

APPENDIX

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APPENDIX A — NINTH CIRCUIT MEMORANDUM DISPOSITION,
FILED APRIL 11, 2025

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 23-55632

D.C. No. 2:21-cv-04327-VAP-AS

HIEN THI NGUYEN,

Plaintiff-Appellant,

v.

JOHN PHELAN, in his official capacity as Secretary of the Navy,

Defendant-Appellee.

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, Chief District Judge, Presiding

Submitted April 11, 2025**
San Francisco, California

Before: FRIEDLAND, BENNETT, and BADE, Circuit Judges.

* The panel unanimously concludes this case is suitable for decision without oral argument.
See Fed. R. App. P. 34(a)(2).

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See Fed. R. App. P. 34(a)(2).

Plaintiff-Appellant Hien Nguyen, a woman of Vietnamese national origin, appeals the district court's orders (1) denying in part her motion to compel, (2) denying reconsideration of her motion for a discovery extension, (3) striking her untimely exhibits in opposition to Defendant-Appellant John Phelan's (the Navy's)¹ motion for summary judgment and (4) granting the Navy's motion for summary judgment. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We review the district court's discovery rulings for abuse of discretion. *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1119 (9th Cir. 2020). We review a district court's grant of summary judgment de novo. *LN Mgmt., LLC v. JPMorgan Chase Bank, N.A.*, 957 F.3d 943, 949 (9th Cir. 2020).

1. Nguyen does not show that the district court abused its discretion in any of the challenged discovery orders. The district court is "vested with broad discretion to permit or deny discovery," and we will not disturb a "decision to deny discovery . . . except upon the clearest showing that the denial of discovery results in actual and substantial prejudice to the complaining litigant." *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) (internal quotation marks and citation omitted). Nguyen fails to explain how the additional discovery she sought would have prevented summary judgment, so she has not shown prejudice. See *Qualls ex rel. Qualls v. Blue Cross of Cal., Inc.*, 22 F.3d 839, 844 (9th Cir. 1994). We similarly

¹ Pursuant to Federal Rule of Appellate Procedure 43(c)(2), John Phelan, in his official capacity as Secretary of the Navy, is automatically substituted as Defendant-Appellee.

conclude that the court did not abuse its “broad discretion” to enforce its local rules by striking Nguyen’s untimely filed exhibits.² *Id.* at 842 n.2.

2. Nguyen failed to meet her burden to establish a genuine dispute of material fact sufficient to defeat summary judgment on her claims that the Navy discriminated against her under Title VII or the Age Discrimination in Employment Act (ADEA).³ “We combine the Title VII and ADEA claims for analysis because the burdens of proof and persuasion are the same.” *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 888 (9th Cir. 1994).

Assuming without deciding that Nguyen established a prima facie case of discrimination, *see Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002), the Navy met its burden to “articulate some legitimate, nondiscriminatory reason for” Nguyen’s poor performance reviews, failure to secure a third tour, and ultimate termination, *Opara v. Yellen*, 57 F.4th 709, 723 (9th Cir. 2023) (quoting *EEOC v. Boeing Co.*, 577 F.3d 1044, 1049 (9th Cir. 2009)). Nguyen then did not meet her burden to “show that the articulated reason is pretextual.” *Id.*

Ample evidence establishes that Nguyen failed to complete basic assignments, required extra review or supervision, and lacked sufficient technical and communication skills, all leading to her poor reviews and termination. The same

² Nguyen attached many of the same exhibits to her opening brief on appeal. Because those documents were not before the district court, the Navy’s motion to strike those exhibits (Dkt. 32) is granted. *See* Fed. R. App. P. 10(a).

³ As a federal employee claiming discrimination against a government agency, Nguyen may recover only for allegedly discriminatory acts occurring within 45 days of her contact with an Equal Employment Opportunity counselor. *See* 29 C.F.R. § 1614.105(a)(1); *Lyons v. England*, 307 F.3d 1092, 1105 (9th Cir. 2002). We therefore consider only those events that Nguyen has alleged within that timeframe. *See Lyons*, 307 F.3d at 1108.

performance and communication problems, as well as funding issues, also prevented her from securing a third tour assignment.

Nguyen presents little to no evidence that the Navy's actions were "more likely motivated" by discrimination based on sex, race, national origin, or age. *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1124 (9th Cir. 2000) (quoting *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 256 (1981)). Nguyen cites a colleague's testimony that he had observed anti-Vietnamese discrimination at Nguyen's workplace and believes it still occurs, as well as offhand comments by coworkers characterizing her as "old." Even when construed in the light most favorable to her, however, Nguyen's evidence is neither "specific [nor] substantial" enough to show pretext. *Villiarimo*, 281 F.3d at 1062. Nor does she demonstrate that the Navy's explanations for its adverse actions are "unworthy of credence." *Chuang*, 225 F.3d at 1124 (quoting *Tex. Dep't of Cmty. Affs.*, 450 U.S. at 256). Because "abundant and uncontroverted independent evidence" suggests that "no discrimination . . . occurred," Nguyen at most creates "a weak issue of fact" insufficient to survive summary judgment. *Opara*, 57 F.4th at 724 (alteration in original) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000)).

3. Nguyen fails to establish a prima facie hostile work environment claim under Title VII or the ADEA. To do so, Nguyen must establish that she experienced unwelcome conduct because of a protected characteristic that was "sufficiently severe or pervasive to alter the conditions of [her] employment and

create an abusive work environment.”⁴ *Manatt v. Bank of Am., NA*, 339 F.3d 792, 798 (9th Cir. 2003) (quoting *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 817 (9th Cir. 2002)); see also *Sischo-Nownejad v. Merced Cmty. Coll. Dist.*, 934 F.2d 1104, 1109 (9th Cir. 1991) (noting hostile work environment claims are cognizable under the ADEA), *superseded by statute on other grounds as recognized by Dominguez-Curry v. Nev. Transp. Dep’t*, 424 F.3d 1027, 1041–42 (9th Cir. 2005). We consider the totality of the circumstances, and the environment must “be both objectively and subjectively offensive.” *Fried v. Wynn Las Vegas, LLC*, 18 F.4th 643, 648 (9th Cir. 2021) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998)).

Nguyen fails to demonstrate that the environment she faced was objectively offensive or hostile. Once again, the only age-related statements Nguyen identifies as hostile are “offhand comments and isolated incidents,” which “do not constitute a hostile or abusive work environment.” *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1095 (9th Cir. 2008) (quoting *Faragher*, 524 U.S. at 788). The same applies to her colleague’s comment about Nguyen’s Master’s degree, and the incident where he gestured towards the men’s restroom and said, “Ladies first.” These fall within the “ordinary tribulations of the workplace” that the objective hostility standard “filter[s] out.” *Fried*, 18 F.4th at 648 (quoting *Faragher*, 524 U.S. at 788).

⁴ Because hostile work environment claims involve “repeated conduct,” not just “discrete acts,” we may consider all unlawful acts alleged so long as at least one falls within the 45-day period before Nguyen contacted the Equal Employment Opportunity (EEO) counselor. See *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115, 117 (2002); see also 29 C.F.R. § 1614.105(a)(1). Nguyen’s allegations satisfy that requirement, so we consider all arguments and evidence regarding her hostile work environment claim.

Nguyen fails to show how her colleague's poster display was objectively offensive, or how it related to one of her protected characteristics, given her testimony that she felt the poster threatened "people who work hard." Nguyen also does not explain why it was objectively offensive for one of her Team Leads to deny that he was her "supervisor" and suggest she did not understand her managerial structure, whether or not he was correct.

4. Nguyen also fails to establish a prima facie Title VII or ADEA retaliation claim. To state a prima facie claim, Nguyen must show that (1) she engaged in a protected activity, (2) she suffered an adverse employment action, and (3) there was a causal connection between the two. *Maner v. Dignity Health*, 9 F.4th 1114, 1127 (9th Cir. 2021) (applying the elements of a retaliation claim under Title VII); *Poland v. Chertoff*, 494 F.3d 1174, 1179–80 (9th Cir. 2007) (applying the same elements under the ADEA).

First, Nguyen establishes no causal connection between her contact with the EEO counselor and her termination. Even though the two events were close in time, the record shows that those involved in her termination were unaware that she had contacted the EEO counselor. Therefore, temporal proximity is insufficient to establish causation. *See Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003).

Second, Nguyen's complaint to her supervisor about the poster display was not protected activity because she did not oppose "conduct [constituting] an unlawful employment practice" and she did not "participat[e] in the machinery set up

by Title VII [or the ADEA] to enforce [their] provisions” in making her complaint. *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997) (quoting *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Cir. 1978)). Although Nguyen argues that her complaint qualifies as protected activity because a supervisor considered it so, Nguyen testified that she had complained out of fear for her ability to succeed based on hard work, not out of fear of discrimination based on a protected characteristic. *Cf. Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1411–12 (9th Cir. 1987) (holding employee’s opposition to radio show format change was not protected activity because he opposed the change for “personal reasons” related to his success at the radio station).

Finally, Nguyen’s incomplete attempt to request formal reconsideration of her performance ratings is neither a protected activity nor an adverse employment action by the Navy. *Cf. Hashimoto*, 118 F.3d at 680 (finding protected activity occurred where the claimant “participat[ed] ‘in the machinery set up by Title VII’” (quoting *Silver*, 586 F.2d at 141)); *Poland*, 494 F.3d at 1180 (“An adverse employment action is ‘any adverse *treatment* that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.’” (emphasis added) (quoting *Ray v. Henderson*, 217 F.3d 1234, 1242–43 (9th Cir. 2000))). Her decision not to follow through with the formal reconsideration process is not adverse treatment by the Navy.

AFFIRMED.

**APPENDIX B — DISTRICT COURT ORDER GRANTING
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT,
FILED JUNE 27, 2023**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 2:21-cv-04327-VAP-ASx

Hien T. Nguyen,

Plaintiff,

v.

Carlos Del Toro,

Defendant.

**Order GRANTING Defendant's Motion
for Summary Judgment
(Doc. No. 99)**

Before the Court is a Motion for Summary Judgment ("Motion") filed by Defendant Secretary of the Navy Carlos Del Toro. (Doc. No. 34.) Plaintiff Hien T. Nguyen ("Plaintiff") filed an untimely Opposition on May 16, 2023. (Doc. No. 106.) Defendant filed a Reply on May 24, 2023. (Doc. No. 150.) After considering all the papers filed in support of, and in opposition to, the Motion, the Court deems this matter appropriate for resolution without a hearing pursuant to Local Rule 7-15. The Court GRANTS the Motion.

I. BACKGROUND

Plaintiff filed this action on May 24, 2021. (Compl., Doc. No. 1.) Plaintiff's initial complaint asserted claims of discrimination, hostile work

environment, and retaliation under Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000a et seq., and claims of discrimination, hostile work environment, and retaliation under the Age Discrimination in Employment Act (“ADEA”) of 1967. (*Id.* at 13-17.) After this Court dismissed with leave to amend all but Plaintiff’s retaliation claims (*see* Doc. No. 30), Plaintiff filed her operative First Amended Complaint on March 18, 2022, asserting the same six claims. (“FAC,” Doc. No. 33.) The FAC generally alleges that Plaintiff was subjected to disparate treatment and a hostile work environment based on her race, national origin, sex, age, and prior Equal Employment Opportunity (“EEO”) activity while working for the Navy. (*Id.* ¶ 9.)

On May 5, 2023, Defendant filed a Motion for Summary Judgment (Doc. No. 99), a Request for Judicial Notice (Doc. No. 99-1), a Statement of Undisputed Facts (“SUF,” Doc. 99-2), and a Declaration of Joseph W. Tursi (“Tursi. Decl.,” Doc. No. 99-3), attaching Exhibits A through FF (Doc. Nos. 99-4-99-35).

On May 16, 2023, Plaintiff filed an untimely Opposition to the Motion. (Doc. No. 106.) She later filed a Declaration of Hien Thi Nguyen (“Nguyen Decl.,” Doc. No. 130) and an accompanying Exhibit 1 (Doc. Nos. 133-35-3, 137-38, 141-41-5).

On May 24, 2023, Defendant filed a Reply. (Doc. No. 150.)

II. LEGAL STANDARD

A motion for summary judgment or partial summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party

is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

Generally, the burden is on the moving party to demonstrate that it is entitled to summary judgment. *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). "The moving party may produce evidence negating an essential element of the nonmoving party's case, or . . . show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1106 (9th Cir. 2000) (reconciling *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). The nonmoving party must then "do more than simply show that there is some metaphysical doubt as to the material facts" but must show specific facts which raise a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A genuine issue of material fact will exist "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248.

In ruling on a motion for summary judgment, a court construes the evidence in the light most favorable to the non-moving party. *Barlow v. Ground*, 943 F.2d 1132, 1135 (9th Cir. 1991). "[T]he judge's function is not [] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

III. FACTS

Defendant filed a Statement of Undisputed Facts along with his Motion. ("SUF," Doc. No. 99-2.) Plaintiff did not file her own Statement of Undisputed Facts or a Statement of Genuine Issues. Instead, Plaintiff asserts various disputed facts by referencing Defendant's Statement of Undisputed Facts throughout her Opposition.¹ (See Opp'n 5-6.) To the extent certain facts or contentions are not mentioned in this Order, the Court has not found it necessary to consider them in reaching its decision.

A. Uncontroverted Facts

The following material facts are supported adequately by admissible evidence² and are uncontroverted. They are "admitted to exist without controversy" for the purposes of this Motion. See Local Rule 56-3.

¹ Plaintiff eventually filed a late Statement of Genuine Issues, which asserted disputes beyond those covered in her Opposition, contradicting Plaintiff's earlier statement that her factual disputes would be addressed in her Opposition only. (See Doc. Nos. 110, 131; Opp'n 5-6 ("Plaintiff regrets that she did not have enough time to properly draft a comprehensive list of disputed facts in this motion Plaintiff seeks to incorporate all of her disputes of material facts . . . into this Motion.")) The Court struck the filing as untimely. See Local Rule 7-12.

² Neither party raises any objection to the admissibility of the evidence presented to assist this Court in adjudicating Defendant's Motion. Some of the evidence consists of employee statements made in sworn affidavits and witness statements based on firsthand impressions made as a result of the EEOC's report of investigation stemming from Plaintiff's claims. "[O]n summary judgment the evidence need not be presented in a *form* that would be admissible at trial. Rather, '[a]t the summary judgment stage, we do not focus on the admissibility of the evidence's form. We instead focus on the admissibility of its contents.'" *Macias v. City of Delano*, 1:18-cv-01634-ADACDBx, 2022 WL 2306961, at *8 (E.D. Cal. June 27, 2022) (quoting *Fraser v. Goodale*, 342 F.3d 1032, 1036-37 (9th Cir. 2003)). Though it is uncertain whether the parties have presented all of their evidence in an admissible form, the statements they rely on could be reduced to admissible evidence at trial by calling the relevant witnesses to testify to their firsthand knowledge of the events in dispute. See, e.g., *Fraser*, 342 F.3d at 1037 ("Because [an inadmissible document]'s contents could be presented in an admissible form at trial, we may consider the . . . contents in the [defendant]'s summary judgment motion."); *Macias*, 2022 WL 2306961, at *8; *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1542 (3d Cir. 1990) (hearsay evidence produced in an affidavit may be considered on summary judgment if the declarant could later present the evidence through direct testimony). The Court therefore finds the parties' proffered evidence admissible for purposes of summary judgment unless otherwise noted.

1. Plaintiff's Probationary Employment with the Navy and the Engineering and Scientific Development Program

Plaintiff Hien T. Nguyen is a woman of Vietnamese national origin. (SUF ¶¶ 2, 4.) On March 1, 2010,³ at the age of fifty-seven, she began working as a probationary engineering trainee in the Engineering and Scientific Development Program ("ESDP"; the "Program") as part of the Navy Career Intern Program. (*Id.* ¶¶ 1, 5.) She was assigned to work in the Weapons Division of the Naval Air Warfare Center in Point Mugu, California. (*Id.* ¶ 5.)

Although human resources and service desk personnel told Plaintiff that Manwah Luk would be her supervisor before she started (Nguyen Decl. Ex. 1, Doc. No. 137 at 13, 17), Plaintiff's first line supervisor was Charles Zhang, and her second line supervisor was Mark Price. (SUF ¶¶ 11-12.)

As a probationary trainee in the Program, Plaintiff was required to complete three to five developmental assignments or "tours," each lasting two to three months, within the first two years of her employment. (*Id.* ¶¶ 6-7; Tursi Decl. Ex. A, at 3.) Plaintiff's Home-Code supervisors and assignment supervisors were to assist in planning, performing, and evaluating these tours (SUF ¶ 7; Tursi Decl. Ex. A, at 3), though Plaintiff's individual performance, rather than her length of service, dictated whether she would complete successfully the Program and be retained as an

³ Defendant has provided a Standard Form 50: Notification of Personnel Action that shows an effective date of February 28, 2010, for Plaintiff's expected appointment (*see* Tursi Decl. Ex. B), but the parties appear to agree that Plaintiff did not begin work until March 1, 2010 (*see* SUF ¶ 5; Opp'n 6).

employee⁴ (SUF ¶ 9). As an ESDP participant, Plaintiff was rated under the National Security Personnel System ("NSPS"), which rated participants on a scale from "1" (unacceptable) to "5" (role model). (*Id.* ¶¶ 17-18.) These ratings were based on Plaintiff's self-assessments, feedback from her team leaders on her tours, and Zhang's observations as a supervisor. (*Id.* ¶ 19.) The Program generally removed any trainees who failed to complete the required developmental activities in time. (*Id.* ¶ 10; Tursi Decl. Ex. A, at 5.).

2. Plaintiff's Onboarding and First Tour

Plaintiff's assigned team leader for her first tour was Luk. (SUF ¶ 13.) When Plaintiff started working on March 1, 2010, she told Luk that she had not been granted a security clearance, although this was not the case. (*Id.* ¶¶ 20-21.) While her first line supervisor Zhang worked to confirm her clearance with security personnel, Plaintiff worked on new employee training and reviewed unclassified documents. (*Id.* ¶ 22; Tursi Decl. Ex. F, at 4.) Around this time, Luk also learned that Plaintiff was struggling to understand who her supervisor and team leader were. (SUF ¶ 23; Tursi Decl. Ex. G, at 5.) Luk had to explain Plaintiff's leadership structure to her repeatedly. (SUF ¶ 24.)

During her first few days of work, Plaintiff asked colleague Nga Vu, "Why didn't I have a supervisor?" (Tursi Decl. Ex. FF, at 5.) Vu responded, "You [are] old enough to supervise yourself." (*Id.*)

⁴ The citations in Plaintiff's Opposition list this fact as disputed, but the substance of her Opposition appears to agree with the proposition. (*See* Opp'n 8 ("In order to be retained, an ESDP participant needs to successfully complete the program.")) Plaintiff further provides no evidence that this fact is actually in dispute. The Court deems the fact undisputed.

During her first month of work, Plaintiff also complained about a poster displayed in a lab. (SUF ¶ 25.) The poster depicted a dragon surrounded by armor and a sword with the caption, "No matter how hard I work, the dragon always wins." (*Id.* ¶ 26; Tursi Decl. Ex. P, at 63.) Plaintiff perceived the poster as "a threat to the people who work hard" that suggested "when they have the power[,] the bad people with power, they still win." (Tursi Decl. Ex. FF, at 15.) Upon learning about Plaintiff's concerns regarding the poster, Zhang removed it and informed Plaintiff of its removal. (SUF ¶ 27; Tursi Decl. Ex. P, at 63.) Zhang also told Plaintiff that discrimination was not tolerated in the workforce and referred her to the EEO office in the event she wanted to file a complaint. (Tursi Decl. Ex. P, at 63.) Zhang also offered to conduct a separate investigation if Plaintiff provided more facts, but Plaintiff did not follow up with Zhang. (*Id.*) Plaintiff's second line supervisor Price later cited Plaintiff's complaint as EEO activity. (Opp'n 13; Nguyen Decl. Ex. 1, Doc. No. 137 at 707.)

Plaintiff's first tour started on April 21, 2010. (SUF ¶ 30.) Plaintiff was assigned two tasks for the tour. The first task involved "Testing," which required learning how to read and use INTEL data to then test an ALR- 67(v)2 EW system against the INTEL data. (*Id.* ¶ 32.) The second was a "Writing" task that required her to work with her colleagues to write test procedures for two other systems. (*Id.* ¶ 37.) Although all past ESDP participants had completed the first task without difficulty, Plaintiff struggled to read and understand the INTEL data and only performed partial analyses and evaluations of the data. (*Id.* ¶¶ 34-35.) Plaintiff's task

eventually was revised because of these struggles. (*Id.* ¶ 33.) As to the second task, Plaintiff consistently requested and relied on her team members to write the required documents for her.⁵ (*Id.* ¶¶ 38-39.) Throughout Plaintiff's first tour, Luk frequently provided Plaintiff feedback on her work, often in the presence of others. Luk later provided feedback to Zhang explaining that 70 to 80% of Plaintiff's "Writing" task documents needed to be rewritten and required three to four peer reviews; that the drafts were written with poor grammar and improper sentences; and that Plaintiff often required repeated feedback and instruction for her understanding. (*Id.* ¶ 46.)

Plaintiff attended an interim review meeting on May 21, 2010. (*Id.* ¶ 82.) While Zhang did not conduct a midterm performance review during the meeting because Plaintiff had not worked ninety days since the end of the prior fiscal year, he covered the NSPS process, provided additional NSPS training, and discussed the organization's overview with Plaintiff. (Nguyen Decl. Ex. 1, Doc. No. 133 at 168.)

Plaintiff's first tour ended on June 18, 2010. (SUF ¶ 30.) She received a 2 out of 5 rating on the NSPS performance scale for her first tour. (*Id.* ¶ 31.)

3. Plaintiff's Second Tour

Plaintiff's second tour began on June 21, 2010. (*Id.* ¶ 49.) Her assigned team leader for this tour was Ngoc Nguyen.⁶ (*Id.* ¶ 14.) The team leader assigned her

⁵ Plaintiff disputes this fact by offering statements from coworker Greg Chang that he did not think he ever saw team members write test procedure for Plaintiff. (Opp'n 9.) Chang's lack of observation, however, does not contradict Defendant's factual assertions that Plaintiff consistently requested and relied on her team members to write the required documents for her. The Court deems this fact undisputed for purposes of the Motion. *See* Fed. R. Civ. P. 56(e)(2); Local Rule 56-3.

⁶ Mr. Nguyen appears to be of no relation to Plaintiff. (Mot. 3.)

a general objective of “emitter simulation development.” (*Id.* ¶ 50.) ESDP participants like Plaintiff generally would produce four or five low-complexity simulations and three to five mid-level complexity simulations during their second tour. (*Id.* ¶ 52.) Although her team leader provided feedback throughout her tour, at times speaking in Vietnamese to help her complete assignments, Plaintiff completed only one low-complexity simulation and updated three existing simulations during her tour. (*Id.* ¶¶ 52-54.)

Plaintiff’s second tour ended on September 30, 2010. (*Id.* ¶ 49.) She received a 2 out of 5 rating on the NSPS performance scale for the tour. (*Id.*)

4. Plaintiff Attempts to Secure a Third Tour and Receives Her Final Performance Review

As part of training, ESDP trainees generally would arrange their own third tours, though supervisors typically would assist by providing potential tour opportunities and names of persons to contact. (*Id.* ¶¶ 59, 60.) After Plaintiff asked Zhang to help secure her third tour, Zhang provided names of supervisors and team leaders who potentially had funding or project work to support Plaintiff’s tour. (*Id.* ¶ 63.) Zhang also contacted ESDP coordinators, other supervisors, and team leads to assist Plaintiff, and both Zhang and Price circulated Plaintiff’s resume. (*Id.* ¶¶ 64, 65.)

Although Plaintiff requested to work on a Royal Australian Air Force (“RAAF”) project, Plaintiff did not secure the required approvals from the Integrated Product Team (“IPT”) leaders to begin working. (*Id.* ¶¶ 67, 78.) Though two other

potential projects were identified, Plaintiff could not be assigned to either due to funding issues. (*Id.* ¶¶ 78-80.) Plaintiff ultimately failed to secure a third tour. (*Id.* ¶ 57.)

Plaintiff received further performance feedback during an initial annual assessment on November 5, 2010, during her official rating assessment on December 16, 2010, and via an official performance assessment for the fiscal year on January 10, 2011. (*Id.* ¶ 83.) For the January 2011 final performance review, Plaintiff received an overall rating of “2 out of 5.” (*Id.* ¶ 87.) Among other issues, the assessment cited the following as a basis for its rating: Plaintiff partially completed tasks; she needed more time to complete tasks; her need for assistance created added work for her coworkers; and her communication skills needed improvement as team members sometimes had difficulty understanding her. (*Id.* ¶¶ 89, 91.) Plaintiff did not exercise her option to request formal reconsideration of this assessment. (*Id.* ¶ 92.)

At some point in January 2011, Plaintiff’s coworker Greg Chang called Plaintiff’s name and pointed to the men’s restroom. (Tursi Decl. Ex. FF, at 8.) After Plaintiff said, “This is the men’s room,” Chang responded, “Ladies first.” (*Id.*)

In February 2011, Price assigned Plaintiff to work on a separate project supported by discretionary funding. (SUF ¶ 81.)

5. Plaintiff First Contacts an Equal Employment Opportunity Counselor and Separately Alleges Harassment

Plaintiff first contacted an EEO counselor on February 9, 2011, regarding concerns of discrimination in the workforce. (*Id.* ¶ 107.)

That same day, Plaintiff requested a meeting with Mark Roth, a supervisory electronics engineer, and Zhang, her first line supervisor, regarding negative workplace experiences.⁷ (*Id.* ¶ 95; Tursi Decl. Ex. X, at 2.) Plaintiff met with Roth and Elaine Tersigni⁸ the next day, during which she alleged four or five instances of receiving verbal abuse from her colleague Greg Chang between April 12, 2010, and May 6, 2010. (SUF ¶ 96; Tursi Decl. Ex. FF, at 6-8.) She specifically alleged that on one occasion in relation to viewing a display, Chang stated, “. . . Oh, you have a Master’s degree, and I could see the same thing on the display and I don’t [have a Master’s degree].” (Tursi Decl. Ex. X, at 13.) Team leader Luk met with Plaintiff to address these issues thereafter, but Plaintiff stated she did not want Luk to pursue any further action. (SUF ¶ 99; Tursi Decl. Ex. X, at 13.) Though Roth opened a management inquiry within the next few days regarding the alleged events, Plaintiff eventually requested that the inquiry not continue upon learning that it would only explore her allegations of verbal abuse and not her employment status. (SUF ¶¶ 97, 101; Tursi Decl. Ex. X, at 14.) Roth determined that Chang’s conduct was “immature” but “not abusive” and closed the inquiry. (SUF ¶ 98; Tursi Decl. Ex. X, at 14.)

6. Plaintiff’s Termination and Filing of an EEO Complaint

On February 16, 2011, Plaintiff received a “Notice of Termination of Excepted Appointment” from Price, her second line supervisor.⁹ (SUF ¶ 102.) The

⁷ The Court deems this fact undisputed. *See supra* note 3.

⁸ The parties have not presented any facts establishing Tersigni’s position at the Navy.

⁹ The Court deems this fact undisputed. *See supra* note 3.

termination notice stated that she was not being converted from probationary employment because her work needed additional guidance; she required more assistance than other employees; she took longer to complete work than other employees; her work product required multiple revisions; and she lacked communication skills to contribute to team-based work. (Tursi Decl. Ex. CC, at 26.) Plaintiff's excepted ESDP appointment was terminated the next day. (SUF ¶ 104.) At the time of her termination, none of Plaintiff's supervisors or team leads were aware of Plaintiff's February 9, 2011, EEO contact. (*Id.* ¶¶ 109-13.)

On June 11, 2011, Plaintiff filed an EEO complaint alleging Defendant's discrimination against her based on race (Asian), sex (female), national origin (Vietnam), age (57), and reprisal for prior protected activity.¹⁰ (*Id.* ¶ 107.) In August and September of 2011, Price hired two ESDP employees to fill Plaintiff's position—a computer engineer in her late twenties and a physicist in his early twenties. (Nguyen Decl. Ex. 1, Doc. No. 135-2 at 16.)

B. Disputed Facts¹¹

The parties genuinely dispute the following facts:

¹⁰ The Court deems this fact undisputed. *See supra* note 3.

¹¹ Here, the Court addresses the facts that Plaintiff formally designated as disputed in her Opposition. Plaintiff also relies on various other facts to formulate her Opposition's arguments, despite failing to designate them as disputed. To the extent these undesignated facts are material to adjudicating Defendant's Motion for Summary Judgment, the Court addresses them below.

- Plaintiff disputes whether Zhang clearly communicated to her that she had a supervisor from the first day she started working. (Opp'n 9; Nguyen Decl. Ex. 1, Doc. Nos. 133 at 159, 137 at 73.)
- Plaintiff disputes whether Zhang attempted to assemble the relevant IPT leaders to secure approval for her to work on the RAAF project for her third tour. (Opp'n 10; Nguyen Decl. Ex. 1, Doc. No. 133 at 216, 219-20.)

IV. DISCUSSION

A. Request for Judicial Notice

Defendant asks the Court to take judicial notice of Exhibits A through BB attached to his Motion for Summary Judgment.¹² (Doc. No. 99-1.) These exhibits comprise portions of the Equal Employment Opportunity Commission ("EEOC") administrative report stemming from Plaintiff's claims and the EEOC administrative decisions adjudicating her claims. (See Doc. Nos. 99-4-99-31.)

A court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (citation omitted). "In the context of employment discrimination cases in particular, it is well established that courts may consider the administrative record of a plaintiff's claims before the EEOC as judicially noticeable matters of public record." *Lacayo v. Donahoe*, No. 3:14-cv-04077-JSC, 2015 WL 993448, at *9 (N.D. Cal. Mar. 4, 2015) (collecting cases). The Court accordingly takes

¹² Plaintiff also relies on these exhibits in her Opposition. (See generally Opp'n.)

judicial notice of Defendant's Exhibits A through BB because they are records from Plaintiff's EEO proceedings.¹³ See *Hamm v. Nielsen*, No. 2:18-cv-05702-PSG-JPRx, 2019 WL 3000656, at *3 (C.D. Cal. Mar. 29, 2019) (taking judicial notice of the existence of a plaintiff's EEO records); *Prouty v. Saul*, No. 2:18-cv-08567-PA-JPRx, 2020 WL 4518605, at *2 (C.D. Cal. June 29, 2020) (taking judicial notice of a plaintiff's EEO records for purposes of summary judgment); *Brode v. Fed. Aviation Admin.*, No. 8:19-cv-00875-MCS-KESx, 2020 WL 4004823, at *2-3 (C.D. Cal. Mar. 9, 2020) (taking judicial notice of records pertaining to plaintiff's administrative proceedings with the EEOC); *Lacayo*, 2015 WL 993448, at *9.

B. Title VII and ADEA Discrimination Claims

Defendant first moves for summary judgment as to Plaintiff's discrimination claims under Title VII and the ADEA.

Title VII makes it unlawful for an employer "to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. The ADEA likewise makes it unlawful for any employer "to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623.

Courts may "combine . . . Title VII and ADEA claims for analysis because the burdens of proof and persuasion are the same." *Wallis v. J.R. Simplot Co.*, 26 F.3d

¹³ Though Plaintiff fails to request judicial notice of similar documents in her Exhibit 1 accompanying her Opposition, the Court takes judicial notice of these documents as well.

885, 888 (9th Cir. 1994) (citing *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1420 (9th Cir. 1990)). “Title VII claims [are analyzed] through the burden-shifting framework of *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).” *Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 1155 (9th Cir. 2010). “Under this analysis, plaintiffs must first establish a prima facie case of employment discrimination.” *Id.* To establish a prima facie case, the plaintiff “must offer evidence that ‘give[s] rise to an inference of unlawful discrimination.’” *Id.* at 1156 (quoting *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir.1998) (quoting *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981))). Alternatively, plaintiffs may establish their prima facie case “by providing direct evidence suggesting that the employment decision was based on an impermissible criterion.” *E.E.O.C. v. Boeing Co.*, 577 F.3d 1044, 1049 (9th Cir.2009) (citing *Cordova v. State Farm Ins. Cos.*, 124 F.3d 1145, 1148 (9th Cir. 1997)).

At the summary judgment stage, “the district court must look at the evidence supporting the prima facie case, as well as the other evidence offered by the plaintiff to rebut the employer’s offered reasons. And, in those cases where the prima facie case consists of no more than the minimum necessary to create a presumption of discrimination under *McDonnell Douglas*, plaintiff has failed to raise a triable issue of fact.” *Wallis*, 26 F.3d at 890 (clarifying the plaintiff’s burden at the summary judgment stage as set forth in *Sischo–Nownejad v. Merced Cmty. Coll. Dist.*, 934 F.2d 1104, 1111 (9th Cir.1991)). “Thus, the mere existence of a prima facie case, based on

the minimum evidence necessary to raise a *McDonnell Douglas* presumption, does not preclude summary judgment.” *Id.*

1. Prima Facie Case

Plaintiff carries the initial burden of establishing a prima facie case of discrimination. *See McDonnell Douglas*, 411 U.S. at 802. To establish a prima facie case under Title VII, Plaintiff must show that: (1) she belongs to some protected class; (2) she was qualified for her position and performing her job satisfactorily; (3) she suffered an adverse employment action; and (4) the employer treated similarly situated employees outside her classification more favorably. *See Hawn*, 615 F.3d at 1156. As for her ADEA claim, Plaintiff must demonstrate that she was (1) at least forty years old; (2) performing her job satisfactorily; (3) discharged; and (4) replaced by a substantially younger employee with equal or inferior qualifications or discharged under circumstances otherwise giving rise to an inference of age discrimination. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1281 (9th Cir. 2000).

As a threshold matter, Defendant raises the same argument raised in his Motion to Dismiss, namely that Plaintiff may support her claims of discrimination only with incidents that occurred in the forty-five days preceding her February 9, 2011, meeting with an EEO counselor. (*See* Mot. 22-23; Doc. No. 30 at 7.) Indeed, “[u]nder federal regulations promulgated by the EEOC, federal employees complaining of discrimination by a governmental agency ‘must consult a[n EEO] Counselor prior to filing a complaint in order to try to informally resolve the matter,’ and they ‘must initiate contact with a Counselor within 45 days of the date of the

matter alleged to be discriminatory.” *Lyons v. England*, 307 F.3d 1092, 1105 (9th Cir. 2002) (quoting 29 C.F.R. § 1614.105(a) and 29 C.F.R. § 1614.105(a)(1)); see *McGee v. Dejoy*, 821 F. App’x 860, 860 (9th Cir. 2020) (affirming application of § 1614.105(a)(1) to an ADEA discrimination claim). The Court agrees that Plaintiff’s claims are so limited. Since Plaintiff first contacted an EEO counselor regarding discrimination on February 9, 2011, she may rely only on incidents occurring from December 26, 2010, to February 9, 2011, to support her claims.

a. Satisfactory Performance

Defendant argues that Plaintiff cannot establish *prima facie* cases under either Title VII or the ADEA because she cannot demonstrate that she was performing her job satisfactorily. The Court agrees.

The undisputed evidence details Plaintiff’s consistent underperformance in relation to her employer’s expectations. During her first tour, Plaintiff only partially completed her first task and eventually needed it revised, though past ESDP participants were able to finish the task without difficulty. (SUF ¶¶ 33-35.) She fared no better on her second task, as the documents she drafted required substantial revision and rewriting, even though she requested and relied on her team members’ help to complete portions of the task for her. (*Id.* ¶¶ 38-39, 46.) Although ESDP participants generally produced four or five low-complexity simulations and three to five mid-level complexity simulations during their second tour, Plaintiff completed only one low-complexity simulation and updated three existing simulations. (*Id.* ¶ 52.) She consequently received below average NSPS

ratings for both tours and eventually received similar scores for her final performance review. (*Id.* ¶¶ 87, 89, 91.) This poor performance appears compounded by Plaintiff's various communication issues during her onboarding regarding her initial security clearance and supervisory structure, during her first tour requiring repeated instruction to aid her understanding, and during her second tour necessitating explanations in Vietnamese to assist with her assignments. (*Id.* ¶¶ 20-21, 23-24, 46, 53.)

Citing testimony from Luk (Nguyen Decl. Ex. 1, Doc No. 133 at 213, 216), Plaintiff argues that her performance rating for her first tour was erroneously low because Zhang disregarded Luk's request not to rate Plaintiff on a particular task. Luk's testimony, however, does not establish any such request from Luk to Zhang. Rather, Luk stated that Plaintiff was "not meet[ing] [his] expectation" with the task, which led him to "remove[] that task from her." (*Id.* at 213.) Though Luk went on to share his belief that Plaintiff "wasn't even rated" on that task, he corrected this statement upon reviewing the NSPS rating for Plaintiff's tour. (*Id.* at 216.) It is unclear how Luk's testimony demonstrates that Plaintiff was performing her job satisfactorily. If anything, his testimony bolsters the very conclusion that Plaintiff aims to dispute, i.e., that she was falling short in performing her required tasks as a probationary trainee.

Plaintiff also points to her second tour team leader Nguyen lowering her second tour rating from 3 to 2 after Zhang asked him what Plaintiff's rating would be in comparison to other employees. Plaintiff, however, fails to provide any evidence

that such a consideration and reassessment was impermissible, and this fact otherwise tends to support that she fell behind other trainees and thus was not meeting her employer's legitimate expectations.

Plaintiff next argues that colleague Edgar Tomines's statement that she was "very competent in her abilities" in operating the simulation program for her second tour raises a genuine issue as to her satisfactory performance. (Opp'n 17.) This statement, however, does not address the undisputed facts showing that Plaintiff experienced difficulty in communicating with colleagues and completing a sufficient number of simulations during her second tour, let alone the various other undisputed performance deficiencies she exhibited throughout her time as an ESDP trainee. Given the other substantial evidence demonstrating Plaintiff's unsatisfactory performance, Tomines's brief and narrow statement is insufficient to create a genuine issue as to Plaintiff's performance being satisfactory. *See Ochs v. Eugene Emeralds Baseball Club, Inc.*, 774 F. App'x 1026, 1028 (9th Cir. 2019) (affirming lack of satisfactory job performance despite plaintiff presenting "good sales numbers"); *Hampton v. Mayorkas*, No. 2:19-cv-10700-CBM-MAAx, 2021 WL 2697143, at *2-3 (C.D. Cal. May 5, 2021), *aff'd*, No. 21-55692, 2022 WL 10382213 (9th Cir. Oct. 18, 2022) (finding no triable issue as to plaintiff's satisfactory performance despite employer's positive statement regarding plaintiff's performance on its notice of removal).

Plaintiff finally cites her preemployment qualifications as evidence that she has demonstrated a triable issue as to this element of her Title VII and ADEA

claims. Whereas such information may be sufficient to support certain Title VII discrimination claims¹⁴ like those based on failure to hire or promote, *see, e.g., Coghlan v. Am. Seafoods Co. LLC*, 413 F.3d 1090, 1093 (9th Cir. 2005), Plaintiff here takes issue with only alleged disparate treatment at work and her eventual termination (*see* Opp’n 16-19; FAC 17-18, 19-20), requiring some evidence that she was meeting her employer’s legitimate work expectations, *see, e.g., Weil v. Citizens Telecom Servs. Co., LLC*, 922 F.3d 993, 1003 (9th Cir. 2019) (analyzing a plaintiff’s job performance in relation to his termination); *Ingram v. Pac. Gas & Elec. Co.*, 690 F. App’x 527, 529 (9th Cir. 2017) (same). This evidence alone thus cannot create a genuine issue as to Plaintiff’s discrimination claims.

“Although the requisite level of proof necessary for a plaintiff to establish a prima facie Title VII case at the summary judgment stage ‘is minimal and does not even need to rise to the level of a preponderance of the evidence,’ the plaintiff still must produce evidence, not just pleadings or argument.” *Weil*, 922 F.3d at 1003 (citation omitted). Plaintiff has failed to do so sufficiently here, proving fatal to her discrimination claims.

b. More Favorable Treatment of Similarly Situated Employees

Defendant also attacks Plaintiff’s discrimination claims on the ground that Plaintiff fails to present evidence showing that similarly situated employees

¹⁴ This evidence certainly is insufficient to support Plaintiff’s ADEA discrimination claim, as such claims specifically address a plaintiff’s discharge and require evidence regarding the plaintiff’s satisfactory job performance. *See, e.g., Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1208 (9th Cir. 2008) (analyzing job performance to assess an ADEA prima facie case); *Chen v. L.A. Mission Coll.*, No. 2:20-CV-11554-JLS-KSx, 2023 WL 3316994, at *5 (C.D. Cal. Jan. 23, 2023) (same); *Reyes v. Fed. Express Corp.*, No. 2:09-cv-00089-GAF-CWx, 2010 WL 11596647, at *2 (C.D. Cal. June 7, 2010).

outside of her protected class were given more favorable treatment. Regarding Plaintiff's Title VII claim, "[i]n order to show that the 'employees' allegedly receiving more favorable treatment are similarly situated . . . , the individuals seeking relief must demonstrate, at the least, that they are similarly situated to those employees in all material respects." *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006); see *Leong v. Potter*, 347 F.3d 1117, 1124 (9th Cir. 2003).

Plaintiff first argues that similarly situated employees outside of her protected class normally were granted immediate security clearance, while her security clearance was delayed a few weeks when she started. Plaintiff, however, fails to identify any specific similarly situated employees who were treated more favorably in this respect. See, e.g., *Grosz v. Boeing Co.*, 455 F. Supp. 2d 1033, 1040 (C.D. Cal. 2006) ("[Plaintiff] must articulate specific facts showing that there were other employees who were similarly situated and treated more favorably."); *Lam v. Hagel*, No. 2:13-cv-07166-DMGMANx, 2015 WL 13917627, at *4 (C.D. Cal. Mar. 13, 2015) ("[Plaintiff] fails to proffer any admissible evidence of the existence of a similarly situated employee"). Further, the undisputed facts demonstrate that Plaintiff's security clearance was not actually delayed. Rather, Plaintiff had security clearance when she started but nevertheless raised this as an issue with her first team leader Luk, which required Zhang to take additional time to confirm Plaintiff's clearance.

Plaintiff also cites ESDP employee Rachel Gude as a similarly situated employee outside of Plaintiff's protected class who received her required interim review, while Plaintiff alleges not receiving such a review in May 2010. "It is not

enough[, however,] for employees to be in similar employment positions” to establish that they are similarly situated in all material respects. *Weil*, 922 F.3d at 1004. Instead, Plaintiff must also demonstrate that the other employees “display[ed] similar conduct.” *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003). Here, the undisputed facts demonstrate that Zhang did not conduct an NSPS interim review with Plaintiff at their May 21, 2010, meeting because Plaintiff had not worked ninety days since the end of the prior fiscal year. (Nguyen Decl. Ex. 1, Doc. No. 133 at 168.) Plaintiff has failed to proffer any evidence that Gude similarly had not accrued sufficient working days by the time of her review, therefore Plaintiff cannot rely on Gude to create a triable issue as to this element.¹⁵ *Cf. Moran*, 447 F.3d at 755-56 (holding that two groups of employees were not similarly situated because their employer’s rules differentiated their ability to qualify for certain benefits).

As Plaintiff has not established a genuine issue as to this element, her Title VII discrimination claim fails for this reason as well.

c. Replacement with Substantially Younger Employees

As to the fourth element of Plaintiff’s ADEA claim, Plaintiff must demonstrate that she was “replaced by substantially younger employees with equal or inferior qualifications” or discharged under circumstances “‘giving rise to an inference of age discrimination.’” *Coleman*, 232 F.3d at 1281 (citation omitted). “This inference ‘can be established by showing the employer had a continuing need for [their] skills and

¹⁵ As discussed above, this alleged adverse action also did not occur within forty-five days of Plaintiff contacting an EEO counselor, so Plaintiff is unable to rely on it to support her prima facie case of discrimination for this additional reason.

services in that [their] various duties were still being performed,' or by showing 'that others not in [their] protected class were treated more favorably.'" *Id.* (citation omitted). "[W]e treat the last element of the prima facie case with 'flexibility.'" *Diaz*, 521 F.3d at 1211 (citation omitted). "To support an inference of discrimination an employee need not demonstrate that one particular individual was designated as his replacement; evidence that a group of younger and comparably or less-qualified employees assumed the plaintiff's responsibilities is sufficient." *Id.*

Plaintiff demonstrates, and Defendant does not dispute, that Price filled Nguyen's position with one of two younger ESDP employees—a computer engineer in her late twenties or a physicist in his early twenties. (Nguyen Decl. Ex. 1, Doc. No. 135-2 at 16.) Given Plaintiff's undisputed preemployment credentials as an electrical engineer, Plaintiff has made out a triable issue regarding her replacement with a substantially younger employee of equal or inferior qualifications. *See Pottenger v. Potlatch Corp.*, 329 F.3d 740, 746 (9th Cir. 2003); *Brockbank v. U.S. Bancorp*, 506 F. App'x 604, 606 (9th Cir. 2013). This being the case, Plaintiff's prima facie case of ADEA discrimination nevertheless fails because, as discussed above, she has not demonstrated a genuine issue as to her satisfactory performance as an ESDP trainee.

2. Legitimate, Non-Discriminatory Reason

Even if Plaintiff were to establish her prima facie cases under Title VII and the ADEA, the burden shifts and the defendant must "provide a legitimate, non-discriminatory reason for the employment action." *Vasquez*, 349 F.3d at 641. The defendant need offer only reasons that, "*taken as true*, would *permit* the conclusion

that there was a non-discriminatory reason for the adverse action.” *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993) (emphasis in original). The defendant bears this burden of production but the burden of persuasion remains with the plaintiff: “The defendant need not persuade the court that it was actually motivated by the proffered reasons It is sufficient if the defendant’s evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.” *Burdine*, 450 U.S. at 254 (citing *Bd. of Trs. of Keene State Coll. v. Sweeney*, 439 U.S. 24, 25 (1978)).

Though it is difficult to parse the exact adverse actions Plaintiff alleges she experienced, it appears that Plaintiff generally takes issue with allegedly incorrect performance reviews, Defendant’s alleged lack of requisite feedback, and her eventual discharge. (See Opp’n 16-19.) Defendant argues that Plaintiff’s poor performance during her probationary period serves as a legitimate, nondiscriminatory reason for Plaintiff’s alleged adverse performance reviews and termination.

As discussed above, ample undisputed evidence exists to support this proffered reason as a justification for Plaintiff’s performance reviews and discharge. These deficiencies were further cited in periodic managerial feedback and the termination notice Plaintiff received. (SUF ¶¶ 46, 87, 89, 91; Tursi Decl. Ex. CC, at 26.) As to Plaintiff allegedly not receiving requisite feedback on May 21, 2010, the undisputed facts again demonstrate that Defendant had a legitimate, nondiscriminatory reason for that action, namely Plaintiff had not worked ninety days since the end of the prior fiscal year to qualify for a formal review. (Nguyen Decl.

Ex. 1, Doc. No. 133 at 168.) Accordingly, the Court finds that Defendant has met its burden of production in presenting legitimate, non-discriminatory reasons for the employment actions Plaintiff perceives as discriminatory. *See Aragon v. Republic Silver State Disposal Inc.*, 292 F.3d 654, 661 (9th Cir. 2002) (holding that poor job performance constitutes a legitimate, nondiscriminatory reason for termination); *Christian v. ABM Onsite Servs.-W., Inc.*, No. 2:16-cv-08493-MWF-PLAx, 2018 WL 11354501, at *6 (C.D. Cal. Jan. 30, 2018) (“The poor performance reviews help to demonstrate that Defendant has come forward with evidence that establishes a legitimate, non-discriminatory reason . . .”).

3. Pretext

Once the defendant has provided a “legitimate, nondiscriminatory reason for the employment action,” then the burden shifts back to the plaintiff to show that this articulated reason was “pretextual.” *Vasquez*, 349 F.3d at 641. “A plaintiff can show pretext directly, by showing that discrimination more likely motivated the employer, or indirectly, by showing that the employer’s explanation is unworthy of credence.” *Id.* “To show pretext using circumstantial evidence, a plaintiff must put forward specific and substantial evidence challenging the credibility of the employer’s motives.” *Id.*

The Court concludes that Plaintiff has not brought specific and substantial evidence of pretext. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062-63 (9th Cir. 2002). Aside from a passing reference to the evidence she offers to demonstrate her satisfactory performance for her prima facie cases of

discrimination (*see* Opp'n 18), Plaintiff does not address pretext in her Opposition. *See, e.g., Maurey v. Univ. of S. Cal.*, 87 F. Supp. 2d 1021, 1032 (C.D. Cal. 1999), *aff'd*, 12 F. App'x 529 (9th Cir. 2001) (granting summary judgment where plaintiff "offer[ed] no evidence that [his employer's] reason [wa]s pretextual"). Even construing these general arguments as specifically directed toward pretext, they do nothing more than emphasize inconsequential inconsistencies and assert unsupported discrepancies that do not render Defendant's proffered reasons for its actions as "unworthy of credence." *Vasquez*, 349 F.3d at 641. As covered above, Plaintiff does not demonstrate that her first tour performance rating was deflated erroneously, as no evidence supports that Luk ever asked Zhang to disregard Plaintiff's incomplete "Testing" task. (Nguyen Decl. Ex. 1, Doc No. 133 at 213, 216.) Further, no evidence suggests that comparing Plaintiff to other employees for her second tour rating was unwarranted or not independently assessed, nor does any evidence tend to show that Plaintiff should have been formally reviewed on May 21, 2010, despite not having accrued ninety working days since the prior fiscal year (*see* Nguyen Decl. Ex. 1, Doc. No. 133 at 168). It is undisputed that Defendant historically had discharged probationary trainees who failed to meet expectations (SUF ¶ 106; Tursi Decl. Ex. D at 3-4); it appears that Plaintiff's below average performance resulted in this exact same treatment.

Plaintiff presents no evidence from which a reasonable factfinder could conclude that the true reason for her low performance ratings, alleged lack of feedback, and discharge was animus towards any of Plaintiff's protected classes. The

Court accordingly GRANTS Defendant's motion for summary judgment as to Plaintiff's Title VII and ADEA discrimination claims.

C. Hostile Work Environment Claims

Plaintiff brings hostile work environment claims under both Title VII and the ADEA. To succeed on these claims, Plaintiff is required to establish that: "(1) [she] was subjected to a hostile work environment; and (2) [Defendant] was liable for the harassment that caused the hostile environment to exist." *Fried v. Wynn Las Vegas, LLC*, 18 F.4th 643, 647 (9th Cir. 2021).

For the first prong of this analysis, Plaintiff must prove that: (1) she was subjected to verbal or physical conduct of a harassing nature; (2) this conduct was unwelcome; and (3) the conduct was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. *See Campbell v. Hawaii Dep't of Educ.*, 892 F.3d 1005, 1016 (9th Cir. 2018). "Analysis of a hostile work environment claim is identical under the ADEA and Title VII, except that the harassment must be shown as motivated by age, rather than the protected classes enumerated in Title VII." *Richardson v. Hilton Resorts Corp.*, No. 1:18-cv-00340-LEKWRP, 2019 WL 1440248, at *4 (D. Haw. Mar. 29, 2019).

Defendant mainly contends that the workplace experiences Plaintiff complains about were not sufficiently severe or pervasive to support her hostile work environment claims. To establish a "pattern of ongoing and persistent harassment severe enough to alter the conditions of employment," Plaintiff must prove that her workplace was "both objectively and subjectively offensive, [that is] one that a

reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.” *Nichols v. Azteca Rest. Enterprises, Inc.*, 256 F.3d 864, 871–72 (9th Cir. 2001) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998)).

The “objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position” *Id.* at 872 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998)). Courts must further “look at ‘all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.’” *Vasquez*, 349 F.3d at 642 (quoting *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270-71 (2001)). “Properly applied, [the objective severity standard] will filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.” *Faragher*, 524 U.S. at 788 (citation and internal quotation omitted). Indeed, “conduct must be extreme to amount to a change in the terms and conditions of employment.” *Id.*

Plaintiff raises two events in her Opposition to demonstrate that she was subjected to a hostile work environment: (1) her encounter with coworker Greg Chang in January 2011, during which Chang pointed to the men’s restroom and said “Ladies first”; and (2) Plaintiff not securing a third tour because Zhang failed to organize a meeting of supervisors regarding the RAAF project. Along with these two instances, the parties have raised three other events potentially related to Plaintiff’s

hostile work environment claims: (1) colleague Nga Vu telling Plaintiff “You [are] old enough to supervise yourself” during her first few days at work in response to Plaintiff’s question regarding her alleged lack of a supervisor; (2) a dragon poster being displayed in a lab at Plaintiff’s workplace; and (3) between April 12, 2010, and May 6, 2010, Chang saying to Plaintiff in relation to viewing a display, “. . . Oh, you have a Master’s degree, and I could see the same thing on the display and I don’t [have a Master’s degree].”

Defendant first argues that Vu’s March 2010 comment regarding Plaintiff’s age cannot support a genuine issue of material fact for purposes of her ADEA hostile work environment claim because Plaintiff did not contact an EEO counselor within forty-five days of the alleged event.

As with discrimination claims under Title VII and the ADEA, plaintiffs bringing hostile work environment claims under either statute must have initiated contact with an EEO counselor within forty-five days of the alleged unlawful conduct as required under the Code of Federal Regulations. *See* 29 C.F.R. § 1614.105(a)(1) (“An aggrieved person must initiate contact with a Counselor within forty-five days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action”); *see also Agbaosi v. Garland*, No. 22-55243, 2023 WL 3409102, at *1 (9th Cir. May 12, 2023) (applying § 1614.105(a)(1) to a hostile work environment claim); *Doe v. Kijakazi*, No. 5:22-cv-00744-RGK-MRWx, 2023 WL 2628064, at *4 (C.D. Cal. Jan. 13, 2023) (same). “Hostile environment claims[, however,] are different in kind from discrete acts. Their very

nature involves repeated conduct. The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002) (citation omitted). Accordingly, as long as "an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered for the purposes of determining liability." *Id.* at 117.

Here, the only age-motivated interaction Plaintiff complains about is Vu's comment in March 2010 that Plaintiff was old enough to supervise herself. It is undisputed, however, that Plaintiff did not contact an EEO counselor regarding any workplace issues until February 9, 2011. Since far longer than forty-five days elapsed between the sole age-related event that Plaintiff cites and her first EEO contact, Plaintiff cannot maintain her hostile work environment claim under the ADEA.

Setting aside the time limitation above, both of Plaintiff's hostile work environment claims fail because the conduct Plaintiff alleges to support these claims was not objectively severe. Even considering all five of Plaintiff's alleged events as a whole, these instances amount to nothing more than the mere offensive utterances or ordinary workplace tribulations that the objective severity standard is meant to filter out. *See Faragher*, 524 U.S. at 788 ("[O]ffhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" (citation omitted)); *Vasquez*, 349 F.3d at 642. Though Plaintiff complained about a dragon poster being posted in a workplace lab, for

example, she has not demonstrated what was objectively harassing about the poster such that it altered the conditions of her employment. Moreover, while Chang's bathroom-related comment and Vu's age-related comment more pointedly address Plaintiff's protected characteristics, no facts demonstrate that these comments were anything more than inadvisable off-hand comments or ill-conceived jokes insufficient to survive summary judgment. See *Westendorf v. W. Coast Contractors of Nev., Inc.*, 712 F.3d 417, 419 (9th Cir. 2013) (affirming summary judgment despite two coworkers directing several sexual comments at plaintiff while at work); *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830, 836 (6th Cir. 1996) (two age-related comments insufficient to support hostile work environment claim).

Courts in this circuit, moreover, regularly grant and affirm summary judgment for hostile work environment claims involving conduct of far greater severity than present here. In *Kortan v. California Youth Authority*, for instance, the Ninth Circuit affirmed summary judgment where the plaintiff's supervisor yelled at her; forced her to listen to a tape with offensive language; read a letter to her containing the phrase "masturbate yourself;" referred to a female superintendent as a "castrating bitch" and "regina;" called women generally "bitches" and "histrionics;" looked at the plaintiff and stared; accused the plaintiff of being an evil character; gave the plaintiff a negative performance evaluation; and laughed outside her door, saying "Yeah, she got me on sexual harassment charges." 217 F.3d 1104, 1107, 1111 (9th Cir. 2000). There are many other pertinent examples of conduct more severe and frequent than at issue here failing to support a hostile work environment claim as a

matter of law. See *Manatt v. Bank of Am., NA*, 339 F.3d 792, 795, 798-99 (9th Cir. 2003) (affirming summary judgment where plaintiff was subjected to at least seven pejorative references to her Chinese descent); *Pieszak v. Glendale Adventist Med. Ctr.*, 112 F. Supp. 2d 970, 992-93 (C.D. Cal. 2000) (granting summary judgment while noting “fifteen to twenty different incidents over an eighteen-month period in which residents . . . made some comment in reference to sex or gender”); *Lappin v. Laidlaw Transit Inc.*, 179 F. Supp. 2d 1111, 1120-21 (N.D. Cal. 2001) (granting summary judgment where two coworkers directed several sexual comments and sex-based expletives at plaintiff and other coworkers while in the workplace); see also *Siam v. Potter*, No. 3:04-cv-00129-MHP, 2005 WL 8166268, at *1-5, *15 (N.D. Cal. May 17, 2005). These cases make clear that the conduct Plaintiff alleges—a few stray comments and innocuous workplace events—is insufficient to create a triable issue of fact as to the objective severity of the work environment she experienced. For this reason, Plaintiff’s hostile work environment claims both fail.

Accordingly, no genuine issues of material fact exist concerning either of Plaintiff’s hostile work environment claims, and the Court GRANTS summary judgment in favor of Defendant as to those claims.

D. Retaliation Claims

To maintain a retaliation claim under either Title VII or the ADEA, Plaintiff must show (1) she engaged in protected activity, (2) she was subjected to an adverse employment action, and (3) a causal connection exists between her protected activity and the adverse employment action she received. See *Brooks v. City of San*

Mateo, 229 F.3d 917, 928 (9th Cir. 2000); *Poland v. Chertoff*, 494 F.3d 1174, 1179-80, 1180 n.1 (9th Cir. 2007) (relying on Title VII retaliation elements and cases to adjudicate an ADEA retaliation claim).

Plaintiff argues that two instances of alleged protected activity support her claims: (1) her February 9, 2011, contact with an EEO counselor; and (2) her March 2010 complaint to Zhang regarding the dragon poster hanging in a workplace lab. While the former instance clearly qualifies as protected activity, the Court is not persuaded that the latter instance does.

“Protected activity includes the filing of a charge or a complaint, or providing testimony regarding an employer’s alleged unlawful practices, as well as engaging in other activity intended to ‘oppose[]’ an employer’s discriminatory practices.” *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003) (citing 42 U.S.C. § 2000e–3(a)). Though “a plaintiff does not need to prove that the employment practice at issue was in fact unlawful under Title VII,” *Trent v. Valley Elec. Ass’n Inc.*, 41 F.3d 524, 526 (9th Cir. 1994), plaintiffs must demonstrate that “one could reasonably believe that the incident recounted . . . violated Title VII,” *Breeden*, 532 U.S. at 270.

Here, Plaintiff provides no evidence she reasonably believed that display of the dragon poster violated Title VII. Instead, when Plaintiff was asked pointedly at deposition what particular issue she had with the poster, Plaintiff stated only that the poster was “a threat to the people who work hard” and suggested “when they have the power[,] the bad people with power, they still win.” (Tursi Decl. Ex. FF, at 14-15.)

Plaintiff's concerns that the poster discouraged work ethic, though admirable, do not suffice to create a triable issue as to her complaint being protected activity. See *Jurado v. Eleven- Fifty Corp.*, 813 F.2d 1406, 1411-12 (9th Cir. 1987) (upholding summary judgment based on lack of protected activity where a Hispanic disc jockey's complaint about an on-air English-only policy only evidenced concerns over his personal success rather than discrimination); *Carrasco v. San Ramon Valley Unified Sch. Dist.*, 258 F. App'x 114, 115 (9th Cir. 2007) (holding that circulating a petition that did not "refer[] to discrimination . . . cannot be considered a protected activity").

Moreover, nothing about the poster would cause any reasonable person to believe it violated Title VII. By all accounts and Plaintiff's own provided depiction (see Nguyen Decl. Ex. 1, Doc. No. 137 at 55), the poster provided a light-hearted, work-related joke with no demonstrable references to any protected class. Such content is not enough to form a reasonable belief of a Title VII violation. See *Breeden*, 532 U.S. at 271 (holding "[n]o reasonable person could have believed" a Title VII violation occurred where two male employees—in the female plaintiff's presence—"chuckled" while discussing a job applicant's prior sexual statement).

Plaintiff argues that it is enough that her second line supervisor Price regarded her dragon poster complaint as prior EEO activity. In essence, Plaintiff argues that Price or her other supervisors could have retaliated against her based on their own perception of her engaging in EEO activity. The Ninth Circuit, however, has not acknowledged such a "perception theory" as a valid basis to establish protected activity for retaliation claims. See *Kurtz v. Caesars Entm't, Inc.*, 266 Fed.

App'x 676, 677 (9th Cir. 2008) (affirming district court's finding of no protected activity where plaintiff argued "she may not have actually engaged in protected activity, [but] her supervisor, and her supervisor's superior who terminated her, mistakenly perceived her to have engaged in protected activity"); *Jenott v. St. Alphonsus Reg'l Med. Ctr.*, No. 1:08-cv-00322-EJL-LMBx, 2009 WL 5200524, at *5, at *15-16 (D. Idaho Dec. 23, 2009) (noting the Ninth Circuit has not expressly endorsed the "perception theory"). The Court declines to adopt this theory absent any precedent compelling such a result. Plaintiff's dragon poster complaint thus does not create a triable issue as to retaliation.

This leaves Plaintiff's February 9, 2011, EEO contact as the only remaining activity that could support her claims of retaliation. Defendant contends that Plaintiff has not created a triable issue as to the causal connection between her EEO contact and the adverse employment action she experienced—here, her discharge. Plaintiff focuses on the timespan between her activity and discharge, noting that less than two weeks accrued between the two events. Defendant responds that the Naval personnel who effectuated her discharge were unaware of Plaintiff's EEO activity at the time of their decision.

The standard of causation for both Title VII and ADEA retaliation claims is but-for causation. See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175-78 (2009). "That an employer's actions were caused by an employee's engagement in protected activities may be inferred from 'proximity in time between the protected action and the

allegedly retaliatory employment decision.” *Ray v. Henderson*, 217 F.3d 1234, 1244 (9th Cir.2000) (quoting *Yartsoff v. Thomas*, 809 F.2d 1371, 1371 (9th Cir.1987)). Plaintiffs, however, must also provide sufficient evidence for a reasonable trier of fact to infer that the defendant was aware that the plaintiff had engaged in protected activity. *See Raad*, 323 F.3d at 1197; *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir.1982). “In general, if the decision maker does not have knowledge of the plaintiff’s protected activity, there can be no retaliation for engaging in that activity.” *Brooks v. Capistrano Unified Sch. Dist.*, 1 F. Supp. 3d 1029, 1037 (C.D. Cal. 2014) (citing various Ninth Circuit cases).

On February 16, 2011, Plaintiff received a Notice of Termination of Excepted Appointment signed by her second line supervisor Mark Price. Defendant has provided sworn affidavits from Price and various other supervisors who could have been involved in Defendant’s termination decision stating that they were not aware of Plaintiff’s February 9, 2011, EEO contact at the time of her termination. Plaintiff further has offered no evidence controverting these facts or pointing to any other personnel who had knowledge of her activity and potentially were involved in the decision to discharge her. Plaintiff therefore is unable to satisfy the causation requirement for her retaliation claims, and granting summary judgment is appropriate. *See Cohen*, 686 F.2d at 796 (“Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity.”)

The Court accordingly GRANTS Defendant's motion for summary judgment on Plaintiff's retaliation claims¹⁶

V. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant's Motion for Summary Judgment.

IT IS SO ORDERED.

Date: 6/27/23 s/ Virginia A. Phillips
Virginia A. Phillips
Senior United States District Judge

¹⁶ Even if Plaintiff had succeeded in establishing her prima facie cases of retaliation, she would still be tasked with demonstrating a triable issue regarding the pretextual nature of Defendant's cited reason for its alleged adverse actions. See, *e.g.*, *Manatt*, 339 F.3d at 801; *Yartsoff*, 809 F.2d at 1375. As discussed *supra* in Section IV.B, Plaintiff has not demonstrated that such a triable issue exists, further justifying summary judgment in Defendant's favor on Plaintiff's retaliation claims.

**APPENDIX C — NINTH CIRCUIT ORDER DENYING
REHEARING AND REHEARING EN BANC,
FILED AUGUST 21, 2025**

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 23-55632

D.C. No. 2:21-cv-04327-VAP-AS
Central District of California, Los Angeles

HIEN THI NGUYEN,

Plaintiff-Appellant,

v.

JOHN PHELAN, in his official capacity as Secretary of the Navy,

Defendant-Appellee.

ORDER

Before: FRIEDLAND, BENNETT, and BADE, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing and the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petition for panel rehearing and the petition for rehearing en banc (Dkt. 51) are DENIED.