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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 ANTONINA R. GAGLIANO,  
12 Plaintiff,  
13 v.  
14 RAYMOND E. MABUS, Jr., Secretary  
15 Department of the Navy, Agency,  
16 Defendant.

Case No.: 16-cv-02299-AJB-AGS

**ORDER:**

**(1) GRANTING DEFENDANT'S  
PARTIAL MOTION FOR  
SUMMARY JUDGMENT; AND**

**(2) DIRECTING THE CLERK OF  
COURT TO CLOSE THIS CASE**

(Doc. No. 78)

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20 Presently before the Court is Defendant Richard V. Spencer's motion for partial  
21 summary judgment. (Doc. No. 78.) Plaintiff Antonia R. Gagliano opposes the motion.  
22 (Doc. No. 85.) On May 9, 2019, the Court held a hearing on the motion. (Doc. No. 95.) At  
23 the hearing, the Court granted the motion with a written order to follow. (*Id.*) For the  
24 reasons set forth more clearly below, the Court **GRANTS** Defendant's motion for partial  
25 summary judgment.

26 **I. BACKGROUND**

27 Plaintiff filed an employment discrimination suit on the basis of gender. (*See*  
28 *generally* Doc. No. 1.) Plaintiff alleges that while she was an employee of NAVFAC SW,

1 she was discriminated against on the basis of her gender when NAVFAC SW failed to  
2 properly classify her past position description. (*Id.* at 2.) She further alleges that the failure  
3 to properly classify her position created a hostile work environment. (*Id.*)

4 Plaintiff worked at NAVFAC SW as a contract specialist during the 1990's. (Doc.  
5 No. 78-1 Ex. B Gagliano Depo at 57:2–22.) In 2007, Plaintiff returned to NAVFAC SW  
6 as a contract specialist. (*Id.* at 58:17–24.) In 2009, Plaintiff left to work at a different  
7 government agency. (*Id.* at 59:16–21, 60:24–61:3.) In 2010, Plaintiff again returned to  
8 NAVFAC SW as a supervisory contract specialist, which is a wage grade of GS-13. (*Id.* at  
9 61:9–11.) In 2014, Plaintiff then accepted a promotion at the NAVFAC Naval Facilities  
10 Institute, which was a wage grade of GS-14. (*Id.* at 63:25–64:4.)

11 Plaintiff alleges that NAVFAC SW's arbitrary education requirements have acted as  
12 a bar to the promotion of women overall. (Doc. No. 1 at 2.) NAVFAC SW requires that  
13 the employee possess an engineering degree for certain upper management level jobs. (*Id.*)  
14 Plaintiff alleges that since engineers are predominately male that this creates a  
15 predominately male upper management. (*Id.*) "[A] 'Good old boy' network of male  
16 management numbers has arisen and become self sustaining, because predominately males  
17 are gaining entry at senior level positions." (*Id.*) Accordingly, Plaintiff alleges that the  
18 requirement of an engineering degree acts as a bar to the promotion of women to these  
19 upper level management positions. (*Id.*)

20 On December 24, 2018, Plaintiff, then pro se, de-designated her statistical expert.  
21 (Doc. No. 78-1 at 4, Ex. J.) This was three days before Defendant was scheduled to depose  
22 Plaintiff's expert. (*Id.*, Ex. K.) Neither Plaintiff nor her expert appeared for the deposition.  
23 (*Id.*)

24 On February 1, 2019, the Court granted Defendant's motion for partial summary  
25 judgment regarding Plaintiff's disparate treatment claim. (Doc. No. 77.) On that same day,  
26 Defendant filed this instant motion for partial summary judgment regarding Plaintiff's  
27 disparate impact claims. (Doc. No. 78.) On February 27, 2019, Plaintiff, now having  
28 obtained counsel, filed a motion for leave to re-designate her statistical analysis expert.

1 (Doc. No. 83.) On April 11, 2019, Magistrate Judge Andrew G. Schopler denied Plaintiff's  
2 motion for leave to re-designate her statistical analysis expert. (Doc. No. 91.) No appeal  
3 of that decision to the district court was filed.

## 4 **II. LEGAL STANDARD**

5 Summary judgment is appropriate under Federal Rule of Civil Procedure 56 if the  
6 moving party demonstrates the absence of a genuine issue of material fact and entitlement  
7 to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact  
8 is material when, under the governing substantive law, it could affect the outcome of the  
9 case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if a  
10 reasonable jury could return a verdict for the nonmoving party. *Id.*

11 A party seeking summary judgment bears the initial burden of establishing the  
12 absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. The moving  
13 party can satisfy this burden in two ways: (1) by presenting evidence that negates an  
14 essential element of the nonmoving party's case; or (2) by demonstrating the nonmoving  
15 party failed to establish an essential element of the nonmoving party's case on which the  
16 nonmoving party bears the burden of proving at trial. *Id.* at 322–23. “Disputes over  
17 irrelevant or unnecessary facts will not preclude a grant of summary judgment.” *T.W. Elec.*  
18 *Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

19 Once the moving party establishes the absence of a genuine issue of material fact,  
20 the burden shifts to the nonmoving party to set forth facts showing a genuine issue of a  
21 disputed fact remains. *Celotex Corp.*, 477 U.S. at 330. When ruling on a summary  
22 judgment motion, a court must view all inferences drawn from the underlying facts in the  
23 light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. Ltd. v. Zenith*  
24 *Radio Corp.*, 475 U.S. 574, 587 (1986).

## 25 **III. DISCUSSION**

26 Title VII prohibits policies or practices that are neutral on their face but have a  
27 disproportionately adverse impact on minorities. 42 U.S.C. § 2000e-2(k); *see Ricci v.*  
28 *DeStefano*, 557 U.S. 557, 583 (2009). To establish a prima facie case of disparate impact

1 the plaintiff must prove causation. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977,  
2 994. To establish causation, “the plaintiff must offer statistical evidence of a kind and  
3 degree sufficient to show that the practice in question has caused the exclusion of  
4 applicants for jobs or promotions because of their membership in a protected group.” *Id.*  
5 The Ninth Circuit has “recognized the necessity of statistical evidence in disparate impact  
6 cases.” *Budnick v. Town of Carefree*, 518 F.3d 1109, 1118 (9th Cir. 2008) (citing *Pottenger*  
7 *v. Potlatch Corp.*, 329 F.3d 740, 749 (9th Cir. 2003)). Furthermore, “[a] plaintiff who fails  
8 to allege facts at the pleading stage or produce statistical evidence demonstrating a causal  
9 connection cannot make out a prima facie case of disparate impact.” *Texas Dept. of*  
10 *Housing and Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2523  
11 (2015).

12 Plaintiff de-designated her statistics expert for her disparate impact claim on  
13 December 24, 2018. (Doc. No. 78-1 at 4, Ex. J.) On February 1, 2019, Defendant filed the  
14 instant motion for partial summary judgment asserting that Plaintiff could not as a matter  
15 of law prove her disparate impact claim without statistical evidence. (*See generally* Doc.  
16 No. 78-1.) Plaintiff, after obtaining counsel, then filed a motion to re-designate her expert  
17 on February 27, 2019. (Doc. No. 83.) On April 11, 2019, Magistrate Judge Andrew G.  
18 Schopler denied Plaintiff’s motion for leave to re-designate her statistical analysis expert.  
19 (Doc. No. 91.) During the hearing on April 11, 2019, Plaintiff’s counsel admitted, “it’s the  
20 motion for summary judgment that maybe makes clear that Ms. Gagliano needs a statistical  
21 expert in order to prove her case. Without it, they believe they are entitled to summary  
22 judgment. And once – as I – I agree with them. She needs this expert to prove her disparate  
23 impact claims.” (Doc. No. 94 at 9:3–9.)

24 However, Plaintiff asserts in her opposition to Defendant’s partial motion for  
25 summary judgment that even without her expert, she is able to prove her claim through  
26 publicly available information. (Doc. No. 85 at 8–9.) Plaintiff alleges that the numbers  
27 needed to do so can be found in spreadsheets provided by Defendant. (*Id.* at 9.) However,  
28 Plaintiff failed to disclose the calculations she would be performing with this data during

1 discovery. (*Id.*) The lack of a statistics expert and statistical evidence is fatal to her  
2 disparate impact claims. Plaintiff simply has failed to establish a prima facie case of  
3 discrimination since, without statistical evidence, Plaintiff cannot prove causation.


4 Accordingly, the Court finds that, as a matter of law, Plaintiff cannot establish a  
5 prima facie case of disparate impact. The Court previously found that, as a matter of law,  
6 Plaintiff could not establish a prima facie case of disparate treatment.

7 **IV. CONCLUSION**

8 Based on the foregoing, the Court **GRANTS** Defendant's motion for partial  
9 summary judgment. Accordingly, the Court **DIRECTS** the Clerk of Court to **CLOSE** this  
10 case.

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12 **IT IS SO ORDERED.**

13 Dated: July 23, 2019

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15 Hon. Anthony J. Battaglia  
16 United States District Judge  
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