

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

MARIE C. HARTWIG,

Plaintiff,

No. C 03-05263 NJV

v.

DEL NORTE COUNTY UNIFIED  
SCHOOL DISTRICT, et al.

Defendant.

**ORDER GRANTING  
DEFENDANTS MOTION FOR  
SUMMARY JUDGMENT**

Before the court is Defendant Del Norte County Unified School District's motion for summary judgment. After careful consideration of the parties papers, relevant statutory authority and case law, and Good Cause Appearing, Defendant's motion is GRANTED for the reasons set forth below.

I. BACKGROUND

Plaintiff Marie Hartwig was hired by the Del Norte Unified School District on or about February 6, 1996, as a clerical assistant. (Declaration of Richard Holley, hereafter Dec. Of RH, ¶ 2.) On May 19, 1997, she began working as a Secretary I in the Transition Partnership Program (TPP) at Del Norte High School. (Id.) The Transition Partnership Program provides disabled students with work experience and is funded with grants from the Department of Rehabilitation and Department of Education. (Id.)

Plaintiff's immediate supervisor in TPP was Charles Mathews. (Declaration of Charles Mathews, hereafter Dec. Of CM, ¶ 1.) Her ultimate supervisor was Jan Moorehouse, the principal of Del Norte High School. (Declaration of Jan Moorehouse, hereafter Dec. Of JM ¶ 2; Dec of CM ¶ 1.) In May, 2002, plaintiff was working four hours a day in TPP and the remaining two hours a day

1 providing front office relief at the high school and in the career center. (Dec. Of CM, ¶ 2; Dec. Of JM,  
2 ¶ 11.)

3 In May, 2002, plaintiff was moody and displayed erratic behavior with her co-employees,  
4 Janet Bigham, Jeanie Harris, and Silvia Gamez. (Declaration of Janet Bigham, hereafter Dec. Of JB ¶  
5 2; Declaration of Jeanie Harris, hereafter Dec. of JH ¶ 4; Declaration of Silvia Gamez, hereafter Dec.  
6 of SG ¶ 3.) Ms. Hartwig’s immediate supervisor, Mr. Mathews, also found it more challenging and  
7 difficult to work with her in May, 2002. He experienced shifts in her mood from being very “up” to  
8 being very “down.” (Dec. Of CM ¶ ¶ 2,3.) In her deposition, plaintiff admitted that these mood  
9 swings were a pre-menopausal symptom that she had experienced for three years. (Deposition of  
10 Marie Hartwig, hereafter DP of MH, p. 26, ln. 25 to p. 27, ln. 7.)<sup>2</sup>

11 On May 3, 2002, it appears that plaintiff became very angry and frustrated in the presence of  
12 Janet Bigham and Jeanie Harris. (Dec. Of JB, ¶ 16; Dec. Of JH, ¶ 4; Dec. Of JM, ¶ 4, Ex. C.) As  
13 plaintiff left the room, she is alleged to have said to her co-employees, “Ladies, what goes around  
14 comes around.” (Dec. Of JB, ¶ 16; Dec. Of JH, ¶ 4; Dec. Of JM, ¶ 4, Ex.C; DP of MH, p. 424, ln.  
15 24 to p. 425 ln. 5.) On May 6, 2002, Ms. Moorehouse spoke with plaintiff about this unprofessional  
16 behavior. (Dec. Of JM, ¶ 5, Ex. C.) On May 15, 2002, plaintiff packed all of her personal  
17 possessions and left a note on the blackboard that said “Don’t take it personally, I love you guys lots  
18 and lots!” (Dec. Of JB, ¶ 16, Ex. B; Dec. Of JH ¶ 4; Dec. Of JM, ¶ 6, Ex.A.) Janet Bigham and  
19 Jeanie Harris perceived these statements as possible threats from plaintiff. (Dec. Of JB, ¶ 16 [“It was  
20 weird and scary, since I didn’t know why she wrote it or what she was planning.”]; Dec. Of JH, ¶ 4  
21 [“I could not figure out what this  
22 meant and did not know whether it was some type of threat from Marie Hartwig.”]; and Dec. Of  
23 JM, ¶ 6, Ex. C).<sup>3</sup>

---

24  
25 <sup>2</sup>From Summer 2002 to her deposition in February, 2004, plaintiff was treated for pre-menopausal  
26 symptoms with marijuana (DP of MH, p.9, ln. 16 to p.12, ln. 10; p. 29 ln.24 to p.30, ln.2.) Prior to using marijuana  
in the summer of 2002, she denies taking any other medication for these mood swings. (Id., at p. 30, lns. 3 to 24.)

27 <sup>3</sup>Plaintiff acknowledges that she was written up for “going off on my coworkers” on May 3, 2002, which  
28 included telling them, “Ladies, what goes around comes around.” She also acknowledges they were threatened  
by this comment. (*See*, DP of MH p. 66, ln. 23 to p. 67, ln. 4 [“They thought it was a threat when I said, “Ladies,  
what goes around comes around.”].)

1 Plaintiff reported in sick and did not work from Thursday, May 16, 2002 through Monday,  
2 May 20, 2002. (Dec. Of JM, ¶ 7, Ex.B.) After Ms. Moorehouse learned about plaintiff's  
3 unprofessional conduct in early May, 2002, followed by plaintiff removing her personal items from the  
4 TPP room and writing the May 15, 2002 blackboard note, Ms. Moorehouse further interviewed  
5 Jeanie Harris, Janet Bigham, and Silvia Gamez, who reported in more detail various problems they  
6 had been having with the plaintiff for some months. (Dec. Of JM, ¶ 4 to 8.) Because of the continuing  
7 problems, Ms. Moorehouse prepared a Written Warning about plaintiff's unprofessional conduct  
8 with co-employees on May 3, 2002. (Dec. Of JM, ¶ 9.) This warning, dated May 15, 2002, was  
9 presented to plaintiff May 20, 2002. Plaintiff refused to sign it. (Id., at ¶ 9, Ex. C.)

10 Plaintiff called Ms. Moorehouse on the evening of Thursday, May 16, 2002 and reported that  
11 she wanted to return to work somewhere other than at TPP. (Dec. Of JM ¶ 10.) Because of budget  
12 limitations, Ms. Moorehouse believed she did not have funding for such reassignment. (Id.)

13 Plaintiff returned to work Tuesday, May 21, 2002. (Dec. Of JM, ¶ 11, Ex. B.) Mr.  
14 Mathews asked plaintiff to work on a new binder system and not to meet with students on their  
15 senior portfolios until after June 1, 2002. (Dec. Of CM, ¶ 4, Ex. A; Dec. Of JM, ¶ 11, Ex. E.)  
16 Plaintiff refused to follow Mr. Mathews directions and met with a student to work on a senior  
17 portfolio. (Dec. Of CM, ¶ 4, Ex. A; Dec. Of JM, ¶ 11, Ex. E.) The new binder system used three-  
18 ring binders and information had to be moved from manilla files and placed in the binders which  
19 plaintiff thought was a "stupid task." (DP of MH, p. 61, Ins. 1-11.) When she did work on the new  
20 filing system, she did not place labels on the binders as requested by Mr. Mathews. (DP of MH, p.  
21 61, Ins. 12-19 [Q: "Were you putting them [on] in a fashion that Charles asked you to do? A: No, I  
22 wasn't."]) Even though her co-employee, Silvia Gamez, had started the job with names printed  
23 vertically on the binder spine, plaintiff put the name tags horizontally, so that there was no continuity in  
24 labeling on the binders when stacked side by side on their shelves. (DP of MH, p. 65, Ins. 6-23)<sup>4</sup>

25  
26  
27 <sup>4</sup>Even though the binders had clear plastic pockets for the names, plaintiff used scotch tape to stick  
28 them to the binders. (See, Dec. Of JB, ¶ 17, Ex. A, p. 5 ["she went back to scotch taping names to binders."] and  
DP of MH, p. 66, Ins. 3-5 [Q: "were you taping them on the outside?" A: "I don't recall. Whatever was easiest  
was the way I did it."])

1 When asked by Jeanie Harris to do things Mr. Mathews' way, since he was her supervisor, plaintiff  
2 responded by telling Ms. Harris, "I am rebellious," and "I do things my way." (Dec. Of JH, ¶ 2.)<sup>5</sup>

3 Plaintiff met with a student to do a senior portfolio, and on May 22, 2002, she again argued  
4 with Mr. Mathews about doing the binders and told him that his priorities were wrong. (Dec. Of  
5 CM, ¶ ¶ 4-5, Ex. A; and Dec. Of JM ¶ 11, Ex.D. Ex.E.) Mr. Mathews told plaintiff that if she  
6 wouldn't do the work as requested, she didn't need to be in the TPP room that day, and plaintiff  
7 stated, "Fine, I'm out of here!" and left TPP (Dec. Of CM, p 5, Ex. A; Dec of JM ¶ 11, Ex. D, Ex.  
8 E; and DP of MH, p. 437, Ins. 12-15.)

9 Ms. Moorehouse met with plaintiff around noon on May 22, 2002, and they discussed her  
10 refusal to properly work on the new binder system and the specific directions not to work on student  
11 portfolios. (Dec. Of JM, ¶ 11.) Plaintiff told Ms. Moorehouse that she always worked on portfolios  
12 at that time of year, and Ms. Moorehouse explained to her that it was her responsibility to complete  
13 work assigned by Mr. Mathews, the Program Manager. (Dec. Of JM, EX.E.) Ms. Moorehouse  
14 suggested that because she had left work earlier in the morning, plaintiff finish the day off campus, and  
15 instructed her to be prepared to do assigned work when she returned to the school. (Dec. Of JM, ¶  
16 11, Ex .E.) As she was leaving, plaintiff stated that she would not return to the campus until Mr.  
17 Mathews was placed on administrative leave. (Id.; DP of MH, p. 438, Ins. 6-10.)<sup>6</sup>

18 Because plaintiff failed to follow Mr. Mathews' instructions, Ms. Moorehouse prepared  
19 another written warning on May 22, 2002, which plaintiff reviewed but again refused to sign on May  
20 29, 2002. (Dec. Of JM, ; 12, Ex. E; and DP of MH, p. 438, Ins. 11-14). From Thursday, May 23,  
21 2002 through Tuesday, May 28, 2002, plaintiff was absent from the school without leave, and Ms.  
22  
23

---

24 <sup>5</sup>Contrary to plaintiff's belief that the new binder system "was stupid,," TPP staff have found the new  
25 system to be far superior to the manilla folders. It is still used today. The three-ring binders are reusable, since  
26 student names can be easily changed on the outside of the binders, and sections inside each binder are color  
27 coded so that the information can be easily found. (See, Dec. Of JB, ¶ 17 ["It is a vast improvement over the old  
28 folder system."]; Dec. Of JH, ¶ 11, ["It is a godsend compared to the old system."])

<sup>6</sup>The binder task clearly fell within plaintiff's job duties at TPP. Further, plaintiff's work objective for  
the 2001-2002 school year was to "complete assigned work thoroughly and skillfully" . . ." in a timely and  
efficient manner" and to "complete all assigned tasks as directed by supervisor and make productive use of  
scheduled work time." (See, DP of MH, p. 300, Ins. 5-14, and Ex. U; p.301, ln. 6 to p.302, ln. 8, and Ex. V).

1 Moorehouse prepared another written warning to plaintiff because of the absence without leave. This  
2 warning plaintiff signed on June 4, 2002. (Dec. Of JM, ¶ 13, Ex. F).

3 Because of the ongoing problems with plaintiff through May, 2002, Ms. Moorehouse  
4 reconsidered plaintiff's request to be reassigned to a position outside TPP. (Dec. Of JM, ¶ 14.) She  
5 decided to move her from TPP to a position in the front office of Del Norte High School, and early  
6 on Thursday, May 30, 2002, she met with Ms. Hartwig and discussed this change in work location.  
7 (Id., at ¶ 14, 15.) After meeting with Ms. Moorehouse, plaintiff returned to TPP to retrieve her purse  
8 and remove her password from the computer at her TPP workstation. (Id., at ¶ 16; *and* DP of MH,  
9 p. 363, ln. 16 to p. 364, ln. 17.) When plaintiff returned to TPP on the morning of May 30, 2002,  
10 Janet Bigham saw plaintiff sit at her computer for fifteen to twenty minutes. (Dec. Of JB, ¶ 9; *and* DP  
11 of MH p. 362, lns. 17-18.) During this time, she observed plaintiff accessing many different areas of  
12 the computer, typing very quickly into little boxes, with the screen periodically going black and  
13 coming on again. (Dec. Of JB, ¶ 10.) Janet Bigham also observed plaintiff take a number of disks  
14 and place them into a straw bag that was on the floor between her legs (Id.) As plaintiff left the  
15 room, she stated, "I'm out of here till Mr. Mathews is gone." (Id., at ¶ 11.)<sup>7</sup>  
16 Approximately an hour and a half later, at about 10:30 a.m., Janet Bigham needed to access  
17 information from the computer at plaintiff's workstation. (Id. At ¶ 12.) She then discovered that all of  
18 the TPP documents were missing from the computer. (Id.) She went to look for Ms. Moorehouse  
19 and told her that information had been deleted from the computer and that computer disks had been  
20 taken by plaintiff. (Id.)

21 Ms. Moorehouse then met with plaintiff in the presence of two California State Employees  
22 Association, CSEA (union) representatives, April Brock and Beverly Brand. (Dec. Of JM, ¶ 18.)  
23 They returned to the TPP room and inspected the computer at plaintiff's workstation. (Id.)  
24 Numerous icons were missing from the desktop, and Janet Bigham showed that the program material  
25 was completely missing. (Dec. Of JB, ¶ 13; *and* Dec. Of JM, ¶ 18.) She also showed them where  
26 backup disks were kept and that they were now missing. (Id.)

---

27  
28 <sup>7</sup>Plaintiff testified at her deposition that she has a poor recollection of the events of May 30, 2002. (DP  
of MH p. 369, lns. 4-24 [... looking back, I realize I was very frazzled, and I don't know if I remember things – I  
don't know if I remember things correctly or not.])

1 Ms. Moorehouse asked plaintiff to let the Union representatives examine the contents of her  
2 purse in the staff room in order to see if she had the various backup disks in her purse. (Dec. Of JM,  
3 ¶ 19.) Plaintiff refused this inspection. (Id.) Plaintiff left for lunch without revealing the contents of  
4 her purse. (Id.) She also called the TPP room and told Jeanie Harris, “I just want you to know that I  
5 have all kinds of tapes of you guys and I’m going to break those puppies out, so you’re in deep  
6 trouble.” (Dec. Of JH, ¶ 9; *and* Dec. Of JB, ¶ 14.)

7 Because of the destruction of essential TPP computer data and removal of the backup disks, Ms.  
8 Moorehouse prepared another written warning recommending that plaintiff be terminated. (Dec. Of  
9 JM, ¶ 20, Ex. G.)

10 At her deposition, plaintiff admitted erasing files on May 30, 2002 – “I was trying to get the  
11 stuff I needed to work on that day onto the computer disk, and I blew it because the disk was blank.  
12 I erased files on my computer. I definitely – I was a basket case for sure, although I did manage to  
13 complete my morning at the main office all by myself.” (DP of MH, p. 362, lns. 5-10). However,  
14 when Ms. Moorehouse asked plaintiff what had happened to the computer data on May 30, 2002,  
15 while they were in the TPP room, plaintiff never acknowledged deleting the data and only said, “I  
16 don’t know what to tell you.” (Dec. Of JB, ¶ 13.)

17 Plaintiff also admitted at her deposition that she took at least one disk from her workstation  
18 on May 30, 2002. (DP of MH, p. 312, lns. 19-23.) She testified that she did not want to reveal the  
19 contents of her purse because she had a tape recorder and microphone in her purse. (DP of MH, p.  
20 58, lns. 1-20; p. 363, lns. 20-25; p. 372, lns. 9-12.) She did not want Ms. Moorehouse to discover  
21 this tape recorder because plaintiff knew she should not be making surreptitious recordings of her  
22 coworkers. (Id.).

23 After discovering that computer information was missing, Ms. Moorehouse called Jay Fair,  
24 the Del Norte High School Technology teacher and asked him to secure the computer at plaintiff’s  
25 workstation. (Declaration of Jay Fair, hereafter Dec. Of JF, ¶ 8.) He verified that all the TPP data  
26 was missing on May 30, 2002. (Id.) He also confirmed that numerous backup disks were missing  
27 from this workstation. (Id.) He then transferred the computer to Steve Capocci to see if the deleted  
28 material could be recovered. (Id.)

1 Steve Capocci, the computer Services Coordinator for the School District, tried to use a  
2 recovery tool to access the deleted information. (Declaration of Steven Capocci, hereafter Dec. Of  
3 SC, ¶ 1, ¶ 5.) A recently used file list identified fifteen or more documents that were no longer on the  
4 system – one of the deleted files was an Excel spreadsheet that he had specifically been asked to try  
5 to recover from the machine. (Id., at ¶ 5.) He determined that there had been a defragmentation of  
6 the hard drive, which he believes could have easily been done in less than ninety minutes. (Id., at ¶  
7 5,6)<sup>8</sup>

8 The School District suffered a significant property loss when the TPP data was deleted and  
9 the backup disks taken. (Dec. Of JM, ¶ 21.) Silvia Gamez re-inputted the TPP data and the  
10 numerous forms that were deleted from the computer at plaintiff’s workstation, using Excel and Word  
11 to recreate this information. (Declaration of Silvia Gamez, hereafter Dec. Of SG, ¶ 8.) The deleted  
12 database was made up of students’ names, their social security numbers, their monthly work hours,  
13 and other information about their work status, all of which had to be inputted into a new Excel  
14 database. (Id.) It took approximately two months, working many hours of overtime, to re-input the  
15 deleted information (Id.)

16 In mid-May, 2002, plaintiff presented Richard Holley, the School District Personnel Director,  
17 with a letter which she stated was “Intended to be an informal step in filing a grievance.” (Dec. RH, ¶  
18 13.) This letter was date-stamped in the personnel office on May 21, 2002. (Id.)<sup>9</sup> This grievance  
19

---

20 <sup>8</sup>In May, 2002, Jay Fair found a telephone modem attached to plaintiff’s computer, which bypassed the  
21 District Internet security system. (De. Of JF, ¶ 4.) He also identified programs that had been downloaded  
22 without proper licenses and peer to peer programs on plaintiff’s computer. (Id., at ¶ 5.) These violated the  
school internet policy (Id., Ex. A.) Plaintiff admits she had downloaded Napster, an illegal music sharing  
program, and a firewall that she was asked to remove from the computer (DP of MH, p. 162, Ins.1-24.)

23 <sup>9</sup>The date plaintiff presented the May 16, 2002 letter to Mr. Holley is unclear. Mr. Holley believes that  
24 plaintiff presented this informal grievance on May 21, 2002, the day it was date-stamped at the personnel office.  
25 This is based on the May 21, 2002 date-stamp and his May 23, 2002 letter to plaintiff, stating that he received the  
26 grievance a couple of days before his May 23, 2002 letter, with Monday, May 21, 2002 being plaintiff’s first day  
27 back to work after two days of sick leave. He also stated in this letter that he gave the grievance to Ms.  
28 Moorehouse on May 22, 2002. (Dec. Of RH, ¶ 13-14, Ex. K, H.) Plaintiff testified that she typed the grievance on  
the evening of May 16, 2002, and she does not recall the date she handed it to Mr. Holley. (DP of MH, p. 434,  
Ins. 20-20; p. 433, Ins. 17-21 [Q: “And you don’t recall the date you handed it to him, do you?” A: “I don’t recall  
the date. I recall it was March 16<sup>th</sup> – what date is this? May 16<sup>th</sup>. I’m sorry. I recall that this was – I typed this  
up on May 16<sup>th</sup>.”]) She also testified that she didn’t take it to the personnel office on either May 16 or May 17,  
2002. (DP of MH, p. 433, ln. 22 to p. 434, ln. 2 [“I didn’t take it to the personnel department on May 16<sup>th</sup> or May  
17<sup>th</sup>.”]) Later in the deposition plaintiff speculated that she gave it to him on May 17, 2002. (DP of MH p. 434,

1 did not raise any claim of sexual harassment or violation of any other activity protected by the Title  
2 VII; rather, the letter addressed areas where plaintiff felt her work hours had been improperly  
3 reduced, problems she perceived with her immediate supervisor, and employment complaints  
4 extending back to May, 2000. (Id., at ¶ 13, Ex. K.) Mr. Holley responded with a letter dated May  
5 23, 2002. (Id., at ¶ 14, Ex. H. ) Since he was unclear of the nature of her grievance, he sent her  
6 copies of the grievance procedures, and he recommended that she consult with a union representative  
7 to help her with her concerns. (Id.) Mr. Holley stated that he had given a copy of this letter to Ms.  
8 Moorehouse on May 22, 2002, something plaintiff had requested Mr. Holley to do when she was in  
9 the personnel office a couple days earlier. (Id.) Mr. Holley also pointed out that the Union  
10 Bargaining Agreement required that grievances had to be made within sixty days of the occurrence of  
11 the violation. (Id.)

12 May 30, 2002, Superintendent Lynch wrote plaintiff, requesting a meeting with her to discuss  
13 her grievances. (Dec. Of FL, ¶ 2, Ex. A.) June 3, 2002, plaintiff sent Mr. Lynch an e-mail stating,  
14 “This e-mail is to let you know that if Mr. Mathews is not placed on leave and I’m not asked to return  
15 to work in TPP by Wednesday, June 5, 2002, I will require that resolution cannot be reached. At  
16 such time, I will consider our Thursday morning meeting canceled; relinquish all assistance for the  
17 DNCSSD; and seek legal representation.” (DP of MH, p. 448, Ins. 15-21, Ex. III.)

18 Plaintiff was placed on paid administrative leave on May 30, 2002. (Dec. Of RH, ¶ 11, Ex.  
19 I.) She remained on paid leave through the remainder of the school year. (Id., at ¶ 12, Ex. J.)  
20 August 8, 2002, Francis Lynch, the School District Superintendent, sent plaintiff a Notice of Intention  
21 to Recommend Termination. (Declaration of Francis Lynch, hereafter Dec. Of FL, ¶ 4, Ex. B.)  
22 August 23, 20202, he wrote plaintiff and informed her that she remained on administrative leave.  
23 (Id., at ¶ 5, Ex. C.)

24 June 21, 2002, Superintendent Lynch wrote plaintiff and informed her of his findings based on  
25 her complaints. (DP of MH, p. 454, Ins. 15-20, Ex. NNN.) Plaintiff was informed that she could

---

26  
27 16-17 [“I delivered ti to Mr. Holley, *I will say*, May 17<sup>th</sup>.].) Plaintiff also testified that Mr. Holley gave it to Ms.  
28 Moorehouse on the same day that she delivered the grievance to Mr. Holley, which, according to Mr. Holley’s  
May 23, 2002 letter, was May 22, 2002. (DP of MH, p. 425, Ins. 19-22 [ Q: “You gave your written complaint to  
Mr. Holley, correct?” A: “Right, and he gave Mrs. Moorehouse it on the very same day. I do have  
documentation to support that.”].)

1 work with her union to further appeal the matter, if she so desired. (Id.) Plaintiff's next step in this  
2 complaint process would have been to request a hearing before the governing board under Level IV  
3 of the complaint procedure. (Dec. Of RH, Ex. H, p.6) Plaintiff did not pursue any further  
4 administrative remedies under this complaint procedure.

5 September 12, 2002, the School District Board of Trustees met and considered the  
6 recommendation for plaintiff's termination. (Id., at ¶ 6.) Following their evaluation, the Board of  
7 Trustees recommended termination, and plaintiff was sent Notice of Termination September 13,  
8 2002. (Id., at ¶ 6, Ex. D.)

9 Plaintiff then requested an Evidentiary Hearing before the Personnel Commission to appeal  
10 her termination (Id., at ¶ 7, Ex. E.) The appeal before the Personnel Commission was scheduled for  
11 October 30, 2002, and two days prior to the hearing plaintiff delivered a letter to the School District  
12 Personnel Office withdrawing her request to appeal her termination of employment with the School  
13 District. (Id., at pp 8-9, Exs. F, G; DP of MH p. 194, Ins. 7-21.) The findings of the School District  
14 Board of Trustees became final and conclusive upon plaintiff's withdrawal from the appeal process.  
15 (Dec. Of FL, Ex. D.)

16 The record shows that plaintiff's termination was directly related to the destruction and theft  
17 of school district property, and her failure to follow directions from her immediate Supervisor, Mr.  
18 Mathews, this constituted insubordination, inattention to and dereliction of her duties, and willful  
19 and/or persistent violation of school district rules and regulations. (Dec. Of RH, ¶ 15; Dec. Of FL, ¶  
20 10, 12; *and* Dec. Of JM, ¶ 21.) Her termination was directly related to the foregoing and was not in  
21 retaliation for filing the informal grievance. (Dec. Of RH, ¶ 15; *and* Dec. Of FL, ¶ 12.) On the  
22 morning of May 30, 2002, Ms. Moorehouse had moved plaintiff from TPP to a new position to  
23 accommodate plaintiff and defuse any personality conflicts, despite the budget impact to the School  
24 District. The recommendation for termination was made only after plaintiff returned to TPP and  
25 deleted computer files and removed the backup disks. (Dec. Of JM, ¶ 21.)

26 On or about December 15, 2003, plaintiff executed her Complaint of Discrimination to the  
27 California Department of Fair Employment & Housing and the EEOC, in which she alleged she was  
28 terminated in retaliation for opposing sexual harassment. (Dec. Of RH, ¶ 3, Ex. A.) Nowhere in the

1 grievance given to Mr. Holley does plaintiff claim Mr. Mathews retaliated against her for opposing  
2 sexual harassment. (Dec. Of RH, Ex. K.) The school district had no record of any complaint of  
3 sexual harassment claim by plaintiff until it received notice of this charge of discrimination in early  
4 2003. (Dec. Of RH, ¶ 3.)

## 5 DISCUSSION

### 6 A. Legal Standard for Summary Judgment

7 Summary judgment may be granted when, viewed in the light most favorable to the  
8 nonmoving party, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986);  
9 Intel Corp. v. Hartford Acc. & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991); T.W. Elec. Serv.  
10 Inc. v. Pacific Elec. Contractors Ass'n, 809 F. 2d 626, 631 (9<sup>th</sup> Cir. 1987); Diaz v. American Tel &  
11 Tel., 752 F. 2d 1356, 1359 n. 1 (9<sup>th</sup> Cir. 1985), “the pleadings, depositions, answers to  
12 interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine  
13 issue as to any material facts and that the moving party is entitled to judgment as a matter of law.”  
14 Fed. R. Civ. P. 56(c) Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Summary judgment is  
15 warranted “against a party who fails to make a showing sufficient to establish the existence of an  
16 element essential to that party’s case, and on which that party will bear the burden of proof at trial.”  
17 Celotex, 477 U.S. at 322. Substantive law determines which facts are material. Anderson v. Liberty  
18 Lobby, Inc., 477 U.S. 242, 248-249 (1986). There is no issue for trial unless there is sufficient  
19 evidence favoring the nonmoving party for a jury to return a verdict for that party. Id.

20 The moving party bears the initial burden of showing the absence of a genuine issue of  
21 material fact. Celotex, 477 U.S. at 322-23. The burden then shifts to the nonmoving party to set  
22 forth by affidavit or as otherwise provided by Rule 56, specific facts demonstrating a genuine factual  
23 issue for trial. Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324; Matsushita, 475 U.S. at 587. The  
24 nonmoving party may not rest upon mere allegations or denials of his pleadings. Fed.R.Civ.P.56(e)  
25 Anderson, 477 U.S. at 256; Matsushita, 475 U.S. at 587. Rather, the nonmoving party must  
26 produce specific facts by affidavit or other evidentiary materials contemplated by Rule 56(e), showing  
27 that there is a genuine issue for trial. Fed. R.Civ.P.56(e); Anderson, 477 U.S. at 256; Matsushita,  
28 475 U.S. at 587. If the evidence is merely colorable or is not significantly probative as to any

1 material fact claimed to be disputed, summary judgment should be granted. Eisenberg v. Insurance  
2 Co. of North Am., 815 F.2d 1285, 1288 (9<sup>th</sup> Cir. 1987); Steckl v. Motorola, Inc., 703 F.2d 392,  
3 393 (9<sup>th</sup> Cir. 1983) (quoting Ruffin. v. County of Los Angeles, 607 F.2d 1276, 1280 (9<sup>th</sup> Cir. 1979),  
4 *cert. Denied*, 445 U.S. 951 (1980)). A mere “scintilla” of evidence supporting the nonmoving  
5 party’s position will not suffice. Anderson, 477 U.S. at 252. There must be enough of a showing  
6 that the jury could reasonably find for the nonmoving party. Id. At 256.

## 8 B. Title VII

### 10 Legal Standard

11 Plaintiff alleges that she was terminated in retaliation for her complaints of sexual harassment.  
12 As in this case, where a plaintiff cannot produce direct evidence of an employer’s discriminatory  
13 intent, the plaintiff may prove her case by circumstantial evidence under the burden-shifting scheme of  
14 proof established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under this  
15 framework, to make out a *prima facie* case of retaliation under Title VII, a plaintiff must demonstrate  
16 that “(1) she engaged in a protected activity, (2) she suffered an adverse employment action, and (3)  
17 there was a causal link between her activity and the employment decision.” Raad v. Fairbanks North  
18 Star Borough Sch. Dist., 323 F.3d 1185, 1196-97 (9<sup>th</sup> Cir. 2003).

21 Once a plaintiff makes out a *prima facie* case of retaliation “the burden shifts to the  
22 [defendant/employer] to articulate a legitimate, non-discriminatory reason for the adverse employment  
23 action.” Manatt v. Bank of Am, N.A., 339 F.3d 792, 800 (9<sup>th</sup> Cir. 2003).

24 If the defendant articulates such a reason, the plaintiff “bears the ultimate burden of  
25 demonstrating that the reason was merely a pretext for a discriminatory motive.” Id. (internal  
26  
27  
28

1 quotation marks and citations omitted); *see also* Ruggles v. Cal. Polytechnic State U., 797 F.2d 782,  
2 786 (9th Cir. 1986).

3  
4 As discussed below, plaintiff does not establish a *prima facie* case of retaliatory termination,  
5 and there were a number of legitimate reasons to support her termination from her position at Del  
6 Norte Unified School District.

7  
8 1. Plaintiff Cannot Meet Her Burden of Demonstrating the *Prima Facie*  
9 Elements of a Retaliation Claim Because the Submission of the  
10 Grievance To the School District Was Not a Protected Activity  
11 Under Title VII.

12 Plaintiff's written grievance to the School District, dated May 16, 2002, was not based on  
13 sexual harassment, gender discrimination or any other conduct proscribed by Title VII. As a result,  
14 plaintiff's submission of the written complaint to the School District did not constitute "protected  
15 activity" under Title VII, and plaintiff cannot establish this *prima facie* element of her retaliation claim.  
16

17 Under Title VII, an employer is prohibited from taking an adverse employment action against  
18 an employee because the employee: (I) opposed any practice made unlawful by Title VII  
19 ("opposition clause"); or (ii) made a charge, testified, assisted, or participated in any manner in any  
20 investigation, proceeding or hearing under Title VII ("participation clause"). 42 U.S.C. § 2000e-  
21 3(a).  
22

23 In order for an employee to establish a claim for retaliation under the opposition clause of  
24 Title VII, the employee must prove that the conduct the employee opposed fell within the protection  
25 of Title VII Learned v. City of Bellevue, 860 F.2d 928, 932 (9<sup>th</sup> Cir. 1988). That is to say a that the  
26 employee must prove that she was retaliated against for opposing discrimination or harassment based  
27  
28

1 upon race, color, religion, sex, or national origin. Ibid.; *see also*, 42 USC § 2000e-2(a)-(d) [setting  
2 forth protected classifications under Title VII].

3  
4 To establish a claim for retaliation under the participation clause of Title VII, the employee  
5 must prove that she participated in a proceeding involving charges of discrimination or harassment  
6 which must be reasonably perceived as prohibited by Title VII (i.e., based on race, color, religion,  
7 sex, or national origin.) Ibid.

8  
9 An employee's generalized complaints about her job conditions and how these conditions  
10 affect her work and her dissatisfaction with her job do not constitute protected activities under Title  
11 VII because they do not relate to conduct made unlawful by Title VII Ibid.; *see also* Oncale v.  
12 Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998 ["Title VII does not prohibit all verbal or  
13 physical harassment in the workplace ..."] Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9<sup>th</sup> Cir.  
14 1987) [plaintiff's complaints about radio show format change were based on personal reasons, not  
15 discriminatory reasons]; Barber v. CSX Distribution Servs., 68 F.3d 694, 701-702 (3<sup>rd</sup> Cir. 1995)  
16 [complaints about unfair treatment in general, and not illegal discrimination, did not constitute requisite  
17 "protected conduct."]; *and* Ammons v. Zia Co., 448 F.2d 117, 120 (10<sup>th</sup> Cir. 1971) [termination  
18 was based on complaints stemming from complaints of underpayment, not complaints of  
19 underpayment by reason of sex.].

20  
21  
22  
23 Plaintiff's written grievance to the School District, dated May 16, 2002, set forth generalized  
24 complaints regarding her job, including problems with her supervisor, Charles Mathews, as well as  
25 her perception that the allocation of work, work hours, and job duties were unfair. Nowhere in the  
26 written grievance does plaintiff state or imply that she was subjected to or complained of sexual  
27  
28

1 harassment, gender discrimination, or any other activity prohibited by Title VII. Consequently plaintiff  
2 cannot establish the *prima facie* element that she engaged in a “protected activity,” as required in  
3 order to pursue a retaliatory termination claim under Title VII.  
4

5 Plaintiff’s sole and proper remedy regarding the problems identified in her written grievance  
6 was the grievance process available to classified employees of the School District under the collective  
7 bargaining agreement. Plaintiff did not follow through with this process. Superintendent Lynch made  
8 his findings on her grievance on June 21, 2002. These findings became final after she did not request  
9 a hearing before the Governing Board under Level IV of the Complaint Procedure arising from the  
10 collective bargaining agreement. (*See* Dec. Of RH. Ex. H, p.6, DP of MH, p. 454, Ins. 15-20, Ex.  
11 NNN). Plaintiff voluntarily opted out of this internal grievance process, thereby waiving her  
12 remedies.  
13  
14

15 The forum for adjudicating any dispute over her termination was an appeal before the  
16 Personnel Board (also provided for by the internal grievance policy). Plaintiff started this process and  
17 the hearing was set for October 30, 2002. Plaintiff voluntarily opted out of this process by  
18 withdrawing from her appeal on October 28, 2002, thereby waiving her remedies.  
19  
20

21 While Title VII provides a remedy for certain retaliatory termination claims, plaintiff’s  
22 grievance, dated May 16, 2002, did not assert that she engaged in any protected activity under Title  
23 VII. Furthermore, in her complaint to the EEOC, plaintiff claimed only that she was terminated “in  
24 retaliation for opposing sexual harassment.” Since plaintiff did not allege any other basis for a Title  
25 VII retaliation claim, other than one based on opposition to sexual harassment, she has failed to  
26 exhaust her administrative remedies before the EEOC, with regard to any claims arising from alleged  
27  
28

1 protected activity not involving opposition to sexual harassment. Vasquez v. County of Los Angeles,  
2 349 F.3d 634, 644 (9<sup>th</sup> Cir. 2003) [to establish subject matter jurisdiction in federal court over Title  
3 VII retaliation claims, plaintiff must first exhaust administrative remedies by filing timely charges with  
4 the EEOC, and claims that are not alleged in EEOC are not administratively exhausted.]

5  
6 Simply put, there is nothing about opposing sexual harassment in the grievance plaintiff wrote  
7 on the evening of May 16, 2002. Based on the foregoing, summary judgment should be granted for  
8 defendant.

9  
10 2. The School District Had Numerous Legitimate Reasons for  
11 Terminating Plaintiff

12  
13 Assuming, *arguendo*, that plaintiff could establish a *prima facie* case for retaliatory  
14 termination, the School District clearly had numerous legitimate, nondiscriminatory reasons for  
15 terminating her employment.  
16

17  
18 Starting on May 3, 2002, plaintiff's behavior was unprofessional, and by the morning of May  
19 16, 2002, she had made at least two threatening statements to co-employees Jeanie Harris and Janet  
20 Bigham. Her behavior became more and more unpredictable and erratic as the month progressed.  
21 Plaintiff was insubordinate to her supervisor, and she left work without official leave. Finally, on May  
22 30, 2002, plaintiff deleted the whole TPP database and all the program forms, in addition to removing  
23 the valuable backup disks. Plaintiff admitted to deleting computer data, removing at least one disk,  
24 not following her supervisor Mr. Mathews' directions, and making threatening comments to  
25 coworkers. Furthermore, her termination by the School District was also justified by her surreptitious  
26 tape recording of coworkers, which plaintiff admitted in her deposition, and which violated California  
27  
28

1 Penal Code §632, punishable by a fine up to \$2,500 or imprisonment for up to one year in the county  
2 jail.

3  
4 After a plaintiff makes out a prima facie case of retaliation, “the burden shifts to the  
5 [employer] to articulate a legitimate, non-discrimination reason for the adverse employment action.  
6 Manatt v. Bank of Am. N.A. *supra*, 399 at 800. For the employer to satisfy its burden of articulating  
7 a legitimate, non-retaliatory explanation for the termination, the employer “need only produce  
8 admissible evidence which would allow the trier of fact rationally to conclude that the employment  
9 decision had not been motivated by discriminatory animus.” Texas Department of Community Affairs  
10 v. Burdine, 450 U.S. 248, 257 (1981).

11  
12  
13 Clearly, in this case the plaintiff’s insubordination and failure to work harmoniously with  
14 others were legitimate nondiscriminatory bases for terminating her employment. Ogunleye v. Arizona,  
15 66 F.Supp.2d 1104, 1108 (D.Az. 1999); *citing* Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1135  
16 (8<sup>th</sup> Cir. 1999); and Carter v. Miami, 870 F.2d 578, 583-584 (11<sup>th</sup> Cir. 1989); *see also* Putman v.  
17 Unity Health System, 348 F.3d 732, 736 (8<sup>th</sup> Cir. 2003) *and* Mesnick v. General Electric Co., 950  
18 F.2d 816, 827-829 (1<sup>st</sup> Cir. 1991) [Age Discrimination in Employment Act claim].

19  
20  
21 Theft, suspicion of theft and destruction of property are also clearly legitimate,  
22 nondiscriminatory reasons for terminating an employee. *See e.g.*, Britton v. City of Poplar Bluff, 244  
23 F.3d 994, 998 (8<sup>th</sup> Cir. 2001) [affirming grant of summary judgment where plaintiff failed to establish  
24 that defendant’s proffered reason that it suspected plaintiff of theft was pretextual]; *see also* Stalter v.  
25 Wal-Mart Stores, Inc., 195 F.3d 285, 289 (7<sup>th</sup> Cir. 1999) [recognizing employer’s belief of  
26 employee theft as legitimate, nondiscriminatory reason.]; *and* Ivy v. Meridian Coca-Cola Bottling  
27  
28

1 Co., 641 F. Supp; 157 (S.D.Miss. 1986) [reckless destruction of property legitimate basis for  
2 termination.].

3  
4 Threats to coworkers also constitute legitimate bases to terminate employment. *See e.g.*,  
5 Vargas v. Gromko, 977 F.Supp. 996 (N.D.Cal. 1997).

6  
7 Unexcused absences constitute a legitimate, nondiscriminatory basis for termination. *See*,  
8 Contreras v. Suncast Corp., 237 F.3d 756, 765, (7<sup>th</sup> Cir. 2001); *and*, Muldrew v. Anheuser-Busch,  
9 Inc., 728 F.2d 989 (8<sup>th</sup> Cir. 1984).

10  
11 Moreover, tape recording confidential conversations with coworkers for purpose of  
12 disclosing the substance of those conversations to third persons is a legitimate, nondiscriminatory  
13 basis for termination. Shoaf v. Kimberly-Clark Corp., 294 F.Supp.2d 746, 756-757 (M.D.N.C.  
14 2003). This activity constitutes criminal activity under California Penal Code § 632.

15  
16 Plaintiff's multiple violations of School District policies and procedures, both before and after  
17 submission of the grievance, constituted legitimate, nondiscriminatory reasons for her termination.

18  
19 3. Plaintiff Cannot Establish That The Legitimate, Nondiscriminatory Reasons For Her  
20 Termination Were Pretextual.

21  
22 Even assuming, *arguendo*, that plaintiff could establish a *prima facie* case of retaliatory  
23 termination, there is no evidence (let alone specific and substantial evidence) that the multiple  
24 legitimate, nondiscriminatory bases for plaintiff's termination articulated by the School District were  
25 merely a pretext for discrimination proscribed under Title VII.  
26  
27  
28

1 If an employer articulates legitimate, nondiscriminatory reasons for termination, the plaintiff  
2 must establish that the alleged nondiscriminatory reason is a “pretext” for unlawful discrimination.  
3  
4 Washington v. Garret, 10 F.3d 1421, 1432 (9<sup>th</sup> Cir. 1993).

5 To survive a motion for summary judgment, the circumstantial evidence relied upon by the  
6 plaintiff to show pretext must be specific and substantial evidence of the employer’s discrimination.  
7  
8 Bradley v. Harcourt, Brace and Co., 104 F.3d 267, 270 (9<sup>th</sup> Cir. 1996) [“To avoid summary  
9 judgment, [plaintiff] must do more than establish a *prima facie* case and deny the credibility of the  
10 [defendant’s] witnesses. She must produce specific, substantial evidence of pretext.”]

11  
12 An employer is not and should not be handcuffed from disciplining employees for unprotected  
13 conduct detrimental to its office function merely because the employee has engaged in some conduct  
14 that was protected under Title VII. See, Garner v. Motorola, Inc., 95 F.Supp.2d 1069, 1080  
15 (D.Az.2000); quoting Mesnick v. General Electric Co., *supra*, 950 F.2d at 828 [“Were the rule  
16 otherwise, then a disgruntled employee, no matter how poor his performance or how contemptuous  
17 his attitude toward his supervisors, could effectively inhibit a well-deserved discharge by merely filing  
18 or threatening to file, a discrimination complaint.”] and Jackson v. St. Joseph State Hosp., 840 F.2d  
19 1387, 1391 (9<sup>th</sup> cir. 1988) [retaliation protection “does not clothe the complainant with immunity for  
20 past and present inadequacies, unsatisfactory performance, and uncivil conduct. . .”].

21  
22  
23 Plaintiff has produced no evidence during discovery to indicate that the legitimate,  
24 nondiscriminatory reasons for terminating her articulated herein were merely pretextual.

25  
26 Title VII does not provide a remedy to every employee who feels that he or she has been wronged  
27 by her employer. Title VII provides relief only for employees who have suffered adverse  
28

1 employment actions on account of discrimination or harassment based on race, color, religion, sex, or  
2 national origin.

3  
4 Here, plaintiff was unhappy with several aspects of her job with the School District. Her  
5 complaints are enumerated in her written grievance that she submitted to the School District, dated  
6 May 16, 2002. It is clear from the grievance that plaintiff did not complain of sexual harassment,  
7 gender discrimination or any other conduct prohibited by Title VII. Consequently, Title VII does not  
8 afford plaintiff a remedy for retaliatory termination.  
9

10 However, plaintiff's termination was not based on the filing of her written grievance. Rather,  
11 as the record amply discloses, it was based on multiple violations of the School District policies and  
12 procedures, all of which are legitimate, nondiscriminatory reasons for termination.  
13

14 Plaintiff was emotional, agitated, and confrontational with coworkers, threatening them on at  
15 least two occasions. She surreptitiously tape recorded conversations of coworkers. Plaintiff failed to  
16 perform tasks as assigned by her supervisor, telling him that his priorities were wrong. After she was  
17 reprimanded for this insubordination, plaintiff left work and remained absent for several days without  
18 obtaining official leave. Even after Ms. Moorehouse accommodated plaintiff by assigning her to a  
19 new workstation in the front office of the high school, plaintiff deleted the TPP database and files and  
20 removed backup disks. The electronic documents plaintiff destroyed and the backup disks she  
21 removed were School District property.  
22  
23  
24

25 V. CONCLUSION

26 Plaintiff has failed to offer sufficient evidence to create a triable issue of material fact of  
27 retaliation under Title VII. Accordingly, the Court finds that defendant is entitled to judgment as a  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

matter of law and GRANTS summary judgment in favor of defendant as to all causes of action.  
Judgment shall be entered for defendant. The Clerk of the Court shall close this case. Parties to bear  
their own costs.

IT IS SO ORDERED:

Dated:

\_\_\_\_\_  
NANDOR J. VADAS  
United States Magistrate Judge