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

5  
6 Maribel Zuniga,

7 Plaintiff,

8 v.

9 Gowan Milling Company LLC, et al.,

10 Defendants.

No. CV-21-00243-TUC-JCH

**ORDER**

11  
12 In this employment discrimination action, Plaintiff Maribel Zuniga ("Zuniga")  
13 alleges that her former employer Gowan Milling Company, LLC ("GMC") unlawfully  
14 terminated her under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C.  
15 § 2000e; the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*;  
16 the Arizona Civil Rights Act ("ACRA"), A.R.S. §§ 41-1463 *et seq.*, and Arizona common  
17 law. Doc. 1. Before the Court is Defendant GMC's Motion for Summary Judgment  
18 ("Motion") (Doc. 44), which is fully briefed (Docs. 46, 49). For the following reasons, the  
19 Court grants the Motion and dismisses this action with prejudice.<sup>1</sup>

20 **I. Procedural Defects**

21 There are multiple deficiencies in Zuniga's submitted materials. First, Zuniga  
22 violates the local rule for summary judgment motions. Rule 56.1 of the Local Rules of  
23 Civil Procedure provides:

24 Any party opposing a motion for summary judgment must file a statement,  
25 separate from that party's memorandum of law, setting forth: (1) for each  
26 paragraph of the moving party's separate statement of facts, a  
27 correspondingly numbered paragraph indicating whether the party **disputes**  
the statement of fact set forth in that paragraph and **a reference to the**

28 <sup>1</sup> Plaintiff's request for oral argument is denied because it would not aid the Court's  
decision. *See* LRCiv. 7.2(f); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

1           **specific admissible portion of the record supporting the party's position**  
2           **if the fact is disputed;** and (2) any additional facts that establish a genuine  
3           issue of material fact or otherwise preclude judgment in favor of the moving  
4           party. Each additional fact must be set forth in a separately numbered  
5           paragraph and **must refer to a specific admissible portion of the record**  
6           **where the fact finds support.**

7           LRCiv 56.1(b) (emphasis added). Zuniga violates this rule by including facts in her  
8           Statement of Facts without citation to evidence in the record. *See* Doc. 47 at 7–22 ("PSOF")  
9           ¶¶ 1–8, 14, 100; *see also* Doc. 47 at 1–7 ("PCSOF") ¶¶ 1–43.<sup>2</sup> For example, Zuniga's  
10          PCSOF ¶ 6 states without record citation that prior to termination "Zuniga had been  
11          informed that her work was more than satisfactory and had received performance raises  
12          and bonuses." The Court should not have to "scour the record" and guess what a party's  
13          alleged facts are based on. *See Keenan v. Allan*, 91 F.3d 1275, 1278 (9th Cir. 1996).  
14          Zuniga's failure to provide any evidence supporting PCSOF ¶ 6 is compounded by the fact  
15          that she has only that paragraph to support one of the elements of her prima facie case. *See*  
16          *infra*, § IV.B.1.

17          Zuniga SOF also violates Rule 56.1 by listing rote objections that fail to cite  
18          admissible evidence in the record. As an Arizona court has previously discussed,

19                 [LRCiv 56.1(b)] requires the controverting party to provide a specific record  
20                 reference supporting the party's position if a fact is disputed; it does not  
21                 permit explanation and argument supporting the party's position to be  
22                 included in the response to the moving party's statement of facts. Argument  
23                 may be made in the response or reply brief on the motion for summary  
24                 judgment, but within the page limits.

25          *Pruett v. Arizona*, 606 F. Supp. 2d 1065, 1075 (D. Ariz. 2009) (disregarding "each of  
26          [plaintiff's arguments in their statement of facts] except for the word "Controverted" and  
27          the references to the record"); *see also Hunton v. Am. Zurich Ins. Co.*, No. CV-16-00539-  
28          PHX-DLR, 2018 WL 1182552, at \*3 (D. Ariz. Mar. 7, 2018) ("Everything after the word

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29          <sup>2</sup> Zuniga submitted her controverting statement of facts and additional statement of facts in  
30          the same document. *See* Doc. 47. The controverting statement of facts, (Doc. 47 at 1–7,  
31          ¶¶ 1–43), will be referenced as "PCSOF," whereas the additional statement of facts  
32          (Doc. 47 at 7–22 ¶¶ 1–131), will be referenced as "PSOF."

1 'Admits' is improper. .... [Plaintiff] also improperly disputes facts as "incomplete" or  
2 "misleading," which is just another way of saying he agrees with the factual statement ...  
3 but believes additional information is material[.]). Ignoring this instruction, Zuniga  
4 objects to Doc. 45 ("DSOF") ¶¶ 3–8, 11, 12, 14–21, 24–28, and 35–43 simply by stating  
5 "Relevance." Similarly, Zuniga objects to DSOF ¶¶ 3–8, 11, 12, 14–19, 31, and 35–43  
6 simply by stating "foundation." Zuniga's other objections are likewise opaque or contain  
7 argument suited for the Response brief, and none cite the record. *See, e.g.*, PCSOF ¶¶ 3–8  
8 ("lack of personal knowledge"), ¶¶ 3–8 ("misleading evidence"), ¶¶ 14–18 ("hearsay,  
9 authentication"), ¶¶ 20–21 ("takes testimony out of context"), ¶ 31 ("improper opinion"),  
10 ¶¶ 35–43 ("mischaracterization of the evidence"). Zuniga's approach suggests she wants  
11 the Court to (1) consider each basis for objection individually, (2) construe the meaning of  
12 her objections for her, (3) identify what part of the record supports her construed objection,  
13 and (4) rule on each objection (potentially ruling in the alternative when different  
14 arguments are available). The Court declines to do so with one exception, discussed below.  
15 *See infra* § IV.B.2.

16 Zuniga's SOF also violates this Court's Case Management Order by exceeding 10  
17 pages without leave. *See* Doc. 18 ¶ 7(c) ("Statements of fact required by Local Rule of  
18 Civil Procedure 56.1 shall not exceed ten pages in length, exclusive of exhibits.") Zuniga's  
19 statement of facts is 15 pages excluding the controverting objections, the certificate of  
20 service, and exhibits. *See* Doc. 47 at 7–22.

21 Finally, Zuniga's Response violates LRCiv. 7.2(e)(1) by exceeding seventeen (17)  
22 pages without prior leave of Court. Zuniga's Response is twenty-two (22) pages excluding  
23 the certificate of service. *See* Doc. 46. In the interest of adjudicating the motion on its  
24 merits, the Court has overlooked Zuniga's violations, and considered her SOF/CSOF, (Doc.  
25 47), and Response (Doc. 46).

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1       **II. Facts**<sup>3</sup>

2           GMC is part of the Gowan Group of companies headquartered in Yuma, Arizona.  
3       DSOF ¶ 2; *see* PCSOF ¶2. GMC provides manufacturing and other services related to the  
4       crop protection industry. DSOF ¶ 1; PCSOF ¶ 1. Although GMC has, at times, a dedicated  
5       HR representative, it appears to also use HR personnel from the Gowan Group. *See* DSOF  
6       ¶ 14. Neither party provided an employee handbook or policy in their exhibits although its  
7       existence is referenced and/or disputed in the attached exhibits. *See, e.g.,* Zuniga's  
8       testimony, Doc. 45 at 46, 59, 60; Priest's testimony, Doc. 45 at 105, Callahan's testimony,  
9       Doc. 47-1 at 44–45, 53–54; Ortiz's Testimony, Doc. 47-1 at 86.

10           In 2003, Zuniga began working for GMC as a Warehouse Attendant. DSOF ¶ 9;  
11       PCSOF ¶ 9. Between 2003 and 2020, Zuniga held several positions with GMC including  
12       Warehouse Attendant, Warehouse Supervisor, a dual position as Purchasing Manager and  
13       Human Resources Manager, and, most recently, Purchasing Manager. DSOF ¶ 10; PCSOF  
14       ¶ 7. Zuniga's employment with GMC was at-will during her active tenure.<sup>4</sup> GMC  
15       terminated Zuniga on June 9, 2020. DSOF ¶ 9; PSOF ¶ 5.

16           Zuniga contends, without citation to the record, that she received raises and bonuses,  
17       GMC repeatedly informed her that her work was satisfactory, and that she was never  
18       subject to disciplinary action before her termination. *See* PSOF ¶¶ 6. Between July 2015  
19

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20       <sup>3</sup> Unless otherwise noted, the facts recited herein are undisputed. All record citations refer  
21       to the page numbers generated by the Court's electronic filing system.

22       <sup>4</sup> GMC indicates Zuniga was an at-will employee and could be terminated for any reason  
23       or no reason at all. Doc. 44 at 9. Arizona codifies its public policy favoring at-will  
24       employment; absent a written employment contract, "[t]he employment relationship is  
25       severable at the pleasure of either the employee or the employer." A.R.S. § 23-1501(A)(2).  
26       Zuniga references GMC's progressive discipline policy in her deposition, (*see* PSOF ¶¶ 51,  
27       91; *see also* DSOF ¶ 10), and in her Response. *See* Doc. 46 at 22 ("It is undisputed that Ms.  
28       Zuniga was not given notice of the allegations prior to termination, nor had Ms. Zuniga  
      been given any prior verbal or written warnings prior to termination ... Gowan Milling  
      admits it has a tiered system of discipline, yet ignored the system in their imposition of  
      discipline against Zuniga."). Zuniga, however, provides no evidence to overcome the at-  
      will employment presumption. The Court finds Zuniga was an at-will employee.

1 and July 2020, Curtis Priest ("Priest") was GMC's Plant Manager. PSOF ¶ 15; DCSOF  
2 ¶ 15. As Plant Manager, Priest supervised Zuniga. PSOF ¶ 16; Doc. 50 ("DCSOF") ¶ 16.  
3 During his term, Priest testified that he never disciplined Zuniga. PSOF ¶ 17 DCSOF ¶ 17.  
4 In contrast, GMC argues there were problems with Zuniga's job performance, engagement,  
5 and demeanor, first in 2018, and immediately preceding her termination in 2020. DSOF  
6 ¶¶ 11, 12, 14.

7 In 2018, Zuniga served a dual position as both Purchasing Manager and Human  
8 Resources Manager. DSOF ¶ 10; PCSOF ¶ 7. At some unspecified time, concerns arose  
9 with her role as Human Resources Manager. *See* DSOF ¶ 11. Some unidentified employees  
10 had expressed discomfort with Zuniga and were reluctant to report their concerns to her.  
11 DSOF ¶ 11. GMC contends that it restricted Zuniga's duties to Purchasing Manager with a  
12 focus on warehouse improvement projects. DSOF ¶ 11. Zuniga disputes the  
13 characterization of events leading to her serving as a Purchasing Manager only. PCSOF  
14 ¶¶ 11–12. The parties agree that this adjustment did not affect Zuniga's salary or other  
15 benefits. DSOF ¶ 13; PCSOF ¶ 13. GMC asserts that following the change, GMC's HR  
16 related functions were handled by Esmeralda Ortiz ("Ortiz") and the Gowan Group's  
17 Director of Human Resources, Lourdes Gonzales ("Gonzales"). DSOF ¶ 14.

18 In June 2020, Mike Callahan ("Callahan") became GMC's Plant Manager. PSOF  
19 ¶ 40 (citing Doc. 47-1 at 42); *see* DCSOF ¶ 94. Priest remained a Plant Manager until July  
20 2020. PSOF ¶ 15; DCSOF ¶ 15. It appears both Callahan and Priest served as GMS Plant  
21 Managers during the events in May and June 2020.

22 On May 28, 2020, GMC employee Felipe Herrera ("Herrera") made a complaint to  
23 Ortiz about Zuniga. PSOF ¶¶ 52, 55; DSOF ¶¶ 15–16. Herrera indicated that, on that day,  
24 Zuniga was upset about boxes found outside the building and wanted them moved. *See*  
25 PSOF ¶ 54; *see also* DSOF ¶ 54. Herrera further claimed Zuniga mistreated him daily and  
26 her conduct negatively impacted his health including his sleep. DSOF ¶ 16. According to  
27 GMC, Ortiz spoke with other employees who confirmed Zuniga's mistreatment of Herrera.  
28 DSOF ¶ 17. Ortiz did not inform Zuniga about the investigation or ask Zuniga for her side

1 of the story. PSOF ¶ 94; DCSOF ¶ 94.

2 As part of Ortiz's investigation, six additional employees allegedly provided  
3 declarations or statements related to Zuniga's conduct: Luisa Neri ("Neri"), Ruben  
4 Dominguez ("Dominguez"), Alejandro Perez Leon ("Leon"), Caleb Juarez ("Juarez"),  
5 Sammy Regalado ("Regalado"), and Erick Villalobos ("Villalobos"). DSOF ¶ 18; Doc. 45  
6 at 20; Exh. A. The statements are attached as exhibits to Callahan's affidavit.<sup>5</sup> Leon and  
7 Regalado provided declarations, both dated May 28, 2020, about Zuniga. Doc. 45 at 23,  
8 26. On both May 28 and 29, 2020, Villalobos provided a statement and declaration. Doc.  
9 45 at 27, 32. On both May 28 and June 1, 2020, Herrera gave a statement and declaration  
10 detailing his complaints against Zuniga. Doc. 45 at 21, 28. On both May 28 and June 2,  
11 2020, Juarez gave a statement about Zuniga. Doc. 45 at 25. On June 2, 2020, Gowan  
12 Administrative Assistant Linette Martinez ("Martinez") submitted a letter indicating that  
13 Ortiz interviewed Regalado, David Gallardo ("Gallardo"), and Villalobos on May 29,  
14 2020. Doc. 45 at 38. On the same day, Veronica Duran ("Duran") submitted an  
15 unaddressed statement saying she was present on May 28, 2020, when Ortiz interviewed  
16 Herrera and Leon. Doc. 45 at 39.

17 The statements detail Zuniga's harassment of Herrera, as witnessed by the  
18 employees, and other instances of Zuniga's misconduct. *See generally*, DSOF ¶ 18.  
19 Specific observations from the employees include: Zuniga repeatedly demanding that  
20 employees identify and/or admit to making a complaint against her to Human  
21 Resources; calling employees inept; stating that employees could not work as efficiently  
22 as she could; stating that she had been investigated in lawsuits before but nothing ever  
23 happened to her; threatening to cut hours and overtime for employees she was upset with;  
24 telling employees that she had no respect for the new plant manager; telling employees

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25  
26 <sup>5</sup> Zuniga challenges these and the other complainant's statements as unreliable because  
27 Affiant Callahan did not speak with the individual witnesses. *See* PCSOF ¶18. Zuniga also  
28 argues that the statements submitted by Neri, Dominguez, Leon, Juarez, and Regalado were  
not "properly authenticated." *See* PCSOF ¶18. The Court considers these objections below.  
*See infra* § IV.B.2.

1 she was not going to change and they had to deal with it; refusing to accept  
2 responsibility for anything; instilling fear in her employees; acting hostile and negative;  
3 abusing her authority; and regularly showing up late and consistently acting rude and  
4 dismissive to her employees. *See* DSOF ¶ 18. Zuniga was never questioned about the  
5 conduct reported by other employees. PSOF ¶ 18.

6 The parties dispute the nature and severity of Zuniga's conduct. For example, Zuniga  
7 admitted to snapping her fingers at employees, but claims that such gesticulations were  
8 meant for her, and were not intended to offend or degrade employees. DSOF ¶ 22; PCSOF  
9 ¶ 22. Zuniga admitted to raising her voice when speaking to Herrera and others, but denied  
10 it rose to the level of yelling (while also acknowledging that her high tone of voice could  
11 be perceived as yelling). DSOF ¶ 23; PCSOF ¶ 23; Doc. 45 at 60. Zuniga also admitted  
12 that in the three months before her termination, she experienced issues in her personal life  
13 that impacted how she treated employees. DSOF ¶ 26; PCSOF ¶ 26. Zuniga asserts,  
14 however, that other managers used more unprofessional language with their subordinates  
15 and denies treating her subordinates any worse in comparison to other managers. PSOF  
16 ¶¶ 112, 114.

17 GMC paints a different picture. According to GMC, Zuniga took actions to make  
18 employees physically uncomfortable, including turning off the air conditioner in the  
19 warehouse at Gowan Milling (Yuma, Arizona) for extended periods of time during the  
20 summer. *See* DSOF ¶ 27; Doc. 49 at 3. Zuniga does not dispute the act but argues she had  
21 justifications for doing so. *See* Doc. 45 at 57. GMC also asserts that Zuniga admitted to  
22 using inappropriate language and derogatory names for employees (including supervisors  
23 and managers), and she admitted to possibly creating a hostile work environment in the  
24 period before her termination. *See* DSOF ¶ 21, 24–26, 28. According to GMC, Zuniga  
25 testified that the only "big mistake" she made at GMC was "trusting the employees" she  
26 worked with and "wanting to go above and beyond for them." *See* DSOF ¶ 20.

27 On June 9, 2020, GMC terminated Zuniga. DSOF ¶ 9; PSOF ¶ 5. The parties dispute  
28 who made the ultimate decision. GMC contends GMC Plant Manager Callahan made the

1 decision. DSOF ¶ 29. Zuniga asserts, without citation to the record, that both Plant Manager  
2 Priest and Director of Human Resources Gonzales testified to making a collective decision  
3 with Callahan. PCSOF ¶ 29; *see* Priest's testimony, Doc. 47-1 at 20.

4 Zuniga contends that she was terminated due to national origin,<sup>6</sup> sex, and age  
5 discrimination and retaliation. Zuniga contends, without citation to the record, that she is a  
6 Hispanic female who was fifty (50) years-old at the time of her termination. *See* PSOF  
7 ¶¶ 1–2. Zuniga's allegations of discrimination and retaliation stem from three separate  
8 circumstances.

9 First, on some unspecified date, Carlos Arroyo—a GMC employee—allegedly told  
10 Zuniga that Plant Managers Callahan and Priest did not like or understand her accent.  
11 DSOF ¶ 31; *see* PSOF ¶ 14. This information came from another employee, Gustavo  
12 Navarro, who allegedly heard a conversation between Callahan and Priest and told Carlos  
13 Arroyo who then conveyed the message to Zuniga and other employees. DSOF ¶ 32;  
14 PCSOF ¶ 32. Callahan and Priest deny ever making any such comments. DSOF ¶¶ 33–34;  
15 PCSOF ¶¶ 33–34. According to GMC, Zuniga later characterized the statements as "just  
16 gossip." DSOF ¶ 36.

17 The second circumstance relates to Zuniga's managerial role at GMC. In 2020,  
18 Zuniga was the only female manager out of ten managers at GMC. PSOF ¶ 16; DCSOF  
19 ¶ 16. Zuniga believes Callahan and Priest did not like her because she was a female  
20 Mexican in a high position. DSOF ¶ 37; *see* PSOF ¶ 14. As support, Zuniga identifies 15  
21 employees (both male and female), the vast majority of whom are over 40 years old (with  
22 several employees older than Zuniga), who allegedly violated company policies but were  
23 neither disciplined nor terminated. *See* DSOF ¶ 38. Zuniga also asserts that the manner and  
24 extent of her investigation, following Herrera's complaint, and her inability to respond to  
25 the allegations, was handled substantially different from investigations related to other  
26 managers. PSOF ¶¶ 18, 38, 43, 94, 117.

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27 <sup>6</sup> In her Complaint, Zuniga references race. *See* Doc. 1-3 ¶ XII (“Defendants discriminated  
28 against Plaintiff based upon sex, gender, and/or race.”). Her Response, however, references  
only national origin discrimination. Doc. 46 at 3, 5–6.



1 The third circumstance relates to Zuniga's retaliation claim and GMC's termination  
2 of former employee Jose Quintero ("Quintero"). DSOF ¶¶ 41–42. According to GMC, it  
3 terminated Quintero after he was observed speeding on a road next to the worksite, which  
4 had been an issue for some time. DSOF ¶ 42. Allegedly, Zuniga viewed Quintero's  
5 termination as a violation of GMC's progressive discipline policy mandating: 1) a verbal  
6 warning; 2) a written warning; 3) suspension; and 4) termination. SOF ¶¶ 41–43. Zuniga  
7 claims she objected to Quintero's termination because he was on worker's compensation.  
8 PSOF ¶ 50. GMC terminated Quintero in October 2018. *See* Doc. 45 at 45; *see also*  
9 Callahan testimony, Doc. 47-1 at 52.

10 Zuniga filed this lawsuit on May 6, 2021. Doc. 1-3. On June 11, 2021, Defendants  
11 removed the matter to federal court. Doc. 1 at 1–4.

### 12 **III. Summary Judgment Standard**

13 Summary judgment is proper only if the pleadings, discovery, and disclosure  
14 materials on file, and any affidavits, show that there is no genuine dispute as to any material  
15 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).  
16 The moving party is entitled to judgment when the nonmoving party fails to make a  
17 sufficient showing on an essential element of a claim in the case on which the nonmoving  
18 party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is  
19 no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational  
20 trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*  
21 *Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant  
22 probative evidence, not simply "some metaphysical doubt"); *see also* Fed. R. Civ. P. 56(e).  
23 Conversely, a genuine dispute over a material fact exists if there is sufficient evidence  
24 supporting the claimed factual dispute, requiring a judge or jury to resolve the differing  
25 versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec.*  
26 *Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

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1 **IV. Analysis**

2 **A. *McDonnell Douglas* Framework**

3 In an employment discrimination case, Courts will generally apply the burden  
4 shifting framework under *McDonnell Douglas Corp. v. Green*, unless the plaintiff presents  
5 direct evidence showing discrimination. 411 U.S. 792 (1973). The *McDonnell Douglas*  
6 analysis applies equally to claims brought under Title VII, 42 U.S.C. § 2000e-2(a)(1), and  
7 the ADA, 42 U.S.C. § 12102, *et seq.* See *Aragon v. Republic Silver State Disposal Inc.*,  
8 292 F.3d 654, 658 (9th Cir. 2002); *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080,  
9 1093 (9th Cir. 2003). Under *McDonnell Douglas*, the plaintiff carries an initial burden of  
10 establishing a prima facie case of discrimination. *McDonnell Douglas Corp.*, 411 U.S. at  
11 802.

12 As a general matter, the Ninth Circuit "require[s] very little evidence to survive  
13 summary judgment in a discrimination case, because the ultimate question is one that can  
14 only be resolved through a searching inquiry—one that is most appropriately conducted by  
15 the factfinder, upon a full record." *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1410  
16 (9th Cir. 1996) (internal quotations omitted). See also *Texas Dep't of Cmty. Affs. v. Burdine*,  
17 450 U.S. 248, 253-54 (1981) ("The prima facie case serves an important function in the  
18 litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's  
19 rejection.").

20 Once plaintiff establishes a prima facie case of discrimination, the burden shifts to  
21 the defendant to "articulate some legitimate, nondiscriminatory reason" for the adverse  
22 employment action. *McDonnell Douglas Corp.*, 411 U.S. at 802. If the defendant does so,  
23 the burden shifts back to the plaintiff to show that the defendant's stated reason for the  
24 adverse employment action is a pretext for unlawful discrimination—a burden that merges  
25 with the plaintiff's "ultimate burden of persuading the court that he has been the victim of  
26 intentional discrimination." *Id.* at 804.

27 **B. Title VII and ACRA**

28 Title VII prohibits employment discrimination based on race, color, religion, sex,

1 or national origin. 42 U.S.C. § 2000e-2(a)(1) (Title VII Civil Rights Act of 1964). Because  
2 the Arizona Civil Rights Act is "generally identical" to Title VII, the Court will address the  
3 ACRA claims together with their corresponding Title VII claims. *See Higdon v. Evergreen*  
4 *Int'l Airlines, Inc.*, 673 P.2d 907, 909 n.3 (Ariz. 1983). *See also Bodett v. CoxCom, Inc.*,  
5 366 F.3d 736, 742 (9th Cir. 2004).

### 6 **1. Prima Facie Discrimination**

7 To establish a prima facie case of discrimination, Plaintiff must show: (1) she  
8 belongs to a protected class; (2) she was qualified for her position; (3) she was subject to  
9 an adverse employment action; and (4) similarly situated individuals outside her protected  
10 class were treated more favorably. *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1090 (9th Cir.  
11 2008). "The requisite degree of proof necessary to establish a prima facie case for Title VII  
12 ... claims on summary judgment is minimal and does not even need to rise to the level of a  
13 preponderance of the evidence." *Id.* (internal citation omitted).

14 GMC does not dispute that Zuniga has established the first and third prongs of the  
15 *McDonnell Douglas* framework: Zuniga, a Hispanic and Spanish-speaking woman, was a  
16 member of a protected class and suffered an adverse employment action when GMC  
17 terminated her employment. *See* Doc. 44 at 12–15. GMC, however, argues that Zuniga  
18 fails to show she was qualified for her position or that similarly situated employees were  
19 treated more favorably. *Id.* Specifically, GMC argues that Zuniga mistreated her  
20 subordinates and thus, Zuniga cannot show that she performed well enough to rule out the  
21 possibility she was fired based on her conduct. *Id.* at 13. GMC further argues that Zuniga  
22 has not identified any similarly situated supervisors who exhibited similar misconduct and  
23 were treated more favorably. *Id.* at 13–14.

24 As to the second prong, Zuniga presents minimal evidence that she was performing  
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1 the baseline requirements for her position.<sup>7</sup> Zuniga contends, without citation to the record,  
2 that GMC awarded her raises and bonuses, GMC repeatedly informed her that her work  
3 was satisfactory, and GMC never subjected her to disciplinary action before her  
4 termination.<sup>8</sup> See PSOF ¶ 6. The record is devoid of any evidence related to formal written  
5 evaluations, disciplinary notices, reprimands, or warnings documenting any problems with  
6 Zuniga's job performance or attitude before 2018. Notwithstanding the complaints in 2018,  
7 there is no evidence that anyone raised concerns about Zuniga's role as a Purchasing  
8 Manager before the events in May and June 2020. See PSOF ¶¶ 6, 17. To support their  
9 position that Zuniga was unqualified, GMC relies upon employee declarations/statements  
10 indicating that Zuniga mistreated her subordinates, displayed a negative attitude, and  
11 abused her authority. See DSOF ¶ 18; Doc. 45 at 20, Exh. A. Nevertheless, Plaintiff's own  
12 deposition testimony, albeit uncorroborated, is sufficient to establish a genuine dispute as

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14 <sup>7</sup> The Court notes that nowhere in the Complaint does Zuniga allege that she was  
15 sufficiently qualified for her position. *Compare with Sumera v. Holder*, 2014 WL 3058278,  
16 \*6 (N.D. Cal. 2014) (in screening the sufficiency of a complaint on a motion to dismiss,  
17 the Court found allegations that plaintiff "was qualified," "was ably performing his job,"  
18 "was recognized as having done the job without problem," and "received a positive  
19 performance evaluation" sufficiently alleged he was qualified for his position).

20 <sup>8</sup> Ninth Circuit case law contains conflicting guidance regarding whether a plaintiff must  
21 present evidence eliminating the possibility that she was fired for inadequate job  
22 performance to establish a prima facie case of discrimination. In *Aragon*, the Ninth Circuit  
23 found that such a requirement would "conflate the minimal inference needed to establish a  
24 prima facie case with the specific, substantial showing [a plaintiff] must make at the third  
25 stage of the *McDonnell Douglas* inquiry." 292 F.3d at 659. However, in an earlier case,  
26 *Sengupta v. Morrison-Knudsen Co.*, the Ninth Circuit cited out-of-circuit authority for the  
27 proposition that a plaintiff must show, as one element of a prima facie case of  
28 discriminatory discharge, that "he was doing his job well enough to rule out the possibility  
that he was fired for inadequate job performance." 804 F.2d 1072, 1075 (9th Cir. 1986);  
*see also Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 672 (9th Cir. 1988) (citing  
*Sengupta*). The analysis contained in *Aragon* contains more detail and is seemingly more  
consistent with Supreme Court precedent, which establishes that a plaintiff's burden at the  
first stage of the *McDonnell Douglas* framework is "not onerous." *Burdine*, 450 U.S. at  
253. But even if *Sengupta*'s standard applies, Zuniga has met her burden because she has  
identified a genuine issue of material fact regarding her satisfactory job performance with  
respect to her prima facie case.

1 to her satisfactory job performance, the second prong, in her prima facie case. *See Aragon*,  
2 292 F.3d at 660 (noting that an employee's own statement that they were performing at a  
3 level equal to that of other employees may be sufficient to establish a prima facie case even  
4 though such self-assessment testimony regarding job performance is not enough to create  
5 a triable issue of fact on the question of pretext). As such, Plaintiff meets the second prong  
6 of her prima facie case.

7 As to the fourth prong, GMC asserts that Zuniga fails to identify similarly situated  
8 employees outside of her protected class who engaged in similar behavior and were treated  
9 differently. Doc. 44 at 13. Specifically, Zuniga fails to show any other GMC manager who  
10 consistently and regularly mistreated employees, retaliated against them for complaining  
11 about them, or forced employees to work in extremely hot weather without air  
12 conditioning. Doc. 49 at 6–9. For purposes of establishing a prima facie case of Title VII  
13 discrimination, "individuals are similarly situated when they have similar jobs and display  
14 similar conduct." *Vasquez v. Cty. of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003). At a  
15 minimum, Zuniga must proffer evidence that a comparator employee had a similar job and  
16 engaged in similar conduct. *Id.*

17 Zuniga identifies three managers who she alleges were treated more favorably:  
18 Jarrod Harvick, Madin Lopez, and Mike Brandt. Doc. 46 at 8–12. As to Madin Lopez and  
19 Mike Brandt, Zuniga fails to submit evidence that these individuals were outside of her  
20 protected class or that they engaged in similar conduct. For example, it's unclear whether  
21 Madin Lopez is Hispanic and the allegations involving his conduct are too vague to make  
22 any sort of meaningful comparison. Zuniga indicates that GMC employee Oscar Salcedo  
23 observed Madin Lopez's misconduct, and separately, a complaint was made to HR by an  
24 unnamed employee. Oscar Salcedo's statement lacks any detail as to specific conduct,  
25 applicable timeframe, or scope. *See* PSOF ¶¶ 30, 31, 107; Doc. 47-1, Salcedo Statement,  
26 Ex. 14 ¶ 4 ("I also witnessed manager Madin Lopez and other male managers be verbally  
27 abusive to lab employees. The verbal abuse included obscene language.") Moreover, HR  
28 personnel did not recall the specific details of the anonymous complaint, indicating that

1 she recalled the situation as a "misunderstanding." *See* PSOF ¶¶ 87–90; Ortiz Testimony,  
2 Statement, Ex. 8 at 84–85. It's unclear whether the two reports refer to the same incident  
3 or repeated conduct. As to Mike Brandt, Plant Manager Priest could not recall the specific  
4 details of the complaint and reported conduct. *See* PSOF ¶ 21; Doc. 47-1, Priest Statement,  
5 Ex. 3 at 26–27 ("That I don't really recall. But I just remember it was – he felt [Brandt] was  
6 too hard on him."). The complaints against Lopez (using obscene language with  
7 employees) and Brandt (being too hard on an employee) are not comparable to the body of  
8 allegations made against Zuniga by multiple employees. As such, Zuniga fails to show that  
9 either Lopez or Brandt engaged in similar conduct.

10         Manager Jarrod Harvick presents a closer question. *See* PSOF ¶¶ 23–29, 45–49, 66,  
11 67, 76, 79, 80–81, 96, 98. Zuniga alleges that her sister, Margarita Ruiz ("Ruiz"), a  
12 Hispanic woman who also worked at Gowan Milling, was subject to three incidents with  
13 GMC supervisor Jarod Harvick. Allegedly, Harvick would use language to demean Ruiz,  
14 yell at her, and would slam and/or kick the door and trash cans. PSOF ¶¶ 96, 98. This  
15 conduct was witnessed by other employees, including Sergio Garcia. PSOF ¶ 66. Ruiz  
16 complained to Plant Manager Priest about Harvick. PSOF ¶¶ 23–24. Zuniga claims Priest  
17 never interviewed witness Garcia. PSOF ¶¶ 66–67. According to GMC, Priest spoke with  
18 Harvick and "there were never any alleged incidents again between Harvick and Ruiz."  
19 Doc. 49 at 8. Viewing the evidence in Zuniga's favor, however, the Court does not find a  
20 genuine factual issue exists as to whether Zuniga was treated less favorably than Harvick.  
21 A single subordinate reported Harvick for an alleged pattern of maltreatment witnessed by  
22 other employees. The nature underlying Harvick's conduct is unlike the treatment Zuniga  
23 allegedly inflicted on Herrera and others. Zuniga's alleged maltreatment varies in scope,  
24 quantity, and severity. As reported by five or six employees, Zuniga targeted and  
25 threatened individual employees and created a hostile environment. Zuniga fails to show  
26 any other GMC manager who was accused of regularly mistreating employees, retaliating  
27 against them, or forcing employees to work without air conditioning. In sum, the  
28 complaints about Zuniga's conduct are different from Harvick's conduct, and the

1 comparator evidence is insufficient to establish a prima facie case. The Court will,  
2 nonetheless, consider the remaining *McDonnell Douglas* framework.

### 3 **2. Legitimate, Non-Discriminatory Reason**

4 To meet its burden showing a legitimate, non-discriminatory reason for an adverse  
5 employment action, a defendant must "raise[] a genuine issue of fact as to whether it  
6 discriminated against the plaintiff" by presenting admissible evidence supporting a  
7 "legitimate, nondiscriminatory reason" for the adverse employment action. *Burdine*, 450  
8 U.S. at 254–55. The defendant "need not persuade the court that it was actually motivated  
9 by the proffered reasons." *Id.* at 254.

10 GMS has met its burden by articulating a legitimate reason for Zuniga's termination:  
11 Zuniga's harassment and targeting of subordinate employees created a "work environment  
12 replete with intimidation and retaliation." Doc. 49 at 2. An employer's concern that an  
13 employee's negative attitude would lower the morale and productivity of other employees  
14 is a legitimate, non-discriminatory reason for terminating an at-will employee. *See Stegall*  
15 *v. Citadell Broadcasting Co.*, 350 F.3d 1061, 1068 (9th Cir. 2003) (holding that an  
16 employee's negative attitude about her job is a legitimate, nondiscriminatory reason for  
17 termination). GMC has offered evidence supporting its position that Zuniga was fired  
18 because at least six Gowan Milling employees made allegations about Zuniga and the work  
19 environment she created. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133,  
20 142 (2000) (the employer's burden is "one of production, not persuasion"). In addition to  
21 the hostile work environment, GMC offers evidence of an unsafe work environment related  
22 to Zuniga's control over the air conditioning. DSOF ¶ 27.

23 Here the Court considers some of Zuniga's objections even though they were  
24 improperly made, as discussed above. *See supra* § I. Several of Zuniga's SOF objections  
25 relate to the argument in her Response that "Defendant has not produced any statements in  
26 affidavit form or sworn testimony from the alleged witnesses [who complained about  
27 Zuniga]." Doc. 46 at 13. In her SOF, Zuniga objects to DSOF ¶¶ 15–18 on grounds of  
28 "[r]elevance, foundation, lack of personal knowledge, hearsay, authentication, and

1 misleading evidence," and adds that "Affiant Callahan testified that he did not talk to any  
2 of the alleged witnesses." *See* PSOF ¶¶ 15–18. Defendants' paragraphs 15–18 all relate to  
3 Callahan's affidavit, where Callahan discusses Ortiz's investigation of complaints against  
4 Zunig. *See* DSOF ¶¶ 15–18 (citing Doc. 45 at 14–18, Ex. A at ¶¶ 17, 18, 20). There,  
5 Callahan stated:

6 ¶ 17. On May 28, 2020, Ms. Ortiz was informed that there were various  
7 Gowan Milling warehouse employees who wanted to lodge reports about a  
8 particular manager.

9 ¶ 18. Ms. Ortiz first met with warehouse attendant Felipe Herrera who  
10 described his relationship with Zuniga and professed that he was so  
11 mistreated by Ms. Zuniga on a daily basis that he had trouble sleeping at  
12 night and his health was being negatively impacted due to constant worrying  
13 about how Ms. Zuniga would treat him each day at work. [*See*, documents  
14 prepared and/or collected in connection with the investigation concerning  
15 employee complaints about Zuniga, true and correct copies of which are  
16 attached hereto as Exhibit A.] [("*See* documents" insertion in original)]

17 ....

18 ¶ 20. Examples of just some of the mistreatment reported by employees  
19 includes, but is in no way limited to, the following:

20 **Felipe Herrera**

21 ....

22 **Luisa Neri**

23 ....

24 **Ruben Dominguez**

25 ....

26 **Alejandro Perez Leon**

27 ....

28 **Caleb Juarez**

....

**Erick Villalobos**

....

23 *See* Doc. 45 at 14–18, Exh. A. These statements are supported by allegedly "true and  
24 correct copies" of documents generated by Ortiz's investigation. *See* Doc. 45 at 20–40.  
25 These documents include descriptions of Ortiz's conversation with Herrera, Leon, Juarez,  
26 Regalado, and Villalobos. *See* Doc. 45 at 20–27. The investigation documents also include  
27 signed declarations by Herrera, Leon, Juarez, Perez, and Villalobos. *See* Doc. 45 at 28–37,  
28 40. The investigation documents also include a signed statement by Martinez that she was



1 present at Ortiz's interviews with Regaldo, Gallardo, and Villobos, Doc. 45 at 38, and a  
2 statement by Duran that she was present at conversations between Ortiz and Herrera and  
3 Perez. Doc. 45 at 39. Reading between the lines somewhat (and setting aside the improper  
4 form of argument), the Court infers that Zuniga is arguing that GMC fails to carry its initial  
5 burden of production because some of GMC's evidence is inadmissible. With that in mind,  
6 the Court will analyze Zuniga's objections.

7 Zuniga first objects that Callahan's statements are not relevant. PSOF ¶¶ 15–18.  
8 Evidence is relevant if it makes a fact more or less probable. Fed. R. Evid. 401. Callahan's  
9 statements are relevant because Callahan's testimony makes it more probable that Zuniga  
10 was fired based on complaints lodged against her. *See also Gypsum Res., LLC v. Clark*  
11 *Cnty.*, No. 219CV00850GMNEJY, 2023 WL 3724797, at \*9 (D. Nev. May 26, 2023)  
12 ("[M]ost relevance-based evidentiary objections are moot in the context of summary  
13 judgment motions ... [because] [a] court can award summary judgment only when there is  
14 no dispute of material fact. It cannot rely on irrelevant facts, and thus relevance objections  
15 are redundant.").

16 Zuniga next objects to Callahan's statements citing "foundation, lack of personal  
17 knowledge, hearsay, authentication[.]" PSOF ¶¶ 15–18. Zuniga also objects that  
18 "Defendant[s] do not produce any statements from alleged witnesses Neri or Dominguez."  
19 PSOF ¶ 18. A witness may testify to a matter only if the witness has personal knowledge  
20 of the matter, which may be proven by the witness's own testimony. Fed. R. Evid. 602.  
21 Hearsay is "a statement, other than one made by the declarant while testifying at the trial  
22 or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid.  
23 801(c). Business records are not hearsay; business records must be made as a matter of  
24 regular practice, at or near the time of the event, and certified as reliable by a custodian or  
25 qualified witness. *See* Fed. R. Evid. 803(6). A witness is qualified if the witness  
26 understands the record-keeping system. *United States v. Ray*, 930 F.2d 1368, 1370 (9th  
27 Cir. 1990). Although previously all evidence at summary judgment had to be authenticated  
28 and admissible in its present form, the 2010 amendments to Federal Rule of Civil Procedure

1 dispensed that unequivocal requirement and now "mandate only that the *substance* of the  
2 proffered evidence would be admissible at trial." *Dinkins v. Schinzel*, 362 F. Supp. 3d 916,  
3 922–23 (D. Nev. 2019) (emphasis in original) (citations omitted)).

4 Callahan's statements about Ortiz's investigation are not hearsay because they are  
5 not offered to prove the truth of the matter asserted. GMC offers them primarily as evidence  
6 that multiple employees complained about Zuniga. *See, e.g.*, Doc. 44 at 9 (not relying on  
7 the truth of the employee allegations); Doc. 49 at 4, 10 (same). Without considering the  
8 truth of the allegations, certain other aspects of them are also admissible: that there were  
9 five or six complainants, that they complained about different aspects of Zuniga's  
10 performance, and that they were not exclusively concerned with Zuniga's use of profanity.  
11 Even if Callahan's statements were offered for the truth of the underlying allegations, those  
12 would be excused by the exception for business records. Callahan was a custodian or  
13 qualified witness of the investigation records because he would be familiar with GMC's  
14 recordkeeping practices. *Cf. Cocroft v. HSBC Bank USA, N.A.*, 796 F.3d 680, 686 (7th Cir.  
15 2015) ("the custodian need not be the individual who personally gather[ed] ... a business  
16 record."); Michael Graham, *Handbook of Fed. Evid.* § 803:6 (9th ed.) ("Lack of personal  
17 knowledge of the entrant or maker may be shown to affect the weight to be given to the  
18 record, but does not affect its admissibility.").

19 For similar reasons, Callahan's statements are properly founded, based on personal  
20 knowledge, and authenticated. Callahan's statements about Ortiz's investigation all concern  
21 something he would be expected to know about. As the GMC Plant Manager, he would be  
22 expected to learn that multiple complaints had been lodged against the former HR  
23 Manager. He swore that his affidavit was based on his personal knowledge and experience.  
24 Doc. 45 at 13. And his testimony shows that he was personally involved in all aspects of  
25 GMC's operation, including the issues arising from Zuniga's dual role as a Purchasing  
26 Manager and HR Manager. He would also be expected to know at least about the non-  
27 hearsay aspects of Ortiz's investigation: that there were five or six complainants, and that  
28 their dissatisfaction with Zuniga was not limited to the use of profanity. And the substance

1 of Callahan's statements, at least those aspects not offered for their truth, would be  
2 admissible at trial as discussed above.<sup>9</sup>

3 For those reasons, Zuniga's objections to Callahan's affidavit are overruled.

### 4 3. Pretext

5 If the defendant articulates a legitimate nondiscriminatory reason for the adverse  
6 employment action, the burden shifts back to the plaintiff to show that the stated reason  
7 was in fact pretextual. *McDonnell Douglas*, 411 U.S. at 804. A plaintiff may demonstrate  
8 pretext in two ways: (1) directly, by showing that unlawful discrimination more likely than  
9 not motivated the employer; or (2) indirectly, by showing that the employer's proffered  
10 explanation is unworthy of credence because it is internally inconsistent or otherwise not  
11 believable. *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1112–13 (9th Cir.2011).  
12 Where evidence of pretext is circumstantial, rather than direct, the plaintiff must produce  
13 "specific" and "substantial" facts to create a triable issue of pretext. *Id.* at 1113 (internal  
14 citations omitted). Where a plaintiff succeeds in raising a genuine issue of material fact  
15 regarding the authenticity of the employer's stated motive, summary judgment is  
16 inappropriate because it is for the trier of fact to decide which story is to be believed.  
17 *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir.1993).

18 Zuniga argues that the record shows GMC's proffered explanation lacks credibility,  
19 and that discrimination more than likely motivated her termination. Doc. 46 at 17–19.  
20 Specifically, Zuniga argues that GMC failed to discipline or terminate other managers for  
21 using profane language; GMC deviated from its internal procedures by investigating  
22 Zuniga without informing her or allowing her to respond to the allegations; and inconsistent  
23 testimony regarding the Zuniga's termination shows that GMC's proffered explanation  
24 lacks credibility. *See id.*

25 First, Zuniga has produced no meaningful evidence showing GMC's proffered

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26  
27 <sup>9</sup> Zuniga does not explain her objection that Callahan's statements are "misleading." The  
28 Court infers that she objects to GMC's characterization of and inferences drawn from  
Callahan's statements. That is different from disputing the fact itself. Zuniga's opposing  
characterization and inferences are properly made in her PSOF, not through objections.

1 explanation is false or that any GMC employee harbored discriminatory animus towards  
2 her because she is a Hispanic woman. GMC has offered evidence of Zuniga's misconduct  
3 separate and distinct from the profane language she argues was the crux of her termination.  
4 Six GMC employees reported Zuniga's conduct and the work environment she created:  
5 Zuniga targeted certain employees, threatened to target employees who made complaints  
6 against her, threatened to cut hours and overtime for employees she was upset with, and  
7 instilled fear in her employees through hostile and negative acts. *See* DSOF ¶ 18. Zuniga  
8 also subjected employees to dangerous environmental conditions by limiting air  
9 conditioning in the warehouse. DSOF ¶ 27. Zuniga argues that factual inconsistencies,  
10 regarding the manner and circumstances around some of the reported statements, create  
11 genuine issues of material fact. The Court disagrees. The issue is not whether the  
12 statements are true, but whether individuals made statements and brought allegations to  
13 GMC's attention. Zuniga must prove both that the proffered reasons for the challenged  
14 conduct are pretextual *and* that the animus behind the challenged action was intentional  
15 discrimination. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 519 (1993) ("It is not  
16 enough, in other words, to disbelieve the employer; the fact finder must believe the  
17 plaintiff's explanation of intentional discrimination."). That some witnesses did not recall  
18 the details of certain events surrounding their reporting has no bearing on the maltreatment  
19 reported by the six employees or the investigation undertaken by GMC. *See Buhl v. Abbott*  
20 *Labs.*, 817 F. App'x 408, 410–11 (9th Cir. 2020) ("The record is replete with evidence of  
21 Buhl's misconduct and performance issues. Although Buhl attempts to explain away this  
22 evidence, ... he has not offered any other evidence from which a jury could find that  
23 Abbott's dissatisfaction with his conduct and performance—dissatisfaction that was  
24 expressed by multiple managers on multiple occasions over multiple months—was  
25 feigned."). *See also Mitchell v. Superior Ct. of Cal. Cty. of San Mateo*, 312 Fed. Appx. 893,  
26 895 (9th Cir. 2009) (finding plaintiff failed to establish pretext where plaintiff did not offer  
27 "any evidence other than the 'timing' to rebut what otherwise appears to be an effort by an  
28 employer to confront ballooning discoveries regarding an employee's inappropriate

1 behavior").

2 Second, even if GMC's investigation was flawed in some way, "merely pointing to  
3 an employer's shoddy investigatory efforts is [not] sufficient to establish pretext."  
4 *Humphries v. CBOCS W., Inc.*, 474 F.3d 387, 407 (7th Cir. 2007), *aff'd*, 553 U.S. 442  
5 (2008). An investigation must be flawed in a way that it suggests that the defendant's  
6 proffered explanation is pretextual; this generally requires that the investigation is "not just  
7 flawed but inexplicably unfair." *See Mastro v. Potomac Elec. Power Co.*, 447 F.3d 843,  
8 855 (D.C. Cir. 2006). GMC's investigation, which culminated in Zuniga's termination,  
9 involved interviewing and obtaining statements from witnesses, but not Zuniga herself. At  
10 first glance, this appears at odds with Harvick's experience. Although GMC did not perform  
11 an investigation with respect to Harvick, Plant Manager Priest discussed the complaint with  
12 him, the individual at the center of the controversy. The circumstances, however, are  
13 distinguishable: Harvick's complaints were not addressed to or by Human Resources and  
14 Human Resources never received any claims of such widespread and severe misconduct  
15 involving Harvick as it did with Zuniga. Doc. 49 at 2. GMC further explains that it was not  
16 required to interview Zuniga and that doing so would have been pointless based upon the  
17 information uncovered during the investigation which left GMC no choice but to terminate  
18 Zuniga. Doc. 44 at 9. Zuniga offers no evidence showing the investigation was inexplicably  
19 unfair or that GMC failed to act in good faith. *See Villiarimo v. Aloha Island Air, Inc.*, 281  
20 F.3d 1054, 1063 (9th Cir.2002) (material fact is not whether employee committed  
21 misconduct, but rather, whether employer "honestly believed its reason for its actions, even  
22 if its reason is ... baseless") (citation omitted). Specifically, Zuniga does not argue that  
23 discriminatory intent fueled the investigation or that manipulation played a role. Zuniga  
24 appeared to testify that she had no basis for regarding the statements from the employees  
25 who accused her of wrongdoing as untruthful. *See* Zuniga's testimony, Doc. 45 at 56  
26 ("[Villalobos] says here [']for the past few weeks I've felt the environment in the warehouse  
27 has become increasingly hostile.['] It may have and I didn't realize because I was so busy  
28 with so many things. I didn't do anything intentional. Like I said, it may have become

1 hostile and that's the way they were feeling, but they didn't tell me."). There is no contrary  
2 evidence to show GMC did not honestly and reasonably believe its proffered reasons for  
3 terminating Zuniga. As such, Zuniga fails to offer "specific" and "substantial" facts  
4 showing GMC's investigation was so flawed as to establish pretext.

5 Lastly, Zuniga attempts to establish pretext by referencing inconsistent testimony  
6 regarding who made her termination decision. Zuniga argues that both Priest and Gonzalez  
7 had a role in the decision. The relevant testimony as to Priest:

8 Q: Did you have any part in the decision to terminate Ms. Zuniga?

9 A: Yes, I did. Yes.

10 Q: Did you make the decision to terminate Ms. Zuniga?

11 A: I'd say it was a collective decision among a few people.

12 Q: And who were those people?

13 A: I would say Mike Callahan, myself, and Esmeralda Ortiz.

14 Priest's testimony, Doc. 47-1 at 20. Testimony relevant to Gonzalez includes:

15 Q: Okay. Did you come to any conclusions prior to meeting with  
16 Mr. Callahan?

17 A: No.

18 Q: Did you recommend to Mr. Callahan that he terminate Ms.  
19 Zuniga?

20 A: Yes.

21 Gonzalez's testimony, Doc. 47-1 at 71. Zuniga's characterizations are immaterial. Zuniga  
22 produces no "specific" and "substantial" facts showing the persons claiming responsibility  
23 for Zuniga's termination decisions—Callahan, Priest, or Gonzales—were motivated by  
24 discriminatory reasons. *See Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267, 270 (9th  
25 Cir. 1996) ("To avoid summary judgment, Bradley must do more than establish a prima  
26 facie case and deny the credibility of the [defendant's] witnesses. She must produce  
27 specific, substantial evidence of pretext.") There is no evidence that these three actors  
28 offered inconsistent explanations for her termination or otherwise disbelieved the reason  
for the termination decision. Because Zuniga fails to establish pretext, summary judgment  
is appropriate as to the Title VII and ACRA claims.

///

1                   **C. Title VII and AEPA Retaliation**

2                   GMC moves for summary judgment on the retaliation claims, construing Zuniga's  
3 claims under the Arizona Employment Protection Act ("AEPA"), A.R.S.  
4 § 23- 501(3)(c)(iii), which permits an employee to assert a wrongful termination claim if  
5 they are terminated for reporting an alleged violation of an Arizona statute or the Arizona  
6 Constitution. Zuniga argues that she was retaliated against because she opposed Jose  
7 Quintero's ("Quintero") 2018 termination. PSOF ¶ 50; PCSOF ¶11 ("Ms. Zuniga contends  
8 that she was removed from the position of Human Resources Manager because she  
9 objected to the termination of an employee who was on worker's compensation at the  
10 time."); DSOF ¶¶ 41–43; *See* Compl. at 9 ("Plaintiff alleges that Defendants retaliated  
11 against her. Plaintiff was targeted by Defendants as she was removed from her position as  
12 Human Resources manager for disagreeing with the other managers regarding the  
13 termination of employees. Plaintiff informed the other managers that she believed  
14 Defendants were violating state law and company policy in terminating the employees.").

15                   To establish a prima facie case of retaliation under the AEPA, plaintiff must show:  
16 (1) that she engaged in a protected activity, (2) that she suffered an adverse employment  
17 action, and (3) that there is a causal link between the two. *Hernandez v. Spacelabs Med.,*  
18 *Inc.*, 343 F.3d 1107, 1113 (9th Cir. 2003). An AEPA retaliation claim uses the same  
19 framework as a Title VII retaliation claim. *See Whitmire v. Wal-Mart Stores Inc.*, 359 F.  
20 Supp. 3d 761, 796 (D. Ariz. 2019). An employee must prove the protected activity was the  
21 "but-for" cause of the adverse employment action. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*,  
22 570 U.S. 338, 360 (2013). In other words, the adverse employment action would not have  
23 occurred in the absence of the employee's protected activity. *See id.*

24                   Zuniga did not respond to the retaliation claim challenge and does not establish a  
25 prima facie case of retaliation. *See generally*, Doc. 46. Zuniga has failed to show that she  
26 was engaged in a protected activity or a causal connection between any purported protected  
27 activity and the adverse employment action she suffered. Quintero's termination occurred  
28 in 2018, and GMC possibly "demoted" Zuniga as Human Resources Manager shortly

1 thereafter. The Ninth Circuit has held that "in order to support an inference of retaliatory  
2 motive, [a] termination must have occurred fairly soon after the employee's protected  
3 expression." *Villiarimo*, 281 F.3d at 1065. Thus, the timing of a plaintiff's complaints may  
4 establish a "causal link" sufficient for a prima facie case of retaliation. *See id.* (citing cases  
5 holding that a four month gap, an eight month gap, a five month gap, and a four month gap  
6 between protected activity and termination is insufficient to establish causation). Zuniga,  
7 however, did not make this argument in her Response.

8 Additionally, even if Zuniga could establish a prima facie case, summary judgment  
9 would still be warranted. As discussed above, GMC has met its burden of production to  
10 offer a legitimate, nondiscriminatory reason for Zuniga's 2020 discharge, and Zuniga has  
11 failed to point to "specific and substantial" evidence to demonstrate that GMC's proffered  
12 reasons are pretextual. *Villiarimo*, 281 F.3d at 1062. Thus, Zuniga has not rebutted  
13 Defendants' legitimate, non-discriminatory reasons for termination. For these reasons, the  
14 Court grants the motion for summary judgment as to Zuniga's retaliations claims under  
15 Title VII and the ADEA.

#### 16 **D. ADEA Claims**

17 Claims of age discrimination based on circumstantial evidence are analyzed under  
18 the *McDonnell Douglas* framework. *Sheppard v. David Evans & Assoc.*, 694 F.3d 1045,  
19 1049 (9th Cir. 2012). *See also Shelley v. Geren*, 666 F3d 599, 607–08 (9th Cir. 2012)  
20 (indicating *McDonnell Douglas* burden-shifting applies to summary judgment evaluation  
21 of age discrimination claims post-*Gross*). Thus, to survive summary judgment on her claim  
22 for a violation of the ADEA under a disparate treatment theory, Zuniga must first establish  
23 a prima facie case of age discrimination.

24 To state a prima facie case of age discrimination under the ADEA, plaintiff must  
25 show that (1) she belongs to a protected class (at least 40 years old), (2) she was performing  
26 her job satisfactorily, (3) she suffered an adverse employment action, and (4) she was  
27 replaced by substantially younger employees with equal or inferior qualifications.  
28 *O'Connor v Consol. Coin Caterers Corp.*, 517 U.S. 308, 313 (1996) ("Because the ADEA



1 prohibits discrimination on the basis of age and not class membership, the fact that a  
2 replacement is substantially younger than the plaintiff is a far more reliable indicator of  
3 age discrimination than is the fact that the plaintiff was replaced by someone outside the  
4 protected class.").


5 As set forth above, the Court concludes there is sufficient evidence to create a  
6 genuine dispute whether Zuniga was performing her job satisfactorily at the time of her  
7 termination. The Court also finds that Zuniga was a member of a protected class, *see* PSOF  
8 ¶¶ 1–2 (Zuniga contends she was fifty (50) years-old at the time of her termination), and  
9 that she suffered an adverse employment action. The only question, then, is whether  
10 Zuniga's circumstance gives rise to an inference of age discrimination.

11 Zuniga has produced circumstantial evidence of age discrimination in the form of  
12 comparator evidence involving Jarrod Harvick, a purportedly "younger" manager who was  
13 not disciplined for allegedly similar conduct. *See* PSOF ¶¶ 23–29, 45–49, 66, 67, 76, 79,  
14 80–81, 96, 98. GMC's decision to not discipline Harvick does not support *prima facie*  
15 discrimination. Zuniga offers no evidence showing Harvick's is substantially younger with  
16 equal or inferior qualifications, provides no evidence to support that age-related bias  
17 influenced GMC's termination decision, and did not respond to the ADEA challenges in  
18 her response. For the reasons stated above, the Court also finds that Zuniga did not engage  
19 in similar conduct to Harvick. Zuniga fails to establish a *prima facie* ADEA claim.  
20 Accordingly, the Court grants GMC's summary judgment motion as to ADEA claims.

21 **V. Order**

22 **IT IS ORDERED GRANTING** Gowan Milling Company, LLC's Motion for  
23 Summary Judgment (Doc. 44). **IT IS FURTHER ORDERED DIRECTING** the Clerk of  
24 the Court to enter Judgment for the Defendant Gowan Milling Company, LLC and against  
25 the Plaintiff Maribel Zuniga.

26 Dated this 25th day of September, 2023.

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John C. Hinderaker  
United States District Judge