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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

CLAUDIA CARLSON, <div style="text-align: center;">Plaintiff(s),</div> <div style="text-align: center;">v.</div> VICTORIA PARTNERS, <div style="text-align: center;">Defendant(s).</div>	Case No. 2:13-CV-378 JCM (PAL)	ORDER
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Presently before the court is defendant Victoria Partners d/b/a Monte Carlo Resort and Casino’s (hereinafter “defendant”) motion for summary judgment. (Doc. # 70). Plaintiffs Claudia Carlson and Joshua Hall (hereinafter “plaintiffs”) filed a response, (doc. # 80), to which defendant replied, (doc. # 88).

I. Background

Plaintiffs were previously employed as ushers in the Monte Carlo showroom. (Doc. # 70). Plaintiff Claudia Carlson (“Carlson”) is a Hispanic female who began working at the Monte Carlo in 2003. (Doc. # 80). Plaintiff Joshua Hall (“Hall”) is an African-American male who began working at the Monte Carlo in 2005. (Doc. # 80).

Plaintiffs allege that, beginning in 2008, they were subjected to and witnessed coworkers’ racist conduct and remarks. (Doc. # 6). Plaintiffs also allege that beginning around 2010 or 2011, coworkers made sexually offensive statements in plaintiffs’ presence and directed such statements towards plaintiffs. (Doc. # 6).

Plaintiffs filed a number of written complaints with defendant concerning this purported discriminatory conduct. (Doc. # 6). Beginning in 2011, Carlson received a number of disciplinary write-ups for allegedly failing to follow appropriate procedures and stay within her workstation. (Doc. # 6).

1 As a result of the disciplinary write-ups, Carlson was suspended pending investigation.
2 On or about November 7, 2011, she was permanently fired. (Doc. # 6). On or about October 31,
3 2011, Hall went on medical leave for severe emotional distress supposedly caused by
4 defendant's alleged discrimination. (Doc. # 6). Hall never returned to work at the Monte Carlo
5 and eventually resigned. (Doc. # 6).

6 Plaintiffs both filed charges of discrimination with the United States Equal Employment
7 Opportunity Commission ("EEOC"). (Doc. # 6). On February 1, 2013, plaintiffs received notice
8 of their rights to sue under Title VII of the Civil Rights Act of 1964 ("Title VII"). (Doc. # 27-1,
9 27-2).

10 On March 7, 2013, plaintiffs filed a complaint asserting the following causes of action: 1)
11 hostile work environment for race in violation of 42 U.S.C. § 1981; 2) hostile work environment
12 for gender in violation of Title VII, on behalf of Carlson; 3) sexual harassment in violation of
13 Title VII, on behalf of Hall; 4) retaliation in violation of § 1981; 5) retaliation in violation of
14 Title VII; and 6) constructive discharge in violation of § 1981, on behalf of Hall.¹ (Doc. # 6).

15 On August 25, 2014, plaintiffs filed a motion for leave to file a declaration in further
16 support of their response to defendant's motion for summary judgment. (Doc. # 90). Plaintiffs
17 sought to authenticate deposition transcripts and other documents included as exhibits to their
18 opposition to defendant's motion for summary judgment. (Doc. # 80).

19 On September 16, 2014, Magistrate Judge Peggy Leen granted in part and denied in part
20 the motion for leave. (Doc. # 93). Judge Leen granted leave to include court reporter
21 certifications to authenticate deposition excerpts. (Doc. # 93). However, Judge Leen denied
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23

24 ¹ The parties conflate and confuse plaintiffs' claims, particularly by referring
25 interchangeably to plaintiffs' sex and gender claims as claims of sexual harassment and § 1981
26 hostile work environment. Plaintiffs' complaint also repeats plaintiff Carlson's hostile work
27 environment claim under § 1981 in both count I and count IV. The court understands plaintiffs'
28 claims to include: (1) hostile work environment claims based on sex and sexual harassment
under Title VII; (2) hostile work environment claims based on race under Title VII and § 1981;
(3) claims for retaliation under Title VII and § 1981; and (4) plaintiff Hall's claim for
constructive discharge under § 1981. For purposes of clarity, the court has arranged its
discussion of the claims into these four categories and will resolve the summary judgment
motion accordingly.

1 plaintiffs' request to authenticate their remaining exhibits with a blanket declaration of
2 authenticity by plaintiffs' counsel. (Doc. # 93).

3 Defendant denies all of plaintiffs' allegations and asserts that plaintiffs have fabricated
4 the instant claims for monetary gain. Accordingly, defendants now move for summary
5 judgment. (Doc. # 70).

6 **II. Legal Standards**

7 **A. Summary judgment**

8 The federal rules of civil procedure allow summary judgment when the pleadings,
9 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if
10 any, show that "there is no genuine dispute as to any material fact and the movant is entitled to a
11 judgment as a matter of law." Fed. R. Civ. P. 56(a). A principal purpose of summary judgment
12 is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S.
13 317, 323-24 (1986).

14 For purposes of summary judgment, disputed factual issues should be construed in favor
15 of the non-moving party. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to
16 be entitled to a denial of summary judgment, the non-moving party must "set forth specific facts
17 showing that there is a genuine issue for trial." *Id.*

18 In determining summary judgment, a court applies a burden-shifting analysis. "When the
19 party moving for summary judgment would bear the burden of proof at trial, it must come
20 forward with evidence which would entitle it to a directed verdict if the evidence went
21 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the
22 absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage*
23 *Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

24 By contrast, when the non-moving party bears the burden of proving the claim or
25 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate
26 an essential element of the non-moving party's case; or (2) by demonstrating that the non-
27 moving party failed to make a showing sufficient to establish an element essential to that party's
28 case on which that party will bear the burden of proof at trial. See *Celotex Corp.*, 477 U.S. at

1 323-24. If the moving party fails to meet its initial burden, summary judgment must be denied
2 and the court need not consider the non-moving party's evidence. See *Adickes v. S.H. Kress &*
3 *Co.*, 398 U.S. 144, 159-60 (1970).

4 If the moving party satisfies its initial burden, the burden then shifts to the opposing party
5 to establish that a genuine issue of material fact exists. See *Matsushita Elec. Indus. Co. v. Zenith*
6 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the
7 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient
8 that "the claimed factual dispute be shown to require a jury or judge to resolve the parties'
9 differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*,
10 809 F.2d 626, 631 (9th Cir. 1987).

11 "A trial court can only consider admissible evidence in ruling on a motion for summary
12 judgment." *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). "Authentication is
13 a condition precedent to admissibility." *Id.* (internal quotation marks omitted). Authentication
14 requires that the proponent produce evidence that is sufficient to support a finding that the
15 document is what the proponent claims it is. Fed. R. Evid. 901(a). "[U]nauthenticated
16 documents cannot be considered in a motion for summary judgment." *Orr*, 285 F. 3d at 773.

17 B. Title VII hostile work environment

18 Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for
19 an employer . . . to discriminate against any individual with respect to his compensation, terms,
20 conditions, or privileges of employment, because of such individual's race, color, religion, sex,
21 or national origin." 42 U.S.C. § 2000e-2(a)(1).

22 "To make a prima facie case of a hostile work environment based on sex or race under
23 Title VII, a person must show that: (1) she was subjected to verbal or physical conduct of a
24 sexual nature or because of race, (2) this conduct was unwelcome, and (3) the conduct was
25 sufficiently severe or pervasive to alter the conditions of the victim's employment and create an
26 abusive working environment." *Craig v. M&O Agencies, Inc.*, 496 F.3d 1047, 1055 (9th Cir.
27 2007); *Manatt v. Bank of Am., N.A.*, 339 F.3d 792, 798 (9th Cir. 2003) (internal quotation marks
28 omitted).

1 “Additionally, the working environment must both subjectively and objectively be
2 perceived as abusive.” Id. “Objective hostility is determined by examining the totality of the
3 circumstances and whether a reasonable person with the same characteristics as the victim would
4 perceive the workplace as hostile.” Id. Finally, “conduct must be extreme to amount to a change
5 in the terms and conditions of employment.” Id.

6 To establish a claim based on hostile work environment, a plaintiff must demonstrate that
7 the “workplace is permeated with discriminatory intimidation, ridicule and insult that is
8 sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an
9 abusive working environment.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (citations
10 and quotations omitted).

11 “Conduct that is not severe or pervasive enough to create an objectively hostile or
12 abusive work environment—an environment that a reasonable person would find hostile or
13 abusive—is beyond Title VII’s purview.” Id. The “mere utterance of an . . . epithet which
14 engenders offensive feelings in a [sic] employee does not sufficiently affect the conditions of
15 employment to implicate Title VII.” Id. (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S.
16 57, 67 (1986)).

17 C. Section 1981 hostile work environment

18 42 U.S.C. § 1981 guarantees “all persons” the same right as white citizens to make and
19 enforce contracts. 42 U.S.C. § 1981(a). “A hostile work environment interferes with the
20 ‘enjoyment of all benefits . . . and conditions of the contractual relationship’ of employment and
21 is therefore actionable under § 1981.” *Manatt*, 339 F.3d at 797 (quoting 42 U.S.C. § 1981(b)).

22 “A plaintiff must meet the same standards in proving a § 1981 claim that he must meet in
23 establishing a . . . claim under Title VII” *EEOC v. Inland Marine Indus.*, 729 F.2d 1229,
24 1233 n. 7 (9th Cir. 1984). Namely, the plaintiff “must raise a triable issue of fact as to whether
25 (1) she was subjected to verbal or physical conduct because of her race, (2) the conduct was
26 unwelcome, and (3) the conduct was sufficiently severe or pervasive to alter the conditions of
27 [the plaintiff’s] employment and create an abusive work environment.” *Manatt*, 339 F.3d at 798
28 (internal quotation marks omitted).

1 D. Retaliation

2 Under Title VII, “it is unlawful to retaliate against an employee because she has taken
3 action to enforce rights protected under Title VII.” *Miller v. Fairchild*, 797 F.2d 727, 730 (9th
4 Cir. 1986). To establish a prima facie case for retaliation, a plaintiff must demonstrate: (1)
5 protected activity; (2) an adverse employment action; and (3) a causal link between the protected
6 activity and the adverse employment action. *Cornwell v. Electra Cent. Credit Union*, 439 F.3d
7 1018, 1034-35 (9th Cir. 2006). Section 1981 also applies to retaliation claims based on race.
8 *Manatt*, 339 F.3d at 800-01.

9 “Temporal proximity between protected activity and an adverse employment action can
10 by itself constitute sufficient circumstantial evidence of retaliation in some cases.” *Bell v.*
11 *Clackamas Cty.*, 341 F.3d 858, 865 (9th Cir. 2003). Further, “where . . . the person who
12 exhibited discriminatory animus influenced or participated in the decision-making process, a
13 reasonable factfinder could conclude that the animus affected the employment decision.”
14 *Dominguez-Curry v. Nev. Trans. Dep’t*, 424 F.3d 1027, 1038-39 (9th Cir. 2005).

15 “Once a plaintiff establishes a prima facie case, the burden of production shifts to the
16 employer to articulate a legitimate, non-retaliatory explanation for the action.” *Miller*, 797 F.2d
17 at 731. “If the employer successfully rebuts the inference of retaliation that arises from
18 establishment of a prima facie case, then the burden shifts once again to the plaintiff to show that
19 the defendant’s proffered explanation is merely a pretext for discrimination.” *Id.*

20 The Supreme Court has recently clarified the standard of proof with respect to causation,
21 holding that “Title VII retaliation claims must be proved according to traditional principles of
22 but-for causation This requires proof that the unlawful retaliation would not have occurred
23 in the absence of the alleged wrongful action or actions of the employer.” *Univ. of Tex. Sw.*
24 *Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013).

25 In introducing this heightened causation standard, the court recognized that “claims of
26 retaliation are being made with ever-increasing frequency.” *Id.* at 2531. It noted that “lessening
27 the causation standard could also contribute to the filing of frivolous claims, which would siphon
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1 resources from efforts by employer, administrative agencies, and courts to combat workplace
2 harassment.” *Id.*

3 E. Constructive discharge

4 In order to establish a claim for constructive discharge, a plaintiff must prove that his
5 working conditions were “so intolerable that a reasonable person would have felt compelled to
6 resign.” *Penn. State Police v. Suders*, 542 U.S. 129, 147 (2004). “[W]hether conditions were so
7 intolerable and discriminatory as to justify a reasonable employee’s decision to resign is
8 normally a factual question left to the trier of fact.” *Thomas v. Douglas*, 877 F.2d 1428, 1434
9 (9th Cir. 1989) (citing *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987)).

10 Evidence of a single isolated discriminatory instance will not preclude summary
11 judgment on the issue of constructive discharge. *Watson*, 823 F.2d at 361. A plaintiff must
12 show aggravating factors such as a continuous pattern of discriminatory treatment over a period
13 of months or years. *Id.*

14 **III. Discussion**

15 A. Hostile work environment based on sex and sexual harassment

16 Hall claims that his supervisor, Quiroga, sexually harassed him and that this created a
17 hostile work environment. (Doc. # 6). In particular, Hall claims that Quiroga asked Hall if a
18 tube of lipstick was his, invited Hall to join Quiroga and his friends on a trip, mentioned a gay
19 club, and performed a pole dance in front of Hall. (Doc. # 6).

20 Hall alleges that Quiroga made sexually offensive remarks in his presence “three or four”
21 times per week. (Doc. # 80). He also claims that Quiroga “frequently stood excessively
22 physically close to Hall” and “cast amorous looks and facial expressions” towards him. (Doc. #
23 6).

24 However, Hall provides evidence, through his deposition testimony, of only four
25 particular instances of alleged harassment. Such limited instances, even offensive in nature, do
26 not rise to the level of “severe or pervasive” conduct. See, e.g., *Westendorf v. West Coast*
27 *Contractors of Nev., Inc.*, 712 F.3d 417, 422 (9th Cir. 2013) (granting summary judgment on a
28 sexual harassment claim where supervisors made multiple comments related to “girly work,”

1 tampons, “Double Ds,” orgasms, and french maid costumes). As a result, the evidence is
2 insufficient to preclude summary judgment on Hall’s sexual harassment claims.

3 Carlson alleges that she was sexually harassed and discriminated against on the basis of
4 her sex. (Doc. # 6). In particular, Carlson claims that her coworker, Hansill, made comments
5 about women’s bodies, including references to breasts and implants, in her presence. (Doc. #
6 80).

7 Carlson also asserts that her coworkers Don and Guzman made comments regarding
8 prostitutes in front of her. (Doc. # 6). She further alleges that Don asked Carlson if she was
9 trying to join the “diva squad,” called her fake, and referenced his preferences with regard to
10 women’s bodies. (Doc. # 6).

11 Carlson’s evidence and allegations of sexual harassment are similarly insufficient to
12 show severe and pervasive conduct. The conduct that Carlson references does not rise to the
13 level of seriousness required to alter the conditions of employment. Mere offensive comments
14 are insufficient; defendant is entitled to summary judgment on this claim. See Westendorf, 712
15 F.3d at 422.

16 Notably, defendant also argues that Carlson’s claims are time-barred. (Doc. # 70). The
17 300-day statutory limitations period for filing an EEOC claim would bar Carlson’s claims for
18 any alleged sexual harassment occurring before October 16, 2009. (Doc. # 70). While Carlson
19 could not recall specific dates of the purported offenses at her deposition, plaintiffs contend that
20 the conduct at issue occurred in 2010 and 2011. (Doc. # 6).

21 The court finds some dispute of material fact over the timing of the conduct which, when
22 viewed in the light most favorable to plaintiffs, would allow their claims to go forward. See
23 *Dominguez-Curry v. Nevada Transp. Dep’t*, 424 F.3d 1027, 1039 (9th Cir. 2005) (reversing
24 summary judgment despite plaintiff’s failure to identify specific dates of alleged pervasive
25 discriminatory conduct). However, because plaintiffs have failed to provide sufficient evidence
26 to show severe and pervasive conduct, the court will grant summary judgment on the merits.

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1 Defendant also argues that Hall failed to exhaust his administrative remedies. (Doc. #
2 70). Defendant contends that Hall’s amended EEOC charge never contained any allegation of
3 sexual harassment, therefore he cannot bring such a claim in this suit. (Doc. # 70).

4 Exhibit DDD to plaintiffs’ response to defendant’s motion for summary judgment is a
5 letter detailing the purported sexual harassment. (Doc. # 80-56). Hall contends that he sent this
6 letter to the EEOC when he filed his amended charge.

7 First, this document has not been authenticated and thus cannot be considered by the
8 court in ruling on a motion for summary judgment. See Orr, 285 F. 3d at 773. However, even if
9 Hall could provide admissible evidence that he sent the letter to the EEOC, this would be
10 insufficient to exhaust Hall’s administrative remedies on this claim.

11 A plaintiff may litigate a claim for which administrative remedies are available only if
12 that claim was included in an EEOC charge or related to allegations in the charge. *Sosa v.*
13 *Hiraoka*, 920 F.2d 1451, 1456 (9th Cir. 1990). While Hall’s sexual harassment and race claims
14 both allege discrimination, they do so on wholly different bases and by evidence of separate
15 alleged instances of conduct.

16 As a result, the court cannot say that “the original EEOC investigation would have
17 encompassed the additional charges made in the court complaint but not included in the EEOC
18 charge itself.” *Id.* (internal quotation marks omitted). Therefore, even if the court did not
19 resolve the instant motion on the merits, Hall’s claim of sexual harassment would be barred at
20 this time for failure to exhaust his administrative remedies.

21 Overall, among other issues, plaintiffs have failed to make a showing sufficient to
22 establish severe or pervasive conduct for their hostile work environment claims based on sex and
23 sexual harassment. As such, defendant has proven that there is insufficient evidence of a
24 genuine, material factual dispute on these claims. Accordingly, the court will grant defendant’s
25 summary judgment motion with respect to plaintiffs’ Title VII hostile work environment and
26 sexual harassment claims.

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1 B. Hostile work environment based on race

2 Plaintiffs allege that defendant created a hostile work environment by discriminating
3 against them on the basis of their race. (Doc. # 6). Plaintiffs claim that they “experienced
4 frequent offensive racial remarks and conduct, at times almost daily.” (Doc. # 80).

5 Alleged comments made to Carlson include a Caucasian usher’s statements that she was
6 “going to take [Carlson’s] green card,” that “Mexicans take our jobs,” that she “couldn’t stand
7 Mexicans,” that she “wishes [Carlson] was back in Mexico,” and that “the blacks and the
8 Mexicans were taking the white people’s jobs.” (Doc. # 80).

9 Carlson also claims that another Caucasian coworker, Richardson, made offensive
10 comments regarding interracial marriage and stated that Carlson “needs to go back to Mexico.”
11 (Doc. # 80). Carlson’s coworker Gozzi allegedly stated that he would “wipe his behind with the
12 Mexican flag.” (Doc. # 80). Carlson also claims that another coworker, Guzman, called her a
13 dirty Mexican. (Doc. # 80).

14 Hall claims that Guzman frequently made racially derogatory remarks to Hall.
15 Specifically, he alleges that Guzman brought up race daily, calling Hall a “Wayne Brady” and an
16 “Obama black” and using the term “house n*gger.” (Doc. # 80). Hall contends that Guzman
17 used “n*gger” at work about 25 to 30 times per month, “all the time.” (Doc. # 80).

18 Hall further alleges that his coworker Hansill stated that Hall’s ancestors were “raped by
19 French persons” and compared Hall’s skin color to that of Hansill’s black shoes. (Doc. # 80).
20 Hall also claims that a coworker, Perry, used the word “colored” and told Hall that “for a black
21 man you are good looking.” (Doc. # 80). Perry also supposedly asked Hall if an African-
22 American baby would “lighten up,” comparing the color of the baby’s skin to a tablecloth. (Doc.
23 # 80). Finally, Perry allegedly used the term “Swartzin-n*gger.” (Doc. # 80). Plaintiffs’
24 deposition testimony supports these claims. (Docs. # 80-1, 80-2).

25 At this stage of the proceedings, defendant has the burden to either present evidence
26 negating plaintiffs’ claims or to demonstrate that plaintiffs have failed to show an essential
27 element of their claims. See *Celotex Corp.*, 477 U.S. at 323-24. Defendant has not met this
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1 burden. While defendant alleges that plaintiffs' claims are untruthful, this is a factual dispute
2 that cannot be resolved as a matter of law at this time.

3 Viewing the evidence in the light most favorable to the non-moving party, plaintiffs have
4 produced enough examples of alleged racial conduct to support a claim of hostile work
5 environment under section 1981. Because the purported discriminatory conduct could have been
6 sufficiently severe or pervasive to create a hostile work environment, defendant is not entitled to
7 summary judgment on plaintiffs' race claims.

8 Further, plaintiffs' claims are not barred by the four-year statute of limitations in section
9 1981. "As noted, a plaintiff need not recite precise dates of an employer's discriminatory
10 conduct, especially where she alleges that the conduct was pervasive." *Dominguez-Curry v.*
11 *Nevada Transp. Dep't*, 424 F.3d 1027, 1039 (9th Cir. 2005).

12 Plaintiffs do not allege that they are entitled to recover for conduct occurring outside the
13 statute of limitations. Further, they claim that they were discriminated against until the end of
14 their employment with defendant in 2011. Because the evidence does not indisputably foreclose
15 plaintiffs' claims on statute of limitations grounds, summary judgment is also inappropriate on
16 this basis.

17 Finally, defendant argues that Hall cannot establish that he was subjectively offended by
18 any racist comments based on his own use of racial epithets outside of the workplace. (Doc. #
19 70). Hall's own use of certain terminology outside of work is irrelevant to whether he or a
20 reasonable person in his position would be offended by coworkers' targeted insults.
21 Accordingly, summary judgment will be denied on plaintiffs' race discrimination claims.

22 C. Retaliation

23 Carlson alleges that she engaged in protected activity by complaining of discrimination
24 and filing EEOC charges. (Doc. # 6). She claims that defendant retaliated against her by issuing
25 negative reviews and firing her. (Doc. # 6).

26 The parties acknowledge that in 2011, Carlson received multiple disciplinary citations for
27 unsatisfactory job performance related to leaving her assigned work station. The parties do not
28 dispute the sharp increase in Carlson's workplace citations leading up to her termination. As

1 noted, temporal proximity can serve as circumstantial evidence of retaliation. See *Bell v.*
2 *Clackamas Cty.*, 341 F.3d 858, 865 (9th Cir. 2003). Whether Carlson’s alleged misconduct was
3 used as pretext to retaliate against her cannot be resolved as a matter of law at this time.

4 With regard to Hall, plaintiffs do not allege particular instances of retaliation. Plaintiffs
5 included exhibits purporting to provide evidence of retaliation with their response to defendant’s
6 motion for summary judgment. Specifically, plaintiffs included what they claim to be Hall’s
7 complaints, a counseling notice suspending Hall for one day without pay, and his EEOC charge
8 alleging retaliation. (Docs. # 80-38, 80-40, 80-55). However, as mentioned above, these
9 documents have not been authenticated. (See doc. # 90). Thus, they may not be properly
10 considered in deciding the motion for summary judgment.

11 Nevertheless, Hall testified in his deposition that after he complained about his
12 supervisor’s purported discriminatory conduct, he received a write-up. (Doc. # 80-2). Further,
13 Ladawndre Stinson, who worked in human resources for defendant, testified in her deposition
14 that Hall received a verbal or written counseling and was also suspended. (Doc. # 80-28).

15 Pursuant to the standard above, timing may provide circumstantial evidence of retaliatory
16 action. *Bell*, 341 F.3d at 865. Further, any adverse employment action, not simply termination,
17 may suffice to prove retaliation. *Cornwell*, 439 F.3d at 1034-35. Therefore, viewing the
18 evidence in the light most favorable to plaintiffs, a factfinder could determine that Hall suffered
19 retaliation in response to his complaints. Accordingly, the court will deny summary judgment on
20 plaintiffs’ retaliation claims.

21 D. Constructive discharge

22 Plaintiff Hall alleges that he was subjected to discriminatory working conditions that
23 were so intolerable that he was forced to resign from his position. (Doc. # 6). It appears that
24 Hall may be attempting to allege constructive discharge as evidence of retaliation. (Doc. # 80).

25 However, retaliation and constructive discharge are two separate claims subject to
26 different legal standards. Viewing the evidence in the light most favorable to Hall, the court will
27 analyze Hall’s constructive discharge allegation as a separate claim as articulated in claim III of
28 his complaint. (Doc. # 6).

1 Hall went on leave from his position with defendant in October 2011, allegedly due to
2 stress from the claimed discrimination and racial comments. (Doc. # 80, 80-2). Hall's physician
3 corroborated that Hall sought leave due to the stressful environment at work, which caused him
4 anxiety and other physical symptoms. (Doc. # 80).

5 Defendant claims that the psychiatric examination of plaintiff Hall is unreliable.
6 However, at this point in time, the court cannot decide this question as a matter of law. Hall has
7 produced sufficient evidence to allow his claim of hostile work environment based on race to
8 proceed.

9 Because it is possible that Hall was subjected to a hostile work environment, it is also
10 conceivable that such pervasive conduct led to Hall's constructive discharge. Again, whether
11 discriminatory conditions rose to a level warranting resignation is unclear, but it cannot presently
12 be resolved as a matter of law. *Thomas v. Douglas*, 877 F.2d 1428, 1434 (9th Cir. 1989).
13 Accordingly, summary judgment on Hall's claim of constructive discharge will be denied.

14 **IV. Conclusion**

15 Based on the above analysis, the court will grant summary judgment on plaintiffs' hostile
16 work environment claims for sexual harassment and sex discrimination. The court will deny
17 summary judgment on plaintiffs' remaining claims.

18 For the foregoing reasons,

19 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant's motion for
20 summary judgment, (doc. # 70), be, and the same hereby is, GRANTED in part and DENIED in
21 part, pursuant to the foregoing.

22 DATED September 26, 2014.

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24 _____
UNITED STATES DISTRICT JUDGE