UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES—GENERAL

**Case No. CV-16-01795-MWF (JCx)** **Date: November 14, 2016**
Title: Tamar Kasbarian -*v*- Equinox Holdings, Inc., et al.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

| Deputy Clerk: | Court Reporter: |
|---|---|
| Rita Sanchez | Not Reported |
| **Attorneys Present for Plaintiff:** | **Attorneys Present for Defendant:** |
| None Present | None Present |

**Proceedings (In Chambers):** ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [25]

This matter is before the Court on Defendant Equinox Holdings, Inc.'s ("Equinox") Motion for Summary Judgment (the "Motion"), filed October 7, 2016. (Docket No. 25). Plaintiff Tamar Kasbarian submitted her Opposition on October 17, 2016. (Docket No. 28). Defendants replied on October 24, 2016. (Docket No. 36). The Court reviewed and considered the papers on the Motion and held a hearing on **November 7, 2016.**

For the reasons stated below, the Motion is **GRANTED**. There is no genuine issue of material fact as to any of Plaintiff's claims. Importantly, Plaintiff cannot show any causal connection between her complaints in early 2014 and her transfer to a different location in early 2015. Nor can Plaintiff show that Equinox's reasons for transferring her were pretextual.

## I. BACKGROUND

The parties have alleged the following facts, which the Court construes in the light most favorable to the Plaintiff, as the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (On a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [her] favor.").

### A. Plaintiff is Hired by Equinox

Equinox owns and operates luxury fitness clubs throughout the United States, including several locations in California. *See Company Overview of Equinox Holdings, Inc.*, BLOOMBERG (*last visited* Nov. 6, 2016), *available at* http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=8942900; *see also* Fed. R. Evid. 201; *Harris v. Cty. of Orange*, 682 F.3d 1126, 1131–32 (9th Cir. 2012) ("The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."). In October 2010, Equinox hired Plaintiff to work as a membership advisor at the Santa Monica club. (Declaration of Tamar Kasbarian ("Kasbarian Decl.") at ¶ 2 (Docket No. 35-2); Defendant's Statement of Uncontroverted Material Facts and Conclusions of Law in Support of Motion for Summary Judgment ("DSUF") No. 1 (Docket No. 25-2). As a membership advisor, Plaintiff was responsible for selling gym memberships, with opportunities for commissions and bonuses. (Kasbarian Decl. ¶ 3).

Upon hiring Plaintiff signed a form, titled "Receipt of Employee Handbook," that included the following language:

> I acknowledge that the receipt of the Employee Handbook in no way creates a contract between Equinox and me. Moreover, I understand and agree that all matters discussed in the Employee Handbook are subject to change or modification from time to time except the At-Will Employment Policy specified therein. The At-Will Employment Policy represents the final and complete agreement concerning the duration of my employment. ***I acknowledge that any change in the At-Will Policy is effective only if set forth in a written document signed by the CEO of Equinox and myself.***

(Declaration of Emerson Figueroa ("Figueroa Decl.") ¶ 5, Ex. B; DSUF No. 8) (emphasis added).

Plaintiff also received an offer letter, dated October 15, 2010, that stated:

> We are excited at the prospect of you joining the Company, you should be aware that our relationship is "employment-at-will." That means you are free, at any time, for any reason, to end your employment with the Company and that the Company may do the same. Our agreement regarding the at-will nature of your employment bay not be changed, except in a writing signed by the Company's Chief Executive Officer. ***Given the at-will nature, the Company may from time to time add to, modify, or discontinue its compensation policies, employee benefit plans or other aspects of your employment.***

(Figueroa Decl. ¶ 6, Ex. C; DSUF No. 10) (emphasis added). Plaintiff acknowledges having received the letter. (PSUF Nos. 9–10).

### B. Plaintiff's Complaints Regarding Fraudulent Billing Practices

Sometime in late 2013 or early 2014 (exactly when is disputed) Plaintiff was promoted to the position of membership executive at the West Los Angeles ("West LA") club. (Kasbarian Decl., Ex. 10; DSUF No. 3). Although the transfer was described by Equinox as a "promotion" and Plaintiff's title and compensation changed, her job duties remained the same. (*See* DSUF No. 3; Plaintiff's Reply to Defendant's Statement of Uncontroverted Facts and Conclusions of Law ("PSUF") No. 3 (Docket No. 29)). Plaintiff's direct supervisor was general manager Kira Simonson. (DSUF No. 6). Also in management were Veronica Santarelli, Regional Sales Manager; Matt Gonzalez, Director of Sales; Brian Hemedinger, Regional Director of Operations of the Santa Monica and West LA clubs; Jack Gannon, Vice President of the West Coast; Barry Holmes, Senior Vice President of Sales (and later, Chief Financial Officer); and Scott Rosen, Chief Operating Officer. (DSUF Nos. 4–6, 20).

Soon after starting work at the West LA club, Plaintiff began to notice what she suspected was fraudulent conduct by the other membership executive and advisors. (Kasbarian Decl. ¶ 6). For example, Plaintiff noticed that membership advisors would

charge a member's credit card for a yearlong membership, when the member had only authorized a one-month membership. (*Id.*). In January 2014, Plaintiff reported what she had seen to Simonson, Hemedinger, Gannon, and Gonzalez. (*Id.*; DSUF No. 22). Plaintiff states that management responded poorly to Plaintiff's complaints: Simonson accused Plaintiff of "tattle telling," warned Plaintiff that she was "lucky" to be making as much money as she did and told Plaintiff not to "ruin it" for herself. (Kasbarian Decl. ¶ 6). Hemedinger warned Plaintiff that she was "too aggressive" in her complaints and told her to leave if she did not want to witness such activity. (*Id.*). Gannon ignored Plaintiff and Gonzalez told her only to "worry about what [she] can control." (*Id.*).

Plaintiff also states that she was told by Simonson and Santarelli that Gannon had begun to refer to Plaintiff as "crazy" and called her "Amy *Wine*house" (presumably meant to be interpreted as a pun, "Amy Whine-house"). (*Id.* ¶ 7). Plaintiff alleges that these comments were repeated to her throughout 2014 and believes they were made in response to her "numerous complaints." (*Id.*).

### C. Changes to the Compensation Plan

In June 2014, Equinox changed the compensation plan for membership advisors in the West LA club. (DSUF No. 17). Membership advisors were paid a fixed bonus per sale upon reaching a certain percentage above the sales goal. (DSUF No. 18). For example, a membership advisor who reached 100% of the goal would receive an extra $20 per sale, while a membership advisor who reached 125% of the goal would receive an extra $55 per sale. (*Id.*). Previously, the West LA club's payroll department had added the bonuses together at each step — so a membership advisor who reached 125% of her goal would be paid an extra $115 ($20 for achieving 100% of goal, another $40 for achieving 115% of goal, and $55 for achieving 125% of goal). (DSUF Nos. 18–19). After the change, payroll was authorized only to give out ***one*** of the bonuses; thus, a membership advisor who reached 125% of her goal would only receive $55 per sale. (DSUF No. 19). This change reduced Plaintiff's commission and bonus check by 25–33%. (PSUF No. 19). The change to the plan affected all of the membership advisors, not just Plaintiff. (*See* DSUF No. 17).

Plaintiff complained about the change to Hemedinger, Gannon, Simonson, Santarelli, Gonzalez, Holmes, and Rosen. (PSUF No. 20). Plaintiff also consulted with an attorney. (Kasbarian Decl. ¶ 8). Hemedinger informed Plaintiff that the compensation plan as previously implemented was a "mistake" and warned her not to complain so as not to jeopardize her career. (*Id.*). Plaintiff states that Gannon avoided her calls about the issue; as a result, she left him several messages about the need to fix her pay, contending that the new compensation plan was unfair and the company was not following the plan as explained upon Plaintiff's promotion. (*Id.*).

Gonzales responded to Plaintiff's complaints that, if it were up to him, Plaintiff would be required to pay back her previous stacked bonuses. (*Id.*). Plaintiff alleges that Gonzales told her that she was "lucky we're not having you pay us back," and "I strongly suggest that you don't challenge the pay." (*Id.*). Nevertheless, Plaintiff continued to work for Equinox for seven months after the change to the compensation plan, until she quit in February 2015. (PSUF No. 21).

### D. Investigation into Billing Practices at the West LA Club

In December 2014, a member of the West LA club complained to Rosen, Equinox's Chief Operating Officer, that a membership advisor had charged a membership to a different member's credit card without that member's authorization. (DSUF No. 28). Rosen contacted Tracy Cuva, Senior Director of the Equinox Member Services Department (which handles membership contracts and membership sales, including auditing membership sales), and asked her to conduct an investigation into the complaint. (DSUF Nos. 29–30). The investigation confirmed that an unauthorized sale had been processed by a membership advisor at the West LA club. (DSUF No. 31). Plaintiff states that this was the same membership advisor she had previously complained about. (Kasbarian Decl. ¶ 10). The membership advisor was terminated. (PSUF No. 32).

As a result of the complaint, Member Services conducted an investigation of sales transactions at the West LA club. (DSUF No. 33). (The parties dispute whether Rosen told Cuva to investigate or Gannon told Jim Burger, Senior Director of Loss

Prevention, to investigate. (*Compare* DSUF No. 33 *with* PSUF No. 33). It is undisputed, however, that Member Services undertook an investigation into sales transactions at the West LA club in about January 2015.)

Cuva instructed Kevin Stanfa, Manager of Compliance and Special Projects, to review sales transactions at the West LA club. (DSUF No. 35). Stanfa prepared a summary detailing the findings of his review. (DSUF No. 36). On January 2, 2015, Cuva sent an email summarizing the results of Stanfa's review to Rosen, Holmes, and Gannon. (Declaration of Tracy Cuva ("Cuva Decl.") ¶ 6, Ex. N (Docket No. 25-6)). Cuva explained that Stanfa's review "reflect[ed] patterns unhealthy for the business." (Cuva Decl., Ex. N at 7). Specifically, Cuva noted that the West LA club "is an outlier in members who request a freeze in the first 60 days of membership who also go on to cancel in the same year." (*Id.*). Additionally, Cuva noted that the West LA club was above average in instances where a member's billing information changes, causing an overdue balance to be applied to the member's account. (*Id.*; *see also* Mot. at 6 n.6). Finally, Cuva noted certain "questionable sales" by Plaintiff, including nine sales that were cancelled within the three-day window with no usage or only one visit. (Cuva Decl., Ex. N at 8). Of those, the card was not present for eight of the nine sales. (*Id.*). The ninth was paid by check, which subsequently bounced. (*Id.*). Neither Cuva nor Stanfa was aware of Plaintiff's previous complaints. (DSUF No. 41).

### E. Plaintiff is Transferred to the Marina Del Rey Club and Resigns

In addition to the Stanfa report, Equinox asked Burger to interview the sales team at the West LA club. (DSUF No. 42). At this time, the West LA sales team consisted of three membership advisors, including Plaintiff, and an Assistant General Manager. (DSUF No. 43). Burger discussed the findings regarding questionable sales at the West LA with Cuva and Stanfa before beginning his interviews. (DSUF No. 46). He then traveled to Los Angeles in late January 2015 to begin the interviews. (DSUF No. 50).

Burger interviewed the following individuals: Plaintiff; the Assistant General Manager; another membership advisor; a third, newly hired membership advisor; and Simonson. (DSUF No. 52).

On January 30, 2015, Burger and a woman named Leah Ball, who worked in Human Resources, interviewed Plaintiff regarding the West LA club's sales practices. (DSUF No. 54). Prior to his interview, Burger had never heard of Plaintiff and did not know about her previous complaints. (DSUF No. 53). Gannon had the payroll department prepare a final paycheck for Plaintiff so that she could be paid in the event that the interview resulted in a decision to terminate her employment. (DSUF No. 63).

After the interview, Burger met with Gannon and Hemedinger to discuss Burger's impressions and next steps. (DSUF No. 57). Ultimately, Burger concluded that, while he was not convinced of Plaintiff's credibility, there was insufficient evidence to support terminating Plaintiff. (DSUF No. 56). However, it was determined that all of the membership advisors interviewed as part of the investigation — with the exception of the new hire, who had never been implicated in the questionable billing practices at the West LA club — should be suspended pending the outcome of the investigation. (DSUF No. 59).

Gannon told Plaintiff she was suspended and asked her to report to the West LA club at 2:00 p.m. the next day for another meeting. (DSUF No. 60). Plaintiff was told that she would not have access to her email or payroll account during that time. (DSUF No. 61). (Equinox contends that it is policy to turn off email access for hourly employees who have been suspended pending the outcome of an investigation. (Declaration of Jack Gannon ("Gannon Decl." ¶ 7 (Docket No. 25-8)). Plaintiff objects to this assertion because Equinox does not provide documentary corroboration of its claim, but presents no evidence to the contrary. Accordingly, the Court will accept Equinox's assertion that Plaintiff's email and payroll account were suspended according to Equinox's policy.)

On January 31, 2015, Plaintiff met with Hemedinger and Gannon. (DSUF No. 64). She was told that the investigation had concluded and that she would be

transferred to the Marina Del Rey club. (*Id.*). Equinox asserts that it decided to transfer Plaintiff to the Marina Del Rey club because it wanted to "create a fresh culture" in the West LA club in the wake of the investigation. (*Id.*). Plaintiff disputes this characterization, noting that one membership advisor was allowed to continue working at the West LA club even after the investigation. (PSUF No. 65). Equinox states that the individual who was allowed to stay was the new hire. (DSUF No. 78–79). As stated above, the new hire had never been implicated in Stanfa's investigation. (Black Decl., Ex. J at 110).

Equinox further contends that it considered the transfer a lateral move. (DSUF No. 66–67). Plaintiff considered the transfer a demotion because she would be paid $10 less per hour at the Marina Del Rey club, and because the club is a "lower tier location" than West LA. (PSUF No. 67). Equinox responds that Plaintiff could have earned at least the same total take-home salary because the Marina Del Rey club was a high performing club with less expensive memberships. (DSUF No. 69). As discussed in more detail below, the Court need not decide whether the transfer was a demotion.

Plaintiff was told to report to the Marina Del Rey club on February 2, 2015 at 9:00 a.m. (DSUF No. 74). Instead, Plaintiff resigned via email on the morning of February 2, effective immediately. (DSUF No. 75, 77).

On April 13, 2015, Plaintiff filed suit against Equinox Holdings, Inc., Equinox Fitness Marina Del Rey, Inc., Equinox Fitness Sepulveda, Inc., Jack Gannon, and Brian Hemedinger in Los Angeles County Superior Court, alleging ten claims arising out of the foregoing events. (Notice of Removal, Ex. A). On March 1, 2016, the superior court dismissed Gannon and Hemedinger from the action as improperly served. (*Id.* ¶¶ 30–31; Declaration of Mia Farber ("Farber Decl.") Ex. V (Docket No. 5)).

On March 16, 2016, Equinox removed the action to federal court, contending that Equinox Fitness Marina Del Rey, Inc., and Equinox Fitness Sepulveda, Inc., were sham defendants, and thus the Court had diversity jurisdiction over the action. (Mot. at 11; Notice of Removal ¶ 13). (Equinox also contends, and Plaintiff does not contest,

that the amount in controversy is greater than $75,000.) Plaintiff never moved for remand; thus, the Court considers its jurisdiction to hear the Motion below.

Plaintiff has agreed to dismiss her second claim for violation of California's Private Attorney General Act, Labor Code §§ 2698 *et seq.*, and her tenth claim for failure to provide accurate itemized wage statements. (*See* Declaration of Dorothy L. Black ("Black Decl.") ¶ 3, Ex. E (Docket No. 25-4)). Eight claims remain to be adjudicated in the action: Claim One, for violation of California Labor Code section 1102.5; Claim Three, for breach of contract; Claim Four, for breach of express oral contract not to terminate employment without good cause; Claim Five, for breach of implied-in-fact contract not to terminate employment without good cause; Claims Six and Seven, for wrongful termination of employment in violation of public policy; Claim Eight, for defamation; and Claim Nine, for intentional infliction of emotional distress. Equinox now moves for summary judgment on those claims.

## II. SUMMARY JUDGMENT STANDARD

In deciding the Motion under Federal Rule of Civil Procedure 56, the Court applies *Anderson*, *Celotex*, and their Ninth Circuit progeny. *Anderson*, 477 U.S. at 242; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(a).

"When the party moving for summary judgment would bear the burden of proof at trial, 'it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial.'" *C.A.R. Transp. Brokerage Co. v. Darden Restaurants, Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (quoting *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1992)). In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case. *See Houghton*, 965 F.2d at 1537. Once the moving party comes forward with sufficient evidence, "the burden then moves to the opposing party, who must present significant probative evidence tending to support its claim or defense." *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir.1991)

(citation omitted). "A motion for summary judgment may not be defeated, however, by evidence that is 'merely colorable' or 'is not significantly probative.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986).

## III. DISMISSAL OF CLUB DEFENDANTS

In her Complaint, Plaintiff named Equinox Fitness Marina Del Rey, Inc., and Equinox Fitness Sepulveda, Inc. (the "Club Defendants"), as Defendants in this action. (Mot. at 11; Notice of Removal ¶ 13). Both of the Club Defendants are California corporations; if they are properly parties to this action, then it must be remanded to the Los Angeles County Superior Court. *See* 28 U.S.C. § 1332. In its Notice of Removal (Docket No. 1), Equinox contends that the Club Defendants are sham defendants because neither has ever had any employment relationship or made any employment decisions regarding Plaintiff's employment. (*See* Not. of Removal at ¶¶13–14; Declaration of Patricia Wencelblat ¶ 3).

Equinox renews its contention in its motion for summary judgment, arguing that the Club Defendants should be dismissed as sham defendants. (Mot. at 11). Equinox states that there is no evidence to indicate that the Club Defendants ever employed Plaintiff, and specifically explains that Plaintiff never received any W-2s during her employment that named either of the Club Defendants as her employer. *See* Cal. Gov't Code § 12928 (creating a rebuttable presumption that the person or entity identified as the employer on the W-2 form is the employer); SUF No. 2. Plaintiff does not substantively contest this point as she does not present any evidence that the Club Defendants were properly named in this action. (Opp. at 11). Plaintiff only states that Equinox does not "clearly list[] the exact entity defendants" meaning that "the motion does not properly give [P]laintiff notice of the exact issue of which it is seeking adjudication." (*Id.*). Contrary to Plaintiff's assertion, the Motion explicitly names Equinox Fitness Sepulveda, Inc., and Equinox Fitness Marina Del Rey, Inc., as the Defendants that it seeks to dismiss.

Accordingly, the Court **GRANTS** the Motion to dismiss the Club Defendants from the action. *See Weeping Hollow Ave. Trust v. Spencer*, 831 F.3d 1110, 1113 (9th

Cir. 2016) ("[J]oinder of a non-diverse defendant is deemed fraudulent, and the defendant's presence in the lawsuit is ignored for purposes of determining diversity, '[i]f the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state.'" (quoting *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001))).

## IV. PLAINTIFF'S SUBSTANTIVE CLAIMS

### A. Claims One, Six, and Seven: Retaliation

In Claim One, Plaintiff alleges that she was unlawfully retaliated against in violation of California Labor Code section 1102.5. In Claim Six, Plaintiff alleges wrongful termination in violation of public policy under Labor Code section 1102.5. *See, e.g.*, *Green*, 19 Cal. 4th at 76–77; *Palmer v. Regents of Univ. of California*, 107 Cal. App. 4th 899, 902, 132 Cal. Rptr. 2d 567 (2003) (noting that Labor Code section 1102.5 provides "a 'classic' common law cause of action for discharge in violation of public policy under *Tameny*"). In Claim Seven, Plaintiff alleges that she was wrongfully terminated in violation of the fundamental public policy protecting an employee's right to protest compensation issues, as expressed in Labor Code section 923. *See Burton v. Covenant Care*, 99 Cal. App. 4th 1361, 1376–77, 122 Cal. Rptr. 2d 204 (2002).

In assessing a claim for retaliation under section 1102.5 or for wrongful termination in violation of public policy, "California courts apply the burden shifting analysis as set forth in *McDonnell Douglas*." *Day v. Sears Holdings Corp.*, 930 F. Supp. 2d 1146, 1191 (C.D. Cal. 2013) (quotations omitted); *see also Loggins v. Kaiser Permanente Intern.*, 151 Cal. App. 4th 1102, 1108–09, 60 Cal. Rptr. 3d 45 (2007) ("When a plaintiff alleges retaliatory employment termination . . . as a claim for wrongful employment termination in violation of public policy, and the defendant seeks summary judgment, California follows the burden shifting analysis of *McDonnell Douglas Corp.*"). Under that analysis, Plaintiff must first establish a prima facie case of retaliation. *Edgerly v. City of Oakland*, 211 Cal. App. 4th 1191, 1199, 150 Cal. Rptr. 3d 425 (2012), *as modified* (Dec. 13, 2012) (internal citations omitted).

"If the defendant then proves there was a legitimate, nonretaliatory explanation for its acts, the plaintiff must demonstrate that this explanation is merely a pretext for retaliation." *Id.* Plaintiff fails to show there is any genuine issue of material fact supporting a prima facie case of retaliation.

**1. *Prima Facie* Case of Retaliation**

"To establish a prima facie case of retaliation 'a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two.'" *Mokler v. Cty. of Orange*, 157 Cal. App. 4th 121, 138, 68 Cal. Rptr. 3d 568 (2007) (quoting *Patten v. Grant Joint Union High School Dist.*, 134 Cal. App. 4th 1378, 1384, 37 Cal. Rptr. 3d 113 (2005)); *see also Edgerly v. City of Oakland*, 211 Cal. App. 4th 1191, 1199, 150 Cal. Rptr. 3d 425 (2012), *as modified* (Dec. 13, 2012) ("To establish a prima facie case [under California Labor Code section 1102.5(c)], a plaintiff must show that he or she was subjected to adverse employment action after engaging in protected activity and that there was a causal connection between the two."); *Patten v. Grant Joint Union High Sch. Dist.*, 134 Cal. App. 4th 1378, 1384, 37 Cal. Rptr. 3d 113 (2005).

For purposes of this Motion, the Court can assume that Plaintiff engaged in a protected activity when she reported to her supervisors that she suspected her coworkers were fraudulently billing customers for memberships without authorization and when she complained about the changes to the compensation plan. The Court also assumes that transfer to the Marina Del Rey club constituted an adverse employment action. *See Patten*, 134 Cal. App. 4th at 1389–90 (holding that transfer of an administrator from one school to another, although considered a "lateral transfer" by the school district, was an adverse employment action because it affected the plaintiff's opportunity for advancement in her career).

Even so, Plaintiff fails to show any causal link between the complaint about her peers and the transfer. Nor does Plaintiff produce any evidence connecting the transfer to her complaints regarding the changes to the compensation plan. The undisputed facts show that the impetus for investigating the billing practices at the West LA club

was not Plaintiff's previous complaints. Rather, Equinox's Chief Operating Officer, Rosen, asked member services to conduct an investigation after he received a complaint from an ***Equinox member*** regarding the billing practices. In response to the complaint, Rosen asked Cuva, who was wholly unaware of Plaintiff's prior complaints, to investigate West LA's billing practices. Burger, who actually interviewed Plaintiff regarding West LA's billing practices, was similarly unaware of Plaintiff's prior complaints. Simply put, no reasonable jury could infer any connection, beyond mere coincidence, between the decision to transfer Plaintiff and her previous complaints. *See Morgan v. Regents of Univ. of Cal.*, 88 Cal. App. 4th 52, 74, 105 Cal. Rptr. 2d 652 (2000) (rejecting claim of retaliation where "each of the individuals who decided not to hire appellant for a particular position disclaimed knowledge of the fact that appellant had previously filed a grievance . . . . Without such knowledge, these individuals could not have acted in retaliation for appellant's filing of the grievance.").

At the hearing, Plaintiff argued that it is immaterial that Cuva and Burger were unaware of her complaints because Gannon was both aware of her complaints and took part in the decision to transfer her. While Gannon's knowledge prevents Equinox from claiming the defense of ignorance, *see Reeves v. Safeway Stores, Inc.*, 121 Cal. App. 4th 95, 108–09, 16 Cal. Rptr. 3d 717 (2004), Plaintiff still has the burden of showing that Gannon's animus toward her was a ***but-for cause*** of her transfer, *id* at 108. The undisputed facts show that the investigation was initiated in response to a member complaint, and that Plaintiff was transferred as a result of the investigation. Plaintiff has raised no evidence indicating that any Equinox decisionmaker relied on her prior, unrelated complaints when deciding to transfer her to the Marina Del Rey club.

**2. Legitimate, Nonretaliatory Explanation**

Even if Plaintiff could show causation, Equinox has stated a legitimate, nonretaliatory explanation for its decision to transfer Plaintiff: It wanted to establish a new culture among membership agents in the West LA office. This explanation is supported by the fact that, of the three membership agents employed in the office at the time of Plaintiff's transfer, only the newly hired agent was not transferred. That

individual was hired after the Stanfa investigation and had not been implicated in any of the questionable billing transactions at issue in the investigation.

**3. Pretext**

Plaintiff has adduced no evidence of pretext. At the hearing, Plaintiff argued that the fact that she was transferred, while the new hire was not, demonstrates that Equinox's reasons for Plaintiff's transfer are inconsistent and thus pretextual. But the fact that the new hire was not transferred is not on its own sufficient to show pretext because the new hire was not similarly situated to Plaintiff. *See Wills v. Superior Court*, 195 Cal. App. 4th 143, 172, 125 Cal. Rptr. 3d 1 (2011), *as modified on denial of reh'g* (May 12, 2011) ("Another employee is similarly situated if, among other things, he or she ***engaged in the same conduct*** without any mitigating or distinguishing circumstances." (emphasis added) (citation and quotation marks omitted)).

Further, at the hearing Plaintiff contended that Equinox determined that the investigation into Plaintiff's billing practices was entirely unfounded. Not so. The undisputed facts show that Equinox merely determined that there was not sufficient evidence of wrongdoing to warrant termination. The decision to transfer Plaintiff (rather than firing her) is consistent with that determination.

In sum, Plaintiff raises no reasonable alternative explanation for Equinox's decision to transfer her to the Marina Del Rey Club. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) ("[A] reason cannot be proved to be 'a pretext for ***discrimination***' unless it is shown ***both*** that the reason was false, ***and*** that discrimination was the real reason." (emphasis in original)). Plaintiff has raised no genuine issue of material fact for trial. *See Day*, 930 F. Supp. 2d at 1171 ("[C]ircumstantial evidence that tends to show that the employer's proffered motives were not the actual motives 'must be specific' and 'substantial' in order to create a triable issue with respect to whether the employer intended to discriminate." (quoting *Blue v. Widnall*, 162 F.3d 541, 546 (9th Cir.1998))).

Accordingly, the Motion is **GRANTED** as to Claims One, Six, and Seven.

**B. Claims Three, Four, and Five: Breach of Contract**

"Unless the parties contract otherwise, employment relationships in California are ordinarily 'at will,' meaning that an employer can discharge an employee for any reason." *Freund v. Nycomed Amersham*, 347 F.3d 752, 758 (9th Cir. 2003) (citing Cal. Labor Code § 2922). Equinox made clear, upon Plaintiff's hiring, that she was an at-will employee. Equinox explained in Plaintiff's offer letter and in the employee handbook that no contract for employment would arise that was not in writing and signed by the CEO of Equinox. Plaintiff produces no evidence tending to show that this understand was changed, either through verbal agreement or in writing. Plaintiff's unsubstantiated belief that she could not be demoted, suspended, or reassigned except for good cause is not sufficient to create a genuine issue of material fact as to her employment status. *See Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384, 392–93, 46 Cal. Rptr. 3d 668 (2006).

Plaintiff claims that the compensation plan, as implemented prior to the June 2014 change, was a contract that Equinox breached by unilaterally changing its terms without Plaintiff's agreement. However, "[a]n 'employee who continues in the employ of the employer after the employer has given notice of changed terms or conditions of employment has accepted the changed terms and conditions.'" *Schachter v. Citigroup, Inc.*, 47 Cal. 4th 610, 620, 101 Cal. Rptr. 3d 2 (2009) (quoting *DiGiacinto v. Ameriko–Omserv Corp.* 59 Cal. App. 4th 629, 637, 69 Cal. Rptr. 2d 300 (1997)). It is undisputed that Plaintiff continued in Equinox's employ for seven months after the implementation of the new compensation plan, and thus Plaintiff accepted the changed terms and conditions of the compensation plan.

Plaintiff further claims that Equinox entered into an express oral and implied-in-fact contract not to terminate her without good cause. In her Complaint, Plaintiff alleges that "Defendants and their managers and supervisors terminated [P]laintiff's employment without good cause" violating the express oral and implied-in-fact employment contracts. However, the undisputed facts show that Plaintiff resigned voluntarily, and thus these claims fail. Moreover, as stated above, Plaintiff has produced no evidence tending to show that she was not an at-will employee.

Accordingly, the Motion is **GRANTED** as to Claims Three, Four, and Five.

### C. Claim Eight: Defamation

Plaintiff claims that Gannon's remarks that she was "crazy" and comparing her to Amy Winehouse were defamatory. To prevail on a claim of defamation, Plaintiff must prove that Gannon's remarks were (1) false, (2) defamatory, (3) unprivileged, (4) had a natural tendency to injure or caused special damage, and (5) were published, *i.e.* communicated to a third party. *See Taus v. Loftus*, 40 Cal. 4th 683, 720, 54 Cal. Rptr. 3d 775 (2007); 5 Witkin, Summary of Cal. Law § 529 (10th ed. 2005).

The First Amendment also "places limits on the types of speech that may give rise to a defamation action under state law." *Lieberman v. Fieger*, 338 F.3d 1076, 1079 (9th Cir. 2003) (quoting *Gilbrook v. City of Westminster*, 177 F.3d 839, 861 (9th Cir. 1999)). If a reasonable factfinder could not conclude that the statement at issue implies an assertion of objective fact, "the claim is foreclosed by the First Amendment." *Id.* (quoting *Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995)). To decide whether a statement implies a factual assertion, the Court should examine:

> (1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, (2) whether the defendant used figurative or hyperbolic language that negates that impression, and (3) whether the statement in question is susceptible of being proved true or false.

*Id.* at 1080. In *Liberman*, the Ninth Circuit approved the district court's determination that an attorney's remarks that a psychiatrist was "Looney Tunes," "crazy," and "nuts" were protected as opinion under the First Amendment. *Id.* at 1082.

Similarly, here, the context indicates that Gannon's remarks hardly implied a factual assertion. Gannon's reference to Plaintiff as "Amy *Wine*house" (presumably a pun implying that Plaintiff whined too much) could hardly be interpreted literally.

Rather, it was a humorous (if unkind) remark used to figuratively comment on Plaintiff's tendency to complain extensively — perhaps excessively — to her superiors regarding the conduct of her peers and her pay. Similarly, comments that Plaintiff was "crazy," while sexist and demeaning, hardly seem to have been meant literally to call Plaintiff's mental health into question as a clinical fact. Plaintiff has provided no evidence that Gannon intended to convince others that Plaintiff was literally insane.

Gannon's statements are protected as opinions under the First Amendment. Accordingly, the Motion is **GRANTED** as to Claim Eight.

### E. Claim Nine: Intentional Infliction of Emotional Distress

Finally, Plaintiff alleges a claim for intentional infliction of emotional distress based on her transfer to the Marina Del Rey club. Because Plaintiff's claim is predicated on her claims for retaliation and wrongful termination in violation of public policy (*see* Opp. at 21), it must fail. Without the wrongful termination claim, no reasonable jury could find that Equinox's decision to transfer Plaintiff to the Marina Del Rey club was "so extreme and outrageous as to go beyond all possible bounds of decency[,] . . . atrocious, and utterly intolerable in a civilized community." *Mintz v. Blue Cross of California*, 172 Cal. App. 4th 1594, 1608, 92 Cal. Rptr. 3d 422 (2009) (quoting *Hailey v. Cal. Phys. Svc.*, 158 Cal. App. 4th 452, 473–474, 69 Cal. Rptr. 3d 789 (2007); *see also Cabesuela v. Browning-Ferris Indus. of Cal., Inc.*, 68 Cal. App. 4th 101, 112–13, 80 Cal. Rptr. 2d 60 (1998) (holding that wrongful termination can be the basis for an intentional infliction of emotional distress claim).

Accordingly, the Motion is **GRANTED** as to Claim Nine.

### F. Punitive Damages

Because Plaintiff cannot sustain any of her claims on summary judgment, her request for punitive damages must also be denied.

## V. CONCLUSION

For the foregoing reasons, the Motion is **GRANTED**. This Order shall constitute notice of entry of judgment pursuant to Federal Rule of Civil Procedure 58. Pursuant to Local Rule 58-6, the Court **ORDERS** the Clerk to treat this order, and its entry on the docket, as an entry of judgment.

IT IS SO ORDERED.