United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

STACY GUTHMANN,

Plaintiff,

v.

CLASSIC RESIDENCE MANAGEMENT LIMITED PARTNERSHIP, et al.,

Defendants.

Case No. 16-CV-02680-LHK

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT ON SELECTED CLAIMS

Re: Dkt. No. 41

Plaintiff Stacy Guthmann ("Plaintiff") brings this action against CC-Palo Alto, Inc. D/B/A Vi at Palo Alto ("Vi") and Classic Residence Management Limited Partnership ("Classic Residence Management") (collectively, "Defendants"). Before the Court is Defendants' motion for summary judgment on certain claims in Plaintiff's complaint. ECF No. 41 ("Mot."). Specifically, Defendants move for summary judgment on Plaintiff's gender discrimination, age discrimination, retaliation, and wrongful termination claims. Having considered the submissions and oral arguments of the parties, the relevant law, and the record in this case, the Court GRANTS Defendants' motion for summary judgment on these claims.

I. BACKGROUND

A. Factual Background

Defendant Classic Residence Management operates retirement communities across the United States. Guthmann Decl. ¶ 2. In August 2011, Plaintiff began working as a Sales Counselor at one of these retirement communities, Vi at Palo Alto. Ex. C. to Mot. Plaintiff worked at Vi at Palo Alto until she was terminated on May 28, 2015. Guthmann Decl. ¶ 1. As a Sales Counselor, Plaintiff's job duties included sales and marketing of residential units at Vi at Palo Alto.

Plaintiff claims that from the time she was hired through January 2012, Plaintiff "reported to work but did not clock in or out." Opp. at 3; Guthmann Depo. 17:4–20. Thereafter, Plaintiff's supervisor instructed Plaintiff to begin clocking in and out, and Plaintiff began to do so. *Id.* However, because Plaintiff was a Sales Counselor, Plaintiff was often unexpectedly interrupted at lunchtime by potential buyers seeking to tour residential units. This would require Plaintiff to clock in before beginning the tour. Plaintiff was also required to "punch out at the supposed end of the day in an artificial manner" even if Plaintiff continued to work after the "supposed end of the day." Guthmann Decl. ¶ 6. According to Plaintiff, this system meant that Plaintiff worked off the clock between 5 and 10 times per month "during the busy times of the year, i.e., October through January," and approximately four times per month during the rest of the year. *Id.*

Plaintiff claims that she made numerous complaints about this system and "constantly suggested that Defendants simply adjust my salary and classification and make me exempt." *Id.* ¶ 7. Specifically, Plaintiff claims that she discussed this topic once per month for almost four years with her supervisor, Michael Wilson. *Id.* ¶ 7. Plaintiff also claims that she discussed this topic with Shari Okumura, the Director of Human Resources, approximately ten times in three and a half years. *Id.* ¶ 8. Finally, Plaintiff claims that she discussed this issue with the Executive Director of Vi at Palo Alto, Steve Brudnick, five times per year. *Id.* ¶ 9.

Plaintiff also claims that she complained about other allegedly unfair wage practices. For example, Plaintiff states that Plaintiff received a commission on every sale of a residential unit. However, if the sale was cancelled for some reason, Plaintiff was required to pay back the commission she earned, but Defendants would not return the amount that Plaintiff had paid in taxes on the commission. *Id.* ¶ 10. Plaintiff complained about this practice to Wilson in April

2013. Plaintiff claims that she also complained to Wilson about another issue regarding what Plaintiff regarded as unfair policies for using Personal Time Off. *Id.* ¶ 11. Additionally, Plaintiff complained that after Defendants switched to a new time-clock system in May 2014, the new system malfunctioned in ways that made it appear that Plaintiff was "working a lot of overtime" and that Plaintiff was taking longer breaks. *Id.* ¶ 13; Opp. at 4.

According to Plaintiff, these complaints and the problems with the new time-clock system caused Wilson "to become frustrated and terse with Plaintiff." Opp. at 4. Therefore, Plaintiff contacted Okumura, who arranged a meeting with Plaintiff to discuss the matter. Guthmann Decl. ¶ 15. When Plaintiff met with Okumura on June 2, 2014, Plaintiff states that Okumura discussed ways to improve the relationship between Plaintiff and Wilson. *Id.* However, Plaintiff also stated that "[w]hen [Plaintiff] pointed out to Ms. Okumura that there were differences between the way that I was compelled to clock in a[nd] out and employees on her Staff, [Okumura] became defensive and angry." *Id.*

The same day as the meeting with Okumura, June 2, 2014, Plaintiff made a separate request to Wilson. Specifically, Plaintiff "foresaw an upcoming need to work on a Saturday coupled with [a] need for some personal time in an upcoming work week." Opp. at 5. Therefore "Plaintiff requested to not have to take PTO [Personal Time Off] but instead to work on Saturday because she believed her PTO had been unfairly depleted by Defendants' practices." *Id.* Wilson denied this request. *Id.*

On June 13, 2014, Plaintiff learned that since June 2, 2014, the Director of Resident Services, Spiller, had been "keeping a log" of Plaintiff's personal calls, lunch breaks, and clock-punching times. *Id.* ¶ 17. Plaintiff found this "highly unusual since [Spiller] was not in [Plaintiff's] chain of command," and therefore Plaintiff complained to Okumura. *Id.* Okumura informed Plaintiff that Spiller had complained to Okumura that Plaintiff was making too many personal calls. *Id.* Plaintiff states that "[t]o solve the issue, Plaintiff shut her door." Opp. at 5.

Plaintiff continued to complain about wage and hour issues to Wilson and Okumura. *Id.* Eventually, Plaintiff emailed Defendants' corporate office in Chicago and requested more

information on why Plaintiff was not classified as an exempt employee. Ex. B to Opp. Okumura forwarded this email and the corporate office's response to Brudnick. *Id.*

On August 12, 2014, Plaintiff received a mid-year performance evaluation from Wilson. Ex. A (Wilson Depo., Ex. 5). As part of the evaluation, Wilson wrote the following:

> An issue coming to [the] forefront for Stacy is that she perceives a disparity regarding her and a few other employees regarding exempt/nonexempt status and has made this an issue of dispute recently with myself and the Director of H.R. Although it has been explained to her the rationale behind the non-exempt status of the Sales Counselor position said status is an irritant to her, however, it has not had a negative effect on her work performance or morale.

Id.

On August 20, 2014, employees in Defendants' Vi community in San Diego filed a class action lawsuit asserting claims related to Defendants' wage and hour practices, including time-clock issues. ECF No. 58-1. Wilson informed Plaintiff about this lawsuit in March 2015.

On May 6, 2015, at Okumura's request, Wilson forwarded Okumura emails from Plaintiff relating to Plaintiff's complaints about wage and hour issues. Ex. A 136:7–15. In mid-May 2015, Plaintiff claims that Wilson informed Plaintiff that because of the Vi San Diego lawsuit, an investigator was coming to Vi Palo Alto to "ask if . . . people who are on the clock had any issues about missed time, about missed breaks." Guthmann Depo. at 144:11–19. Plaintiff states that Wilson told Plaintiff that if Plaintiff "play[ed] ball," Wilson would support Plaintiff's effort to be classified as an exempt employee. *Id.* at 146:7–9. Plaintiff met with the investigator on May 15, 2015 and told the investigator that Plaintiff "did not have a problem with not receiving . . . breaks." *Id.* at 148:1–2.

On May 21, 2015, Plaintiff was involved in an altercation with a Vi resident, Mrs. Lawver, and her dog. Plaintiff claims that even before the incident, Mrs. Lawver's dog was "known for attacking other dogs and people" and that Mrs. Lawver herself "was known for her violent, vulgar, racist[,] abusive conduct, which has repeatedly occurred over the years." Opp. at 2–3. Plaintiff has produced evidence regarding particular incidents involving Mrs. Lawver and her dog. *Id.*

The basic facts of the May 21, 2015 incident are as follows. As Plaintiff sat in her office,

she heard a dog barking outside and left to investigate. Guthmann Depo. 95:5–12. Once outside, Plaintiff witnessed Mrs. Lawver's dog barking at another resident's dog. *Id.* at 96:4–7. Plaintiff took Mrs. Lawver's dog's leash, and Plaintiff and Mrs. Lawver exchanged words. *Id.* at 97:6–24. Plaintiff then returned to her office. *Id.* at 97–98. After remaining in her office for a few seconds, Plaintiff again left her office and encountered Mrs. Lawver in the hallway. Plaintiff and Mrs. Lawver then engaged in a second verbal altercation in the hallway. *Id.* at 102:4–25.

Plaintiff reported this incident by email to Luis Lopez, the manager of the day, the same day it occurred and gave her version of events. Plaintiff stated that she "ran up to take the leash from Mrs. Lawver's arm" and told Mrs. Lawver that her dog needed to leave the community. Ex. K to Guthmann Decl. Plaintiff stated that Mrs. Lawver threatened to sue Plaintiff, and that Plaintiff "told her she could get a lawyer or speak to Steve [Brudnick] about me." *Id.* Plaintiff then stated that during the second altercation in the hallway, Mrs. Lawver swore at Plaintiff and Plaintiff "told her that she cannot use that language with me nor could she hit me[.] [T]hat behavior isn't allowed in the community." *Id.*

Plaintiff claims that Plaintiff was the only person to report this incident to Lopez and that Mrs. Lawver returned to her room and made no effort to lodge a complaint regarding the incident. Lopez Depo. 32:2–11. However, one employee, Joy Flores, informed her supervisor, Spiller, about the incident. Ex. D to Opp. In response, Spiller told Flores that if Mrs. Lawver "tries to get you involved, tell her she has to talk to Steve [Brudnick]." Spiller Depo. 123:10–13.

Spiller forwarded this email chain to several people, including Christina Ninh, a Move-In Coordinator who witnessed the incident. Ex. M. to Opp. Ninh responded to Spiller and stated that "I've heard [Plaintiff's] side of the story, which is very untrue, she is not the victim in this at all." *Id.* Ninh stated that she was "writing a report with Esmerelda [Rodriguez] that I can cc you on." *Id.* Ninh added, "[a]s crazy as we think Mrs. Lawver may be, she was very composed." *Id.*

Soon afterward, Ninh forwarded her full statement to Rodriguez, who forwarded it to Okumura, who forwarded it to Brudnick. Ex. N. to Opp. According to Ninh's statement, when Plaintiff confronted Mrs. Lawver, Plaintiff repeatedly told Mrs. Lawver that "[y]ou need to leave."

Ex. I at 49. Plaintiff also told Mrs. Lawyer that "You can call an attorney [if] you want, I don't care." *Id.* Ninh stated that after Plaintiff momentarily went back to her office, Ninh "was very apologetic to Mrs. Lawver, and even hugged her." Subsequently, during the second altercation in the hallway, Ninh stated that Plaintiff "came back in a U-turn fashion in front of Mrs. Lawver's face, and stood there upright with her hands folded. It was provoking and unnecessary." *Id.* Plaintiff then "dared [Dr. Lawver] to lay a hand on her." *Id.* According to Ninh, Plaintiff "completely lost it. [Plaintiff] was very unprofessional, undignified, provoking and unacceptable." *Id.*

On May 22, 2015, the day after the incident, Joy Flores also emailed Okumura and stated that another resident and her caregiver "saw and heard everything [and] told me that the sales lady [Plaintiff] was very rude and unprofessional [and] that she needs to be reported to Steve [Brudnick]." Ex. P. Okumura forwarded this email to Brudnick and noted that Flores "was going to speak with Susan [Spiller] but she was considering contacting the Ombudsman to report [Plaintiff] for elder abuse." *Id.* Brudnick responded, "Let her do what she wants to do. It's ridiculous of course but you can't stop her." *Id.*

An hour later, Spiller emailed Brudnick directly, cc-ing Okumura, and stated that Spiller would speak to Mrs. Lawver and would report the incident to the Santa Clara County Ombudsman. Ex. Q to Opp. Spiller asked Brudnick, "Are you ok with this?" *Id.* In response, Okumura emailed Spiller and stated, "I texted with Steve. He's 'in the know' and we'll proceed per our normal protocol." *Id.*

The same day, Spiller visited Mrs. Lawver in her apartment. Ex. R. to Opp. Mrs. Lawver stated that she "did not want to make a statement as she was preparing to leave." *Id.* Spiller informed Mrs. Lawver about the next steps regarding the Ombudsman. *Id.* Spiller also "apologized profusely, acknowledging that an incident like this should never happen." *Id.* Mrs. Lawver stated that Plaintiff should be fired. *Id.* Mrs. Lawver stated that she would file a report as part of the elder abuse claim. *Id.*

Defendants have produced fax transmission records showing that the complaint was sent to

the Santa Clara County Ombudsman and Adult Protection Services on May 26, 2015. Ex. J to Mot. However, Plaintiff "seriously question[s] the authenticity" of Defendants' fax transmissions. Opp. at 18.

On May 22, 2015, Okumura met with Plaintiff regarding the incident and suspended Plaintiff from work pending investigation of the incident. Guthmann Depo. 110:11–13. Okumura informed Plaintiff that "there had been an elder abuse claim by Mrs. Lawver" and that Defendants could not allow someone accused of abuse to work around the alleged victim. *Id.* at 110:24–25. Because Mrs. Lawver lived at Vi Palo Alto, Plaintiff "would need to be the one to leave pending the investigation." *Id.* at 111:1–2. Plaintiff informed Wilson that Plaintiff was being sent home, and Wilson "was shocked because of [Mrs. Lawver's] reputation of being a serial abuser within the community." *Id.* at 111:16–17. Plaintiff also claims that Wilson stated that he "wasn't included in this decision." *Id.* at 111:18–19.

Mrs. Lawver, Blanca Ruiz, and Carmen Galindo, each of whom witnessed the incident, gave written statements about the incident. Ex. I to Mot. Mrs. Lawver's statement stated that Plaintiff "castigated me for being a disturbance and told me that I did not belong here and should leave." Ex. I at 48. Blanca Ruiz, an Administrative Assistant, gave little information but stated that Plaintiff "rais[ed] her arm and pointed her finger at [Mrs. Lawver] a couple of times" and then "walk[ed] away from the scene in a[n] upsetting way." Ex. I at 52. Carmen Galindo, a personal aide to another resident, stated that Plaintiff "shouted at [Mrs. Lawver]" and said that Mrs. Lawver "should get out with her dog, right away, today." Ex. I at 51. Galindo stated that in the hallway, Plaintiff "continued to shout" at Mrs. Lawver. *Id.*

After conducting an investigation, Defendants determined that Plaintiff should be terminated. Okumura Depo. 47. Specifically, on or around May 27, 2015, Okumura had a call with members of the corporate office, which to the best of Okumura's recollection included Danielle Kerry, Diane Schreiber, and Stephanie Fields. *Id.* During this call, "the situation was reviewed and the decision was made." *Id.* Okumura testified that Brudnick did not participate in the call. *Id.* Thereafter, on May 28, 2015, Plaintiff met with Okumura and Wilson to discuss the meeting. At

that meeting, Okumura informed Plaintiff that she was being fired based on the incident. Guthmann Depo. 87:3–6, 89:7–10.

B. Procedural History

This action began with a complaint filed in Santa Clara County Superior Court on April 11, 2016. ECF No. 1 at 7 ("Compl."). The complaint asserts nine causes of action: (1) failure to pay overtime wages; (2) failure to provide meal periods; (3) failure to provide rest periods; (4) failure to furnish accurate wage statements; (5) failure to pay earned wages upon termination; (6) gender discrimination; (7) age discrimination; (8) retaliation; and (9) wrongful termination in violation of public policy. *Id.* Defendants removed the case to this Court on May 18, 2016. ECF No. 1. Defendants also answered the complaint on May 18, 2016. ECF No. 1.

On May 17, 2017, Defendants filed the instant motion for summary judgment on a subset of Plaintiff's claims. ECF No. 41. In the motion, Defendants requested summary judgment on Plaintiff's claims for gender discrimination, age discrimination, and wrongful termination in violation of public policy. *Id.* On May 31, 2017, Plaintiff filed an opposition to Defendants' motion for summary judgment. ECF No. 54. Also on May 31, 2017, Plaintiff filed a request for judicial notice in conjunction with the opposition. ECF No. 58. On June 7, 2017, Defendants filed a reply. [1] ECF No. 64.

II. LEGAL STANDARD

Summary judgment is proper where the pleadings, discovery and affidavits demonstrate that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.*

[1] Along with the reply, Defendants also submitted separate evidentiary objections. ECF Nos. 64-1, 64-2. However, Civil Local Rule 7–3 requires that "[a]ny evidentiary and procedural objections to the motion must be contained within the brief or memorandum." Accordingly, the Court strikes Defendants' separately filed objections.

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery and affidavits which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. However, on an issue for which the opposing party will have the burden of proof at trial, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The court is only concerned with disputes over material facts and "factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. It is not the task of the court to scour the record in search of a genuine issue of triable fact. *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir. 1996). The nonmoving party has the burden of identifying, with reasonable particularity, the evidence that precludes summary judgment. *Id.* If the nonmoving party fails to make this showing, "the moving party is entitled to judgment as a matter of law." *Celotex Corp.*, 477 U.S. at 323.

At the summary judgment stage, the court must view the evidence in the light most favorable to the nonmoving party: if evidence produced by the moving party conflicts with evidence produced by the nonmoving party, the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact. *See Leslie v. Grupo ICA*, 198 F.3d 1152, 1158 (9th Cir. 1999).

III. DISCUSSION

As discussed above, Plaintiff's complaint asserts nine causes of action: (1) failure to pay overtime wages; (2) failure to provide meal periods; (3) failure to provide rest periods; (4) failure to furnish accurate wage statements; (5) failure to pay earned wages upon termination; (6) gender discrimination; (7) age discrimination; (8) retaliation; and (9) wrongful termination in violation of public policy.

Defendants move for summary judgment on four of these causes of action: gender discrimination, age discrimination, retaliation, and wrongful termination in violation of public policy. Plaintiff has filed a request for judicial notice in connection with Plaintiff's opposition to the motion for summary judgment. The Court first addresses Plaintiff's request for judicial notice. The Court then considers Plaintiff's gender and age discrimination claims together, followed by Plaintiff's retaliation claim and then Plaintiff's claim for wrongful termination in violation of public policy.

A. Request for Judicial Notice

The Court first addresses Plaintiff's request for judicial notice. ECF No. 58. The Court may take judicial notice of matters that are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Public records, including judgments and other publicly filed documents, are proper subjects of judicial notice. *See, e.g.*, *United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007) ("[Courts] may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue."); *Rothman v. Gregor*, 220 F.3d 81, 92 (2d Cir. 2000) (taking judicial notice of a filed complaint as a public record).

However, to the extent any facts in documents subject to judicial notice are subject to reasonable dispute, the Court will not take judicial notice of those facts. *See Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001) ("A court may take judicial notice of matters of public record . . . But a court may not take judicial notice of a fact that is subject to reasonable dispute.") (internal quotation marks omitted), *overruled on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

Defendant requests judicial notice of the following documents:

- Complaint for Damages in the matter of *Shiela Victoriano v. Classic Residence Management, LP*, San Diego Superior Court Case No. 37-2014-00028031-CU-OE-CTL, filed on August 20, 2014;

- Order and Judgment Re: Plaintiff's Motion for Attorneys' Fees and costs and Class Representative Enhancement; and Motion for Conditional Certification and Final Approval of Class Action Settlement, filed on May 5, 2016 in the matter of *Shiela Victoriano v. Classic Residence Management, LP*, San Diego Superior Court Case No. 37-2014-00028031- CU-OE-CTL.

Both of these documents are public records and are therefore proper subjects of judicial notice. Additionally, Defendants do not oppose Plaintiff's request for judicial notice. The Court therefore GRANTS Plaintiff's request for judicial notice.

B. Gender and Age Discrimination

The Court first addresses Plaintiff's causes of action for gender and age discrimination. Plaintiff's gender and age discrimination causes of action are asserted solely under the California Fair Employment and Housing Act, Cal. Gov't Code § 12900 *et seq.* ("FEHA").

The FEHA provides that it is an unlawful employment practice "for an employer, because of the . . . [sex or age] . . . of any person, to . . . discriminate against the person in . . . terms, conditions, or privileges of employment." Cal. Gov. Code, § 12940(a). Claims for gender and age discrimination under the FEHA are subject to the three-part burden-shifting analysis described in the United States Supreme Court's decision in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). *See, e.g., Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317, 354 (2000) (applying *McDonnell Douglas* burden shifting framework to age discrimination claim); *University of Southern California v. Sup. Ct.*, 222 Cal. App. 3d 1028, 1035 (1990) (applying *McDonnell Douglas* burden shifting framework to sex discrimination claim).

Under the McDonnell Douglas framework, "an employee challenging an adverse employment action has the initial burden of establishing a prima facie case of discrimination." *Curley v. City of N. Las Vegas*, 772 F.3d 629, 632 (9th Cir. 2014). In order to establish a *prima facie* case of discrimination, Plaintiff must show that: (1) she is a member of a protected class; (2) she was qualified for her position and was performing her job satisfactorily; (3) she experienced an adverse employment action; and (4) similarly situated individuals outside of her protected class

were "treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination." *Hawn v. Executive Jet Mgmt., Inc.*, 615 F.3d 1151, 1156 (9th Cir. 2010) (citing *Peterson v. Hewlett–Packard Co.*, 358 F.3d 599, 603 (9th Cir. 2004).

If a plaintiff establishes a prima facie case of discrimination, the burden "shifts to the employer to provide a legitimate, nondiscriminatory . . . reason for the adverse employment action. If the employer does so, then the burden shifts back to the employee to prove that the reason given by the employer was pretextual." *Curley*, 772 F.3d at 632. If the employer has met its burden of providing a legitimate, nondiscriminatory reason for the adverse employment action and the employee has not raised a genuine material fact dispute as to whether the employer's reasons were pretextual, the Court need not address whether the employee has met the employee's burden to establish a prima facie case of discrimination. *Id.*

At the outset, the Court notes that Plaintiff provides no argument in her opposition regarding her age discrimination claim, and the Court has located no evidence in the record supporting this claim. Plaintiff does not claim that Defendants were motivated by Plaintiff's age, that similarly situated younger employees who were treated more favorably, or that Defendants' proffered reason was a pretext for age discrimination. *Keenan*, 91 F.3d at 1279 ("It is not our task, or that of the district court, to scour the record in search of a genuine issue of triable fact. We rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment.") (citation omitted); *see also* Fed. R. Civ. P. 56(e) ("If a party . . . fails to properly address another party's assertion of fact . . . the court may . . . consider the fact undisputed for purposes of the motion."). Plaintiff has not raised a triable issue of fact regarding Plaintiff's age discrimination claim. Therefore, the Court GRANTS Defendants' motion for summary judgment on Plaintiff's age discrimination claim.

As for Plaintiff's gender discrimination claim, the Court assumes without deciding that Plaintiff has met her burden of establishing a prima facie case. However, for the reasons discussed below, the Court finds that Defendants have met their burden of providing a legitimate, nondiscriminatory reason for terminating Plaintiff and that Plaintiff has not raised a genuine

material fact dispute as to whether these reasons were a pretext for gender discrimination.

1. Defendants' Proffered Legitimate, Nondiscriminatory Reason for Terminating Plaintiff

Defendants' stated reason for terminating Plaintiff is Plaintiff's behavior on May 21, 2015, when Plaintiff confronted a resident at Vi at Palo Alto, Mrs. Lawver. The incident was as follows. As Plaintiff sat in her office, she heard a dog barking outside and left to investigate. Guthmann Depo. 95:5–12. Once outside, Plaintiff witnessed Mrs. Lawver's dog barking at another resident's dog. *Id.* at 96:4–7. Plaintiff took Mrs. Lawver's dog's leash, and Plaintiff and Mrs. Lawver exchanged words about the incident. *Id.* at 97:6–24. Plaintiff then returned to her office. *Id.* at 97–98. After remaining in her office for a few seconds, Plaintiff again left her office and encountered Mrs. Lawver in the hallway. Plaintiff and Mrs. Lawver then engaged in a second verbal altercation in the hallway. *Id.* at 102:4–25.

The undisputed facts show that Defendants conducted an investigation of the incident in which they reviewed the statements of Plaintiff, Christina Ninh, Blanca Ruiz, and Carmen Galindo, each of whom witnessed the incident.[2] Except for Plaintiff herself, each of these witnesses portrayed Plaintiff as behaving in an unprofessional manner during the incident.

For example, Ninh's statement contained the following facts. When Plaintiff confronted Mrs. Lawver, Plaintiff repeatedly told Mrs. Lawver that "[y]ou need to leave." Ex. I at 49. Plaintiff also told Mrs. Lawver that "You can call an attorney [if] you want, I don't care." *Id.* After Plaintiff momentarily went back to her office, Ninh "was very apologetic to Mrs. Lawver, and even hugged her." *Id.* Subsequently, during the second altercation in the hallway, Plaintiff "came back in a U-turn fashion in front of Mrs. Lawver's face, and stood there upright with her hands folded. It was provoking and unnecessary." *Id.* Plaintiff then "dared [Dr. Lawver] to lay a hand on her." *Id.*

[2] It is unclear whether Defendants reviewed a written statement by Mrs. Lawver in connection with the investigation. Mrs. Lawver's written statement appears to be dated May 21, 2015. Ex. I to Mot. However, this date may refer to the date on which the incident occurred. This is consistent with Spiller's statement that it took Mrs. Lawver "about ten days I think to get us a statement." Ex. D at 135:7–8. However, it is undisputed that Spiller spoke to Mrs. Lawver about the incident on or around May 22, 2015, and that Mrs. Lawver told Spiller that she believed Plaintiff should be fired. Ex. R to Opp.

Plaintiff "completely lost it. [Plaintiff] was very unprofessional, undignified, provoking and unacceptable." *Id.*

Similarly, Ruiz stated that Plaintiff "rais[ed] her arm and pointed her finger at [Mrs. Lawver] a couple of times" and then "walk[ed] away from the scene in a[n] upsetting way. Ex. I at 52.

Galindo stated that Plaintiff "shouted at [Mrs. Lawver]" and said that Mrs. Lawver "should get out with her dog, right away, today." Ex. I at 51. Galindo stated that in the hallway, Plaintiff "continued to shout" at Mrs. Lawver. *Id.*

After the investigation, Defendants determined that Plaintiff's action during the incident violated Defendants' written policy requiring all employees to be courteous to all residents of the community. *See* Ex. B (Employee Handbook) ("Employees are expected to be professional . . . when . . . interacting with residents . . . ."); Ex. F (Communicating and Socializing with Residents Policy) (stating that the rights of residents include the right "[t]o be accorded dignity in your personal relationships with staff, residents, and other persons" and the right "[t]o be free from corporal or unusual punishment, humiliation, intimidation, mental abuse or other actions of a punitive nature . . . ."). Defendants terminated Plaintiff on May 28, 2015.

Although Plaintiff may disagree with the accounts of these three witnesses, there is no genuine dispute that the weight of the evidence that Defendants reviewed in deciding to terminate Plaintiff indicated that Plaintiff had behaved in an unprofessional manner. In other words, the undisputed facts show that Defendants "entertained an honest belief" that Plaintiff acted unprofessionally during the May 21, 2017 incident. *King v. United Parcel Serv., Inc.*, 152 Cal. App. 4th 426, 433, 60 Cal. Rptr. 3d 359, 366 (2007) ("For purposes of establishing the moving employer's initial burden of proof, it does not matter whether plaintiff actually did commit [a] violation as long as [the employer] honestly believed he did."). Therefore, the Court finds that Defendants have met their burden of production to show a legitimate, nondiscriminatory reason for Plaintiff's termination.

2. Plaintiff's Burden to Show Pretext

Defendants have met their burden of production to show a legitimate, nondiscriminatory reason for Plaintiff's termination. Therefore, under the *McDonnell-Douglas* framework, the burden shifts to Plaintiff to adduce evidence that Defendants' justification for its decision to terminate Plaintiff was merely a pretext for discrimination. *See Hawn*, 615 F.3d at 1155. A Plaintiff may demonstrate pretext using either direct or circumstantial evidence. When the evidence of discrimination is direct, a plaintiff needs to present "very little evidence to survive summary judgment in a discrimination case." *EEOC v. Boeing Co.*, 577 F.3d 1044, 1049 (9th Cir. 2009) (quoting *Lam v. Univ. of Hawaii*, 40 F.3d 1551, 1564 (9th Cir. 1994)). "But when the plaintiff relies on circumstantial evidence, that evidence must be specific and substantial to defeat the employer's motion for summary judgment." *Boeing*, 577 F.3d at 1049 (quoting *Coghlan v. Am. Seafoods Co. LLC*, 413 F.3d 1090, 1095 (9th Cir. 2005)). An employee "cannot simply show the employer's decision was wrong, mistaken or unwise" in order to establish pretext. *Dep't of Fair Employment & Housing v. Lucent Techs., Inc.*, 642 F.3d 728, 746 (9th Cir. 2011) (internal quotation marks and citation omitted). Instead, "the employee must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact-finder could rationally find them unworthy of credence." *Id.* Additionally, the United States Supreme Court has held that in employment discrimination cases, an employer is "entitled to judgment . . . if the plaintiff create[s] only a weak issue of fact as to whether the employer's reason was untrue and there [is] abundant and uncontroverted independent evidence that no discrimination has occurred." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 148 (2000).

In the instant case, Plaintiff's evidence of discrimination is circumstantial, and thus Plaintiff must point to "specific and substantial" evidence of pretext to survive a motion for summary judgment. Plaintiff claims that she has produced "specific and substantial" evidence of pretexts for several reasons. First, Plaintiff claims that a similarly situated male employee was not terminated and that Brudnick sometimes called women "sweetie," "honey," "angel," and "pumpkin." Opp. at 14. Second, Plaintiff claims that "Defendants' changing reasons for Plaintiff's

termination" demonstrate pretext. Opp. at 15. Third, Plaintiff claims that Defendants conducted a shoddy investigation that violated Defendants' policies, and that these circumstances suggest pretext. The Court addresses these arguments in turn. Opp. at 17–20.

a. Comparison to Lopez and Brudnick's References to Women

Plaintiff claims that similarly situated male employees were not terminated for behavior similar to Plaintiff's. However, Plaintiff specifically identifies only one such employee, Luis Lopez. Lopez was the Director of Dining Services, which is a supervisory position. Mot. at 5. Plaintiff claims that on several occasions, Lopez "screamed at" and "demeaned" other employees at Vi at Palo Alto. Mot. at 5–6. Additionally, Plaintiff claims that on two occasions, Lopez was rude to residents. First, in 2014, a resident complained to Brudnick that Lopez had made rude comments to the resident, including "Nobody likes you," and "I am not sitting you with anyone." Gerson Decl. ¶ 4a. Second, in 2017, Lopez instituted a change in policy dictating that no residents could bring their pets "into the village store nor down the colonnade hallway to hand in their to-go meal forms." Ex. C. to Opp. 28:2–7. Mrs. Lawver complained about this policy change and stated that Lopez "chased her." *Id.* Mrs. Lawver "wanted him to get fired." *Id.*

These facts suggest that in many respects, Lopez is situated quite differently than Plaintiff. For example, Lopez was in a supervisory position, and Plaintiff was a lower-level employee. "[E]mployees in supervisory positions are generally deemed not to be similarly situated to lower level employees." *Vasquez v. Cty. of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003). Additionally, most of the incidents in which Lopez allegedly yelled at others involved employees, not residents.

Furthermore, although the 2014 incident between Lopez and a resident is somewhat similar to the incident between Plaintiff and Mrs. Lawver, the 2017 incident between Lopez and Mrs. Lawver is significantly different from the incident between Plaintiff and Mrs. Lawver. Mrs. Lawver's primary objection to Lopez was based on a policy change restricting the area in which pets were allowed rather than any lack of professionalism on Lopez's part. *See* Ex. C to Opp. 28:14–17 ("She just complained, you know, about Luis, that she had been living here – ever since she lived here she was able to bring her dog into both those areas. She didn't know why it

changed. She wanted to get him fired, that he chased her."). Additionally, the witness statements regarding the incident between Lopez and Mrs. Lawver state that Lopez simply "told [Mrs. Lawver] that she cannot bring her dog into the dining areas because it violates health code" and that Mrs. Lawver threw a piece of paper at Lopez, yelled at Lopez, threatened to hit and stab Lopez's testicles, yelled at Lopez for not being able to speak English, and called Lopez a "Mexican Rattlesnake." Ex. K to Opp. In contrast, according to the witness accounts, Mrs. Lawver was more "composed" than Plaintiff during the May 21, 2017 incident between Plaintiff and Mrs. Lawver. *See, e.g.*, Ex. M. to Opp. ("As crazy as we think Mrs. Lawver may be, she was very composed.").

Lopez and Plaintiff are not similarly situated. Thus, lesser discipline for Lopez does not suggest that Defendants' legitimate, nondiscriminatory reasons are a pretext for gender discrimination. *Meyer v. California & Hawaiian Sugar Co.*, 662 F.2d 637, 640 (9th Cir. 1981) (holding that a particular comparison was "not such [a] parallel[] to [Plaintiff's] case as to raise a genuine issue of pretext"); *see also Sun v. Asian Am. Recovery Servs.*, 1991 U.S. Dist. LEXIS 18073, *12 (N.D. Cal. Dec. 9, 1991) ("Regarding the showing that other employees committed similar violations of workplace rules, courts generally require that the situations of the other employees be very analogous to that of the plaintiff.").

The Court assumes, without deciding, that Plaintiff's comparison to Lopez is sufficient to establish a prima facie case of discrimination. However, "a plaintiff's burden is much less at the prima facie stage than at the pretext stage." *Hawn*, 615 F.3d at 1158. Plaintiff has cited no caselaw establishing that pretext can be inferred from the fact that a single male employee in a supervisory capacity was treated somewhat differently from a lower-level female employee.

Additionally, the Ninth Circuit has held that employees with different supervisors are not similarly situated. *Hargrow v. Fed. Express Corp.*, 2009 WL 226039, at *1 (9th Cir. Jan. 30, 2009) ("[T]he employees who allegedly received more favorable treatment than Hargrow were not similarly situated to Hargrow. They were subject to different supervisors."). In the instant case, Plaintiff's direct supervisor was Wilson, and the investigation leading up to Plaintiff's termination

was conducted primarily by Okumura. There is no evidence that Wilson was Lopez's direct supervisor or that Okumura or Wilson made any decision regarding the incidents between Lopez and residents at Vi at Palo Alto. Thus, Plaintiff's comparison to Lopez is not "specific and substantial" evidence suggesting that Defendants' stated reason for terminating Plaintiff is pretextual.

The Court next considers Brudnick's references to women. According to Okumura, the Human Resources Director, the group who held a phone call and decided that Plaintiff should be terminated consisted of four women. *See* Ex. B at 47:7–8 (listing Okumura herself and three corporate employees: Danielle Kerry, Diane Schreiber, and Stephanie Fields). Plaintiff does not claim that any of these four women harbored any prejudice against Plaintiff on the basis of Plaintiff's gender. Although Brudnick was the Executive Director of Vi at Palo Alto and therefore shared ultimate responsibility with Okumura for signing off on the decision to terminate Plaintiff, Brudnick did not participate in the phone call in which "the situation was reviewed and the decision was made." *Id.* Thus, the fact that Brudnick sometimes referred to women as "sweetie," "honey," "angel," or "pumpkin" does not constitute "specific and substantial" evidence to rebut Defendants' legitimate, nondiscriminatory reason for terminating Plaintiff. Ex. C to Opp. at 53:9–25. Additionally, there is no evidence that Brudnick ever referred to Plaintiff using these terms. Indeed, Plaintiff admitted in her deposition that no Vi employees ever made any comments about her gender. Pl. Depo. 130:16–20; 1362–4. Thus, Brudnick's references to women other than Plaintiff are not "specific and substantial" evidence suggesting that Defendants' stated reason for terminating Plaintiff is pretextual.

b. Defendants' "Changing Reasons" for Plaintiff's Termination

Next, the Court addresses Plaintiff's claims regarding "Defendants' changing reasons for Plaintiff's termination." Opp. at 15. Plaintiff claims that on May 28, 2015, Okumura informed Plaintiff that because of the incident involving Mrs. Lawver, "an Ombudsm[a]n had been contacted and . . . an investigation had been conducted and . . . the Ombudsm[a]n agreed that there was 'elder abuse.'" Guthmann Decl. ¶ 31. Plaintiff then claims that in June 2015, Plaintiff

received documents from the Employment Development Department ("EDD") which stated that the reason for Plaintiff's discharge was "violation of company policy. [Plaintiff] blocked a resident[']s pathway on 05/21/15 and provoked the elderly resident to hit her during a verbal altercation with the resident and failed to report the incident." Guthmann Decl, Ex. L.[3] On December 5, 2016, in response to Plaintiff's Special Interrogatory, Defendants claimed that "Plaintiff's employment was terminated because she became embroiled in an altercation with two residents and their dogs, during which she behaved in an inappropriate, threatening manner toward one of the residents (in violation of Vi's policies and procedures)." Ex. Y to Mot. Finally, on May 25, 2017, Defendants' Federal Rule of Civil Procedure 30(b)(6) witness testified that Plaintiff was terminated for "improper conduct with a resident" and did not mention company policy. Kerry Depo. 14:13–20. Plaintiff claims that these "changing reasons" suggest that Defendants' claimed reason was pretextual.

However, these explanations of why Plaintiff was fired are not materially different. Although these explanations emphasized different aspects of the May 21, 2015 incident and provided varying levels of detail about the incident, Defendants have consistently maintained that Plaintiff was terminated because of her behavior during the May 21, 2015 incident.

Plaintiff also points to differences in Defendants' account of who made the decision to terminate her. First, in response to a Special Interrogatory, on December 6, 2016, Defendants identified Michael Wilson, Steve Brudnick, Shari Okumura, Danielle Kerry, Diane Schreiber, and Stephanie Fields. Ex. Y. On December 7, 2016, during Okumura's deposition testimony, Okumura stated that "[t]o my recollection," Okumura, Kerry, Schreiber, and General Counsel Stephanie Fields were on the phone call in which the decision was made to terminate Plaintiff. Ex. B at 47:11–12. Finally, Defendants' Rule 30(b)(6) witness testified that Brudnick, the Executive Director of Vi at Palo Alto, was the individual "responsible for making the final decision to

[3] Plaintiff asserts that she did in fact report the incident, and Plaintiff's May 21, 2017 email to Lopez suggests that Plaintiff is correct. Thus, the EDD form's statement that Plaintiff failed to report the incident appears to be incorrect. The record does not identify the source of the information in the EDD form or the preparer of the EDD form. Guthmann Decl. Ex. L.

terminate" Plaintiff. Ex. I at 14:14–20; *see* Ex. BB to Opp. ("No separation may occur without prior knowledge of Human Resources and the Executive Director.").

Here again, there is no material inconsistency between the different explanations of who made the decision to terminate Plaintiff. Most of the discrepancies can be resolved by considering the difference in the questions to which Defendants were responding at the time. For example, in Okumura's deposition testimony, Okumura was asked about who participated in a specific phone call. Ex. B to Opp. ("Who was part of that call?"). In contrast, the Special Interrogatory to which Defendants responded on December 5, 2016 asked Defendants to "identify each PERSON(S) who *contributed* to YOUR decisions to terminate PLAINTIFF'S employment with the Vi." Ex. Y (emphasis added). Finally, immediately after the Rule 30(b)(6) witness identified Brudnick as "the person . . . responsible for making the final decision to terminate Stacy Guthmann," the following discussion occurred:

> MS. LEYTON-JONES: I'm going to object on the ground that the question is vague to the extent it says the final decision. Are you asking was there anybody else involved in the decision-making process?
>
> MR. MCMAHON: I'll get to that.

Ex. I at 14:21–25. Thus, it is clear that the question to the 30(b)(6) witness, unlike the Special Interrogatory, was not meant to elicit an identification of everyone who contributed to the decision.

In short, the evidence shows only that different witnesses responded to different questions by identifying different people who were involved in different aspects of the decision-making process. There is no significant inconsistency between these explanations. Even if there are some minor discrepancies, these discrepancies in no way suggest that the offered explanation for Plaintiff's termination was pretext for gender discrimination. Thus, the Court finds that Defendants' alleged "changing reasons" for terminating Plaintiff are not "specific and substantial" reasons indicating pretext.

c. Defendants' Alleged "Shoddy Investigation"

Finally, Plaintiff claims that pretext can be inferred from Defendants' "shoddy

investigation." Opp. at 17. Plaintiff claims that the investigation was "shoddy" for various reasons, including that three potential witnesses were not interviewed, that Okumura did not give important information to corporate employees who participated in the decision to terminate Plaintiff, and that Defendants' claims regarding a complaint with the Ombudsman are not credible. Plaintiff also claims that according to Defendants' policy, Plaintiff's supervisor should have participated more in the investigation and Defendants should have used more formalized processes such as interviews and witness statements.

Many of Plaintiff's claims are not indicative of a poor investigation. For example, Plaintiff claims that she was not interviewed during the investigation. However, while there may not have been a formal interview, Plaintiff provided a statement regarding the incident and Plaintiff spoke to Okumura on May 22, 2015 about the incident.

Additionally, Plaintiff claims that Enrico Galvez, Ms. Soltau, and Ms. Macovski should have given witness statements. However, in his deposition testimony, Galvez stated that he did not witness the incident but was instead at the Sales Desk "on a phone call with a client the whole time . . . covering [his] ear" and that he only heard "dogs barking" outside the building. Ex. G to Opp. at 26:4–7. Moreover, Spiller, who was Director of Residents for Vi at Palo Alto, did in fact speak to Mrs. Soltau and reported to Brudnick and Okumura that "Mrs. Soltau did not witness the resident/staff interaction, only the initial dog to dog interaction." Ex. Q to Mot. Indeed, Plaintiff's own declaration states that Ms. Soltau "began walking away from the area with her dog" almost immediately after Plaintiff intervened in the incident with Mrs. Lawver. Guthmann Decl. ¶ 23. Plaintiff also stated that Ms. Macovski was "nearby" but "too far to intervene to help the situation." *Id.* Additionally, even if Galvez or Ms. Macovski were potential witnesses, there is no evidence that Defendants were aware of this at the time of the investigation.

Plaintiff's complaints about Okumura's failure to inform "corporate" about Ms. Lawver's past actions, Plaintiff's history with Spiller, or Ninh's reputation as a "drama queen" also do not indicate a poor investigation. Opp. at 17–18. The investigation was focused on Plaintiff's behavior during the May 21, 2015 incident, and thus the details of all of Plaintiff's workplace relationships

were not directly relevant to the investigation. Even if the investigation may have been more complete with this information, the fact that Okumura did not specifically inform "corporate" about these issues does not suggest an investigation so shoddy that it indicates that Defendants' stated reason for termination was pretext for discrimination.

Plaintiff also claims that "Okumura did not provide the statement of Joy Flores, which supports Plaintiff's version of events, to corporate." Opp. at 18. However, Flores did not support Plaintiff's version of events. Instead, on May 21, 2015, Flores emailed Spiller and stated the following:

> There was a little commotion with Mrs. L & Mrs. S dogs. Stacy came out, Mrs. L was very upset with Stacy.

Ex. D to Opp. Subsequently, on May 22, 2015, Flores emailed Okumura and stated the following:

> I was at the front desk and heard the commotion going on from the hallway by the bar and peek, I heard Stacy stating "you need to get out of here," don't know who she meant or what. I just saw Mrs. Lawver very upset and shaking. A resident came to me after, Mr. Gurley and her [sic] caregiver who saw and heard everything, he told me that the sales lady was very rude and unprofessional [and] that she needs to be reported to Steve.

Ex. P to Opp. Thus, Flores's version of events does not "support[] Plaintiff's version," and Okumura's failure to provide this statement to corporate does not indicate an investigation so shoddy that it suggests that Defendants' proffered reasons for termination were pretextual.

Furthermore, Plaintiff's claim that Defendants violated their own policies in investigating the May 21, 2015 incident is not persuasive. Plaintiff claims that the investigation violated Defendants' policies because "Plaintiff's Supervisor, Mr. Wilson, did not participate in the investigation . . . ." Opp. at 20. Plaintiff points to several provisions in the Human Resources Procedures Manual that discuss the duty of supervisors to document and report misconduct. However, none of the provisions to which Plaintiff points indicate that the Director of Human Resources cannot directly investigate misconduct. *See, e.g.*, Ex. BB to Opp. ("Under certain circumstances immediate discharge may be the proper form of discipline. *For instance,* an employee commits an offense for which immediate discharge is deemed as the penalty *or* in the supervisor's judgment, in partnership with the HR department . . . ."). On the contrary, the

provisions of the Manual are meant to ensure that supervisors do not take certain actions without consulting the Director of Human Resources, who must "review and approve every discharge." *Id.* Thus, Plaintiff has pointed to no policy that was violated by the fact that Okumura, the Human Resources Director, directly investigated the incident.

Similarly, Plaintiff states that "[t]he HR Manual also makes repeated references to a 'Workplace Conduct Investigation Process' ('WCIP'), which Defendants did not follow either." Opp. at 20. The only way in which Plaintiff claims that the investigation of the May 21, 2015 incident departed from the WCIP is that "Okumura did not conduct any interviews." Opp. at 20. However, Okumura spoke with Plaintiff on May 22, 2015. Additionally, Plaintiff cites no evidence for her claim that Okumura did not conduct any interviews, and it is undisputed that Okumura at least reviewed witnesses' written accounts of the incident. Furthermore, Spiller, who was Director of Residents for Vi at Palo Alto, spoke with Mrs. Lawver on May 22, 2015. ECF No. 41-2; *see also* Ex. CC to Opp. ("If resident issue, the assigned Community Leader conducts resident interviews and gathers data/information."). In short, Plaintiff has not identified deviations from company policy that suggest that Defendants' proffered reasons for termination were a pretext for discrimination.

Plaintiff also argues that Defendants' proffered explanation is pretextual because the Santa Clara County Ombudsman could not locate any records regarding Plaintiff. Ex. V to Opp. Defendants have produced fax cover sheets indicating that on May 26, 2015, Spiller sent the complaint at issue to the Santa Clara County Ombudsman. Ex. J to Mot. Plaintiff states that she is awaiting review of electronic records of the faxes at issue, but "[i]n the meantime, Plaintiff objects to the authenticity of" Defendants' evidence. Opp. at 18 n.13. The Court doubts whether this is sufficient to create a genuine dispute about the authenticity of Defendants' documents. The fact that the Ombudsman could not locate records regarding Plaintiff on January 3, 2017 does not support an inference that Defendants fabricated a document showing that Spiller sent a fax to the Ombudsman on May 26, 2015. Additionally, it is not clear how this issue is material to the question of whether Defendants' proffered reason for terminating Plaintiff was pretextual.

Although Plaintiff claims that these circumstances show that "Defendants did not actually want an investigation by the Ombudsm[a]n or [Adult Protective Services] because it would exonerate Plaintiff," this claim is belied by the fact that even Plaintiff does not dispute that Spiller called Santa Clara County Adult Protective Services to report the incident. *See* Ex. W to Opp. Plaintiff provides no other explanation for why this dispute would indicate that Defendants' claim that Plaintiff was fired because of the incident involving Mrs. Lawver was pretextual. In short, even if there is some dispute about the complaint to the Ombudsman, this dispute is not material because it does not provide "specific and substantial" evidence to rebut Defendants' proffered explanation for terminating Plaintiff.

Additionally, even if Defendants' investigation was flawed in some way, "merely pointing to an employer's shoddy investigatory efforts is [not] sufficient to establish pretext. Erroneous (but believed) reasons for terminating an employee are not tantamount to pretextual reasons." *Humphries v. CBOCS W., Inc.*, 474 F.3d 387, 407 (7th Cir. 2007), *aff'd*, 553 U.S. 442 (2008). There is no requirement that an employer's investigation be entirely free of error. *King*, 152 Cal. App. 4th at 439 (holding that the defendant "conducted an adequate investigation as a matter of law" even though there were "flaws in the investigation"). Instead, an investigation must be flawed in a way that it suggests that the defendant's proffered explanation is pretextual, which generally requires that the investigation is "not just flawed but inexplicably unfair." *Mastro v. Potomac Elec. Power Co.*, 447 F.3d 843, 855 (D.C. Cir. 2006). Any flaws in Defendants' investigation in the instant case were not "inexplicably unfair" and do not suggest that Defendants' proffered reasons for terminating Plaintiff were pretext for discrimination.

In short, Plaintiff has provided no "specific and substantial" reason to believe that Defendants' proffered explanation for Plaintiff's termination was pretextual. Essentially, Plaintiff has pointed to one male employee who was not similarly situated in most respects, immaterial differences among Defendants' explanations of who decided to fire Plaintiff and why she was fired, and some minor flaws in the investigation leading up to Plaintiff's termination. The United States Supreme Court has held that an employer is "entitled to judgment . . . if the plaintiff created

only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 148 (2000). The evidence in the instant case provides abundant support for Defendants' proffered explanation, and Plaintiff has failed to offer "specific and substantial" evidence to rebut that explanation. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002).

For these reasons, the Court finds that Defendants have met their burden of production by offering a legitimate, nondiscriminatory reason justifying Plaintiff's termination and that Plaintiff has failed to meet her burden to demonstrate a triable issue of fact regarding whether this reason was a pretext for discrimination. Therefore, the Court GRANTS Defendants' motion to dismiss Plaintiff's cause of action for gender discrimination.

C. Retaliation

Next, the Court addresses Plaintiff's claim for retaliation, which is asserted under California Labor Code § 98.6 and under the California Fair Employment and Housing Act, Cal. Gov't Code § 12900 *et seq.* ("FEHA").

In evaluating retaliation claims, Courts apply the same burden-shifting framework that is used for discrimination claims. Specifically, the burden-shifting framework is as follows:

> First, the plaintiff must establish a prima facie case of retaliation. If the plaintiff is successful, the burden shifts to the defendant to respond with a legitimate, nondiscriminatory reason for its actions. The burden then shifts back to the plaintiff to establish that the reason for the adverse action was a pretext or cover-up for the unlawful retaliation. To establish a prima facie case of retaliation, a plaintiff must show (1) that he engaged in a protected activity, (2) that his employer subjected him to adverse employment action, and (3) that there is a causal link between the two.

Hollie v. Concentra Health Servs., 2012 WL 993522, at *4 (N.D. Cal. Mar. 23, 2012) (citations omitted). This burden-shifting framework applies to claims under both California Labor Code § 98.6 and the FEHA. *See id.* (applying this framework to California Labor Code § 98.6); *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1042, 116 P.3d 1123, 1130 (2005) (applying this framework to California Labor Code § 98.6). Thus, the Court applies the same analysis to both

claims. *See Yoshimoto v. O'Reilly Auto., Inc.*, 2013 WL 6446249, at *24 (N.D. Cal. Dec. 9, 2013) ("The court finds that this claim [for retaliation under Labor Code § 98.6] is substantively the same as plaintiff's Title VII and FEHA retaliation claims . . . .").

Under Labor Code § 98.6, as relevant here, an employer may not retaliate against any employee because the employee "made a written or oral complaint that he or she is owed unpaid wages, or because the employee has initiated any action or notice pursuant to Section 2699, or has testified or is about to testify in a proceeding pursuant to that section." Plaintiff argues that she engaged in protected activity because "a class action lawsuit alleging various wage and hour violations . . . was filed on August 20, 2014. Accordingly, Plaintiff had made a written or oral complaint and had initiated an action pursuant to [Labor Code §] 2699 because she was part of the class covered by the lawsuit." Opp. at 21.

The lawsuit to which Plaintiff refers was filed in San Diego County Superior Court by Shiela Victoriano against Classic Residence Management LP D/B/A Vi at La Jolla ("La Jolla lawsuit"). *See* ECF No. 58 at 4. Based on the court documents, of which the Court has taken judicial notice, *see supra* Part II.A, it is not clear whether Plaintiff was included in the class definition in the La Jolla lawsuit. The original complaint in the La Jolla lawsuit discussed several proposed classes, each of which was limited to "employees of Defendant." *Id.* at 8. Because the only defendant in the lawsuit was Vi at La Jolla, this class definition appears to exclude Plaintiff. However, in the order granting final approval of the class action settlement, the court certified the following class: "All hourly non-exempt employees who are or were employed at least one day by Vi in California at any time during the Class Period August 20, 2010 to October 31, 2015 working in a 'Covered Position,' as defined in the Settlement Agreement." *Id.* at 34. This class definition appears to be broader than the class definition in the complaint. However, even if this class definition covers all employees at all Vi locations in California, Plaintiff has produced no evidence that she falls within a "Covered Position" for the purposes of the lawsuit, nor has Plaintiff produced the Settlement Agreement so that the Court can make this determination. Thus, based on the court documents in the La Jolla lawsuit, it is unclear whether Plaintiff was ever included in the

class definition.

Additionally, in the La Jolla lawsuit, a class was provisionally certified on February 19, 2016 and finally certified on May 31, 2016. *Id.* at 32–33. Thus, at the time of the events at issue in the instant case in May 2015, Plaintiff was at most a *putative* class member in the La Jolla lawsuit. Indeed, in order to avoid releasing the claims at issue in the instant case, Plaintiff *excluded* herself from the class in the La Jolla lawsuit before the class was finally certified. *See id.* at 42 (listing Stacy Guthmann as the sole opt-out from the class). Thus, even if Plaintiff fell within the class definition, Plaintiff was never actually a class member. Instead, Plaintiff was at most a putative class member who later excluded herself from the class.

Furthermore, even if Plaintiff was a putative class member in the La Jolla lawsuit at the time of the events at issue in the instant case, the Court finds that this does not qualify as protected activity for the purposes of Plaintiff's retaliation claim. Plaintiff argues that her putative class membership was protected activity because it constituted both a "written or oral complaint" and the initiation of an action under Labor Code § 2699, both of which are listed protected activities under Labor Code § 98.6. Specifically, § 98.6 forbids retaliation against any employee because the employee "made a written or oral complaint that he or she is owed unpaid wages, or because the employee has initiated any action or notice pursuant to Section 2699, or has testified or is about to testify in a proceeding pursuant to that section . . . ." California Labor Code § 98.6. Section 2699, in turn, describes civil actions that "aggrieved employees" may initiate to enforce "any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency . . . ." California Labor Code § 2699(a).

However, the mere fact that Plaintiff may have been a putative class member does not establish that Plaintiff "made" a complaint or "initiated" an action under Labor Code § 98.6. Indeed, it appears that the only active step that Plaintiff took regarding the La Jolla lawsuit was to exclude herself from the suit after the class was provisionally certified. Although Plaintiff suggests that Defendants were afraid that Plaintiff might testify in the La Jolla lawsuit, Opp. at 22, Plaintiff provides no evidence that there was a possibility that she might testify in the La Jolla lawsuit, let

alone that she was "about to testify . . . ." California Labor Code § 98.6. To the contrary, in Plaintiff's deposition in the instant case, Plaintiff stated that when she was interviewed by an investigator after the lawsuit was filed, Plaintiff did not mention any wage and hour complaints and specifically said that she "did not have a problem with not receiving . . . breaks." Guthmann Depo. at 148:1–2. Thus, Plaintiff's claim that her termination was "a preemptive strike to prevent her testimony" has no evidentiary support. Opp. at 27. Instead of indicating a desire to testify on behalf of the plaintiffs in the class-action lawsuit, Plaintiff informed the investigator that she had no complaints about not receiving breaks. Plaintiff also offers no legal argument and cites no cases in support of the proposition that being a putative class member constitutes protected activity, despite the fact that it is Plaintiff's burden to establish that she engaged in protected activity. *Heard v. Lockheed Missiles & Space Co.*, 44 Cal. App. 4th 1735, 1749 (1996) ("[I]t is the plaintiff's burden to prove by a preponderance of the evidence a prima facie case of discrimination [or retaliation].").

Furthermore, both the phrase "made a written or oral complaint" and "initiated any action or complaint" describe active conduct on the part of the employee. In contrast, falling within a class definition in a putative class action is purely passive and requires no active participation. *See Cullen v. Margiotta*, 811 F.2d 698, 719 (2d Cir. 1987) ("[A]bsent putative class members are expected and encouraged to remain passive during the early stages of the class action . . . . Not until a class is certified does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it . . . .") (internal quotation marks omitted).

Plaintiff also claims that Plaintiff's "long history of complaining about wage and hour issues" was somehow connected to her termination. Opp. at 21. However, Plaintiff does not provide any argument as to how these complaints constituted protected activity. *See Weingand v. Harland Fin. Sols., Inc.*, 2012 WL 3537035, at *7 (N.D. Cal. Aug. 14, 2012) ("Plaintiff makes no argument as to why or under what provision his complaints to his superiors constitute a protected activity under the provisions of § 98.6 . . . ."). Indeed, Plaintiff appears to concede that these complaints were not protected activity. Specifically, after mentioning both her wage and hour

complaints and her membership in the putative class action as "two instances of Defendants' retaliatory animus," Plaintiff describes her membership in the class action as "the one [instance] that is actionable under Labor Code Section 98.6." Opp. at 22.[4]

Furthermore, even if Plaintiff's complaints qualified as protected activity under § 98.6, the most recent specific complaints to which Plaintiff has pointed occurred in or around June 2014.[5] Plaintiff's termination occurred on May 28, 2015. The Ninth Circuit has held that "in order to support an inference of retaliatory motive, [a] termination must have occurred fairly soon after the employee's protected expression." *Villiarimo*, 281 F.3d at 1065. Thus, the timing of Plaintiff's complaints does not establish a "causal link" sufficient for even a prima facie case of retaliation. *See id.* (citing with approval cases holding that a four month gap, an eight month gap, a five month gap, and a four month gap between protected activity and termination is insufficient to establish causation).[6]

Additionally, even if Plaintiff could establish a prima facie case, summary judgment would still be warranted. As discussed above, Defendants have met their burden of production to offer a legitimate, nondiscriminatory reason for Plaintiff's discharge, and Plaintiff has failed to point to "specific and substantial" evidence to demonstrate that Defendants' proffered reason is pretextual. *Villiarimo*, 281 F.3d at 1062. Thus, Plaintiff has not rebutted Defendants' legitimate, non-

[4] As discussed above, under § 98.6 protected activity includes "written or oral complaint[s] that . . . [an employee] is owed unpaid wages." Labor Code § 98.6(b). However, Plaintiff does not claim that her wage and hour complaints fall under this category, and Plaintiff points to no evidence that in her "long history" of complaints, Plaintiff ever claimed that she was "owed unpaid wages." To the contrary, Plaintiff's complaints focused on her desire to be reclassified as an exempt employee in the future rather than a desire to be paid wages for work performed in the past.

[5] Plaintiff has also claimed more generally that she complained about these issues "during my entire tenure . . . ." Opp. at 2. However, Plaintiff does not argue for causation based on this fact. Moreover, even if Plaintiff did make such an argument, this vague claim is not sufficiently specific to raise an inference that Plaintiff's termination occurred in close temporal proximity to these complaints.

[6] Plaintiff mentions that Plaintiff's August 2014 performance review occurred in close temporal proximity to her complaints. However, Plaintiff does not claim that this performance review was an adverse employment action. Indeed, the August 2014 performance review was positive and described Plaintiff as a "consistent performer." Ex. A to Mot. The performance review specifically noted that although Plaintiff had complaints "regarding exempt/non-exempt status," these issues had "not had a negative effect on her work performance or morale." *Id.*

discriminatory reason for termination.

For these reasons, the Court GRANTS Defendants' motion for summary judgment on Plaintiff's retaliation claim.

D. Wrongful Termination in Violation of Public Policy

The Court next considers Plaintiff's claim for wrongful termination in violation of public policy. Wrongful termination in violation of public policy is a California common law cause of action providing that "when an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." *Tameny v. Atl. Richfield Co.*, 27 Cal.3d 167 (1980); *see also Freund v. Nycomed Amersham*, 347 F.3d 752, 758 (9th Cir. 2003).

Plaintiff's claim for wrongful termination is mostly derivative of Plaintiff's claim for gender discrimination and retaliation. *See Hoskins v. BP Prod. N. Am. Inc.*, 2014 WL 116280, at *7 (C.D. Cal. Jan. 9, 2014) (citing *Reno v. Baird*, 18 Cal. 4th 640, 664 (1998) ("[I]f a plaintiff cannot sue the defendant for discrimination or retaliation under FEHA, the plaintiff cannot sue the defendant for wrongful termination in violation of FEHA or public policy."); *Guyton v. Novo Nordisk, Inc.*, 151 F. Supp. 3d 1057, 1091 (C.D. Cal. 2015) ("[B]ecause [the plaintiff's] retaliation claim fails as a matter of law, he cannot establish that he was wrongfully discharged because he exercised a statutory right or reported a statutory violation for the public's benefit.") (internal quotation marks omitted). Therefore, for the same reasons discussed above, the Court finds that summary judgment is warranted on Plaintiff's derivative claim for wrongful termination.

To the extent that Plaintiff asserts that her wrongful termination claim is not simply derivative of her discrimination and retaliation claims, the Court also finds that summary judgment is warranted. First, Plaintiff appears to claim that her termination was in violation of the public policy in Labor Code § 1102.5(b) protecting whistleblowers. Under § 1102.5(b), an employer is forbidden from retaliating against an employee for "disclosing information . . . to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation . . . if the employee has reasonable cause to believe that the

information discloses a violation of state or federal statute . . . ."

However, under California law "disclosure" within the meaning of § 1102.5(b) "means to reveal something that was hidden and not known." *Mize-Kurzman v. Marin Cmty. Coll. Dist.*, 202 Cal. App. 4th 832, 858 (2012) ("We agree with . . . federal cases that have held that the report of information that was already known did not constitute a protected disclosure."). Plaintiff never claims that she "disclosed" unlawful practices to those who did not know about them. To the contrary, in her complaints Plaintiff expressed her disagreement with wage and hour policies to Wilson, Okumura, and Brudnick, who clearly knew about the policies at issue. *See id.* at 866 (finding no violation because "Plaintiff was not disclosing any previously unknown or hidden conduct, practice or policy, but only her view that the known policy was not lawful."). Additionally, there is no indication that Plaintiff ever told any of her supervisors that she believed this conduct was unlawful before her termination. *See Carter v. Escondido Union High Sch. Dist.*, 148 Cal. App. 4th 922, 933 (2007) (finding no violation of § 1102.5 in part because the plaintiff's "conversation with [his supervisor] was not motivated by his belief that a law had been broken."); *see also Nieves v. City of Oakland*, 2016 WL 6879282, at *6 (Cal. Ct. App. Nov. 22, 2016) (unpublished) ("There is no allegation that appellant's conversations with [his supervisors] were 'motivated by his belief that a law had been broken' rather than just an internal administrative or payroll problem." (citing *Carter*, 148 Cal. App. 4th at 933)).[7] Indeed, in her letter to the corporate office, Plaintiff mentioned no legal violation at all, but instead simply stated that "I am trying to gain a better understanding on how the Vi determined that [certain] positions are exempt and not the Sales Counselor position." Ex. B to Opp. Thus, Plaintiff's questioning of a known policy did not qualify as disclosing an unknown legal violation under § 1102.5(b). [8]

[7] The *Nieves* opinion is unpublished and is therefore not precedent under the California Rule of Court 8.1115. However, the Court may "may nonetheless rely on the unpublished opinion[] . . . to 'lend support'" to the idea that *Carter* "accurately represents California law." *Emp'rs Ins. of Wausau v. Granite State Ins. Co.*, 330 F.3d 1214, 1220 n. 8 (9th Cir. 2003).

[8] *Green v. Ralee Eng. Co.*, 19 Cal.4th 66, 87 (1998), expanded the protections of § 1102.5(b) to a quality control inspector who disclosed to internal managers that the company sold defective airplane components in violation of federal regulations. Accordingly, § 1102.5(b) has since been amended to protect internal disclosures and violations of regulations. However, no court has ever

Similarly, Plaintiff claims that she was terminated for "disclosures regarding working conditions under Labor Code §§ 226.7, 232.5, and 512 that implicate fundamental public policy." However, as discussed above, Plaintiff's complaints did not constitute "disclosure" under California law. *Cf. Cuevas v. SkyWest Airlines*, 17 F. Supp. 3d 956, 967 (N.D. Cal. 2014), *aff'd*, 644 F. App'x 791 (9th Cir. 2016) (granting summary judgment on wrongful termination claim premised on disclosure of working conditions despite the fact that employee had complained internally). Additionally, Plaintiff does not provide any argument about how the working conditions of which Plaintiff complained implicated any well-established "public policy" that is "fundamental and substantial" and that "inures to the benefit of the public at large." *See, e.g.*, *Deschene v. Pinole Point Steel Co.*, 76 Cal. App. 4th 33, 43 (1999), *as modified*, (Nov. 29, 1999) ("In order to establish a common law cause of action for wrongful termination in violation of public policy the *plaintiff must identify a public policy* which: (1) is supported by a constitutional or statutory provision; (2) inures to the benefit of the public at large; (3) is fundamental and substantial; and, (4) is well established at the time of plaintiff's discharge.") (emphasis added).

For these reasons, the Court finds that Plaintiff has not identified any additional public policy ground for her wrongful termination claim except for those public policies that are derivative of her gender discrimination and retaliation claims. Nevertheless, even if Plaintiff had identified a distinct public policy ground for her wrongful termination claim, summary judgment would nevertheless be warranted. As discussed above, Defendants have offered a valid, nondiscriminatory reason for Plaintiff's discharge, and Plaintiff has failed to offer specific and substantial evidence to rebut Defendants' proffered reason. *See Day v. Sears Holdings Corp.*, 930 F. Supp. 2d 1146, 1191 (C.D. Cal. 2013) ("In assessing a claim for wrongful termination in violation of public policy, California courts apply the burden shifting analysis as set forth in *McDonnell Douglas*.") (internal quotation marks omitted); *see also Loggins v. Kaiser Permanente*

---

expanded § 1102.5(b) to protect employees who did not "disclose" anything. At the very least, expansion of § 1102.5(b) to this degree was not "well established at the time of the discharge here," as required for the tort of wrongful termination in violation of public policy. *Stevenson v. Superior Court*, 16 Cal. 4th 880, 885 (1997).

Intern., 151 Cal. App. 4th 1102, 1108–09 (2007) (same).

Thus, the Court GRANTS Defendants' motion for summary judgment on Plaintiff's claim for wrongful termination in violation of public policy. The Court therefore need not consider whether Plaintiff is entitled to punitive damages.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' motion for summary judgment on Plaintiff's age discrimination, gender discrimination, retaliation, and wrongful termination claims.

IT IS SO ORDERED.

Dated: July 14, 2017

Lucy H. Koh

LUCY H. KOH
United States District Judge