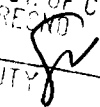


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CLERK, US DIST. COURT
EASTERN DIST. OF CALIF
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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

OLIVIA TAMAYO,

Plaintiff-Intervenor,

v.

HARRIS FARMS, INC.,

Defendant.

CIV F 02-6199 AWI LJO

ORDER ON DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

This is a sexual harassment case brought by the EEOC and Olivia Tamayo against Harris Farms, Inc. Harris Farms now moves for summary judgment. For the reasons that follow, Harris Farms's Motion for Summary Judgment shall be denied.

FACTS¹

Plaintiff Olivia Tamayo ("Tamayo") began working for Defendant Harris Farms ("Harris") in 1985 as a seasonal laborer. Tamayo is monolingual Spanish and has a very limited

¹The facts are taken from all of the evidence submitted by the parties in this case, but are drawn largely from Plaintiffs' Statement of Disputed Facts as Harris made no objections thereto.

1 vocabulary of spoken English. Tamayo did not attend school past the third grade and is unable to
2 read or write English. Harris is a large farming interest that was founded in 1937. Harris is
3 family owned and maintained. Harris's operations cover several thousand acres of farmland and
4 grows approximately thirty-three different varieties of produce. Harris is one of the largest
5 integrated farming ventures in the world.

6 In 1990, Tamayo received a copy of the 1989 Harris Farms Employee Handbook. The
7 handbook, which was in Spanish and English, contained a section on "harassment." That section
8 of the handbook, in its entirety, read:

9 The company strongly disapproves of any form of employment related
10 harassment. Our organization maintains a policy of freedom from discrimination
11 and bias. To guarantee that all personnel will cooperate in implementing that
12 policy, the following specific elements of the policy should be noted:

- 13 1. All supervisors and employees will ensure and maintain a bias-free
14 and non-discriminatory work environment.
- 15 2. The use of verbally derogatory racial, ethnic and sexual epithets
16 will not be tolerated.
- 17 3. All employees will be treated without regard to race, ancestry,
18 color, sex, pregnancy, religion, national origin, age, medical
19 condition or handicap (that does not render the person unable to
20 carry out normal assigned duties), marital status or to any other
21 condition which is protected by law in regard to but not limited to
22 promotions, transfers, job rotation, training, work assignment,
23 merit increases, overtime, employment tests, related employment
24 decisions.
- 25 4. Racial, ethnic, or sexual harassment by any person in the employ of
26 the organization shall not be tolerated.
- 27 5. An employee who feels that this policy is being violated should
28 report that belief to the appropriate executive director or the
manager immediately either in writing or personally. The
executive director or manager shall investigate the allegation and
shall take corrective action as deemed appropriate.

Plaintiffs' Exhibit V.

Tamayo began working with Rene Rodriguez in March 1993. That same month,
Rodriguez placed Tamayo "in charge of the people" in Tamayo's agriculture crew and it appears

1 that Rodriguez was a supervisor with Harris.² In June 1993, Rodriguez allegedly raped Tamayo
2 for the first of three times. On the day of the rape, Tamayo was weeding tomatoes in one of
3 Harris's fields. See Plaintiffs's Disputed Facts No. 3.³ Rodriguez gave Tamayo a soda during a
4 morning break and told her that he wanted to show her the crew's next field. Rodriguez drove
5 Tamayo in a company truck towards a different field, but instead of stopping, he drove into an
6 almond field owned by a different ranch. See id. Rodriguez showed Tamayo a gun, put the gun
7 on the dashboard so that it was always within his reach, and then raped Tamayo in the truck.
8 See id. Rodriguez later took Tamayo back to the field and told her not to tell anyone, including
9 her husband, what had happened. See id. at No. 5. Rodriguez had the weapon and said that he
10 could kill Tamayo's husband if he tried to fight. See id. Rodriguez also told Tamayo that he had
11 fought another employee, Matias Barerra, over Barerra's wife because "when he likes a woman .

12
13 ²Harris disputes that Rodriguez was a supervisor and instead argues that he took food, water, and toilets to
14 the agriculture crews. Harris does not, however, cite to evidence in support this contention. As explained *infra*,
15 Rodriguez is the alleged principal harasser. Whether an alleged harasser is a supervisor or co-worker is dependant
16 on whether harasser had the authority to demand obedience from other employees; it is not dependent on job titles.
17 See McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1119 n.13 (9th Cir. 2004). If the harasser engaged in supervision
18 of or had authority over the plaintiff, the alleged harasser would qualify as the plaintiff's supervisor irrespective of
19 whether the employer defined the alleged harasser's job in that manner. See Swinton v. Potomac Corp., 270 F.3d
20 794, 803-805 (9th Cir. 2001).

21 Tamayo has offered the following facts, to which Harris makes no objection, in order to show that
22 Rodriguez was a supervisor:

- 23 1. Rodriguez put Tamayo in charge of a crew in 1993, which resulted in a pay increase for Tamayo.
- 24 2. Rodriguez told members of the crew the he would be sending Tamayo with orders and the crew
25 should follow what Tamayo said as she would be carrying out his orders.
- 26 3. Tamayo and at least one other employee believed that Rodriguez was Tamayo's supervisor.
- 27 4. In a December 1996 Human Resources document, it is noted that Rodriguez "supervises some
28 crews . . . [and was then] supervising the crew shooting birds."
- 29 5. Rodriguez evaluated Tamayo's performance and made recommendations as to her re-hire for the
30 next season.
- 31 6. Rodriguez was sent to Sexual Harassment training for supervisors.
- 32 7. Rodriguez was sent to supervisory training "numerous times."
- 33 8. Rodriguez indicated that he was a "foreman" on various company records.
- 34 9. Rodriguez is listed as "supervision" on various time sheets.
- 35 10. In December 1999, he executed an affidavit that states, "I was a supervisor at Harris Farms."

36 See Tamayo's Statement of Disputed Facts 43-51. This evidence is sufficient to raise a genuine issue as to whether
37 Rodriguez was Tamayo's supervisor for Title VII purposes. For purposes of this summary judgment, the Court will
38 assume that Rodriguez was Tamayo's supervisor.

39 ³Hereinafter, "PDF" refers to Plaintiffs' Disputed Facts.

1 . . he wouldn't leave her alone." See id. at No. 6.

2 The second rape occurred in September 1993. Rodriguez cut off Tamayo's car as she was
3 driving to a field and then ran to her car with his gun in hand. Rodriguez threatened Tamayo and
4 forced his way into the car, where he again raped her. See id. at No. 8. Rodriguez had been on
5 duty and had been driving a company truck at the time. See id.

6 The third rape occurred at Tamayo's home in November 1994. Rodriguez threatened
7 Tamayo with his gun in order to gain entry to the house. See id. at No. 9. Once inside the home,
8 Rodriguez raped Tamayo. No witnesses to these three rapes have been located, and Tamayo did
9 not report the rapes to Harris at the time they occurred. See Plaintiffs's Response to Defendant's
10 Statement of Undisputed Facts Nos. 17 & 30.

11 In addition to the three rapes, between 1993 and 1999, each time Rodriguez was alone
12 with Tamayo, he would tell her how much he liked her and that he did not want her talking to
13 any other workers. See PDF No. 10. He would also call her a "bitch" and threaten her by putting
14 his hand on his pocketknife, which was in his pocket. See id. If he saw Tamayo talking to other
15 workers, Rodriguez would pull out the pocketknife and expose the blade, but would do so in a
16 manner such that others could not see the knife. See id.

17 In 1996, Tamayo attended a seminar sponsored by Harris concerning sexual harassment.
18 See Plaintiffs's Response to Harris's Undisputed Material Facts No. 9. The seminar was
19 conducted in Spanish and English. See Declaration of Olivia Tamayo at ¶ 3. Although language
20 was not a problem, Tamayo did not understand "a lot" of what was being taught. See id.

21 Later, in December 1996, Maria Martinez, an employee of Harris, told Harris's Human
22 Resources personnel that Rodriguez had made three phone calls to her expressing a romantic
23 interest and had also driven by and parked outside of her home. See PDF at No. 12. Harris
24 instituted an investigation into Rodriguez's conduct and Tamayo was interviewed. See id. at No.
25 13. Rodriguez told Tamayo to report to Human Resources office and told her that the company
26 wanted to talk to her. See Declaration of Olivia Tamayo at ¶ 5. It made Tamayo nervous that
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1 Rodriguez had directed her to the Human Resources office. See id.

2 Tamayo was interviewed on January 8, 1997, about Martinez's complaint of sexual
3 harassment. See Plaintiffs' Exhibit L. An interpreter, who was a male, was present, and Tamayo
4 was asked a number of questions including whether Rodriguez told her why she was asked to the
5 meeting, and whether she had any relatives who were also employees. See PDF No. 13. Tamayo
6 did not feel at ease during the meeting and felt that Harris was bias against Maria. See
7 Declaration of Olivia Tamayo at ¶ 5. Tamayo did not disclose any of the harassment or rapes by
8 Rodriguez. See Plaintiff's Response to Defendant's Statement of Undisputed Facts No. 17. At
9 the meeting, Tamayo stated that she had no problems with or complaints about Rodriguez, and
10 that the interview was the first time that she had heard about him sexually harassing. See
11 Plaintiffs' Exhibit L. Tamayo also said that she has told employees that if they are harassed, to
12 let her know and that "she will find out what she has to do." See id. On January 22, 1997,
13 Rodriguez was given a three-day suspension as a result of Martinez's complaints and was given a
14 "final written warning" that warned him that any similar conduct would subject him to further
15 discipline, including termination. See PDF No. 14; Plaintiff's Exhibit SS.

16 In late 1998, Tamayo spoke to her supervisor, Audelio Corona, about Rodriguez's
17 placement of the toilets and Rodriguez talking to her. See Deposition of Olivia Tamayo at 323:3-
18 12. Tamayo asked Corona to speak to Rodriguez about were to move the bathrooms when
19 Tamayo moved with her Caterpillar [equipment]. See id. at 324:6-13. Tamayo also told Corona
20 that Rodriguez would bother her whenever Tamayo's crew would move, specifically, that
21 Rodriguez would come down and ask where the crew was moving.⁴ See id. at 324:15-22.
22 Tamayo told Corona that she did not want Rodriguez to get close to her or bother her and that she
23 was fed up with Rodriguez. See id. at 324:19-325:8. Corona said that he wanted talk to
24 Rodriguez as Rodriguez had left Tamayo's crew without a bathroom for a period of time that
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26 ⁴The deposition testimony is not entirely clear regarding the nature of the equipment and jobs of Tamayo
27 and Rodriguez.

1 day. See id. at 325:2-5. Corona also said that Rodriguez's conduct was because he liked Tamayo
2 a lot. See id. at 325:23-25. Rodriguez did not stop bothering Tamayo. See id. at 325:11-17.
3 Tamayo did not, however, tell Corona that she was being sexually harassed by Rodriguez. See
4 id. at 325:21-23.

5 On June 10, 1999, Tamayo spoke with Corona on a road next to one of Harris's fields.
6 See PDF No. 17. Later, Rodriguez stopped Tamayo and angrily warned her not to talk to other
7 men. See id. Sometime before July 19, 1999, a similar event occurred when Rodriguez stopped
8 Tamayo's truck and asked her why she was talking with another man. See id.

9 On July 19, 1999, Rodriguez blocked Tamayo with his truck. See id. at No. 18. Tamayo
10 had her left arm dangling out her window and Rodriguez grabbed her hand. See id. Rodriguez
11 slapped Tamayo and pulled her hair. See id. Rodriguez said that he was jealous of Corona,
12 pulled out his gun, and said "I can kill you now you son of a bitch." See id.

13 Within days of this incident, Tamayo told her supervisor, Rene Enriquez,⁵ that she had a
14 big personal problem with a crazy person. See id. at No. 19. Tamayo could not remember
15 exactly what she told Enriquez, but she told Enriquez about Rodriguez and that Rodriguez had
16 been bothering her. See Deposition of Olivia Tamayo at 360:12-25. It does not appear that
17 Tamayo told Enriquez about the rapes or Rodriguez's use of the gun or pocketknife. See id. at
18 360:9-25.

19 On July 26, 1999, Tamayo complained to Human Resources that, for at least three years,
20 Rodriguez had been harassing her by repeatedly telling her that he liked her and asking her out.
21 See PDF No. 20. Tamayo also told Harris about the July 10, 1999, incident and the July 19,
22 1999, assault. See id. Tamayo expressed her fears that Rodriguez's harassment would again
23 become violent and said that Rodriguez carried a gun and knife to work with him. See id. She
24 did not reveal the rapes. After Tamayo spoke with Human Resources, Harris recommended to
25 Tamayo, and offered to help obtain, a preliminary injunction against Rodriguez that would
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27 ⁵Both Corona and Enriquez were Tamayo's supervisors.
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1 prohibit further harassment. See Plaintiff's Response to Defendant's Undisputed Facts No. 35.

2 Fresno County Sheriff's Deputy Dana Crittenden was called to investigate the July 19,
3 1999, battery. See Defendant's Exhibit 12 at ¶ 4. Tamayo told Crittenden that Rodriguez had
4 pulled her hair and then hit her arm. See id. at ¶ 5. Sylvia Gomez, one of Harris's Human
5 Resources personnel, said that Tamayo had initially said that Rodriguez had grabbed her arm
6 instead of hitting it. See id. Crittenden recalled that Tamayo was constantly squirming, would
7 not make eye contact, and gave indirect and disjointed answers. See id. at ¶ 6. Tamayo asserted
8 that Rodriguez was just a friend. See id. at ¶ 7. When asked why Rodriguez would act they way
9 he did, Tamayo explained that Rodriguez had seen another man in her truck. See id. Tamayo
10 also said that Rodriguez had given her a bracelet, that her husband had found the bracelet, and
11 that her husband was very upset. See id. Tamayo denied any sexual relationship with Rodriguez
12 and did not mention the rapes to Crittenden. See id. at 11.

13 Crittenden also interviewed Rodriguez. See id. at ¶ 9. Rodriguez denied hitting Tamayo
14 or pulling her hair. See id. Rodriguez made eye contact with Crittenden throughout the
15 interview and was very quick to answer questions, except when asked about his relationship with
16 Tamayo. See id. Crittenden concluded that, at most, Rodriguez grabbed Tamayo's arm, that this
17 was not a criminal matter, and recommended that Harris separate Tamayo and Rodriguez so as to
18 avoid future contact. See id. at 10.

19 On August 2, 1999, after interviewing various employees, including Rodriguez, Harris's
20 Human Resources consultant, Shirley Butts, drafted a memo. See PDF No. 21. Butts found
21 Tamayo to be generally credible, but that there were conflicting stories. See Exhibit N. Butts
22 recommended, and Harris ordered, the following: (1) Rodriguez was ordered to have no contact
23 with Tamayo, nor was he to retaliate against her in any way; (2) Rodriguez was reassigned to the
24 irrigation department in order to ensure such interaction would not take place again; (3)
25 Rodriguez was required to attend additional sexual harassment training; and (4) Rodriguez was
26 ordered not to discuss the complaint or the outcome of the investigation with anyone other than
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1 upper management or Human Resources. See Defendant's Statement of Undisputed Facts No.
2 34; Plaintiffs's Exhibit N. Additionally, Rodriguez was not demoted, did not receive a reduction
3 in wages, and was payed for each of the seven days that he had been suspended during the
4 investigation. See PDF No. 21. During the investigation, various employees indicated that there
5 were rumors that Tamayo and Rodriguez were having an affair. See PDF Nos. 54 & 55; see also
6 PDF No. 53.

7 On August 16, 1999, Tamayo was working alone in a field when she saw Rodriguez's
8 blue truck drive slowly by the field. See Deposition of Olivia Tamayo at 406:8-407:6; Plaintiff's
9 Exhibit P. Tamayo reported the incident to Human Resources and said that she was frightened
10 by Rodriguez's behavior and fearful for Corona (Rodriguez had threatened to kill Corona if
11 Tamayo continued to have contact with Corona). See id. A meeting with Human Resources was
12 made for August 18, 1999. See id.

13 At the August 18 meeting, Tamayo said that she wanted to tell the whole truth and
14 revealed the rapes by Rodriguez. See Plaintiffs' Exhibit P. Tamayo explained that Rodriguez
15 had made threats with his knife and gun, that he had told her about fighting over Barerra's wife,
16 and that Rodriguez said that he kept his job because the paperwork was destroyed by Rafael
17 Reyna, a relative of Rodriguez. See id. Tamayo stated that she had not said anything about the
18 rapes because her husband had not known. See id. Tamayo also explained that if she had gone
19 to the office to report Rodriguez's conduct when Reyna was present, then Rodriguez would have
20 found out.⁶ See id. Tamayo told Human Resources that she was very scared, that she was
21 dominated by Rodriguez, and fearful for her husband's safety if her husband were to confront
22 Rodriguez. See id. Tamayo identified three employees as possible witnesses. See id.

23 Harris re-interviewed Rodriguez on August 29, 1999, and then again on September 29,
24 1999. See Plaintiff's Exhibits R & OO. Rodriguez denied Tamayo's allegations and stated that
25 they had had a consensual relationship that had ended on good terms. See Plaintiff's Exhibit OO.

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27 ⁶Reyna appears to have been a supervisor of some sort with Harris.

1 Harris also interviewed two of the potential witnesses identified by Tamayo, Lourdes Ramirez
2 and Maria Martinez on October 13, 1999. See PDF No. 30. Ramirez told Human Resources that
3 Rodriguez would scream at Tamayo, give Tamayo orders energetically, and always wanted
4 Tamayo to be around him. See id. at No. 31. Ramirez also said that Rodriguez would get upset
5 when other men were working or talking with Tamayo. See id. It does not appear that the third
6 suggested witness, Armando Soto, was ever interviewed. See id. at No. 30.

7 Tamayo was never told by Human Resources that they had finished their investigation of
8 the August 18, 1999, complaint, nor whether any kind of determination had been made. See
9 Declaration of Olivia Tamayo at ¶ 6. It appears that no other corrective action was taken, and
10 Rodriguez retired from Harris in December 1999. See PDF at 33. Additionally, Tamayo filed an
11 EEOC Charge of Discrimination on September 24, 1999, which was “Fedexed” to Harris the
12 same day. See PDF No. 28.

13 Tamayo made no further complaints to Harris until January 29, 2001. See PDF No. 57.
14 Tamayo complained to supervisory personnel about threats and gossip concerning herself and
15 Rene Rodriguez. See Plaintiff’s Exhibits JJ & PP. The rumors were spread by Jose Hernandez,
16 Clarisa Mendoza, and Refugio Mosqueda. See PDF No. 58. Both Mendoza and Mosqueda had
17 been issued “final written warnings” in 1998 for engaging in sexual harassment. See id. at No.
18 59. On February 3, 2001, Tamayo met with Human Resources to discuss the problem with
19 gossip. See id. at 61. Tamayo had earlier requested that she not work alone because she was
20 fearful that something may happen. See Plaintiffs’ Exhibit KK. During the February 3 meeting,
21 Tamayo was told that her request was denied; Tamayo then requested to meet with the Farm
22 Manager, Larry Chrisco, along with her two supporting witnesses, Lourdes and Gustavo Ramirez.
23 See PDF No. 61.

24 The rumors being spread centered around the situation with Rodriguez (that Rodriguez
25 and Tamayo had had an affair), and that Tamayo had asked Hernandez how he made love to his
26 wife, to which Hernandez, in turn, asked Tamayo how she made love to her husband. See
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1 Plaintiff's Exhibit LL. Tamayo told Chrisco that rumors were being spread that Plaintiff liked
2 "to be on top of men." See id. Mendoza and Mosqueda also were saying that Gustavo Ramirez
3 was the source of the rumor of the conversation between Tamayo and Hernandez. See id. Also,
4 before meeting with Chrisco, Gustavo and Lourdes Ramirez's work vehicles were vandalized,
5 including cutting the brake lines on one of the trucks. See PDF No. 63.

6 At the meeting with Chrisco on February 21, the rumors and the recent vandalism were
7 discussed. See id. at No. 64. Tamayo explained the rumors about her and Hernandez and
8 Rodriguez. See Plaintiff's Exhibit MM. Tamayo also stated that Mendoza was in
9 communication with Rodriguez and there was a threat that Rodriguez (and possibly others) were
10 going to harm Tamayo. See id. Tamayo indicated that the problems and rumors were in the
11 Almond Department. See id. Additionally, Gustavo Ramirez explained that Mendoza and
12 Mosqueda had been offered \$2,000.00 to drug Tamayo and then get pictures of her having sex
13 with another man; the pictures were to be sent to Rodriguez and Tamayo's husband. See
14 Plaintiff's Exhibits LL & MM. Gustavo Ramirez also told Chrisco that Mendoza and Mosqueda
15 had threatened him that he would lose his job if he spoke to Chrisco. See Exhibit LL.

16 Harris's Human Resources Department determined that there were two groups involved
17 in the rumors, each group claiming that the other group had started the problem. See Deposition
18 of Sylvia Gomez at 235:18-236:2. Because of previous warnings, Lourdes Ramirez, Mendoza,
19 and Mosqueda were each terminated. See Harris's Exhibit 28. Gustavo Ramirez was given a
20 "final written warning." See Harris's Exhibit 27. Tamayo and Jose Hernandez were also given
21 "final written warnings," and both were suspended. See Harris's Exhibit 29. Tamayo's
22 suspension was for one day and Hernandez's was for three days. See id. The March 12, 2001,
23 suspension memo explained to Tamayo that there was no proof as to who started the rumors and
24 that there was a lot of "he said/she said." See id. The memo continued, "We do believe that
25 inappropriate comments were made by each of the employees involved in the investigation." See
26 id. Other than the memo, no one ever explained to Tamayo why she was being suspended or
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1 what she did to warrant suspension. See Declaration of Olivia Tamayo at ¶ 9. When Tamayo
2 asked what action had been taken against Mendoza and the other employees, Sylvia Gomez
3 refused to tell, but did say that Mendoza received a harsh punishment. See PDF No. 69;
4 Deposition of Sylvia Gomez at 254:2-5.

5 Tamayo returned from her one day suspension and tendered her resignation. Tamayo
6 testified that she resigned because she was tired of the harassment and gossip. See PDF No. 70.
7 Tamayo was afraid because her co-workers were saying that “something more could happen,”
8 which was why she turned to Harris and Farm Manager Larry Chrisco. See id.; Deposition of
9 Olivia Tamayo at 319:17-20. Tamayo was also very bothered by the conduct of Hernandez and
10 Mendoza because they were talking about “doing something against [her],” and Mendoza was in
11 communication with Rodriguez. See PDF No. 70. Tamayo was also upset that Mendoza and
12 Hernandez would “get close to her” and that Hernandez was spreading sexual rumors among the
13 workers in the Almond Department. See Deposition of Olivia Tamayo at 318:20-319:20.

14 In 2002, the Equal Employment Opportunity Commission (“EEOC”) brought a sexual
15 harassment/discrimination suit against Harris. Tamayo later intervened. Harris now moves for
16 summary judgment on Plaintiffs’s claim of sexual harassment under the Civil Rights Acts of
17 1964 and 1991, California Government Code § 12900, and Article I, § 8 of the California
18 Constitution. Harris also moves for summary judgment on Plaintiffs’s claims for retaliation and
19 constructive discharge under these statutes.⁷

21 ⁷There is a dispute as to the scope of Plaintiffs’ complaints. In their opposition, Plaintiffs argue that they
22 are asserting five claims: (1) supervisor hostile-environment harassment from 1993 to 1999; (2) co-worker hostile-
23 environment in 2001; (3) retaliation stemming from Tamayo’s 1999 complaint; (4) retaliation stemming from
24 Tamayo’s 2001 complaint; and (5) a constructive discharge claim. See Plaintiffs’ Opposition at 3. Defendant argues
that Plaintiffs’ complaint alleged three causes of action (harassment, retaliation, and constructive discharge), but has
now “mushroomed” into five separate claims. Harris argues that this is an impermissible amendment of the
complaints.

The relevant paragraphs in the complaint and complaint in intervention read:

25 “Since at least 1993, Defendant has engaged in unlawful employment practices in violation of
26 [Title VII]. These practices include subjecting [Tamayo] to a sexually hostile, abusive,
intimidating and offensive work environment, which culminated in a tangible employment action.”

27 “Since at least August of 1999, Defendant subjected [Tamayo] to adverse employment actions in

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56©); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Fortyune v. American Multi-Cinema, Inc., 364 F.3d 1075, 1080 (9th Cir. 2004); Jung v. FMC Corp., 755 F.2d 708, 710 (9th Cir. 1985). Where summary judgment requires the court to apply law to undisputed facts, it is a mixed question of law and fact. See Sousa v. Unilab Corp. Class II (Non-Exempt) Members Group Benefit Plan, 252 F. Supp.2d 1046, 1049 (E.D. Cal. 2002). Where the case turns on a mixed question of law and fact and the only dispute relates to the legal significance of the undisputed facts, the controversy for trial collapses into a question of law that is appropriate for disposition on summary judgment. See Union Sch. Dist. v. Smith, 15 F.3d 1519, 1523 (9th Cir. 1994); Sousa, 252 F.Supp.2d at 1049.

Under summary judgment practice, the moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). “[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the ‘pleadings, depositions, answers to interrogatories, and admissions on file.’” Id. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of

retaliation for her opposition to and rejection of the sexual harassment in violation of [Title VII] These practices include but are not limited to demotion, isolation from other employees, continued harassment, suspension for filing a grievance, all leading to her constructive discharge on March 13, 2001.”
EEOC’s Complaint at 2-3, ¶¶ 7-8; Olivia Tamayo’s Complaint in Intervention at 3, ¶¶ 9-10.

These allegations are broad and they do not expressly limited the specific claims to harassment only by Rodriguez or retaliation occurring only as a result of Tamayo’s 1999 complaint. The five specific claims named by Plaintiffs in their opposition fit within the broad allegations made in their complaint. The Court cannot agree that Plaintiffs are trying to amend their complaint without permission.

1 an element essential to that party's case, and on which that party will bear the burden of proof at
2 trial. Id. at 322. "[A] complete failure of proof concerning an essential element of the
3 nonmoving party's case necessarily renders all other facts immaterial." Id. In such a
4 circumstance, summary judgment should be granted, "so long as whatever is before the district
5 court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56©), is
6 satisfied." Id. at 323.

7 If a moving party fails to carry its burden of production, then "the non-moving party has
8 no obligation to produce anything, even if the nonmoving party would have the ultimate burden
9 of persuasion." Nissan Fire & Marine Ins. Co. v. Fritz Companies, 210 F.3d 1099, 1102-03 (9th
10 Cir. 2000). If the moving party meets its initial burden, the burden then shifts to the opposing
11 party to establish that a genuine issue as to any material fact actually does exist. See Matsushita
12 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Nolan v. Cleland, 686 F.2d
13 806, 812 (9th Cir. 1982); Ruffin v. County of Los Angeles, 607 F.2d 1276, 1280 (9th Cir. 1979).
14 A fact is "material" if it might affect the outcome of the suit under the governing law. See
15 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986); Thrifty Oil Co. v. Bank of
16 America Nat'l Trust & Savings Assn, 322 F.3d 1039, 1046 (9th Cir. 2002). A "genuine issue of
17 material fact" arises when the evidence is such that a reasonable jury could return a verdict for
18 the nonmoving party. See Anderson, 477 U.S. at 248-49; Thrifty Oil, 322 F.3d at 1046.

19 In attempting to establish the existence of a factual dispute, the opposing party may not
20 rely upon the mere allegations or denials of its pleadings, but is required to tender evidence of
21 specific facts in the form of affidavits, and/or admissible discovery material, in support of its
22 contention that the dispute exists. Rule 56(e); Matsushita, 475 U.S. at 586 n.11; First Nat'l Bank,
23 391 U.S. at 289; Willis v. Pacific Maritime Ass'n, 244 F.3d 675, 682 (9th Cir. 2001). However,
24 the opposing party need not establish a material issue of fact conclusively in its favor. It is
25 sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the
26 parties' differing versions of the truth at trial." First Nat'l Bank, 391 U.S. at 290; Hopper v. City
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1 of Pasco, 248 F.3d 1067, 1087 (9th Cir. 2001). Thus, the “purpose of summary judgment is to
2 ‘pierce the pleadings and to assess the proof in order to see whether there is a genuine need for
3 trial.’” Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on
4 1963 amendments); Mende v. Dun & Bradstreet, Inc., 650 F.2d 129, 132 (9th Cir. 1982).

5 In resolving the summary judgment motion, the court examines the pleadings,
6 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if
7 any. See Rule 56©); Fortyune, 364 F.3d at 1079-80. The evidence of the opposing party is to be
8 believed, and all reasonable inferences that may be drawn from the facts placed before the court
9 must be drawn in favor of the opposing party. See Anderson, 477 U.S. at 255; Matsushita, 475
10 U.S. at 587; Stegall v. Citadel Broad, Inc., 350 F.3d 1061, 1065 (9th Cir. 2003). Nevertheless,
11 inferences are not drawn out of the air, and it is the opposing party’s obligation to produce a
12 factual predicate from which the inference may be drawn. See Sousa, 252 F. Supp.2d at 1049.

13 Finally, to demonstrate a genuine issue, the opposing party “must do more than simply
14 show that there is some metaphysical doubt as to the material facts. . . . Where the record taken
15 as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no
16 ‘genuine issue for trial.’” Matsushita, 475 U.S. at 587 (citation omitted). If the nonmoving party
17 fails to produce evidence sufficient to create a genuine issue of material fact, the moving party is
18 entitled to summary judgment. See Nissan Fire & Marine, 210 F.3d at 1103.

19 20 1. SEXUAL HARASSMENT/HOSTILE WORK ENVIRONMENT

21 Under Title VII, an employer is prohibited from discriminating against “any individual
22 with respect to his compensation, terms, conditions, or privileges of employment, because of
23 such individual’s race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1);
24 Swenson v. Porter, 271 F.3d 1184, 1191 (9th Cir. 2001). Sexual harassment is a recognized form
25 of sex discrimination, and by tolerating sexual harassment, an employer is “deemed to have
26 adversely changed the terms of . . . employment in violation of Title VII.” Swenson, 271 F.3d at
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1 1191; see also Brooks v. City of San Mateo, 229 F.3d 917, 923 (9th Cir. 2000). A plaintiff may
2 establish sexual harassment based on a “hostile work environment.” See Little v. Windermere
3 Relocation, Inc., 301 F.3d 958, 966 (9th Cir. 2001); Nichols v. Azteca Rest. Enters., Inc., 256
4 F.3d 864, 871 (9th Cir. 2001). A hostile work environment claim is evaluated by determining
5 whether the plaintiff has established that she was subjected to a hostile work environment, and
6 whether the employer is liable for the harassment that caused the hostile environment. See
7 Faragher v. City of Boca Raton, 524 U.S. 775, 787-89 (1998); Little, 301 F.3d at 966; Nichols,
8 256 F.3d at 871-75.

9 The standard for determining whether an employer is liable for sexual harassment
10 depends on the harassing party. See Swinton v. Potomac Corp., 270 F.3d 794, 803 (9th Cir.
11 2001); Nichols, 256 F.3d at 875. If the harassing party is a co-worker, the plaintiff must prove
12 that the employer was negligent, that is, “that the employer knew or should have known of the
13 harassment but did not take adequate steps to address it.” Swinton, 270 F.3d at 803; Nichols,
14 256 F.3d at 875; Burrell v. Star Nursery, 170 F.3d 951, 955 (9th Cir. 1999). Remedies or steps
15 taken to end co-worker harassment “should be reasonably calculated to end the harassment.”
16 Nichols, 256 F.3d at 875; Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991). How reasonable a
17 remedy is depends both on its ability to stop harassment by the harassing party and to persuade
18 potential harassers to refrain from unlawful conduct. See Nichols, 256 F.3d at 875; Ellison v.
19 Brady, 924 F.2d at 882.

20 When the harassment is conducted by an employee’s supervisor, the employer is “subject
21 to vicarious liability to a victimized employee for an actionable hostile environment created by a
22 supervisor with immediate (or successively higher) authority over the employee.” Faragher, 524
23 U.S. at 806; Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998). When a supervisor
24 exercises “his authority to make critical employment decisions on behalf of his employer [and
25 then] takes a sufficiently concrete action with respect to an employee, the employer may be held
26 vicariously liable, as in the case of traditional vicarious liability under agency law.” Holly D. v.
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1 California Institute of Technology, 339 F.3d 1158, 1167 (9th Cir. 2003). In other words, when a
2 supervisor makes a “tangible employment action” against a subordinate, the employer will be
3 vicariously liable for the act of the supervisor. See Ellerth, 524 U.S. at 762-63. “A tangible
4 employment action constitutes a significant change in employment status, such as hiring, firing,
5 failing to promote, reassignment with significantly different responsibilities, or a decision
6 causing a significant change in benefits.” Ellerth, 524 U.S. at 761.

7 For cases in which the harassing supervisor has taken no tangible employment action, the
8 “defending employer may raise an affirmative defense to liability or damages subject to proof by
9 a preponderance of the evidence.” See Faragher, 524 U.S. at 806; Ellerth, 524 U.S. at 765. A
10 defendant seeking to utilize the *Faragher/Ellerth* affirmative defense must show both that: (1)
11 the employer exercised reasonable care to prevent and correct promptly any sexually harassing
12 behavior; and (2) that the plaintiff employee unreasonably failed to take advantage of any
13 preventive or corrective opportunities provided by the employer or to avoid harm otherwise.⁸
14 See Faragher, 524 U.S. at 806; Ellerth, 524 U.S. at 765. The standard for evaluating an
15 employer’s efforts to prevent and correct promptly harassment “is not whether any additional
16 steps or measures would have been reasonable if employed, but whether the employer’s actions
17 as a whole established a reasonable mechanism for prevention and correction.” Holly D., 339
18 F.3d at 1177. “While proof that an employer had promulgated an anti-harassment policy with
19 complaint procedure is not necessary in every instance as a matter of law, the need for a stated
20 policy suitable to the employment circumstances may appropriately be addressed in any case
21 when litigating the first element of the defense.” Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at
22 765. Furthermore, even though an employer may have a reasonable policy in place to prevent
23 sexual harassment, the affirmative defense may nevertheless be unavailable if the evidence
24 shows that the employer did not reasonably correct harassment. See Nichols, 256 F.3d at 877.

25
26 ⁸This affirmative defense is also available when a tangible employment action has been taken if the tangible
27 employment action is unrelated to any harassment or complaint thereof. See Elvig v. Calvin Presbyterian Church,
375 F.3d 951, 959 (9th Cir. 2004).

1 The “employer need not act instantaneously, but must act in a reasonably prompt manner to
2 respond to the employer’s complaint.” Frederick v. Sprint/United Mgmt. Co., 246 F.3d 1305,
3 1313 (11th Cir. 2001).

4 When a defendant relies on an anti-harassment policy for its *Faragher/Ellerth* defense, a
5 plaintiff may defeat summary judgment with evidence that shows that the policy was ineffective
6 or dysfunctional and thus, not a reasonable effort to prevent and correct sexual harassment. See
7 Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1279-80 (11th Cir. 2002); Gentry v. Export
8 Packaging Co., 238 F.3d 842, 847 (7th Cir. 2001); Lissau v. Southern Food Service, 159 F.3d
9 177, 182-83 (4th Cir. 1999); see also Holly D., 339 F.3d at 1178 n.22.

10 With respect to the second element, “proof that an employee failed to fulfill the
11 corresponding obligation of reasonable care to avoid harm is not limited to showing any
12 unreasonable failure to use any complaint procedure provided by the employer, [but] a
13 demonstration of such failure will normally suffice to satisfy the employer’s burden under the
14 second element of the defense.” Faragher, 524 U.S. at 807-08; Ellerth, 524 U.S. at 765.

15
16 *Exhibits of Anti-Harassment Materials*

17 In response to Harris’s Statement of Undisputed Material Facts, Plaintiffs respond that
18 there is no indication that sexual harassment materials, Exhibits 36, 38, and 39, were actually
19 distributed. In filing its Reply to Plaintiffs’s Opposition, Harris did not address this objection.
20 By arguing that there is no evidence that the materials were actually distributed, Plaintiffs are
21 essentially arguing that there is a failure of proof by Defendants.

22 Plaintiffs are correct that there is nothing to show that Exhibits 36, 38, and 39 were
23 actually distributed. The documents are simply submitted as exhibits with no further
24 explanation. Because Plaintiffs’ response/objection to these exhibits is valid, and since Harris
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1 did not respond, the Court will not consider them.⁹

2
3 Applicability of Faragher/Ellerth Affirmative Defense

4 Harris argues that, assuming Rodriguez is a supervisor, then Harris is entitled to summary
5 judgment on the basis of the *Faragher/Ellerth* affirmative defense. With respect to the first
6 element, Harris argues that it has an anti-sexual harassment policy in place; that when Tamayo
7 reported the conduct of Rodriguez, it acted quickly and stopped the harassment; that it went
8 above and beyond what was required when it contacted the sheriff's office to investigate and
9 recommended and offered to pay for obtaining an injunction; and that it has conducted seminars,
10 had "tailgate meetings," and distributed handouts concerning sexual harassment.

11 Plaintiffs argue that there is a genuine issue of material fact with respect to the
12 effectiveness/adequacy of the sexual harassment policy, that Harris did not adequately respond to
13 Tamayo's allegations of rape, and that there is no evidence that certain documents submitted by
14 Harris as exhibits were actually distributed to employees.¹⁰

15
16 Reasonable Efforts to Prevent and Correct Harassment and the Sexual Harassment Policy

17 Plaintiffs argue that Harris's sexual harassment policy is inadequate as written.

18
19 ⁹Plaintiffs also argue that an affidavit by Nicholas Perez is faulty. Specifically, the affidavit is signed by
20 "Nicholas Perez." The first line of the testimonial portion states "I, Nicholas Perez," but the first line of the affidavit
21 states a "Nicholas Guillen" was sworn and appeared before the notary. See Harris's Exhibit 37. The Plaintiffs also
22 complained about this defect in their Response/Objection to Harris's Undisputed Fact No. 11. Harris did not address
23 this in their reply papers and have not resubmitted the affidavit. Plaintiffs correctly point out that there is no
24 evidence that Nicholas Guillen and Nicholas Perez are the same person. Accordingly, the Court will not consider the
25 affidavit. However, even if the affidavit were considered, it simply states that Perez conducted tailgate meetings,
26 including meetings on sexual harassment, that Tamayo attended. There is no indication as to when or how often
27 these meetings occurred and there is no discussion as to the content of such meetings. Even if considered, the
28 affidavit is too vague to change the analysis.

¹⁰Plaintiffs have submitted the expert report of Amy Oppenheimer in an attempt to create a genuine issue of
25 fact with respect to the adequacy of Harris's anti-harassment policy. Defendant moves to strike this report since
26 Oppenheimer was designated as a rebuttal witness to Harris's expert, Pratt. Because Harris does not rely on the
27 testimony of Pratt in its motion, Harris argues that the testimony of a rebuttal expert should not be considered.
28 Because the Court concludes that there is a genuine issue of material fact with respect to Harris's policy, irrespective
of Ms. Oppenheimer's opinions, it is unnecessary to rule on the motion to strike.

Specifically, Plaintiffs argue that the policy: (1) does not contain any description of prohibited conduct; (2) does not contain any guarantee of confidentiality; (3) has no anti-retaliation provision; (4) does not state that employees who violate the policy will be disciplined; (5) requires employees to submit complaints “either in writing or personally”; (6) provides no contact information for complaints; (7) requires complaints to be made to the “executive director or executive manager” whose identity is unknown to even Harris Farms management. Plaintiffs cite to *Nichols v. Azteca Restaurant* and *Montero v. AGCO* as examples of anti-sexual harassment policies that are sufficient. In those cases, the Ninth Circuit found that the defendant’s harassment policy satisfied the first prong of *Faragher/Ellerth* were the policies: (1) defined sexual harassment; (2) set forth a reporting procedure; (3) stated that employees who violated the policy would not be disciplined; and (4) assured employees that no reprisals would be made against those who complain. See Nichols, 256 F.3d at 877; Montero v. AGCO Corp., 192 F.3d 856, 862 (9th Cir. 1999). Finally, Plaintiffs argue that Tamayo only received the policy one time in 1990 and that one of Harris’s Human Resources consultants stated that the policy was outdated.

Plaintiffs have raised a genuine issue of material fact as to the first element. Although the Ninth Circuit has not addressed whether certain “omissions” from an employer’s anti-retaliation policy may raise a genuine issue of fact concerning the first element of *Faragher/Ellerth*, other courts have. In *Frederick v. Sprint/United Management*, it was unclear whether a 1990 or 1994 harassment policy was in force at the time of the harassment. See Frederick, 246 F.3d at 1314-15. Which policy was in effect was “material because the 1994 Policy [did] not limit an employee to complaining to a direct supervisor, but allows the employee to report her sexual harassment allegations to anyone ‘in a management position with whom she feels comfortable.’” Id. at 1315. Accordingly, the Eleventh Circuit held that “the fact finder must address the first part of the first element of the *Faragher/Ellerth* affirmative defense, whether the employer had a reasonable policy to prevent harassment and what that policy was.” Id.

1 Other Courts are similar to *Frederick*. In *Smith v. First Union National Bank*, the Fourth
2 Circuit, held that the defendant's policy read as if a sexual advance was required for sexual
3 harassment and did not mention discrimination based on gender. See Smith v. First Union
4 National Bank, 202 F.3d 234, 245 (4th Cir. 2000). Because of the inadequate definition, the
5 court was unable to hold, as a matter of law, that the policy was sufficient to prevent harassment
6 for purposes of *Faragher/Ellerth*. See id.; see also Stricker v. Cessford Construction Co., 179
7 F.Supp.2d 987, 1008-09 (N.D. Iowa). In *Thomas v. BET Soundstage Restaurant*, the district
8 court was unable to hold as a matter of law that the defendant's sexual harassment policy was
9 sufficient because it did not, *inter alia*, define or give examples of what constitutes sexual
10 harassment, give direction on how to proceed where the harasser was either the immediate
11 supervisor or upper management, and was silent as to any prohibition against retaliation or
12 guarantees of confidentiality. See Thomas v. BET Soundstage Restaurant, 104 F.Supp.2d 558,
13 565-66 (D. Md. 2000). In *EEOC v. United States Bakery*, the Court found that, "Defendant's
14 1993 anti-harassment policy was inadequate because it failed to include a reporting procedure, a
15 notice that offending employees would be subject to discipline, and an anti-retaliation provision."
16 See EEOC v. United States Bakery, Inc., 2004 U.S. Dist. LEXIS 15979 at *22-*23, 2004 WL
17 1774214 at *8 (D. Or. August 9, 2004); see also Miller v. Woodharbor Modeling & Millwork,
18 Inc., 80 F.Supp.2d 1026, 1029 (holding that an effective sexual harassment policy must contain,
19 among other provisions, an express anti-retaliation provision).

20 Viewing the evidence in the light most favorable to Plaintiffs, and in light of the above
21 authority, Plaintiffs' argument is well taken. Although the policy does state that sexual
22 harassment by any person will not be tolerated, the policy does not contain any description or
23 definition of conduct that could constitute sexual harassment. See Plaintiff's Exhibit V. There is
24 no express anti-retaliation provision to be found in Harris's policy, nor is there any guarantee of
25 confidentiality. See id. Furthermore, the policy is not entirely clear about whom to contact in
26 order to make a complaint. The policy states that an employee should contact the appropriate
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1 executive director or the manager. However, there is no specific person identified in the policy
2 and Plaintiffs have presented evidence that some of Harris's personnel have never heard of an
3 executive director or executive manager, including a Human Resources department consultant.¹¹
4 See PDF Nos. 36 & 37. A reporting confusion/ambiguity is reflected in Tamayo's statement to
5 Harris that she told people in her crew to tell her about harassment and she "would find out what
6 she has to do."¹² See Plaintiffs's Exhibit L. Furthermore, there is no apparent "lateral reporting
7 alternatives for those offended by their immediate supervisors." See Thomas, 104 F.Supp.2d at
8 565. In other words, there is no express provision for situations involving one's supervisor found
9 in the harassment section of the employee handbook.

10 Although Tamayo did attend some form of sexual harassment seminar in March 1996,
11 there has been no discussion as to what was actually said at the seminar and Tamayo has testified
12 that she did not understand all that was being taught. See Declaration of Olivia Tamayo at ¶ 3. It
13 also appears that this seminar occurred one time during Tamayo's employment in 1996.¹³

14 Furthermore, while it is true that as soon as Tamayo informed Harris that Rodriguez had
15 assaulted her and had been harassing her, Harris conducted an investigation, called in a Sheriff's
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17 ¹¹Plaintiffs argue that the witnesses have never heard of an "executive director or executive manager." The
18 policy reads "the appropriate executive director or the manager." See Plaintiffs' Exhibit V. There is not necessarily
an "executive manager" as Plaintiffs wish to read the policy.

19 ¹²In deposition testimony, Tamayo stated that she knew that she was supposed to report sexual harassment
20 to either her supervisor or the office. See Deposition Testimony of Olivia Tamayo at 403:1-4. "Plaintiff's
21 knowledge, however, may not be entirely dispositive of the reasonableness of Defendant's policy." Thomas, 104
22 F.Supp.2d at 565. Given the lack of guidance or description in the policy as to what sexual harassment is, the lack of
a confidentiality provision, and the lack of an anti-retaliation provision, the fact alone that Tamayo at some point
knew that she was supposed to report sexual harassment to her supervisor or at the office is not enough to conclude
that the first element of *Faragher/Ellerth* has been satisfied. See id. at 565-66.

23 ¹³Harris has submitted that affidavit of John Harris, the president and CEO of Harris Farms. In his
24 affidavit, John Harris states, "Harris Farms, Inc. established an anti-harassment policy as early as 1989 and has
25 provided sexual harassment seminars, monthly tailgate meetings, and literature distribution to train employees on
26 these policies." See August 18, 2004, Declaration of John Harris at ¶ 4. Plaintiffs have lodged a variety of
27 objections against this declaration. It is not necessary to rule on these objections. At most, John Harris's statement
is vague and offers little detail as to the specifics of the anti-harassment policies in place during Tamayo's alleged
harassment. Viewed in the light most favorable to Plaintiffs as the non-moving parties, John Harris's declaration is
insufficient to establish the first element of *Faragher/Ellerth*. Because the declaration would not change the result, it
is unnecessary to rule on the objections.

1 deputy to investigate, and offered to pay for the cost of obtaining an injunction against
2 Rodriguez, these are actions that go more towards correction of sexual harassment as opposed to
3 prevention. The first element of *Faragher/ Ellerth* contains two parts, prevention and correction,
4 and a lack of evidence on one part of the first element will be sufficient to defeat summary
5 judgment on the affirmative defense. See Nichols, 256 F.3d at 877 (holding affirmative defense
6 may be unavailable where there is a reasonable policy in place but no reasonable correction of
7 harassment). While this evidence is probative of reasonable correction, it does not necessarily go
8 towards prevention, and the Court cannot conclude that it counter balances the omissions of the
9 sexual harassment policy as a matter of law.

10 Finally, there is a question as to whether Harris responded promptly to all of Plaintiffs's
11 complaints. A memo indicates that Tamayo complained about Rodriguez grabbing her arm in
12 mid to late July, and there is a post-investigation memo dated August 2, that makes
13 recommendations. See Plaintiffs's Exhibit L. However, Tamayo made the additional allegations
14 of rape on August 18, 1999. It appears that no significant investigation was conducted until late
15 September and mid October 1999 (although Rodriguez was re-interviewed on August 29), which
16 was after Tamayo filed her complaint with the EEOC in September. See PDF Nos. 27-30. This
17 evidence could be viewed as a failure to promptly act in light of the serious nature of the second
18 complaint, rape. See Nichols, 256 F.3d at 877; Frederick, 246 F.3d at 1313.

19 Because Plaintiffs are the non-moving parties, the facts are viewed in the light most
20 favorable to them and all reasonable inferences are drawn in their favor. See Anderson, 477 U.S.
21 at 255; Matsushita, 475 U.S. at 587; Stegall, 350 F.3d at 1065. Given the omissions within
22 Harris's sexual harassment policy, the vague information concerning additional prevention
23 efforts, and the delay in investigating the report of rape, the Court cannot conclude, as a matter of
24 law, that Harris has met the first element of the *Faragher/ Ellerth* defense.¹⁴ See Nichols, 256

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26 ¹⁴Harris has also moved for summary judgment on Tamayo's California Fair Employment and Housing Act
27 claim. The California Supreme Court recently held that, to the extent *Faragher/ Ellerth* relied on the doctrine of
28 avoidable consequences, the *Faragher/ Ellerth* rationale is applicable to California law, but only for the purpose of

1 F.3d at 877; Frederick, 246 F.3d at 1313; Smith, 202 F.3d at 245; United States Bakery, 2004
2 U.S. Dist. LEXIS 15979 at *22-*23, 2004 WL 1774214 at *8; Stricker, 179 F.Supp.2d at 1008-
3 09; Thomas, 104 F.Supp.2d at 565-66. Summary judgment on the *Faragher/ Ellerth* defense is
4 not appropriate.¹⁵

5 6 2. RETALIATION

7 Under Title VII, it is unlawful for “an employer to discriminate against any of his
8 employees . . . because [the employee] has opposed any practice made an unlawful employment
9 practice by [Title VII], or because [the employee] has made a charge, testified, assisted, or
10 participated in any manner in an investigation, proceeding, or hearing under [Title VII].” 42
11 U.S.C. § 2000e-3; Stegall, 350 F.3d at 1065. The *McDonnell Douglas* burden shifting scheme
12 applies to claims of retaliation: it is the plaintiff’s initial burden to make a prima facie case, the
13 burden then shifts to the Harris to articulate a legitimate/non-discriminatory reason for its
14 conduct, and finally the burden then shifts back to the plaintiff who must establish that the
15 proffered reason is pretext. See Hernandez v. Spacelabs Medical, Inc., 343 F.3d 1107, 1112-13
16 (9th Cir. 2003).

17 In order to make out a prima facie case of retaliation under Title VII, a plaintiff must
18 show that (1) she engaged in a protected activity; (2) she suffered an adverse employment action;
19 and (3) there was a causal link between her activity and the employment decision. Elvig v.

20 _____
21 damages. See State Dept. of Health Services v. Superior Court, 31 Cal.4th 1026, 1044 (2003). The California
22 defense of avoidable consequences has three elements: (1) the employer took reasonable steps to prevent and correct
23 sexual harassment; (2) the employee unreasonably failed to use the preventive and corrective measures provided; and
24 (3) reasonable use of the employer’s procedures would have prevented at least some of the harm. See id. The first
two elements track *Faragher/ Ellerth*. For the same reason that there exists a genuine issue as to the first element of
Faragher/ Ellerth, there also exists a genuine issue of material fact with respect to the first element of the California
defense. Accordingly, summary judgment in favor of Harris on this claim is not appropriate.

25 ¹⁵Both elements of the *Faragher/ Ellerth* defense must be established to entitle Harris to summary judgment.
26 Because Harris cannot establish the first element of the defense, it is unnecessary to discuss the second element. See
27 Briseno v. McDaniel, 2004 U.S. Dist. LEXIS 19690 at *18 n.7, 20004 WL 2203255 at *5 n.7 (N.D. Tex. September
30, 2004); Jackson v. Xavier Univ. of Louisiana, 2002 U.S. Dist. LEXIS at *13, 2002 WL 1482756 at *4 (E.D. La.
July 8, 2002).

1 Calvin Presbyterian Church, 375 F.3d 951, 965 (9th Cir. 2004); Stegall, 350 F.3d at 1065-66.
2 “Causation sufficient to establish the third element of the prima facie case may be inferred from
3 circumstantial evidence, such as the employer’s knowledge that the plaintiff engaged in protected
4 activities and the proximity in time between the protected action and the allegedly retaliatory
5 employment decision.” Yartzo v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987). However,
6 where the timing between the protected activity and the alleged retaliation is too attenuated,
7 timing alone will not establish the necessary causal connection. See Stegall, 350 F.3d at 1069;
8 Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1065 (9th Cir. 2002).

9 With respect to the second element, conduct “is cognizable as an adverse employment
10 action if it is reasonably likely to deter employees from engaging in protected activity.” Elvig,
11 375 F.3d at 965 (quoting Ray v. Henderson, 271 F.3d 1234, 1243 (9th Cir. 2000)). The
12 definition of an “adverse employment action” is broad, and “the universe of potential adverse
13 employment actions for retaliation claims is larger than the universe of potential tangible
14 employment actions that can subject an employer to vicarious liability for harassment [as
15 explained in *Faragher/Ellerth*].” Elvig, 375 F.3d at 965; Ray, 271 F.3d at 1242-44 & n.5; see
16 also Fonseca v. Sysco Food Services of Arizona, Inc., 374 F.3d 840, 847 (9th Cir. 2004).

17 18 Retaliation For Tamayo’s Complaint

19 Harris argues that Plaintiffs cannot meet the second and third elements of their prima
20 facie case for retaliation. Specifically, Harris argues that Plaintiffs cannot point to an adverse
21 employment action and they cannot show any causal connection.

22 Plaintiffs argue that Tamayo engaged in the protected activity of complaining about
23 sexual harassment in July and August of 1999, when she complained about Rene Rodriguez, and
24 in January 29, 2001, when she complained about threats and “sexually offensive gossip” by co-
25 workers. Plaintiffs have identified three adverse employment actions: (1) on February 3, 2001,
26 Tamayo was not transferred despite her articulated fear of working alone; (2) on March 12, 2001,
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1 Tamayo was issued a “final written warning”; and (3) on March 12, 2001, Tamayo was also
2 suspended for one day. Plaintiffs also argue that if Tamayo had not made the complaint, then she
3 would never have been subject to the suspension and warning. The close proximity in time,
4 Plaintiffs argue, is sufficient circumstantial evidence to show a causal connection.

5 With respect to a suspension, Harris relies on *Rose v. Buckeye Telesystems* for the
6 proposition that a one day suspension is not an adverse employment action because it does not
7 rise to the level of a materially adverse change in the terms and conditions of employment. See
8 *Rose v. Buckeye Telesystems*, 181 F.Supp.2d 772 (N.D. Ohio 2001). The *Rose* court, however,
9 utilized a definition of “adverse employment action” that is different from that used by the Ninth
10 Circuit. In *Rose*, the district court stated, “An adverse employment action is a ‘materially
11 adverse change in the terms and conditions of . . . employment.’” *Rose*, 181 F.Supp.2d at 776
12 (citing *Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 662 (6th Cir. 1999)). As explained above, in
13 the Ninth Circuit, conduct “is cognizable as an adverse employment action if it is reasonably
14 likely to deter employees from engaging in protected activity.” *Elvig*, 375 F.3d at 965. Because
15 *Rose* utilizes a different definition of “adverse employment action” than the Ninth Circuit, *Rose*
16 is not persuasive.

17 Each of the three actions identified by Plaintiffs can constitute an adverse employment
18 action, that is, they may reasonably deter employees from engaging in protected activity.
19 Suspension from work is a form of discipline and is generally done to deter unwanted behavior.
20 Viewed in the light most favorable to Plaintiffs as the non-moving party, a jury could find that
21 Tamayo’s one day suspension was reasonably likely to deter Tamayo. See *Ray*, 271 F.3d at 1241-
22 42 (citing with approval *Wideman v. Wal-Mart Store, Inc.*, 141 F.3d 1453 (11th Cir. 1998), for
23 the proposition that adverse employment actions include, *inter alia*, a one-day suspension). With
24 respect to the “final written warning,” the Ninth Circuit has held that a warning letter or negative
25 review also can be considered an adverse employment action. See *Fonseca*, 374 F.3d at 847
26 (citing *Yartzo*, 809 F.2d at 1376). Similarly, with respect to the refusal to transfer, the Ninth
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1 Circuit has also held that a refusal to grant an employee's request for a transfer may constitute an
2 adverse employment action.¹⁶ See Bouman v. Block, 940 F.2d 1211, 1229 (9th Cir. 1991).

3 Viewed in the light most favorable to Plaintiffs as the non-moving parties, the fact finder could
4 conclude that the warning letter and refusal to transfer constituted adverse employment actions.
5 Accordingly, Plaintiffs have met their burden of establishing adverse employment actions.

6 Plaintiffs have also met their burden of showing a causal connection. Harris denied
7 Tamayo's request for transfer approximately six days after she complained to her supervisors
8 about the threats and gossip. Furthermore, Tamayo received her warning letter and suspension
9 memo on March 12, 2001, approximately six weeks after she made her complaints about the
10 threats and gossip. The evidence shows that, but for Tamayo's complaint, she would not have
11 been suspended. Given the close temporal proximity between Tamayo's 2001 complaint and the
12 adverse employment actions, there is sufficient evidence to reasonably infer a causal connection.
13 See Stegall, 350 F.3d at 1069; Bell v. Clackamas County, 341 F.3d 858, 865-66 (9th Cir. 2003);
14 Yartsoff, 809 F.2d at 1376.

15 Accordingly, as Harris has moved for summary judgment on the basis that Plaintiffs are
16 unable to meet the second and third elements of their *prima facie* case, summary judgment on
17 Plaintiffs's retaliation claim for Tamayo's 2001 complaint is not appropriate.¹⁷

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19 ¹⁶It is not clear that Tamayo did request a "transfer." Tamayo requested that she not "work alone." See
20 Plaintiffs' Exhibits JJ & KK. Harris does not challenge the characterization of Tamayo's request as a request for
21 transfer. When Harris denied Tamayo's request, Gomez told Tamayo that Harris had a policy against having two
22 people doing a job that one could accomplish. See Plaintiffs' Exhibit KK. Given this policy, it could reasonably be
23 inferred that a request to not work alone is tantamount to a request to be transferred to a job that requires more than
one person. Since all reasonable inferences are made in Plaintiffs' favor as the non-moving parties, and because
Harris does not challenge the characterization of the request, Tamayo's request will be viewed as a request for a
transfer.

24 ¹⁷In arguing that Plaintiffs cannot establish a causal connection, Harris argues that, although the time
25 between the 2001 complaint and the one day suspension is shorter than the time gap associated with the 1999
26 complaint, "the only causal connection between those events is Tamayo's own involvement in the gossip." See
27 Harris's Brief In Support of Motion for Summary Judgment at 18:12-13. Although Defendant moves for summary
judgment on the basis that Plaintiffs cannot meet the second and third elements of their *prima facie* case, this
argument may be an attempt to articulate a non-discriminatory reason under the second burden in the *McDonnell*
Douglas scheme. To the extent Harris may have been articulating a non-discriminatory reason under *McDonnell*
Douglas, i.e. the discipline was based on Tamayo's own improper participation in gossip, Plaintiffs have argued and

1 3. CONSTRUCTIVE DISCHARGE

2 Constructive discharge usually results from a series of discriminatory actions on the part
3 of the employer that are in the nature of a continuing violation. See Draper v. Coeur Rochester,
4 Inc., 147 F.3d 1104, 1110 (9th Cir. 1999). Looking at the totality of the circumstances, a
5 constructive discharge occurs when “a reasonable person in the plaintiff’s position would have
6 felt that [she] was forced to quit because of intolerable and discriminatory working conditions.”
7 See Bergene v. Salt River Project Agricultural Improvement and Power District, 272 F.3d 1136,
8 1144 (9th Cir. 2001); Steiner v. Showboat Operating Co., 25 F.3d 1459, 1465 (9th Cir. 1994);
9 Watson v. Nationwide Ins. Co., 823 F.2d 360, 361 (9th Cir. 1987). In other words, the
10 “individual has simply had enough; she can’t take it anymore.” Draper, 147 F.3d at 1110. A
11 plaintiff “must at least show some aggravating factors, such as a continuous pattern of
12 discriminatory treatment.” Bergene, 272 F.3d 1136, 1144 (9th Cir. 2001). Constructive
13 discharge is generally a question to be determined by the finder of fact. See Watson, 823 F.2d at
14 261. Summary judgment is “appropriate on a constructive discharge claim where the decision to
15 _____
16 presented sufficient evidence of pre-text to deny summary judgment.

17 “An employee is not protected by Title VII when he violates legitimate company rules, knowingly disobeys
18 company orders, disrupts the work environment of his employer, or willfully interferes with the attainment of the
19 employer’s goals.” Unt v. Aerospace Corp., 765 F.2d 1440, 1446 (9th Cir. 1982). However, there is relatively little
20 evidence presented that shows Tamayo engaged in inappropriate gossip or describes the investigation in detail.
21 Defendant relies on each of the employees’s disciplinary memos, which are general and do not go into specifics, and
22 the deposition testimony of Sylvia Gomez. See Defendant’s Undisputed Material Fact No. 39. Gomez testified that
23 she conducted interviews with the involved employees and came to the conclusion that there were two groups who
24 each claimed that the other side started saying inappropriate things. See Deposition of Sylvia Gomez at 235:1-236:2.
25 There is no indication what Tamayo allegedly said and Defendant has produced no notes or memos concerning the
26 interviews with Hernandez, Mosqueda, or Mendoza. See id. at 235:2-10 (stating that Gomez had taken notes from
27 interviewing these employees). Furthermore, the memorandum of the interview with Tamayo does not indicate that
she was even asked about her participation in the gossip, and it does not appear that Tamayo was given the chance to
refute or explain any allegations against her. See Deposition of Larry Chrisco at 204:21-205:8; Plaintiffs’ Exhibit
MM. Furthermore, it is noteworthy that both Mendoza and Mosqueda had final written warning in their file for
making inappropriate, harassing statements at work, while Tamayo had no such warnings. See Plaintiffs’ Exhibit FF;
Deposition of Sylvia Gomez at 236:3-11.

28 Additionally, Harris did not explain to Tamayo what she said or did to warrant the suspension and refused
to tell her what happened to the other parties. The refusal to tell Tamayo what happened to the other parties is
puzzling given the nature of the threats and the concern/fear of Tamayo. Also, the adverse actions occurred within
weeks of Tamayo making her complaint. Taken together, the above evidence is sufficiently specific and substantial
to support a reasonable inference of pre-text. See Snead v. Metropolitan Property & Casualty Ins. Co., 237 F.3d
1080, 1093 (9th Cir. 2001); Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1222 (9th Cir. 1998)

1 resign [is] unreasonable as a matter of law.” Lawson v. Washington, 296 F.3d 799, 805 (9th Cir.
2 2002) (quoting King v. AC & R Advertising, 65 F.3d 764, 767 (9th Cir. 1995)).

3
4 Scope of Plaintiffs’ Claim

5 In its motion for summary judgment, Harris argues that Plaintiffs are making a claim for
6 constructive discharge through a hostile work environment and that the contours of that claim are
7 governed by *Pennsylvania State Police v. Suders*, 124 S.Ct. 2342 (2004). “Creation of a hostile
8 work environment is a necessary predicate to a hostile-environment constructive discharge case.”
9 Suders, 124 S.Ct. at 2356. However, a plaintiff must do more than simply establish behavior
10 that is sufficiently severe or pervasive that it altered the conditions of the victim’s employment.
11 See Suders, 124 S.Ct. at 2354. “A hostile-environment constructive discharge claim entails
12 something more: A plaintiff who advances such a compound claim must show working
13 conditions so intolerable that a reasonable person would have felt compelled to resign.” Suders,
14 124 S.Ct. at 2354. However, the Supreme Court stated that *Suders* “concerns an employer’s
15 liability for one subset of Title VII constructive discharge claims: constructive discharge
16 resulting from sexual harassment, or ‘hostile work environment,’ attributable to a supervisor.” Id.
17 at 2352. Harris argues that it is entitled to summary judgment on the constructive discharge
18 claim because: (1) it had no knowledge of the alleged gossip until Tamayo made her complaint;
19 (2) as soon as it found out about the gossip, Harris took reasonable steps to correct the problem;
20 (3) Plaintiffs cannot show that co-worker gossip was so severe that a reasonable person would
21 have quit; and (4) Tamayo did not utilize Harris’s remedial procedures.

22 Plaintiffs respond by making a constructive discharge argument based on the conduct of
23 Harris and past and current harassment, and do not directly address Harris’s express arguments or
24 the *Suders* decision. Plaintiffs’ complaints read, “Since at least August of 1999, Harris subjected
25 Ms. Tamayo to adverse employment actions in retaliation for her opposition to and rejection of
26 the sexual harassment in violation of [Title VII]. These practices include but are not limited to
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1 demotion, isolation from other employees, continued harassment, suspension for filing a
2 grievance, all leading to her constructive discharge on March 31, 2001.” See EEOC’s Complaint
3 at 3 ¶ 8; Olivia Tamayo’s Complaint in Intervention at 3 ¶ 10. From the complaints, Plaintiffs’
4 constructive discharge claim is based on retaliatory conduct by Harris and not specifically on a
5 “hostile work environment.” See, e.g., Tran v. Trustees of the State Colleges of Colorado, 355
6 F.3d 1263, 1271 (10th Cir. 2004); Munday v. Waste Management of North America, Inc., 126
7 F.3d 239, 243-44 (4th Cir. 1997). Given Plaintiffs’ response in opposition to Harris’s motion,
8 and given Plaintiffs’ complaints, the Court construes Plaintiffs’ argument/claim for constructive
9 discharge as one based on retaliatory conduct of Harris and not on a hostile work environment.
10

11 Discussion

12 Plaintiffs argue that the evidence raises a genuine issue of fact as to whether a reasonable
13 person would have felt compelled to resign due to Harris’s conduct.

14 As discussed previously, there is an issue of material fact concerning Plaintiffs’
15 retaliation claim, and the adverse employment actions relied upon, that is, the refusal of the
16 request not to work alone/transfer, the final written warning, and the suspension. Viewed in the
17 light most favorable to Plaintiffs, shortly after Tamayo told her supervisors about the gossip and
18 threats, she requested that she not work alone. See PDF Nos. 57 & 58; Plaintiffs’ Exhibits JJ &
19 KK. Despite Tamayo’s concerns, her request was denied and she was told that if she would not
20 work alone, then she needed to decide whether she wanted to stay and work with Harris. See
21 Plaintiffs’ Exhibit JJ. After Tamayo made her complaint and spoke to Human Resources, she
22 felt it necessary to take her concerns to higher management, but was forced to wait nearly three
23 weeks for that meeting.

24 Tamayo did not receive the results of her complaint until she received two memos on
25 March 12, 2001, one of which suspended her for one day and the other gave her a final written
26 warning. The suspension memo was general and informed Tamayo that all the individuals made
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1 inappropriate comments to each other and that discipline was necessary. See Plaintiffs' Exhibit
2 NN. The final written warning is broad and warns Tamayo that if she is "involved in any
3 additional incidents, including retaliation of any kind against anyone involved in this incident,
4 you will be subject to further disciplinary action, up to and including immediate termination."
5 Plaintiffs' Exhibit PP. The warning memo also states, after listing the individuals involved,
6 "Though we are unable to substantiate the extent of the inappropriate behavior, we believe that
7 each of your actions warrants disciplinary action." See id. The memo could be viewed, as is
8 argued in Plaintiffs' opposition, as a warning about making further complaints. See Plaintiffs'
9 Exhibit FF; Deposition of Sylvia Gomez at 236:3-11.

10 Further, despite the nature of the gossip and threats and Tamayo's fears, Harris refused to
11 tell Tamayo what would happen to anyone else involved, including Mendoza and Refugio, the
12 two principal rumor mongers.

13 The surrounding circumstances and past conduct are relevant in viewing the above
14 conduct. See Bergene, 272 F.3d at 1144; Watson, 823 F.2d at 361. In 1999, Tamayo made
15 complaints to Harris about harassment from Rodriguez. Tamayo did not disclose the rapes in her
16 initial July 1999 meeting, but she later disclosed the rapes in August 1999. The evidence
17 suggests that Harris did not make substantial inquiries or investigations concerning the rapes
18 until late September and October 1999, which was after Tamayo filed her complaint with the
19 EEOC. Harris never spoke to Tamayo about any additional investigation and never informed her
20 of any findings or determinations regarding the rapes.

21 Additionally, during an October 1999 meeting with Lourdes Ramirez, Ramirez told
22 Harris that Mendoza talked about Tamayo and Rodriguez and said that they were having an
23 affair. See Exhibit S. Thus, since at least October 1999, there is some evidence that Harris was
24 aware of some of the rumors. Also, it is noteworthy that Mendoza and Mosqueda each had "final
25 written warnings" in their file for making harassing comments, while Tamayo had no such
26 warnings.

1 Furthermore, although the rumors concerning Tamayo and Hernandez and the rumor
2 about the fake picture plot seem to be a recent occurrence, the plot to obtain the fake pictures
3 would be particularly distressing because it showed Rodriguez was still in contact with Tamayo's
4 co-workers and was still able to affect or "reach" Tamayo. See Plaintiffs' Exhibit MM.
5 Tamayo's co-workers had been saying that "something would happen" and, before receiving the
6 March 12, 2001, memos, the work vehicles of Tamayo's two witness were vandalized. In
7 particular, the brake lines on one of the vehicles was cut. Harris was aware of the history with
8 Rodriguez, Tamayo's discomfort and fears, the nature of the rumors, past harassing behavior of
9 Mendoza and Mosqueda, and the vandalism to the Ramirez's work vehicles when it acted on
10 Tamayo's complaint.

11 Viewing Harris's retaliatory conduct in the light of the above surrounding circumstances,
12 and in the light most favorable to Plaintiffs, the Court cannot conclude that, as a matter of law,
13 no reasonable jury could find a constructive discharge based on Harris's conduct. See Bergene,
14 272 F.3d at 1144; Steiner, 25 F.3d at 1465; Watson, 823 F.2d at 361-62. Tamayo had been
15 through a difficult ordeal concerning Rodriguez, which included rape and additional threats of
16 violence made with weapons. She was currently having to deal with sexual rumors/gossip,
17 rumors that "something was going to happen," and a plot by Rodriguez to take fake pictures of
18 her having sex with another man. Harris was aware of the history and past allegations
19 concerning Rodriguez and was nevertheless content to let Tamayo work alone. In the course of
20 the investigation, Tamayo learned that the brake lines of one of her corroborating witness had
21 been cut. When Harris's investigation concluded, Tamayo was disciplined and warned based on
22 unspecified conduct, even though she is the one who brought the complaint. Finally, Harris
23 never told Plaintiff what was going to happen to the other people involved. Given the failure to
24 tell Plaintiff of any disciplinary or remedial measures, a reasonable person in Tamayo's position
25 could have reasonably believed that Harris was willing to let the situation continue. Accordingly,
26 the Court cannot conclude that Tamayo's decision to quit in response to Harris's conduct was
27
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unreasonable as a matter of law in light of the surrounding circumstances. See Lawson, 296 F.3d at 805. Summary judgment is not appropriate.¹⁸

CONCLUSION

After viewing the evidence in the light most favorable to Plaintiffs and making all reasonable inferences in their favor, there are genuine issues of material fact as to each of the claims challenged by Harris.

Harris moved for summary judgment on Plaintiffs' hostile work environment claim involving the conduct of Rodriguez on the basis of the *Faragher/Ellerth* affirmative defense. However, Plaintiffs have pointed out omissions from the harassment policy/section of the employee handbook. Other courts reviewing anti-harassment policies have found such omissions material and denied summary judgment on that basis. The harassment policy at issue in this case does not define or describe sexual harassment, does not contain a confidentiality provision, does not contain an anti-retaliation provision, does not expressly state what to do if the harassment is by the immediate supervisor, and it is not entirely clear to whom harassment should be reported. Additionally, it appears that over a month passed before Harris did significant investigation with respect to Tamayo's complaint of rape. This evidence is sufficient to raise genuine issue of material fact as to the first element of the *Faragher/Ellerth* defense. Nichols, 256 F.3d at 877; Frederick, 246 F.3d at 1313; Smith, 202 F.3d at 245; United States Bakery, 2004 U.S. Dist. LEXIS 15979 at *22-*23, 2004 WL 1774214 at *8; Stricker, 179 F.Supp.2d at 1008-09; Thomas,

¹⁸Plaintiffs argue in their opposition that they are making a claim for co-worker hostile work environment with respect to conduct occurring in 2001. Plaintiffs state that Harris has not moved for summary judgment on this claim. Harris responds by arguing that it discussed the standard for co-worker hostile environment in sections IV(A)(5) and V(B)(2) of its motion. Section IV(A)(5) deals with co-worker harassment, but it is in the context of Rodriguez's behavior. Harris states that it disputes whether Rodriguez was a supervisor, but they do not support this statement with facts. As discussed previously, there is a question whether Rodriguez was Tamayo's supervisor. In context, section IV(A)(5) is dealing with Rodriguez. With respect to section V(B)(2), that section is part of Harris's argument about constructive discharge. As explained above, based on Plaintiffs' complaints, a non-*Suders* constructive discharge claim is being made. As section V(B)(2) is dealing with constructive discharge, and a method of showing constructive discharge that is not dependant on proving a hostile work environment, Plaintiffs' reading of Harris's motion is not unreasonable.

1 104 F.Supp.2d at 565-66. Because both elements of the *Faragher/Ellerth* affirmative defense
2 must be proven, summary judgment on this claim is not appropriate.

3 Harris's motion for summary judgment on Plaintiff Tamayo's California claims on the
4 basis of avoidable consequences fails for the same reason as its *Faragher/Ellerth* defense. See
5 State Dept. of Health Services, 31 Cal.4th at 1044.

6 With respect to Plaintiffs' retaliation claim based on complaints made in 2001, and
7 specifically Plaintiffs' suspension, Harris argued that there was no causal connection and no
8 adverse employment action. However, the Ninth Circuit has adopted an expansive definition of
9 an "adverse employment action." Under Ninth Circuit precedent, a suspension, a refusal to
10 transfer, and a warning can constitute adverse employment actions. See Fonseca, 374 F.3d at
11 847; Ray, 271 F.3d at 1241-42; Bouman, 940 F.2d at 1229; Yartzoff, 850 F.2d at 1376.
12 Furthermore, there is also sufficient evidence of a causal connection based on the timing of
13 Tamayo's complaint about co-worker gossip and threats, and the listed adverse employment
14 actions based on timing. The adverse employment actions occurred either within six days or six
15 weeks of the complaint. See Stegall, 350 F.3d at 1069; Yartzoff, 853 F.2d at 1376. This
16 evidence is sufficient to show adverse employment actions and a causal connection.
17 Accordingly, summary judgment is not appropriate.

18 Finally, with respect to Plaintiffs' claim for constructive discharge, Plaintiffs have raised
19 a genuine issue of material fact. Harris's retaliatory conduct, when viewed in light of the
20 relevant circumstances and in the light most favorable to Plaintiffs, could have reasonably lead
21 Tamayo to believe that Harris was not going to remedy the situation and was content with the
22 status quo. Constructive discharge is generally a question for the jury. See Watson, 823 F.2d at
23 360. Given the nature of the rumors, past instances of violence, the vandalism to the truck of a
24 corroborating witness, the final warning, the refusal to let Tamayo work with others, and the
25 suspension, there is sufficient evidence as to whether Tamayo was constructively discharged as a
26 result of Harris's conduct. See Bergene, 272 F.3d at 1144; Steiner, 25 F.3d at 1465; Watson, 823
27
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1 F.2d at 360. Summary judgment is therefore not appropriate.
2

3 Accordingly, the Court HEREBY ORDERS that Defendant's Motion for Summary
4 Judgment is DENIED.

5
6 DATED: 10-19-04


7 ANTHONY W. ISHII
UNITED STATES DISTRICT JUDGE
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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

OLIVIA TAMAYO,

Plaintiff-Intervenor,

v.

CIV F 02-6199 AWI LJO

ORDER ON DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

United States District Court
for the
Eastern District of California
October 20, 2004

* * CERTIFICATE OF SERVICE * *

1:02-cv-06199

Equal Employment

v.

Harris Farms Inc

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on October 20, 2004, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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