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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

ANA LOPEZ, an individual,  <p style="text-align: center;">v.</p> DOWNTOWN LAS VEGAS EVENTS CENTER,  <p style="text-align: right;">Defendant.</p>		Case No. 2:19-cv-01532-KJD-NJK  <p style="text-align: center;">ORDER</p>
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Presently before the Court is Defendant’s Motion for Summary Judgment (#31). Plaintiff filed a response in opposition (#36) to which Defendant replied (#37).

I. Facts

Plaintiff, Ana Lopez, worked as an Event Coordinator for the Downtown Las Vegas Events Center (“DLVEC”) from April 1, 2017 to November 21, 2017. Amy Brown (“Brown”), Director of Ticketing for DLVEC, served as her supervisor and initially hired Plaintiff. Brown asserts that she gave Plaintiff many verbal and informal warnings about behaviour that violated company policy, such as fraternizing with family and friends during DLVEC events and failing to clock out when socializing.

In September 2017, during the “Miller Lite Event” at DLVEC, Plaintiff escorted guests to VIP areas where she remained, hanging out with friends who were attending the event. Additionally, Brown instructed Lopez to prepare a document summarizing the Miller Lite Event. Plaintiff failed to adequately prepare the document summarizing the Event for accounting purposes. When Brown criticized Plaintiff’s performance and asserted that she had violated company policy by fraternizing with friends on the clock, Lopez grew upset, reacted loudly and raised her voice to Brown. Consequently, Brown issued Plaintiff a verbal warning and instructed

1 Plaintiff to clock out and go home for the evening. Notably, Plaintiff conceded her misbehavior  
2 and violation of company policy when she apologized to Ms. Brown the next day.

3 In October 2017, Bud Pico ("Pico"), the General Manager of DLVEC, had entered into  
4 preliminary discussions with Univision Radio Group ("Univision") to promote a Baile Privado  
5 Event (the "Univision Event"). As General Manager, it was Mr. Pico's decision as to whether the  
6 DLVEC would contract with Univision. Mr. Pico had not made a final decision whether to go  
7 forward with the Univision Event and no agreement had been signed regarding the same.  
8 Regardless, on Saturday, October 21, 2017, Plaintiff, without consent of Mr. Pico, contacted the  
9 company's finance department and requested a wire transfer to Univision in the amount of  
10 \$25,000.00. When questioned about her actions, Plaintiff falsely stated she had received approval  
11 for the transfer from Mr. Pico when no such authorization had ever been given. On Monday  
12 October 23, 2017, unaware of the unauthorized wire transfer, Mr. Pico decided not to proceed  
13 with the Univision Event.

14 As a result of her actions, Plaintiff was suspended pending investigation. Upon her  
15 reinstatement, Plaintiff was placed on a disciplinary plan (the "90 Day Plan") which required her  
16 to, among other things, follow policies and procedures obtaining proper approvals. Plaintiff  
17 signed the 90 Day Plan and agreed to follow it.

18 On Friday November 17, 2017, the DLVEC hosted a free event. Due to capacity limits,  
19 although the event was free, DLVEC required tickets to maintain an accurate count on the  
20 number of attendees. For this particular event, there were leftover tickets. Brown informed  
21 Plaintiff that she would be on vacation during the event. Plaintiff asked if she could enlist the  
22 assistance of her family members to distribute tickets for the event. Brown declined Plaintiff's  
23 request.

24 Despite Brown's clear instructions, Plaintiff allowed her two nephews to work the ticket  
25 booth without proper approval or authorization. Plaintiff concedes that she instructed her  
26 nephews to pass out the remaining leftover tickets to people at the box office. Hiring or allowing  
27 any individual to work for DLVEC without approval or authorization is a direct violation of  
28 company policy and subjected Plaintiff to discipline. Given that Plaintiff had been placed on the

1 90 Day Plan immediately before this event, and her behavior was in complete disregard of a  
2 direct order from her supervisor and in violation of the company's policies, the decision was  
3 made to fire Plaintiff. She was terminated on November 21, 2017.

4 On or about June 4, 2018, Plaintiff filed a Charge of Discrimination with the Nevada  
5 Equal Rights Commission ("NERC"). She alleged discrimination based on National Origin  
6 stating that she was "subjected to harassment, different terms and conditions of employment,  
7 suspension and discharged." She specifically complained about constant harassment and  
8 comments based on her national origin by a co-worker, the Operations Manager. However, she  
9 admits that at no time while she was employed did she notify her supervisor or the appropriate  
10 employee under the employer's process for reporting harassment.

11 After receiving her right-to-sue letter, she filed the present complaint on September 3,  
12 2019. She asserts claims for retaliation, national origin discrimination (disparate treatment),  
13 hostile work environment and emotional distress. Defendant has now moved to dismiss each of  
14 her claims. In response, Plaintiff has waived her retaliation claim, but continues to press her  
15 disparate treatment and hostile work environment claims.

## 16 II. Standard for Motion for Summary Judgment

17 Summary judgment may be granted if the pleadings, depositions, answers to  
18 interrogatories, and admissions on file, together with affidavits, if any, show that there is no  
19 genuine issue as to any material fact and that the moving party is entitled to a judgment as a  
20 matter of law. See Fed. R. Civ. P. 56(a); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322  
21 (1986). The moving party bears the initial burden of showing the absence of a genuine issue of  
22 material fact. See Celotex, 477 U.S. at 323. The burden then shifts to the nonmoving party to set  
23 forth specific facts demonstrating a genuine factual issue for trial. See Matsushita Elec. Indus.  
24 Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

25 All justifiable inferences must be viewed in the light most favorable to the nonmoving  
26 party. See Matsushita, 475 U.S. at 587. However, the nonmoving party may not rest upon the  
27 mere allegations or denials of his or her pleadings, but he or she must produce specific facts, by  
28 affidavit or other evidentiary materials as provided by Rule 56(e), showing there is a genuine

1 issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The court need  
2 only resolve factual issues of controversy in favor of the non-moving party where the facts  
3 specifically averred by that party contradict facts specifically averred by the movant. See Lujan  
4 v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990); see also Anheuser-Busch, Inc. v. Natural  
5 Beverage Distribs., 69 F.3d 337, 345 (9th Cir. 1995) (stating that conclusory or speculative  
6 testimony is insufficient to raise a genuine issue of fact to defeat summary judgment). Evidence  
7 must be concrete and cannot rely on “mere speculation, conjecture, or fantasy. O.S.C. Corp. v.  
8 Apple Computer, Inc., 792 F.2d 1464, 1467 (9th Cir. 1986). “[U]ncorroborated and self-serving  
9 testimony,” without more, will not create a “genuine issue” of material fact precluding summary  
10 judgment. Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002).  
11 Summary judgment shall be entered “against a party who fails to make a showing sufficient to  
12 establish the existence of an element essential to that party's case, and on which that party will  
13 bear the burden of proof at trial.” Celotex, 477 U.S. at 322. Summary judgment shall not be  
14 granted if a reasonable jury could return a verdict for the nonmoving party. See Anderson, 477  
15 U.S. at 248.

### 16 III. Analysis

#### 17 A. Disparate Treatment

18 Title VII provides that an employer may not “discriminate against any individual with  
19 respect to his compensation, terms, conditions, or privileges of employment, because of such  
20 individual’s race ... or national origin.” 42 U.S.C. § 2000e-2(a)(1). A plaintiff bringing a Title  
21 VII national origin discrimination action under a theory of disparate treatment must demonstrate  
22 that her employer took one or more adverse employment actions against the plaintiff because of  
23 the plaintiff's national origin. See Desert Palace, Inc. v. Costa, 539 U.S. 90, 92–93, 99–100  
24 (2003). An adverse employment action is one that “materially affect[s] the compensation, terms,  
25 conditions, or privileges of ... employment.” Davis v. Team Elec. Co., 520 F.3d 1080, 1089 (9th  
26 Cir. 2008).

27 If an employer moving for summary judgment on a disparate treatment claim meets its  
28 initial burden, “the plaintiff is presented with a choice regarding how to establish his or her

1 case.” McGinest v. GTE Service Corp., 360 F.3d 1103, 1122 (9th Cir. 2004). The plaintiff may  
2 proceed by using the burden-shifting framework first set out in McDonnell Douglas Corp. v  
3 Green, 411 U.S. 792 (1973), or alternatively, may produce direct or circumstantial evidence that  
4 a discriminatory reason motivated the defendant in taking the challenged actions against the  
5 plaintiff. McGinest, 360 F.3d at 1122. The plaintiff retains the burden of persuasion throughout,  
6 regardless of whether or not the plaintiff chooses to use the McDonnell Douglas framework.  
7 Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

8 Under McDonnell Douglas, a Title VII plaintiff “must first establish a prima facie case of  
9 discrimination.” Chuang v. Univ. of Cal. Davis, Bd. of Trs., 225 F.3d 1115, 1123 (9th Cir. 2000).  
10 A plaintiff must show: “(1) he belongs to a protected class; (2) he was qualified for the position;  
11 (3) he was subject to an adverse employment action; and (4) similarly situated individuals  
12 outside his protected class were treated more favorably.” Chuang, 225 F.3d at 1123.

13 This shifts the “burden of production, but not persuasion, ... to the employer to articulate  
14 some legitimate, nondiscriminatory reason for the challenged action.” Chuang, 225 F.3d at  
15 1123–24. “To accomplish this, the defendant must clearly set forth, through the introduction of  
16 admissible evidence, the reasons for” the challenged adverse employment actions. Lyons v.  
17 England, 307 F.3d 1092, 1112 (9th Cir. 2002) (quoting Burdine, 450 U.S. at 255). Whether a  
18 defendant has met its burden of production involves “no credibility assessment.” St. Mary's  
19 Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993). “In other words, the factfinder’s general duty to  
20 draw all reasonable inferences in favor of the nonmovant does not require that the court make a  
21 credibility determination on the defendant’s evidence at the summary judgment stage, even if it  
22 has reason to disbelieve that evidence.” Bodett v. CoxCom, Inc., 366 F.3d 736, 742 (9th Cir.  
23 2004).

24 If the defendant meets this burden of production, any presumption that the defendant  
25 discriminated “drops from the case.” St. Mary’s Honor Ctr., 509 U.S. at 507–11. At this point,  
26 the plaintiff must be given the opportunity to demonstrate that the proffered reason or reasons  
27 were pretext for intentional discrimination. Burdine, 450 U.S. at 255–56.

28 The plaintiff may offer additional evidence to rebut the employer’s proffered reasons but

1 the plaintiff is not necessarily required to produce evidence in addition to the evidence produced  
2 to establish the prima facie case. Lyons, 307 F.3d at 1112–13; Chuang, 225 F.3d at 1127. This is  
3 because a reasonable factfinder may infer “the ultimate fact of intentional discrimination”  
4 without additional proof once the plaintiff has made out his prima facie case if the factfinder  
5 believes that the employer's proffered nondiscriminatory reasons lack credibility. Lyons, 307  
6 F.3d at 1112–13 (quoting Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147  
7 (2000)).

8 To establish that a defendant's nondiscriminatory explanation is pretext for  
9 discrimination, a plaintiff may rely on circumstantial evidence or direct evidence or both. See  
10 Chuang, 225 F.3d at 1127. Typically, circumstantial evidence offered by a plaintiff to prove  
11 pretext will take one of two forms. Coghlan v. Am. Seafoods Co. LLC, 413 F.3d 1090, 1095 (9th  
12 Cir. 2005); Stegall v. Citadel Broad. Co., 350 F.3d 1061, 1066 (9th Cir. 2003) (as amended Jan.  
13 6, 2004). The plaintiff may “make an affirmative case that the employer is biased.” Coghlan, 413  
14 F.3d at 1095; Stegall, 350 F.3d at 1066 (describing the first option as “persuading the court that a  
15 discriminatory reason more likely motivated the employer”). Or, the plaintiff may “make his  
16 case negatively, by showing that the employer's proffered explanation for the adverse action is  
17 ‘unworthy of credence.’ ” Coghlan, 413 F.3d at 1095.

18 First, the Court must grant summary judgment to Defendant on Plaintiff's disparate  
19 treatment claim, because she has not shown that any similarly situated employees were treated  
20 differently. Her general conclusions that other employees were allowed to socialize and take  
21 photos during DLVEC events contain no specifics from which a fact finder could determine  
22 whether those employees were similarly situated to Plaintiff or not. To show that the  
23 “employees” allegedly receiving more favorable treatment are similarly situated (the fourth  
24 element necessary to establish a prima facie case under Title VII), the individuals seeking relief  
25 must demonstrate, at the least, that they are similarly situated to those employees in all material  
26 respects. See Moran v. Selig, 447 F.3d 748, 755 (9th Cir. 2006) (citing Aragon v. Republic  
27 Silver State Disposal, Inc., 292 F.3d 654, 660 (9th Cir. 2002) (citing with approval the Second  
28 Circuit's opinion in McGuinness v. Lincoln Hall, 263 F.3d 49, 53-54 (2d Cir. 2001) which stated

1 that “similarly situated” means that employees must “be similarly situated in all material  
2 respects”); see also Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 352 (6th  
3 Cir.1998) (holding that “the plaintiff must show that the ‘comparables’ are similarly-situated in  
4 all respects” (citation and internal quotation marks omitted)); Lynn v. Deaconess Med. Center-  
5 West Campus, 160 F.3d 484, 487 (8th Cir.1998) (requiring that employees be “similarly situated  
6 in all relevant respects”). Plaintiff fails to adduce any evidence of employees that were similarly  
7 situated, i.e., disciplined or not disciplined for submitting wire transfers without proper  
8 authorization, allowed family members to work or hand out tickets against their direct  
9 supervisor’s specific orders, or socialized at events while on the clock.

10 Finally, Plaintiff’s discrimination claim for her termination must be dismissed because  
11 she has adduced no relevant evidence from which a fact finder could conclude that the  
12 employer’s legitimate, nondiscriminatory reason for her termination was merely pretext for  
13 actual discrimination based on her national origin. Plaintiff’s reliance on stray remarks by a co-  
14 worker, who is not linked to her termination, is insufficient to avoid summary judgment. See  
15 Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (“stray” remarks are insufficient to establish  
16 discrimination). In the Ninth Circuit, discriminatory statements can only demonstrate direct  
17 evidence of employment discrimination when the employer, not co-worker, makes the  
18 discriminatory statements. See Nesbit v. Pepsico, Inc., 994 F.2d 703, 705 (9th Cir. 1993). Here,  
19 Plaintiff has presented no evidence of conduct by the decision makers on her termination that  
20 raises even an inference that their stated reasons for her dismissal were pretextual. Accordingly,  
21 the Court grants summary judgment to Defendant on Plaintiff’s claims for disparate treatment  
22 and discrimination based on national origin.

### 23 B. Hostile Work Environment

24 To prevail on her harassment claim, Plaintiff must show: (1) that she was subjected to  
25 verbal or physical conduct because of her national origin; (2) “that the conduct was unwelcome”;  
26 and (3) “that the conduct was sufficiently severe or pervasive to alter the conditions of the  
27 plaintiff’s employment and create an abusive work environment.” See Gregory v. Widnall, 153  
28 F.3d 1071, 1074 (9th Cir.1998). Generally, a plaintiff alleging racial or national origin

1 harassment would present facts showing that she was subjected to racial epithets in the  
2 workplace. To establish whether Defendant’s conduct was sufficiently severe or pervasive  
3 enough to alter the conditions of Plaintiff’s employment or create an abusive environment,  
4 Defendant’s conduct must be more than “merely offensive,” and must create an objectionably  
5 hostile work environment. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

6 Merely offensive comments, teasing, and isolated incidents are not sufficient to create a  
7 hostile work environment. Id. at 21-22; see also Garrity v. Potter, 2008 WL 872992, \*4-5 (D.  
8 Nev. 2008) (finding rude, insensitive, or unpleasant conditions are not sufficient to create a  
9 hostile work environment); see also Crawford v. Medina General Hosp., 96 F.3d 830, 836 (5th  
10 Cir. 1996). “[I]solated comments would not alone support a claim for hostile work environment.”  
11 McGinest, 360 F.3d at 1112 (citing Campbell v. Hawaii Dep’t of Educ., 892 F.3d 1005, 1020  
12 (9th Cir. 2018)) (“A violation is not established merely by evidence showing sporadic use of  
13 abusive language, [national origin]-related jokes, and occasional teasing.”); Dominguez-Curry v.  
14 Nev. Transp. Dep’t, 424 F.3d 1027, 1034 (9th Cir. 2005) (“Simple teasing, offhand comments,  
15 and isolated incidents (unless extremely serious) will not amount to discriminatory changes in  
16 the terms and conditions of employment.”); Kortan v. Calif. Youth Authority, 217 F.3d 1104,  
17 1110 (9th Cir. 2000) (offensive comments “mainly made in a flurry” on one day do not  
18 constitute hostile work environment).

19 The Court agrees with Defendant that Plaintiff’s allegations are neither severe nor  
20 pervasive enough to establish a claim, even when drawing all inferences in the light most  
21 favorable to her. “The required level of severity or seriousness varies inversely with the  
22 pervasiveness or frequency of the conduct.” McGinest, 360 F.3d at 1113; see, e.g., Pringle v.  
23 Wheeler, 478 F. Supp. 3d 899, 914 (N.D. Cal. 2020) (rejecting the argument that a pattern of  
24 racially disparate treatment over five years was not sufficiently severe because each incident  
25 should be analyzed separately as “counter to the concept of a hostile work environment” and  
26 “inconsistent with the holistic approach endorsed by the Ninth Circuit and the Supreme Court”);  
27 see also Shaninga v. St. Luke’s Med. Ctr. LP, Case No. CV-14-02475-PHX-GMS, 2016 WL  
28 1408289, at \*13 (D. Ariz. Apr. 11, 2016) (acknowledging that “repeated derogatory or



1 humiliating statements can constitute a hostile work environment” but finding the work  
2 environment was not hostile because the plaintiff only cited three incidents). The Ninth Circuit  
3 more recently found that comments that did not include racial slurs but were nevertheless tinged  
4 with racism, such as “we should close the borders to keep motherf\*\*\*ers like you from coming  
5 up here,” were “demeaning comments that directly reference race or national origin,” not “  
6 ‘offhand comments’ or ‘merely offensive utterance[s].’ ” See Reynaga v. Roseburg Forest  
7 Prods., 847 F.3d 678, 688 (9th Cir. 2017) (distinguishing Faragher v. City of Boca Raton, 524  
8 U.S. 775 (1998)); see also Kendall v. Nevada, 434 F. App'x 610, 612-13 (9th Cir. 2011)  
9 (reversing summary judgment because a series of demeaning comments that extended  
10 throughout the plaintiff's employment could establish a hostile work environment claim even if  
11 one incident alone may not be actionable).

12 Here, though the comments were made on more than one occasion, the conduct is neither  
13 severe nor pervasive. The comments, which the Court finds distasteful and unprofessional, were  
14 not vulgar or accompanied by physical violence. In fact, Plaintiff considered Stuard, the  
15 commenter, a friend and associated with him outside of work. “The Supreme Court has followed  
16 a ‘middle path’ with regard to the level of hostility or abuse necessary to establish a hostile work  
17 environment.” McGinest, 360 F.3d at 1112. “In evaluating the objective hostility of a work  
18 environment, the factors to be considered include the frequency of discriminatory conduct; its  
19 severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and  
20 whether it unreasonably interferes with an employee's work performance.” Id. (internal quotation  
21 marks omitted). Viewing the evidence in the light most favorable to Lopez, the evidence is  
22 insufficient to withstand summary judgment. The harassment did not alter the terms and  
23 conditions of her employment. In fact, she testified that she tried to brush the comments off and  
24 continued to socialize with the perpetrator outside of work. Therefore, the Court grants summary  
25 judgment on Plaintiff's claim for a hostile work environment.

### 26 C. Supplemental Jurisdiction over Remaining State Law Claim

27 A district court has discretion to decline to exercise supplemental jurisdiction over a claim if  
28 all claims over which it has original jurisdiction have been dismissed or if the claim raises a novel or

1 complex issue of state law. See 28 U.S.C. § 1367(c). Since the Court has dismissed all claims over  
2 which it has original jurisdiction, the Court declines to exercise its supplemental jurisdiction over  
3 Plaintiff's emotional distress state law claim. Therefore, that claim is dismissed without prejudice.

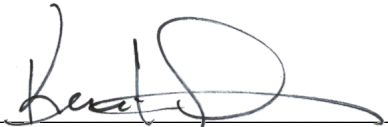
4 IV. Conclusion

5 Accordingly, IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment  
6 (#31) is **GRANTED**;

7 IT IS FURTHER ORDERED that the Clerk of the Court enter **JUDGMENT** for  
8 Defendant and against Plaintiff on Plaintiff's Title VII claims;

9 IT IS FURTHER ORDERED that Plaintiff's state law claim for emotional distress is  
10 **DISMISSED without prejudice**.

11 DATED this 22<sup>nd</sup> day of September 2021.

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The Honorable Kent J. Dawson  
United States District Judge