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United States District Court  
Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

LUTRELL B. HUDDLESTON,  
Plaintiff,  
v.  
CITY & COUNTY OF SAN FRANCISCO,  
et al.,  
Defendants.

Case No. 16-cv-01998-JCS

**ORDER GRANTING MOTION FOR  
SUMMARY JUDGMENT**

Re: Dkt. Nos. 53, 55

**I. INTRODUCTION**

Plaintiff Lutrell Huddleston, who is proceeding pro se, brings an employment discrimination case against her former employer, the Office of the Treasurer and Tax Collector (“TTX”) of the City and County of San Francisco (“CCSF”), Tax Collector David P. Augustine, and her former supervisor, Assistant Tax Collector Attorney Debra D. Lew. Defendants bring a Motion for Summary Judgment (“Motion”) seeking dismissal of all of Ms. Huddleston’s claims. A hearing on the Motion was held on December 1, 2017 at 9:30 a.m. For the reasons stated below, the Motion is GRANTED.<sup>1</sup>

**II. BACKGROUND**

**A. Factual Background<sup>2</sup>**

Ms. Huddleston is an African-American woman who was, at the time of the relevant events, between 60 and 62 years old. First Amended Complaint (“FAC”) at 4-7. She worked as an 8173 Legal Assistant in the TTX. Declaration of Jennifer Donnellan in Support of Defendants’

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<sup>1</sup> The parties have consented to the jurisdiction of the undersigned magistrate judge pursuant to 28 U.S.C. § 636(c).  
<sup>2</sup> Except as otherwise stated, the facts set forth below are undisputed.

1 Motion for Summary Judgment (“Donnellan Motion Decl.”), Ex. A (Huddleston  
2 Deposition)(“Huddleston Dep.”) at 18. One of her main duties was working on Medical  
3 Reimbursement Liens (“MRLs”). *Id.* According to Debra Lew, her supervisor during the relevant  
4 period, in addition to reviewing MRLs, Ms. Huddleston’s duties included drafting for attorney  
5 review basic legal documents and pleadings, including liens and written discovery and performing  
6 basic legal research. Declaration of Debra Lew (“Lew Decl.”) ¶ 3. Lew reported to David  
7 Augustine, who was the Tax Collector for most of the relevant period. *Id.* Although the Legal  
8 Department had at least one other Legal Assistant, Ben Tsui, he was not responsible for MRLs  
9 during the relevant time period. Huddleston Dep. at 113-114:3. Cathy McCarthy, a legal  
10 secretary, also worked with Ms. Huddleston in the Legal Department. *Id.* at 35. Ms. Huddleston  
11 was the only person in the Legal Department who reviewed MRLs, however. *Id.* at 113.

12 TTX prepares MRLs in connection with its efforts to recover medical costs that the City  
13 has incurred for treating injured patients at City hospitals, such as Zuckerberg San Francisco  
14 General Hospital, by filing reimbursement liens in personal injury lawsuits. Lew Decl. ¶ 4.  
15 During the relevant period, the procedure for preparing MRLs was as follows. First, a senior  
16 collection officer (“SCO”) from the Bureau of Delinquent Revenue would gather the pertinent  
17 information, including the pending personal injury lawsuit complaint and detailed records of the  
18 medical costs the City incurred. Huddleston Dep. at 18-21; Lew Decl. ¶ 4. Using a two-page  
19 MRL template with proof of service, created by the Legal Division of TTX, the SCO would  
20 change the template’s caption to that of the personal injury case, add the amount of the requested  
21 lien, insert the plaintiff’s name in the body of the template, and include the plaintiff’s counsel’s  
22 name and address in the proof of service. Huddleston Dep. at 20-21; Lew Decl. ¶ 4; Bound  
23 Exhibits, Ex. A (MLR template). Next, the SCO would send the draft MRL and the backup  
24 documentation to the Legal Department for approval. Lew Decl. ¶ 4.

25 Once the draft MRL was received by the Legal Department, it was Ms. Huddleston’s  
26 responsibility to ensure that she had received all of the required documents and to review the MRL  
27 to confirm that the information contained in it was correct. Huddleston Dep. at 18-21; *see also id.*  
28 at 243 (testimony that Huddleston “was responsible for catching mistakes.”). Ms. Huddleston

1 verified the following nine items on the MRLs: 1) the case number; 2) the county of the superior  
2 court; 3) whether the jurisdiction was limited or unlimited; 4) plaintiff's name in the caption; 5)  
3 defendant's name in the caption; 6) plaintiff's name in the body of the lien; 7) the date of first  
4 service rendered; 8) the amount of damages; and 9) the names and addresses of all attorneys on  
5 the proof of service. Lew Decl. ¶ 5; Huddleston Dep. at 27-28. Lew provided Ms. Huddleston  
6 with a checklist that listed these nine items and the back-up documentation that the SCO was  
7 supposed to have provided. Lew Decl. ¶ 11; Bound Exhibits, Ex. D (checklist). If Ms.  
8 Huddleston found an error, she would either correct it herself or send it back to the SCO for  
9 revision. Huddleston Dep. at 21. Then she would pass the MRL on to Lew for review and  
10 signature. *Id.* at 21-22. When Lew found errors in the MRLs, she returned them to Huddleston to  
11 correct. Lew Decl. ¶¶ 8-9. After Lew approved an MRL, she signed it and returned it to Ms.  
12 Huddleston, who would send it back to the SCO for filing and service. Lew Decl. ¶ 6.

13 Lew became Ms. Huddleston's supervisor in 2011. *Id.* ¶ 3. She was 55 years old at the  
14 time of Huddleston's retirement and is seven years younger than Ms. Huddleston. *Id.* ¶ 7; FAC at  
15 4. On December 15, 2011, Lew sent Ms. Huddleston an email telling her that she had reviewed  
16 seven liens from Ms. Huddleston in the past two days and had rejected four of them due to errors.  
17 Bound Exhibits, Ex. A. Lew asked Ms. Huddleston to "[p]lease check and verify the information  
18 given to [her]," reminding her that "[y]ou cannot assume the [SCO's] work is accurate (and that is  
19 why we have to check it)." *Id.*

20 Lew states in her declaration that around April 18, 2012, she "found Ms. Huddleston  
21 standing at the copier ripping up paper for what [she] believed was an unnecessary amount of  
22 time." Lew Decl. ¶ 10. Lew further states that "this was not part of her duties, and [Lew] had  
23 given [Ms. Huddleston] pressing assignments in the form of two applications for order of  
24 examinations to draft." *Id.* At her deposition, Ms. Huddleston offered the following testimony  
25 regarding this incident:

26 I was working on a document at the copier, and she kept on passing  
27 me while I was making copies. I'm trying to do an assignment she  
28 wanted me to do. It was a lot of copying that had to be done. And  
so, as I would do copies, I would have to get new reams of paper.  
The reams of paper are pretty wide, like when you take the paper  
apart there's a wide big sheet of paper. Because other people were

1 using this copier it wasn't just me, there was like 4, 5 other people  
2 doing jobs. I was trying to get the copier done, hoping nothing  
3 would break down. I was standing up. I was tearing this huge thing  
4 you get when you take the ream off. I was tearing it up. She got on  
5 my case and told me I shouldn't be standing at the copier tearing up  
6 paper. That to me that's harassment.

7 Huddleston Dep. at 140-141.

8 According to Lew, Ms. Huddleston "continued to fail to spot errors in the MRLs." Lew  
9 Decl. ¶ 14. Lew states in her declaration that she returned MRLs to Huddleston due to errors on  
10 April 19, 2012 (one MRL returned because the year of the incident and amount of the lien were  
11 incorrect and the proof of service did not list both attorneys representing the plaintiff), April 26,  
12 2012 (one MRL returned with an error in the plaintiff's name and caption and an error in an  
13 attorney's address in the proof of service), April 28, 2012 (the same MRL as on April 26, 2012  
14 returned because the error in the plaintiff's name had not been corrected), May 1, 2012 (one MRL  
15 returned because it had the wrong county superior court listed on it), and September 24, 2012 (one  
16 MRL returned twice for the same error). *Id.* ¶¶ 10, 12-13, 15. Defendants have also attached  
17 copies of MRLs with notations indicating that Lew rejected them for errors on September 28,  
18 2012, November 7, 2012, November 27, 2012, and November 28, 2012. Bound Exhibits, Exs. 17-  
19 20.<sup>3</sup>

20 Lew stated in her declaration that she "expected Ms. Huddleston to spot these errors in the  
21 MRLs and correct them." Lew Decl. ¶ 11. She further stated that "[t]he types of errors that Ms.  
22 Huddleston was making made it likely that a court would reject the MRL upon filing or the MRL  
23 would be deemed defective," which would "deny the City the ability to recover the monies to  
24 which it was entitled." *Id.* ¶ 18. Ms. Huddleston does not dispute that "[s]ometimes . . . [she]  
25 ma[d]e errors" but testified that these errors were "typos" and were not "really, really horrible."  
26 Huddleston Dep. at 96. Huddleston testified at her deposition that she told Lew, "If you find a  
27 typo, let me know, I will switch it off, no problem, get it out the door after it's signed." *Id.*

28 On July 23, 2012, Lew and Tax Collector, David Augustine gave Ms. Huddleston an

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<sup>3</sup> TTX seeks to file these documents, which are marked-up MRLs, under seal on the basis that they are protected attorney work product. *See* Dkt. No. 53. As discussed below, the Court finds that Defendants have waived work product protection as to these documents.

1 “Overall Appraisal Rating” of “Did Not Meet Expectations” on her 2011-2012 Performance Plan  
2 and Appraisal Report (“2011-2012 Appraisal”). Lew Dec. ¶ 19; Declaration of David Augustine  
3 (“Augustine Decl.”) ¶ 7; Bound Exhibits, Ex. E (2011-2012 Appraisal) at CCSF 000007. Lew  
4 and Augustine presented the performance appraisal to Ms. Huddleston and Ms. Huddleston signed  
5 the document. Augustine Decl., Ex. E.<sup>4</sup> The performance review notes that Ms. Huddleston had  
6 “errors in analyzing” and summarizing “pertinent factual and financial information” and “errors in  
7 modifying judicial council forms, letters, and pleadings . . . .” *Id.* at CCSF 000004. With respect  
8 to MRLs specifically, the Appraisal Report comments that “[h]ospital liens are often not accurate;  
9 have been submitted in improper form; does not employ mechanisms to verify accuracy.” *Id.* In  
10 comments regarding Overall Performance, the Appraisal Report states that Ms. Huddleston is “a  
11 very likeable person” but that “her work product is often incomplete and inaccurate, particularly  
12 concerning [MRLs] where her primary duty is to proofread for accuracy. Lutrell neglects to  
13 follow procedures which would enable her to verify the accuracy of the liens.” *Id.* at CCSF  
14 000007.

15 On the same day, TTX placed Ms. Huddleston on a Performance Improvement Plan (“July  
16 23, 2012 PIP”). Augustine Decl. ¶ 8; Lew Dec. ¶ 20. The July 23, 2012 PIP was divided into  
17 three periods; after the close of each period, Ms. Huddleston and Lew were to meet to discuss  
18 whether Ms. Huddleston’s performance met TTX standards and if it did not, why not. *Id.* Lew  
19 met with Ms. Huddleston after the first and second periods, but she did not meet with Ms.  
20 Huddleston promptly at the close of the third period and therefore Augustine decided to set aside  
21 the July 23, 2012 PIP. Lew Dec. ¶ 21; Augustine Decl. ¶ 9.

22 TTX established a new PIP for Ms. Huddleston on October 26, 2012 (“October 26, 2012  
23 PIP”), which Ms. Huddleston signed. Lew Dec. ¶ 22; Augustine Decl. ¶ 10; Bound Exhibits, Ex.  
24 F (October 26, 2012 PIP). That PIP covered the period from October 29, 2012 to January 25,  
25 2013; however, Ms. Huddleston was on leave for part of that time so TTX extended the PIP

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27 <sup>4</sup> The signature carries a notation “As Amended.” *Id.* at 000009. It appears that the amendments  
28 changed the wording of the two comments quoted below and added a comment recognizing  
improvement in the accuracy of Huddleston’s medical reimbursement liens in the month of June  
2012.

1 completion deadline to February 15, 2013. *Id.* As with the earlier PIP, the October 26, 2012 PIP  
2 had three compliance periods. The PIP also listed three “performance improvement areas,” each  
3 with a corresponding goal. The goals were as follows:

4 1. GOAL: To review entire file for pertinent facts or financial  
5 information as needed, organize the particular information, then  
6 prepare written summary in memo form to substantiate the  
7 conclusion

8 . . .

9 2. GOAL: To identify what general facts and law are relevant to the  
10 assignment; to organize the facts in an understandable chronological  
11 manner . . . ; not to use hearsay or make unsubstantiated assertions  
12 in declarations and statements of facts; and use proper grammar to  
13 the extent possible.

14 The legal forms and other adaptable information should be chosen  
15 and filled out accurately and completely at least 80% of the time by  
16 the end of period 1; 85% by the end of period 2 and 90% by period 3  
17 with little or no assistance.

18 3. GOAL: To proofread and provide the reviewing attorney  
19 accurate, complete, and legally compliant Medical Reimbursement  
20 Liens and proofs of service with the supporting documents to enable  
21 efficient verification. The Medical Reimbursement Liens and proofs  
22 of service with supporting documents must be at least . . . 6 liens per  
23 week with 85 % by the end of period 2 with little or no assistance.

24 Bound Exhibits, Ex. F (October 26, 2012 PIP) at CCSF 000619. The October 26, 2012 PIP  
25 reflects that Ms. Huddleston met the first goal for the second period but did not meet it for the first  
26 or third period. *Id.* at CCSF 000618. The second goal was not applicable for the first period and  
27 Ms. Huddleston failed to meet it for the second and third periods. *Id.* at CCSF 000619. With  
28 respect to the third goal, related to Ms. Huddleston’s MLR accuracy, the October 26, 2012 PIP  
reflects that Ms. Huddleston met that goal for the first period, with an accuracy rate of 82.15%  
(23/28 correct) but that she did not meet the goal for the second and third periods. *Id.* at CCSF  
000620. In particular, her accuracy rate for the second period was 57.14 % (4/7 correct) and for  
the third period was 77% (7/9 correct), thus falling below the target of 85% accuracy for those  
periods. *Id.* Lew met with Ms. Huddleston to provide feedback at the end of each period, on  
December 4, 2012, February 6, 2013 and February 21, 2013. Lew Decl. ¶ 22.

On March 11, 2013, TTX issued a Written Warning for Huddleston’s failure to perform

1 the essential functions of her job, signed by Debra Lew and David Augustine. Augustine Decl. ¶  
2 11; Bound Exhibits, Ex.G (Written Warning). The Written Warning, which was mailed to Ms.  
3 Huddleston’s home by certified mail, stated that Ms. Huddleston “did not meet the goal set on the  
4 [October 26, 2012] PIP” because, among other things, she “failed to achieve the required degree of  
5 accuracy for medical reimbursement liens.” *Id.* at CCSF 000117. It stated that the rate of Ms.  
6 Huddleston’s errors “merits this Written Warning,” which was to be placed in her personnel file.  
7 *Id.* It went on to warn that “[i]f your performance does not improve, you may get additional  
8 discipline, up to and including termination.” *Id.*

9 Ms. Huddleston took a leave of absence from April to November 2013. Huddleston Dep. at  
10 133. Ms. Huddleston states that she took the leave of absence because Defendants “caused [her]  
11 to have a nervous breakdown.” September 8, 2017 Huddleston Declaration (“First Huddleston  
12 Decl.”) ¶ 17; Huddleston Dep. at 123. She has also submitted an excerpt of a report by Qualified  
13 Medical Evaluator Dr. George Becker, dated September 10, 2013, in which he found that  
14 “personnel actions were . . . the sole cause of the psychiatric injury” suffered by Huddleston.  
15 October 5, 2017 Huddleston Declaration (“Second Huddleston Decl.”), Ex. 2 (Becker Letter,  
16 Excerpt).<sup>5</sup>

17 When Ms. Huddleston returned to work, she was again placed under Lew’s supervision.  
18 While Ms. Huddleston was on leave, Stephanie Profitt joined TTX as Tax Collector Attorney.  
19 Declaration of Stephanie Profitt (“Profitt Decl.”) ¶ 5. Profitt supervised Lew. *Id.* ¶ 3. According  
20 to Ms. Huddleston, eight days after she returned from her leave of absence, Profitt told her that  
21 Augustine had instructed her to place Ms. Huddleston on another PIP. Huddleston Dep. at 130.  
22 On January 16, 2014, Ms. Huddleston was placed on another PIP (“January 16, 2014 PIP”), which  
23 was scheduled to run from January 16, 2014 to March 21, 2014. Profitt Decl. ¶ 6; Lew Decl. ¶ 25;  
24 Bound Exhibits, Ex. H (January 16, 2014 PIP). Profitt presented Ms. Huddleston with the PIP.  
25 Profitt Decl. ¶ 6. According to Augustine, this PIP was based on Ms. Huddleston’s poor  
26 performance before her leave of absence. Augustine Decl. ¶ 13. Huddleston testified that she  
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28 <sup>5</sup> Because the excerpt did not include Dr. Becker’s summary of the relevant facts, it is impossible  
to determine what “personnel actions” Dr. Becker was referring to.

1 thought that after she returned from her breakdown “they would be nice, just let [her] work in  
2 peace” and that she asked Profitt to talk to Augustine and “tell [Augustine] to leave [her] alone”  
3 and to ask him to stop giving her PIPs. *Id.* at 227-229. Profitt told Huddleston that Augustine  
4 would not agree to discontinue the PIP. *Id.* at 229.

5 The January 16, 2014 PIP, like the previous PIPs, was broken down into three periods.  
6 Profitt Decl. ¶ 6; Lew Decl. ¶ 25, Bound Exhibits, Ex. H. The January 16, 2014 PIP also listed  
7 three goals. Bound Exhibits, Ex. H. The goals were as follows:

8 1. GOAL: To proofread and provide the reviewing attorney  
9 accurate, complete, and legally compliant Medical Reimbursement  
10 Liens and proofs of service with the supporting documents to enable  
11 efficient verification. The Medical Reimbursement Liens and proofs  
12 of service with supporting documents must be at least 8 liens per  
13 week with an accuracy rate of 90% with little or no assistance.

14 2. GOAL: To identify what general facts and law are relevant to the  
15 assignment; to organize the facts in an understandable chronological  
16 manner . . . ; to properly format a legal document (define the party  
17 before using short name; identification and use of attached  
18 Exhibits); not to use hearsay or make unsubstantiated assertions in  
19 declarations and statements of fact; and use of proper grammar to  
20 the extent possible.

21 The legal forms and other adaptable information should be chosen  
22 and filled out accurately and completely at least 90% with little or  
23 no assistance.

24 3. GOAL: To review entire file for pertinent facts or financial  
25 information as needed, organize the particular information, then  
26 prepare written summary in memo form to substantiate the  
27 conclusion.

28 *Id.*

Ms. Huddleston failed the first two goals for all three of the periods. *Id.* She met the third  
goal for the first and third periods; that goal was not applicable for the second period. *Id.* Profitt  
and Lew met with Ms. Huddleston at the end of each period, on February 7, March 31, and April  
24, 2014, to review her performance. Profitt Decl. ¶ 6; Lew Decl. ¶ 25. Ms. Huddleston testified  
that although Profitt had told her she would participate in the meetings as a neutral party, she  
scrutinized Ms. Huddleston’s work as much as Lew did. Huddleston Dep. at 161-162. Ms.  
Huddleston also testified that she had completed special assignments for Profitt and that Profitt  
had told her that her work was “perfect” but that Profitt refused to add this to the PIP even though



1 she knew Ms. Huddleston would pass the PIP if this information were included. *Id.* at 165-167.  
2 Ms. Huddleston believed that Profitt was going along with a plan of Augustine and Lew for Ms.  
3 Huddleston to fail the PIPs. *Id.*

4 On May 12, 2014, TTX sent to Ms. Huddleston’s home address a Notice of Proposed  
5 Discipline seeking to impose a one-day suspension for “inattention to duty and inability to  
6 perform the essential functions of the 8173 Legal Assistant position.” Augustine Decl. ¶ 14.<sup>6</sup>  
7 According to Ms. Huddleston, this warning should not have been sent to her home. Declaration of  
8 Lutrell B. Huddleston in Support of Plaintiff’s Supplemental Brief in Opposition to Motion for  
9 Summary Judgment (“Huddleston Supp. Decl.”) ¶ 8. Instead, she contends, [Augustine] “should  
10 have talked to [her] at the office [ ] first.” *Id.* Ms. Huddleston further states that “[p]aragraph 1 as  
11 well as paragraph 3 are just not factual” and that the warning was “laughable and ludicrous”  
12 because she “never had work performance issues grievous enough to get a written warning for  
13 inattention to duty and inability to perform the essential functions of the 8173 Legal Assistant  
14 position.” *Id.*

15 Pursuant to due process requirements, TTX scheduled and held a *Skelly* hearing on May  
16 28, 2014.<sup>7</sup> Augustine Decl. ¶ 15. Ms. Huddleston and her union representative attended the  
17 meeting and requested additional documentation. *Id.* TTX agreed to provide the requested  
18 documentation. *Id.* TTX gathered the requested documents and attached them as an exhibit to the  
19 Amended Notice of Proposed Discipline and *Skelly* Meeting (“Amended Notice”), which it sent to  
20 Ms. Huddleston on September 4, 2014. Augustine Dec. ¶ 15; Bound Exhibits, Ex. I. TTX  
21 rescheduled the *Skelly* meeting for September 19, 2014. *Id.*

22 In the meantime, TTX placed Ms. Huddleston on another PIP beginning August 4, 2014.  
23 (“August 4, 2014 PIP”). Profitt Decl. ¶ 7; Lew Decl. ¶ 26; Bound Exhibits, Ex. J (August 4, 2014  
24 PIP.) The goals were as follows:

25

26 \_\_\_\_\_  
27 <sup>6</sup> The May 12, 2014 notice was not provided by the parties but is referenced in an amended notice  
(discussed below) that was attached to the Bound Exhibits. *See* Bound Exhibits, Ex. I.

28 <sup>7</sup> A *Skelly* hearing refers to the due process meeting required under *Skelly v. State Personnel Bd.*,  
15 Cal. 3d 194 (1975), when a public employee faces a potential deprivation of his or her property  
interest as an employee.

1 1. GOAL: With an accuracy rate of 90% per PIP period, proofread  
2 and provide the reviewing attorney with accurate, complete, and  
legally compliant Medical Reimbursement Liens and proofs of  
service.

3 2. GOAL: Identify what facts and law are relevant to the  
4 assignment; organize the facts in an understandable chronological  
5 manner, if necessary . . . ; understand which is the proper legal form  
to use and why; properly format documents; and use proper  
grammar and punctuation.

6 The legal forms, pleadings, and/or correspondence should be correct  
7 and completed with a 90% accuracy rate over each PIP period with  
minimal assistance.

8 3. GOAL: Accurately create [ancillary records to support collection  
9 efforts] within a reasonable time period with limited assistance.

10 Bound Exhibits, Ex. J. Lew and Profitt met with Ms. Huddleston after the first and second  
11 compliance periods. Lew Decl. ¶ 26. For the first period (August 4-21, 2014), Ms. Huddleston  
12 met the goal of proofreading MRLs with a 90% accuracy rate. Bound Exhibits, Ex. J (August 4,  
13 2014 PIP) at CCSF 000268. She failed that goal in the second period, however. *Id.* For both  
14 periods, she failed to meet the third goal.

15 Ms. Huddleston did not complete the third period of the PIP, which was to run from  
16 September 12, 2014 to September 25, 2014, because on September 13, 2014, she retired.  
17 Huddleston Dep. at 123. According to Lew, Ms. Huddleston gave notice of her retirement by  
18 slipping a note under her door, along with her access card, apparently after Lew had left for the  
19 evening. Lew Decl. ¶ 27. Although Ms. Huddleston did not give Lew advance notice of her plan  
20 to retire, Ms. Huddleston testified that she had decided to retire three months earlier, after  
21 receiving confirmation from the retirement board that she could receive retirement benefits.  
22 Huddleston Dep. at 286-287; 288-291.

23 Ms. Huddleston testified at her deposition that although she did not experience “overt  
24 racism,” she was subjected to “subtle racism.” *Id.* at 30. She also testified that she never heard  
25 anyone say anything negative to her about her age or her sex, but believed that she was treated less  
26 favorably than others because of both. *Id.* at 69, 237. As an example of such unfavorable  
27 treatment, she recounted being called into Augustine’s office two days in a row and being  
28 questioned about shirts she was wearing – on the first day a “creative” shirt that had a large picture

1 of Tina Turner on it and on the next day a shirt made from ethnic cloth from Africa called a  
2 “Dashiki.” *Id.* at 54-55. As to the first shirt, Augustine told Ms. Huddleston that it violated the  
3 dress code because it had a person’s face on it. *Id.* at 55. He also “called it a T-shirt,” though  
4 Huddleston testified that it was made of “expensive . . . material.” *Id.* at 54. Huddleston also  
5 testified that Augustine gave her a copy of a written dress code when he called her into his office  
6 that day. *Id.* at 55. The next day, Augustine asked Ms. Huddleston why her shirt was different  
7 from the previous day and Huddleston explained “what a Dashiki” is. *Id.* at 57. Augustine  
8 apparently did not tell Huddleston that the Dashiki violated the dress code and instead thanked  
9 Ms. Huddleston for explaining what it was. *Id.* at 58. Ms. Huddleston testified that no further  
10 action was taken with respect to either shirt and they were not mentioned again by any supervisor.  
11 *Id.*

12 Another example of discrimination offered by Ms. Huddleston at her deposition concerned  
13 a fan. According to Ms. Huddleston, at a TTX Christmas party, she had brought out a fan and was  
14 fanning herself with it. *Id.* at 83-84. She was showing it to Augustine because it was “really,  
15 really cute” and told Augustine that it was “good for hot flashes.” *Id.* A few months later,  
16 Huddleston brought out the fan on a warm day and Augustine said, “Oh, that’s the fan that is good  
17 for hot flashes.” *Id.* at 84.

18 Ms. Huddleston also testified that on one occasion in 2012, Lew asked her to use five  
19 different colored pens when she was correcting interrogatories. *Id.* at 142, 151. Huddleston told  
20 Lew that she “was not going to do that” because it didn’t “make any kind of sense.” *Id.* at 151.  
21 Huddleston believed Lew asked her to use the colored pens based on her race, sex and age and that  
22 the request was “harassing.” *Id.* at 142, 151.

23 According to Ms. Huddleston, another example of discrimination occurred after she  
24 returned from her leave of absence, when the mail section of the legal department was looking for  
25 volunteers to work overtime to take care of a backlog. *Id.* at 73. Ms. Huddleston expressed  
26 interest in the assignment to Profitt but Profitt subsequently told her that Augustine had denied the  
27 request. *Id.* Ms. Huddleston testified that she believed Augustine denied her request “because he  
28 is a racist” and had “sexual orientation issues.” *Id.* at 73-74. Ms. Huddleston testified that she did

1 not know who else volunteered for this assignment or was approved for the overtime. *Id.*

2 Ms. Huddleston testified that after she returned from her leave of absence, legal secretary  
3 Cathy McCarthy told her that she had been instructed “not to talk” to Ms. Huddleston. *Id.* at 42.  
4 McCarthy did not tell her who had given her these instructions. *Id.*

5 Other conduct that Ms. Huddleston believes was discriminatory and harassing was: 1) an  
6 incident when Augustine brought a group of people into the office and was introducing them to  
7 TTX staff but passed over Ms. Huddleston, *id.* at 50; 2) Lew’s requirement that Ms. Huddleston  
8 respond immediately to messages from Lew when they popped up on her computer, *id.* at 121-  
9 122, 154-155; 3) Augustine’s denial of a request by Ms. Huddleston for overtime to finish some  
10 MLRs, *id.* at 79; and 4) a request that Ms. Huddleston’s desk be moved closer to Lew’s, *id.* at 72.

11 Ms. Huddleston contends Augustine was determined to get rid of her and that he led a  
12 campaign to do so, with Lew and Profitt following his instructions. *See, e.g., id.* at 165, 286. She  
13 also testified that Profitt told her as much shortly before she retired. *Id.* at 118. In particular, Ms.  
14 Huddleston testified that she asked Profitt who “put [her] up to this” and Profitt “said David  
15 [Augustine], she said Debra [Lew] helped, and the panel.” *Id.* at 117-118. In a declaration, she  
16 states that she believed he wanted to “run [her] off” “so that he could take the City’s part of [her]  
17 pension away from her.” Huddleston Supp. Decl. ¶ 7.

18 **B. The Complaint**

19 In the First Amended Complaint, which is the operative complaint, Ms. Huddleston asserts  
20 claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e – 2000e-17 and the  
21 Age Discrimination in Employment Act of 1976, 29 U.S.C. §§ 621-634.

22 First, she asserts a claim for “Discrimination/Disparate Treatment” based on race and sex  
23 (Claim One). In that claim, Ms. Huddleston alleges that she was treated differently from  
24 “colleagues who were not Black,” citing her failing scores on her PIPs, her 2011-2012 Appraisal,  
25 and the written warning and amended warning that were sent to her house, and asserting that  
26 neither Ben Tsui nor Cathy McCarthy, who are not Black, received any of this “unwanted and  
27 unlawful treatment.” FAC at 3-4. Ms. Huddleston alleges further that she was the sole Black  
28 employee in the Legal Section of TTX. *Id.* She alleges that she was forced into retirement and

1 that her position was filled by a younger white male. *Id.* at 4.

2 Second, Ms. Huddleston asserts a claim for Age Discrimination (Claim Two), alleging that  
3 she was subjected to adverse treatment such as teasing about hot flashes and criticism about her  
4 clothes based on her age. *Id.* She further alleges that she was the oldest member of the Legal  
5 Department at the time of her retirement and that her position was filled by a younger white male.  
6 *Id.*

7 Third, Ms. Huddleston asserts a claim for Hostile Work Environment Created by  
8 Plaintiff's Supervisor (Claim Three). *Id.* at 5. This claim is based on alleged harassment of Ms.  
9 Huddleston by Debra Lew based on Huddleston's race, sex and age. *Id.* According to Ms.  
10 Huddleston, Lew's harassing conduct was directed by David Augustine and included "ma[king]  
11 sure that [Ms. Huddleston] received low marks on [her] Performance Appraisal and [PIPs] so that  
12 [she] could eventually be terminated." *Id.* In support of this claim Ms. Huddleston further  
13 alleges that she was denied the accommodation recommended by the City's Independent Medical  
14 Examiner when she returned to work after her leave of absence, namely, that she was not to have  
15 any contact with Lew or Augustine. *Id.* at 6.

16 Fourth, Ms. Huddleston asserts a claim for Hostile Work Environment Created by  
17 Plaintiff's Co-Worker (Claim Four) based on the conduct of Stephanie Profitt, who allegedly  
18 "wound up, with the blessing of Debra D. Lew and David P. Augustine scrutinizing me on a more  
19 'negative' and 'discriminatory' sophisticated level." *Id.* at 7.

20 **C. The Motion**

21 In the Motion, Defendants challenge Ms. Huddleston's discrimination claims (Claims One  
22 and Two) on the grounds that she fails to make a prima facie case of discrimination and that she  
23 cannot show that the City's legitimate, non-discriminatory reasons for its conduct are pretext. As  
24 to the harassment claims, Defendants contend they are entitled to summary judgment because the  
25 conduct alleged by Huddleston is not so severe and pervasive as to alter the terms and conditions  
26 of her employment.

27 In her supplemental opposition brief, Ms. Huddleston contends there are material factual  
28 disputes and that her claims should be decided by a jury. Dkt. No. 69 (Supplemental Brief in

1 Opposition to Motion for Summary Judgment) at 3-4. In support of her brief she has filed her own  
2 declaration, a declaration by coworker Jo Anne Adams, an excerpt of QME Dr. Becker’s report,  
3 and an email exchange between Ms. Huddleston and Profitt in which Ms. Huddleston asked not to  
4 be placed on a PIP in January 2014 and Profitt denied her request.

5 Defendants assert evidentiary objections to Ms. Huddleston’s supplemental declaration.  
6 They also ask the Court not to consider the Adams declaration on the basis that Ms. Huddleston  
7 did not list Adams in her initial disclosures, as required under Rule 26(a)(1) of the Federal Rules  
8 of Civil Procedure. Reply at 6. Defendants assert the Court should exclude this declaration  
9 pursuant to Rule 37(c)(1) of the Federal Rules of Civil Procedure. *Id.* Defendants also assert a  
10 variety of specific objections to statements in the Adams declaration, including objections that  
11 numerous statements are not based on personal knowledge and/or constitute hearsay. *Id.* at 7-9.

12 **III. ANALYSIS**

13 **A. Motion to File Under Seal**

14 Defendants have filed a Motion to File Documents Under Seal asking the Court to seal  
15 Exhibits 1-20 (draft legal pleadings) and Exhibits F, G, H, and I (performance improvement plans,  
16 a written warning and an amended notice of intent to suspend for one day), on the basis that they  
17 contain attorney work product and that the protection to which such materials are entitled has not  
18 been waived. Dkt. No. 53. Defendants note that as to Exhibits F, G, H, and I, these documents  
19 were provided to Ms. Huddleston in partially redacted form (omitting the names of the debtors) in  
20 order to give her notice of her performance deficiencies, but that Defendants did not intend to  
21 waive work product protection when they provided them to her. Dkt. No. 53-1 (Lew Decl.) ¶ 7.

22 The documents that Defendants seek to protect as work product were produced to Ms.  
23 Huddleston in this litigation, albeit under a protective order, and are being used by Defendants to  
24 defend against her claims. Because, Ms. Huddleston is an adversary, Defendants have waived any  
25 protection to which the documents may have been entitled (with the exception of the portions of  
26 those documents that were redacted when they were produced to Ms. Huddleston). As the Third  
27 Circuit explained in *Westinghouse Elec. Corp. v. Republic of Philippines*, “the work-product  
28 doctrine promotes the adversary system directly by protecting the confidentiality of papers

1 prepared by or on behalf of attorneys in anticipation of litigation.” 951 F.2d 1414, 1428 (3d Cir.  
2 1991). While disclosure of work product to a third party does not necessarily waive the  
3 protection, it *does* result in a waiver if the disclosure “enable[s] an adversary to gain access to the  
4 information.” In *Westinghouse*, the court found that this principle applies even where the  
5 disclosure is to a *different* adversary than the opponent in the underlying litigation to which the  
6 work product relates, and that it applies even when the party disclosing the materials reasonably  
7 expected that they would remain confidential. *Id.* at 1429-1430; *see also In re Worlds of Wonder*  
8 *Sec. Litig.*, 147 F.R.D. 208, 212 (N.D. Cal. 1992) (adopting rule from *Westinghouse* that  
9 disclosure of work product to an adversary results in waiver and that parties “may not pick and  
10 choose to which adversaries they will reveal documents”).

11 Having produced documents that contain work product in this litigation to Huddleston,  
12 who is clearly an adversary, Defendants have waived work product protection as to the materials  
13 they seek to file under seal. Therefore, the Motion to Seal is DENIED.

14 **B. Objections to Adams Declaration**

15 Defendants assert that the Court should decline to consider the Adams Declaration  
16 pursuant to Rule 37(c) of the Federal Rules of Civil Procedure because Ms. Huddleston did not list  
17 Ms. Adams in her initial disclosures. The Court DENIES that request because Defendants failed  
18 to comply with Civil Local Rules 37-4(a) and 7-8. These rules govern requests for sanctions  
19 under Rule 37 of the Federal Rules of Civil Procedure and require that such requests “must be  
20 separately filed.” On the other hand, the specific objections Defendants assert as to the Adams  
21 Declaration are well-taken. The Court sustains those objections on the grounds stated in  
22 Defendants’ brief. *See Reply* at 6-9.<sup>8</sup>

23 **C. Legal Standard Under Rule 56**

24 Summary judgment on a claim or defense is appropriate “if the movant shows that there is  
25 no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of  
26

27 <sup>8</sup> Defendants also assert various evidentiary objections to Ms. Huddleston’s supplemental  
28 declaration. *See Reply* at 5-6. The Court does not rule on these because even assuming the  
statements made in Ms. Huddleston’s declaration are admissible, they do not change the Court’s  
conclusion that Defendants are entitled to summary judgment on all of her claims.

1 law.” Fed. R. Civ. P. 56(a). In order to prevail, a party moving for summary judgment must show  
2 the absence of a genuine issue of material fact with respect to an essential element of the non-  
3 moving party’s claim, or to a defense on which the non-moving party will bear the burden of  
4 persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has  
5 made this showing, the burden then shifts to the party opposing summary judgment to designate  
6 “specific facts showing there is a genuine issue for trial.” *Id.* Neither conclusory, speculative  
7 testimony in affidavits nor arguments in moving papers are sufficient to raise genuine issues of  
8 fact and defeat summary judgment. *Thornhill Publ’g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738  
9 (9th Cir. 1979). “A trial court can only consider admissible evidence in ruling on a motion for  
10 summary judgment.” *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). On  
11 summary judgment, the court draws all reasonable factual inferences in favor of the non-movant.  
12 *Scott v. Harris*, 550 U.S. 372, 378 (2007).

13 **D. Discrimination Claims**

14 **1. Legal Standard**

15 To survive summary judgment on her discrimination claims under Title VII and the  
16 ADEA, Ms. Huddleston must point to direct evidence of discriminatory intent or raise an  
17 inference of discriminatory intent under the burden-shifting framework of *McDonnell Douglas*  
18 *Corp. v. Green*, 411 U.S. 792 (1973) (“*McDonnell Douglas*”). *Metoyer v. Chassman*, 504 F.3d  
19 919, 930–31 (9th Cir. 2007) (to prevail on discrimination claim asserted under Title VII, 42 U.S.C.  
20 § 2000e, plaintiff must point to direct evidence of discriminatory intent or raise an inference of  
21 discriminatory intent under *McDonnell Douglas*); *Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151,  
22 1155 (9th Cir. 2010) (*McDonnell Douglas* framework applies to Title VII claims); *Reeves v.*  
23 *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141 (2000) (assuming *McDonnell Douglas*  
24 framework applies to ADEA claims where the parties do not dispute that it may be applied); *Wool*  
25 *v. Weil, Gotshal & Manges, LLP*, No. C 07-00646 WHA, 2008 WL 793788, at \*9 (N.D. Cal. Mar.  
26 24, 2008) (applying *McDonnell Douglas* framework in age discrimination case under ADEA to  
27 decide summary judgment motion where parties did not dispute that it could be applied).

28 “[D]irect evidence is evidence which, if believed, proves the fact [of discriminatory



1 animus] without inference or presumption.” *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220  
2 (9th Cir. 1998) (citation omitted). The Ninth Circuit has held a “stray remark” that is “uttered in  
3 an ambivalent manner and [is] not tied directly to” the adverse employment action is insufficient  
4 to create an inference of discriminatory animus. *Merrick v. Farmers Ins. Group*, 892 F.2d 1434,  
5 1438–39 (9th Cir.1990); *see also Scott v. Sears, Roebuck & Co.*, 395 F. Supp. 2d 961, 973 (D. Or.  
6 2005)(“Not every comment about a worker’s age is direct evidence of a discriminatory motive”).

7 Under the *McDonnell Douglas* framework, the plaintiff first must establish a prima facie  
8 case of discrimination. *Hawn*, 615 F.3d at 1155. To make a prima facie case of discrimination, a  
9 plaintiff must show that: (1) he is a member of a protected class; (2) he was qualified for the  
10 position; (3) he suffered an adverse employment action; and (4) that persons outside his protected  
11 class with equal or lesser qualifications, were given more favorable treatment. *Hodge v. Oakland*  
12 *Unified Sch. Dist.*, No. C 09-04719 RS, 2012 WL 1933678, at \*4 (N.D. Cal. May 29, 2012), *aff’d*,  
13 555 F. App’x 726 (9th Cir. 2014). “The requisite degree of proof necessary to establish a prima  
14 facie case for Title VII . . . claims on summary judgment is minimal and does not even need to rise  
15 to the level of a preponderance of the evidence.” *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th  
16 Cir.1994) (citation omitted).

17 If the plaintiff establishes a prima facie case, the burden of production, but not persuasion,  
18 shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged  
19 actions. *Hawn*, 615 F.3d at 1155. If this burden is met, the plaintiff “must then raise a triable  
20 issue of material fact as to whether the defendant’s proffered reasons for [the challenged conduct]  
21 are mere pretext for unlawful discrimination.” *Id.* “The plaintiff may show pretext either (1) by  
22 showing that unlawful discrimination more likely motivated the employer, or (2) by showing that  
23 the employer’s proffered explanation is unworthy of credence because it is inconsistent or  
24 otherwise not believable.” *Dominguez-Curry v. Nevada Transp. Dept.*, 424 F.3d 1027, 1037 (9th  
25 Cir. 2005) (citation omitted). The employee must offer ““specific, substantial evidence of  
26 pretext.”” *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890 (9th Cir.1994) (quoting *Steckl v. Motorola*,  
27 703 F.2d 392, 393 (9th Cir. 1983)). Evidence as to pretext is considered cumulatively. *Chuang v.*  
28 *University of California Davis, Bd. of Trustees*, 225 F.3d 1115, 1129 (9th Cir. 2000).

1                                   **2. Whether There is Direct Evidence of Discriminatory Intent**

2                   Ms. Huddleston has conceded that none of the individuals who supervised her (and indeed,  
3 no one at TTX) ever made overt statements reflecting discriminatory animus based on her race,  
4 sex or age. The only evidence in the record that might conceivably constitute direct evidence of  
5 discriminatory intent is Ms. Huddleston’s testimony regarding the comment by Augustine about  
6 her fan and his reaction to two of Ms. Huddleston’s shirts (the “artistic shirt” with an image of  
7 Tina Turner on it and the Dashiki). The Court concludes that neither is sufficient to demonstrate  
8 discriminatory intent.

9                   Augustine’s comment about Ms. Huddleston’s fan (“Oh, that’s the fan that is good for hot  
10 flashes”) is ambiguous and has no apparent connection to any adverse employment action. Based  
11 on Ms. Huddleston’s own account, Augustine merely repeated back to her a remark that she had  
12 made to him on a past occasion about the same fan. In that context, this statement does not prove  
13 the fact of discriminatory animus without inference or presumption even if it is an  
14 acknowledgement of Ms. Huddleston’s age and sex. It is, at most, a “stray comment” that is not  
15 sufficient to defeat summary judgment.

16                   Similarly, Ms. Huddleston’s testimony about Augustine’s reaction to two shirts she wore  
17 to the office is not sufficient to establish discriminatory intent. With respect to the first shirt,  
18 Augustine’s criticism was based on the fact that it had a face on it – something that he said  
19 violated the dress code. He did not aim his criticism at the *particular* face on the shirt or make  
20 any comment about the race, age or sex of the person depicted on the shirt; nor does Ms.  
21 Huddleston argue or offer any evidence that the dress code (a copy of which Augustine provided  
22 to Ms. Huddleston at the time of the incident) did not, in fact, prohibit shirts with faces on them.  
23 As to the Dashiki, there is no evidence in the record that Augustine called Ms. Huddleston in to  
24 his office because the shirt had (according to Ms. Huddleston) an African motif. To the contrary,  
25 Ms. Huddleston testified that Augustine did not criticize her for wearing it but instead thanked her  
26 once she explained to him what a Dashiki was. Again, assuming Ms. Huddleston’s testimony to  
27 be true, Augustine’s statements and conduct about Ms. Huddleston’s shirts do not prove the fact of  
28 discriminatory animus without further inference.

1                                   **3. Evidence of Discriminatory Intent Under *McDonnell Douglas***

2                                   a. *Prima Facie* Case

3                                   Defendants contend Ms. Huddleston fails to make a prima facie case of discrimination  
4 because: 1) she cannot demonstrate that she was performing the duties of her position  
5 competently; 2) she did not suffer an adverse action; and 3) she has not shown that similarly  
6 situated employees were treated differently or that any adverse action occurred under  
7 circumstances suggesting discrimination. Motion at 12-14. The Court concludes that Ms.  
8 Huddleston has not made a *prima facie* case of discrimination because even drawing all reasonable  
9 inferences in her favor, Ms. Huddleston has not demonstrated that she was performing the duties  
10 of her position competently.

11                                   “‘A plaintiff who violates company policy and fails to improve his performance despite a  
12 warning has not demonstrated satisfactory performance.’” *Diaz v. Eagle Produce Ltd. P’ship*, 521  
13 F.3d 1201, 1208 (9th Cir. 2008) (quoting *Mungro v. Giant Food, Inc.*, 187 F.Supp.2d 518, 522  
14 (D.Md. 2002)). Thus, in *Diaz*, the court of appeals found that the district court had properly  
15 granted summary judgment in favor of the employer in an age discrimination case as to one of the  
16 plaintiffs who had “over an extended period openly violated [the employer’s] policy against  
17 solicitation on company property and continued to do so even after receiving a warning from [the  
18 employer].” 521 F.3d at 1208. The court reasoned that no reasonable juror could have found that  
19 this employee’s performance was satisfactory and therefore, that he had not made a prima facie  
20 case of discrimination. *Id.*

21                                   Here, Ms. Huddleston does not dispute that one of her main duties was working on the  
22 MLRs. Huddleston Dep. at 18. She also does not dispute that she did not always correct errors in  
23 the MLRs with respect to the particular fields on her checklist, even though it was her  
24 responsibility to do so. *Id.* at 96. Nor does she challenge the accuracy rates reflected on her PIPs  
25 as to the MLRs, which fell below the goals established under the PIPs with respect to accuracy for  
26 almost every performance period. *See* Bound Exs. F, H & J. Ms. Huddleston also does not point  
27 to any evidence from which a juror could reasonably conclude that she performed adequately as to  
28 the other goals on the PIPs, the vast majority of which she did not meet. *Id.* Indeed, there is no

1 evidence in the record that contradicts the conclusions in the PIPs with respect to her performance.  
2 For this reason, Ms. Huddleston has not made a *prima facie* case of discrimination.

3 b. *Pretext*

4 Even assuming that Ms. Huddleston has made a *prima facie* case of discrimination,  
5 Defendants are entitled to summary judgment on her discrimination claims because she has not  
6 offered “specific, substantial evidence” that the non-discriminatory reason offered by Defendants  
7 for the conduct at issue – that Ms. Huddleston was not performing the requirements of her job  
8 adequately – was pretext.

9 Defendants have presented evidence that they repeatedly counseled Ms. Huddleston that  
10 her performance was deficient, placed her on a series of PIPs that she failed, sent her a warning  
11 letter, and eventually threatened to suspend her on the basis that her performance was deficient.  
12 “The [anti-discrimination law] was not intended as a vehicle for the general judicial review of  
13 business decisions.” *Nasser v. AT & T Corp.*, No. C 05-5426 PJH, 2007 WL 1119203, at \*8  
14 (N.D. Cal. Apr. 16, 2007), *aff’d*, 307 F. App’x 103 (9th Cir. 2009) (quoting *Phipps v. Gary*  
15 *Drilling Co.* 722 F.Supp. 615, 620 (E.D. Cal. 1989)). Nor is *McDonnell-Douglas* “a device which  
16 permits the jury to examine an employer’s reasons for discharge and determine that the employer’s  
17 business judgment or policies do not appeal to its sensibilities.” *Phipps*, 722 F. Supp. at 621  
18 (quoting *Elliott v. Group Medical and Surgical Service*, 714 F.2d 556 (5th Cir.1983)). The  
19 relevant inquiry for the Court is whether Ms. Huddleston has shown with specific, substantial  
20 evidence that the reason offered by Defendants for their conduct is pretext and that in fact, she was  
21 discriminated against on the basis of her race, sex or age. The Court concludes that she has not.

22 Ms. Huddleston testified in her deposition that the conduct at issue was, in large part, at the  
23 direction of Augustine, who she contends was a “racist” and had “sexual orientation issues.” *Id.* at  
24 73-74. Apart from her own opinion that Defendants’ treatment of her was because of her age, race  
25 and sex, however, the only admissible evidence she cited was that she was the only African-  
26 American employee in her division and that she was older than the other employees (including her  
27 supervisors). She did not, however, offer any *specific* evidence that other similarly situated  
28

1 employees who were not in these protected groups were treated more favorably.<sup>9</sup> In particular,  
2 she conceded that she was the only individual in the TTX who worked on MLRs and she offered  
3 no specific evidence that her co-workers were treated more favorably with respect to any  
4 shortcomings in their performance of comparable assignments. Although Ms. Huddleston  
5 testified that she believed she was scrutinized more closely than her co-workers, she was unable to  
6 point to specific and substantial evidence suggesting that this was the case. Moreover, to the  
7 extent that Ms. Huddleston relies on the fact that she was replaced by a younger, white male after  
8 she retired, this is not sufficient to demonstrate pretext. *Phipps*, 722 F. Supp. at 622  
9 (“Replacement by a younger employee alone, however, does not prove age discrimination or even  
10 create a strong presumption of discrimination . . .”).

11 In sum, the Court concludes that Ms. Huddleston has failed to meet her burden on  
12 summary judgment of demonstrating discriminatory animus. Accordingly, Defendants are entitled  
13 to summary judgment as to the discrimination claims.

## 14 **E. Harassment Claims**

### 15 **1. Legal Standard**

16 To establish a *prima facie* case for a claim for harassment based on hostile-work  
17

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18 <sup>9</sup> Huddleston relies on the Adams Declaration to show that she was treated less favorably than  
19 other employees with respect to PIPs. Adams works at TTX, apparently as an SCO. Adams Decl.  
20 ¶ 2 & Ex. 1 (MLR checklist reflecting that “Collections Officer” was Jo Anne Adams). Adams,  
21 who is a white female, states that she was once placed on a PIP because she inadvertently made an  
22 error. Adams Decl. ¶ 3. Adams’s PIP was discontinued, whereas Huddleston’s was not, leading  
23 Adams to conclude that the continuation of Huddleston’s PIP was a result of the fact Huddleston  
24 was black. *Id.* ¶ 4. Adams further states that she knows of another woman who was placed on a  
25 PIP and whose PIP was discontinued. *Id.* at ¶ 5. Adams believes that this woman’s PIP was not  
26 continued because she “is Chinese” and not Black. *Id.* In addition to her statements about others  
27 who were placed on PIPs, Adams also makes various statements opining that “David P. Augustine  
28 used the PIPs as a tool to eventually terminate employees” and that the PIPs were “just one of the  
tools he used for discriminatory practices.” *Id.* ¶ 10. As to Ms. Huddleston, Adams states that  
PIP’s were “used in a discriminatory manner to punish her for complaining and speaking out.” *Id.*  
¶ 11. The Court has sustained Defendants’ evidentiary objections that these statements are  
conclusory, lack foundation, and are based on hearsay. Even assuming these statements were  
admissible, however, they do not change the Court’s conclusion. Adams offers no specific  
statements that demonstrate that the circumstances under which she and the other woman were  
placed on PIPs (or taken off of them) were comparable to the circumstances relating to Ms.  
Huddleston’s PIPs. Nor does she offer any other specific facts to support her claims that  
Augustine used PIPs to discriminate against Ms. Huddleston or to punish her for speaking out. No  
reasonable juror could conclude based on this evidence that it establishes discriminatory intent.

1 environment, a plaintiff “must raise a triable issue of fact as to whether (1) the defendants  
2 subjected her to verbal or physical conduct based on her [membership in a protected class]; (2) the  
3 conduct was unwelcome; and (3) the conduct was sufficiently severe or pervasive to alter the  
4 conditions of her employment and create an abusive working environment.” *Surrell v. California*  
5 *Water Serv. Co.*, 518 F.3d 1097, 1108 (9th Cir. 2008). “To determine if an environment is  
6 sufficiently hostile or abusive to violate Title VII, [courts] look at ‘all the circumstances,’  
7 including the ‘frequency of the discriminatory conduct; its severity; whether it is physically  
8 threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes  
9 with an employee's work performance.’” *Nichols v. Azteca Rest. Enterprises, Inc.*, 256 F.3d 864,  
10 872 (9th Cir. 2001) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)); *see also*  
11 *Sheridan v. Providence Health & Servs.-Oregon*, No. 10-CV-775-PK, 2011 WL 6887160, at \*5  
12 (D. Or. Dec. 29, 2011) (“To assert a hostile workplace claim under the ADEA, Plaintiff must meet  
13 the same requirements as for a hostile workplace claim under Title VII: the existence of severe or  
14 pervasive and unwelcome verbal or physical harassment because of a plaintiff's membership in a  
15 protected class”) (citing *Sischo–Nownejad v. Merced Cmty. Coll. Dist.*, 934 F.2d 1104, 1109 (9th  
16 Cir. 1991), superseded by statute on other grounds as recognized by *Dominguez–Curry v. Nev.*  
17 *Trans. Dist.*, 424 F.3d 1027 (9th Cir. 2005)). A plaintiff must show that the work environment  
18 was both subjectively and objectively hostile. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1113  
19 (9th Cir. 2004).

## 20 **2. Discussion**

21 Ms. Huddleston has not met the first or third requirement of the *prima facie* case for  
22 harassment based on a hostile work environment.

23 As discussed above, other than the fact that Ms. Huddleston is the only African-American  
24 female and apparently the oldest employee in her department, there is no evidence in the record  
25 from which a jury could reasonably conclude that any of the conduct of which Ms. Huddleston  
26 complains was based on her membership in a protected class. Ms. Huddleston’s own testimony  
27 that Defendants’ conduct was based on her race, age, and sex is entirely speculative. Therefore,  
28 Ms. Huddleston has not demonstrated a triable issue of fact that she was subjected to verbal or

1 physical conduct based on her race, sex or age.

2 Further, none of the conduct at issue was so “severe and pervasive” as to create an abusive  
3 working environment under the standards articulated above. In particular, considering all the  
4 circumstances, the Court concludes that while Ms. Huddleston found the work environment to be  
5 hostile, she has not demonstrated a material issue of fact as to whether the work environment was  
6 *objectively* hostile. Although she believes she was subjected to a higher level of scrutiny than her  
7 coworkers, the scrutiny took the form of various negative evaluations and plans to improve her  
8 performance. As Ms. Huddleston has not demonstrated a fact question as to the substantive  
9 conclusions Defendants reached about her performance, this conduct is not sufficient to  
10 demonstrate a hostile work environment. Nor do the various reprimands and instructions by Lew  
11 and Augustine (e.g., to stop ripping paper by the copy machine, to respond immediately to pop-up  
12 messages, to use colored pens in her work, and to adhere to the dress code) meet this requirement.  
13 Rather, the Court concludes based on all the circumstances that Ms. Huddleston has failed to offer  
14 evidence that her work environment was, by an objective standard, hostile for the purposes of the  
15 ADEA and Title VII.

16 Defendants are entitled to summary judgment on Ms. Huddleston’s harassment claims.

17 **IV. CONCLUSION**

18 For the reasons stated above, the Motion is GRANTED. The Clerk is instructed to enter  
19 judgment in favor of Defendants on all claims.

20 **IT IS SO ORDERED.**

21 Dated: December 7, 2017

22   
23 \_\_\_\_\_  
24 JOSEPH C. SPERO  
25 Chief Magistrate Judge  
26  
27  
28