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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DONNA HINES,

No. C-10-2813 EMC

Plaintiff,

v.

CALIFORNIA PUBLIC UTILITIES  
COMMISSION, *et al.*,

**ORDER RE DEFENDANT  
CALIFORNIA PUBLIC UTILITIES  
COMMISSION’S MOTION TO DISMISS  
SECOND AMENDED COMPLAINT  
AND TO STRIKE PUNITIVE DAMAGES**

Defendants.

**(Docket No. 44)**

Plaintiff Donna Hines has filed suit against the California Public Utilities Commission (“CPUC”), Michael R. Peevey, Frank R. Lindh, Joseph A. Abhulimen, and the Estate of Dana S. Appling, for retaliation under Title VII of the Civil Rights Act of 1964. Pending before the Court are CPUC’s motion to dismiss and motion to strike.

**I. FACTUAL & PROCEDURAL BACKGROUND**

In her second amended complaint (“SAC”), Ms. Hines alleges as follows. The CPUC is a state agency. *See* SAC ¶ 46. CPUC regulates the three largest utilities operating in California, including Pacific Gas and Electric Company (“PG&E”). *See id.* ¶ 48. Ms. Hines has worked for the CPUC since 2002. *See* Original Compl. ¶ 19. Ms. Hines currently works as an analyst in the CPUC department of the Division of Ratepayer Advocates (“DRA”). *See id.* ¶¶ 19, 32; *see also* SAC ¶¶ 66, 75-77.

On August 13, 2007, Ms. Hines filed suit against the CPUC for race discrimination and retaliation in violation of Title VII. *See* SAC ¶ 310; *see also Hines v. CPUC*, No. C-07-4145 CW.

1 Some two years later, CPUC issued several disciplinary actions against Ms. Hines. *See* SAC ¶¶  
2 289-291. On July 27, 2009, CPUC issued to Ms. Hines a Corrective Action Memo (“CAM”). *See*  
3 *id.* ¶ 289 & Ex. 1 (Disciplinary Actions). On September 8, 2009, the CPUC issued to Ms. Hines a  
4 Notice of Adverse Action. *See id.* ¶ 290 & Ex. 1. Lastly, on December 3, 2009, the CPUC issued to  
5 Ms. Hines a second Notice of Adverse Action, which resulted in a suspension without pay. *See id.* ¶  
6 291 & Ex. 1.

7 According to Ms. Hines, the December 3, 2009 Notice of Adverse Action cited, among other  
8 reasons, Ms. Hines’s refusal to sponsor testimony as a cause of the disciplinary action. *See id.* ¶  
9 348. When a DRA report is prepared, the name of the analyst who worked on the matter is included  
10 on the report, and the analyst is expected to endorse the report and testify as to the report’s contents  
11 before the CPUC. Order, at 2. Ms. Hines has declined to sponsor the reports as she believes that  
12 the recommendations protected the utility interests and were biased in favor of the utilities the  
13 CPUC was supposed to be regulating. *See* SAC ¶¶ 217, 218; *see also* Order, at 3. Ms. Hines alleges  
14 that the DRA management ordered material changes to the testimony as part of the “chain of  
15 command.” SAC ¶ 219. Ms. Hines claims that CPUC, *inter alia*, changed her analysis in these  
16 reports. *See id.* ¶ 357. After changing her analysis, CPUC management compelled Ms. Hines to  
17 “sponsor” (*i.e.* sign, offer biographical details as a witness, and testify under oath) the changed  
18 analysis as part of her job responsibilities. *See id.* ¶¶ 363-64. Ms. Hines argues that CPUC has  
19 effectuated disciplinary actions against Ms. Hines for her refusal to “sponsor” these reports (*i.e.* the  
20 disciplinary actions). *See id.* ¶ 365.

21 Ms. Hines filed suit against CPUC and the other defendants on June 28, 2010 for retaliation  
22 under Title VII, alleging that CPUC’s disciplinary actions constituted retaliation for her having filed  
23 the Title VII suit in August 2007. Order Granting Defendant’s Motion to Dismiss and Strike  
24 (“Order”), 11/08/2010, Docket No. 24, at 2. With respect to the claims asserted against the CPUC,  
25 they are as follows: retaliation pursuant to Title VII; violation of the Clayton and Sherman Acts;  
26 violation of the Sarbanes-Oxley Act; violation of the federal securities laws; and fraud, pursuant to  
27 federal law. Order at 3. CPUC filed a motion to dismiss and strike. Mot. Dismiss, 8/27/2010,  
28 Docket No. 9. The Court dismissed all, but the Title VII claim, against CPUC based on Eleventh

1 Amendment immunity. *See* Order at 8. As the Court concluded that there is Eleventh Amendment  
2 immunity, the Court dismissed with prejudice all the non-Title VII claims. *Id.* The Court dismissed  
3 Ms. Hines’s Title VII claim, but with leave to amend. *Id.* at 12. The Court held that Ms. Hines’s  
4 Title VII claim was lacking as Ms. Hines failed to plead evidence of causation in her retaliation  
5 claim under Title VII. *Id.* at 11. The Court found that the lapse of two years between Ms. Hines’s  
6 Title VII lawsuit and the adverse employment actions, without any other evidence of causation,  
7 rendered Ms. Hines’s retaliation claim facially implausible. *Id.* The Court found that to  
8 successfully plead a retaliation claim, Ms. Hines would need to allege that CPUC engaged in  
9 adverse employment actions closer in time to the August 2007 Title VII lawsuit, that Ms. Hines  
10 engaged in activity protected by Title VII closer to the July-December 2009 adverse employment  
11 actions, or allege additional facts that support an inference of a causal relationship. *Id.* The Court  
12 also granted CPUC’s motion to strike punitive damages. *See* Order at 12-13.

13 In her second amended complaint (“SAC”), Ms. Hines again alleges that CPUC’s  
14 disciplinary actions constituted retaliation for Ms. Hines’s 2007 Title VII lawsuit against CPUC.  
15 *See* SAC ¶¶ 294-296. In particular, she alleges that CPUC’s actions constituted retaliation for her  
16 refusal to endorse certain DRA reports. *See id.* ¶ 334. Ms. Hines alleges she had never received  
17 disciplinary action while working for CPUC prior to her filing of the lawsuit against CPUC. *See id.*  
18 ¶ 300. She also alleges that prior to her lawsuit, she received good or superior performance  
19 evaluations. *See id.* ¶ 301. CPUC cited inefficiency and insubordination as causes for the  
20 disciplinary actions issued against Ms. Hines. *See id.* ¶ 297. Ms. Hines argues that she was an  
21 efficient worker and was not insubordinate. *See id.* ¶¶ 304, 309, 314. Ms. Hines also states that, in  
22 2009, she refused to meet with CPUC privately, behind closed doors, as opposed to in her cubicle,  
23 and that the Program Manager for the Energy Division made hostile comments about her. *See id.* ¶¶  
24 333-345. None of these hostile comments, which were made in 2009, were race-based and none  
25 referred to Ms. Hines’s Title VII August 2007 complaint. *See id.*

26 CPUC again seeks to dismiss Ms. Hines’s Title VII claim under Rule 12(b)(6) and moves to  
27 strike Ms. Hines’s claim for punitive damages under Rule 12(f). *See* Fed. R. Civ. P. 12(b)(6); 12(f).

1 **II. PLEADING STANDARD**

2 “Federal Rule of Civil Procedure 8(a)(2) requires only a ‘short and plain statement of the  
3 claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what  
4 the claim is and the grounds upon which it rests.’” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,  
5 554 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). A motion to dismiss tests the sufficiency of a  
6 complaint or counterclaim, facilitating dismissal to the extent the pleading fails to state a claim upon  
7 which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). The pleading is construed in the light  
8 most favorable to the non-moving party and all material allegations in it are taken to be true.  
9 *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir.1986). However, even under the liberal pleading  
10 standard of Rule 8, “a plaintiff’s obligation to provide the grounds of his entitlement to relief  
11 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of  
12 action will not do.” *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)  
13 (internal brackets and quotation marks omitted)). Hence, the Court need not assume unstated facts,  
14 nor will it draw unwarranted inferences. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009)  
15 (“Determining whether a complaint states a plausible claim for relief . . . [is] a context-specific task  
16 that requires the reviewing court to draw on its judicial experience and common sense.”); *Cousins v.*  
17 *Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988  
18 (9th Cir. 2001) (“Nor is the court required to accept as true allegations that are merely conclusory,  
19 unwarranted deductions of fact, or unreasonable inferences.”).

20 Under *Twombly* and *Iqbal*, a plaintiff may not merely allege conduct that is conceivable, but  
21 must allege “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S.  
22 at 555. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court  
23 to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129  
24 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 556). “The plausibility standard is not akin to a  
25 probability requirement, but it asks for more than a sheer possibility that a defendant has acted  
26 unlawfully. . . . When a complaint pleads facts that are merely consistent with a defendant’s  
27 liability, it stops short of the line between possibility and plausibility of entitlement to relief.” *Id.*  
28 (quoting *Twombly*, 550 U.S. at 556-57) (internal quotation marks omitted). In sum, if the facts

1 alleged foster a reasonable inference of liability – stronger than a mere possibility – the claim should  
2 survive; if not, the claim must be dismissed. *See Iqbal*, 129 S. Ct. at 1949-50.

3 **III. DISCUSSION**

4 A. Motion to Strike

5 As a preliminary matter, the Court addresses CPUC’s motion to strike Ms. Hines’s claim for  
6 punitive damages. Under Rule 12(f), a “court may strike from a pleading an insufficient defense or  
7 any redundant, immaterial, impertinent or scandalous matter.” Fed. R. Civ. P. 12(f); *see also*  
8 *McArdle v. AT & T Mobility LLC*, 657 F. Supp. 2d 1140 (N.D. Cal. 2009). The purpose of a Rule  
9 12(f) motion is to avoid spending time and money litigating spurious issues. *See Fantasy, Inc. v.*  
10 *Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev’d on other grounds, Fogerty v. Fantasy, Inc.*, 510  
11 U.S. 517 (1994).

12 In her second amended complaint, Ms. Hines asks the Court to “[p]unish or discipline” those  
13 determined to have committed wrongdoing. *See* SAC ¶¶ 407-408. However, in her response to  
14 CPUC’s motion to strike her claim for punitive damages, Ms. Hines states that she seeks only  
15 “remedial relief.” Pl.’s Opp’n Br.

16 As held by this Court in its previous Order, at 12-13, punitive damages are not available  
17 under Title VII against government entities. 42 U.S.C. § 1981a(b)(1). As Ms. Hines has clarified,  
18 she does not seek punitive damages, the Court declines to strike the challenged portion of the SAC.  
19 Instead, the Court simply construes Ms. Hines’s complaint to request all damages available under  
20 the law, which does not include punitive damages against the CPUC.

21 B. Title VII

22 In her second amended complaint, Ms. Hines alleges, *inter alia*, that CPUC retaliated against  
23 her in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e *et seq.*). “In order  
24 to establish a prima facie case of retaliation under Title VII, [a plaintiff] must demonstrate that (1)  
25 she engaged in an activity protected under Title VII; (2) her employer subjected her to an adverse  
26 employment action; and (3) a causal link exists between the protected activity and the adverse  
27 employment action.” *Thomas v. City of Beaverton*, 379 F.3d 802, 811 (9th Cir. 2004). In her  
28 second amended complaint, Ms. Hines asserts that the CPUC engaged in retaliation when it

1 subjected her to adverse employment actions in 2009 (*i.e.*, the Corrective Action Memorandum and  
2 two Notices of Adverse Action) after she had filed a Title VII lawsuit against the CPUC in August  
3 2007.

4 1. Protected Activity

5 To prevail on a Title VII retaliation claim, a plaintiff must establish, *inter alia*, that “she  
6 engaged in an activity *protected under Title VII.*” *Thomas*, 379 F.3d at 811. Title VII protects  
7 against, for example, discrimination on the basis of race and retaliation against an employee for  
8 making a Title VII charge or otherwise participating in a Title VII proceeding. *See id.* Protected  
9 activity that falls within Title VII includes, *e.g.*, an employee opposing any practice of the employer  
10 that is an unlawful employment practice by Title VII, such as the employer’s practice of  
11 discrimination on the basis of race, color, religion, sex or natural origin. *See id.*; *see also* 42 U.S.C.  
12 ¶ 2000e-2. Protected activity includes an employee’s actions relating to a Title VII claim, including:  
13 making a charge, testifying, assisting, or participating in enforcement proceedings. 42 U.S.C. ¶  
14 2000e-3(a).

15 However, Ms. Hines describes the bases for the disciplinary actions against her – they stem  
16 from her failure to sponsor testimony. She stresses that her refusal to endorse certain DRA reports  
17 contributed to the adverse employment actions. *See* SAC ¶¶ 348, 363-365. The Court has already  
18 rejected the argument that refusal to endorse DRA reports constitutes a protected activity under Title  
19 VII. Order, at 11. Ms. Hines has failed to allege that she engaged in a “protected activity” other  
20 than the 2007 Title VII lawsuit. Ms. Hines’s allegation that CPUC’s institutional practices  
21 disregards the conflict of interest provisions, in violation of state law, *see id.* ¶¶ 380-385, has no  
22 relation to the activity protected under Title VII which focuses on opposing an employment practice  
23 that discriminates against an *e.g.*, race or gender – not an activity in violation of state laws protecting  
24 consumers or prohibiting conflicts of interest. Even if Ms. Hines’s activity in refusing to endorse  
25 the DRA report were protected under other state or federal law or the First Amendment, it is not  
26 relevant to her Title VII retaliation claim.

1           2.       Causal Link Between the Protected Activity and an Adverse Employment Action

2           In her first complaint, Ms. Hines alleged that CPUC retaliated against Ms. Hines, with  
3 adverse employment actions, after she filed suit against CPUC in 2007. The Court found that the  
4 two-year gap between the lawsuit and adverse employment actions, without other evidence of  
5 causation, rendered Ms. Hines’s claim facially implausible. The Court held that without more, Ms.  
6 Hines’s refusal to endorse the DRA reports, as alleged, had no plausible connection with the  
7 discrimination prohibited by Title VII or a Title VII proceeding. Order, at 11. To make a Title VII  
8 retaliation claim, it is necessary to allege facts showing that the activity protected under Title VII,  
9 such as discrimination on the basis of race and retaliation against an employee for making a Title  
10 VII charge, motivated the adverse employment actions. *Id.* A two-year lapse in time, without facts  
11 alleging causation, render a retaliation claim facially implausible. *Id.*

12           In its pending motion to dismiss, CPUC again argues that Ms. Hines’s retaliation claim under  
13 Title VII must be dismissed as Ms. Hines fails to allege a casual connection between a protected  
14 activity and the alleged adverse employment action. Mot. Dismiss, at 5. CPUC claims that Ms.  
15 Hines has failed to rectify the deficiencies of her first complaint and, in her second amended  
16 complaint, Ms. Hines offers only conclusory statements regarding the casual link. *See id.*

17           The Court agrees that Ms. Hines has failed to address the deficiencies in alleging a plausible  
18 claim of causation between the protected activity (filing of the Title VII claim in 2007) and the  
19 disciplinary action in 2009. The Court has already held that a two-year lapse in time, without other  
20 evidence of causation, makes Ms. Hines’s retaliation claim facially implausible. Order, at 11. The  
21 Supreme Court has stated that “[t]he cases that accept mere temporal proximity between an  
22 employer’s knowledge of protected activity and an adverse employment action as sufficient  
23 evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must  
24 be ‘very close.’” *Clark County School Dist. v. Breeden*, 121 S.Ct. 1508, 1511 (2001) (emphasis  
25 added). In *Breeden* itself, the Supreme Court concluded that a twenty-month gap between the  
26 protected activity and adverse employment action suggested “by itself, no causality at all.” *Id.* at  
27 1511. Some courts have found even a gap of even a few months insufficient. *See, e.g., Richmond v.*  
28 *ONEOK, Inc.*, 120 F. 3d 205 (10th Cir. 1997) (3-month period insufficient), and *Hughes v.*

1 *Derwinski*, 967 F. 2d 1168 (7th Cir. 1992) (4-month period insufficient). The causal link between a  
2 protected activity and the alleged retaliatory action “can be inferred from timing alone” only when  
3 there is a close proximity between the two. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054,  
4 1065 (9th Cir. 2002).

5 As Ms. Hines points out, “a specified time period cannot be a mechanically applied  
6 criterion.” Opp’n Br. (quoting *Coszalter v. City of Salem*, 320 F.3d 968, 978 (9th Cir. 2003)).  
7 Nonetheless, courts must consider retaliation claims “in the light of the timing and the surrounding  
8 circumstances.” *Id.* No such surrounding circumstances is alleged here which could reasonably  
9 lead to an inference that the adverse employment actions against her were motivated by her 2007  
10 lawsuit against CPUC. In fact, Ms. Hines’s allegations suggest that the actions were taken in  
11 response to her conduct in 2009 in refusing to sponsor testimony. Even if she was justified in doing  
12 so and the disciplinary actions taken were unwarranted, that does not suggest the disciplinary actions  
13 were taken in retaliation of the 2007 Title VII claim; instead they appear to have been made in  
14 response to her disputes with the CPUC in 2009 over the DRA reports.

15 Moreover, the Court notes that in *Coszalter*, the time gap between the protected activity and  
16 the adverse actions was three to eight months, *id.* at 977, a considerably shorter period than the  
17 twenty-seven months alleged here. Ms. Hines has failed to allege anything happened during that  
18 time to suggest a stronger nexus.

19 Ms. Hines’s explanation about her work efficiency, *see* SAC ¶¶ 304-312, and decision not to  
20 participate in closed doors, private meetings, *see* SAC ¶¶ 333-345, also fail reasonably to imply a  
21 causal connection between the 2007 Title VII claim and the 2009 disciplinary actions.

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**IV. CONCLUSION**

Having failed to establish a non-conclusory plausible claim that the 2009 disciplinary actions were motivated as retaliation against the 2007 Title VII claim, and having previously afforded Ms. Hines an opportunity to cure the deficiency in her complaint, the Court dismisses the Title VII claim against the CPUC with prejudice.

This order disposes of Docket No. 44.

IT IS SO ORDERED.

Dated: April 5, 2011

  
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EDWARD M. CHEN  
United States Magistrate Judge

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

DONNA HINES,

No. C-10-2813 EMC

Plaintiff,

v.

**CERTIFICATE OF SERVICE**

CALIFORNIA PUBLIC UTILITIES  
COMMISSION, *et al.*,

Defendants.

\_\_\_\_\_/

I, the undersigned, hereby certify that I am an employee in the U.S. District Court, Northern District of California. On the below date, I served a true and correct copy of the attached, by placing said copy/copies in a postage-paid envelope addressed to the person(s) listed below, by depositing said envelope in the U.S. Mail; or by placing said copy/copies into an inter-office delivery receptacle located in the Office of the Clerk.

Donna Hines  
268 Bush Street, #3204  
San Francisco, CA 94104  
415-205-3377

Dated: April 5, 2011

RICHARD W. WIEKING, CLERK

By:           /s/ Leni Doyle            
Leni Doyle  
Deputy Clerk