

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA

Frohm v. City and County of San Francisco

No. 22-cv-06002-JST (N.D. Cal. May 14, 2025) · No. 22-cv-06002-JST · Decided May 14, 2025

SUMMARY

The United States District Court for the Northern District of California partially granted and partially denied the City and County of San Francisco’s motion for summary judgment in Darlene Frohm’s employment discrimination, retaliation, and Equal Pay Act action. The court granted summary judgment on Frohm’s discrimination claims and most asserted retaliation theories, but denied it as to retaliation based on the denial of a request to upgrade her position and as to the merits of her Equal Pay Act claim. The court applied a two-year statute of limitations to the Equal Pay Act claim.

CASE DETAILS

COURT	United States District Court for the Northern District of California
WRITING FOR THE COURT	Jon S. Tigar
JURISDICTION	United States District Court for the Northern District of California
DECIDED	May 14, 2025
DOCKET	22-cv-06002-JST
DISPOSITION	other
PROCEDURAL POSTURE	Defendant moved for summary judgment on Plaintiff's discrimination and Equal Pay Act claims and partial summary judgment on her FEHA retaliation claims. The court granted the motion in part and denied it in part.
STANDARD OF REVIEW	Summary judgment is proper when 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. The court must draw all justifiable inferences in favor of the nonmoving party and may not weigh evidence or make credibility determinations.
PRECEDENTIAL VALUE	Unpublished federal district court order; metadata lists precedential status as Unknown.

TOPICS

- summary judgment
- retaliation
- employment discrimination
- wage and hour
- civil rights

PRACTICE AREAS

employment law

civil rights

civil procedure

municipal law

QUESTIONS PRESENTED

1. Whether the City was entitled to summary judgment on Frohm's FEHA and Title VII race-discrimination claims based on alleged failures to promote or reclassify her.
2. Whether Frohm's Title VII equal-pay claim could proceed under a failure-to-promote framework.
3. Whether newly asserted discrimination theories raised for the first time in opposition to summary judgment could be considered and, if considered, whether they survived summary judgment.
4. Whether the City was entitled to summary judgment on Frohm's FEHA retaliation claim concerning the denial of a request to upgrade her position from 0932 to 0941.
5. Whether the City was entitled to summary judgment on Frohm's retaliation theory concerning a CAT 18 temporary placement.
6. Whether the City was entitled to summary judgment on the merits of Frohm's Equal Pay Act claim based on the City's classification and compensation system.
7. Whether Frohm's Equal Pay Act claim was subject to a two-year or three-year limitations period.

HOLDINGS

1. The City was entitled to summary judgment because Frohm did not establish that she was qualified for the permanent 0932, 0941, or 0954 positions at issue; she failed the required management test battery.
2. The Title VII equal-pay claim failed because Frohm could not show that she was qualified for a 0941 position and did not present evidence giving rise to an inference of racial discrimination.
3. The court declined to consider newly asserted bases for liability that were not adequately disclosed in the operative complaint or discovery responses. In any event, the theories would fail on the merits for lack of evidence supporting an inference of race discrimination.
4. The City was not entitled to summary judgment on Frohm's retaliation claim based on the denial of the request to upgrade her position from 0932 to 0941.
5. The court granted summary judgment on, or declined to consider, the CAT 18 retaliation theory because Frohm's vague deposition testimony did not put the City on notice of that specific claim. The court also held that the theory would fail because Frohm did not show that the identified decisionmaker knew of her protected activity.
6. The City was not entitled to summary judgment on the merits of Frohm's Equal Pay Act claim because it did not establish the absence of disputed facts concerning whether the pay differential was based on a factor other than sex.
7. The court applied a two-year limitations period because Frohm did not present evidence creating a disputed fact concerning whether the City's alleged violation was willful.

KEY QUOTATIONS

“Summary judgment is proper when a “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.”” (at 2)

“It is not the court’s duty “to scour the record in search of a genuine issue of triable fact”; instead, the nonmoving party must “identify with reasonable particularity the evidence that precludes summary judgment.”” (at 2)

“The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff.” (at 3)

““[S]ummary judgment is not a procedural second chance to flesh out inadequate pleadings.”” (at 6)

“adverse treatment that is reasonably likely to impair a reasonable employee’s . . . prospects for advancement or promotion” (at 10)

“employers cannot meet their burden of proving that a factor-other-than-sex is responsible for a wage differential by asserting use of a gender-neutral classification system without more.” (at 11)

FACTUAL BACKGROUND

Darlene Frohm, a Black woman, worked for the City and County of San Francisco and was appointed in 2018 to a temporary CAT 17 position classified as 0932 Manager IV. She contended that she performed work associated with the higher 0941 Manager VI classification but was not promoted or paid at that level. Frohm asserted race-discrimination and FEHA retaliation claims, a Title VII equal-pay claim based on race, and an Equal Pay Act claim based on sex. She received a score of 52.6 on the City's management test battery, below the required passing score of 55.8 for positions requiring that test.

PROCEDURAL HISTORY

The City moved to dismiss the original and amended complaints. The court allowed certain discrimination claims to proceed but dismissed retaliation and Equal Pay Act claims in part. After the court permitted a supplemental complaint concerning Plaintiff's termination, Plaintiff filed the operative supplemental complaint. The City then moved for summary judgment, and the court considered Plaintiff's untimely opposition.

DISPOSITION

other

CASES CITED

- Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 255 (1986)
- C.A.R. Transportation Brokerage Co. v. Darden Restaurants, Inc., 213 F.3d 474, 480 (9th Cir. 2000)
- Nissan Fire & Marine Insurance Co. v. Fritz Companies, 210 F.3d 1099, 1102-03 (9th Cir. 2000)
- Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir. 1996)
- Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)
- Ambat v. City and County of San Francisco, 757 F.3d 1017, 1023 n.2 (9th Cir. 2014)
- McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)

- *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603 (9th Cir. 2004)
- *Guz v. Bechtel National, Inc.*, 24 Cal. 4th 317, 354-56 (2000)
- *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994)
- *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)
- *Jaburek v. Foxx*, 813 F.3d 626, 631 (7th Cir. 2016)
- *Wasco Products, Inc. v. Southwall Technologies, Inc.*, 435 F.3d 989, 992 (9th Cir. 2006)
- *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 24 (1st Cir. 1990)
- *Barrilleaux v. Mendocino County*, No. 14-cv-01373-DMR, 2018 WL 3585133, at *9 (N.D. Cal. July 26, 2018)
- *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968-69 (9th Cir. 2006)
- *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292-94 (9th Cir. 2000)
- *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1042, 1052 (2005)
- *Adams v. Kmart Corp.*, No. C 00-03885 WHA, 2001 WL 969049, at *4 (N.D. Cal. Aug. 10, 2001)
- *Morgan v. Regents of the University of California*, 88 Cal. App. 4th 52, 69-70 (2000)
- *Rizo v. Yovino*, 950 F.3d 1217, 1222-25 (9th Cir. 2020)
- *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986)
- *Corning Glass Works v. Brennan*, 417 U.S. 188, 196, 201 (1974)
- *Aldrich v. Randolph Central School District*, 963 F.2d 520, 525 (2d Cir. 1992)
- *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988)
- *Alvarez v. IBP, Inc.*, 339 F.3d 894, 909 (9th Cir. 2003)

OPINION

1 2 3 4 UNITED STATES DISTRICT COURT 5 NORTHERN DISTRICT OF CALIFORNIA 6 7
 DARLENE FROHM, Case No. 22-cv-06002-JST 8 Plaintiff, ORDER GRANTING IN PART
 AND 9 v. DENYING IN PART DEFENDANT’S MOTION FOR SUMMARY 10 CITY AND
 COUNTY OF SAN JUDGMENT FRANCISCO, 11 Re: ECF No. 87 Defendant. 12 13 Before the
 Court is a motion for summary judgment brought by Defendant City and 14 County of San
 Francisco (“the City”).

ECF No. 87. The Court will grant the motion in part and 15 deny it in part. 16 I. BACKGROUND
 17 Plaintiff Darlene Frohm, a Black woman, worked for the City’s Office of Contract 18
 Administration from February 2000 until April 2018, when she was appointed to a temporary 19
 CAT 17 position as Assistant to the Deputy Director of Operations in the Public Works 20
 Department.¹ That position was classified at the 0932 Manager IV level of the City’s job 21
 classification system.

Frohm contends that she was qualified for, and was already performing the 22 work of, the higher
 0941 Manager VI classification, but that the City did not promote her to the 23 higher
 classification. In her initial complaint, she alleged that she was discriminated against on 24 the

basis of race, in violation of both the California Fair Employment and Housing Act (“FEHA”) 25 26 1 “CAT 17” refers to Category 17 under Section 10.104 of the City’s Charter, which excludes from competitive civil service selection “[a]ppointments, which shall not exceed two years and 27 shall not be renewable, as substitutes for civil service employees on leave.” 1 and Title VII, and that she was unlawfully retaliated against under FEHA after she complained 2 about that discrimination.

She also alleged that the City’s failure to pay her the same as male 3 colleagues violated the federal Equal Pay Act, and that its failure to pay her the same as non-Black 4 colleagues violated Title VII. 5 The City moved to dismiss the initial complaint, and Frohm amended her complaint rather 6 than oppose the motion.

The City then moved to dismiss the first amended complaint. The Court 7 concluded that Frohm sufficiently alleged discrimination claims, but it dismissed her retaliation 8 and Equal Pay Act claims, with leave to amend except as to her California Equal Pay Act claim. 9 ECF No. 36. 10 Frohm timely filed a second amended complaint, and the City moved to dismiss only the 11 retaliation claims.

The Court granted that motion in part and denied it in part. ECF No. 62. The 12 Court dismissed Frohm’s retaliation claims as to Deputy Director of Finance and Administration 13 Julia Dawson’s alleged failure to approve a 0941 position requested by Alaric Degrafinried, then 14 the Acting Director of Public Works, in 2020; the City’s failure to select Frohm for an interview 15 for the 0954 Deputy Director of Operations position; and Frohm’s remaining in her 0932 position 16 on a backfilled basis instead of being allowed to fill it on a permanent basis.

Id. at 3–4. However, 17 the Court denied the motion as to the City’s alleged failure to reclassify Frohm to a 0941 position 18 in August 2021. Id. at 4. The Court granted leave to amend, but Frohm did not file an amended 19 complaint to address the deficiencies identified by the Court. 20 Frohm subsequently sought leave to file a “first supplemental complaint” to allege facts 21 surrounding her October 18, 2023 termination, which occurred after she filed the second amended 22 complaint.

The City did not oppose the motion, and the Court granted it. Frohm filed her first 23 supplemental complaint, which is now the operative complaint, on March 5, 2024. ECF No. 69. 24 The City now moves for summary judgment on Frohm’s discrimination and EPA claims, 25 and for partial summary judgment on her retaliation claims. ECF No. 91. It does not seek 26 summary judgment on Frohm’s retaliation claims regarding her termination.

27 As the City correctly observes, Frohm’s opposition to the motion was untimely. It was due 1 Order for All Civil Cases Before District Judge Jon S. Tigar, available at 2 <https://www.cand.uscourts.gov/judges/tigar-jon-s-jst/>; ECF No. 90.

The Court has nonetheless 3 considered the opposition. 4 II. LEGAL STANDARD 5 Summary judgment is proper when a “movant shows that there is no genuine dispute as to 6 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). 7 A dispute is genuine only if there is sufficient evidence “such that a reasonable jury could return a 8 verdict for the nonmoving party,” and a fact is material only if it might affect the outcome of the 9 case.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). When deciding a motion for 10 summary judgment, the court must draw “all justifiable inferences” in the nonmoving party’s 11 favor and may not weigh evidence or make credibility determinations. *Id.* at 255. 12 Where the party moving for summary judgment would bear the burden of proof at trial, 13 that party “has the initial burden of establishing the absence of a genuine issue of fact on each 14 issue material to its case.” C.A.R.

Transp. Brokerage Co. v. Darden Rests., Inc., 213 F.3d 474, 15 480 (9th Cir. 2000). Where the party moving for summary judgment would not bear the burden of 16 proof at trial, that party “must either produce evidence negating an essential element of the 17 nonmoving party’s claim or defense or show that the nonmoving party does not have enough 18 evidence of an essential element to carry its ultimate burden of persuasion at trial.” *Nissan Fire & 19 Marine Ins.*

Co. v. Fritz Cos., 210 F.3d 1099, 1102 (9th Cir. 2000). If the moving party satisfies 20 its initial burden of production, the nonmoving party must produce admissible evidence to show 21 that a genuine issue of material fact exists. *Id.* at 1102–03. It is not the court’s duty “to scour the 22 record in search of a genuine issue of triable fact”; instead, the nonmoving party must “identify 23 with reasonable particularity the evidence that precludes summary judgment.” *Keenan v. Allan*, 24 91 F.3d 1275, 1279 (9th Cir.

1996) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 25 (7th Cir. 1995)). If the nonmoving party fails to make the required showing, the moving party is 26 entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). 27 1 III. DISCUSSION 2 A. Discrimination 3 Frohm brings discrimination claims under both FEHA and Title VII. “FEHA is interpreted 4 consistently with Title VII,” *Ambat v. City and County of San Francisco*, 757 F.3d 1017, 1023 n.2 5 (9th Cir.

2014), and “California courts look to pertinent federal precedent when applying [state 6 employment discrimination] statutes,” *Guz v. Bechtel Nat’l, Inc.*, 24 Cal. 4th 317, 354 (2000). The 7 Court therefore analyzes Frohm’s state and federal discrimination claims together. 8 Under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 9 (1973), the plaintiff must first establish a prima facie case of discrimination by showing that: 10 (1) they belong to a protected class; (2) they were qualified to do the job; (3) they were subject to 11 an adverse employment action; and (4) “similarly situated individuals outside [their] protected 12 class were treated more favorably, or other circumstances surrounding the adverse employment 13

action give rise to an inference of discrimination.” *Peterson v. Hewlett-Packard Co.*, 358 F.3d 1459, 603 (9th Cir.

2004). If “the plaintiff establishes a prima facie case, a presumption of discrimination arises,” and “the burden then shifts to the employer to rebut the presumption by producing admissible evidence... that its action was taken for a legitimate, nondiscriminatory reason.” *Guz*, 24 Cal. 4th at 355–56. If the employer meets that burden, “[t]he plaintiff must then have the opportunity to attack the employer’s proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive....

The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff.” *Id.* at 356. “If a rational trier of fact could, on all the evidence, find that the employer’s action was taken for impermissibly discriminatory reasons, summary judgment for the defense is inappropriate.” *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir.

1994). 1. Promotions The operative complaint alleges that the City “discriminated against Ms. Frohm based on her race by denying her promotion to positions for which she was qualified and offering such positions to non-Black persons with equal or lesser qualifications.” ECF No. 69 ¶ 68 (FEHA); *id.* 1 promotions to three permanent positions classified at the 0932, 0941, and 0954 levels.

ECF No. 2 87-1 at 80. 3 To be hired into any of these positions, an applicant must pass the City’s management test battery (“MTB”). ECF No. 87-1 at 211; ECF No. 87-4 at 71. Frohm took the MTB when she 5 applied for a 0941 position in 2023, and she received a score of 52.6. ECF No. 87-5 at 3. “For any City job announcement requiring the MTB as part of the selection process, the same 7 examination is used, with the same required passing score of 55.8 or greater.” *Id.* Thus, Frohm 8 did not receive a passing score on the MTB, and she has therefore not demonstrated that she was 9 qualified for any permanent 0932, 0941, and 0954 positions.

Because a plaintiff must demonstrate 10 they are “qualified for the position [they] sought” to prevail on a discrimination claim, Frohm’s 11 failure to pass the MTB is fatal to her claims regarding failure to promote to any of these 12 positions. *Guz*, 24 Cal. 4th at 355 (citing *Tex. Dep’t of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981)). 14 2. Equal pay under Title VII 15 Frohm also contends that the City violated Title VII because it “wrongfully refused to pay 16 Ms. Frohm equal to non-African American colleagues on the basis of her race.” ECF No. 69 ¶ 76.

17 She argues that, although classified at the 0932 level, she was performing the duties of a 0941 18 manager and should have been paid as much as three white employees who were employed at the 19 0941 level and who performed substantially equal work. Citing *Jaburek v. Foxx*, 813 F.3d 626, 20 631 (7th Cir. 2016), the City argues, and Frohm does not rebut, that this claim should be analyzed 21 under a failure-to-promote framework.

The Court agrees. 22 Applying that framework, Frohm's Title VII equal pay claim fails for the same reason as 23 her discrimination claims: She cannot show that she was qualified for a 0941 position because she 24 failed the required MTB.

In addition, Frohm bases her claim on "non-Black HR and Finance and 25 Administration staff that blocked" the efforts of "Frohm's Black supervisors... to get her a 0941 26 position approved" at various times between 2019 and 2023. ECF No. 90 at 22. But Frohm's 27 1 recitation of facts relies only on the fact that certain staff were not Black; she does not cite 2 evidence giving rise to an inference of racial discrimination by these individuals.

Nor does she 3 cite any authority, and the Court is aware of none, for the proposition that simply being of a 4 different race "suggests discriminatory motive." *Guz*, 24 Cal. 4th at 355. 5 3. Other claims raised in Frohm's opposition brief 6 The City objects to consideration of three arguments it contends Frohm raised for the first 7 time in her opposition brief: that she was discriminated against on the basis of race when (1) she 8 was required to take the MTB for the temporary 0941 position to which she applied in 2023; 9 (2) her temporary 0932 position was not made permanent under the City's Exempt to Permanent 10 Status ("E2P") program; and (3) she was removed from her 0932 position in 2023 and reverted 11 back to her supervising purchaser position, which was classified at the lower 1958 level.

12 "[S]ummary judgment is not a procedural second chance to flesh out inadequate 13 pleadings." *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) 14 (quoting *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 24 (1st Cir.1990)).

Thus, where a plaintiff 15 does not disclose a basis for liability "either in the operative complaint or in [their] discovery 16 responses," the court may refuse to consider those allegations at summary judgment. *Barrilleaux 17 v. Mendocino County*, No. 14-cv-01373-DMR, 2018 WL 3585133, at *9 (N.D. Cal. July 26, 2018) 18 (citing *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968–69 (9th Cir.

2006); *Coleman v. 19 Quaker Oats Co.*, 232 F.3d 1271, 1292-94 (9th Cir. 2000)). 20 The Court ordered supplemental briefing to allow Frohm to respond to the City's 21 timeliness arguments and the City to reply to Frohm's response. ECF No. 93.

Having reviewed 22 the record and the parties' supplemental briefs, the Court concludes that Frohm's opposition raised 23 new bases for liability but that, even if the Court were to consider those claims, it would conclude 24 that Frohm has not presented sufficient evidence to survive summary judgment. 25 First, as to the requirement to take the MTB for the 0941 position in 2023, Frohm does not 26 argue that she included that allegation in her complaint or in her response to the City's 27 interrogatory asking her to identify all adverse actions that she alleged the City took

against her, 1 Durden, Deputy Director of Operations, told her, “we don’t have the Management Battery Test on 2 temporary position[s], and it was going to be removed.

But if it’s not removed, take the test; and 3 eventually,... for a permanent position, you have to take the test.” ECF No. 94-1 at 14. She also 4 cites to a declaration from Larry Stringer, former Deputy Director of Operations, “confirm[ing] 5 what Ms. Frohm had already testified to,” ECF No. 94 at 3 (citing ECF No. 90-3 ¶¶ 7–8), but that 6 declaration was executed on November 14, 2024, ECF No. 90-3 at 3, the date Frohm filed her 7 opposition to the City’s summary judgment motion and after the close of discovery.

The Court 8 agrees with the City that Frohm’s lone deposition statement is insufficient to put the City on notice 9 that Frohm intended to assert a discrimination claim based on the City’s requiring her to take the 10 MTB. Frohm did not make that allegation in her complaint, identify it as a basis for her 11 discrimination claims during her deposition, or identify it as an adverse action in her interrogatory 12 responses.

But even if the Court were to consider the claim, Frohm has cited no evidence 13 indicating that other persons applying to that position were not required to take the MTB, or any 14 other evidence giving rise to an inference that the decision to require Frohm to take the MTB was 15 based on race. 16 Second, as to the E2P program, Frohm acknowledges that she did not raise the argument in 17 her complaint but argues that she did so in discovery.

However, none of the evidence she cites 18 refers to the E2P program. See ECF No. 94 at 2–3. Frohm correctly observes that her 19 interrogatory responses stated that she was discriminated against because, “[i]n May 2023, 20 plaintiff was denied the opportunity to extend her position and apply to fill a permanent position 21 equivalent to the position that she was serving in on a temporary basis,” and “[o]thers in the 22 department were able to have their positions extended past the June 30, 2023 deadline.” ECF No. 23 87-1 at 269.

But, as the City notes, Frohm “presents no evidence regarding the [E2P’s] program’s 24 parameters, such as its duration, scope, or eligibility requirements” or “evidence that her 0932 25 CAT 17 Manager IV position was eligible for the program.” ECF No. 91 at 6.

The only evidence 26 Frohm cites regarding the E2P program is testimony from Durden’s deposition, stating that Frohm 27 “may have” requested to use the program to make her 0932 position permanent; that Human 1 department did become permanent through the E2P program. ECF No. 90-1 at 57–59. This is not 2 evidence that failure to make Frohm’s position permanent through the E2P program was based on 3 race.

Moreover, as discussed above, Frohm did not receive a passing score on the MTB, and she 4 therefore has not demonstrated that she was qualified for a permanent 0932 position. 5 Finally, as to reversion to her 1958 position, the complaint does include allegations 6 regarding Frohm’s

request to stay in her temporary 0932 position past the June 30, 2023⁷ expiration date, that she was not allowed to do so, and that instead she could revert to her 1958⁸ position.

ECF No. 69 ¶¶ 54–57. But these allegations were not alleged as a basis for Frohm’s⁹ discrimination claims. To the contrary, both her FEHA and Title VII discrimination claims are¹⁰ based on “denying [Frohm’s] promotion to positions for which she was qualified and offering¹¹ such positions to non-Black persons with equal or lesser qualifications.” Id. ¶¶ 68, 75.

¹² Additionally, although Frohm testified that she believes she was “denied the ability to stay on¹³ past the June 30 deadline because of [her] race,” she named only two individuals who were allowed to¹⁴ keep their temporary positions past that deadline, and she identified both individuals as Black.¹⁵ ECF No. 94-1 at 17; ECF No. 90-1 at 42. She has thus failed to identify any similarly situated¹⁶ persons from outside her protected class who “were treated more favorably, or other circumstances¹⁷ surrounding the adverse employment action [that] give rise to an inference of discrimination.”¹⁸ Peterson, 358 F.3d at 603.

¹⁹ For all of the above reasons, the City’s motion for summary judgment is granted as to²⁰ Frohm’s discrimination claims. ²¹ B. Retaliation ²² Frohm brings her retaliation claims only under FEHA. The McDonnell Douglas burden- ²³ shifting framework also applies to such claims:²⁴ [T]o establish a prima facie case of retaliation..., a plaintiff must show (1) [they] engaged in a “protected activity,” (2) the employer²⁵ subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer’s²⁶ action.

Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for²⁷ the adverse employment action. If the employer produces a shifts back to the employee to prove intentional retaliation. ¹ Yanowitz v. L’Oreal USA, Inc., 36 Cal. 4th 1028, 1042 (2005) (citations omitted). ² In her opposition, Frohm asserts three bases for her retaliation claim: (1) failure to grant³ Durden’s June 2021 request to upgrade Frohm’s 0932 position to a 0941 position; (2) not allowing⁴ Frohm to transition from a temporary 0932 position to a permanent 0932 position in July 2021;⁵ and (3) failure to move Frohm to a 0941 position suing a CAT¹⁸ temporary placement in⁶ November 2021.³ ECF No. 90 at 30–31.

⁷ The Court previously dismissed Frohm’s retaliation claim as to the second asserted basis:⁸ Frohm alleges that she has been in her current 0932 position since⁹ April 2018, beginning on a backfilled basis, and that the permanent position was allowed to remain vacant for three years after the prior¹⁰ holder resigned in 2020. [ECF No. 41] ¶¶ 18, 32. She contends that she was retaliated against because she was not allowed to fill the¹¹ position on a permanent basis for those three years.

However, she does not allege that her being in the position on a backfilled basis¹² had any material effect on “the terms, conditions, or privileges of employment,” as required to state a

retaliation claim. Yanowitz, 36 13 Cal. 4th at 1052.

The Court therefore grants the City's motion as to the 0932 position. 14 ECF No. 62 at 4. Frohm did not file an amended complaint to attempt to cure these deficiencies, 15 and the claim is therefore no longer part of this lawsuit. 16 As to the first and third asserted bases, the City argues that Frohm did not raise them in the 17 complaint or identify them during discovery as bases for her retaliation claim.

In her supplemental 18 response, Frohm did not assert that these allegations were contained her complaint or in any 19 written responses to discovery. Instead, she relied on only eight lines from her deposition: 20 Q. Are there any other actions that happened to you that you feel 21 were retaliatory besides not getting a position or promotion like you've been describing?

22 23 A. Well, it's not that I didn't get a position or a promotion; it's that the process was not followed. 24 So, because the process was not followed, I didn't get the same 25 26 3 "CAT 18" refers to Category 18 under Section 10.104 of the City's Charter, which excludes from competitive civil service selection "[a]ppointments, which shall not exceed three years and 27 shall not be renewable, for special projects and professional services with limited term funding." opportunity as other people did.

So, for right now, that's all I can 1 think of right now. 2 ECF No. 94-1 at 20 (cited by ECF No. 94 at 5). The Court agrees with the City that this "vague 3 assertion... was insufficient to put the City on notice of the very specific claims raised in her 4 opposition" as to the CAT 18 temporary placement in November 2021. ECF No. 95 at 6.

Thus, 5 the Court need not consider that argument at summary judgment. *Barrilleaux*, 2018 WL 3585133, 6 at *9. Moreover, even if the Court did consider it, Frohm identifies Kimberly Castillo as the only 7 decisionmaker, ECF No. 90 at 31, but has not presented any evidence that Castillo knew of 8 Frohm's alleged protected activity. This would be insufficient to survive summary judgment 9 because "the decisionmaker's knowledge of the protected activity is an essential element" of a 10 FEHA retaliation claim.

Adams v. Kmart Corp., No. C 00-03885 WHA, 2001 WL 969049, at *4 11 (N.D. Cal. Aug. 10, 2001) (citing *Morgan v. Regents of Univ. of Cal.*, 88 Cal. App. 4th 52, 69–70 12 (2000)). 13 As to the denial of Durden's request to upgrade Frohm's position, however, although 14 Frohm did not cite this in her supplemental response, see ECF No. 94 at 5, the complaint contains 15 allegations regarding that request.

ECF No. 69 ¶ 44. In fact, the Court denied the City's motion to 16 dismiss Frohm's retaliation claim "as to HR's alleged failure to reclassify Frohm to a 0941 17 position in August 2021," which is when Frohm contends the City denied Durden's request. ECF 18 No. 62 at 4.

The City argues that Frohm identifies Castillo as the only decisionmaker as to this 19 action as well, but that misstates the record. Frohm does not clearly identify whom she contends 20 denied Durden's request, but the record contains some evidence that the decision was made after a 21 meeting that included Degrafinried, Human Resources Director Chanda Ikeda, and Employee and 22 Labor Relations Division Director Svetlana Vaksberg, and that these individuals knew of Frohm's 23 complaints.

ECF No. 90-1 at 201–03, 230–31; ECF No. 94-1 at 28–29. Nor is the Court 24 persuaded by the City's argument that failure to upgrade Frohm's classification to 0941 was not an 25 adverse employment action because Frohm would have had to compete for any position that was 26 created.

As the case relied on by the City itself explained, "adverse treatment that is reasonably 27 likely to impair a reasonable employee's... prospects for advancement or promotion" may form 1 grant summary judgment as to this claim. 2 C. Equal Pay Act 3 1. Merits 4 The EPA prohibits an employer from paying lower wages to employees of one sex "for 5 equal work on jobs the performance of which requires equal skill, effort, and responsibility, and 6 which are performed under similar working conditions." 29 U.S.C. § 206(d)(1).

Claims under the 7 EPA "have just two steps." *Rizo v. Yovino*, 950 F.3d 1217, 1223 (9th Cir. 2020). First, the 8 "employee bears the burden of establishing a prima facie case of wage discrimination by showing 9 that 'the employer pays different wages to employees of the opposite sex for substantially equal 10 work.'" *Id.* at 1222 (quoting *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir.

1986)). If the 11 employee meets that burden, then "the burden shifts to the employer to show that the differential is 12 justified under one of the Act's four exceptions." *Id.* (quoting *Corning Glass Works v. Brennan*, 13 417 U.S. 188, 196 (1974)).

The four exceptions are when differential payments are "made 14 pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by 15 quantity or quality of production; or (iv) a differential based on any other factor other than sex." 16 29 U.S.C. § 206(d) (1).

The City invokes the fourth exception here, which, like the first three, is 17 "limited to job-related factors." *Rizo*, 950 F.3d at 1225. The legislative history of the EPA 18 indicates that Congress intended "that a bona fide job classification program that does not 19 discriminate on the basis of sex will serve as a valid defense to a charge of discrimination." 20 *Corning Glass Works*, 417 U.S. at 201 (quoting H.R.

Rep. No. 88-309, reprinted in 1963 21 U.S.C.C.A.N. 687, 689). 22 Frohm does not contest any of the City's evidence regarding its classification and 23 compensation system, but the fact that

Frohm's position was classified as a 0932 Manager IV 24 position while the male employees to whom she compares herself worked in higher-classified 25 0941 Manager VI positions is not dispositive.

As one of the cases relied on by the City explained: 26 [E]mployers cannot meet their burden of proving that a factor-other- than-sex is responsible for a wage differential by asserting use of a 27 gender-neutral classification system without more. Rather, claims only when the employer proves that the job classification 1 system resulting in differential pay is rooted in legitimate business-related differences in work responsibilities and qualifications for the 2 particular positions at issue.

3 Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 525 (2d Cir. 1992). "Surely," the court 4 continued, "Congress did not intend that an employee would lose an EPA claim after making out a 5 prima facie case of wage discrimination simply because, for example, the employer chooses to call 6 one employee a cleaner and another employee a custodian." Id. 7 In its motion, although the City "disputes that Plaintiff was performing the same or 8 substantially equal work in comparison to Mr. Naclerio or Mr. Keenan," two white men in 0941 9 Superintendent positions within the Department of Public Works, it argued that "the Court need 10 not reach that issue for purposes of this motion." ECF No. 87 at 27.

The City thus did not attempt 11 to establish a lack of disputed facts as to whether Frohm and her comparators performed the same 12 or substantially equal work. However, if, as the City assumes for purposes of this motion, Frohm 13 did perform the same or substantially equal work as Naclerio or Keenan, then that is some 14 evidence that the City's classification system was not "rooted in legitimate business-related 15 differences in work responsibilities and qualifications for the particular positions at issue." 16 Aldrich, 963 F.3d at 525.

The City therefore has not demonstrated a lack of disputed material 17 facts on its affirmative defense that the pay differential was based on a factor other than sex, and 18 the Court denies the City's motion as to Frohm's EPA claim. 19 2. Statute of Limitations 20 The City also seeks summary judgment on the applicable statute of limitations. EPA 21 claims are subject to a two-year statute of limitations unless the action "aris[es] out of a willful 22 violation," in which case the statute of limitations is three years.

29 U.S.C. § 255(a). Willfulness 23 in this context requires a showing "that the employer either knew or showed reckless disregard for 24 the matter of whether its conduct was prohibited by the statute." McLaughlin v. Richland Shoe 25 Co., 486 U.S. 128, 133 (1988). Courts do "not presume that conduct was willful in the absence of 26 evidence." Alvarez v. IBP, Inc., 339 F.3d 894, 909 (9th Cir.

2003). 27 Frohm "agrees that since her lawsuit was filed on August 8, 2022, her recovery without 1 violation and therefore her recovery will go back to August 8, 2019." ECF No. 90 at 28. 2 ||

However, Frohm cites no legal authority to support her contention. She cites evidence regarding 3 the process a City employee might follow if they believed they were entitled to a higher 4 || classification, and she asserts that she “spoke to her supervisors informing them she was 5 || performing work above her classification and requested higher pay,” but that “an audit on her 6 || classification was never performed, nor was she provided with acting pay nor was the work taken 7 away from her.” Jd.

However, none of the cited testimony goes to whether the City knew or had 8 || reckless disregard for whether its classification of Frohm’s job as a 0932 position violated the 9 EPA, which is the relevant question for determining if the three-year statute of limitation applies.* 10 || Consequently, the Court cannot conclude that there are disputed material facts as to the City’s 11 willfulness, and it will therefore apply a two-year statute of limitations to Frohm’s EPA claim.

12 CONCLUSION 13 For the above reasons, the City’s motion for summary judgment is granted in part and 14 || denied in part. The motion is denied as to: (1) Frohm’s retaliation claim based on the denial of 3 15 || Durden’s June 2021 request to upgrade the classification of Frohm’s position from 0932 to 0941, a 16 || and (2) the merits of Frohm’s Equal Pay Act claim.

It is granted in all other respects. IT IS SO ORDERED. || Date: May 14, 2025. 19 JON S. TIGA 20 nited States District Judge 21 22 23 24 25 26 * Additionally, the cited paragraph from Frohm’s declaration states, “An audit was never performed on my classification, nor was I provided with acting pay nor was the work taken away 97 || from me. I don’t understand this section.” ECF No. 90-2 §| 18 (emphasis added).

As the City correctly suggests, this indicates that the cited paragraph is not competent evidence because, 28 although she signed her declaration under penalty of perjury, Frohm apparently did not understand these statements.