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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

NORA LAVERY-PETRASH,  
Plaintiff,

v.

SIERRA NEVADA MEMORIAL  
HOSPITAL, et al.,  
Defendants.

No. 2:11-cv-1520 GEB DAD PS

FINDINGS AND RECOMMENDATIONS

This matter came before the court on March 20, 2015, for hearing of defendant Dignity Health's (formerly known as Catholic Healthcare West and erroneously sued as Sierra Nevada Memorial Hospital) motion for summary judgment. Plaintiff Nora Lavery-Petrash appeared at the hearing on her own behalf. Attorney David Burkett appeared on behalf of the defendant.

Upon consideration of the arguments on file and at the hearing, and for the reasons set forth below, the undersigned will recommend that defendant's motion for summary judgment be granted.

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1 BACKGROUND

2 Plaintiff, then proceeding through counsel, commenced this action on March 2, 2011, by  
3 filing a complaint in the Nevada County Superior Court. (Dkt. No. 1-2 at 1.<sup>1</sup>) Plaintiff's original  
4 complaint alleged four cause of action, including one for violation of Title VII of the Civil Rights  
5 Act of 1964. On June 6, 2011, defendants Dignity Health, James Heard, David Witthaus, Arthur  
6 Dewson and Annalise O'Connor removed the action to this court. (Dkt. No. 1 at 1-2.)

7 On June 10, 2011, defendants filed a motion to dismiss. (Dkt. No. 8.) The assigned  
8 District Judge granted defendants' motion on December 12, 2011, dismissed plaintiff's original  
9 complaint and granted plaintiff leave to file an amended complaint. (Dkt. No. 23.) Plaintiff filed  
10 her amended complaint on December 25, 2011. (Dkt. No. 24.)

11 On January 12, 2012, defendants filed a motion to dismiss the amended complaint. (Dkt.  
12 No. 27.) On March 26, 2012, the assigned District Judge granted in part and denied in part  
13 defendants' motion to dismiss and granted plaintiff leave to file a second amended complaint.  
14 (Dkt. No. 37.) Plaintiff filed her second amended complaint on April 5, 2012. (Dkt. No. 39.)

15 On April 23, 2012, defendants filed a motion to dismiss plaintiff's second amended  
16 complaint. (Dkt. No. 40.) The assigned District Judge granted defendants' motion to dismiss the  
17 second amended complaint on September 5, 2012, and granted plaintiff leave to file a third  
18 amended complaint. (Dkt. No. 50.) Plaintiff filed her third amended complaint on September 16,  
19 2012. (Dkt. No. 52.)

20 On October 3, 2012, defendants filed a motion to dismiss plaintiff's third amended  
21 complaint. (Dkt. No. 54.) On May 28, 2013, the assigned District Judge dismissed the third  
22 amend complaint's causes of action alleging age-based employment discrimination, hostile work  
23 environment harassment, retaliation and negligence, but granted plaintiff leave to file a fourth  
24 amended complaint.<sup>2</sup> (Dkt. No. 58.) That same day the assigned District Judge issued an order

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26 <sup>1</sup> Page number citations such as this one are to the page number reflected on the court's CM/ECF  
27 system and not to page numbers assigned by the parties.

28 <sup>2</sup> The assigned District Judge did not, however, dismiss the third amended complaint's sex-based  
discrimination claims against defendant Dignity Health. (Dkt No. 58 at 5.)

1 finding that plaintiff was no longer represented by counsel eligible to practice in this court,  
2 deeming plaintiff to be proceeding in this action *in propria persona* and referring the matter to the  
3 undersigned Magistrate Judge pursuant to Local Rule 302(c)(21.) (Dkt. No. 59.)

4 On June 12, 2013, plaintiff, now proceeding pro se, filed a fourth amended complaint.  
5 (Dkt. No. 64.) Therein, plaintiff alleges generally that while employed by defendant Dignity  
6 Health she experienced discrimination, harassment and retaliation, in part because of her sex and  
7 age. On July 1, 2013, defendants again filed a motion to dismiss.<sup>3</sup> (Dkt. No. 67.) On January 29,  
8 2014, the undersigned issued findings and recommendations, recommending that the individual  
9 defendants be dismissed from this action and that the motion to dismiss be granted as to the fourth  
10 amended complaint's hostile work environment and negligence claims, but denied as to plaintiff's  
11 claims of age-based discrimination and retaliation. (Dkt. No. 73.) Those findings and  
12 recommendations were adopted in full by the assigned District Judge on March 17, 2014. (Dkt.  
13 No. 75.)

14 Defendant Dignity Health, ("defendant"), filed an answer on April 7, 2014. (Dkt. No. 76.)  
15 On February 13, 2015, defendant filed the pending motion for summary judgment. (Dkt. No. 85.)  
16 Plaintiff filed her opposition on March 4, 2015. (Dkt. No. 88.) Defendant filed a reply on March  
17 13, 2015. (Dkt. No. 90.)

#### 18 LEGAL STANDARDS

19 Summary judgment is appropriate when the moving party "shows that there is no genuine  
20 dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.  
21 Civ. P. 56(a).

22 Under summary judgment practice, the moving party "initially bears the burden of  
23 proving the absence of a genuine issue of material fact." In re Oracle Corp. Securities Litigation,  
24 627 F.3d 376, 387 (9th Cir. 2010) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)).  
25 The moving party may accomplish this by "citing to particular parts of materials in the record,  
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27 <sup>3</sup> Defendant's motion to dismiss expressly stated that it did "not challenge the sufficiency of  
28 Plaintiff's sex discrimination claim as asserted against DIGNITY HEALTH . . . ." (Dkt. No. 65-1  
at 4.)

1 including depositions, documents, electronically stored information, affidavits or declarations,  
2 stipulations (including those made for purposes of the motion only), admission, interrogatory  
3 answers, or other materials” or by showing that such materials “do not establish the absence or  
4 presence of a genuine dispute, or that the adverse party cannot produce admissible evidence to  
5 support the fact.” FED. R. CIV. P. 56(c)(1)(A), (B). When the non-moving party bears the burden  
6 of proof at trial, “the moving party need only prove that there is an absence of evidence to support  
7 the nonmoving party’s case.” Oracle Corp., 627 F.3d at 387 (citing Celotex, 477 U.S. at 325.).  
8 See also FED. R. CIV. P. 56(c)(1)(B). Indeed, summary judgment should be entered, after  
9 adequate time for discovery and upon motion, against a party who fails to make a showing  
10 sufficient to establish the existence of an element essential to that party’s case, and on which that  
11 party will bear the burden of proof at trial. See Celotex, 477 U.S. at 322. “[A] complete failure  
12 of proof concerning an essential element of the nonmoving party’s case necessarily renders all  
13 other facts immaterial.” Id. In such a circumstance, summary judgment should be granted, “so  
14 long as whatever is before the district court demonstrates that the standard for entry of summary  
15 judgment . . . is satisfied.” Id. at 323.

16 If the moving party meets its initial responsibility, the burden then shifts to the opposing  
17 party to establish that a genuine issue as to any material fact actually does exist. See Matsushita  
18 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the  
19 existence of this factual dispute, the opposing party may not rely upon the allegations or denials  
20 of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or  
21 admissible discovery material, in support of its contention that the dispute exists. See FED. R.  
22 CIV. P. 56(c)(1); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the  
23 fact in contention is material, i.e., a fact that might affect the outcome of the suit under the  
24 governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv.,  
25 Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is  
26 genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving  
27 party. See Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

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1 In the endeavor to establish the existence of a factual dispute, the opposing party need not  
2 establish a material issue of fact conclusively in its favor. It is sufficient that “the claimed factual  
3 dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at  
4 trial.” T.W. Elec. Serv., 809 F.2d at 631. Thus, the “purpose of summary judgment is to ‘pierce  
5 the pleadings and to assess the proof in order to see whether there is a genuine need for trial.’”  
6 Matsushita, 475 U.S. at 587 (citations omitted).

7 “In evaluating the evidence to determine whether there is a genuine issue of fact,” the  
8 court draws “all reasonable inferences supported by the evidence in favor of the non-moving  
9 party.” Walls v. Central Costa County Transit Authority, 653 F.3d 963, 966 (9th Cir. 2011). It is  
10 the opposing party’s obligation to produce a factual predicate from which the inference may be  
11 drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985),  
12 aff’d, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing  
13 party “must do more than simply show that there is some metaphysical doubt as to the material  
14 facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the  
15 nonmoving party, there is no ‘genuine issue for trial.’” Matsushita, 475 U.S. at 587 (citation  
16 omitted).

17 In assessing a motion for summary judgment brought in the context of an employment  
18 discrimination action such as this one, it is important to recognize that “California has adopted the  
19 three-stage burden-shifting test established by the United States Supreme Court [in McDonnell  
20 Douglas Corp. v. Green, 411 U.S. 792 (1973)] for trying claims of discrimination . . . .” Guz v.  
21 Bechtel National, Inc., 24 Cal.4th 317, 354 (2000).

22 Under the three-part McDonnell Douglas test, the plaintiff bears the  
23 initial burden of establishing a prima facie case of employment  
24 discrimination. Once the plaintiff has done so, the burden shifts to  
25 the employer to articulate a legitimate, nondiscriminatory reason for  
26 its actions. If the employer articulates a legitimate reason, the  
27 plaintiff must raise a triable issue that the employer’s proffered  
28 reason is pretext for unlawful discrimination. The ultimate burden  
of persuasion remains with the plaintiff.

27 Earl v. Nielsen Media Research, Inc., 658 F.3d 1108, 1112 (9th Cir. 2011) (citation omitted).

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1 In January of 2009, Witthaus received a complaint from Phlebotomist Rene MacNeil, who  
2 claimed that plaintiff, “again refused to help out with the morning [blood] draw for the past two  
3 days,” and that plaintiff “remains unwilling to be a team player.” On February 11, 2009,  
4 Witthaus again advised plaintiff to use Mobilab after learning that plaintiff had not been using it.  
5 That conversation was documented in a memorandum to plaintiff’s employee file. (Def.’s SUDF  
6 (Dkt. No. 85-6) 5, 10.)

7 In July of 2009, plaintiff attended a meeting in her role as union steward with Witthaus,  
8 Nursing Supervisor Kathy Sheahan and co-worker Constance Goodwin. The purpose of the  
9 meeting was to investigate Goodwin’s allegation that Phlebotomist Roy Gatlin intimidated her  
10 during a disagreement. Plaintiff claims that she was asked by Witthaus whether she ever  
11 witnessed any inappropriate conduct by Gatlin and that plaintiff told Witthaus that Gatlin had  
12 shown pornographic photographs to other co-workers. On July 22, 2009, Laboratory Trainer  
13 Kaye Holzworth complained to Witthaus that plaintiff was not following proper procedures for  
14 discarding blood specimen labels, even though Holzworth had reminded plaintiff of the proper  
15 procedure on several occasions. Witthaus sent a message to plaintiff that same day instructing  
16 plaintiff to follow Holzworth’s directive. (Def.’s SUDF (Dkt. No. 85-6) 6-9, 11-12.)

17 On July 23, 2009, Witthaus received a letter from Phlebotomist Patricia Daniel, asking to  
18 change shifts so that she did not have to work with plaintiff because plaintiff did not follow  
19 instructions and was “manipulative and conniving.” Daniel also informed Witthaus that plaintiff  
20 had stated that Witthaus “fucked himself” because there was a sexual harassment complaint  
21 pending against another employee. Daniel was reportedly not comfortable working with plaintiff  
22 and feared plaintiff would retaliate against her. On that same day, Witthaus received a complaint  
23 from Roy Gatlin, who claimed that plaintiff had a negative attitude and that Housekeeper Anita  
24 Hunter had informed Gatlin that plaintiff had made a derogatory comment about Phlebotomist  
25 Jessica Hoglund. Witthaus met with Hunter who reported that plaintiff had said that “Jessica  
26 [Hoglund] is a worthless piece of shit.” Hunter also said that plaintiff regularly made negative  
27 comments about her co-workers and management, and verbally attacked other employees.  
28 (Def.’s SUDF (Dkt. No. 85-6) 13-15.)

1           In August of 2009, after conducting an investigation into plaintiff's behavior, Witthaus  
2 issued plaintiff a Written Warning for failing to follow instructions on the proper handling of  
3 labels, making negative statements about co-workers and management, and projecting a negative  
4 attitude in the workplace. Plaintiff was asked to improve her communication and attitude. On  
5 September 3, 2009, Patricia Daniel told Witthaus that plaintiff had been "following her around"  
6 and accusing Daniel of being the person responsible for the complaints about plaintiff to  
7 management. On September 30, 2009, Daniel reported that plaintiff told her that the Union gave  
8 plaintiff copies of the investigation notes that indicated Daniel was the person who complained  
9 about plaintiff to management. That same day, Witthaus sent a message to plaintiff on Dignity  
10 Health's secure server stating that plaintiff had been warned that any retaliatory behavior would  
11 not be tolerated and that she should keep her conversations professional. (Def.'s SUDF (Dkt. No.  
12 85-6) 16-20.)

13           In October of 2009, Phlebotomist Rene MacNeil told Witthaus that Emergency  
14 Department staff told MacNeil that plaintiff was constantly complaining about other Laboratory  
15 Department employees and hid her food at work because she was concerned someone was trying  
16 to poison her. On October 19, 2009, Daniel told Witthaus that plaintiff was still retaliating  
17 against her by spreading inappropriate rumors about Daniel, including a rumor that Daniel was  
18 taking behavior modifying medications. On October 23, 2009, Nurse Corrine Lovendahl told  
19 Witthaus that plaintiff had a negative attitude which was getting worse. On November 5, 2009,  
20 Anita Hunter again reported that plaintiff had a negative attitude and spoke poorly about her  
21 colleagues. Hunter told Witthaus that she had witnessed plaintiff tell Patricia Daniel that plaintiff  
22 did not like the other Phlebotomists. (Def.'s SUDF (Dkt. No. 85-6) 21-25.)

23           On May 13, 2010, Phlebotomist Cheryl Ann Blank complained to Witthaus that plaintiff  
24 called in sick every time plaintiff was scheduled to work with Blank. That same day Witthaus  
25 issued an Anecdotal Note to plaintiff for attendance issues pursuant to the terms and conditions of  
26 the Collective Bargaining Agreement between SNMH and the Teamsters Union Local No. 150.  
27 Plaintiff was to sign and return the Anecdotal Note by May 25, 2010, but did not do so until June  
28 8, 2010. On May 17, 2010, Witthaus issued a performance evaluation regarding plaintiff, stating

1 that although plaintiff was accurate in her work and completed tasks assigned, her attitude and  
2 communication did not meet Dignity Health's standards. Plaintiff was given 90 days to begin  
3 showing improvement in those areas. (Def.'s SUDF (Dkt. No. 85-6) 25-31.)

4 On May 26, 2010, Clinical Laboratory Supervisor Susan Sparks told Witthaus that  
5 plaintiff became angry when Phlebotomist Cheryl Ann Blank had to go home because of  
6 mandatory furloughs. Plaintiff failed to draw blood before going on break and then left, leaving  
7 the graveyard shift without a Phlebotomist. That same day Blank complained that plaintiff stated  
8 that Witthaus "just doesn't understand" how the night shift works and that plaintiff was not  
9 stocking or bleaching counters as she should. On June 4, 2010, Clinical Lab Scientist Bob  
10 Franklin told Witthaus that he was concerned about plaintiff's negative attitude and the comments  
11 she was making. On June 16, 2010, Phlebotomist Cindy Sassman complained to Witthaus that  
12 plaintiff confronted Sassman about complaints Sassman had made to management concerning  
13 plaintiff's behavior. On June 21, 2010, Franklin complained to Witthaus that plaintiff had also  
14 confronted him about earlier complaints to management concerning plaintiff's behavior. On June  
15 28, 2010 Jessica Hoglund complained to Witthaus that plaintiff was rude to Hoglund during a  
16 conversation. On July 5, 2010, Phlebotomist Rene MacNeil reported to Witthaus that plaintiff  
17 followed MacNeil to her car and accused her of complaining to management about plaintiff's  
18 behavior. (Def.'s SUDF (Dkt. No. 85-6) 26-39.)

19 In July of 2010, an employee told Witthaus that plaintiff still was not consistently using  
20 Mobilab to track blood draws. Witthaus investigated and confirmed that there were several days  
21 plaintiff did not use Mobilab even though other employees used it without encountering any  
22 problems. Witthaus issued plaintiff a Written Warning on July 26, 2010. On November 22,  
23 2010, Witthaus was scheduled to meet with plaintiff to discuss her May 2010 performance  
24 evaluation. Plaintiff failed to appear at the meeting even though she was clocked-in for work. As  
25 a result, Witthaus issued plaintiff a Written Warning for her failure to attend. On December 9,  
26 2010, Witthaus and plaintiff met to discuss her performance and Witthaus issued an updated  
27 evaluation, stating that plaintiff still needed to focus on communicating in a calm and professional

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1 manner. Plaintiff did not sign that evaluation until February 7, 2011. (Def.'s SUDF (Dkt. No.  
2 85-6) 40-47.)

3 On December 22, 2010, SNMH posted internally an opening for the position of  
4 Laboratory Supervisor. Witthaus was responsible for hiring the Laboratory Supervisor. Plaintiff,  
5 who was 57 years old at that time, applied for the position along with eight other applicants.  
6 Witthaus did not interview plaintiff for the position because of her long history of being the  
7 subject of complaints from her co-workers, and instead interviewed Cheryl Ann Blank and  
8 Jessica Hoglund. Witthaus selected Hoglund for the position because of her excellent  
9 interpersonal skills and range of experience. The choice was approved by Vice President of  
10 Professional Services James Hear and SNMH CEO Catherine Medeiros. Hoglund was 56 years  
11 old at the time she was selected. (Def.'s SUDF (Dkt. No. 85-6) 48-53.)

#### 12 PLAINTIFF'S OPPOSITION

13 Plaintiff's opposition to defendant's motion for summary judgment partially complies  
14 with Local Rule 260(b). In this regard, in opposing the grant of summary judgment in favor of  
15 defendant, plaintiff has reproduced each fact enumerated in defendant's statement of undisputed  
16 facts and expressly admitted or denied each fact. Plaintiff, however, has not cited to evidence in  
17 support of each of her denials. (Pl.'s SUDF (Dkt. No. 88) at 17-26.) Moreover, to the extent  
18 plaintiff denies a fact asserted by defendant, plaintiff's argument is essentially that "the evidence  
19 presented to support [defendant's SUDF] is based solely on the hearsay statement of David  
20 Witthaus."<sup>5</sup> (Pl.'s SUDF (Dkt. No. 88) at 30-38.)

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22 <sup>5</sup> "At summary judgment, a party does not necessarily have to produce evidence in a form that  
23 would be admissible at trial." Nevada Dep't of Corr. v. Greene, 648 F.3d 1014, 1019 (9th Cir.  
24 2011) (citing Block v. City of Los Angeles, 253 F.3d 410, 418-19 (9th Cir. 2001) (internal  
25 quotations omitted)). The focus is instead on the admissibility of the evidence's contents, not its  
26 form. See Fraser v. Goodale, 342 F.3d 1032, 1036 (9th Cir. 2003). "Objections to evidence on  
27 the ground that the evidence is irrelevant, speculative, argumentative, vague and ambiguous, or  
28 constitutes an improper legal conclusion are all duplicative of the summary judgment standard  
itself." Century 21 Real Estate LLC v. All Prof'l Realty, Inc., 889 F.Supp.2d 1198, 1215 (E.D.  
Cal. 2012) (citing Burch v. Regents of the Univ. of Cal., 433 F.Supp.2d 1110, 1119-20 (E.D. Cal.  
2006)). "Even if the non-moving party's evidence is presented in a form that is currently  
inadmissible, such evidence may be evaluated on a motion for summary judgment so long as the  
moving party's objections could be cured at trial." Id.

1           Nonetheless, in light of plaintiff’s pro se status, the court has reviewed plaintiff’s filing in  
2 an effort to discern whether she actually denies any material fact asserted in defendant’s  
3 statement of undisputed facts and, if so, what evidence plaintiff has offered that may demonstrate  
4 the existence of a disputed issue of material fact with respect to any of her claims thereby  
5 defeating the pending motion for summary judgment.

6           In her opposition, plaintiff argues that “almost immediately after” she attended the July  
7 2009 meeting with Constance Goodwin in her role as union steward, “[s]he became the victim of  
8 discrimination, harassment and retaliation.” (Pl.’s Opp.’n (Dkt. No. 88) at 5.) Plaintiff asserts  
9 that for the first seven years of her employment she received positive performance evaluations but  
10 that once Witthaus commenced his employment, plaintiff’s performance evaluation worsened  
11 until Witthaus left, at which time “her performance evaluations resumed their positive position  
12 and remain so to date.” (Id.)

## 13 ANALYSIS

### 14 **I. Age Based Discrimination**

15           The Age Discrimination in Employment Act (“ADEA”) makes it unlawful for an  
16 employer<sup>6</sup>

17           (1) to fail or refuse to hire or to discharge any individual or otherwise  
18 discriminate against any individual with respect to his compensation, terms,  
19 conditions, or privileges of employment, because of such individual’s age;

20           (2) to limit, segregate, or classify his employees in any way which would  
21 deprive or tend to deprive any individual of employment opportunities  
22 or otherwise adversely affect his status as an employee, because of such  
individual’s age . . . .

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23 <sup>6</sup> Defendant argues, correctly, that plaintiff’s fourth amended complaint’s claim of age based  
24 discrimination specifically refers to the California Fair Employment and Housing Act (“FEHA”) and Title VII despite the fact that Title VII does not apply to age based discrimination. However,  
25 “[t]he label that a plaintiff places on [her] pleadings . . . does not determine the nature of [her] cause of action.” Rains v. Criterion Systems, Inc., 80 F.3d 339, 343 n.2 (9th Cir. 1996). See also  
26 Newhouse v. Aurora Bank FSB, 915 F.Supp.2d 1159, 1168 (E.D. Cal. 2013) (The “court . . .  
27 analyzes the underlying conduct which forms the basis of plaintiffs’ state law claims and not the  
28 label of the claims themselves”). In this regard, as noted in the undersigned’s January 28, 2014 findings and recommendations, plaintiff’s fourth amended complaint stated a claim for age-based discrimination. (Dkt. No. 73 at 5.)

1 29 U.S.C. § 623(a)(1)-(2).

2 “To establish a prima facie case of failure-to-promote under the ADEA, the plaintiff must  
3 demonstrate ‘that he or she was (1) at least forty years old, (2) qualified for the position for which  
4 an application was submitted, (3) denied the position, and (4) the promotion was given to a  
5 substantially younger person.’” Morgan v. Napolitano, 988 F.Supp.2d 1162, 1181 (E.D. Cal.  
6 2013) (quoting Shelley v. Geren, 666 F.3d 599, 608 (9th Cir. 2012)). Claims of age  
7 discrimination under California’s Fair Employment and Housing Act (“FEHA”), CAL. GOV.’S  
8 CODE § 12940, are subject to the same standard. See Guz v. Bechtel Nat. Inc., 24 Cal.4th 317,  
9 355 (Cal. 2000) (“Generally, the plaintiff must provide evidence that (1) he was a member of a  
10 protected class, (2) he was qualified for the position he sought or was performing competently in  
11 the position he held, (3) he suffered an adverse employment action, such as termination,  
12 demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory  
13 motive.”).

14 In her fourth amended complaint, plaintiff alleges that at the age of 58 she applied for the  
15 position of Laboratory Supervisor, a position she believed she was qualified for, was denied an  
16 opportunity to interview for the position and that the position was eventually filled by Jennifer  
17 Hoglund, a younger and less experienced employee.<sup>7</sup> (Fourth Am. Compl. (Dkt. No. 64) at 2-3.)  
18 Defendant, however, has proffered evidence, specifically a declaration from Jennifer Hoglund,  
19 establishing that Hoglund was 56 years old at the time she was hired. (Hogl. Decl. (Dkt. No. 85-  
20 4) at 1.) Plaintiff has offered nothing to contradict defendant’s evidence with respect to  
21 Hoglund’s age at the time she was hired for the position in question.

22 Thus, the undisputed evidence establishes that the age difference between plaintiff and  
23 Hoglund was only two years. Hoglund, therefore, was not substantially younger than plaintiff  
24 when she was selected for the Laboratory Supervisor position. See Diaz v. Eagle Produce Ltd.  
25 Partnership, 521 F.3d 1201, 1209 (9th Cir. 2008) (“That the average age of the workers hired  
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27 <sup>7</sup> It appears from plaintiff’s date of birth that plaintiff was actually 57 years old when Hoglund  
28 was selected for the Laboratory Supervisor position. (Def.’s SUDF (Dkt. No. 85-6) 50) (citing  
plaintiff’s deposition wherein plaintiff provides her date of birth); (Hoglund Decl. (85-4) at 1.)

1 during the two-year period is approximately nine and a half years younger than the average age of  
2 those laid off - 38.75 versus 48.4 years - also fails to justify an inference of age discrimination.  
3 The disparity is not so stark as to suggest bias rather than pure chance.”); Grosjean v. First Energy  
4 Corp., 349 F.3d 332, 338 (6th Cir. 2003) (“The overwhelming body of cases in most circuits has  
5 held that age differences of less than ten years are not significant enough to make out the fourth  
6 part of the age discrimination prima facie case.”); Munoz v. St. Mary-Corwin Hosp., 221 F.3d  
7 1160, 1166 (10th Cir. 2000) (“we agree with the district court that because plaintiff’s replacement  
8 was only two years his junior – an obviously insignificant difference – the necessary inference of  
9 discrimination was precluded, and he failed to establish his prima facie case”); Holtzclaw v.  
10 Certaineed Corp., 795 F.Supp.2d 996, 1011 (E.D. Cal. 2011) (“Stofle . . . was only three years  
11 younger than Plaintiff, thus not significantly younger”).

12 Plaintiff’s fourth amended complaint also alleges, in a vague and conclusory manner, that  
13 Arthur Dewszen discriminated against plaintiff based on her age. (Fourth Am. Compl. (Dkt. No.  
14 64) at 3.) Similarly, in her opposition to the pending motion for summary judgment, plaintiff  
15 argues that “Arthur Dewszen refused to allow Plaintiff to do any tasks other than stocking, wiping  
16 the counters, and putting reagents on the analyzer,” but permitted “other employees” who were  
17 younger than plaintiff “to do many other tasks.” (Pl.’s Opp.’n (Dkt. No. 88) at 8.) However,  
18 plaintiff has failed to present any further argument or evidence in support of these vague and  
19 conclusory allegations.<sup>8</sup>

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27 <sup>8</sup> To the extent plaintiff is referring to her argument that Arthur Dewszen did not allow her to plate  
28 and culture specimens but allowed Mike Olsen to perform those tasks, those allegations are  
addressed below.

1           Accordingly, the undersigned finds that plaintiff has failed to establish a prima facie case  
2 of age discrimination.<sup>9</sup> Defendant’s motion for summary judgment should, therefore, be granted  
3 as to the fourth amended complaint’s claim for age based discrimination.

4       **II. Sex Based Discrimination**

5           “Both Title VII and FEHA prohibit employment discrimination based upon sex.” Ortiz v.  
6 Georgia Pacific, 973 F.Supp.2d 1162, 1172 (E.D. Cal. 2013). Title VII makes it unlawful for  
7 employers:

8                       (1) to fail or refuse to hire or to discharge any individual, or  
9 otherwise to discriminate against any individual with respect to his  
10 compensation, terms, conditions, or privileges of employment,  
11 because of such individual’s race, color, religion, sex, or national  
12 origin; or (2) to limit, segregate, or classify his employees or  
applicants for employment in any way which would deprive or tend  
to deprive any individual of employment opportunities or otherwise  
adversely affect his status as an employee, because of such  
individual’s race, color, religion, sex, or national origin.

13 42 U.S.C. § 2000e–2(a)(1), (2). The same standard for proving intentional discrimination under  
14 Title VII applies to FEHA discrimination claims. Los Angeles Cnty. Dep’t of Parks & Recreation  
15 v. Civil Serv. Com., 8 Cal.App.4th 273, 280 (1992).

16           A plaintiff “may establish a prima facie case of discrimination under the McDonnell  
17 Douglas framework by showing that: ‘(1) [s]he is a member of a protected class; (2) [s]he was  
18 qualified for [her] position; (3) [s]he experienced an adverse employment action; and (4) similarly  
19 situated individuals outside [her] protected class were treated more favorably, or other  
20 circumstances surrounding the adverse employment action give rise to an inference of

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22 <sup>9</sup> Even if plaintiff had established a prima facie case of age discrimination, she has failed to offer  
23 any evidence that defendant’s proffered legitimate nondiscriminatory reason for failing to  
24 interview plaintiff for the Laboratory Supervisor position, i.e., that plaintiff had a long history of  
25 complaints from her co-workers regarding her lack of interpersonal skills, was pretextual. See  
26 Ortega v. Regents of University of California, No. C 11-4031 PSG, 2012 WL 5988638, at \*5  
27 (N.D. Cal. Nov. 29, 2012) (“good interpersonal and communication skills may be valid,  
28 nondiscriminatory reasons for hiring or promotion”); Kraus v. Presidio Trust Facilities  
Division/Residential Management Branch, 704 F.Supp.2d 859, 866-67 (N.D. Cal. 2010)  
 (“Plaintiff has failed to demonstrate that Mr. Blean’s reasons behind his informal evaluation of  
her performance were pretextual, and therefore summary judgment should be granted for  
Defendant as to this claim.”).

1 discrimination.”<sup>10</sup> Fonseca v. Sysco Food Services of Arizona, Inc., 374 F.3d 840, 847 (9th Cir.  
2 2004) (quoting Peterson v. Hewlett-Packard Co., 358 F.3d 599, 604 (9th Cir. 2004)).

3 Here, plaintiff’s fourth amended complaint alleges that Arthur Dewsen discriminated  
4 against plaintiff based on her sex by not allowing plaintiff to “plate the urines and/or conduct  
5 cultures,” while allowing “male lab technicians such as Mike Olsen” to perform those same  
6 duties. (Fourth Am. Compl. (Dkt. No. 64) at 4.) In her opposition to the pending motion for  
7 summary judgment, plaintiff argues, without citation to any evidentiary support, that Dewsen  
8 “was charged with training all of the graveyard laboratory employees on how to streak specimens  
9 for testing, commonly referred to as plating urines and cultures” and instead ‘left that sole  
10 responsibility to Mr. Olson.’ (Pl.’s Opp.’n (Dkt. No. 88) at 37.) According to plaintiff, at the  
11 time in question, all graveyard laboratory employees were women except Michael Olson and  
12 “Dewsen refused to train any of the other graveyard lab employees, and left that sole  
13 responsibility to Mr. Olson.” (Id.)<sup>11</sup>

14 In moving for summary judgment in their favor, however, defendant has provided  
15 evidence in the form of a sworn declaration from Dewsen stating that Laboratory Assistants and  
16 Phlebotomists typically were not allowed to perform the task of “plating urines and cultures.”  
17 (Dewsen Decl. (Dkt. No. 85-3) at 2.) An exception was made for Laboratory Assistant Michael  
18 Olson due to Olson’s “considerable amount of prior experience performing those tasks.” (Id.)  
19 Defendant’s evidence establishes that Dewsen “was not aware that Plaintiff had any prior  
20 experience plating urines or cultures.” (Id.)

21 On summary judgment defendant has produced evidence of a legitimate,  
22 nondiscriminatory reason for the additional tasks Olson was allowed to perform. See Texas Dept.

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23 <sup>10</sup> Defendant does not dispute that plaintiff is a member of a protected class or that she was  
24 qualified for her position. (Def.’s MSJ (Dkt. No. 85-1) at 18.)

25 <sup>11</sup> It is certainly questionable whether the assignment of such tasks to Olson instead of to plaintiff  
26 and other female employees is actionable. See Brooks v. City of San Mateo, 229 F.3d 917, 928  
27 (9th Cir. 2000) (Recognizing that the Ninth Circuit has held that declining to hold a job open for  
28 an employee or “badmouthing” an employee outside the job reference context do not constitute  
adverse employment actions.) The undersigned has nonetheless assumed that it is for purposes of  
the analysis set forth above.

1 of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981) (“the employer has discretion to  
2 choose among equally qualified candidates, provided the decision is not based upon unlawful  
3 criteria”); Wallace v. Texas Tech Univ., 80 F.3d 1042, 1048-49 (5th Cir. 1996) (recognizing that  
4 evidence of more experience in a particular position is a legitimate, nondiscriminatory reason for  
5 a pay differential); Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276 (9th Cir. 1981) (“employer’s  
6 decision may be justified by the hired employee’s superior qualifications”); Wilson v. Dana  
7 Corp., 210 F.Supp.2d 867, 885 (W.D. Ky. 2002) (“Thomas has established a prima facie case  
8 regarding Dana’s decisions to not name him to these positions, but Dana has likewise satisfied its  
9 burden of articulating legitimate nondiscriminatory reasons for its actions. According to Dana,  
10 the individuals selected were more experienced and better qualified, and Dana had concerns about  
11 Thomas’ leadership abilities and work ethic.”); Reed v. Connecticut, Dept. of Transp., 161  
12 F.Supp.2d 73, 81 (D. Conn. 2001) (“the DOT has proffered legitimate, nondiscriminatory reasons  
13 why Reed was not promoted to the director position. Kilbon stated that the person appointed  
14 instead of Reed, DiCioccio, had more experience in contract compliance than Reed”).

15 Because defendant has articulated a legitimate, nondiscriminatory reason for the  
16 challenged action, plaintiff must “raise a triable issue of material fact as to whether the  
17 defendant’s proffered reasons . . . are mere pretext for unlawful discrimination.” Hawn v.  
18 Executive Jet Management, Inc., 615 F.3d 1151, 1155-56 (9th Cir. 2010). See also Noyes v.  
19 Kelly Services, 488 F.3d 1163, 1168 (9th Cir. 2007) (“Should the defendant carry its burden, the  
20 burden then shifts back to the plaintiff to raise a triable issue of fact that the defendant’s proffered  
21 reason was a pretext for unlawful discrimination.”). “[A] plaintiff can prove pretext in two  
22 ways: (1) indirectly, by showing that the employer’s proffered explanation is unworthy of  
23 credence because it is internally inconsistent or otherwise not believable, or (2) directly, by  
24 showing that unlawful discrimination more likely motivated the employer.” Noyes, 488 F.3d at  
25 1170 (quoting Chuang v. University of California Davis, Bd. Of Trustees, 225 F.3d 1115, 1127  
26 (9th Cir. 2000). Direct evidence is evidence “which, if believed, proves the fact [of  
27 discriminatory animus] without inference or presumption.” Godwin v. Hunt Wesson, Inc., 150  
28 F.3d 1217, 1221 (9th Cir. 1998) (quoting Davis v. Chevron, U.S.A., Inc., 14 F.3d 1082, 1085 (5th

1 Cir. 1994)) (alteration in original). Direct evidence typically consists of clearly sexist, racist, or  
2 similarly discriminatory statements or actions by the employer. See, e.g., Godwin, 150 F.3d at  
3 1221 (supervisor stated he “did not want to deal with [a] female”); Cordova v. State Farm Ins.,  
4 124 F.3d 1145, 1149 (9th Cir. 1997) (alleged derogatory comments constitute direct evidence).  
5 “Where evidence of pretext is circumstantial, rather than direct, the plaintiff must produce  
6 ‘specific’ and ‘substantial’ facts to create a triable issue of pretext.” Earl v. Nielsen Media  
7 Research, Inc., 658 F.3d 1108, 1113 (9th Cir. 2011) (quoting Godwin, 150 F.3d at 1222). “[T]hat  
8 requirement is tempered by our observation that, in the context of Title VII claims, the burden on  
9 plaintiffs to raise a triable issue of fact as to pretext is ‘hardly an onerous one.’” Noyes, 488 F.3d  
10 at 1170 (quoting Payne v. Norwest Corp., 113 F.3d 1079, 1080 (9th Cir. 1997)). Nonetheless, a  
11 “plaintiff cannot create a genuine issue of pretext to survive a motion for summary judgment by  
12 relying solely on unsupported speculations and allegations of discriminatory intent.” Crawford v.  
13 MCI Worldcom Communications, Inc., 167 F.Supp.2d 1128, 1135 (S.D. Cal. 2001). Moreover,  
14 “[m]erely denying the credibility of the employer’s proffered reasons is insufficient to withstand  
15 summary judgment.” Munoz v. Mabus, 630 F.3d 856, 865 (9th Cir. 2010).

16 Here, plaintiff has not come forward with any evidence to challenge defendant’s proffered  
17 legitimate, nondiscriminatory reason for the challenged actions. Indeed, plaintiff concedes that  
18 defendant’s characterization of the situation is accurate. Specifically, plaintiff testified at her  
19 deposition that Michael Olson did, in fact, have more education and knowledge with respect to  
20 the tasks in question than did plaintiff. In this regard, plaintiff testified that:

21 Michael Olson has degrees up the ying-yang. I think he’s two  
22 courses behind being a physician assistant from years ago, so he has  
23 a massive amount of knowledge on the functions of the back lab,  
which is the analyzation (sic), the cultures, where I do not have the  
degrees to know that.

24 (Pl.’s Depo (Dkt. No. 85-7) at 15-16.) Plaintiff also testified that Dewsen never made any  
25 comments about plaintiff’s gender. (Id. at 18.)

26 Assuming without deciding that plaintiff had stated a prima facie case of sex based  
27 discrimination, defendant has come forward on summary judgment with evidence of a legitimate,

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1 nondiscriminatory reason for the allegedly adverse employment action. Plaintiff has failed to  
2 respond by raising a triable issue that defendant’s proffered reason is pretextual.

3 Accordingly, the undersigned finds that defendant’s motion for summary judgment should  
4 be granted as to the fourth amended complaint’s claim for sex based discrimination.

5 **III. Retaliation**

6 A plaintiff may establish a prima facie case of retaliation under Title VII, the ADEA or  
7 the FEHA by showing that (1) she engaged in a protected activity (i.e., that she protested or  
8 otherwise opposed unlawful employment discrimination directed against a protected employee),  
9 (2) the employer subjected her to an adverse employment decision, and (3) there was a causal link  
10 between the protected activity and the employer’s action. Univ. of Texas S.W. Med. Ctr. v.  
11 Nassar, — U.S. —, —, 133 S. Ct. 2517, 2534 (2013) (“a plaintiff making a retaliation claim  
12 under [Title VII] must establish that his or her protected activity was a but-for cause of the  
13 alleged adverse action by the employer”); Poland v. Chertoff, 494 F.3d 1174, 1180 (9th Cir.  
14 2007) (same); Passantino v. Johnson & Johnson Consumer Products, Inc., 212 F.3d 493, 506 (9th  
15 Cir. 2000) (same); Yanowitz v. L'Oreal USA, Inc., 36 Cal.4th 1028, 1042 (2005). “It is not  
16 necessary, however, that the employment practice actually be unlawful; opposition clause  
17 protection will be accorded ‘whenever the opposition is based on a ‘reasonable belief’ that the  
18 employer has engaged in an unlawful employment practice.’” Moyo v. Gomez, 40 F.3d 982, 984  
19 (9th Cir. 1994) (quoting EEOC v. Crown Zellerbach Corp., 720 F.2d 1008, 1012 (9th Cir. 1983)).

20 In her fourth amended complaint plaintiff alleges that she was retaliated against in the  
21 following ways: (1) her “receipt of a written warning after an investigation meeting in July 2010,  
22 regarding ... inability to use the Mobil Lab machine”; (2) “David Whitthaus, providing a list . . .  
23 in mid-September, 2010, containing the names of several of her co-workers and their alleged  
24 comments about [plaintiff],”; (3) being subjected “to a 90 day performance re-evaluation,”; and

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1 (4) by receiving a negative performance evaluation in December of 2010.<sup>12</sup> (Fourth Am. Compl.  
2 (Dkt. No. 64) at 8-9.) The fourth amended complaint also alleges that defendant retaliated against  
3 plaintiff by denying her an opportunity to interview for the Laboratory Supervisor position. (Id.  
4 at 3.)

5 As indicated by defendant's statement of undisputed facts addressed above, defendant has  
6 offered evidence on summary judgment establishing that beginning in January of 2009, plaintiff's  
7 supervisor, David Witthaus, began receiving complaints from her co-workers about plaintiff's  
8 behavior and attitude. In response to these co-worker complaints, Witthaus conducted an  
9 investigation and thereafter issued plaintiff a written warning. Witthaus, nonetheless, continued  
10 to receive complaints about plaintiff from her co-workers. Thereafter, plaintiff was issued an  
11 Anecdotal Note for excessive absences.

12 On May 17, 2010, Witthaus conducted plaintiff's performance evaluation and gave  
13 plaintiff 90 days to show improvement in her ability to communicate and in her working  
14 relationships. Nevertheless, Witthaus continued to receive complaints about plaintiff from her  
15 fellow co-workers. Moreover, plaintiff's repeated failure to use Mobilab resulted in the receipt of  
16 a Written Warning on July 26, 2010. Plaintiff received another Written Warning on November  
17 22, 2010, for her failure to attend a meeting to discuss her May 17, 2010 performance evaluation.  
18 On December 22, 2010, defendant posted an opening for a Laboratory Supervisor position, but in  
19 light of the history of complaints about her from plaintiff's co-workers, Witthaus decided not to  
20 interview plaintiff for that position which was eventually filled by a woman who was not  
21 substantially younger than plaintiff.

22 In light of this undisputed evidence, assuming without deciding that plaintiff had  
23 established a prima facie claim for retaliation, the undersigned concludes that defendant has  
24 produced evidence of legitimate nondiscriminatory reasons for plaintiff's treatment. See Stegall

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25 <sup>12</sup> The fourth amended complaint also contains an allegation that plaintiff "was threatened of  
26 (sic) insubordination by my supervisor . . . and then written up in July 2009 . . . ." (Fourth Am.  
27 Compl. (Dkt. No. 64) at 5.) Plaintiff, however, has failed to explain this allegation or offer any  
28 evidence in support of this vague and conclusory allegation regarding a threat of insubordination.  
Moreover, plaintiff states in her opposition that "[a]ll of the discrimination and retaliation began  
after Plaintiff attended the meeting of July 2009 . . . ." (Pl.'s Opp. (Dkt. No. 88) at 10.)

1 v. Citadel Broadcasting Co., 350 F.3d 1061, 1075 (9th Cir. 2003) (“Marathon states that it  
2 terminated Stegall because of a perception among Marathon management that Stegall did not  
3 place a priority on maintaining strong working relationships and thus displayed a poor attitude  
4 toward her job and her co-workers. The reasons articulated by Marathon satisfy Marathon’s  
5 burden of production to articulate legitimate nondiscriminatory reasons for terminating Stegall’s  
6 employment.”); Unt v. Aerospace Corp., 765 F.2d 1440, 1446 (9th Cir. 1985) (“An employee is  
7 not protected by Title VII when he violates legitimate company rules, knowingly disobeys  
8 company orders, disrupts the work environment of his employer, or willfully interferes with the  
9 attainment of the employer’s goals.”); Day v. Sears Holdings Corp., 930 F.Supp.2d 1146, 1170  
10 (C.D. Cal. 2013) (“violation of company policies is a legitimate, nondiscriminatory reason for  
11 terminating an employee”).

12 Because defendant has come forward with evidence articulating legitimate,  
13 nondiscriminatory reasons for the challenged actions, plaintiff must “raise a triable issue of  
14 material fact as to whether the defendant’s proffered reasons . . . are mere pretext for unlawful  
15 discrimination.” Hawn, 615 F.3d at 1155-56. Accordingly, in order to survive summary  
16 judgment plaintiff must come forward with specific and substantial evidence that defendant’s  
17 proffered reasons are actually a pretext. See Aragon v. Republic Silver State Disposal Inc., 292  
18 F.3d 654, 659 (9th Cir. 2002) (“evidence must be both specific and substantial to overcome the  
19 legitimate reasons put forth by Republic”).

20 Here, plaintiff has failed to offer any evidence that could demonstrate that defendant’s  
21 articulated reasons are pretextual. In opposing defendant’s evidence, plaintiff argues merely that  
22 much of the evidence defendant has offered is “hearsay” and refers generally to plaintiff’s  
23 attached declaration which also argues that defendant’s evidence consists of the “hearsay  
24 statement(s) of David Witthaus.”<sup>13</sup> (Pl.’s Opp.’n (Dkt. No. 88) at 21-22, 29-40.) Moreover, the  
25 evidence plaintiff offers in opposition to defendant’s motion consists essentially of letters written

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26 <sup>13</sup> Defendant has submitted not only the declarations referenced above, as well as the  
27 contemporaneous communications from Witthaus to plaintiff reflecting the complaints discussed  
28 above, but also some of the letters from plaintiff’s co-workers to Witthaus complaining about  
plaintiff’s attitude and behavior. (Def.’s MSJ (Dkt. No. 85-7) at 47, 51.)

1 by some of plaintiff's co-workers attesting to her good behavior and plaintiff's handwritten notes  
2 regarding various incidents. (Pl.'s Opp.'n (Dkt. No. 88) at 40-41.) That evidence, however, fails  
3 to contradict the significant evidence offered by defendant.<sup>14</sup> See Bradley v. Harcourt, Brace and  
4 Co., 104 F.3d 267, 270 (9th Cir. 1996) ("an employee's subjective personal judgments of her  
5 competence alone do not raise a genuine issue of material fact").

6 Plaintiff also argues that she "may establish a causal link between the alleged protected  
7 activity and the alleged adverse action by circumstantial evidence, including . . . the proximity in  
8 time between the protected action and the adverse employment act." (Pl.'s Opp.'n (Dkt. No. 88)  
9 at 10.) "Temporal proximity between protected activity and an adverse employment action can  
10 by itself constitute sufficient circumstantial evidence of retaliation in some cases."<sup>15</sup> Bell v.  
11 Clackamas County, 341 F.3d 858, 865 (9th Cir. 2003). See also Dawson v. Entek Intern., 630  
12 F.3d 928, 937 (9th Cir. 2011) ("In some cases, temporal proximity can by itself constitute  
13 sufficient circumstantial evidence of retaliation for purposes of both the prima facie case and the  
14 showing of pretext.").

15 Defendant, however, has produced considerable evidence of plaintiff's poor work  
16 performance and behavioral problems. Specifically, defendant has produced evidence that  
17 plaintiff repeatedly refused to use the Mobilab device despite its using being mandatory,

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18 <sup>14</sup> Moreover, not all of the letters offered by plaintiff are entirely supportive of her arguments. In  
19 this regard, although largely positive, a letter dated September 10, 2009, from Michael Olson  
20 notes that "because of [plaintiff's] frustration with how things are handled . . . people may  
21 interpret her words as profanity," that plaintiff "does speak of co-workers . . . but she is tactful  
22 and her comments are predominantly constructive," and that although "foul language and  
speaking negatively about co-workers is an everyday occurrence . . . [plaintiff] participates far  
less than the average lab employee in these types of behaviors." (Pl.'s Opp.'n (Dkt. No. 88) at  
55-58.)

23 <sup>15</sup> "At least one district court within the Ninth Circuit has concluded that following the Supreme  
24 Court's decision in Nassar evidence of knowledge and proximity in time alone is insufficient to  
25 create a disputed issue of fact on causation with respect to a retaliation claim." Ellorin v. Applied  
Finishing, Inc., 996 F.Supp.2d 1070, 1091 (W.D. Wash. 2014). See also Williams v. Serra  
26 Chevrolet Automotive, LLC, 4 F.Supp.3d 865, 879 (E.D. Mich. 2014) ("applying the teachings of  
Nassar and Gross here, temporal proximity alone is not enough to allow a reasonable inference of  
27 'but-for' causation"); Dall v. St. Catherine of Siena Medical Center, 966 F.Supp.2d 167, 195  
28 (E.D. N.Y. 2013) ("While temporal proximity alone may still be sufficient at the prima facie  
stage, it is not sufficient at the pretext stage.").

1 (Witthaus Decl. (Dkt. No. 85-5) at 7-8), and that plaintiff’s co-workers frequently complained  
2 about plaintiff’s poor behavior and attitude. (Whitthaus Decl. (Dkt. No. 85-5) at 1-10; Ex. F.  
3 (Dkt. No. 85-7) at 47; Ex. H (Dkt. No. 85-7) at 51.)

4 “[T]iming alone, accompanied by evidence of Plaintiff’s behavior problems, coupled with  
5 a complete lack of evidence of retaliatory intent, is neither specific nor substantial circumstantial  
6 evidence.” Davenport v. Board of Trustees of State Center Community College Dist., 654  
7 F.Supp.2d 1073, 1102 (E.D. Cal. 2009). See also Mitchell v. Superior Court of Cal. County of  
8 San Mateo, 312 Fed. Appx. 893, 894 (9th Cir. 2009) (affirming summary judgment where  
9 plaintiff “has not offered any evidence other than the ‘timing’ to rebut what otherwise appears to  
10 be an effort by an employer to confront ballooning discoveries regarding an employee’s  
11 inappropriate behavior”)<sup>16</sup>; Brooks v. Capistrano Unified School Dist., 1 F.Supp.3d 1029, 1038  
12 (C.D. Cal. 2014) (“Here, mere temporal proximity, with nothing more, is insufficient to establish  
13 pretext.”).

14 Accordingly, for all of the reasons set forth above, the undersigned finds that defendant’s  
15 motion for summary judgment should also be granted as to the fourth amended complaint’s  
16 retaliation claim.

#### 17 CONCLUSION

18 Given the evidence presented by the parties on summary judgment, there does not appear  
19 to be even a scintilla of evidence that defendant violated plaintiff’s rights under Title VII, the  
20 ADEA or the FEHA. See Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000) (“A  
21 scintilla of evidence or evidence that is merely colorable or not significantly probative does not  
22 present a genuine issue of material fact” precluding summary judgment); Summers v. A. Teichert  
23 & Son, Inc., 127 F.3d 1150, 1152 (9th Cir. 1997) (“a mere scintilla of evidence will not be  
24 sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving  
25 party must introduce some significant probative evidence tending to support the complaint”).

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27 \_\_\_\_\_  
28 <sup>16</sup> Citation to this unpublished Ninth Circuit opinion is appropriate pursuant to Ninth Circuit Rule  
36–3(b).

1 In the absence of any evidence of a disputed issue of material fact regarding plaintiff's  
2 claims, the court finds that defendant is entitled to summary judgment in its favor on all of  
3 plaintiff's claims. After adequate time for discovery, plaintiff has failed to make a showing  
4 sufficient to establish the existence of any disputed issue of fact regarding elements essential to  
5 her claims and on which she would bear the burden of proof at trial.

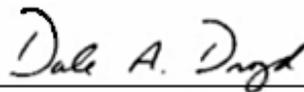
6 Accordingly, IT IS HEREBY RECOMMENDED that:

7 1. Defendant's February 13, 2015 motion for summary judgment (Dkt. No. 85) be  
8 granted; and

9 2. This action be closed.

10 These findings and recommendations are submitted to the United States District Judge  
11 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
12 after being served with these findings and recommendations, any party may file written  
13 objections with the court and serve a copy on all parties. Such a document should be captioned  
14 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
15 shall be served and filed within seven days after service of the objections. The parties are advised  
16 that failure to file objections within the specified time may waive the right to appeal the District  
17 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

18 Dated: June 11, 2015

19 

20 \_\_\_\_\_  
21 DALE A. DROZD  
22 UNITED STATES MAGISTRATE JUDGE

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