

1 WO

2

3

4

5

6

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

7

8

9

Carrie Ferrara Clark,

No. CV 14-02543-TUC-CKJ

10

Plaintiff,

ORDER

11

v.

12

City of Tucson,

13

Defendant.

14

15

Pending before the Court is Defendant City of Tucson’s Motion for Summary Judgment (DMSJ, Doc. 115) and Plaintiff Carrie Ferrara Clark’s Cross-Motion for Summary Judgment (PCMSJ, Doc. 117). Both parties have filed responses (Pl’s Resp. MSJ, Doc. 122; Def’s Resp. CMSJ, Doc. 124) and replies (Pl’s Rep. CMSJ, Doc. 127; Def’s Rep. MSJ, Doc. 126). The Court grants Defendant’s Motion in part and denies Plaintiff’s Cross-Motion.

16

17

18

Case Summary

19

Plaintiff’s complaint relates to her employment at Tucson Fire Department (“TFD”). Plaintiff alleges that after the birth of her first child, TFD failed to provide her appropriate accommodations for expressing breastmilk. Once she filed a complaint about the lack of facilities, this allegedly led to a series of discriminatory and retaliatory actions by TFD. Plaintiff raises six claims in her Third Amended Complaint. They include: (1) sex discrimination in violation of 29 U.S.C. § 207(r) for failing to provide a statutorily compliant space for Plaintiff to express milk; (2) retaliation in violation of 29 U.S.C. §

20

21

22

23

24

25

26

27

28

1 215 for adversely acting against Plaintiff after she reported that TFD did not have
2 appropriate space for lactating mothers; (3) retaliation in violation of Title VII for
3 moving Plaintiff's husband to a less desirable position in response to Plaintiff's wrongful
4 conduct complaint pertaining to a hostile work environment; (4) retaliation in violation of
5 Title VII for arbitrarily moving Plaintiff to inferior assignments because of Plaintiff's
6 wrongful conduct complaints; and (5) sex discrimination in violation of Title VII of the
7 Civil Rights Act of 1964. (Third Amended Complaint ("TAC") Doc. 87 at 20-23.)
8 Defendant's Motion for Summary Judgment challenges the adequacy of all counts, and
9 Plaintiff's Cross-Motion for Summary Judgment counters that all counts should be
10 determined in her favor.

11 ***Timeliness of Defendant's Response to Cross-Motion for Summary Judgment***

12 As a preliminary matter, Plaintiff argues that Defendant's Response to Plaintiff's
13 Cross-Motion for Summary Judgment should be stricken as untimely. (Pl's Rep. CMSJ,
14 Doc. 127 at 1.)

15 Defendant makes similar summary judgment arguments in both its Motion for
16 Summary Judgment (DMSJ, Doc. 115) and its Response to Defendant's Cross Motion for
17 Summary Judgment (Def's Resp. CMSJ, Doc. 124). Since Defendant's arguments will
18 still be considered *via* Defendant's Motion for Summary Judgment, and Plaintiff must
19 still show there is no genuine issue of material fact, striking the filing is of no benefit to
20 the Plaintiff. *See Martinez v. Stanford*, 323 F.3d 1178, 1182-83 (9th Cir. 2003) (despite
21 party's failure to timely file a response to motion for summary judgment, the moving
22 party still has an "affirmative duty under [Fed.R.Civ.P.] 56 to demonstrate its entitlement
23 to judgment as a matter of law").

24 Furthermore, the Court finds Defendant's filing useful in summarizing Plaintiff's
25 own allegations. Plaintiff's claims are vague; they often fail to specifically allege which
26 actions apply to which counts. Plaintiff lists instances which she believes support her
27 claims, but at times does not clearly explain who she believes is the actor, what is the
28

1 adverse action, how there is causation, or why an action should be considered pretext.¹
2 And while it appears that Plaintiff would like every single factual allegation to apply to
3 each count, the allegations must be assessed through the lens of the statutory
4 framework—not all facts plausibly apply in the same manner to each count. Further, the
5 Court notes the response is eight hours late and there is no prejudice to Plaintiff. The
6 Court will consider Defendants’ response.

7 ***Standard of Review***

8 A court must grant summary judgment “if the movant shows that there is no
9 genuine dispute as to any material fact and the movant is entitled to judgment as a matter
10 of law.” Fed.R.Civ.P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23
11 (1986). A genuine dispute exists “if the evidence is such that a reasonable jury could
12 return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
13 248 (1986).

14 The movant bears the initial responsibility of presenting the basis for its motion
15 and identifying those portions of the record, together with affidavits, if any, that it
16 believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at
17 323. If the moving party carries “the burden of proof on an issue at trial, the movant must
18 affirmatively demonstrate that no reasonable trier of fact could find other than for the
19 moving party.” *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).
20 But, if the burden rests on the non-moving party, “the moving party need only prove that
21 there is an absence of evidence to support the non-moving party’s case.” *In re Oracle*

22 ¹ This imbroglio is not clarified in Plaintiff’s responses to non-uniform interrogatories.
23 For instance, when asked to state the actions and actors for Count Four, Plaintiff simply refers
24 Defendant back to the allegations in Counts One through Three. (Doc. 166-6, Exh. 69 at 138.)
25 The lack of specificity makes it difficult for Defendant to address the claims, and difficult for the
26 Court to separate wheat from chaff. *See e.g., Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996)
27 (the court need not “scour the record in search of a genuine issue of triable fact. We rely on the
28 nonmoving party to identify with reasonable particularity the evidence that precludes summary
judgment.”); *see also Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 405 (6th Cir.
1992) (“[T]he designated portions of the record must be presented with enough specificity that
the district court can readily identify the facts upon which the nonmoving party relies. . . [The
nonmoving party’s] burden to respond is really an opportunity to assist the court in understanding
the facts. But if the nonmoving party fails to discharge that burden - for example, by remaining
silent - its opportunity is waived and its case wagered.”) (internal citations omitted).

1 *Corp. Secs. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010).

2 If the movant fails to carry its initial burden of production, the nonmovant need
3 not produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d
4 1099, 1102-03 (9th Cir. 2000). But, if the movant meets its initial responsibility, the
5 burden shifts to the nonmovant to demonstrate the existence of a factual dispute and that
6 the fact in contention is material, i.e., a fact that might affect the outcome of the suit
7 under the governing law, and that the dispute is genuine. *Anderson*, 477 U.S. at 248, 250;
8 *see Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). The
9 nonmovant need not establish a material issue of fact conclusively in its favor, *First Nat'l*
10 *Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968); however, it must “come
11 forward with specific facts showing that there is a genuine issue for trial.” Fed.R.Civ.P.
12 56(c)(1); *see Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587
13 (1986).

14 At summary judgment, the judge’s function is not to weigh the evidence and
15 determine the truth but to determine whether there is a genuine issue for trial. *Anderson*,
16 477 U.S. at 249. In its analysis, the court must believe the nonmovant’s evidence and
17 draw all inferences in the nonmovant’s favor. *Id.* at 255. However, “[w]here the parties
18 file cross-motions for summary judgment, the court must consider each party’s evidence,
19 regardless under which motion the evidence is offered.” *Las Vegas Sands, LLC v. Nehme*,
20 632 F.3d 526, 532 (9th Cir. 2011). In this instance, the District Court “review[s] each
21 motion . . . separately, giving the nonmoving party for each motion the benefit of all
22 reasonable inferences.” *Brunozzi v. Cable Commc’ns, Inc.*, 851 F.3d 990, 995 (9th Cir.
23 2017), *cert. denied*, 138 S. Ct. 167 (2017). In addition, the court may consider Plaintiff’s
24 evidence from its cross-summary judgment motion to determine defendant’s summary
25 judgment motion, and vice versa. *See Fair Hous. Council v. Riverside Two*, 249 F.3d
26 1132, 1136-37 (9th Cir. 2001).

27 The court need consider only the cited materials, but it may consider any other
28 materials in the record. Fed.R.Civ.P. 56(c)(3). If, after considering the arguments and
materials in the record, it appears that jurors of reason could find by a preponderance of

1 the evidence that the defendant is liable, then the court should not grant summary
2 judgment. *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1027-28 (9th Cir.
3 2006). If, however, jurors of reason could not determine that plaintiff is entitled to a
4 judgment in her favor, then summary judgment is appropriate. *Id.*

5 ***Count One: Sex Discrimination Under Fair Labor Standards Act, 29 U.S.C. § 207(r)***

6 Plaintiff's first claim alleges that TFD did not provide appropriate
7 accommodations for her to express milk for her child. Under § 207(r) of the Fair Labor
8 Standards Act ("FLSA"), as amended by the Patient Protection and Affordable Care Act,
9 employers must provide a suitable space and time for nursing for a period of one year
10 subsequent to the birth of a child. 29 U.S.C. § 207(r). The space must be "a place, other
11 than a bathroom, that is shielded from view and free from intrusion from coworkers and
12 the public." 29 U.S.C. § 207(r)(1). A plaintiff's damages are limited to "lost wages
13 attributable to the § 207(r) violation." *Lico v. TD Bank*, No. CV 14-4729-JFB-AKT, 2015
14 WL 3467159 at *3 (E.D.N.Y. June 1, 2015); *Mayer v. Prof'l Ambulance, LLC*, 211
15 F.Supp.3d 408, 413 (D.R.I. 2016); *see also Hicks v. City of Tuscaloosa*, No. CV 13-
16 02063-TMP, 2015 WL 6123209 at *28-29 (N.D. Ala. Oct. 19, 2015); *Frederick v. New*
17 *Hampshire*, No. CV 14-403-SM, 2015 WL 5772573 at *7 (D.N.H. Sept. 30, 2015).

18 • ***Suitable Space***

19 Plaintiff claims that her station assignments upon returning from maternity leave
20 (between October 27, 2013 and March 23, 2013) did not comport with the lactation
21 requirements under the FLSA. (TAC, Doc. 87 at 19.) Plaintiff contends that the following
22 facts are admissions that TFD did not comply with the statute, so there is no disputed
23 issue of fact that Defendant violated § 207(r), and the Court should grant summary
24 judgment in Plaintiff's favor. (PCMSJ, Doc. 117 at 3; Pl's Resp. MSJ, Doc. 122 at 5.)

25 First, Plaintiff notes that TFD freely admits it did not have a policy for expressing
26 milk in place prior to July 19, 2013, nor had it implemented a procedure for employees to
27 submit requests for space accommodations for expressing milk. (*Id.*) Furthermore, on
28

1 March 22, 2013, the Equal Opportunity Programs Division (“EOPD”)² determined that
2 only nine of twenty-one TFD fire stations were compliant with FLSA. (PCMSJ, Doc. 117
3 at 3.) The evaluation, entitled “American Fair Labor Standards Act Section 7
4 Compliance,” stated that Stations 3, 9, 10, 12, and 18-22 did not meet FLSA standards.
5 (Exh. Q, Doc. 118-1 at 129.) The document, however, notes that all of these stations
6 possessed a dorm, study, or private room that *would be* in compliance *if there was a lock*
7 *on the door. (Id.)*

8 As further proof of noncompliance, Plaintiff submits a series of emails between
9 TFD staff documenting the need for—and subsequent installation of—a lock at Station 6
10 (Exhs. N-O, Doc. 118-1 at 121-123), work orders for the other stations listed as
11 noncompliant in the EOPD evaluation, and a memorandum from Fire Chief Jim Critchley
12 (Exh. VVVV, Doc. 123-1 at 106-117). All of these specifically concede that the stations
13 are not compliant with the nursing mothers’ space requirement. (*Id.* at 106-119.) Because
14 Defendant never challenged the EOPD determination prior to the filing of the instant
15 action, and admits noncompliance in its own correspondence, Plaintiff submits summary
16 judgment is appropriate. (Pl’s Rep. CMSJ, Doc. 127 at 4.)

17 Plaintiff also states that after her return from maternity leave, she was assigned to
18 “swing shift.” This meant she was not assigned to a consistent station. (Pl’s Resp. MSJ,
19 Doc. 122 at 2.) While on swing shift, she was assigned to several noncompliant stations.
20 (*Id.*) This situation forced her to use sick leave in order to avoid working at stations
21 where she would be unable to express milk in private. (*Id.*)

22 Defendant’s summary judgment motion counters that Plaintiff’s assignment to
23 swing shift did not violate FLSA because §207(r) does not require preferential
24 assignment to stations (i.e. an assignment to one station), but simply an appropriate
25 lactating area at the assigned station. (DMSJ, Doc. 115 at 6.) Plaintiff admits she was
26 assigned to swing shift prior to her nursing needs. (Pl’s Resp. MSJ, Doc. 122 at 4.) She

27
28 ² As noted in Defendant’s summary judgment motion, the Office of Equal Opportunity
Programs changed its name to the Equal Opportunity Programs Division during the pendency of
this litigation. For consistency, the Court uses the acronym “EOPD” throughout this Order.

1 also concedes she is not afforded the right to preferential station assignments. (*Id.* at 4-5.)
2 Plaintiff further professes that “being on swing shift would not have been an issue for
3 Plaintiff had all of TFD’s stations had space for mothers expressing breastmilk that
4 complied with federal law.” (*Id.* at 5.) Therefore, the contested issue here is not whether
5 her assignment to swing shift was a violation, but rather whether the stations to which
6 Plaintiff was assigned were adequate under the FLSA guidelines.

7 Defendant claims it only assigned Plaintiff to stations that complied with the
8 requirements under the FLSA. (DMSJ, Doc. 115 at 6.) Defendant theorizes that the
9 EOPD findings are not dispositive of Defendant’s legal compliance with FLSA. (*Id.* at 2-
10 3.) Furthermore, the EOPD’s findings do not contradict Defendant’s claims of legal
11 compliance because the evaluation simply determined that the stations were
12 noncompliant because the designated rooms did not have door locks. (*Id.*) Defendant
13 agrees there were no locks, but contends that the spaces provided were “free from
14 intrusion” and “shielded from view.” (*Id.* at 2.) Therefore the stations were compliant
15 with the statute despite the lack of a door lock. (*Id.* at 2.)

16 Plaintiff argues that Defendant needed to have a lock for compliance because the
17 Department of Labor’s (“DoL”) Reasonable Break Time for Nursing Mothers states “the
18 employer must ensure the employee’s privacy through means such as signs that designate
19 when the space is in use, *or* a lock on the door.” 75 Fed. Reg. 80073-01 (emphasis
20 added). (Pl’s Rep. CMSJ, Doc 127 at 5.)

21 The Court finds that whether the stations Plaintiff was assigned to—both those she
22 actually worked at and those for which she was assigned but used sick leave to avoid—
23 violated the FLSA raises a genuine issue of material fact. To be compliant, the stations
24 needed to provide a space “shielded from view and free from intrusion from coworkers
25 and the public.” 29 U.S.C. § 207(r)(1). The EOPD evaluation suggests that every
26 noncompliant station did have a private space, which may or may not qualify as free from
27 intrusion. (Exh. Q, Doc. 118-1, at 129.)

28 The DoL’s Reasonable Break Time for Nursing Mothers indicates a variety of
ways that an employer may provide appropriate space, and not all of them require a lock.

1 Some acceptable spaces provide neither a space designated solely for expressing milk,
2 nor an isolated space. For example, the document states:

- 3 • “The employer is not obligated to maintain a permanent, dedicated space for
4 nursing mothers.”
- 5 • “[A]n anteroom or lounge area connected to the bathroom may be sufficient to
6 meet the requirements of the law. For example, if there is a wall with a door
7 separating the lounge area from the bathroom, and if there is a space for nursing
8 mothers within the lounge that is ‘shielded from view’ and ‘free from intrusion,’
9 this would likely meet the requirements of the law.”
- 10 • “Locker rooms that function as changing rooms (i.e., for changing in and out of
11 uniforms) may also be adequate as long as there is a separate space designated
12 within the room for expressing milk that is shielded from view and free from
13 intrusion.”
- 14 • “[E]mployers may provide a large room with privacy screens so that the room may
15 be used simultaneously by several nursing employees.”

16 75 FR 80073-01.

17 Plaintiff alternately contends that some stations were not appropriate because the
18 room may have been exposed to dangerous germs. (Pl’s Rep. CMSJ, Doc. 127 at 5.) The
19 DoL’s concerns with sanitation do not afford Plaintiff the right to a permanent space that
20 she has previously sanitized, or an unshared private space. 75 FR 80073-01. Plaintiff’s
21 concerns about germs may be a factor in compliance. Again, the factual ambiguity of
22 what is compliant prevents the Court from granting summary judgment to either party.

23 Finally, whether a station could have been made compliant simply from a
24 perfunctory hand-written sign on the door or paper taped over a window is unclear.

25 Therefore, giving both non-moving parties all reasonable inferences, the
26 compliance of each assigned and potentially-assigned station is a genuine issue of
27 material fact. Summary judgment on this issue is not appropriate.

- 28 • ***Lost Wages: Minimum Wage***

Defendant’s Motion for Summary Judgment argues that Plaintiff’s § 207(r) claim
fails as a matter of law because she cannot demonstrate that Defendant’s failure to
provide an appropriate space for expression of milk resulted in lost wages. (DMSJ, Doc.
115 at 5.) Plaintiff contends (1) she was assigned or had reason to believe she would be

1 assigned to noncompliant stations, (2) she was forced to use sick/vacation time to avoid
2 having to express milk at locations without appropriate nursing rooms, (3) but for being
3 forced to use the sick/vacation time, she could have sold her time back to TFD for
4 income. Therefore, Defendant's noncompliance resulted in an actual financial loss. (Pl's
5 Resp. MSJ, Doc. 122 at 3-4.) In support, Plaintiff cites to the Tucson Firefighters
6 Association's Labor Agreement, which states that earned sick leave may accrue to an
7 employee's benefit, and may be sold back at the employee's base rate of pay. (Exh.
8 OOO, Doc. 123-1, at 119, ¶ 19.)

9 A violation of Section 207(r) alone does not necessarily afford a private right of
10 action. Indeed, the DoL has stated:

11 Section 207(r) of the FLSA does not specify any penalties if an employer is
12 found to have violated the break time for nursing mothers requirement. In
13 most instances, an employee may only bring an action for unpaid minimum
14 wages or unpaid overtime compensation and an additional equal amount in
15 liquidated damages. 29 U.S.C. 216(b). Because employers are not required
16 to compensate employees for break time to express breast milk, in most
17 circumstances there will not be any unpaid minimum wage or overtime
18 compensation associated with the failure to provide such breaks.

19 75 FR 80073-01.

20 Here Plaintiff wishes to recover for hours scheduled but not worked because she
21 did not have a compliant area to express milk. In the limited case law addressing this
22 specific issue, other district courts have determined that a plaintiff may recover lost
23 wages for missed work because there was no statutorily acceptable area for expressing
24 milk. *See e.g., Lico*, 2015 WL 3467159, at *4 (Plaintiff who traveled home during work
25 hours to express milk which resulted in loss in wages for failing to comply with 207(r)
26 stated a viable claim under 207(r)); *see Hicks*, 2015 WL 6123209, at *28 (an employee
27 who missed work time to travel to an appropriate place to express milk states a plausible
28 claim for lost wages); *see also Tolene v. T-Mobile, USA, Inc.*, 178 F. Supp. 3d 674, 680
(N.D. Ill. 2016) (same).

As explained above, Plaintiff is not required to be compensated for time used to
express milk. In this instance, however, Defendant concedes it compensates nursing

1 mothers during break times. (Def's Resp. CMSJ, Doc. 124 at 3.) Therefore, any break
2 time used to express milk would have been compensated, and any vacation/sick time used
3 would also have constituted work time spent, and Plaintiff has stated a viable claim
4 alleging she is entitled to compensation for unpaid minimum wages.

5 On the other hand, Plaintiff never alleges that anyone told her she must use sick
6 time for expressing milk, and concedes that on more than one occasion she prematurely
7 used sick leave before even being assigned to a station. (Pl's Resp. MSJ, Doc. 122 at 3.)
8 Furthermore, Plaintiff's own filings show that she was willing and even desired to work
9 at some noncompliant stations, such as Stations 12 and 20. (Exh. K, Doc. 118-1 at 112.)
10 Yet, Plaintiff has alleged at least eleven instances where she was actually assigned to
11 stations that were deemed noncompliant by the EOPD, and used her sick or vacation
12 leave for at least eight of these assignments to avoid a noncompliant station. (PCMSJ,
13 Doc. 117 at 4; Exh. 69, Doc. 116-6 at 132-33.)

14 Plaintiff's sick leave and vacation time are financial assets, which she allegedly
15 spent to avoid being forced to express milk at noncompliant stations. Furthermore,
16 Plaintiff was compensated for her time expressing milk at work, so the assigned breaks
17 during a shift in which she was forced to expend her own sick/vacation time raises a
18 genuine issue as to unpaid minimum wage. Given both parties' factual allegations, a
19 reasonable juror could find for either party. Summary judgment on this issue is denied.

20 • ***Lost Wages: Overtime***

21 Plaintiff also alleges that she was forced to work additional hours that could have
22 accrued overtime because she used vacation/sick time to avoid noncompliant stations.
23 (Pl's Resp. MSJ, Doc. 122 at 4.) Like the other alleged lost wages, Defendant argues that
24 because the TFD stations were compliant, she did not lose overtime because of a
25 violation of § 207(r). (Def's Resp. CMSJ, Doc. 124 at 4.)

26 This appears to be a barren allegation. Unlike the loss of pay for vacation and sick
27 leave, Plaintiff never cites to any evidence demonstrating which hours worked would
28

1 have otherwise been considered overtime.³ See *F.T.C. v. Publ'g Clearing House, Inc.*,
2 104 F.3d 1168, 1171 (9th Cir. 1997) (no genuine issue of material fact where claim relies
3 only on plaintiff's conclusory, self-serving statement absent of any details or evidence in
4 support). Plaintiff fails to allege any specific shifts she would have been able to work for
5 overtime.

6 Accordingly, Plaintiff has not presented any evidence that she worked additional
7 hours which would otherwise have been construed as overtime, and fails to raise a
8 genuine issue of material fact. The Court grants summary judgment for the Defendant as
9 to the matter of overtime under § 207(r).

10 ***Count Two: Retaliation Under Fair Labor Standards Act, 29 U.S.C. § 215(a)(3)***

11 In Count Two, Plaintiff contends that Defendant retaliated against her in violation
12 of the FLSA's anti-retaliation provision for "her repeated and continued reports of her
13 belief that TFD violated federal law by not providing her with an appropriate lactation
14 room on a consistent basis." (TAC, Doc. 87 at 20.)⁴ Plaintiff asserts that TFD retaliated
15 by:

16 disciplining her and relegating her to work only at Station 6 . . . [and by]
17 maintain[ing] a pattern and practice of retaliation[,] discrimination[,] and,
18 by the use of facially neutral employment practices and on other occasions,
19 by the use of excessively subjective standards for selection of those to be
promoted, demoted, transferred, discharged[,] or disciplined, caused
adverse and discriminatory impact upon Plaintiff.

20 *Id.* On summary judgment, Plaintiff alleges TFD's adverse actions included: (1) being
21 placed at Station 6, and (2) being prevented from working overtime hours at Station 6.
22 (PCMSJ, Doc. 117 at 20.)

23 _____
24 ³ The Court does not address Plaintiff's assertion that she was prevented from working
25 overtime at Station 6 under Count One because Plaintiff's assigned time at Station 6 occurred on
26 March 21, 2013. (Exh. R, Doc. 118-1 at 131.) Once stationed at 6, Plaintiff was provided a
locked door to express milk, therefore, 29 U.S.C. § 207(r) is not applicable. That issue is
appropriately addressed in Plaintiff's retaliation claim under FLSA.

27 ⁴ Plaintiff raises two counts of retaliation resulting in adverse actions against her; one for
28 retaliation due to her complaint about lactation facilities, and one for retaliation due to her
complaints about wrongful conduct and hostile work environment. The Court addresses the facts
that relate to her complaints about lactation space here and events that appear to relate to her
wrongful conduct complaint in the corresponding count.

1 Title 29 U.S.C. § 215(a)(3) prohibits an employer from discriminating against an
2 employee because she has “filed any complaint or instituted or caused to be instituted any
3 proceeding” under the Fair Labor Standards Act. “To state a prima facie case of
4 retaliation, a plaintiff must show that: (1) she was engaging in a protected activity, (2) the
5 employer subjected her to an adverse employment action, and (3) there was a causal link
6 between the protected and the employer’s action.” *Xin Liu v. Amway Corp.*, 347 F.3d
7 1125, 1144 (9th Cir. 2003); *EEOC v. Luce, Forward, Hamilton & Scripps*, 303 F.3d 994,
8 1005 (9th Cir. 2002)). When an adverse action is taken for both protected and non-
9 protected reasons, plaintiff must demonstrate the protected activity was a “substantial
10 factor” for the adverse action. *Knickerbocker v. City of Stockton*, 81 F.3d 907, 911 (9th
11 Cir. 1996). Protected activities are a ‘substantial factor’ where the adverse actions would
12 not have been taken ‘but for’ the protected activities.” *Contreras v. Corinthian Vigor Ins.*
13 *Brokerage, Inc.*, 103 F. Supp. 2d 1180, 1184 (N.D. Cal. 2000) (quoting *Knickerbocker*,
14 81 F.3d 907 at 911).

15 A plaintiff may show retaliation through direct or indirect evidence. To establish a
16 prima facie case of retaliation through direct evidence, plaintiff must present “evidence
17 which, if believed, proves the fact [of discriminatory animus] without inference or
18 presumption.” *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998). Direct
19 evidence need only be minimal to show pretext, and create a genuine issue of material
20 fact on the matter. *Bergene v. Salt River Project Agr. Imp. & Power Dist.*, 272 F.3d 1136,
21 1142 (9th Cir. 2001) (citing *Godwin*, 150 F.3d at 1221); *Blue v. Widnall*, 162 F.3d 541,
22 546 (9th Cir. 1998) (“With direct evidence, a triable issue as to the actual motivation of
23 the employer is created even if the evidence is not substantial.”).

24 When a plaintiff has provided direct evidence of a discriminatory motive for an
25 employment action, the defendant must show by a preponderance of the evidence that the
26 same conclusion would have been reached even if discrimination had not played a factor
27 in the decision. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 228 (1989).

28 If presenting indirect evidence, the burden shifting analysis established by the
United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792

1 (1973) is used to evaluate a retaliation claim. After establishing a prima facie case of
2 retaliation, “the burden shifts to the defendant to articulate a legitimate nondiscriminatory
3 reason for its decision. If the defendant articulates such a reason, the plaintiff bears the
4 ultimate burden of demonstrating that the reason was merely a pretext for a
5 discriminatory motive.” *Walker v. City of Lakewood*, 272 F.3d 1114, 1127 (9th Cir. 2001)
6 (citations omitted); see *Nilsson v. City of Mesa*, 503 F.3d 947, 953-54 (9th Cir. 2007).

7 • ***Placement at Station 6***

8 Plaintiff’s Third Amended Complaint alleges that in January 2013, she conferred
9 with the EOPD about filing a discrimination complaint, but chose at that time not to file
10 and to take a “wait and see” approach. (TAC, Doc. 87 at 3, ¶¶ 36-37.) Plaintiff finally
11 filed discrimination charges against TFD on July 31, 2013. (*Id.* at 8, ¶ 66.)

12 Subsequent to the conference with EOPD, Plaintiff contends she was assigned to
13 Station 6. (PCMSJ, Doc. 117 at 21.) Plaintiff attempted to obtain an assignment to Station
14 12, but after speaking to BC McDonough about the trade, and formally requesting it, the
15 position was put up to bid and given to someone else. (Exh. A1, Doc. 118-1 at 8, ¶ 22-
16 24.) Plaintiff states that when she asked why she was not placed at Station 12 Assistant
17 Chief (“AC”) Fischback stated, “well, that’s what happens when you file a complaint
18 with EEO.” (PCMSJ, Doc. 117 at 21.) Plaintiff contends this move treated her disparately
19 than others similarly-situated because another lactating mother was placed at Station 12.
20 (*Id.* at 15.) Plaintiff argues this is direct evidence of discriminatory animus underlying the
21 move.

22 Defendant counters that Plaintiff’s EOPD conference in January 2018 was never
23 about legally compliant stations, therefore AC Fischback’s response was not reflective of
24 retaliation due to a protected act. Rather, Plaintiff was already assigned to Station 6 when
25 she went to talk to the EOPD to complain that she was not assigned to Station 12, which
26 was closer to her mother so that her mother could pick up breastmilk from the station.
27 (Def’s Resp. CMSJ, Doc. 124 at 12-13; Exh. J, Doc. 118-1 at 106.)

28 Furthermore, Defendant claims that AC Fischback’s comment occurred after her
assignment to Station 6, did not result in the assignment, and cannot show causation.

1 Defendant explains that AC Fischback was giving an honest response to Plaintiff's
2 inquiry; TFD could not place her at Station 12 because there was no lock and the EOPD
3 required one. (DMSJ, Doc. 115 at 14.) Moreover, Defendant alleges that TFD did not
4 receive her request until after the assignment was already put up to bid. (Def's Rep. MSJ,
5 Doc. 126 at 7.)

6 However, Defendant also notes that Plaintiff was assigned to Station 6 because
7 DC Rodriguez and AC Fischback were worried about Plaintiff's ability to respond in the
8 event of an emergency because of her frequent expression of milk. (Def's Resp. CMSJ,
9 Doc. 124, 12-13.) Defendant contends that among other factors, it determined Station 6
10 was appropriate because she would no longer be on swing shift (which she desired), if an
11 emergency arose another medic was available to cover if she was expressing milk, and
12 the move to a slower station allowed Plaintiff the flexibility to express milk more. (*Id.* at
13 12-13.) Therefore, it is arguable that the move was actually in consideration of Plaintiff's
14 desires, not in spite of her complaint about lactation facilities.

15 Plaintiff has met at her initial burden of proof by showing direct evidence of
16 discrimination; Fischback's statement alone sufficiently demonstrates that her move to a
17 less desirable station was more likely than not caused by her EOPD meeting. Even if the
18 comment was made after her assignment to Station 6, it still specifically states that her
19 EOPD involvement was the reason for the move. She has also demonstrated that her
20 status as a lactating mother was a substantial factor in TFD's decision to assign her to
21 Station 12. Further, Plaintiff viably claims that the move was pretext, TFD could have
22 installed a lock just as easily at Station 12 as Station 6. There is a genuine issue whether
23 Plaintiff was treated differently than other lactating mothers, since at least one other
24 mother was placed at Station 12.

25 Defendant has not shown that but for her status as a lactating mother, TFD still
26 would have moved her to Station 6 because the primary reasons she was moved were in
27 consideration of this status. But, Defendant has raised a genuine issue whether Plaintiff's
28 EOPD meeting constituted a protected action or simply an attempt to get an assignment
that was more convenient. Since the EOPD consult related to lactation facilities, a

1 reasonable juror could find either. And while AC Fischback’s statement is discriminatory
2 on its face, Defendant’s explanation raises ambiguity about whether the move was
3 because of discriminatory animus. Therefore, the Court may not make the factual
4 determinations as to whether these actions were based on retaliation, or merely in
5 consideration of other needs of Plaintiff. Summary judgment is denied.

6 • ***Overtime and Trades at Station 6***

7 Plaintiff states her assignment to Station 6 caused her to be unable to work
8 overtime hours and make trades. (PCMSJ, Doc. 117 at 21.) She claims she asked AC
9 Fischback about working overtime or trade, and AC Fischback said he had not thought it
10 through and would get back to her about it. (PSoF, Doc. 118 at 11, ¶ 63.) She claims that
11 because she was not contacted thereafter she was prevented from working overtime and
12 trading shifts. (Exh. 10, Doc. 116-2 at 51-52.)

13 Defendant presents Plaintiff’s own deposition as evidence that Plaintiff requested
14 overtime only once, which was granted, and was never denied overtime. (DCSoF, Doc.
15 125 at 10, ¶ 63-64; Exh. 10, Doc. 116-2 at 47-48.) Further, the only other time she was
16 denied a trade was because she wanted to trade with her husband. (*Id.*) In this instance,
17 the request was denied because per TFD policy, trades may only be made with employees
18 with equal qualifications.⁵ (Exh. 4, Doc. 166-1 at 71.) Therefore, Defendant asserts that
19 Plaintiff’s placement never prevented her from trading, rather her rank prevented it, and
20 this would be no different for any other employee.

21 Even granting all inferences in Plaintiff’s favor, the Court finds that a reasonable
22 juror could not find that failing to follow through with a general inquiry was retaliation,
23 or that it prevented Plaintiff from asking for specific overtime or trade. Nor has she been
24 denied a request to trade with someone of her same status, and therefore Plaintiff does not
25 demonstrate either adverse action or pretext. Taking Plaintiff’s allegations at face value,
26 Plaintiff has never been denied or prevented from obtaining overtime, nor was she

27 ⁵ Plaintiff objects to the Defendant’s terms “equal qualifications” or “equal ranks,” but
28 does not contradict Defendant’s notion that trading with employees of equal level is TFD’s
policy. Whether designated a rank or qualification, Plaintiff has presented no evidence that Mr.
and Mrs. Clark were equals, or that the policy should not apply to her.

1 discouraged in any way from asking for clarification or reminding her supervisor of her
2 inquiry. *See Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000) (whether an action is
3 adverse focuses on the deterrent effect of the action). Plaintiff may not make a
4 hypothetical claim. Summary judgment for Defendant is granted as to the issue of
5 overtime and trades under the FLSA.

6 ***Count Four: Title VII Retaliation Against Captain Clark***

7 Count Four of Plaintiff's Third Amended Complaint alleges that TFD retaliated
8 against her for her Title VII lawsuit by moving her husband, Capt. Gordon Clark, from
9 Fire Prevention to Operations, and later failing him from a probationary position as
10 Battalion Chief. (TAC, Doc. 87 at 21.) The count alleges that the move was in retaliation
11 for her harassment complaint against Capt. Jeff Langejans, but was instituted under the
12 guise of nepotism. (*Id.* at 22, ¶¶ 202.) This was an adverse action because it forced Capt.
13 Clark to work in a less desirable position for less pay. (*Id.* at 21, ¶203.)

14 An employer is prohibited "from retaliating against an applicant for employment
15 because the applicant has opposed any unlawful employment practice, or has made a
16 charge, testified, assisted, or participated in an employment discrimination investigation
17 or proceeding." 42 U.S.C. § 2000e-3(a); *Lam v. University of Hawaii*, 40 F.3d 1551,
18 1558-59 (9th Cir. 1994). At summary judgment, the Court considers whether the Title
19 VII retaliation was "materially adverse," meaning the action might "dissuade a
20 reasonable worker from making or supporting a charge of discrimination." *Burlington N.*
21 *& Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006).

22 A transfer occurring after a Title VII suit "is immaterial in light of the fact that
23 petitioner concededly was contemplating the transfer before it learned of the suit.
24 Employers need not suspend previously planned transfers upon discovering that a Title
25 VII suit had been filed, and their proceeding along lines previously contemplated, though
26 not yet definitively determined, is no evidence whatever of causality." *Clark Cty. Sch.*
27 *Dist. v. Breeden*, 532 U.S. 268, 272 (2001).

28 Plaintiff contends that after filing her complaint against TFD, an article was
published in the *Arizona Daily Star* about the lawsuit. (PSoF, Doc. 118 at 17, ¶104.) TFD

1 Capt. Langejans read the article and made several discriminatory comments. (TAC, Doc.
2 87 at 10-11, ¶¶ 91-110.) Among them, he stated TFD should have anticipated problems
3 once TFD started hiring women. (Exh. TT, Doc.118-2 at 77; TAC Doc. 118 at 17 ¶ 106.)
4 In December 2014, after attending a strategic planning meeting with Chief Laura Baker
5 (one of Capt. Clark's supervisors in Fire Prevention), Capt. Langejans stated that he was
6 trying to get Capt. Clark removed from Fire Prevention before Plaintiff was moved into
7 the division. (Exh. CCC, Doc. 118-2 at 146, ¶ 672-75.) Allegedly, Capt. Langejans also
8 gave Chief Critchley an ultimatum, either Capt. Clark left or he would. (Exh. TT, Doc.
9 118-2 at 71.)

10 A formal investigation of Capt. Langejans ensued, and on January 26, 2015, Capt.
11 Langejans admitted to making several of the derogatory and discriminatory comments.
12 (TAC, Doc. 87 at 13, ¶ 118; PSoF, Doc. 118 at 19, ¶ 116.)

13 On February 5, 2015, after the investigation, AC Laura Baker issued a
14 memorandum stating that Capt. Langejans' actions did not constitute a hostile work
15 environment. (Exh. TT, Doc. 118-2 at 68.) Capt. Langejans was issued a written
16 reprimand for the action. (PSoF, Doc. 118 at 20 ¶ 120.) AC Baker's memo noted that no
17 one would be moved from Fire Prevention, however, Capt. Clark *could* be moved
18 immediately if he desired, in accordance with a succession plan that was instituted prior
19 to the incidents with Capt. Langejans. (Exh. TT, Doc. 118-2 at 80.) The succession plan
20 involved moving Capt. Clark out of Fire Prevention, into Operations, and eventually a
21 possible promotion to Battalion Chief. (*Id.*) The memo indicates that Capt. Clark was
22 reluctant to move to Operations, but agreed he would be willing to move because he
23 understood the shift helped management prepare for his prospective role as Battalion
24 Chief. (*Id.*)

25 Plaintiff subsequently filed an administrative complaint with the City of Tucson
26 about Capt. Langejans' actions on March 21, 2015. (PSOF, Doc. 118 at 20, ¶ 121; Exh.
27 VV, Doc. 118-2.) After investigating Plaintiff's allegations, the EOPD determined that
28 TFD's initial investigation was not thorough, and did not address the proper punishment
level for Capt. Langejans' actions. (Exh. XX, Doc. 118-2 at 115.) It further concluded

1 that Plaintiff's assignment to a division where her husband was a Captain violated the
2 City's nepotism policy. (TAC, Doc. 87 at 14, ¶ 130.)

3 AC Baker responded to the EOPD determination, and said she believed Capt.
4 Langejans was disciplined appropriately. (Exh. XX, Doc. 118-2 at 117.) AC Baker noted
5 the next level of discipline involved misuse or abuse of authority—for instance crimes
6 and reckless disregard for safety—and Capt. Langejans' actions did not rise to this level.
7 (*Id.*) She further stated that in response to the EOPD's comments about the nepotism
8 violation, TFD had made shift changes accordingly. (*Id.* at 18.) This move occurred as of
9 August 23, 2015. (*Id.*) AC Baker indicates that the EOPD's claim that the nepotism
10 policy had been violated was also "supported through statements and concerns by
11 members of the [Fire] Prevention Section." (*Id.*)

12 On August 22, 2015, after the EOPD issued its findings, Capt. Clark was
13 transferred from Fire Prevention to Operations Shift Captain. (PSoF, Doc. 118 at 21 ¶
14 126.) Soon thereafter, Capt. Clark was assigned to a probationary term as Battalion Chief,
15 but after one year he failed and was returned to Captain. (PI's Resp. MSJ, Doc. 122 at
16 16.) Plaintiff argues that this move was retaliatory because Capt. Clark was provided no
17 warning about his failing performance.

18 • ***Protected Activity***

19 There is no dispute that Plaintiff engaged in protected activity when she filed an
20 EOPD complaint against Capt. Langejans on March 21, 2015. (PSoF, Doc. 118 at 20, ¶
21 121; Exh. VV, Doc. 118-2.) Furthermore, Plaintiff has shown that TFD knew of the
22 complaint. Plaintiff must therefore show that it was because of that knowledge that Capt.
23 Clark was moved to a less desirable position in retaliation, and that the move was
24 materially adverse.

25 • ***Adverse Action: Move to Operations***

26 Plaintiff alleges that Capt. Clark's move to Operations was an adverse action
27 because the field position was less desirable than Fire Prevention and paid less. (PSoF,
28 Doc. 118. at ¶ 136.) Defendant claims there was no adverse action because the move was
predetermined, and Capt. Clark had agreed to it. Furthermore, as planned, Capt. Clark

1 was later given a probationary period as Battalion Chief. (Exh. 55, Doc. 116-6 at 5.)

2 Even if the Court considered only the move to the temporarily less desirable post
3 in Operations, Plaintiff cannot meet the requirement of materiality. “An employee does
4 not suffer a materially adverse change in the terms and conditions of employment, and
5 thus does not suffer an ‘adverse employment action’ in the context of a Title VII
6 retaliation claim, where the employer merely enforces its preexisting policies in a
7 reasonable manner.” *Sherman v. Nat’l Grid*, 993 F. Supp. 2d 219, 228 (N.D.N.Y. 2014)
8 (quoting *Joseph v. Leavitt*, 465 F.3d 87, 91 (2d Cir. 2006)); see *McKenzie v. Illinois Dep’t*
9 *of Transp.*, 92 F.3d 473, 484 (7th Cir. 1996) (a policy that is generally applicable does
10 not constitute an adverse employment action when reasonably enforced). Here, TFD
11 reasonably applied its policy for nepotism after the violation was brought to its attention.
12 Simply because the reason the nepotism violation was recognized was through the
13 EOPD’s conclusions on hostile work environment does not mean it would discourage
14 future employees from raising hostile work environment allegations.

15 In addition, Capt. Clark’s move to Operations was not an adverse action because it
16 was a prearranged, temporary shift in preparation for a possible promotion. See *Clark*
17 *Cty. Sch. Dist.*, 532 U.S. at 272. Plaintiff offers no further evidence of why Capt. Clark’s
18 move was pretext. Plaintiff’s filings do not address how discriminatory animus could be
19 inferred when (1) Capt. Clark was not moved under AC Baker’s initial memorandum,
20 and (2) it was only after the EOPD found that the nepotism policy had been violated and
21 the EOPD told TFD to correct the violation that Capt. Clark was moved. Plaintiff also
22 fails to address Defendant’s contention—supported by Plaintiff’s own exhibits—that the
23 move was predetermined, and Capt. Clark had agreed to it prior to any complaint about
24 Capt. Langejans. Finally, Plaintiff never confronts the fact that the final move in the plan
25 was to give Capt. Clark the opportunity to become Battalion Chief, a higher-ranked
26 position than Captain. In fact, Capt. Clark was promoted to a probationary term as
27 Battalion Chief, as planned, discussed, and agreed to by Capt. Clark.

28 While in some sense it is true that but-for her filing the complaint against
Langejans the violation of nepotism may have gone unnoticed, this is not dispositive of

1 retaliation. Defendant has offered legitimate reasons for the transfer. Plaintiff does not
2 proffer any evidence that Capt. Clark did not know of, or agree to the proposed change
3 prior to the complaint against Langejans and fails to show pretext.

4 • ***Failure of Probationary Period***

5 However, the inquiry does not end here. Plaintiff asserts that an adverse retaliatory
6 action occurred when Capt. Clark was terminated from his probationary position as
7 Battalion Chief and returned to Captain, a less desirable position with reduced pay. (Pl's
8 Resp. MSJ, Doc. 122 at 16.) Plaintiff claims that failing him from his probationary period
9 infers discrimination because in five years as Chief, Chief Critchley had never failed
10 someone from a probationary period. (*Id.* at 16-17.) In addition, Capt. Clark was not
11 provided with a six-month evaluation prior to the move back to Captain as needed under
12 the City of Tucson's Administrative Directives. (*Id.*)

13 "A reasonable fact finder could find from the inconsistent application of [an
14 employment] policy that the defendants' motivation for enforcing the policy" was
15 retaliatory). *Flores v. City of Westminster*, 873 F.3d 739, 750 (9th Cir. 2017) (quoting
16 *Coszalter*, 320 F.3d at 978.

17 Chief Critchley agreed that since he became Fire Chief no one other than Capt.
18 Clark had failed a probationary period. (Exh. ZZZ, Doc. 118-4 at 91). But, Critchley also
19 stated that there are others who failed when he was Chief Officer. (*Id.*) Furthermore,
20 Defendant concedes "there is a City civil service policy to provide six month evaluation
21 during a probationary period," but claims it was not applied to Battalion Chiefs. (DSof,
22 Doc. 116 at 48, ¶ 204; Exh. ZZZ, Doc. 118-4 at 91.) Therefore, Chief Critchley did not
23 provide a six-month evaluation because it was not TFD's practice, and even if it were, at
24 six months Capt. Clark was doing fine. (Exh. ZZZ, Doc. 118-4 at 91). It was only after
25 six months that Chief Critchley found Capt. Clark's leadership skills subpar. (DMSJ,
26 Doc. 115 at 25.) After that time, Capt. Clark directly undermined Critchley's orders. (*Id.*)
27 Capt. Clark also did not disclose to his superiors that he was investigated for misuse of
28 firearms by a federal agency. (*Id.*) Furthermore, Capt. Clark did not inspire trust with
other co-workers, for one battalion chief was so skeptical about Capt. Clark's ability to

1 effectively perform the role of battalion chief that the battalion chief refused to trade
2 shifts with Capt. Clark. (*Id.*)

3 After the defendant has shown legitimate reason for an adverse action, all
4 presumption of discrimination drops, and the plaintiff must give a reason why the
5 legitimate action is pretext. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1123 (9th Cir.
6 2004). Plaintiff has not shown pretext.

7 Based on the facts presented, the parties do not have a genuine issue of material
8 fact as to whether the sequence of events was retaliatory. The application of policy was
9 not inconsistent with other TFD employees. The six-month evaluation was not TFD's
10 practice for Battalion Chiefs, and Plaintiff has not alleged that other Battalion Chiefs
11 received reviews but Capt. Clark did not. In addition, even if he had been given an
12 evaluation at six months, his performance at that time was adequate, and it was only
13 subsequent events that caused the demotion. Furthermore, in the time Chief Critchley
14 worked for TFD, other Battalion Chiefs have failed the probationary period. Considering
15 both sides and taking all reasonable inferences, summary judgment is granted as to Count
16 Four.

17 ***Count Five: Title VII Retaliation Against Plaintiff***

18 Plaintiff's Fifth Count alleges TFD retaliated against her for filing a complaint
19 about Capt. Langejans' sexual harassment, and a second complaint for continued
20 harassment. (TAC, Doc. 87 at 21-22; PSoF, Doc. 118 at 21, ¶133.)

21 An "[a]dverse employment action [or a] hostile work environment can . . . be the
22 basis for a retaliation claim." *Black v. Cty & Cnty of Honolulu*, 112 F. Supp. 2d 1041,
23 1050 (D. Haw. 2000) (citing *Ray*, 217 F.3d at 1243). While one instance may not lead a
24 fact finder to conclude an adverse action was discriminatory, under the totality of the
25 circumstances, a series of actions for which plaintiff is subjected may suggest a
26 retaliatory motive. *Id.*

27 "[T]his standard does *not* require a reviewing court or jury to consider the nature
28 of the discrimination that led to the filing of the charge. . . . Rather, the standard is tied to

1 the challenged retaliatory act, not the underlying conduct that forms the basis of the Title
2 VII complaint.” *Burlington*, 548 U.S. at 69 (internal citations and quotations omitted).

3 • ***Hostile Work Environment as Basis for Retaliation Claim***

4 Hostile-work-environment claims “involve[] repeated conduct” and require the
5 plaintiff to demonstrate that “the workplace is permeated with discriminatory
6 intimidation, ridicule, and insult that is sufficiently severe and pervasive to alter the
7 conditions of the victim's employment and create an abusive working environment.”
8 *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. at 115–16 (internal quotation marks
9 omitted). To determine if conduct is a part of the same unlawful employment practice
10 under the hostile-work-environment doctrine, a court is to consider whether the conduct
11 was “‘sufficiently severe or pervasive,’ and whether the earlier and later events amounted
12 to the ‘same type of employment actions, occurred relatively frequently, or were
13 perpetrated by the same managers.’” *Porter v. California Dept. of Corr.*, 419 F.3d 885,
14 893 (9th Cir. 2005) (quoting *Nat’l R.R. Passenger*, 536 U.S. at 116, 120).

15 “An employer is liable under Title VII for conduct giving rise to a hostile
16 environment where the employee proves (1) that he was subjected to verbal or physical
17 conduct of a harassing nature, (2) that this conduct was unwelcome, and (3) that the
18 conduct was sufficiently severe or pervasive to alter the conditions of the victim's
19 employment and create an abusive working environment.” *Kortan v. California Youth*
20 *Authority*, 217 F.3d 1104, 1109 (9th Cir. 2000) (quoting *Pavon v. Swift Trans. Co.*, 192
21 F.3d 902, 908 (9th Cir. 1999)). The “‘objectionable environment must be both objectively
22 and subjectively offensive, one that a reasonable person would find hostile or abusive,
23 and one that the victim in fact did perceive to be so.’” *Id.* (quoting *Montero v. AGCO*
24 *Corp.*, 192 F.3d 856, 860 (9th Cir. 1999)). In determining whether the alleged
25 objectionable conduct is sufficiently severe or pervasive, “courts consider all the
26 circumstances, including the frequency of the allegedly discriminatory conduct, its
27 severity, and whether it unreasonably interferes with an employee's work performance.”
28 *Surrell v. California Water Service Co.*, 518 F.3d 1097, 1109 (9th Cir. 2008). “Simply
causing an employee offense based on an isolated comment is not sufficient to create

1 actionable harassment under Title VII.” *McGinest*, 360 F.3d at 1113. Rather, a plaintiff
2 must show that the workplace was “permeated with discriminatory intimidation, ridicule,
3 and insult” to demonstrate that it was sufficiently hostile or abusive to establish an
4 actionable harassment claim. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

5 The Court does not address factual allegations which occurred prior to the filing of
6 the complaint against Capt. Langejans, because these actions cannot be construed as
7 retaliation since her complaint was non-existent. *See Burlington*, 548 U.S. at 69 (2006).
8 Furthermore, Plaintiff has not raised a hostile work environment claim. The Court will
9 not *sua sponte* add claims which were absent from Plaintiff’s Third Amended Complaint.
10 What remains are a few sparse comments and intimidating looks over a prolonged period
11 that Plaintiff may have felt were offensive, but are not objectively hostile.

12 Plaintiff claims that insensitive statements went unaddressed by TFD, including
13 being told she would just have to get along with Capt. Langejans (PSoF, Doc. 118 at 19,
14 ¶ 119) and ignoring her complaint that Langejans glared at her (Exh. 1, Doc. 71-1 at 9-
15 10.). Plaintiff further contends that issuing Capt. Langejans’ a written reprimand for his
16 behavior was inappropriate and did not sufficiently prevent further harassment and
17 intimidation. (*Id.* at 10.)

18 The Court finds a reasonable person would not find Plaintiff’s situation was a
19 hostile or abusive environment, i.e., that the acts were severe or pervasive. *See e.g.*
20 *Kortan v. California Youth Authority*, 217 F.3d 1104 (9th Cir. 2000) (plaintiff failed to
21 sustain a hostile work environment claim based on: (1) a supervisor calling female
22 employees “castrating bitches,” “Madonnas,” or “Reginas” on multiple occasions in the
23 plaintiff’s presence; (2) the plaintiff’s supervisor calling the plaintiff “Medea;” and (3)
24 sending her postcards at home); *Vasquez v. County of Los Angeles*, 349 F.3d 634 (9th Cir.
25 2003) (no racially hostile work environment claim where the supervisor made only two
26 derogatory comments about the plaintiff in a six-month period); *Manatt v. Bank of Am.*,
27 339 F.3d 792, 798 (9th Cir. 2003) (conduct was not severe or pervasive even though
28 plaintiff alleged her coworkers often made racially insensitive comments such as “China
man,” made derogatory comments regarding China and communism, made fun of the

1 plaintiff's accent, and "pulled their eyes back with their fingers in an attempt to imitate or
2 mock the appearance of Asians"); *but see Fuller v. Idaho Dep't of Corr.*, 865 F.3d 1154,
3 1163 (9th Cir. 2017) (employer's decision to support employee who allegedly raped
4 plaintiff went beyond simple offensive comments and was sufficiently hostile to survive
5 summary judgment). No overtly hostile comments were made directly to Plaintiff; most
6 comments expressed confusion, could be interpreted as factually correct, or were not
7 comments at all. Further, Plaintiff has not sufficiently tied any perceived hostility to a
8 specific adverse action. Summary judgment in favor of Defendant is appropriate as to
9 Plaintiff's claim of retaliation based on hostile work environment.

10 • ***Other Adverse Retaliatory Actions***

11 As far as the Court can identify, Plaintiff has made a few other claims of
12 retaliation that resulted in adverse employment actions. In one incident, Plaintiff claims
13 that TFD ordered education counseling for inappropriate conduct. Plaintiff claims
14 because it occurred close in time to her complaint against Capt. Langejans, this action
15 was retaliatory. (PCMSJ, Doc. 117 at 17-18; PSoF, Doc. 118, at 22, ¶ 134.) Defendant
16 agrees Plaintiff was disciplined, but states the reason for the reprimand was because she
17 talked back to her superiors, telling them they "were out of their friggin' minds." (Exh. 3,
18 Doc. 118-3 at 9-10; DSoF, 170-172.)

19 Within a month of her complaint against Capt. Langejans, Plaintiff contends Chief
20 Critchley also involuntarily transferred Plaintiff from Fire Prevention Operations and
21 because of a retroactive application of a seniority policy, she was stripped of seniority at
22 her new position. (PSoF, Doc. 118 at 22, ¶¶ 137-39.) Moreover, she was the only
23 employee affected by the policy change. (*Id.* at ¶ 139.) Defendant disputes Plaintiff's
24 statement, arguing her transfer was voluntary, and was motivated in part because of
25 instances of insubordination and Plaintiff's inability to get along with others in Fire
26 Prevention. (DSoF, Doc. 116 at 41-42, ¶¶ 170-73.)

27 Plaintiff has demonstrated that her move to Operations in correlation with a
28 retroactive application of seniority was an adverse action that "is reasonably likely to
deter employees from engaging in protected activity." *See Ray*, 217 F.3d at 1239-40.

1 Furthermore, Plaintiff has presented evidence of temporal proximity between Chief
2 Critchley’s dismissal of her complaint and his determination to move Plaintiff to
3 Operations. This could indicate retaliatory motive. *See Yartzoff*, 809 F.2d at 1376.

4 Furthermore, Plaintiff has shown that the retroactive amendment had a disparate
5 impact on her, because she was the only person to lose years of seniority from the policy
6 change. This sufficiently presents an issue of pretext. *Davis v. Team Elec. Co.*, 520 F.3d
7 1080, 1092-93 (9th Cir. 2008) (An “allegation that similarly situated . . . employees were
8 treated more favorably is itself probative of pretext.”).

9 Summary judgment is denied as to Count Five as to these allegations.

10 ***Count Three: Title VII Sex Discrimination Based on Lactating Status***

11 Under the Pregnancy Discrimination Act (“PDA”), employers may not
12 discriminate on the basis of sex, including against an employee who is “affected by
13 pregnancy, childbirth, or related medical conditions.” 42 U.S.C. § 2000(k).
14 Discrimination because of status as a lactating mother qualifies as sex discrimination
15 under the PDA. *See e.g., Allen-Brown v. D.C.*, 174 F. Supp. 3d 463, 478 (D.D.C. 2016).

16 For Title VII sex discrimination, Plaintiff must first demonstrate a *prima facie*
17 case; alleging (1) she is a member of a protected class, (2) she was qualified for her
18 position, (3) her employer subjected her to an adverse employment action, and (4) other
19 individuals who were similarly-situated were treated differently. *Davis*, 520 F.3d at
20 1089. Like retaliation claims, sex discrimination claims are also analyzed under the
21 *McDonnell Douglas* burden-shifting analysis. *Young v. Parcel Service, Inc.*, 135 S.Ct.
22 1338 (2015). Plaintiff may show discrimination through direct or circumstantial evidence.
23 If attempting to demonstrate discrimination with circumstantial evidence, “the plaintiff
24 must present ‘specific’ and ‘substantial’ facts showing that there is a genuine issue for
25 trial.” *Dannenbring v. Wynn Las Vegas, LLC*, 646 Fed. Appx. 556, 556 (9th Cir. 2016)
26 (quoting *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1170 (9th Cir. 2007)); *Godwin*, 150 F.3d
27 at 1222. Furthermore, to show an action was adverse, a plaintiff must demonstrate the
28 action “materially affect[ed] the compensation, terms, conditions, or privileges of . . .
employment.” *Davis*, 520 F.3d at 1089.

1 In this instance, the amount of evidence necessary to defeat summary judgment is
2 minimal. *Id.*; *see McGinest*, 360 F.3d at 1112 (“In evaluating motions for summary
3 judgment in the context of employment discrimination, we have emphasized the
4 importance of zealously guarding an employee's right to a full trial, since discrimination
5 claims are frequently difficult to prove without a full airing of the evidence and an
6 opportunity to evaluate the credibility of the witnesses.”); *see also Lam*, 40 F.3d at 1564
7 (“[W]e require very little evidence to survive summary judgment in a discrimination
8 case, because the ultimate question is one that can only be resolved through a searching
9 inquiry—one that is most appropriately conducted by the fact-finder, upon a full record.”)

10 • ***Captain Langejans’ Imputed Actions***

11 First, Plaintiff appears to claim that one of the adverse actions constituting
12 discrimination was Captain Langejans’ harassment, and Defendant should be liable for
13 this hostility. (PCMSJ, Doc. 117, at 12.) But, Plaintiff’s Third Amended Complaint has
14 only pleaded sex discrimination and retaliation. Despite the fact that Capt. Langejans was
15 not the Clarks’ supervisor and did not directly determine Capt. Clark’s assignment to the
16 field, Plaintiff contends that Capt. Langejans may be deemed a “supervisory employee”
17 because he “can recommend that another employee suffer an adverse employment
18 action” and therefore his discriminatory actions and attempts to get the Clarks out of Fire
19 Prevention can be imputed to TFD. (PCMSJ, Doc. 117 at 11.) Plaintiff’s conclusion that
20 Defendant should be liable for the harassment of an employee under a discrimination
21 claim is misguided. To explain her proposition, Plaintiff cites to *Burlington Indus., Inc. v.*
22 *Ellerth*, 524 U.S. 742, 762 (1998). In *Burlington*, the Supreme Court explains:

23 When a supervisor makes a tangible employment decision, there is
24 assurance the injury could not have been inflicted absent the agency
25 relation. A tangible employment action in most cases inflicts direct
26 economic harm. As a general proposition, only a supervisor, or other person
27 acting with the authority of the company, can cause this sort of injury. A
28 co-worker can break a co-worker's arm as easily as a supervisor, and
anyone who has regular contact with an employee can inflict psychological
injuries by his or her offensive conduct. But one co-worker (absent some
elaborate scheme) cannot dock another's pay, nor can one co-worker
demote another. Tangible employment actions fall within the special

1 province of the supervisor. The supervisor has been empowered by the
2 company as a distinct class of agent to make economic decisions affecting
3 other employees under his or her control. . . . In that instance, it would be
4 implausible to interpret agency principles to allow an employer to escape
liability.

5 *Id.* at 763 (internal citations omitted). However, the District of Columbia circuit aptly
6 explained the causation needed to impute the actions of an employee who does not have
7 supervisory duties to the employer. The court stated:

8 To prevail on a subordinate bias claim, a plaintiff must establish more than
9 mere “influence” or “input” in the decision making process. Rather, the
10 issue is whether the biased subordinate's discriminatory reports,
11 recommendation, or other actions caused the adverse employment action.
12 The requisite causation is present where, for instance, a review committee
or other formal decisionmaker relies on a subjective evaluation or
misinformation supplied by the biased low-level supervisor.

13 *Furline v. Morrison*, 953 A.2d 344, 356 (D.C. 2008).

14 Here, Capt. Langejans was not a supervisor, and Plaintiff cannot show that any
15 discriminatory information provided by Capt. Langejans led to an adverse employment
16 action. Plaintiff has noted that Capt. Langejans spoke to her supervisors about getting rid
17 of her husband before she joined Fire Prevention. However, Plaintiff cannot show that
18 Capt. Langejans provided any misinformation for which TFD relied on when moving
19 Plaintiff out of Fire Prevention. As noted earlier, Plaintiff has not sufficiently stated a
20 claim of hostile work environment created by TFD’s response to Capt. Langejans
21 statements. Furthermore, Plaintiff had adequate time (2 1/2 years) and multiple
22 amendments (2) to add any additional claims of harassment or hostile work environment
23 and failed to do so. Plaintiff has not sufficiently alleged a claim of harassment or imputed
24 liability for Capt. Langejans’ comments, and the Court will not now add claims that were
25 nonexistent prior to summary judgment.

26 • ***Adverse actions***

27 However, Plaintiff names other alleged instances of discrimination in her Cross-
28

1 Motion for Summary Judgment:⁶ (1) failing to provide Plaintiff with a permanent station
2 assignment; (2) taking five months to create a policy for expressing milk; (3) failing to
3 provide appropriate lactation space; (4) putting the assignment for Station 12 up for bid
4 rather than allowing Plaintiff to trade for it; (5) enforcing the Rules of Assignment in her
5 instance but neglecting to enforce in other cases; (6) multiple discriminatory comments
6 by supervisors, and (7) disciplining Plaintiff when she lost her composure after repeated
7 requests to accommodate her lactation needs. (PCMSJ, Doc. 117 at 6-8.)

8 Defendant breaks down each allegation and gives legitimate reasons for its
9 actions. Specifically, (1) she was put on swing shift prior to her pregnancy, (2) the statute
10 does not require TFD to have a policy for lactating mothers, but only an appropriate place
11 for expressing milk, (3) the stations she was assigned to were compliant, (4) TFD was
12 unaware of Plaintiff's desire for Station 12 before it was put up for bid, (5) TFD was
13 following standard Rules of Assignment when it put Station 12 up for bid, (6) a few
14 insensitive comments over a prolonged amount of time did not result in adverse action,
15 and (7) she was disciplined for insubordination, not discrimination. (Def's Resp. CMSJ,
16 Doc. 124.)

17 Plaintiff is able to show pretext through her declaration of disparate treatment for
18 TFD's actions. *Davis*, 520 F.3d at 1092-93. Defendant argues Plaintiff's alleged
19 instances of unequal treatment are inadmissible, but the Court finds her personal
20 knowledge of the disparate treatment of other employees adequately meets the personal
21 knowledge requirement for admissibility of a personal declaration. *See* Fed.R.Civ.P.
22 56(c)(4).

23 Defendant's pleadings attempt to apply Plaintiff's claims to each separate incident,
24 however, this fails to address the incidents in their entirety. "The real social impact of
25 workplace behavior often depends on a constellation of surrounding circumstances,

26 ⁶ The Court cannot discern any other specific actions alleged specifically for this count
27 from the Third Amended Complaint or Cross-Motion for Summary Judgment. *See Single Chip*
28 *Sys. Corp. v. Intermec IP Corp.*, 495 F.Supp.2d 1066, 1089 (S.D. Cal. 2007) (granting summary
judgment on an issue because "[Plaintiff's] discussion . . . borders on forcing this [c]ourt to 'dig'
through the exhibits to find its arguments.").

1 expectations, and relationships . . . [therefore] an act that would be immaterial in some
2 situations is material in others.” *Burlington*, 548 U.S. at 69 (internal quotation marks and
3 citations omitted). In isolation, these instances may not appear malevolent. Yet, even if
4 the Court found individually that Defendant had sound reason for acting in the way that it
5 did, in totality, reasonable minds could differ as to whether Defendant’s actions were
6 discriminatory on the whole.

7 Whether or not Defendant’s delay in addressing Plaintiff’s need for appropriate
8 lactation space, refusal to place Plaintiff at Station 12, arbitrary enforcement of the Rules
9 of Assignment, inflammatory comments by supervisors, and disciplinary measures
10 constituted discrimination is a factual determination. The Court cannot conclusively state
11 that these occurrences did not materially affect the conditions of Plaintiff’s employment
12 or that the evidence “is so one-sided that one party must prevail as a matter of law.”
13 *Anderson*, 477 U.S. at 243.

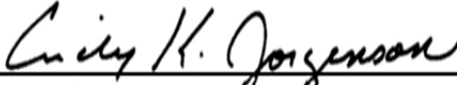
14 Therefore, IT IS ORDERED:

- 15 1. Plaintiff’s motion to strike Defendant’s responsive pleading as untimely is
16 DENIED.
- 17 2. Defendant’s Motion for Summary Judgment is GRANTED IN PART.
 - 18 a. Defendant is GRANTED Summary Judgment as to the issue of overtime
19 pay and trades.
 - 20 b. Defendant is GRANTED Summary Judgment as to the issues of hostile
21 work environment and harassment.
 - 22 c. Defendant is GRANTED Summary Judgment on Count Four: Retaliation
23 Under Title VII of the Civil Rights Act of 1964.
 - 24 d. Defendant is DENIED Summary Judgment on: Count One: Sex
25 Discrimination Under Fair Labor Standards Act, 29 U.S.C. § 207(r); Count
26 Two: Retaliation Under Fair Labor Standards Act, 29 U.S.C. § 215; Count
27 Three: Sex Discrimination under Title VII of the Civil Rights Act of 1964;
28 and Count Five: Retaliation Discrimination Under Title VII of the Civil
Rights Act of 1964.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 3. Plaintiff's Cross-Motion for Summary Judgment is DENIED.
- 4. The parties shall file a Joint Proposed Pretrial Order within forty-five (45) days of the date of this Order. A sample Joint Proposed Pretrial Order is attached to the Court's May 22, 2015 Order setting deadlines. (Doc. 8.)

Dated this 24th day of April, 2018.



Honorable Cindy K. Jorgenson
United States District Judge