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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JERRI CURRY,  
Plaintiff,  
v.  
CONTRA COSTA COUNTY,  
Defendant.

Case No. [12-cv-03940-WHO](#)

**ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT; DENYING MOTION RE  
EX PARTE CONTACTS**

Re: Dkt. Nos. 60, 64, 89, 93

A judge’s role in deciding summary judgment motions is not to weigh evidence; it is to discern whether there are triable issues of fact that must go to a jury. In this age discrimination and retaliation case, I must decide whether Dr. Jerri Curry raises material questions of fact showing that defendant Contra Costa County relied on pretextual justifications for failing to hire her for open positions or use her for on-call work. Because Curry’s age and retirement issues were explicitly discussed in her interview for an open position, the County’s explanations for not hiring and not continuing to offer her on-call work shifted over time and were not documented, and witnesses’ perspectives on her abilities are in conflict, I find that Curry has raised material questions of fact as to some of the positions but not others. Therefore, I GRANT in part and DENY in part the County’s Motion for Summary Judgment. The County also argues that Curry violated California Rule of Professional Conduct 2-100 in contacting non-managerial County employees to support her case. I find that Curry and her counsel did not violate Rule 2-100 and DENY the County’s Motion re Ex Parte Contacts.

**BACKGROUND**

From December 2003 through March 2010, plaintiff Dr. Jerri Curry worked as a part-time Mental Health Clinical Specialist (MHCS) in the County’s “Detention Mental Health” unit.

1 During this time, she worked primarily at the Martinez Detention Facility (MDF) with occasional  
2 shifts at the West County Detention Facility (West County). Curry has a doctorate in psychology,  
3 is a licensed Marriage and Family Therapist (MFT), and is a certified Registered Addiction  
4 Specialist (RAS). Declaration of Dr. Jerri Curry ¶ 2. She is 70. *Id.*

5 In March 2010, Curry became a full-time MHCS at the Concord Adult Mental Health  
6 Clinic (CAMHC), where Curry continues to work. John Allen selected Curry for that position,  
7 after receiving a qualified recommendation from Candace Kunz-Tao, who was plaintiff's co-  
8 worker in the Detention Mental Health unit. Declaration of Candace Kunz-Tao ¶ 4. After March  
9 2010, Curry continued to work on an "on call" basis in the Detention Mental Health unit.

10 In July 2010, Kunz-Tao became the supervisor of the Detention Mental Health unit. Kunz-  
11 Tao asserts that she received "a number" of complaints from co-workers in the Detention Mental  
12 Health unit about Curry's work both before and after she took over as supervisor. None of these  
13 complaints was documented. The only specific co-worker identified by Kunz-Tao is Morgan  
14 Knowles, who reported to Kunz-Tao (at some unspecified point) that Curry "frequently" left her  
15 shift early and without discussing the status of inmates and their counseling needs. Kunz-Tao  
16 Decl. ¶ 5. Kunz-Tao believes this conduct was a serious breach of unit protocol. *Id.* Curry  
17 disputes this allegation, and alleges that Kunz-Tao has told her "You are the most dependable  
18 member of the staff; I can always count on you to show up." Curry Decl. ¶ 33.

19 Kunz-Tao also discusses an incident, reported by an unnamed co-worker, where Curry  
20 allegedly left her shift without noting in the computer system that an inmate was in a safety cell  
21 and that once a Sheriff's department employee could not locate Curry "for a considerable" period  
22 of time; asserting again that these incidents were "serious" and caused Kunz-Tao to "have  
23 concerns about Ms. Curry's professional judgment and trustworthiness." Kunz-Tao Decl. ¶ 5.  
24 Curry contends that "she never heard any complaints about her performance" from Kunz-Tao or  
25 anyone else. Curry Decl. ¶ 13. Ms. Curry also notes that on May 25, 2011, Kunz-Tao expressed  
26 her hope that Curry would continue to work on-call shifts at MDF. *Id.* ¶ 21, Ex.4.

27 Starting in May 2011, when plaintiff was 68 years old, plaintiff applied for multiple  
28 MHCS job vacancies at MDF or West County, but was not given any of the positions she applied

1 for. Pl. Oppo. at 1. In May 2011, Curry applied for two full-time MHCS positions and  
2 “requested” to be considered for a third part-time position in the Detention Mental Health unit.  
3 Curry Decl. ¶ 14. Kunz-Tao had a “pre-interview” telephone discussion with Curry. *Id.* ¶ 16.  
4 Curry alleges that during the phone call she told Kunz-Tao her age, and assumed (but could not  
5 recall) that she did so in response to a question by Kunz-Tao. *Id.* On May 9, 2011, Curry had an  
6 in-person interview with Kunz-Tao. Curry alleges that in that interview Kunz-Tao did not ask  
7 Curry about her references, qualifications, or interest in the positions and did not discuss  
8 “teamwork” or “cohesiveness” or how Curry would fit into the unit. *Id.* Instead, according to  
9 Curry, Kunz-Tao spent 20 minutes discussing “retirement issues,” and made statements regarding  
10 how many staff were leaving the unit and retiring, how that would be difficult, and how Kunz-Tao  
11 had not realized that Curry had worked at the jail as long as the others who were getting ready to  
12 retire. *Id.* ¶ 17.

13 Kunz-Tao admits discussing retirement issues during the interview, but contends the  
14 purpose was to probe Curry’s willingness and ability to work as a team player during the transition  
15 from the current to the new team. Kunz-Tao Decl. ¶ 9. Curry contends that Curry’s age was  
16 “clearly” on Kunz-Tao’s mind and believed, based on the contents of the interview, that Kunz-Tao  
17 was not considering Curry as a viable candidate for the positions because of her age. Curry Decl.  
18 ¶ 17.

19 Margaret Robbins was eventually selected for the first full-time position. Kunz-Tao based  
20 her selection on Robbins’ experience, better “fit,” and the opinion of Michael Elder (who was a  
21 Team Leader in the unit) that other employees would quit if Curry was selected. Kunz-Tao Decl.  
22 ¶¶ 12-14. Robbins was 48 at that time. Curry Decl. ¶ 20. Robbins had recently graduated from  
23 college and her only detention experience at that point was working as a temporary employee at  
24 MDF. *Id.* ¶ 20.

25 For the second full-time position, Kunz-Tao selected Rebecca Bertram based on several  
26 factors including her experience and skills in Art Therapy, her better “fit,” Elder’s comments, and  
27 a recommendation of Bertram by Kunz-Tao’s own supervisor, Julie Kelley. Kunz-Tao Decl. ¶ 18.  
28 Bertram was 42 at the time. Curry Decl. ¶ 18. Curry contends that Bertram had only worked for

1 the County for six months at that time, and lasted only a few months in the full-time jail position  
2 before leaving to work for the State of California. *Id.* ¶ 19.

3 For the third, part-time position, Margaret Knowles was selected. Knowles was in her 20s  
4 at that time. Curry Decl. ¶ 18. Curry contends that neither Bertram nor Knowles were qualified to  
5 do the job because they did not have professional licenses to conduct “one of the most essential  
6 duties of the positions” to assess and complete a 5150 to transfer inmates from jail to the county  
7 hospital. *Id.* ¶ 20.

8 On May 25, Curry emailed Kunz-Tao questioning why less experienced individuals were  
9 hired and informing Kunz-Tao that she would contact her union to “determine my rights.” *Id.* ¶¶  
10 21, 23. On May 27, 2011, Curry’s counsel wrote a letter to the County claiming age  
11 discrimination by Kunz-Tao against Curry. Curry Decl. ¶ 24. On the same date, Curry formally  
12 complained to the County through her union about age discrimination. *Id.* ¶ 26.

13 Curry alleges that during “the last week of May 2011” after the County was notified of her  
14 complaint of discrimination, Kunz-Tao began discriminating against Curry by having other staff  
15 fill on-call positions, even though Curry normally filled on-call slots two to three times a month on  
16 average. Curry Decl. ¶¶ 25, 29. The last on-call shift Curry filled was a June 4 slot that had been  
17 assigned in early May. *Id.* ¶ 25. Kunz-Tao asserts that she received complaints about how Curry  
18 counseled an inmate during her last on-call shift on June 4th. Kunz-Tao Decl. ¶ 21. Curry states  
19 that Kunz-Tao never discussed the complaint with her and did not write up any report of the  
20 complaint/incident. Curry Decl. ¶ 32.

21 Kunz-Tao does not admit when she learned of Curry’s allegation of age discrimination.  
22 Kunz-Tao declares that in May 2011, the County implemented a new schedule that reduced the  
23 number of on-call shifts in the Detention Mental Health Unit. Kunz-Tao Decl. ¶ 20; *see also*  
24 Declaration of Sheila R. Reid, Ex. 6 at pg.6 (County response to EEOC charge). However, Curry  
25 asserts that on May 30, 2011, Kunz-Tao gave two other employees on-call slots in June. Curry  
26 Decl. ¶ 29. Curry also contends that at least one other employee continued to receive on-call shifts  
27 in July and August. *Id.*

28 On June 9, 2011, Curry filed a discrimination charge with the Equal Employment

1 Opportunity Commission (EEOC) and the California Department of Fair Employment and  
2 Housing (DFEH). Curry Decl. ¶ 27. On June 21, 2011, Curry’s union faxed Kunz-Tao a letter  
3 informing her that Curry filed a grievance on the ground that she was discriminated against with  
4 respect to the positions she applied for. *Id.* ¶ 28.

5 On June 24, 2011, the County alleges that Curry gave a “tour” of MDF to two  
6 unauthorized visitors. The County asserts this was in violation of Sheriff Department policy.  
7 Kunz-Tao Decl. ¶ 22; Declaration of Michael F. Elder ¶ 7. Curry contends that she was asked by  
8 her supervisor, Guillermo Cuadra, to take two new CAMHC employees to tour the MDF. Curry  
9 Decl. ¶ 30. Curry asserts that during her prior eight years working at the MDF, she never had to  
10 obtain advance clearance to take others to the jail. *Id.* During the visit, which included a visit  
11 with Kunz-Tao at the Mental Health unit, Curry was never advised that she was violating protocol.  
12 *Id.*

13 On June 28, 2011, Kunz-Tao informed Curry that she had violated protocol by not  
14 obtaining clearance for the two visitors. Kunz-Tao also informed Curry that her jail clearance was  
15 revoked because it had expired. Curry Decl. ¶ 31, Ex. 8-1. Kunz-Tao’s email did not inform  
16 Curry that she would no longer be working in the jail, nor did it inform Curry that the unapproved  
17 June 24 jail visit was serious. It simply told Curry to contact Ernesto Lara if she had questions.  
18 *Id.*, Ex. 8-1. Curry alleges these reasons were pretext, to allow Kunz-Tao to revoke Curry’s  
19 security clearance. Curry Decl. ¶ 31. Prior to that time, when her security clearance expired,  
20 Curry alleges she would have simply received a new badge and clearance. When Curry inquired  
21 with the Custody Services Bureau as to why her clearance was not renewed in June 2011, Curry  
22 was informed it was because Kunz-Tao informed the Bureau that Curry was no longer working at  
23 the jail. *Id.*

24 As a result of the loss of her jail clearance, Curry alleges that she cannot fully perform her  
25 job and duties as a member of the Forensic Multidisciplinary Team. Curry Decl. ¶ 34. She also  
26 alleges that she has lost income due to the termination of her on-call work. *Id.*

27 On August 27, 2011, Curry filed additional charges with the EEOC alleging retaliation as a  
28 result of her age discrimination complaints. Curry Decl. ¶ 35. Curry asserts that since that filing,

1 Kunz-Tao has refused to consider Curry for any available MHCS position at the jail or under her  
2 supervision in retaliation. *Id.*

3 In the Fall of 2011, there was another open MHCS position in the Detention Mental Health  
4 unit. Curry applied for the position, as did David Ezra (who had held the position earlier in the  
5 year). Curry Decl. ¶ 36. The County contends that Ezra was a Detention Mental Health Unit  
6 member considering retirement in the new future. Kunz-Tao selected Ezra over Curry for the  
7 position for several reasons, including his training skills, a better “fit” and Elder’s comments.  
8 Kunz-Tao Decl. ¶ 24. Curry asserts she was the more qualified person for the position because  
9 she had a forensic background and a Ph.D., while Ezra did not. *Id.* ¶ 36.

10 Later in 2011, Curry says she was approached by Barbara Shafer who wanted to transfer  
11 from her position at West County to CAMHC where Curry worked, and the two discussed the  
12 possibility of a job exchange. Shafer told Curry that the exchange suggestion came from a senior  
13 member of the MDF Mental Health team, Dr. Sigmund Moskovitz, and that the County Disability  
14 Coordinator, Susan Skamser, was also involved in the potential exchange. Curry Decl. ¶ 37.  
15 Curry emailed Kunz-Tao and others advising them of her interest in the exchange. *Id.* Within a  
16 few days, Shafer was transferred to CAMHC, but Curry was not allowed to transfer to West  
17 County. Curry contends that this was the result of retaliation by Kunz-Tao. *Id.* The County  
18 contends that the decision to deny the exchange was not made by Kunz-Tao, but by her  
19 supervisor, Julie Kelley, who was the one that responded to Curry’s email and informed Curry that  
20 the County does not allow position exchanges. Supplemental Declaration of D. Cameron Baker  
21 [Docket No. 110], Ex Q. (Ex. to Deposition of Juliette Kelley).

22 In February 2012, Curry applied for a full-time position (#7956) at MDF, after Bertram left  
23 the position. Curry Decl. ¶ 39. When she first applied for the position in May 2011 it was not  
24 flagged as “Spanish-speaking,” but now it was. *Id.* Curry inquired with Kunz-Tao and asked that  
25 if there were flexibility in the designation, Curry would like to be interviewed for the position. *Id.*  
26 Curry was not interviewed and the position was filled by Margaret Pena, who Curry contends was  
27 in her 40s, non-licensed and “much less qualified” than Curry. *Id.* The County contends that Pena  
28 is certified as Spanish-speaking and Curry is not. Kunz-Tao Decl. ¶ 26.

1 In April or May 2012, Curry applied for a MHCS position at the Behavior Health Court  
2 (BHC), which is also a unit under the supervision of Kunz-Tao. Curry Decl. ¶ 40. Curry was  
3 interviewed by Martha Wilson and Victoria Brown, who believed Curry interviewed poorly.  
4 Wilson Decl. ¶ 5. Curry was informed by Kunz-Tao on June 7, 2012 that she “was not selected  
5 because we are particular about finding the right fit” and that the County decided to interview  
6 more applicants. Curry Decl. ¶ 40.

7 On September 24, 2012, two additional MHCS positions were posted. When Curry  
8 inquired with Kunz-Tao about the positions, she was informed that there was only one position  
9 open and it was for a Spanish-speaking candidate only. Curry Decl. ¶ 41.

10 Curry contends that the failure of the County to hire her into the open positions, the  
11 County’s failure to allow her to exchange positions, and the elimination of Curry’s on-call work  
12 was the result of age discrimination and, for decisions taken after May 2011, in retaliation for  
13 Curry’s complaint of age discrimination. The County moves for summary judgment, arguing that  
14 Curry has failed to establish a prima facie case of discrimination or retaliation, failed to show the  
15 County’s legitimate nondiscriminatory reasons were pretext, and failed to exhaust some of her  
16 claims.

17 **LEGAL STANDARD**

18 Summary judgment is proper “if the movant shows that there is no genuine dispute as to  
19 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).  
20 The moving party bears the initial burden of demonstrating the absence of a genuine issue of  
21 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party, however,  
22 has no burden to disprove matters on which the non-moving party will have the burden of proof at  
23 trial. The moving party need only demonstrate to the court “that there is an absence of evidence to  
24 support the nonmoving party’s case.” *Id.* at 325.

25 Once the moving party has met its burden, the burden shifts to the non-moving party to  
26 “designate specific facts showing a genuine issue for trial.” *Id.* at 324 (quotation marks omitted).  
27 To carry this burden, the non-moving party must “do more than simply show that there is some  
28 metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,

1 475 U.S. 574, 586 (1986). “The mere existence of a scintilla of evidence . . . will be insufficient;  
2 there must be evidence on which the jury could reasonably find for the [non-moving party].”  
3 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Rather, the nonmoving party must “go  
4 beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories,  
5 and admissions on file, designate specific facts showing that there is a genuine issue for trial.”  
6 *Celotex*, 477 U.S. at 324 (internal quotations omitted). “Disputes over irrelevant or unnecessary  
7 facts will not preclude a grant of summary judgment.” *T.W. Elec. Serv., Inc. v. Pacific Elec.*  
8 *Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

9 In deciding a summary judgment motion, the court must view the evidence in the light  
10 most favorable to the non-moving party and draw all justifiable inferences in its favor. *Anderson v.*  
11 *Liberty Lobby, Inc.*, 477 U.S. at 255. “Credibility determinations, the weighing of the evidence,  
12 and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . .  
13 ruling on a motion for summary judgment.” *Id.* However, conclusory or speculative testimony in  
14 affidavits is insufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill*  
15 *Publ’g Co. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

16  
17 **DISCUSSION**

18 **I. EVIDENTIARY ISSUES AND MOTION RE EX PARTE CONTACTS**

19 Curry and the County raise evidentiary objections to key portions of the other’s evidence  
20 on the motion for summary judgment. In addition, the County seeks an order requiring plaintiff’s  
21 counsel to: (i) identify all communications between her counsel and employees of defendant (other  
22 than Curry); (ii) produce all documents regarding such contacts and communications; (iii) destroy  
23 all such documents; and (iv) exclude all such evidence obtained by means of such  
24 communications, including the declarations of Barbara Shafer, Marina Becerra, and Sigmund  
25 Moskovitz submitted by Curry in support of her opposition to the County’s Motion for Summary  
26 Judgment. Docket No. 93. The County argues that the contacts with Shafer, Becerra, Moskovitz,  
27 Dr. Douglas Quinn and any other County employee violated California Rule of Professional  
28 Conduct 2-100.



1                   **A. Motion re Contacts with County Employees**

2                   Turning first to the County’s Motion re Ex Parte Contacts, the County asserts that  
3 plaintiff’s and plaintiff’s counsel’s contacts with any County employee violated California Rule of  
4 Professional Conduct 2-100 and, as a result, this Court should not consider the declarations of  
5 Barbara Shafer, Sigmund Moskovitz and Marina Becerra submitted in support of Curry’s  
6 opposition to the Motion for Summary Judgment.

7                   California Rule of Professional Conduct 2-100 provides:

8                   (A) While representing a client, a member shall not communicate directly or indirectly  
9 about the subject of the representation with a party the member knows to be represented by  
10 another lawyer in the matter, unless the member has the consent of the other lawyer.

11                   (B) For purposes of this rule, a “party” includes:

- 12                   (1) An officer, director, or managing agent of a corporation or association, and a  
13 partner or managing agent of a partnership; or
- 14                   (2) An association member or an employee of an association, corporation, or  
15 partnership, if the subject of the communication is any act or omission of such  
16 person in connection with the matter which may be binding upon or imputed to the  
17 organization for purposes of civil or criminal liability or whose statement may  
18 constitute an admission on the part of the organization.

19                   (C) This rule shall not prohibit:

- 20                   (1) Communications with a public officer, board, committee, or body; or
- 21                   (2) Communications initiated by a party seeking advice or representation from an  
22 independent lawyer of the party's choice; or
- 23                   (3) Communications otherwise authorized by law.

24                   The County does not argue that any of the County employees contacted by plaintiff  
25 (Shafer, Becerra, Moskovitz, or Quinn) were officers, directors or managing agents of the County.  
26 Nor do they submit evidence that these parties were specially represented by County counsel with  
27 respect to the litigation at issue.<sup>1</sup> Instead, the County relies on two Eastern District of California  
28 cases to argue that because the employees’ comments to plaintiff’s counsel could constitute

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<sup>1</sup> The County simply asserts that it considers the employees at issue to be “represented.” Relatedly, the County argues that Curry “knew” the County “took the position that Plaintiff and counsel should contact county employees only through counsel” because the County’s initial and supplemental disclosures listed County Counsel Cameron Baker as the contact for county employees the County believed were likely to have discoverable information. Reply Br. In Support of Motion [Docket No. 114] at 4-5. However, none of the employees at issue on this motion were included by the County on their initial disclosures as employees who were likely to have discoverable information. Moreover, the County has not argued or shown how these employees were specially represented by County Counsel on this matter.

1 hearsay “admissions” on behalf of the County under Federal Rule of Evidence 801(d)(2)(D), they  
2 cannot and should not have been contacted under 2-100(b)(2). In *United States v. Sierra Pac.*  
3 *Indus.*, 857 F. Supp. 2d 975, 980-981 (E.D. Cal. 2011), the district court held that defendant’s  
4 expert was prohibited by Rule 2-100 from contacting any Forest Service employee because, under  
5 Federal Rule of Evidence 801(d)(2), any statement by a Forest Service employee about a matter  
6 within the scope of their job could constitute an “admission” binding on the federal government.  
7 Therefore, applying federal evidence law (and rejecting the California Court of Appeal’s own  
8 interpretation of Rule 2-100), the Court held that the expert violated Rule 2-100 in contacting  
9 Forest Service employees as part of his investigation on behalf of the defendant. *See also Guthrey*  
10 *v. Cal. Dep’t of Corr. & Rehab.*, 2012 U.S. Dist. LEXIS 110862, \* 17 (E.D. Cal. Aug. 7, 2012)  
11 (following *Sierra Pacific Industries* and concluding that since all California Department of  
12 Correction employees statements could “be imputed to CDCR in a manner creating civil liability”  
13 and “in conjunction with the Federal Rules of Evidence, such an employee is a represented party”  
14 no CDC employee should have been contacted by plaintiff or plaintiff’s counsel).

15 As an initial matter, I note that courts in the Northern and Southern Districts have applied  
16 California law, not the Federal Rules of Evidence, in determining whether Rule 2-100 has been  
17 violated. *See, e.g Hoyt v. Career Sys. Dev. Corp.*, 2010 U.S. Dist. LEXIS 66957, \* 4 (S.D. Cal.  
18 June 30, 2010); *HTC Corp. v. Tech. Props. Ltd.*, 715 F. Supp. 2d 968, 973 (N.D. Cal. 2010);  
19 *Krzyzanowski v. Orkin Exterminating Co.*, Case No: C 07-05362 SBA, 2009 U.S. Dist. LEXIS  
20 113200, \* 8 (N.D. Cal. Nov. 19, 2009). Moreover, I decline to follow the analysis of *Sierra*  
21 *Pacific Industries* for a number of reasons. First, the *Sierra Pacific Industries* Court appears to  
22 have conflated an exception to the hearsay rule which allows statements of a party’s employee to  
23 be *admissible* as long as they were made within the scope of their employment (*see* Fed. Rule of  
24 Evid. 801(d)(2)) with admissions “on the part of the organization” that are *binding* as a matter of  
25 fact or law on a party. *See* Rule 2-100(B)(2); *see also Triple A Machine Shop, Inc. v. State of*  
26 *California*, 213 Cal. App. 3d 131, 140 (Cal. App. 1989) (“Thus, rule 2-100 permits opposing  
27 counsel to initiate ex parte contacts with unrepresented former employees, and present employees  
28 (other than officers, directors or managing agents) who are not separately represented, so long as

1 the communication does not involve the employee’s act or failure to act in connection with the  
2 matter which may bind the corporation, be imputed to it, or constitute an admission of the  
3 corporation for purposes of establishing liability.”).

4 Second, the *Sierra Pacific Industries*’ holding – barring a party or their counsel from  
5 contacting *any* employee of an opposing party to discuss a topic relevant to the litigation and that  
6 could fall within the hearsay exception – would swallow Rule 2-100’s narrow limitations. Rule 2-  
7 100 only prohibits contact of employees who *are* “officers, directors, or managing agents” of an  
8 opposing party or those employees who can bind the party “for purpose of civil or criminal  
9 liability” or whose statements would constitute an “admission on the part of the organization.”  
10 The wide application of Rule 2-100 proposed by the County would make all employees who were  
11 not specifically represented by counsel and who had knowledge of an event relevant to any  
12 incident uncontactable and would render 2-100(B)(1) an effective nullity.

13 Because the County has not established that any of the employees plaintiff or her counsel  
14 contacted during their investigation of Curry’s case had information that could meet the narrow  
15 standard of binding the County or constitute an admission by the County “for purposes of  
16 establishing liability,” the contacts were not prohibited by Rule 2-100. *See Triple A Machine*  
17 *Shop, Inc.*, 213 Cal. App. 3d at 140.

18 **B. Plaintiff’s Motion for Sanctions**

19 In her opposition to the County’s Motion re Ex Parte Contacts, Curry moves for sanctions,  
20 specifically to recover the costs she incurred in opposing the County’s motion. *See* Docket No.  
21 111 at 7-8. Curry seeks sanctions under 28 U.S.C. § 1927,<sup>2</sup> arguing that there was no reason why  
22 the County waited until summary judgment briefing to bring its motion, because Curry’s intention  
23 to rely on the testimony of at least two of the employees at issue (Shafer and Moskovitz) was  
24 disclosed in her initial disclosures over a year ago, yet the County waited until Curry served her  
25 amended disclosures in March 2014 to raise the issue. Curry also asserts that the current motion is

26 \_\_\_\_\_  
27 <sup>2</sup> 28 USC § 1927 provides: “Any attorney or other person admitted to conduct cases in any court  
28 of the United States or any Territory thereof who so multiplies the proceedings in any case  
unreasonably and vexatiously may be required by the court to satisfy personally the excess costs,  
expenses, and attorneys’ fees reasonably incurred because of such conduct.”

1 baseless and intended only to harass and increase plaintiff’s litigation costs. Finally, Curry points  
2 to the County’s prior (now withdrawn) motion for sanctions related to an email Curry did not  
3 produce (until she conducted a further search and located it), as demonstrating the County’s  
4 pattern of vexatious litigation.

5 I DENY Curry’s request for sanctions. As to the County’s now-withdrawn motion for  
6 sanctions, I do not find it was vexatious or frivolous – although it now appears that it was  
7 unnecessary, as plaintiff was able to locate and produce the email the County was seeking. With  
8 respect to the County’s current motion, I find that the County had a reasonable basis for bringing  
9 the motion, although I ultimately disagree with the case law the County relies on in its motion.

10 **C. Other Evidentiary Objections**

11 **1. County’s Objections**

12 The County objects to statements in paragraph 16 of Curry’s declaration regarding Curry’s  
13 recollection of her phone pre-interview with Kunz-Tao as inadmissible conjecture and speculation.  
14 Objection is OVERRULED. The County objects to statements in paragraph 17 of Curry’s  
15 declaration describing her belief that Kunz-Tao discriminated against her based on Curry’s age as  
16 inadmissible conjecture and speculation. Objection is OVERRULED. The County objects to  
17 statements made in paragraph 19 of Curry’s declaration regarding Bertram as inadmissible hearsay  
18 and not based on personal knowledge. The objection based on lack of personal knowledge is  
19 OVERRULED and the objection based on hearsay is OVERRULED under Fed. R. Evid.  
20 801(d)(2). Finally, the County objects to statements in paragraph 28 of Curry’s declaration  
21 regarding Curry’s June 11, 2011 union letter under the best evidence rule. Objection is  
22 OVERRULED.

23 **2. Curry’s Objections**

24 Curry objects to the County’s evidence that Curry was not a “good fit.” Oppo. Br. at 13.  
25 This objection does not identify the specific testimony Curry objects and it is OVERRULED.

26 Curry objects to statements in paragraphs 13 and 14 of the Kunz-Tao Declaration as  
27 conclusory, speculative, lacking foundation, hearsay, and prejudicial. Objections are  
28 OVERRULED. Curry also object to statements in paragraphs 17, 18 and 24 of the Kunz-Tao

1 Declaration as conclusory, lacking foundation, hearsay, and contradicted. Objections are  
2 OVERRULED.

3 Curry objects to statements in paragraphs 4-7 of the Elder Declaration as conclusory,  
4 lacking foundation, hearsay, prejudicial, and inadmissible opinion. Objections are OVERRULED.

5 Curry objects to statements in the declaration of Margaret Robbins on the basis of  
6 relevance. Objections are OVERRULED.

7 Curry objects to statements in the declaration of Rebecca Bertram on the basis of relevance  
8 and inadmissible character evidence. Objections are OVERRULED.

9 Curry objects to statements in the declaration of Morgan Knowles on the basis of relevance  
10 and prejudice. Objections are OVERRULED.

11 Curry objects to statements in the declaration of Martha P. Wilson on the basis of  
12 relevance, conclusory, lacking foundation, and speculative. Objections are OVERRULED. Curry  
13 also objects to the statements in paragraph 6 about Curry's comment based on hearsay and  
14 prejudice. Objections are OVERRULED.

15 Finally, Curry objects to statements in the declaration of Chris Vannoy as lacking  
16 foundation, conclusory and prejudice. Objections are OVERRULED.

17 **II. AGE DISCRIMINATION AND RETALIATION CLAIMS**

18 To prevail on her age discrimination claim under the federal Age Discrimination in  
19 Employment Act (ADEA), "plaintiff must prove at trial that age was the 'but-for' cause of the  
20 employer's adverse action." *Shelley v. Geren*, 666 F.3d 599, 607 (9th Cir. 2012). Under  
21 California's Fair Employment and Housing Act (FEHA), plaintiff must prove that age  
22 discrimination was "a substantial factor motivating the adverse employment action." *Harris v.*  
23 *City of Santa Monica*, 56 Cal. 4th 203, 225 (2013).

24 Under both her ADEA and FEHA age discrimination claims, at the summary judgment  
25 stage Curry must make a prima facie case of age discrimination. Here, she must show that she  
26 was (1) at least forty years old, (2) qualified for the position for which an application was  
27 submitted, (3) denied the position, and (4) the position was given to a substantially younger  
28 person. *Shelley v. Geren*, 666 F.3d at 608. The person hired instead of the complaining applicant

1 need only be “substantially younger” but need not be under 40. *See O’Connor v. Consol. Coin*  
2 *Caterers Corp.*, 517 U.S. 308, 312 (1996) (noting age discrimination can be shown where a “56-  
3 year-old is replaced by a 40-year-old.”).

4 Similarly, “[u]nder Title VII, a plaintiff may establish a prima facie case of retaliation by  
5 showing that (1) she engaged in activity protected under Title VII, (2) the employer subjected her  
6 to an adverse employment decision, and (3) there was a causal link between the protected activity  
7 and the employer’s action.” *Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493,  
8 506 (9th Cir. 2000).

9 If Curry demonstrates a prima facie case, the burden shifts to the County to articulate a  
10 legitimate, non-discriminatory reason for the adverse employment action.

11 If the County presents a legitimate, non-discriminatory reason, the burden shifts back to  
12 plaintiff to “demonstrate that there is a material genuine issue of fact as to whether the employer’s  
13 purported reason is pretext for age discrimination.” *Shelley v. Geren*, 666 F.3d at 608 (applying  
14 the *McDonnell Douglas* burden-shifting framework); *see also Lawler v. Montblanc N. Am., LLC*,  
15 704 F.3d 1235, 1242 (9th Cir. 2013) (applying *McDonnell Douglas* framework to FEHA claim on  
16 summary judgment); *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1066 (9th Cir. 2003) (adopting  
17 the same for retaliation claim under Title VII). Pretext can be shown ““(1) indirectly, by showing  
18 that the employer’s proffered explanation is ‘unworthy of credence’ because it is internally  
19 inconsistent or otherwise not believable, or (2) directly, by showing that unlawful discrimination  
20 more likely motivated the employer.’ . . . All of the evidence—whether direct or indirect—is to be  
21 considered cumulatively.” *Shelley v. Geren*, 666 F.3d at 609 (quoting *Chuang v. University of*  
22 *Cal. Davis*, 225 F.3d 1115, 1124 (9th Cir. 2000)).

23 Direct evidence is evidence which, if believed, proves the fact discrimination without  
24 inference or presumption. *Stegall*, 350 F.3d at 1066. When direct evidence is offered “a triable  
25 issue as to the actual motivation of the employer is created even if the evidence is not substantial.”  
26 *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998). Where only circumstantial  
27 evidence is offered to show “that the employer’s motives were different from its stated motives,  
28 we require ‘specific’ and ‘substantial’ evidence of pretext to survive summary judgment.” *Stegall*,

1 350 F.3d at 1066.

2 As noted above, Curry contends that she suffered the following adverse employment  
3 actions as a result of discrimination or retaliation: (i) she was not hired for three open positions in  
4 May 2011; (ii) after complaining about age discrimination, she was denied on-call work; (iii) after  
5 complaining about discrimination, her jail clearance was revoked and not renewed; (iv) she was  
6 not hired for the open MHCS position in Fall 2011; (v) she was denied the opportunity to  
7 exchange with Shafer to West County in November 2011; (vi) she was not hired in the open  
8 MHCS position in February 2012; (vii) she was not hired for the MHCS position at the BCH; and  
9 (viii) she was not allowed to apply for either of the two open positions in Fall 2012. I will  
10 address each in turn.

11 **A. May 2011 Positions**

12 Curry claims that Kunz-Tao discriminated against her on the basis of her age when the  
13 County failed to hire Curry into the two-full time or the one part-time MDF positions in May  
14 2011.

15 **1. Part-Time Position That Went to Morgan Knowles**

16 As an initial matter, Curry does not claim that she formally applied for the part-time  
17 position given to Knowles. In her declaration, Curry only states that she “requested that I be  
18 considered for the third, part-time position.” Curry Decl. ¶ 14. The County’s evidence is that  
19 Curry did not apply for the position and only expressed her interest on May 25, 2011, after the  
20 County had hired Margaret Knowles for the position. Kunz-Tao Decl. ¶ 6. Curry does not explain  
21 when she first expressed interest in the position, much less provide evidence showing that the  
22 County would consider hiring someone who did not formally apply, but only requested  
23 consideration for an open position. Similarly, Curry does not provide evidence to suggest that the  
24 County took any adverse action against Curry with respect to the part-time position (*e.g.*, that they  
25 interviewed or hired others who likewise did not formally apply, but only requested  
26 consideration).

27 As such, Curry has failed to demonstrate a prime facie case of age discrimination with  
28 respect to the part-time position and the County’s Motion for Summary Judgment is GRANTED

1 as to this claim.

2 **2. Full-time MDF Position (#8910) That Went to Margaret Robbins**

3 With respect to the full-time MDF position (#8910) that went to Margaret Robbins, the  
4 County argues that Curry cannot establish a prima facie case of discrimination because Curry was  
5 not “qualified” for the position because she was not performing her job in a satisfactory manner.  
6 Motion at 11. The County relies on the following to support its argument: Julie Kelley (Curry’s  
7 supervisor from 2009 – 2011) testified that there were “problems” with Curry’s work on her shifts  
8 and Kunz-Tao received “a number” of complaints about Curry, including that Curry left early and  
9 once did not communicate about an inmate in a safety cell. Motion at 12.

10 These complaints are non-specific (vague “problems” or “a number of complaints”) and  
11 have no timeframe associated with them. Moreover, as Curry points out, there is no evidence that  
12 the County documented the problems/complaints at the time they arose, or discussed the concerns  
13 with Curry. These problems and complaints are not reflected in any of Curry’s performance  
14 evaluations, which generally found Curry’s work to be “above standard” during the relevant time.<sup>3</sup>  
15 Moreover, Curry provides her own evidence – from co-workers at the jail and from CAMHC –  
16 that Curry did not leave early and that Curry more than adequately performed her job duties at  
17 MDF, West County and CAMHC. *See, e.g.*, Declaration of Margaret Blush [Docket No. 106] (co-  
18 worker at MDF from 2003 through 2007); Declaration of Barbara Shafer [Docket No. 104] ¶¶ 2,  
19 11 (co-worker from 2007 through 2011 at West County who never heard any negative comments  
20 about Curry’s work performance from co-workers or jail staff, and co-worker at CAMHC for six  
21 months in 2011-2012 where “everyone loved working with” Curry); Declaration of Dr. Sigmund  
22 Moskovitz [Docket No. 105] (attaching a letter of recommendation he wrote for Curry in 2008,

23 \_\_\_\_\_  
24 <sup>3</sup> The performance appraisal from 2010-11 submitted by Curry shows her “competency  
25 assessment” as “above standard” for all of the categories. Curry Decl, Ex. 3. Her 2004-05  
26 appraisal shows marks at “above standard” and “exceptional.” Amended Baker Decl. [Docket No.  
27 91], Ex. B. Her 2005-06 performance appraisal shows “meets standard” marks with suggested  
28 improvements in communicating with peers, supervisors and custodial. *Id.*, Ex. C. Her 2007-08  
appraisal shows marks as exceptional and above standard, but only “meets standard” in human  
interaction, with a note that she could sometimes be abrupt and harsh and that she needs to “be  
aware” of her communication skills. *Id.*, Ex. D. A “meets standard” mark shows “satisfactory  
performance” and a “below standard mark” which Curry did not receive, requires “immediate  
improvement.”



1 expressing high quality of her work and standards a MDF).<sup>4</sup> Finally, in her May 25, 2011 email to  
2 Curry informing Curry that she was not selected for the open positions, Kunz-Tao did not raise  
3 any concerns with Curry’s work, but instead expressed her hope that Curry would continue to  
4 work on-call for MDF despite the fact that she was not hired for the permanent position. Curry  
5 Decl., Ex 4. This contemporaneous statement calls into question Kunz-Tao’s *later* identification  
6 of “serious” problems with Curry’s work and professional judgment. *But see* Kunz-Tao Decl. ¶ 5.

7 Taking all inferences from the undisputed and disputed evidence in favor of Curry, I find  
8 that Curry has raised a material issue of fact as to whether she was “qualified” for the open  
9 position and was adequately performing her job during her on-call shifts.

10 Curry does not really dispute that the County has provided non-discriminatory reasons for  
11 not hiring Curry: the County asserts that Curry was not hired for this position because she was not  
12 a good fit, because of Kunz-Tao’s own “concerns” about Curry, and because Kunz-Tao had been  
13 informed by Michael Elder that other MHCS employees at the jail would quit if Curry was hired  
14 full-time. Kunz-Tao also asserts that Margaret Robbins was hired instead based on her better fit,  
15 recommendations, and “superior qualifications.” Curry challenges these reasons as being  
16 pretextual for age discrimination.

17 Curry argues that she has both direct and circumstantial evidence of age discrimination. In  
18 the pre-interview phone call with Kunz-Tao, Curry told Kunz-Tao her age which Curry believes  
19 was in response to a question posed by Kunz-Tao. Curry Decl. ¶ 16. Kunz-Tao does not claim  
20 that Curry’s age was *not* mentioned, but instead testifies that “to the best of her recollection” she  
21 has never asked Curry her age. Kunz-Tao Decl. ¶ 8.<sup>5</sup> Moreover, the parties agree that the

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22  
23 <sup>4</sup> The County questions the value of the Moskowitz and Shafer declarations and testimony,  
24 because neither of those individuals – who both worked at West County – saw or could comment  
25 on Curry’s performance at MDF. Reply at 11, n. 5 (citing *Bennett v. City & County of San*  
26 *Francisco*, 2014 U.S. Dist. LEXIS 4651, \*21-22 (N.D. Cal. Jan. 13, 2014)). However, Moskowitz  
27 and Shafer (unlike the declarant discounted by the Court in *Bennett*) explained the basis for their  
28 comments; namely that they worked with Curry in the jail setting, albeit at West County and not at  
MDF. The County does not explain how that distinction (West County vs. MDF) is significant or  
otherwise support its position that the Moskowitz and Shafer testimony should be discounted.

<sup>5</sup> The County also relies heavily on contemporaneous notes Curry made and sent on June 20,  
2011 to her union, where Curry admits she could not recall what was said that led to the disclosure  
of her age, but she “believed” Kunz-Tao asked her. Amended Baker Decl. [Docket No. 91], Ex.  
E. Contrary to the County’s position, Curry’s contemporaneous notes do not undermine her

1 retirements of various MDF employees were discussed during Curry’s May 9, 2011 interview.  
2 While Curry and Kunz-Tao have different explanations as to why that topic was discussed in such  
3 depth – and Curry alleges that Kunz-Tao also commented that she didn’t realize that Curry had  
4 been working at the jail “as long as the others who are getting ready to retire” Curry Decl. ¶ 17 –  
5 the fact that retirements were discussed in such depth is significant and substantial evidence that  
6 age may have been on Kunz-Tao’s mind, sufficient to create an issue of material fact as to pretext.  
7 *See, e.g., Shelley v. Geren*, 666 F.3d at 610 (where decision-makers “sought out the retirement  
8 dates at the time of their participation in the hiring process for the temporary and permanent  
9 positions shows more than that the decision-makers may have known of the candidates’ ages. It  
10 raises an inference that they considered this information relevant to their decisions.”).<sup>6</sup>

11 Further, in combination with this evidence, Curry’s uncontradicted testimony is that her  
12 experience and interest in the open MHCS position were not discussed in the May 9th interview  
13 and that Kunz-Tao made a comment that it would be hard to fill the two to midnight shift, the job  
14 Curry applied for. This additional comment, when taken into consideration along with the  
15 discussion of the retirement of workers who had been at the jail “as long as” Curry had, and  
16 viewed in the light most favorable to Curry, is substantial and significant evidence that age was on  
17 Kunz-Tao’s mind and that Kunz-Tao was not seriously considering Curry for the open position.

18 The County argues that the “same actor” inference applies here and negates any inference  
19 of age discrimination in 2011 because Kunz-Tao gave a qualified recommendation of Curry for  
20 the position at CAMHC in 2010. Motion at 17-18. As explained in the Ninth Circuit, “where the  
21 same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both  
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23 current position that “she believes” that Kunz-Tao asked her about her age.

24 <sup>6</sup> The County argues that I should not rely on the portion of the Ninth Circuit’s decision in *Shelley*  
25 where the Court concluded that a discussion of retirement data was “direct” evidence of age  
26 discrimination because that conclusion contradicts prior Ninth Circuit cases holding that direct  
27 evidence of discrimination should be able to stand alone, “without inference or presumption,” to  
28 demonstrate discrimination was cause or part of the determination. Motion at 11, n 4. *See, e.g.,*  
*Coghlan v. Am. Seafoods Co. LLC*, 413 F.3d 1090, 1095 (9th Cir. 2005) (distinguishing between  
direct evidence which “typically consists of clearly sexist, racist, or similarly discriminatory  
statements or actions by the employer,” and indirect evidence which “requires an additional  
inferential step to demonstrate discrimination.”). Whether or not Kunz-Tao’s statements about age  
and retirement are direct or indirect evidence, they are part of “substantial” and “significant”  
showing of pretext made by Curry to survive summary judgment.

1 actions occur within a short period of time, a strong inference arises that there was no  
2 discriminatory motive.” *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270-71 (9th Cir. 1996).  
3 The inference is a “strong” one that courts must take into account on summary judgment.  
4 *Coghlan*, 413 F.3d at 1098. The inference applies to favorable employment actions other than  
5 hiring, such as promotion, and may arise when the favorable action and termination are as much as  
6 a few years apart. *Schechner v. KPIX-TV & CBS Broad., Inc.*, 686 F.3d 1018 (9th Cir. 2012).  
7 However, Kunz-Tao was not the decision-maker for the CAMHC position, even though she gave  
8 Curry a qualified recommendation for the job. Moreover, here a negative inference (that Kunz-  
9 Tao was interested in having Curry transfer out of her unit and into another job) could be  
10 supported as easily as a positive inference. Therefore, I do not find that the same actor inference  
11 applies to negate Curry’s substantial and significant evidence of age discrimination.

12 The County also argues that it hired Robbins over Curry because of Robbins’ “superior”  
13 qualifications, Kunz-Tao’s own experiences with the applicants (including her concerns respecting  
14 Curry’s ability to get along with others, her desire to work at MDF, and her trustworthiness), and  
15 Michael Elder’s comments about Curry (that Curry was not a “good fit,” that “others” in the unit  
16 might quit if Curry was hired, and “inappropriate actions” by Curry) and positive comments about  
17 Robbins. Kunz-Tao Decl. ¶¶ 11-14. These justifications are largely consistent with the  
18 explanations provided by the County to the EEOC. Reid Decl., Ex 6 at pgs. 14-15.

19 With respect to Kunz-Tao’s concerns about Curry’s quality of work, trustworthiness, and  
20 ability to work with others, those “complaints” were not discussed with Curry, were not  
21 contemporaneously noted (other than a need to improve communication and that Curry can be  
22 perceived sometimes as “harsh” in 2007-08), and are unspecific (i.e., other than Knowles, no  
23 complaining co-workers are identified by name and no timeframe given for when the complaints  
24 arose). Moreover, at least as of May 25, 2011, Kunz-Tao was expressing her hope that Curry  
25 would continue to work for her. That calls into question Kunz-Tao’s current position that Curry’s  
26 work quality and trustworthiness were already a concern on May 25, 2011.

27 With respect to Elder’s comments – relied on by the decision-maker Kunz-Tao – I note  
28 that they too are mostly unspecific. Mr. Elder testifies that Curry had a “history” of not getting

1 along with unspecified other members of the unit, and that unspecified “others” in his unit “could  
2 quit” if Curry were hired. Elder Decl. ¶ 5. He also states without specifics that Curry had a  
3 history of not getting along with other members of the unit and Sheriff’s staff, and a history of  
4 poor clinical judgment. *Id.* ¶ 4. These concerns, like the concerns of Kunz-Tao, are not generally  
5 reflected in her performance appraisals and do not (based on the record before me) appear to have  
6 been formally documented. Elder also asserts that Miles Kramer told him it was a mistake to hire  
7 Curry, Curry is difficult to supervise, and that prior managers of the unit, Frances Molina and  
8 Kelley, had attempted to get Curry out of the unit because of the problems she caused in the unit.  
9 *Id.* ¶ 5.

10 There is no direct testimony from Molina or Kelley on these points. However, there is  
11 testimony, as noted above, from Curry’s co-workers, including a co-worker at MDF, that  
12 contradicts Elder’s assertions about Curry’s performance and relationships with co-workers.  
13 Kunz-Tao’s reliance on Elder’s comments cannot insulate Kunz-Tao’s decision as there are  
14 material questions of fact as to the specificity and legitimacy of Elder’s comments and, therefore,  
15 Kunz-Tao’s reliance on them.

16 As to Robbins’ superior qualifications, I find that Curry has likewise raised a material  
17 question of fact as to whether reliance on Robbins’ allegedly superior qualifications was  
18 pretextual. Curry notes that her work history in the detention setting was more extensive than  
19 Robbins. Declaration of Margaret Robbins ¶ 8 (noting direct work in detention unit only started in  
20 December 2010); *see also* Kunz-Tao Decl. ¶ 12. The County responds with Kunz-Tao’s argument  
21 that Robbins’ license as a Clinical Social Worker was key. Kunz-Tao Decl. ¶ 12 (“the best  
22 educational background for social work counseling, which is the primary role of MHSC’s working  
23 in Detention Mental Health”). Yet, the job description for the MHCS positions at issue requires at  
24 least a master’s degree in psychology and *either* a license as a Clinical Social Worker (which  
25 Robbins possesses) *or* a license as an MFT (which Curry possesses). Kunz-Tao Decl., Ex. G.<sup>7</sup> On  
26 the facts of this record, I cannot say that Robbins’ qualifications were “superior” to Curry’s, and  
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28 <sup>7</sup> I note that Bertram – who was hired into the other open position – was not a licensed Clinical  
Social Worker, but had a doctorate in psychology, like Curry.

1 Curry has raised material questions of fact as to whether they were.

2 Based on the evidence before me, and taking all reasonable inferences from that evidence  
3 in Curry's favor, I find that Curry has introduced significant and substantial evidence of pretext to  
4 survive summary judgment on her age discrimination claim as to this position.<sup>8</sup>

5 **3. Full-time MDF Position (#7956) That Went to Rebecca Bertram**

6 Kunz-Tao states she hired Bertram because of Bertram's superior qualifications, positive  
7 comments Bertram's supervisor (Julie Kelley) made to Kunz-Tao about Bertram, and Kunz-Tao's  
8 concerns about Curry. Kunz-Tao Decl. ¶¶ 17-18. As to Kunz-Tao's concerns with Curry, much  
9 of the analysis above is applicable and, likewise, creates material issues of fact as to pretext. With  
10 respect to Bertram's "superior qualifications," Kunz-Tao declares that Bertram had more  
11 experience in the field, including seven years in different correctional institutions, and experience  
12 with Art therapy, which was a skill lacking in the unit. *Id.* ¶ 18. Considering Bertram and Curry's  
13 qualifications (including Curry's license as a MFT and her doctorate, as compared to Bertram's  
14 doctorate and no license), and in light of the job description, I find there are disputed issues of  
15 material facts as to who had the "superior" qualifications for the #7956 position.

16 As above, based on the evidence before me, and taking all reasonable inferences from that  
17 evidence in Curry's favor, I find that Curry has introduced significant and substantial evidence of  
18 pretext to survive summary judgment on her age discrimination claim as to this position.

19 **B. On-Call and Revocation of Jail Clearance**

20 On May 27, 2011 Curry complained to the County through her attorney and separately  
21 through her union that she was denied the May 2011 positions because of age discrimination.

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<sup>8</sup> At oral argument, the County contended that I should discount the evidence regarding Curry's  
24 work quality and job performance from her co-workers, because similar evidence was not  
25 sufficient to defeat the defendant's motion for summary judgment in *Benz v. Clorox Company*,  
26 Case No. 13-1361. In *Benz*, however, there was consistent evidence from plaintiff's annual  
27 reviews noting the performance issue that primarily led to her termination. There was also  
28 consistent contemporaneous evidence that Benz was not performing at the level required by  
certain critical clients. In the face of that evidence, Benz could not create a showing of pretext by  
relying on contemporaneous evidence from *other* clients that she was performing adequately.  
Here, as noted above, the County did not point to a documented history of poor performance by  
Curry and, indeed, there is evidence that as late as May 25, 2011 Kunz-Tao appreciated Curry's  
work and hoped she could continue her on-call work.

1 Curry Decl. ¶¶ 24, 26. On June 9, 2011, she filed her EEOC charge alleging age discrimination.  
2 *Id.* ¶ 27. On June 21, 2011, Curry’s union faxed a letter to Kunz-Tao informing her that Curry  
3 filed a grievance because the County failed to hire her for the open May 2011 positions because of  
4 age discrimination. *Id.* ¶ 28. Curry alleges that in retaliation for her complaint of age  
5 discrimination, in late May and June 2011 Kunz-Tao retaliated against her by not assigning any  
6 more on-call shifts to Curry at the jail.

7 Curry’s evidence of retaliation is that prior to May 2011, Curry had on average secured  
8 two to three on-call shifts per month at the jail. Curry Decl. ¶ 29. Kunz-Tao did not assign Curry  
9 the first and last weekend shifts in July, although those were shifts Curry normally worked and  
10 they were “available.” Instead, Kunz-Tao assigned those shifts to others. *Id.* ¶ 25. Curry also  
11 asserts that at least one other on-call employee was assigned shifts in July and August. *Id.* ¶ 29 &  
12 Ex. 8.

13 In support of the County’s motion, Kunz-Tao declares that at some point in or by May  
14 2011, she had developed a new schedule where there were “many fewer” open or on-call slots.  
15 Kunz-Tao Decl. ¶ 20. Kunz-Tao also says that at some undisclosed time “prior” to the June 4th  
16 and June 24th incidents, she had already made a decision to “limit” her use of Curry for on-call.  
17 *Id.* ¶ 23. Kunz-Tao does not say what led her to that decision or when it was made. However, I  
18 note that on May 25, 2011, Kunz-Tao told Curry in the email that she “appreciated the  
19 enthusiasm” Curry showed for her work at the jail and Kunz-Tao also “hoped” that Curry would  
20 continue to work on-call for MDF. Curry Decl. Ex. 4. Kunz-Tao also declares that based on a  
21 complaint from an inmate and a Sheriff’s deputy about Curry’s counseling on June 4th, and the  
22 incident on June 24th when she gave a jail tour to two new Clinic employees, Kunz-Tao decided  
23 not to use Curry for any more on-call shifts. *Id.* ¶¶ 21-23; *see also* Kunz-Tao Decl., Ex. E  
24 (informing co-workers that Curry will not be used for future on-call because of “too many  
25 complaints”).

26 Neither the June incidents nor Kunz-Tao’s questions about Curry’s professional judgment  
27 were mentioned as grounds for the reduction of Curry’s on-call work in the County’s September 2,  
28 2011 response to the EEOC. Reid Decl., [Docket No. 102], Ex. 6 at pg. 6. Instead, the County

1 relied only on the fact that the “permanent schedule change” significantly reduced the need for on-  
2 call staff. *Id.*

3 I find that Curry has raised a question of material fact as to the County’s alleged  
4 justifications for not using Curry for further on-call work. Kunz-Tao’s states in her declaration  
5 that at *some* undisclosed point prior to June 4th, she had decided to limit her use of Curry on-call,  
6 but that is arguably contradicted by her comment to Curry on May 25 that Kunz-Tao hoped Curry  
7 would still work on-call. Moreover, while the June 4 and 24 incidents weigh heavily in Kunz-  
8 Tao’s declaration as her justification for not providing any additional on-call work to Curry, those  
9 incidents are not mentioned in the County’s EEOC response. Also, there is no evidence that the  
10 June 4th issue was raised with Curry prior to the termination of her on-call work, and the  
11 seriousness of the June 24th incident is disputed. In sum, the shifting rationales for reducing and  
12 then terminating Curry’s on-call work, and the County’s failure to rebut Curry’s evidence  
13 regarding others who were still being offered on-call work despite the scheduling change, raises  
14 material questions of fact on pretext sufficient for Curry to survive summary judgment on this  
15 claim.<sup>9</sup>

16 **C. October 2011 MHCS Position That Went to David Ezra**

17 Curry alleges that she was retaliated against when Ezra was hired into this position (one  
18 which he had held and vacated a few months prior) and not her.<sup>10</sup> Curry points out that there were  
19

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20 <sup>9</sup> I do not find sufficient evidence to support Curry’s claim that the withdrawal of her jail  
21 clearance is a *separate* retaliation claim, although the facts surrounding the decision to refuse to  
22 renew Curry’s clearance is potentially relevant to Curry’s claim that the cessation of her on-call  
23 work was retaliatory. In particular, the County’s evidence establishes that Curry’s jail clearance  
24 had expired, and it was not renewed because Curry was no longer performing on-call work at the  
25 jail as of the end of June. *See* Declaration of Chris Vannoy ¶ 4 (“Standard protocol at MDF  
26 requires that individuals no longer working at the MDF return their issued badges and keys.”);  
27 Curry Decl. ¶ 31 (Curry was told her jail clearance was not renewed because she was no longer  
28 working at the jail). Relatedly, Curry has not raised a material issue of fact to demonstrate that she  
cannot perform her current job without jail credentials. While she declares that she cannot  
perform her “full Forensic Mental Health Clinical Specialist duties in working with clients,” she  
does not explain why that is. She also asserts, without explanation, that she cannot “do the work”  
of the Forensic Multidisciplinary Team without clearance. Curry Decl. ¶ 34. Without specific  
facts to support her claim, I cannot find that she has made a *prima facie* case of an adverse  
employment action as retaliation for the removal of her jail clearance on its own.

<sup>10</sup> As Ezra was not substantially younger than Curry at the time, she cannot base an age  
discrimination claim on the selection of Ezra.

1 only two applicants for this position, Ezra and Curry; argues that she was as qualified as Ezra; and  
2 asserts that if Kunz-Tao was really concerned about retiring employees, Curry should have been  
3 given the position when Ezra had vacated it only months prior and Ezra was retiring soon. Kunz-  
4 Tao explains that Ezra was hired by her and Elder because of Ezra’s “superior” qualifications and  
5 better “fit.” Kunz-Tao Decl. ¶ 24. At that time, Ezra had worked in the unit for eight years, had  
6 been responsible for providing important training to Sheriff’s staff, was well-regarded, got along  
7 with other members of staff, and was able to impose a 5150 hold. *Id.*

8 As to qualifications, Ezra and Curry seem on par and Ezra does not appear to have  
9 “superior” qualifications, contrary to the County’s characterization. Ezra may well have been a  
10 better fit and more liked within the unit than Curry, but Curry has raised at least some evidence to  
11 dispute the County’s characterization of her working relationships and style. And while Kunz-Tao  
12 admits that she was concerned in May 2011 about the near retirement of members of the unit  
13 (including, according to Curry, Ezra), she does not explain why Ezra was a better choice for this  
14 position than Curry in light of Ezra’s apparent intent to retire in the near future.

15 There are issues of fact as to pretext for retaliation in light of the County’s justifications for  
16 hiring Ezra over Curry.

17 **D. November 2011 Job Exchange**

18 Curry argues that the County’s failure to approve the proposed job exchange between  
19 Curry and Shafer was retaliatory. However, Curry has failed to meet her burden to show a prima  
20 facie case of retaliation. In particular, Curry cites to no evidence that a position at West County  
21 was in fact open or approved in light of Shafer’s needs to transfer, that others in the County had in  
22 fact approved such an exchange, or that Kunz-Tao or Kelley rejected the exchange for any reason  
23 other than the fact it was not customary and it was not approved.

24 Curry relies on the declaration of Barbara Shafer who states that when her need for an  
25 ADA accommodation arose, she discussed the possibility of an exchange with Susan Skamser.  
26 According to Shafer, Skamser told her that both Shafer’s union representative and the Disability  
27 Benefits Coordinator, Debbie Cowden, had given their approval for the exchange. Declaration of  
28 Barbara Shafer [Docket No. 104], ¶ 6-7. But there is no evidence provided by Curry that any of



1 the supervisors or managers at CAMHC (where Curry worked) or at West County (where Shafer  
2 worked) knew about the proposed exchange much less approved it, or that such an exchange had  
3 occurred in the past or could occur without the input of the directors in those units. Indeed,  
4 Curry’s own email to Kunz-Tao and Julie Kelley inquiring about the exchange indicated that she  
5 “had been advised” that the transfer was approved, wanted to know if that was “still” the County’s  
6 position, and if not, what she needed to do to apply for Shafer’s position at West County. Supp.  
7 Baker Decl. [Docket No. 110], Ex. Q.

8 Kunz-Tao’s supervisor, Julie Kelley, testified that the County “does not ‘authorize’  
9 position exchanges.” *Id.* Kelley also testified that she had never encountered a similar situation  
10 before and that she expected that she would have heard from “risk management” in the County  
11 about any ADA need for a job exchange, which she did not. Supp. Baker Decl., Ex. Q, Kelley  
12 Depo. at 67:8-19; 69:8-18. An email from Skamser indicated that the proposed exchange was “not  
13 approved,” but simply being investigated for Shafer. *See, e.g.*, Curry Decl., Ex. 10 (email from  
14 Susan Skamser); *see also* Skamser Depo. [Ex. I to Amended Baker Decl] at 35:9-14 (testifying  
15 that she had never arranged a position exchange before).

16 Without evidence that the proposed exchange was in fact approved by others but then  
17 denied by Kunz-Tao or Kelley (acting on behalf of Kunz-Tao) in retaliation, or that such  
18 exchanges had occurred in the past, Curry fails to make a prima facie case of retaliation as to the  
19 proposed November 2011 transfer.

20 **E. February 2012 MHCS Position That Went to Pena**

21 Curry argues that the County’s failure to consider and/or hire her for the February 2012  
22 open position (#7956) was both discriminatory and retaliatory. Curry, however, has failed to  
23 make a prima facie case and failed to raise a material question as to pretext. The position was, at  
24 the time Curry applied for it in 2012, flagged as Spanish-speaking and the County hired a Spanish  
25 speaker to fill the open position (Pena). Kunz-Tao Decl. ¶ 26. Kunz-Tao does not explain why  
26 this position was flagged as Spanish-speaking, but simply declares that she has flagged positions  
27 in her unit as Spanish-speaking. *Id.* Curry argues that the designation of the position as Spanish-  
28 speaking was itself pretextual – presumably in an attempt to prevent Curry from being eligible to

1 apply for it – because it was not a Spanish-speaking position in May 2011 when Curry originally  
2 applied for it and it was awarded to Bertram. Oppo. at 24; Curry Decl. ¶ 39. However, Curry fails  
3 to point to any *evidence* to raise a question of material fact showing that the County intentionally  
4 redesignated the position to Spanish-speaking or that there was no need at that time for a Spanish-  
5 speaking position.<sup>11</sup>

6 Because Curry fails to point to any evidence that she was qualified for the Spanish-  
7 speaking position or that the County intentionally redesignated the position as Spanish-speaking in  
8 order to prevent Curry from applying, the County’s Motion for Summary Judgment is granted as  
9 to this claim.

10 **F. BHC Position**

11 Curry claims that the failure to the County to offer her the Behavioral Health Court  
12 position in spring 2012 was both discriminatory and retaliatory. The County argues that Curry  
13 cannot show a prima facie case or pretext for retaliation because Curry did not interview well and  
14 Kunz-Tao was not the decision maker, but instead deferred to Martha Wilson and Victoria Brown  
15 who ran the interviews. Specifically, Kunz-Tao declares that Wilson and Brown were “principally  
16 responsible” for conducting the interviews and selecting the candidate, and that she “deferred” to  
17 Wilson and Brown’s selection. Kunz-Tao Decl. ¶ 25. Wilson likewise confirms that she and  
18 Brown were “principally” responsible for selecting the individual to fulfill the position. Wilson  
19 Decl. [Docket No. 69] ¶ 4. Wilson and Brown’s position is that Curry did not respond  
20 “appropriately” to the questions and did not answer the questions, but instead talked about other  
21 subjects. *Id.* ¶ 5. In rejecting Curry, Brown also relied on an incident at BHC where she believed  
22 Curry acted inappropriately with a client. *Id.* ¶ 6. As a result, Wilson states that she and Brown  
23 “jointly selected another individual to fill the MHCS position” and “we” informed Kunz-Tao of  
24 their decision to hire another individual. *Id.* ¶ 7.<sup>12</sup>

25 \_\_\_\_\_  
26 <sup>11</sup> Curry’s only point on pretext is that “one can sadly probably assume” that the need for  
27 Spanish-speaking MHCS staff “has been the case for a while.” Oppo. at 24. However,  
28 assumptions cannot carry Curry’s burden, she must point to evidence to support her pretext for  
retaliation argument on summary judgment.

<sup>12</sup> Curry cannot bring a discrimination claim based on the BHC position because she submits no  
evidence as to who was eventually hired (much less evidence showing that a substantially younger

1 Curry does not address or respond to the performance in the interview statements made by  
2 Wilson. Instead, she argues that her background demonstrates her extensive qualifications for the  
3 position. Curry Decl. ¶ 40; Oppo. at 24-25. Nevertheless, I find that there is a material question  
4 of fact created by the County's shifting explanation of Kunz-Tao's role in the process for the  
5 hiring of the BHC position. Kunz-Tao admits that she sat in on the interview, and that Wilson and  
6 Brown were "principally" but not solely responsible for the decision not to hire Curry. More  
7 importantly, it was Kunz-Tao who informed Curry that she did not get the position, and in her  
8 email to Curry, explained that "*we* completed our interviews and have decided to interview more  
9 candidates. You were not selected because *we* are particular about finding the right fit . . . . *We*  
10 had mutual consensus." Curry Decl., Ex. 13. The fact that Wilson and Brown may have selected  
11 another unidentified candidate at an unidentified time (Wilson Decl. ¶ 7) does not eliminate the  
12 fact – taking all inferences in Curry's favor – that Kunz-Tao was involved in the decision not to  
13 hire Curry, despite her current position to the contrary.

14 Taking the inferences of this evidence in Curry's favor, the County's attempt to show that  
15 Kunz-Tao was not a decision-maker for the BHC position is inconsistent, and creates a question of  
16 fact as to pretext.

17 **G. Fall 2012 MHCS Positions**

18 Finally, with respect to the Fall 2012 positions, Curry alleges that in September 2012, there  
19 were two MHCS positions posted. Curry Decl. ¶ 41. Curry does not attach the postings for those  
20 positions, describe the basis for her belief that there were two positions open, or describe the  
21 requirements for those positions. In response to Curry's inquiry about the two open positions,  
22 Kunz-Tao responded that there was only one part-time position open for a Spanish speaker. Curry  
23 Decl., Ex. 14. Curry cites no evidence that anything other than the one part-time Spanish-  
24 speaking position was actually open and points to no evidence that the designation of that one  
25 part-time position as Spanish-speaking was directed at her or otherwise retaliatory. In short, Curry  
26 has failed to make a prima facie case of discrimination or retaliation as to these positions.

27  
28 \_\_\_\_\_  
person was hired). She has, therefore, failed to make a prima facie case as to age discrimination.

1 Summary judgment is GRANTED to the County on this claim.

2 **III. EXHAUSTION**

3 Curry filed her EEOC charges alleging age discrimination and retaliation in June and  
4 August 2011. The County argues that any acts after August 2011 were not covered by an EEOC  
5 charge and have, therefore, not been exhausted. In the Ninth Circuit, allegations of discrimination  
6 not included in a plaintiff's EEOC charge can nonetheless be considered by the Court where the  
7 new claims are "like or reasonably related" to the allegations contained in the EEOC charge. *See,*  
8 *e.g., B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1100 (9th Cir. 2002). In making that  
9 determination, the Court considers the alleged basis of the discrimination, dates of discriminatory  
10 acts including within the charge and the "new" acts, the alleged perpetrators, the locations of the  
11 acts in the charge and the "new" acts, and whether the new acts are "consistent with the plaintiff's  
12 original theory of the case." *Id.*

13 I find that the acts of discrimination or retaliation following the August 2011 EEOC charge  
14 are "like or reasonably related" to the acts Curry complained of in her June and August charges.  
15 The basis of the post-August 2011 claims are the same as the basis for Curry's June and August  
16 EEOC charges – Kunz-Tao discriminated and retaliated against Curry. The fact that other  
17 decision-makers may have been involved in one of the claims (Wilson and Brown), does not  
18 undermine this conclusion because Curry has raised a material question of fact as to Kunz-Tao's  
19 role in that process. Moreover, the period of time between the EEOC charges and the other  
20 conduct Curry claims is actionable is short; August 2011 through 2012.

21 I DENY the County's motion for summary judgment on failure to exhaust.<sup>13</sup>

22 **CONCLUSION**

23 For the foregoing reasons, I GRANT in part and DENY in part defendant's Motion for  
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25 <sup>13</sup> The County argues that summary judgment should be granted on Curry's failure to prevent  
26 discrimination and harassment claim under California Government Code section 12940(k),  
27 because Curry fails to allege any facts demonstrating harassment and Curry has failed to survive  
28 summary judgment on her age discrimination claim. Motion at 23-24. I agree that Curry has not  
stated any facts to support a harassment claim, but because I find Curry raises issues of material  
fact precluding summary judgment on her age discrimination claims, the County's motion for  
summary judgment as to the section 12940(k) claim based on discrimination is DENIED.

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Summary Judgment. The following claims survive summary judgment: (i) age discrimination in failing to hire Curry for the two full-time MHCS positions in May 2011; (ii) retaliation in terminating Curry's on-call work; (iii) retaliation in failing to hire Curry for the MHCS position in Fall 2011; and (iv) retaliation for failing to hire Curry for the BHC position.

I also DENY defendant's Motion re Ex Parte Contacts and DENY plaintiff's related motion for sanctions.

**IT IS SO ORDERED.**

Dated: April 30, 2014



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WILLIAM H. ORRICK  
United States District Judge