UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALISON N. TERRY, Plaintiff, vs. CITY OF SAN DIEGO and DOES 1-20, Defendants.	CASE NO. 06CV1459-MMA (CAB) **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT** [Doc. No. 74]

Pending before the Court is Defendant's Motion for Summary Judgment filed on August 18, 2008. [Doc. No. 74]. On September 22, 2008, Plaintiff submitted her opposition to Defendant's Motion for Summary Judgment. [Doc. No. 79]. On October 24, 2008, Defendant filed its Reply in support of its Motion for Summary Judgment. [Doc. No. 87].

BACKGROUND

Plaintiff Alison N. Terry is a seasonal Lifeguard I who has been employed by the City of San Diego since 1992. *Terry Decl.* [Doc. No. 79-6] at 1:22–23. Lifeguard Is are part-time, seasonal employees who work full-time only from Memorial Day to Labor Day, and are not entitled to receive pension, health, or other benefits. *Darling Decl.* [Doc. No 79-8] at 1:26–2:3; *Wurts Depo.* [Notice of Lodgment ("NOL"), Ex. 70] at 29:5–13.[1] In early 2003, Plaintiff decided that she would like to be promoted to a permanent Lifeguard II position. *Terry Decl.* [Doc. No. 79-6] at 1:25–26.

[1]Unless stated otherwise, all references to the "Notice of Lodgment" refer to Plaintiff's Notice of Lodgment filed in support of the Opposition to Defendant's Motion for Summary Judgement located at Doc. Nos. 79-12 through 79-15.

Plaintiff, however, lacked certification as a personal watercraft ("PWC") operator, a prerequisite to being able to apply for the position. *Id.*; *NOL*, Ex. 20. Plaintiff began the certification process on March 27, 2003 and became certified as a PWC operator on August 8, 2005, 29 months later. *NOL*, Ex. 29 at TE00041. Plaintiff contends that the certification process took longer than necessary because of substantial resistance she encountered from those who were charged with Plaintiff's training and testing. Plaintiff asserts that the delay in her certification was because of her gender. *Id.* at 2:1–21; *Pl.'s Opp.* [Doc. No. 79] at 1:5–14.

In 2006, Plaintiff applied for the Lifeguard II position. The interview panel, comprised of Sergeant Jon Vipond, Sergeant Katherine Jackson, and Captain Jill Murray, convened on February 13, 14, and 15, 2006 to interview 33 applicants for the position. *NOL*, Ex. 40. The panel placed the applicants in two categories: Highly Qualified and Qualified. *Id.*[2] Plaintiff was placed in the highly qualified category. Following the submission of the interview results to the Appointing Authority, the panel was then asked to rank the candidates in the highly qualified category in numerical order. *Id.* Out of 15 candidates in the highly qualified category, Plaintiff was ranked 14th. *Id.* The top six candidates were offered Lifeguard II positions, while the remaining applicants were denied promotion. *Id.* Plaintiff alleges that her ranking and subsequent denial of promotion were the result of gender discrimination because the City used (1) a flawed performance review ("EPR") process which she claims heavily favors men, and (2) promotion criteria she contends was concealed from female candidates and disclosed only to male candidates. *Pl.'s Opp.* at 1:5–14.

Finally, Plaintiff contends that her employer retaliated against her for filing the instant action by not scheduling her to work any hours during the 2007 summer season. *Pl.'s Opp.* at 1:13–14. On June 20, 2006, Plaintiff filed a complaint alleging violations of 42 U.S.C. § 2000e-2 and Cal. Gov. Code § 12940(a). [Doc. No. 1]. Plaintiff alleges both disparate treatment and disparate impact in support of her gender discrimination claims. *Pl.'s Opp.* at 1:11–13. On April 24, 2008, Plaintiff amended the complaint to add violations of 42 U.S.C. § 2000e-3(a) and Cal. Gov. Code § 12940(a) for Defendant's alleged retaliation against her. [Doc. No. 69]. On August

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[2]The panel also had a third category, minimally qualified, but did not assign any candidates to that category. *NOL*, Ex. 40.

18, 2008, Defendant filed the instant Motion for Summary Judgment. [Doc. No. 74].

LEGAL STANDARD

A moving party is entitled to summary judgment only if she can demonstrate that (1) "there is no genuine issue as to any material fact," and (2) the moving party is "entitled to judgment as a matter of law." Fed R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A material issue of fact is one that raises a question that a trier of fact must answer to determine the rights of the parties under the substantive law that applies. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. The initial burden is on the moving party to show that both prongs are satisfied. *Celotex*, 477 U.S. at 323. The moving party can satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *Id.* at 322–23. If the moving party fails to discharge this initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

If the moving party meets this initial burden, the nonmoving party cannot defeat summary judgment merely by demonstrating "that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Anderson*, 477 U.S. at 252 ("The mere existence of a scintilla of evidence in support of the nonmoving party's position is not sufficient."). Rather, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by 'the depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324 (*quoting* Fed. R. Civ. P. 56(e)). The inferences to be drawn from the facts must be viewed in a light most favorable to the nonmoving party. *Gibson v. County of Washoe, Nev.*, 290 F.3d 1175, 1180 (9th Cir. 2002). "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, [when] he is ruling on a motion for summary judgment." *Anderson*, 477 U.S. at 255.

ANALYSIS

A. Objections to Evidence

The Court rules on objections to evidence only to the extent that they address evidence that is material to the Court's present ruling. Both parties object to various arguments set forth in their respective memoranda of points and authorities. *Pl.'s Objections* [Doc. No. 79-2]; *Def.'s Objections* [Doc. No. 86]. These are not evidentiary objections, and thus, will not be addressed by the Court. In addition, the Court disregards all responsive briefing to those objections.

1. Plaintiff's Objections [Doc. No. 79-2]

a. **Cranston Declaration** [Doc. No. 74-4]

1. SUSTAINED on grounds asserted.

2. SUSTAINED on grounds asserted.

3. OVERRULED. Objection not properly identified.

b. **Jackson Declaration** [Doc. No. 74-5]

1. SUSTAINED on grounds asserted.

2. OVERRULED. Statement not vague in context of declaration.

3. SUSTAINED on grounds asserted.

4. OVERRULED. Witness's perception relevant to ranking determination.

5. OVERRULED. Relevant to ranking determination.

6. OVERRULED. Permissible opinion.

c. **Murray Declaration** [Doc. No. 74-7]

1. OVERRULED. Permissible opinion based on personal observation.

2. OVERRULED. Permissible opinion based on personal observation.

d. **Vipond Declaration** [Doc. No. 74-12]

1. Except for the following, all objections are OVERRULED because they consist of permissible opinion based on personal observation.

a. Objection 7 is SUSTAINED as improper opinion testimony.

b. Objection 16 is SUSTAINED to the extent that the statement

exceeds Plaintiff's personal knowledge.

c. Objection 17 is SUSTAINED as inadmissible hearsay.

d. Objection 18 is SUSTAINED as inadmissible hearsay.

2. Defendant's Objections [Doc. No. 86]

a. **Conger Declaration** [Doc. No. 79-4]

1. OVERRULED because it does not lack foundation.

b. **Lackritz Declaration** [Doc. No. 79-5]

1. OVERRULED because it does not lack foundation.

c. **Snow Declaration** [Doc. No. 79-11]

1. Except for the following portions, the objection is SUSTAINED on relevancy and hearsay grounds.

a. Pages 1:19–2:1. OVERRULED as relevant and based on personal knowledge.

b. Page 2, lines 19–21. OVERRULED as relevant and based on personal knowledge.

c. Page 2, lines 23–24. OVERRULED as proper opinion based on personal knowledge.

A. Plaintiff's Disparate Impact Claim

In order to establish a discrimination claim under a disparate impact theory, Plaintiff "must identify a specific, seemingly neutral practice or policy that has a significantly adverse impact on persons of a protected class." *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1486 (9th Cir. 1993) (citing *Connecticut v. Teal*, 457 U.S. 440, 446 (1981)). If Plaintiff establishes a prima facie case, "the burden shifts to the employer to 'demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.'"*Id.* (quoting 42 U.S.C. § 2000e-2(k)(1)(A)). "The best evidence of discriminatory impact is proof that an employment practice selects members of a protected class in a proportion smaller than their percentage in the pool of actual applicants, or in promotion and benefit cases, in a proportion smaller than in the actual pool of eligible employees." *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 483 (9th Cir. 1983).

Defendant contends that Plaintiff has failed to establish a prima facie case for her disparate impact theory. Defendant asserts that compared to the number of women and men who applied for the position, there was statistical neutrality in those who were promoted to Lifeguard II. *Mot. for Summ. J.* at 5:6–6:4. Thirty-three individuals applied for the promotion: five women (or 15%) and twenty-eight men (or 85%). Five men (or 17.85%) were promoted and one woman (or 20%) was promoted. *NOL*, Ex. 40.

Plaintiff, however, argues that she has established a disparate impact claim because women are promoted at a significantly lower rate than male lifeguards. Plaintiff contends that Defendant's policy of using employee performance ratings during the promotion process has a statistically significant disparate impact on women because (1) female Lifeguard Is receive the highest rating at a statistically significant lower rate than male Lifeguard Is; (2) there is a statistically significant correlation between obtaining the highest rating and being promoted; and (3) women are not adequately represented in more senior positions because they are receiving the highest rating at a significantly lower rate than male lifeguards. *Pl.'s Opp.* at 10:9–18. Plaintiff's contentions are based on her assertion that the appropriate comparison pool is all Lifeguard Is, rather than just those Lifeguard Is who applied for the promotion. *Pl.'s Opp.* at 6:19–21.

Given the statistical neutrality among the pool of applicants, and the statistically significant disparity among all Lifeguard Is, Plaintiff's disparate impact claim necessarily depends on what the Court finds to be the appropriate comparison pool. Plaintiff relies on the Ninth Circuit case, *Hemmings v. Tidyman's, Inc.*, 285 F.3d 1174 (9th Cir. 2002), for the proposition that the appropriate comparison pool is all Lifeguard I employees. In *Hemmings*, the Ninth Circuit held that in cases involving claims of promotion discrimination, the proper comparison pool is the current employees in lower management positions. *Id.* at 1185–87. However, *Hemmings* is distinguishable from the case at bar. In *Hemmings*, higher management positions were filled by internal promotions and did not require employees to apply for the promotion. *Id.* Here, the Lifeguard II position was filled by internal promotions, but included an application process requiring each applicant to demonstrate certain qualifications to be included on the "eligibility list." *NOL*, Ex. 22.

The Court finds the Ninth Circuit's decision in *Moore* more instructive. In *Moore*, the Ninth Circuit rejected an argument similar to Plaintiff's argument here on grounds that the plaintiff failed to demonstrate that those in the proposed comparison pool were qualified for the upper-level positions. The Court held: "When the allocation [of the burden of proof] is applied to promotion cases, it will be necessary for the plaintiff to show that the pool of eligible employees is qualified for promotion to a position for which it is manifest that special skills are required."*Moore*, 708 F.2d at 483 (9th Cir. 1983). Here, the Lifeguard II position is a position open only to persons who have the required special skills. Some of the qualifications that an applicant must demonstrate prior to being placed on the eligibility list include CPR certification, EMT certification, City of San Diego Main Tower Observation certification, SCUBA certification, and PWC certification. *NOL*, Ex. 22. Plaintiff suggests using the entire pool of Lifeguard Is as the comparison pool without any demonstration that all Lifeguard Is are qualified to be promoted to Lifeguard IIs. Without such a demonstration, the Court finds that the appropriate pool for statistical analysis is that pool composed of Lifeguard Is who applied for the position and were subsequently placed on the eligible list. Because the statistics show that a statistically neutral portion of women and men were promoted to Lifeguard II, the Court finds that Plaintiff has failed to establish a prima facie case on her disparate impact theory. Accordingly, the Court hereby **GRANTS** Defendant's Motion for Summary Judgment on Plaintiff's disparate impact theory.

B. Plaintiff's Disparate Treatment Claim

On a motion for summary judgment, disparate treatment claims are analyzed in terms of an allocation of burdens first established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Plaintiff has the initial burden to establish a prima facie case of discrimination. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–53 (1981). In order to establish a prima facie case of sex discrimination on a disparate treatment theory, Plaintiff must show: "(1) [s]he is a member of a protected class; (2) [s]he was qualified for [the] position; (3) [s]he experienced an adverse employment action; and (4) similarly situated individuals outside [her] protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination." *Fonseca v. Sysco Food Servs. of*

Ariz., Inc., 374 F.3d 840, 847 (9th Cir. 2004) (quoting *Peterson v. Hewlett Packard Co.*, 358 F.3d 599, 604 (9th Cir. 2004)). Under this scheme, "establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." *Burdine*, 450 U.S. at 253–54. Once this presumption is created, the burden shifts to the employer to produce evidence that "the plaintiff was rejected, or someone else was preferred for a legitimate, nondiscriminatory reason." *Id.* at 254. If the employer presents evidence of a legitimate, nondiscriminatory reason for the adverse employment action, the plaintiff then has the burden to "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id.* at 253.

1. Plaintiff's Prima Facie Case

Plaintiff contends that she has established a prima facie case based on the following: (1) Terry is a female, and as such, is part of a protected class under federal and state law; (2) Terry was "highly qualified" for the position of Lifeguard II; (3) Terry experienced an adverse employment action—she did not receive the promotion to Lifeguard II; and (4) similarly situated male Lifeguard Is were treated more favorable in several ways which substantially improved their chances for promotion to Lifeguard II. *Pl.'s Opp.* at 12:16–23. As to the fourth element, Plaintiff asserts three ways in which male Lifeguard Is were treated more favorably: (1) male Lifeguard Is were able to obtain their certification on the PWC more quickly than women; (2) male Lifeguard Is received three consecutive years of the highest ratings more frequently than women; and (3) male Lifeguard Is were told about critical evaluation criteria and women were not. *Id.* at 12:21–18:13.

Acknowledging that Plaintiff's burden of establishing a prima facie case is "minimal," Defendant does not contest that Plaintiff has met her initial burden of establishing a prima facie case. *Mot. for Summ. J.* at 9:1–2. Although Plaintiff's burden is "minimal," the Court must still assess whether Plaintiff has established a prima facie case for her disparate treatment theory. Upon review of the evidence, the Court finds that Plaintiff's second and third contentions of mistreatment cannot serve as bases for her disparate treatment claim.

As Plaintiff's second basis for her disparate treatment claim, Plaintiff contends that unlike

her male counterparts, Plaintiff did not receive three consecutive years of the highest ratings on her EPRs. *Pl.'s Opp.* at 15:8–16:4. Plaintiff relies on evidence that female lifeguards have a statistically significant lower percentage of outstanding/commendation ratings than do male lifeguards. *Id.* at 15:17–21 (citing *Lackritz Decl.* at ¶5c). Plaintiff's argument, however, is that she was not promoted because she did not receive *three consecutive outstanding ratings*. The data offered by Plaintiff regarding Defendant's award of outstanding or commendation ratings does not support an inference of discrimination. Plaintiff offers evidence that during the years 1999 to 2003, six male Lifeguard Is received the highest rating three years in a row. In determining who to promote to Lifeguard II, however, the panel considered EPRs for 2003 to 2005. *NOL,* Ex. 38–39. Thus, this evidence is irrelevant.

Plaintiff also asserts that of the all-male Lifeguard Is originally offered the Lifeguard II position in 2006, at least four received three consecutive outstanding/commendation ratings. The Court, however, finds that the relevant statistical data must include only those who were actually promoted to the Lifeguard II position. The application for the Lifeguard II position specifically states that the Lifeguard II position is contingent on passing a background investigation. *NOL,* Ex. 22. Although Defendant initially offered the position to six men, one of the male lifeguards did not pass the background investigation. Accordingly, the Appointing Authority offered the sixth Lifeguard II position to a female Lifeguard I. *Wurts Depo, NOL,* Ex. 78 at 10:24–12:2. Thus, out of those actually promoted, only three had three consecutive commendation or outstanding ratings. *NOL,* Ex. 40. The female who was offered the Lifeguard II position had only one commendation/outstanding rating, while Plaintiff had two. *Id.*; *NOL,* Ex. 38, p. 2. Thus, Plaintiff's argument is undercut by the fact that the female lifeguard who was ultimately promoted to Lifeguard II was promoted despite having fewer commendation/outstanding ratings than Plaintiff.[3]

[3]Plaintiff implies that the female lifeguard who was promoted, Maureen Rabe, was promoted due to her personal relationship with Sergeant Kate Jackson, one of the interviewers who ranked the candidates. *Pl.'s Opp.* at 8 n.7. Plaintiff, however, offers no evidence of any favorable treatment during the interview process. Moreover, the Court notes that all of the ranking decisions were unanimous among the three-person panel. *NOL,* Ex. 40; *Vipond Decl.* [Doc. No. 74-12] at 2:22–25. The Court also notes that Plaintiff herself had a close relationship with Sergeant Jill Murray, but that relationship did not play a role in the ranking of Plaintiff. *Murray Depo.* [Doc. No. 87-6] at 15:15–23; *Murray Decl.* [Doc. No. 74-7] at 1:23–3:13.

The Court also notes that among those ranked as "highly qualified," Plaintiff was ranked below several lifeguards who had fewer commendation or outstanding ratings than her. *NOL*, Ex. 40. In order to show a prima facie case of disparate treatment based solely on statistics, Plaintiff must show a "'stark' pattern of discrimination unexplainable on grounds other than gender." *Palmer v. United States*, 794 F.2d 534, 539 (9th Cir. 1986) (quoting *Gay v. Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531, 552 (9th Cir. 1982)). The Court finds that Plaintiff has failed to make such a showing. Because Plaintiff has not provided any relevant evidence on this aspect of her disparate treatment theory, the Court finds that Plaintiff's second contention—that male Lifeguard Is received three consecutive years of the highest ratings more frequently than women—cannot be a basis for Plaintiff's disparate treatment claim.

Plaintiff next argues that unlike her male counterparts, she was not told about critical evaluation criteria which she contends would have improved her chances for promotion. *Pl.'s Opp.* at 16:5–18:13. Plaintiff contends that male Lifeguard Is were told to take PC832 and two technical swift water rescue courses ("SRT-1" and "SRT-2"), and that Plaintiff was never told about these courses and their importance in the promotional process. *Id.* Plaintiff, however, fails to provide any relevant evidence to support this argument. Of the seven lifeguards who were offered the Lifeguard II position, only one lifeguard took both the PC832 and SRT-1 courses. Two other lifeguards who were promoted took the PC832 course. Of the seven highly qualified candidates who were offered the job, only one had a mention of PC 832 in his EPR and actually took the course. *Vipond Decl.* [Doc. No. 87-5] at 2:1–3. The other two lifeguards who took the PC832 course were not told to take the course in any EPR. *Id.* at 2:3–4. Although the evidence shows that the lifeguard who took the SRT 1 course was told to take the course in an EPR, two other lifeguards who were promoted were told to take the course in their EPRs but never did. *Id.* The evidence also demonstrates that one female lifeguard ranked as highly qualified was told to take the SRT course in an EPR. *Id.* at 2:8–13. Finally, there were other candidates who took either one or both of the courses, but did not receive an offer of promotion. *NOL*, Ex. 39. Based on the foregoing, the Court cannot find a "stark" pattern of discrimination that can only be explained by an inference of discrimination. Accordingly, the Court finds that Plaintiff's third contention—that

male Lifeguard Is were told about critical evaluation criteria and female lifeguards were not—cannot be a basis for Plaintiff's disparate treatment claim.

The Court, however, does find that Plaintiff has presented evidence to satisfy the fourth element—that she was treated less favorably than similarly situated male Lifeguard Is—on the asserted basis that, unlike her male counterparts, Plaintiff was prevented from obtaining her PWC certification in a timely manner, which prevented her from seeking promotion at an earlier date. Accordingly, because Plaintiff has established a prima facie case of disparate treatment, the burden shifts to Defendant, who must offer legitimate, non-discriminatory reasons for the alleged delay in Plaintiff's PWC certification.

2. Legitimate, Non-Discriminatory Reasons

Defendant contends that it had legitimate, nondiscriminatory reasons to explain why Plaintiff was not able to take the PWC certification test earlier. *Id.* at 9:1–5. Plaintiff asserts that unlike her male counterparts, she was prevented from obtaining the final certificate she needed to apply for promotion—PWC certification. *Pl.'s Opp.* at 12:24–15:7. Defendant makes several arguments to rebut Plaintiff's prima facie case of disparate treatment in connection with her PWC certification. First, Defendant contends that several Field Training Officers ("FTOs") found that Plaintiff had difficulty handling the PWC in even mild wave conditions, and "she was timid and unsure of herself operating the machine." *Mot. for Summ. J.* at 3:11–27. Defendant asserts that it has a legitimate business reason to deny its employees certification on the PWC until they have demonstrated proficiency with the PWC. *Id.* at 4:25–5:5. Defendant advances evidence showing that Plaintiff had more than 40 hours of training on the PWC, and declarations from various FTOs who state that Plaintiff had difficulty operating and maneuvering the PWC. *See, e.g., Brown Decl.* [Doc. No. 74-3] at 2:1–23; *Kleymann Decl.* [Doc. No. 74-6] at 2:3–12; *Owens Decl.* [Doc. No. 74-8] at 2:1–21; *Stropky Decl.* [Doc. No. 74-11] at 7–15; *Mot. for Summ. J.*, Ex. 11. One FTO stated that while he was acting as a victim needing help, Plaintiff ran into him with the wave runner instead of rescuing him. *Rahm Decl.* [Doc. No. 74-9] at 2:1–13.

Defendant also presents evidence that rather than deny Plaintiff opportunities to train, several FTOs gave Plaintiff additional time during the off-season to practice, which was rare for

the lifeguard service. *Kleymann Decl.* at 2:16–18; *Mot. for Summ. J.*, Ex. 11. In addition, Defendant offers evidence demonstrating that Plaintiff herself caused several delays in becoming certified. Sergeant Casey Owens states that for several weeks during the Summer of 2004, Plaintiff did not train on the PWC because she had an upcoming swimming/lifeguard competition and feared that she would injure herself on PWC and not be able to compete. *Owens Decl.* at 2:22–27. This statement is supported by Terry's training log sheet which shows that her first training session during the Summer of 2004 occurred well into the month of August. *Mot. for Summ. J.*, Ex. 11. In addition, Sergeant Richard Stropky states that on October 11, 2004, Plaintiff submitted the paperwork to take the PWC certification test but Plaintiff failed to provide the required letter of recommendation from one of her FTOs. *Stropky Decl.* at 2:23–26. Stropky states that in November 2004, he received a recommendation from FTO Owens. *Stropky Decl.* at 2:27–3:2. Stropky states that although the application was submitted during the off-season, Plaintiff was permitted to test, but Plaintiff asked that she be given some more time to operate the PWC on her own because she had not operated the PWC for some time. *Stropky Decl.* at 3:3–7. Stropky states that the next time Plaintiff approached him was after Memorial Day 2005, when Plaintiff indicated that she was ready to test on the PWC. Plaintiff took the test and became certified on August 8, 2005. *Stropky Decl.* at 3:8–15.

Plaintiff contends that her certification was delayed because, unlike her male counterparts, she was required to provide two recommendations when the testing requirements required only one. *Pl.'s Opp.* at 13:17–14:10. Sergeant Stropky states that Plaintiff was only required to provide one recommendation, and in November 2004, Owens submitted a recommendation on Plaintiff's behalf. *Stropky Decl.* at 2:16–27. Plaintiff does not provide any evidence to support the conclusory statements in her declaration that she was required to provide two recommendations prior to being able to test. There is no evidence that she actually obtained the two recommendations she insists were required in order for her to test on the PWC. Plaintiff also contends that she was not permitted to test because she failed to have the recommendations submitted in written form and was told that she could not test because "the conditions were not right." *Pl.'s Opp.* at 14:11–15:7. Barring Plaintiff's conclusory statements, there is no evidence that Plaintiff was required to have

her recommendations submitted in typewritten form, that two recommendations were actually submitted in typewritten form, or that she was not permitted to test because the conditions were not right. Defendant provides a declaration from Sergeant Stropky that is based on facts and not conclusions. Conclusory allegations, without factual support, are insufficient to defeat summary judgment. *Nat'l Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496, 502 (9th Cir. 1997).

Plaintiff also asserts that she was denied training opportunities due to her assignment to South Mission Beach, a location without a PWC. *Pl.'s Opp.* at 20:1–3; *Terry Decl.* [Doc. No. 79-6] at 2:5–8. According to Sergeant Katherine Jackson, the lifeguard service had a "vacancy at South Mission at that time that had to be filled by a Main Tower Lifeguard." *Jackson Decl.* [Doc. No. 74-5] at 2:21–22. Jackson states that Plaintiff filled the criterion, and that the main tower transfer to South Mission Beach was one of Plaintiff's goals listed on her 2003 Employee Performance Review. *Id.* at 2:18–28; *Mot. for Summ. J.*, Ex. 7, p. 2. Jackson states that Terry's completion of the main tower transfer was one of the reasons why Terry was ranked as "highly qualified." *Id.* at 2:28–3:3. Jackson also asserts that contrary to Terry's assertion that she was denied training on the PWC as a result of her assignment at the South Mission Beach tower, Jackson went out of her way to ensure that Terry received training on the PWC. *Id.* at 3:4–20; *Terry Depo., Mot. for Summ. J.*, Ex. 5 at 18:2–20. The evidence demonstrates that Plaintiff trained on the PWC on six of the twenty-three days Plaintiff was paid to work at South Mission Beach. *Jackson Decl.* at 3:9–10; *Mot. for Summ. J.*, Ex. 11. Jackson states that Plaintiff could have had more opportunities to train on the PWC, but Plaintiff either took time off or called in sick on six of the days she was scheduled to work and was unwilling to work on weekends. *Jackson Decl.* at 3:21–25.

Moreover, Defendant contends that there is nothing unusual about the length of time it took for Plaintiff to obtain certification on the PWC. *Mot. for Summ. J.* at 3:8–11. As evidence, Defendant offers declarations from various individuals who took longer to certify on the PWC than Plaintiff. *See, e.g., Cranston Decl.* [Doc. No. 74-4] at 3:22–23; *Vipond Decl.* [Doc. No. 74-12] at 2:10–16. The Court finds this evidence persuasive that Plaintiff was not treated differently than similarly situated male Lifeguard Is.

Based on the foregoing, there are legitimate, nondiscriminatory reasons for the amount of time it took Plaintiff to get her PWC certification. The evidence demonstrates that Plaintiff experienced great difficulty in operating the PWC, which required her to obtain additional training. The lifeguard service accommodated her by providing more training, including otherwise rare training opportunities during the off-season. Plaintiff failed to provide complete paperwork, and then once she was permitted to test, Plaintiff requested that she be given additional time on the PWC. The evidence also demonstrates that Plaintiff frequently took time off, including almost a month during the summer of 2004, which limited her training opportunities. Moreover, the Court finds that despite Plaintiff's assertion that she was not given training opportunities during her assignment at South Mission Beach, she was given several opportunities to train. The Court is also persuaded by evidence that it took other lifeguards similar, if not longer, amounts of time to become certified on the PWC. Because the Court finds that Defendant has demonstrated legitimate, nondiscriminatory reasons for the amount of time it took Plaintiff to become certified on the PWC, the burden then shifts back to Plaintiff to articulate why these reasons are false and merely pretext for discrimination.

3. Pretext

Having reviewed Plaintiff's arguments and her evidence, the Court finds that Plaintiff has failed to meet her burden and demonstrate that these reasons are merely pretext for discrimination. Plaintiff first asserts that Defendant has failed to advance any reason for making PWC certification a prerequisite to applying for the Lifeguard II position when lifeguards rarely use the PWC. *Pl.'s Opp.* at 20:11-12 (citing *Darling Decl.* ¶10; *Owens Decl.* ¶6). The Court, however, finds that Defendants have demonstrated why PWC certification is necessary. Sergeant Jackson states in her declaration, "the PWC is a tool that the Lifeguard Service uses to ensure public safety." *Jackson Decl*. at 3:13–14. Use of the PWC plays a role in two of a lifeguard's five essential skills: tower observation and prevention. In order to be considered an "outstanding lifeguard," a lifeguard must grasp when a PWC is necessary for rescue, as well as how to "deploy[] a PWC in a timely manner so as to prevent rescues or critical rescues from developing." *Mot. for Summ. J.*, Ex. 9. Although use of the PWC may be infrequent, it is still a tool used by lifeguards to protect the public. When a

situation calls for use of the PWC, it is understandable that the lifeguard service would want lifeguards who are able to operate the PWC. Thus, the Court finds this argument unpersuasive.

Plaintiff next relies on the fact that she passed the PWC test on her first try to rebut the Defendant's argument that Plaintiff was not prepared to take the test. *Pl.'s Opp.* at 19:25–20:1. The Court, however, finds that this evidence does not rebut Defendant's argument, and may even lend support to Defendant's argument. The fact that Plaintiff passed the test on her first try supports the proposition that she was not authorized to take the test until she could pass the test. When she was finally authorized by an FTO to take the test, it was because she was able to perform the skills necessary to pass the test. The Court also finds Plaintiff's contention that there were more male lifeguards obtaining PWC certifications than female lifeguards unpersuasive. Plaintiff does not provide pertinent data on how many lifeguards were training for the PWC certification, or place these numbers in any context for the Court to find that discrimination was at play when Plaintiff was attempting to obtain her PWC certification.

Plaintiff also contends that remarks by decision makers are admissible to show pretext, pointing to statements made by Sergeant Jackson. *Pl.'s Opp.* at 20:22–21:1. Plaintiff's evidence consists of a declaration offered by another female lifeguard, Erin Snow-Creagan. *Snow Decl.* [Doc. No. 79-11]. Disregarding the portions of her declaration that constitute hearsay, the Court finds no evidence to support this argument. Moreover, the Court notes that the ranking decision was unanimous, thus alleged remarks by one decision-maker is not particularly probative under these facts. *See NOL*, Ex. 40; *Vipond Decl.* [Doc. No. 74-12] at 2:22–25.

Next, Plaintiff attempts to show pretext by arguing that she had superior qualifications. In support of this argument, Plaintiff points to evidence that she possessed more positive citizen feedback letters than any other candidate, that she had been selected "for the most special assignments," that she had the second-most seniority among all candidates, and that she is one of the fastest swimmers in the lifeguard service. *Pl.'s Opp.* at 21:2–11. Plaintiff's skills are not disputed. However, it has been widely documented that the promotion process was highly competitive. *Vipond Depo.*, *NOL*, Ex. 74 at 63:3–5; *Murray Decl.* [Doc. No. 74-7] at 2:15–20. The members on the interview panel identified numerous reasons why Plaintiff, despite these other

qualifications, was ultimately not promoted. First, Plaintiff lacked technical rescue courses, including rope rescue, PC832, rescue system 1 & 2, swift water rescue training, Coast Guard Auxiliary courses, Department of Boating & Waterways courses, etc. *NOL*, Ex. 41. Second, Plaintiff did not have as many skills in "operations" (i.e. core guarding skills). *Id.*; *Jackson Decl.* [Doc. No. 74-5] at 4:3–7:21; *Murray Decl.* [Doc. No. 74-7] at 2:11–3:13; *Vipond Decl.* [Doc. No. 74-12] at 4:1–5:13. The panel's ranking system relied in part on the substantive portions of the candidates' EPRs in 2003, 2004, and 2005. It was noted in all three EPRs that Plaintiff had an excellent grasp on the public relations side of lifeguarding, but needed to work more on developing her core guarding skills. *Id.; see also NOL*, Ex. 3–5. Plaintiff frequently took time off, including the last three weeks of the 2005 Summer season, the period immediately preceding the Lifeguard II interview. All three of the panelists questioned Plaintiff's dedication to being a lifeguard. Based on the foregoing, the Court is simply not persuaded that Plaintiff was more qualified than the candidates who received the promotion. *See, e.g.*, *NOL*, Ex. 38–39.

Finally, Plaintiff points to evidence of other employees who Defendant allegedly discriminated against. *Pl.'s Opp.* at 21:12–22:2. Although there may be evidence of discrimination against other female lifeguards, without any evidence pertaining to the case at bar, this evidence is not particularly probative. The Court notes that of the three people on the panel that ranked the candidates, two were females. *NOL*, Ex. 40. That fact alone substantially militates against a finding of discrimination. Defendant has advanced legitimate, nondiscriminatory reasons for Plaintiff's delay in obtaining her PWC certification and the subsequent denial of Plaintiff's promotion to Lifeguard II. Plaintiff has failed to demonstrate that these reasons are fabricated or mere pretext for discrimination.

For the foregoing reasons the Court finds that Plaintiff has failed to show that the legitimate, nondiscriminatory reasons were pretext for discrimination. Accordingly, Defendant's Motion for Summary Judgment on Plaintiff's disparate treatment claim is **GRANTED**.

C. Plaintiff's Retaliation Claim

Title VII makes it unlawful for an employer to retaliate against an employee for engaging in protected activity. 42 U.S.C. § 2000a-3(a); *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268,

269 (2001). At the summary judgment stage, courts assess Title VII retaliation claims under the same *McDonnell Douglas* burden shifting approach as Title VII discrimination claims. *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1513–14 (9th Cir. 1989); *Villarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1064 (9th Cir. 2002). To establish a prima facie case, plaintiff must demonstrate "(1) that she was engaging in protected activity, (2) that she suffered an adverse employment decision, and (3) that there was a causal link between her activity and the employment decision." *Trent v. Valley Elec. Ass'n*, 41 F.3d 524, 525-26 (9th Cir. 1994). "Causation sufficient to establish the third element of the prima facie case may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision." *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987). "Alternatively, the plaintiff can prove causation by providing direct evidence of retaliatory motivation." *Miller v. Fairchild Indus., Inc.*, 885 F.2d 498 (9th Cir. 1989).

If Plaintiff successfully establishes a prima face case, the burden of production then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment decision. *EEOC*, 881 F.2d at 1514. (citing *Ruggles v. Calif. Polytechnic State University*, 797 F.2d 7823, 786 (9th Cir. 1986)). If the employer is successful, the plaintiff must then prove by a preponderance of the evidence that the proffered reasons are pretexts for retaliation or that a discriminatory reason more likely motivated the adverse employment action. *Id.*

Plaintiff states her retaliation claim as follows: (1) she engaged in protected activity when she filed her gender discrimination complaint on June 20, 2006, (2) she suffered adverse employment action by not receiving any hours to work in the summer of 2007, and (3) she did not receive any hours during the summer of 2007 as a result of her complaint against Defendant. *Pl.'s Opp.* at 22:19-23:17. Defendant does not contest the first two elements of Plaintiff's prima facie case, but does argue that Plaintiff cannot show the required causal link between her protected activity and her lack of work in 2007. *Mot. for Summ. J.* at 14:24-15:22. Specifically, Defendant contends that the action Plaintiff complains of did not occur until the summer following Plaintiff's

filing of the complaint in the above-entitled action. *Id.*

On May 2, 2006, Plaintiff filed a complaint of discrimination under the provisions of the California Fair Employment and Housing Act, seeking an immediate right-to-sue. [Doc. No. 1] at 13. Plaintiff's complaint was closed effective May 2, 2006, and Plaintiff was given the Right-to-Sue Notice on May 11, 2006. *Id.* at 14. Plaintiff filed the instant action in Superior Court on June 20, 2006. *Id.* at 5-15. On July 19, 2006, Defendant removed the action to Federal Court. *Id.* at 2-3. Defendant then answered the complaint on July 28, 2006. [Doc. No. 2]. Plaintiff contends that in retaliation for filing the complaint, she was not scheduled during the entire Summer of 2007. *Pl.'s Opp.* at 22:19-23:17.

Based on the foregoing, it is evident that prior to Memorial Day 2006, the City was aware that Plaintiff was pursuing a claim of discrimination. Yet Plaintiff was scheduled and worked 69 hours during the Summer 2006 season. *NOL*, Ex. 2. Even if the Court were to use the June 20, 2006 complaint as the date of Plaintiff's protected activity, Plaintiff still cannot show a causal link because Plaintiff worked throughout the Summer 2006 season. Plaintiff does not take issue with her work schedule during the Summer 2006 season, but instead contends that the City's failure to schedule her for work more than a year later, during the Summer of 2007, was in retaliation for her protected activity. Plaintiff cannot ignore the fact that she was scheduled to work during the Summer of 2006, when one would think retaliatory conduct would have been most likely to occur. Plaintiff seems to imply that the Court should disregard the Summer 2006 season because the season ended on September 4, 2006, "barely one month after the City filed its answer." *Pl.'s Opp.* at 23:7–9. Plaintiff, however, does not provide any case law that would justify the Court's reliance on the date of Defendant's answer rather than the date Plaintiff engaged in the protected activity. Considering these facts, the Court cannot find a causal link between Plaintiff's protected activity and her not being scheduled for work during the Summer of 2007.

Moreover, even if the Court were to disregard Plaintiff's work during the Summer of 2006, Plaintiff has failed to show that the person responsible for scheduling her during the Summer of 2007 had any knowledge of her protected activity. Michael Cranston, who was a Lifeguard II at the time and responsible for scheduling all Lifeguard Is for the Central District (where Plaintiff

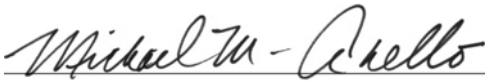
was assigned), states that at no time during 2007 was he aware that Plaintiff had filed a lawsuit against the City. *Cranston Decl.* [Doc. No. 74-4] at 3:17–20. Plaintiff does not offer any evidence that shows otherwise. Plaintiff attempts to rebut this evidence by demonstrating that Sergeant Vipond, who was in charge of the PSP program, had knowledge of the lawsuit. *Pl.'s Opp.* at 24:23–25:5. Plaintiff adequately demonstrates that Sergeant Vipond had knowledge of the lawsuit; however, there is no evidence that Sergeant Vipond had any involvement in scheduling the PSP lifeguards for work after he assigned the PSP lifeguards to their respective districts. *Vipond Decl.* at 8:24–10:23. Sergeant Vipond specifically states: "After early June 2007 when I delegated the task of scheduling the twelve PSP guards, I was not involved with Ms. Terry in any way until October 2007 when I conducted her performance review." *Id.* at 10:7–9. Nor does Plaintiff explain how Captain Wurts's knowledge of the lawsuit is relevant when he stated during his deposition that Plaintiff's work schedule "falls quite a bit below the level of operations that I ever get involved with. It's not really a fair question to ask me because I don't engage in that level of detail." *Wurts Depo.*, *NOL*, Ex. 78 at 56:2–13. Without any evidence that someone with direct control over Plaintiff's schedule had knowledge of her protected activity, Plaintiff has failed to demonstrate a causal link between the protected activity and the adverse employment action. As a result, the Court finds that Plaintiff has failed to state a prima facie case for retaliation. Accordingly, Defendant's Motion for Summary Judgment is hereby **GRANTED**.

CONCLUSION

Based on the foregoing reasons, Defendant's Motion for Summary Judgment is hereby **GRANTED**. This order disposes of all claims. Accordingly, the Court **ORDERS** the Clerk of Court to enter judgment in favor of Defendant City of San Diego, and to terminate the case.

IT IS SO ORDERED.

DATED: April 9, 2009



Hon. Michael M. Anello
United States District Judge