

1 THE HONORABLE JOHN C. COUGHENOUR

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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

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10 JASON ANKENY,

11 Plaintiff,

12 v.

13 JANET NAPOLITANO, SECRETARY, U.S.
14 DEPARTMENT OF HOMELAND
15 SECURITY, a Federal Sector Employer,
DIVISION OF CUSTOMS AND BORDER
PROTECTION,

16 Defendants.

Case No. C09-1379-JCC

ORDER

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18 This matter comes before the Court on Defendants' motion for summary judgment
19 (Dkt. No. 12), Plaintiff's response (Dkt. No. 18) and Defendants' reply (Dkt. No. 22). Having
20 thoroughly considered the parties' briefing and the relevant record, the Court GRANTS IN
21 PART and DENIES IN PART the motion for the reasons explained herein.

22 I. BACKGROUND

23 Plaintiff, a former customs and border-protection officer with United States Customs
24 and Border Protection ("CBP"), accuses his employer of sex-based discrimination and
25 retaliation. In 2005, CBP reassigned Plaintiff from his probationary supervisory position to his
26 prior position as a nonsupervisory officer. Two months earlier, CBP rated Plaintiff technically

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1 competent and meeting expectations. Yet CBP provides evidence that coworkers complained
2 about Plaintiff's impatience and profanity use, that Plaintiff improperly maintained overdue log
3 entries for which Plaintiff had received counseling, that Plaintiff improperly processed an alien
4 resident, and that Plaintiff responded in an extremely agitated and confrontational manner to
5 further counseling. After CBP returned Plaintiff to his prior position and Plaintiff filed a sex-
6 discrimination complaint, Plaintiff claims that CBP, in particular Supervisor Margaret Fearon,
7 engaged in unlawful retaliation. Specifically, Plaintiff claims retaliation when he was
8 constructively discharged, when Supervisor Fearon interfered with the EEOC investigation,
9 when CBP repudiated a purported settlement agreement, and when coworkers subjected
10 Plaintiff to a hostile work environment because of fear of repercussions from Supervisor
11 Fearon.

12 II. DISCUSSION

13 A. Legal Standard

14 Summary judgment is proper "if the pleadings, the discovery and disclosure materials
15 on file, and any affidavits show that there is no genuine issue as to any material fact and that
16 the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must
17 view all evidence in the light most favorable to the nonmoving party and draw all reasonable
18 inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–50 (1986).
19 A genuine issue of material fact exists where there is sufficient evidence for a reasonable
20 factfinder to find for the nonmoving party. *Id.* at 248. The inquiry is "whether the evidence
21 presents a sufficient disagreement to require submission to a jury or whether it is so one-sided
22 that one party must prevail as a matter of law." *Id.* at 251–52.

23 A plaintiff bringing a cause of action under Title VII must first establish a prima facie
24 case of discrimination by offering evidence that gives rise to an inference of unlawful
25 discrimination. *E.E.O.C. v. Boeing Co.*, 577 F.3d 1044, 1049 (9th Cir. 2009). A plaintiff may
26 establish a prima facie case either by meeting the four-part test laid out in *McDonnell Douglas*

1 *Corp. v. Green*, 411 U.S. 792, 802 (1973),¹ or by providing direct evidence suggesting that the
2 employment decision was based on an impermissible criterion. *Boeing Co.*, 577 F.3d at 1049.
3 If the plaintiff establishes a prima facie case, the burden of production, but not persuasion,
4 shifts to the employer to articulate some legitimate, nondiscriminatory reason for the
5 challenged action. *Id.* If the employer meets that burden, “the plaintiff must then show that the
6 articulated reason is pretextual either directly by persuading the fact-finder that a
7 discriminatory reason more likely motivated the employer or indirectly by showing that the
8 employer’s proffered explanation is unworthy of credence.” *Id.* (quotation marks omitted).

9 When a plaintiff relies on direct evidence of discrimination, courts “require very little
10 evidence to survive summary judgment.” *Id.*; see also *McGinest v. GTE Serv. Corp.*, 360 F.3d
11 1103, 1124 (9th Cir. 2004) (“[A]ny indication of discriminatory motive may suffice to raise a
12 question that can only be resolved by a fact-finder.” (quoting *Schnidrig v. Columbia Mach.,*
13 *Inc.*, 80 F.3d 1406, 1409 (9th Cir. 1996)). The Ninth Circuit has “repeatedly held that a single
14 discriminatory comment by a plaintiff’s supervisor or decisionmaker is sufficient to preclude
15 summary judgment for the employer.” *Dominguez-Curry v. Nev. Transp. Dep’t*, 424 F.3d
16 1027, 1039 (9th Cir. 2005). But when a plaintiff relies on circumstantial evidence, “that
17 evidence must be specific and substantial to defeat the employer’s motion for summary
18 judgment.” *Coghlan v. Am. Seafoods Co. LLC*, 413 F.3d 1090, 1095 (9th Cir. 2005) (quotation
19 marks omitted). To the extent the parties’ claims rise and fall on the credibility of witnesses,
20 those issues must be resolved at trial, not on summary judgment. See, e.g., *McGinest*, 360 F.3d
21 at 1112.

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23 ¹ See *Coghlan v. Am. Seafoods Co. LLC*, 413 F.3d 1090, 1094 (9th Cir. 2005) (“Under
24 [the *McDonnell Douglas*] framework, the burden of production first falls on the plaintiff to
25 a protected class, (2) he was qualified for the position he held (or for the position to which he
26 wished to be promoted), (3) he was terminated or demoted from (or denied a promotion to) that
position, and (4) the job went to someone outside the protected class.”).

1 To establish a retaliation claim, a plaintiff must show that (1) he or she is engaged in a
2 protected activity, (2) he or she suffered from an adverse employment decision, and (3) there
3 was a causal link between the protected activity and the adverse employment action. *Lyons v.*
4 *England*, 307 F.3d 1092, 1118 (9th Cir. 2002). A causal link can be established by showing
5 that the employer knows about the employee’s engagement in a protected activity and the
6 proximity in time between that activity and the alleged retaliatory employment action. *Jordan*
7 *v. Clark*, 847 F.2d 1368, 1376 (9th Cir. 1988). In retaliation cases, the *McDonnell Douglas*
8 burden-shifting framework applies after the plaintiff shows a prima facie case of retaliation.
9 *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1065–66 (9th Cir. 2003).

10 **B. Sex-Discrimination Claim**

11 Plaintiff has not shown a genuine issue of material fact with respect to his sex-
12 discrimination claims. Plaintiff generally complains that he was demoted without sufficient
13 notice or opportunity to respond. Yet Plaintiff has provided no direct evidence of sex
14 discrimination. Instead, he relies on circumstantial allegations that Supervisor Fearon treated
15 female employees more favorably. But none of those female employees, with one exception,
16 were “similarly situated” to plaintiff because they were not probationary supervisors. *See*
17 *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006) (“In order to show that the ‘employees’
18 allegedly receiving more favorable treatment are similarly situated (the fourth element
19 necessary to establish a prima facie case under Title VII), the individuals seeking relief must
20 demonstrate, at the least, that they are similarly situated to those employees in all material
21 respects.”); *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003)
22 (“[I]ndividuals are similarly situated when they have similar jobs and display similar
23 conduct.”). Plaintiff offers no showing that these female employees are similarly situated aside
24 from the insufficient fact that they all work for the same employer.

25 Nor was the lone female probationary supervisor similarly situated to Plaintiff.
26 Importantly, CBP likewise *demoted* the female probationary supervisor because of her own

1 misconduct. Plaintiff argues, without citation, that the female probationary supervisor received
2 more favorable treatment because she was allowed to complete her full probationary period.
3 Yet the female probationary supervisor was demoted three months prior to the end of her
4 probationary period, after committing an alcohol violation. Moreover, although a plaintiff may
5 be able to show in an appropriate case that a similarly demoted employee was treated more
6 favorably by receiving extra training or supervision, Plaintiff provides nothing more than
7 conclusory allegations that the female probationary supervisor committed similar acts yet
8 received more training and leniency.² Different misconduct mandates different responses.
9 Plaintiff's comparison is too remote for Title VII standards.

10 In addition, Plaintiff has not proffered sufficient evidence to overcome the "same-actor
11 inference." The same-actor inference holds that "where the same actor is responsible for both
12 the hiring and the firing of a discrimination plaintiff, and both actions occur within a short
13 period of time, a strong inference arises that there was no discriminatory motive." *Bradley v.*
14 *Harcourt, Brace & Co.*, 104 F.3d 267, 270–71 (9th Cir. 1996). Supervisor Fearon
15 recommended Plaintiff for the probationary-supervisor position, and she was similarly
16 responsible for his demotion less than halfway through the probationary period. Plaintiff has
17 not provided corresponding evidence to rebut this inference. *See Coghlan*, 413 F.3d at 1097
18 n.10 ("[W]hen the allegedly discriminatory actor is someone who has previously selected the
19 plaintiff for favorable treatment, that is very strong evidence that the actor holds no
20 discriminatory animus, and the plaintiff must present correspondingly stronger evidence of bias
21 in order to prevail."). Nor does Plaintiff dispute that he was replaced by a male employee. *See*

23 ² Similarly situated individuals must "display similar conduct." *Vasquez*, 349 F.3d at
24 641. Plaintiff has not shown how the female probationary supervisor was "involved in the
25 same type of offense" as Plaintiff or "engaged in problematic conduct of comparable
26 seriousness" to that of Plaintiff. *See id.* The female supervisors' misconduct, such as failing to
report for an overtime shift because of a schedule change and failure to notify CBP when she
was tardy for work, do not constitute material similarity to Plaintiff's professionalism issues.

1 *id.* (requiring under a disparate-treatment claim that the plaintiff show that “the job went to
2 someone outside the protected class”). Accordingly, the Court grants summary judgment in
3 favor of Defendants on Plaintiff’s sex-discrimination claim.

4 **C. Retaliation Claim**

5 Nonetheless, Plaintiff raises a genuine dispute over a material fact with respect to his
6 retaliation claim. Initially, the Court agrees with Plaintiff that he sufficiently exhausted his
7 constructive-discharge claim. Plaintiff apparently did not file an EEOC charge of constructive
8 discharge, but he had previously raised a retaliation claim that encompassed much, if not all, of
9 the conduct he alleges led to the constructive discharge. Although, as Defendants argue, the
10 Supreme Court holds that “discrete discriminatory acts are not actionable if time barred, even
11 when they are related to acts alleged in timely filed charges,” *Nat’l R.R. Passenger Corp. v.*
12 *Morgan*, 536 U.S. 101, 113 (2002), that holding “does not address whether a previously filed
13 EEOC complaint must be amended to encompass subsequent discrete acts in order to render
14 such acts susceptible to judicial review,” *Rivera v. P.R. Aqueduct & Sewers Auth.*, 331 F.3d
15 183, 189 (1st Cir. 2003). Notably, *Morgan* focused on complainants who attempt to bring into
16 an EEOC charge claims of *previous* discrimination that became stale by falling outside the
17 statute of limitations. Here, Plaintiff’s constructive discharge occurred *after* he had already
18 filed his EEOC complaint. The Court concludes that under these circumstances it would be
19 unreasonable to require that Plaintiff have filed an additional EEOC charge for the same
20 retaliatory acts simply because those acts, for which he timely filed a charge, culminated in
21 what he argues was a constructive discharge. *See Josephs v. Pac. Bell*, 443 F.3d 1050, 1062
22 (9th Cir. 2006) (“Subject matter jurisdiction extends over all allegations of discrimination that
23 either fell within the scope of the EEOC’s *actual* investigation or an EEOC investigation which
24 *can reasonably be expected* to grow out of the charge of discrimination.”) (citing *B.K.B. v.*
25 *Maui Police Dep’t*, 276 F.3d 1091, 1100 (9th Cir. 2002))). Additionally, the Court grants
26 equitable relief to Plaintiff on this matter, estopping Defendants from raising the exhaustion

1 requirement and finding constructive exhaustion via Plaintiff’s earlier charge. *See Morgan*, 536
2 U.S. at 113 (“[T]his time period for filing a charge is subject to equitable doctrines such as
3 tolling or estoppel.”). Defendants do not rebut Plaintiff’s claim that the discharge issue was
4 “put to hearing at the EEOC in 2008 in the face of defendants’ motion to dismiss,” thus
5 satisfying the purposes of exhaustion. *See Freeman v. Oakland Unified Sch. Dist.*, 291 F.3d
6 632, 636 (9th Cir. 2002) (“The administrative charge requirement serves the important
7 purposes of giving the charged party notice of the claim and narrowing the issues for prompt
8 adjudication and decision.” (quoting *B.K.B.*, 276 F.3d at 1099)).

9 The Court also disagrees with Defendants that any claims related to CBP’s alleged
10 interference with the EEOC investigation are not actionable. Defendants cite only District of
11 Columbia district-court decisions for such a position. These decisions emphasize that “a claim
12 regarding interference with an EEOC investigation is not about a condition of employment.”
13 *See Keeley v. Small*, 391 F. Supp. 2d 30, 45 (D.D.C. 2005). Yet the Supreme Court recently
14 held that Title VII’s antiretaliation provision is not limited to employer conduct affecting
15 conditions of employment. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006)
16 (“Thus, purpose reinforces what language already indicates, namely, that the antiretaliation
17 provision, unlike the substantive provision, is not limited to discriminatory actions that affect
18 the terms and conditions of employment.”). The purpose of the antiretaliation provision is
19 “maintaining unfettered access to statutory remedial mechanisms.” *Id.* “[A] plaintiff must show
20 that a reasonable employee would have found the challenged action materially adverse, which
21 in this context means it well might have dissuaded a reasonable worker from making or
22 supporting a charge of discrimination.” *Id.* at 68 (quotation marks omitted); *see also Vasquez*,
23 349 F.3d at 646 (“[A]n action is cognizable as an adverse employment action if it is reasonably
24 likely to deter employees from engaging in protected activity[, including] any adverse
25 treatment that is based on a retaliatory motive and is reasonably likely to deter *the charging*
26 *party* or others from engaging in protected activity.” (quotation marks and footnote omitted)).

1 If a supervisor interferes with an EEOC investigation by intimidating witnesses, as Plaintiff
2 alleges, that employer has engaged in conduct that the Court concludes would dissuade a
3 reasonable worker, including “the charging party,” from making or supporting a charge of
4 discrimination.

5 Finally, the Court concludes that Plaintiff raises a genuine issue of material fact with
6 respect to his claim for a retaliatory hostile work environment and constructive discharge.
7 Defendants correctly argue that “ostracism suffered at the hand of coworkers cannot constitute
8 an adverse employment action.” *See Brooks v. City of San Mateo*, 229 F.3d 917, 929 (9th Cir.
9 2000); *see also Burlington N.*, 548 U.S. at 68 (“An employee’s decision to report
10 discriminatory behavior cannot immunize that employee from those petty slights or minor
11 annoyances that often take place at work and that all employees experience.”). Yet the isolation
12 and exclusion Plaintiff describes is neither petty nor minor. Viewing the evidence in the light
13 most favorable to Plaintiff, Plaintiff’s coworkers blacklisted Plaintiff because of the fear
14 engendered by Supervisor Fearon, with Fearon coercing employees to rewrite statements to the
15 EEOC and commanding employees not to talk to Plaintiff. *See McGinest*, 360 F.3d at 1112
16 (“In evaluating motions for summary judgment in the context of employment discrimination,
17 we have emphasized the importance of zealously guarding an employee’s right to a full trial,
18 since discrimination claims are frequently difficult to prove without a full airing of the
19 evidence and an opportunity to evaluate the credibility of the witnesses.”). With respect to
20 Supervisor Fearon’s statement at the supervisors’ meeting regarding contact with Plaintiff,
21 Defendants provide a plausible, and perhaps believable, explanation. But that explanation is
22 merely one interpretation, and Plaintiff has pointed to enough evidence to raise a genuine issue
23 of material fact regarding Supervisor Fearon’s credibility. *See id.* at 1112 (holding that to the
24 extent the parties’ claims rise and fall on the credibility of witnesses, those issues must be
25 resolved at trial, not on summary judgment). Supervisor Fearon’s alleged interference with the
26 EEOC investigation further contributes to Plaintiff’s claim that Defendants created a hostile

1 work environment that led to his constructive discharge.³ Accordingly, the Court denies
2 summary judgment with respect to Plaintiff's retaliation and hostile-work-environment
3 claims.⁴

4 III. CONCLUSION

5 For the foregoing reasons, the Court GRANTS Defendant's motion for summary
6 judgment with respect to Plaintiff's sex-discrimination claims. The Court DENIES
7 Defendant's motion for summary judgment with respect to Plaintiff's retaliation and hostile-
8 work-environment claims.

9 DATED this 8th day of December 2010.

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John C. Coughenour
UNITED STATES DISTRICT JUDGE

19 ³ Although twenty-one months passed between the filing of the EEOC charge and
20 Plaintiff's constructive discharge, that time is drastically reduced because Plaintiff alleges
21 ongoing retaliatory conduct.

22 ⁴ The Court agrees with Defendants' assertion, unopposed by Plaintiff, that Janet
23 Napolitano in her official capacity as Secretary of the Department of Homeland Security is the
24 only proper defendant in this action. *See* 42 U.S.C. § 2000e-16(c). Accordingly, the Court
25 dismisses the action against the Division of Customs and Border Protection. The Court also
26 agrees with Defendants' assertion, unopposed by Plaintiff, that Plaintiff's claims regarding an
unsigned settlement agreement are not viable because Plaintiff has not shown the Court a
signed settlement agreement and because Plaintiff agreed that "all discussions during
mediation sessions are confidential and may not be used against either party in any subsequent
proceeding."