need to retaliate. This does not dispute the substance of DUMF 23.

27 ⁷Plaintiff disputes this DUMF by arguing that Defendants' position ignores the prior documentation and
28 notes about her restrictions. Plaintiff cites three pieces of evidence in support of this argument. Plaintiff cites a
portion of her deposition in which she testifies about diabetes related restrictions in 2005, see Dotson Depo. 105:10-
22, an October 13, 2005, letter from Dr. Cousins that lists Dotson's restrictions, see Plaintiff's Ex. C, and the
November 29, 2007, letter from Dotson to Dr. Terleski. See Plaintiff's Ex. F. This evidence does not create a
genuine dispute. The deposition testimony and the October 2005 letter merely establish the existence of the
restrictions, they do not show Drakos's knowledge (especially since Drakos was not Dotson's supervisor until 2007).
The November 29, 2007, letter was created after Drakos refused to approve the 9/80 schedule. See Plaintiff's Ex. F
(in part describing Drakos's refusal to approve the 9/80 schedule); Drakos Dec. ¶ 3. As discussed above, there is no
evidence that Drakos reviewed Dotson's personnel file, nor is there evidence of the contents of Dotson's personnel
file. Drakos's uncontradicted declaration states he was not aware that Dotson was working a 9/80 schedule. See id.
Dotson has failed to submit facts that actually dispute this DUMF.

1 unaware of anyone working a 9/80 schedule who was under Drakos's supervision. See Skaggs
2 Dec. ¶ 3. From October 2005, Dotson had worked under a restricted schedule pursuant to an
3 October 14, 2005 doctor's note. See Dotson Depo. 105:10-22; Plaintiff's Ex. C.

4 Sometime in 2007, the County began implementing a computer record and data system
5 called Anasazi. See Gutierrez Dec. ¶ 5; Defendants' Ex. H. Because the Anasazi system was to
6 become the exclusive means of documenting services provided, employees needed to become
7 competent in using Anasazi. See Gavin-Cruse Dec. ¶ 4. There were problems with the Anasazi
8 system, especially during the first year of implementation. See Dotson Depo. 56:16-25;
9 Gutierrez Dec. ¶ 6. Dotson experienced problems on a daily basis, including her computer
10 freezing and losing 20 to 30 minutes worth of data entry. See Dotson Depo. 56:16-25. Dotson
11 also experienced problems with entries being in a different server or under a different staff
12 member's name. See Skaggs Depo. 38:11-21. Other County employees experienced the loss of
13 notes and other work information on a regular basis due to the Anasazi system freezing.
14 See Gutierrez Dec. ¶ 6. One County employee opined that it was virtually impossible to meet the
15 75% productivity requirement because of the problems with the Anasazi system. See Gutierrez
16 Dec. ¶ 8. The County still experiences some problems with Anasazi. See Skaggs Depo. 38:24-
17 39:1. Dotson reported her problems with the Anasazi system to Skaggs, and reported the
18 problems daily to Drakos. See Dotson Depo. 56:16-25. Skaggs had Anasazi staff come and try
19 to work on Dotson's computer to fix some of the problems. See Skaggs Depo. 39:18-19. Dotson
20 received what she describes as "very little" training on the Anasazi system. See Dotson Depo.
21 156:6-8. Rick Erickson was at least partly responsible for training Dotson on the Anasazi
22 system, but he would not go to Dotson's desk even when Dotson had questions. See id. at
23 156:14-157:7. Dotson believed that she went to Skaggs's team without knowing about parts of
24 Anasazi because Erickson did not show her. See id.

25 Dotson was not eligible for promotion from SAS 1 to SAS 2 prior to 2008 because she
26 did not possess a CADAAC certification. DUMF 26.⁸ Defendants' contend that Dotson was not

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28 ⁸ Plaintiff disputes this DUMF by arguing that it was the County's practice to promote on merit and even a
prior supervisor had recommended Dotson for promotion in 2003. Plaintiff also states that others have advised her
that they were promoted without CADAAC certification. However, despite these arguments, there is not a genuine

1 reclassified or promoted from SAS 1 to SAS 2 at the time of her request in 2008 because her
2 productivity was significantly below the department standard of 75%. See DUMF 27. The
3 2007/2008 evaluation indicates that Dotson's productivity was 57.64% without factoring in the
4 first two months with the new Green Gardens team due to problems with the Anasazi system.
5 See Defendants' Ex. E. The evaluation states that, if the first two months were included,
6 productivity would have been 49.11%. See id. Defendants contend that the denial of a
7 promotion at that time had nothing to do with prior complaints that Dotson had made and was
8 not retaliatory. See DUMF 27. The Mental Health Department productivity standard is a vital
9 component in generating sufficient revenue to fund the direct client services provided by
10 employees of the Department to the community. DUMF 28.⁹ Dotson is aware of one employee,
11 Jessie Chavaria, who was promoted despite not meeting the 75% productivity rating. See Dotson
12 Depo. 63:24-64:6; 64:14-16.¹⁰ Skaggs did not have authority to promote Dotson, but
13 recommended Dotson for promotion in 2008. DUMF 29.

14 In May 2007, December 2007, June 2008, and July 2008, Dotson received memoranda
15 from the County regarding professional certification. See Defendants' Ex. O. Dotson
16 understood that she was required by state law to keep a current copy of her professional

17 _____
18 dispute. The four pieces of evidence cited by Dotson do not support her arguments: a page from her deposition that
19 was not provided to the Court, a portion of Skaggs' deposition that relates to her recommendation to promote in
20 2008, and two grievances that Dotson filed against Jim Waterman and Drakos in October 2008. This evidence has
21 nothing to do with pre-2008 promotion requirements or practices. As for the assertion that others have told Dotson
22 that they were promoted, there is no evidence presented in support of this hearsay statement, and counsel's bare
23 assertion is not evidence. Exeter Bancorporation, Inc. v. Kemper Secs. Group, Inc., 58 F.3d 1306, 1312 n.5 (8th Cir.
24 1995); Angel v. Seattle-First Nat'l Bank, 653 F.2d 1293, 1299 (9th Cir. 1982); British Airways Bd. v. Boeing Co.,
25 585 F.2d 946, 951-52 (9th Cir. 1978). Finally, even if a supervisor recommended Dotson for promotion in 2003, i.e.
26 three years prior to Dotson's complaints against Gause, that she was not promoted indicates that the CADAAC is a
27 genuine requirement. DUMF 26 is undisputed.

28 ⁹Plaintiff disputes this DUMF through arguments relating to the non-existence of uniform standards for
employees. However, such arguments do not address the substance of DUMF 28. Thus, DUMF 28 is undisputed.

¹⁰Dotson also testified that Brian Whitfield did not meet the 75% requirement, but that she did not know
what his percentage was. See Dotson Depo. 64:8-9. Defendants object to testimony regarding Whitfield based on a
lack of personal knowledge. Dotson does not respond to the objection. The Court will sustain the objection because
there is no description of how or why Dotson knows that Whitfield did not meet the 75% requirement, and
knowledge is not apparent from the limited deposition pages provided. In fact, Dotson states that she did not "know
exactly what his [Whitfield] was." Additionally, Defendants also object to portions of testimony about Chavaria
based on lack of personal knowledge. However, Dotson testified that she heard Chavaria read her productivity
number and Dotson read Chavaria's evaluation, which read "not met." This testimony shows knowledge by Dotson
that Chavaria did not meet the 75% requirement. The objection with respect to Chavaria is overruled.

1 certification on file with the County. DUMF 31. The memoranda sent to Dotson indicate that
2 she needed to submit a current certification to the Mental Health Department, and they were sent
3 to all licensed or certified employees employed by Mental Health because they were required by
4 department policy. DUMF 32. In 2007-2008, there were approximately 300 employees in the
5 Mental Health Department with professional licenses, certificates, or registrations. Id. In 2008-
6 2009, there were approximately 750 such employees. See id. Even though Dotson did not need
7 to be certified to work as an SAS 1, because she was certified and was providing drug counseling
8 services, the Mental Health Department needed proof that Dotson was still authorized by the
9 State to provide those services. DUMF 33. The memoranda sent to Dotson regarding her
10 certification were not the product of retaliation. DUMF 34. Skaggs did not question Dotson's
11 certification as a substance abuse counselor. DUMF 35.

12 Dotson has obtained all of her required Continuing Education Units each year she has
13 been employed with the County. DUMF 36. However, Dotson had to obtain some of the credits
14 on her own. See Dotson Depo. 70:6-10. On February 25, 2008, Drakos denied a request by
15 Dotson to attend a continuing education program. See Defendants Ex. M; see also Drakos Dec. ¶
16 7. Defendants contend that Drakos's refusal to approve Dotson's attendance at a continuing
17 education program was based on her lack of productivity and that the subject matter of the course
18 did not pertain to Dotson's clients. See DUMF 37;¹¹ Drakos Dec. ¶ 7. Defendants contend that it
19 had nothing to do with any complaints Dotson had made at a prior time and was not retaliatory.
20 Id. As it turned out, there was no urgency for plaintiff to attend the training. Id. Skaggs did not
21 withhold continuing education units from Dotson and did not restrict her opportunity to obtain
22 them. DUMF 38.

23 Dotson was off work beginning in October 2008 due to a knee injury which she sustained
24 at work and for which she desired surgery. DUMF 20. When Dotson returned from knee surgery
25 in 2009, she was transferred to a position in another division that was not as physically

26
27 ¹¹ Plaintiff disputes this DUMF in part by citing to the two grievances (one each) that she filed against
28 Drakos and Jim Waterman. However, the evidence submitted indicates that Drakos denied the continuing education
course in February 2008, but the two grievances were both filed in October 2008. See Defendants' Ex. M; Plaintiff's
Exs. H, I. Since the grievance had not yet been filed, the grievance could not have possibly influenced Drakos's
decision to deny approval of the course. Plaintiffs' Exhibits H and I do not dispute in any way DUMF 37.

1 demanding. DUMF 21. In Dotson’s new position, she is not required to meet a productivity
2 standard. DUMF 22. Dotson was promoted to SAS 2 in June 2010. DUMF 30.

3 Dotson received every increment raise to which she was entitled as an SAS 1 while
4 employed by the County. DUMF 7. Dotson has never been demoted or had her compensation
5 reduced while employed by the County. DUMF 8.¹² Dotson has never been suspended while
6 employed by the County. DUMF 9. As an SAS 1, Dotson has not received an evaluation with an
7 overall rating lower than “standard” while employed by the County. DUMF 10.¹³

8 Dotson first complained to a supervisor about Gause’s behavior about two months prior
9 to his removal from the Mental Health Court team on August 30, 2006. DUMF 11. Dotson was
10 rated overall as performing at a “standard” level both before she complained about Gause and
11 after she complained about Gause. DUMF 12.¹⁴ Defendants contend that Dotson’s 2006/2007
12 performance rating was based on her performance and was not retaliatory. See DUMF 13. The
13 2006/2007 performance rating was signed by Dotson’s then supervisors (Rick Erickson and Lisa
14 Gavin-Cruse) on May 10, 2007. See Defendants’ Ex. H. Dotson was rated as “standard” on 23
15 of 27 categories, rated “above standard” on 3 categories, and rated “improvement needed” on the
16 “promptness in completing work” category. See id. Dotson refused to sign the evaluation. See
17 id. Gavin-Cruse’s evaluation was based in part on concerns that Dotson was not documenting
18 her sessions in a timely manner and Dotson was continuing to have difficulty with the Anasazi
19 system. See Gavin-Cruse Dec. ¶ 3.

20 Defendants contend that Dotson’s 2007/2008 performance evaluation was based on her

21
22 ¹² Plaintiff disputes this DUMF by arguing that she was not promoted and has been “blackballed” to the
23 point that she has a bad reputation. See Court’s Docket Doc. No. 30-1 at 2:15-20. However, this argument does not
dispute the fact that she was not demoted and did not have her pay reduced. DUMF 8 is undisputed.

24 ¹³ Plaintiff disputes this DUMF by making arguments that do not address the actual substance of the DUMF.
25 Further, this DUMF is based on Plaintiff’s admission in response to a Rule 36 request for admission that she never
26 received an overall rating below “standard.” See Plaintiff’s Ex. A. Plaintiff’s admission conclusively establishes the
fact that she never received an overall rating lower than “standard” as an SAS 1. See Fed. R. Civ. Pro. 36(b); Hadley
v. United States, 45 F.3d 1345, 1348 (9th Cir. 1995); Plaintiff’s Ex. A. DUMF 10 is undisputed.

27 ¹⁴ Plaintiff disputes this DUMF by making the same arguments, and citing nearly the identical evidence, as
28 she did in connection with DUMF 10. Plaintiff again makes arguments that do not actually dispute that she was
rated overall as “standard” both before and after she complained about Gause. Further, Plaintiff has admitted
pursuant to Rule 36(b) that she never received an overall rating below “standard” as an SAS 1 (and she was
promoted to SAS 2 in 2010). See Plaintiff’s Ex. A; DUMF 30. Therefore, DUMF 12 is undisputed.

1 performance and was not retaliatory. See DUMF 14. The 2007/2008 performance rating was
2 signed by Drakos on September 12, 2008. See Defendants Ex. E. On the 2007/2008 evaluation,
3 Dotson is rated “standard” on 22 of 27 categories, rated “above standard” on 4 categories, and
4 rated “unsatisfactory” on the “volume of work produced” category. See id. Terry Parks
5 replaced Skaggs in August 2008. Se Skaggs Dec. ¶ 7; Parks Dec. ¶ 2. Parks wrote on the
6 evaluation that Dotson had refused to sign, that Dotson was offered a special 3 month evaluation
7 for purposes of obtaining a promotion, but Dotson refused the 3 month evaluation. See
8 Defendants Ex. E. Skaggs did not sign the 2007/2008 evaluation because she had originally
9 rated Dotson as “improvement needed” under the “volume of work produced” category and had
10 recommended Dotson for promotion to SAS 2. See Skaggs Dec. ¶ 9; Skaggs Depo. 82:10-16;
11 Parks Dec. ¶ 3. Skaggs testified she was aware that Dotson had filed a grievance or complaint
12 against the County for its failure to promote her, and from an administrative view, promotion
13 should be considered to protect the County. See Skaggs Depo. 67:16-68:12. However, Skaggs
14 did not think that an overall rating higher than “standard” for Dotson was justified because of
15 Dotson’s low productivity. See Skaggs Dec. ¶ 9. Drakos refused to authorize promotion for
16 Dotson, and he ordered Parks to delete the recommendation for promotion and to change the
17 rating under the “volume of work produced” category from “improvement needed” to
18 “unsatisfactory.” See Drakos Dec. ¶ 5; Skaggs Dec. ¶ 6; Parks Dec. ¶ 3.

19 20 SUMMARY JUDGMENT FRAMEWORK

21 Summary judgment is appropriate when it is demonstrated that there exists no genuine
22 issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.
23 Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Fortyone v.
24 American Multi-Cinema, Inc., 364 F.3d 1075, 1080 (9th Cir. 2004). The party seeking summary
25 judgment bears the initial burden of informing the court of the basis for its motion and of
26 identifying the portions of the declarations (if any), pleadings, and discovery that demonstrate an
27 absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986);
28 Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007). A fact is “material” if it

1 might affect the outcome of the suit under the governing law. See Anderson v. Liberty Lobby,
2 Inc., 477 U.S. 242, 248-49 (1986); Thrifty Oil Co. v. Bank of America Nat'l Trust & Savings
3 Assn, 322 F.3d 1039, 1046 (9th Cir. 2002). A dispute is “genuine” as to a material fact if there is
4 sufficient evidence for a reasonable jury to return a verdict for the non-moving party. Anderson,
5 477 U.S. at 248; Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006).

6 Where the moving party will have the burden of proof on an issue at trial, the movant
7 must affirmatively demonstrate that no reasonable trier of fact could find other than for the
8 movant. Soremekun, 509 F.3d at 984. Where the non-moving party will have the burden of
9 proof on an issue at trial, the movant may prevail by presenting evidence that negates an essential
10 element of the non-moving party’s claim or by merely pointing out that there is an absence of
11 evidence to support an essential element of the non-moving party’s claim. See James River Ins.
12 Co. v. Schenk, P.C., 519 F.3d 917, 925 (9th Cir. 2008); Soremekun, 509 F.3d at 984; Nissan Fire
13 & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1105-06 (9th Cir. 2000). If a moving party fails
14 to carry its burden of production, then “the non-moving party has no obligation to produce
15 anything, even if the non-moving party would have the ultimate burden of persuasion.” Nissan
16 Fire & Marine Ins. Co. v. Fritz Companies, 210 F.3d 1099, 1102-03 (9th Cir. 2000). If the
17 moving party meets its initial burden, the burden then shifts to the opposing party to establish
18 that a genuine issue as to any material fact actually exists. See Matsushita Elec. Indus. Co. v.
19 Zenith Radio Corp., 475 U.S. 574, 586 (1986); Nissan Fire & Marine, 210 F.3d at 1103. The
20 opposing party cannot “rest upon the mere allegations or denials of [its] pleading’ but must
21 instead produce evidence that ‘sets forth specific facts showing that there is a genuine issue for
22 trial.’” Estate of Tucker v. Interscope Records, 515 F.3d 1019, 1030 (9th Cir. 2008) (quoting
23 Fed. R. Civ. Pro. 56(e)).

24 The evidence of the opposing party is to be believed, and all reasonable inferences that
25 may be drawn from the facts placed before the court must be drawn in favor of the opposing
26 party. See Anderson, 477 U.S. at 255; Matsushita, 475 U.S. at 587; Stegall v. Citadel Broad,
27 Inc., 350 F.3d 1061, 1065 (9th Cir. 2003). Nevertheless, inferences are not drawn out of the air,
28 and it is the opposing party’s obligation to produce a factual predicate from which the inference

1 may be drawn. See Sanders v. City of Fresno, 551 F.Supp.2d 1149, 1163 (E.D. Cal. 2008);
2 UMG Recordings, Inc. v. Sinnott, 300 F.Supp.2d 993, 997 (E.D. Cal. 2004). “A genuine issue of
3 material fact does not spring into being simply because a litigant claims that one exists or
4 promises to produce admissible evidence at trial.” Del Carmen Guadalupe v. Agosto, 299 F.3d
5 15, 23 (1st Cir. 2002); see Galen v. County of Los Angeles, 477 F.3d 652, 658 (9th Cir. 2007);
6 Bryant v. Adventist Health System/West, 289 F.3d 1162, 1167 (9th Cir. 2002). Further, a
7 “motion for summary judgment may not be defeated . . . by evidence that is ‘merely colorable’ or
8 ‘is not significantly probative.’” Anderson, 477 U.S. at 249-50; Hardage v. CBS Broad. Inc., 427
9 F.3d 1177, 1183 (9th Cir. 2006). Additionally, the court has the discretion in appropriate
10 circumstances to consider materials that are not properly brought to its attention, but the court is
11 not required to examine the entire file for evidence establishing a genuine issue of material fact
12 where the evidence is not set forth in the opposing papers with adequate references. See
13 Southern Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885, 889 (9th Cir. 2003); Carmen v. San
14 Francisco Unified Sch. Dist., 237 F.3d 1026, 1031 (9th Cir. 2001). If the nonmoving party fails
15 to produce evidence sufficient to create a genuine issue of material fact, the moving party is
16 entitled to summary judgment. See Nissan Fire & Marine, 210 F.3d at 1103.

17 18 **DEFENDANTS’ MOTION**

19 **1. Ninth Claim – Title VII Disability Discrimination**

20 The County argues that summary judgment on this claim is appropriate because disability
21 is not a protected class under Title VII. Dotson does not expressly respond to this argument or
22 specifically defend this cause of action.

23 Resolution

24 Summary judgment on this claim is appropriate. First, it is recognized that if the moving
25 party meets its initial burden on summary judgment and the non-moving party fails to address or
26 raise the claim in opposition to summary judgment, the Court may deem the claim abandoned
27 and grant summary judgment. See Shakur v. Schriro, 514 F.3d 878, 892 (9th Cir. 2008); Coufal
28 Abogados v. AT&T, Inc., 223 F.3d 932, 937 (9th Cir. 2000); Doe v. Dickenson, 615 F.Supp.2d

1 1002, 1010 (D. Ariz. 2009). Because Dotson did not acknowledge this claim or Defendants’
2 argument, she has abandoned it. Second, Title VII protects persons on the basis of “race, color,
3 religion, sex, or national origin,” it does not protect persons on the basis of disability. See 42
4 U.S.C. §§ 2000e-2(a)(1), (m); Rahmann v. Wal-Mart Stores, Inc., 2010 U.S. Dist. LEXIS 21020,
5 *11-*12 (D. S.C. Mar. 8, 2010); Montanez v. Education Tech. College, 660 F.Supp.2d 235, 243
6 (D. P.R. 2009); Scott v. City of Yuba City, 2008 U.S. Dist. LEXIS 80307, *11 (E.D. Cal. July 7,
7 2008). Thus, summary judgment on this cause of action is appropriate.

8
9 **2. Fourth Claim (Title VII) & Fifth Claim (FEHA) – Retaliation**

10 *Defendant’s Argument*

11 The County argues that Dotson’s claims fail because there was no adverse action, there is
12 no causal link, and/or there were legitimate, non-retaliatory reasons behind each employment
13 action alleged. Dotson identifies several actions in her complaint as retaliatory, but they are not
14 actionable. First, with respect to performance reviews, Dotson was rated overall as “standard”
15 both before and after her complaints, and her ratings during annual evaluations were based on
16 legitimate concerns over her productivity, including her learning the Anasazi system. Second,
17 the transfer to Green Gardens was an attempt to accommodate her request to not work at
18 Westwind or the ACT team, and her transfer in 2009 was an attempt to accommodate her recent
19 knee surgery. Third, Dotson was denied the 9/80 work schedule for a very limited period of
20 time. Neither Skaggs nor Drakos knew that Dotson had been working the 9/80 schedule, neither
21 Skaggs nor Drakos knew that Dotson had participated in protected activity, and once a current
22 doctor’s note was received, the 9/80 schedule was approved. Fourth, the denial of promotions
23 were based on either Dotson’s failure to obtain CADAAC certification or her low productivity.
24 With respect to certification memoranda, Dotson was one of over 300 people to get these
25 memoranda and her receipt of some of the memoranda was an error, but it had nothing to do with
26 any protected activity. Fifth, on one occasion Dotson was denied permission to attend a
27 continuing education class because of her low productivity and because the class dealt with
28 juveniles, whereas Dotson’s clients were adults. Finally, any attempt by Dotson to rely on

1 conduct by Gause is time barred.

2 Plaintiff's Opposition

3 Dotson argues that she filed complaints against Gause, filed complaints with the EEOC
4 and DFEH, requested accommodation for her disability, and raised complaints about the failure
5 to accommodate her alternative work schedule. These are protected activities. Over the past
6 years, Dotson suffered adverse employment actions through Defendants' failure to promote, poor
7 marks on the 2007 and 2008 annual reviews, failure to accommodate, and denial of continuing
8 education courses. The reasons offered by Defendants for this conduct are manufactured.

9 First, the County "routinely promoted" individuals regardless of certifications. Prior to
10 filing complaints, Plaintiff had been recommended for promotion despite not having the
11 CADAAC certification.

12 Second, Dotson's productivity was impacted by a new computer system. Dotson received
13 minimal training, and the system would constantly freeze up and lose notes/entries and had
14 numerous problems. The 75% requirement was not communicated or enforced prior to Dotson's
15 complaints, and other individuals were promoted despite not meeting the 75% requirement.¹⁵
16 Dotson received poor marks for the 2007 and 2008 reviews, and these "reviews are for the first
17 two years for which the Defendant County went through their computer conversion. Defendants
18 knew that all employees' productivity were affected." Opposition at 7:18-20. Also, Skaggs did
19 not sign the 2008 review or approve of the changes made to the 2008 review because she did not
20 agree with them.

21 Third, Defendants have a history of retaliating against employees who complain. Also, as
22 described in counsel's declaration, the County has blackballed Dotson as a troublemaker because
23 of her complaints about Gause and requests for accommodation. Other employees who suffered
24 productivity issues or similar matters were not subject to the same treatment as Dotson endured.¹⁶

25
26 ¹⁵No evidence is cited in support of the assertion that the 75% requirement was not communicated. See
27 Opposition at 8:6-8. Counsel's statement is not evidence. Angel, 653 F.2d at 1299.

28 ¹⁶No evidence is cited in support of the assertion that other employees who had similar production issues or
"similar matters" as Dotson were treated differently than Dotson. See Opposition at 8:18-21. Counsel's statement is
not evidence. Exeter, 58 F.3d at 1312 n.5; Angel, 653 F.2d at 1299; British Airways, 585 F.2d at 951-52.

1 Legal Standard

2 a. Title VII

3 Title VII prohibits an employer from retaliating against an employee because that person
4 has opposed any unlawful employment practice, or has made a charge, testified, assisted, or
5 participated in an employment discrimination investigation or proceeding. See 42 U.S.C. §
6 2000e-3(a); Nilsson v. City of Mesa, 503 F.3d 947, 953 (9th Cir. 2007); Ray v. Henderson, 217
7 F.3d 1234, 1240 (9th Cir. 2000). In order to establish a prima facie case of retaliation under Title
8 VII, a plaintiff must show that: (1) she engaged in an activity protected under Title VII; (2) her
9 employer subjected her to an adverse employment action; and (3) a causal link exists between the
10 protected activity and the adverse employment action. See Nilsson, 503 F.3d at 953-54; Thomas
11 v. City of Beaverton, 379 F.3d 802, 812 (9th Cir. 2004); Ray, 217 F.3d at 1240. If the plaintiff
12 meets her burden of establishing a prima facie case, the burden shifts to the defendant to
13 articulate a legitimate non-retaliatory reason for its decision. See Nilsson, 503 F.3d at 954; Ray,
14 217 F.3d at 1240. If the defendant meets its burden of setting forth a non-retaliatory reason, the
15 burden shifts back to the plaintiff to submit evidence that indicates that the defendant’s proffered
16 reason is merely a pretext for a retaliatory motive. See Nilsson, 503 F.3d at 954; Ray, 217 F.3d
17 at 1240.

18 With respect to the prima facie case, an “adverse employment action” is an employment
19 action that is “reasonably likely to deter employees from engaging in protected activity.” Ray,
20 217 F.3d at 1243. “Among those employment decisions that can constitute an adverse
21 employment action are termination, dissemination of a negative employment reference, issuance
22 of an undeserved negative performance review and refusal to consider for promotion.” Brooks v.
23 City of San Mateo, 229 F.3d 917, 928 (9th Cir. 2000). Further, that “an employer’s actions were
24 caused by an employee’s engagement in protected activities may be inferred from proximity in
25 time between the protected action and the allegedly retaliatory employment decision.” Raad v.
26 Fairbanks N. Star Borough, 323 F.3d 1185, 1197 (9th Cir. 2003); Ray, 217 F.3d at 1244. That is,
27 “causation can be inferred from timing alone where an adverse employment action follows on the
28 heels of protected activity.” Van Asdale v. Int’l Game Tech., 577 F.3d 989, 1002 (9th Cir.

1 2009); Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1065 (9th Cir, 2002). However, the
2 Ninth Circuit has determined that “a specified time period cannot be a mechanically applied
3 criterion,” and an analysis of temporal proximity cannot be done “without due regard to [the]
4 factual setting.” Van Asdale, 577 F.3d at 1002; Coszalter v. City of Salem, 320 F.3d 968, 977-78
5 (9th Cir. 2003). “There is no set time beyond which acts cannot support an inference of
6 retaliation, and there is no set time within which acts necessarily support an inference of
7 retaliation.” Coszalter, 320 F.3d at 978. Additionally, “the plaintiff must make some showing
8 sufficient for a reasonable trier of fact to infer that the defendant was aware that the plaintiff had
9 engaged in protected activity.” Raad, 323 F.3d at 1197; Cohen v. Fred Meyer, Inc., 686 F.2d
10 793, 796 (9th Cir. 1982). Stated differently, a plaintiff must present evidence that shows that the
11 particular decision maker who authorized or committed the adverse employment action was
12 aware that plaintiff had engaged in protected activity. See Raad, 323 F.3d at 1197; Cohen, 682
13 F.2d at 796-97; Gunther v. County of Washington, 623 F.2d 1303, 1316 (9th Cir. 1979). Finally,
14 to show pretext, a plaintiff can produce “either direct evidence, such as clearly sexist, racist, or
15 similarly discriminatory statements or actions by the employer, or circumstantial evidence
16 supporting an inference of retaliatory or discriminatory motive, so long as such evidence is
17 ‘specific and substantial.’” Munoz v. Mabus, 630 F.3d 856, 865 (9th Cir. 2010); Winarto v.
18 Toshiba Am. Elecs. Components, Inc., 274 F.3d 1276, 1284 (9th Cir. 2001).

19 b. FEHA

20 The standards and analysis of retaliation claims under FEHA are very similar to
21 retaliation claims under Title VII. The same burden shifting framework is utilized in both Title
22 VII and FEHA. That is, the plaintiff must establish a prima facie case of retaliation by showing
23 that: (1) she engaged in a protected activity, (2) the defendant subjected her to an adverse
24 employment action, and (3) there was a causal link between the two.” Yanowitz v. L'Oreal USA,
25 Inc., 36 Cal.4th 1028, 1042 (2005); Scotch v. Art Institute of Cal., 173 Cal.App.4th 986, 1020
26 (2009); Jones v. Department of Corrections & Rehabilitation, 152 Cal.App.4th 1367, 1380
27 (2007). Once the prima facie case is established, the burden shifts to the defendant to show a
28 legitimate, nondiscriminatory reason for the adverse action. Yanowitz, 36 Cal.4th at 1042;

1 Scotch, 173 Cal.App.4th at 1020; Jones, 152 Cal.App.4th at 1380. Upon making such a
2 showing, the burden shifts back to the plaintiff to establish intentional retaliation. Yanowitz, 36
3 Cal.4th at 1042; Scotch, 173 Cal.App.4th at 1021; Jones, 152 Cal.App.4th at 1380.

4 With respect to the prima facie case, as in Title VII, the timing between the plaintiff
5 engaging in protected conducted and the defendant committing an adverse employment action
6 may indicate a sufficient causal connection. See Scotch, 173 Cal.App.4th at 1020; Loggins v.
7 Kaiser Permanente Internat., 151 Cal.App.4th 1102, 1112 (2007). Also, the plaintiff must
8 present evidence that the employer was aware that the plaintiff had engaged in the protected
9 activity. George v. California Unemployment Ins. Appeals Bd., 179 Cal.App.4th 1475, 1491
10 (2009); Morgan v. Regents of University of Cal., 88 Cal.App.4th 52, 70 (2001). However, the
11 California Supreme Court has rejected the Ninth Circuit’s definition of an “adverse employment
12 action.” See Yanowitz, 36 Cal.4th at 1036. Instead, an “adverse employment action” under
13 FEHA is an employment action “that materially affects the terms, conditions, or privileges of
14 employment, rather than simply . . . an adverse action or treatment that reasonably would deter an
15 employee from engaging in protected activity.” Id. at 1051; see Jones, 152 Cal.App.4th at 1380.

16 Discussion

17 Before the Court analyzes the arguments of the parties under the retaliation claims,
18 several preliminary matters should be addressed.

19 The allegations under the fourth cause of action for retaliation under Title VII incorporate
20 by reference all previous paragraphs. Prior paragraphs include allegations related to disability
21 discrimination. Additionally, Dotson’s opposition appears to rely on disability related conduct
22 by the County. To the extent that Dotson is relying on disability related conduct, such reliance
23 under the fourth cause of action is misplaced. Title VII is the statute that Dotson expressly cites
24 under the fourth cause of action. As discussed above, disability is not a protected class under
25 Title VII. Accordingly, to the extent that Dotson is alleging Title VII retaliation based on
26 disability related conduct, such a claim is not cognizable and summary judgment is appropriate.
27 See 42 U.S.C. § 2000ee-2(a)(1), (m); Rahmann, 2010 U.S. Dist. LEXIS 21020 at *11-*12;
28 Montanez, 660 F.Supp.2d at 243; Scott, 2008 U.S. Dist. LEXIS 80307 at *11.

1 Additionally, Dotson is unclear in identifying which adverse employment actions were in
2 response to which protected activities. Dotson has generally argued that she suffered retaliation
3 for making complaints against Gause in 2006 (the “Gause Complaint”), for filing EEOC charges
4 on October 23, 2007 (“the October 2007 Charge”) and April 7, 2008 (“the April 2008 Charge”),
5 and for complaining to Dr. Terleski about the 9/80 schedule on November 29, 2007 (“the
6 Terleski Letter”).¹⁷ See Opposition at 6:11-18. The County’s reply does not expressly address
7 the propriety of relying on each of these activities. Given the County’s failure to address the
8 propriety of relying on these acts as protected activities, for purposes of this motion, the Court
9 will consider and analyze the protected activities identified by Dotson, i.e. the Gause Complaint,
10 the October 2007 Charge, the April 2008 Charge, and the Terleski Letter.

11 Further, in her opposition, Dotson does not dispute that some of the County’s actions
12 were not retaliatory. Dotson does not dispute that her receipt of memoranda regarding
13 certification was non-retaliatory nor does she dispute that her transfers to Green Gardens and her
14 current position were non-retaliatory. The evidence submitted by the County shows that the
15 transfers were an attempt to accommodate either Dotson’s surgery or her express requests to
16 transfer to a different location. See DUMF’s 15, 16, 19, 20, 21. The evidence submitted by the
17 County shows that the memoranda were the result of administrative error and/or standard
18 procedure that affected 300 employees. See DUMF’s 32, 33, 34. Because Dotson does not
19 dispute that her transfers and her receipt of memoranda were not retaliatory, the transfers and
20 certification memoranda cannot form the basis of a retaliation claim. Accordingly, the Court will
21 limit its analysis to Dotson’s contentions regarding her annual evaluations, the failure to promote,
22 the failure to accommodate, and the failure to authorize continuing education credits.

23 Finally, Dotson has not offered any “direct” evidence of retaliatory intent. When
24 attacking the County’s proffered reasons for the adverse employment actions, Dotson relies
25 entirely on circumstantial evidence. As such, after making a *prima facie* case, and when the
26

27 ¹⁷In Plaintiff’s response to Defendants’ undisputed facts, Dotson included internal complaints dated
28 October 2, 2008, against Drakos, Parks, and Jim Waterman. The Court will not consider these complaints. First,
Dotson does not rely on these complaints or address them in her opposition argument. See Court’s Docket Doc. No.
30. Second, Dotson has identified no retaliatory conduct that occurred post-October 2, 2008.

1 County proffers a non-retaliatory explanation, Dotson must present specific and substantial
2 evidence of pretext. See Munoz, 630 F.3d at 865; Nilsson, 503 F.3d at 953-54; Yanowitz, 36
3 Cal.4th at 1042.

4 With this these preliminary matters addressed, the Court will proceed to analyze Dotson’s
5 identified “adverse employments actions” in relation to her identified “protected activities.”¹⁸

6 *a. 2006/2007 Performance Evaluation*

7 Dotson’s 2006/2007 Evaluation was signed by Dotson’s then supervisors, Rick Erickson
8 and Lisa Gavin-Cruse, on May 10, 2007. See Defendants’ Ex. H. The Gause Complaint is the
9 only identified protected activity at issue relative to the 2006/2007 Evaluation because all of the
10 other identified activities post-date May 10, 2007.

11 Dotson contends that the 2006/2007 Evaluation contains false information and
12 undeserved ratings. The parties acknowledge that undeserved performance reviews/evaluations
13 can be adverse employment actions under Title VII. See Brooks, 229 F.3d at 928. Dotson does
14 not expressly explain which parts of the evaluation were false or undeserved. While there are
15 less “above standard” ratings in the 2006/2007 Evaluation than in the previous evaluation, there
16 is only one category that is rated as less than standard. Based on the general tenor of the
17 opposition, it appears that Dotson is complaining about her rating as “needs improvement” under
18 the “promptness of completing work” category.¹⁹ See Opposition at 7:1-22. In the absence of
19 express identification by Dotson, the Court will focus its analysis on the “needs improvement”
20 rating under the “promptness in completing work” category.

21 There is no doubt that Gavin-Cruse was aware of the Gause Complaint prior to May 10,
22 2007, because she is the one who removed Gause from Dotson’s work unit. See Gavin-Cruse
23 Dec. ¶ 2. Gause was removed on August 30, 2006, from Dotson’s work unit as a direct result of
24 Dotson’s complaint. See id.; see also DUMF 5. However, approximately nine months elapsed
25 from the Gause Complaint to the 2006/2007 Evaluation. See Gavin-Cruse Dec. ¶¶ 2, 3;

26
27 ¹⁸Given the similarity between FEHA and Title VII, unless the Court notes otherwise, its analysis applies
equally to both Dotson’s FEHA and Title VII claims.

28 ¹⁹The Court notes that a rating of “standard” under the “volume of work produced” category was given in
both the 2005/2006 and 2006/2007 evaluations. See Defendants’ Exs. F, H.

1 Defendants Ex. H; Plaintiff Exs. D, E. Further, Gavin-Cruse declared that her investigation
2 confirmed Dotson’s allegations against Gause, and that Gavin-Cruse believed that Dotson had
3 done the right thing in complaining about Gause. See Gavin-Cruse Dec. ¶ 5. These
4 circumstances do not indicate a causal link, and Dotson does not explain how a causal link exists.
5 There is therefore a failure to establish a causal link.²⁰

6 Alternatively, if there is a causal link, Gavin-Cruse declared that Dotson’s ratings were
7 based on Dotson’s continuing difficulty in learning the new Anasazi computer data-entry system
8 and Dotson’s failure to document sessions in a timely manner as required by Medi-Cal.²¹ See
9 Gavin-Cruse Dec. ¶¶ 3-4. This is a neutral, non-retaliatory reason for giving a rating of “needs
10 improvement” on the “promptness of completing work” category. As such, it is incumbent upon
11 Dotson to show that this proffered reason is pretext.

12 In her opposition, Dotson has cited a portion of her deposition that indicates that Erickson
13 did not come to her desk when she had questions about Anasazi, a portion of her deposition that
14 indicates that she had daily problems with Anasazi (including her computer freezing or loss of
15 data after 30 minutes of input), and Jean Gutierrez’s declaration that everyone was negatively
16 impacted by Anasazi. See Opposition at 7:1-20. This evidence is not specific and substantial.

17 While the Court accepts that Erickson did not come to Dotson’s desk to answer questions,
18 Gavin-Cruse declared that all employees under her received training on Anasazi, and when it
19 became apparent that Dotson was having problems, Dotson was provided additional training.
20 See Gavin-Cruse Dec. ¶ 4. Dotson nowhere discusses either the initial training she received
21 (other than to call it “very little”) or the additional training that she received, nor does Dotson
22 submit evidence that disputes whether she received additional training. With respect to

23
24 ²⁰It does not appear to the Court that the “needs improvement” rating is an “adverse employment action”
25 under FEHA. California courts have held that “a mere oral or written criticism of an employee . . . does not meet the
26 definition of an adverse employment action under FEHA,” but that an “unfavorable employee evaluation may be
27 actionable where the employee proves the employer subsequently uses the evaluation as a basis to detrimentally alter
the terms or conditions of the recipient’s employment.” Akers v. County of San Diego, 95 Cal.App.4th 1441, 1457
(2002). However, since Defendants have not sufficiently explained their position about “adverse employment
actions” under FEHA, and since the result will not change, the Court need not decide whether the performance rating
is an “adverse employment action” under FEHA.

28 ²¹Gavin-Cruse also declared that it was important and expected for all employees to become proficient in
Anasazi. See Gavin-Cruse Dec. ¶ 4.

1 Gutierrez’s declaration, Gutierrez does indicate that other employees experienced regular
2 problems with Anasazi. See Gutierrez Dec. ¶ 6. However, Gutierrez’s declaration does not
3 indicate in what unit she works, whether she worked with Dotson, whether she knew the amount
4 and types of problems that Dotson had, whether she knew the types and amount of problems that
5 other employees in Dotson’s unit at that time experienced, or how other employees under
6 Erickson and Gavin-Cruse were rated. In other words, Gutierrez’s declaration does not show a
7 basis for her to comment about Dotson’s particular performance or situation.

8 There is no doubt that Dotson experienced problems with Anasazi, and those problems
9 negatively affected her performance by slowing her down. However, more evidence is needed
10 that the “improvement needed” rating was unwarranted in Dotson’s particular case. For
11 example, there is no evidence regarding the types of problems experienced by others in her unit
12 or the ratings that they received. There is simply no specific and substantial evidence that shows
13 that the County’s proffered reason for the “improvement needed” rating under the “promptness in
14 completing work” category was pretext.²²

15 Because Dotson’s has not shown a causal link, and because Dotson has failed to provide
16 specific and substantial evidence of pretext, the 2006/2007 Evaluation was not retaliatory.
17 Summary judgment on this claim is appropriate.

18 ***b. Failure To Accommodate***

19 The only identified instance of a failure to accommodate occurred in November 2007,
20 when Dotson was initially told that she could not work the 9/80 schedule without a doctor’s note.
21 See Plaintiff’s Ex. F; DUMF 23. In the Terleski Letter (dated November 29, 2007), Dotson
22 explained that Skaggs told her on November 15, 2007, that Drakos would have to approve the
23 9/80 schedule. See Plaintiff’s Ex. F. Dotson also explained that Drakos informed her that a
24 doctor’s note was necessary. See id. A doctor’s note also dated November 29, 2007, was
25 submitted to the County, and Skaggs subsequently approved the 9/80 schedule. See DUMF 23;
26 Defendants’ Ex. F. The failure to accommodate pre-dates the April 2008 Charge and, by days,
27

28 ²²Also, Dotson does not specifically address the criticism regarding timely documenting sessions for Medi-Cal purposes.

1 predates the Terleski Letter. The Court will therefore analyze Dotson's failure to accommodate
2 claim in relation to the Gause Complaint and the October 2007 Charge. Further, in the absence
3 of any other identified conduct, the Court views Dotson's failure to accommodate claim as based
4 entirely on Drakos's failure to approve a 9/80 work schedule for two to four weeks, beginning on
5 November 15, 2007.²³ See DUMF 23; Plaintiff Ex. F; Defendants Ex. F.

6 With respect to the Gause Complaint, there is no genuine dispute that Drakos did not
7 know about the Gause Complaint. See DUMF 24. Without awareness or knowledge of the
8 protected activity, there can be no retaliation. See Raad, 323 F.3d at 1197; Gunther, 623 F.2d at
9 1316. Further, approximately fourteen months had elapsed from the time of the Gause
10 Complaint to the November 2007 failure to accommodate. This is an extensive period of time.
11 Cf. Villiarimo, 281 F.3d at 1065 (finding a 18 month lapse to be too long to support causation).
12 Also, the Gause Complaint involved different personnel, different supervisors, a different work
13 unit/team, and a different physical location. There is no indication why Drakos would wish to
14 retaliate against Dotson for her complaints against Gause. Dotson has failed to establish a *prima*
15 *facie* case of retaliation based on the Gause Complaint.

16 With respect to the October 2007 Charge, there is no evidence that Drakos was aware of
17 this charge. The October 2007 Charge was actually filed on October 23, 2007, and the initial
18 failure to accommodate appears to have been November 15, 2007. See Defendants' Ex. B;
19 Plaintiff's Ex. F. This is a short period of time, and there is no evidence that the EEOC
20 contacted Drakos (or the County) in that short period of time.²⁴ Moreover, the circumstances do
21 not necessarily indicate a clear reason why Drakos would retaliate. The October 2007 Charge
22 complained about retaliatory performance evaluations in June 2007. See Defendants' Ex. B.
23 Neither Drakos nor Skaggs participated in the 2006/2007 Evaluation. That evaluation was

24
25 ²³As explained above, Dotson did not adequately dispute DUMF 25 and DUMF 25 stated that the refusal to
26 allow the 9/80 schedule was not retaliatory. See DUMF 25; Court's Docket Doc. No. 30-1 at 7:15-23. Dotson's
27 failure to sufficiently dispute DUMF 25 is an adequate ground for summary judgment. Out of caution and as an
alternative holding, the Court will review the failure to accommodate claim apart from DUMF 25.

28 ²⁴The EEOC did not issue a right to sue letter on the October 23, 2007 Charge until April 30, 2009. See
Complaint at ¶ 12(n) & Exs. A, B. This lengthy period of time indicates that it is unlikely that the EEOC contacted
the County prior to November 15, 2007.

1 performed by Erickson and Gavin-Cruse. Like the Gause Complaint, the October 2007 Charge
2 involved different personnel, different supervisors, a different work team/unit, and a different
3 physical location. The October 2007 Charge had nothing to do with Drakos, and without
4 additional evidence, it is not necessarily clear why Drakos would retaliate for it. As such, Dotson
5 has failed to establish a causal link with the October 2007 Charge.

6 However, even assuming that there is a causal link between the November 2007 failure to
7 accommodate and the October 2007 Charge, Defendants have identified a non-retaliatory reason
8 for the initial denial. Drakos has declared that he did not approve of 9/80 schedules because, in
9 his experience, individuals under the 9/80 schedule were not as productive. See Drakos Dec. ¶ 2.
10 In other words, as a matter of course Drakos does not approve of the 9/80 schedule because of
11 productivity concerns. This is a non-retaliatory explanation for the denial.

12 Dotson does not expressly explain how this reason is pretext. Dotson points out that she
13 was working under the 9/80 schedule prior to her transfer to Green Gardens. However, the
14 Terleski Letter indicates that Skaggs told Dotson that Gavin-Cruse (the previous supervisor) had
15 not mentioned the 9/80 schedule to her, and that Gavin-Cruse did not remember if she told
16 Drakos about the 9/80 schedule. See Plaintiff Ex. F. Drakos's declaration indicates that it was
17 Dotson who brought the 9/80 schedule to his attention, and that he did not know that she had
18 been working the 9/80 schedule prior to transfer. See Drakos Dec. ¶¶ 2, 3. It is not apparent that
19 Drakos knew that Dotson was working the 9/80 schedule before the transfer. Nevertheless, even
20 if Drakos knew about the 9/80 schedule, it does not cast doubt on Drakos's general disapproval
21 of 9/80 schedules. Dotson has presented no evidence that Drakos approved of other 9/80
22 schedules on anything other than a temporary basis. See Drakos Dec. ¶ 3. Skaggs has declared
23 that, when Dotson talked to her about the 9/80 schedule, no one under Skaggs's and Drakos's
24 supervision had been allowed to work the 9/80 schedule. See Skaggs Dec. ¶ 3. Once Drakos
25 learned that new medical authorization had been given and that Skaggs had approved the
26 schedule, he permitted Dotson to work the 9/80 schedule. See Drakos Dec. ¶ 3. The evidence
27
28

1 before the Court indicates that Drakos’s refusal was simply his standard policy.²⁵ See Drakos
2 Dec. ¶ 3; Skaggs Dec. ¶ 3. Dotson has not produced specific and substantial evidence that the
3 proffered reason for the initial failure to allow a 9/80 schedule was pretext.

4 Because Dotson’s has not shown a causal link, and because Dotson has failed to provide
5 specific and substantial evidence of pretext, the November 2007 failure to accommodate, i.e. the
6 initial failure to approve a 9/80 work schedule, was not retaliatory.²⁶ Summary judgment on this
7 claim is appropriate.

8 c. 2007/2008 Performance Evaluation

9 Dotson’s 2007/2008 Evaluation was signed by Dotson’s supervisors, Terry Parks on
10 September 9, 2008, and Bill Drakos on September 12, 2008. See Defendants’ Ex. E. Skaggs had
11 prepared part of the evaluation, but was replaced by Parks before September 2008. See Skaggs
12 Dec. ¶ 6. The 2007/2008 Evaluation post-dates the Gause Complaint, the October 2007 Charge,
13 the November Terleski Letter, and the April 2008 Charge.

14 Like the 2006/2007 Evaluation, Dotson does not identify which specific ratings are
15 undeserved or false. The parties focus on the issue of low productivity in their respective papers.
16 There is one glaring rating in the 2007/2008 Evaluation. Under the “volume of work produced,”
17 Dotson is rated as “unsatisfactory,” which appears to be the lowest rating available. See
18 Defendants’ Ex. E. Since the remaining categories are generally rated as “satisfactory” (with
19 four categories rated “above standard”), and since the parties focus on productivity, the Court
20 will analyze only the rating of “unsatisfactory” under the “volume of work produced” category.²⁷

22 ²⁵Further, Dotson has presented no authority that Drakos’s request for current medical authorization was
23 improper. Drakos’s declaration indicates that Dotson told him that she had been working under the 9/80 schedule
24 pursuant to medical authorization “for several years.” See Drakos Dec. ¶ 3. In the absence of cited authority to the
25 contrary from Dotson, the Court sees nothing unreasonable with Drakos asking for current medical information,
26 especially since Dotson was starting at a new job/location and the other authorization was “several years old.”

27 ²⁶Further, the evidence indicates that Dotson worked a standard schedule for two or four weeks only. It is
28 not clear that this *temporary* interruption of Dotson’s work schedule would be considered something that materially
affects the conditions of Dotson’s employment. See Yanowitz, 36 Cal.4th at 1036. However, given the resolution of
Dotson’s claim regarding the 9/80 schedule, as well as Defendants failure to adequately discuss “adverse
employment actions” under FEHA, it is unnecessary to decide this issue.

²⁷Despite its concerns, as discussed in footnotes 20 and 26, the Court will not decide whether the
“unsatisfactory” rating is an “adverse employment action” under FEHA. Cf. Akers, 95 Cal.App.4th at 1457.

1 With respect to the Gause Complaint, for the same reasons that there is no causal
2 connection between the Gause Complaint and the failure to accommodate contention, there is no
3 causal connection between the 2007/2008 Evaluation and the Gause Complaint. That is, it is
4 undisputed that Drakos, Skaggs and Parks did not know about the Complaint, approximately two
5 years elapsed from the Gause Complaint to the 2007/2008 Evaluation, and the circumstances
6 show no reason why Drakos, Skaggs, or Parks would retaliate based on the Gause Complaint.
7 See Raad, 323 F.3d at 1197; Villiarimo, 281 F.3d at 1065; Gunther, 623 F.2d at 1316; DUMF 24.
8 Dotson has failed to establish a *prima facie* case of retaliation based on the Gause Complaint.

9 With respect to the October 2007 Charge, for the same reasons that there is no causal
10 connection between the October 2007 Charge and the failure to accommodate contention, there is
11 no causal connection with the October 2007 Charge and the 2007/2008 Evaluation. That is, there
12 is no indication that Drakos, Parks, or Skaggs were aware of the October 2007 Charge, eleven
13 months passed from the October 2007 Charge to the 2007/2008 Evaluation, and the
14 circumstances as presented do not clearly show why Drakos, Parks, or Skaggs would necessarily
15 retaliate because the October 2007 Charge complains of conduct by prior supervisors. See Raad,
16 323 F.3d at 1197; Villiarimo, 281 F.3d at 1065; Gunther, 623 F.2d at 1316; DUMF 24;
17 Defendants' Ex. B. Dotson has failed to establish a *prima facie* case of retaliation based on the
18 October 2007 Charge.

19 With respect to the Terleski Letter, like other complaints, there is no evidence that
20 Drakos, Parks, or Skaggs was aware of the Terleski letter. The letter is addressed to Dr. Terleski
21 only (with no "cc's"), see Plaintiff's Ex. F, and it is not clear how Dr. Terleski viewed or dealt
22 with the letter as it does not appear to be a formal grievance. Cf. Plaintiff's Ex. F with Plaintiff's
23 Ex. I. Indeed, Dotson states that her letter is a response to Dr. Terleski's own request for a
24 medical note. See Plaintiff's Ex. F ("Dear Donald R. Terleski, I received your request for a
25 medical note on November 29, 2007, following my meeting with Bill Drakos and Felicia
26 [Skaggs] on November 29, 2007."). Nevertheless, the letter continues to explain that Dotson
27 worked the 9/80 schedule prior to Green Gardens, that prior administrators had approved of the
28 9/80 schedule but had not told Drakos, that Drakos would not approve the schedule without a

1 doctor's note, other administrators (including Terleski) were aware of a doctor's note, and
2 Dotson views the situation as retaliation and harassment. See id. Dotson also provided to the
3 County a doctor's note dated November 29, 2007. See Defendants' Ex. C. Further, Drakos's
4 declaration does not indicate that he was aware of the Terleski Letter. See Drakos Dec. ¶ 3;²⁸ see
5 also Skaggs Dec. ¶ 3. The evidence submitted does not indicate knowledge of the Terleski
6 Letter, and the nature of the letter itself does not indicate knowledge. Again, without knowledge
7 of protected activity, there can be no retaliation. See Raad, 323 F.3d at 1197; Gunther, 623 F.2d
8 at 1316. Further, ten months elapsed between the Terleski Letter and the 2007/2008 Evaluation.
9 This is not an insignificant period of time. In that time, the 9/80 schedule had been in place,
10 current medical documentation approving of the 9/80 schedule was on file, and Drakos had not
11 pursued the matter. Finally, the Terleski Letter discusses Drakos's decision, it does not address
12 conduct by Skaggs or Parks. See Plaintiff's Ex. F. These circumstances do not indicate a causal
13 link. Dotson has failed to establish a *prima facie* case of retaliation based on the Terleski Letter.

14 With respect to the April 2008 Charge, approximately five months passed between the
15 April 2008 Charge and the 2007/2008 Evaluation. In her deposition, Skaggs testified that she
16 was aware that, in 2008, Dotson had filed "a grievance against the County" for a failure to
17 promote. See Skaggs Depo. 68:7-19. Apparently in an e-mail, Skaggs recommended promoting
18 Dotson. See id. at 66:9-13. At some point in that e-mail, it appears that Skaggs had mentioned
19 "protecting the County" from "an administrative point of view." See id. at 68:3-6. Skaggs was
20 referring to Dotson's grievance over not being promoted. See id. at 68:3-19. The April 2008
21 Charge is the only sort of "grievance" that has been submitted to the Court that fits a time frame
22 in which Skaggs was evaluating Dotson and that references promotion. Since Skaggs was aware
23 of the April 2008 Charge, it is not unreasonable to assume that Skaggs' supervisor, Drakos, was
24 also aware. Further, if Skaggs was considering the April 2008 Charge with respect to promotion
25 and evaluation, and was referring to the grievance (be it indirectly) through an e-mail, it is not
26 unreasonable to think that Drakos would also be considering the April 2008 Charge since he

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28 ²⁸Drakos's declaration indicates that he knew that Dotson submitted a new medical note and that Skaggs approved of the schedule after discussions with Dotson's attorney; there is no mention of the Terleski Letter. See Drakos Dec. ¶ 3.

1 would need to approve the promotion.²⁹ See DUMF 29. Under these circumstances, there is a
2 sufficient causal link. See Van Asdale, 577 F.3d at 1002.

3 The County has proffered a non-retaliatory reason for the 2007/2008 Evaluation. Drakos
4 declared that the reason Dotson received an “unsatisfactory” rating was that her productivity was
5 too low. See Drakos Dec. ¶ 5. Drakos declared that the standard productivity percentage that an
6 employee was encouraged to meet or exceed was 75%, which was tied to the department’s
7 budget and Medi-Cal. See id. at ¶ 4. Dotson’s productivity for the entirety of the 2007/2008
8 Evaluation period was 49%, but was 57% if two particularly bad months were excluded. See id.
9 at ¶ 5; Defendants’ Ex. E; see also Skaggs Dec. ¶ 6. This low productivity number is a non-
10 retaliatory reason for evaluating Dotson as “unsatisfactory.”

11 Dotson contends that this reason is pretext because it was known that the Anasazi system
12 was causing significant problems and Dotson experienced regular problems with it. However, as
13 discussed above, Dotson’s evidence regarding Anasazi is not sufficient to show pretext. It is
14 undisputed that Dotson had regular, if not daily, problems with Anasazi. Skaggs declared that
15 she herself, as well as those under her supervision, experienced problems with Anasazi. See
16 Skaggs Dec. ¶ 5. Nevertheless, Skaggs has declared (without dispute) that Dotson appeared to
17 have more problems with the system and that computer technicians were sent to work on
18 Dotson’s computer. See id. Consistent with this declaration, the 2007/2008 Evaluation states,
19 “You have had some challenges with Anasazi due to the problems with the program itself, and I
20 commend you for attempting to overcome those issues by contacting the Anasazi core team
21 regularly.” Defendants Ex. E. The evidence clearly indicates that Anasazi caused problems in
22 Dotson’s unit at Green Gardens. It does not, however, dispute that Dotson’s productivity was
23 between 49% and 57%, depending on the months in which productivity was measured. There is
24 no evidence concerning the amount of problems other people suffered, or the productivity figures
25 of others in the unit, or the ratings of others in the unit regarding “volume of work produced.”

26
27 ²⁹The Court does not know about Skaggs’s e-mail, other than it was sent. It is unknown when precisely it
28 was sent, other than pre-September 9, 2008, and it is unknown to whom it was sent. If it was a recommendation for
promotion, it would seem that Drakos would be a recipient since Skaggs could not promote. See DUMF 29; Skaggs
Dec. ¶¶ 8, 9.

1 Evidence that others in Dotson’s unit had similar productivity levels but were rated above
2 “unsatisfactory” would indicate pretext, but there is no such evidence. Further, even though
3 Skaggs recommended Dotson for promotion, she had rated Dotson as “improvement needed”
4 under the “volume of work produced” category. See Skaggs Dec. ¶¶ 6, 9; Parks Dec. ¶ 3; see
5 also Drakos Dec. ¶ 5. “Improvement needed” is the rating between “standard” and
6 “unsatisfactory.” See Defendants Exs. E, G, H. Despite the recommendation for promotion,
7 Skaggs’s initial “improvement needed” rating shows that Dotson suffered from a productivity
8 problem. Skaggs and Drakos simply disagreed on the degree, either “improvement needed” or
9 “unsatisfactory,” both of which are below “standard.” See id. The problems with Anasazi do not
10 dispute that Dotson’s productivity was between 49% and 57%, nor does it address how other
11 employees were rated in Dotson’s unit relative to their productivity percentage.³⁰ Dotson has
12 failed to produce specific and substantial evidence that the reason for the “unsatisfactory” rating
13 under the “volume of work produced” category in the 2007/2008 Evaluation was pretext.³¹

14 Because Dotson’s has either failed to show a causal link, or because Dotson has failed to
15 provide specific and substantial evidence of pretext, the 2007/2008 Evaluation, i.e. the “volume
16 of work completed” category rated as “unsatisfactory,” was not retaliatory. Summary judgment
17 on this claim is appropriate.

18 *d. Denial of Continuing Education*

19 There is no evidence that the County actually prevented Dotson from meeting her
20 continuing education requirements. See DUMF 36. Rather, the only evidence before the Court
21 is that Drakos refused to authorize Dotson’s attendance at one class in February 25, 2008. See
22 DUMF 37; Defendant’s Ex. M; Drakos Dec. ¶ 7. Assuming that the refusal to authorize
23 attendance at one course can be classified as an “adverse employment action,” the conduct is not
24 retaliatory.

25
26 ³⁰ Again, the Gutierrez declaration is of limited value since it is unknown where Gutierrez worked, whether
27 she knew of the type and amount of problems that either Dotson or Dotson’s co-workers experienced, and whether
she was aware of Dotson’s co-worker’s productivity levels and the co-worker’s productivity ratings.

28 ³¹ Also, assuming that there is a sufficient causal link between the 2007/2008 Evaluation and the Terleski
Letter, this same analysis would apply, and Dotson would not meet her burden to show pretext.

1 As discussed above, there is no evidence that Drakos was aware of either the Gause
2 Complaint or the October 2007 Charge. Without awareness/knowledge of the protected activity,
3 there can be no retaliation. See Raad, 323 F.3d at 1197; Gunther, 623 F.2d at 1316. Further, the
4 Gause Complaint and the October 2007 Charge involved different personnel, different
5 supervisors, and a different location. Without more evidence, no reason to retaliate for these
6 actions is clearly apparent.

7 The April 2008 Charge had not yet occurred, so it could not have been the basis for
8 Drakos to refuse approval in February 2008.

9 Finally, the Terleski Letter is within three months of Drakos's denial. This timing can
10 suggest a causal connection. See Van Asdale, 577 F.3d at 1002. However, as discussed above,
11 there is no evidence that Drakos was aware of the Terleski Letter and, given the nature of the
12 letter, it is not clear that Terleski would have necessarily disclosed it to Drakos. Again, without
13 knowledge of protected activity, there can be no retaliation. See Raad, 323 F.3d at 1197;
14 Gunther, 623 F.2d at 1316.

15 However, even if Drakos was aware of the Terleski Letter and there is a sufficient causal
16 link, the County has proffered a non-retaliatory reason for the refusal to approve attendance.
17 Drakos has declared that he did not approve Dotson's request because her productivity was too
18 low and because the continuing education course dealt with children/adolescents and Dotson's
19 case load was exclusively adults. See Drakos Dec. ¶ 7.

20 Dotson has not shown that Drakos's reason for denying approval was pretext. As
21 discussed above, Dotson has not shown that the concerns about her productivity were pretext.
22 Further, Dotson does not dispute that the subject of the continuing education course dealt with
23 children/adolescents, yet Dotson's case load was limited to adults. See Drakos Dec. ¶ 7. There
24 is no evidence that other employees under Drakos's supervision were allowed to attend
25 continuing education courses that did not pertain to their clients, or that employees who had
26 production levels similar to Dotson's were given approval to attend courses.³² There simply is no

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28 ³²Again, Dotson's production level in February 2008 was somewhere between 49% and 57% and the
standard to be met was 75%. See DUMF 27; Defendants' Ex. E; Drakos Dec. ¶¶ 4, 5; Skaggs Dec. ¶ 6.

1 evidence, be it specific and substantial or not, that the reasons for withholding approval were
2 pretext.

3 Dotson has failed to meet her burden either at the *prima facie* phase or the pretext phase.
4 Drakos's denial of approval to attend a continuing education course was not retaliatory.
5 Summary judgment on this claim is appropriate.

6 *e. Failure to Promote*

7 There is insufficient evidence that Defendants' failure to promote was retaliatory. Prior
8 to 2008, it is undisputed that Dotson was not eligible for promotion to SAS 2 because she did not
9 have CADAAC certification. See DUMF 26. While Dotson mentions without citation to any
10 evidence that one supervisor of unknown rank recommended her for promotion in 2003,³³ that
11 she was not promoted indicates that the CADAAC requirement was enforced. There is no
12 evidence that Dotson's lack of CADAAC certification is pretext.

13 With respect to the failure to promote in 2008, there is no evidence that Drakos, Skaggs,
14 or Parks was aware of the Gause Complaint, the October 2007 Charge, or the Terleski Letter. As
15 discussed above, neither the circumstances of the Gause Complaint or the October 2007 Charge
16 (which dealt with different personnel, different supervisors, and a different location), nor the
17 nature of the Terleski Letter (which was sent only to Dr. Terleski and in response to his request
18 for a medical note) indicate a causal link with the failure to promote in 2008. There is no *prima*
19 *facie* case of retaliation with respect to the Gause Complaint, the October 2007 Charge, or the
20 Terleski Letter.

21 However, also as discussed above, there is knowledge of the April 2008 Charge by
22 Skaggs, and the evidence supports an inference that Drakos was aware of the April 2008 Charge.
23 Further, Skaggs's deposition indicates that the April 2008 Charge was a consideration in the
24 promotion recommendation. Under these circumstances, Dotson has met her *prima facie* phase
25 burden. See Van Asdale, 577 F.3d at 1002.

26 Defendants have proffered a non-retaliatory reason for the failure to promote Dotson in
27

28 ³³The unsupported arguments of counsel are not evidence. See Exeter, 58 F.3d at 1312 n.5; Angel, 653
F.2d at 1299; British Airways, 585 F.2d at 951-52.

1 2008. Drakos declared that Dotson was not promoted in 2008 because her productivity
2 percentage was too low, between 49% and 57% (depending on the months considered). See
3 Drakos Dec. ¶ 5; Defendants’ Ex. E.

4 Dotson argues that the proffered reason is pretext because Dotson (along with everyone
5 else) was having problems with Anasazi, the Anasazi conversion made it impossible to meet the
6 75% standard, Skaggs had recommended Dotson for promotion, and the 75% was selectively
7 enforced or inconsistently enforced. Dotson’s arguments and evidence are not sufficiently
8 specific and substantial to show pretext.

9 With respect to inconsistent application of the 75% standard, it appears that Dotson relies
10 on Gutierrez’s declaration and on Dotson’s testimony that Jessica Chavarria was promoted despite
11 not making the 75% standard. First, Gutierrez’s declaration is not helpful. Gutierrez declares
12 that she is familiar with the County’s productivity requirements and that the “requirements are
13 not consistently enforced.” Gutierrez Dec. ¶ 3. Gutierrez’s statement is too general and she does
14 not provide a sufficient foundation for her opinion. Gutierrez does not explain how she knows
15 about enforcement or how individual supervisors enforce the requirement. In particular,
16 Gutierrez’s declaration does not indicate that she has any knowledge of how Drakos enforces the
17 75% standard. That Gutierrez may have experienced other supervisors who do not enforce the
18 the 75% standard is immaterial because it was Drakos who made the decision. Further, Gutierrez
19 does not explain to what extent the 75% standard is enforced. Specifically, Gutierrez does not
20 testify about people who have performed at a level of between 49% and 57%.³⁴ If Drakos was
21 applying his standard criteria to Dotson, and if others who had similar production numbers were
22 not promoted, then there can be no retaliation, irrespective of the practices of other supervisors in
23 different parts of the County. Second, Dotson indicates that she knows Jessica Chavarria was
24 promoted despite not making the 75% standard. See Dotson Depo. 63:24-64:18. However,
25 what Dotson does not indicate is by how much Chavarria did not make the 75% standard. See id.
26 at 64:17-18. Drakos did not declare that he refuses promotions to people who fail to meet the

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28 ³⁴ Again, the 49% is for the entire review period and the 57% excludes two particularly bad months. See
Defendants’ Ex. E.

1 75% standard. Drakos declared that he did not approve Dotson because her productivity was too
2 far below the 75% standard. See Drakos Dec. ¶ 5. Skaggs also declared that Drakos would not
3 approve the promotion, not because the 75% standard was not met, but because Dotson’s
4 productivity was “significantly below” the 75% mark. See Skaggs Dec. ¶ 6. In other words, the
5 key is how close to the 75% mark that an employee gets. That Chavaria was promoted despite
6 not making the 75% is not sufficiently probative without evidence of Chavaria’s actual
7 percentage.

8 With respect to the contention that no one could meet the 75% standard during the
9 Anasazi implementation, that position is based on Gutierrez’s declaration. However, Gutierrez
10 offers only an opinion that, given the problems with Anasazi, the productivity requirement was
11 “virtually impossible.” See Gutierrez Dec. ¶ 8. This opinion is not helpful. There is no
12 indication that Gutierrez knew other people’s productivity levels, there is no indication that she
13 was familiar with the particular problems and the particular personnel in Dotson’s unit, and there
14 is no indication about what the average level of productivity was during Anasazi implementation.
15 Gutierrez does not purport to know that Dotson’s levels were between 49% and 57% (depending
16 on which months were considered), and Gutierrez offers no opinion that such production levels
17 were normal during Anasazi’s implementation period. Gutierrez’s opinion is unduly speculative,
18 has an insufficient foundation, does not relate to Dotson’s unit, and fails to indicate pretext.

19 With respect to the contention that Skaggs had recommended Dotson for promotion,
20 Skaggs declared that she believed that Dotson’s interaction with clients and other team members
21 warranted a promotion. See Skaggs Dec. ¶ 6. Skaggs acknowledged that Dotson’s productivity
22 was below 50%, but believed that the rest of her performance merited a promotion. See id.
23 Skaggs’s deposition also indicated that she thought that promotion might help to protect the
24 County, which suggests that Skaggs viewed promotion, in part, as a prophylactic measure. See
25 Skaggs Depo. 68:3-12.³⁵ What Skaggs’s testimony shows is a difference of opinion about the

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27 ³⁵Viewing the promotion as prophylactic, and combined with Skaggs’s initial rating of “needs
28 improvement” under the “volume work produced” category, there is an indication that Skaggs believed that
productivity was a problem, but that protection for the County outweighed Dotson’s low productivity. Skaggs’s
testimony indicates that the April 2008 Charge may have had, at least in part, the opposite of a retaliatory effect with
her.

1 consequences of productivity between 49% and 57% (depending on which months were
2 considered). Drakos disagreed with Skaggs's assessment. Drakos's uncontradicted declaration
3 states that he told Skaggs that he "would not authorize a promotion for anyone with such low
4 productivity" Drakos Dec. ¶ 5. It is also uncontradicted that Drakos has denied promotions
5 for at least twelve other employees whose productivity was too low. See id. at ¶ 6. Indeed,
6 Dotson herself testified that she was personally aware of another employee, Angelo, who was
7 denied a promotion to SAS 2 because of a lack of productivity. See Dotson Depo. 65:3-9.
8 Skaggs has not declared or testified that Drakos had approved promotions for other employees
9 who had productivity levels that were similar to Dotson. There is simply no evidence that
10 Drakos deviated from his normal criteria when he denied promotion because Dotson's
11 productivity was too far below the 75% standard. Skaggs's recommendation is not sufficient to
12 show pretext.

13 With respect to Dotson's difficulty with the Anasazi system, the Court has previously
14 addressed this. Dotson had significant problems, she documented her problems with Skaggs and
15 Drakos, and Anasazi technical personnel were sent to assist Dotson. However, there is no
16 dispute that her productivity was between 49% and 57%, and there is no evidence concerning the
17 amount of problems that others in her unit suffered. Significantly, there is also no evidence of
18 the productivity figures of others in the unit or the ratings of others in the unit regarding
19 productivity related categories. There is no evidence that others under Drakos's supervision were
20 promoted despite having production levels of between 49% and 57%. There is no real dispute
21 that Dotson had difficulties with Anasazi and her productivity was low, the issue is how her
22 productivity and her difficulties compared to others in the unit. No evidence has been submitted
23 that she was treated differently from those who had similar productivity or similar difficulties
24 with Anasazi.

25 Finally, it should be noted that there is no dispute that Drakos and Parks offered to
26 specially reevaluate Dotson in three months time to see if her productivity had increased. See
27 Parks Dec. ¶ 3; Drakos Dec. ¶ 5; Defendants' Ex. E. If her productivity increased, then the
28 promotion would have been processed. See Parks Dec. ¶ 3. Dotson refused the special

1 reevaluation. See Parks Dec. ¶ 3; Drakos Dec. ¶ 5; Plaintiffs’ Ex. E. Without additional
2 evidence, a willingness to do an early evaluation for the purposes of obtaining a promotion does
3 not on its face seem consistent with retaliation.

4 Dotson has not met her burden either at the *prima facie* phase, due to a lack of a causal
5 link, or at the pretext phase, due to a lack of specific and substantial evidence of pretext. There is
6 insufficient evidence that the failure to promote was retaliatory. Summary judgment on this
7 claim is appropriate.

8
9 **3. First Claim (FEHA) & Eighth Claim (Title VII) – Hostile Environment³⁶**

10 *Defendants’ Argument*

11 Defendants argue that the acts identified by Dotson were non-discriminatory and did not
12 cause a hostile work environment. As previously argued, the denial of promotion was based on
13 the lack of certification and failure to acceptably meet productivity goals. The refusal to initially
14 allow Dotson to work the 9/80 schedule was temporary, was based on concerns of productivity,
15 and occurred once. The evaluations for 2007 and 2008 were based on productivity concerns, yet
16 still yielded an overall rating of “standard.” Dotson’s transfer in 2007 to Green Gardens was
17 done at her request as an accommodation. The certification memoranda Dotson received were
18 sent to 300 employees and Dotson’s inclusion on some was a mistake. Finally, Dotson was
19 never denied continuing education credits, rather a request to attend a seminar was denied
20 because of Dotson’s low productivity and the subject of the conference did not deal with
21 Dotson’s client base. None of the conduct is extreme, severe, threatening or abusive.

22 With respect to Skaggs, she argues summary judgment should be granted specifically as
23 to her because she did not contribute to the hostile environment or the acts identified by Dotson
24 as creating the hostile environment.

25 *Plaintiff’s Opposition*

26 Dotson argues that, over the past years, each of the Defendants made personnel decisions
27

28

³⁶The eighth cause of action is under Title VII and is brought against only the County. The first cause of
action is under FEHA is brought against the County, Skaggs, and Drakos.

1 in a distinct attempt to retaliate against her and create a hostile work environment. This has led
2 Dotson to be on edge with everything she does, which causes substantial emotional and physical
3 stress/harm.³⁷ Defendants routinely denied her promotion by using sham reasons, like a lack of
4 certification and productivity issues which arose from Defendants' own computer problems.
5 Defendants also made it difficult for her to obtain education credits, gave her unjustified ratings,
6 and required her to obtain a doctor's note even though one was already on file. Defendants also
7 assigned her duties outside of her job assignment. But for medical leave, the hostile environment
8 created would have caused more harm to Dotson.

9 Legal Standard

10 The Ninth Circuit has recognized that retaliation may take the form of a hostile work
11 environment. See Hardage v. CBS Broad. Inc., 427 F.3d 1177, 1189 (9th Cir. 2005); Ray, 217
12 F.3d at 1244-45. A retaliatory hostile work environment is actionable if it is "sufficiently severe
13 or pervasive to alter the conditions of the victim's employment and create an abusive working
14 environment." Hardage, 427 F.3d at 1189; Ray, 217 F.3d at 1245. The hostile environment must
15 be both objectively and subjectively offensive. Faragher v. City of Boca Raton, 524 U.S. 775,
16 787 (1998); Ray, 217 F.3d at 1245. "To determine whether an environment is sufficiently
17 hostile, we look to the totality of the circumstances, including the frequency of the discriminatory
18 conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive
19 utterance; and whether it unreasonably interferes with an employee's work performance."
20 Faragher, 524 U.S. at 787; Ray, 217 F.3d at 1245. "Simple teasing, offhand comments, and
21 isolated incidents (unless extremely serious) will not amount to discriminatory changes in the
22 terms and conditions of employment." Faragher, 524 U.S. at 788; Hardage, 427 F.3d at 1189.

23 California recognizes that a hostile work environment may form the basis of a retaliation
24 claim. See Yanowitz, 36 Cal.4th at 1056 n.16. California also follows the United States
25 Supreme Court's jurisprudence regarding the severity and pervasiveness of the hostile work
26 environment. See Lyle v. Warner Bros. Television Productions, 38 Cal.4th 264, 282-84 (2006).

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28

³⁷No evidence is cited for this assertion. See Opposition at 9:3-5.

1 Discussion

2 As an initial matter, Dotson claims a hostile work environment under Title VII based on
3 “gender, race, and disability.” Complaint at ¶ 50. As discussed above, disability is not a
4 protected class under Title VII. Accordingly, Dotson’s Title VII hostile work environment based
5 on disability is not cognizable and summary judgment is appropriate. See 42 U.S.C. § 2000ee-
6 2(a)(1), (m); Rahmann, 2010 U.S. Dist. LEXIS 21020 at *11-*12; Montanez, 660 F.Supp.2d at
7 243; Scott, 2008 U.S. Dist. LEXIS 80307 at *11.

8 The basis of Dotson’s hostile work environment shows that it is intertwined with her
9 retaliation claims. Dotson claims a hostile work environment was created by the failure to
10 promote, the failure to accommodate, and the failure to approve continuing education credits.
11 See Opposition at 9:6-17. However, as discussed above, these acts were not retaliatory. In each
12 instance, the County has proffered legitimate, non-retaliatory reasons for these actions. Further, a
13 request to produce a doctors note, a one time denial of attending a continuing education course
14 that did not relate to Dotson’s clients, and failing to promote at most once per year over a two
15 year period of time constitute sporadic events. These events are not particularly severe, were not
16 physically threatening or humiliating, and there is no evidence that these acts interfered with
17 Dotson’s ability to do her job. See Faragher, 524 U.S. at 787-88; Hardage, 427 F.3d at 1189.
18 While the Court is willing to accept that Dotson perceived a hostile environment, the evidence
19 does not sufficiently show an objectively severe “hostile” environment. See Faragher, 524 U.S.
20 at 787.

21 Dotson also argues that her name has been smeared to the point where she is constantly
22 looking over her shoulder. However, like other parts of the opposition, there is no evidence cited
23 to support this assertion, and counsel’s bare argument is not evidence. Exeter Bancorporation,
24 Inc. v. Kemper Secs. Group, Inc., 58 F.3d 1306, 1312 n.5 (8th Cir. 1995); Angel v. Seattle-First
25 Nat’l Bank, 653 F.2d 1293, 1299 (9th Cir. 1982); British Airways Bd. v. Boeing Co., 585 F.2d
26 946, 951-52 (9th Cir. 1978).

27 Dotson also argues that Defendants assigned her duties outside of her job description
28 without just compensation. Dotson cites to her Exhibit G, which is an internal grievance dated

1 October 2, 2008, against Terry Parks. See Plaintiff’s Ex. G. The exhibit states that Dotson is
2 grieving Parks for *inter alia* “assigning duties outside of my classification.” Id. Under the
3 “settlement desired” section, it reads: “I would like to be retroactively compensated for being
4 assigned duties outside of my classification as a SAS I working as a rehab spec., doing case
5 management.” Id. This evidence does not show a hostile environment. Assuming that Dotson
6 was actually assigned duties outside of her classification, there is no indication of how often
7 Dotson was assigned duties outside of her classification or how long she performed such duties.
8 It is undisputed that Dotson suffered an accident and was out of the office recovering from
9 October 2008 to sometime in 2009, and then was assigned to a new department upon her return
10 to work. See DUMF’s 20, 21. With this time-line, Dotson would not have been around Parks or
11 Parks’s job assignments too much longer after October 2, 2008. Exhibit G, either alone or in
12 combination with the non-retaliatory conduct discussed above, does not indicate conduct that was
13 regularly occurring, or that occurred over a longer period of time, or that was physically
14 intimidating or demeaning, or that was severe and pervasive, . See Faragher, 524 U.S. at 787-88.

15 The evidence cited by Dotson simply does not establish a sufficiently severe or pervasive
16 hostile work environment. Summary judgment on this claim is appropriate.

17 Additionally, Skaggs specifically moved for summary judgement on the FEHA claim
18 against her. Under FEHA, an employee “is personally liable for any harassment prohibited by
19 this section that is perpetrated by the employee” Cal. Gov. Code § 12940(j)(3). Here, it is
20 undisputed that Skaggs did not deny approval for the continuing education course, see DUMF 38,
21 Skaggs was not the person who decided not to promote Dotson, see DUMF 29, Skaggs was not
22 the person who initially refused the 9/80 schedule, see DUMF 23, Skaggs is not the person
23 grieved in Exhibit G, see Plaintiff Ex. G, and Skaggs did not sign the 2007/2008 Evaluation. See
24 Skaggs Dec. ¶ 6. Dotson has failed to identify any act of harassment that Skaggs committed.
25 Accordingly, summary judgment is appropriate specifically as to Skaggs.
26

27 CONCLUSION

28 Defendants move for summary judgment on the five remaining claims in this case.

1 Summary judgment on Dotson's ninth cause of action is appropriate because Title VII
2 does not protect persons on the basis of disability.

3 Summary judgment on Dotson's fourth and fifth causes of action is appropriate because
4 Dotson has not produced sufficient evidence of retaliation. The Court has considered the
5 arguments made by Dotson in her opposition, and has analyzed the identified protected activities
6 with the various identified adverse employment actions. In each instance, Dotson's claims are
7 insufficient due to a failure to raise a *prima facie* case, a failure to sufficiently show pretext
8 through the submission and explanation of specific and substantial evidence, or a combination of
9 these two phases of the burden shifting analysis.

10 Summary judgment on Dotson's first and eighth causes of action is appropriate. These
11 claims rely predominately on the conduct that Dotson identified as retaliatory. However, as
12 explained, that conduct was not in fact retaliatory. Other conduct identified by Dotson is either
13 unsupported by the evidence or does not show a severe and pervasive hostile work environment.
14 Additionally, summary judgment in favor of Skaggs is particularly appropriate because Dotson
15 has failed to show how Skaggs harassed her as envisioned by California Government Code §
16 12940(j)(3).

17
18 Accordingly, IT IS HEREBY ORDERED that:

- 19 1. Defendants' motion for summary judgment is GRANTED; and
20 2. The Clerk shall enter judgment in favor of Defendants and CLOSE this case.

21
22 IT IS SO ORDERED.

23 Dated: March 14, 2011

24 
25 CHIEF UNITED STATES DISTRICT JUDGE
26
27
28