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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JANE DOE and ANNE RASKIN,

Plaintiffs,

vs.

CITY AND COUNTY OF SAN FRANCISCO; JANICE MADSEN, an individual; KIM DOUGHERTY, an individual; AUDREY HILLMAN, an individual; HEATHER GRIVES, an individual; and DOES 1-10,.

Defendant(s).

Case No. C 10-04700 TEH

DEFENDANT CITY AND COUNTY OF SAN FRANCISCO, JANICE MADSEN, KIM DOUGHERTY, AUDREY HILLMAN AND HEATHER GRIVES' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

Hearing Date: November 21, 2011
Time: 10:00 a.m.
Judge: Hon. Thelton E. Henderson
Dept. 12, 19th Floor

Action File: October 14, 2010
Trial Date: January 10, 2012

Documents Filed Concurrently:
Declaration of Terrence Daniel
Declaration of Janice Madsen
Declaration of Kim Dougherty
Declaration of Heather Grives
Declaration of Lawrence Hecimovich
Exhibits to Hecimovich Declaration
Confidential Exhibits to Hecimovich Declaration

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NOTICE OF MOTION

TO PLAINTIFFS AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT, pursuant to Federal Rule of Civil Procedure 56, Defendants City and County of San Francisco, Janice Madsen, Kim Dougherty, Audrey Hillman and Heather Grives will and hereby do move, jointly and severally, for summary judgment or, in the alternative, partial summary judgment. The matter will be heard November 21, 2011 in the Courtroom of the Honorable Thelton E. Henderson. The motion is based on all pleadings and records on file with the Court, on the declarations of Terrence Daniel, Janice Madsen, Kim Dougherty, Heather Grives, and Deputy City Attorney Lawrence Hecimovich, and the exhibits attached thereto, and on all such other oral and documentary evidence as the Court may consider in the hearing of this motion. This motion is brought on the following grounds, and seeks adjudication of these issues in favor of Defendants:

I. PLAINTIFFS' FAILURE TO SHOW THAT DEFENDANTS INTENTIONALLY ACCESSED DOE'S EMAIL ACCOUNT BARS THEIR CLAIM UNDER THE FEDERAL STORED COMMUNICATIONS ACT

II. PLAINTIFFS PRIVACY CLAIMS FAILS

- **A. Plaintiffs Had No Reasonable Expectation Of Privacy In a Shared Computer**
- **B. Even If Plaintiffs Had A Right To Privacy In the Computer, They Forfeited That Right When Doe Left the E-Mails Open On the Screen**
- **C. The Alleged Invasion Of Plaintiffs' Privacy Was Not "Serious"**

III. PLAINTIFFS' WHISTLEBLOWER AND FEHA RETALIATION CLAIMS FAIL BECAUSE PLAINTIFFS' COMPLAINTS DID NOT ALLEGE UNLAWFUL CONDUCT, BECAUSE PLAINTIFFS FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES, AND BECAUSE PLAINTIFFS HAVE NO EVIDENCE OF RETALIATION

- **A. Plaintiffs' Labor Code Claims Fail Because Plaintiffs Never Complained About Alleged Unlawful Conduct**
- **B. Plaintiffs' Whistleblower Claim Fails Because Plaintiffs Have Not Exhausted Administrative Remedies**

IV. PLAINTIFFS' FIFTH AND SIXTH CLAIMS FOR RELIEF FOR GENDER DISCRIMINATION AND HARASSMENT FAIL

V. PLAINTIFFS' CLAIM FOR FAILURE TO PREVENT DISCRIMINATION AND HARASSMENT FAILS

VI. PLAINTIFFS' CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS FAILS

October 14, 2011

/s/Lawrence Hecimovich
LAWRENCE HECIMOVICH
Attorneys for Defendants

INTRODUCTION

Plaintiff Jane Doe is a dispatch supervisor for the City's Department of Emergency Management. Plaintiff Ann Raskin is a 911 dispatcher and a good friend of Doe's. Defendant Janice Madsen is a DEM watch commander, while Kym Dougherty, Heather Grives and Audrey Hillman are DEM supervisors, each of whom was assigned to the midnight shift in October 2009. DEM supervisors handle life-and-death situations, and demand exceptional and timely performance from dispatchers. The work environment is intense, 24 hours a day, 7 days a week.

When Doe came to DEM in 2003, she struggled during new-hire training under Supervisor Heather Grives. In response to what she regarded as insensitive and demeaning treatment by Grives, Doe requested reassignment to a different supervisor. DEM granted her request and Doe passed probation. In the eight years since then, both Doe and Raskin have received uniformly positive performance reviews. Doe was promoted as soon as she became eligible to be a supervisor, in October 2008. While Raskin is not yet eligible for promotion, DEM supervisors and managers consistently praise her work and have "groomed her" for promotion. Neither Plaintiff alleged unlawful conduct or "gender-based hazing" (by female supervisors) prior to filing this lawsuit, and neither can identify any benefit of employment they were denied on the basis of gender.

Plaintiffs' career trajectories changed on October 18, 2009. Doe, working the swing-midnight overlap shift, logged into her Yahoo e-mail account on a shared computer in the supervisor room. Although Doe has no recollection of that evening, Yahoo records show she logged in at 5:30 p.m. After Doe left the supervisors' room, midnight shift Supervisor Kym Dougherty sat down to use the computer, found an e-mail open on the screen, and closed it. As she did so, another e-mail popped up from the bottom of the screen and, when Dougherty closed it, another. Dougherty was not reading the e-mails as she closed them.[1] But when she saw an e-mail disclosing confidential information relating to a DEM personnel investigation, sent to a nonsupervisory employee, she realized that it violated DEM policy. Dougherty alerted Madsen, who sat down at the computer station, read and printed the e-mail, printed and closed the dozen or so e-mails open at the bottom of the screen, closed the Yahoo account, sealed the e-mails in an envelope and delivered them to DEM Human Resources.

[1] Dougherty does not recall if she noticed insults directed at her or other DEM supervisors. The e-mails are replete with what Plaintiffs describe as "catty" insults. (Ex. L)

HR Manager Terry Daniel investigated whether the improper disclosure had contaminated the personnel investigation, and whether Doe should be disciplined. Doe reacted with outrage. She hired an attorney, denied she opened her e-mail on October 18 (six weeks before Daniel apprised her of the incident), filed a police report, and filed this action, all the while publicly accusing Grives (who played no role in the incident) of having "hacked" her e-mail. In the face of Doe's rage, DEM closed its investigation and secured the computer hard drive, only to forensically determine that any information relating to log-ons or use of the account would be on Yahoo's server, not the City's.

With news of the defamatory e-mails and her allegations of criminal misconduct swirling through the midnight shift, Doe demanded reassignment from the overlap shift, which she had only recently bid onto. DEM awarded Doe "superseniority", allowing her to bypass the bid process to secure a swing shift assignment. Although this was precisely what she had demanded, Doe now alleges that DEM caused her to be severely resented by her peers for circumventing union bid rules.

Faced with this resentment, Plaintiffs for the first time alleged they are "whistleblowers", apparently based on Doe's complaints that midnight shift supervisors spend time on the Internet on City time. Plaintiffs further alleged they were victims of a decade-long campaign of gender-based harassment, discrimination and retaliation.

Plaintiffs present no evidence in support of these claims, and their employment history tells a different story. Doe feared for her job after a series of mistakes: improperly disclosing confidential information to a nonsupervisor; sending e-mails grossly disparaging DEM supervisors, then leaving them open to the world; falsely and recklessly accusing DEM supervisors of hacking into her account; and fabricating allegations of unlawful harassment in support of her demand for a shift change she was not entitled to. Raskin, whose first thought after the e-mail disclosure was “oh my god, my job was over, my life was over”, sued to "protect" herself from future retaliation that could impact her career path. (Raskin 42:22-43:17, 74:11-23)[2]

Simply put, Doe and Raskin decided that their best defense was a good offense. The Court should not tolerate this abuse of the legal system, and should dismiss each of Plaintiffs' claims.

[2] Neither Doe nor Raskin has been subject to any "gender-based hazing" – as opposed to alleged ostracism - since July 2009, the last time Doe was assigned to midnights.

FACTUAL BACKGROUND

I. RASKIN SURVIVES THE DEPARTMENT'S RIGOROUS DISPATCHER TRAINING AND IS GROOMED FOR PROMOTION, NEITHER PERCEIVING NOR REPORTING "GENDER-BASED HAZING"

Plaintiff Ann Raskin lived a charmed life at DEM prior to the e-mail incident. DEM management "embraced" Raskin throughout her employment, providing her constructive and positive mentoring, and encouraging and "grooming" her for promotion. (Raskin 12:9-17:10; Ex. F)

Neither Raskin's employment history nor her perceptions of DEM operations support Plaintiffs' allegations. Raskin acknowledges that dispatcher training is exceptionally demanding, but testified that she has never witnessed gender bias, and that she herself has never been unfairly criticized or reviewed based on her gender. (Raskin 50:6-51:17, 66:15-71:9, 77:9-24, 121:1-123:11, 126:2-127:13, 130:17-131:3) Raskin is never second to anyone (including male peers) in being groomed for promotion, whereas dispatchers complain that she receives special treatment. (Raskin 61:19-62:25)

Prior to her e-mails to Doe becoming public in December 2009, Raskin was not troubled by and did not track or complain about DEM supervisors' conduct and never doubted that she would be promoted to supervisor as soon as she was eligible. (Raskin 8:6-19, 82:18-83:10, 118:2-119:12)

II. DOE PASSES DISPATCH PROBATION AFTER A DISPUTE WITH GRIVES, IS PROMOTED TO SUPERVISOR AND PASSES PROBATION AGAIN, NEVER CLAIMING ANY GENDER-BASED HARASSMENT OR DISCRIMINATION DURING THE SIX YEARS PRIOR TO DECEMBER 2009

Doe was hired as a 911 dispatcher in 2003. She struggled with dispatcher training, which is "extremely difficult". Doe alleges that DEM Supervisor Heather Grives, her trainer during the critical third stage of training, unfairly criticized her in an abusive manner. Doe alleges that, while Grives is rude to everyone, she reserved the worst abuse for Doe. Doe does not know the reason Grives disliked her, but believes it may have been because Doe was thinner and more attractive. (Doe 149:22-151:25) Doe challenged Grives, alleging unfair criticism (but not gender bias), triggering DEM to assign her to a different trainer, who then passed her. Doe alleges that Grives retaliated against her in all their subsequent interactions based on that complaint. (Doe 9:25-10:10, 85:13-89:4, 96:15-97:17; 98:4-6)[3]

[3] As with Grives' alleged resentment of her figure, Doe attributes other supervisors' resentment of her to personal reasons. Dougherty treated Doe fairly until former supervisor Glenn Ortiz-Schultz broke off his relationship with her to date Doe, and has been bitter ever since. (Doe 256:9-257:16)

Dispatchers must work five years before taking the supervisor exam. Doe worked swing shift, receiving fair and unbiased reviews for five years. (Doe 9:18-24, 252:8-254:16, 255:10-17; Ex. H)

Doe's supervisors encouraged her to take the exam as soon as she was eligible, and she did. (Doe 12:18-25) Doe and Raskin expected Doe to be promoted on her first attempt in October 2008, and she was. (Doe 11:8-12:8; Raskin 81:15-17) Doe was never denied any training or assistance she needed for promotion, and admits that the promotional consideration process, like her reviews, was fair. (Doe 154:10-155:23) Doe's supervisory assignment was subject to a six month probation. Doe was not concerned about passing probation, and did so in March 2009. (Doe 184:5-15, 185:13-24)

III. DOE'S 2009 COMPLAINTS THAT SUPERVISORS ON THE MIDNIGHT SHIFT VIOLATED CITY POLICIES

Doe dispatched on midnights only occasionally after completing new hire training. She returned to midnights as a supervisor in January 2009 after not working midnights for almost four years. (Doe 13:1-19, 90:9-18) She left midnights in July 2009, but chose to bid onto a swing-midnight overlap shift, rather than to sever all contact with the midnight crew. On the overlap shift, Doe worked alongside Defendants at the end of her shift, performing separate duties. According to Doe, she complained, at one time or another, that midnight shift supervisors violated City policies:

- Grives and Hillman entered time in PeopleSoft before working it (Doe 32:8-34:4);
- Manager Carol Bernard denied her radio training (Doe 35:18-36:24, 37:17-38:4);
- Dispatchers were improperly turning off important equipment (Doe 65:4-66:3);
- Grives "hyperscrutinized" a schedule Doe had created (Doe 39:13-40:5);
- Grives once allowed her daughter to use a City computer (Doe 64:3-19);[4]
- Doe was assigned mandatory overtime on two occasions (FAC);
- Doe did not get to take a lunch or rest break on 20 occasions (Doe 65:4-70:19);
- Supervisors spent time on Facebook and other internet sites (Doe 40:16-41:15, 63:2-64:2, 135:4-139:11, 140:7-141:16-144:10, 147:7-15).

Doe attributes Defendants' alleged hostility – alleged shunning, name-calling, false criticisms and fabricating complaints – to these complaints. (Doe 174:19-175:18, 191:7-20).

[4] Doe told management that the computer had CLETS access, but admitted at deposition that she had no idea whether that was true. Her contemporaneous communications with Raskin make clear that Doe knew her allegation was false. (Doe 63:3-19, 273:6-274:4, 293:18-294:4)

IV. DEM MANAGERS' INADVERTENT OCTOBER 2009 DISCOVERY OF DOE'S E-MAILS IMPROPERLY DISCLOSING CONFIDENTIAL PERSONNEL INFORMATION TO A NON-SUPERVISOR, AND DISPARAGING DEM MANAGERS

Doe wrote and received a host of e-mails disparaging DEM supervisors. Doe understood that she had a duty to report this type of harassing conduct, but elected not to and in fact engaged in and encouraged this behavior, which she describes as "catty". (Doe 234:21-235:2, 236:14-24, 282:6-13; Ex. B)[5] On October 18, 2009, Doe inadvertently disclosed e-mail communications between herself, Raskin and various co-workers reflecting their negative opinion of DEM midnight shift supervisors.

Doe worked the 1:00 to 11:00 p.m. swing-midnight overlap shift on October 18, 2009. Around 5:30 that evening, Doe sat down at a City computer in the dispatch supervisors' room and logged into her Yahoo e-mail account. (Ex. E, Yahoo subpoena return) When she finished, she left the e-mails open on the monitor. The e-mails relate almost entirely to workplace issues, and contain a significant number of disparaging references to DEM supervisors. (Ex. L)

After Doe left the supervisors' room, midnight supervisor Kym Dougherty went to use the computer Doe was logged on to. She found an e-mail on the screen, and a large number of e-mails open but minimized at the bottom of the screen. Dougherty began closing the e-mails one-by-one, not reading them. When Dougherty saw an e-mail improperly disclosing confidential investigatory information, she informed her manager, Janice Madsen. In the e-mail, Doe falsely represented to a nonsupervisory union steward that Madsen was improperly influencing the investigation to shift blame from a female to a male dispatcher. (Doe 181:22-25; Dougherty Decl. ¶¶ 2-4)

Madsen's reaction upon learning that Dougherty had looked at Doe's e-mail was to tell her to close out the account. However Madsen reconsidered when Dougherty described Doe's improper disclosure of confidential information. Madsen accompanied Dougherty to the supervisors' room and read the e-mail on the screen. Madsen told Dougherty she could leave but to treat the matter as confidential. Madsen then printed the investigation e-mail, maximized and printed the e-mails at the bottom of the screen, closed the account, sealed the e-mails in an envelope and gave it to Human Resources with a form explaining her concerns. (Madsen Decl. ¶¶2-4; Dougherty Decl. ¶¶3-5; Ex. M)

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[5] When she was a dispatcher, Doe received a written counseling due to "bursts of very loud profanity between transmissions." Doe admits she may have used the terms "bitch" and "fucker". (Doe 265:9-266:19, 294:20-25)

Doe thinks she heard Dougherty say "bitch" once, but otherwise has never heard Madsen, Dougherty, Grives or Hillman use the terms "bitch", fucker" or "cunt". (Doe 267:21-269:20)

V. DEM'S INVESTIGATION INTO DOE'S IMPROPER DISCLOSURE OF CONFIDENTIAL INFORMATION, DOE'S OUTRAGE AND COUNTER-ALLEGATIONS, AND DEM'S DECISION TO CLOSE THE INVESTIGATION

The Department assigned Human Resources Manager Terry Daniel to investigate Doe's improper disclosure of confidential personnel information. Daniel reviewed the e-mails and informed DEM management that the investigation may have been compromised. On or about December 4, 2009, Daniel informed Doe of the investigation and his need to interview her. Doe immediately feared for her job due to the highly pejorative content of the e-mails. Doe told her friend Joanne Donohue of her concern, and Donohue encouraged Doe to take the offensive. Doe did so by challenging Daniel's investigation as well as her managers' actions. (Daniel Decl. ¶¶ 9-11; Ex. I)

First, over Donohue's strenuous objection, Doe insisted that sharing confidential personnel information with a non-supervisor did not violate City policy. (Doe 117:2-20, 199:5-23, 222:13-223:2, 295:21-296:22 ("that's ludicrous"). Doe alleged that, by falsely accusing her of having violated City policy, Madsen and others were retaliating against her based on her prior complaints against midnight shift supervisors. DEM determined that Doe's disclosure was not consistent with DEM policy or practice for supervisors and demonstrated poor judgment. (Daniel Decl. ¶ 11, Ex. M) [6]

Second, Doe forcefully and unequivocally denied having accessed her e-mail on October 18,[7] and made a "counter-complaint" that DEM managers had unlawfully "hacked" into her account, had "rummaged around" in her e-mail for a number of hours, and should be fired. (Doe 98:7-99:13, 100:8-101:24, 102:25-105:1, 107:2-8; Ex. I) Doe recruited union steward Ron Davis to lead the attack relating to the e-mail incident, repeatedly alleging (without any basis in fact) that her financial information had been compromised and that unauthorized messages had been sent from her e-mail

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[6] Doe stands alone in that belief. Donohue, Doe's good friend and mentor, testified **unequivocally** that Doe had no right to disclose personnel information to a nonsupervisory union steward. (Donohue 190:4-191:6, 193:5-11). Each of the other supervisors involved in the case likewise testified that Doe's action in disclosing the information to a nonsupervisory violated City policy and could have subjected Doe to discipline. (Daniel Decl. ¶ 11; Madsen Decl. ¶¶ 2-3; Dougherty Decl. ¶¶ 2-3; Grives Decl. ¶ 8. Even Raskin concedes that the Department investigated the e-mails due to a legitimate operational concern over the disclosure. (Raskin 116:15-117:25) Raskin further testified that she considers Madsen to be a highly qualified manager who has not sought to harm her. (Raskin 41:16-42:7)

[7] Confronted with Yahoo records showing her accessing the account, Doe now says she does not recall whether she logged in, but insists she did not leave e-mail open. (Doe 162:16-19, 292:21-293:5) Despite the forensic evidence, Doe continues to accuse managers of illegal computer hacking and of searching through large quantities of e-mail in her account. See FAC ¶ 100.

address, and demanding that the City fire any supervisor who engaged in hacking. (Doe 196:18-198:21, 230:15-24; Ex. I) Doe's claims that managers had "hacked" her Yahoo account led a large number of DEM employees to express concern about the alleged hacking. (Donohue 186:24-187:17)

DEM ultimately elected to forego disciplining Doe, and further concluded that it could not discipline Madsen or Dougherty absent evidence corroborating Doe's "hacking" claim. (Daniel Decl. ¶¶ 9-11; Ex. M, N)[8] Hennessey met with Doe in May 2010, reiterating the Department's conclusion that Doe's disclosure of confidential information relating to the investigation had reflected "poor judgment", leaving Doe feeling that Madsen had "won". (Doe 215:14-216:23, 240:12-15, 245:15-20; Ex. M, N) Hennessey revised DEM's computer policy in May 2010. (Doe 242:12-15; Ex. C, D)

VI. MIDNIGHT SHIFT SUPERVISORS' ALLEGED OSTRACISM OF PLAINTIFFS, DEM'S AGREEMENT TO ALLOW DOE TO CHANGE SHIFTS WITHOUT BIDDING, AND DEM SUPERVISORS' CONDEMNATION OF DOE FOR DEMANDING SPECIAL TREATMENT

When Raskin learned that her e-mails to Doe had become public, Raskin's first thought was "oh my god, my job was over, my life was over." (Raskin 42:22-43:17) DEM HR told Doe not to discuss the content of the e-mails while it investigated the impact of Doe's disclosure on the investigation. (Doe 59:24-60:3) Nonetheless, Plaintiffs allege that midnight shift supervisors and dispatchers learned that the e-mails insulted them. (Doe 41:16-42:11, 56:23-58:17) Doe shared Raskin's fears, and alleges that when midnight shift supervisors learned that she and Raskin had criticized them and called them names, then accused them of engaging in illegal conduct, the supervisors ostracized them, but never did anything beyond that. (Doe 43:1-45:4, 218:12-219:1, 279:10-280:7, 281:23-282:5, 299:8-11) Raskin thinks supervisors have avoided her based on her having "aired dirty laundry in public", but also admits that is the only adversity she has faced. (Raskin 26:20-27:2, 34:21-35:2, 39:3-10, 41:9-23, 51:9-56:13, 58:13-22, 71:15-24, 72:3-73:9, 85:22-86:5)[9]

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[8] Doe did not track the City's investigative efforts and is not aware of anything the City could have done to uncover additional information relating to her claims. (Doe 193:25-195:9, 246:14-22)

Doe alleged that supervisor Heather Grives was responsible for the incident as part of a plot to intentionally discredit her and to maintain an atmosphere of hostile gender-based hazing. *Id.* Raskin liked Grives and had a "great time" working with her until October 2009, and describes Grives as "very, very competent, very good at her job". (Raskin 31:17-23, 37:4-38:21, 88:7-19)

[9] Raskin attributes two incidents to DEM management's knowledge of the criticisms in her e-mails. Raskin's male manager rated her average on her 2010 review. When Raskin asked to be re-graded, a female supervisor gave her the rating she wanted. (Raskin 25:1-26:6) Raskin believes that a written warning for sending inappropriate CAD radio messages should have been a counseling. (Raskin 75:20-76:16) Raskin attributes that disparity to her e-mails, not to gender. (Raskin 76:10-16)

Doe's attorney demanded that Doe be allowed to change shifts. The Department granted Doe's request for 'super-seniority' to allow her to bid off the shift. Doe's demand for and receipt of that benefit created intense backlash among her peers, who consider it a violation of the Memorandum of Understanding and DEM Work Rules. (Doe 50:12-52:7, 55:25-56:25; Raskin 97:15-21; Ex. I)

Doe has worked on the day shift since January 2010. (Doe 14:3-22) Neither Doe nor Raskin has had meaningful contact with midnight supervisors since then. (See FAC ¶ 135)[10] Doe has never experienced a hostile work environment except on midnights. (Doe 192:9-17, 198:22-199:13)[11]

VII. DOE FOR THE FIRST TIME ALLEGES THAT DEM MANAGERS TREAT MEN MORE FAVORABLY THAN WOMEN

Doe understood that, had she experienced or witnessed gender-based harassment, she was required as a supervisor to report it to her management or to DHR. She never made such a report, and never complained that the conduct in her Complaint was based on gender at any time prior to filing her charges. (Doe 148:3-149:10, 160:9-14, 236:14-24; Ex. B) Prior to December 2009, Doe never alleged any violation of law, as opposed to City policy. (Doe 135:4-139:11, 140:7-25, 141:16-144:10, 147:7-15, 172:10-174:7; Madsen Decl. ¶ 8; Grives Decl. ¶ 7; Dougherty Decl. ¶¶7-8) Doe never considered filing any legal complaint prior to learning of the e-mail incident in December 2009. (Doe 149:8-10)

Doe now claims that she was the victim of gender-based harassment and discrimination from her start at DEM. (Doe 90:24-91:4) She claims she was harassed based on her gender her first stint on midnights, and that the harassment resumed, in more severe form, when she bid back onto midnight shift in January 2009. (Doe 92:8-11, 93:7-12) She alleges the harassment worsened between January and July 2009, but admits that she chose to transfer to the overlap shift, as opposed to cutting off all contact with the midnight crew. (Doe 115:22-116:8)[12]

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[10] Raskin believes Madsen, Dougherty, Hillman and Grives have attempted to reconnect with her, while Lisa Hoffman has gone out of her way to do so. (Raskin 18:19-19:3, 54:11-55:16)

[11] Doe alleges that DEM manager Carol Bernard was overly critical of day shift personnel when a Thanksgiving Day 2010 turkey deep fry resulted in slippery floors and a slip-and-fall accident. Doe admits that Bernard did not single her out and instead blamed the entire shift, including the manager who received formal retraining on safety protocols. She further alleges that Madsen falsely criticized her regarding a dispatch, but withdrew the criticism without implementing discipline. (Doe 20:20-21:2, 70:20-71:22, 73:1-78:20, 79:16-81:18, 82:2-4, 82:10-83:3, 99:22-100:7, 112:21-113:2)

[12] Doe alleges managers have targeted her for hazing due to her union work. (Doe 278:4-12)

Doe cannot identify a single instance of a male employee receiving a benefit that should have gone to a female employee. (Doe 270:2-272:18) In fact, Doe alleges that the Department "abandoned" some male trainees to fail; investigated misconduct involving male dispatchers while ignoring a female dispatcher's misconduct; and empowered three female supervisors to "gang up on" a male supervisor in an attempt to drive him off their shift. (Doe 181:22-25, 284:15-285:18) [13]

Raskin's testimony cannot be reconciled with the Complaint's allegations. Raskin admits that she joined Doe's lawsuit to "protect" herself from being fired due to the e-mails she wrote. (Raskin 74:11-23) Raskin testified that DEM supervisors are overly critical of all dispatchers, regardless of gender, throughout training and the first two or three years on the job. (Raskin 50:6-51:17, 66:15-71:9, 77:9-24) Raskin believes that virtually all dispatchers are subject to this "hazing", and can identify only a few dispatchers, both male and female, spared this treatment. (Raskin 65:25-66:14, 93:12-97:1) Like many dispatchers, Raskin considers herself a perfectionist and is sometimes overly sensitive to performance feedback necessary to public safety. (Raskin 84:6-22) Prior to this lawsuit, Raskin never complained that this criticism (or "hazing") was gender-based, nor did she raise any complaint relating to her gender in any forum. (Raskin 66:15-69:5, 74:11-75:11)

Raskin testified that Doe never raised any gender complaints prior to December 2009, and in fact never expressed any opinion that the stern supervision in DEM had anything to do with gender. (Raskin 33:12-21, 82:5-8, 99:19-23) Raskin has never experienced the unfair treatment Doe claims is directed at all women, and does not believe that Doe is treated differently due to gender. (Raskin 39:14-40:13) Raskin attributes Doe's problems integrating herself into DEM management to Doe's complaints regarding other supervisors' commitment and productivity, which Raskin believes offend and threaten Doe's peers. (Raskin 111:7-12, 134:10-135:12)

PROCEDURAL HISTORY

Plaintiffs filed charges of discrimination on October 13, 2010 and September 21, 2011. (Ex. A) Plaintiffs filed Government Claims with the City Controller's office, but have not filed claims with the Labor Commissioner or other office. (Daniel Decl. ¶¶ 13)

[13] Doe resents that the supervisors who decried her demand for superseniority have not similarly criticized Jim Dominica, a highly skilled supervisor disabled by cancer. Dominica faced termination until he was reassigned. Doe believes he should have been fired. (Doe 50:12-53:11)

ARGUMENT

I. PLAINTIFFS' FAILURE TO SHOW THAT DEFENDANTS INTENTIONALLY ACCESSED DOE'S EMAIL ACCOUNT BARS THEIR CLAIM UNDER THE FEDERAL STORED COMMUNICATIONS ACT

The purpose of the Stored Communications Act is to "prevent hackers from obtaining, altering or destroying certain stored electronic communications." *In re DoubleClick Inc. Privacy Litigation*, 154 F. Supp. 2d 497, 507 (S.D.N.Y. 2001). The Act is violated when a person or entity "(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system." 18. U.S.C. § 2701.[14] To establish their claim under the Act, 18 U.S.C. § 2701, Plaintiffs must show that Defendants accessed Doe's e-mail "with a knowing or intentional state of mind." 18 U.S.C. § 2707(a). Plaintiffs cannot make that showing.

Cases finding liability under the Act uniformly turn on the defendant's intentional, planned infiltration of the protected stored source. In *Miller v. Meyers*, 766 F. Supp. 2d 919, 923 (W.D. Ark. 2011), for example, the defendant installed a keystroke log to infiltrate his former wife's computer, stole her e-mail password, then used the stolen password to open her account. Likewise in *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp*, 759 F. Supp. 2d 417, 423 (S.D.N.Y. 2010), defendants searched the office computer's cache, found an employee's password, then used the password to open his e-mail four times to download 456 e-mails. *Id*. at 429.[15]

Doe has no evidence that midnight shift personnel intentionally opened her account. The Yahoo records show that the account was opened early Doe's shift and was neither closed nor reopened. Accordingly, Plaintiffs cannot show that Defendants engaged in the kind of intentional hacking the SCA prohibits. *See In re DoubleClick Inc. Privacy Litigation*, 154 F. Supp. 2d at 507.

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[14] The Act defines "electronic storage" as "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." *Id*. § 2510(17), incorporated by § 2711(1). This definition encompasses storage on a server. *See*, *e.g.*, *Theofel v. Farey-Jones*, 359 F.3d 1066, 1075 (9th Cir. 2004).

[15] The court found that four violations, one for each act of opening the account. *Id*. Plaintiffs' speculation that Defendants read over 1,000 e-mails is immaterial. The SCA only prohibits *accessing* stored communications, not reviewing or using the accessed information. 18 U.S.C. § 2701; *Pure Power Boot Camp, Inc.*, 759 F. Supp. 2d at 423 (finding single violation for each time accessed, regardless of number of e-mails); *Garback v. Lossing*, 2010 WL 3733971 (E.D. Mich. Sept. 20, 2010) (contractor who hacked computer violated Act; attorney who used hacked information did not).

II. PLAINTIFFS' PRIVACY CLAIM FAILS

To establish a claim for invasion of privacy under Article I, section 1, Plaintiffs must prove that 1) they had a reasonable expectation of privacy; and 2) the invasion was serious. *Hill v. National Collegiate Athletic Ass'n* (1994) 7 Cal. 4th 1, 36-37. Plaintiffs cannot satisfy either of these elements.

A. Plaintiffs Had No Reasonable Expectation Of Privacy In A Shared Computer

A reasonable expectation of privacy "is an objective entitlement founded on broadly based and widely accepted community norms." *Sheehan v. San Francisco 49ers, Ltd.*, 45 Cal. 4th 992, 1000 (2009). For example, in *Carter v. County of Los Angeles* (C.D. Cal. 2011) 770 F. Supp. 2d 1042, 1054 the employer violated employees' right to privacy by installing a video surveillance system in a secure room. The court found a reasonable expectation of privacy based on the room being locked during business hours, employees knocked before entering, and no one could see in. *Id*. at 1054.

Employees possess some reasonable expectation of privacy in data stored on work computers. In *U.S. v. Ziegler*, 474 F.3d 1184, 1190 (9th Cir. 2007), the Ninth Circuit found that an employee had a reasonable expectation of privacy in the contents of the computer locked in his private office. However, the computer's location and the protections afforded by the employer are critical to determining whether privacy expectations are reasonable. "The use of computers in the employment context carries with it social norms that effectively diminish the employee's reasonable expectation of privacy with regard to his use of his employer's computers." *TBG Ins. Services Corp. v. Sup.Ct.* (2002) 96 Cal. App. 4th 443, 452; accord, *Holmes v. Petrovich Dev. Co.* (2011) 191 Cal. App. 4th 1047, 1071 (employee has no legitimate belief that personal emails sent using company computer were private, regardless of whether the company actually monitored employees' email).

In *TBG*, an employee used his employer's computers, one at home and one at work, to access sexually explicit material. *Id*. at 446. The employer fired him and demanded surrender of the computers. *Id*. The employee wanted to "wipe" the hard drive of the home computer, which contained personal information. The court held that, since employers often monitor employees' computer use and the plaintiff knew his computer use could be monitored, he lacked a reasonable expectation of privacy in the computer's contents. *Id*. at 452-454.

B. Even If Plaintiffs Had A Right To Privacy In The Computer, They Forfeited That Right When Doe Left The E-Mails Open On The Screen

Even where an individual has a reasonable expectation to privacy, that expectation evaporates when the private material is left in plain view. The plain view exception to the Fourth Amendment applies where: (1) the person taking the item be lawfully in the place where the item was in plain view; (2) the item's improper nature is immediately apparent; and (3) that the person taking the item have a lawful right of access to the object itself. *Horton v. California*, 496 U.S. 128, 136-37 (1990); *United States v. Wong*, 334 F.3d 831, 838 (9th Cir. 2003); *see also In re York*, 9 Cal. 4th 1133 (1995) (holding that Article I, § 1 does not establish broader protection than the Fourth Amendment).

In *U.S. v. Wong*, for example, police officers executing a search warrant of a murder suspect's computer unexpectedly found child pornography. *Wong*, 334 F.3d at 838. The court applied the plain view doctrine, holding that the officers were lawfully searching the computer for evidence of murder, that the incriminating nature of child pornography is readily apparent, and that the police had a lawful reason to be opening graphic files to assess the evidence. *Id*.; see also *Ker v. State of Cal.*, 374 U.S. 23, 43 (1963) (police officer permissibly walked to door of room where contraband plainly visible).

Plaintiffs had no reasonable expectation of privacy in e-mail on a shared computer, and what little privacy interest they possessed was eviscerated when Doe left the e-mail open on a computer she knew was regularly used by other supervisors. The Court should dismiss Plaintiffs' privacy claim.

C. The Alleged Invasion Of Plaintiffs' Privacy Was Not "Serious"

The California Supreme Court has long held that "[a]ctionable invasions of privacy [must] be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. *Hill v. National Collegiate Athletic Ass'n* (1994) 7 Cal. 4th 1, 36-37. "Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part….Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy." *Id*.

The courts have treated privacy in one's body and the confidentiality of financial information with particular sensitivity. *Id.; Tourgeman v. Collins Financial Services* (S.D. Cal. 2009) 2009 WL 6527758 (finding serious invasions where financing company turned over plaintiff's personal

information). By contrast, the disclosure of information having some relation to employer operations has been held not to constitute a serious invasion. See *Diaz, supra*, 2008 WL 2949272 at *9 ("Most employees understand that management will discuss major events such as a managerial termination"); *Deaile v. Gen. Tel. Co. of California* (1974) 40 Cal. App. 3d 841, 845-847 (dismissing claims based on supervisors' discussion of reasons for plaintiff's termination); see also, *Alch v. Superior Court* (2008) 165 Cal. App. 4th 1412, 1418 (union members' demographic information, including individualized employment history, name, date of birth, gender, race, and residential area).[16] Likewise, courts have held that there is no serious invasion of privacy where an advertiser obtains mailing addresses, class action plaintiffs obtain names and telephone numbers of other potential class members, or company managers discuss the reasons for an employee termination. *Folgelstrom v. Lamps Plus, Inc.* (2011) 195 Cal. App. 4th 986, 992; *Khalilpour v. CELLCO Partnership* (N.D. Ca. 2010) 2010 WL 1267749; *Diaz v. Safeway Inc*. (N.D. Cal. 2008) 2008 WL 2949272.

In this case, Defendants' inadvertent discovery of work-related e-mail on a shared supervisor-room computer does not constitute a serious invasion of privacy. Defendants did not breach social norms when they viewed the e-mails on the work computer and submitted the e-mails for review by Human Resources. Since these emails were in plain view, they are akin to generally public information that may be disclosed without implicating serious privacy concerns. See, *e.g., Alch*, *supra,* 165 Cal. App. 4th at 1432-1437 (employment history); *Folgelstrom supra,* 195 Cal. App. 4th at 992 (residence addresses). Madsen's submission of the e-mails to Human Resources, the very safeguard of workplace confidentiality, does not constitute a serious violation. See *Diaz, supra,* 2008 WL 2949272 at *8-9 (managers' disclosure of potential misconduct in furtherance of employer's interests not a serious intrusion on privacy).

Plaintiffs have failed to show any serious invasion of their privacy.

[16] The court also reasoned that the vague threat of identity theft was insufficient to create a serious invasion of privacy. *Id.* at 1438-1439.

III. PLAINTIFFS' WHISTLEBLOWER AND FEHA RETALIATION CLAIMS FAIL BECAUSE PLAINTIFFS' COMPLAINTS DID NOT ALLEGE UNLAWFUL CONDUCT, BECAUSE PLAINTIFFS FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES, AND BECAUSE PLAINTIFFS HAVE NO EVIDENCE OF RETALIATION

A. Plaintiffs' Labor Code Claims Fail Because Plaintiffs Never Complained About Alleged Unlawful Conduct

For a complaint to be protected, it must disclose violations of law, and not merely City policies. A complaint is protected if it discloses to a governmental agency "reasonably based suspicions of *illegal activity*." *Green v. Ralee Engineering Co.*, 19 Cal. 4th 66, 86–87 (1998) (emphasis added). To have a reasonably based suspicion of illegal activity, an employee must point to some statute, rule or regulation arguably violated by the conduct disclosed. *Love v. Motion Indus., Inc.*, 309 F. Supp. 2d 1128, 1135 (N.D. Cal. 2004).

Plaintiffs allege that Defendants violated California Labor Code sections 98.6, 1102.5, and 6310. Plaintiffs bear the burden of showing that their workplace complaints alleged violations of the Labor Code (Labor Code § 98.6), were based on the reasonable belief "that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation" (§ 1102.5), or were made "to the division, other governmental agencies having statutory responsibility for or assisting the division *with reference to employee safety or health*, his or her employer, or his or her representative" (§ 6310).[17] Plaintiffs' complaints made no such allegations.

Doe complained that midnight supervisors violated City policies, but never complained about any alleged violation of the law. (Doe 135:4-139:11, 140:7-25, 141:16-144:10, 147:7-15,148:3-149:10,160:9-14, 172:10-174:7, 236:14-24) For her part, Raskin made no complaints at all. (Raskin 50:6-51:17, 66:15-71:9, , 65:25-66:14, 74:11-75:11, 77:9-24, 84:6-22, 93:12-97:1) As such, Plaintiffs did not engage in protected activity, and their whistleblowing claim fails.[18]

[17] Complaints protected by § 6310 must relate to workplace safety, not merely waste of public funds or possible future harm to the public. *See, e.g., Creighton v. City of Livingston*, 628 F. Supp. 2d 1199, 1222-1223 (E.D. Cal. 2009) (plaintiff alleging mismanagement of water funds and danger of drinking water becoming contaminated was not protected under § 6310); *Schulthies v. Nat'l Passenger R.R. Corp.*, 650 F. Supp. 2d 994, 1002 (N.D. Cal. 2009) (plaintiff alleging disruption of railroad service and monetary waste does not relate to workplace safety).

[18] Plaintiff's FEHA retaliation claim makes no sense, since the alleged retaliatory conduct preceded Plaintiffs' discrimination allegations.

B. Plaintiffs' Whistleblower Claim Fails Because Plaintiffs Have Not Exhausted Administrative Remedies

Prior to bringing an action under § 1102.5, a plaintiff must exhaust her administrative remedies by filing a complaint with the Labor Commissioner. *Campbell v. Regents of the Univ. of Cal*. (2005) 35 Cal.4th 311, 317 ("well established rule of exhaustion of administrative remedies in California jurisprudence" supports imposing agency exhaustion requirement); *Ortiz v. Lopez*, 688 F. Supp. 2d 1072, 1080 (E.D. Cal. 2010); *Creighton v. City of Livingston*, 628 F. Supp. 2d 1199, 1222 (E.D. Cal. 2009); *Neveu v. City of Fresno*, 392 F. Supp. 2d 1159, 1180 (E.D. Cal. 2005); *Carter v. Dept. of Corrections* (N.D. Cal. 2010) 2010 WL 2681905 (unpublished); *Hall v. Apartment Inv. & Mgmt. Co*. (N.D. Cal. 2008) 2008 WL 5396361 (unpublished). A plaintiff does not satisfy this burden by filing a charge of discrimination with the DFEH (*Creighton, supra*, 628 F. Supp. 2d at 1222; *Hall, supra*, 2008 WL 5396361, at *3-4) or by filing a government claim. (*Carter, supra*, 2010 WL 2681905, at *9.)[19]

IV. PLAINTIFFS' FIFTH AND SIXTH CLAIMS FOR RELIEF FOR GENDER DISCRIMINATION AND HARASSMENT FAIL[20]

A. Plaintiffs Cannot Show That Any Of The Alleged Conduct Was Based On Gender

To prevail on their FEHA claims, Plaintiffs must prove 1) that their managers acted with an intent to unlawfully discriminate against or harass them *based on* their gender (*Oncale v. Sundowner*

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[19] Section 6310(a)(1) similarly requires an employee bringing a claim to have first filed a complaint with the DIR Division of Labor Law Enforcement. *See Div. of Labor Law Enforcement v. Sampson*, 64 Cal. App. 3d 893, 896-898 (1976). *Plaintiffs' Complaint for Damages*, ¶106, 111.

[20] Before suing under the FEHA, a plaintiff must exhaust his administrative remedies by filing a complaint with the DFEH within one year of the allegedly wrongful conduct. (Govt. Code § 12960; *Richards v. CH2M Hill, Inc*. (2001) 26 Cal.4th 798, 811-12.) Conduct that occurred more than one year earlier falls outside the limitations period. *Id.* Because Plaintiffs filed their first DFEH charges on October 13, 2010, they cannot base their claims on conduct occurring prior to October 13, 2009.

For the continuing violation doctrine to apply, Plaintiffs must prove that the unlawful acts within the limitations period (1) are "sufficiently similar in kind" to that occurring before the limitations period; (2) "have occurred with reasonable frequency;" and (3) "have not acquired a degree of permanence." *Cucuzza v. City of Santa Clara* (2002) 104 Cal. App. 4th 1031, 1041. Courts apply the continuing violation doctrine only when there is no significant break in the alleged harasser's conduct, and Doe's four year absence from the midnight shift precludes her from making that showing. *See, e.g., Birchstein v. New United Motors Manufacturing Inc*., 92 Cal. App. 4th 994 (2002). Likewise, courts will not find a continuing violation where a plaintiff cannot recall specific instances of unlawful conduct within the statute of limitations that are similar in kind to those the plaintiff alleges outside the statute of limitations. See *Trovato v. Beckman Coulter, Inc*. (2011) 192 Cal. App. 4th 319, 325. Doe did not work on the midnight shift and does not claim any hazing between February 2006 and October 2008.

Moreover, Plaintiffs concede that any alleged mistreatment from October 2009 forward was due to new and different factors: DEM supervisors learning the substance of their e-mails and / or being upset at Doe's successful demand for superseniority to circumvent the bid list.

Offshore Services, Inc. (1998) 523 U.S. 75, 81; *Mustafa v. Clark County School Dist*. (9th Cir. 1998) 157 F.3d 1169, 1180)[21]; and 2) that they suffered an adverse employment action or, if alleging a hostile work environment, that the alleged conduct was sufficiently severe or pervasive to alter the terms and conditions of their employment and create an abusive environment. *Aguilar v. Avis Rent A Car System, Inc.*, 21 Cal. 4th 121; *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal.App.3rd 590.[22]

With regard to being "based on" gender, the court must carefully examine the role played by each factor to discern whether the harassment was based on legally impermissible motives. *Morgan, supra,* 88 Cal.App.4th 52, 69; *McRae v. Department of Corrections* (2006) 142 Cal.App.4th 377. "Workplace harassment, even harassment between men and women, is [not] automatically discrimination because of sex merely because the words used have sexual content or connotations." *Oncale, supra,* 523 U.S. 75, 80–81. "The critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id*. Plaintiffs must show "that if the plaintiff had been a man she would not have been treated in the same manner." *Accardi v. Superior Court* (1993) 17 Cal. App. 4th 341, 348. "It is the disparate treatment of an employee on the basis of sex . . . that is the essence of a sexual harassment claim." *Lyle, supra,* 38 Cal. 4th 264, 280.[23]

Here, Plaintiffs have *no* evidence that any of the conduct alleged has anything to do with gender. The facts that defendants are women - and that DEM promoted Doe shortly before the hazing allegedly began − weigh heavily against any inference of discriminatory animus. *West v. Bechtel Corp*. (2002) 96 Cal.App.4th 966, 980; *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 809; *Bradley v. Harcourt, Brace & Co.* (9th Cir. 1996) 104 F.3d 267, 270-271.[24]

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[21] Because of the similarities in the statutes, California state courts look to federal decisions interpreting Title VII when analyzing FEHA sexual harassment claims. *See Lyle*, 38 Cal. 4th at 278.

[22] Plaintiffs must show a "concerted pattern of harassment of a repeated, routine or generalized nature." *Aguilar, supra, 21* Cal. 4th 121, 131; *Manatt v. Bank of America* (9th Cir. 2003) 339 F.3d 792, 798.

[23] Even statements suggesting sexual behavior pertaining to only one sex may not meet this standard. *Kelley v. Conco Companies* (2011) 196 Cal. App. 4th 191, 206 (comments suggesting oral and anal sex not "because of sex" where "sexually taunting comments by supervisors and employees were commonplace, including gay innuendo, profanity, and rude, crude and insulting behavior. Such comments were made both jokingly and in anger"); *accord, Kortan v. California Youth Authority* (9th Cir. 2000) 217 F.3d 1104, 1110 (occasional use of terms like "castrating bitch" insufficient).

[24] DEM's decision not to discipline Doe despite her disclosure shows the lack of any animus toward them. *Yanowitz v. L'Oreal*, 36 Cal.4th 1060-1061 (presence or absence of adverse personnel

B. The Alleged Incidents of Gender Harassment Were Neither Severe Nor Pervasive

An adverse employment action is one that "materially affects the terms and conditions of employment." *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1050-1051 (2005). Where a supervisor merely reprimands an employee, no adverse employment action has occurred. *See Pinero v. Specialty Restaurants Corp.*, 130 Cal. App. 4th 635, 647 (2005) (evidence "shows only that [plaintiff's] supervisors complained to him about work-related matters, some of which he admits were warranted, and others he disputes"). In *McRae, supra,* 142 Cal.App.4th 386, the court determined that even written records of reprimand would not be considered adverse employment actions absent evidence that the reprimands would affect future employment decisions. Furthermore, an investigation of the employee's on-the-job conduct, regardless of why the investigation was initiated, does not constitute an adverse employment action, absent a resulting material change in the terms or conditions of employment. *Id*. at 392.[25]

The laws prohibiting gender harassment are not meant to be a "general civility code." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998). "Sporadic use of abusive language, gender related jokes and occasional teasing" is not actionable. *Faragher*, 524 U.S. at 788. Isolated or trivial comments are not enough. *See Etter v. Veriflo Corp*., 67 Cal. App. 4th 457, 465 (1998). "[A]n employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature." *Lyle* v. *Warner Bros. TV Prod*., 38 Cal. 4th 264, 283. Moreover, "when a plaintiff cannot point to a loss of tangible job benefits, she must make a commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment." *Id*. at 284.

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decisions bears directly on determination of hostile work environment); *Chiaramonte v. Fashion Bed Group* (7th Cir. 1997) 129 F.3d 391, 399 (decision to retain employee creates "presumption of nondiscrimination); *Goosby v. Johnson & Johnson* (3d Cir. 2000) 228 F.3d 313, 323.

[25] To challenge the investigation as an adverse employment action, Plaintiffs would need to show that it was neither reasonable nor conducted in good faith. Where an employer's investigation is called into question, the burden is on the plaintiff to impugn the integrity of the investigation, and not on the defendant to prove the truth of the underlying misconduct. *Cotran v. Rollins Hudig Hall Int'l*, (1994) 17 Cal. 4th 93, 95-96, 109 (issue is whether at the time the disciplinary action was made, "defendants, acting in good faith and following an investigation that was appropriate under the circumstances, had reasonable grounds for believing plaintiff had done so"); *Silva v. Lucky Stores* (1998) 65 Cal. App. 4th 256, 262 (affirming summary judgment); *King v. United Parcel Service, Inc.* (2007) 152 Cal. App. 4th 426, 438; *City of Oakland v. Workers' Comp. Appeals Bd.* (2002) 99 Cal. App. 4th 261, 265-67.

The instant case is similar to *Jones v. Dep't of Corr. & Rehab*. (2007) 152 Cal. App. 4th 1367, 1378. In *Jones*, the court found the following allegations of workplace harassment were not sufficiently severe or pervasive to establish her claim: plaintiff's male co-workers criticized her without reason; treated her in a hostile manner on a daily basis; refused to respond to her calls for assistance; falsely accused her of misconduct; intentionally misled her into believing she was responsible for working expanded areas; treated her inmate crews more harshly than their own crews; and ordered her to do paperwork in another room because she couldn't get along with them. *Id*. at 1375. The court noted that these events, while allegedly based on gender, were "objectively non-discriminatory." *Id*. at 1379. The court found that, although the constant criticisms and hazing greatly troubled Jones, "they amounted to no more than comments that she was 'not doing her job.'" *Id*.

Even if Plaintiffs could show gender bias, which they cannot, they cannot show an adverse action. **A**llegedly unfair reprimands do not materially change the terms and conditions of Plaintiffs' employment. *See Pinero*, 130 Cal. App. 4th at 647. Nor does a disciplinary investigation that was dropped with no discipline imposed. *See McRae*, 142 Cal. App. 4th at 392; *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir. 1996) ("The question [in discrimination lawsuits] is not whether the employer made the best, or even a sound, business decision; it is whether the real reason is [gender].").[26]

[26] Doe allegedly complained about all sorts of things throughout her employment. However none of the complaints alleged inappropriate conduct *based on gender*. Those complaints do not constitute protected activity, barring Plaintiffs' retaliation claims. *Trent v. Valley Elec. Ass'n*, 41 F.3d 524, 527 (9th Cir. 1994); *Sada v. Robert F. Kennedy Medical Ctr.,* 56 Cal.App.4th 138, 160.

The fact that a significant amount of time passed between the complaints and alleged retaliatory conduct precludes an inference of causal nexus. *Loggins v. Kaiser Permanente, supra*, 151 Cal.App.4th 1102, 1110; *Morgan v. Regents of the University of California*, 88 Cal.App.4th 52, 69- 70 (2000)(alleged retaliation must occur within a short time); *Cornwell v. Electra Central Credit Union,* 439 F.3d 1018, 1036 (9th Cir. 2006) (seven month gap too great to infer nexus); *Richmond v. ONEOK, Inc.,* 120 F.3d 205, 209 (10th Cir. 1997)(3-month period); *Mesnick v. General Electric*, 950 F.2d 816, 828 (1st Cir. 1991)(gap of nine months "suggests the absence of a causal connection").

Similarly, the fact that Plaintiffs allege hostility prior to their complaints precludes an inference of unlawful retaliation. *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1053 (rejecting claim where alleged retaliatory acts occurred prior to complaint); Guthrey *v. State of California* (1998) 63 Cal.App.4th 1118, 1125; *Clark County School District v. Breeden* (2002) 121 S.Ct. 1508, 1510-11 (fact that employer contemplated changes prior to complaint bars inference of retaliation); *Slattery v. Swiss Reinsurance* (2d Cir. 2001) 248 F.3d 87, 95 (where "gradual job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise").

V. PLAINTIFFS' CLAIM FOR FAILURE TO PREVENT DISCRIMINATION AND HARASSMENT FAILS

Plaintiffs' failure to raise triable issues as to discrimination, harassment or retaliation bars their failure to prevent claim. *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 288-289.

VI. PLAINTIFFS' CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS FAILS

As a general rule, a plaintiff may not replicate allegations of FEHA violations in a separate tort cause of action. *Diem v. City and County of San Francisco* (N.D. Cal. 1988) 686 F.Supp. 806, 811 (dismissing claims for intentional and negligent infliction of emotional distress on grounds that FEHA "provides the sole remedy for employment discrimination under California law"); *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 62 (affirming dismissal of tort claims that "simply duplicated the FEHA claim," holding that "if personnel management decisions are improperly motivated, the remedy is a suit against the employer for discrimination").

Moreover, an essential element of the claim for intentional infliction of emotional distress (IIED) is "outrageous conduct beyond the bounds of human decency." *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 80. "Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3rd 590, 617. "Managing personnel is not outrageous conduct beyond the bounds of human decency, but rather conduct essential to the welfare and prosperity of society." *Id.* Here, subjecting emergency personnel to rigorous training, even if harsh, is not "outrageous conduct beyond the bounds of human decency, but rather conduct essential to the welfare and prosperity of society."[27]

Accordingly, the Court should dismiss Plaintiffs' IIED claim.

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[27] Even if Plaintiffs could meet that standard, worker's compensation is their only remedy, as to the City, for the alleged workplace conduct. Labor Code sections 3600-3602, 5300; *Vuillemainroy v. American Rock & Asphalt, Inc*. (1999) 70 Cal.App.4th 1280, 1283. This is true even where the injury arises from intentional employer misconduct and the employee's only injury is emotional distress. *Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 756. Conduct that is a normal part of the employment relationship termination, demotion, criticism of work, investigation of employee theft is within the normal risk of employment and therefore is subject to the exclusivity provisions of the Worker's Compensation Act. *Charles J. Vacanti MD, Inc. v. State Compensation Ins. Fund* (2001) 24 Cal.4th 800; *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3rd 148. Plaintiffs' allegations fall squarely within workers' compensation exclusivity parameters.

The City is also immune from liability under Govt. Code Sections 821.6, 820.2 and 815.2. The decision whether to initiate an investigation or disciplinary proceedings is, as a matter of law, a discretionary act under § 820.2. *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d , 1426.

CONCLUSION

For each of the reasons set forth above, the Court should enter judgment for Defendants.

October 14, 2011

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