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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CARMEN CORTES,

CASE NO. 5:11-cv-03645 EJD

Plaintiff(s),

**ORDER GRANTING DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT**

v.

COUNTY OF SANTA CLARA,

[Docket Item No(s). 32]

Defendant(s).
_____ /

In this action alleging employment discrimination and retaliation, presently before the court is Defendant County of Santa Clara’s (“Defendant”) Motion for Summary Judgment. See Docket Item No. 32. Plaintiff Carmen Cortes (“Plaintiff”) has filed written opposition to the Motion.

Federal jurisdiction arises pursuant to 28 U.S.C. § 1331. Having carefully reviewed the relevant documents and evidence, the court has determined that Defendant’s Motion is meritorious. It will therefore be granted for the reasons explained below.¹

I. FACTUAL BACKGROUND

A. The Assessor’s Office

Defendant maintains an Assessor’s Office separated into five divisions, one of which is the Business Division. See Decl. of Cristina Torio (“Torio Decl.”), Docket Item No. 34, at ¶ 4. The

¹ Plaintiff’s request to postpone ruling on this Motion pursuant to Federal Rule of Civil Procedure 56(d) is DENIED because the court finds it both untimely - filed a month *after* the close of fact discovery - and unjustified. See Blough v. Holland Realty, Inc., 574 F.3d 1084, 1091 n.5 (9th Cir. 2009); Everson v. Leis, 556 F.3d 484, 493 (6th Cir. 2009).

1 Business Division is responsible for “locating, valuing, and enrolling all taxable business personal
2 property, including property such as computers, supplies, machinery, equipment, and fixtures”
3 through a series of audits that are completed each year. Id. The Business Division is also
4 responsible for processing business property statements, which need to be completed by June 30th
5 each year. Id. at ¶ 5.²

6 The Assessor’s Office employs three grades of auditors: senior auditor-appraisers, auditor-
7 appraisers, and accountant auditor-appraisers. Id. at ¶ 7. Auditors at each level generally work
8 independently and often travel within and out of California to investigate and complete assignments.
9 Id.; Decl. of Dow W. Patten (“Patten Decl.”), Docket Item No. 39, at Ex. B. At the beginning of
10 each fiscal year, every auditor-appraiser is required to prepare an annual audit workplan setting forth
11 “rolling” deadlines by which assigned audits will be completed. See Torio Decl., at ¶ 6. This is
12 done to ensure that all audits are completed by June 30th. Id.

13 **B. Plaintiff is hired by the Assessor’s Office**

14 Plaintiff is a Hispanic woman of Puerto Rican descent. Plaintiff was hired to work as an
15 auditor-appraiser in the Business Division in June, 2005. Id. at ¶¶ 8, 9. By that time and according
16 to her employment application, Plaintiff had earned a bachelor’s degree in Accounting, was licensed
17 as a certified public accountant, and had worked as an auditor/accountant at Deloitte & Touche, Tab
18 Products Co., Integrated Technologies, Softbank, Solectron, NetFrame, Lasescape, and Hewlett-
19 Packard. See Patten Decl., at Ex. A.

20 Plaintiff was initially assigned 42 audits to complete during the 2005 to 2006 fiscal year. See
21 Torio Decl., at ¶ 10. For that fiscal year, the range of audits assigned to each auditor-appraiser at the
22 beginning of the period was between 33 and 44 audits, with an average of 38 assigned audits per
23 auditor. Id. By the end of the fiscal year, the range was between 27 and 44 audits with the same
24 average. Id.

25 **C. Plaintiff is subjected to discipline**

26 Cristina Torio (“Torio”) was Plaintiff’s supervisor from January, 2006, through January,
27

28 ² Plaintiff’s evidentiary objections to the Torio Declaration are OVERRULED.

1 2009. Id., at ¶ 9. Richard Leong (“Leong”) was her supervisor from January, 2009, through August
2 2, 2010, after Torio was promoted to Assistant Chief Auditor-Appraiser. See id. at ¶ 3; Decl. of
3 Richard Leong (“Leong Decl.”), Docket Item No. 35, at ¶ 3.³ Beginning in 2006, the evidence
4 shows that Plaintiff was subject to the following instances of discipline before her termination on
5 August 2, 2010:

- 6 • On January 13, 2006, Plaintiff was given a verbal counseling by Torio because the
7 number of audits she had completed by that time - two audits - was insufficient in
8 comparison to the total number of audits assigned to her. See Torio Decl., at ¶ 12;
9 Ex. A. Torio also reassigned eight audits originally assigned to Plaintiff to other
10 auditor-appraisers. Id.
- 11 • On January 27, 2006, Torio provided Plaintiff a mid-probationary performance
12 appraisal noting that Plaintiff needed improvement in “quantity of work” and “work
13 habits.” Id. at ¶ 13; Ex. B.
- 14 • On April 5, 2006, Plaintiff was given another verbal counseling by Torio because
15 Plaintiff was behind in her goal to complete five to six audits per month and still had
16 21 audits to complete before the end of the fiscal year. Id. at ¶ 14; Ex. C. Torio
17 reassigned another seven audits and instructed Plaintiff to complete the remaining 14
18 audits by May 31, 2006. Id.
- 19 • On June 7, 2006, Plaintiff was given a written counseling by Torio because she did
20 not timely complete the 14 assigned audits. Id. at ¶ 15; Ex. D. Torio instructed
21 Plaintiff to complete the remaining audits by June 14, 2006. Id.
- 22 • On July 18, 2006, Plaintiff was given a second written counseling by Torio because
23 many of her audits needed improvement before submission could be made to the
24 taxpayer and one of the audits was not completed by the June 30th deadline, resulting
25 in an assessment loss to Defendant. Id. at ¶ 16; Ex. E.
- 26 • On February 7, 2007, Plaintiff was given a third written counseling by Torio, again
27 for failing to timely complete audits according to her workplan. Id. at ¶ 19; Ex. F. A
28 third verbal counseling by Torio followed on May 9, 2008, for the same reason. Id. at
¶ 21; Ex. G.
- On December 10, 2008, and again on March 16, 2009, Torio issued to Plaintiff
“Employee Unfavorable Reports,” both of which explained Plaintiff’s failure to
complete audits according to the deadlines provided in her workplan. Id. at ¶¶ 22, 23;
Exs. H, I. By March, 2009, Plaintiff carried the lightest workload in her unit. Id. at
Ex. I.
- On October 26, 2009, Torio provided Plaintiff with a notice of forty-hour suspension
from work for a continued failure to complete audits on a timely basis. Id. at ¶ 25;
Ex. J.
- On December 3, 2009, Leong provided Plaintiff a performance evaluation noting that
Plaintiff needed improvement in “quantity of work,” “adaptability,”

³ Plaintiff’s evidentiary objections to the Leong Declaration are also OVERRULED.

1 “communication,” and “work habits.” See Leong Decl., at ¶ 6; Ex. B. The “overall
2 appraisal” was “improvement needed.” Id.

- 3 • On February 25, 2010, Torio provided Plaintiff with a notice of three-week
4 suspension for poor job performance. See Torio Decl., at ¶ 26; Ex. K.
- 5 • On July 8, 2010, Torio advised Plaintiff byletter that she recommended Plaintiff’s
6 termination. Id. at ¶ 27; Ex. L. Plaintiff was placed on administrative leave as a
7 result, and was ultimately terminated after a Skelly⁴ hearing on August 2, 2010. Id.

8 **D. Plaintiff’s Discrimination Complaints**

9 Plaintiff made two discrimination complaints during her employment:

- 10 • On December 18, 2006, Plaintiff lodged a complaint with Defendant’s Department of
11 Equal Opportunity and Employee Development. See Patten Decl., at Ex. H. Plaintiff
12 alleged that she was being treated differently by Torio because of her race/ancestry
13 and gender. Id. On January 30, 2007, the investigator concluded that Plaintiff’s
14 allegations were not be sustained. Id.
- 15 • On November 12, 2009, Plaintiff submitted a charge against Defendant with the
16 California Department of Fair Employment and Housing (“DFEH”). See Decl. of
17 David Rollo (“Rollo Decl.”), Docket Item No. 33, at Ex. D. As relevant here,
18 Plaintiff alleged that she was subjected to differential treatment due to her race and
19 disability. Id. On June 23, 2010, Plaintiff amended this charge to include her
20 suspension and termination and requested that her charge be filed with the Equal
21 Employment Opportunity Commission. Id.

22 Plaintiff alleges, and Defendant does not dispute, that the DFEH issued a right to sue letter
23 on September 20, 2010, relating to the June 23rd amended charge, and another right to sue letter
24 relating to Plaintiff’s termination on July 19, 2011. This lawsuit followed on July 25, 2011.

25 **II. LEGAL STANDARD**

26 A motion for summary judgment should be granted if “there is no genuine dispute as to any
27 material fact and the movant is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(a);
28 Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). The moving party bears the initial
burden of informing the court of the basis for the motion and identifying the portions of the
pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the
absence of a triable issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

If the moving party meets this initial burden, the burden then shifts to the non-moving party
to go beyond the pleadings and designate specific materials in the record to show that there is a
genuinely disputed fact. Fed. R. Civ. P. 56(c); Celotex, 477 U.S. at 324. The court must regard as

⁴ See Skelly v. State Pers. Bd., 15 Cal. 3d 194 (1975).

1 true the opposing party’s evidence, if supported by affidavits or other evidentiary material. Celotex,
2 477 U.S. at 324. However, the mere suggestion that facts are in controversy, as well as conclusory
3 or speculative testimony in affidavits and moving papers, is not sufficient to defeat summary
4 judgment. See Thornhill Publ’g Co. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979). Instead, the
5 non-moving party must come forward with admissible evidence to satisfy the burden. Fed. R. Civ.
6 P. 56(c); see also Hal Roach Studios, Inc. v. Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1990).

7 A genuine issue for trial exists if the non-moving party presents evidence from which a
8 reasonable jury, viewing the evidence in the light most favorable to that party, could resolve the
9 material issue in his or her favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986);
10 Barlow v. Ground, 943 F.2d 1132, 1134-36 (9th Cir. 1991). Conversely, summary judgment must
11 be granted where a party “fails to make a showing sufficient to establish the existence of an element
12 essential to that party’s case, on which that party will bear the burden of proof at trial.” Celotex, 477
13 U.S. at 322.

14 III. DISCUSSION

15 Plaintiff asserts the following causes of action: (1) race discrimination in violation of
16 California’s Fair Employment and Housing Act (“FEHA”), Government Code § 12940 et. seq., (2)
17 retaliation in violation of FEHA, (3) retaliation in violation of the CFRA, (4) race discrimination in
18 violation of 42 U.S.C. § 1981, (5) race discrimination in violation of 42 U.S.C. § 1983, and (6)
19 retaliation in violation of 42 U.S.C. § 1983.⁵ Since Defendant moves for summary judgment on all
20 of these claims, each are discussed below.

21 A. Race Discrimination

22 Defendant argues there is no issue of triable fact as to Plaintiff’s first cause of action for race
23 discrimination under FEHA.

24 FEHA makes it unlawful for an employer to discriminate against a person because of his or
25 her race. Cal. Gov’t Code § 12940(a). To examine such claims, “California has adopted the
26 three-stage burden-shifting test established by the United States Supreme Court for trying claims of
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28 ⁵ Based on Plaintiff’s representation in the opposition to this motion, her second, fourth, sixth
and seventh causes of action will be dismissed.

1 discrimination . . . based on a theory of disparate treatment.” Guz v. Bechtel Nat’l, Inc., 24 Cal. 4th
2 317, 354 (2000).⁶ The first stage requires the plaintiff to state a prime face case. Id. at 355.

3 “Generally, the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he
4 was qualified for the position he sought or was performing competently in the position he held, (3)
5 he suffered an adverse employment action, such as termination, demotion, or denial of an available
6 job, and (4) some other circumstance suggests discriminatory motive.” Id.

7 If the plaintiff demonstrates a prima facie case, a presumption of discrimination arises and
8 the burden shifts to defendant to articulate a legitimate, nondiscriminatory reason for its conduct. Id.
9 at 355-56. If defendant states such a reason, the burden then shifts back to plaintiff to show that the
10 stated reason is a pretext for discrimination. Id.

11 1. Prima Facie Case

12 Plaintiff believes she can establish the elements of a prima face case of race discrimination
13 because (1) she is Hispanic, (2) she experienced discipline, and (3) “similarly situated applicants,
14 who are Asian and non-Puerto Rican, were not disciplined by decision makers of Filipino descent.”
15 In response, Defendant does not dispute the first two elements, both of which have support in the
16 record. Instead, Defendant argues two other points.

17 a. Satisfactory Job Performance

18 Pointing to evidence that Plaintiff failed to submit audits on time from 2006 through her
19 termination, Defendant first argues that Plaintiff’s prima facie showing is incomplete because
20 Plaintiff has not also proven that she was performing her job satisfactorily.

21 Defendant is correct that the prima facie showing required in a FEHA case is often stated to
22 include satisfactory job performance as a requisite element. Indeed, one such formulation
23 articulated by the California Supreme Court is cited above. Id. at 354. It is also true, however, that
24 a showing of satisfactory job performance may not be such a strict requirement depending on the
25 particular facts at issue. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n. 13 (1973)
26 (“The facts necessarily will vary in [discrimination] cases, and the specification above of the prima

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28 ⁶ The court also cites state and federal law interchangeably because, in the area of
employment discrimination, “California courts look to pertinent federal precedent when applying
[their] own statutes.” Guz, 24 Cal.4th at 354.

1 facie proof required from respondent is not necessarily applicable in every respect to differing
2 factual situations.”); see also Heard v. Lockheed Missiles & Space Co., 44 Cal. App. 4th 1735, 1750
3 (1996) (“The McDonnell Douglas model was never intended to be rigid, mechanized, or ritualistic. .
4 . . The importance of McDonnell Douglas is not in its specification of the discrete elements of proof
5 but is instead in its recognition that the [discrimination] plaintiff carries the initial burden of offering
6 evidence *which creates an inference that an employment decision was based on an illegal*
7 *discriminatory criterion.*” (quotations and citations omitted, emphasis preserved)).

8 In the context of this case, requiring Plaintiff to prove satisfactory job performance at this
9 stage is concerning because it restricts that element to a narrow definition unsuited to the
10 circumstances. As noted, Defendant cites its own expectations of Plaintiff which it then contends
11 Plaintiff consistently failed to achieve. But one of Plaintiff’s central contentions is that these same
12 expectations were in fact unachievable and not applied to others in her position or with her same
13 skills. This contention is entirely plausible considering each auditor-appraiser’s workplan is
14 individualized and, as the evidence in this case demonstrates, subject to adjustment by a supervisor
15 and “continually evolving.” See Torio Decl., at ¶ 6 (“At the beginning of each fiscal year, every
16 auditor-appraiser in the Assessor’s Office is required to prepare an annual audit work plan setting
17 forth deadlines to complete their assigned audits; ¶ 10 (“During the 2005 to 2006 fiscal year,
18 [Plaintiff] was initially assigned 42 audits. Over the course of that fiscal year, I reduced her
19 assignments to 27 audits based on her failure to complete her audits.”); Patten Decl., at Ex. C, 65:9-
20 12 (“Because work plan[s] are, like evolving, continually evolving.”).⁷

21 The Courts of Appeals have also been concerned with this issue. Faced with a similar
22 scenario, the Ninth Circuit rejected the approach advocated by Defendant, explaining that it “seems
23 to conflate the minimal inference needed to establish a prima facie case with the specific, substantial
24 showing” that must be made to demonstrate that Defendant’s reasons for adverse action are pretext.

26 ⁷ It is for this reason - the individualized nature of the workplans - that the case cited by
27 Defendant is inapposite. In Crawford v. MCI Worldcom Communications, Inc., 167 F. Supp. 2d
28 1128 (S.D. Cal. 2001), the plaintiff admitted that a particular standard stated in terms of a percentage
was used to measure performance, and the evidence demonstrated that the plaintiff was not meeting
that standard. Plaintiff has made no similar admission, and the evidence does not show that a
comparable percentage-type standard applied to auditor-appraisers.

1 Aragon v. Republic Silver State Disposal, 292 F.3d 654, 659 (9th Cir. 2002). Similarly, the Eighth
2 Circuit has held that “by requiring plaintiff to disprove the alleged conduct violations in order to
3 establish his prima facie case, the district court essentially required plaintiff, at the outset, to
4 disprove defendant’s alleged business reasons for its adverse employment action - in other words, to
5 prove pretext and the ultimate issue of intentional discrimination.” Davenport v. Riverview Gardens
6 Sch. Dist., 30 F.3d 940, 944 (8th Cir. 1994). “The prima facie burden is not so onerous.” *Id.*

7 At its extreme, forcing an employment-discrimination plaintiff to essentially prove pretext at
8 the front end would allow employers to impose unreasonable amounts of work on an employee,
9 terminate them for substandard performance, and then defeat the employee’s discrimination case at
10 the prima facie stage by simply arguing that the employee failed to perform at the aforementioned
11 unreasonable level. All sorts of nefarious motivations would go unpunished if that were truly the
12 law. Fortunately its not. As McDonnell Douglas, Aragon and Davenport make clear, the prima
13 facie burden is meant to be a minimal one with elements that can be modified to fit the case.
14 Aragon, 292 F.3d at 659; Davenport, 30 F.3d at 944 (“[T]he prima facie case in discrimination cases
15 varies somewhat with the specific facts of each case . . .”).

16 Accordingly, the court has determined, based on *these* facts and *these* arguments, that
17 Defendant’s workplan metric is not a reasonable formulation of the job performance factor. Instead,
18 the alternative definition is appropriate. Plaintiff must therefore show that she was qualified for her
19 position as an auditor-appraiser. See Davenport, 30 F.3d at 944. This fact is undisputed. See Rollo
20 Decl., Ex. B, at 73:18-74:22; Torio Decl., at ¶ 8. The court therefore finds that Plaintiff has met her
21 burden on this element of the prima facie case.

22 **b. Disparate Treatment**

23 Defendant also argues that Plaintiff failed to show she was treated differently than other
24 similarly-situated employees as part of her prima facie case. To that end, Defendant references
25 incidents in the record which show “Plaintiff has an extensive history of failing to submit her audits,
26 and she has not identified any other employees with a similar history.”

27 The court disagrees. Contrary to what Defendant represents, Plaintiff has produced *some*
28 evidence suggesting certain instances of disparate treatment. In that regard, the record demonstrates

1 Plaintiff was the only auditor-appraiser subjected to a mid-probationary review, and was the only
2 auditor-appraiser disciplined by Torio in January through June, 2006, for failing to complete audits
3 on a “flow basis,” even though it appears other auditor-appraisers had a comparable amount of
4 outstanding appraisals during that time. See Patten Decl., at Ex. C, 56:9-12, 100:15-101:15; Ex. G;
5 Ex. I. Again, “[e]stablishing a prima facie case should not be such an onerous requirement.”
6 Humphries v. CBOCS W., Inc., 474 F.3d 387, 405 (7th Cir. 2007); see also Guz, 24 Cal. 4th at 355.
7 “The requisite degree of proof necessary to establish a prima facie case for [discrimination] claims
8 on summary judgment is minimal and does not even need to rise to the level of a preponderance of
9 the evidence.” Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994). Because Plaintiff has
10 submitted a minimal amount of evidence on this element, the court finds it satisfied. Plaintiff has
11 therefore stated a prima facie case on her claim of race discrimination under FEHA.

12 2. Nondiscriminatory Reason

13 The burden now shifts to Defendant to “‘clearly set forth, through the introduction of
14 admissible evidence,’ reasons for its actions which, *if believed by the trier of fact*, would support a
15 finding that unlawful discrimination was not the cause of the employment action.” St. Mary’s
16 Honor Center v. Hicks, 509 U.S. 502, 507 (1993) (quoting Texas Dept. of Cmty. Affairs v. Burdine,
17 450 U.S. 248, 254-55 (1981)) (emphasis preserved); see also Guz, 24 Cal. 4th at 355-56.

18 Here, the admissible evidence submitted by Defendant demonstrates that its employment
19 decisions concerning Plaintiff were the result of legitimate, nondiscriminatory motivations. On the
20 issue of work assignments, Defendant’s decision to assign Plaintiff 42 audits is supported by the
21 extent of her prior professional auditing experience. See Rollo Decl., at Ex. B, 73:23-74:22; Patten
22 Decl., at Ex. A. The evidence also shows that the amount of audits assigned to Plaintiff was within
23 the range of audits assigned to other similar employees. See Torio Decl, at ¶ 10. These facts rebut
24 Plaintiff’s allegation that the amount of work assigned to her was motivated by her race.

25 As to the instances of discipline, the evidence shows that Plaintiff consistently failed to
26 complete audits in a timely manner according to her individual workplan. This was true even after
27 the number of audits assigned to Plaintiff was reduced and deadlines were extended by her
28 supervisors. The evidence also shows that Plaintiff was ultimately terminated due to an unfavorable

1 evaluation. Discipline and termination due to poor performance is not discriminatory. See Unt v.
2 Aerospace Corp., 765 F.2d 1440, 1447 (9th Cir. 1985).

3 Because Defendant has produced evidence supporting legitimate, nondiscriminatory reasons
4 for its conduct, the court finds that it satisfied its burden at this stage of the analysis.

5 3. Pretext

6 It is now Plaintiff's obligation to "offer substantial evidence that [Defendant's] stated
7 nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer
8 acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact
9 could conclude the employer engaged in intentional discrimination." Hersant v. Dep't of Soc.
10 Servs., 57 Cal. App. 4th 997, 1004-1005 (1997). When, as here, only circumstantial evidence of
11 pretext is available, such evidence must be "specific" and "substantial." Wallis, 26 F.3d at 890; see
12 also Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1220 (9th Cir. 1998) (holding that a plaintiff
13 "must produce evidence in addition to that which was sufficient for her prima facie case in order to
14 rebut the defendant's showing" of non-discriminatory purpose).

15 Plaintiff relies on circumstantial statistical evidence to show pretext, which she believes
16 overwhelmingly shows disparate treatment. The court, however, disagrees that this evidence is
17 sufficient to discharge Plaintiff's burden. As an initial matter, the documentation supporting
18 Plaintiff's statistical interpretation, which is largely contained in Exhibit I to her attorney's
19 declaration, is neither presented nor cited in a meaningful way such that the court can understand its
20 impact on Plaintiff's case. Plaintiff has simply submitted a one and one-half inch stack of
21 documents which she contends supports her argument for pretext. But most of this stack consists of
22 a list of audits, the significance of which is unclear. "The district judge is not required to comb the
23 record to find some reason to deny a motion for summary judgment." Forsberg v. Pac. Nw. Bell Tel.
24 Co., 840 F.2d 1409, 1418 (9th Cir. 1988). "A district court does not have a duty to search for
25 evidence that would create a factual dispute." Bias v. Moynihan, 508 F.3d 1212, 1218-19 (9th Cir.
26 2007). The court cannot marshal Plaintiff's evidence for her.

27 In addition, Plaintiff did not adequately explain the conclusions her attorney draws from this
28 documentation. In his declaration, Plaintiff's attorney states that a series of facts are "apparent"

1 from Exhibit I. As already noted, however, there is not much that can be apparent from Exhibit I on
2 its face, outside of the chart which lists the number of audits assigned and completed by each
3 auditor-appraiser as of March 31, 2006. That chart does not contain obvious evidence of
4 discrimination.

5 It also appears that many of Plaintiff's conclusions based on Exhibit I are insubstantial
6 because they include comparisons of Plaintiff with other employees who are not similarly-situated.
7 For example, Plaintiff compares her work pattern and deadlines to that of senior auditor-appraisers,
8 but fails to account for the fact that employees in the senior position are expected to complete fewer,
9 yet more complicated audits each year. See Reply Decl. of Christina Torio ("Torio Reply Decl."),
10 Docket Item No. 45, at ¶ 7; Patten Decl., at Ex. B (auditor-appraiser positions are "distinguished
11 from positions in the Senior Auditor-Appraiser class in that they are not assigned to the year round
12 audit program and perform less difficult commercial and industrial audit-appraisal work.").
13 Although it is true that similarly-situated employees need not be identical, they must be similar in all
14 material aspects. Hawn v. Exec. Jet Mgmt., Inc., 615 F.3d 1151, 1157 (9th Cir. 2010). Material
15 similarity "is a fact-intensive inquiry, and what facts are material will vary depending on the case."
16 Id. Here, the distinction in work requirements is a material *dissimilarity* between Plaintiff and senior
17 auditor-appraisers because Plaintiff seeks to show discrimination through circumstantial evidence of
18 differing works assignments. The evidence falls short of supporting disparate treatment if
19 distinctions between employees can be explained by other, non-discriminatory reasons, such as
20 different job expectations.

21 Moreover, Plaintiff's reliance on statistical information is insufficient to establish a triable
22 issue of fact regarding pretext unless the statistics "show a stark pattern of discrimination
23 unexplainable on grounds other than" race. Coleman v. Quaker Oats Co., 232 F.3d 1271 (quoting
24 Rose v. Wells Fargo & Co., 902 F.2d 1417, 1423 (9th Cir. 1990)). The statistical evidence
25 presented here fails to meet that standard because the differences in work patterns shown by the
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1 statistics can be explained by the individualized nature of each auditor-appraiser's workplan.⁸

2 Further, Plaintiff has not identified another comparable non-Hispanic employee who
3 continuously failed to meet the expected workplan, and as already indicated, Plaintiff's own record
4 of discipline is well-supported by documentation of her performance deficiencies.

5 For these reasons, the court finds that Plaintiff's evidence of pretext is insubstantial and her
6 assertion of race discrimination is unsupported by sufficient evidence. She has therefore failed to
7 meet her burden at this stage, and Defendant is entitled to summary judgment on Plaintiff's first
8 cause of action.

9 **B. Retaliation**

10 Plaintiff's third and fifth causes of action are for retaliation. In the former, Plaintiff alleges
11 retaliation after she made complaints of discrimination. See Cal. Gov't Code § 12940(h). In the
12 latter, Plaintiff alleges retaliation after taking medical leave. See Cal. Gov't Code § 12945.2(1).
13 Claims for retaliation under FEHA are subject to the same burden shifting analysis that governs
14 discrimination claims. See Yanowitz v. L'Oreal USA, Inc., 36 Cal. 4th 1028, 1042 (2005).

15 Plaintiff, therefore, must first establish a prima facie case before proceeding further. Id. "[I]n order
16 to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she
17 engaged in a "protected activity," (2) the employer subjected the employee to an adverse
18 employment action, and (3) a causal link existed between the protected activity and the employer's
19 action." Id.

20 Here, Plaintiff cites the following facts in support of the first two elements of a prima facie
21 case: Plaintiff filed a discrimination charge with the DFEH on November 16, 2009. She was then
22 suspended for three weeks on February 25, 2010. She amended her DFEH charge on June 24, 2010.
23 She was then terminated on July 8, 2010.

24 Assuming these facts satisfy the first two required elements, Plaintiff's showing on the third

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26 ⁸ The same can be said of Plaintiff's allegation that she was given an unattainable amount of
27 audits to complete. Contrary to Plaintiff's unsubstantiated argument, the evidence shows that she
28 was assigned audits based on her experience within a range comparable to other auditor-appraisers.
In addition, Plaintiff does not account for the fact that she still did not complete audits timely even
when the number of audits assigned to her was reduced to a number at the low-end of the range of
audits assigned to comparable employees.

1 element fails to meet her burden. Plaintiff argues that a causal link between the DFEH charge and
2 the adverse employment actions can be inferred based on the timing of these events. She relies on
3 the proposition that “in some cases, causation can be inferred from timing alone where an adverse
4 employment action follows on the heels of protected activity.” Villiarimo v. Aloha Island Air, Inc.,
5 281 F.3d 1054, 1065 (9th Cir. 2002). But “if a plaintiff’s causation arguments rest on the relative
6 timing of his protected activity and his dismissal, the plaintiff must also clearly show that the
7 defendant was aware of the protected activity when the adverse employment decision was made.”
8 Burch v. Regents of Univ. of Cal., 433 F. Supp. 2d 1110, 1126 (E.D. Cal. 2006). Plaintiff points to
9 no evidence which demonstrates that Defendant knew of her DFEH charge or the amended charge
10 when it suspended her in February, 2010, and terminated her in July, 2010.

11 Furthermore, Plaintiff would not prevail even if the court proceeded to the pretext analysis.
12 No matter how short the amount of time at issue, “there is no set time within which acts necessarily
13 support an inference of retaliation.” Coszalter v. City of Salem, 320 F.3d 968, 978 (9th Cir. 2002).
14 “Whether an adverse employment action is intended to be retaliatory is a question of fact that must
15 be decided in the light of the timing *and* the surrounding circumstances.” Id. (emphasis added). The
16 surrounding circumstances in this case include Plaintiff’s deficient work performance and the
17 numerous verbal and written counseling sessions that occurred prior to November, 2009. Those
18 facts significantly weaken any inference that can arise from timing alone. See Arteaga v. Brink’s,
19 Inc., 163 Cal. App. 4th 327, 354 (2008) (“An employee, fearing that his job is on the line, may not
20 raise an old wound as a preemptive strike to escape appropriate discipline or discharge.”). Plaintiff
21 seeks to ignore that evidence by relying on the timing between her charge and the last two adverse
22 employment actions, and the court has already explained why her other evidence is insufficient to
23 establish pretext.

24 Because Plaintiff did not establish a prima facie case of retaliation and cannot show pretext
25 in any event, Defendant is entitled to summary judgment on the third and fifth causes of action.⁹

26 _____
27 ⁹ Since Plaintiff offered no argument concerning her fifth cause of action, Defendant’s
28 Motion is unopposed as to the claim of retaliation for taking medical leave. Accordingly, Defendant
is entitled to summary judgment on that claim because it has met its burden to show there is no
dispute of material fact that its conduct was not retaliatory. See Cristobal v. Siegel, 26 F.3d 1488,

