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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KATHLEEN D. BURKS,

Plaintiff,

v.

KENNETH SALAZAR, Secretary of the
Dep't of the Interior, ET AL.,

Defendants.

No. 2:12-cv-1975 JAM AC PS

FINDINGS & RECOMMENDATIONS

Before the court is defendant's January 22, 2014 motion for summary judgment (ECF No. 47). Plaintiff opposes the motion. On review of the motion, the documents filed in support and opposition, and good cause appearing therefor, THE COURT FINDS AS FOLLOWS:

UNDISPUTED FACTS¹

A. Introduction

1. General Background

The Bureau of Reclamation ("Reclamation") is a water management agency best known for the dams, power plants, and canals that it constructed in the 17 western states, and it is the largest wholesaler of water in the country. ECF No. 48, Decl. of Katherine Thompson ¶ 3. Reclamation's Mid-Pacific Region covers the northern two-thirds of California, most of western

¹ All facts are undisputed unless noted otherwise.

1 Nevada, and parts of southern Oregon. Id. ¶ 4. At the heart of the agency’s mission, Reclamation
2 manages one of the largest water storage and conveyance systems in the world – the Central
3 Valley Project. Id. That system of 20 reservoirs and more than 500 miles of major canals and
4 aqueducts was built to tame the flood waters and irrigate the semi-arid acreage of California’s
5 vast Central Valley. Id.

6 Reclamation is tasked with recovering the federal investment in constructing, operating,
7 and maintaining the Central Valley Project. Thompson Decl. ¶ 5. It does this by setting rates for
8 water users that are calculated based on past, present, and future costs to Reclamation. Id.
9 Because of the size and scope of the Central Valley Project, the rate-setting process is complex
10 and presents Reclamation with unique accounting challenges. Id.; see also ECF No. 47-6, Decl.
11 of Lora Close ¶ 1 (“[Reclamation] has many unique public laws concerning how it does its
12 accounting. [Reclamation] also has water customers that it deals with directly. . . . This creates
13 accounting and rate-setting challenges unique to [Reclamation.] That makes accounting work for
14 [Reclamation] very complicated.”).

15 Reclamation’s Finance Division plays a crucial role in accomplishing Reclamation’s
16 mission. Thompson Decl. ¶ 6. The division supports Reclamation’s cost-recovery objectives
17 through budgeting, accounting, water rate-setting, power accounting, and cost-analysis services.
18 Id. At all times relevant to this action, the division consisted of three branches: Accounting,
19 Budget, and Rate-Setting. Id.

20 2. Assistant Regional Director Katherine Thompson

21 Katherine Thompson, a Caucasian woman, began her employ with Reclamation in 2004.
22 Thompson Decl. ¶ 2. In late-2006 or early-2007, Thompson was promoted to the position of
23 Assistant Regional Director of Support Services for the Mid-Pacific Region. Id. In this position,
24 she oversaw five Reclamation divisions: Financial Management, Acquisitions, Information
25 Technology, Human Resources, and Administrative Services. Id.

26 During Thompson’s tenure at Reclamation, she supervised multiple managers, many of
27 whom came to understand that Thompson has very high expectations, which she applied to her
28 subordinates evenly. See, e.g., ECF No. 47-13, Decl. of Yolanda Smith (formerly Yolanda

1 Wesson) ¶ 6 (African American woman born in 1971; “[She] expect[s] staff to be competent and
2 subject matter experts and to proactively learn about Reclamation’s business and customers. . . . I
3 observed her to apply these expectations evenly to all her subordinates. Though her high
4 expectations could sometimes cause stress, they were applied fairly to all.”); ECF No. 47-11,
5 Decl. of Craig Muehlberg ¶ 7 (Caucasian man born in 1958; “In my experience with Thompson, I
6 observed that she has high expectations of her direct reports. Though her high expectations can
7 cause stress, they are applied evenly to all of her subordinates.”); Close Decl. ¶ 2 (Caucasian
8 woman, approximately 63 years old; “As a manager, Ms. Thompson has high expectations. She
9 expects that people will do their jobs diligently, and she consistently monitors those she
10 supervises to ensure that that happens. She gives out assignments, and she lets you know her
11 expectations. . . . I observed that Ms. Thompson consistently applied high expectations to all of
12 her subordinates.”); ECF No. 47-9, Decl. of Julia McGinnis ¶ 4 (African American and Native
13 American woman born in 1981; “I observed that Thompson treated people fairly, applying the
14 same expectations to all her subordinates.”); ECF No. 47-5, Decl. of Brenda Bryant ¶ 5 (African
15 American woman born in 1960; “[Thompson] is very dedicated and sets a high bar, higher than
16 people are used to, and some people react negatively to this. I observed that Thompson evenly
17 applies the same expectations to all her subordinates.”).

18 3. Thompson Hires Plaintiff as Financial Manager

19 As part of the reorganization leading to Thompson’s promotion, Reclamation’s upper
20 management decided to create a Mid-Pacific Region Financial Manager position. Thompson
21 Decl. ¶ 7. Modeled on such managers in other regions, the Financial Manager would oversee the
22 Mid-Pacific Region’s Accounting, Budget, and Rate-Setting branches and would be responsible
23 for integrating their functions. Id. Thompson therefore initiated a search to find a person with the
24 skills and knowledge required to bring the Finance Division together as a team and effectively
25 tackle Reclamation’s considerable financial and accounting challenges. Id.

26 Thompson considered several applicants for the position, including plaintiff, who is
27 African-American, and two internal Caucasian candidates. See Close Decl. ¶¶ 1, 5; Muehlberg
28 Decl. ¶¶ 2-3. At the time, plaintiff was the Deputy Comptroller with the Department of

1 Homeland Security, Coast Guard in Alameda, California. ECF No. 49, Pl.’s Opp’n at 3.² In that
2 position, plaintiff oversaw approximately 50 staff members and managed an annual allocation of
3 \$350 million. Id. As the Deputy Comptroller, plaintiff advised “the Command” of financial
4 issues, and she managed the distribution of grants and financial oversight. Id. Before working as
5 the Deputy Comptroller, plaintiff was the Financial Manager with the Department of Agriculture,
6 Food and Nutrition Service in San Francisco, California. Id. This position required plaintiff to
7 manage the \$8 billion Special Nutrition Assistance Program, which included Food Stamp, Special
8 Nutrition, Nutrition Education, Child Nutrition, and Food Distribution for Tribal Organizations
9 for the Western United States. Id. Before that, plaintiff worked as an Administrative Officer with
10 the Department of Agriculture, Plant Protection and Quarantine, managing business services such
11 as human services, information management, budget and customer support. Id.

12 Thompson ultimately chose plaintiff as the Mid-Pacific Region’s Financial Manager.
13 Thompson Decl. ¶ 8. Before extending an offer, Thompson met with plaintiff over lunch to
14 discuss the many challenges a Financial Manager would face. Id. Thompson initiated this
15 conversation to ensure that plaintiff understood that the Financial Manager job would be very
16 demanding, requiring critical thinking and proactive leadership and would involve accounting
17 problems significantly different from those that plaintiff faced previously. Id. Plaintiff disputes
18 this account, asserting that the only matters discussed were managing staff, bringing new
19 managers on board, providing direction, and unifying the team in the absence of supervisors.³
20 Pl.’s Opp’n at 5 ¶ C. Plaintiff said that she was up for the job, and Thompson left the

21
22 ² The Court notes that, pursuant to Rand v. Rowland, 154 F.3d 952, 953-54 (9th Cir. 1998) (en
23 banc), and Klinge v. Eikenberry, 849 F.2d 409, 411-12 (9th Cir. 1988), plaintiff was provided
24 with notice of the requirements for opposing a motion for summary judgment. See ECF No. 47-
25 3. This notice informed plaintiff that, to oppose a motion for summary judgment, she must set out
26 specific facts in declarations, depositions, answers to interrogatories, or authenticated documents.
27 Plaintiff, though, does not submit any declarations with her opposition, including her own.
28 Therefore, the Court is must rely on plaintiff’s statements that are included in the opposition
itself, which creates an evidentiary problem because the opposition is not signed under penalty of
perjury. See 28 U.S.C. § 1746.

³ Plaintiff also states that she was asked how much longer she thought she would be working,
suggesting to plaintiff that Thompson did not intend to have her working very long. Pl.’s Opp’n
at 5 ¶ B.

1 conversation enthusiastic about plaintiff's ability to take charge and improve Reclamation's
2 financial processes. Thompson Decl. ¶ 8.

3 Thompson wanted plaintiff to succeed as Financial Manager. Thompson Decl. ¶ 9. Not
4 only would this relieve Thompson of the burdens associated with managing the Finance
5 Division's personnel and day-to-day substantive priorities, it would also demonstrate to
6 Thompson's superiors that she had made the right choice. Id.

7 B. Plaintiff Begins Work as Financial Manager

8 In May 2007, plaintiff began work as Financial Manager. Thompson Decl. ¶ 10. In that
9 position, she was responsible for advising Reclamation's Regional Directors on financial issues
10 that impact Reclamation's work throughout the Mid-Pacific Region. Id. That included (1)
11 applying financial rules and statutes to Reclamation's contracts, (2) analyzing Reclamation's
12 business processes to eliminate inefficiencies, and (3) leading efforts to streamline service to
13 Reclamation's customers. Id.; see also ECF No. 47-4, Decl. of Victoria Boesch, Ex. I (Financial
14 Manager Job Description and Major Duties). She was also responsible for organizing, managing,
15 and directing all of the Mid-Pacific Region's financial management programs and activities,
16 including by developing and implementing annual and long-term strategic plans. Thompson
17 Decl. ¶ 10. Plaintiff managed approximately 55 Finance Division staff, with four high-level
18 managers and a secretary reporting directly to her. Id.

19 Approximately six months before plaintiff's hire, Lora Close was reassigned to be
20 Assistant Financial Manager. Close Decl. ¶ 4. Close first began working for Reclamation in
21 2003 as an accountant and was promoted to Accounting Manager in 2004. Id. ¶¶ 1, 3. In her
22 newly reassigned position as Assistant Financial Manager, Close's duties were to help the
23 Financial Manager create a cohesive Finance Division out of the existing three units. Id. ¶ 6. At
24 the time of plaintiff's hire, Thompson encouraged plaintiff to consult with Close on a day-to-day
25 basis because Close had extensive experience with Reclamation accounting. Thompson Decl. ¶
26 11. Thompson also advised plaintiff to consult with Reclamation's contractor-accounting
27 systems expert, Julia McGinnis, because McGinnis's knowledge of systems solutions would help
28

1 plaintiff integrate financial functions.⁴ Id.

2 During plaintiff's first month, Thompson and others provided background materials to
3 help plaintiff acclimate. Thompson Decl. ¶ 12. These included the Managing for Excellence
4 Report, the Central Valley Water Project Association's briefing materials on financial issues, and
5 a comprehensive report evaluating the Mid-Pacific Region's financial systems and process. Id.

6 In July and August 2007, Thompson coached plaintiff to begin actively participating in
7 meetings as the Finance Division's leader. Thompson Decl. ¶ 13. For example, Thompson
8 encouraged plaintiff to speak up at weekly Regional Management Team staff meetings and to
9 make sure that the team was aware of financial issues that were relevant to all managers. Id.
10 When plaintiff failed to bring up any issues, Thompson asked her on one occasion to address
11 three specific issues, but again plaintiff did not do so. Id. In her opposition, plaintiff does not
12 address this specific incident. See ECF No. 49, Pl.'s Opp'n at 6 ¶ F. Instead, she states in a
13 conclusory fashion that she did inform the regional managers of relevant issues. See id.

14 Around this time, Thompson also advised plaintiff to consult with her staff before
15 attending an August CFO Council meeting. Thompson Decl. ¶ 14. Thompson explained that the
16 CFO Council was Reclamation's financial oversight body, and that the Financial Manager's role
17 at its meetings was to ensure that the Deputy Chief Financial Officer understood the Region's
18 financial challenges and priorities. Id. Thompson claims that plaintiff came to the meeting
19 unprepared. Id. Though plaintiff states that she disputes this statement, see Pl.'s Opp'n at 6 ¶ G,
20 she does not address her level of preparedness at the August CFO Council meeting. Rather,
21 plaintiff states generally that she would consult with her staff prior to meetings, oftentimes over
22 the phone. Id.

23 ///

24 ⁴ Plaintiff disputes these statements. See Pl.'s Opp'n at 5-6, ¶ E. She claims that Close was
25 assigned to be Thompson's assistant beginning in April 2006 and that Thompson retained Close
26 as an assistant long after the position of Financial Manager was filled. Id. Exs. A-C. While
27 plaintiff's supporting exhibits establish that Close moved from the position of Accounting
28 Services Manager to Assistant Financial Manager sometime in mid- to late-2007, see Ex. A, and
that Close was included in various email chains addressing various projects, id. Ex. B, plaintiff
has not disputed Thompson's statement that she encouraged plaintiff to consult with Close,
though she does state that Thompson did not request that plaintiff consult with McGinnis. Pl.'s
Opp'n at 6 ¶ E.

1 C. Plaintiff's Performance Issues

2 1. Surnaming Problems

3 Reclamation has an approval process called "surnaming" whereby subject matter experts
4 review the Regional Director's formal correspondence as well as proposed contracts to ensure
5 factual and technical accuracy. Thompson ¶ 13. One of the Financial Manager's duties is to sign
6 off on such documents after vetting them for financial issues. Id. The vetting process would
7 include, among other things, consulting with experts in the division to screen for significant
8 financial risks such as non-compliance with financial standards and internal controls. Id.

9 As early as June 2007, Thompson noticed that plaintiff had approved documents with
10 financial implications without appropriately identifying technical problems and financial risks.
11 Thompson Decl. ¶ 14. Thompson advised plaintiff that she must have appropriate subject matter
12 experts review documents before approving them. Id. She then instructed plaintiff to have Close,
13 the Assistant Financial Manager, review all documents before plaintiff approved them. Id. In the
14 following months, Thompson noticed that plaintiff continued to approve documents posing
15 financial risks. Id. ¶ 14. When Thompson contacted Close to discuss the risks, she learned that
16 plaintiff had not asked Close to review the documents before plaintiff approved them. Id. After
17 this happened several times, a formal procedure was created requiring Finance Division review.
18 Id. Thompson found it necessary to create a formal process because plaintiff repeatedly failed to
19 follow verbal instructions and failed to respond to Thompson's emails and verbal requests for
20 information regarding specific document approvals. Id.

21 Plaintiff counters that it was she, in fact, who developed and implemented a surnaming
22 routing process to assure Thompson that there was a consensus amongst managers in the Finance
23 Division. See Pl.'s Opp'n at 6-7 ¶¶ H-I, Ex. E.⁵

24 2. Failure to Respond to Email from Richard Stevenson

25 On July 5, 2007, Richard Stevenson, Chief of the Water Rights and Contracts Branch, sent
26 an email to plaintiff asking her to review a draft water service contract and provide finance-

27
28 ⁵ Plaintiff incorrectly identifies this document as Exhibit D. See Pl.'s Opp'n at 6 ¶ H.

1 related feedback. Thompson Decl. ¶ 18, Ex. B. Stevenson noted that he was anxious to get the
2 contract out and asked for a response date. Id. On July 18, 2007, after failing to hear from
3 plaintiff, Stevenson sent a second email asking for an idea of when he can expect the review to be
4 completed. Id. On August 8, 2007, after again failing to receive a response, Stevenson sent a
5 third email to plaintiff, this time copying a number of high-level managers on the email thread,
6 including Thompson. See id. Thompson responded to Stevenson right away apologizing for the
7 delay and assuring him that the Finance Division would provide feedback within two days. Id.
8 Thompson then met with plaintiff to see what had been done and learned that plaintiff had taken
9 no action. Thompson Decl. ¶ 18. Thompson then herself coordinated with Finance Division staff
10 to review the draft contract, forcing her to reschedule meetings and delay other work to resolve
11 the crisis. Id. Plaintiff's failure to respond to Stevenson and to assign staff to review the draft
12 water contract deeply concerned Thompson. Id. ¶ 19. Thompson states that plaintiff did not have
13 an explanation for her repeated failure to act. Id.

14 Plaintiff admits that it was reasonable to expect a Financial Manager to respond to emails
15 such as those sent by Stevenson, that a failure to respond would be very concerning, and that
16 Thompson's distress over the failure to respond was reasonable.⁶ Pl.'s Depo. 259:6-14, 260:7-9,
17 262:1-5 [Boesch Decl. Ex. G, ECF No. 47-4 at 37-52]. Nonetheless, plaintiff asserts that she
18 spoke in person with Stevenson about getting subject matter expert review, and Stevenson
19 suggested several Finance Division employees to help get the review completed. Pl.'s Opp'n at 7
20 ¶ J. Plaintiff does not address her failure to respond to Stevenson's email and further fails to
21 address Thompson's need to coordinate with Finance Division staff to respond to Stevenson.

22 3. Failure to Provide Managing for Excellence Action Plan by Deadline

23 On July 18, 2007, Michelle Light, the Regional Director's Chief of Staff, emailed plaintiff

24 _____
25 ⁶ Though plaintiff questions the completeness of the Stevenson email thread provided by
26 defendant, see Pl.'s Depo. 261:9-21 [Boesch Decl. Ex. G, ECF No. 47-4 at 51], she fails to submit
27 any other copies of this email thread. A party asserting that a fact is genuinely disputed must
28 support the assertion by "citing to particular parts of materials in the record, including
depositions, documents, electronically stored information, affidavits or declarations, stipulations
(including those made for purposes of the motion only), admissions, interrogatory answers, or
other materials." Fed. R. Civ. P. 56(c)(1)(A).

1 (and copied Thompson) asking for a financial-initiative Managing for Excellence implementation
2 plan. Thompson Decl. ¶ 20, Ex. C. The email set an August 6, 2007 deadline for a response from
3 plaintiff since the Region's response was due on August 10, 2007. Id. When Thompson asked
4 plaintiff about this project on August 10, 2007, she learned that plaintiff had done nothing
5 towards completing the assignment. Thompson Decl. ¶ 20. Thompson then worked with Burks
6 to assign the matter to a staff member, who had to work on Saturday to complete the project
7 (August 10, 2007 was a Friday). Id. Thompson explained to plaintiff that her failure to act
8 promptly had created an otherwise unnecessary Saturday assignment and made the entire
9 Region's response late. Id.

10 Plaintiff admits that the response was late, but states that Light explained that the
11 Managing for Excellence Plan was previously updated by Thompson on a monthly basis. See
12 Pl.'s Opp'n at 7 ¶ K. Plaintiff fails to explain, however, why she did not respond to Light's email
13 or update the Plan herself when asked to do so.

14 4. Decline in Quality and Reliability of Plaintiff's Work

15 Thompson developed further reservations regarding the quality and reliability of
16 plaintiff's work in September 2007. Thompson Decl. ¶¶ 21-22. First, plaintiff provided a San
17 Luis Drainage Draft Legislation Briefing that both incorrectly stated that certain measures would
18 impose costs on the Region, when in fact they would create a savings, and failed to adequately
19 analyze the impacts of the subject legislation. Id. ¶ 21. At the meeting on this issue, neither
20 plaintiff nor any of her staff were able to explain the reasoning behind the Finance Division's
21 conclusions. Id. Following this meeting, Thompson sent plaintiff an email asking for an updated,
22 accurate analysis, and telling plaintiff that she was expected to come to meeting with complete
23 and accurate analyses that either she or a staff member could coherently discuss.⁷ Id.

24 In late-September 2007, a problem regarding power-revenue accounting emerged.

25 ⁷ In her opposition, plaintiff states that she may have attended this meeting, but she did not
26 present a brief since subject matter experts and Branch Chiefs typically make such presentations.
27 Pl.'s Opp'n at 7 ¶ I. But neither plaintiff's opposition nor her submitted documents refute
28 Thompson's statements. See id. Ex. F (late-July 2007 email exchange discussing the San Luis
Unit facilities; an edited draft of a contract between the United States and Pacheco Water District
providing project water service from San Luis Unit and Delta Division).

1 Thompson Decl. ¶ 22. This issue was so significant that the Bureau of Reclamation’s Chief
2 Financial Officer traveled to the Region from Washington D.C. for an in-person briefing. Id. On
3 Friday, September 28, at 4 p.m., Thompson met with Burks and key staff to analyze certain
4 transactions at issue for a Monday meeting with the Chief Financial Officer. Id. As these
5 discussions continued, plaintiff left the meeting to pick up her husband at the airport. Id.
6 Plaintiff then did not participate in continuing discussions over the weekend between Thompson
7 and other staff members, despite being copied on emails, and she missed a Monday morning
8 conference that developed a resolution to the revenue-recognition problem just before the meeting
9 with the Chief Financial Officer. Id. When Thompson asked plaintiff why she did not participate
10 while the Finance Division grappled with an urgent and substantial problem, plaintiff responded
11 that meetings are not an effective way to resolve issues. Id. ¶ 23. When Thompson asked for an
12 alternate approach, she claims that plaintiff did not respond.⁸ Id.

13 5. Further Performance Issues

14 In October 2007, Thompson became further dissatisfied with plaintiff’s reliability. See
15 Thompson Decl. ¶¶ 26-27. For example, on October 10, 2007, Thompson sent plaintiff an email
16 asking her to provide comments by October 18, 2007, on a draft letter regarding a COMB Water
17 Project. Id. ¶ 26, Ex. F. Thompson claims that plaintiff did nothing. Id. ¶ 26. Plaintiff counters
18 that the document was routed to the Branch Chiefs for review and comment. Pl.’s Opp’n at 8 ¶
19 O.

20 Also in October 2007, Thompson assigned plaintiff to draft a letter responding to the
21 Kanawha Water District’s claim for a refund. Thompson Decl. ¶ 27. After plaintiff circulated a
22 draft for comment, Thompson verbally directed her to provide a final product before leaving for a
23 business trip on October 26, 2007. Id. Plaintiff told Thompson that the letter was being reviewed
24 for approval by the Resources Management Division. Id. When plaintiff later failed to provide

25 ⁸ Plaintiff disputes this account, but again fails to address the substance of Thompson’s
26 statements. She states only that she attended this meeting, that Thompson reacted to
27 “POTENTIAL” debt issues, that the end of September and first week of October are a busy time
28 for Finance Division staff, and that numerous scheduled and impromptu meetings were held.
Pl.’s Opp’n at 7-8 ¶¶ M-N. Plaintiff claims that she told Thompson that, in light of the numerous
meetings, it was very difficult to be in two places at once, “attending the meetings and following
up on the actions and then bringing those actions and activities to to [sic] a close.” Id. at 8 ¶ N.

1 the final letter, Thompson discovered that plaintiff had not in fact submitted it to the Resources
2 Management Division for review. Id. Thompson then learned from plaintiff's staff that
3 plaintiff's draft letter did not analyze the refund issue. Id. Thompson therefore was forced to
4 meet with Finance Division staff to devise appropriate substantive content for the letter and get it
5 out. Id.; see also id. Ex. G. In opposition, plaintiff asserts only that there were two letters from
6 the Kanawha Water District, one sent to the Financial Manager and the other to the Regional
7 Director a few days later. Pl.'s Opp'n at 8 ¶ P. Plaintiff submits as evidence the draft letter sent
8 to Thompson, and states that she responded to the Financial Manager letter and was unaware of
9 the letter to the Regional Director. Id., Ex. H.⁹

10 Additionally, Thompson declares that plaintiff failed to prepare an assigned presentation,
11 did not participate in a discussion of her division's budget, and missed another Managing for
12 Excellence deadline. Thompson Decl. ¶ 28, Exs. H-J. Plaintiff does not address her failure to
13 prepare an assigned presentation or the second missed Managing for Excellence deadline.
14 Instead, as to her participation in discussions of her division's budget, plaintiff states generally
15 that she worked with a budget technician and other budget staff each year on the Finance Division
16 budget. Pl.'s Opp'n at 8 ¶ Q.

17 The performance problems that Thompson observed were also observed by others in
18 Reclamation. See, e.g., Smith Decl. ¶ 8 ("In many meetings, I observed Thompson asking
19 [plaintiff] substantive financial questions that [plaintiff] was unable to answer. . . . [Plaintiff]
20 usually stuttered, stammered, and looked uncomfortable in response to Thompson's questions.
21 Though I believed it was fair for Thompson to expect the Financial Manager to address such
22 issues, I never saw [plaintiff] able to substantively discuss critical financial issues on her own
23 without addressing the issue to a subordinate."); Muehlberg Decl. ¶¶ 5-6 ("[Plaintiff] did not take
24 a leadership role in . . . meetings and did not really participate. [¶] As time went on, in meetings, I
25 observed that Thompson appeared frustrated by [plaintiff]'s inability to answer pressing questions
26 regarding financial issues and by [plaintiff]'s lack of understanding of Reclamation accounting.").

27
28 ⁹ Plaintiff incorrectly identifies this document as Exhibit I. See Pl.'s Opp'n at 8 ¶ P.

1 In late-2007, either Thompson or plaintiff came up with an idea to have plaintiff work
2 with a couple of successful and experienced Financial Managers in other regions. Thompson
3 Decl. ¶ 29; Pl.'s Opp'n at 8 ¶ R. Thompson believed this would give plaintiff the opportunity to
4 observe first-hand the type of work that would make her successful. Thompson Decl. ¶ 29. She
5 felt this was particularly important because of plaintiff's lack of participation in the Finance
6 Division's October 2007 budget discussions. Id. Thompson claims she broached the subject of
7 having plaintiff shadow other regions' Financial Managers at an October 26, 2007 meeting. Id.
8 Thompson declares that she told plaintiff that her first assignment would be to go to the Upper
9 Colorado Region to work with the Financial Manager in Salt Lake City during the last week of
10 November. Id. Plaintiff claims there was no mention of specific dates during that meeting. Pl.'s
11 Opp'n at 8 ¶ R.

12 6. Thompson's Expectations for Plaintiff

13 Thompson believed that plaintiff's failure to engage rendered her minimally successful (at
14 best) on her performance plan's communications and customer service elements. Thompson
15 Decl. ¶ 30. In addition to missed deadlines and unanswered customer requests, Thompson found
16 that plaintiff's staff continually looked to Thompson rather than plaintiff for direction. Id.; see
17 also McGinnis Decl. ¶ 6 (“[Plaintiff] did not seem to understand finance-related concepts. As a
18 consequence, I was never able to go to [plaintiff] with substantive issues”); Smith Decl. ¶ 5
19 (“[Plaintiff] did not give me the type of guidance that I needed and that I believed appropriate for
20 my immediate supervisor and the manager of the Finance Division.”), id. ¶ 11 (“[Plaintiff] did not
21 provide substantive guidance to me or other subordinates. She also did not provide leadership or
22 address substantive issues in meetings.”); Close Decl. ¶ 7 (“During the June 2007 to November
23 2007 time period, [plaintiff] . . . gave me no guidance regarding my work or her expectations.”),
24 id. ¶ 9 (“[Plaintiff] gave me no assignments. I found [plaintiff] uncommunicative and
25 unresponsive.”), id. ¶ 11 (“During all the time I worked under [plaintiff], I observed that she did
26 not appear to have a firm grasp of pertinent financial standards or appropriation law.”).
27 Thompson therefore met directly with Finance Division staff to make assignments, monitor
28 progress, direct their work, and answer their questions. Thompson Decl. ¶ 30. This required

1 Thompson to forgo other high-priority tasks and work after regular business hours. Id.

2 To improve the situation, Thompson provided verbal and written guidance, the latter via
3 email dated November 6, 2007, to plaintiff regarding her communications and customer-service
4 expectations. Thompson Decl. ¶ 31, Ex. K. These expectations included, inter alia, responding to
5 emails within one business day unless the email is informational; to confer with Thompson after
6 each meeting on all financial issues to ensure agreement with assignments and next steps; brief
7 RMT on financial issues at staff meetings; have daily check-ins or more frequent communications
8 with the ARD; verbally debrief after each significant financial meeting to further confer with the
9 ARD on next steps; and respond to contractor communications within five workdays. Id. Ex. K.
10 With this list of expectations, Thompson hoped that, by increasing her level of oversight of
11 plaintiff's work, she could avoid more missed deadlines resulting from plaintiff's failure to assign
12 work to her staff. Id. ¶ 31.

13 7. Thompson's Continued Frustration with Plaintiff's Performance

14 On November 7, 2007, plaintiff received an email from the Regional Liaison asking for
15 ACWA issue papers by November 13, 2007. Thompson Decl., Ex. L. Two days later, Thompson
16 emailed plaintiff to check on the status of her response. See id. Plaintiff purportedly failed to
17 respond to either email. Thompson Decl. ¶ 32. After the deadline passed, Thompson again
18 intervened to get the work done. Id. Thompson claims that plaintiff did nothing to help complete
19 the assignment and took no responsibility for her inaction.¹⁰ Id.

20 Then, on November 14, 2007, plaintiff attended a Battle Creek meeting at Thompson's
21 direction. Thompson Decl. ¶ 34. Thompson asked plaintiff to confer with her following the
22 meeting so that Thompson could explain the pertinent financial issues to allow plaintiff to take
23 the lead on them. Id. Plaintiff, however, did not talk to Thompson after the meeting as
24 instructed. Id. When Thompson asked plaintiff why, plaintiff stated that everyone was in

25 ¹⁰ Plaintiff does not address this incident specifically, and instead submits two tables, one titled
26 "Fall 2007 ACWA" and the other titled "Spring 2008 ACWA Assignments." See Pl.'s Opp'n at
27 9 ¶ T, Ex. J. The relevance of these tables is unclear since they are submitted without any
28 explanatory information. Plaintiff also states generally that she developed all assigned issue
papers, Pl.'s Opp'n at 9 ¶ U, but in support submits draft documents that are either facially
irrelevant, undated, pre-date the November 2007 request for AWCA issue papers by one month,
or post-date the request by up to one year. See id., Ex. K.

1 agreement when the meeting concluded. Id. Per Thompson, this illustrated plaintiff's
2 inattentiveness since the parties' lack of agreement was one of the meeting's primary topics. Id.;
3 see also id. Ex. M (email from Thompson to plaintiff, November 18, 2007).

4 D. Plaintiff's Meeting with Mike Finnegan

5 On November 14, 2007, plaintiff met with Acting Deputy Regional Director Mike
6 Finnegan. See Thompson Decl. ¶ 33. The purpose of this meeting was to discuss
7 communications between Thompson and plaintiff. Id. Finnegan allegedly advised plaintiff to
8 meet with Thompson to discuss the issue. Id.

9 E. Plaintiff's Reassignment

10 On November 15 and 16, 2007, the Finance Division held off-site strategy planning
11 sessions to develop a mission statement and to identify financial roles and responsibilities.
12 Thompson Decl. ¶ 35. Thompson claims that plaintiff participated very little in these meetings,
13 while plaintiff claims that she participated as much as the other managers in attendance. Id.; Pl.'s
14 Opp'n at 9 ¶ Y. During these meetings, Thompson came to understand that the managers
15 reporting to plaintiff believed plaintiff's lack of knowledge regarding Reclamation finance
16 significantly hindered her work as a financial manager. Thompson Decl. ¶ 35; see also supra.
17 Accordingly, Thompson began to plan an intensive developmental assignment to help plaintiff
18 "get on the fast track." Thompson Decl. ¶ 35. This assignment would temporarily relieve plaintiff
19 of day-to-day management duties as Financial Manager and give her time to study Reclamation
20 finance so she could build a solid foundation that would give her the confidence to lead the
21 Finance Division. Id.

22 F. The Salt Lake City Meeting

23 As previously noted, either Thompson or plaintiff decided that the latter could benefit
24 from shadowing other regions' Financial Managers, giving plaintiff the opportunity to observe
25 first-hand the type of work that would make her successful. Thompson claims she first broached
26 the subject at an October 26, 2007 meeting when she told plaintiff that her first assignment would
27 be to go to the Upper Colorado Region to work with the Financial Manager in Salt Lake City
28 during the last week of November. Plaintiff denies that they discussed a date at this meeting.

1 On November 18, 2007, Thompson sent plaintiff an email outlining her expectations for
2 plaintiff's Salt Lake City trip the next week. Thompson Decl. ¶ 36, Ex. O. On Monday,
3 November 19, 2007, plaintiff told Thompson that she could not attend the Salt Lake City budget
4 meeting because she had a personal class each night that week that conflicted. Id. ¶ 36.
5 Thompson responded via email on November 20, 2007, stressing the importance of plaintiff's
6 attendance in Salt Lake City and informing plaintiff that there would be consequences if she did
7 not attend. Id., Ex. Q. Plaintiff responded that personal financial obligations and also work
8 duties prevent her from making the trip. Id. The next day, on November 21, 2007, Thompson
9 sent another email to plaintiff informing her that she was required to go on the planned trip.
10 Thompson Decl. Ex. P. In response, plaintiff accused Thompson of harassment. Id. Plaintiff did
11 not attend the Salt Lake City meeting. Instead, she called in sick on that Monday and Tuesday
12 with a migraine headache. Pl.'s Depo. at 302: 22-24 (Boesch Decl. Ex. H, ECF No. 47-4 at 54).

13 Plaintiff disputes all of Thompson's statements regarding the Salt Lake City trip. Pl.'s
14 Opp'n at 9-10 ¶ Y. Though she fails to address the content of the emails submitted by Thompson,
15 plaintiff contends that she did not have a problem traveling, as evidenced by her travel log, see id.
16 Ex. N, but states that traveling was difficult because she wearing a heart monitor and was
17 undergoing medical tests, id. Ex. O.¹¹

18 G. The Individual Development Plan

19 On November 30, 2007, Thompson presented plaintiff with an Individual Development
20 Plan ("IDP"), which was to span four months and had as its objective "[t]o provide sufficient
21 training and development activities to enable plaintiff to function effectively as the regional
22 financial manager." Thompson Decl. ¶ 37, Ex. R; see also id. Ex. S. Thompson spoke to plaintiff
23 about the IDP and incorporated some of her suggestions. Id. During the period of the IDP, Susan
24 Hoffman was selected to serve as the Interim Financial Manager who would handle the day-to-
25 day management of the Finance Division. Id.

26 On December 7, 2007, Thompson met with plaintiff to discuss the latter's progress under

27 ¹¹ In support, plaintiff submits only an August 2007 email that she sent to Thompson requesting
28 leave on two days for doctor's appointments. See Pl.'s Opp'n Ex. O.

1 the IDP. Thompson Decl. ¶ 38. In the progress review report, called the Supervisory Employee
2 Performance Appraisal Plan, Thompson rated plaintiff minimally successful. Id., Ex. T. She
3 noted that plaintiff's communication competencies have been ineffective, that plaintiff was
4 completely nonresponsive on important financial matters, that she did not respond to verbal or
5 email supervisory instruction, that she missed deadlines, and that there was evidence of customer
6 dissatisfaction. Id. In support, Thompson referred to many instances of plaintiff's subpar
7 performance, including her August 2007 and October 2007 failure to provide Managing for
8 Excellence financial action plans by the deadline, her July 2007 failure to respond to an email
9 from Richard Stevenson asking her to review a draft water service contract and provide finance-
10 related feedback, her October 2007 failure to respond to the Kanawha District's request for a
11 refund, her failure to respond to the November 2007 email from the Regional Liaison to respond
12 to the ACWA issue papers, and lastly, plaintiff's failure to attend the Salt Lake City meeting
13 despite direct orders to attend. See id. Plaintiff refused to sign this progress report. See id.

14 H. Plaintiff's December 2007 Complaint of Discrimination

15 On December 3, 2007, plaintiff met with EEO Counselor Wilber "Louis" Moore to
16 discuss a complaint of discrimination against Thompson. See ECF No. 47-8, Decl. of Kevin
17 Mack Ex. B (Pl.'s EEO Complaint). Moore then reached out to John Davis, the then-Acting
18 Regional Director, on December 7, 2007, to inform him of the meeting. ECF No. 47-7, Decl. of
19 John Davis ¶ 5.

20 Davis then met with Thompson. Davis Dec. ¶ 5; Thompson Decl. ¶ 39. At this meeting,
21 Davis and Thompson discussed plaintiff's performance problems and Thompson's attempts to
22 help plaintiff improve her work performance. Davis Decl. ¶ 5.

23 On December 11, 2007, plaintiff sent Davis a memo detailing her complaints against
24 Thompson; Davis received this memo on December 14, 2007. Davis Decl. ¶ 6, Ex. B. Because
25 the memo referred to plaintiff's meeting with Mike Finnegan concerning "the disparate,
26 harassing, and inappropriate behavior of [plaintiff's] superior," Davis contacted Finnegan. Davis
27 Decl. ¶ 6. Finnegan allegedly told Davis that plaintiff did not raise such concerns, but instead
28 spoke to him about communication issues. Id. Per Davis, Finnegan counseled Davis to speak to

1 Thompson. Id.

2 On December 14, 2007, Davis met again with Thompson. Davis Decl. ¶ 6. Davis asked
3 Thompson directly whether plaintiff's meeting with Finnegan caused her to move plaintiff out of
4 her position, to which Thompson responded "No." Id. ¶ 7. Thompson explained that she had
5 serious concerns regarding plaintiff's performance dating back to October and that feedback from
6 the mid-November Finance Division strategy meeting convinced Thompson that plaintiff needed
7 a structured development plan. Id.; Thompson Decl. ¶ 39. The purpose of the IDP was to help
8 plaintiff understand her role as Financial Manager. Davis Decl. ¶ 7; Thompson Decl. ¶ 39. Davis
9 reviewed the IFP and concluded that the activities that plaintiff was asked to perform were
10 reasonable. Davis Decl. ¶ 7.

11 I. Denial of Within-Grade Increase in Pay

12 In early 2008, plaintiff provided Thompson with a list of plaintiff's accomplishments for
13 2007. Thompson Decl. ¶ 40, Ex. U. Plaintiff and Thompson went back and forth on this list,
14 with Thompson expressing numerous concerns to plaintiff regarding both the substance and
15 quality of the information provided by plaintiff. See id., Ex. V. For example, Thompson noted
16 that many of the accomplishments identified by plaintiff consisted of attending and setting up
17 meetings, conveying information plaintiff's staff had developed, and carrying out other
18 administrative tasks. Thompson Decl. ¶ 40. Thompson believed that plaintiff's list also included
19 items that she had not completed and that she had taken credit for the accomplishments of others.
20 Id. Plaintiff counters that supervisors typically list as their accomplishments those done
21 personally as well as those done in conjunction with their staff. Pl.'s Opp'n at 10 ¶ Z. On
22 February 12, 2008, Thompson asked for a response by February 13, 2008 to the issues she raised
23 regarding plaintiff's accomplishments. Thompson Decl. Ex. V. Plaintiff did not respond to this
24 email. Thompson Decl. ¶ 40.

25 On February 21, 2008, because plaintiff had not identified significant accomplishments
26 that altered Thompson's earlier analysis, Thompson finalized plaintiff's rating for 2007 as
27 minimally successful. Id. Based on this minimally successful rating, plaintiff's within-grade
28 increase in pay was denied on May 30, 2008. Id., Ex. W.

1 J. Plaintiff's Performance Reviews

2 In May 2008, Thompson provided plaintiff with a Supervisory Assessment of her work
3 during the prior five-month IDP period. Thompson Decl. ¶ 42, Ex. Y. In this assessment,
4 Thompson noted that plaintiff has "consistently been incapable of demonstrating a basic
5 understanding of governing accounting principles, concepts, and standards. [Plaintiff] is unable to
6 articulate, to any degree, this governing guidance." Id. Ex. Y. Thompson also noted that, despite
7 5 months in a concentrated learning plan, plaintiff continued to display unfamiliarity with the
8 federal appropriation used to fund Reclamation's mission. Id. Lastly, Thompson noted that
9 plaintiff's written products are difficult to follow, contain irrelevant and inaccurate information,
10 and are generally unsuitable for executive-level communications. Id.

11 On June 30, 2008, Thompson provided plaintiff with another Supervisory Employee
12 Performance Appraisal Plan, wherein Thompson again rated plaintiff as performing at a less than
13 satisfactory level. Thompson Decl. ¶ 42, Ex. Z.

14 K. Five-Day Suspension

15 Based on plaintiff's failure to follow Thompson's directions to attend the Salt Lake City
16 Budget meeting and to provide her with an adequate response to the Kanawha Water District's
17 refund request, Thompson proposed on January 14, 2008 that plaintiff receive a five-day
18 suspension without pay. Thompson Decl. ¶ 41, Ex. X. Thompson felt this was important to get
19 plaintiff's attention because plaintiff did not seem to understand the importance of completing
20 assigned tasks or following supervisory direction. Id. ¶ 41. Thompson believed it was important
21 to hold plaintiff formally accountable. Id.

22 Plaintiff responded to this proposal by letter and also met with Frank Michny, the
23 Assistant Regional Director for the Bureau of Reclamation's Mid-Pacific Region. ECF No. 47-
24 10, Michny Decl. ¶ 4, Exs. A-B. After giving plaintiff a chance to tell her side of the story,
25 Michny upheld the suspension on February 20, 2008, because the evidence showed that plaintiff
26 failed to comply with Thompson's direct order to attend the Salt Lake City budget meeting and
27 that she failed to complete the Kanawha Water District response as Thompson directed. Id., Ex.

28 C.

1 On March 13, 2008, plaintiff filed a formal administrative grievance regarding her
2 suspension. Schulz Decl., Ex. A. Plaintiff also made an oral presentation to Elizabeth Ann
3 Rieke, Area Manager, on May 4, 2008, to present her position. Id., Ex. B. On May 10, 2008,
4 Rieke also upheld the 5-day suspension for failure to follow a direct order and failure to complete
5 an assigned task. Id.

6 L. Plaintiff's Transition Back to Full Financial Manager Responsibilities

7 Despite plaintiff's performance issues, Thompson planned to transition her back to full
8 Financial Manager responsibilities. Thompson Decl. ¶ 43. In order to prepare plaintiff for the
9 transition, Thompson instructed her in late-May and again in mid-June to obtain briefings on the
10 Finance Division's current workload. Id. On June 27, 2008, Thompson, plaintiff, and Hoffman
11 (the Acting Interim Financial Manager) met to collaboratively formulate an agreement for a
12 Financial Manager transition with the help of a facilitator from Positive Impact Consulting. Id.
13 Based on the Transition Charter they drafted together, Thompson prepared a July 15, 2008 letter
14 of expectations emphasizing the important of communication and collaboration. Id., Ex. AA.

15 Shortly thereafter, on July 24, 2008, Thompson issued a Letter of Counseling to plaintiff
16 in light of the latter's failure to obtain briefings on the Finance Division's current workload as
17 previously instructed. Thompson Decl. ¶ 43, Ex. BB. In this letter, plaintiff was warned that
18 failure to follow Thompson's direction will be considered insubordination and may result in the
19 initiation of formal disciplinary action. Id.

20 M. Unsatisfactory Performance Rating

21 In January 2009, Thompson completed another Supervisory Employee Performance
22 Appraisal Plan, giving plaintiff an unsatisfactory rating based on failure to complete assignments,
23 poor leadership, and substandard work. Thompson Decl. ¶ 44, Ex. CC. Thompson also discussed
24 the problems identified in the Appraisal Plan with plaintiff. See id., Ex. DD. Plaintiff disagreed
25 with the evaluation and refused to sign it. See id. From February through May 2009, plaintiff
26 continued to produce work product that Thompson found inadequate. See Thompson Decl. ¶ 44,
27 Exs. EE-KK.

28 ///

1 N. Plaintiff's Transfer to New Position

2 In June 2009, Thompson removed plaintiff from the Financial Manager position and
3 transferred her to a position in which she would coordinate the Region's Internal Control
4 Program. Thompson Decl. ¶ 45, Ex. LL. Thompson did this because she did not believe that
5 plaintiff could performance the Financial Manager job in a way that avoided significant financial
6 risk for Reclamation. Id. ¶ 45. She also did this because plaintiff continued to produce untimely
7 and inaccurate work and failed to provide leadership that Thompson thought was necessary for
8 the Financial Division. Id. In plaintiff's new position, she continued to receive the same pay and
9 benefits. Thompson Decl. ¶ 45.

10 Thompson appointed Assistant Financial Manager Lora Close to step in as Acting Interim
11 Financial Manager while Thompson looked for a replacement for plaintiff. Thompson Decl. ¶ 46.
12 In late-2010, Thompson chose Brenda Bryant, an African-American woman, as the Region's new
13 Financial Manager. Id.; Bryant Decl. ¶ 2. Per Thompson, Bryant has done an excellent job as a
14 Financial Manager during the three years that Thompson supervised her. Thompson Decl. ¶46.

15 O. The EEOC Proceedings

16 On January 22, 2008, plaintiff filed a complaint of discrimination based on her race
17 (African-American), color (light complexion), and age (date of birth, February 13, 1956). Mack
18 Decl. Ex. B. An administrative hearing was held on March 17 and 18, 2010.¹² Id. Ex. A. On
19 February 3, 2012, administrative law judge Jeanne M.L. Player issued an order finding no
20 evidence of discrimination, retaliation or hostile work environment. Mack Decl. Ex. A.

21 PRODCEDURAL BACKGROUND

22 Plaintiff initiated this action on May 4, 2012 in the Northern District of California.
23 Following transfer to this court on July 30, 2012 and upon grant of defendant's motion to dismiss,
24 see ECF No. 36, this matter is now proceeding on a first amended complaint filed January 2,
25 2013, ECF No. 33. Plaintiff brings suit for discrimination based on race (African-American),
26 color (light complexion), age (date of birth, February 13, 1956), and reprisal (for participation in

27 _____
28 ¹² At the hearing, plaintiff dropped her claim of discrimination based on color. Michny Decl. Ex. A at 2 n.1.

1 the EEO process). Plaintiff also asserts a claim for hostile work environment.

2 On May 10, 2013, a pretrial scheduling order issued setting June 27, 2014 as the date for
3 the pretrial conference and September 8, 2014 as the trial date. ECF No. 41. These dates have
4 now been continued to August 22, 2014 and October 27, 2014, respectively. See ECF No. 54.

5 On January 22, 2014, defendant filed the instant motion for summary judgment, which
6 plaintiff opposes.

7 LEGAL STANDARDS

8 “A party may move for summary judgment, identifying each claim . . . or the part of each
9 claim . . . on which summary judgment is sought. The court shall grant summary judgment if the
10 movant shows that there is no genuine dispute as to any material fact and the movant is entitled to
11 judgment as a matter of law.” Fed. R. Civ. P. 56(a). A material fact is one that could affect the
12 outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477
13 U.S. 242, 248 (1986). For a dispute to be “genuine,” a reasonable jury must be able to return a
14 verdict for the nonmoving party. Id.

15 The moving party’s burden on summary judgment depends on whether it bears the burden
16 of proof at trial with respect to the claim or defense at issue. When the party moving for
17 summary judgment would bear the burden of proof at trial, it must come forward with evidence
18 which would entitle it to a directed verdict if the evidence went uncontroverted at trial. See
19 C.A.R. Transp. Brokerage Co., Inc. v. Darden Restaurants, Inc., 213 F.3d 474, 480 (9th Cir.
20 2000). In such a case, the moving party has the initial burden of establishing the absence of a
21 genuine issue of fact on each issue material to its case. Id. However, if the nonmoving party
22 bears the burden of proof on an issue at trial, such as an affirmative defense, the moving party
23 need not produce affirmative evidence of an absence of fact to satisfy its burden. Celotex Corp.
24 v. Catrett, 477 U.S. 317, 323 (1986). The moving party may simply point to the absence of
25 evidence to support the nonmoving party’s case. Id.

26 Once the moving party has met its burden, the burden then shifts to the nonmoving party
27 to designate specific facts showing a genuine issue for trial. Celotex, 477 U.S. at 324; Anderson,
28 477 U.S. at 256 (“a party opposing a properly supported motion for summary judgment may not

1 rest upon mere allegations or denials of his pleading, but must set forth specific facts showing that
2 there is a genuine issue for trial.”). A party asserting that a fact is genuinely disputed must
3 support the assertion by “citing to particular parts of materials in the record, including
4 depositions, documents, electronically stored information, affidavits or declarations, stipulations
5 (including those made for purposes of the motion only), admissions, interrogatory answers, or
6 other materials.” Fed. R. Civ. P. 56(c)(1)(A).

7 To carry its burden, the nonmoving party must show more than the mere existence of a
8 scintilla of evidence, Anderson, 477 U.S. at 252, and “do more than simply show that there is
9 some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co., Ltd. v. Zenith
10 Radio Corp., 475 U.S. 574, 586 (1986). In fact, the nonmoving party must come forward with
11 affirmative evidence from which a jury could reasonably render a verdict in the nonmoving
12 party’s favor. Anderson, 477 U.S. at 252, 257. In determining whether a jury could reasonably
13 render a verdict in the nonmoving party’s favor, the court must view the evidence in the light
14 most favorable to the nonmoving party and draw all justifiable inferences in its favor. Id. at 255.
15 Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s obligation to
16 produce a factual predicate from which the inference may be drawn. Dias v. Nationwide Life Ins.
17 Co., 700 F. Supp. 2d 1204, 1214 (E.D. Cal. 2010).

18 To establish a genuine dispute of material fact, a plaintiff must present affirmative
19 evidence; bald assertions that genuine issues of material fact exist are insufficient. Galen v.
20 County of Los Angeles, 477 F.3d 652, 658 (9th Cir. 2007); see also F.T.C. v. Stefanchik, 559
21 F.3d 924 (9th Cir. 2009) (“A non-movant’s bald assertions or a mere scintilla of evidence in his
22 favor are both insufficient to withstand summary judgment.”). Further, evidence that is merely
23 colorable or that is not significantly probative is not sufficient to withstand a motion for summary
24 judgment. Anderson, 477 U.S. at 249-50 (citations omitted). “Conclusory, speculative testimony
25 in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary
26 judgment.” Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007); see also
27 Nelson v. Pima Community College, 83 F.3d 1075, 1081-82 (9th Cir. 1996) (“[M]ere allegation
28 and speculation do not create a factual dispute for purposes of summary judgment”). If the

1 nonmoving party fails to show that there is a genuine issue for trial, “the moving party is entitled
2 to judgment as a matter of law.” Celotex, 477 U.S. at 323.

3 DISCUSSION

4 A. Evidentiary Problems

5 As already noted, plaintiff was provided with notice of the requirements for opposing a
6 motion for summary judgment pursuant to Rand v. Rowland, 154 F.3d 952, 953-54 (9th Cir.
7 1998) (en banc), and Klinge v. Eikenberry, 849 F.2d 409, 411-12 (9th Cir. 1988). See ECF No.
8 47-3. This notice informed plaintiff that, to oppose a motion for summary judgment, she must set
9 out specific facts in declarations, depositions, answers to interrogatories, or authenticated
10 documents.

11 Notwithstanding this notice, plaintiff has not submitted any declarations with her
12 opposition, not even her own. Plaintiff’s arguments are therefore limited to statements made in
13 her opposition, which is problematic since it is not signed under penalty of perjury. See 28
14 U.S.C. § 1746. Moreover, plaintiff attaches to her opposition over 250 pages of exhibits, none of
15 which are authenticated and many of which are submitted without explanation of context or
16 relevance. See Orr v. Bank of Am., NT & SA, 285 F.3d 764, 773-75 (9th Cir. 2002) (finding
17 exhibits improperly authenticated and thus inadmissible and stating that “[a] trial court can only
18 consider admissible evidence in ruling on a motion for summary judgment”); see also Fed. R.
19 Evid. 901. Lastly, plaintiff (and, at times, defendant, see Thompson Decl. ¶ 33; Davis Decl. ¶ 6)
20 relies on statements made by other people, statements that are inadmissible as hearsay and that
21 are not subject to any exceptions to the rule against hearsay. See Fed. R. Evid. 801-804.

22 The Court recognizes that Fraser v. Goodale, 342 F.3d 1032, 1036-37 (9th Cir. 2003),
23 provides that “at the summary judgment stage, we do not focus on the admissibility of the
24 evidence’s form. We focus instead on the admissibility of its contents.” See also Block v. City of
25 Los Angeles, 253 F.3d 410, 418-19 (9th Cir. 2001) (“To survive summary judgment, a party does
26 not necessarily have to produce evidence in a form that would be admissible at trial, as long as the
27 party satisfies the requirements of Federal Rules of Civil Procedure 56.”). Fraser affirmed
28 consideration of hearsay contained in the plaintiff’s diary on summary judgment because at trial,

1 the plaintiff’s testimony of its contents would not be hearsay—the plaintiff could testify to the
2 portions of the diary from her personal knowledge, Fed. R. Evid. 602, use the diary to refresh her
3 recollection, Fed. R. Evid. 612, or even read the diary into evidence as a recorded recollection,
4 Fed. R. Evid. 803(5). Fraser, 342 F.3d at 1037.

5 In this case, despite the glaring evidentiary problems presented, the Court will assume for
6 the purposes of this motion, and without analyzing the propriety of each submitted evidentiary
7 item, that all of the evidence can be submitted in admissible form at trial.

8 B. Title VII Discrimination Claim

9 Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice for
10 an employer” to “discriminate against any individual with respect to” the “terms, conditions, or
11 privileges of employment, because of such individual's race, color, religion, sex, or national
12 origin.” 42 U.S.C. § 2000e–2(a). A discrimination claim must be supported by direct evidence of
13 discrimination, or may instead be evaluated under the burden-of-proof-and production analysis
14 set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973).

15 Here, plaintiff has presented no direct evidence of disparate treatment by Thompson based
16 on either race or age. Thus, under the McDonnell Douglas analysis, she must first provide
17 sufficient evidence to establish a prima facie case of discrimination. If she succeeds, the burden
18 shifts to defendant to produce evidence of a legitimate, nondiscriminatory reason for the adverse
19 action. If defendant successfully carries that burden, the ultimate burden shifts to plaintiff to raise
20 a triable issue of material fact as to whether the proffered reasons for the adverse action are a
21 mere pretext for unlawful discrimination. See Fonseca v. Sysco Food Servs. of Arizona, Inc., 374
22 F.3d 840, 850 (9th Cir. 2004). Notwithstanding the burden-shifting, the ultimate burden of proof
23 remains with plaintiff to show that defendant intentionally discriminated against her because of
24 her race and/or age. Coleman v. Quaker Oats Co., 232 F.3d 1271, 1281 (9th Cir. 2000).

25 1. Prima Facie Case

26 “Establishing a prima facie Title VII case in response to a motion for summary judgment
27 requires only minimal proof and does not even need to rise to the level of a preponderance of the
28 evidence.” Palmer v. Pioneer Assocs, Ltd., 338 F.3d 981, 984 (9th Cir. 2003) (internal citations

1 and quotations omitted). To establish a prima facie case, the plaintiff must present evidence
2 showing: (1) she is a member of a protected class; (2) she was performing her job in a satisfactory
3 manner; (3) she suffered an adverse employment action; and (4) that similarly situated individuals
4 outside her protected class were treated more favorably, or other circumstances surrounding the
5 adverse employment action give rise to an inference of discrimination. See, e.g., Zeinali v.
6 Raytheon Co., 636 F.3d 544, 552 (9th Cir. 2011).

7 Plaintiff has established that she is a member of a protected class as to both race and age¹³
8 and that she suffered an adverse employment action. Nonetheless, the Court finds that plaintiff
9 cannot establish that she was performing her job in a satisfactory manner. Instead, the undisputed
10 facts establish a pattern of poor performance, failure to communicate, failure to respond to
11 requests for information, and failure to guide and supervise subordinates. Though plaintiff claims
12 to dispute some (though certainly not all) of defendant's evidence, her objections are, for the most
13 part, vague, relying on general statements of her accomplishments and failing to address the
14 particular incidents referenced by defendant. For example, Thompson declares that sometime in
15 July or August 2007, plaintiff failed to bring up three specific issues at a weekly Regional
16 Management Team staff meeting, even after Thompson directed her to do so. See Thompson
17 Decl. ¶ 13. In opposition, although plaintiff states that she did inform the regional managers of
18 relevant issues, she does not refute that she failed to raise three issues at this specific meeting
19 after being directed by Thompson to raise them. Pl.'s Opp'n at 6 ¶ F. In another example,
20 Thompson submits evidence that plaintiff failed to respond to three emails sent by Richard
21 Stevenson to review a draft water service contract and provide finance-related feedback.
22 Thompson Decl. ¶ 18, Ex. B. Rather than addressing her failure to respond, plaintiff states only
23 that she spoke with Stevenson, and Stevenson suggested several Finance Division employees to
24 help get the review completed. Pl.'s Opp'n at 7 ¶ J.

25 Plaintiff also fails to show that similarly situated individuals outside her protected class
26 (whether based on race, age or color) were treated more favorably. Rather, the weight of the

27 ¹³ The Court also will assume for the purposes of the present motion that plaintiff has established
28 membership in a protected class based on color.

1 evidence, which is undisputed, establishes that Thompson managed all subordinates with the
2 same high expectations. See Smith Decl. ¶ 6; Muehlberg Decl. ¶ 7; Close Decl. ¶ 2; McGinnis
3 Decl. ¶ 4 Bryant Decl. ¶ 5. Plaintiff thus fails to establish a prima facie case of discrimination.

4 2. Legitimate, Nondiscriminatory Reason

5 Assuming that plaintiff did establish a prima facie case, the Court also finds that defendant
6 has provided a legitimate, nondiscriminatory reason for the allegedly discriminatory actions. “If
7 plaintiff[] establish[es] a prima facie case, the burden of production, not of persuasion, shifts to
8 the employer to articulate some legitimate, nondiscriminatory reason for the challenged action.”
9 Hawn v. Exec. Jet Mgmt., Inc., 615 F.3d 1151, 1155 (9th Cir. 2010) (internal citations and
10 quotations omitted). “If defendant meets this burden, plaintiff[] must then raise a triable issue of
11 material fact as to whether the defendant's proffered reasons for [the adverse action] are mere
12 pretext for unlawful discrimination.” Id.

13 Here, defendant has submitted extensive evidence of plaintiff’s poor work performance,
14 which is a legitimate, nondiscriminatory reason for Thompson’s conduct. The undisputed facts
15 establish, inter alia, plaintiff’s failure to respond to three emails sent by Richard Stevenson,
16 failure to timely provide two Managing for Excellence Plans, failure to explain the reasoning
17 behind what was determined to be an incorrect analysis on the San Luis Drainage Draft
18 Legislation, failure to participate in discussions leading up to a meeting with Reclamation’s Chief
19 Financial Officer, failure to prepare an assigned presentation, failure to attend the Salt Lake City
20 meeting, and failure to guide and supervise subordinates. See Aragon v. Repub. Silver State
21 Disposal, Inc., 292 F.3d 654, 660-61 (9th Cir. 2002) (“poor job performance” is a “legitimate,
22 nondiscriminatory reason for terminating . . . employment”). The burden now shifts back to
23 plaintiff to show pretext.

24 3. Pretext

25 “A plaintiff can prove pretext in two ways: (1) indirectly, by showing that the employer’s
26 proffered explanation is unworthy of credence because it is internally inconsistent or otherwise
27 not believable, or (2) directly, by showing that unlawful discrimination more likely motivated the
28 employer.” Noyes v. Kelly Servs., 488 F.3d 1163, 1171 (9th Cir. 2007) (internal citations,

1 quotations, and alterations omitted). “All the evidence as to pretext—whether direct or indirect—
2 is to be considered cumulatively.” Id.

3 Defendant argues that plaintiff is unable to show that the proffered legitimate reasons are
4 pretextual in light of the “same actor inference.” The Ninth Circuit has held “that where the same
5 actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions
6 occur within a short period of time, a strong inference arises that there was no discriminatory
7 motive.” Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 270-71 (9th Cir. 1996); see also
8 Coghlan v. Am. Seafoods Co. LLC, 413 F.3d 1090, 1096 (9th Cir. 2005) (extending Bradley’s
9 pronouncement on the same-actor inference for “hiring and . . . firing” to cases where the
10 employee is “offered a less desirable job assignment” (quotation marks omitted)). The same-
11 actor inference is “neither a mandatory presumption (on one hand) nor a mere possible conclusion
12 for the jury to draw (on the other hand).” Coghlan, 413 F.3d at 1098. Instead, “it is a ‘strong
13 inference’ that a court must take into account on a summary judgment motion.” Id.; see also
14 Bradley, 104 F.3d at 271-72. The same actor inference can be overcome, however, if the plaintiff
15 provides “meaningful evidence that her supervisor harbored discriminatory animus,” Johnson v.
16 Boys & Girls Clubs of S. Puget Sound, 191 Fed. App’x 541, 545 (9th Cir. 2006), or “evidence
17 suggesting that [the employer] developed a bias against [the protected class]” during the interval
18 between the favorable and unfavorable employment actions, Coghlan, 413 F.3d at 1097.

19 Here, it is undisputed that Thompson was responsible for hiring plaintiff. It is also
20 undisputed that Thompson was responsible for the allegedly discriminatory conduct, culminating
21 in the permanent removal of plaintiff from the Financial Manager position. The same-actor
22 inference therefore applies to the facts of this case, and plaintiff may only prevail on this motion
23 if she makes the “extraordinarily strong showing of discrimination” required to rebut the “same
24 actor” inference. Coghlan, 413 F.3d at 1097. Plaintiff, however, has not presented any evidence
25 to rebut this inference. Rather, she relies on “[c]onclusory, speculative testimony in . . . [her]
26 moving papers[, which] is insufficient to raise genuine issues of fact and defeat summary
27 judgment.” Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007); see also
28 Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69 F.3d 337, 345 (9th Cir. 1995) (stating that

1 conclusory or speculative testimony is insufficient to raise a genuine issue of fact to defeat
2 summary judgment). Although plaintiff contends that there was a high learning curve in her new
3 Financial Manager position, this does not negate the fact that Thompson, her supervisor, was
4 dissatisfied with plaintiff's multiple and documented performance issues many months into the
5 position. Plaintiff also suggests that Thompson only hired her, an African American, to offset a
6 complaint of discrimination filed by another African American female. See Pl.'s Opp'n at 10-11.

7 But as the ALJ noted during the administrative hearing:

8 The complainant's contention is illogical and unpersuasive. It
9 makes no sense whatsoever to conclude that Ms. Thompson would
10 have hired [plaintiff] because of her race and then, almost
11 immediately, set out to abuse her because of her race. It seems
12 equally implausible that Ms. Thompson would have hired [plaintiff]
13 because of her race and not because of her qualifications, thus
14 setting herself up for another EEO complainant from another
15 African American employee if [plaintiff] was not successful and
16 eventually needed to be removed from the Financial Manager
17 position.

18 Mack Decl. Ex. A at 17 n.5.

19 As plaintiff has failed to submit any evidence of pretext, summary judgment should be
20 entered on plaintiff's Title VII discrimination claim.

21 C. Title VII Retaliation Claim

22 Plaintiff's retaliation claim similarly fails. "To make out a prima facie case of retaliation,
23 an employee must show that (1) he [or she] engaged in a protected activity; (2) his [or her]
24 employer subjected him [or her] to an adverse employment action; and (3) a causal link exists
25 between the protected activity and the adverse action." Ray v. Henderson, 217 F.3d 1234, 1240
26 (9th Cir. 2000); accord Rose v. Plastikon Indus., Inc., 537 Fed. Appx. 750, 751 (9th Cir. 2013);
27 see Univ. of Texas S.W. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013) ("a plaintiff making a
28 retaliation claim under [Title VII] must establish that his or her protected activity was a but-for
cause of the alleged adverse action by the employer"). The causal link "can be inferred from
temporal proximity between the protected activity and any adverse employment action or by
demonstrating that the person making the employment decision was aware that the plaintiff had
engaged in the protected activity." Devi v. Oregon Dept. of Corrections, slip op., 2013 WL

1 3479566, at *7 (D. Or. July 9, 2013) (citing Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054,
2 1065 (9th Cir. 2002); Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987) (citation
3 omitted)). The McDonnell Douglas burden-shifting framework applies to plaintiff's retaliation
4 claim. See McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1124 (9th Cir. 2004). Thus, if plaintiff
5 establishes a prima facie case of retaliation, the burden shifts to defendant to offer a legitimate,
6 non-discriminatory explanation for the challenged actions. Dawson v. Entek Int'l, 630 F.3d 928,
7 936 (9th Cir. 2011). If defendant proffers such a reason, the burden shifts back to plaintiff to
8 show that defendant's reason is actually a pretext for discrimination. EEOC v. Boeing Co., 577
9 F.3d 1044, 1049 (citation and quotation omitted).

10 Plaintiff alleges that Thompson retaliated against her for her November 2007 meeting
11 with Mike Finnegan and later her formal EEO complaint. The adverse employment action
12 plaintiff complains of includes Thompson's five-day suspension of plaintiff, Thompson's denial
13 of a within pay-grade raise, and Thompson's temporary and then permanent removal of plaintiff
14 from the Financial Manager position. Plaintiff, however, cannot establish that her protected
15 activity was a but-for cause of Thompson's conduct. Rather, as discussed supra, the undisputed
16 facts establish that Thompson was dissatisfied with plaintiff's extensively documented poor work
17 performance, much of which predated plaintiff's protected activity. Plaintiff's statements in this
18 matter provide no more than her own speculative conclusion and argument that Thompson was
19 acting with discriminatory or retaliatory animus. Because the record is devoid of evidence from
20 which a reasonable trier of fact could conclude that defendant's proffered reasons for Thompson's
21 conduct were merely a pretext for unlawful retaliation, summary judgment should also be entered
22 on plaintiff's Title VII retaliation claim.

23 D. Hostile Work Environment

24 The Ninth Circuit has determined a three-part test for Title VII hostile work environment
25 claims. Under this test, an employee "must show that (1) he was subject to verbal or physical
26 conduct due to his membership in a protected class; (2) that the conduct was unwelcome; and (3)
27 that the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's
28 employment and create an abusive or hostile work environment." Gregory v. Widnall, 153 F.3d


1 1071, 1074 (9th Cir. 1998). The showing must satisfy both subjective and objective
2 requirements; that is, the plaintiff must show that the plaintiff perceived the work environment to
3 be hostile, and that a reasonable person in the plaintiff's position would have perceived it as
4 hostile. Brooks v. City of San Mateo, 229 F.3d 917, 923 (9th Cir. 2000). The plaintiff must also
5 prove that the hostility related to something prohibited by the applicable employment
6 discrimination statute. Thus, for example, a plaintiff claiming to have been subjected to a work
7 environment that was hostile because it was permeated with sexually harassing comments or
8 conduct must show that the harassment occurred "because of" the plaintiff's sex. Id.; Nichols v.
9 Azteca Rest. Enter., 256 F.3d 864, 874 (9th Cir. 2001).

10 Plaintiff's hostile work environment claim fails because, again, she has not submitted any
11 evidence that Thompson's conduct was due to plaintiff's membership in a protected class rather
12 than due to her poor work performance and the legitimate actions of a supervisor. Accordingly,
13 summary judgment should be entered on this claim.

14 Based on the foregoing, IT IS HEREBY RECOMMENDED that motion for summary
15 judgment (ECF No. 47) be granted and this action be dismissed with prejudice.

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

24 DATED: June 6, 2014

25 
26 ALLISON CLAIRE
27 UNITED STATES MAGISTRATE JUDGE
28