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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KATHLEEN SOGA,

 Plaintiff,

 v.

ROLF KLEINHANS and COUNTY OF
NEVADA,

 Defendants.

No. 2:14-cv-01084-KJM-KJN

ORDER

 After five years of working in the Nevada County Sheriff’s Department, Kathleen Soga resigned, attributing her resignation to the harassment of her former supervisor, Rolf Kleinhans, the Chief Fiscal and Administrative Officer for the Department. Shortly after her resignation, Ms. Soga filed this action against Mr. Kleinhans, as well as the County of Nevada, alleging sexual harassment, constructive discharge, and retaliation. After the close of discovery, the County and Mr. Kleinhans moved for summary judgment on all Ms. Soga’s claims. Mot., ECF No. 17. Ms. Soga opposed the motion, Opp’n, ECF No. 25, and defendants replied, Reply, ECF No. 28.

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1 At hearing on the motion, Kerry Schaffer appeared for plaintiff and Carl
2 Fessenden and Ariana Van Alstine appeared for defendants. ECF No. 29. For reasons explained
3 below, defendants' motion is GRANTED IN PART and DENIED IN PART.¹

4 I. PROCEDURAL HISTORY AND CLAIMS

5 As discussed in more detail below, Ms. Soga's suit tracks an internal harassment
6 and hostile work environment complaint submitted to the County's Human Resources (HR)
7 division on April 16, 2013. Defs.' Ex. L, Soga's Formal Discrimination Harassment Complaint
8 (HR Compl.), ECF No. 17-5. After submitting the HR complaint and before filing suit, Ms. Soga
9 filed an administrative complaint with the California Department of Fair Employment and
10 Housing (DFEH) on September 5, 2013, alleging sexual harassment, discrimination, retaliation,
11 and constructive discharge. Defs.' Ex. M, ECF No. 17-5. Ms. Soga then filed a complaint with
12 the U.S. Equal Employment Opportunity Commission (EEOC) on November 19, 2013, alleging
13 sexual harassment and retaliation. Defs.' Ex. N, ECF No. 17-5. Ms. Soga received immediate
14 right-to-sue notifications from both agencies. Defs.' Ex. M; Defs.' Ex. N. Ms. Soga then
15 commenced this action on May 1, 2014, asserting the following claims: (1) hostile environment
16 due to sexual harassment in violation of Title VII and FEHA; (2) retaliation in violation of Title
17 VII and FEHA; and (3) retaliation in violation of California Labor Code section 1102.5. *See*
18 *generally* Compl., ECF No. 1.

19 Ms. Soga did not present her Labor Code retaliation claim in the form of a
20 California Government Tort Claim before filing suit against the County or Mr. Kleinhans.
21 Undisputed Material Fact (UMF) No. 46.

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25 ¹ In Ms. Soga's opposition, she noted defendants did not meet and confer prior to filing
26 the motion, thereby violating the court's standing order. Opp'n at 12. In defendants' reply, they
27 argue Ms. Soga filed an untimely opposition, and therefore the motion for summary judgment
28 should be granted as unopposed. Reply. at 2. Given the parties' equivalent transgressions, the
court does not impose sanctions, but the parties are cautioned they cannot assume the court will
respond with such magnanimity in the future.

1 II. UNDISPUTED MATERIAL FACTS²

2 The following facts are undisputed unless otherwise stated. Where a genuine
3 dispute exists, the court draws reasonable inferences in favor of Ms. Soga. *Tolan v. Cotton*,
4 ___U.S.___, 134 S. Ct. 1861, 1868 (2014).

5 A. Ms. Soga’s History with County Sheriff’s Department

6 Ms. Soga started with the County Sheriff’s Department in April 2008 as a
7 dispatcher trainee, and then became a legal office assistant (LOA) in Nevada City under the
8 supervision of Public Administrator Robert Wood. Mot. at 7; ECF No. 37-7 at 26. Under Mr.
9 Wood’s supervision, Ms. Soga assisted in the public administration of decedents’ estates. Pl.’s
10 Undisputed Material Facts (PUMF) No. 2, ECF No. 28-3. Mr. Wood retired in May 2011, and
11 Ms. Soga then started work under the supervision of Mr. Kleinhans, the new Public Administrator
12 and Chief Financial Officer (CFO) for the Sheriff’s Department. PUMF Nos. 2, 9.

13 B. Interactions with Mr. Kleinhans

14 While working on an estate matter together in June 2011, Ms. Soga and
15 Mr. Kleinhans encountered a beehive on the estate property. UMF No. 28, ECF No. 28-1.
16 Mr. Kleinhans suggested his friend had experience with bees and could remove the beehive. *Id.*
17 Ms. Soga responded, “You can’t hire your friends . . . you need to be careful with that.” *Id.*
18 Additionally, Ms. Soga told him she had already called another company for a referral. Soga
19 Dep. 46:10–12.

20 The relationship between Ms. Soga and Mr. Kleinhans turned sour shortly after
21 this incident. Soga Dep. 40:9–17. For example, when working on another estate to collect
22 donations with representatives for Habitat for Humanity, Ms. Soga asked Mr. Kleinhans for
23 guidance, but he declined to help. HR Compl. at 77.³ Mr. Kleinhans eventually came to the
24

25 ² Ms. Soga requests the court take judicial notice of a description of the California
26 Government Claims Program. ECF No. 21. Because this fact is not relevant to resolution of this
27 motion, Ms. Soga’s request is denied.

28 ³ Ms. Soga relies on facts alleged in her HR Complaint. ECF No. 24. Defendants do not
object to her reliance, and in fact rely on the HR Complaint as well. *Id.* For purposes of this

1 estate, however, and heard Ms. Soga had discovered a water leak on the property. *Id.*
2 Mr. Kleinhans suggested Ms. Soga call one of his friends to do the plumbing work, and Ms. Soga
3 again said he could not hire his friends. *Id.* The conversation quickly turned into an argument,
4 and in Ms. Soga’s view, Mr. Kleinhans was rude and disrespectful to her in front of a Habitat for
5 Humanity representative. *Id.*

6 Mr. Kleinhans left the property and the Habitat for Humanity employee asked
7 Ms. Soga, “What did you do to piss him off?” *Id.* Ms. Soga replied, “I don’t know, he’s just mad
8 all the time.” *Id.* The employee responded, “It’s obvious he doesn’t like you and I bet it’s not
9 just you, it’s women in general. He wasn’t happy that you knew where the water shut-off was
10 when he couldn’t find it.” *Id.* When she returned to the Sheriff’s Department, Ms. Soga met with
11 Mr. Kleinhans to tell him she was embarrassed by the way he had acted in front of the Habitat for
12 Humanity employee. *Id.* at 79. She accused Mr. Kleinhans of having received his job on a silver
13 platter, and asked that he show more respect for the people they served and for his position as
14 Public Administrator. UMF No. 30.

15 Ms. Soga and Mr. Kleinhans soon developed strong opinions about each other,
16 with Ms. Soga describing him as arrogant, dismissive, and like a “big rooster” puffing his chest,
17 Soga Dep. 36:17–37:9, and Mr. Kleinhans describing her as uncommunicative and difficult,
18 Kleinhans Dep. 56:3–14. As their relationship worsened, Mr. Kleinhans sought advice from
19 Undersheriff Joseph Salivar, a captain in the Sheriff’s Department, and Nancy Haffey, an Analyst
20 in Human Resources (HR). Defs.’ Ex. I, ECF No. 17-5.

21 After receiving others’ advice, Mr. Kleinhans set up a meeting with Ms. Soga and
22 Undersheriff Salivar on July 13, 2011. UMF No. 9. In this meeting, Mr. Kleinhans and
23 Undersheriff Salivar gave Ms. Soga a letter of instruction, advising her of the County’s expected
24 standards of performance and discussing Ms. Soga’s key strengths and areas of needed

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26 motion, the court relies on the facts set forth here as undisputed, assumes Ms. Soga would testify
27 regarding them at trial, and draws reasonable inferences from them in her favor.
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1 improvement. Defs.’ Ex. J, ECF No. 17-5. For key strengths, the letter stated Ms. Soga brought
2 value to the Sheriff’s Department with her “procedural knowledge,” “compassionate demeanor
3 with those in a state of bereavement,” and “care about the states of the deceased.” *Id.* For areas
4 of needed improvement, the letter stated Ms. Soga had not educated Mr. Kleinhans about the
5 duties of her position, needed to communicate with him in an “open and honest manner,” and
6 needed to cease her “discourteous treatment” of Mr. Kleinhans. *Id.* For her part, Ms. Soga raised
7 concerns about Mr. Kleinhans’s behavior, asserting he was arrogant, condescending, easily
8 annoyed, gave improper referrals to friends, and failed to adequately manage and handle estates.
9 Soga Dep. 93:19–21, 152:20–24; Defs.’ Ex. I at 51–52.

10 After the July 2011 meeting, their relationship did not improve. Kleinhans Dep.
11 178:4–22. Instead, their interactions grew more contentious as time went on. In August 2011,
12 Mr. Kleinhans directed Ms. Soga to clean out storage units during the heat of the summer, and in
13 performing this task she experienced heat exhaustion. HR Compl. at 81; Soga Dep. 153:19–22.
14 When she informed Mr. Kleinhans of her condition, his only reaction was, “[s]omeone your age
15 has to be careful in the sun.” HR Compl. at 81. In August or September 2011, a house in the
16 Nevada County town of North San Juan had to be searched and sealed as part of the Public
17 Administrator’s duties. *Id.* at 81–82. When Ms. Soga asked Mr. Kleinhans to come with her, he
18 responded, “You’ll have to find someone else to do it.” *Id.* Around the same time, a family had
19 asked for directions regarding legal information, and Ms. Soga provided five names of local
20 attorneys she drew from a list she received from Linda Hartman, the County Counsel. *Id.* at 82–
21 83; Soga Dep. 155:15–23. Mr. Kleinhans reprimanded Ms. Soga, asserting a breach of County
22 policy, which did not allow County employees to refer people to specific vendors. HR. Compl. at
23 82–83. Shortly thereafter, Ms. Soga worked with the Sheriff’s Department’s property unit to
24 process property that recently had been removed from an estate. Soga Dep. 156:21–157:6. A
25 Sheriff’s Department employee, Mike Mariani, wrote an email to Ms. Soga, copying Mr.
26 Kleinhans, stating “atta-girl” for a job well done on the estate. *Id.*; HR Compl. at 83. Upon
27 receiving the e-mail, Mr. Kleinhans stormed out of his office and into Ms. Soga’s cubicle,
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1 screaming the words, “[y]ou made him write that,” to Ms. Soga, while spitting on her. Soga Dep.
2 157:22–24.

3 After seeing no improvement in his relationship with Ms. Soga, Mr. Kleinhans
4 started visiting HR Analyst Nancy Haffey’s office five to six times a day to seek advice in
5 resolving issues with Ms. Soga. Soga Dep. 177:1–13; Haffey Dep. 88:11–15, 98:25–99:16.
6 During her deposition, Ms. Haffey testified she did not recall when Mr. Kleinhans’s frequent
7 visits or calls started to occur, but noted he was angry and frustrated during each visit. Haffey
8 Dep. 88:11–15, 98:25–99:16.

9 With Ms. Haffey’s help, Mr. Kleinhans drafted a second letter of instruction and
10 issued it to Ms. Soga on September 23, 2011, again discussing her behavior. Haffey Dep.
11 99:20–25. According to the letter, Ms. Soga needed to improve in “timely, open, and honest
12 communication,” and take “personal initiative and responsibility.” Defs.’ Ex. K, ECF No. 17-5.
13 Shortly after receiving the letter, in October 2011, Ms. Soga went on medical or stress leave.
14 Defs.’ Ex. M. She returned to work in December 2011. *Id.*

15 Ms. Soga would continue to encounter Ms. Kleinhans after she returned. In
16 December 2011, Mr. Kleinhans approached Ms. Soga while she was waiting for the elevator to
17 say, “[y]ou really should be taking the stairs,” a remark Ms. Soga interpreted as derogatory.
18 UMF No. 27. A month later, Ms. Soga witnessed Mr. Kleinhans approach Janet Brenneman, a
19 co-worker who sat in a nearby cubicle. HR. Compl. at 77. As Mr. Kleinhans approached he
20 asked, “What are you doing? Getting dressed?” and Brenneman responded, “No, I’m just
21 combing my hair.” Soga Dep. 146:12–17. Ms. Soga interpreted Kleinhans’s tone as
22 inappropriate. *Id.* at 146:16–17.

23 On January 6, 2012, Ms. Soga requested and received a reassignment to a different
24 unit and a different supervisor, Shelli Netherby, the records supervisor for the Nevada County
25 Sheriff’s Department. UMF No. 17. In her new position, Ms. Soga completed several
26 administrative tasks including managing the front desk of the administrative unit in the
27 Department, answering phone calls, and completing crime reports. Soga Dep. 111:9–14.
28 Although they still were in the same general office space, Ms. Soga did not encounter

1 Mr. Kleinhans often, and in any event, “avoided him at all costs.” *Id.* at 111:17–112:7. For
2 example, if Ms. Soga saw Mr. Kleinhans walking down the hallway, she would run in the other
3 direction or hide behind a pillar until he passed by. *Id.* at 112:9–12.

4 But Ms. Soga still encountered Mr. Kleinhans at times. In March 2012, while
5 standing at a copy machine close to Ms. Brenneman’s cubicle, Ms. Soga saw Mr. Kleinhans
6 approach Ms. Brenneman to ask how she was doing. HR Compl. at 76. Mr. Kleinhans said
7 something to the effect of, “What . . . you and your hubby, mumble, mumble . . . bouncing,
8 mumble . . . , all night?” *Id.*; Soga Dep. 143:25–144:1–5. To Ms. Soga, Mr. Kleinhans’s tone
9 was inappropriately sexual. UMF No. 25. In May or June 2012, a female member of the public
10 came to the Sheriff’s Department waiting area to obtain services connected with an ongoing
11 investigation of a burglary. Defs.’ Ex. M, ECF No. 17-5. As the woman waited for assistance,
12 Ms. Soga saw Mr. Kleinhans inappropriately place his body in a way that crowded the woman
13 and blocked her movement. UMF Nos. 24, 49. Mr. Kleinhans would not allow the woman to
14 leave until another person told the woman Ms. Soga wanted to talk with her. Soga Dep. 140:9–
15 19.

16 In an attempt to get further away from Mr. Kleinhans and still keep her job,
17 Ms. Soga volunteered to transfer to a LOA position in Truckee on January 14, 2013, and started
18 in that position shortly thereafter. UMF No. 18; Soga Dep. 189:11–16; Defs.’ Ex. I. In her
19 position, Ms. Soga was responsible for picking up and taking mail from the Sheriff’s Department
20 in Nevada City to Truckee each morning. PUMF No. 17. In this position, Ms. Soga received the
21 added benefit of traveling to and from work on County-sponsored time in a County car filled with
22 fuel paid for by the County. Soga Dep. 189:25–190:5. During her deposition, Ms. Soga testified
23 her experience in Truckee was “beautiful,” up until the time she resigned on September 3, 2013.
24 Soga Dep. 193:20–194:18.

25 Ms. Soga successfully avoided Mr. Kleinhans from November 2012, while still
26 working in Nevada City, until April 2, 2013, by which time she had started working in Truckee.
27 On April 2, 2013, she had an encounter at the Sheriff’s Department that she explained left her
28 “rattled.” HR Compl. at 74–75. While in the hallway, Mr. Kleinhans said, “Hello”; Ms. Soga

1 nodded without a verbal response. Soga Dep. 137:1–8. Ms. Soga then heard five fast, heavy
2 footsteps behind her, with Mr. Kleinhans yelling, “You need to stop being rude to me Kathleen!”
3 Ms. Soga did not look back, picked up her pace, and went quickly down the stairs. She then
4 heard him say, “Ok . . . okay then!” HR Compl. at 74–75.

5 Two days after this incident, Mr. Kleinhans complained to Nevada County
6 Sheriff’s Department Captain Shannon Moon, Ms. Soga’s supervisor, that Ms. Soga had been
7 rude. *Id.* at 73. Mr. Kleinhans also complained to Janet Brenneman, who then went to Ms. Soga
8 to say, “[Kleinhans] is really, really mad at you,” and he “won’t rest until you’re gone.” UMF
9 No. 22.

10 C. Ms. Soga files an Internal Harassment Complaint Against Mr. Kleinhans

11 Ms. Soga’s interactions with Mr. Kleinhans led her to file an internal formal
12 complaint of harassment and hostile work environment. HR Compl. She filed the complaint with
13 the County HR department on April 16, 2013, asserting the following incidents supported her
14 claims:

- 15 1. Incident #1/June 2012: Ms. Soga’s warning that Mr. Kleinhans’ referral to friends
16 was improper. HR Compl. at 77.
- 17 2. Incident #2/June 2012: Mr. Kleinhans’s and Ms. Soga’s argument in front of a
18 Habitat for Humanity employee. *Id.* at 78.
- 19 3. Incident #3/June 2012: The Habitat for Humanity employee’s comment to
20 Ms. Soga, noting Mr. Kleinhans did not like Ms. Soga because she was a woman.
21 *Id.*
- 22 4. Incident #4/July 2011: Mr. Kleinhans’s first letter of instruction to Ms. Soga. *Id.*
23 at 80–81.
- 24 5. Incident #5/August 2011: Mr. Kleinhans’s directive that Ms. Soga clean out
25 storage units in the heat of summer, causing her to experience heat exhaustion, to
26 which Mr. Kleinhans replied, “[s]omeone your age has to be careful in the sun.”
27 *Id.* at 81.

- 1 6. Incident #6/September 2011: Mr. Kleinhans’s refusal to help Ms. Soga search and
2 seal a house in North San Juan. *Id.* at 81–82.
- 3 7. Incident #7/September 2011: Ms. Soga’s infraction arising from recommending
4 attorneys to a family. *Id.* at 82–83.
- 5 8. Incident #8/September 2011: The “atta-girl” email sent to Mr. Kleinhans, which
6 resulted in Mr. Kleinhans screaming at Ms. Soga. *Id.* at 83.
- 7 9. Incident #9/December 2011: Mr. Kleinhans’s comment to Ms. Soga that she
8 should take the stairs. *Id.* at 77.
- 9 10. Incident #10/January 2012: Ms. Soga witnessing Mr. Kleinhans approach
10 Ms. Brenneman to ask, “What are you doing? Getting dressed?” *Id.* at 76–77.
- 11 11. Incident #11/March 2012: Ms. Soga witnessing Mr. Kleinhans ask Ms. Brenneman
12 if she was “bouncing . . . all night” with her husband. *Id.* at 75–76.
- 13 12. Incident #12/May–June 2012: Ms. Soga witnessing Mr. Kleinhans inappropriately
14 crowd a female member of the public who came to the Sheriff’s Department for
15 services. *Id.*
- 16 13. Incident #13/April 2, 2013: Mr. Kleinhans’s saying hello and Ms. Soga not
17 verbally responding. *Id.* at 74–75.
- 18 14. Incident #14/April 4, 2013: Mr. Kleinhans’s complaint to Captain Shannon Moon
19 that Ms. Soga was rude. *Id.* at 73.
- 20 15. Incident #15/April 4, 2013: Ms. Brenneman’s warning to Ms. Soga that Mr.
21 Kleinhans was mad at Ms. Soga and would not rest until she was gone. *Id.* at 74;
22 UMF No. 22.

23 The County immediately began investigating Ms. Soga’s internal complaint. UMF
24 No. 38. Mr. Kleinhans heard about the complaint on April 22, 2013, and he called three of
25 Ms. Soga’s co-workers, including Ms. Brenneman, into his office to ask about the complaint and
26 if he was as “aggressive” as the complaint suggested. Brenneman Dep. 58:21–62:7. Later that
27 day, Mr. Kleinhans again reached out to Ms. Brenneman to say, “If I had a gun, I would shoot
28

1 her,” referring to Ms. Soga. UMF No. 36; HR Brenneman Interview 14, ECF No. 27-4.

2 Ms. Brenneman reported the comment to Nancy Haffey. HR Brenneman Interview at 15.

3 D. Kleinhans Disciplined

4 After reviewing her complaint, the County concluded Ms. Soga could not support
5 her harassment and hostile work environment claims. Report 2, ECF No. 37-1. However, after
6 hearing from Ms. Brenneman, the County found Mr. Kleinhans’s comment that he wanted to
7 shoot Ms. Soga to be inappropriate and a violation of County policy. *Id.* The County acted
8 immediately to escort Mr. Kleinhans from the building, and placed him on paid administrative
9 leave for more than four months, from April 22, 2013 until September 3, 2013. UMF Nos. 39,
10 60; Haffey Dep. 134:23–135:2. When asked at her deposition whether she thought it was
11 inappropriate for the County to act as it did in disciplining Kleinhans, Ms. Soga answered “no.”
12 Soga Dep. 194:19–23

13 E. Soga Resigns

14 In July 2013, while Mr. Kleinhans was still on leave, Undersheriff Salivar offered
15 to convert Ms. Soga’s temporary assignment in Truckee into a permanent position with a ten
16 percent increase in pay, a County car, and gas covered by the County. UMF No. 63; Soga Decl.
17 ¶ 17, ECF No. 22. The record does not make clear whether Ms. Soga accepted the offer at this
18 time. Later that summer on August 28, 2013, Undersheriff Salivar and HR head Charlie Wilson
19 arranged a meeting with Ms. Soga to advise her of Mr. Kleinhans’s impending return. UMF No.
20 40. They informed Ms. Soga that Mr. Kleinhans wanted to apologize to her, but Ms. Soga
21 refused to meet with Mr. Kleinhans and left work the same day. UMF Nos. 41–42.

22 Three days after Mr. Kleinhans’s return on September 3, Ms. Soga sent a
23 resignation letter to the County. UMF No. 43. The County reiterated its offer to give Ms. Soga a
24 permanent position in Truckee with the ten percent pay raise but now without the company car
25 and fuel, and Ms. Soga declined. Salivar Dep. 98:23–25; Soga Decl. ¶ 17.⁴ Ms. Soga testified at

26 ⁴ Defendants object to portions of this paragraph of Ms. Soga’s declaration on grounds of
27 lack of personal knowledge/foundation, hearsay, speculation, and relevancy. All objections are
28 overruled to the extent they attack information considered in this order. The County’s personal
knowledge, hearsay, and foundation objections are not made in reference to the statement relied

1 her deposition that she declined the offer because it would have been cost prohibitive to drive to
2 and from Truckee, and she felt her safety was in jeopardy. Soga Dep. 193:1–5.

3 III. DISCUSSION

4 A. Hostile Environment Sexual Harassment and Statute of Limitations

5 Defendants argue Ms. Soga’s hostile environment sexual harassment claims are
6 barred by the statutes of limitations applicable to Title VII and FEHA actions. Mot. at 6.

7 Ms. Soga argues defendants’ conduct was part of a continuing violation of her rights from the
8 time she started working with Mr. Kleinhans in June 2011, to April 4, 2013, just after her last
9 encounter with Kleinhans in the hallway. She says the last incident occurred less than one year
10 before she filed her complaint with the DFEH on September 5, 2013, and less than 300 days
11 before she filed a complaint with the EEOC on November 19, 2013, and therefore her claims are
12 not time-barred. Opp’n at 13.

13 1. Title VII

14 Title VII is a broad remedial measure, designed “to assure equality of employment
15 opportunities.” *Pullman-Standard v. Swint*, 456 U.S. 273, 276 (1982). Title VII was designed to
16 bar not only overt employment discrimination, “but also practices that are fair in form, but
17 discriminatory in operation.” *Id.* A Title VII charge must be filed within 300 days after the
18 allegedly unlawful employment practice. 42 U.S.C. § 2000e–5(e)(1); *Nat’l R.R. Passenger Corp.*
19 *v. Morgan*, 536 U.S. 101, 119 (2002).

20 Before 2002, a plaintiff could obtain relief for acts outside the limitations period
21 that were part of a “continuing violation” of Title VII rights. *Sosa v. Hiraoka*, 920 F.2d 1451,
22 1455 (9th Cir. 1990). A continuing violation could be established by demonstrating a series of
23 “related” acts against a single individual; that is, against the plaintiff alone. *Id.* But the United
24 States Supreme Court limited this doctrine in *Morgan*, holding “discrete discriminatory acts are
25 not actionable if time barred, even [if] related to acts alleged in timely filed charges.” 536 U.S. at

26 upon in this order. Defendants’ relevancy and speculation objections are overruled because such
27 objections are redundant; the court does not rely on irrelevant or speculative facts. *Burch v.*
28 *Regents of Univ. of Cal.*, 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006).

1 113. A “discrete act,” even if related to another “discrete act,” would start a new clock for filing
2 charges. *Id.*

3 The *Morgan* Court carved out an exception for claims based on a hostile work
4 environment. *See id.* at 115. Noting by their very nature that hostile environment claims
5 involved “repeated conduct,” the Court held such claims are not “time barred so long as all acts
6 which constitute the claim are part of the same unlawful employment practice and at least one act
7 falls within the time period.” *Id.* Applying this rule to the facts of its case, the *Morgan* Court
8 allowed the plaintiff’s racial discrimination claim to proceed on the hostile environment theory,
9 holding a reasonable juror could conclude the plaintiff’s evidence, that managers “made racial
10 jokes, performed racially derogatory acts, and used various racial epithets,” could be a part of the
11 same actionable hostile environment claim. *Id.* at 120–21. In sum, *Morgan* held claims based on
12 discrete acts are timely only when such acts occurred within the limitations period, and claims
13 based on a hostile environment are timely only when at least one act occurred during the
14 limitations period. *See id.*; *see also Cherosky v. Henderson*, 330 F.3d 1243, 1246 (9th Cir. 2003).

15 The Ninth Circuit Court of Appeals further limited the reach of the hostile
16 environment exception, holding intervening occurrences can separate prior incidents from more
17 recent incidents such that the plaintiff may not recover for prior incidents. *McGinest v. GTE Serv.*
18 *Corp.*, 360 F.3d 1103, 1126 (9th Cir. 2004). In *McGinest*, the Ninth Circuit held the plaintiff
19 could not prevail on his Title VII racial discrimination claim because the prior acts and more
20 recent acts were separated by several years, in addition to other attenuating circumstances
21 including the plaintiff’s change in job title, transfer to another department, change in supervisor,
22 and transfer to another location. *Id.* at 1129.

23 Here, but for the “hostile environment exception,” only incidents occurring on or
24 before January 23, 2013, 300 days before she filed her EEOC complaint, can support Ms. Soga’s
25 Title VII sexual harassment hostile environment claim. In contrast to *Morgan*, the incidents
26 giving rise to Ms. Soga’s Title VII sexual harassment claim are “discrete” and not sufficient to
27 form a “hostile environment.” The discrete acts, as identified by Ms. Soga, include: Ms. Soga’s
28 warning to Mr. Kleinhans about his referrals to friends and his response, HR Compl. at 77; Ms.

1 Soga’s receipt of the June 2011 letter of instruction, *id.* at 80–81; Mr. Kleinhans’s demand that
2 Ms. Soga work in the hot summer sun, and his comment signaling the punitive nature of the
3 assignment, *id.* at 81; Mr. Kleinhans’s reprimand of Ms. Soga for encouraging the “atta-girl”
4 email, *id.*; his verbal altercation with her in front of the Habitat for Humanity employee, *id.* at 78;
5 and Mr. Kleinhans’s reprimand of Ms. Soga for recommending attorneys to a member of the
6 public, *id.* at 82–83. These instances do not “repeat” each other as did the racial jokes, racial
7 epithets, and racially derogatory acts giving rise to the plaintiff’s racial discrimination claim in
8 *Morgan*. See 536 U.S. at 120–21 (“racial jokes, . . . racially derogatory acts, . . . negative
9 comments regarding the capacity of blacks to be supervisors, and . . . various racial epithets” can
10 support hostile environment claim). These incidents are less “related” to each other than to
11 incidents other courts have deemed discrete, further suggesting Ms. Soga’s claim cannot prevail
12 on the hostile environment theory. See, e.g., *Macgregor v. Dial*, No. 13–1883, 2015 WL
13 1405492, at *9 (E.D. Cal. Mar. 26, 2015) (denials of medical treatment in response to plaintiff’s
14 repeat requests made on several different dates constituted “discrete acts of deliberate
15 indifference.”); *Pouncil v. Tilton*, 704 F.3d 568, 581 (9th Cir. 2012) (repeated denials of
16 prisoner’s request for a conjugal visit are discrete acts); *RK Ventures, Inc. v. City of Seattle*,
17 307 F.3d 1045, 1061 n.13 (9th Cir. 2002) (municipality’s alleged pattern of hostile or harassing
18 conduct constitute “discrete acts” because each incident was actionable on its own).

19 Furthermore, intervening occurrences preclude the hostile environment exception
20 from applying here. Between the untimely twelfth incident, in which Ms. Soga witnessed Mr.
21 Kleinhans inappropriately crowd a female member of the public who came to the Sheriff’s
22 Department for services, HR Compl. at 75–76, and the timely thirteenth incident in which Ms.
23 Soga did not respond to Mr. Kleinhans’s attempt to say “hello,” provoking his frustrated
24 response, *id.* at 74–75, over ten months passed. During this time, Ms. Soga was transferred to an
25 entirely new location, UMF No. 18, and Ms. Soga and Mr. Kleinhans had not seen each other for
26 at least six months, HR Compl. at 74–75. Construing these facts in a light most favorable to the
27 plaintiff, no reasonable juror could conclude the timely and untimely incidents supporting Ms.
28

1 Soga’s Title VII claim involve clear repetitions of the same behavior, such that her hostile
2 environment claim overcomes summary judgment.

3 Finally, to the extent any incidents are plausibly repetitions and sexually hostile in
4 nature, they are not linked to other incidents identified in the HR Complaint. These matters
5 include the tenth incident, in which Ms. Soga witnessed Mr. Kleinhans approach Ms. Brenneman
6 to ask, “What are you doing? Getting dressed?,” HR Compl. at 76–77; the eleventh incident in
7 which Ms. Soga witnessed Mr. Kleinhans ask Ms. Brenneman if she was “bouncing . . . all night”
8 with her husband, *id.* at 75–76; and the twelfth incident in which Ms. Soga witnessed Mr.
9 Kleinhans inappropriately crowd a female member of the public who came to the Sheriff’s
10 Department for services, *id.* Moreover, they fall outside the statute of limitations: Incidents one
11 through twelve occurred prior to January 23, 2013 and are therefore claims based on them are
12 time-barred.

13 The court next considers Ms. Soga’s FEHA claims.

14 2. The FEHA

15 “The purpose of the FEHA is to provide effective remedies which will eliminate
16 discriminatory practices” *Blum v. Super. Court*, 141 Cal. App. 4th 418, 424, (2006). For
17 acts arising under the FEHA, a plaintiff must file a complaint with the DFEH within one year
18 from the date upon which the alleged unlawful practice occurred. Cal. Gov’t Code § 12960(d);
19 *Reyes v. Healthcare Servs. Groups, Inc.*, No. 15–07177, 2015 WL 6551870, at *3 (C.D. Cal.
20 Oct. 26, 2015). An employer is liable for actions that take place outside the limitations period if
21 these actions are “sufficiently linked” to unlawful conduct that occurred within the limitations
22 period. *Yanowitz v. L’Oreal USA, Inc.*, 36 Cal. 4th 1028, 1056 (2005). The employers’ actions
23 are sufficiently linked if they (1) were sufficiently similar in kind, while recognizing that similar
24 kinds of unlawful employer conduct, such as acts of harassment, may take a number of different
25 forms; (2) occurred with reasonable frequency; and (3) have not acquired a degree of
26 permanence, in that the “employer’s statements and actions make clear to a reasonable employee
27 that any further efforts at informal conciliation to . . . end harassment will be futile.” *Id.* at 1059
28 & n.19.

1 But for the “sufficiently linked” exception, only incidents occurring on or before
2 September 5, 2012, one year before Ms. Soga filed her DFEH complaint, can support Ms. Soga’s
3 FEHA sexual harassment hostile environment claim.

4 Similar to the court’s analysis in the Title VII context, the break in time between
5 the untimely twelfth incident and the timely thirteenth incident, in addition to Ms. Soga’s transfer
6 to Truckee, precludes a reasonable jury’s concluding the incidents occurred “with reasonable
7 frequency” such that all incidents are “sufficiently linked.” *Yanowitz*, 36 Cal. 4th at 1056; *see*
8 *also Lelaind v. City & Cty. of S.F.*, 576 F. Supp. 2d 1079, 1096 (N.D. Cal. 2008) (continuing
9 violation doctrine could not apply when untimely conduct was insufficiently close enough in time
10 or similar). Further, as in the Title VII analysis, the three plausibly sexual harassing incidents are
11 outside the limitations period.

12 In sum, the continuing violations doctrine does not apply to the acts giving rise to
13 Ms. Soga’s FEHA or Title VII claims. To the extent Ms. Soga’s Title VII and FEHA sexual
14 harassment hostile environment claims are based on acts outside the applicable statute of
15 limitations, such claims are dismissed as time-barred. The only acts that can give rise to
16 Ms. Soga’s sexual harassment claim are incidents thirteen through fifteen, considered below.

17 3. Merits Analysis

18 To establish a FEHA or Title VII “hostile work environment” claim, plaintiff must
19 demonstrate conduct “sufficiently severe or pervasive to alter the conditions of the victim’s
20 employment and create an abusive working environment.” *Swenson v. Potter*, 271 F.3d 1184,
21 1191 (9th Cir. 2001) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)); *see*
22 *also Brooks v. City of San Mateo*, 229 F.3d 917, 923 (9th Cir. 2000) (Title VII and FEHA operate
23 under the same guiding principles). “The working environment must both subjectively and
24 objectively be perceived as abusive.” *Brooks*, 229 F.3d at 923. The court uses a totality of the
25 circumstances test to determine whether a plaintiff’s allegations make out a colorable claim of
26 hostile work environment. *Id.* at 923–24. Under this test, the frequency, severity, and level of
27 interference with work performance are among the factors considered. *Id.* at 924.

1 Moreover, although untimely acts cannot give rise to a Title VII or FEHA claim,
2 the statute of limitations does not “bar an employee from using the prior acts as background
3 evidence in support of a timely claim.” *Morgan*, 536 U.S. at 113; *Raad v. Fairbanks N. Star*
4 *Borough Sch. Dist.*, 323 F.3d 1185, 1192 (9th Cir. 2003) (although not independently actionable,
5 “evidence about the District’s refusal to hire Raad for a full-time teaching position in 1991 and
6 1992 is relevant and admissible insofar as it bears on her claim that she was discriminatorily
7 refused a full-time position in August 1993”); *Lyons v. England*, 307 F.3d 1092, 1108 (9th Cir.
8 2002) (“[A]ppellants are permitted to offer evidence of the pre-limitations discriminatory detail
9 assignment scheme in the prosecution of their timely claims.”).

10 The district court case of *Ortega v. Regents of Univ. of Cal.*, No. 11–04031, 2012
11 WL 5988638, at *1 (N.D. Cal. Nov. 29, 2012), is illustrative here. In *Ortega*, a Hispanic woman
12 and Asian woman both filed FEHA and Title VII claims against their employer, alleging racial
13 and gender-based discriminatory treatment in the interview and promotion process for a director
14 position in the workplace. *Id.* at *1–2. In analyzing plaintiffs’ claims, the court held prior acts of
15 discriminatory conduct, namely promotions that took place before the statute of limitations
16 period, could be used to assess whether the interview and promotion process at issue in plaintiffs’
17 case violated Title VII and FEHA. *Id.* at *5. Although the prior acts were not actionable in and
18 of themselves, such acts could provide background evidence to support plaintiffs’ claims. *Id.* at
19 *4.

20 Here, incidents thirteen through fifteen occurred within a two-day period, from
21 April 2, 2013 to April 4, 2013. HR Compl. at 74–75, UMF No. 22. Construing the “totality of
22 the circumstances” in a light most favorable to the plaintiff, no reasonable jury could conclude a
23 complaint about Ms. Soga’s rudeness, in addition to hearing Mr. Kleinhans would not rest until
24 Ms. Soga was gone, by themselves created an “abusive” working environment. *See Meritor*,
25 477 U.S. at 67. When considering incidents one through twelve as background, a reasonable jury
26 could conclude acts thirteen through fifteen may have heightened the hostility of Ms. Soga’s
27 workplace, but not so much that the workplace was rendered abusive with “pervasive” or
28 “frequent” acts abounding. *See Brooks*, 229 F.3d at 926 (“the required showing of severity or

1 seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the
2 conduct. . .[i]f a single incident can ever suffice to support a hostile work environment claim, the
3 incident must be extremely severe.”).

4 Defendants’ motion for summary judgment is GRANTED.

5 B. Retaliation under Title VII and the FEHA

6 The County and Mr. Kleinhans also move for summary judgment on Ms. Soga’s
7 retaliation claim, contending they took no adverse action after she filed her HR complaint. Mot.
8 at 15. Ms. Soga argues the County and Mr. Kleinhans engaged in a “series of retaliatory actions,”
9 including constructive discharge, which together support her claim for retaliation.

10 Opp’n at 12–15.

11 1. Legal Standards

12 To defeat summary judgment on a retaliation claim under Title VII or the FEHA,
13 the plaintiff must show (1) involvement in a protected activity, (2) an adverse employment action,
14 and (3) a causal link between the two. *Brooks*, 229 F.3d at 928. Thereafter, the burden of
15 production shifts to the employer to present legitimate reasons for the adverse employment
16 action, and if the employer carries this burden, a plaintiff must demonstrate a genuine issue of
17 material fact as to whether the reason advanced by the employer is pretext. *Id.*; *see also Flait v.*
18 *N. Am. Watch Corp.*, 3 Cal. App. 4th 467, 476 (1992) (FEHA).

19 To constitute “protected activity,” the conduct a plaintiff opposes must constitute a
20 violation of Title VII or the FEHA. *See* 42 U.S.C. § 2000e–3; *Learned v. City of Bellevue*,
21 860 F.2d 928, 932 (9th Cir. 1988) (“[T]he opposed conduct must fairly fall within the protection
22 of Title VII to sustain a claim of unlawful retaliation.”); *see also Flait*, 3 Cal. App. 4th at 476.
23 The opposition can be formal or informal, so long as the plaintiff reasonably believed the
24 employer engaged in an unlawful employment practice under Title VII or the FEHA. *See Ray v.*
25 *Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000) (an informal complaint to a supervisor is a
26 protected activity).

27 An adverse employment action is one that “materially affect[s] the compensation,
28 terms, conditions, or privileges of the [plaintiff’s] employment.” *Chuang v. Univ. of Cal. Davis*,

1 *Bd. of Trs.*, 225 F.3d 1115, 1126 (9th Cir. 2000). For purposes of a Title VII or FEHA retaliation
2 claim, a plaintiff must show that “a reasonable employee would have found the challenged action
3 materially adverse,” meaning “it might well have ‘dissuaded a reasonable worker from making or
4 supporting a charge of discrimination.’” *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53,
5 60 (2006).

6 A plaintiff can also establish adverse employment action by showing she was
7 constructively discharged. *See Pa. State Police v. Suders*, 542 U.S. 129, 130 (2004) (“Under the
8 constructive discharge doctrine, an employee’s reasonable decision to resign because of
9 unendurable working conditions is assimilated to a formal discharge for remedial purposes.”); *see*
10 *also Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 919 (9th Cir. 1996) (constructive discharge
11 is an adverse employment action); *Jordan v. Clark*, 847 F.2d 1368, 1377 n.10 (9th Cir. 1988)
12 (same). Constructive discharge occurs when working conditions deteriorate as a result of
13 discrimination, to the point they become “sufficiently extraordinary and egregious to overcome
14 the normal motivation of a competent, diligent, and reasonable employee to remain on the job to
15 earn a livelihood and to serve his or her employer.” *Brooks*, 229 F.3d at 930; *see also Poland v.*
16 *Chertoff*, 494 F.3d 1174, 1184 (9th Cir. 2007). Although the determination of whether conditions
17 were sufficiently intolerable and discriminatory is normally a factual question left to the trier of
18 fact, a plaintiff must at least show some “‘aggravating factors,’ such as a ‘continuous pattern of
19 discriminatory treatment’” to survive summary judgment. *Thomas v. Douglas*, 877 F.2d 1428,
20 1434 (9th Cir. 1989).

21 In evaluating a constructive discharge claim, the Ninth Circuit has considered the
22 time that elapses between the rise of intolerable working conditions and an employee’s
23 resignation to determine whether a reasonable employee would have felt compelled to resign.
24 *Poland*, 494 F.3d at 1185. For example, in *Poland*, the district court concluded the plaintiff
25 employee’s transfer from a supervisory position in Oregon to a nonsupervisory position in
26 Virginia amounted to a “constructive discharge” because the transfer would have resulted in
27 separation from his family and demotion. *Id.* at 1184. The Ninth Circuit held otherwise,
28 concluding that because the plaintiff had worked five months in the nonsupervisory position after

1 the transfer and before retiring, and three additional months after retiring during which he still
2 was paid, he was not constructively discharged. *Id.* at 1185. In the Ninth Circuit’s view, working
3 additional months was not “the action[] of someone who finds his working conditions so
4 intolerable that he felt compelled to resign.” *Id.*

5 To show a causal link, a plaintiff must present evidence sufficient to raise the
6 inference that her protected activity was the likely reason for the adverse action. *Cohen v. Fred*
7 *Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982). That an employer’s actions were caused by an
8 employee’s engagement in protected activities may be inferred from “proximity in time between
9 the protected action and the allegedly retaliatory employment decision.” *Ray*, 217 F.3d at 1244.

10 2. Analysis

11 a) Protected Activity

12 Ms. Soga contends she engaged in “protected activity” by both (1) opposing
13 “gender harassment” during a meeting with Mr. Kleinhans on July 13, 2011, when she received
14 her first letter of instruction; and (2) filing a formal HR complaint on April 16, 2013.
15 Opp’n at 14.

16 Ms. Soga’s HR Complaint is protected activity because the complaint alleges
17 several inappropriate acts, some of which were sexually harassing in nature and which Ms. Soga
18 reasonably believed violated Title VII or the FEHA. *Chuang*, 225 F.3d at 1126. As for the
19 July 13, 2011 meeting during which Ms. Soga objected to Mr. Kleinhans’s arrogant attitude and
20 attempted to make job referrals to his friends, conduct that she characterizes as “gender
21 harassment,” no reasonable juror could conclude such conduct violated Title VII or FEHA. On
22 the record before the court, Ms. Soga’s HR complaint constitutes protected activity, and only acts
23 that took place after she filed her complaint on April 16, 2013 alleging harassment and hostile
24 work environment can support her retaliation claim. *See Jordan*, 847 F.2d at 1376 (“[Plaintiff]
25 must show ‘that she engaged in a protected activity, that she was thereafter subjected by her
26 employer to adverse employment action.’” (citing *Cohen*, 686 F.2d at 796)).

1 b) Adverse Employment Action

2 Ms. Soga characterizes two incidents as adverse employment actions by the
3 County: (1) an August 23, 2013 meeting in which the County informed Ms. Soga that
4 Mr. Kleinhans was returning to work after he made the verbal threat of violence against her; and
5 (2) the County's call to Ms. Soga after her resignation, in which the County reiterated its offer to
6 give Ms. Soga a permanent position in Truckee, but without free gas and a company car, as first
7 proposed. UMF No. 66. Ms. Soga argues Mr. Kleinhans individually engaged in two adverse
8 employment acts in: (1) interrogating three female co-workers in late April 2013 to determine if
9 Ms. Soga had filed the HR complaint; and (2) making a serious threat of violence against
10 Ms. Soga after she filed the HR complaint. Opp'n at 8–13. Ms. Soga argues all these acts taken
11 together form the basis of her constructive termination claim. *Id.* at 16. While she also argues
12 several other events before April 16, 2013 also support her retaliation claim, those acts occurred
13 before she filed her HR complaint.

14 (1) General Adverse Employment

15 a. County

16 The County's call made after Ms. Soga's resignation is easily disposed of, as it
17 was not an adverse employment action. Because Ms. Soga was no longer an employee with the
18 County, the offer, although less favorable than the prior offer, could not have affected the
19 "compensation, terms, conditions, or privileges of [Ms. Soga's] employment." *Chuang*, 225 F.3d
20 at 1126.

21 The County's decision to let Mr. Kleinhans return is similarly disposed of
22 Ms. Soga has not established a causal link between her HR complaint and this decision. The
23 County's decision came after it first ordered Mr. Kleinhans take paid administrative leave and
24 after the County conducted a thorough investigation over more than four months. When asked at
25 her deposition whether she thought it was inappropriate for the County to act as it did in allowing
26 Kleinhans to return to work, Ms. Soga answered "no." Soga Dep. 194:19–23. Further, no
27 evidence before the court raises a material dispute as to whether the County would have
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1 responded differently in its handling of Kleinhans's employment if Ms. Soga had not filed her HR
2 complaint.

3 Defendants' motion for summary judgment is GRANTED on these aspects of
4 Ms. Soga's retaliation claim.

5 b. Kleinhans

6 On the other hand, a reasonable jury could conclude Mr. Kleinhans's interrogation
7 of three female co-workers after Ms. Soga filed her HR complaint, and his threat communicated
8 to Ms. Brenneman, constituted adverse employment action. The undisputed material facts show
9 Ms. Soga and Mr. Kleinhans had a hostile and contentious relationship. For example,
10 Mr. Kleinhans screamed and spit on Ms. Soga after he saw the "atta-girl" email from another
11 employee. While the interrogation and threat by themselves may not have changed the terms of
12 Ms. Soga's employment immediately or directly because they occurred behind Ms. Soga's back,
13 given the County's response, a reasonable jury could conclude Mr. Kleinhans's conduct
14 ultimately did have the effect of altering the "conditions" of Ms. Soga's employment. An
15 employee who anticipates that a superior to her in the hierarchy of a department will interrogate
16 co-workers about her actions and tell a co-worker he wants to harm her, may reasonably be
17 dissuaded from filing a complaint.

18 (2) Constructive Discharge

19 Support for Ms. Soga's constructive discharge claim also takes the form of (1) the
20 post-resignation County call; (2) Mr. Kleinhans's interrogation of co-workers; and
21 (3) Mr. Kleinhans's threat of violence communicated to a co-worker.

22 No reasonable juror could conclude the County's call effected a constructive
23 termination, for Ms. Soga had already resigned, the call was not "sufficiently extraordinary or
24 egregious," and the call could not have amounted to "discriminatory treatment." On the other
25 hand, a reasonable jury could find that Mr. Kleinhans's threat, when considered together with the
26 County's decision to let Mr. Kleinhans return to work, made Ms. Soga's working conditions
27 intolerable. Although there was a five-month gap between Mr. Kleinhans's threat and
28 interrogation of co-workers, and Ms. Soga's resignation, Ms. Kleinhans was on administrative

1 leave during virtually that entire time. This makes Ms. Soga’s case distinguishable from *Poland*
2 because her delay in resigning did not occur during purportedly deteriorating conditions. During
3 the time Mr. Kleinhans was absent and the County was investigating his threat, Ms. Soga had
4 little reason to assume working conditions were deteriorating as to “overcome the normal
5 motivation of a competent, diligent, and reasonable employee to remain on the job.” *Brooks*,
6 229 F.3d at 930; *Poland*, 494 F.3d at 1184.

7 But Ms. Soga then resigned less than two weeks after hearing Mr. Kleinhans was
8 returning, and three days after he did return. Additionally, Ms. Soga declined to take the
9 County’s job offer to reside in Truckee permanently, even with a ten percent raise, because she
10 felt her safety was in jeopardy. Soga Dep. 193:1–5. A reasonable jury could conclude she felt
11 this way because of Mr. Kleinhans’s verbal threat. Taken together, Mr. Kleinhans’s threat to
12 shoot Ms. Soga, and his intimidation of Ms. Soga’s co-workers, could reasonably be found to
13 qualify as “aggravating factors” “sufficiently extraordinary and egregious to overcome the normal
14 motivation of a competent, diligent, and reasonable employee to remain on the job.” *Brooks*,
15 229 F.3d at 930; *Poland*, 494 F.3d at 1184. Mr. Kleinhans’s actions as a County employee could
16 support a finding of constructive discharge.

17 (3) Causal Link

18 A reasonable jury also could conclude Mr. Kleinhans’s actions were causally
19 linked to Ms. Soga’s filing her HR complaint. In her deposition, HR Analyst Nancy Haffey
20 described how Mr. Kleinhans almost immediately called Ms. Soga’s three co-workers into his
21 office after HR informed him about the complaint. Haffey Dep. 131:4–9. Ms. Brenneman’s
22 testimony was consistent. Brenneman Dep. 58:21–62:7. On the same day, he threatened to shoot
23 Ms. Soga if he had a gun. HR Brenneman Interview at 14.

24 (4) Legitimate Reasons

25 Having determined certain acts could be found by a jury to constitute adverse
26 employment actions, the court next considers whether the defendants “present legitimate reasons
27 for the adverse employment action[s].” *Brooks*, 229 F.3d at 928. Defendants in fact offer no
28 explanation for Mr. Kleinhans’s interrogation of the three employees. As to Mr. Kleinhans’s

1 threat of violence, the County argues it handled the situation seriously by ordering Mr. Kleinhans
2 to leave the premises, putting him on administrative leave, and investigating the situation
3 thoroughly. Mot. at 17–18. The County’s prompt response, however, does not show how or why
4 Mr. Kleinhans’s threat was in any way justified. Nor could it, given the outrageousness of the
5 threat.

6 Summary judgment is DENIED.

7 In sum, the court finds Mr. Kleinhans’s behavior in the form of the co-worker
8 interrogation and verbal threat could support Ms. Soga’s retaliation claim. Defendants’ motion
9 for summary judgment is DENIED on these aspects of Ms. Soga’s Title VII and FEHA retaliation
10 claims.

11 C. Retaliation Under Labor Code Section 1102.5

12 The County contends Ms. Soga’s state law retaliation claim is procedurally barred
13 under Labor Code section 1102.5 because Ms. Soga did not exhaust her administrative remedies
14 by filing a California Government Tort Claim prior to filing suit. Mot. at 6. Ms. Soga contends
15 she was not required to file a Government Tort Claim. Opp’n at 25.

16 No suit for damages may be brought against a public entity until a written claim
17 has been presented to and rejected by that entity. *Munoz v. California*, 33 Cal. App. 4th 1776,
18 1777 (1995). Compliance with this requirement constitutes an element of a state claim for
19 damages against a public entity, and failure to meet this requirement is fatal to the claim. *See*
20 *State v. Super. Court (Bodde)*, 32 Cal. 4th 1234, 1239 (2004); *Karim-Panahi v. L.A. Police Dep’t*,
21 839 F.2d 621, 627 (9th Cir. 1988).

22 Here, it is undisputed that Ms. Soga did not present her Labor Code retaliation
23 claim in the form of a California Government Tort Claim before filing suit against the County or
24 Mr. Kleinhans. UMF No. 46. Defendants’ motion for summary judgment is GRANTED as to
25 this state claim.

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IV. CONCLUSION

Defendants' motion is GRANTED as to Ms. Soga's sexual harassment claims under Title VII and FEHA; DENIED as to Ms. Soga's Title VII and the FEHA retaliation claims based on Mr. Kleinhans's threat and interrogation of co-workers; and GRANTED as to Ms. Soga's Labor Code section 1102.5 retaliation claim.

This resolves ECF No. 17.

IT IS SO ORDERED.

DATED: August 8, 2016.


UNITED STATES DISTRICT JUDGE