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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Kimberly Fisher,
Plaintiff,
v.
Glendale Elementary School District,
Defendant.

No. CV-14-02083-PHX-ESW
ORDER

Pending before the Court is Defendant’s fully briefed Motion for Summary Judgment (Docs. 63, 64, 73, 74) and Motion for Sanctions (Docs. 61, 66, 67) in a civil case alleging unlawful employment discrimination which occurred while Plaintiff was working for Glendale Elementary School District. Two causes of action remain in Plaintiff’s First Amended Complaint (Doc. 9): a violation of Title VII of the Civil Rights Act of 1964 (Count Two) and a violation of 42 U.S.C.§ 1981 (Count Six). The parties have consented to proceeding before a Magistrate Judge pursuant to Fed. R. Civ. P. 73 and 28 U.S.C. § 636(c) (Doc. 20). This Court has federal question jurisdiction over Plaintiff’s federal law claims pursuant to 28 U.S.C.§ 1331.

Oral argument has been requested on Defendant’s Motion for Summary Judgment. However, the matter has been fully briefed, and the Court deems oral argument unnecessary to a determination of the issues presented. The request for oral argument is denied.

1 After reviewing the parties' submissions, the Court finds that no genuine issue of
2 material fact exists, and Defendant is entitled to summary judgment on Counts Two and
3 Six of Plaintiff's First Amended Complaint as a matter of law. Defendant's Motion for
4 Summary Judgment (Doc. 63) will be granted for the reasons set forth herein.

5 Because the Court will grant the Defendant's Motion for Summary Judgment, the
6 Motion for Sanctions (Doc. 61) will be denied as moot.

7 **I. PROCEDURAL HISTORY**

8 Plaintiff filed her First Amended Complaint (Doc. 9) on December 12, 2014.
9 Defendant filed a Motion to Dismiss First Amended Complaint (Doc. 17) on January 5,
10 2015. By Order (Doc. 25) filed on May 26, 2015, the Court found that Plaintiff's notice
11 of claim did not fully comply with ARIZ. REV. STAT. § 12-821.01(E) and deemed
12 Plaintiff's state claims barred, granting Defendant's Motion to Dismiss as to all state law
13 claims reflected in Counts One, Three, Four, and Five. The Court denied the Motion to
14 Dismiss as to Counts Two and Six (Doc. 25 at 7). Defendant filed an Answer to the First
15 Amended Complaint on June 12, 2015 (Doc. 26). All issues are joined.

16 Defendant filed its Motion for Summary Judgment (Docs. 63-64) on December 5,
17 2016. Plaintiff responded (Doc. 73) and Defendant replied (Doc. 74). Defendant asserts
18 that Plaintiff has failed to meet her burden of proof on Counts Two and Six. Defendant
19 also filed a Motion for Sanctions (Doc. 61) on November 29, 2016, alleging that Plaintiff
20 has failed to respond to discovery requests. Plaintiff responded (Doc. 66) and Defendant
21 replied (Doc. 67). Plaintiff asserts that she has responded to Defendant's discovery and
22 met her burden of proof as to Counts Two and Six. The matters are deemed submitted
23 for decision.

24 **II. LEGAL STANDARDS**

25 **A. Summary Judgment**

26 Summary judgment is appropriate if the evidence, when reviewed in a light most
27 favorable to the non-moving party, demonstrates "that there is no genuine dispute as to
28 any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ.

1 P. 56(a). Substantive law determines which facts are material in a case and “only
2 disputes over facts that might affect the outcome of the suit under governing law will
3 properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477
4 U.S. 242, 248 (1986). “A fact issue is genuine ‘if the evidence is such that a reasonable
5 jury could return a verdict for the nonmoving party.’” *Villiarimo v. Aloha Island Air,*
6 *Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) (quoting *Anderson*, 477 U.S. at 248). Thus, the
7 nonmoving party must show that the genuine factual issues ““can be resolved only by a
8 finder of fact because they may reasonably be resolved in favor of either party.”” *Cal.*
9 *Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th
10 Cir. 1987) (quoting *Anderson*, 477 U.S. at 250).

11 Because “[c]redibility determinations, the weighing of the evidence, and the
12 drawing of legitimate inferences from the facts are jury functions, not those of a judge . . .
13 [t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be
14 drawn in his favor” at the summary judgment stage. *Anderson*, 477 U.S. at 255 (citing
15 *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)); *Harris v. Itzhaki*, 183 F.3d
16 1043, 1051 (9th Cir. 1999) (“Issues of credibility, including questions of intent, should be
17 left to the jury.”) (citations omitted).

18 When moving for summary judgment, the burden of proof initially rests with the
19 moving party to present the basis for his motion and to identify those portions of the
20 record and affidavits that he believes demonstrate the absence of a genuine issue of
21 material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the movant fails
22 to carry his initial burden of production, the non-movant need not produce anything
23 further. The motion for summary judgment would then fail. However, if the movant
24 meets his initial burden of production, then the burden shifts to the non-moving party to
25 show that a genuine issue of material fact exists and that the movant is not entitled to
26 judgment as a matter of law. *Anderson*, 477 U.S. at 248, 250; *Triton Energy Corp. v.*
27 *Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). The nonmovant need not establish a
28 material issue of fact conclusively in his favor. *First Nat’l Bank of Ariz. v. Cities Serv.*

1 Co., 391 U.S. 253, 288-89 (1968). However, he must “come forward with specific facts
2 showing that there is a genuine issue for trial.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith*
3 *Radio Corp.*, 475 U.S. 574, 587 (1986) (internal citation and emphasis omitted); see Fed.
4 R. Civ. P. 56(c)(1).

5 Conclusory allegations unsupported by factual material are insufficient to defeat a
6 motion for summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989); see
7 also *Soremekun v. Thrifty Payless, Inc.*, 502 F.3d 978, 984 (9th Cir. 2007) (“[c]onclusory,
8 speculative testimony in affidavits and moving papers is insufficient to raise genuine
9 issues of fact and defeat summary judgment”). Nor can such allegations be the basis for
10 a motion for summary judgment.

11 **B. Title VII**

12 Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq., (“Title VII”) provides
13 that “[i]t shall be an unlawful employment practice for an employer (1) to fail or refuse to
14 hire or to discharge any individual, or otherwise discriminate against any individual with
15 respect to his compensation, terms, conditions, or privileges of employment, because of
16 such individual’s race, color, religion, sex, or national origin” 42 U.S.C. § 2000e-
17 2(a)(1). In a claim for discrimination pursuant to Title VII, a plaintiff must “offer
18 evidence that ‘give[s] rise to an inference of unlawful discrimination.’” *Lowe v. City of*
19 *Monrovia*, 775 F. 2d 998, 1005 (9th Cir. 1985), as amended, 784 F. 2d 1407 (1986)
20 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)). A
21 plaintiff may prove discrimination by direct evidence that a defendant’s challenged
22 employment action was either intentionally discriminatory or that it had a discriminatory
23 effect on the plaintiff. See *Jespersen v. Harrah’s Oper. Co., Inc.*, 444 F. 3d 1104, 1108-
24 09 (9th Cir. 2006).

25 In the absence of direct evidence, a plaintiff may establish by circumstantial
26 evidence a prima facie case of discrimination by proving that (i) plaintiff is a member of
27 a protected class, (ii) plaintiff was qualified for her position and performing her job
28 satisfactorily, (iii) plaintiff experienced an adverse employment action, and (iv) similarly

1 situated employees outside plaintiff’s protected class were treated more favorably, or
2 other circumstances surrounding the adverse employment action give rise to an inference
3 of discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973);
4 *Hawn v. Executive Jet Mgmt., Inc.*, 615 F. 3d 1151, 1156 (9th Cir. 2010) (quoting
5 *Petersen v. Hewlett-Packard Co.*, 358 F.3d 599, 603 (9th Cir. 2004)). Plaintiff must
6 show that discrimination was either the sole reason for or a “motivating factor” in the
7 employer’s adverse employment decision. *See Costa v. Desert Palace, Inc.*, 299 F.3d
8 838, 853-54 (9th Cir. 2002) (en banc) (“Put simply, the plaintiff in any Title VII case
9 may establish a violation through a preponderance of evidence (whether direct or
10 circumstantial) that a protected characteristic played ‘a motivating factor.’”), *aff’d*, 539
11 U.S. 90 (2003).

12 A plaintiff bears the burden of proof under Title VII. *Burdine*, 450 U.S. at 253
13 (“The ultimate burden of persuading the trier of fact that the defendant intentionally
14 discriminated against the plaintiff remains at all times with the plaintiff.”). If the plaintiff
15 establishes by a preponderance of the evidence a prima facie case of discrimination, then
16 “the burden of production, but not persuasion, shifts to the defendant to articulate some
17 legitimate, nondiscriminatory reason for the challenged action.” *Chuang v. Univ. of Cal.*
18 *Davis, Bd. of Trs.*, 225 F. 3d 1115, 1123-24 (9th Cir. 2000). Plaintiff must then show that
19 defendant’s stated reason for the adverse employment action was a mere “pretext” for
20 unlawful discrimination or discriminatory in its application. *McDonnell Douglas Corp.*,
21 411 U.S. at 804. “[A] plaintiff can prove pretext in two ways: (1) *indirectly*, by showing
22 that the employer’s proffered explanation is ‘unworthy of credence’ because it is
23 internally inconsistent or otherwise not believable, or (2) *directly*, by showing that
24 unlawful discrimination more likely motivated the employer.” *Chuang*, 225 F.3d at 1127
25 (emphasis added) (citing *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220–22 (9th Cir.
26 1998)); *see Burdine*, 450 U.S. at 256. “All of the evidence [as to pretext] – whether
27 direct or indirect – is to be considered cumulatively.” *Raad v. Fairbanks North Star*
28 *Borough School Dist.*, 323 F.3d 1185, 1194 (9th Cir. 2003). Where the evidence of

1 pretext is circumstantial, rather than direct, the plaintiff must present “specific” and
2 “substantial” facts showing discrimination. *Godwin*, 150 F.3d at 1222.

3 Title VII also prohibits discrimination against an individual “because he has
4 opposed any practice made an unlawful employment practice by this subchapter, or
5 because he has made a charge, testified, assisted, or participated in any manner in an
6 investigation, proceeding, or hearing under this subchapter.” 42 U.S.C. § 2000e-3(a).
7 “Title VII’s antiretaliation provision forbids employer actions that ‘discriminate against’
8 an employee (or job applicant) because he has ‘opposed’ a practice that Title VII forbids
9 or has ‘made a charge, testified, assisted, or participated in’ a Title VII ‘investigation,
10 proceeding, or hearing.’” *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S.
11 53, 59 (2006) (quoting 42 U.S.C. § 2000e-3(a)). Whereas the anti-discrimination
12 provision of Title VII seeks to secure a workplace free from discrimination on the basis
13 of race, religion, sex, or national origin, the anti-retaliation provision of Title VII
14 prohibits employers from “interfering (through retaliation) with an employee’s efforts to
15 secure or advance enforcement of [Title VII’s] basic guarantees.” *Id.* at 63. In a
16 retaliation claim, the plaintiff must prove by a preponderance of evidence that (i) plaintiff
17 engaged in or was engaging in “protected activity”; (ii) the employer subsequently
18 subjected the plaintiff to adverse employment action; and (iii) that “a causal link exists
19 between the two.” *See Dawson v. Entek Int’l*, 630 F. 3d 928, 936 (9th Cir. 2011).

20 **C. 42 U.S.C. § 1981**

21 42 U.S.C. § 1981 (a) provides that “[a]ll persons within the jurisdiction of the
22 United States shall have the same right in every State and Territory to make and enforce
23 contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws
24 and proceedings for the security of persons and property as is enjoyed by white citizens.”
25 In 1991 Congress added a new subsection to § 1981 that defines the term “make and
26 enforce contracts” to also include the “termination of contracts, and the enjoyment of all
27 benefits, privileges, terms, and conditions of the contractual relationship.” 42 U.S.C. §
28 1981(b). “Analysis of an employment discrimination claim under § 1981 follows the

1 same legal principals as those applicable in a Title VII disparate treatment case.”
2 *Fonseca v. Sysco Food Services of Arizona, Inc.*, 374 F. 3d 840, 850 (9th Cir. 2004).
3 Defendant correctly notes that the *McDonnell Douglas* analysis for Title VII claims also
4 applies to § 1981 claims. *See Cornwell v. Electra Cent. Credit Union*, 439 F. 3d 1018,
5 1028 n. 5 (9th Cir. 2006).

6 Further, a local governmental unit may not be held responsible under § 1981 for
7 the acts of its employees under a *respondeat superior* theory of liability. *See Connick v.*
8 *Thompson*, 131 S. Ct. 1350, 1359 (2011); *Monell v. Dep’t of Soc. Servs. of the City of*
9 *N.Y.*, 436 U.S. 658,691 (1978). A plaintiff must go beyond the *respondeat superior*
10 theory of liability and demonstrate that the alleged constitutional deprivation was the
11 product of a policy or custom of the local governmental unit, because District liability
12 must rest on the actions of the School District, and not the actions of the employees of the
13 District. *Id.* Under *Monell*, local governmental liability may be based on any of three
14 theories: (1) an expressly adopted official policy; (2) a longstanding practice or custom;
15 or (3) the decision of a person with final policymaking authority. *Lytle v. Carl*, 382 F.3d
16 978, 982 (9th Cir. 2004).

17 A policy “promulgated, adopted, or ratified by a local governmental entity’s
18 legislative body unquestionably satisfies *Monell*’s policy requirement.” *Thompson v.*
19 *City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989), *overruled on other grounds by*
20 *Bull v. City & Cnty. of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc). Moreover,
21 a policy of inaction may be a governmental policy within the meaning of *Monell*. *See*
22 *Waggy v. Spokane Cnty. Washington*, 594 F.3d 707, 713 (9th Cir. 2010). Even if there is
23 not an explicit policy, a plaintiff may establish liability upon a showing that there is a
24 permanent and well-settled practice by the governmental unit that gave rise to the alleged
25 constitutional violation. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988).
26 Allegations of random acts, or single instances of misconduct, however, are insufficient
27 to establish a custom. *See Navarro v. Block*, 72 F.3d 712, 714 (9th Cir. 1995).

28

1 Finally, for claims arising under 42 U.S.C. § 1981, courts apply either (i) the
2 statute of limitations for personal injury actions of the forum state if the cause of action
3 existed in law prior to the enactment of the Civil Rights Act of 1991; or (ii) the federal
4 four year statute of limitations set forth in 28 U.S.C. § 1658 if the cause of action arose
5 under an Act of Congress enacted after December 1, 1990. *See Jones v. R.R. Donnelley &*
6 *Sons Co.*, 541 U.S. 369, 380-81(2004) (differentiating between claims governed by the
7 federal “catch-all” statute of limitations set forth in 28 U.S.C § 1658 and claims governed
8 by forum state statute of limitations). Plaintiff alleges that Defendant failed to promote
9 her on the basis of her race. Failure to promote claims existed under § 1981 prior to the
10 passage of the Civil Rights Act of 1991. Therefore, the Arizona statute of limitations for
11 this claim is two years. *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 974 (9th Cir.
12 2004) (“borrow[ing] Arizona’s statute of limitations for personal injury claims” for §§
13 1981 and 1983 claims). Hostile workplace, retaliation, and wrongful discharge § 1981
14 claims arise under the Civil Rights Act of 1991 and therefore fall under the federal four
15 year statute of limitations. *Jones*, 541 U.S. at 383. “[U]nder federal law, a claim accrues
16 “when the plaintiff knows or has reason to know of the injury which is the basis of the
17 action.” *Lukovsky v. City & Cnty. of S. F.*, 535 F.3d 1044, 1048 (9th Cir. 2008).

18 III. FACTS

19 Plaintiff has failed to properly address Defendant’s Statement of Facts as required
20 by Fed. R. Civ. P. 56(c). Therefore, the Court considers Defendant’s Statement of Facts
21 undisputed for purposes of the Motion for Summary Judgment. *See Fed. R. Civ. P.*
22 *56(e)(2).*

23 Plaintiff worked for Glendale Elementary School District in the business services
24 department as an administrative assistant from January 7, 2011 until she resigned,
25 terminating her employment effective February 21, 2013. In June and August 2012, prior
26 to the Plaintiff’s filing of an EEOC complaint, co-workers notified Plaintiff’s supervisor
27 and the District’s Human Resources Department of Plaintiff’s unprofessional conduct at
28 work. As a result of complaints received regarding the Plaintiff’s conduct, the District

1 hired a third party attorney to investigate the allegations. After conducting his
2 investigation, which included interviewing the Plaintiff and other employees as well as
3 reviewing emails and District policies governing conduct and ethics, the investigating
4 attorney issued a confidential report to Superintendent Quintana on October 18, 2012,
5 concluding “the weight of the testimony and the available documents indicate that Ms.
6 Fisher acted improperly.” (Doc. 64-2 at 3). Specifically, the investigator found that Ms.
7 Fisher’s conduct had been unprofessional, several of her emails were both unprofessional
8 and hostile, and employees feared that she would act violently in the future. Ms. Fisher
9 was provided with a copy of the investigator’s report as well as a memorandum from her
10 supervisor advising her that a letter of reprimand would issue. Ms. Fisher submitted her
11 rebuttal and Formal Grievance Presentation. A letter of reprimand thereafter issued on
12 December 20, 2012, which Plaintiff received and signed. Plaintiff continued to work at
13 the same location in her same position with her same title for the same rate of pay, hours,
14 and benefits until she resigned effective February 21, 2013.

15 **IV. DISCUSSION**

16 **A. Count Two: Title VII**

17 Pursuant to the Court’s Order filed on May 26, 2015 (Doc. 25 at 6), at issue in this
18 case for Count Two is conduct alleged to have occurred on or after November 15, 2012
19 through February 21, 2013 as set forth in Plaintiff’s second charge of discrimination filed
20 September 11, 2013 with the EEOC. In her second EEOC charge of discrimination,
21 Plaintiff alleged (i) discrimination due to race, national origin, color, and age; (ii)
22 retaliation; (iii) denial of due process; and (iv) constructive discharge, all in violation of
23 Title VII of the Civil Rights Act of 1964 (Doc. 23-2 at 1-2).

24 In Count Two of the First Amended Complaint during the relevant three-month
25 time frame, Plaintiff alleges that she was subjected to “unfounded, baseless disciplinary
26 actions, including a letter of reprimand and recommendations that Plaintiff be
27 transferred” (Doc. 9 at ¶20), coercive conduct, supervisory interference with completion
28 of work tasks, false information, uncompensated overtime duties, an orchestrated and

1 forced resignation which constituted constructive discharge, a denial of due process, and
2 mistreatment all due to her race and age, all in violation of Title VII. (Doc. 9 ¶¶ 20-30).¹

3 Plaintiff asserts in her Response that she was treated differently because she was
4 “neither fully White or Hispanic” and a woman over the age of forty.² (Doc.73 at 8).
5 Plaintiff further states that her work was removed from her after receipt of a written
6 reprimand and she was “left sitting on display with nothing to do.” (*Id.*). However, the
7 record reflects that Plaintiff was assigned job duties within her job description subsequent
8 to the letter of reprimand. Plaintiff contests the basis for the reprimand despite the
9 findings of the independent investigator, though she acknowledges having sent two
10 inappropriate emails that were unprofessional, hostile, and unkind.

11 It is undisputed that Plaintiff was not subjected to uncompensated overtime during
12 the time period at issue. It is also undisputed that no recommendation that Plaintiff be
13 transferred was ever made by the District. The record reflects that a legitimate, work-
14 related basis existed for the reprimand. The District followed appropriate procedures in
15 issuing the reprimand, affording Plaintiff due process. No factual basis has been

16
17 ¹ In addition, Count Two alleges that Defendant discriminated against Plaintiff by
18 “denying her equal terms, conditions and privileges of employment, including but not
19 limited to, denying her an opportunity to be considered for positions as Coordinator for
20 Classified, and with the District’s wellness program.” (*Id.* at ¶ 36). However, all activity
regarding the Coordinator for Classified position and District wellness program arise
from Plaintiff’s first EEOC charge dated October 11, 2012 (Doc. 23-1) which the Court
has ruled cannot form the basis of Plaintiff’s current Title VII claim (Doc. 25 at 6).
Therefore, the Court does not consider it.

21 ² Defendant asserts that because gender was not a basis for the September 11,
22 2013 EEOC complaint, Plaintiff’s gender discrimination claim was not administratively
23 exhausted. Although Plaintiff did not explicitly allege gender discrimination in her
24 September 11, 2013 EEOC complaint, Plaintiff did allege that she was retaliated against
25 after filing her 2012 EEOC complaint, which did explicitly allege gender discrimination.
The Ninth Circuit has instructed that courts are to liberally construe EEOC charges.
26 *B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 1100 (9th Cir. 2002) (EEOC charges are
27 construed “with utmost liberality since they are made by those unschooled in the
28 technicalities of formal pleading”) (citation omitted). If the claim could “reasonably be
expected to grow out of” the claims expressly made in the EEOC charge,
the claim should be considered. *Id.* That is, “Title VII does not require that the plaintiff
separately exhaust additional claims that are ‘so closely related [to the allegations made
in the charge] that agency action would be redundant.’” *Id.* at 1102 (citing *Sosa v.*
Hiraoka, 920 F.2d 1451, 1457 n.2 (9th Cir. 1990)). However, it is unnecessary to resolve
the exhaustion issue with respect to Plaintiff’s gender discrimination claim as Plaintiff
has not presented any direct or circumstantial evidence of gender discrimination.

1 presented that Plaintiff's resignation was forced. The job duties Plaintiff was required to
2 perform were within her job description. Plaintiff's claim of mistreatment due to race
3 and age are not supported by the record. The reprimand did not negatively affect
4 Plaintiff's pay, position, benefits, hours, or working conditions.

5 Plaintiff has not presented any direct evidence of discrimination. Therefore, the
6 Court analyzes the record under *McDonnell Douglas Corp.* for circumstantial evidence of
7 discrimination. Plaintiff alleges that she is a member of a protected class as a "neither
8 fully white or Hispanic" employee. The evidence reflects that Plaintiff was not
9 performing her job satisfactorily due to unprofessional conduct in the form of hostile,
10 unkind emails to co-workers. For this conduct she received a letter of reprimand in
11 accordance with policy and procedures in place within the District. Plaintiff has
12 presented no admissible evidence that similarly situated employees outside of the
13 Plaintiff's protected class were treated more favorably. Nor has Plaintiff presented
14 admissible evidence of circumstances surrounding the reprimand giving rise to an
15 inference of discrimination.

16 Were the Court to find that Plaintiff had met her burden and established a prima
17 facie case of discrimination, which she has not, Defendant clearly has established a
18 legitimate, non-discriminatory reason for issuing its letter of reprimand. Plaintiff has not
19 established that Defendant's legitimate, non-discriminatory reason for the letter of
20 reprimand is a pretext for discrimination. The record is devoid of specific and substantial
21 facts showing discrimination. *See Cornwell*, 439 F.3d at 1029 (circumstantial evidence
22 of pretext "must be 'specific' and 'substantial' to create genuine issue of material fact").

23 Reviewing the record before it, the Court finds no evidence of any additional
24 adverse employment action taken by the District against Plaintiff other than the letter of
25 reprimand. Count Two does not allege, and neither does the record support, any finding
26 of a hostile work environment. Finally, Plaintiff's retaliation allegation mentioned in her
27 Response, but not alleged in Count Two of her Complaint, fails because her EEOC claim
28 of September 11, 2013 was filed well after her letter of reprimand issued on December

1 20, 2012. Complaints from co-workers regarding Plaintiff’s unprofessional and hostile
2 statements and the ensuing third party investigation into those substantiated complaints
3 all occurred prior to the Plaintiff’s filing of both of her EEOC complaints. No causal link
4 has been shown between the letter of reprimand and the filing of Plaintiff’s EEOC
5 complaints.

6 For all of the above reasons, the Court finds that Defendant has met its burden of
7 proof that no genuine issue of material fact exists regarding Count Two, and Defendant is
8 entitled to judgment as a matter of law.

9 **B. Count Six: 42 U.S.C. § 1981**

10 Count Six of Plaintiff’s Amended Complaint alleges that the Defendant violated
11 42 U.S.C. § 1981 by denying Plaintiff “due to her race and/or appearance (that she was
12 not Hispanic enough) the same right to enjoy the benefits, privileges, terms and
13 conditions of her contractual relationship with District as other employees, including, but
14 not limited to, the manner and method of evaluation, promotion, and the ability to work
15 in an environment free of racially motivated harassment” (Doc. 9 at ¶54). Other
16 than the claim based on the Coordinator for Classified position, which the following
17 discussion explains is time-barred, Plaintiff fails to set forth any specific factual
18 allegations in her Response regarding her ability to make and enforce contracts with the
19 Defendant. Plaintiff’s allegations in her Response are broadly directed to her “remaining
20 claims” and reference “adverse actions” that led her to resign as well as a “continued
21 pattern of discrimination” (Doc. 73 at 1). As detailed below, Plaintiff’s § 1981
22 claim fails for several reasons: (i) no viable theory of liability, (ii) the statute of
23 limitations, and (iii) lack of a factual record.

24 **1. No Viable Theory of Liability**

25 Because 42 U.S.C. § 1981 does not impose *respondeat superior* liability,
26 Defendant correctly notes that a school district is only liable under § 1981 if it has a
27 “deliberate policy, custom, or practice that was the ‘moving force’ behind the
28 constitutional violation” alleged by the Plaintiff. *Galen v. Cnty of Los Angeles*, 477 F. 3d

1 652, 667 (9th Cir. 2007). The record reflects that the District has clearly delineated
2 policies and procedures which demonstrate a commitment to insuring a work place free
3 from discrimination. No admissible evidence has been presented from which the Court
4 could conclude that the District has a longstanding practice or custom of discrimination.
5 Single instances of misconduct and allegations of random acts even if deemed to be true,
6 are insufficient to establish custom. *Navarro*, 72 F. 3d at 714.

7 **2. Statute of Limitations**

8 The gravamen of Plaintiff's complaint rests on the fact that she did not receive the
9 Coordinator for Classified position. That the Coordinator for Classified position would
10 have been a promotion for Plaintiff is undisputed. *Sitgraves v. Allied Signal, Inc.*, 953 F.
11 2d 570, 574 (9th Cir. 1992) (stating that "a simple change in position from supervised
12 employee to supervisor is one that alters the contractual relationship sufficiently" to be
13 deemed a promotion). Promotion claims existed prior to the passage of the Civil Rights
14 Act of 1991. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 185 (1989),
15 *superseded by statute as stated in CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 449
16 (2008). Such claims therefore are governed by the most analogous state statute of
17 limitations, which is two years in Arizona. See *Cholla Ready Mix, Inc. v. Civish*, 382 F.
18 3d 969, 974 (9th Cir. 2004). The record reflects that the two year statute of limitations
19 expired in April 2014, prior to the filing of Plaintiff's Complaint. Plaintiff's § 1981
20 claim based upon the Coordinator for Classified position is time-barred.

21 **3. Lack of a Factual Record**

22 Plaintiff does not specifically mention Count Six in her Response. Plaintiff
23 broadly states "[t]he evidence to prove my remaining claims is information in the
24 Recruitment for Classified, adverse actions that resulted in my constructive discharge,
25 and a continued pattern of discrimination corroborated by other EEOC complaints."
26 (Doc.73 at 1). Plaintiff's conclusory allegations unsupported by admissible factual
27 material are insufficient to raise a genuine issue of material fact. *Soremekun*, 502 F.3d at
28 984. Plaintiff makes no effort to direct the Court to which documents she believes are

1 applicable to Count Six in her Response. Nor are Plaintiff's exhibits authenticated or
2 admissible. "Judges are not like pigs, hunting for truffles buried in briefs." *Christian*
3 *Legal Soc. Chapter of Univ. of Calif. v. Wu*, 626 F. 3d 483, 488 (9th Cir. 2010).

4 As to Plaintiff's broad assertions of retaliation, "adverse actions" leading her to
5 resign, and an alleged "pattern of discrimination" as raised in her Response, the legal
6 authorities and analysis set forth in Sections II(B) and IV(A) herein regarding a claim of
7 employment discrimination under Title VII are applicable for the same allegations raised
8 under § 1981 and are incorporated by reference. Plaintiff has failed to raise genuine
9 issues of material fact regarding her claims of employment discrimination under 42
10 U.S.C. § 1981.

11 For the above reasons, the Court finds that Defendant has met its burden of proof
12 that no genuine issue of material fact exists regarding Count Six, and Defendant is
13 entitled to judgment as a matter of law.

14 V. CONCLUSION

15 For the reasons set forth herein,

16 **IT IS ORDERED** granting Defendant's Motion for Summary Judgment (Doc.
17 63). Judgment is entered against Plaintiff and on behalf of Defendant on Counts Two and
18 Six.

19 **IT IS FURTHER ORDERED** denying Defendant's motion to strike contained
20 within its Reply (Doc. 74 at 5).

21 **IT IS FURTHER ORDERED** denying as moot Defendant's Motion for
22 Sanctions (Doc. 61).

23 Dated this 3rd day of May, 2017.

24 

25 _____
26 Eileen S. Willett
27 United States Magistrate Judge
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