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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JANE WHEELER,

Plaintiff,

v.

HOME DEPOT U.S.A., INC.,

Defendant.

Case No.: 15cv2236-CAB-AGS

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

[Doc. No. 41]

This matter is before this Court on Defendant’s motion for summary judgment. On March 13, 2017, a hearing was held with regard to the motion. [Doc. No. 54.] Erin Hanson, Esq., and Kevin Mirch, Esq. appeared on behalf of Plaintiff Jane Wheeler. Anthony Sbardellati, Esq. appeared on behalf of Defendant Home Depot. For the reasons set forth below, the motion is granted.

I. General Background

Plaintiff was employed by Home Depot from 1994 until August 2014. [Deposition of Plaintiff Janet Wheeler [Doc. No. 41-5 (“Wheeler Depo.”), 22:16-24:18 and 32:1-25.] During her employment at Home Depot, Plaintiff worked as an assistant store manager (“ASM”), a co-manager and a Store Manager (“SM”). In 2005, Plaintiff was transferred

1 to become the SM of the Chula Vista store, where she remained until 2012. [*Id.*, 30:23-
2 31:11.] In 2012, Plaintiff was transferred to work as the SM of the Otay Mesa store, where
3 she remained until she resigned in 2014. [Doc. No. 41-5, Wheeler Depo., 31:12-32:25,
4 239:17-240:11; Doc. No. 41-7.]

5 In the First Amended Complaint (“FAC”), Plaintiff alleges Defendant constructively
6 terminated her by discriminating against her based on age and gender, and retaliated against
7 her for complaining about improper conduct in the workplace. Defendant seeks summary
8 adjudication of each of the remaining claims in the FAC.¹

9 II. Statement of Facts

10 In the last few months of her employment at Home Depot, Plaintiff received two
11 progressive disciplinary notices from her District Operations Manager, Mr. Taylor, and
12 five Manager’s Notes from the Human Resources Manager, Ms. Korkow, with regard to
13 poor store operations and appearances. [Doc. Nos. 41-31, 41-32; Doc. Nos. 41-22 – 41-
14 27.]²

15 At 3:49 p.m. on August 25, 2014, Mr. Taylor sent an email to a listserv which
16 included all eleven SMs in District 199 (the “August 25 email”). [Taylor Depo., 47:12-
17 48:6, 119:1-120:23; Wheeler Depo., 227:18-228:19; Doc. No. 41-10.] In that email, Mr.
18 Taylor wrote that Plaintiff’s store had performed poorly over the prior six months and that
19 she was not improving and was “at risk.” [Taylor Dep., 47:12-53:9; Doc. No. 41-10.] Mr.
20 Taylor testified that he should have sent this email to his boss and [District Manager]
21 Astorino, only, but he accidentally sent it to all the SMs in District 199. [Taylor Depo.,
22 44:19-47:25 and 119:1-120:23.] As soon as he sent the August 25 email, Mr. Taylor
23

24 ¹ On July 29, 2016, this Court granted Defendant’s motion to dismiss the first and second causes of
25 action for fraudulent and negligent misrepresentation. [Doc. No. 127.]

26 ² Defendant argues any events that occurred before June 4, 2014 are barred as a matter of law due to
27 Plaintiff’s failure to timely pursue them. [Doc. No. 41-1 at 20-21.] Plaintiff does not oppose this
28 argument except to say that a disciplinary notice sent in April 2014 “was used to justify the later
discipline notices and Plaintiff’s final write-up” and therefore should be included in the analysis. [Doc.
No. 44 at 26-27.] Even assuming this to be true, Plaintiff fails to state a prima facie case of
discrimination or retaliation for the reasons set forth below.

1 received a call from another SM in District 199 who explained that it was sent to all SMs
2 in the district. [Taylor Depo., 119:1-120:23.] Two minutes after the August 25 email was
3 sent, Mr. Taylor sent another email asking all the SM's to immediately delete the August
4 25 email. [Doc. No. 41-11.] Approximately 14 minutes after sending the second email,
5 Mr. Taylor sent a third email to the SMs, apologizing for any embarrassment and taking
6 responsibility for sending the August 25 email. [Doc. No. 41-12.] After sending the
7 emails, Mr. Taylor also called Plaintiff and apologized for sending it. [Taylor Depo.,
8 119:1-120:23.] Mr. Taylor was later disciplined by his boss for circulating the August 25
9 email. [Astorino Depo, 116:12-118:11; Taylor Depo., 44:19-45:18.]

10 Upon receipt of the August 25 email, Plaintiff forwarded it to the Human Resources
11 Manager, Ms. Korkow, and requested a meeting to discuss the issue. [Wheeler Depo.,
12 231:13-232:14; Doc. No. 41-13.] Ms. Korkow responded to Plaintiff that Mr. Taylor
13 sending the August 25 email was a "huge mistake" and asked Plaintiff whether she could
14 meet at a Starbucks on August 28, 2014 at 8:15 a.m. [Wheeler Depo., 234:8-238:12; Doc.
15 No. 41-14.] The following is Plaintiff's testimony with regard to that meeting:

16 Q. Did you meet her?

17 A. I did.

18 Q. When?

19 A. The next day at 8:15.

20 Q. And was that –

21 A. So the 27th.

22 Q. Maybe the 28th?

23 A. Oh, yeah, the next day after the 27th. I'm sorry. Yes, the
24 28th.

25 Q. You met her at 8:15 in the morning?

26 A. At 8:15 in the morning, at Starbucks inside the Target next
27 to the Balboa Home Depot.

28 Q. How long did you meet with Courtney [Ms. Korkow]?

A. About 15 minutes, probably.

Q. Do you recall what you discussed?

A. Yes, I told her that – she had asked me, when we had met
previously, to not quit and to think about it, to not leave. And I
had told her on that previous occasion that I – I would take some
time to think about it, but I didn't think that it would make any

1 difference because if they had decided to terminate me, they were
2 going to terminate me anyway. One way or another, it was going
3 to happen, so why would I postpone it.

4 And she asked me if I knew anybody that could hire me,
5 off the record. And, again, asked me to please take a couple of
6 days at least to think about it.

7 And so this was our follow-up meeting, where I had asked
8 her to bring me a copy of my file, and I let her know that I was
9 for sure not coming back.

10 Q. So based on your testimony, it's my understanding that
11 after Alex Taylor sent out that email to the entire team on August
12 25th that was not supposed to be sent to the entire team, you told
13 Courtney that you felt like you wanted to quit, and then she asked
14 you to take a few days to think about it; is that correct?

15 A. What I told her is I couldn't work for this company
16 anymore. I couldn't work with Alex anymore. I couldn't work
17 in a place that people would allow that anymore. And she asked
18 me to think about it for a few days. And this is when I came back
19 and told her that I had made the decision that I was not going to
20 continue to work for Home Depot.

21 Q. And prior to this meeting, did Courtney urge you not to
22 quit?

23 A. That is a – that is an interesting question, because she –
24 she said, “We don't want you to quit.” But when I said that I
25 was going to be fired if I didn't – that this was – there's, you
26 know, no doubt in my mind that there was this target, and that
27 they were going to find things wrong with me.

28 And I let her know that if I – if somebody told me I had to
fire this person, no matter who it was, I could find something
wrong. You can find ways to document anybody out of a job if
it was a – something that they wanted to do, and therefore, it
didn't make sense for me to – to wait.

Her response to that was no longer, “Please don't quit”;
her response to that was, “Off the record, do you know anybody
that would hire you in retail?”

Q. Do you think it's possible she asked you that because she
was personally concerned about your financial welfare?

A. I think she was trying to give me a hint that I was right.

Q. But do you know that for a fact?

A. I don't know what is inside her head.

Q. Okay. So it is at least theoretically possible that she was

1 concerned for you?

2 A. But even if she was concerned about me, I – to me, it just
3 validated that she knew that I was right; that this was – that this
4 was a moot point, to go back to work for the company. Because
5 otherwise, she would have said, “I’m genuinely concerned for
6 you, I will help you. Let —“come back to work. I will be the
7 HR manager that I should be, and I will help support you and get
8 you the training, if that’s what is needed, or help you understand
9 what the circumstances are that are causing this. I will be there
10 and be a partner to you and help you through it.”

11 Instead, she said, “Go find another job.”

12 Q. Well, let me just ask you generally, because you did say
13 that you were not inside her head.

14 A. Uh-huh.

15 Q. Isn’t it true that you can’t possibly know what she actually
16 meant by that statement?

17 A. Nobody could.

18 [Doc. No. 41-5 at 96-99, Wheeler Depo., 235, ll. 2 – 238, ll. 12.]

19 On August 29, 2014, Plaintiff resigned from her position as the SM of Otay Mesa.
20 [Wheeler Depo., 31:12-32:25 and 239:17-240:11; Doc. No. 41-7.] According to Plaintiff,
21 “I would have retired from Home Depot. But they . . . made that impossible for me . . . and
22 if I had not left when I did leave, I was going to be terminated anyway, guaranteed.”
23 [Wheeler Depo., 259:5-260:7]. When asked how she knew that she would be terminated if
24 she did not resign, Plaintiff testified as follows:

25 Q. How do you know that?

26 A. Because that last email from Alex was heading me in that
27 direction. And the comment that Courtney made about finding
28 another job. It was going to happen. They knew that they –
anybody can get fired. Anybody can find – they can fire you.
And they make it really clear that that’s where they are going.

Q. Isn’t it at least possible that you would have survived the
final warning?

A. Again, anything is possible. I can’t read into the future.
But I’ll tell you, that was not their plan.

[Doc. No. 41-5 at 115, Wheeler Depo., 260: 9-19.]

Other witnesses testified that when an employee is placed on a final warning, there
are several potential outcomes, including termination, but only if performance does not

1 improve. [Astorino Depo., 70:22-71:4; Grooms Depo., 22:18-23:5]. However, if an
2 employee's performance does improve that employee can maintain her employment with
3 the company. [*see Id.* and Taylor Depo.,76:23-78:19].

4 Finally, Plaintiff's testimony with regard to when she made her decision to quit her
5 job at Home Depot is as follows:

6 Q. When did you make the decision to quit your job at Home
7 Depot?

8 A. The final straw was when I got the email.

9 Q. And –

10 A. And I had – before that, I would say probably – I'm going
11 to say it's been – probably about a month before that, I had
12 started taking some of my stuff home. But that was the straw that
13 broke the camel's back. That was when I decided then, "I've got
14 to go."

15 I had asked for help, and felt like I was getting nowhere
16 with that. And that's when I had started little by little taking
17 some of my personal effects out of my office and taking them
18 home with me.

19 So I think, in reality, in my mind, it had been for a while;
20 enough so that I was taking things home. But I – but it was
21 nothing that I had to have at work, so the decision hadn't been
22 really made, you know, concrete until that day. That date was
23 sealed.

24 Q. And just to have a clear record, when you say "that day,"
25 and "that email," that was the straw that broke the camel's back,
26 you're referring to the email sent on August –

27 A. On the 27th – 5th – whatever it was. 25th.

28 Q. August 25th, 2014?

A. Correct.

[Doc. No. 41-5 at 99-100, Wheeler Depo., 238:14 – 239:14.]

23 **III. Legal Standards on Motions for Summary Judgment**

24 A party is entitled to summary judgment "if the pleadings, depositions, answers to
25 interrogatories, and admissions on file, together with the affidavits, if any, show that there
26 is no genuine issue as to any material fact and that the moving party is entitled to a judgment
27 as a matter of law." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To avoid
28 summary judgment, disputes must be both 1) material, meaning concerning facts that are

1 relevant and necessary and that might affect the outcome of the action under governing
2 law, and 2) genuine, meaning the evidence must be such that a reasonable jury could return
3 a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
4 (1986); *Cline v. Indus. Maint. Eng'g & Contracting Co.*, 200 F.3d 1223, 1229 (9th Cir.
5 2000) (citing *Anderson*, 477 U.S. at 248).

6 The initial burden of establishing the absence of a genuine issue of material fact falls
7 on the moving party. *See Celotex Corp.*, 477 U.S. at 322-323. If the moving party can
8 demonstrate that its opponent has not made a sufficient showing on an essential element of
9 his case, the burden shifts to the opposing party to set forth facts showing that a genuine
10 issue of disputed fact remains. *Id.* at 324. When ruling on a summary judgment motion,
11 the court must view all inferences drawn from the underlying facts in the light most
12 favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
13 U.S. 574, 587 (1986).³

14 **IV. Discussion**

15 **A. Fair Employment and Housing Act (“FEHA”) Claims**

16 **1. Prima Facie Discrimination or Retaliation**

17 “California applies the *McDonnell Douglas* burden-shifting framework and other
18 federal employment law principles when interpreting the FEHA.” *Schechner v. KPIX-TV*,
19 686 F.3d 1018, 1023 (9th Cir. 2012); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792
20 (1973). As the Ninth Circuit has explained:

21 The *McDonnell Douglas* analysis imposes on the plaintiff an initial burden of
22 establishing a prima facie case of discrimination. To establish a prima facie
23 case, a plaintiff must offer evidence that gives rise to an inference of unlawful
24 discrimination. The prima facie case may be based either on a presumption
25 arising from the factors such as those set forth in *McDonnell Douglas*, or by
26 more direct evidence of discriminatory intent. The requisite degree of proof
27 necessary to establish a prima facie case for Title VII on summary judgment

28 ³ In the reply, Defendant objects to the Declaration of Amapola Martin. [Doc. No. 49 at 2-3.] The
declaration is not pertinent to the issue of whether Plaintiff was constructively discharged, and therefore
was not considered. Accordingly, Defendant’s objection is denied as moot.

1 is minimal and does not even need to rise to the level of a preponderance of
2 the evidence.

3 *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998) (internal quotation
4 marks, brackets, ellipses and citations omitted). “While the plaintiff’s prima facie burden
5 is not onerous, he must at least show actions taken by the employer from which one can
6 infer, if such actions remain unexplained, that it is more likely than not that such actions
7 were based on a prohibited discriminatory criterion.” *Guz v. Bechtel Nat’l, Inc.*, 24 Cal.
8 4th 317, 355 (2000)(internal quotation marks and citations omitted). Once the plaintiff
9 establishes a prima facie case, the burden shifts to the employer to offer a legitimate, non-
10 discriminatory or retaliatory reason for the adverse employment action. *Id.* If the employer
11 satisfies this burden, the burden shifts back to the plaintiff to prove discrimination or
12 retaliation. *Id.* at 356.

13 The FAC asserts four FEHA claims: (a) Claim Three for Retaliation; (b) Claim Four
14 for Failure to Prevent Discrimination and Retaliation; (c) Claim Five for Age
15 Discrimination and (d) Claim Six for Gender Discrimination.

16 ***Claim Five – Age Discrimination***

17 To make a prima facie age discrimination case under FEHA, Plaintiff must show (1)
18 she was at least 40 years old; (2) she was performing her job satisfactorily; (3) she suffered
19 an adverse employment action; and (4) evidence, such as replacement by a significantly
20 younger employee with similar or inferior qualifications, suggests a discriminatory motive
21 for the employment action. *Guz*, 24 Cal. 4th at 355; see also *Diaz v. Eagle Produce Ltd.*
22 *P’ship.*, 521 F.3d 1201, 1207 (9th Cir. 2008) (“Generally, an employee can satisfy the last
23 element of the prima facie case only by providing evidence that he or she was replaced by
24 a substantially younger employee with equal or inferior qualifications”). “While the
25 plaintiff’s prima facie burden is not onerous..., [s]he must at least show actions taken by
26 the employer from which one can infer, if such actions remained unexplained, that it is
27 more likely than not that such actions were based on a [prohibited] discriminatory criterion
28 [.]” *Guz*, 24 Cal. 4th at 355 (internal quotation marks and citations omitted).

1 Here, the first prong is satisfied because it is undisputed that Plaintiff is over the age
2 of 40; she was 52 years old when she resigned from Home Depot. [Doc. No. 44-2 at ¶2.]
3 As to the fourth prong, there is evidence that Plaintiff’s replacement, Richard Tim, is “late
4 30s, early 40s, somewhere around there.” [Doc. No. 42, Astorino Depo., Ex. 25, p. 216;
5 Doc. No. 44-26 at 62, ll. 4-8.] There is also evidence that Tim had previously been a co-
6 manager at another Home Depot store. [Doc. No. 44-26 at 66, ll. 16-19.] Thus Plaintiff
7 established a genuine issue as whether she was “replaced by a substantially younger
8 employee with equal or inferior qualifications.” *Hersant v. Dept. of Soc. Serv.*, 57
9 Cal.App.4th 997, 1002-1003 (1997).

10 Plaintiff also established a genuine issue as to whether she was performing her job
11 in a satisfactory manner. *Id.* Defendant provided evidence that Plaintiff had been given
12 several disciplinary notices from her District Manager and Human Resources in the months
13 prior to her resignation with regard to various performance issues primarily related to store
14 appearance and operations. [Doc. Nos. 41-31, 41-32; Doc. Nos. 41-22 – 41-27.] However
15 Plaintiff submitted evidence that, five days prior to her departure, she received a positive
16 evaluation in similar categories from a different (asset protection) manager. [Doc. No. 44-
17 16.] In the last year of her employment, Plaintiff was also in the top five stores in her
18 district and received a bonus based on her store’s performance. [Doc. No. 44-15.]
19 Therefore, Plaintiff established a genuine issue as to whether she was performing her job
20 satisfactorily.

21 However, Plaintiff fails to establish a genuine issue that an adverse employment
22 action was taken against her. Defendant has submitted evidence that Plaintiff voluntarily
23 resigned from her employment. In the briefing, Plaintiff argued that a series of events,
24 culminating in the August 25 email, were adverse employment actions. [Doc. No. 44 at
25 22-23.] At oral argument, Plaintiff’s counsel argued that Plaintiff resigned because of the
26 contents of the August 25 email and a later discussion with Human Resources where she
27 was essentially given an “ultimatum.”

28 “Constructive discharge, like actual discharge, is a materially adverse employment

1 action.” *Steele v. Youthful Offender Parole Bd.*, 162 Cal.App.4th 1241, 1253, quoting
2 *EEOC v. Univ. of Chicago Hospitals*, 276 F.3d 326, 331–332 (7th Cir. 2002).
3 “Constructive discharge occurs when the employer's conduct effectively forces an
4 employee to resign. Although the employee may say ‘I quit,’ the employment relationship
5 is actually severed involuntarily by the employer's acts, against the employee's will. As a
6 result, a constructive discharge is legally regarded as a firing rather than a resignation.
7 [Citation.]” *Turner v. Anheuser–Busch*, 7 Cal.4th 1238, 1244–1245 (1994). “Under the
8 constructive discharge doctrine, an employee’s reasonable decision to resign because of
9 unendurable working conditions is assimilated to a formal discharge for remedial purposes.
10 The inquiry is objective: Did working conditions become so intolerable that a reasonable
11 person in the employee’s position would have felt compelled to resign?” *Poland v.*
12 *Chertoff*, 494 F.3d 1174, 1184 (9th Cir. 2007) (quoting *Penn. State Police v. Suders*, 542
13 U.S. 129, 141 (2004)). Courts “set the bar high for a claim of constructive discharge
14 because . . . antidiscrimination policies are better served when the employee and employer
15 attack discrimination within their existing employment relationship, rather than when the
16 employee walks away and then later litigates whether his employment situation was
17 intolerable.” *Id.*

18 A “constructive discharge occurs when the working conditions deteriorate, as a
19 result of discrimination, to the point that they become ‘sufficiently extraordinary and
20 egregious to overcome the normal motivation of a competent, diligent, and reasonable
21 employee to remain on the job to earn a livelihood and to serve his or her employer.’”
22 *Brooks v. City of San Mateo*, 229 F.3d 917, 930 (9th Cir. 2000) (quoting *Turner*, 7 Cal. 4th
23 at 1246). There are “‘three areas of inquiry’ to test whether a constructive discharge claim
24 can be proved”: (1) whether there were intolerable conditions; (2) “whether a reasonable
25 person faced with the allegedly intolerable employer actions or conditions of employment
26 would have no reasonable alternative except to quit”; and (3) whether the employee’s
27 resignation was “*employer-coerced*, not caused by the voluntary action of the employee or
28 by conditions or matters beyond the employer’s reasonable control.” *Casenas v. Fujisawa*

1 *USA, Inc.*, 58 Cal. App. 4th 101, 113-14 (Cal. Ct. App. 1997) (quoting *Turner*, 7 Cal. 4th.
2 at 1246, 1248) (*italics* in original; internal quotation marks and citations omitted). In sum,
3 “to establish a constructive discharge, an employee must plead and prove . . . that the
4 employer either intentionally created or knowingly permitted working conditions that were
5 so intolerable or aggravated at the time of the employee’s resignation that a reasonable
6 employer would realize that a reasonable person in the employee’s position would be
7 compelled to resign.” *Turner*, 7 Cal. 4th at 1251.

8 “Whether working conditions were so intolerable and discriminatory as to justify a
9 reasonable employee’s decision to resign is normally a factual question for the jury.”
10 *Wallace v. City of San Diego*, 479 F.3d 616, 626 (9th Cir. 2007) (quoting *Schnidrig v.*
11 *Columbia Mach., Inc.*, 80 F.3d 1406, 1411 (9th Cir. 1996)). However, “an employee
12 cannot simply ‘quit and sue,’ claiming he or she was constructively discharged.” *King v.*
13 *AC & R Advert.*, 65 F.3d 764, 767 (9th Cir. 1995) (quoting *Turner, Inc.*, 7 Cal. 4th at 1246).
14 “In such instances, summary judgment is appropriate.” *Id.*; *see also Scotch v. Art Inst. of*
15 *California-Orange Cty., Inc.*, 173 Cal. App. 4th 986, 1022 (Cal. Ct. App. 2009)
16 (“[S]ummary judgment against an employee on a constructive discharge claim is
17 appropriate when, under the undisputed facts, the decision to resign was unreasonable as a
18 matter of law.”).

19 In the briefing, Plaintiff first argues that the following were adverse employment
20 actions:

21 . . . the July 31, 2014 counseling, the manager’s notes, the August 25, 2014
22 email, the District Operations Manager sending admittedly sensitive and
23 private performance discipline information to Plaintiff’s peers, and the final
24 writeup that Taylor confirmed Wheeler would receive, *see* Ex. 1. Astorino
25 testified that Taylor would have had access to the disciplinary information
26 contained in the August 25th email, and he doesn’t believe Taylor fabricated
the fact that Wheeler was being put on a final. *See* Astorino Depo. 118:5-
119:15.

[Doc. No. 44 at 22.]

27 The counseling, manager’s notes, and August 25 email do not constitute
28

1 adverse employment actions even if, as Plaintiff argues, those disciplinary notices
2 were unfair and instigated by a discriminatory animus. Being given poor
3 performance reviews or disciplinary notices are not the sort of extraordinary and
4 egregious conditions that would justify a constructive discharge claim.

5 Plaintiff confuses alleged discrimination with harassment and the heightened
6 requirements for intolerable conditions. Whether Plaintiff was a victim of
7 discrimination does not automatically indicate that conditions were so intolerable
8 that she was forced to resign. As one California court explained in the context of a
9 hostile work environment claim (which is a lower standard than the intolerable
10 conditions required for constructive discharge), “harassment consists of a type of
11 conduct not necessary for performance of a supervisory job. Instead, harassment
12 consists of conduct outside the scope of necessary job performance, conduct
13 presumably engaged in for personal gratification, because of meanness or bigotry,
14 or for other personal motives. Harassment is not conduct of a type necessary for
15 management of the employer’s business or performance of the supervisory
16 employee’s job.” *Janken v. GM Hughes Elec.*, 46 Cal. App. 4th 55, 63 (Cal. Ct.
17 App. 1996). “[C]ommonly necessary personnel management actions such as hiring
18 and firing, job or project assignments, office or work station assignments, promotion
19 or demotion, performance evaluations, the provision of support, the assignment or
20 nonassignment of supervisory functions, deciding who will and who will not attend
21 meetings, deciding who will be laid off, and the like, do not come within the meaning
22 of harassment.” *Id.* at 64-65. “Discrimination claims, by contrast, arise out of the
23 performance of necessary personnel management duties.” *Id.* at 63.

24 Here, Plaintiff argues that she is the victim of discrimination, but whether
25 Home Depot engaged in discrimination is a separate question from whether it created
26 working conditions so intolerable that Plaintiff had to resign. In that regard, Plaintiff
27 offers no evidence that Home Depot changed Plaintiff’s working conditions or made
28 it difficult for her to perform her job functions. In fact, after the August 25 email

1 event, Mr. Taylor and Ms. Korkow apologized and tried to rectify the sending of the
2 email. There is no evidence Plaintiff was harassed⁴ or subjected to epithets and
3 scorn.⁵ Rather, the only evidence is that Plaintiff was subject to numerous
4 disciplinary actions that are part of employee supervision. Even if these disciplinary
5 actions were falsely or unfairly inflicted upon Plaintiff in a discriminatory fashion,
6 they do not create the intolerable conditions necessary to hold that Plaintiff's
7 resignation was in fact a constructive discharge.

8 Moreover, Plaintiff misstates the evidence when she argues that Taylor
9 "confirmed Wheeler would receive" a final write-up, and cites to the August 25
10 email. [Doc. No. 44 at 22.] The August 25 email does not confirm that Plaintiff
11 would be given a final write-up. Rather, it is an internal document (not meant to be
12 seen by Plaintiff) where Mr. Taylor relays to his supervisor that Plaintiff was "at
13 risk." Thus, it does not constitute a final write-up. Moreover, Mr. Taylor did not
14 have authority to put Plaintiff on a final write-up. [Doc. No. 44-27 at 7, Taylor
15

16 ⁴ It is noteworthy that Plaintiff has not brought a claim for harassment, as the conditions identified by
17 Plaintiff are not even sufficient to maintain a hostile work environment claim, which is a lower standard
18 than what must be shown for constructive discharge. *Brooks*, 229 F.3d at 930 ("Where a plaintiff fails
19 to demonstrate the severe or pervasive harassment necessary to support a hostile work environment
20 claim, it will be impossible for her to meet the higher standard of constructive discharge: conditions so
21 intolerable that a reasonable person would leave the job."); see also *Pennsylvania State Police v. Suders*,
542 U.S. 129, 133 (2004) (holding that to establish constructive discharge, a plaintiff must make a
further showing beyond that required to establish a hostile work environment: "that the abusive working
environment became so intolerable that her resignation qualified as a fitting response.").

22 ⁵ Plaintiff testified as to various comments that were made to her concerning personal issues, such as a
23 death in her family, along the lines of "Wow, you're having a bad year." (Plaintiff Dep., 243:6-246:10
24 and 248:6-25) However, she testified that she never heard her supervisors make any comments
25 specifically related to her age. (*Id.*, 243:6-246:10 and 248:6-25). She was also teased by a few coworkers
26 while they played on a company softball team. (*Id.*, 253:11-254:12 and 255:16-256:11). Finally,
27 Plaintiff testified that Mr. Taylor spoke to her in a condescending tone. (Plaintiff Dep., 162:1-7 and
28 175:4-180:19) However, Plaintiff admitted that she felt Mr. Taylor was a "jerk" to some men too, and
that she did not have many interactions with him. (*Id.*, 162:1-7 and 175:4-180:19). None of these events
rise to the level of harassment, much less "intolerable conditions."

1 Depo., 23:1-4.] That authority was with Mr. Astorino, who testified as follows:

2 Q. Do you have any reason to believe that Mr. Taylor would have been not
3 – would have been fabricating the fact that Ms. Wheeler was going to be put
4 on a final?

5 A. So I just want to be clear; I don't think I ever saw the email that you're
6 referring to, so I can't really speak to what he said or didn't say because I never
7 saw it. Do I think he would fabricate, no.

8 Q. So, in your professional relationship with Mr. Taylor, if he said that Ms.
9 Wheeler is going to be put on a final, she was going to be put on a final?

10 A. If he – I want to be clear. He in his mind may have thought she was
11 going to be put on a final. I don't know where his mind was. What I am saying
12 to you is, I don't know where I was in the process at that point, if I had agreed
13 to it or not.

14 Q. Okay.

15 A. I may have. I may not have. I don't recall.

16 [Doc. No. 44-26 at 64.]

17 Thus, there is no evidence, other than Plaintiff's subjective belief, that she had
18 been placed on a final write-up. Moreover, even if she had been placed on a final
19 write-up, disciplinary notices, in and of themselves, cannot be adverse employment
20 actions. As argued by Defendant, if this were so, then no employer would be able
21 to discipline or document poor performance without being at risk of a constructive
22 discharge claim.

23 Second, in the briefing, Plaintiff argues that failure to receive a mid-year
24 bonus was an adverse employment action. [Doc. No. 44 at 22.] According to
25 Plaintiff, if an employee is on a final write-up, then the employee is not eligible to
26 receive a mid-year bonus, which in her case could have been as much as \$20,000.
27 [Doc. No. 44 at 22.] This failure to receive a mid-year bonus, argues Plaintiff, is an
28 adverse employment action. *Id.* However, as discussed above, at the time of her
resignation, Plaintiff had not yet been placed on a final write-up. Moreover, mid-
year bonuses are not paid until September. [Doc. No. 44-2 at ¶44.] Thus, by
resigning in August 2014, Plaintiff made it impossible for her to receive a bonus in
September. Therefore neither the final write-up (which had not yet happened), nor

1 the mid-year bonus (which was not yet due) are adverse employment actions because
2 they had not occurred prior to Plaintiff's resignation. Plaintiff provides no authority
3 for the proposition that Plaintiff's subjective anticipation of an adverse employment
4 action is sufficient.

5 Third, in the briefing, Plaintiff argues that "the action of sending the August
6 25 email to Plaintiff's peers was an adverse employment action, it negatively
7 affected Plaintiff's work conditions because she was suddenly receiving judgment
8 by her peers and her reputation was negatively impacted." [Doc. No. 44 at 22.]
9 According to Plaintiff, after the August 25 email was sent to other Store Managers,
10 she had no choice but to resign, notwithstanding the fact that Mr. Taylor and Ms.
11 Korkow both apologized to her. While the August 25 email event may have been
12 embarrassing for Plaintiff, it was an isolated instance that does not rise to the level
13 of intolerable conditions. See *Turner*, 7 Cal.4th at 1246 (single or isolated acts are
14 generally insufficient to support a constructive discharge claim). Moreover, Mr.
15 Taylor tried to rectify the situation by asking the other Store Managers to delete the
16 email and apologizing to Plaintiff. Ms. Korkow also apologized to Plaintiff, letting
17 her know that it was a mistake. In essence, once put on notice of the transmission
18 of the August 25 email, Defendant took reasonable steps to remedy the situation.
19 See *Cesenas v. Fujisawa USA, Inc.*, 58 Cal.App.4th 101, 118 (1997)(employer's
20 timely response to employee's complaint and reasonable efforts to remedy the
21 situation tend to show that employer did not knowingly permit the [allegedly
22 intolerable] conditions to exist). Therefore, this isolated incident which Defendant
23 took reasonable steps to remedy does not constitute an "intolerable condition" to
24 justify Plaintiff's decision to resign. *Turner*, 7 Cal.4th at 1246.

25 At oral argument, Plaintiff's counsel presented a new theory that Plaintiff did
26 not resign merely because an email was sent to her peers; rather, Plaintiff resigned
27 because of the "contents" of the email and a later discussion with her Human
28 Resources Manager where she was given an "ultimatum." First, as to the contents

1 of the email stating that Plaintiff was “at risk,” this was an internal document
2 discussing a series of disciplinary actions. As discussed above, even if those
3 disciplinary actions were motivated by a discriminatory animus, they do not
4 constitute “intolerable conditions” that would support a constructive termination
5 claim.

6 Second, at oral argument, Plaintiff’s counsel characterized Plaintiff’s
7 discussion with Ms. Korkow at Starbucks on August 28 (the “Starbucks meeting”)
8 as Ms. Korkow giving Plaintiff an “ultimatum” that she needed to “go find another
9 job” or she would be fired. However, this is a mischaracterization of the evidence.
10 As the testimony discussed above makes clear, prior to the August 25 email, Plaintiff
11 had discussions with Ms. Korkow about wanting to quit because she believed Mr.
12 Taylor wanted to fire her. [Wheeler Depo., 235:16 – 24.] After Plaintiff told Ms.
13 Korkow she wanted to quit, Ms. Korkow said “off the record, do you know anybody
14 that would hire you in retail?” [Wheeler Depo., 235:25 – 236: 1; 237: 8 -10.] Later
15 in Plaintiff’s testimony, when Plaintiff referred back to that conversation, she
16 characterized Ms. Korkow’s statement as “Go find another job.” [Wheeler Depo.,
17 237:18 – 238: 6.] Plaintiff admitted, however, that she did not know what Ms.
18 Korkow meant by that statement. [Wheeler Depo., 238:10-12.] Finally, Plaintiff
19 never testified that Ms. Korkow ever said anything to the effect of “you will be
20 fired.” Therefore, Plaintiff’s counsel’s attempt to characterize this conversation as
21 an “ultimatum” is a vast distortion of the actual testimony.

22 Regardless of what Ms. Korkow said to Plaintiff after the August 25 email,
23 Plaintiff was very clear in her testimony that she had made the decision to quit the
24 day the August 25 email was sent. [Wheeler Depo., 238:14 – 239:14.] Plaintiff had
25 been thinking about quitting for one month prior to that date, and had even taken
26 some of her personal items home. [Wheeler Depo., 238:17 – 239: 7.] But when the
27 August 25 email was sent, Plaintiff testified, that was “the straw that broke the
28 camel’s back.” [Wheeler Depo., 238:21 – 23.] “That date [the decision to quit] was

1 sealed.” [Wheeler Depo., 239: 7.] Thus, Plaintiff’s counsel’s attempt at oral
2 argument to de-emphasize the importance of the August 25 email and argue that Ms.
3 Korkow had given Plaintiff some sort of ultimatum at the Starbucks meeting is
4 disingenuous at best. In fact, Plaintiff testified that the Starbucks meeting was a
5 follow-up meeting to previous discussions where Ms. Korkow had asked Plaintiff to
6 take a couple of days to think about whether she was going to quit. [Wheeler Depo.,
7 235: 16 – 236: 5.] Plaintiff further testified that she asked Ms. Korkow to bring a
8 copy of her file to the Starbucks meeting, where Plaintiff “let [Korkow] know that
9 [she] was for sure not coming back.” [Wheeler Depo., 236:3 – 6.] Thus, the evidence
10 is undisputed that Plaintiff had made up her mind to quit on August 25, and the
11 August 28 Starbucks meeting was simply for Plaintiff to convey her decision to Ms.
12 Korkow and obtain a copy of her file. Therefore, anything Ms. Korkow may have
13 said to Plaintiff at the Starbucks meeting is not a material fact with regard to
14 Plaintiff’s decision, made days earlier, to quit her employment at Home Depot.

15 Finally, even if Ms. Korkow had said something along the lines of “go get
16 another job or you will be fired,” that is not an ultimatum that would support a
17 constructive discharge claim. In the Ninth Circuit, “[i]n some circumstances, a
18 single intolerable incident, such as ... an employer's ultimatum that an employee
19 commit a crime, may constitute a constructive discharge.” *Turner*, 7 Cal. 4th at 1247
20 n.3; *see also Jacobs v. Universal Dev. Corp.*, 53 Cal. App. 4th 692, 698–702 (1997)
21 (noting that an employer cannot “demand that the employee commit a criminal act”).
22 Here, there is no allegation or evidence that Plaintiff was ever asked to commit a
23 crime.⁶

24
25
26 ⁶ To support the new “ultimatum” theory, Plaintiff’s counsel cited to the following cases, none of which
27 are in the Ninth Circuit: *Faruki v. Parsons S.I.P., Inc.*, 123 F.3d 315, 319 (5th Cir. 1997); *Burkes v.*
28 *Oklahoma Pub. Co.*, 81 F.3d 975, 978 (10th Cir. 1996); and *Jenkins v. State of Louisiana*, 874 F.2d 992,
996 (5th Cir. 1989). However, even under the cases cited by Plaintiff, the alleged discussions with Ms.
Korkow did not constitute an ultimatum that would support a constructive discharge claim. In *Faruki*, a
genuine issue was established as to discharge where the employer told the plaintiff that he “would be

1 Plaintiff may have been unhappy with the conditions at Home Depot and they
2 may have caused her stress, but “an employer is not obligated to provide a stress-
3 free environment.” *Casenas*, 58 Cal. App. 4th at 113; *see also Turner*, 7 Cal. 4th at
4 1247 (holding that an employee is not “guaranteed a working environment free from
5 stress”) (internal quotation marks and citation omitted). “The conditions giving rise
6 to the resignation must be sufficiently extraordinary and egregious to overcome the
7 normal motivation of a competent, diligent, and reasonable employee to remain on
8 the job to earn a livelihood and to serve his or her employer. The proper focus is on
9 whether the resignation was coerced, not whether it was simply one rational option
10 for the employee.” *Turner*, 7 Cal. 4th at 1246. While the August 25 email event
11 may have been embarrassing and even stressful for Plaintiff, it was not an intolerable
12 condition that would justify Plaintiff being able to “quit and sue.” *Turner, Inc.*, 7
13 Cal. 4th at 1246. Plaintiff has failed to demonstrate that she experienced an adverse
14 employment action, which is a necessary element of her claim. Accordingly,
15 Defendant’s motion for summary adjudication as to age discrimination is granted.

16 ***Claim Six – Gender Discrimination***

17 Plaintiff claims that she was terminated because of her gender. In evaluating
18 discrimination claims under FEHA, California courts look to federal precedent governing
19 analogous federal discrimination laws. *See Guz v. Bechtel Nat’l Inc.*, 24 Cal.4th 317, 354
20 (2000). When responding to a summary judgment motion, the plaintiff may proceed by

21 _____
22 unable to retain him, and that he had one week before he would be placed on indefinite leave.” 123 F.3d
23 at 319. This was evidence of an actual discharge that was merely being postponed by a week. Here,
24 there is no evidence that Plaintiff had even been placed on a final write-up, much less discharged. In
25 *Burks*, the court found that when an employer failed to respond when plaintiff asked about her future
26 with the department, and did not authorize an expenditure for new business cards, this evidence did not
27 support a constructive discharge claim. 81 F.3d at 978. Here, Plaintiff had subjective beliefs that she
28 was going to be fired, but has no evidence that she was on a final write-up, much less fired. Finally, in
Jenkins, the trial court properly found plaintiff voluntarily resigned after the employer recommended
that he be terminated for falsifying medical excuses. 874 F.2d at 996. Similarly, here, Defendant had
(rightly or wrongly) disciplined Plaintiff for poor performance. But that does not equate to Plaintiff
being given an ultimatum. Therefore, neither the non-binding case law nor the facts support Plaintiff’s
counsel’s argument that Plaintiff was given an ultimatum and was forced to resign.

1 using the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792
2 (1973), or alternatively, may simply produce direct or circumstantial evidence
3 demonstrating that “a discriminatory reason more likely than not motivated” the
4 employment decision. *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1122 (9th Cir.
5 2004).

6 To make a prima facie case for gender discrimination, plaintiff must show she was
7 a member of a protected class, was competently performing in the position held, suffered
8 an adverse employment action, and the action occurred under circumstances suggesting a
9 discriminatory motive. *McDonnell Douglas Corp.*, 411 U.S. at 80, fn. 13.

10 Here, is undisputed that Plaintiff is a member of a protected class (female). For the
11 reasons set forth above, Plaintiff presented a genuine issue as to whether she was
12 performing competently. In addition, Plaintiff also established a genuine issue as to
13 discriminatory motive because she was replaced by a male. *See Sandell v. Taylor-Listug,*
14 *Inc.* 188 Cal.App.4th 297, 323 (2010)(plaintiff must show that position ultimately was
15 filled by someone not a member of the protected class). However, for the reasons set forth
16 above, Plaintiff has not provided evidence to show that she suffered an adverse
17 employment action. Therefore, Plaintiff fails to provide evidence to support a prima facie
18 case of gender discrimination. Accordingly, Defendant’s motion for summary adjudication
19 as to gender discrimination is granted.⁷

20 ***Claim Three – Retaliation***

21 “FEHA makes it unlawful for an employer ‘to discharge, expel, or otherwise
22 discriminate against any person because the person has opposed any practices forbidden
23 under this part or because the person has filed a complaint, testified, or assisted in any
24

25 ⁷ In addition, Defendant’s motion for adjudication as to any claim for gender discrimination under the
26 Unruh Civil Rights Act (Cal. Civil code §51) is granted. In the context of an action by an employee
27 against an employer, the “California Supreme Court has expressly held that employment discrimination
28 claims are excluded from § 51 's protection.” *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1124
(9th Cir.2008) (en banc) (citing *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal.3d 493, 500 (1970)). Plaintiff’s
Unruh Act claim against Defendant fails as a matter of law.

1 proceeding under this part.”” *Lawler v. Montblanc N. Am., LLC*, 704 F.3d 1235, 1243 (9th
2 Cir. 2013) (quoting Cal. Gov’t Code § 12940(h)). California courts apply the *McDonnell*
3 *Douglas* framework to retaliation claims. *Id.* “[T]o establish a prima facie case of
4 retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a ‘protected
5 activity,’ (2) the employer subjected the employee to an adverse employment action, and
6 (3) a causal link existed between the protected activity and the employer’s action.”
7 *Yanowitz v. L’Oreal USA, Inc.*, 36 Cal. 4th 1028, 1042 (2005); *see also Brooks v. City of*
8 *San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000). For the reasons set forth above, Plaintiff
9 has failed to show an adverse employment action. Accordingly, Defendant’s motion for
10 summary adjudication as to the retaliation claim is granted.

11 ***Claim Four – Failure to Prevent Discrimination***

12 FEHA makes it unlawful “for an employer...to fail to take all reasonable steps
13 necessary to prevent discrimination and harassment from occurring” in the workplace. Cal.
14 Gov’t Code § 12940(k). “When a plaintiff seeks to recover damages based on a claim of
15 failure to prevent discrimination or harassment she must show three essential elements: 1)
16 plaintiff was subjected to discrimination, harassment or retaliation; 2) defendant failed to
17 take all reasonable steps to prevent discrimination, harassment or retaliation; and 3) this
18 failure caused plaintiff to suffer injury, damage, loss or harm.” *Lelaind v. City and Cty. of*
19 *San Francisco*, 576 F.Supp.2d 1079, 1103 (N.D.Cal.2008).

20 For the reasons set forth above, Plaintiff has failed to establish a prima facie case as
21 to discrimination or retaliation. Therefore, Plaintiff fails to establish a claim for failure to
22 prevent discrimination. Accordingly, Defendant’s motion for summary adjudication of this
23 claim is granted.

24 **B. Common Law Wrongful Termination Claim**

25 To establish a constructive discharge claim, plaintiff must show that “the employer
26 either intentionally created or knowingly permitted working conditions that were so
27 intolerable or aggravated at the time of [plaintiff’s] resignation that a reasonable employer
28 would realize that a reasonable person in [plaintiff’s] position would be compelled to

1 resign.” *Turner v. Anheuser-Busch, Inc.*, 7 Cal. 4th 1238, 1251 (1994). “To be ‘intolerable’
2 or ‘aggravated,’ [plaintiff’s] working conditions must be ‘sufficiently extraordinary and
3 egregious to overcome the normal motivation of a competent, diligent, and reasonable
4 employee to remain on the job to earn a livelihood and to serve ... her employer.’ ” *Id.* at
5 1246. “The standard by which a constructive discharge is determined is an objective one—
6 —the question is ‘whether a reasonable person faced with the allegedly intolerable employer
7 actions or conditions of employment would have no reasonable alternative except to quit.’
8 ” *Id.* at 1248 (quoting *Rochlis v. Walt Disney Co.*, 19 Cal. App. 4th 201, 212 (1993)). If
9 plaintiff establishes a constructive discharge, she then needs to show there is a nexus
10 between the alleged gender discrimination and adverse treatment by defendants. *Turner*, 7
11 Cal. 4th at 1258.

12 For the reasons set forth above with regard to age and gender discrimination,
13 Plaintiff has failed to provide evidence of “intolerable conditions.” *Turner*, 7 Cal.4th at
14 1251. Therefore, Defendant’s motion for summary adjudication of the wrongful
15 termination claim is granted.

16 C. Defamation

17 Defamation involves the intentional publication of a statement of fact that is (1)
18 false, (2) unprivileged, and; (3) has a natural tendency to injure or cause special damage.
19 *Smith v. Maldonado*, 72 Cal. App 4th 637, 645 (1999). Under California law, “defamation
20 consists of either libel or slander; ‘slander’ is false and unprivileged publication, orally
21 uttered, which tends directly to injure person in respect to his office, profession, trade or
22 business, by imputing to him general disqualifications in those respects which office or
23 other occupation peculiarly requires.” *Lee v. Eden Medical Center*, 690 F. Supp. 2d 1011,
24 1023 (N.D. Cal. 2010) (citing Cal. Civ. Code § 46). In a motion for summary judgment on
25 a defamation claim, plaintiff bears a heavy burden to show a triable issue of fact, as
26 summary judgment is a favored remedy in defamation cases. *Couch v. San Juan Unified*
27 *School District*, 33 Cal. App 4th 1491, 1498-99. A plaintiff alleging defamation must
28 identify the person who made the statement at issue, and to whom it was made. CACI

1 (2016) Nos. 1704 and 1705; *Matson v. Dvorak*, 40 Cal.App.4th 539, 549 (1995)(to be
2 actionable, the publication must in fact be made by the defendant).

3 In the FAC, Plaintiff alleges that Mr. Taylor made a statement to Mr. Martinez, a
4 Home Depot vendor, and other Home Depot employees, that Plaintiff was terminated for
5 poor performance. [Doc. No. 17 at 14.] However, during her deposition, Plaintiff admitted
6 she did not know who told Mr. Martinez that she was terminated for poor performance.
7 [Doc. No. 41-5, Wheeler Depo. 283:5 – 287:19.] Plaintiff also acknowledged that the other
8 Home Depot employees referred to in her complaint, were just “the rumor mill.” [Doc. No.
9 41-5, Wheeler Depo. 285:7 - 20.] Plaintiff also has no knowledge of the manner in which
10 Mr. Martinez found out this information, nor did she know when he found it out. [Doc. No.
11 41-5, Wheeler Depo. 283:19 – 285:6.] Moreover, Plaintiff does not know exactly what
12 Mr. Martinez was told, except that she was let go and that it had to do with poor
13 performance. *Id.* Plaintiff’s lack of evidence to show who made the statement, and to
14 whom it was made is fatal to this claim.⁸ Accordingly, Defendant’s motion for summary
15 adjudication of the claim for defamation is granted.

16 **V. Conclusion**

17 For the foregoing reasons, Defendant’s motion for summary judgment is
18 **GRANTED**. Judgment shall be entered for Defendant and the Clerk of the Court shall
19 **CLOSE** the case. It is **SO ORDERED**.

20 Dated: March 22, 2017

21 
22 _____
23 Hon. Cathy Ann Bencivengo
24 United States District Judge

25 _____
26 ⁸ In the briefing, Plaintiff cites to various testimony, but none of it supports the allegations in the
27 defamation claim. [Doc. No. 44 at 17-18.] At oral argument, Plaintiff’s counsel claimed that a
28 statement made by Mr. Astorino that he “did not know” why Plaintiff left Home Depot was defamatory.
However, that is not what is alleged in the FAC, and Plaintiff has not asked for leave to amend. In
addition, Plaintiff provides no authority for her proposition that Mr. Astorino allegedly saying “I don’t
know” is defamation “by omission.”