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2
3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF CALIFORNIA
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6
7 EQUAL EMPLOYMENT OPPORTUNITY
8 COMMISSION,

1:06-CV-01251-OWW-GSA

9 Plaintiff,

MEMORANDUM DECISION RE
PLAINTIFF EEOC'S MOTION FOR
SUMMARY ADJUDICATION (Doc. 37)
AND DEFENDANT CALIFORNIA
PSYCHIATRIC TRANSITIONS,
INC.'S MOTION FOR SUMMARY
ADJUDICATION (Doc. 40.)

10 v.

11 CALIFORNIA PSYCHIATRIC
12 TRANSITIONS, INC.,

13
14 Defendant.

15 This case involves allegations of sexual harassment,
16 retaliation, and constructive discharge at California Psychiatric
17 Transitions, Inc ("CPT"). Plaintiff Equal Employment Opportunity
18 Commission ("EEOC") alleges that CPT subjected a number of its
19 female employees to a hostile environment created by sexual and
20 gender harassment which culminated in adverse employment actions in
21 violation of Title VII of the Civil Rights Act of 1964 ("Title
22 VII"). Plaintiff seeks to correct these alleged unlawful
23 employment practices and obtain relief for Mareil Somera ("Somera")
24 and Valeria Soares ("Soares"), the charging parties.

25 Plaintiff EEOC seeks summary adjudication on the statutory
26 prerequisites for bringing a suit under Title VII. CPT cross-moves
27 for summary adjudication, arguing that the EEOC has not satisfied
28

1 Title VII's statutory prerequisites as to charging party Somera and
2 those "women similarly situated." CPT also seeks summary
3 adjudication on Somera's constructive discharge claim, Soares'
4 retaliation and hostile work environment claims, and the EEOC's
5 requests for punitive damages.

6 EEOC's motion for summary adjudication, filed on May 4, 2009,
7 addresses whether it satisfied Title VII's statutory prerequisites
8 to commence litigation on behalf of Soares, Somera, and similarly
9 situated women. (Doc. 37.) The EEOC seeks summary adjudication
10 that a prima facie case is established for: (1) Soares' hostile
11 work environment and retaliation claims; (2) Somera's hostile work
12 environment and constructive discharge claims; and (3) the
13 aggrieved parties' hostile work environment claim.

14 CPT moved for summary adjudication on May 4, 2009. (Doc. 40.)
15 As to Somera, CPT argues that the EEOC's constructive discharge
16 claim is barred on three grounds: 1) her EEOC charge was untimely;
17 2) the EEOC failed to provide notice and opportunity to conciliate
18 on the discharge claim; and 3) Somera sought to be rehired after
19 quitting and, therefore, was not constructively discharged.

20 As to Soares, CPT seeks to summarily adjudicate the following
21 claims: 1) her sexual harassment claim fails as the harassing
22 events she experienced did not rise to an actionable level; and 2)
23 her retaliation claim fails because Soares did not engage in
24 protected activity and the EEOC cannot demonstrate a pretextual
25 dismissal. CPT does not challenge that Somera meets Title VII's
26 jurisdictional prerequisites.

27 CPT also moves to dismiss the EEOC's claims for punitive
28 damages on behalf of Somera and Soares.

1 II. FACTUAL BACKGROUND.

2 A. The Parties

3 The EEOC is an independent federal agency created by Congress
4 in 1964 to eliminate discrimination in workplaces across the United
5 States. The EEOC is charged with the administration,
6 interpretation and enforcement of Title VII of the Civil Rights Act
7 of 1964, and is expressly authorized to bring this action on behalf
8 of Soares and Somera pursuant to §§ 706(f) (1) and (3).

9 Charging party Soares is a female employed by Defendant CPT
10 from October 2003 to April 2004. Soares was hired by CPT as a
11 mental health worker ("MHW"). Her duties included counseling
12 residents, daily charting, and monitoring symptoms for medical and
13 behavioral changes. Soares primarily worked the evening shift at
14 the re-entry facility and was supervised by Larry Fuentes and
15 Barbara Kelly.

16 Charging party Somera is a female employed by Defendant CPT
17 from February 2003 to December 2003. Somera was hired by CPT as a
18 dietary aid and primarily prepared meals for CPT's residents.
19 Soares was one of five dietary aids supervised by Sherry Wall.

20 CPT operates a mental health rehabilitation facility in Delhi,
21 California. CPT contracts with the State of California and various
22 other agencies to provide patients with residential mental health
23 rehabilitation, treatment, and long term care. At all relevant
24 times herein, CPT's President and Medical Director was John T.
25 Hackett, M.D. and its Facilities Director was James T. Drayton. At
26 all relevant times, CPT employed between 25 and 85 persons. (Doc.
27 40, 2:12-2:13.)
28

1 CPT also employed Larry Fuentes, the focus of Soares and
2 Somera's allegations. Fuentes was CPT's lead MHW and worked the
3 day shift in 2003 and 2004. Fuentes was supervised by Barbara
4 Kelly and remained employed at CPT throughout the tenures of Soares
5 and Somera.

6 1. CPT's Employee Manual

7 In 2001, CPT issued a comprehensive Employee Manual which
8 remained in effect until revised in 2005. (Drayton Dec. ¶7; Ex. B
9 ("CPT Emp. Manual") at CPT 0314-0317.) The Employee Manual is
10 provided to all employees for review during the initial orientation
11 period. (*Id.*) Copies are maintained at CPT and immediately
12 accessible to all employees upon request. (*Id.*) The Employee
13 Manual includes a policy statement regarding harassment in the
14 workplace and the duties and responsibilities of CPT employees.
15 (*Id.*) In addition, all employees receive sexual harassment
16 training during orientation. (*Id.*) In-service training is
17 provided on a regular and recurring basis. (*Id.*)
18
19

20 B. Events Leading up to Somera's EEOC Charge

21 Somera began working at CPT as a dietary aide on about
22 February 6, 2003. (Plaintiff's Statement of Disputed Facts
23 (hereinafter "DF") 1).¹) As part of Somera's orientation, Fuentes
24 gave Somera a tour of the kitchen. (DF 2.) He showed her around
25

26 ¹ Reference to the document as a "Statement of *Disputed*
27 *Facts*" is not entirely accurate. CPT does not dispute the bulk
28 of the "disputed facts." To the extent they do, their objections
are overruled, immaterial to the ultimate facts of the case, or
discussed separately in Part III(A), *infra*.

1 the kitchen and to the walk-in refrigerator/freezer. (DF 2.)
2 After showing Somera the freezer, Fuentes stopped in the exit door
3 and told her to stay there because he wanted to see her nipples get
4 hard. (DF 2.) He laughed and then proceeded to show her the rest
5 of the kitchen. (DF 2.)

6 Over the course of Somera's employment, she alleges that
7 Fuentes engaged in a pattern of "obnoxious sexual behavior."
8 Somera states that Fuentes would stand behind her and thrust his
9 hips in a way suggestive of sexual intercourse. (DF 3.) This
10 behavior began about two or three weeks after Somera started at
11 CPT. (DF 3.) Fuentes also frequently grabbed his crotch in front
12 of CPT employees, including Somera.² (DF 4.)

13 Somera complained to her supervisor, Sherry Wall, about
14 Fuentes' behavior during her orientation, and also about him
15 grabbing his crotch in front of her and others. (DF 5.) This was
16 consistent with CPT's policy, which directed employees to complain
17 to their direct supervisors. (DF 6.) Wall responded that Somera
18 should not worry, and that Wall would talk to CPT's Business
19 Manager, Donna McGowan, about it. (DF 7.) Between one and three
20 months after her first complaint, Wall told Somera that she had
21 told Donna McGowan about Somera's complaint, and asked Somera if
22 Fuentes had said or done anything else. (DF 8.) Somera responded
23 that Fuentes had come up from behind and thrust his hips simulating
24 sex. (DF 8.) Wall responded that she would talk either to McGowan
25 or Dr. Hackett. (DF 8).

27 ² Somera states that the crotch grabbing occurred more than
28 10 times, four of which she caught Fuentes in the act. (DF 3.)

1 Somera maintains that Fuentes' harassment escalated during her
2 employment. According to Somera, Fuentes began bragging that he
3 had sex in the kitchen with another employee and that this
4 individual "gave good head" and "was a good lay." (DF 9.) Fuentes
5 also touched Somera's hips and asked her if she was wearing thong
6 underwear and, also, the color of her underwear. (DF 10.) Fuentes
7 also looked down her blouse when she bent over. (DF 11.) Wall
8 observed one such episode, and Wall assured Somera that she would
9 report it. (DF 12.) Wall reported the episode to McGowan. (DF 13).

10 Fuentes also started wiggling his pierced tongue and remarked
11 that he could satisfy Somera's sexual desires. (DF 15.) Somera
12 states she told him, "That's nasty," to which he would respond,
13 "Just kidding, girl, come on. You [are] just such a pussy." Somera
14 witnessed Fuentes engage in the same behavior with other female
15 workers and patients. (DF 15.) She never saw him wiggling his
16 tongue to men. (DF 15.)

17 In late 2003, Somera received more responsibility in the
18 kitchen, including scheduling the staff and creating nametags for
19 the patients, both of which required her to use the computers
20 located on the second floor. (DF 16.) Fuentes left six or seven
21 love letters to her on the computer. (DF 16.) Fuentes also tried
22 to look down her blouse when she was seated at the computer, and
23 commented something to the effect of, "Shit, babe, you got nice
24 boobs," or "Girl, you have nice tits." (DF 17.)

25 In September 2003, Somera complained to Wall that Fuentes was
26 touching her buttocks and asking her and other women if they were
27 wearing thong underwear. (DF 18.) In November 2003, Somera asked
28

1 Wall what was happening with her complaint about Fuentes. (DF 21.)
2 Wall later told her that she had brought Somera's complaints to the
3 Director of Nurses, Barbara Kelly. (DF 20.) Around this same
4 time, Donna McGowan or Kelly conveyed Somera's complaint about
5 Fuentes to Drayton. (DF 21.)

6 As a result, Kelly interviewed Fuentes, informed him of the
7 complaint, and admonished him to stay away from the kitchen.
8 (Defendant's Statement of Undisputed Facts (hereinafter "DSUF")
9 58.) Kelly also followed up with Somera. (Id.; DF 22.) According
10 to CPT, Kelly offered Somera alternative work arrangements, but
11 Somera declined the offer. (DSUF 50.) The EEOC disputes that
12 Fuentes was disciplined as a result of Somera's complaints and that
13 Kelly offered Somera an alternative work arrangement. (DF 24.)

14 As a further result of the reported harassment, Drayton
15 arranged for an in-service training on the subject of sexual
16 harassment. (DSUF 60.) The sexual harassment training took place
17 on November 20, 2003. (DF 23; DSUF 8.) The entire staff was at
18 the training, including Fuentes. (DF 23.)

19 According to Somera, Fuentes was on the telephone instead of
20 paying attention to the presentation. (DF 24). CPT disputes this.
21 However, the parties agree that, following the in-service training,
22 there were no further incidents of unwelcome sexual harassment by
23 Fuentes toward Somera.³ (DF 25; DSUF 23.)
24

25
26 ³ Although Fuentes' unwelcome comments to Somera ceased, the
27 record indicates that Fuentes' illicit behavior continued.
28 Somera stated in her deposition that a few days after the in-
service, Fuentes went behind a female employee and began
thrusting his hips. (Somera Dep. 144:-145:17.) Several CPT

1 Thereafter, according to CPT, Somera told Mr. Drayton that she
2 was quitting, but he convinced her to remain at CPT for two
3 additional weeks. (DSUF 14.) In the meantime, Ms. Wall called and
4 spoke with Ms. Somera and convinced her not to quit. Shortly
5 thereafter, Ms. Wall resigned and CPT appointed Latrice Wills, a
6 more senior employee, to supervise the kitchen. Somera resigned a
7 few days later.⁴

8 CPT maintains, and the EEOC does not dispute, that Somera was
9 overwhelmed by the additional responsibilities she assumed when Ms.
10 Wall went on vacation. (DSUF 11.) CPT claims this led to her
11 resignation. CPT also asserts that Somera believed that her co-
12 workers were jealous that she was appointed to a temporary
13 supervisory position. (DSUF 12.) CPT states that her resignation
14 involved in-fighting in the kitchen, CPT's decision to appoint
15 another employee to kitchen supervisor, and continuing rumors that
16 she and Mr. Fuentes had sex. (DSUF 13, 15.)

17 The dispute over Somera's departure appears limited to Wall's
18 involvement. Somera claims that she resigned after learning that
19 Wall, whom she viewed as a protector, quit after a dispute over her
20 sexual harassment allegations. (DF 28.) CPT denies this, stating
21 that Wall's resignation was not related to Somera, and stemmed from
22

23
24
25 _____
26 employees witnessed the incident. (Id.) Somera stated that
27 "[h]e still does the same things, all those things that he did to
28 me." (Id.)

27 ⁴ Somera testified that "[t]he day that Sherry quit, I
28 decided to quit. I wanted to quit with them." (Somera Dep. at
168:9-169:17.)

1 reasons set forth above.⁵ (DSUF 11-15.)

2
3 C. Events Leading up to Soares' EEOC Charge

4
5 1. Background

6 Soares began working at CPT as a mental health worker in
7 October 2003. (DF 30; DSUF 28.) During orientation, Fuentes showed
8 Soares the facilities and introduced her to the staff and patients.
9 Fuentes, in Soares' presence, asked a male psychiatric patient, "I
10 bet you would like [Soares] to wash you in the shower, right?" (DF
11 31; DSUF 28.) Fuentes then asked the patient, "you like her ass,
12 don't you?" (DF 31; DSUF 28.)

13 According to Soares, Fuentes repeatedly referenced his
14 decorative piercing and its use for the sexual satisfaction of his
15 partners. (DF 32.) Fuentes stated that it was "to please the
16 woman" and it made "women feel good." (Soares Dep. 39:12-39:19.)
17 Fellow CPT employees also heard Fuentes' comments concerning his
18 tongue ring. (*Id.*) According to Soares, she relayed Fuentes'
19 comments to the nurses to whom she reported, Della McClendon and
20 Janice Monges. (DF 33.) CPT disputes this and argues that
21 McClendon and Monges were nurses and not in Soares's chain of
22 command. CPT maintains that Soares did not report Fuentes'
23 orientation comments to CPT management. (DSUF 30.)

24 At unspecified points in time throughout her employment,
25

26
27

⁵ The parties do not dispute that roughly a month later,
28 Somera called CPT asking if she could return to her job. (DSUF
17.)

1 Soares heard of Fuentes' sexual comments toward other CPT employees.
2 One employee told Soares that "she had squatted down [and] Fuentes
3 want to know, you know, what it looked like." (Soares Dep. 73:15-
4 73:19.) Charging Party Somera also told Soares of her experiences
5 with Fuentes and his sexually-charged behavior. Specifically,
6 Somera told Soares of the freezer incident which occurred during
7 her orientation.⁶

8 Soares testified in her deposition that Fuentes constantly
9 used the word "pussy" to describe female employees. (DF 36.) CPT
10 argues that the record identifies only two instances when Fuentes
11 used the word to refer to someone in particular. (Doc. 56, Exh. G
12 162:13-163:21.) First, in reference to a male employee, Bob Rice
13 ("Don't be a pussy") and, second, following the shower incident, he
14 referred to Soares as a "pussy" to a fellow employee. Soares did
15 not discover the latter incident until after her departure from
16 CPT.

17 At some point in time during her employment, Fuentes displayed
18 a calendar of near-naked women on his desk. (DF 37.) Fuentes asked
19 Soares, "that doesn't offend you, does it?" (Soares Dep. 66:19-
20 66:24.) The parties agree that there was no further discussion
21 between the two regarding the calendar.

22 According to Soares, the calendar was approximately 5x5 inches
23 and was prominently displayed on his desk. Fuentes' desk was
24 located directly adjacent to the room where CPT held employee
25

26 ⁶ The statements made by CPT employees to Soares are not
27 offered to prove the truth of the matter asserted; rather the
28 comments are admissible for their effect on the listener - here,
Soares. (See Fed R. Evid. §§ 801-802.)

1 meetings. (Soares Dep. 67:3-67:12.) Soares observed Fuentes'
2 calendar every shift, either on the way to staff meetings or to
3 work at the meeting table. (Soares Dep. 67:10-67:12.)

4 According to CPT, the calendar was a "Sports Illustrated
5 Swimsuit Calendar," and Soares viewed the swimsuit calendar on only
6 one occasion in March 2004. (Doc. 56, Exh. G, 69:15-71:3) CPT
7 also argues that Soares did not complain to Drayton about the
8 calendar. (DSUF 26.)

9 In March 2004, Soares was charting when a male patient named
10 Kevin approached her and asked if she would accompany him outside
11 so that he could have a cigarette. (DF 40; DSUF 33.) The patient
12 did not like to shower as a general matter, and Soares told him
13 that she would take him out for a cigarette if he agreed to shower
14 first. (*Id.*) He agreed and she gave him his shower toiletries,
15 which were kept under locks when not in use. He returned to Soares
16 when he finished showering, and asked if she would take him outside
17 for the cigarette. (*Id.*) According to Soares, Fuentes yelled from
18 his position on the second floor words to the effect, "Kevin, you
19 didn't take no shower." Soares replied, "He did, Larry. I gave him
20 everything and he took a shower." Fuentes said, "You liar, you did
21 not." Then Fuentes responded, "[w]ell, have Valerie smell your
22 balls to see if you took a shower." Kevin responded, "That's
23 messed up." Soares and Kevin then proceeded outside. (*Id.*)

24 The next day, Soares complained about the episode to
25 McClendon, a nurse whom she considered to be one of her
26 supervisors. (DF 42.) She explained that she had been offended by
27 Fuentes' remark and also told McClendon that Fuentes' behavior
28

1 posed a threat to her: "If he says things like that to me in front
2 of the male patients when I'm going in their rooms at night,
3 sometimes by myself, they're not going to take me seriously and I
4 could get hurt." (DF 42.)

5 CPT states that McClendon was a day shift nurse and not
6 Soares' supervisor. (Soares Dep. 38:16-38:25.) At that point, Mr.
7 Fuentes was her immediate supervisor. (*Id.*) Soares did not report
8 the shower incident to Ms. Kelly, Ms. Steele, Dr. Hackett, or Mr.
9 Drayton.⁷ (DF 41.)

10 Soares also spoke with the charge nurse on the graveyard or
11 "NOC" shift, David Baker, who had witnessed the episode. (DF 43.)
12 According to Soares, she raised concerns that Fuentes' behavior was
13 putting her at personal risk, saying words to the effect that "if
14 he makes me out to be a sexual thing with me and the male
15 residents, at any one time going in their rooms, you know during
16 the night, they may see me as that and do something, you know, be
17 behind a door or what not if he keeps egging them on." (*Id.*; Soares
18 Dep., 57:20-59:2.) Although Baker thought it was a violation of
19 CPT's sexual harassment policy, he did not report the incident to
20 management. (Baker Dep. 48:2-48:25, 50:1-50:5.) However, Baker
21 told Soares that he would corroborate the incident if and when
22 there was an investigation. (Baker Dep. 50:17-50:24.)

23 CPT's sexual harassment policy at the time directed employees
24 to report episodes of potential harassment to their immediate
25

26
27 ⁷ The next day Fuentes apologized to Soares for his
28 inappropriate comments. He did not report the incident to
management.

1 supervisor or designated management representative. Additionally,
2 any employees who witnessed or learned of harassment were obligated
3 to report the incident to their supervisor or manager. (DF 45.)
4 Baker never reported the episode to anyone else in CPT management
5 or human resources. (DF 44.) CPT argues that Baker's supervisory
6 duties were limited to conveying information regarding patient
7 status during shift exchanges.

8 9 2. Complaints to the Department of Mental Health

10 The California Department of Mental Health received an
11 anonymous report of the shower incident involving Soares, Fuentes,
12 and the male patient. (DF 47.) The Department of Mental Health
13 contacted CPT regarding the complaint and Drayton investigated it
14 as a potential patient abuse episode. (DF 47.) He spoke to the
15 male psychiatric patient, Kevin, about the episode. Kevin
16 corroborated that it took place. Drayton also spoke with Fuentes
17 about it and Fuentes told Drayton that he had apologized to Soares
18 and she was fine with it. Drayton did not, however, speak with
19 Soares about the incident. (DF 47.)
20

21 According to the EEOC, the Department of Mental Health
22 received several anonymous complaints about Fuentes prior to the
23 shower episode. (DF 46.) This is supported by Drayton's
24 deposition testimony where he confirmed that Mr. Omoregie - the
25 Department of Mental Health's representative - requested a
26 "chronology" of sexual harassment complaints involving Larry
27 Fuentes. (Drayton Dep. 444:7-444:19.) Mr. Omoregie told Drayton
28 that the Department had received several complaints about Fuentes

1 on their hotline, some of a sexual nature, some of them involving
2 patient care.⁸ (Id.)

3
4 **3. Soares' Attempts to Contact Drayton**

5 According to Soares, she made several attempts to talk to
6 Drayton following the shower incident. (DF 48.) Soares says she
7 called and left messages for him with the secretary twice and
8 slipped a note under his door informing him that she needed to see
9 him. (DF 48.) It is undisputed that Soares never made contact
10 with Drayton.
11

12
13 **4. Events of April 9, 2004**

14 In early April, Soares was transferred to the re-entry
15 building. (DF 49.) At the time, the re-entry program was just
16 being implemented, and there were only a few patients residing in
17 the new building. (DF 49.) On the evening of April 9, 2004, CPT
18 Systems Analyst Julie Steele visited the re-entry building. (DF
19 49; DSUF 20). The parties dispute what happened next.
20

21 According to CPT, Steele discovered Soares asleep on the
22 evening of April 9, 2004. (DSUF 37.) Around 11:00 p.m., Steele
23 called Mr. Drayton and reported that she had discovered Ms. Soares
24 asleep on the job working alone in the re-entry building with 22
25 patients. (DSUF 37.) According to Ms. Steele, she observed Ms.
26

27 ⁸ CPT responded to the Department's requests. According to
28 the EEOC, Drayton's response was incomplete; CPT did not disclose
the orientation incident involving Somera and Fuentes.

1 Soares on the living room couch in the re-entry building, covered
2 with a blanket and snoring. Ms. Steele reported that Ms. Soares
3 then resisted her attempts to discuss the situation and offer
4 suggestions. (Drayton Dep. at 34:6-37:17.) Sleeping on the job is
5 a critical patient safety issue, a strict violation of CPT policy
6 and a condition of its State licensing. (Doc. 41, Ex. A at
7 CPT0321.) Ms. Soares was aware of the policy. (DSUF 36.) Upon
8 receiving this information Mr. Drayton made the decision to
9 terminate Ms. Soares based on the gravity of the violation and
10 rejection of Ms. Steele's suggestions. (DSUF 38.) At the end of
11 her shift, the following morning, Ms. Soares was discharged. (DSUF
12 39.)

13 According to Soares, Steele did not discover her sleeping on
14 the night of April 9th. (DF 49.) Soares states that Steele entered
15 the re-entry building about 15 minutes after her shift started.
16 (DF 49.) Soares was sitting on a couch reading a magazine. (DF
17 49.) The television was on and the few patients in that building
18 were asleep. (DF 49.) Steele entered from a door down the hallway,
19 and the slamming of the door startled Soares. (DF 49.) Steele
20 walked quickly down the hall to the nurses' "cage." (DF 49.)
21 Soares, who had never seen Steele at the facility at night before,
22 assumed Steele was picking up some patient charts. (DF 49.)
23 Steele came back out and they had a brief discussion in which
24 Soares expressed that she was a little bored in the new building,
25 then Steele left. (DF 49.) The next day, Fuentes told Soares she
26 was terminated. (DF 49).

27 The record reflects considerable dispute over whether CPT
28

1 uniformly enforced its sleeping policy. (DF 60.) According to
2 David Baker, a CPT nurse, he often slept during his shift and
3 observed other employees sleeping during their shifts, including
4 Soares. (Baker Dep. 65:2-67:25.) Baker was unaware of any
5 occasion where a shift employee was discovered sleeping by a
6 supervisor. (Baker Dep. 54:22-54:25.)

7 Further, the record indicates that Jamie, a former CPT
8 employee, was not fired after he was caught sleeping during his
9 shift. (DF 61.) Jamie was given several chances to improve his
10 sleeping patterns before he resigned. (DF 61.)

11 According to Soares, the only other employee fired for
12 sleeping on the job was Johnny Montalvo. (DF 62.) According to
13 Montalvo, CPT employees, including Fuentes, discovered Montalvo
14 sleeping during his shift on a number of occasions. (Montalvo Dep.
15 21:22-22:2.) Montalvo was not disciplined for sleeping until the
16 final incident, which occurred in August 2008. (Montalvo Dep.
17 31:19-45:17.) The last Montalvo sleeping incident resulted in a
18 resident escaping the facility. (*Id.*)

21 5. Soares' Sexual Harassment Complaints

22 Although she complained of Fuentes' comments to fellow CPT
23 employees, it is undisputed that Soares did not file a harassment
24 complaint or report any harassment to CPT management during her
25 employment. (DSUF 40, 45.) This includes the orientation
26 incident, Fuentes' references to "pussy", and the Sports
27 Illustrated calendar. (DSUF 42-43.)

1 It is similarly undisputed that Soares did not report the
2 shower incident to Ms. Kelly, Ms. Steele, Dr. Hackett, or Mr.
3 Drayton. (DSUF 41, 46.) However, Soares did report the incident to
4 Nurse McClendon, Nurse Baker, and spoke with Fuentes, her direct
5 supervisor, about his comments.
6

7 D. EEOC Involvement and Investigation

8 1. Ms. Soares

9 In April 2004, Ms. Soares filed a discrimination charge with
10 the EEOC against CPT. (Plaintiff's Statement of Undisputed Facts
11 ("PSUF") 2.) Soares alleged that she and other women were sexually
12 harassed by Larry Fuentes during her employment at CPT. (PSUF
13 2.) Soares also stated that she was fired in retaliation for
14 opposing the sexual harassment. (PSUF 2.)

15 On May 4, 2004, the EEOC provided CPT with notice of Soares'
16 discrimination charge. (PSUF 3.) The notice was sent to Dr. John
17 Hackett, Owner, California Psychiatric Services, and indicated the
18 discrimination charge was based on "sex" and "retaliation." (Exh.
19 2) The letter stated that "there is reasonable cause to believe
20 that [CPT] discriminated against [Soares] and a class of similarly
21 situated female employees based on their sex [...] and there is
22 reasonable cause to believe [CPT] retaliated against [Soares]."
23 The letter did not mention any other female employee and did not
24 include specific evidence supporting the conclusion. (PSUF 14-15.)
25

26
27 2. Ms. Somera

28 On September 27, 2004, Somera filed a charge of discrimination

1 with the EEOC against CPT. (PSUF 4.) Somera alleged that she and
2 other women were sexually harassed by Larry Fuentes, the harassment
3 was "verbal and physical," and continued throughout her tenure at
4 CPT. (PSUF 4.) Soares also stated that she complained about
5 Fuentes to her supervisor Sherry Wall, but no action was taken and
6 the harassment continued. Somera did not allege retaliation or
7 constructive discharge in her EEOC charge. (PSUF 10.)

8 On October 14, 2004, the EEOC provided CPT with notice of the
9 Somera's discrimination charge. (PSUF 5.) The notice was sent to
10 Dr. John Hackett, Owner, California Psychiatric Services, and
11 indicated "sex" as the basis for the discrimination charge. (Exh.
12 4.) The letter stated that "the evidence demonstrates that
13 [Somera] and other similarly situated females were harassed," but
14 did not include specific evidence supporting the conclusion. (PSUF
15 12.) The letter also did not mention any other female employee and
16 did not include allegations of retaliation or constructive
17 discharge. (PSUF 11, 13.)

18
19
20 **3. EEOC's Investigation and Correspondence**

21 Following notice of the charges, the EEOC investigated Soares'
22 and Somera's discrimination claims. (PSUF 6.) As part of the
23 investigation, the EEOC requested from CPT statements of position
24 and copies of all documentation supporting its position. (PSUF 6.)
25 The EEOC also conducted interviews with current and former CPT
26 employees. (PSUF 6.)

27 On September 1, 2005, the EEOC sent correspondence referencing
28

1 "Ms. Valerie Shaw"⁹ to CPT in Delhi, California. The
2 correspondence included EEOC's determination letter that Ms. Shaw
3 and a class of females were subjected to harassment based on their
4 sex and that the Charging Party was terminated for protected
5 activity. The determination letter noted that EEOC "will contact
6 you in the near future to begin the conciliation process."

7 The EEOC sent additional correspondence to CPT on September 1,
8 2005. The second letter referenced "Ms. Mariel Somera" and
9 included EEOC's determination that Ms. Somera and a class of
10 females were subjected to harassment based on their sex. The
11 determination letter noted that EEOC "will contact you in the near
12 future to begin the conciliation process."

13 Following the September 1, 2005 letters, the EEOC and CPT
14 attempted to settle the discrimination claims made by Ms. Soares
15 and Ms. Somera. (PSUF 8.) According to CPT, the EEOC offered to
16 resolve the matter for \$75,000. (PSUF 8.) CPT offered \$15,000.
17 (PSUF 8.)

18 On January 31, 2006 and February 22, 2006, the EEOC sent
19 letters to CPT's legal counsel regarding Ms. Soares and Ms.
20 Somera's claims. (PSUF 9.) The EEOC stated that "efforts to
21 conciliate this charge as required by our procedures and policies
22 have been unsuccessful" and it was forwarding the matter to its
23 regional attorney for litigation review. (PSUF 9.) This case
24 followed.

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28 ⁹ Aka, Valerie Soares.

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III. PROCEDURAL BACKGROUND.

This action was filed on September 13, 2006, by Plaintiff Equal Employment Opportunity Commission. The complaint contained several causes of action related to CPT's alleged discrimination, harassment, and adverse employment actions. (Doc. 1.) Specifically, the complaint raised hostile work environment causes of action on behalf of Mareil Somera, Valeria Soares, and similarly aggrieved women. The EEOC also raised a retaliation claim on behalf of charging party Soares and a constructive discharge claim on behalf of Somera. The EEOC requested punitive damages.

On December 11, 2006, Defendant CPT filed an answer to the complaint. (Doc. 6.)

On May 4, 2009, the EEOC filed a motion for summary adjudication on whether it satisfied Title VII's statutory prerequisites to commence litigation on behalf of Soares, Somera, and "similarly aggrieved parties." (Doc. 37.)

CPT moved for summary adjudication on May 4, 2009. (Doc. 40.) As to Somera, CPT argues that the EEOC's constructive discharge claim is barred on three grounds: 1) her EEOC charge was untimely; 2) the EEOC failed to provide notice and opportunity to conciliate on the discharge claim; and 3) Somera sought to be rehired after quitting and, therefore, was not constructively discharged.

As to Soares, CPT seeks summary adjudication on the following claims: 1) her sexual harassment claim because the harassing events she experienced did not rise to an actionable level; and 2) her retaliation claim fails because Soares did not engage in protected activity and the EEOC cannot demonstrate a pretextual dismissal. As

1 to Soares, CPT only challenges the merits of her claims; CPT does
2 not challenge Somera's satisfaction of Title VII's jurisdictional
3 prerequisites.

4 Defendants also move to dismiss the EEOC's claims for punitive
5 damages on behalf of Somera and Soares.

6 On June 12, 2009, the EEOC opposed CPT's motion for summary
7 adjudication. (Docs. 54-57.) On June 15, 2009, CPT opposed the
8 EEOC's motion for summary adjudication. (Doc. 59.)

9
10 **A. Evidentiary Objections**

11 Defendant objects to the Declarations of John Hackett, David
12 Baker and Mariel Somera, submitted in support of the instant Motion
13 for Summary Adjudication, on the ground that these witnesses lack
14 personal knowledge, the cited testimony constitutes inadmissible
15 hearsay and lacks foundation. (Docs. 61, 68.)

16 Rule 56(e) of the Federal Rules of Civil Procedure requires
17 that affidavits supporting and opposing a motion for summary
18 judgment "shall be made on personal knowledge, shall set forth such
19 facts as would be admissible in evidence, and shall show
20 affirmatively that the affiant is competent to testify to the
21 matters therein."

22 Hearsay is a statement, other than one made by the declarant,
23 offered in evidence to prove the truth of the matter asserted. Fed
24 R. Evid. 801(c). Hearsay is not admissible except as provided by
25 the Federal Rules of Evidence, or other rules prescribed by the
26 Supreme Court. Fed R. Evid. 802.

27 CPT's objections are, in the majority, sustained. In order to
28 enforce the standards set forth in Federal Rules of Civil Procedure

1 and the Federal Rules of Evidence, the Court will simply disregard
2 any portion of the testimony containing inadmissible hearsay,
3 conjecture, speculation, or not made on the basis of his personal
4 knowledge. Any assertions made by Hackett, Baker or Somera that
5 are not supported by the record, by a demonstration of personal
6 knowledge or by corroborating evidence, are insufficient to
7 establish a genuine issue of material fact.

8 To the extent that the statements are offered to prove the
9 truth of the matter asserted, they are inadmissible. See Fed R.
10 Evid. §§ 801-802 ("Hearsay is not admissible except as provided by
11 the Federal Rules of Evidence [...]").

12 IV. LEGAL STANDARDS.

13 A. Summary Judgment/Adjudication

14 Summary judgment, or summary adjudication, is appropriate when
15 "the pleadings, the discovery and disclosure materials on file, and
16 any affidavits show that there is no genuine issue as to any
17 material fact and that the movant is entitled to judgment as a
18 matter of law." Fed. R. Civ. P. 56(c). The movant "always bears
19 the initial responsibility of informing the district court of the
20 basis for its motion, and identifying those portions of the
21 pleadings, depositions, answers to interrogatories, and admissions
22 on file, together with the affidavits, if any, which it believes
23 demonstrate the absence of a genuine issue of material fact."
24 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal
25 quotation marks omitted).

26
27 Where the movant will have the burden of proof on an issue at
28 trial, it must "affirmatively demonstrate that no reasonable trier

1 of fact could find other than for the moving party." *Soremekun v.*
2 *Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir.2007). With
3 respect to an issue as to which the non-moving party will have the
4 burden of proof, the movant "can prevail merely by pointing out
5 that there is an absence of evidence to support the nonmoving
6 party's case." *Soremekun*, 509 F.3d at 984.

7 When a motion for summary judgment is properly made and
8 supported, the non-movant cannot defeat the motion by resting upon
9 the allegations or denials of its own pleading, rather the
10 "non-moving party must set forth, by affidavit or as otherwise
11 provided in Rule 56, 'specific facts showing that there is a
12 genuine issue for trial.'" *Soremekun*, 509 F.3d at 984. (quoting
13 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). "A
14 non-movant's bald assertions or a mere scintilla of evidence in his
15 favor are both insufficient to withstand summary judgment." *FTC v.*
16 *Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009). "[A] non-movant
17 must show a genuine issue of material fact by presenting
18 affirmative evidence from which a jury could find in his favor."
19 *Id.* (emphasis in original). "[S]ummary judgment will not lie if [a]
20 dispute about a material fact is 'genuine,' that is, if the
21 evidence is such that a reasonable jury could return a verdict for
22 the nonmoving party." *Anderson*, 477 U.S. at 248. In determining
23 whether a genuine dispute exists, a district court does not make
24 credibility determinations; rather, the "evidence of the non-movant
25 is to be believed, and all justifiable inferences are to be drawn
26 in his favor." *Id.* at 255.

1 B. Title VII

2 Title VII of the Civil Rights Act makes it unlawful for
3 employers to discriminate on the basis of sex with respect to the
4 terms and conditions of employment. 42 U.S.C. 2000e-2(a)(1). The
5 courts have held that discriminatory conduct includes harassment
6 (see e.g., *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)) when
7 that harassment occurs because of sex. See *Oncale v. Sundowner*
8 *Offshore Services*, 523 U.S. 75, 80-81 (1998) (stating that Title
9 VII only prohibits harassment which occurs because of sex,
10 regardless of whether the harasser is the same sex as or opposite
11 sex from the victim).

12 Courts have recognized two legal theories on which plaintiffs
13 may base sexual harassment claims. The first is quid pro quo
14 harassment, or harassment in which a supervisor requires an
15 employee to engage in sexual activity and threatens tangible
16 employment actions, such as demotion, denial of promotion, or
17 discharge, if the employee does not comply with the harasser's
18 demands. The second is hostile work environment harassment. This
19 harassment can be perpetrated by a supervisor or coworker. The
20 hallmark of hostile work environment harassment is that there is no
21 tangible employment action which results from the harassment. See
22 *Burlington v. Ellerth*, 524 U.S. 742, 751-753 (noting that the terms
23 "quid pro quo" and "hostile work environment" have been used in the
24 courts to refer to sexual harassment and describe respectively,
25 harassment that is accompanied by specific harm to the victim's job
26 and harassment that harms an employee's job more generally, by
27 creating a hostile work environment).

28 To survive a defendant's motion for summary judgment, as a

1 threshold matter, a plaintiff must show that the harassment
2 occurred because of sex. See *Oncale v. Sundowner Offshore*
3 *Services*, 523 U.S. 75, 80-81 (1998). In addition to this
4 requirement, to state a prima facie case of hostile work
5 environment sexual harassment a plaintiff must show that she has
6 experienced (1) conduct of a sexual nature (2) that is so severe or
7 pervasive as to alter the terms and conditions of her working
8 environment and (3) that the conduct is unwelcome. *Harris v.*
9 *Forklift Systems*, 510 U.S. 17 (1993); *Brooks v. City of San Mateo*,
10 229 F.3d 917, 924 (9th Cir. 2000); *Ellison v. Brady* 924 F.2d 872,
11 875 (9th Cir. 1991). The plaintiff's belief that she has been
12 subjected to a hostile and abusive work environment must be both
13 subjectively held and objectively reasonable. *Ellison*, 924 F.2d
14 872, 879 (9th Cir. 1991).

15 V. DISCUSSION.

16
17 To determine the scope of the actions that may be considered
18 as part of the EEOC's case, the first inquiry addresses the
19 administrative filing requirements of Title VII.

20 21 A. Conditions Precedent

22 Title VII allows the EEOC to commence civil suits in its own
23 name. 42 U.S.C. § 2000e-5(f)(1). There are four conditions
24 precedent, before the agency brings suit. First, a charge of
25 discrimination must be filed. The EEOC must then inform the
26 alleged wrongdoer of the charge, conduct an investigation, and
27 determine whether reasonable cause exists to believe that the
28 charges are true. If reasonable cause is found, the agency must

1 engage in conciliation efforts. *EEOC v. Pierce Packing Co.*, 669
2 F.2d 605, 607 (9th Cir. 1982).

3 The EEOC argues that it has met all jurisdictional
4 requirements to file this action on behalf of Soares, Somera, and
5 the class of similarly situated women. CPT disagrees, in part.
6 CPT argues that the EEOC has not fulfilled Title VII's statutory
7 prerequisites as to: (1) the timeliness of Somera's administrative
8 charge; (2) the notice and conciliatory regarding Somera's
9 constructive discharge claim; and (3) the notice and conciliatory
10 requirements regarding the class claim.

11
12 1. Charging Party Soares

13 The EEOC moves for summary adjudication as to whether it
14 satisfied the jurisdictional prerequisites to bring suit on behalf
15 of charging party Soares. CPT does not oppose the motion. Here,
16 Soares filed her EEOC Charge on April 26, 2004 and the EEOC
17 provided CPT with notice of the Soares Charge in May 2006. The
18 Soares Charge states that Soares was sexually harassed by her
19 supervisor, Larry Fuentes, from the time of her hire on about
20 October 16, 2003 (192 days before she filed her charge) until her
21 termination on about April 10, 2004. Because the entire period of
22 Soares' employment falls within the 300 day limitations period,
23 there can be no dispute that her charge was timely.

24 The record also reflects that the EEOC investigated Soares'
25 claims and attempted to settle the matter prior to bringing suit.
26 The EEOC's efforts satisfy Title VII.

27 The EEOC's motion for summary adjudication as to whether it
28 satisfied the conditions precedent to bring suit on behalf of

1 charging party Soares is GRANTED.

2
3 2. Charging Party Somera

4 a. *Untimely Administrative Charge*

5 CPT argues that Somera's claim is untimely because the last
6 discriminatory act against her took place more than 300 days from
7 the date on which Somera filed her charge of discrimination.

8 A plaintiff must file a timely charge of discrimination with
9 the EEOC as a prerequisite to bringing suit under Title VII. 42
10 U.S.C. § 2000e-5(e). Title VII requires that a complainant file a
11 charge with the EEOC within 180 days after the last act of alleged
12 discrimination, unless the alleged violation occurred in a
13 jurisdiction that has a "work-sharing" agreement. *Id.* California
14 is a "work-sharing" state with a state agency capable of affording
15 relief, that is, the California Department of Fair Employment and
16 Housing, thus the period for filing a charge of employment
17 discrimination with the EEOC can be 300 days. *Santa Maria v.*
18 *Pacific Bell*, 202 F.3d 1170, 1176 (9th Cir. 2000).

19 In a Title VII suit, a charge filed after the period has run
20 is untimely and cannot be the basis of a suit. *Roberts v. Gadsden*
21 *Memorial Hosp.*, 835 F.2d 793, 799 (11th Cir. 1988). Failure to
22 file an EEOC charge within the prescribed 300-day period is not a
23 jurisdictional bar, but it is treated as a violation of a statute
24 of limitations, complete with whatever defenses are available to
25 such a violation, such as equitable tolling and estoppel.
26 *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1174 (9th Cir. 1986).

27 The timing - or lack thereof - of Somera's claim is not in
28 dispute. Somera, a CPT employee from February 2003 until December

1 2003, stated in her deposition that the last act of alleged
2 discrimination against her took place on November 20, 2003. The
3 300-day time limit thus commenced on that day and expired on
4 September 15, 2004. It is undisputed that Somera did not file a
5 charge with the EEOC until September 27, 2004, more than the 300
6 days after last act of alleged discrimination.

7 While the EEOC does not contest the untimeliness of Somera's
8 charge, it argues that Somera is entitled to rely on the earlier
9 EEOC charge filed by Soares to satisfy the 300-day statutory
10 prerequisite.¹⁰ The EEOC contends that because Soares' charge was
11 timely and brought on behalf of "Soares and any other similarly
12 situated women," it provided the EEOC with a sufficient
13 jurisdictional foundation to bring a suit on Somera's behalf. This
14 is known as the "single filing" rule or "piggybacking." *Holowecki*
15 *v. Fed. Express Corp.*, 440 F.3d 558, 564 (10th Cir. 2006).

16 Although the Ninth Circuit has not specifically addressed the
17 issue,¹¹ the single filing rule has been applied under various

18
19 ¹⁰ It is undisputed that Soares' administrative charge was
20 timely. (PSUF 1-14.)

21 ¹¹ There is some indication that the Ninth Circuit has
22 declined to adopt the rule. See *Inda v. United Air Lines*, 565
23 F.2d 554, 559 (9th Cir. 1977) ("if one brings suit on his own
24 behalf, or as a named plaintiff on behalf of a class, he must
25 have secured a right to sue by timely following the procedures
26 set forth in Title VII."). However, to the extent such language
27 in *Inda* is not dicta, it has been restricted to its facts where a
28 plaintiff sought to rely on an administrative charge of an
individual employee in a separate action, and where the EEOC
charge did not give sufficient notice that other
similarly-situated persons would also be affected. See *Dukes v.*
Wal-Mart Stores Inc., 2002 WL 32769185, at *5 (N.D. Cal. Sept. 9,
2002) (limiting *Inda*'s application); see also *White v. BFI Waste*
Services, LLC, 375 F.3d 288, 293-94 (4th Cir. 2004) (observing

1 circumstances by the Second, Fifth, Sixth, Seventh, Eighth, Tenth,
2 and Eleventh Circuits. See *Anson v. Univ. of Tex. Health Science*
3 *Center*, 962 F.2d 539, 541 (5th Cir. 1992) (The single filing rule
4 is "universally [held]."); *Foster v. Ruhrpumpen, Inc.*, 365 F.3d at
5 1197 (10th Cir. 2004); *Anderson v. Unisys Corp.*, 47 F.3d 302, 308
6 (8th Cir. 1995). Most courts have adopted a test requiring only
7 that the timely exhausted claims and the non-exhausted claims arise
8 out of the same circumstances and occur within the same general
9 time frame. See e.g., *Stone v. First Union Corp.*, 371 F.3d 1305,
10 1311 (11th Cir. 2004).

11 A charge will be adequate to support piggybacking under the
12 single filing rule if it contains sufficient information to notify
13 prospective defendants of their potential liability and permit the
14 EEOC to attempt informal conciliation of the claims before a
15 lawsuit is filed. *Howlett v. Holiday Inns, Inc.*, 49 F.3d 189, 195
16 (6th Cir. 1995). To determine the adequacy of a charge for use in
17 piggybacking subsequent plaintiffs, courts often look to the size
18 and type of the work unit involved. *Id.* "[M]ere similarity of the
19 grievances within the same general time frame suffices to permit
20 the 'single filing rule'" when the complaints "arise in a work unit
21 of modest size." *Id.* (quoting *Tolliver v. Xerox Corp.*, 918 F.2d
22 1052, 1058 (2d Cir. 1990)).

23 CPT argues that Somera is not "similarly situated" to Soares,
24

25 that the single-filing rule allows plaintiffs who have not
26 exhausted administrative filing requirements to join in a lawsuit
27 with other plaintiff, as opposed to bringing a separate suit on
28 their own behalf). Because Soares' EEOC charge gave notice of
other similarly situated individuals, *Inda* would not prevent
application of the single-filing rule.

1 to prevent the single filing rule from relieving the tardiness of
2 Soares' complaint. CPT asserts that Somera's claims differ from
3 Soares' claims in that they focus on complaints to supervisors
4 while Soares' claims focus on complaints to co-workers. Further,
5 CPT argues that Somera and Soares held different jobs, worked
6 different shifts, and had different supervisors. CPT contends this
7 creates a genuine issue of material fact as to the charging parties
8 relatedness and supports a denial of the EEOC's motion for summary
9 adjudication.

10 CPT's arguments are unpersuasive. The EEOC has adequately
11 shown that the individual claims of charging parties arose out of
12 similar alleged sexually harassing treatment by the same
13 individual, who allegedly created a constant environment of
14 sexually offensive conditions for female employees, during the same
15 timeframe.¹² Somera and Soares both assert that they were
16 discriminated against on the basis of their sex by Larry Fuentes,
17 a fellow CPT employee, from 2003-2004.¹³ The parties' claims need
18 not be factually identical to those timely filed, but instead need
19 to be sufficient similarity as to prevent frustration of Title VII
20 policies. See *Trbovich v. Ritz-Carlton Hotel Co.*, 920 F. Supp.
21 1030 (E.D. Mo. 1995).

22 The relatedness of the Soares and Somera's claims is best
23 illustrated by their EEOC charges, filed by Somera on September 27,
24 2004 and Soares on April 26, 2004, respectively. Like Soares'

26 ¹² The relevant timeframe is February 2003 to April 2004.
27 See Part II(A), "Parties", discussed *supra*.

28 ¹³ Relatedness is magnified based on CPT's size: it is a
mid-size company employing 25-85 people. (Doc. 40, 2:12-2:13.)

1 charge, Somera's charge described in detail the allegedly harassing
2 conduct, such as Larry Fuentes' sexually explicit comments, his
3 sexual epithets, and his inappropriate touching. Soares' charge
4 also described the nature of the harassment and notice that Larry
5 Fuentes was harassing other CPT employees. Soares' charge
6 provided, for instance, that "I and other women were subjected to
7 sexual harassment by Supervisor Larry Fuentes [...] he was
8 constantly making gross sexual statements." (Doc. 37, Exh. 1.)
9 Moreover, Somera's charge stated that "Manager Larry Fuentes
10 sexually harassed me and other female employees. The harassment
11 was of a verbal and physical nature, and was constant." (Doc. 37,
12 Exh. 3.)

13 CPT relies on *Arrieta v. Yellow Transp., Inc.*, 2008 U.S. Dist.
14 LEXIS 101502 (N.D. Tex. 2008), to assert that the parties are not
15 similarly situated. *Arrieta* is factually distinguishable. Unlike
16 this case, the charging party in *Arrieta* did not provide any
17 evidence supporting relatedness. *Arrieta* found:

18 [Plaintiff's] argument consists primarily of the
19 conclusory statements that he is similarly
20 situated to the other plaintiffs and that their
21 charges provided some notice to YTI of the
22 collective nature of their charges. He does not
23 offer any explanation or argument to show how he
24 is similarly situated to the other plaintiffs or
25 how their charges provided the requisite notice
26 to YTI. Given the purpose of the exhaustion
27 requirement and the limited nature of the
28 piggybacking exception, a plaintiff may not
simply assume that his independent, non-exhausted
claims can be supported by the independent claims
of others.

26 *Arrieta* at *79-*80.

27 CPT's reliance on *Arrieta* misses the mark. Because of the
28 similarity of Soares' and Somera's EEOC charges, CPT had notice

1 regarding the relatedness of their sexual harassment allegations
2 against the same individual, which were ignored by CPT's
3 management. *Arrieta* is distinguishable.

4 Here, the requirements of the single filing rule are met.
5 CPT's unsupported assertions that the parties are not "similarly
6 situated" are not enough to create a genuine issue of material
7 fact. Although Somera's charge was untimely, the EEOC has met its
8 Rule 56 burden and demonstrated, as a matter of law, that the
9 individual claims of the charging parties arose out of similar
10 alleged harassing treatment to enable use of the "single filing"
11 exception.

12 CPT does not oppose presence of the remaining jurisdictional
13 prerequisites regarding the EEOC's ability to bring a hostile work
14 environment claim on Somera's behalf. Somera can "piggyback" on
15 Soares' earlier EEOC charge, making her charge timely. The record
16 reflects that the EEOC investigated Somera's claims, provided CPT
17 with a letter of determination, and attempted to settle the matter
18 prior to bringing suit. The EEOC's efforts satisfy Title VII.

19 The EEOC motion as to whether it satisfied the conditions
20 precedent to bring a hostile work environment claim on behalf of
21 charging party Somera is GRANTED. CPT's contrary motion for
22 summary adjudication is DENIED.

23
24 *B. Somera's Constructive Discharge Claim*

25
26 CPT contends that Somera's constructive discharge claim was
27 not within the scope of her EEOC charge and is not actionable. CPT
28 states that the EEOC "never provided notice to CPT" and "never

1 considered or investigated Ms. Somera's voluntary resignation as a
2 constructive discharge flowing from allegations of sexual
3 harassment." The EEOC counters that the claim of "constructive
4 discharge constitutes an additional consequence of the conduct
5 alleged in the charge" and is permissible. Both parties move for
6 summary adjudication on the issue.

7 Analysis of this issue begins with an examination of the
8 prerequisites to suit by the EEOC and the scope of claims the EEOC
9 is empowered to assert. In *EEOC v. Shell Oil Co.*, 466 U.S. 54, 80
10 L. Ed. 2d 41, 104 S. Ct. 1621 (1984), the Supreme Court explained
11 the EEOC's enforcement procedure as follows:

12 In its current form, Title VII sets forth "an
13 integrated, multistep enforcement procedure" that
14 enables the Commission to detect and remedy
15 instances of discrimination. See *Occidental Life*
16 *Insurance Co. v. EEOC*, 432 U.S. 355, 359, 97 S.
17 Ct. 2447, 2450, 53 L. Ed. 2d 402 (1977). The
18 process begins with the filing of a charge with
19 the EEOC alleging that a given employer has
20 engaged in an unlawful employment practice [....]

21 [The statute] require[s] the Commission to
22 "serve a notice of the charge (including the
23 date, place and circumstances of the alleged
24 unlawful employment practice) on [the] employer
25 . . . within ten days" of the filing of the
26 charge. 42 U.S.C. § 2000e-5(b).

27 After a charge has been filed, the EEOC
28 conducts an investigation of the allegations
contained therein. . . . If, after completing its
investigation, the EEOC determines that there is
"reasonable cause to believe that the charge is
true," it must "endeavor to eliminate [the]
alleged unlawful employment practice by informal
methods of conference, conciliation, and
persuasion." § 2000e-5(b). If those methods prove
ineffectual, the Commission is empowered to bring
a civil action against the employer. §
2000e-5(f) (1).

29 In the course of this procedure, a "reasonable cause"
30 determination by the EEOC is critical:

1 The statute directs the EEOC to notify the
2 respondent of the charge within 10 days, to
3 investigate the charge, and to determine "as
4 promptly as possible and, so far as practicable,
5 not later than one hundred and twenty days from
6 the filing of the charge" whether there is
7 reasonable cause to believe that the charge is
8 true. 42 U.S.C. § 2000e-5(b). If the EEOC finds
9 no reasonable cause, then it must dismiss the
10 charge. See *id.* If it finds reasonable cause,
11 then it must attempt to resolve the dispute "by
12 informal methods of conference, conciliation, and
13 persuasion." *Id.* "If within thirty days after a
14 charge is filed . . . the Commission has been
15 unable to secure from the respondent a
16 conciliation agreement acceptable to the
17 Commission, the Commission may bring a civil
18 action against any [non-governmental] respondent.
19 . . ." *Id.* § 2000e-5(f)(1).

11 *Martini v. Federal Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1340 (D.C.
12 Cir. 1999). Thus, following investigation, a determination that
13 "reasonable cause" is lacking ends the EEOC's procedures, while a
14 determination that there is "reasonable cause" initiates the
15 conciliation process, and also opens the door to suit by the EEOC,
16 if conciliation fails. *EEOC v. Occidental Life Ins. Co.*, 535 F.2d
17 533, 541-542 (9th Cir. 1976).

18 The Ninth Circuit adopted the reasoning of other courts on the
19 importance of a reasonable cause determination and conciliation as
20 prerequisites to suit by the EEOC. *Id.*; see also *EEOC v. Pierce*
21 *Packing Co.*, 669 F.2d 605, 608 (9th Cir. 1982) ("Genuine
22 investigation, reasonable cause determination and conciliation are
23 jurisdictional conditions precedent to suit by the EEOC.")

24 Turning to the scope of the claims the EEOC may assert,
25 admittedly, once the EEOC decides to sue in its own name, it is not
26 limited to the facts presented in the charge. *EEOC v. Farmer*
27 *Bros.*, 31 F.3d 891, 899 (9th Cir. 1994). Rather, the EEOC may sue
28 based on any violations that fall within the scope of the EEOC's

1 actual investigation, or are "like or reasonably related to" the
2 allegations made before the EEOC, such that they would have been
3 included within the scope of an EEOC investigation. *Id.*; see also
4 *Sosa v. Hiraoka*, 920 F.2d 1451, 1456 (9th Cir. 1990) ("The
5 jurisdictional scope of a Title VII claimant's court action depends
6 upon the scope of both the EEOC charge and the EEOC
7 investigation."). However, as this statement indicates, the EEOC's
8 power to sue depends upon ascertainment of a violation, in other
9 words, upon a "reasonable cause" determination that a violation has
10 occurred.

11 In *EEOC v. Hearst Corp., Seattle Post-Intelligencer Div.*, 553
12 F.2d 579 (9th Cir. 1976), a gender discrimination case, the Ninth
13 Circuit explained:

14 [S]o long as discovery of the new
15 discrimination arises out of the reasonable
16 investigation of the charge filed, it can be
17 the subject of an EEOC 'reasonable cause'
18 determination to be followed by an EEOC offer
19 of conciliation and, if conciliation fails, by
20 a civil suit - without the filing by EEOC of a
21 separate charge on the new claim.

19 In other words, the original charge is
20 sufficient to support EEOC administrative
21 action, as well as an EEOC civil suit, for any
22 discrimination stated in the charge itself or
23 discovered in the course of a reasonable
24 investigation of that charge, provided such
25 additional discrimination was included in the
26 EEOC 'reasonable cause' determination and was
27 followed by compliance with the conciliation
28 procedures of the Act.

24 *Hearst* at 580-581.¹⁴)

26 ¹⁴ In *Hearst Corp.*, the Ninth Circuit noted that it was not
27 departing from its decision in *Oubichon v. North American*, 482
28 F.2d 569 (9th Cir. 1973) - a private Title VII suit, holding that
when an employee seeks judicial relief for incidents not listed
in his original EEOC charge, the judicial complaint may encompass

1
2 Here, the original charge by Somera alleged that she and other
3 women were sexually harassed by Larry Fuentes, the harassment was
4 "verbal and physical," and continued throughout her tenure at CPT.
5 Somera's charge did not allege constructive discharge, retaliation,
6 or otherwise mention her exit from CPT. Thereafter, the EEOC
7 commenced its investigation into Somera's claims, which included
8 interviewing witnesses and requesting documents.

9 The EEOC issued a letter of determination regarding Somera's
10 claims on September 1, 2005. The letter stated that "[b]ased on
11 the evidence of record, there is reasonable cause to believe that
12 Respondent discriminated against Charging Party and a class of
13 similarly situated female employees based on their sex, female, in
14 violation of the statute." The letter mentions only Somera's
15 gender discrimination claims; it did not mention Somera's departure
16 from CPT and did not find that there is reasonable cause to believe
17 that CPT constructively discharged Somera.¹⁵

18 The EEOC argues that the base charge of sexual harassment puts
19 CPT on notice of the constructive discharge claim, and that "as
20 long as the EEOC's finding of harassment is clear, the notice need
21 not detail every consequence of the harassment." (Pl.'s reply, pg.
22

23
24 _____
any discrimination "like or reasonably related to the allegations
of the EEOC charge"

25 ¹⁵ The particularity of Somera's letter stands in contrast
26 to Soares' letter. Soares' letter states that "Charging Party
27 also alleges that she was retaliated against for engaging in
28 protected activity" and "there is reasonable cause to believe
Respondent retaliated against Charging Party, in violation of
statute." (Doc. 56, Exh. M, EEOC 00003.)

1 8.) The EEOC cites *EEOC v. Newton Inn Assoc.*, 647 F. Supp. 957
2 (E.D. Va. 1986)., in support of its argument. However, Newton is
3 distinguishable.

4 In *Newton*, the charging parties filed charges with the EEOC
5 alleging gender discrimination. The EEOC conducted an
6 investigation and issued letters of determination stating it found
7 reasonable cause to believe the charging parties were subjected to
8 sexual harassment and retaliation. Following failed conciliation
9 efforts, the EEOC filed a lawsuit alleging, among other things,
10 sexual harassment, retaliation, and constructive discharge.
11 Defendant moved to dismiss the constructive discharge claim arguing
12 that it is outside the scope of the original administrative charge
13 and subsequent EEOC investigation. The court held that the
14 constructive discharge claim "logically flowed" from the substance
15 of the initial administrative charge because the EEOC had
16 determined that the charging parties and at least six other female
17 associates were reassigned to a less desirable shift. The court
18 found that the constructive discharge claims - tacked onto the same
19 charging parties' retaliation claims - broadened the scope "only
20 minimally."

21 Here, unlike *Newton*, the EEOC's complaint does not refer to an
22 earlier retaliation claim made by the charging party. In fact,
23 Somera did not allege constructive discharge or include any facts
24 relating to her resignation. In *Newton*, the EEOC also notified the
25 employer - during conciliation discussions - that compliance would
26 require "reinstatement and back wages for five additional
27 individuals allegedly constructively discharged [...]". There is
28 no such notice by the EEOC to the employer in this case.

1 The EEOC states that specific notice of the constructive
2 discharge claim is not required because "a constructive discharge
3 predicated upon harassment does not provide a new theory of
4 discrimination." (Pl.'s Rep. 7:24-7:28.) This is not accurate.
5 See *Herron v. DaimlerChrysler Corp.*, 388 F.3d 293, 303 (7th Cir.
6 2004) (finding that Plaintiff could not sustain his Title VII
7 constructive discharge claim because it was not "like or reasonably
8 related" to the original EEOC charge, which described only racial
9 discrimination and harassment.); *Zartman v. Coffey County Hospital*,
10 2004 WL 877667 (D. Kan. 2004) (finding that Plaintiffs were not
11 entitled to pursue a constructive discharge claim because it was
12 not "similarly situated" to claims of hostile work environment and
13 retaliation.); *Tupua v. Hawaii, Dept. of Health*, WL 1561578 (D.
14 Haw. 2009) (finding that treatment on the job and constructive
15 discharge are separate and distinct discriminatory events.);
16 *Harvill v. Westward Communications, LLC*, 311 F. Supp. 2d 573 (E.D.
17 Tex. 2004) (stating that "[c]onstructive discharge, however, does
18 not grow out of harassment allegations.").

19 *Harvill* is instructive. In *Harvill*, Defendants moved for
20 summary judgment on Plaintiff's constructive discharge claim
21 because Plaintiff's EEOC charge did not include a claim for
22 constructive discharge. Plaintiff first introduced a claim for
23 constructive discharge in her complaint. The Defendants argued it
24 fell outside the scope of her EEOC charge. In granting Defendant's
25 motion, the *Harvill* court stated:

26 It is undisputed that *Harvill* did not assert
27 constructive discharge in her charge. The charge
28 only contains harassment allegations regarding
the terms and conditions of *Harvill*'s employment.
Constructive discharge, however, does not grow

1 out of harassment allegations.

2 *Harvill* at 585.

3
4 Without more, allegations of sexual harassment do not provide
5 a foundation for constructive discharge claims. Constructive
6 discharge ends the employer/employee relationship and requires the
7 plaintiff to demonstrate that "a reasonable person in the
8 plaintiff's position would have felt he or she was forced to quit
9 because of intolerable or discriminatory work conditions." *Wallace*
10 *v. City of San Diego*, 479 F.3d 616, 626 (9th Cir 2007). This
11 differs dramatically from sexual harassment's posture and required
12 elements.¹⁶

13 The EEOC presents no evidence that they considered or
14 investigated Somera's resignation as a constructive discharge
15 flowing from her sexual harassment allegations. If the EEOC was
16 squarely presented with the issue of constructive discharge - which
17 allegedly occurred ten months prior to Somera's EEOC charge and two
18 years prior to the EEOC's LOD -, why did they limit a reasonable
19 cause determination to Somera's allegation of gender
20 discrimination? Whatever the reason, we arrive at the same point:
21

22 ¹⁶ 29 C.F.R. § 1604.11 states: "Unwelcome sexual advances,
23 requests for sexual favors, and other verbal or physical conduct
24 of a sexual nature constitute sexual harassment when (1)
25 submission to such conduct is made either explicitly or
26 implicitly a term or condition of an individual's employment, (2)
27 submission to or rejection of such conduct by an individual is
28 used as the basis for employment decisions affecting such
individual, or (3) such conduct has the purpose or effect of
unreasonably interfering with an individual's work performance or
creating an intimidating, hostile, or offensive working
environment."

1 the EEOC did not find reasonable cause to include allegations of
2 constructive discharge.¹⁷

3 While mindful of enforcing "form over substance," the EEOC's
4 lack of a reasonable cause finding is conspicuous. It provides a
5 basis for conciliation and, if those efforts fail, permits the EEOC
6 to initiate litigation.¹⁸ By failing to provide any notice to CPT
7 of the constructive discharge claim - whether in the form of the
8 EEOC charge, factual findings, or the LOD - the EEOC circumvents
9 its "investigatory and conciliatory role, as well as deprive[s] the
10 charged party of notice of the charge." *B.K.B. v. Maui Police*
11 *Dept.*, 276 F.3d 1091, 1099 (9th Cir. 2002) (quoting *Babrocky v.*
12 *Jewel Food Co.*, 773 F.2d 857, 863 (7th Cir.1985)). Consistent with
13

14 ¹⁷ *EEOC v. Hearst Corp.*, *supra*, addresses an original charge
15 that alleged only discrimination against males. The subsequent
16 EEOC findings, based on evidence revealed during its
17 investigation, included discrimination, not only as to males, but
18 also as to females and members of minority groups. The EEOC
19 formally notified the employer of these findings and the EEOC
20 issued its "Determination of Reasonable Cause," which included
21 the additional claims of discrimination. The parties proceeded
22 to conciliation efforts on all the issues. Conciliation
23 eventually failed and the EEOC initiated litigation. On appeal,
24 the Ninth Circuit ruled that because "defendant has received
adequate notice of the new charge during the administrative
proceedings," the EEOC's allegations of gender and race
discrimination were proper. Here, the EEOC never notified CPT of
the constructive discharge claim, thus distinguishing it from the
typical situation where "the complaint may encompass [...] new
acts occurring during the pendency of the charge before the
EEOC." *Gen. Tel. Co. Of the N.W. v. EEOC*, 446 U.S. 318, 331
(1980).

25 ¹⁸ In *Seymore v. Shawver & Sons, Inc.*, 11 F.3d 794, 799 (10th
26 Cir. 1997), the Tenth Circuit stated: "[W]here a retaliatory act
27 occurs prior to the filing of a charge and the employee fails to
allege the retaliatory act of a retaliation claim in the
28 subsequent charge, the retaliatory act ordinarily will not
reasonably relate to the charge."

1 case law and the purposes of Title VII, notice to CPT regarding the
2 constructive discharge claim was required to maintain such a claim
3 on Somera's behalf.

4 In this case, the EEOC's lack of a reasonable cause finding is
5 fatal to EEOC's pursuit of a constructive discharge claim on
6 Somera's behalf. Even if the constructive discharge claim is
7 factually related to the substance of the sexual harassment claim,
8 Somera did not include the constructive discharge claim in her EEOC
9 charge and the EEOC did not include the allegations of constructive
10 discharge in its reasonable cause determination. Title VII's
11 jurisdictional standards preclude a constructive discharge claim in
12 this case.

13 Summary adjudication is GRANTED in favor of CPT regarding the
14 EEOC's ability to bring a constructive discharge claim on Somera's
15 behalf. The EEOC's cross-motion in this regard is DENIED.

16 Given this ruling on Somera's constructive discharge claim, it
17 is unnecessary to decide the motions regarding conciliation on
18 constructive discharge. The EEOC's and CPT's motions on this issue
19 are DENIED as MOOT.

20
21 C. Conclusions Re Charging Party Somera

22 1. Hostile Work Environment Claim

23 Somera can "piggyback" on Soares' earlier EEOC charge, making
24 her charge timely. CPT did not challenge the remaining
25 jurisdictional prerequisites to EEOC's ability to maintain a
26 hostile work environment claim on Somera's behalf. The record
27 reflects that the EEOC investigated Somera's claims, provided CPT
28 with a letter of determination, and attempted to settle the matter

1 prior to bringing suit. The EEOC's efforts satisfy Title VII.

2 EEOC's motion whether it satisfied the conditions precedent to
3 bring a hostile work environment claim on behalf of charging party
4 Somera is GRANTED. CPT's motion for summary adjudication on this
5 issue is DENIED.

6
7 **2. Constructive Discharge Claim**

8 The EEOC's lack of a reasonable cause finding is fatal to the
9 EEOC's assertion that it can pursue a constructive discharge claim
10 on Somera's behalf. Title VII's jurisdictional standards preclude
11 a constructive discharge claim in this case.

12 Summary adjudication is GRANTED in favor of CPT regarding the
13 EEOC's constructive discharge claim on Somera's behalf. The EEOC's
14 motion in this regard is DENIED.

15
16
17 **3. Similarly Aggrieved Parties**

18 CPT claims that the EEOC has not satisfied the notice and
19 conciliation prerequisites to proceed with the class claims.¹⁹
20 According to CPT, it was not properly notified of the pattern-or-
21 practice allegations against it. In addition, CPT asserts it was
22 not informed of either the identity of the claimants or the facts
23 underlying their claims at any stage during the administrative
24

25 ¹⁹ To remedy any confusion on this point, the term
26 "similarly situated female employees" is referred to as in the
27 relevant part of Title VII: "allegedly aggrieved persons." See 42
28 U.S.C. § 2000e-5(f)(1) (referring to "[t]he person or persons
aggrieved" and "the person aggrieved"). "Similarly situated
female employees" are not referred to as "class members."

1 process, and was therefore denied an opportunity to engage in
2 "conciliation." (Def.'s Opp. Pg. 11.) CPT concludes, EEOC's claim
3 on behalf of similarly aggrieved persons must fail.
4

5 a. Notice

6 Title VII grants the EEOC authority "to investigate and act on
7 a charge of a pattern or practice of discrimination, whether filed
8 by or on behalf of a person claiming to be aggrieved or by a member
9 of the Commission." *EEOC v. Jillian's of Indianapolis, IN, Inc.*,
10 279 F. Supp. 2d 974; 42 U.S.C. § 2000e-5(f). The EEOC may
11 institute a "pattern-or-practice" case on its own initiative, i.e.,
12 by the filing of a Commissioner's charge. Such cases must "be
13 conducted in accordance with the procedures set forth in [42 U.S.C.
14 § 2000e-5]." *Id.*

15 As explained in Part V(1), *supra*, jurisdiction exists over any
16 discrimination claims "that are alike or reasonably related to the
17 allegations made in the EEOC charge[s], or that fall within the
18 'EEOC investigation which can reasonably be expected to grow out of
19 the charge[s] of discrimination.'" *Deppe v. United Airlines*, 217
20 F.3d 1262, 1267 (9th Cir. 2000); *see Gen. Tel. Co. of the N.W. v.*
21 *EEOC*, 446 U.S. 318, 331, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980)
22 ("Any violations that the EEOC ascertains in the course of a
23 reasonable investigation of the charging party's complaint are
24 actionable."). The EEOC may, to the extent warranted by an
25 investigation reasonably related in scope to the allegations of the
26 underlying charge, seek relief on behalf of individuals beyond the
27 charging parties who are identified during the investigation."
28 *United Parcel Serv.*, 94 F.3d at 318 (citing *Cheek*, 31 F.3d at 500);

1 The evidence in this case demonstrates the following: The two
2 original charges alleged sexual harassment by a employee at CPT's
3 Delhi facility and retaliation by Soares. (DSUF 1-4; Doc. 37, Exh.
4 1 & 3.) Somera asserted in her charge that the "I and other women
5 were subjected to sexual harassment." (*Id.*) Soares stated in her
6 charge that the employee "sexually harassed me and other female
7 employees" and "constantly stared at the buttocks of female
8 employees, including my buttocks." (*Id.*) The charges filed by
9 Soares and Somera mention Larry Fuentes by name, alleging that he
10 had verbally sexually harassed them and fellow CPT employees "
11 (*Id.*) The EEOC's LOD letters further provided that there was
12 reasonable cause to believe that CPT discriminated against each of
13 them and a class of allegedly aggrieved persons based on their sex.
14 (Doc. 37, Exh. 6 & 7.)

15 The EEOC's sexual harassment claim on behalf of allegedly
16 aggrieved persons is related to the allegations made in the
17 original charges and arose out of Plaintiff's investigation of
18 those charges. The EEOC notified CPT that the allegations included
19 "similarly situated women." While the EEOC did not specifically
20 identify those women by name in its correspondence, Defendant has
21 cited no legal authority that such specific disclosure is a
22 prerequisite to an exhaustion of the statutory prerequisites. The
23 EEOC has provided adequate notice to CPT of sexual harassment of
24 similarly situated women.

25
26 b. Conciliation

27 "The sufficiency of a conciliation effort by the EEOC does not
28 present a jurisdictional question, so long as a conciliation

1 attempt has been made." *EEOC v. California Teachers' Ass'n*, 534
2 F.Supp. 209, 213, n. 3 (N.D. Cal. 1982) (citing *EEOC v. Zia Co.*,
3 582 F.2d 527, 533 (10th Cir. 1978). A district court's
4 dissatisfaction with an EEOC conciliation attempt "is not the
5 appropriate standard of review. The district court should only
6 determine whether the EEOC made an attempt at conciliation. The
7 form and substance of those conciliations is within the discretion
8 of the EEOC as the agency created to administer and enforce our
9 employment discrimination laws and is beyond judicial review."
10 *EEOC v. Keco Industries, Inc.*, 748 F.2d 1097, 1101 (6th Cir. 1984).
11 "The EEOC is under no duty to attempt further conciliation after an
12 employer rejects its offer. Before bringing suit, the EEOC must
13 make a good faith effort to conciliate the claim. However, once
14 the employer rejects the conciliation attempts, the EEOC is free to
15 file suit under Title VII." *Keco Industries*, 748 F.2d at 1101-1102
16 (citing *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th
17 Cir.1979); *EEOC v. Zia Co.*, 582 F.2d 527 (10th Cir.1978)). Where
18 defendant "was unwilling to engage in any discussion regarding [a]
19 charge . . .[,] the EEOC could reasonably have believed that its
20 efforts to conciliate were sufficient." *EEOC v. Bruno's*
21 *Restaurant*, 13 F.3d 285, 289 (9th Cir. 1993).

22 Here, applying a deferential standard of review to the EEOC's
23 conciliation efforts, there is substantial evidence that the EEOC
24 satisfied the statutory condition precedent of conciliation on
25 behalf of allegedly aggrieved parties. The record indicates that
26 the EEOC invited CPT to conciliate all of the claims against it,
27 which necessarily included the sexual harassment charges levied by
28 "similar aggrieved parties." (PSUF 3.) CPT received letters from

1 the EEOC providing notice that it had found reasonable cause to
2 believe that similarly situated parties were subjected to sexual
3 harassment while employed at CPT; (Doc. 37, Exh. 6 &7.) as part of
4 settlement negotiations, the EEOC notified CPT that it would
5 resolve the matter for \$75,000; (PSUF 8.) CPT made a counteroffer
6 of \$15,000, which the EEOC rejected; (PSUF 8.) And CPT was
7 notified, on or about January 31, 2006, that the EEOC deemed
8 conciliation efforts futile. (Doc. 37, Exh. 8,9.)

9 During the conciliation, the EEOC provided more than
10 sufficient information about the class and was not required to
11 provide any additional detail. See *EEOC v. Dial Corp.*, 156
12 F.Supp.2d 926, 942 (D. Ill. 2001) (EEOC's failure to identify class
13 members during conciliation does not render its conciliation
14 efforts inadequate). The record is clear: the EEOC complied with
15 its conciliation obligations by providing CPT with an opportunity
16 to confront the sexual harassment charges brought by the similar
17 aggrieved parties.

18
19 c. Conclusion Re Allegedly Aggrieved Persons

20 The EEOC satisfied the notice and conciliation prerequisites
21 to proceed with a Title VII suit on behalf of allegedly aggrieved
22 persons. CPT has not opposed the remaining jurisdictional
23 prerequisites regarding the EEOC's ability to bring a hostile work
24 environment claim on Somera's behalf. The EEOC's efforts satisfy
25 Title VII.

26 The EEOC motion as to whether it satisfied the conditions
27 precedent to bring a hostile work environment claim on behalf of
28 similarly aggrieved persons is GRANTED. CPT's motion for summary

1 adjudication in this regard is DENIED.

2
3 **B. Substantive Claims**

4 CPT moves for summary adjudication on each of Soares' claims:
5 (1) Soares' claim that she was subjected to a hostile work
6 environment; and (2) Soares' claim that she was retaliated against
7 for participating in federally protected conduct.

8
9 1. **Soares' Hostile Work Environment Claim**

10 As described in Part VI(B), *supra*, to establish a hostile work
11 environment based on sex, the plaintiff must prove that she was
12 subjected to verbal or physical conduct, that the conduct was
13 unwelcome, and that the conduct was sufficiently severe or
14 pervasive to alter the terms and conditions of her employment and
15 create an abusive work environment. See *Rene v. MGM Grand Hotel,*
16 *Inc.*, 305 F.3d 1061, 1065 (9th Cir. 2002) (en banc). The work
17 environment "must be both objectively and subjectively offensive,
18 one that a reasonable [woman] would find hostile or abusive, and
19 one that the [plaintiff] in fact did perceive to be so." *Faragher*
20 *v. City of Boca Raton*, 524 U.S. 775, 787 (1998).

21 Whether the conduct is severe or pervasive is determined in
22 reference to the following factors: "the frequency of the
23 discriminatory conduct; its severity; whether it is physically
24 threatening or humiliating or a mere offensive utterance; and
25 whether it unreasonably interferes with an employee's work
26 performance." *Kortan v. California Youth Auth.*, 217 F.3d 1104 (9th
27 Cir. 2000) (internal quotations and citations omitted). T h e
28 required showing of severity of the harassing conduct varies

1 inversely with the pervasiveness or frequency of the conduct. See
2 *Ellison v. Brady*, 924 F.2d 872, 878 (stating "the strength of the
3 claim depends on the number of incidents and the intensity of each
4 incident."²⁰)

5 CPT contends that Soares' hostile work environment claim fails
6 because the harassing conduct was neither severe nor pervasive.
7 Plaintiff's counters that the verbal comments to which she was
8 subject and the additional harassing conduct creates a triable
9 issue that she experienced severe or pervasive sexual harassment
10 that altered the conditions of her employment and created a hostile
11 working environment. Although CPT urges that improper conduct does
12 not rise to an actionable level, several Ninth Circuit cases in
13 which a hostile work environment has been found to exist are
14 reasonably similar to the circumstances of this case. At the very
15 least, the precedents create a triable issue sufficient to survive
16 summary adjudication.

17 In *Anderson v. Reno*, 190 F.3d 930 (9th Cir. 1999), an FBI
18 agent endured a host of sexually harassing incidents between 1986
19 and 1994, including being referred to by her supervisor as the
20 "office sex goddess," "sexy," "gorgeous," and "the good little
21 girl" instead of by name. At a presentation she was to make about
22 an arrest plan, finding an easel with a drawing of a pair of
23 breasts and the words, "Operation Cupcake," and being told by the
24 supervisor in front of the assembled group "This is your training
25

26 ²⁰ However, to be actionable, the offensive conduct need not
27 be both severe and pervasive, one or the other will do. *Quantock*
28 *v. Shared Mktg. Services, Inc.* 312 F.3d 899, 904 (7th Cir.
2002).

1 bra session." The agent also received various vulgar notes
2 including a cartoon depicting varieties of female breasts with her
3 initials next to an example labeled "cranberries"; and being patted
4 on the buttocks by another agent, who commented on her "putting on
5 weight down there" and informed Anderson of his observations from
6 time to time.

7 In another example, *Draper v. Coeur Rochester, Inc.*, 147 F.3d
8 1104 (9th Cir. 1998), a female employee of a mining company alleged
9 that over a two-year period her supervisor made sexual remarks
10 about her, in and out of her presence. The supervisor frequently
11 called her "beautiful" and "gorgeous" rather than her name and told
12 her about his sexual fantasies, including his desire to have sex
13 with her as well as his wife. The supervisor also joked that the
14 answer to a riddle about what a Mexican prostitute was called is
15 "frijole" and several times remarked about Draper's "ass" and
16 commented to others that "it would be fun to get into [Draper's]
17 pants". On one occasion the supervisor used the loudspeaker to ask
18 whether Draper needed help changing clothes and said there were
19 several guys willing to help, and on another, after Draper had
20 taken off a sweatshirt, asked whether that was all she was going to
21 take off.

22 *Montero v. AGCO Corp.*, 192 F.3d 856, 860 (9th Cir. 1999)
23 further illustrates the type of conduct that gives rise to a
24 hostile working environment. Montero was the only female employee
25 at a parts distribution center. Over a two-year period, one
26 supervisor called her a "butt-kiss," told Montero he was going to
27 spank her, rested his chin on her shoulder, grabbed her arms until
28 she said "ouch," and made crude gestures. Another supervisor

1 grabbed his crotch while speaking with her, placed his face on her
2 bottom, told her he had sexual dreams about her, put his hand on
3 her chair as she sat down, tried to bite her neck, and knelt in
4 front of her and tried to put his head between her knees. Another
5 employee had pulled her pants up from behind by the belt loop,
6 commented about the small size of his penis, and placed notes on
7 her desk telling Montero to dance naked on the desk or to take off
8 her clothes.

9 There is no evidence or argument in this case that Soares was
10 subject to any direct physical acts. Soares' hostile work
11 environment claim is based on verbal comments and actions taken by
12 employees of CPT, specifically, Larry Fuentes. However, Soares
13 asserts that Fuentes' sexually-explicit comments in front of male
14 psychiatric patients put her safety at risk. Even so, a sexual
15 harassment claim may be viable even though comprised solely of
16 verbal harassment, with or without sexual advances. *Lipsett v.*
17 *Univ. of Puerto Rico*, 864 F.2d 881, 905 (1st Cir. 1988).

18 The earliest identified comment took place during Soares'
19 orientation in October 2003. During orientation, Fuentes, Soares'
20 supervisor, showed her CPT's facilities and introduced her to the
21 staff and patients. Fuentes, in Soares' presence, asked a male
22 psychiatric patient, "I bet you would like [Soares] to wash you in
23 the shower, right?" (Soares Dep. 29:16-29:22.) Fuentes then asked
24 the patient, "you like her ass, don't you?" The "like her ass"
25 comment concerned Soares' buttocks. (Soares Dep. 29:23-30:3.)

26 On more than one occasion during her employment, Fuentes told
27 Soares about his tongue piercing. (Soares Dep. 39:7-39:24.)
28 Fuentes stated that it was "to please the woman" and it made "women

1 feel good." (Soares Dep. 39:12-39:19.) Fellow CPT employees heard
2 Fuentes' comments concerning his tongue ring. (*Id.*)

3 At unspecified points in time throughout her employment,
4 Soares heard of Fuentes' sexual comments toward other CPT
5 employees.²¹ One employee told Soares that "she had squatted down
6 [and] Fuentes want to know, you know, what it looked like."
7 (Soares Dep. 73:15-73:19.) Charging Party Somera also told Soares
8 of her experiences Fuentes and his sexually-charged behavior.
9 Specifically, Somera told Soares of her distress when Fuentes
10 trapped her in the facility's freezer and stated "I want to see
11 your nipples get hard."

12 Soares testified in her deposition that Soares constantly used
13 the word "pussy" to describe female employees. (Soares Dep. 163:1-
14 163:5.) Soares stated that "[Fuentes] said that to me in referring
15 [...] after he found that Della told him what I said about the
16 shower incident." (*Id.*)

17 At some point in time during her employment, Fuentes displayed
18 a calendar of almost naked women on top of his desk. Fuentes asked
19 Soares, "that doesn't offend you, does it?" (Soares Dep. 66:19-
20 66:24.) The pictures were approximately 5x5 and were prominently
21 displayed on his desk. Fuentes' desk was located directly adjacent
22 to the room where CPT held employee meetings. (Soares Dep. 67:3-
23 67:12.) Soares observed Fuentes' calendar every shift, either on

24
25 ²¹ One who has been personally subject to sexual harassment
26 may introduce evidence of the harasser's sexual misconduct toward
27 others, of which she becomes aware during her employment, even if
28 the other acts occurred outside of the Plaintiff's presence.
Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 335 (6th Cir.
2008); *Weeks v. Baker & McKenzie*, 63 CA 4th 1128, 1160-1163
(1998).

1 the way to staff meetings or to work at the meeting table. (Soares
2 Dep. 67:10-67:12.)

3 There are also Fuentes' comments to a male psychiatric patient
4 in March of 2004. Soares agreed to take a male psychiatric patient
5 on a smoke break if he took a shower. (Soares Dep. 53:7-55:12.) To
6 the best of Soares' knowledge, the patient did so. On their way to
7 the smoking area, Fuentes challenged the patient's shower claims
8 and stated that, "well, have [Soares] smell your balls to see if
9 you took a shower." (Id.) The patient responded, "that's messed
10 up." Soares complained to the head nurse, Mr. Baker, who had
11 witnessed the episode. (Id.) Soares told Baker that Fuentes'
12 comments threatened to her physical safety, as she was often alone
13 with male patients during her evening shift.²² (UF 42.)

14 Although this case lacks the level of misconduct contained in
15 the most egregious cases, Soares experienced much more than one
16 isolated incident. Soares has identified a continuing pattern of
17 sexually unwelcome comments far exceeding the comments found in
18 *Smith v. County of Humboldt*, 240 F. Supp. 2d 1109 (N.D. Cal. 2003),
19 the case relied on by CPT. Overt sexual comments that females were
20 "pussies" and offers to male psychiatric patients that female
21 nurses would "wash them in the shower" and "smell their balls,"
22 were a continuing part of Plaintiff's workplace. A reasonable
23

24 ²² CPT argues that "Ms. Soares did not perceive the shower
25 incident as subjectively offensive by reason of sex. Instead,
26 she was concerned because the remark was made in the presence of
27 a mental patient." CPT's arguments miss the mark. "Rude,
28 overbearing, loud vulgar and generally unpleasant comments by a
male supervisor toward female subordinates" may constitute sexual
harassment under certain circumstances. *EEOC v. National Ed.
Ass'n , Alaska*, 422 F.3d 840, 845 (9th Cir. 2005)

1 woman would, like Soares, find them offensive.

2 CPT also cites *Sanchez v. City of Santa Ana*, 936 F.3d 1027
3 (9th Cir. 1990) as an example of case where harassing conduct was
4 not enough to create a hostile work environment. *Sanchez*, however,
5 is not altogether helpful. The court did not specify the nature of
6 the "racially offensive slurs" or the "racially offensive"
7 "cartoon" in the case or otherwise elaborate on the nature of the
8 harassing incidents. *Id.* The court described the incidents in
9 generic terms and often referred to what was "alleged" or
10 "claim[ed]." *Id.* at 1031. The hostile work environment claim was
11 tried in a bench trial and the district court granted a motion for
12 judgment in favor of the defendant. In affirming the judgment, the
13 court did not provide an extended analysis of the hostile work
14 environment claim. The court simply stated: "We cannot say that
15 the district court's ultimate conclusion, that the plaintiffs
16 failed to prove the existence of a discriminatory atmosphere, is
17 incorrect as a matter of law." *Id.* at 1037. Absent more
18 information about the nature of the incidents involved, the
19 conduct, and an articulated analysis as to why the hostile work
20 environment claim failed, the value of *Sanchez* is minimal and is
21 unhelpful in resolving this motion.

22 Here, Soares has provided evidence of numerous harassing and
23 offensive incidents that occurred over her seven-month employment
24 at CPT. In terms of frequency, "[w]hile a hostile work environment
25 claim may be stronger where it is based upon repeated incidents,
26 the pervasiveness of the conduct that must be shown to prevail on
27 a hostile work environment claim varies inversely with the
28 seriousness of the incidents." *Ellison v. Brady*, 924 F.2d 872,

1 880-81 (9th Cir. 1991). And "[w]ithin the totality of
2 circumstances, there is neither a threshold 'magic number' of
3 harassing incidents that gives rise, without more, to liability as
4 a matter of law nor a number of incidents below which a plaintiff
5 fails as a matter of law to state a claim." *Rodgers v. Western-*
6 *Southern Life Ins Co.*, 12 F.3d 668, 674 (7th Cir. 1993).

7 CPT suggests that these acts were nothing more than a "handful
8 of minor allegations," (Def's Reply at pg. 9), but that is a
9 question for the jury.²³ A reasonable jury considering all the
10 evidence could find that the actions and comments of Larry Fuentes
11 were offensive sexual harassment and sufficiently pervasive to be
12 actionable. See *Ellison v. Brady*, 924 F.2d 872, 880-81 (9th Cir.
13 1991) ("Sexual harassment is a major problem in the workplace.
14 Adopting the victim's perspective ensures that courts will not
15 sustain ingrained notions of reasonable behavior fashioned by the
16 offenders.") Construing the evidence in EEOC's favor, the non-
17 moving party, there is a triable issue as to whether Soares' work
18 environment was sufficiently hostile to violate Title VII.

19 CPT's motion on Soares' hostile work environment claim is
20 DENIED.

21 22 2. Soares' Retaliation Claim

23 The EEOC claims that CPT retaliated against Somera for
24 complaining about sexual harassment by Mr. Fuentes. CPT counters
25 that the EEOC has not established a prima facie case of retaliation
26

27 ²³ Displays of offensive materials may contribute to a
28 hostile environment. *Lipsett v. Univ. of Puerto Rico*, 864 F.2d
887.

1 nor proffered evidence demonstrating CPT's allegedly adverse
2 employment actions were a pretext for unlawful retaliation.

3 To make out a prima facie case of retaliation, an employee
4 must show that (1) he engaged in a protected activity; (2) his
5 employer subjected him to an adverse employment action; and (3) a
6 causal link exists between the protected activity and the adverse
7 action. See *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464
8 (9th Cir. 1994). Causation "may be inferred from circumstantial
9 evidence, such as the employer's knowledge that the plaintiff
10 engaged in protected activities and the proximity in time between
11 the protected action and the allegedly retaliatory employment
12 decision." *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir.
13 1987); see also *Flait v. No. American Watch Corp.*, 3 Cal. App.4th
14 467, 478, 4 Cal. Rptr. 2d 522 (1992) (reversing judgment for
15 employer on motion for summary adjudication where circumstantial
16 evidence of causal link raised issue of fact).

17 Once plaintiff produces evidence supporting a prima facie
18 case, the burden shifts to the defendant employer to articulate a
19 legitimate, non-retaliatory reason for the adverse employment
20 action. Once the employer articulates such a reason, a plaintiff
21 bears the burden of demonstrating that the reason was merely a
22 pretext for the unlawful retaliatory motive. *Stegall v. Citadel*
23 *Broad. Co.*, 350 F.3d 1061, 1066 (9th Cir. 2003). A plaintiff can
24 prove pretext with either direct or indirect evidence. If a
25 plaintiff offers direct evidence of discriminatory motive, a
26 triable issue as to the actual motivation of the employer is
27 created even if the evidence is not substantial. When direct
28 evidence is unavailable, however, and the plaintiff proffers only

1 circumstantial evidence that the employer's motives were different
2 from its stated motives, specific and substantial evidence of
3 pretext is required to survive summary judgment. See *id.* (citing
4 *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998)).
5

6 A. Prima Facie Case

7 CPT argues that the EEOC cannot establish a prima facie case
8 for retaliation fails because Somera did not engage in protected
9 activity. CPT also argues that there is no casual nexus between
10 Somera's alleged complaints and Mr. Drayton's decision to terminate
11 her.

12 1. *Protected Activity*

13 As noted above, Soares must demonstrate as part of her prima
14 facie case that she participated in a statutorily protected
15 activity. "An employee has engaged in activity protected by Title
16 VII if she has either (1) 'opposed any practice made an unlawful
17 employment practice' by Title VII or (2) 'made a charge, testified,
18 assisted, or participated in any manner in an investigation,
19 proceeding, or hearing' under Title VII." *Grimes*, 102 F.3d at 140
20 (citing 42 U.S.C. § 2000e-3(a); *Long*, 88 F.3d at 304). For
21 example, an employee's filing of a discrimination charge with
22 external agencies has been recognized as a "protected activity."
23 See *United States v. New York City Transit Auth.*, 97 F.3d 672, 677
24 (2d Cir.1996). Likewise, picketing an employer to protest its
25 failure to provide employment opportunities for minorities is a
26 protected activity. See *Payne*, 654 F.2d at 1137. Similarly,
27 sending letters protesting unspecified "racism" and
28 "discrimination" by an employer also constitutes protected

1 activity. See *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008,
2 1012-13 (9th Cir.1983); *Sias v. City Demonstration Agency*, 588 F.2d
3 692, 695-96 (9th Cir.1978). Further, making complaints to an
4 officer of a company about discriminatory practices is a protected
5 activity. See *Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170,
6 1178 (2nd Cir.1996); accord *Robinson v. Pinnacle Brands, Inc.*, No.
7 95-CV-689, 1997 WL 102478, at *8 (N.D.Tex. Feb.28, 1997); *Harker v.*
8 *Utica College of Syracuse Univ.*, 885 F.Supp. 378, 385
9 (N.D.N.Y.1995); *Arzate v. City of Topeka*, 884 F.Supp. 1494, 1503
10 (D.Kan.1995). As the Second Circuit has stated:

11 In addition to protecting the filing of formal
12 charges of discrimination, § 704(a)'s opposition
13 clause protects as well informal protests of
14 discriminatory practices, including making
15 complaints to management, writing critical
16 letters to customers, protesting against
17 discrimination by industry or by society in
18 general, and expressing support of co-workers who
19 have filed formal charges.

20 *Sumner v. United States Postal Serv.*, 899 F.2d 203, 209 (2nd Cir.
21 1990).

22 Soares claims that she engaged in protected activity in March
23 2003, which led to her eventual dismissal from CPT in April 2003.
24 Specifically, Soares claims that she reported a number of Fuentes'
25 offensive comments to Nurse McClendon and Nurse Baker in March
26 2003. Such comments included complaining about being told by
27 Fuentes to smell a patient's private parts, something Soares
28 thought was offensive and put her in danger. Soares also asserts
that her unsuccessful attempts to get in touch with Mr. Drayton
constituted protected activity.

Here, Soares' opposition was directed at sexually explicit

1 comments made by Fuentes in the presence of a patient. Soares
2 complained to a nurse, Della McClendon, whom she viewed as a
3 supervisor and someone who could potentially discuss the situation
4 with Fuentes. Soares' deposition testimony demonstrates this
5 point:

6
7 Q. When you first told Della about Mr. Fuentes'
8 comment, what was her reaction, if any?

9 [...]

10 A. When I told her about this incident. She went
11 to Larry with it and told him that he offended me.
12 Because I felt like I was actually talking to her
13 as a supervisor. I told her, 'If he says things
14 like that to me in front of male patients when I'm
15 going into their rooms at night sometimes by
16 myself, they're not going to take me seriously and
17 I could get hurt.'

18 Q. Okay. And so you were talking to Della as a
19 supervisor?

20 A. As - right. I'd never been in the situation
21 of these things before.

22 (Soares Dep. 57:8-57:25.)

23 Soares also complained about Fuentes to another nurse, David
24 Baker, who witnessed the shower incident. The record demonstrates
25 that Soares' complaints to Nurse Baker were specific and apprised
26 him of Fuentes' comments and why she believed they were
27 discriminatory and presented safety concerns.

28 CPT does not dispute that Soares complained to Nurse McClendon
and Baker; rather, CPT minimizes Soares' complaints to Nurses
McClendon and Baker, arguing that they do not demonstrate that
Soares engaged in "protected activity." In effect, CPT states that

1 Soares' complaints to Nurses Baker and McClendon are irrelevant
2 because they were not in her direct chain of supervision.²⁴

3 CPT's arguments are not controlling. Taking the evidence in
4 a light most favorable to Soares, there remains a genuine issue of
5 material fact as to whether she engaged in protected activity.
6 First, Soares' complaint to Nurse McClendon is arguably protected
7 activity because McClendon relayed it to Fuentes - her direct
8 supervisor. Per CPT policy, this was the appropriate route to file
9 a sexual harassment complaint and Fuentes was obligated to report
10 it to management.²⁵ Second, Soares' formal complaint path was
11 compromised: the object of Soares' complaint, Fuentes, was her
12 direct supervisor and had previously harassed her on CPT property.
13 The record also demonstrates that CPT management was aware of
14 Fuentes' behavior toward women; nevertheless, Fuentes continued to
15 supervise female employees and was responsible for reporting sexual
16 harassment complaints to CPT management. According to Soares, this
17 led to an erosion of employee trust concerning their complaints
18 about Fuentes and, taking the evidence in her favor, supports her
19 reasons for complaining to supervising nurses.

21 ²⁴ CPT argues that Soares merely "complained to a co-worker
22 about the shower incident" and "did not report the shower
23 incident to Mr. Drayton or Ms. Kelly." (Doc. 40 at 11:23-12:2.)

24 ²⁵ Fuentes testified in his deposition that "I had said
25 something to Valerie in the morning. And after I said it, I knew
26 I hadn't have said it. The following day I apologized to her for
27 saying it." (Fuentes Dep. 62:8-62:12.) Aware that his comments
28 to Soares were inappropriate, Fuentes - as MHW lead supervisor -
had an obligation to report the incident to management. CPT's
Sexual Harassment policy states: "Any incidents of harassment
must be immediately reported to a manager or management
representative." (CPT Employee Manual, CPT0315.)

1 Further, although nurses and MHW's treated patients together,
2 nurses were organizationally superior to MHW's and gave them orders
3 concerning patient care.²⁶ Nurse Baker's deposition testimony
4 demonstrates why it was reasonable for Soares to complain about
5 Fuentes to the nursing staff, especially a nurse supervisor:

6 Q. Do you know if [Fuentes] was [Soares'] direct
7 supervisor?

8 A. He may have been at [the time of the shower
9 incident]

10 Q. Okay. And the protocol, according to the policy,
11 was complain first to your immediate supervisor,
12 and then obviously in this case she cant be
13 complaining to him. Who would be the next person
14 according to the protocol she should complain to?

15 A. The administrator or program director.

16 Q. Or director of nurses?

17 A. Yes.

18 Q. All right. And were you - did you tell the EEOC
19 investigator in your conversation with her that
20 you were shift supervisor at the time.

21 A. I was charge nurse.

22 Q. Is that the same thing?

23 A. Yeah. I would be considered a supervisor, yes.

24 [...]

25 Q. And it's your duty to make those sorts of reports?

26 A. Yes.

27 Q. Okay. Did you consider that comment from Mr.
28 Fuentes violated sexual harassment policy?

²⁶ Soares stated in her deposition that McClendon was superior to her and, being a nurse, she could give her orders. (Soares Dep. 38:8-38:20.) Soares stated this was the case even though Fuentes was her direct supervisor. (*Id.*)

1 A. Yes.

2
3 (Baker Dep. 49:4-50:5.)

4 There are sufficient facts in the record upon which a jury
5 could find that Soares' complaints to Nurses McClendon and Baker
6 constituted protected activity. In *EEOC v. Crown Zellerbach Corp.*,
7 720 F.2d 1008, 1013, the Ninth Circuit stated that it must be
8 possible to discern from the context of the statement that the
9 employee opposes an unlawful employment practice. Soares satisfies
10 this standard. Her comments were specific and apprised Nurses
11 McClendon and Baker of particular practices she viewed as
12 discriminatory. Although Soares did not complain to her direct
13 supervisor - per CPT policy - she did complain to supervisory-level
14 employees with whom she "felt comfortable."²⁷ Soares complained to
15 two nurses - one a direct charge nurse - about Fuentes' statements,
16 and the record supports this. Moreover, Nurse McClendon told
17 Fuentes his comments offended Soares and he did not report the
18 incident - a violation of CPT policy. CPT provides no authority
19 supporting the argument that such complaints, under the unique
20 circumstances presented, are not sufficient to create a genuine
21 issue of material fact.

22 It is also reasonable to infer that Soares' attempts to
23 contact Drayton constituted protected opposition activity. Soares
24 provided evidence reasonably warranting an inference that she
25 complained to Drayton, CPT's Director, about Fuentes' sexually

26
27 ²⁷ CPT policy stated that employees "must report
28 [harassment] to their immediate supervisor or the designated
management representative with whom they feel comfortable."

1 explicit "shower tirade" and his continued sexual harassment of CPT
2 employees. At the very least, Drayton had knowledge of the shower
3 incident - pursuant to an anonymous Department of Mental Health
4 Complaint - and likely inferred that Soares was the one who
5 complained to the Department of Mental Health.

6 Balancing all applicable factors, the EEOC's evidence is
7 enough to create a genuine issue of material fact. CPT has not met
8 its Rule 56 burden and demonstrated, as a matter of law, that
9 Soares did not engage in protected activity under Title VII.

10 CPT's motion for summary adjudication regarding Soares' claim
11 for retaliation is DENIED.

12 13 2. *Causal Connection*

14 For the first time in its reply papers, CPT argues that
15 Soares' does not establish a prima facie case for retaliation
16 because there is no "causal nexus" between CPT decision-makers and
17 Soares' complaints about Fuentes. In its opening motion, CPT
18 argued that Soares' did not establish a prima facie case because
19 Soares did not engage in a protected activity. CPT did not argue,
20 as it does in its reply papers, that Soares' claim fails because
21 the CPT decision-makers did not "have actual knowledge of the
22 protected activity in order for its decisions to be retaliatory."
23 (Def.'s Rep. 2:3-2:5.)

24 A moving party's attempt to introduce new facts or different
25 legal arguments in reply papers is improper. See *Lujan v. National*
26 *Wildlife Federation*, 497 U.S. 871, 894-895, 110 S.Ct. 3177, 3192
27 (1990) (court has discretion to disregard late-filed factual
28 matters); see also *Glenn K. Jackson v. Roe*, 273 F.3d 1192,

1 1201-1202 (9th Cir. 2001) (district court's discretion to consider
2 issue raised for first time in reply brief); *Jackson, Inc. v. Roe*,
3 273 F.3d 1192, 1202 (9th Cir.2001) (stating a district court "may
4 grant summary judgment on any legal ground the record supports.").
5 The "causal nexus" argument is new to CPT's reply papers and is
6 disregarded. The argument will not be considered as part of CPT's
7 motion for summary adjudication.²⁸

8
9 **B. Legitimate Business Reason**

10 CPT has set forth ample evidence to support its proffered
11 legitimate reason for Soares' termination: her sleeping during her
12 shift. Failure to perform in accordance with standards set by the
13 employer is sufficient to constitute a legitimate business reason
14 for termination. See *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1446
15 (9th Cir. 1985) (holding that Title VII does not protect employee
16 who violates employer's rules, disobeys orders and disrupts the
17 work environment); *Mansur v. Peralta Community College Dist.*, 216
18 F.3d 1083 (9th Cir. 2000). The record contains direct evidence
19 that Soares slept during her April 9, 2004 shift, a violation of
20

21 ²⁸ To survive summary judgment, Plaintiff "must make some
22 showing sufficient for a reasonable trier of fact to infer that
23 the defendant was aware that the plaintiff had engaged in
24 protected activity." *Raad*, 323 F.3d 1185, 1197; see also *Dey v.*
25 *Colt Const. & Dev. Co.*, 28 F.3d 1446, 1458 (7th Cir. 1994)
26 (stating, in a Title VII case, that a plaintiff "may rely on
27 circumstantial evidence to establish her employer's awareness of
28 protected expression" and the plaintiff must "produce evidence
that would support an inference that Irsay [a decision-maker] was
. . . aware" of the "sexual harassment complaints"). The EEOC
satisfies this burden. When construing the evidence in a light
most favorable to Plaintiff, a genuine issue of material fact
remains as to the causal connection between the alleged protected
activity and the adverse employment action.

1 CPT policy. (Drayton Dep. 43:6-37:17.) The record also
2 demonstrates that Soares knew of the policy prior to April 9, 2004.
3 (Soares Dep. 65:13-65:16.) CPT has met its burden of demonstrating
4 legitimate business reasons for terminating Soares' employment.

5
6 C. Pretext

7 CPT met its burden of offering legitimate, nondiscriminatory
8 reasons for its actions. Therefore, the burden shifts back to
9 Plaintiff to prove that this reason was merely pretextual.
10 Plaintiff can do so by either showing that the articulated reason
11 is "unworthy of credence" or that a discriminatory motive more
12 likely motivated Defendant. *Villiarimo v. Aloha Island Air, Inc.*,
13 281 F.3d 1054, 1062 (9th Cir. 2002). A plaintiff may rely on
14 circumstantial evidence to show pretext, but the evidence must be
15 both specific and substantial. *Id.*

16 The EEOC offers circumstantial evidence to show that CPT's
17 explanations for Soares' termination are pretextual. Specifically,
18 the EEOC presents relatively strong evidence based on timing, as
19 Soares' discharge occurred five weeks after her complaints to
20 nurses regarding the shower incident and a few weeks after her
21 repeated attempts to contact Drayton. The EEOC also demonstrates
22 CPT's lack of consistency to follow internal policies regarding
23 CPT's "no sleeping policy" and questions whether the sleeping
24 policy applies to MHW's. Soares argues that she was not sleeping
25 during her shift and that Steele's "surprise visit" was meant to
26 create a for-cause dismissal.

27 CPT, however, has offered strong evidence that Plaintiff's
28 termination was based on legitimate, nondiscriminatory factors --

1 namely, that Plaintiff was discharged for sleeping during her
2 shift, which occurred after the shower incident and less than 24
3 hours prior to Soares' dismissal. The EEOC has some evidence that
4 the sleeping policy was not consistently applied. However,
5 although the question is a close one, on balance, the EEOC has
6 pointed to enough evidence of pretext in the form of the timing,
7 circumstances of the discharge, and inconsistent application of
8 internal policies to survive summary judgment.

9 The EEOC's circumstantial evidence is sufficient to raise a
10 genuine issue of material fact because it demonstrates that an
11 illegitimate reason more likely than not motivated CPT, or was at
12 least a motivating factor in Soares' dismissal.

13 CPT's motion for summary adjudication as it relates to Soares'
14 claim for retaliation is DENIED.

15
16 C. Punitive Damages

17 42 U.S.C. § 1981a(b) (1) provides that punitive damages may be
18 recovered "if the complaining party demonstrates that the
19 respondent engaged in a discriminatory practice or discriminatory
20 practices with malice or with reckless indifference to the
21 federally protected rights of an aggrieved individual." The
22 Supreme Court found that the employer's behavior need not have to
23 be "egregious" to meet this standard. *Kolstad v. Am. Dental*
24 *Assoc.*, 527 U.S. 526, 534-35 (1999). Instead, punitive damages
25 will be awarded in cases of intentional discrimination where an
26 employer discriminates in the face of a perceived risk that its
27 actions will violate federal law. *Id.* at 534. The terms "malice"
28 and "reckless" focus on the employer's state of mind, that is, its

1 knowledge that it may be acting in violation of federal law. *Id.*

2 There are some instances in which intentional discrimination
3 will not give rise to punitive damage liability. *Passantino v.*
4 *Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 515 (9th
5 Cir. 2000). First, if the theory of discrimination advanced by the
6 plaintiff is sufficiently novel or poorly recognized, then the
7 employer could believe its action was legal. *Id.* Second, if the
8 employer believed it had a valid bona fide occupational
9 qualification (BFOQ) defense to its conduct. *Id.* Third, in some
10 situations, albeit rare, the employer could actually be unaware of
11 Title VII's prohibition against discrimination. *Id.*

12 In addition to meeting this standard, the plaintiff must also
13 impute liability for punitive damages to the employer. *Hemmings v.*
14 *Tidyman's, Inc.*, 285 F.3d 1174, 1197 (9th Cir. 2002). This can be
15 done through traditional agency principles, e.g., "that a
16 managerial employee acted within the scope of his or her
17 employment." *Id.*

18 An affirmative defense to punitive damage liability exists
19 where the defendant shows its good faith efforts to comply with
20 Title VII, "if such efforts were contrary to the actions of its
21 managerial agents." *Id.* at 1197-98. Not only must the employer
22 show it has an antidiscrimination policy, but that it has
23 implemented the policy in good faith. *Passantino v. Johnson &*
24 *Johnson Consumer Products, Inc.*, 212 F.3d 493, 517 (9th Cir. 2000).
25 The purpose of Title VII would be "undermined if those policies
26 were not implemented and were allowed instead to serve only as a
27 device to allow employers to escape punitive damages for the
28 discriminatory activities of managerial employees." *Id.*

1 1. Soares' Punitive Damage Claim

2 CPT submits that even if Fuentes' conduct is found to be
3 actionable, it is entitled to summary judgment on Soares' punitive
4 damages claim because "EEOC is unable to establish that CPT 'almost
5 certainly knew' of Mr. Fuentes' alleged misconduct at the time Ms.
6 Soares was terminated for sleeping on the job." (Doc. 40, 17:22-
7 17:23.) CPT's assertion is inconsistent with the record.

8 The record indicates that Drayton knew about Fuentes' comments
9 to Soares during the aforementioned shower incident. Although it
10 was presented as a patient care issue, Drayton knew about Fuentes'
11 comments and interviewed Fuentes and the patient concerning the
12 incident. He did not interview Soares. Drayton testified at his
13 deposition:

14 Q: Your testimony indicated that because you learned
15 about this episode through the Department of Mental
16 Health, you treated it as a patient violation as
opposed to like a sexual harassment violation. Do you
recall that testimony?

17 A: Yes, I do

18 Q: What exactly was entailed in investigating it as a
19 patient violation?

20 A: I spoke to the patient involved and I asked them
21 what had happened, was he offended by it, did he feel
22 that he was being treated in a manner outside of the
standard of care. And did he want to speak with - did
he want to speak with Larry directly and did he want
an apology from Larry.

23 Q: Did he want an apology from Larry?

24 A: No. I do not believe it was that big of a deal.

25 [...]

26 Q: Did you do anything else in connection with
27 investigating this episode as a patient violation?

28 A: Yes. I made a call to the Department of Mental
Health and explained to them what I had found and they

1 had told me at the time that they did not feel that
2 although it was unfortunate that it had happened, that
3 it was handled to their satisfaction and did not rise
4 to the level of citation.

5 (Drayton Dep. 285:1-286:6.)

6 The EEOC argues a material dispute exists because "Drayton did
7 nothing to investigate the matter as a potential sexual harassment
8 policy violation." (Pl.'s Opp. 30:26-30:28.) In essence, the EEOC
9 argues that CPT was on notice of the harassing event and chose to
10 look the other way, classifying the incident only as a "patient
11 safety issue." The EEOC argues that this was not the first time
12 CPT looked the other way; that CPT continually disregarded
13 harassment complaints against Fuentes. The EEOC contends that
14 CPT's conduct creates a genuine issue of material fact as to its
15 claim for punitive damages. This argument has merit.

16 Drayton's deposition testimony demonstrates that he knew about
17 Fuentes' sexually-charged comments to Soares; that he investigated
18 the incident as a patient care issue even though it involved
19 explicit sexual language and a repeat perpetrator of sexual
20 harassment - whose actions prompted sexual harassment in-service
21 training in November 2003. The record further indicates that Mr.
22 Omoregie - the Department of Mental Health's representative -
23 contacted Drayton prior to the shower incident to provide a
24 "chronology" of sexual harassment complaints involving Larry
25 Fuentes. This context is critical to the inquiry:

26 A. Mr. Omoregie asked me to give him a chronology of
27 what was going on with Larry because they had
28 received some complaints about him and he wanted
me to make sure that we were doing things to

1 safeguard the residents. If the things that he
2 was being attributed of doing were true, he
wanted to know what our global efforts were.

3 Q. Okay. Do you know - so Mr. Omoregie had received
4 some complaints about Fuentes. Do you know what
those complaints were?

5 A. He had gotten several complaints via telephone,
6 their hot line that some where of a sexual
7 nature, some of them were patient care nature
[...]

8 (Drayton Dep. 444:7-444:19.)

9
10 Drawing the inferences in the EEOC's favor, Drayton's
11 explanation regarding the limited scope of his investigation
12 undermines CPT's motion for summary adjudication and creates an
13 inference that CPT was inconsistent, careless, and reckless
14 concerning sexual harassment at CPT. Although the Department's
15 jurisdiction is limited to patient and licensing issues, that does
16 not provide CPT with an unrestricted mandate to ignore a number of
17 incidents of sexual harassment, especially when they involve a
18 repeat offender.²⁹ CPT's conduct comes under additional scrutiny
19 given that it knew about Fuentes' continued improper interactions
20 with female employees and Mr. Omoregie previously requested
21 Fuentes' sexual complaint history. In sum, Drayton's actions are
22 suspect - rather than consistent with regulatory compliance - and
23 create a genuine dispute of material fact as to whether or not
24 CPT's conduct in this regard was malicious, recklessly indifferent
25 or oppressive by ratifying Fuentes' continuing harassing conduct.

26 ²⁹ At the very least, Drayton should have interviewed Soares
27 as a percipient witness to the incident. CPT's Sexual Harassment
28 Policy states: "Appropriate investigation and disciplinary action
will be taken." (Doc. 41, Exh. B at CPT0315.)

1 As explained above under "Pretext," a rational trier of fact
2 could infer that CPT terminated Soares because she complained that
3 her rights against sexual discrimination were being violated. This
4 is sufficient for malice under Title VII. *Ezell v. Edwards*
5 *Theatres, Inc.*, 2006 WL 3782698 at *20 (E.D. Cal. 2006). It is
6 true that mere evidence of an intentional violation has been held
7 insufficient, but the showing required beyond the threshold level
8 of intent required for compensatory liability is wilful and
9 egregious conduct, or conduct that displays reckless indifference
10 (and not mere negligence) to the Plaintiff's federal rights such
11 that the defendant almost certainly knew that what he was doing was
12 wrongful and subject to punishment. *Ngo v. Reno Hilton Resort*
13 *Corp.*, 140 F.3d 1299, 1303-05 (9th Cir.1998), amended 156 F.3d 988,
14 988-89 (9th Cir.1998) (holding that merely negligent calculations
15 with respect to taking leave did not support punitive damages).
16 The evidence in this case is sufficient to raise an issue of fact
17 as to whether or not CPT's conduct was malicious, recklessly
18 indifferent to known federally protected rights of Soares, and
19 oppressive.

20 CPT's motion for summary adjudication is DENIED as to Soares'
21 claim for punitive damages.

22 23 2. Somera's Punitive Damage Claim

24 CPT argues that punitive damages are not available in this
25 case because it made good faith efforts to comply with Title VII by
26 having a policy against sexual harassment, investigating the claims
27 of harassment, disciplining the harasser, and providing in-service
28 sexual harassment training.

1 The EEOC submits there is substantial evidence creating a
2 genuine issue of material fact. This includes that CPT did not
3 appropriately respond to Somera's allegations, including her
4 repeated complaints to Sherry Wall and other supervisors and
5 employees. Additionally, CPT's managers, Wall and McGowan, had
6 knowledge of Fuentes' serial sexual misconduct and did not respond
7 for eight months. CPT never effectively punished Fuentes for his
8 conduct, seemingly condoning his behavior. Plaintiff asserts other
9 evidence that Drayton omitted any reference to Somera's sexual
10 harassment complaints when asked to detail episodes of Fuentes'
11 potentially inappropriate behavior.

12 An affirmative defense exists to punitive damage liability
13 when an employer has a bona fide policy against discrimination and
14 did not ignore Plaintiff's complaint. Defendant did have an
15 anti-harassment policy and Somera knew of the policy. But this is
16 not the end of the inquiry. There was testimony that sexual
17 harassment training was illusory. Specifically, according to
18 Somera, Fuentes - the individual whose harassment brought on the
19 in-training - talked on the telephone the entire time and did not
20 pay attention. (Somera Dep. 138:9138:17.) The record also
21 contains testimony that Fuentes actually conducted a portion of the
22 sexual harassment in-training. (Soares Dep. 77:19-77:24.) The
23 employer must show it implemented its policy in good faith. See
24 *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d
25 493, 517 (9th Cir. 2000). It must be shown that CPT made efforts
26 to implement its policy, through education of its employees and
27 active enforcement of its mandate. See *Lopez v. Aramark Uniform &*
28 *Career Apparel, Inc.*, 426 F. Supp. 2d 914, 964 (N.D. Iowa 2006).

1 Even if an employer adduces evidence showing it maintains on
2 paper a strong non-discrimination policy and makes good faith
3 efforts to educate its employees about that policy and Title VII,
4 an employee may still recover punitive damages for sexual
5 harassment by demonstrating the employer failed to adequately
6 address Title VII violations of which it was aware. *Cadena v.*
7 *Pacesetter Corp.*, 224 F.3d 1203, (10th Cir. 2000).

8 After reviewing the evidence in a light most favorable to
9 Plaintiff, there is sufficient evidence that CPT acted in the face
10 of this awareness by ignoring Somera's complaints, not disclosing
11 Fuentes' history of harassment, and giving Fuentes a meaningless
12 warning for his repeated use of sexually-charged language and
13 touching female employees. See *Rowe v. Hussmann Corp.*, 381 F.3d
14 775, 784 (8th Cir. 2004) ("Recklessness and outrageousness may be
15 inferred from evidence of management's participation in the
16 discriminatory conduct or where an employee's repeated complaints
17 to supervisors fall on deaf ears.") (internal citations and
18 quotation marks omitted).

19 A jury must decide whether CPT engaged in good faith efforts
20 to comply with Title VII.

21 CPT's motion for summary adjudication is DENIED as to Soares'
22 claim for punitive damages.

24 VI. CONCLUSION.

25 A. Jurisdictional Prerequisites.

26 For the reasons discussed above:

27 1. The EEOC's motion as to whether it satisfied the conditions
28 precedent to bring suit on behalf of charging party Soares is

1 GRANTED.

2 2. The EEOC motion as to whether it satisfied the conditions
3 precedent to bring a hostile work environment claim on behalf of
4 charging party Somera is GRANTED. CPT's motion for summary
5 adjudication in this regard is DENIED.

6 3. Summary adjudication is GRANTED in favor of CPT regarding
7 the EEOC's ability to bring a constructive discharge claim on
8 Somera's behalf. The EEOC's motion in this regard is DENIED.

9 4. Given the ruling on Somera's constructive discharge claim,
10 it is unnecessary to decide the motions regarding whether the EEOC
11 satisfied the statutory prerequisite to conciliate. The EEOC's and
12 CPT's motions regarding the statutory prerequisite to conciliate
13 are DENIED as MOOT.

14 5. Summary adjudication is GRANTED in favor of the EEOC
15 regarding its ability to bring a hostile work environment claim on
16 behalf of allegedly aggrieved persons. CPT's motion in this regard
17 is DENIED.

18
19 B. Substantive Claims.

20 For the reasons discussed above:

21 1. CPT's motion on Soares' hostile work environment claim is
22 DENIED. Construing the evidence in EEOC's favor, there is a
23 triable issue as to whether Soares' work environment was
24 sufficiently hostile to violate Title VII.

25 2. CPT's motion for summary adjudication on Soares'
26 retaliation claim is DENIED. The EEOC established a prima facie
27 case for retaliation and CPT demonstrated a legitimate business
28 reason for Soares' termination. However, the EEOC's evidence is

1 sufficient to raise a genuine issue of material fact as it
2 demonstrates that an illegitimate reason more than likely motivated
3 CPT, or was at least a motivating factor in Soares' dismissal.

4 3. CPT's motion for summary adjudication as to Soares'
5 punitive damage claim is DENIED. The evidence is sufficient to
6 raise an issue of fact as to whether or not CPT's conduct was
7 malicious, oppressive, or recklessly indifferent to known federally
8 protected rights of Soares.

9 4. CPT's motion for summary adjudication as to Somera's
10 punitive damage claim is DENIED. A jury must decide whether CPT
11 engaged in good faith efforts to comply with Title VII.

12 Plaintiff shall submit a form of order consistent with this
13 memorandum decision within five (5) days of electronic service.

14 IT IS SO ORDERED.

15 Dated: July 31, 2009

/s/ Oliver W. Wanger

16 UNITED STATES DISTRICT JUDGE