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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

CARLA VAN PELT,)	3:11-cv-00061-HDM-VPC
)	
Plaintiff,)	ORDER
vs.)	
)	
HOWARD SKOLNIK, JACK PALMER,)	
JAMES BENEDETTI, ROD MOORE,)	
LAWRENCE BOOTH, JAMES BACA, EDGAR)	
MILLER, ELIZABETH WALSH, and THE)	
STATE OF NEVADA EX REL ITS)	
DEPARTMENT OF CORRECTIONS,)	
)	
Defendants.)	
)	

19 Before the court is the defendants' motion for summary
20 judgment (#35). Plaintiff has opposed (#38), and defendants have
21 replied (#43).

22 Defendants are Nevada Department of Corrections ("NDOC")
23 employees and the State of Nevada. Plaintiff Carla Van Pelt
24 ("plaintiff") is a former NDOC employee. Pursuant to the parties'
25 stipulation, plaintiff filed a second amended complaint asserting:
26 (1) First Amendment retaliation under 42 U.S.C. § 1983; (2) Title
27 VII retaliation; and (3) Title VII gender discrimination.
28 Defendants now seek summary judgment on plaintiff's claims.

1 **Facts**¹

2 From 1989 until 1997, and again from 2000 until her
3 termination in November 2010, plaintiff worked for NDOC at the
4 Northern Nevada Correctional Center ("NNCC"). At the time of her
5 termination, she was a program officer in OASIS, a drug and alcohol
6 addiction program for inmates. (See Def. Mot. Summ. J. Ex. A at 3,
7 29).² At various times, her supervisors included defendants former
8 Associate Warden of Programs James Baca ("Baca"), acting Associate
9 Warden of Programs Lisa Walsh ("Walsh"), and OASIS site supervisor
10 Ed Miller ("Miller").

11 Plaintiff's complaint focuses primarily on events that took
12 place between December 2009 and May 2010, when she was placed on
13 administrative leave before eventually being terminated. She
14 asserts that she suffered several adverse employment actions,
15 including termination, for engaging in protected activities, and
16 that she was subjected to gender discrimination. Defendants deny
17 plaintiff's claims and assert that she was terminated for
18 falsifying log books and time sheets. The following facts, set
19 forth in a light most favorable to the plaintiff, appear from the
20 record.

21 On December 10, 2009, plaintiff testified at an NDOC
22

23 ¹ Defendants assert broadly that plaintiff has failed to authenticate
24 her exhibits. The court considers this argument only where defendants have
25 raised a specific objection. Defendants make just one specific objection,
26 to plaintiff's exhibit #8, which plaintiff claims is a notice of
27 investigation that she received on April 1, 2010. Exhibit 8 is not
authenticated and does not even appear to be a notice of investigation. The
court therefore finds defendants' objection well taken and will not consider
plaintiff's exhibit 8.

28 ² All page citations to defendants' exhibits are to the Bates-stamped
number at the bottom of the page.

1 employee's administrative disciplinary hearing pursuant to
2 subpoena. (Def. Mot. Summ. J. Ex. A at 41). Plaintiff testified
3 that the actions for which the employee was facing discipline were
4 actions plaintiff told her to take, and that she believed the
5 proposed discipline to be excessive. (*Id.*) Plaintiff claims she
6 also testified

7 that I was like the little warden of the [OASIS] unit; I
8 did everything that the warden does in that particular
9 unit. And I told them I did all the budgeting, I did the
10 making sure maintenance stuff was done, the hiring, the
11 firing, the personnel stuff, the purchasing. It was its
12 own little prison within the prison.

13 (Pl. Dep. 30:8-19).³

14 On December 18, 2009, defendant Warden James Benedetti
15 ("Benedetti") emailed NNCC staff to notify them that all employees
16 were required to sign in at the gatehouse when arriving to work.
17 (Def. Mot. Summ. J. Ex. A at 24). Although plaintiff denies
18 getting any such email or notification, she was aware that she was
19 required to sign in at the gatehouse. (Pl. Dep. 56-57).

20 On December 30, 2009, plaintiff hired a female substance abuse
21 counselor for the OASIS program. (Pl. Opp'n Ex. 7). On January 4,
22 2010, plaintiff claims that Miller told her that she had to unhire
23 the new employee, stating he didn't want another "f---ing female"
24 in the unit because they were too much trouble. Plaintiff claims
25 that although she reported this to two supervisors and a personnel
26 tech, nothing was done. (*Id.*)

27 On January 22, 2010, Baca conducted a staff meeting during
28 which plaintiff was stripped of any supervisory duties she had - or

³ Parts of plaintiff's deposition are located in Exhibit F to defendants' motion for summary judgment and other parts are located in Exhibit 2 to plaintiff's opposition.

1 thought she had - in the OASIS program, Miller was designated as
2 plaintiff's supervisor, and all employees, including plaintiff,
3 were directed to fill out and submit leave slips and obtain prior
4 approval for all leave. (Def. Mot. Summ. J. Ex. A at 42; Pl. Opp'n
5 Ex. 3). Baca further instructed that all employees would start
6 working shifts from 8:00 a.m. to 4:00 or 8:00 am. to 5:00 p.m.
7 (*Id.*). Plaintiff claims that before this meeting she was acting
8 director of the OASIS unit north. (See Def. Mot. Summ. J. Ex. A at
9 30).

10 After the January 22, 2010, meeting, plaintiff allegedly told
11 another OASIS employee that she would not help Miller learn his new
12 supervisory job. (See Pl. Opp'n Ex. 3).

13 On January 30, 2010, plaintiff filed a NERC/EEOC complaint
14 (hereinafter "EEOC complaint"). (Second Am. Compl. 1). Plaintiff
15 claims that the complaint alleged "disparate treatment" by
16 "coworkers and supervisors, including transmission of
17 pornography."⁴ (Pl. Opp'n 2).

18 On February 11, 2010, Baca issued plaintiff a "Letter of
19 Instruction for Insubordination," for, in part, plaintiff's
20 statement after the January 22, 2010, meeting.⁵ (Pl. Opp'n Ex. 3).
21 After receiving the letter of instruction, and at that meeting,
22 plaintiff informed Baca, Walsh, and Miller about her EEOC
23 complaint. (Pl. Opp'n Ex. 7).

24 On February 15, 2010, plaintiff claims she submitted an
25

26 ⁴ It is unknown exactly what plaintiff alleged in this complaint as it
27 is not part of the record. Defendants do not dispute that the complaint was
filed or plaintiff's characterization of its contents.

28 ⁵ It appears that it also alleged other instances of insubordination,
but plaintiff has not attached all pages of the document.

1 incident report alleging that Miller had given favorable treatment
2 to an inmate. (Pl. Opp'n Ex. 7).

3 On March 1, 2010, plaintiff signed an acknowledgment prepared
4 by Miller that signing in and out of gatehouse and at the unit was
5 "important." (Def. Mot. Summ. J. Ex. A at 21).

6 On March 2, 2010, plaintiff informed NDOC Director Howard
7 Skolnik ("Skolnik") of her EEOC complaint. (Pl. Opp'n Ex. 7). As
8 she was leaving, plaintiff heard Skolnik "say that he was going to
9 do what he could to get rid of me." (Pl. Dep. 72). Afterwards,
10 plaintiff claims Baca "screamed" at her for talking directly to
11 Skolnik.⁶ (Pl. Dep. 35-36).

12 On March 3, 2010, plaintiff allegedly told Miller that
13 defendant Larry Booth ("Booth"), a coworker in the OASIS program,
14 was creating a hostile work environment and needed his "ass
15 kicked." (Def. Mot. Summ. J. Ex. A at 77; Pl. Opp'n Ex. 5).
16 Plaintiff denies this, insisting that instead she said that Booth
17 "'need[ed] to come off his high horse' because she was tired of the
18 comments he was making and his total disregard for anything she had
19 to say." (Def. Mot. Summ. J. Ex. A at 36). That same date, an
20 OASIS employee wrote an incident report about the unprofessional
21 and hostile way he believed Booth and Miller were treating
22 plaintiff. (Pl. Opp'n Ex. 4). In particular, the employee noted
23 that Booth and Miller were trying to isolate and ignore plaintiff

24
25 ⁶ Later that day, plaintiff apparently received a written reprimand
26 issued by Baca and approved by Benedetti. (Pl. Opp'n Ex.7; *id.* Ex. 11
27 (Benedetti Dep. 10)). According to plaintiff, the letter scolded her for
28 talking directly to Skolnik and for writing the incident report about
Miller. (Pl. Opp'n Ex. 7). It also appears the letter charged
insubordination for plaintiff telling two correctional officers that they
should watch their backs when Miller was around. (*Id.* Ex. 11 (Benedetti
Dep. 10)).

1 and that they showed visible disregard for her opinions during
2 staff meetings. (*Id.*)

3 On March 11, 2010, plaintiff left work at 2 p.m. to pick up
4 her car and did not return for the rest of the day. (Def. Mot.
5 Summ. J. Ex. A 76). She did not tell any of her supervisors
6 directly that she was leaving, although she was required to do so.
7 On March 12, 2010, plaintiff again left work in the early
8 afternoon, telling another NNCC employee that she had hurt her
9 back. (*Id.* at 75). On March 15, 2010, plaintiff arrived late to
10 work, saying she had forgotten to change her clock for daylight
11 savings time. (*Id.* at 76).

12 At some point, an internal investigation into allegations that
13 plaintiff had been discourteous, been insubordinate, made false and
14 misleading statements, neglected her duties, and engaged in
15 unbecoming conduct began. (See Def. Mot. Summ. J. Ex. A at 25).
16 The exact date the investigation was initiated is unclear from the
17 record, but based on the timing of the allegations, which included
18 instances as late as March 12, 2010, and the timing of the
19 interviews, the first of which apparently took place on March 17,
20 2010, it may be inferred the investigation began sometime around
21 those two dates. (See *id.* at 26, 29).

22 On March 15, 2010, plaintiff filed an incident report stating
23 that during an OASIS staff meeting she had complained to Miller and
24 Booth about the hostile work environment, including their excluding
25 her from meetings and decisions about the program. According to
26 plaintiff, Miller and Booth began yelling at her and denying her
27 allegations. The report stated that the hostility had been
28 occurring for the past six weeks and was so bad even the inmates

1 noticed it. (Pl. Opp'n Ex. 6). Around this time, it appears,
2 plaintiff met with Baca and Walsh about the problems she was having
3 with Miller and Booth. (Pl. Dep. 38). According to plaintiff,
4 Baca said "there may be something to what you're saying." (*Id.*)
5 The following day, Baca was transferred to another institution, and
6 Walsh became acting associate warden of programs. (Pl. Dep. 38).

7 Toward the end of March 2010, a number of events occurred.

8 First, plaintiff complained to Skolnik of retaliatory
9 harassment by Miller, Booth, Walsh, and Baca following the filing
10 of her EEOC complaint. (Pl. Opp'n Ex. 7).

11 Second, Walsh advised plaintiff that she was chronically late
12 and gave her the option to change her schedule. Plaintiff
13 responded that as an exempt employee she did not have to work 40
14 hours a week, and Walsh asked for proof of exempt status. Although
15 plaintiff promised to provide such proof, there is no indication in
16 the record that she ever did.⁷ (Def. Mot. Summ. J. Ex. A at 78-
17 79).

18 Third, plaintiff showed Walsh evidence of the alleged
19 harassment underlying her EEOC complaint, which was a video that
20 Booth had sent to her "sometime ago" of a man's buttocks and
21 people's reactions to it. (Def. Mot. Summ. J. Ex. A at 42).
22 According to Booth, he had sent the video a year and a half
23 earlier, he had sent it to everybody and not just plaintiff, and
24

25 ⁷ In fact, an NDOC personnel officer avers that no record exists
26 showing plaintiff was an exempt employee, and that the position of OASIS
27 program director was not an exempt position. (Def. Mot. Summ. J. Ex. E at
28 178). Plaintiff claims that she received notice from personnel that her
position was exempt because she was the program's acting director in the
north, but she provides no evidence to support this claim. (Pl. Dep. 17:12-
24).

1 plaintiff had not complained of it at the time. (Def. Reply (Booth
2 Dep. 24)).

3 Finally, after showing Walsh the alleged evidence of
4 harassment on or about March 31, 2010, plaintiff claims Walsh told
5 her three times that she needed to withdraw her EEOC complaint or
6 "somebody, looking directly at me, is going to get fired." (Pl.
7 Dep. 35:16-24; see also Def. Mot. Summ. J. Ex. A at 38).

8 Immediately after this, as plaintiff was leaving Walsh's office,
9 plaintiff heard Walsh pick up the phone, call investigator Rod
10 Moore ("Moore"), and tell him, "It's on."⁸ (Pl. Dep. 35:21-24).

11 On April 5, 2010, plaintiff began a new schedule, working 8:30
12 a.m. to 4:30 p.m. (Def. Mot. Summ. J. Ex. A at 117).

13 On May 12, 2010, plaintiff was placed on administrative leave
14 following allegations that she had taken her unit's logbook into
15 her office to "doctor" it - that is, to falsify her hours worked in
16 order to cover up that she was arriving late and leaving early.
17 (Def. Mot. Summ. J. Ex. A at 11, 14, 22). Plaintiff denied
18 doctoring the log book and claimed she was doing her "statistics
19 ... like always." (Pl. Dep. 47-48).

20 On June 16, 2010, Moore issued a report of investigation into
21 the following allegations: (1) that on several occasions in March
22 and April 2010 plaintiff arrived late to work, left early, and
23 falsified logbooks and time sheets to show that she had worked
24

25
26 ⁸ Plaintiff claims that the day after this last conversation, she
27 received a notice of investigation, but the evidence she attaches to prove
28 such - Exhibit 8 - is unauthenticated and does not appear to be a notice of
investigation. See *supra* n.1. At any rate, it is clear from the record
that plaintiff was already under at least one investigation by the time of
her conversation with Walsh.

1 longer hours than she actually had;⁹ and (2) that plaintiff had
2 doctored the unit logbook. (Def. Mot. Summ. J. Ex. A at 11, 14).
3 On July 16, 2010, Moore issued a second report of investigation
4 into the following allegations: (1) that from October 2009 to March
5 2010 plaintiff chronically arrived for work late, left early, and
6 concealed that fact on her timesheets; (2) that plaintiff
7 repeatedly failed to sign into the gatehouse and unit logbooks; (3)
8 that in summer 2009 plaintiff threw a chair during a meeting with
9 Miller, Booth, and others when the issue of plaintiff's performance
10 came up; (4) that plaintiff improperly claimed to be an exempt
11 employee who could work from home; (5) that plaintiff misused the
12 computer by visiting numerous sites not related to her job duties;
13 and (6) that plaintiff told Miller that Booth needed his "ass
14 kicked." (Def. Mot. Summ. J. Ex. A at 26-31).

15 On October 14, 2010, plaintiff was served with a specificity
16 of charges, which contained many of the factual allegations
17 investigated by Moore. (Def. Mot. Summ. J. Ex. A at 2, 7). A
18 predisciplinary hearing took place on October 26, 2010, at which
19 plaintiff did not appear. (Def. Mot. Summ. J. Ex. A at 2). After
20 the hearing, plaintiff was terminated effective November 1, 2010.
21 (*Id.*)

22 On March 2, 2011, plaintiff received a right-to-sue letter
23 from the EEOC.

24 **Standard**

25 "The court shall grant summary judgment if the movant shows
26

27 ⁹ The investigation report specifies four such times: (1) March 24,
28 2010; (2) March 31, 2010; (3) April 23, 2010; (4) April 20, 2010, along with
a number of other unspecified times. (Def. Mot. Summ. J. Ex. A at 15).

1 that there is no genuine issue as to any material fact and the
2 movant is entitled to judgment as a matter of law." Fed. R. Civ.
3 P. 56(a). The burden of demonstrating the absence of a genuine
4 issue of material fact lies with the moving party, and for this
5 purpose, the material lodged by the moving party must be viewed in
6 the light most favorable to the nonmoving party. *Adickes v. S.H.*
7 *Kress & Co.*, 398 U.S. 144, 157 (1970); *Martinez v. City of Los*
8 *Angeles*, 141 F.3d 1373, 1378 (9th Cir. 1998). A material issue of
9 fact is one that affects the outcome of the litigation and requires
10 a trial to resolve the differing versions of the truth. *Lynn v.*
11 *Sheet Metal Workers Int'l Ass'n*, 804 F.2d 1472, 1483 (9th Cir.
12 1986); *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir.
13 1982).

14 Once the moving party presents evidence that would call for
15 judgment as a matter of law at trial if left uncontroverted, the
16 respondent must show by specific facts the existence of a genuine
17 issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
18 250 (1986). "[T]here is no issue for trial unless there is
19 sufficient evidence favoring the nonmoving party for a jury to
20 return a verdict for that party. If the evidence is merely
21 colorable, or is not significantly probative, summary judgment may
22 be granted." *Id.* at 249-50 (citations omitted). "A mere scintilla
23 of evidence will not do, for a jury is permitted to draw only those
24 inferences of which the evidence is reasonably susceptible; it may
25 not resort to speculation." *British Airways Bd. v. Boeing Co.*, 585
26 F.2d 946, 952 (9th Cir. 1978); see also *Daubert v. Merrell Dow*
27 *Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) ("[I]n the event
28 the trial court concludes that the scintilla of evidence presented

1 supporting a position is insufficient to allow a reasonable juror
2 to conclude that the position more likely than not is true, the
3 court remains free . . . to grant summary judgment.”). Moreover,
4 “[i]f the factual context makes the non-moving party’s claim of a
5 disputed fact implausible, then that party must come forward with
6 more persuasive evidence than otherwise would be necessary to show
7 there is a genuine issue for trial.” *Blue Ridge Ins. Co. v.*
8 *Stanewich*, 142 F.3d 1145, 1149 (9th Cir. 1998) (citing *Cal.*
9 *Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818
10 F.2d 1466, 1468 (9th Cir. 1987)). Conclusory allegations that are
11 unsupported by factual data cannot defeat a motion for summary
12 judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

13 Finally, if the nonmoving party fails to present an adequate
14 opposition to a summary judgment motion, the court need not search
15 the entire record for evidence that demonstrates the existence of a
16 genuine issue of fact. *See Carmen v. San Francisco Unified Sch.*
17 *Dist.*, 237 F.3d 1026, 1029-31 (9th Cir. 2001) (holding that “the
18 district court may determine whether there is a genuine issue of
19 fact, on summary judgment, based on the papers submitted on the
20 motion and such other papers as may be on file and specifically
21 referred to and facts therein set forth in the motion papers”).
22 The district court need not “scour the record in search of a
23 genuine issue of triable fact,” but rather must “rely on the
24 nonmoving party to identify with reasonable particularity the
25 evidence that precludes summary judgment.” *Keenan v. Allan*, 91
26 F.3d 1275, 1279 (9th Cir. 1996) (quoting *Richards v. Combined Ins.*
27 *Co.*, 55 F.3d 247, 251 (7th Cir.1995)). “[The nonmoving party’s]
28 burden to respond is really an opportunity to assist the court in

1 understanding the facts. But if the nonmoving party fails to
2 discharge that burden—for example by remaining silent—its
3 opportunity is waived and its case wagered.” *Guarino v. Brookfield*
4 *Twp. Trustees*, 980 F.2d 399, 405 (6th Cir. 1992).

5 **Analysis**

6 Defendants moved for summary judgment on plaintiff’s claims,
7 arguing: (1) plaintiff’s First Amendment retaliation claim fails
8 because she has failed to show she spoke on a matter of public
9 concern as a private citizen; (2) plaintiff’s gender discrimination
10 claim fails because she has not alleged or shown any similarly
11 situated employee was treated differently than she was; (3) res
12 judicata on the basis of administrative decisions precludes
13 plaintiff’s claims; and (4) several of the defendants were not
14 personally involved. Defendants did not move for summary judgment
15 on the merits on plaintiff’s Title VII retaliation claim.

16 **I. First Amendment Retaliation**

17 To prove a violation under 42 U.S.C. § 1983, a plaintiff must
18 establish that the defendants (1) acting under color of law (2)
19 deprived plaintiff of the rights, privileges, or immunities secured
20 by the Constitution or the laws of the United States. *Gibson v.*
21 *United States*, 781 F.2d 1334, 1338 (9th Cir. 1986). Plaintiff’s
22 first claim for relief asserts First Amendment retaliation against
23 the individual defendants. There is no dispute that the defendants
24 were acting under color of law. The issue is thus whether
25 defendants deprived plaintiff of her First Amendment rights.

26 “It is well settled that the state may not abuse its position
27 as employer to stifle ‘the First Amendment rights its employees
28 would otherwise enjoy as citizens to comment on matters of public

1 interest.'" *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009).
2 First Amendment retaliation claims are analyzed through a
3 sequential five-step test: (1) whether the plaintiff spoke on a
4 matter of public concern; (2) whether the plaintiff spoke as a
5 private citizen or public employee; (3) whether the plaintiff's
6 protected speech was a substantial or motivating factor in the
7 adverse employment action; (4) whether the state had an adequate
8 justification for treating the employee differently from other
9 members of the general public; and (5) whether the state would have
10 taken the adverse employment action even absent the protected
11 speech. *Id.* at 1070.

12 "Speech involves a matter of public concern when it can fairly
13 be considered to relate to 'any matter of political, social, or
14 other concern to the community.'" *Eng*, 552 F.3d at 1070.
15 This inquiry is a question of law and is based on the "content,
16 form, and context of a given statement, as revealed by the record
17 as a whole." *Id.* Plaintiff bears the burden of showing her speech
18 was a matter of public concern. *Id.*

19 The scope of the public concern element has been defined
20 broadly. *Desrochers v. City of San Bernardino*, 572 F.3d 703, 710
21 (9th Cir. 2009). "Speech that concerns issues about which
22 information is needed or appropriate to enable the members of
23 society to make informed decisions about the operation of their
24 government merits the highest degree of first amendment
25 protection." *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th
26 Cir. 2003). On the other hand, "individual personnel disputes and
27 grievances" that are "of no relevance to the public's evaluation of
28 the performance of governmental agencies" are not usually of public

1 concern. *Eng*, 552 F.3d at 1070. "In a close case, when the
2 subject matter of a statement is only marginally related to issues
3 of public concern, the fact that it was made because of a grudge or
4 other private interest or to coworkers rather than to the press may
5 lead the court to conclude that the statement does not
6 substantially involve a matter of public concern." *Desrochers*, 572
7 F.3d at 710. "The same is true of speech that relates to internal
8 power struggles within the workplace." *Id.* Opposition to unlawful
9 discrimination by public employees can be a matter of public
10 concern. See *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917,
11 925-26 (9th Cir. 2006).

12 Plaintiff must also show the speech was made in her capacity
13 as a private citizen and not as a public employee. *Eng*, 552 F.3d
14 at 1071. Statements which the speaker "had no official duty" to
15 make or which were not the product of "performing the tasks the
16 employee was paid to perform" satisfy this requirement. *Id.*
17 Public employees do not have First Amendment protection for
18 statements made pursuant to their official duties. *Garcetti v.*
19 *Ceballos*, 547 U.S. 410, 421 (2006).

20 Plaintiff's complaint asserts three instances of allegedly
21 protected speech: (1) her December 10, 2009, predisciplinary
22 hearing testimony; (2) her filing of the incident report alleging
23 favorable inmate treatment by Miller; and (3) her filing of an EEOC
24 complaint and the internal report of such. Defendants argue that
25 none of this speech was on a matter of public concern or done as a
26 private citizen.

27 A. Disciplinary Hearing Testimony

28 The record reflects that plaintiff's testimony at the

1 predisciplinary hearing of another consisted of three statements:
2 (1) that plaintiff had directed the employee to engage in the
3 conduct for which she was being punished; (2) that plaintiff
4 thought the proposed discipline was excessive; and (3) that
5 plaintiff testified "that I was like the little warden of the unit;
6 I did everything that the warden does in that particular unit. And
7 I told them I did all the budgeting, I did the making sure
8 maintenance stuff was done, the hiring, the firing, the personnel
9 stuff, the purchasing. It was its own little prison within the
10 prison." (Pl. Dep. 30:8-19). All three statements directly
11 related to plaintiff's job duties (or perceived job duties).
12 Accordingly, in light of the speech's context, content, and form,
13 the court concludes that as a matter of law plaintiff's testimony
14 was not on a matter of public concern.

15 Further, plaintiff has raised no genuine issue of material
16 fact that as an NDOC employee she was required to testify at the
17 hearing pursuant to the subpoena. (Def. Mot. Summ. J. Ex. D 172 ¶
18 T; *id.* Ex. F 191-92). Accordingly, because plaintiff was under an
19 official duty to speak, this speech was not, as a matter of law,
20 made in her capacity as a private citizen.

21 B. Incident Report Regarding Favorable Treatment

22 The incident report has not been included in the record by
23 either party. Accordingly, it is impossible to determine whether
24 plaintiff's statements therein spoke to a matter of public concern.
25 Even if they did, however, the report was not filed in plaintiff's
26 capacity as a private citizen. Rather, she was required to file
27 reports about alleged misconduct pursuant to NDOC regulations.
28 (See Def. Mot. Summ. J. Ex. C at 157; Ex. D at 172); *see also*

1 *Anthoine v. N. Cen. Counties Consortium*, 605 F.3d 740, 749 (9th
2 Cir. 2010) (explaining that in *Freitag v. Ayers*, 468 F.3d 528 (9th
3 Cir. 2006) the court held that plaintiff's report that inmates were
4 sexually harassing her made to officials in the chain of command
5 were made pursuant to her official duties because she was required
6 to report inmate misconduct). Thus, plaintiff has failed to
7 support her claim with respect to this speech.

8 C. EEOC Complaint and Internal Report

9 Neither party has included plaintiff's EEOC complaint as part
10 of the record. Therefore the court is unable to determine whether
11 the complaint or the internal report thereof involved a matter of
12 public concern and if so to what extent. Thus, plaintiff has
13 failed to support her claim in this regard.

14 The defendants are therefore entitled to judgment as a matter
15 of law on plaintiff's First Amendment retaliation claim. Having so
16 concluded, it is unnecessary for the court to address the
17 defendants' arguments regarding personal participation.

18 **II. Title VII Retaliation**

19 Under Title VII, it is unlawful for an employer to
20 discriminate against an employee because the employee has opposed
21 an unlawful employment practice under Title VII. 42 U.S.C. §
22 2000e-3(a). Title VII claims are analyzed under a burden-shifting
23 framework. First, the plaintiff must establish a prima facie case
24 of discrimination. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792,
25 802 (1973). Then, the burden of production shifts to the employer
26 to articulate a legitimate nondiscriminatory reason for its
27 actions. *Id.* at 802. Once met, the plaintiff must offer evidence
28 that the employer's stated reasons are pretextual. *Id.* at 804.

1 "[S]ummary judgment is not appropriate if, based on the evidence in
2 the record, a reasonable jury could conclude by a preponderance of
3 the evidence that the defendant undertook the challenged employment
4 action because of the plaintiff's" protected activity. See
5 *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1028 (9th
6 Cir. 2006).

7 A. Prima Facie Case

8 To establish a prima facie case of retaliation, the plaintiff
9 must show: (1) she engaged in a protected activity; (2) she
10 suffered an adverse employment action; and (3) a causal link exists
11 between the protected activity and the adverse action. *Id.* at
12 1034-35.

13 "To show the requisite causal link, the plaintiff must present
14 evidence sufficient to raise the inference that her protected
15 activity was the likely reason for the adverse action." *Cohen v.*
16 *Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982). "At the prima
17 facie stage of a retaliation case, the casual link element is
18 construed broadly so that a plaintiff merely has to prove that the
19 protected activity and the negative employment action are not
20 completely unrelated." *Poland v. Chertoff*, 494 F.3d 1174, 1181 n.2
21 (9th Cir. 2007) (internal citation and quotations omitted).

22 i. Protected Activity

23 Although the complaint is not part of the record, defendants
24 have not disputed that plaintiff filed an EEOC complaint alleging
25 "disparate treatment" by "coworkers and supervisors, including
26 transmission of pornography." (Pl. Opp'n 2). While the
27 plaintiff's failure to include the EEOC complaint is fatal to her
28 First Amendment claim, which requires careful analysis of the

1 speech itself and the context in which it is made, it is not fatal
2 with respect to her Title VII claim. All that the plaintiff is
3 required to show is that she complained of activity that a
4 reasonable person would believe is unlawful under Title VII. The
5 plaintiff has satisfied this requirement by the fact she filed a
6 Title VII EEOC complaint alleging disparate treatment and
7 transmission of pornography and that she received a right-to-sue
8 letter. What's more, plaintiff told her supervisors of her
9 complaint and showed defendant Walsh the evidence she believed
10 supported it. This is sufficient to meet this element of
11 plaintiff's prima facie case.

12 ii. Adverse Employment Action

13 Plaintiff suffered an adverse employment action by being
14 terminated.

15 iii. Causal Link

16 Plaintiff filed her EEOC complaint on January 30, 2010. She
17 advised many of her superiors of the complaint on February 11,
18 2010, and advised NDOC Director Howard Skolnik specifically on
19 March 2, 2010. Plaintiff was placed on administrative leave on May
20 12, 2010, after being accused of falsifying logbooks. Although
21 plaintiff was not ultimately terminated until November 2010, the
22 investigations leading to her termination began within a few
23 months, if not weeks, of many defendants learning of her Title VII
24 claim.¹⁰ Construing this element broadly at the prima facie stage,

25

26 ¹⁰ While defendants claim that the investigations had already begun by
27 this point, they provide no evidence to support their assertion. Even if
28 that is true, however, the investigations clearly picked up steam after
defendants learned of the EEOC complaint, as the bulk of the specific
allegations of misconduct were for incidents that occurred in March, April,
and May 2010.

1 it cannot be said that plaintiff's protected activity and her
2 eventual termination were completely unrelated. A causal link
3 therefore exists between plaintiff's protected activity and her
4 termination.

5 Plaintiff has thus established a prima facie case of
6 retaliation.

7 B. Legitimate Nondiscriminatory Reason

8 Because plaintiff has established a prima facie case, the
9 burden shifts to the state to provide a legitimate
10 nondiscriminatory reason for the adverse employment action. The
11 record reflects plaintiff was terminated for allegedly falsifying
12 logbooks and timesheets over a substantial period of time, which is
13 a legitimate nondiscriminatory reason.

14 C. Pretext

15 Pretext may be shown either indirectly, by showing the
16 employer's proffered explanation is unworthy of credence because it
17 is internally inconsistent or otherwise not believable, or
18 directly, by showing that unlawful discrimination more likely
19 motivated the employer. *Lyons v. England*, 307 F.3d 1092, 1113 (9th
20 Cir. 2002). Circumstantial evidence must be specific and
21 substantial. *Id.*

22 "That an employer's actions were caused by an employee's
23 engagement in protected activities may be inferred from proximity
24 in time between the protected action and the allegedly retaliatory
25 employment decision." *Raad v. Fairbanks N. Star Borough Sch.*
26 *Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003) (internal citations and
27 quotations omitted). Temporal proximity can by itself be
28 sufficient circumstantial evidence of retaliation in some cases.

1 *Bell v. Clackamas County*, 341 F.3d 858, 865 (9th Cir. 2003).

2 As discussed, there is at least a question of fact as to the
3 temporal proximity between plaintiff's protected activity and the
4 alleged adverse employment actions, and they are potentially very
5 close in time. In addition to that, however, plaintiff has also
6 alleged the following statements by superiors: (1) Skolnik's
7 statement that he was going to do whatever he could to get rid of
8 plaintiff; and (2) Walsh's statement that plaintiff had to drop her
9 claim or "someone was going to get fired." These statements
10 suggest a retaliatory animus by Walsh and Skolnik, who were both
11 involved in plaintiff's termination. Combined with the temporal
12 proximity, genuine issue of material fact exists as to whether
13 plaintiff was terminated for legitimate nondiscriminatory reasons
14 or whether she was terminated for engaging in protected activity.
15 Defendants' motion for summary judgment on plaintiff's Title VII
16 retaliation claim must therefore be denied.

17 Plaintiff has not sued the individual defendants in their
18 official capacities, only in their individual capacities. (See Pl.
19 Sec. Am. Compl. ¶ 2). Individual defendants cannot be held liable
20 in their individual capacities for violating Title VII. *Ortez v.*
21 *Washington County*, 88 F.3d 804, 808 (9th Cir. 1996). Accordingly,
22 plaintiff's Title VII claim may only proceed against her employer,
23 the State of Nevada.

24 In their reply, the defendants argue for the first time that
25 the state cannot be a party to this case because plaintiff has not
26 provided proof that it served NDOC's director, as required by
27 statute. See Nev. Rev. Stat. § 41.031. The court does not
28 consider an issue raised for the first time in a defendant's reply.

1 See *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) (“The
2 district court need not consider arguments raised for the first
3 time in a reply brief.”). However, because the record is unclear
4 on whether plaintiff served the State of Nevada in compliance with
5 § 41.031, the plaintiff shall, on or before October 19, 2012, file
6 proof that service has been made in compliance with § 41.031.¹¹

7 **III. Title VII Gender Discrimination**

8 Under Title VII, it is an unlawful employment practice for an
9 employer to discriminate against any individual because of his or
10 her sex. 42 U.S.C. § 2000e-2(a)(1). This claim is also analyzed
11 under the burden-shifting framework outlined above.

12 The plaintiff’s prima facie case of disparate treatment
13 requires her to show that: (1) she is a member of a protected
14 class; (2) she was qualified for her position; (3) she suffered an
15 adverse employment action; and (4) similarly situated individuals
16 outside her protected class were treated more favorably. *Fonseca*
17 *v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 847 (9th Cir.
18 2004).

19 Defendant argues that plaintiff has failed to identify any
20 similarly situated individual who was treated more favorably,
21 defining similarly situated as “any individual or group who was
22 investigated and charged with falsification of log books and time
23 sheets and who reported alleged improper use of pornography, and
24

25 ¹¹ The court notes that while § 41.031 relates to the state’s waiver
26 of sovereign immunity, “the manner and timing of serving process are
27 generally nonjurisdictional matters of procedure that do not condition the
28 waiver of sovereign immunity.” *Quality Loan Serv. Corp. v. 24702 Pallas*
Way, Mission Viejo, CA, 635 F.3d 1128, 1133 n. 5 (9th Cir. 2011) (internal
alterations omitted) (citing *Henderson v. United States*, 517 U.S. 654, 656
(1996)).

1 was then terminated.” (Def. Mot. Summ. J. 8). While this
2 definition is far too narrow, plaintiff has failed to identify
3 anyone similarly situated even in a broader sense with enough
4 specificity to survive summary judgment.

5 In her deposition plaintiff identified Miller and Booth as
6 similarly situated males who had reported misconduct in the
7 workplace and had not properly completed log books who were not
8 investigated or terminated. (Pl. Dep. 69:9-15). But nowhere does
9 she provide any explanation as to what type of conduct Miller and
10 Booth reported or in what way Miller and Booth improperly completed
11 logbooks. Moreover, plaintiff was terminated for allegedly
12 repeatedly falsifying not only the logbooks but also her
13 timesheets, all after being counseled by her superiors to not do
14 so. There is no indication anywhere in the record that Miller and
15 Booth were similarly situated to plaintiff in this way.

16 Plaintiff, in support of this claim, also argues that
17 defendants failed to act on her complaints of discrimination and
18 pornography, but she does not argue or identify another employee
19 who reported such claims to which the defendants did respond.
20 Plaintiff has therefore failed to carry her burden that similarly
21 situated individuals were treated more favorably than she was. See
22 *Anthoine*, 605 F.3d at 753-54 (finding plaintiff failed to establish
23 his gender discrimination claim because he had not offered any
24 specific evidence on the circumstances of other employees allegedly
25 discriminated against because of their gender).

26 It is unclear whether plaintiff is also asserting sexual
27 harassment/hostile work environment claim. To the extent she is,
28 however, she has also failed to support that claim.

1 A Title VII discrimination claim can be based on sexual
2 harassment amounting to a hostile work environment. See *Harris v.*
3 *Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (“When the workplace is
4 permeated with discriminatory intimidation, ridicule, and insult,
5 that is sufficiently severe or pervasive to alter the conditions of
6 the victim’s employment and create an abusive working environment,
7 Title VII is violated.”) (internal quotation marks and citation
8 omitted); *Brooks v. City of San Mateo*, 229 F.3d 917, 923 (9th Cir.
9 2000) (noting that harassment committed or tolerated by an employer
10 is discrimination). Title VII does not prohibit all harassment,
11 just harassment because of an individual’s membership in a
12 protected group. *Oncale v. Sundowner Offshore Servs., Inc.*, 523
13 U.S. 75, 80 (1998).

14 To prevail on a hostile work environment claim, plaintiff must
15 show: (1) she was subjected to verbal or physical conduct because
16 of her sex; (2) the conduct was unwelcome; and (3) the conduct was
17 sufficiently severe or pervasive to alter the conditions of her
18 employment and create an abusive working environment. *Mannatt v.*
19 *Bank of Am., NA*, 339 F.3d 792, 798 (9th Cir. 2003); see also *Craig*
20 *v. M & O Agencies, Inc.*, 496 F.3d 1047, 1055 (9th Cir. 2007). In
21 addition, the environment must also “both subjectively and
22 objectively be perceived as abusive.” *Brooks*, 229 F.3d at 923.
23 That is, the plaintiff must show that she perceived the environment
24 to be hostile, and that a reasonable person would find it to be so.
25 *Equal Employment Opportunity Comm’n v. Prospect Airport Servs.,*
26 *Inc.*, 621 F.3d 991 (9th Cir. Sept. 3, 2010).

27 Whether conduct is sufficiently objectively severe or
28 pervasive is determined “by looking at all the circumstances,

1 including the frequency of the discriminatory conduct; its
2 severity; whether it is physically threatening or humiliating, or a
3 mere offensive utterance; and whether it unreasonably interferes
4 with an employee's work performance." *Clark County Sch. Dist. v.*
5 *Breeden*, 532 U.S. 268, 270-71 (2001) (quoting *Faragher v. City of*
6 *Boca Raton*, 524 U.S. 775, 787-88 (1998)). Title VII is not
7 violated by simple teasing, off-hand comments, isolated incidents
8 (unless extremely serious), or "mere offensive utterance of an
9 epithet which engenders offensive feelings in an employee."
10 *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986); *Faragher*
11 *v. City of Boca Raton*, 524 U.S. 775, 788 (1998). "[T]he required
12 showing of severity or seriousness of the harassing conduct varies
13 inversely with the pervasiveness or frequency of the conduct."
14 *Brooks*, 229 F.3d at 926. The court assumes the perspective of the
15 reasonable victim in assessing the objective portion. *Id.* at 924.
16 "If hostility pervades a workplace, a plaintiff may establish a
17 violation of Title VII, even if such hostility was not directly
18 targeted at plaintiff." *Dominguez-Curry v. Nev. Transp. Dep't*, 424
19 F.3d 1027, 1036 (9th Cir. 2005).

20 The record reveals just two examples of potential harassment
21 linked to gender - the transmission of a video of a man's buttocks
22 by Booth to plaintiff and everyone else in the workplace a
23 significant time before plaintiff complained about it, and Miller's
24 comment that he didn't want any more "f-ing females in the unit
25 because they were too much trouble." As far as the record
26 reflects, Booth's forwarding of the video was an isolated incident
27 and thus insufficient to support a hostile work environment claim.
28 Miller's comment, coupled with the assertion that he shut plaintiff

1 out and ignored plaintiff's opinions, may suggest harassment based
2 on gender. But there is a distinct lack of specific examples that
3 Miller's conduct pervaded the working environment so as to be both
4 subjectively and objectively perceived as abusive. Without more,
5 plaintiff has failed to show sufficient evidence exists to support
6 her hostile work environment claim.

7 As plaintiff has failed to establish a gender discrimination
8 claim under either a disparate impact or a hostile work environment
9 theory, the defendants' motion for summary judgment on this claim
10 will be granted.

11 **IV. Res Judicata**

12 As plaintiff's First Amendment claim fails on the merits, the
13 court need not decide it is barred by res judicata. In terms of
14 plaintiff's Title VII claims, the unreviewed agency determination
15 is not entitled to preclusive effect. *See Univ. of Tenn. v.*
16 *Elliott*, 478 U.S. 788, 795-96 (1986) (holding that unreviewed state
17 administrative proceedings do not have preclusive effect on Title
18 VII claim); *see also Kremer v. Chem. Constr. Co.*, 456 U.S. 461, 470
19 n.7 (1982); *Snow v. Nev. Dep't of Prisons*, 543 F. Supp. 752, 755
20 (D. Nev. 1982). Accordingly, defendants' res judicata argument
21 with respect to plaintiff's Title VII claims is denied.

22 **Conclusion**

23 In accordance with the foregoing, the defendants' motion for
24 summary judgment is **GRANTED IN PART** and **DENIED IN PART**. The motion
25 is denied as to the plaintiff's Title VII retaliation claim but is
26 granted as to plaintiff's Title VII gender discrimination claim and
27 her First Amendment retaliation claim. Accordingly, the individual
28 defendants, sued in their individual capacities - Howard Skolnik,

1 Jack Palmer, James Benedetti, Rod Moore, Lawrence Booth, James
2 Baca, Edgar Miller, and Elizabeth Walsh - are dismissed from this
3 action. At this stage, the sole remaining defendant is the State
4 of Nevada and the sole remaining claim is the Title VII claim. On
5 or before October 19, 2012, the plaintiff shall file proof that
6 service has been made on the State of Nevada in compliance with §
7 41.031.

8 IT IS SO ORDERED.

9 DATED: This 21st day of September, 2012.

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UNITED STATES DISTRICT JUDGE