

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

YESENIA GUITRON; and JUDI KLOSEK,

No. C 10-3461 CW

Plaintiffs,

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR SUMMARY JUDGMENT, DENYING AS MOOT MOTION TO SEVER, AND SETTING CASE MANAGEMENT CONFERENCE (Docket Nos. 64 and 74)

v.

WELLS FARGO BANK, N.A.; WELLS FARGO & CO.; PAM RUBIO; and DOES 1-20,

Defendants.

_____ /

Plaintiffs Yesenia Guitron and Judi Klosek allege that Defendants Wells Fargo Bank, N.A., Wells Fargo & Co., and Pam Rubio unlawfully retaliated and discriminated against them based on Plaintiffs' reporting of unlawful and unethical business practices, as well as their disability, age, gender and marital status. Defendants move for summary judgment on Plaintiffs' claims against them and move to sever Plaintiffs' claims from one another. Having considered the papers filed by the parties and their oral arguments at the hearing, the Court GRANTS in part Defendants' motion for summary judgment, and DENIES it in part. The Court also DENIES AS MOOT Defendants' motion to sever.

BACKGROUND

The following summary presents any disputed facts in the light most favorable to Plaintiffs, as the non-moving parties.

I. Facts related to Plaintiff Guitron

In March 2008, Guitron, a single mother, began work as a Personal Banker One at the Wells Fargo branch in St. Helena,

United States District Court
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1 California. Guitron Depo., Tr. 382:6, 409:6-13; Guitron Decl.
2 ¶ 5.

3 Guitron was told on numerous occasions by "Branch management"
4 to unbutton her shirt to get more sales. Guitron Decl. ¶ 6. One
5 day Pam Rubio, the branch manager, sent her a text message
6 requesting permission to open a package that Guitron had received
7 from a customer, "an admirer," and asking who it was from.

8 Guitron Depo., Tr. 333:10-16.¹ Isook Park, the branch service
9 manager, made comments to Guitron, including, "Call your
10 boyfriends and have them all open accounts." Id. at 333:17-21.
11 She asked Guitron questions about whom she was dating and whom she
12 would bring to Christmas parties or bank events. Id. On one
13 occasion, Chris Jensen, another service manager, told Guitron, "Go
14 and shake your skirt to the farm workers in the corner so we can
15 get some accounts." Id. at 333:22-334:1. Guitron refused to
16 engage in these practices and was offended by them. Guitron Decl.
17 ¶ 6.

18 Prior to the time that Guitron began to work at the St.
19 Helena branch, Liz Mendez, who worked there as a Personal Banker
20 from December 2000 through January 2007, was told about once a
21 week by Rubio, "Maybe if you unbutton that top button you'll get
22 more accounts." Mendez Depo. Tr. 128:18-129:9; Mendez Decl. ¶ 2.
23 Marcela Franco, who was employed by Wells Fargo from November 2001
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25 ¹ Plaintiffs also argue that "Rubio encouraged younger women
26 who worked at the Branch, including Guitron, to use their
27 'physical assets' to garner sales." Opp. at 3. Rubio was fifty-
28 five years old in 2009. Rubio Decl. ¶ 3. However, Plaintiffs
cite only evidence that Rubio made such comments to female
employees other than Guitron and offer no evidence, including from
Guitron, that Rubio did so to Guitron herself or in her presence.

1 through January 2007, again, before Guitron began working there,
2 heard Rubio make similar comments to other employees on multiple
3 occasions. Franco Depo. Tr. 87:7-88:23; Franco Decl. ¶ 2. Matt
4 Taylor, a single father who worked at the St. Helena branch as a
5 financial consultant, was never encouraged to use his physical
6 assets to achieve more sales. Taylor Decl. ¶¶ 4-6.

7 In June 2009, Guitron asked to take eighteen days of paid
8 family leave in order to care for her son who had surgery.
9 Guitron Depo., Tr. 352:2 353:21. Guitron was permitted to take
10 the time off, but she was paid one week of vacation time and was
11 given unpaid leave for the remainder of the time. Id. at 352:4-7.
12 The eighteen days that she was absent were originally counted as
13 impermissible absences on her second quarter review and Guitron
14 had to make multiple requests for this to be corrected. Guitron
15 Depo., Tr. 368:25-369:3; Drafts of 2009 Second Quarter Performance
16 Reviews, Pls.' Exs. 49-57.

17 Guitron was required to submit a typed request to modify her
18 work schedule to a six-day work week and to take a shorter lunch
19 break and a longer break in the afternoon to pick up her children,
20 while others were able to request days off or a vacation on
21 handwritten Post-it notes. Guitron Depo., Tr. 345:4-346:11.²
22 Guitron believed that she was given "a hard time" when asking to
23 leave early or late on particular days, although she was never
24 _____

25 ² In their opposition, Plaintiffs aver that the others who
26 "gave notices on a post-it note" were "not single parents," and
27 cite in support pages 345 to 349 of Guitron's deposition
28 testimony. In these pages, Guitron testified that the other
individuals to whom she was referring included "Corina, Javier,
Mary," but she did not state that these individuals or any others
were not single parents. See Guitron Tr. 345:4-349.

1 denied such an accommodation. Id. at 348:9-349:5. She also
2 believed that other employees, including "Javier," were not given
3 a hard time when they made similar requests, because she did not
4 hear other people complain about this. Id.³

5 From 2008 through 2009, Guitron repeatedly complained to
6 branch management about certain activities of other bankers within
7 the St. Helena branch. Guitron Depo., Tr. 155:18-25, 172:4-176:6;
8 Guitron Decl. ¶¶ 20-56.⁴ Many of Guitron's complaints involved
9 another banker, Corina Zavaleta. Id. Some of Guitron's
10 complaints arose out of reports she received from customers about
11 problems with accounts, including accounts that other bankers at
12 the St. Helena branch had allegedly opened or closed without the
13 customer's permission or knowledge, and accounts about whose terms
14 the customer had been misled. Id. After customers complained to
15 her that they were not receiving their debit cards for an extended
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18 ³ Plaintiffs assert, "Even when Guitron would finally get
19 permission to leave to care for her children, Rubio would harass
20 her by calling her children's day care to 'ensure' that Guitron
21 was actually caring for her children, a practice that was unique
22 to Guitron only." Opp. at 5. However, this assertion is not
23 supported by the evidence cited by Plaintiffs. At her deposition,
24 Guitron testified, "Other times they called back either the day
25 care or called me," Guitron Depo., Tr. 348:4-5, but she did not
26 specify who called her children's day care, for what purpose, or
27 that this practice was unique to her or to single mothers.

28 ⁴ Defendants object to the admissibility of portions of
Guitron's declaration, in which she describes complaints made by
customers which she reported to management, on the basis that they
constitute inadmissible hearsay and speculation for which she has
failed to establish personal knowledge. While the statements made
by Guitron in her declaration are not admissible to establish the
truth of the customers' complaints, her statements are admissible
to establish the substance of the reports that Guitron herself
made to management. According, Defendants' objections to the
admissibility of Guitron's declaration for this purpose are
OVERRULED.

1 period of time, Guitron reported a concern to management that
2 other bankers had been directing that the debit cards be mailed to
3 the branch instead of the customers' homes, so that the bankers
4 could re-order cards sent to the correct address. Guitron Decl.
5 ¶ 28. Guitron also reported that other bankers were opening
6 accounts with customer identification that was not accepted under
7 company policy, such as a foreign driver's license that was not
8 written in English. Id. at ¶ 33. At some point after Guitron
9 made her complaints, Rubio stopped referring business to her.
10 Guitron Depo., Tr. 246:2-8.

11 Guitron stated that, at the time of some of her complaints,
12 she had two "main reasons to make these reports:" first, as a
13 Wells Fargo employee, it was her responsibility to report any
14 suspicions or acts of unethical behavior; and second, she wanted
15 to protect herself from future retaliation. Ex. 99, at 2163-64.
16 When asked during her deposition on May 12, 2011 whether she
17 believed that the practices that she reported to management were
18 unlawful, Guitron stated, "I don't think that I ever considered
19 them illegal. I knew they were against our sales--sales
20 practices." Guitron Depo. Tr. 241:16-18. She also stated that
21 "somebody is getting financial gain for committing these
22 activities. So it could be; it could not be. It just depends on
23 the specifics." Id. at 241:25-242:2. In her declaration executed
24 on December 8, 2011, Guitron states that she made complaints to
25 management because she believed that these banking activities
26 violated Wells Fargo's policies regarding sales practices and
27 because "these practices resulted in employees receiving unearned
28 bonuses under Wells Fargo's incentive plan." Guitron Decl. ¶ 3.

1 Guitron alleges that Wells Fargo failed to investigate her
2 complaints properly. At the branch level, two of the individuals
3 whom Guitron accused of misconduct, Zavaleta and Mary Crisp, were
4 never questioned about accusations leveled by Guitron. Zavaleta
5 Depo., Tr. 29:15-31:25; Crisp Depo., Tr. 153:2-22. Both of these
6 individuals are now assistant managers at the branch. Zavaleta
7 Depo., Tr.9:21-10:21; Crisp Depo., Tr. 181:15-182:25. When
8 Guitron contacted the regional Vice President, Greg Morgan, to
9 request a meeting with him about her complaints, he directed her
10 to contact Human Resources. Ex. 67, emails between Guitron and
11 Morgan. Guitron also reported certain incidents to the Wells
12 Fargo Ethics Hotline. One investigator, Jodi Takahashi, who was
13 assigned to Guitron's complaints, interviewed only Rubio about the
14 complaints. Takahashi Depo., Tr. 30:1-25, 36:5-38:8, 80:18-85:10.
15 When Guitron attempted to follow up with another investigator,
16 Damian Brown, he declined to provide her with any information
17 regarding the status of the investigation, citing confidentiality
18 of the personnel matters involving the employees she had accused.
19 Pls.' Ex. 83, emails between Brown and Guitron. Guitron also
20 complained to Diana Brandenburg, a Human Resources consultant,
21 whose ensuing investigation involved interviews of only Rubio and
22 Guitron. Guitron Depo., Tr. 181:25-182:14, 186:24-188:8;
23 Brandenburg Depo., Tr. 50:21-51:13, 66:14-75:21.

24 Guitron adhered to "proper procedures and ethical means" to
25 get sales, and she struggled to meet her sales requirements.
26 Guitron Decl. ¶ 8. During the time that Guitron worked at Wells
27 Fargo, she had a number of performance reviews. In 2008, during
28 the first two quarters that Guitron worked at Wells Fargo, she did

1 not meet her minimum sales goals. Guitron Depo., Tr.
2 427:23-428:14. Rubio did not give her any corrective actions,
3 because she was still in training and a "rookie." Id. In the
4 fourth quarter of 2008, Guitron again did not meet her minimum
5 sales goals and Rubio gave her a verbal warning for this. Id. at
6 433:20-435:13, Ex. 6.

7 In February 2009, Rubio informed all of the personal bankers
8 at the St. Helena branch that an assistant manager position had
9 been opened for the branch. Guitron Decl. ¶ 36. Guitron emailed
10 Rubio to express her interest in the position and Rubio indicated
11 her support by offering to discuss the position with Guitron. Id.
12 However, Rubio told Guitron that she could not apply for the
13 position. Id.

14 Guitron again failed to meet her minimum sales goals in the
15 first quarter of 2009 and, at that time, Rubio gave her an
16 informal warning. Id. at 431:14-23.⁵ Guitron missed her sales
17 goals again in the second quarter of 2009 and Rubio extended her
18 informal warning. Id. Rubio wrote multiple drafts of Guitron's
19 performance review for that quarter, adding negative comments in
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22 ⁵ Plaintiffs assert that, in contrast, "other bankers
23 testified that on occasions where they did not obtain their sales
24 minimum goals, they were not placed on informal warning by Rubio."
25 Opp. at 9-10. However, the cited evidence does not support this.
26 Plaintiffs cite the deposition testimony of Crisp and the
27 declaration of Dreydy Metelin. In her deposition, Crisp stated
28 that she did not remember if she met her minimum sales goals in
the year before she was promoted to sales manager, not that she
was promoted despite missing these goals. Crisp Depo., Tr.
337:20-339:22. In her declaration, Metelin stated that she was
not subjected to disciplinary action when she missed her sales
goal for a single quarter. Metelin Decl. ¶ 5(g). Guitron was not
placed on an informal warning until she had missed her sales goals
for multiple quarters.

1 later drafts. The original performance review said that Guitron
2 had more unscheduled absences than she did, which was eventually
3 corrected. Guitron Depo., Tr. 368:25-369:3. In the earlier
4 drafts of the performance review, Rubio said that Guitron received
5 a "perfect 5" under the section regarding "Ways to Wow" and made
6 only positive remarks on this metric, but in later drafts, she
7 added that Guitron was not doing enough to help others at the
8 branch improve in this category. Cf. Pls.' Ex. 49 at 3161, to
9 Pls.' Ex. 52 at 3660. Similarly, in earlier drafts, Rubio noted
10 that Guitron missed her sales goals but that all bankers were
11 struggling with a new pilot program for monthly incentives, while
12 in later drafts, she removed the language that all bankers were
13 struggling in this area. Cf. Pls.' Ex. 49 at 3171-72, to Pls.'
14 Ex. 57 at 3119-20.

15 In the fall of 2009, Rubio recorded certain accusations
16 against Guitron. Rubio documented a complaint from Zavaleta that
17 Guitron was "borderline harassing her" with the complaints Guitron
18 had made about Zavaleta's work ethics. Pls.' Ex. 66. Rubio also
19 documented Guitron's alleged misuse of "banker notes" in violation
20 of company policy. Pls.' Ex. 90. Rubio questioned Guitron
21 regarding a customer complaint on an account that Guitron had
22 opened. Pls.' Exs. 95, 96. Rubio also recorded an incident in
23 which Zavaleta said that Guitron had pushed her into a desk out of
24 malice. Pls.' Exs. 93-94.

25 Between October 28, 2009 and November 22, 2009, several
26 anonymous complaints were made to the Wells Fargo Ethics line
27 regarding Guitron. See Pls.' Exs. 84, 97, 100, 102, 103, 105,
28 106. In his investigation, Takahashi examined various documents

1 related to at least one of these complaints, and he did not
2 interview anyone other than Rubio about any of the complaints.
3 Pls.' Exs. 103, 105; Takahashi Depo., Tr. 43:7-49:2. Takahashi
4 did not substantiate any of the allegations against Guitron.
5 Takahashi Depo., Tr. 43:7-49:2.

6 At Rubio's direction, in December 2009, Park sent a complaint
7 to Brown about Guitron, related to an incident in October 2009 in
8 which Guitron allegedly asked her about opening an account for a
9 customer with a fake Mexican identification card. Pls.' Ex. 108;
10 Park Depo., Tr. 154:5 159:15.

11 In January 2010, Rubio sent Brandenburg and Hale Walker, the
12 district manager, an email with a formal warning and corrective
13 action plan for Guitron for missing her sales goals in the fourth
14 quarter of 2009; this was never given to Guitron. Pls.' Ex.
15 86-87.

16 On January 26 and 27, 2010, Rubio asked Guitron to attend a
17 meeting. Guitron Depo., Tr. 507:9-18, 510:6-17. Guitron insisted
18 that Rubio have "some neutral senior management people" present
19 for the meeting. Id. at 507:15-508:25; 510:6-17. On January 27,
20 after Guitron insisted on the presence of senior management a
21 second time, Rubio told Guitron that senior management would not
22 be present at the meeting and that Guitron had to meet with Rubio
23 and Park. Id. at 510:14-21. Guitron said that she wanted someone
24 from upper management present, because she could not stand any
25 more retaliation. Id. at 511:1-3. Rubio then told Guitron that
26 because Guitron did not want to meet with her, she was being
27 insubordinate, and that she had to turn in her keys, clear her
28 desk and leave. Id. at 513:6-514:10. Rubio did not state that

1 Guitron was fired or terminated. Id. at 514:16-22. Guitron did
2 not gather all of her personal belongings from her desk at that
3 time. Id. at 5:19-21. At some point on that day, Park took a
4 folder into the closet in which the shredder was stored, closed
5 the door and emerged empty-handed. Pls.' Ex. 113, at 2; Cook
6 Depo., Tr. 130:1-4.⁶

7 Two days later, Guitron emailed Walker, Rubio, Park and
8 several others, stating that she had been fired and asking to be
9 allowed to gather the rest of her personal belongings. Pls.' Ex.
10 114. On January 29, 2010, Walker responded to Guitron, stating
11 that Rubio had not terminated her and had instead placed her on
12 administrative leave. Guitron Depo., Tr. 524:13-525:9. Walker
13 asked that Guitron contact her to discuss her return to her job.
14 Id. Guitron replied by email stating that she had been
15 terminated. Guitron Depo., Ex. 14. Guitron and Walker
16 corresponded and spoke over the next several days. Id. at Exs.
17 15, 19, 20.

18 On February 8, 2010, Rubio announced the hire of a new
19 Personal Banker One, Andrew Keopraseuth. Klosek Decl. ¶ 27. When
20 he started work, he took over Guitron's desk.⁷ Id.

21 On February 9, 2010, Walker sent Guitron another letter
22 stating that she had not been terminated, that she was still an
23 employee of Wells Fargo, and that she had to appear at Walker's
24 office on February 11, 2010 to discuss her return to work or she
25 _____

26 ⁶ Plaintiffs argue that Park took documents from Guitron's
27 desk into the closet, but cite no evidence that supports this.

28 ⁷ No evidence is offered to establish the date on which
Keopraseuth began work and took over Guitron's desk.

1 would be deemed to have voluntarily resigned, effective on that
2 date. Guitron Depo., at Ex. 16.

3 On February 10, 2010, Guitron responded to Walker by email
4 stating that she would not be returning to work, because she had
5 already been terminated. Id.

6 On February 12, Walker sent Guitron a letter by email and
7 regular mail, stating that Walker had processed her voluntary
8 resignation effective February 11, 2010, because Guitron had not
9 reported to her office on that day. Id. at Ex. 17.

10 Guitron filed a complaint with the Department of Labor
11 against Wells Fargo alleging violations under section 206 of the
12 Sarbanes-Oxley Act (SOX). Second Amended Complaint (2AC) ¶ 69;
13 Answer to 2AC ¶ 69. Guitron alleges that she filed this complaint
14 on or about May 11, 2010. 2AC ¶ 69.⁸ On June 14, 2010, Wells
15 Fargo learned that Guitron had filed a complaint against it with
16 the Department of Labor. Defs.' Resps. to Guitron's
17 Interrogatories, Set 2, at 5.

18 On June 18, 2010, Guitron filed complaints against Wells
19 Fargo and Rubio with the California Department of Fair Employment
20 and Housing (DFEH), alleging that they had subjected her to
21 discrimination and failed to accommodate her based on "her status
22 as a single woman and a single mother." 2AC ¶ 68, Ex. B. Guitron
23 listed certain conduct by Wells Fargo and Rubio that she alleged
24 was discriminatory. Id. Guitron also indicated that she felt
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27 ⁸ This complaint is not part of the record in this case.
28 While Plaintiffs state that it is attached to the 2AC as Exhibit
C, that exhibit instead contains documents related to Klosek.
2AC, Ex. C.

1 that she was retaliated against, but did not provide descriptions
2 of actions that she believed were retaliatory. Id. Guitron was
3 given a right to sue notice by the DFEH on the same day. Id.

4 On June 23, 2010, Guitron filed a complaint against Wells
5 Fargo with the Equal Employment Opportunity Commission (EEOC),
6 alleging discrimination based on sex and marital status and
7 retaliation for filing complaints. 2AC ¶ 67, Ex. A. Guitron did
8 not provide a description of the particulars and instead stated
9 "See Attached DFEH." Id.⁹ The EEOC issued Guitron a right to sue
10 letter on July 6, 2010.

11 II. Facts related to Plaintiff Klosek

12 In approximately 1987, Klosek received a juris doctorate from
13 Southwestern University School of Law and was later admitted to
14 the state bar of California. Klosek Depo., Tr. 9:25-10:12.

15 In September 2008, Klosek began work as a Registered Personal
16 Banker Two at the Wells Fargo branch in Sonoma, California.
17 Klosek Depo., Tr. 422:12-15. Klosek was sixty-three or sixty-four
18 years old at the time she applied to Wells Fargo. Id. at 80:5-8.
19 The St. Helena and Sonoma branches are in the same region and have
20 the same regional management.

21 On April 2, 2009, Klosek emailed her supervisor at the Sonoma
22 branch, John Alejo, to report that a customer had complained that
23 tellers had been taking money out of his mother's account instead
24 of his, that he was not sure why a joint savings account had been

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27 ⁹ While this appears to refer to the DFEH complaint filed on
28 June 18, 2010, Plaintiffs did not include an attachment to the
EEOC complaint when they filed it in the record of this case. See
2AC, Ex. A.

1 opened for him and his mother, and that he wanted his name taken
2 off all accounts.¹⁰ Pls.' Ex. 75.

3 Also on April 2, 2009, Klosek received a memorandum from
4 Brandenburg confirming a conversation that the two had on March
5 24, 2009, in which Klosek had reported unfair treatment by Alejo
6 and her coworkers at the branch. Pls.' Ex. 78; Klosek Depo., Tr.
7 508:24-509:19. In the memorandum, Brandenburg asked Klosek to let
8 her know if she had additional concerns or facts that were not in
9 the memorandum. Pls.' Ex. 78 at WFB002344. Klosek felt that
10 Brandenburg left out certain points and misstated others. Klosek
11 Depo., Tr. 509:20-24.

12 On April 7, 2009, Klosek sent Brandenburg two lengthy emails
13 documenting the complaints she made in their meeting. Pls.' Exs.
14 76-77; Klosek Depo., Tr. 509:24-510:1. In the emails, Klosek
15 stated, among other things, that when she had returned to work
16 after a leave of absence due to an illness and had suggested that
17 she sit and welcome customers rather than stand, Alejo told her,
18 "I am not having a WalMart greeter in my branch." Pls.' Ex. 76,
19 at 5. See also Klosek Depo., Tr. 239:11-14 (testifying that Alejo
20 had made this comment). Klosek also complained that Alejo treated
21 her differently after she returned from her medical leave, such as
22 requiring her to ask permission to take breaks. Pls.' Ex. 76, at
23 5. Klosek further reported that, on a particular occasion when
24 she called Alejo to tell him that she had a medical emergency and
25 _____

26 ¹⁰ Plaintiffs contend that Klosek reported that the customer
27 had said that the account was opened without his authorization.
28 Opp. at 7. However, in Klosek's email, she stated the customer
told her that he "wasn't sure why it was opened and why his mother
and him were put on the account." Pls.' Ex. 75.

1 was critically ill, he told her that "next time this happens I
2 will write you up. I'm warning you." Id. at 4. She also
3 complained that Alejo compared Klosek and her computer skills to
4 his mother and his mother's computer skills. Klosek Depo., Tr.
5 239:15-18. Klosek also made complaints about other employees at
6 the branch, including that a coworker, Tony Cervantes, preferred
7 to work with younger women, which hindered her ability to do her
8 job, including by preventing her from doing business with existing
9 bank customers. Pls.' Ex. 77, at 3. Klosek also complained that
10 Alejo showed favoritism toward Cervantes and another coworker and
11 made excuses for their behavior, instead of addressing the
12 problems. Pls.' Ex. 76, at 4-5; Pls.' Ex. 77, at 2. Klosek
13 expressed concern that Alejo, as her manager, would be preparing
14 performance reviews of her. Id. at 5.

15 In response to Klosek's concerns, Brandenburg interviewed
16 about a dozen people who worked at the branch, including Alejo.
17 Brandenburg Depo., Tr. 189:4-17, Ex. 4. On June 4, Klosek told
18 Brandenburg that "accounts were excessively being opened and
19 closed, and that I suspected bankers were unethically forcing
20 customers to open and close accounts unnecessarily to gain" sales
21 credits. Klosek Decl. ¶ 14. On that same day, during a telephone
22 call, Brandenburg informed Klosek that she had been unable to
23 substantiate Klosek's allegations. Klosek Depo., Tr. 510:20-
24 511:5. Klosek then asked to transfer to another branch. Id. at
25 511:22-24. Klosek did not provide Brandenburg with geographic
26 restrictions and Brandenburg offered her two choices of branches
27 to which Klosek could transfer. Id. at 511:22-512:16. Klosek
28 chose the St. Helena branch. Id. at 513:22-24. Brandenburg also

1 gave Klosek a memorandum stating that she was unable to
2 substantiate her allegations. Klosek Depo. Tr. 543:11-544:19, Ex.
3 12.

4 In June 2009, Klosek transferred to the St. Helena branch.
5 At that time, the St. Helena branch had not had a Registered
6 Personal Banker Two since 2006 or 2007. Rubio Depo., Tr.
7 287:20-288:10.

8 During each of the three quarters that Klosek had worked at
9 the Sonoma branch, she failed to achieve at least some of her
10 minimum sales goals. Klosek Depo., Tr. 437:21-438:7. Klosek
11 attested that she believes that she was held accountable for her
12 sales goals for days that she was absent from work due to medical
13 reasons and that this negatively impacted her performance reviews.
14 Klosek Decl. ¶ 5. She also testified that, while at the St.
15 Helena branch, she was "pretty much knocked out of the teller
16 referral system" and got few referrals. Klosek Depo. Tr. 207:8-
17 24.¹¹

18 Beginning around August 2009, Klosek raised concerns with the
19 St. Helena branch about "unethical conduct, opening and closing
20 accounts, forced sales, ordering products that customers don't
21 want, . . . shoving products down customers' throats." Klosek
22 Depo., Tr. 370:20-376:3, 385:2-387:18. On September 4, 2009,
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25 ¹¹ In this deposition excerpt offered by Plaintiffs, Klosek
26 testifies that "she," a woman who is not identified in the
27 transcript provided, managed the teller referral system unfairly,
28 "along with Pam Rubio." Klosek Depo. Tr. 207:8-24. Klosek also
testifies that, as a result of the unidentified woman's
management, she was "knocked out of" the system. Id. In the
cited excerpt, Klosek does not attribute this result to Rubio.

1 Klosek objected to Rubio about being asked to give referral credit
2 to a banker who had not made the referral. Klosek Depo., Tr.
3 375:13-376:16; Pls.' Ex. 68. On November 16, 2009, Klosek
4 reported to Rubio that a customer wanted to close several accounts
5 that another banker had "insisted on opening." Pls.' Ex. 71.
6 Klosek believed at the time that the conduct violated both Wells
7 Fargo's ethical rules and the law, including "consumer rules and
8 laws that you shouldn't conduct fraudulent activity." Klosek
9 Depo., Tr. 419:2-421:19. Although Klosek did not know which
10 specific "consumer rights laws" may have been violated, she
11 thought the conduct may have violated "consumer rights -- a
12 consumer has a right to know what he or she is buying, not to be
13 forced into something they're not asking for and full disclosure."
14 Id. She reported these perceived violations because she thought
15 that it was her responsibility, and that they were "contrary to
16 our training, our visions and values." Id. at 421:2-11.¹² See

18 ¹² Plaintiffs assert that, in October 2009, Rubio threatened
19 Klosek that she would make her work at the branch difficult if
20 Klosek supported Guitron's complaints against Zavaleta. Opp. at
21 13. However, most of the evidence cited by Plaintiffs does not
22 support this assertion. See Opp. at 13 (citing Klosek Decl. ¶ 24
23 (describing an unrelated email sent by Klosek to Rubio on December
24 28, 2009); Pls.' Ex. 71 (an unrelated email sent by Klosek to
25 Rubio and Combs on November 16, 2009); Klosek Depo Tr. 375:13-
376:16 (deposition testimony in which this is not stated); Pls.'
Ex. 68 (emails between Klosek and Rubio on September 4, 2009
regarding referral credits and a possible violation of Wells Fargo
ethical rules and policies); Klosek Decl. ¶ 29 (describing an
email sent by Klosek to Rubio on March 12, 2010 about a lack of
support from management)).

26 The one exhibit they cite that contains a similar statement
27 is a list of allegations that Klosek prepared in early February
28 2010 for a meeting with Susan Eagles-Williams. See Pls.' Ex. 80;
Klosek Decl. ¶ 25. To the extent that Plaintiffs offer this list
to prove the truth of the allegations contained in it, the list is
inadmissible as hearsay.

1 also Pls.' Ex. 68 (email from Klosek to Rubio on September 4, 2009
2 stating that she objected on that day "in the interest of
3 fairness," because she believed giving someone unearned referral
4 credit was contrary to what she was taught in the Wells Fargo
5 ethics class and a "distortion of the policy").

6 At the St. Helena branch, Klosek refused to participate in
7 this conduct herself and only secured her sales credits by
8 following Wells Fargo's proper procedures and ethical means.
9 Klosek Decl. ¶¶ 9, 10. She found it difficult to meet the sales
10 goals set by Wells Fargo, which she characterizes as unreasonable.
11 Id. at ¶ 10. She testified, "Due to my refusal to partake in
12 unethical and fraudulent behavior and inability to meet my goals
13 following proper procedure, I was subjected to poor performance
14 reviews and disciplinary actions for missing those goals." Id.

15 In October or November 2009, Rubio, who was fifty-five years
16 old at the time, told Klosek, "You're too old for banking," and
17 that she had noticed her date of birth when she reviewed her file.
18 Klosek Depo., Tr. 168:7-169:1; Rubio Decl. ¶ 3. In November 2009,
19 Rubio asked Klosek if she had any plans for retirement. Id. at
20 237:22-238:8. In November or December 2009, Rubio told Klosek
21 that she should read the book, "Bridging the Age Generation Gap."
22 Id. at 233:13-234:4.

23 In early December 2009, Rubio gave Klosek her third quarter
24 performance review. Klosek Depo., Tr. 471:13-22. The performance
25 review stated that Klosek had received a verbal warning in October
26 for not meeting her sales goals. Pls.' Ex. 61, at 4791, 4794.

1 However, prior to the review, Klosek had not received a verbal
2 warning from Rubio. Klosek Depo., Tr. 378:5-382:8.¹³

3 On December 12, 2009, Klosek emailed Rubio about her
4 quarterly review. Klosek Decl. ¶ 23.¹⁴

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6
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8
9
10 _____
11 ¹³ Plaintiffs assert that Rubio created policies in order to
12 prevent Klosek from performing her job; however, their assertions
13 are not supported by the evidence they cite.

14 For example, Plaintiffs allege that, in October 2009, Rubio
15 set forth a new policy "that Hispanic customers should only be
16 served by Hispanic bankers," so that "Klosek was not allowed to
17 assist Hispanic customers who made up 95% of the walk-in traffic
18 at the Branch." Opp. at 14 & n.35. However, the trial policy to
19 which they cite states, "If customers do not speak any English
20 they need to be serviced by someone who is bilingual (whoever is
21 available). If customers do speak English they can go to any
22 banker available." Pls.' Ex. 126. The policy does not state that
23 Hispanic customers had to be served by someone of a particular
24 race or ethnicity, and instead appears intended to ensure that
25 customers who do not speak English are served by someone who can
26 communicate with them. Further, there is no evidence in the
27 record that Klosek does not speak Spanish, that she was the only
28 non-Spanish speaker at the branch or that 95% of the customers who
come in do not speak any English.

Plaintiffs also assert that Rubio did not allow Klosek to
take walk-in traffic. Opp. at 14. However, the evidence to which
they cite, Klosek's deposition testimony, instead states that she
was allowed to take walk-in referrals, but that she believed that
a particular banker--not Rubio--gave her too few referrals.
Klosek Depo., Tr. 180:18-181:16. Further, other evidence
establishes that Rubio changed the prior policy that employees at
the Personal Banker Two level were not allowed to take walk-in
traffic, in order to allow Klosek to do so. Rubio Depo. Tr.
238:19-25; Pls.' Ex. 126.

Plaintiffs also contend that Klosek was not allowed to take
business clients, and that Rubio gave no reason for this. Opp. at
14. However, the only evidence that they cite in support of this
is an unrelated performance review for Guitron. See Rubio Depo.
Tr. 166:16-170:24; Pls.' Ex. 128.

1 On December 28, 2009, Klosek sent Rubio an email documenting
2 a conversation from several days before. Pls.' Ex. 118. Klosek
3 stated that, in that conversation, Rubio had asked Klosek about
4 several matters, including Klosek's activities in opening a
5 particular bank account and documenting a complaint against
6 another banker, and Klosek had asked Rubio to make certain changes
7 to her third quarter performance review. Pls.' Ex. 118. On
8 January 5, 2010, Rubio emailed Takahashi asking him to look into
9 an account that was apparently opened by Klosek and for which the
10 second identification appeared to be falsified. Takahashi Depo.,
11 Tr. 114:21-119:5. After an investigation, Takahashi determined
12 that Klosek was not the one who had entered the information. Id.

13 On January 11, 2010, Rubio emailed a draft informal warning
14 for Klosek to Walker and Brandenburg. Pls.' Ex. 119, at 1935. In
15 the email, Rubio stated that "based on her high performance on the
16 investment piece . . . she might not warrant an informal once the
17 calculations are completed." Id. Walker responded that she
18 "wouldn't use the word impressive" in the performance review and
19 that Klosek "absolutely warrants an informal" warning because she
20
21

22
23 ¹⁴ Although Klosek states that this email is contained in
24 Plaintiffs' Exhibit 206, it appears that Plaintiffs failed to file
25 that exhibit in the record of this case. See Docket No. 96, at
26 3-4 (placeholder stating that Exhibit 206 was filed under seal);
27 Order Granting in Part and Denying in Part Plaintiffs' Motion to
28 File Under Seal, Docket No. 124 (granting Plaintiffs permission to
file Exhibits 51, 52, 56, 72-74, 172-175, 177-195 and 197-201
under seal and directing them to file the remaining exhibits in
the public record); Pls.' Index of Additional Unsealed Exhibits,
Docket No. 126 (omitting Exhibit 206); Pls.' Index of Evidence
under Seal, Docket No. 129 (omitting Exhibit 206).

1 "did not meet minimum expectations in 3 out of the 4 categories."
2 Id. at 1934.

3 On January 12, 2010, Alejo, Klosek's supervisor at the Sonoma
4 branch, submitted her performance reviews from the first and
5 second quarters of 2009. Alejo Depo., Tr. 110:8-11. Alejo
6 usually tried to do this type of review within a month of the
7 quarter for which the review applied. Id. at 84:22-85:9. Both of
8 these reviews noted that Klosek did not meet her sales goals.
9 Pls.' Exs. 120, 121.¹⁵

10 On February 6, 2010, Klosek sent Rubio an email about not
11 receiving the "same leads, referrals, introductions and level of
12 support" given to other bankers, including "Dreydy, Mary, Xavier
13 and even our very temporary banker, Daniel." Klosek Decl. ¶ 26;
14 Pls.' Ex. 207. The examples that Klosek provided were that Rubio
15 said that she could not "do Business Solutions like the others,"
16 that Rubio took a long time to respond to Klosek's request that
17 "all Bankers and tellers send CD referrals and renewals to me,"
18 and that Rubio was "trying to force her to work now on Wednesdays
19 until 7PM," although Klosek had told her that she could not "do
20 that for personal reasons." Id.

21 On February 11, 2010, Klosek emailed Park with concerns about
22 the calculation of her paid time off and sick leave during the
23 prior month, and sent a copy to Rubio. Klosek Decl. ¶ 28, Ex. 58.

24 _____
25 ¹⁵ In the list of allegations that Klosek prepared in early
26 February 2010 for a meeting with Susan Eagles-Williams that was
27 discussed above, Klosek stated that Brandenburg had told her that
28 she would receive "no further reviews from John Alejo." Pls.' Ex.
80, at WFB00862. However, as previously discussed, this list is
inadmissible as hearsay to support the fact that Brandenburg told
her this, and Plaintiffs cite no evidence in support of this fact.

1 Klosek complained that Chris Jensen required her to submit a
 2 doctor's note after the third day of her illness, although Wells
 3 Fargo policy required a note only after the seventh day. Id.
 4 Klosek also said that January 13 or 14 was marked as her first day
 5 of leave, but that she had been working through January 18. Id.

6 On February 22, 2010, Klosek met with Rubio and Walker "to
 7 address the concerns" that Klosek had raised with Rubio. Klosek
 8 Depo., Tr. 518:23-25, 520:9-12.¹⁶ During the meeting, Klosek
 9 interrupted Walker once. Id. at 522:20-25. Klosek told Walker
 10 that "it's sad, as regional director, you're allowing this meeting
 11 to occur." Id. at 522:5-25. At that point, Walker instructed
 12 Rubio to document Klosek's comment and placed Klosek on paid
 13 administrative leave for a week and a half. Id. at 522:13-524:2.¹⁷

14 _____
 15 ¹⁶ Neither party offers evidence regarding what concerns Rubio
 and Walker intended to address in this meeting.

16 ¹⁷ Plaintiffs assert that "Wells Fargo does not allow
 17 employees to be placed on administrative leave as a punitive
 18 measure." Opp. at 14. Plaintiffs cite the following deposition
 testimony of Deborah Cook:

19 Q: Based on your experience with Wells Fargo, is it your
 20 understanding that administrative leave may serve as a
 disciplinary action as opposed to interim action during
 an investigation? . . .

21 A: I've never been aware of it used as a punitive
 22 measure.

23 Q: . . . So would you agree with me that placing someone
 24 on administrative leave is not part of the disciplinary
 procedure of Wells Fargo to your knowledge? . . .

25 A: To my knowledge, no.

26 Q: Did you ever recommend to place a team member on
 administrative leave as a form of discipline?

27 A: Never.

28 Q: Would you ever do that?

1 In February 2010, Klosek asked Susan Eagles-William that
2 Wells Fargo conduct "an objective, independent investigation" of
3 her concerns. Klosek Depo., Tr. 516:13-16. Wells Fargo engaged
4 Debbie Cook, a human resources consultant from Southern
5 California, to conduct an investigation; prior to that time, Cook
6 did not have knowledge of the St. Helena branch, Rubio, Klosek or
7 Guitron. Eagles-William Depo., Tr. 227:17-25; Cook Depo., Tr.
8 46:22-47:19.

9 When Cook completed her investigation on or before April 29,
10 2010, she concluded that Klosek's "allegation of harassment and
11 retaliation" were "largely unsubstantiated," but that there was an
12 appearance of favoritism at the branch, along with an environment
13 in which some team members were afraid to come forward to express
14 concerns out of a fear of reprisal. Pls.' Ex. 137, at WFB003921.
15 The specific allegations that Cook investigated were (1) that
16 Alejo's performance reviews of Klosek "contained errors, omissions
17 and misstatements," (2) that Rubio "falsely accused Klosek of
18 participating in a complaint involving another banker,"
19 undermining her credibility with her coworkers; (3) that Rubio was
20 rude, generally unresponsive, managed by favoritism, and offered
21 support selectively; (4) that Klosek had not received incentive
22 credit for a large sale; (5) that she received few referrals, if
23

24
25 A: I've never encountered a situation in which I would.

26 Cook Depo., Tr. 45:2-22. This testimony does not establish that
27 such use of administrative leave is contrary to Wells Fargo
28 policy, but rather that Cook was unaware whether it was and that
she had not had occasion to do so.

1 any, and that customers referred by Rubio were not interested;
2 (6) that Rubio instructed her to give referral credit to Zavaleta
3 for a transaction that Klosek referred; (7) that she was not
4 allowed to attend an offsite sales event to generate new business
5 unless she used personal time; (8) that Rubio said she was
6 overqualified for her position and Rubio would make sure she was
7 promoted to financial advisor but this did not happen; (9) that
8 her chance to be promoted to financial advisor "was blocked by
9 senior management" and the position was filled by a "young guy
10 from Sacramento; (10) that Rubio completed the 2009 third quarter
11 review and said she had given Klosek a verbal warning when she had
12 not; (11) that Rubio "picked on her for everything; and (12) that
13 Park told her to lie to a bank official and say she was busy to
14 avoid participating in a compliance review. Id. at WFB003916-17.
15 Klosek alleges that Cook failed to investigate her claims
16 thoroughly. Opp. at 15-16.

17 On April 24, 2010, Klosek filed a DFEH complaint against
18 Wells Fargo, Rubio, and Walker, alleging that they discriminated
19 against her because of her age and national origin, and retaliated
20 against her for making complaints about unlawful and unethical
21 company policies and practices. 2AC ¶ 127, Ex. E. DFEH issued
22 Klosek right to sue letters on the same day. Id.

23 On April 29, 2010, Klosek filed a charge with the EEOC
24 against Wells Fargo of discrimination based on age, disability and
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26
27
28

1 national origin. 2AC ¶ 126, Ex. C.¹⁸ The EEOC issued Klosek a
2 right to sue letter on May 6, 2010. Id.

3 Klosek filed a complaint with the Department of Labor against
4 Wells Fargo alleging violations under section 206 of the SOX. 2AC
5 ¶ 129; Answer to 2AC ¶ 129. Klosek alleges that she filed this
6 complaint on or about May 11, 2010. 2AC ¶ 129.¹⁹ On June 14,
7 2010, Wells Fargo learned that Klosek had filed a complaint
8 against it with the Department of Labor. Defs.' Resps. to
9 Guitron's Interrogatories, Set 2, at 5.

10 On May 14, 2010, Klosek went on a leave of absence due to
11 work-related stress. Klosek Depo., Tr. 248:20-249:1. Klosek did
12 not pursue a worker's compensation claim for her leave. Id. at
13 528:21-529:7. In late June 2010, Klosek learned that she had
14 breast cancer. Id. at 250:3-9. She subsequently extended her
15 leave several times. Id. at 256:10-13.

16 Klosek received a letter dated July 29, 2010 from "Wells
17 Fargo Leave Management" stating that she had exhausted her Family
18 and Medical Leave Act protected leave and that her absences would
19 no longer be protected under the Act. Klosek Depo., Ex. 4; Klosek
20 Depo. Tr. 259:3-14. Subsequently, Klosek's leave was extended
21 through September 30, 2010. Mot. at 22; Opp. at 16.

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25 ¹⁸ On the complaint form, Klosek stated, "See attached." Id.
26 However, Plaintiffs did not include an attachment to this
complaint when they filed it with this Court. See 2AC, Ex. C.

27 ¹⁹ This complaint is not part of the record in this case.
28 While Plaintiffs state that it is attached to the 2AC as Exhibit
C, that exhibit instead contains an EEOC complaint filed by Klosek
and a right to sue letter issued by the EEOC. 2AC, Ex. C.

1 On September 9, 2010, Walker sent Klosek a letter stating, in
2 relevant part, "Due to business needs, we cannot continue to hold
3 your position open for you. It is critical that we have adequate
4 staffing and an active Registered Banker available to assist our
5 customers. Accordingly, we will be posting a Registered Banker
6 position on September 13, 2010 . . . If you plan on returning to
7 work within the next few weeks, please let us know immediately."
8 Klosek Depo., Ex. 5. The letter also stated that, if Wells Fargo
9 filled her position, she could extend her leave for up to twenty-
10 four months, and if she was cleared to return to work during that
11 time, she would be placed on a ninety day job search leave, during
12 which time Wells Fargo would assist her in searching for vacant
13 positions at Wells Fargo for which she qualified. Id.

14 In response, on September 13, 2010, Klosek sent Walker an
15 email stating, "At this time, I anticipate that I will be back to
16 work no later than on December 11, 2010 or before," as directed by
17 her doctor, and alleging that Defendants were filling her position
18 based on discrimination and retaliation and not because of a
19 legitimate business need. Klosek Depo. Tr. 275:20-276:15, Ex. 6.

20 Klosek was not medically cleared to return to work until
21 March 1, 2011. Id. at 256:13-20. In the interim, in January
22 2011, Chris Sipes was promoted from a Personal Banker One position
23 at the Sonoma branch to fill Klosek's vacant Registered Personal
24 Banker Two position at the St. Helena branch. Sipes Depo., Tr.
25 12:13-16, 12:21-13:2, 26:18-27:5. Sipes had obtained the
26 necessary qualifications for this position in January 2011. Id.
27 at 27:4-5.

28

1 When Klosek was able to return to work on March 1, 2011, she
2 was given a job search leave for ninety days; Klosek understood
3 that she had been terminated as of March 1 with privileges to
4 search for an internal posting. Klosek Depo., Tr. 262:5-265:16,
5 283:25-285:4, Ex. 7. In early March 2011, Klosek spoke to a
6 recruiter about issues she was having accessing the internal job
7 search system. Klosek Decl. ¶ 40. That recruiter stated that she
8 could not help Klosek look for a job and that it was Klosek's
9 responsibility to get access to the system and look for a job.

10 Id.

11 Klosek alleges that she filed an additional DFEH complaint
12 against Wells Fargo on March 30, 2011 and that DFEH issued her a
13 right to sue letter on the same day. 2AC ¶ 128. However, Klosek
14 has not presented any evidence, and Defendants have not admitted,
15 that she did so.²⁰

16 Klosek asked Walker for a letter of recommendation during
17 this internal hiring process. Klosek Depo. Tr. 301:7-302:7.
18 Walker told Klosek that it was not her "practice to issue any type
19 of recommendation letter for either current or former employees"
20 and directed Klosek to the neutral reference policy that applied
21 to external prospective employers outside of Wells Fargo. Id.;
22 Pls.' Ex. 209, email from Walker to Klosek dated April 15, 2011.

23 During the first and second quarters in 2011, Alejo believed
24 that there was a need for an additional Personal Banker Two in the
25 Sonoma branch and informed Walker, his supervisor, of this need.

26
27 ²⁰ Plaintiffs state that they attached these documents to the
28 2AC as Exhibit F. However, they failed to include an Exhibit F
with their 2AC.

1 Alejo Depo. Tr. 51:3-53:19. He does not recall the position being
2 posted. Id. Although Klosek was searching the postings on the
3 internal job search system on a daily basis, she never saw a
4 posting for a Personal Banker Two position in either the Sonoma or
5 St. Helena branch between March 1, 2011 and June 20, 2011, when
6 her access to the internal system was terminated. Klosek Decl.
7 ¶ 38. During that time, she applied to at least nine positions
8 within Wells Fargo, but she was not accepted to any of those
9 positions and was not re-hired by Wells Fargo. Id. ¶ 39.

10 Sipes was moved back to the Sonoma branch in August 2011.
11 Sipes Depo., Tr. 38:4-11.²¹

12 III. The Instant Action

13 Plaintiffs initiated the instant case on August 6, 2010.
14 Docket No. 1. They amended their pleadings on November 15, 2010
15 and on April 29, 2011. Docket Nos. 9, 26.

16 Guitron asserts five claims against Wells Fargo:
17 (1) retaliation under SOX; (2) discrimination based on her status
18 as a single female and a single mother, in violation of Title VII
19 and California's Fair Employment and Housing Act (FEHA);
20 (3) retaliation in violation of Title VII and FEHA; (4) wrongful
21 discharge in violation of public policy as expressed in Title VII,
22 FEHA and SOX; and (5) failure to prevent discriminatory practices
23 in violation of Title VII and FEHA. Guitron also asserts a claim
24

25
26
27 ²¹ Defendants assert, "Walker testified that she transferred
28 Sipes temporarily back to the Sonoma branch in August 2011 to fill
a staffing shortage at the Sonoma branch." Reply, at 18.
Defendants, however, have not offered any such testimony.

1 under FEHA against Rubio for harassment based on her status as a
2 single woman and single mother.

3 Klosek asserts six claims against Wells Fargo:

4 (1) retaliation under SOX; (2) discrimination based on her age and
5 medical condition in violation of Title VII and FEHA;

6 (3) retaliation in violation of Title VII and FEHA; (4) wrongful
7 discharge in violation of public policy as expressed in Title VII,
8 FEHA and SOX; (5) failure to prevent discriminatory practices in
9 violation of Title VII and FEHA; and (6) denial of accommodation
10 under FEHA. Klosek also asserts a claim under FEHA against Rubio
11 for harassment based on her status as a woman over the age of
12 forty.

13 LEGAL STANDARD

14 Summary judgment is properly granted when no genuine and
15 disputed issues of material fact remain, and when, viewing the
16 evidence most favorably to the non-moving party, the movant is
17 clearly entitled to prevail as a matter of law. Federal Rule of
18 Civil Procedure 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23
19 (1986); Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89
20 (9th Cir. 1987).

21 The moving party bears the burden of showing that there is no
22 material factual dispute. Therefore, the court must regard as
23 true the opposing party's evidence, if supported by affidavits or
24 other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg,
25 815 F.2d at 1289. The court must draw all reasonable inferences
26 in favor of the party against whom summary judgment is sought.
27 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
28

1 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952
2 F.2d 1551, 1558 (9th Cir. 1991).

3 Material facts which would preclude entry of summary judgment
4 are those which, under applicable substantive law, may affect the
5 outcome of the case. The substantive law will identify which
6 facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S.
7 242, 248 (1986).

8 Where the moving party does not bear the burden of proof on
9 an issue at trial, the moving party may discharge its burden of
10 production by either of two methods:

11 The moving party may produce evidence negating an
12 essential element of the nonmoving party's case, or,
13 after suitable discovery, the moving party may show that
14 the nonmoving party does not have enough evidence of an
essential element of its claim or defense to carry its
ultimate burden of persuasion at trial.

15 Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d
16 1099, 1106 (9th Cir. 2000).

17 If the moving party discharges its burden by showing an
18 absence of evidence to support an essential element of a claim or
19 defense, it is not required to produce evidence showing the
20 absence of a material fact on such issues, or to support its
21 motion with evidence negating the non-moving party's claim. Id.;
22 see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990);
23 Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If
24 the moving party shows an absence of evidence to support the non-
25 moving party's case, the burden then shifts to the non-moving
26 party to produce "specific evidence, through affidavits or
27 admissible discovery material, to show that the dispute exists."
28 Bhan, 929 F.2d at 1409.

1 If the moving party discharges its burden by negating an
2 essential element of the non-moving party's claim or defense, it
3 must produce affirmative evidence of such negation. Nissan, 210
4 F.3d at 1105. If the moving party produces such evidence, the
5 burden then shifts to the non-moving party to produce specific
6 evidence to show that a dispute of material fact exists. Id.

7 If the moving party does not meet its initial burden of
8 production by either method, the non-moving party is under no
9 obligation to offer any evidence in support of its opposition.
10 Id. This is true even though the non-moving party bears the
11 ultimate burden of persuasion at trial. Id. at 1107.

12 DISCUSSION

13 Defendants move for summary judgment on all claims asserted
14 by both Plaintiffs, and to sever their claims from one another.

15 I. Plaintiffs' claims for retaliation under SOX

16 "Section 1514A(a)(1) of Title 18 prohibits employers of
17 publicly-traded companies from 'discriminat[ing] against an
18 employee in the terms and conditions of employment' for
19 'provid[ing] information . . . regarding any conduct which the
20 employee reasonably believes constitutes a violation of section
21 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348
22 [securities fraud], any rule or regulation of the Securities and
23 Exchange Commission, or any provision of Federal law relating to
24 fraud against shareholders.'" Van Asdale v. Int'l Game Tech., 577
25 F.3d 989, 996 (9th Cir. 2009). Subsection (b)(2) "further
26 specifies that § 1514A claims are governed by the procedures
27 applicable to whistle-blower claims brought under 49 U.S.C.
28 § 42121(b)," which, "in turn, sets forth a burden-shifting

1 procedure by which a plaintiff is first required to make out a
2 prima facie case of retaliatory discrimination; if the plaintiff
3 meets this burden, the employer assumes the burden of
4 demonstrating by clear and convincing evidence that it would have
5 taken the same adverse employment action in the absence of the
6 plaintiff's protected activity." Id.

7 A. The prima facie case under SOX

8 An employee seeking to establish a prima facie case of
9 unlawful retaliation under § 1514A must prove four elements:

10 (a) the employee engaged in a protected activity or
11 conduct;

12 (b) the named person knew or suspected, actually or
13 constructively, that the employee engaged in the
protected activity;

14 (c) the employee suffered an unfavorable personnel
action; and

15 (d) the circumstances were sufficient to raise the
16 inference that the protected activity was a contributing
factor in the unfavorable action.

17 Id. at 996 (quoting 29 C.F.R. § 1980.104(b)(1)(i)-(iv)) (internal
18 formatting and quotation marks omitted).

19 1. Protected activity

20 "To constitute protected activity under Sarbanes-Oxley, an
21 employee's communications must definitively and specifically
22 relate to one of the listed categories of fraud or securities
23 violations under 18 U.S.C. § 1514A(a)(1)." Id. at 996-97
24 (internal formatting and quotation marks omitted); see also 18
25 U.S.C. § 1514A(a)(1) (listing covered categories of fraud). The
26 Ninth Circuit has also stated that "to trigger the protections of
27 the Act, an employee must also have (1) a subjective belief that
28

1 the conduct being reported violated a listed law, and (2) this
2 belief must be objectively reasonable." Id. at 1000.

3 Defendants argue that Plaintiffs' complaints related to
4 violations of internal company policies, not to bank fraud,²² and
5 that neither Plaintiff had a subjective and objectively reasonable
6 belief that the conduct she was reporting was bank fraud.

7 "The essential elements of bank fraud under [the Act] are:
8 '(1) that the defendant knowingly executed or attempted to execute
9 a scheme to defraud a financial institution; (2) that the
10 defendant did so with the intent to defraud; and (3) that the
11 financial institution was insured by the FDIC [Federal Deposit
12 Insurance Corporation].'" United States v. Rizk, 660 F.3d 1125,
13 1135 (9th Cir. 2011) (quoting United States v. Warshak, 631 F.3d
14 266, 312 (6th Cir. 2010)). "Intent to defraud may be established
15 by circumstantial evidence." Id. (citing United States v.
16 Sullivan, 522 F.3d 967, 974 (9th Cir. 2008) (holding, in mail and
17 wire fraud case, that "the scheme itself may be probative
18 circumstantial evidence of an intent to defraud"))).

19 Plaintiffs have established a genuine dispute of material
20 fact as to whether Guitron's reports related to bank fraud.
21 Plaintiffs presented evidence that Guitron reported that her
22 _____

23 ²² In their opposition, Plaintiffs contend that their
24 complaints were related to "bank, wire and mail fraud." Opp. at
25 19. However, in the operative complaint, they did not allege wire
26 or mail fraud as a basis for this claim. See 2AC ¶ 134.
27 Accordingly, Plaintiffs may not assert this new theory to defeat
28 summary judgment. See Federal Rule of Civil Procedure 9(b) ("a
party must state with particularity the circumstances constituting
fraud or mistake" in its pleading); see also Hardin v. Wal-Mart
Stores, Inc., 2010 U.S. Dist. LEXIS 125410, at *5 (E.D. Cal.) ("In
opposing summary judgment, plaintiffs may not rely on new claims
or new theories under a claim that was plead in the complaint.").

1 former colleagues were engaging in practices such as opening and
2 closing accounts without customer permission or awareness or
3 without proper identification, which would allow them to obtain
4 otherwise unearned bonuses from Wells Fargo, thereby defrauding
5 it.

6 Defendants' arguments to the contrary are unavailing.
7 Defendants contend that Guitron failed to present evidence that
8 Defendants had the necessary intent to participate in bank fraud.
9 See Mot. at 8; Reply at 3, 4. However, Guitron must prove only
10 that she had a subjective and objectively reasonable belief that
11 the colleagues she reported were engaged in bank fraud; she need
12 not prove that Defendants themselves engaged in bank fraud.

13 Further, contrary to Defendants' argument, it is not
14 necessarily fatal to Guitron's claim that she did not investigate
15 whether or not her colleagues were actually engaged in fraud and
16 that she based her complaints on reports from customers or her own
17 suspicions about the transactions. See Van Asdale, 577 F.3d at
18 1001 ("It is not critical to the Van Asdales' claim that they
19 prove that Anchor officials actually engaged in fraud in
20 connection with the merger; rather, the Van Asdales only need show
21 that they reasonably believed that there might have been fraud
22 . . ."). From the evidence presented, a jury could conclude that
23 Guitron's beliefs were objectively reasonable.

24 Finally, considered in the light most favorable to Guitron as
25 the non-moving party, the evidence could support a finding that
26 Guitron had a subjective belief that the activity she reported may
27 have been unlawful, even though she was unsure. Cf. Gale v. Dept.
28 of Labor, 384 Fed. App'x. 926, 930 (11th Cir. 2010) (finding no

1 subjective belief where the employee testified that he "did not
2 believe that" the company had engaged in any kind of illegal or
3 fraudulent activity when he made the reports).

4 Defendants, however, have established that there is no
5 material factual dispute that Klosek did not engage in activity
6 protected by SOX. Unlike Guitron, Klosek reported conduct akin to
7 overly aggressive sales techniques, which may have been unethical
8 or in violation of Wells Fargo's sales policies, but which could
9 not objectively be considered bank fraud. Further, Klosek did not
10 have a subjective belief that these practices amounted to bank
11 fraud. Although she testified that she believed that her
12 colleagues were engaged in "unlawful behaviors," she believed that
13 they were unlawful because they violated "consumer rights"-- which
14 she described as the consumer's rights "to know what he or she is
15 buying," to "full disclosure" and "not to be forced into something
16 they're not asking for"--not because the practices were bank
17 fraud. Klosek Depo., Tr. 419:2-421:19. Because Klosek cannot
18 establish that she engaged in protected activity, she fails to
19 establish a prima facie case for a SOX violation. Thus,
20 Defendants' motion for summary judgment is GRANTED as to Klosek's
21 claim for retaliation under SOX.

22 2. Knowledge of decision-maker

23 Plaintiffs have offered evidence, and Defendants do not
24 dispute, that Defendants knew or suspected, actually or
25 constructively, that Guitron had engaged in activity protected by
26 SOX. Accordingly, Plaintiffs have established this element of
27 Guitron's prima facie case for a SOX retaliation claim.
28

1 3. Unfavorable personnel action

2 Defendants contend that Plaintiffs have failed to offer
3 evidence that Guitron suffered a "materially adverse" employment
4 action. Mot. at 8 (quoting Allen v. Admin. Review Bd., 514 F.3d
5 468, 476 n.2 (5th Cir. 2008)). Plaintiffs respond that she
6 suffered many adverse employment actions and that she need not
7 show that any was materially adverse.

8 The parties dispute the relevant standard for determining
9 whether an employee has suffered an "unfavorable personnel action"
10 under SOX. Defendants argue that the alleged action must be
11 "materially adverse," meaning that "it well might have dissuaded a
12 reasonable worker from making or supporting" the protected report.
13 Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53,
14 68 (2006) (quotations omitted). Defendants base their argument on
15 Burlington Northern, which addressed the meaning of "adverse
16 employment action" in the Title VII context. To argue that the
17 Court should apply this standard in the SOX context, Defendants
18 rely on the Fifth Circuit's discussion in Allen v. Admin. Review
19 Bd., 514 F.3d 468, 476 n.2 (5th Cir. 2008), in which that court
20 applied the Burlington Northern definition to SOX claims. In
21 Allen, the Fifth Circuit recognized that the Department of Labor's
22 Administrative Review Board (ARB), which issues final agency
23 decisions for the Secretary of Labor in a variety of contexts,
24 including SOX claims, had adopted the definition of "adverse
25 employment action" from Burlington Northern for claims brought
26 under the Wendell H. Ford Aviation Investment and Reform Act for
27 the 21st Century (AIR 21), 49 U.S.C. § 42121. 514 F.3d at 476 n.2
28 (citing Hirst v. Southeast Airlines, Inc., 2007 DOL Ad. Rev. Bd.

1 LEXIS 7, at *4-5). Because of the similarity between the AIR 21
2 and SOX statutes, the Fifth Circuit decided to apply the
3 Burlington Northern definition to SOX claims. Id.

4 Since those decisions, the ARB has issued two additional
5 relevant opinions, which have materially undermined the reasoning
6 underlying Allen. First, in Williams v. America Airlines, Inc.,
7 ARB Case No. 09-018 (2010), the ARB held that, while persuasive,
8 the Burlington Northern "materially adverse" test did not control
9 in cases under AIR 21, in which the statutory language is broader
10 than in Title VII. The ARB stated instead that, based on the
11 clear language of the AIR 21 statute and congressional intent to
12 have strong whistleblower protection for aviation employees, the
13 term "'adverse actions' refers to unfavorable employment actions
14 that are more than trivial, either as a single event or in
15 combination with other deliberate employer actions alleged." Id.
16 at *15. See also id. at 14 (citing Burlington Northern, 548 U.S.
17 at 68, for examples of trivial actions, including "petty slights,"
18 "minor annoyances," "personality conflicts" and "snubbing by
19 supervisors and coworkers"). The ARB further held that the
20 statute "prohibits the act of deliberate retaliation without any
21 expressed limitation to those actions that might dissuade the
22 reasonable employee." Id. (emphasis added). The ARB also
23 expressed the belief that "some actions are per se adverse (e.g.,
24 termination of employment, suspensions, demotions)." Id. at 15
25 n.75.

26 More recently, in Menendez v. Halliburton, Inc., 2011 DOL Ad.
27 Rev. Bd. LEXIS 83, the ARB held that, because of the similarity
28 between the AIR 21 statutory language and the broad language in

1 SOX, "the Williams standard of actionable adverse actions" is
2 "likewise applicable" to SOX claims. Id. at *37. Thus, under the
3 standard set forth by the ARB, "adverse actions" in the SOX
4 context also "refers to unfavorable employment actions that are
5 more than trivial, either as a single event or in combination with
6 other deliberate employer actions alleged." Id. at *37-38.
7 Nonetheless, the analysis in Burlington Northern continues to be a
8 "helpful guide." Id. at *38.

9 Plaintiffs have offered substantial evidence, and Defendants
10 do not dispute, that Guitron suffered unfavorable employment
11 actions, including suspension and poor performance reviews. Thus,
12 Plaintiffs have established this element of Guitron's prima facie
13 case for a SOX retaliation claim.

14 4. Contributing factor

15 Plaintiffs argue that the fact that the purportedly
16 retaliatory acts occurred during the same time period when Guitron
17 was making complaints is sufficient to raise an inference that her
18 protected activity was a contributing factor to the unfavorable
19 employment actions. Viewing the circumstances as a whole, the
20 Court agrees that Plaintiffs have introduced evidence sufficient
21 to support such an inference.

22 B. Non-retaliatory reason

23 When a plaintiff establishes a prima facie case of unlawful
24 retaliation under SOX, the burden then shifts to the defendant to
25 demonstrate "by clear and convincing evidence that it would have
26 taken the same adverse employment action in the absence of the
27 plaintiff's protected activity." Van Asdale, 577 F.3d at 996.
28

1 The Court finds that the undisputed facts establish that
2 Defendants have met this burden. The evidence demonstrates that,
3 without Guitron's protected activity, Defendants would have issued
4 her verbal and informal warnings, because she failed to meet her
5 sales goals for each quarter in which she received a warning.
6 Despite their assertions to the contrary, Plaintiffs have not
7 introduced evidence that Defendants inconsistently implemented
8 their personnel management policies, or that others who performed
9 similarly were not given such warnings. Further, Defendants have
10 established a non-retaliatory reason for placing Guitron on
11 administrative leave: her insubordination in refusing to meet with
12 her manager, Rubio. While Plaintiffs argue that this reason was
13 pretextual because using administrative leave as a punitive
14 measure was purportedly contrary to Wells Fargo's policy,
15 Plaintiffs have not established the existence of any such policy.
16 Defendants have also established a non-retaliatory reason for
17 Guitron's termination: her refusal to return to work after Walker
18 repeatedly informed her that she had only been placed on
19 administrative leave and was not fired. Plaintiffs have not
20 offered evidence that this reason for her termination was
21 pretextual.

22 Accordingly, the Court GRANTS Defendants' motion for summary
23 judgment on Guitron's claim for retaliation under SOX.
24
25
26
27
28

1 II. Discrimination in violation of Title VII and FEHA

2 Plaintiffs contend that Defendants discriminated against
3 Guitron based on her status as a single woman²³ and against Klosek
4 based on her age²⁴ and disability status.

5 In disparate treatment cases, plaintiffs can prove
6 intentional discrimination through direct or indirect evidence.
7 See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121
8 (1985). Plaintiffs argue that they can prove their case through
9 both methods.

10 A. Direct evidence of discrimination

11 "Direct evidence is evidence which, if believed, proves the
12 fact of discriminatory animus without inference or presumption."
13 DeJung v. Superior Court, 169 Cal. App. 4th 533, 550 (2008). See
14 also Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1221 (9th Cir.
15 1998) (same). Direct evidence "typically consists of clearly
16 sexist, racist, or similarly discriminatory statements or actions
17 by the employer." Coghlan v. Am. Seafoods Co. LLC, 413 F.3d 1090,
18 1095 (9th Cir. 2005). "Comments demonstrating discriminatory
19 _____

20 ²³ In the 2AC, Guitron based her claims on her status as a
21 single woman and mother. However, in Plaintiffs' opposition to
22 Defendants' motion for summary judgment, she argued that she was
23 discriminated against as a "single female," and did not pursue
claims based on discrimination against her as a single mother.
See Opp. at 25-27.

24 ²⁴ Klosek asserts her claim for age discrimination under Title
25 VII and FEHA. 2AC ¶¶ 161-62, 202. However, Title VII does not
26 prohibit discrimination on the basis of age. See 42 U.S.C.
27 § 2000e-2 (prohibiting employment discrimination based on "race,
28 color, religion, sex, or national origin"). Instead, federal law
prohibits age discrimination in employment through the Age
Discrimination and Employment Act of 1967 (ADEA), 29 U.S.C. § 621,
et seq. Accordingly, the Court GRANTS Defendants' motion for
summary judgment on Klosek's claim for age discrimination under
Title VII.

1 animus may be found to be direct evidence if there is evidence of
2 a causal relationship between the comments and the adverse job
3 action at issue." DeJung, 169 Cal. App. 4th at 550.

4 Plaintiffs argue that they have direct evidence of
5 discriminatory animus against both Guitron and Klosek. However,
6 that "Guitron was pressured to shake her skirt, expose her
7 cleavage and generally use sex to earn" daily sales credit, Opp.
8 at 25, is not evidence of discriminatory animus toward single
9 women without inference or presumption. Further, Plaintiffs offer
10 no evidence that these actions were connected to any particular
11 adverse job actions taken against Guitron. Similarly, that
12 "Klosek was shunned, called a 'Wal-Mart greeter,' questioned about
13 her retirement, and even given a book to 'help' her relate to the
14 younger staff," Opp. at 25, is not evidence of discriminatory
15 animus based on age or disability status without inference or
16 presumption. Only Rubio's comment that Klosek was "too old for
17 banking" is direct evidence of discrimination based on age.
18 Further, Rubio made this comment shortly before giving Klosek her
19 third quarter performance review, in which Rubio incorrectly
20 asserted that Klosek had received a verbal warning for her
21 performance. See Dominguez-Curry v. Nev. Transp. Dep't, 424 F.3d
22 1027, 1039-40 (9th Cir. 2005) ("a single discriminatory comment by
23 a plaintiff's supervisor or decision maker is sufficient to
24 preclude summary judgment for the employer," and where "the person
25 who exhibited discriminatory animus influenced or participated in
26 the decisionmaking process, a reasonable factfinder could conclude
27 that the animus affected the employment decision").
28

1 Defendants contend that Klosek's negative performance ratings
2 were not adverse employment actions, because they did not
3 materially affect the terms and conditions of her employment.
4 Klosek's regular compensation, position and title were not
5 decreased by her negative performance reviews. Brandenburg Decl.
6 ¶ 3. However, there is evidence in the record that employees
7 could receive monetary bonuses, beyond their normal income, for
8 achieving daily sales goals, if they also met certain other
9 requirements. See Rubio Depo. Tr. 76:25-79:15. Further, the
10 Ninth Circuit has found that "undeserved performance ratings, if
11 proven, would constitute 'adverse employment decisions.'" Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987).

13 Because Klosek has raised a material question of fact as to
14 whether Defendants subjected her to discrimination based on her
15 age, the Court DENIES Defendants' motion for summary judgment on
16 her claim for age discrimination under FEHA.

17 B. Circumstantial evidence of discrimination

18 Because direct proof of intentional discrimination is rare,
19 such claims may also be proved circumstantially. See Dominguez-
20 Curry, 424 F.3d at 1037. Title VII and FEHA claims based on
21 circumstantial evidence are analyzed through the burden-shifting
22 framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S.
23 792 (1973). In the first step of the McDonnell Douglas analysis,
24 a plaintiff must establish a prima facie case of discrimination.
25 See Diaz v. Eagle Produce Ltd. P'ship, 521 F.3d 1201, 1207 (9th
26 Cir. 2008).

27 A prima facie showing includes proof that (1) the plaintiff
28 is a member of a protected class; (2) the plaintiff is qualified

1 for the position in question or is performing her job
2 satisfactorily; (3) the plaintiff suffered an adverse employment
3 action; and (4) the plaintiff was treated differently than a
4 similarly situated employee who did not belong to the same
5 protected class. Cornwell v. Electra Cent. Credit Union, 439 F.3d
6 1018, 1028 (9th Cir. 2006); Coleman v. Quaker Oats Co., 232 F.3d
7 1271, 1281 (9th Cir. 2000) (citing Nidds v. Schindler Co., 113
8 F.3d 912, 917 (9th Cir. 1997)); Washington v. Garrett, 10 F.3d
9 1421, 1433 (9th Cir. 1993); Sischo-Nownejad v. Merced Community
10 College, 934 F.2d 1104, 1109-10 & n.7 (9th Cir. 1991). See also
11 Faust v. California Portland Cement Co., 150 Cal. App. 4th 864,
12 886 (2007) (for a disability discrimination claim under FEHA,
13 requiring a plaintiff to show "(1) he suffers from a disability;
14 (2) he is otherwise qualified to do his job; and, (3) he was
15 subjected to adverse employment action because of his
16 disability"). The amount of evidence that must be produced to
17 make the prima facie case is "very little." Sischo-Nownejad, 934
18 F.2d at 1110-11.

19 Once a plaintiff has established a prima facie inference of
20 discrimination, he or she will generally have raised a genuine
21 issue of material fact regarding the legitimacy of the employer's
22 articulated reason for the adverse employment action.
23 Accordingly, a factual question will almost always exist, and
24 summary judgment will not be appropriate. Id. at 1111;
25 Washington, 10 F.3d at 1433. However, in those cases where the
26 prima facie case consists of no more than the minimum necessary to
27 create a presumption under McDonnell Douglas, the plaintiff must
28 produce some evidence of pretext to overcome summary judgment

1 where the employer has articulated a non-discriminatory reason for
2 the adverse treatment. Wallis v. J.R. Simplot Co., 26 F.3d 885,
3 890 (9th Cir. 1994). When a plaintiff presents direct evidence
4 that the proffered explanation is a pretext for discrimination,
5 "very little evidence" is required to avoid summary judgment.
6 EEOC v. Boeing Co., 577 F.3d 1044, 1049 (9th Cir. 2009). In
7 contrast, when a plaintiff relies on circumstantial evidence to
8 show pretext, "that evidence must be specific and substantial to
9 defeat the employer's motion for summary judgment.'" Id. (quoting
10 Coghlan, 413 F.3d at 1095).

11 In performing this analysis, the Ninth Circuit has cautioned
12 that district courts should consider a plaintiff's "claim of
13 discrimination with regard to each of these employment decisions
14 separately, examining the specific rationale offered for each
15 decision and determining whether that explanation supported the
16 inference of pretext.'" Odima v. Westin Tucson Hotel Co., 991
17 F.2d 595, 600 (9th Cir. 1993) (quoting Norris v. San Francisco,
18 900 F.2d 1326, 1330 (9th Cir. 1990)).

- 19 1. Guitron's claims under Title VII and FEHA for
20 discrimination based on her status as a single
21 woman

22 Defendants argue that Guitron has not established that she is
23 a member of a protected class, because "marital status" cannot be
24 the basis of such a class. Guitron responds that her status as a
25 single woman is protected under a "sex plus" theory of
26 discrimination. Under that theory, "Title VII not only forbids
27 discrimination against women in general, but also discrimination
28 against subclasses of women, such as women with pre-school-age
children." Coleman v. B-G Maint. Mgmt., 108 F.3d 1199, 1203 (10th

1 Cir. 1997). See Rauw v. Glickman, 2001 U.S. Dist. LEXIS 22739, at
2 *25 (D. Or.) ("Although the Ninth Circuit has not specifically
3 addressed the viability of the 'sex plus' claim, it presumably
4 would allow such a claim given the current state of the law.").

5 However, Guitron nonetheless fails to establish the elements
6 of a prima facie case of discrimination based upon her status as a
7 single woman. The undisputed evidence establishes that Guitron
8 repeatedly failed to meet her sales goals, and that she was thus
9 not performing her job satisfactorily.²⁵ For many of the adverse
10 actions of which she complains,²⁶ including her negative ratings,
11 asking her to document her requests for schedule modifications,
12 and giving her a hard time when she asked for time off (although
13 consistently allowing her to take the requested time off) and for
14 other actions to which Guitron did not point as the basis for this
15 claim in the 2AC, such as placing her on administrative leave,
16 Guitron also has failed to identify any single men who were
17 treated differently than she was. "[A]lthough the protected class

18 _____
19 ²⁵ In Plaintiffs' opposition, they argue that this was
20 pretextual and that, "as a way to ensure poor sale [sic]
21 performance, Rubio stopped giving Guitron referrals which made it
22 harder for her to meet her sales goals." Opp. at 10. In support,
23 Plaintiffs cite pages 245 and 246 of Guitron's deposition
24 testimony contained in Plaintiffs' Exhibit 21. However,
25 Plaintiffs did not include the cited pages in the exhibit provided
to the Court. See Docket Nos. 82-5, 82-6. Although Plaintiffs
also argue that "Rubio refused to provide Plaintiffs with
referrals and other means of support," none of the cited exhibits
are related to Guitron. See Opp. at 4 (citing Pls.' Exs. 18, 19;
Klosek Depo. Tr. 207:1-24).

26 ²⁶ The specific adverse employment actions to which Guitron
27 points for these claims are "setting additional requirements for
28 Guitron, subjecting Guitron to torment and harassment about her
private life, giving Guitron poor performance reviews based on her
familial obligations and discriminating against Guitron for having
to care for her children." 2AC ¶¶ 156, 196.

1 need not include all women, the plaintiff must still prove that
2 the subclass of women was unfavorably treated as compared to the
3 corresponding subclass of men." Coleman, 108 F.3d at 1203.
4 Further, many of the employment decisions of which Guitron
5 complains do not amount to actionable adverse employment actions,
6 because they did not "materially affect the compensation, terms,
7 conditions, or privileges of . . . employment." Davis v. Team
8 Elec. Co., 520 F.3d 1080, 1089 (9th Cir. 2008).

9 Accordingly, the Court GRANTS Defendants' motion for summary
10 judgment on Guitron's claims for discrimination under Title VII
11 and FEHA.

12 2. Klosek's FEHA claim for discrimination based on
13 disability status

14 In the 2AC, Klosek alleges that Defendants discriminated
15 against her based on her disability status when her "position was
16 taken from her while she was on medical leave of absence" and when
17 she was terminated. 2AC ¶ 203.

18 Defendants argue that Klosek cannot establish a prima facie
19 case because she cannot establish that either of these actions was
20 taken "because of" her disability. See Faust, 150 Cal. App. 4th
21 at 886. Defendants do not challenge her ability to establish the
22 other elements of her prima facie case. See Mot. at 29-30.

23 In response, Klosek "must come forward with some admissible
24 facts capable of demonstrating a causal nexus" between her
25 disability and these adverse actions. Evans v. Sears Logistics
26 Servs., 2011 U.S. Dist. LEXIS 141145, at *40 (E.D. Cal.). In
27 their opposition, Plaintiffs aver that Defendants have "not moved
28

1 on the question of causality" and do not address this requirement
2 specifically. Opp. at 28.

3 Nevertheless, the Court finds the evidence in the record
4 establishes a prima facie case of discrimination based on
5 disability. As previously described, while Klosek was on
6 disability leave, on September 9, 2010, Walker sent her a letter
7 stating that Wells Fargo would be posting her position in several
8 days and expected to fill it shortly and asking that Klosek let
9 her know if she planned to return to work soon thereafter.
10 Walker's letter suggested that, if Klosek were able to return to
11 work at that time, she would be able to retain her position.
12 After Klosek informed Walker that she was unable to return because
13 of her medical condition, her position was filled by Sipes.
14 Further, because Wells Fargo filled her position, it also placed
15 her on job search leave, as stated in Walker's letter. Because
16 she was unable to find a new position during that leave, Wells
17 Fargo terminated her. However, she would not have been placed on
18 that leave, but for the fact that she could not return to her
19 former position in September 2010 due to her disability. Thus,
20 the evidence is sufficient to establish a causal nexus between
21 Klosek's disability and Wells Fargo's decisions to fill her
22 position while she was on leave and to terminate her.

23 Defendants aver that they filled Klosek's position because
24 Wells Fargo had a business need for a Registered Personal Banker
25 Two at the St. Helena branch and could not hold her position open
26 indefinitely. Defendants also contend that they terminated Klosek
27 because she was unable to find an open position during her
28

1 ninety-day job search leave. Defendants further argue that Klosek
2 cannot establish that these reasons were pretextual.

3 However, Klosek has produced evidence sufficient to create a
4 genuine issue of material fact as to whether Defendants' proffered
5 non-discriminatory reasons for these actions were "unworthy of
6 credence." Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248,
7 256 (1981). The evidence in the record demonstrates that the St.
8 Helena branch had not had a Personal Banker Two for several years
9 prior to the time that Klosek transferred there from the Sonoma
10 branch. After Klosek had been on leave for about seven months,
11 Wells Fargo transferred Sipes from the Sonoma branch to fill her
12 position. However, shortly after Klosek's job search leave ended,
13 Defendants transferred Sipes from the St. Helena branch back to
14 the Sonoma branch. This raises an inference that Defendants
15 transferred Sipes to the St. Helena branch to fill Klosek's former
16 position only long enough for her job search leave to expire.
17 Further, Klosek has offered evidence that Defendants chose not to
18 announce an opening for a Personal Banker Two in the Sonoma
19 branch, even though Alejo, the manager at that branch, testified
20 that he had a need for one during the time period that Klosek was
21 searching for such a position.

22 Thus, the Court DENIES Defendants' motion for summary
23 judgment on Klosek's claims for disability discrimination under
24 the FEHA.

25 III. Failure to prevent discriminatory practices in violation of
26 Title VII and FEHA

27 Defendants contend that summary judgment should be granted on
28 Plaintiffs' claims for failure to prevent discriminatory practices

1 in violation of Title VII and FEHA, because the underlying
2 discrimination claims fail. Plaintiffs argue the converse.

3 Because Defendants' motion for summary judgment on Guitron's
4 discrimination claims and Klosek's discrimination claim under
5 Title VII is granted, the Court GRANTS Defendants' motion for
6 summary judgment on Guitron's claims for failure to prevent
7 discriminatory practices under Title VII and FEHA and Klosek's
8 corresponding claim under Title VII. Because their motion for
9 summary judgment is denied as to Klosek's claim for age and
10 disability discrimination under FEHA, the Court DENIES Defendants'
11 motion for summary judgment on Klosek's FEHA claim for failure to
12 prevent discriminatory practices.

13 IV. Retaliation in violation of Title VII and FEHA

14 Claims for retaliation under Title VII and FEHA are analyzed
15 under the McDonnell Douglas framework outlined above. Lam v.
16 University of Hawaii, 40 F.3d 1551, 1559 n.11 (9th Cir. 1994);
17 Yanowitz v. L'Oreal USA, Inc., 36 Cal. 4th 1028, 1042 (2005). To
18 establish a prima facie case of retaliation, a plaintiff must
19 "show (1) he or she engaged in a 'protected activity,' (2) the
20 employer subjected the employee to an adverse employment action,
21 and (3) a causal link existed between the protected activity and
22 the employer's action." Yanowitz, 36 Cal. 4th at 1042; accord
23 Miller v. Fairchild Indus., Inc., 797 F.2d 727, 731 (9th Cir.
24 1986).

25 A. Guitron's claims for retaliation under Title VII and
26 FEHA

27 In Plaintiffs' opposition, they contend that the relevant
28 protected activity for Guitron's claims was her "refusal to

1 conform to the constant pressure to use her sex appeal to elicit"
2 daily sales credits. Opp. at 30. They also allege that "Rubio
3 was well aware" that Guitron refused to do this and that "Rubio
4 was the same person that denied Guitron referrals because she
5 would not flirt with customers." Id. at 31.

6 However, Plaintiffs' allegations are not supported by
7 evidence in the record. The comments that Guitron points to were
8 made by Isook Park and Chris Jensen, and Plaintiffs offered no
9 evidence that Rubio knew about them or knew that Guitron refused
10 to engage in these behaviors. Similarly, as discussed above,
11 Guitron has offered no evidence that Rubio denied her referrals
12 because Guitron did not flirt with customers.

13 Accordingly, the Court GRANTS Defendants' motion for summary
14 judgment on Guitron's claims for retaliation under Title VII and
15 FEHA.

16 B. Klosek's claims for retaliation under Title VII and FEHA

17 In the 2AC, Klosek alleges that she engaged in protected
18 activity by making reports of improper, unlawful, discriminatory
19 and harassing conduct of Rubio, Zavaleta and others, and that, as
20 a result, she was retaliated against by being given negative
21 performance evaluations and placed on unwarranted administrative
22 leave. 2AC ¶¶ 174-76, 216-19.

23 Defendants argue that Klosek presents no evidence of a causal
24 connection between any protected activity and the purportedly
25 adverse employment actions.

26 In response, Klosek points to three exhibits supporting that
27 she engaged in protected activity that was causally related to
28

1 adverse employment actions.²⁷ However, these exhibits do not
2 support such a finding. First, in her declaration, Klosek attests
3 that the "poor performance reviews and disciplinary actions for
4 missing [sales] goals" she received were caused by her "refusal to
5 partake in unethical and fraudulent behavior and inability to meet
6 my goals following proper procedure." Klosek Decl. ¶ 10. This
7 alleged activity underlies her failed SOX claim, and does not
8 constitute protected activity under FEHA or Title VII.

9 Second, Klosek cites her complaints to Brandenburg in April
10 2009 about Alejo and her coworkers in the Sonoma branch. Many of
11 her allegations in those complaints were based on her feeling that
12 certain coworkers acted like they "owned" their customers and
13 refused to work as a team, and that Alejo displayed favoritism to
14 particular employees. These complaints also do not constitute
15 protected activity under FEHA or Title VII. Similarly, although
16 Klosek complained that Alejo treated her differently after she
17 returned from a sick leave and that he became mad at her when she
18 called about a "medical emergency,"²⁸ Klosek did not allege that
19 she had a physical disability or medical condition as defined by
20

21
22 ²⁷ In Plaintiffs' opposition brief, although they refer to
23 Klosek, they cite paragraph thirteen of Guitron's declaration and
24 an exhibit related to that paragraph. See Opp. at 31 (citing
25 Guitron Decl. ¶ 13; Pls.' Ex. 60). It appears that Plaintiffs
meant instead to cite the corresponding paragraph in Klosek's
declaration and the exhibit related to that paragraph. See Klosek
Decl. ¶ 13; Pls.' Ex. 77.

26 ²⁸ There is no evidence in the record regarding the reason
27 that Klosek took sick leave or was hospitalized while she worked
28 at the Sonoma branch between 2008 and 2009. As previously noted,
Klosek took a medical leave due to stress in 2010 and was
diagnosed with cancer while on that leave.

1 FEHA at that time or that Alejo discriminated against her based on
2 one. Further, although Klosek complained that Cervantes preferred
3 to work with younger women and refused to work with her, Klosek
4 does not point to an adverse employment action that Cervantes took
5 against her or participated in, or any reason that others may have
6 retaliated against her for complaints against Cervantes. Finally,
7 even if such complaints did constitute protected activity, Klosek
8 relies only on temporal proximity to establish causation between
9 these complaints and the performance reviews that Alejo gave for
10 her. However, Alejo submitted his performance reviews
11 approximately nine months after Klosek made these complaints and
12 approximately seven months after Brandenburg completed her
13 investigation, during which she interviewed Alejo about Klosek's
14 accusations. See Clark County Sch. Dist. v. Breeden, 532 U.S.
15 268, 273 (2001) (per curiam) (noting that a court may not infer
16 causation from temporal proximity unless the time between an
17 employer's knowledge of protected activity and an adverse
18 employment action is "very close" and citing cases for the
19 proposition that a three-month and four-month time lapse is too
20 long to infer causation).

21 Klosek also offers no evidence that the performance review
22 completed by Rubio or the administrative leave imposed by Walker
23 were causally connected to any activity protected by Title VII and
24 FEHA. As noted above, Klosek's claims of unethical behavior by
25 others were not activity protected by Title VII and FEHA. Klosek
26 has offered no evidence that she complained about Rubio's comment
27 that she was "too old for banking," question about her plans for
28

1 retirement or recommendation of the book, "Bridging the Age
2 Generation Gap," before these actions were taken.

3 Accordingly, the Court GRANTS Defendants' motion for summary
4 judgment as to Klosek's claims for retaliation under Title VII and
5 FEHA.

6 V. Wrongful discharge in violation of public policy

7 Under California law, an employee may maintain a tort cause
8 of action against his or her employer when the employer's
9 discharge of the employee contravenes fundamental public policy.
10 Foley v. Interactive Data Corp., 47 Cal. 3d 654, 666 (1988). Such
11 claims are often referred to as Tameny claims, after the decision
12 in Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 176-177
13 (1980). A claim for wrongful termination in violation of public
14 policy must be based on a fundamental policy established by a
15 constitutional, statutory or regulatory provision. Green v. Ralee
16 Eng'g Co., 19 Cal. 4th 66, 76, 90 (1998).

17 A. Guitron's wrongful discharge claim

18 Defendants argue that Guitron cannot establish a Tameny
19 claim, because her "employment ended only when she abandoned her
20 job" on February 11, 2010. Mot. at 11. Defendants further
21 contend, "Termination for job abandonment is not violative of any
22 public policy." Arn v. News Media Group, 2004 U.S. Dist. LEXIS
23 31324, at *23 (E.D. Cal.).

24 Guitron responds that she was fired on January 27, 2010 when
25 Rubio told her to turn over her keys and leave for being
26 insubordinate and then had her escorted off the premises. Opp. at
27 21-22, 32. Guitron relies on cases that have held, "No set words
28 are necessary to constitute a discharge; words or conduct, which

1 would logically lead an employee to believe his tenure had been
2 terminated, are in themselves sufficient.” NLRB v. Cement Masons
3 Local No. 555, 225 F.2d 168, 172 (9th Cir. 1955). However, based
4 on her own testimony, Guitron could not have reasonably believed
5 that she was terminated, particularly in light of the repeated
6 statements to the contrary made by Walker.

7 Because Guitron was terminated only when she voluntarily
8 abandoned her job on February 11, 2010, after being warned by
9 Walker that failure to appear for work would result in
10 termination, she cannot maintain a claim for wrongful termination.
11 Further, the Court has already concluded that Guitron has failed
12 to establish a prima facie case of discrimination or retaliation
13 that would violate the public policy expressed in SOX, Title VII
14 or FEHA. Accordingly, Defendants’ motion for summary judgment on
15 her wrongful termination claim is GRANTED.

16 B. Klosek’s wrongful discharge claim

17 Klosek contends that she was wrongfully terminated when
18 Defendants filled her position while she was on medical leave and
19 did not offer her an alternative position when she was able to
20 return to work. In the 2AC, Klosek alleges that she was
21 terminated because she complained about unethical and unlawful
22 banking practices and because of her medical conditions. 2AC
23 ¶ 150.

24 To the extent that Klosek bases this claim on her complaints
25 about “unethical and unlawful banking practices,” the Court has
26 already concluded that there is no material dispute that Klosek
27 did not engage in activity protected under SOX, and thus Klosek’s
28 claim for wrongful termination based on the public policy

1 expressed in SOX also fails. Accordingly, Defendants' motion for
2 summary judgment is GRANTED insofar as Klosek rests her claim on
3 this activity.

4 However, the Court has concluded that Klosek established a
5 prima facie case of discrimination under FEHA based on disability
6 status and has raised a disputed issue of material fact as to
7 whether Defendants' reasons for her termination were pretextual.
8 Thus, Defendants' motion for summary judgment is DENIED on
9 Klosek's wrongful termination claim to the extent it alleges
10 termination in violation of the public policy of preventing
11 disability discrimination as expressed in the FEHA.

12 VI. Harassment in violation of FEHA

13 In the 2AC, Guitron alleges that Rubio created a hostile work
14 environment and harassed her based on her status as a single woman
15 and mother. Klosek brings a similar claim against Rubio on the
16 basis of her age. Both Plaintiffs bring their harassment claims
17 against Rubio only.

18 A. Guitron's claim of harassment based on her status as a 19 single woman and mother

20 "California courts have adopted the same standard [applied
21 under Title VII] for hostile work environment sexual harassment
22 claims under the FEHA." Lyle v. Warner Bros. Television Prods.,
23 38 Cal. 4th 264, 279 (2006). Accordingly, to prevail on her
24 claim, Guitron must establish that "she was subjected to sexual
25 advances, conduct, or comments that were (1) unwelcome,
26 (2) because of sex, and (3) sufficiently severe or pervasive to
27 alter the conditions of her employment and create an abusive work
28 environment." Id. (internal citations omitted). "Past California

1 decisions have established that the prohibition against sexual
2 harassment includes protection from a broad range of conduct,
3 ranging from expressly or impliedly conditioning employment
4 benefits on submission to or tolerance of unwelcome sexual
5 advances, to the creation of a work environment that is hostile or
6 abusive on the basis of sex." Miller v. Department of
7 Corrections, 36 Cal. 4th 446, 461 (2005). "With respect to the
8 pervasiveness of harassment, courts have held an employee
9 generally cannot recover for harassment that is occasional,
10 isolated, sporadic, or trivial; rather, the employee must show a
11 concerted pattern of harassment of a repeated, routine, or a
12 generalized nature." Lyle, 38 Cal. 4th at 283.

13 Defendants characterize Guitron's claim as alleging that
14 Rubio harassed her on the basis of her marital status. However,
15 as noted above, Guitron's claim against Rubio is based, not on her
16 marital status alone, but rather upon her "sex plus" her marital
17 status. See Opp. at 32 (arguing that "Rubio harassed her because
18 of her status as a single woman").

19 Defendants also contend that Guitron misrepresents the
20 contents of her exhibits and that she cannot establish
21 sufficiently severe or pervasive sexual harassment attributable to
22 Rubio based on the actual evidence in the record. While, in her
23 opposition, Guitron points to what she characterizes as "ample
24 evidence" of Rubio's conduct directed at her, much of the cited
25 evidence relates to comments or actions made toward people other
26 than Guitron, by people other than Rubio or before Guitron began
27 working for Wells Fargo. See, e.g., Metelin Decl. ¶ 5(f)
28 (allegedly sexist comments made by Park and Hernandez); Guitron

1 Depo. Tr. 333:17-334:1 (allegedly sexist comments made by Park and
2 Jensen); Mendez Depo. Tr. 128:18-129:9 (allegedly sexist comments
3 made by Rubio through January 2007); Franco Depo. Tr. 87:7-88:23
4 (same). Guitron offers no authority that the behavior of other
5 staff people should be attributable to Rubio, or that comments
6 Rubio made before Guitron began working at the branch and that
7 Guitron did not witness can establish the existence of a hostile
8 work environment during the time that she did work for Rubio. See
9 Lyle, 38 Cal. 4th at 285 ("the plaintiff generally must show that
10 the harassment directed at others was in her immediate work
11 environment, and that she personally witnessed it"). Guitron also
12 offers no evidence that Rubio refused to give her referrals
13 because Guitron refused to "shake her skirt." Similarly, although
14 Guitron states in her declaration that she was told on multiple
15 occasions by "Branch management" to unbutton her shirt to get more
16 sales, she does not specify which of the several managers at the
17 branch made these comments, despite the fact that this was within
18 her knowledge. Guitron Decl. ¶ 6.

19 The single allegation for which Guitron provides evidentiary
20 support is that Rubio once sent her a text message asking
21 permission to open a package that Guitron had received from a
22 customer, whom Rubio called "an admirer," and that Rubio asked who
23 the package was from. Guitron Depo., Tr. 333:10-16. This is not
24 sufficiently severe or pervasive to create an abusive work
25 environment or to support a harassment claim.

26 Accordingly, Defendants' motion for summary judgment as to
27 Guitron's harassment claim against Rubio is GRANTED.
28

1 B. Klosek's claim of harassment based on her age

2 Defendants argue that Klosek cannot establish that Rubio's
3 alleged age-related comments to her constituted severe or
4 pervasive harassment, because Klosek alleged that Rubio made only
5 three such comments. Klosek responds that Defendants' count is
6 incorrect. However, the evidence that Klosek cites in support of
7 her argument is comprised of three comments made by Rubio. The
8 other comments or actions cited are by people other than Rubio.
9 See Opp. at 34 (citing Klosek Depo. Tr. 181:3-12 (alleging that
10 Jensen failed to give Klosek referrals); 239:6-240:4 (discussing
11 comments made by Alejo)).

12 Defendants also contend that the other conduct of which
13 Klosek complains amounts to personnel management activity, which
14 as a matter of law cannot support a claim of harassment, and can
15 only support a discrimination claim.

16 "Personnel management action must be analyzed in the context
17 of discrimination as opposed to harassment." Hardin v. Wal-Mart
18 Stores, Inc., 2012 U.S. Dist. LEXIS 28002, at *68 (E.D. Cal.)
19 (citing Lewis v. UPS, Inc., 252 Fed. App'x. 806, 808 (9th Cir.
20 2007)). "However, some official employment actions done in
21 furtherance of a supervisor's managerial role can also have a
22 secondary effect of communicating a hostile message if done in an
23 unnecessarily demeaning manner." Id. (internal quotations
24 omitted); see also Roby v. McKesson Corp., 47 Cal. 4th 686, 709
25 n.10 (2009) (giving as examples "shunning of Roby during staff
26 meetings, Schoener's belittling of Roby's job, and Schoener's
27 reprimands of Roby in front of Roby's coworkers"). Klosek cites
28

1 no evidence that Rubio's supposed failure to provide support or
2 adequate referrals was done in an unnecessarily demeaning manner.

3 Thus, viewed in the light most favorable to Klosek, the
4 harrassment evidence consists of Rubio's three age-related
5 comments to Klosek. First, in October or November 2009, Rubio,
6 who was fifty-five years old, told Klosek, who was in her mid-
7 sixties, "You're too old for banking," and that she had noticed
8 her date of birth when she reviewed her file. Klosek Depo., Tr.
9 168:7-169:1; Rubio Decl. ¶ 3. Then, in November 2009, Rubio asked
10 Klosek "if [she] was going to stay at the branch, did [she] have
11 any plans of retiring" and "when." Klosek Depo., Tr. 237:22-
12 238:8. Finally, in November or December 2009, Rubio told Klosek
13 that she should read a book entitled "Bridging the Age Generation
14 Gap." Id. at 233:13-234:4.

15 "To prevail on an age-based hostile workplace/harassment
16 claim, [a plaintiff] must show that she was subjected to verbal or
17 physical conduct of an age-related nature, that the conduct was
18 unwelcome, and that the conduct was sufficiently severe or
19 pervasive to alter the conditions of her employment and create an
20 abusive work environment." Cozzi v. County of Marin, 787 F. Supp.
21 2d 1047, 1069 (N.D. Cal. 2011). As with sex harassment claims, to
22 be pervasive, the offensive conduct must consist of "more than a
23 few isolated incidents." Lyle, 38 Cal. 4th at 284. See also
24 Cozzi, 787 F. Supp. 2d at 1072 ("The 'severe or pervasive'
25 standard excludes occasional, sporadic, isolated, or trivial
26 incidents of verbal abuse.). This conduct instead must amount to
27 a "concerted pattern of harassment of a repeated, routine and
28 generalized nature." Aguilar v. Avis Rent A Car System, 21 Cal.

1 4th 121, 131 (1999). "The plaintiff must prove that the
2 defendant's conduct would have interfered with a reasonable
3 employee's work performance and would have seriously affected the
4 psychological well-being of a reasonable employee and that she was
5 actually offended." Beyda v. City of Los Angeles, 65 Cal. App.
6 4th 511, 517 (1998) (internal quotations and citations omitted).

7 None of the comments purportedly made by Rubio, nor the
8 combination of them, rises to the level of egregious conduct that
9 would "alter the conditions of employment" or "create an abusive
10 work environment." See Vasquez v. County of Los Angeles, 349 F.3d
11 634, 643 (9th Cir. 2003) (finding no hostile work environment in
12 case involving statements that plaintiff had "a typical Hispanic
13 macho attitude" and should consider transferring to the field
14 because "Hispanics do good in the field"). Accordingly, the Court
15 GRANTS Defendants' motion for summary judgment on Klosek's
16 harassment claim against Rubio.

17 VII. Failure to provide reasonable accommodation or to engage in
18 an interactive process in violation of FEHA

19 The FEHA provides a cause of action for failure to
20 accommodate a disability or medical condition. Cal. Govt. Code
21 § 12940(k). See also Cal. Govt. Code § 12926(i) (defining
22 "medical condition" to include, "Any health impairment related to
23 or associated with a diagnosis of cancer or a record or history of
24 cancer"). "[A]ssuming the employee is disabled, the employer
25 cannot prevail on summary judgment on a claim of failure to
26 reasonably accommodate unless it establishes through undisputed
27 facts that (1) reasonable accommodation was offered and refused;
28 (2) there simply was no vacant position within the employer's

1 organization for which the disabled employee was qualified and
2 which the disabled employee was capable of performing with or
3 without accommodation; or (3) the employer did everything in its
4 power to find a reasonable accommodation, but the informal
5 interactive process broke down because the employee failed to
6 engage in discussions in good faith.” Jensen v. Wells Fargo Bank,
7 85 Cal. App. 4th 245, 263 (2000).

8 “Under FEHA, an employer must engage in a good faith
9 interactive process with the disabled employee to explore the
10 alternatives to accommodate the disability.” Wysinger v.
11 Automobile Club of Southern California, 157 Cal. App. 4th 413, 424
12 (2007). Failure to engage in this process is a separate FEHA
13 violation independent of an employer’s failure to provide a
14 reasonable disability accommodation, which is also a FEHA
15 violation. Id.

16 In the 2AC, Klosek asserts that Wells Fargo breached its duty
17 to accommodate her disability by failing to keep her position open
18 when she was on medical leave and refusing to return her to that
19 position or to any other when she returned from that leave.
20 Klosek also alleges that Wells Fargo failed to engage in good
21 faith in a meaningful interactive process regarding these
22 accommodations, by failing to help her find a different position
23 within Wells Fargo.

24 Defendants contend that Wells Fargo provided Klosek with
25 reasonable accommodations by giving her a ten month medical leave.
26 Defendants argue that it was not obliged to keep her position open
27 indefinitely after she acknowledged that there was no “definite
28 timeline” for her recovery, because it had a business need to fill

1 her position. However, the Court has already concluded that there
2 is a genuine issue of material fact as to whether Wells Fargo in
3 fact had such a business need. Further, while Klosek extended her
4 leave, she did not seek to do so indefinitely, as Defendants
5 suggest. There is a genuine question of material fact as to
6 whether, at the time that Wells Fargo filled her position and did
7 not offer her an alternative position, it appeared unlikely that
8 Klosek would be able to return to her position at some point in
9 the foreseeable future. See, e.g., Hanson v. Lucky Stores, Inc.,
10 74 Cal. App. 4th 215, 226-27 (1999).

11 Defendants do not claim that Wells Fargo engaged in a good
12 faith interactive process or offered Klosek reasonable
13 accommodations when she was able to return to work, but rather
14 maintain that, at that point, because Klosek was medically cleared
15 to return to work without restrictions, she no longer needed
16 accommodation to perform the essential functions of her job, and
17 she no longer had a statutory entitlement either to a good faith
18 interactive process or reasonable accommodation. Defendants'
19 argument is essentially that Klosek did not need accommodation at
20 the moment that she was well enough to return to work, and
21 therefore Wells Fargo's obligation to help her return immediately
22 ceased.

23 Holding a job open for Klosek or identifying a replacement
24 position upon her return would have been a reasonable
25 accommodation for her need for cancer treatment. See, e.g.,
26 Jensen v. Wells Fargo Bank, 85 Cal. App. 4th 245, 263 (2000)
27 ("Holding a job open for a disabled employee who needs time to
28 recuperate or heal is in itself a form of reasonable accommodation

1 and may be all that is required where it appears likely that the
2 employee will be able to return to an existing position at some
3 time in the foreseeable future.”). To find that an employer no
4 longer has an obligation to follow through on such an
5 accommodation once an employee has recuperated enough to return to
6 work would render it meaningless.

7 There is a genuine material dispute as to whether Defendants
8 offered Klosek meaningful accommodations or engaged in a good
9 faith interactive process. Klosek has offered evidence that
10 Defendants did not attempt to find her an alternative position.
11 As previously discussed, Klosek has offered evidence that the
12 Sonoma branch had a need for a Personal Banker Two during the time
13 period that Klosek was searching for a position and Defendants
14 chose not to announce the opening.

15 Accordingly, Defendants’ motion for summary judgment on this
16 claim is DENIED.

17 CONCLUSION

18 For the reasons set forth above, Defendants’ motion for
19 summary judgment is GRANTED IN PART and DENIED IN PART (Docket No.
20 74).

21 Wells Fargo is granted summary judgment as to all claims
22 brought by Guitron. Wells Fargo also is granted summary judgment
23 as to Klosek’s claims for retaliation in violation of SOX, Title
24 VII and FEHA, wrongful discharge resulting from her complaints
25 about unethical and unlawful banking practices, age discrimination
26 under Title VII and failure to prevent discriminatory practices in
27 violation of Title VII. Further, Rubio is granted summary
28

1 judgment on all claims brought against her individually by both
2 Plaintiffs.

3 The Court denies summary judgment on Klosek's claims for age
4 and disability discrimination under FEHA, wrongful discharge based
5 on disability, failure to prevent discriminatory practices in
6 violation of FEHA and failure to accommodate and to engage in an
7 interactive process in violation of FEHA.

8 Because the Court grants summary judgment as to all claims
9 brought by Guitron, Defendants' motion to sever the claims of
10 Guitron and Klosek is DENIED as moot (Docket No. 64).

11 A case management conference will be held on Wednesday,
12 August 8, 2012 at 2:00 p.m. Klosek and Wells Fargo shall file a
13 joint case management conference statement one week before the
14 conference.

15 IT IS SO ORDERED.

16
17 Dated: July 6, 2012

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19 _____
20 CLAUDIA WILKEN
21 United States District Judge
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