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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

LISA STOUT, individually and the marital  
community composed of Lisa and Ray C. Stout,

Plaintiff,

v.

UNITED AIR LINES, INC.,

Defendant.

CASE NO. C07-0682-JCC

ORDER

**REDACTED**

This matter comes before the Court on Plaintiff’s Motion for Partial Summary Judgment (Dkt. No. 50), Defendant’s Response (Dkt. No. 72), and Plaintiff’s Reply (Dkt. No. 75), as well as Defendant’s Motion for Summary Judgment (Dkt. No. 56), Plaintiff’s Response (Dkt. No. 67), and Defendant’s Reply (Dkt. No. 74). Having considered these papers, their supporting declarations and exhibits, and the balance of the record, the Court has determined that oral argument is not necessary. For the reasons discussed herein, the Court finds and rules as follows.

**I. BACKGROUND**

Plaintiff Lisa Stout became a pilot for Defendant United Air Lines, Inc. (“United”) in October 1990. (Def.’s Answer 3 (Dkt. No. 7).) During the relevant time frame for the instant dispute, Plaintiff held the position of a B737 Captain and was based in Seattle, Washington. (*Id.*) Plaintiff alleges that from

1 June 8, 2004, through her last flight on June 26, 2005, in over twenty instances on different flights, “she  
2 encountered graphic, sexually-explicit, offensive pornographic photographs taped and glued in various  
3 places within the cockpit.” (Pl.’s Mot. 1–2 (Dkt. No. 50).) The images were generally adhered inside the  
4 closed pilot’s ashtray and under the stickshaker cap. (Chart Answer to Interrogatory No. 2 (Dkt. No. 51-  
5 4 at 2).) The first time she found the pornography in June 2004, Plaintiff noted its existence in the United  
6 maintenance log and contacted her union, the Airline Pilot’s Association (“ALPA”), for guidance on what  
7 could be done about it. (Stout Dep. 66:24–67:25, 72:2–5 (Dkt. No. 42 at 18, 19).) On June 16, 2004, the  
8 professional standards committee head at ALPA told Plaintiff that ALPA did not deal with sexual  
9 harassment complaints and that Plaintiff would have to lodge a complaint with United. (Stout Dep.  
10 73:3–8 (Dkt. No. 42 at 19).) On June 21, 2004, Plaintiff contacted her supervisor at United, Captain  
11 Ulrika Wallitner, to report the pornography she had found that month. (Compl. ¶ 4.2 (Dkt. No. 1 at 3).)  
12 She told Wallitner that she wanted to file a sexual harassment complaint. (Pl.’s Mot. 4 (Dkt. No. 50).)  
13 Wallitner contacted Sheryl Hinkle, United’s Senior Human Resources Representative, for guidance.  
14 (Hinkle Dep. 86:1–25 (Dkt. No. 52-4 at 10).) Hinkle referred Wallitner to United’s Supervisor’s Packet  
15 for Responding to a Sexual Harassment Claim. (Pl.’s Mot. 4 (Dkt. No. 50); Hinkle Dep. 86:24–92:1  
16 (Dkt. No. 52-4 at 10–12).)

17 On June 24, 2004, Wallitner conducted a telephone interview of Plaintiff, based on questions in  
18 the packet. (Def.’s Answer ¶ 4.2 (Dkt. No. 7 at 3); Wallitner Dep. 144:7–18 (Dkt. No. 52-3 at 17).)  
19 Plaintiff met in person with Wallitner on July 24, 2004, and also completed a “Written Statement of  
20 Alleged Victim.” (Def.’s Answer ¶ 4.2 (Dkt. No. 7 at 3).) By this time, Plaintiff had noted in the  
21 maintenance logs that she had encountered pornography on her flights on June 8, July 1, and July 18.  
22 (Pl.’s Mot. 5 (Dkt. No. 50).) Following Wallitner’s face-to-face interview with Plaintiff, Wallitner  
23 conducted an investigation, which consisted of three steps: (1) an interview with the First Officer from  
24 the June 8 flight who had also seen the pornography that day; (2) a check of one aircraft to see that  
25 pornography had been adhered to places in the cockpit; and (3) a conversation with Captain Waingrow,

1 her job-share flight manager, in which Wallitner asked Waingrow to check his aircraft during the next  
2 flight month to see if pornography was present—which Waingrow later answered in the affirmative.  
3 (Wallitner Dep. 161:12–173:16; 174:10–17 (Dkt. No. 52-3 at 36); Def.’s Resp. 3 (Dkt. No. 72 at 4).)  
4 After the investigation, Wallitner and Hinkle had a phone conversation to determine how to remedy the  
5 situation, during which they discussed who could have placed the pornography in the cockpits—including  
6 pilots, mechanics, flight attendants, customer service representatives, ramp operators, fuelers, cleaners  
7 and caterers. (Wallitner Dep. 181:17–182:4 (Dkt. No. 52-3 at 38–39).) However, Wallitner and Hinkle  
8 were “unable to devise a method of identifying and punishing the responsible individual(s).” (Def.’s Resp.  
9 4 (Dkt. No. 72 at 5).)

10 Defendant had in place a “zero-tolerance” anti-harassment policy that prohibited “[d]isplay in the  
11 workplace of sexually suggestive objects or pictures[.]” (Def.’s Resp. 2 (Dkt. No. 72 at 3); Policy on  
12 Harassment & Discrimination (Dkt. No. 39-2 at 30–31).) The policy stated that “[i]ndividuals found after  
13 a thorough and impartial investigation to have engaged in conduct constituting harassment or  
14 discrimination will be disciplined up to and including discharge.” (Dkt. No. 39-2 at 33.) Hinkle testified in  
15 a declaration that Defendant widely disseminated this policy to its employees, that all pilots had been  
16 provided a copy of the policy in their flight operations manuals, and that employees had received  
17 numerous live and online trainings on United’s policy. (Hinkle Decl. ¶ 4 (Dkt. No. 73-2 at 2).)  
18 Accordingly, according to Defendant, when Plaintiff reported her complaint, Defendant appropriately  
19 responded by reminding its pilots about the policy. (Def.’s Resp. 3 (Dkt. No. 72 at 4).) On August 17,  
20 2004, Defendant sent an e-note message<sup>1</sup> to all United pilots stating as follows:

21 United Airlines is dedicated to providing a safe and non-discriminatory work environment  
22 for all employees. Unfortunately, we have recently encountered a few instances where  
23 inappropriate materials were found in the cockpit. If you discover any inappropriate  
materials please note it in the logbook, request that maintenance remove the material, and

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24 <sup>1</sup>An “e-note” is an electronic message posted on the United communications system, accessible to  
25 certain employees for a predetermined length of time. (See Pl.’s Mot. 9 (Dkt. No. 50).) The August 17,  
2004, e-note was accessible by pilots from August 17–31, 2004. (*Id.*)

1 notify your flight office immediately. Thank you[.]

2 Captain Mark Sebby  
3 Manager Line Operations

4 (E-note to Pilots (Dkt. No. 52-6 at 2) (brackets added).) Defendant explains that any defects noted on the  
5 maintenance log must be addressed before a plane can fly again. (Def.'s Resp. 5 (Dkt. No. 72 at 6).) In  
6 this way, Defendant asserts, all reported instances of pornography would be promptly removed. (*Id.*)  
7 Although the line mechanics were supposed to be copied on the e-note, the line mechanics did not receive  
8 the message. (Wallitner Dep. 189:16–19, 210:25–211:4 (Dkt. No. 52-3 at 44, 51–52); Hinkle Dep.  
9 183:4–20 (Dkt. No. 52-4 at 62).) That same day, August 17, Wallitner closed the complaint file. (Closing  
10 Letter (Dkt. No. 52-7 at 2).)

11 Plaintiff alleges that she continued to find pornography in the cockpits of United aircraft she was  
12 scheduled to fly. (Compl. ¶ 4.4 (Dkt. No. 1 at 3).) She reported these instances in the logbook for  
13 maintenance removal on August 3, 4, 5, 31, September 1, 7, 8, and 9. (Pl.'s Mot. 11 (Dkt. No. 50);  
14 Maintenance Log Entries (Dkt. No. 54 at 4–6).) In September 2004, she again complained to Wallitner  
15 that she was finding pornography on her flights. (Compl. ¶ 4.4 (Dkt. No. 1 at 3); Wallitner Dep. 212:1–2  
16 (Dkt. No. 52-3 at 53).) Wallitner, however, did not re-open the investigation. (Pl.'s Mot. 12 (Dkt. No.  
17 50).) Instead, sometime in October 2004, Defendant sent another e-note, this time to United's line  
18 mechanics, stating that:

19 United Airlines is dedicated to providing a safe and non-discriminatory work environment  
20 for all employees. Periodically, we encounter instances where inappropriate materials are  
21 found in the cockpit. If you discover any inappropriate materials please note it in ACARS,  
22 remove the material and notify your manager immediately.

23 (Pl.'s Mot. 12 (Dkt. No. 50).)

24 Plaintiff asserts that despite her complaints to Wallitner, her reports in the logbook, and her  
25 requests to maintenance to remove the material, she continued to find pornography glued and taped in  
26 places around the cockpit on approximately 19 flights after she made her initial report. (Compl. ¶ 4.5  
(Dkt. No. 1 at 4).) Other pilots also found pornography in the cockpit and noted these instances in the

1 logbooks. (Pl.'s Mot. 14–15 (Dkt. No. 50).) Neither Hinkle nor Wallitner monitored the logbooks for  
2 reports of pornography, nor conducted any further investigation. (Pl.'s Mot. 15 (Dkt. No. 50); Hinkle  
3 Dep. 198:16–23 (Dkt. No. 52-4 at 68).) However, Defendant contends, maintenance logs were not meant  
4 to serve as a reporting mechanism for harassment issues. (Def.'s Resp. 7 (Dkt. No. 72 at 8).) Pursuant to  
5 the e-notes, the pilots and line mechanics were supposed to report any incidents of pornography to their  
6 flight offices or managers in addition to noting the pornography in the logbooks for removal. (*Id.*)  
7 Defendant asserts that besides her two reports to Wallitner in June/July and mid-September 2004,  
8 Plaintiff made no other complaints about pornography to any supervisor at United, even though she  
9 continued to note its presence in the logbooks. (*Id.*) As such, Defendant argues, it was unaware that  
10 Plaintiff found pornography on over twenty flights during the course of approximately a year. (Def.'s  
11 Resp. 8 (Dkt. No. 72 at 9).)

12 Plaintiff contends that being subjected to repeated instances of pornography in her workplace was  
13 humiliating and affected her ability to focus and do her job, and thereby endangered the crew and  
14 passengers. (Compl. ¶ 4.5 (Dkt. No. 1 at 4).) Plaintiff asserts that Defendant failed to take adequate  
15 remedial steps to remedy the situation and therefore is liable for subjecting Plaintiff to a hostile work  
16 environment. (*Id.* at ¶¶ 4.6–4.7.) Plaintiff also contends that she was retaliated against after she made her  
17 complaints by being treated with disdain, by being singled out for criticism, and by being “red flagged”  
18 and docked in pay. (*Id.* at ¶ 4.8.) Plaintiff alleges that the hostile work environment caused her to suffer a  
19 work-induced medical condition that forced her to voluntarily ground herself from flying. (*Id.* at ¶ 4.9.)  
20 She left employment with United on July 5, 2005; her medical grounding was effective August 9, 2005.  
21 (Def.'s Answer ¶ 4.9 (Dkt. No. 7 at 4).)

22 Plaintiff filed the instant lawsuit on May 3, 2007, bringing claims for hostile work environment  
23 sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended, 42  
24 U.S.C. § 2000e, *et seq.*, and the Civil Rights Act of 1991. (Compl. ¶¶ 5.2, 6.2 (Dkt. No. 1 at 5).) She  
25 also seeks punitive damages as authorized by Title VII. (*Id.*) In addition, Plaintiff brings similar

1 supplemental state law causes of action under the Washington Law Against Discrimination. (Compl. ¶¶  
2 7.2, 8.2 (Dkt. No. 1 at 6).) Defendant denies liability and asserts numerous defenses, including the  
3 contention that Defendant exercised reasonable care to prevent and correct promptly any sexually  
4 harassing behavior and that Plaintiff failed to take advantage of United's preventive and corrective  
5 opportunities. (Def.'s Fifth Defense (Dkt. No. 7 at 6).)

6 In the instant motions, Plaintiff seeks partial summary judgment on the issues of whether Plaintiff  
7 was subjected to a hostile work environment and whether Defendant took adequate remedial steps  
8 reasonably calculated to end the harassment. (Pl.'s Mot. 1 (Dkt. No. 50).) Plaintiff also seeks to strike  
9 Defendant's Fifth Defense—that it exercised reasonable care to prevent and remedy any harassment. (*Id.*  
10 at 3.) Defendant seeks summary judgment on the issues of whether United took adequate remedial action,  
11 whether United retaliated against Plaintiff, whether Plaintiff is entitled to punitive damages, and whether  
12 Plaintiff's alleged misconduct limits her potential remedies. (Def.'s Mot. i (Dkt. No. 56 at 2).) With  
13 respect to the latter three arguments, Defendant asserts that in 2004 and 2005, Plaintiff's supervisors  
14 were forced to talk with Plaintiff about "communications problems she was having with her co-workers  
15 and her improper use of United's fatigue policy." (Def.'s Mot. 5 (Dkt. No. 56 at 10).) [REDACTED]

16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED] Defendant  
19 argues that if it had known of these misrepresentations, it would have terminated Plaintiff's employment.  
20 (*Id.*) Plaintiff moves to strike that argument as scurrilous. (Pl.'s Resp. 21 (Dkt. No. 67).)

## 21 II. APPLICABLE STANDARD

22 Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file,  
23 and any affidavits show that there is no genuine issue as to any material fact and that the movant is  
24 entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). "A 'material' fact is one that is relevant  
25 to an element of a claim or defense and whose existence might affect the outcome of the suit." *T.W. Elec.*

1 *Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987). The moving party bears  
2 the initial burden of showing that no genuine issue of material fact exists. *Matsushita Elec. Indus. Co. v.*  
3 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). If the moving party meets this initial burden, then the  
4 party opposing the motion must set forth facts showing that there is a genuine issue for trial. *See T.W.*  
5 *Elec. Serv.*, 809 F.2d at 630. The party opposing the motion must “do more than simply show that there  
6 is some metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586. “In response to a  
7 summary judgment motion, . . . the [non-moving party] can no longer rest on . . . mere allegations, but  
8 must set forth by affidavit or other evidence specific facts, . . . which for the purposes of the summary  
9 judgment motion will be taken to be true.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992);  
10 FED. R. CIV. P. 56(e). If the nonmoving party fails to establish the existence of a genuine issue of material  
11 fact, “the moving party is entitled to judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S.  
12 317, 323–24 (1986).

13 Where the moving party bears the ultimate burden of proof at trial, she must affirmatively put  
14 forth evidence that would satisfy her burden of proof at trial. STEPHEN S. GENSLER, FEDERAL RULES OF  
15 CIVIL PROCEDURE: RULES AND COMMENTARY 777 (2008). The nonmoving party can defeat summary  
16 judgment with fact assertions that create a genuine dispute as to any essential element of the moving  
17 party’s claim. *Id.*

### 18 **III. ANALYSIS**

#### 19 **A. Plaintiff’s Motion for Summary Judgment**

##### 20 **1. Hostile Work Environment**

21 “Title VII guarantees employees ‘the right to work in an environment free from discriminatory  
22 intimidation, ridicule, and insult.’” *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1095 (9th Cir. 2008)  
23 (*quoting Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)). Plaintiff argues that she is entitled  
24 to summary judgment on the issues of whether she was subjected to hostile work environment  
25 discrimination in violation of Title VII and on the issue of whether Defendant took adequate remedial

1 steps reasonably calculated to end the harassment. (Pl.’s Mot. 1 (Dkt. No. 50).)

2 “To make a prima facie case of a hostile work environment, a person must show ‘that: (1) she  
3 was subjected to verbal or physical conduct of a sexual nature, (2) this conduct was unwelcome, and (3)  
4 the conduct was sufficiently severe or pervasive to alter the conditions of the victim’s employment and  
5 create an abusive working environment.’” *Craig v. M & O Agencies, Inc.*, 496 F.3d 1047, 1055 (9th Cir.  
6 2007) (quoting *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995) (internal quotations  
7 omitted)). “[T]he working environment must be both subjectively and objectively perceived as abusive.”  
8 *Id.*

9 **a. Subjectively Abusive Environment**

10 Plaintiff makes the following showing that she subjectively found her workplace to be hostile  
11 towards women: Plaintiff reported the pornography problem to her union the first time she discovered it  
12 in June 2004, she complained on at least two occasions to Wallitner in June/July and September 2004,  
13 she filed a formal sexual harassment complaint with United based on finding pornography in the cockpit,  
14 and she made approximately twenty notes in the maintenance logs for the removal of the pornography  
15 over the course of approximately a year. She also testified at her deposition that when she saw the  
16 pornography in her workplace, she was “ashamed[,]” “taken aback[,]” “embarrassed[,]” and  
17 “disappointed.” (Stout Dep. 34:13–14 (Dkt. No. 42 at 10).)

18 Defendant argues in response to Plaintiff’s motion that Plaintiff cannot demonstrate that she found  
19 the pornography subjectively offensive because: (1) she previously saw pornography on the aircraft  
20 between 1991 and 1993 and did not complain then; (2) she once worked in a retail store that sold  
21 pornographic magazines and encountered no problems working there; (3) as an artist, Plaintiff views and  
22 draws live nude models; (4) Plaintiff wrote a novel whose cover depicts nude women; (5) Plaintiff  
23 recently attended an art exhibit displaying photographs of nude women and “Plaintiff was unable to  
24 explain the distinction between art and pornography.” (Def.’s Resp. 9 (Dkt. No. 72 at 10).) Defendant  
25 also attempts to raise doubt about Plaintiff’s motivations for alleging that pornography interfered with her

1 work. Specifically, Defendant argues that because on the author bio flap of her novel, Plaintiff stated that  
2 she considered herself a writer and artist “first and foremost,” she did not want to work as a pilot. (Def.’s  
3 Resp. 10 (Dkt. No. 72 at 11).) In addition, Defendant points to the fact that Plaintiff and her husband  
4 moved two hours from Seattle before Plaintiff stopped working, ostensibly showing that she was not  
5 prioritizing work, and that some of Plaintiff’s art collages express “distaste for work.” (*Id.*) Defendant  
6 argues that Plaintiff was motivated to claim that she had developed a mental condition caused by the  
7 harassment and retaliation so that she could get long-term disability payments to support her art career  
8 and retirement from flying. (*Id.*)

9         The Court finds Defendant’s arguments could most charitably be described as unpersuasive. To  
10 suggest that Plaintiff could not be offended by explicit pornographic images such as the ones attached as  
11 exhibits to the Stout Declaration (Dkt. Nos. 51-2 at 2, 51-3 at 3) based on the fact that she depicts the  
12 female form in her own artwork (Dkt. No. 73-6 at 1) or attends art exhibits comes across to this Court as  
13 disingenuous. It is not the female form *per se* that Plaintiff claims to have found objectionable—it was  
14 repeatedly finding in her workplace explicitly sexual photographs depicting women as sexual objects.  
15 Further, the fact that Plaintiff worked as a cashier in a general store that happened to carry pornographic  
16 magazines for three months nearly thirty years prior to the conduct at issue in this case, (Stout Dep.  
17 207:25–209:10 (Dkt. No. 42)), is evidence is of doubtful relevance. Moreover, Plaintiff testified at her  
18 deposition that the reason she did not file any complaints regarding pornography she found in the early  
19 1990s was that she had just been hired in 1990 and was afraid to report it because “[i]t was a different  
20 culture in the 1990s. It was a male-dominated industry then as well as now. There are about four women  
21 in a hundred pilots. And I didn’t think it would be received very well.” (Pl.’s Reply 3 (Dkt. No. 75);  
22 Stout Dep. 27:9–20 (Dkt. No. 42 at 8).) Finally, Plaintiff’s interest in art, her choice of where to live, and  
23 the subject of her art collages do nothing to dissuade the Court that Plaintiff subjectively found her  
24 workplace to be hostile towards women.

25         The Ninth Circuit has said that to prove a hostile workplace claim, “the harassment need not

1 cause diagnosed psychological injury.” *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1113 (9th Cir.  
2 2004) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993)). Rather, “[a] working environment is  
3 abusive if ‘hostile conduct pollutes the victim’s workplace, making it more difficult for her to do her job,  
4 to take pride in her work, and to desire to stay on in her position.’” *Davis*, 520 F.3d at 1095 (quoting  
5 *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463 (9th Cir. 1994)). The Court finds it highly  
6 unlikely that a jury could find that Plaintiff did not subjectively perceive her working environment to be  
7 abusive towards women. However, a closer fact question exists on the issue of whether a reasonable  
8 woman would feel the same way, and for the reasons discussed below, the Court will leave for trial the  
9 question of whether Plaintiff was subjected to a hostile work environment.

10 **b. Objectively Abusive Environment**

11 “[W]hether a particular work environment is objectively hostile is necessarily a fact-intensive  
12 inquiry[.]” *Patane v. Clark*, 508 F.3d 106, 114 (2d Cir. 2007). “The objective measure of an abusive  
13 working environment is set by what a reasonable woman would consider abusive.” *Davis*, 520 F.3d at  
14 1095 (citing *Ellison v. Brady*, 924 F.2d 872, 879–80 (9th Cir. 1991)). The Court “must consider all the  
15 circumstances, including ‘the frequency of the discriminatory conduct; its severity; whether it is physically  
16 threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an  
17 employee’s work performance.’” *Id.* (quoting *Harris*, 510 U.S. at 23). “[N]o single factor is required and  
18 [t]he required level of severity or seriousness varies inversely with the pervasiveness or frequency of the  
19 conduct.” *Id.* (quoting *Harris*, 510 U.S. at 23; *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 872  
20 (9th Cir. 2001)) (internal quotation marks omitted). “[W]here the severity of frequent abuse is  
21 questionable, it is more appropriate to leave the assessment to the fact-finder than for the court to decide  
22 the case on summary judgment.” *Id.* at 1096.

23 Defendant argues that a reasonable juror could conclude that the pornography was not severe and  
24 pervasive enough that it would alter the conditions of Plaintiff’s employment. (Def.’s Resp. 13 (Dkt. No.  
25 72 at 14).) The Court finds that no genuine issue of material fact exists as to whether the pornography

1 itself is objectively offensive. Sheryl Hinkle, United's Senior Human Resources Representative, testified  
2 both that she herself found the pornography offensive, (Hinkle Dep. 244:3–18 (Dkt. No. 52-4 at 80)),  
3 and that the pornography in the cockpit was a violation of United's company policy on harassment and  
4 discrimination. (Hinkle Dep. 103:20–23; 141:8–10 (Dkt. No. 52-4 at 17, 37).) However, the Court's  
5 finding that the pornography is objectively offensive does not necessarily mean a reasonable woman  
6 would find that the instances of pornography in the cockpit were pervasive and severe enough to alter the  
7 conditions of her employment.

8         The District of New Jersey has acknowledged that, where a female pilot for a major airline  
9 encountered repeated instances of pornography in the cockpit, and endured demeaning comments, such  
10 an atmosphere may violate Title VII. *Blakey v. Continental Airlines, Inc.*, 992 F. Supp 731, 742 (D. N.J.  
11 1998). In addition, the Second Circuit has held that “the mere presence of pornography in a workplace  
12 can alter the ‘status’ of women therein and is relevant to assessing the objective hostility of the  
13 environment.” *Patane*, 508 F.3d at 114. Arguing to the contrary, Defendant points to an unpublished case  
14 from the Ninth Circuit, *Fonseca v. Secor International, Inc.*, for the proposition that a reasonable woman  
15 would not find her workplace hostile just because of the occasional presence of pornography. 247 Fed.  
16 App'x 53, 55 (9th Cir. 2007). In *Fonseca*, the plaintiff alleged that she entered her supervisor's office  
17 unannounced and repeatedly caught him looking at pornography on his computer, which he attempted to  
18 hide from her, and to which she was subjected for no longer than a few seconds at a time. *Id.* The Ninth  
19 Circuit held that although the supervisor's conduct was frequent, “a reasonable woman would not find  
20 [the supervisor's] conduct to be sufficiently severe or pervasive to alter the conditions of [her]  
21 employment and create an abusive working environment.” *Id.* (internal quotation marks and citation  
22 omitted). The Court finds *Fonseca* distinguishable here, where the pornography was permanently affixed  
23 to various places in Plaintiff's working area, she was exposed to it for more than a few seconds at a time,  
24 and she had to take affirmative steps to have the pornography removed.

25         Notwithstanding the foregoing, a few facts make the severity and pervasiveness of the

1 pornography here appropriate for assessment by a jury. First, Plaintiff states that she encountered  
2 pornography on approximately twenty-one flights over the course of a little over a year. It is unclear how  
3 many flights she piloted over the course of that time. Plaintiff characterizes the frequency as averaging  
4 twice a month for one year, though the Court is not persuaded that averaging the number of instances  
5 over the course of the year appropriately describes Plaintiff's work environment. Defendant asserts that  
6 between December 1, 2004, and her last flight on June 28, 2005, Plaintiff observed pornography on only  
7 four of her 106 flights. (Def.'s Resp. 11 (Dkt. No. 72 at 12).) Of course, that means that Plaintiff viewed  
8 approximately seventeen instances over the previous six months. However, the pornography was hidden  
9 in closed spaces around the cockpit and was removed or made inaccessible before takeoff at each  
10 reported instance. In addition, the pornography was not accompanied by demeaning comments and may  
11 not have been targeted at Plaintiff. The Court finds that the severity and the pervasiveness of the conduct  
12 at issue, while of concern to the Court, is best left for the jury to weigh in determining whether a  
13 reasonable woman would find Plaintiff's workplace sufficiently abusive to constitute a hostile workplace.  
14 This is not a case where Plaintiff faced a sustained campaign of taunts directed at her by a supervisor and  
15 co-workers, *see Nichols*, 256 F.3d at 872–73, nor is it comparable to being the targeted recipient of  
16 unwanted love letters and date requests from a co-worker, *see Ellison*, 924 F.2d at 880–81, nor does  
17 Plaintiff claim as the basis for her hostile workplace claim that she was individually “barraged with insults  
18 and abuse” by co-workers and supervisors, *see McGinest*, 360 F.3d at 1114. The Court is not persuaded  
19 that the facts presented by Plaintiff obviate the need for a trial to establish conclusively whether Plaintiff  
20 was subjected to a hostile work environment.

## 21           2.       Plaintiff's Other Claims at Summary Judgment

22           Plaintiff also argues that she is entitled to summary judgment on her claim that Defendant did not  
23 take adequate remedial steps to correct and prevent the hostile environment. In addition, Plaintiff seeks to  
24 strike Defendant's Fifth Defense—i.e., that Defendant used reasonable care to correct and prevent the  
25 harassment. Because the Court declines to find that, as a matter of law, Plaintiff suffered a hostile work

1 environment, the Court must DENY Plaintiff's motion for partial summary judgment in its entirety. The  
2 Court cannot logically find that as a matter of law, Defendant did not take adequate remedial steps to  
3 remedy a situation that has not yet been found to constitute a hostile work environment. As such, the  
4 Court now turns to Defendant's motion for summary judgment to determine whether, considering  
5 Defendant's arguments, Plaintiff's claims survive for trial.

## 6 **B. Defendant's Motion for Summary Judgment**

7 In evaluating Defendant's motion for summary judgment, the Court keeps in mind the Ninth  
8 Circuit's directive that:

9 A plaintiff alleging employment discrimination need produce very little evidence in order  
10 to overcome an employer's motion for summary judgment. This is because the ultimate  
11 question is one that can only be resolved through a searching inquiry—one that is most  
12 appropriately conducted by a factfinder, upon a full record. In evaluating motions for  
13 summary judgment in the context of employment discrimination, [the Ninth Circuit has]  
14 emphasized the importance of zealously guarding an employee's right to a full trial, since  
15 discrimination claims are frequently difficult to prove without a full airing of the evidence  
16 and an opportunity to evaluate the credibility of the witnesses.

17 *Davis*, 520 F.3d at 1089 (internal quotations and citations omitted). The Supreme Court has said that  
18 “[t]he real social impact of workplace behavior often depends on a constellation of surrounding  
19 circumstances, expectations, and relationships which are not fully captured by a simple recitation of the  
20 words used or the physical acts performed.” *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75,  
21 81–82 (1998). “As a result, when a court too readily grants summary judgment, it runs the risk of  
22 providing a protective shield for discriminatory behavior that our society has determined must be  
23 extirpated.” *McGinest*, 360 F.3d at 1112.

24 The Court will address each of Defendant's arguments, in turn, below.

### 25 **1. Adequacy of Remedial Measures**

26 Defendant first argues that it took adequate remedial steps to address Plaintiff's complaints, and  
therefore, as a matter of law, it cannot be held liable for the placement of the pornography on Plaintiff's  
flights. (Def.'s Mot. 7 (Dkt. No. 56 at 12).) Defendant never discovered who placed the pornography in

1 the cockpit, and therefore, in Plaintiff's motion, Plaintiff analyzes Defendant's liability under the  
2 alternative theories of co-worker harassment, harassment by supervisors, and harassment by third parties.  
3 (*Id.* at 20–24.) Under each of these theories, Plaintiff argues, Defendant's response was inadequate to  
4 shield Defendant from liability. Defendant, however, asserts that there is no evidence to suggest that the  
5 pornography was placed on the flight deck area by any supervisor, and that, therefore, the co-worker  
6 harassment standard applies.

7 “Where harassment by a co-worker is alleged, the employer can be held liable only where ‘its own  
8 negligence is a cause of the harassment.’” *Swenson v. Potter*, 271 F.3d 1184, 1191 (9th Cir. 2001)  
9 (*quoting Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759 (1998)). In other words, if the harassment  
10 was perpetrated not by a supervisor but “merely a coworker, the plaintiff must prove that . . . the  
11 employer knew or should have known of the harassment but did not take adequate steps to address it.”  
12 *McGinest*, 360 F.3d at 1119 (*quoting Swinton v. Potomac Corp.*, 270 F.3d 794, 803 (9th Cir. 2001)).  
13 Adequate remedial measures “must include immediate and corrective action reasonably calculated 1) to  
14 end the current harassment, and 2) to deter future harassment from the same offender or others.”  
15 *Yamaguchi v. United States Dep’t of the Air Force*, 109 F.3d 1475, 1483 (9th Cir. 1997) (*citing Fuller*,  
16 47 F.3d at 1528); *accord McGinest*, 360 F.3d at 1120. “[T]o avoid liability an employer must take at  
17 least some form of disciplinary action against a harassing co-worker in order to prevent future workplace  
18 sexual harassment.” *Id.* (*citing Intlekofer v. Turnage*, 973 F.2d 773, 777 (9th Cir. 1992)). This is because  
19 “[e]mployers have a duty to ‘express[ ] strong disapproval’ of sexual harassment, and to ‘develop [ ]  
20 appropriate sanctions.’” *Ellison*, 924 F.2d at 881 (*quoting 29 C.F.R. § 1604.11(f)*). In assessing an  
21 employer's liability, “[t]he adequacy of the employer's response depends on the seriousness of the sexual  
22 harassment.” *Yamaguchi*, 109 F.3d at 1483.

23 Defendant argues that it took adequate remedial measures to address any harassment that it knew  
24 or should have known about. First, Defendant argues that it received only two complaints from  
25 Plaintiff—the June/July and September 2004 complaints—and that after United received the first

1 complaint, Wallitner, with the support of Hinkle, conducted a prompt and extensive investigation in  
2 which Wallitner interviewed Plaintiff; reviewed her written report; interviewed the First Officer who also  
3 viewed the pornography on June 8, 2004; conducted multiple searches of United aircraft for  
4 pornography; discussed with Hinkle potential ways of identifying the person(s) responsible for placing the  
5 pornography in the cockpit; and devised some remedial action. (Def.'s Mot. 8–9 (Dkt. No. 56 at 13–14).)  
6 Wallitner testified that she conducted a search of only one plane. (Wallitner Dep. 174:10–17 (Dkt. No.  
7 52-3 at 36).) However, she also asked Waingrow to check his flights in the next month. (Wallitner Dep.  
8 161:24–162:1; 170:12–18 (Dkt. No. 52-3 at 23–24, 32).)

9 Second, Defendant argues, United acted to end the current harassment by implementing a  
10 procedure by which pilots would report, and maintenance would remove, any pornography discovered in  
11 the cockpit. (Def.'s Mot. 9 (Dkt. No. 56 at 14).) Defendant states that after Plaintiff's second complaint,  
12 it sent the e-note directive to all line mechanics directing them to remove any pornography whether or not  
13 the pornography was reported by a pilot. (*Id.*) Defendant argues that this remedy was effective in  
14 eliminating the pornography from the cockpits. Defendant relies upon the maintenance log entries  
15 showing that in each instance, pornography was removed after it was reported in the log book. Defendant  
16 also points to Plaintiff's testimony that maintenance was required to address any defects in the  
17 maintenance logs before the plane could take off.

18 Third, Defendant argues, United acted to prevent future harassment by "reiterat[ing] its anti-  
19 discrimination policy to all of its pilots and maintenance personnel, stat[ing] that inappropriate materials  
20 in the cockpit are improper, and implement[ing] a mandatory reporting mechanism to identify any future  
21 instances of pornography." (*Id.* at 9–10.) Defendant points to the fact that its anti-discrimination policy  
22 warned potential harassers that engaging in harassment could lead to discipline, including discharge. (*Id.*  
23 at 10.) Defendant argues that it was impracticable to discover who anonymously placed the pornography  
24 in the cockpits, given the large number of employees and aircraft operated by United; therefore, a general  
25 reminder sent to employees was an adequate and appropriate response. (*Id.*)

1 The Court is not persuaded by Defendant's arguments. First, the process Defendant put into place  
2 for the removal of the pornography still required Plaintiff, or another pilot or line mechanic, to first  
3 unwittingly discover the pornography. The Court is thus not persuaded that, as a matter of law,  
4 Defendant's strategy was reasonably calculated to end the harassment. Second, the Court is not  
5 persuaded that as a matter of law, Defendant's remedial measures reasonably attempted to deter future  
6 harassment. Defendant cites to an unpublished case from the Southern District of Florida, *Benn v.*  
7 *Florida East Coast Railway Company*, for the proposition that "where the perpetrator of a harassing act  
8 is unknown, general instructions to all employees regarding the company's prohibition against harassment  
9 is an adequate response." No. 97-4403-CIV, 1999 WL 816811, at \*5 (S. D. Fla. July 21, 1999).  
10 However, in *Benn*, the main focus of the employee's complaint was one incident where an inappropriate  
11 object was left in the workplace, and the alleged harassment stopped after the employer investigated the  
12 matter and re-issued its anti-harassment policy in its company bulletin. *Id.* In the instant case, the alleged  
13 harassment was composed of repeated conduct that, according to Plaintiff's numerous notations in the  
14 maintenance log, did not stop after Defendant's investigation was completed and continued after  
15 Defendant posted the e-note reminders to pilots and line mechanics regarding its anti-harassment policy.

16 In *McGinest v. GTE Service Corporation*, where an African-American employee reported the  
17 repeated occurrence of racist graffiti in the workplace, the Ninth Circuit held that although painting over  
18 the graffiti was a necessary first step, the employer did not take adequate remedial steps where it did not  
19 ensure that the recurrent graffiti would cease, and it did not cease. 360 F.3d at 1120-21. The court stated  
20 that the defendant "could have heavily emphasized to all employees that serious punishment would result  
21 if the perpetrators of this or future incidents were caught, underlining the fact that such behavior was  
22 neither tolerated or condoned." *Id.* at 1121 n.14. The court said that minimally, the defendant could have  
23 had a manager check the areas in question on a regular basis to ensure that this problem did not recur. *Id.*  
24 In this case, Defendant did not explicitly emphasize to all its employees that serious punishment would  
25 result if the perpetrators were caught. In fact, the e-notes Defendant sent to employees were so vague as

1 to the type of “inappropriate material” discovered in the cockpit that it is not even clear to the Court that  
2 employees were gently reminded of United’s sexual harassment policies. It is also unclear to the Court  
3 whether Defendant reasonably should have done more to discover the identity of the perpetrator(s).  
4 According to Plaintiff, Defendant took no steps at all to determine the frequency of the conduct or track  
5 the dates or identity of the aircraft in which pornography appeared. (Pl.’s Resp. 4 (Dkt. No. 67).)

6 Defendant argues that its response was adequate insofar as it responded to the two complaints  
7 Plaintiff actually made to her supervisor. Defendant contends that no response was required to any other  
8 alleged harassment because it had no reason to know of the recurring problem of pornography in the  
9 cockpit since Plaintiff made no further report to her supervisor after September 2004. (Def.’s Mot. 11  
10 (Dkt. No. 56 at 16).) Plaintiff, however, argues that United had notice of the ongoing problem by way of  
11 Plaintiff’s reports through June 2005 on the official logbooks of the aircraft. (Pl.’s Resp. 7 (Dkt. No.  
12 67).) Although Defendant argues that it was reasonable for Wallitner not to check for ongoing reports of  
13 pornography in the logbooks because pilots and line mechanics were also supposed to contact their  
14 managers or supervisors if they found pornography, (Def.’s Resp. 5, 7 (Dkt. No. 72 at 6, 8)), the Court is  
15 not so persuaded. Wallitner knew that there was a widespread problem of pornography in the cockpits,  
16 given the fact that Waingrow, her job share flight manager, had found additional instances of  
17 pornography besides those Plaintiff reported. (Wallitner Dep. 170:12–24 (Dkt. No. 52-3 at 32).)  
18 Defendant had specifically told its pilots to note any further instances of pornography in the logbook. The  
19 Court finds that a reasonable jury could conclude that United should have taken the proactive step of  
20 checking the logbooks to discover whether the problem was ongoing.

21 In addition, Plaintiff argues that after she reported the pornography problem to her supervisor  
22 twice with no apparent results, she felt that reporting the issue yet again to Wallitner was futile and  
23 potentially hazardous to her career. According to Plaintiff, after her complaints, Defendant started  
24 retaliating against her. (*Id.*) Whether or not Defendant actually did retaliate, the Court is not persuaded  
25 that Plaintiff should be penalized for failing to continue to make reports to Wallitner that she reasonably

1 deemed futile. The Court will not award summary judgment to Defendant under these circumstances.  
2 Based on the foregoing, the Court finds that a jury question exists as to whether Defendant should have  
3 known of the unresolved pornography problem, despite Plaintiff's failure to report it to Wallitner after  
4 September 2004. Accordingly, whether Defendant's remedial response was adequate is also a jury  
5 question, and Defendant's request for summary judgment on this issue is DENIED.

## 6 **2. Retaliation**

7 "Employers may not retaliate against employees who have 'opposed any practice made an  
8 unlawful employment practice' by Title VII." *Davis*, 520 F.3d at 1093 (*quoting* 42 U.S.C. § 2000e-3(a)).  
9 Defendant argues that it is entitled to summary judgment on Plaintiff's retaliation claims. (Def.'s Mot. 12  
10 (Dkt. No. 56 at 17).)

11 Retaliation claims are subject to the burden-shifting analysis of *McDonnell Douglas Corp. v.*  
12 *Green*, 411 U.S. 792 (1973). The Ninth Circuit has explained that:

13 The analysis has three steps. The employee must first establish a prima facie case of  
14 [retaliation]. If [s]he does, the employer must articulate a legitimate, [non-retaliatory]  
15 reason for the challenged action. Finally, if the employer satisfies this burden, the  
16 employee must show that the "reason is pretextual either directly by persuading the court  
17 that a [retaliatory] reason more likely motivated the employer or indirectly by showing  
18 that the employer's proffered explanation is unworthy of credence."

19 *Davis*, 520 F.3d at 1089 (brackets added) (*quoting Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115,  
20 1123–24 (9th Cir. 2000) (internal quotations omitted)).

21 Defendant argues that Plaintiff cannot present sufficient evidence from which a jury could  
22 reasonably find a prima facie case of retaliation; that United had legitimate, non-retaliatory reasons for its  
23 actions; and that Plaintiff cannot identify evidence to establish that United's explanations are pretextual.  
24 (Def.'s Mot. 13 (Dkt. No. 56 at 18).) The Court will address each of these arguments in turn.

### 25 **a. Plaintiff's Prima Facie Case**

26 "The elements of a prima facie retaliation claim are, (1) the employee engaged in a protected  
activity, (2) she suffered an adverse employment action, and (3) there was a causal link between the

1 protected activity and the adverse employment action.” *Davis*, 520 F.3d at 1093–94 (*citing Villiarimo v.*  
2 *Aloha Island Air, Inc.*, 281 F.3d 1054, 1064 (9th Cir. 2002)). Defendant argues that Plaintiff cannot  
3 demonstrate the second and third elements. As for the second element, Defendant argues that Plaintiff  
4 acknowledged in an answer to an interrogatory that “plaintiff has not alleged in her Complaint that  
5 defendant took an ‘adverse employment action’ against her. She alleges a variety of conduct by defendant  
6 following her reports and complaints, which she alleges constitute retaliation.” (Pl.’s Resp. to Def.’s  
7 Second Discovery Requests 8 (Dkt. No. 45 at 8).) In addition, Defendant asserts that it “did not  
8 terminate, demote, suspend, or fail to promote Plaintiff. To the contrary, Plaintiff voluntarily grounded  
9 herself due to medical concerns.” (Def.’s Mot. 13 (Dkt. No. 56 at 18).) Defendant argues that this is  
10 insufficient to show an adverse employment action.

11 In *Burlington Northern & Santa Fe Railway Company v. White*, the Supreme Court addressed  
12 the Courts of Appeals’ use of “differing language to describe the level of seriousness to which [an  
13 employee’s] harm must rise before it becomes actionable retaliation.” 548 U.S. 53, 67 (2006). In  
14 clarifying the standard, the Court held that:

15 a plaintiff must show that a reasonable employee would have found the challenged action  
16 materially adverse, which in this context means it well might have dissuaded a reasonable  
worker from making or supporting a charge of discrimination.

17 *Id.* at 68 (internal quotations and citations omitted). This is an objective standard. *Id.* at 68–69. In  
18 addition, “[c]ontext matters. . . . for an act that would be immaterial in some situations is material in  
19 others.” *Id.* at 69 (internal quotation and citation omitted).

20 Plaintiff alleges that the following actions were materially adverse:

- 21 (1) In July 2004, after Plaintiff reported her complaint of pornography to  
22 Wallitner, Waingrow (Wallitner’s job-share colleague) questioned  
23 Plaintiff’s recent use of United’s “fatigue policy.” Apparently, Plaintiff had  
24 refused to accept a flight assignment on June 29, 2004, on grounds that she  
25 was fatigued. (Stout Decl. ¶ 6 (Dkt. No. 69 at 2).) Plaintiff had the  
understanding that she could refuse to accept a flight assignment for fatigue  
26 purposes without suffering any adverse consequences under United’s  
fatigue policy. (Fatigue Policy (Dkt. No. 39-12 at 3–4).) On July 6, 2004,  
Waingrow told Plaintiff that she was being “red flagged,” or reprimanded,

1 because of the fatigue call. (Stout Dep. 105:9–21, 109:19–23 (Dkt. No.  
2 68-2 at 3, 5).)

3 (2) Plaintiff claims that after her reports to Wallitner in July and September  
4 2004, Wallitner “began treating plaintiff with disdain, like an annoyance or  
5 inconvenience. She was terse and cold to her, and when plaintiff finally  
6 sought assistance for scheduling her dental and mammogram appointments  
7 in October, 2004, (after significant delays) Wallitner did not help her at all.  
8 Instead, Wallitner accused her of being inflexible and having an agenda.  
9 She treated her sarcastically and dismissively.” (Pl.’s Resp. 10 (Dkt. No. 67  
10 at 10).) In addition, on September 3–4, 2004, when Plaintiff again reported  
11 fatigue, Wallitner wrote to United management that she wanted to discuss  
12 Plaintiff’s several reports of fatigue that summer. (Wallitner memo (Dkt.  
13 No. 71 at 1).)

14 (3) In November 2004, Seattle Chief Pilot Patrick Durgan told Plaintiff that  
15 there was “chatter” or gossip about her, that there were complaints about  
16 her behavior, and that she was combative and argumentative. (Stout Decl.  
17 ¶ 9 (Dkt. No. 69 at 3).) Plaintiff felt intimidated by Durgan’s conduct and  
18 believed her job was threatened. (*Id.*)

19 (4) On June 4, 2005, Plaintiff was called at 2:00 a.m. for a 6:00 a.m. departure,  
20 and she called in fatigue because she had not been able to sleep that night.  
21 (*Id.* at ¶ 14.) Durgan told Plaintiff that as a result, she was being docked in  
22 pay for the day she missed. In addition, a few days later, Durgan called  
23 Plaintiff, chastised her for calling in fatigue four times in the course of that  
24 year, and told her that she would be receiving a Letter Counsel in her file.  
25 (Stout Decl. ¶ 16 (Dkt. No. 69 at 5).) Plaintiff asserts that a Letter of  
26 Counsel is a precursor to a Letter of Charge, which is a step toward  
termination. (*Id.* at ¶ 17.)

Defendant argues that none of United’s actions, as described above, resulted in any discipline to  
Plaintiff and could not have deterred a reasonable employee from engaging in protected activity. (Def.’s  
Mot. 14 (Dkt. No. 56 at 19).) Defendant argues that the conversations Plaintiff had with her supervisors  
were the result of legitimate concerns about Plaintiff’s work and scheduling issues. (Def.’s Reply 5 (Dkt.  
No. 74 at 6).) Defendant also argues that the loss of one day’s pay is too minimal to be considered a  
materially adverse action supporting a retaliation claim. (*Id.*) Additionally, Defendant argues, the Letter  
of Counsel was not a disciplinary action. Rather, it was meant only “to document that a conversation  
occurred between a supervisor and an employee[.]” (Def.’s Mot. 16 (Dkt. No. 56 at 21).) Defendant  
contends that the Letter of Counsel was irrelevant to Plaintiff’s career prospects at United and was not

1 sufficiently final to constitute an adverse employment action. (*Id.* at 16–17.)

2       The Supreme Court has explained that “[a]n employee’s decision to report discriminatory  
3 behavior cannot immunize that employee from those petty slights or minor annoyances that often take  
4 place at work and that all employees experience.” *Burlington Northern*, 548 U.S. at 68. The court must  
5 try to “screen out trivial conduct while effectively capturing those acts that are likely to dissuade  
6 employees from complaining or assisting in complaints about discrimination.” *Id.* at 70. If being treated  
7 coldly by Wallitner was Plaintiff’s only complaint, such an allegation would be insufficient. *See, e.g., id.*  
8 at 68 (explaining that “snubbing” by co-workers and supervisors is not actionable); *Brooks v. City of San*  
9 *Mateo*, 229 F.3d 917, 929 (9th Cir. 2000) (holding that “mere ostracism” in the workplace was not  
10 enough to constitute an adverse employment action). However, taken together, the Court finds that the  
11 conduct Plaintiff has identified may be enough to have dissuaded a reasonable employee from filing a  
12 sexual harassment complaint.

13       Defendant’s fatigue policy states that:

14       While we agree that it is the pilot’s professional responsibility to be rested and prepared  
15 for a flight assignment, we also recognize that circumstances may arise that prevent a pilot  
16 from obtaining adequate rest. Consequently, no pilot should ever feel pressured to accept  
an assignment when not properly rested. . . . The onus will be on the pilot, as a  
professional, to decide when he or she is not adequately rested for an assignment.

17 (Fatigue Policy (Dkt. No. 39-12 at 3).) The timing of Defendant’s “red flagging” of Plaintiff on July 6,  
18 2004, based on what appears to have been her use of a “no fault” fatigue policy, shortly after Plaintiff  
19 stated her intention to file a sexual harassment complaint on June 21, 2004, is suspect. Although being  
20 docked in pay for a day’s work and receiving the Letter of Counsel came nearly a year later, after  
21 Plaintiff’s fourth use of the fatigue policy, these actions appear to have culminated from the earlier July 6,  
22 2004, event. Although Defendant downplays the significance of the Letter of Counsel, Plaintiff has put  
23 forth some evidence, by way of her expert in Aviation Safety, John Nance, that such a letter “inserted in  
24 [a] pilot personnel file is considered a direct and serious threat to [the pilot’s] career” and could  
25 reasonably have been considered by Plaintiff to be “a documentation of her company’s loss of confidence

1 and withdrawal of support” of her employment as a pilot. (Expert Report 14 (Dkt. No. 52-12 at 15).)

2 Plaintiff argues that for a pilot, whose job performance requires a high degree of focus, being  
3 treated poorly by her supervisors and being accused of unprofessional conduct would reasonably  
4 materially affect one’s ability to perform one’s job, and a reasonable employee in Plaintiff’s shoes would  
5 have perceived Defendant’s actions as undermining and as precursors to reprimand and termination. (Pl.’s  
6 Resp. 15–16.) The Court agrees that a reasonable jury could find that Plaintiff satisfies the second  
7 element of her prima facie case.

8 Defendant also argues that Plaintiff cannot demonstrate the third element of her prima facie  
9 case—causation. (Def.’s Mot. 17 (Dkt. No. 56 at 22).) “At the prima facie stage of a retaliation case,  
10 ‘[t]he causal link element is construed broadly so that a plaintiff merely has to prove that the protected  
11 activity and the negative employment action are not completely unrelated.’” *Poland v. Chertoff*, 494 F.3d  
12 1174, 1181 n.2 (9th Cir. 2007) (quoting *Pennington v. City of Huntsville*, 261 F.3d 1262, 1266 (11th  
13 Cir. 2001)). “[C]ausation can be inferred from timing alone where an adverse employment action follows  
14 on the heels of protected activity.” *Davis*, 520 F.3d at 1094 (quoting *Villiarimo*, 281 F.3d at 1065). As  
15 discussed above, Plaintiff was reprimanded and “red flagged” by Waingrow less than two weeks after she  
16 told Wallitner that she wanted to file a sexual harassment complaint. Although Plaintiff’s dock in pay and  
17 Letter of Counsel occurred nearly a year later, in June 2005, “a plaintiff can establish a link between his  
18 or her protected behavior and subsequent discharge if the employer engaged in a pattern of antagonism in  
19 the intervening period.” *Woodson v. Scott Paper Co.*, 109 F.3d 913, 920–21 (3d Cir. 1997). Plaintiff has  
20 described an increasingly antagonistic relationship between her and her supervisors in the year following  
21 her sexual harassment complaint. Prior to her sexual harassment complaint, Plaintiff had no performance  
22 issues, no behavioral issues, and no problems with her supervisors. (Pl.’s Resp. 17 (Dkt. No. 67).) Based  
23 on the foregoing, the Court is persuaded that a jury could reasonably find a prima facie case of retaliation.

24 Defendant points out that the person who initially designated Plaintiff as ineligible for pay the  
25 fourth time she called in fatigue had no knowledge of Plaintiff’s discrimination claim, (Def.’s Mot. 19

1 (Dkt. No. 56 at 24)); however, the ultimate decisions not to award the pay and to put the Letter of  
2 Counsel in Plaintiff's file were made by Seattle Chief Pilot Pat Durgan, who was kept apprised of  
3 Plaintiff's complaints. (Letter of Counsel (Dkt. No. 39-12 at 2).) Therefore, the Court does not find that  
4 Defendant has negated the causal link with this evidence.

5 Assuming, then, that Plaintiff has met the standard of demonstrating a prima facie case of  
6 retaliation, the burden now shifts to Defendant to show legitimate, non-retaliatory reasons for the  
7 challenged actions.

8 **b. Legitimate, Non-Retaliatory Reasons and Evidence of Pretext**

9 Defendant argues that the allegedly retaliatory actions were each based on legitimate safety and  
10 performance issues. Defendant asserts that Plaintiff abused the no fault fatigue policy in June 2004 by  
11 calling in fatigue for the second time in three months, when no other Seattle pilot had called in fatigue  
12 more than one time in the previous ten months. (Def.'s Mot. 18 (Dkt. No. 56 at 23).) Defendant further  
13 argues that Plaintiff's June 2005 fatigue call, the one that resulted in the dock in pay and Letter of  
14 Counsel, was her fourth fatigue call in a little over a year. (*Id.* at 18–19.) Defendant contrasts Plaintiff's  
15 four fatigue calls with the fact that no other Seattle pilot had used the fatigue policy more than once  
16 during that time, and argues that given Plaintiff's overuse of the fatigue policy, Defendant's actions were  
17 legitimate and non-retaliatory. (*Id.*) The Court agrees that, if unrebutted, these reasons would be  
18 legitimate.

19 Therefore, to succeed, Plaintiff must prove that Defendant's reasons are pretextual. In support of  
20 this argument, Plaintiff argues that Durgan's decisions to withhold pay and file the Letter of Counsel  
21 were based on his subjective opinion of Plaintiff's use of the fatigue policy, and subjective actions are can  
22 mask retaliatory motives. (Pl.'s Resp. 18 (Dkt. No. 67).) Plaintiff argues that because the question of  
23 whether Durgan's proffered reasons are non-retaliatory depend in part on Durgan's credibility, this issue  
24 cannot be resolved at summary judgment and must be resolved by the fact-finder. The Court agrees. *See*  
25 *McGinest*, 360 F.3d at 1115 n.5 ("it is axiomatic that disputes about material facts and credibility

1 determinations must be resolved at trial, not on summary judgment”). Further, Plaintiff argues that when  
2 Plaintiff used the fatigue policy before she filed her sexual harassment complaint, she was in no way  
3 reprimanded. However, after her complaints, she was docked in pay and written up for her use of the  
4 same fatigue policy. (*Id.*) The Court finds that a jury could reasonably interpret this as evidence of  
5 pretext. In addition, the timing of her first reprimand and “red flagging,” less than two weeks after her  
6 sexual harassment complaint, coupled with the allegations of antagonism from her supervisors following  
7 her complaints, could also be evidence that retaliation more likely motivated the Defendant than its  
8 legitimate safety and performance concerns.

9 As for Plaintiff’s arguments that her confrontational meetings with Durgan were retaliatory,  
10 Defendant argues that those meetings legitimately stemmed from Plaintiff’s co-worker’s complaints about  
11 Plaintiff’s conduct and combative demeanor. (Def.’s Mot. 19–20 (Dkt. No. 56 at 24–25).) Defendant  
12 points to two emails in which Plaintiff described two incidents that supposedly formed the basis of  
13 Durgan’s meetings with Plaintiff. In one, Plaintiff admits that she “did mention a couple of things in class  
14 . . . tried to clarify some misinformation they wanted me to swallow, but I sure as hell wasn’t  
15 combative[.]” (Nov. 21, 2004 Email (Dkt. No. 39-10 at 38).) In the other, Plaintiff writes that “[a female]  
16 flight attendant reported how miffed she was” because Plaintiff waited for a male flight attendant to guard  
17 the cockpit door when the female flight attendant who was supposed to be performing that role was  
18 neglecting that duty. (Dec. 1, 2004 Email (Dkt. No. 39-10 at 40–41).) Plaintiff asserts that “none of the  
19 so-called examples of bad attitude were really valid or even investigated by Durgan, there was no official  
20 follow up or any finding of improper conduct by plaintiff[.]” (Pl.’s Resp. 11 (Dkt. No. 67).) Plaintiff  
21 argues that Durgan’s criticisms of Plaintiff were really meant to intimidate Plaintiff, not to remedy any  
22 problem behavior. Because Defendant has not shown any clear proof that Plaintiff’s behavior was truly  
23 problematic, and because his decisions to meet with her about performance issues were subjective ones,  
24 the Court finds that the jury should assess Durgan’s credibility on this issue rather than the Court.  
25 Accordingly, the Court finds that Plaintiff’s retaliation claims survive summary judgment and therefore

1 DENIES Defendant's motion as to this issue.

2 **3. Punitive Damages**

3 Defendant next argues that Plaintiff cannot sustain a claim for punitive damages. (Def.'s Mot. 21  
4 (Dkt. No. 56 at 26).) A prevailing Title VII plaintiff may be awarded punitive damages if she  
5 "demonstrates that the [defendant] engaged in a discriminatory practice or discriminatory practices *with*  
6 *malice or with reckless indifference to [her] federally protected rights.*" *Kolstad v. Am. Dental Ass'n*,  
7 527 U.S. 526, 534 (1999) (*quoting* 42 U.S.C. § 1981a(b)(1) (emphasis in original) (brackets added)). In  
8 *Kolstad*, the Supreme Court articulated a three-part framework for determining whether punitive  
9 damages may be assessed against an employer under Title VII.

10 First, the plaintiff must show that the employer acted with the requisite mental state. Specifically,  
11 the employer must have acted "in the face of a perceived risk that its actions will violate federal law[.]"  
12 *Kolstad*, 527 U.S. at 536 (explaining that where the employer is simply unaware of the relevant federal  
13 prohibition or was acting under the distinct belief that its discrimination was lawful, this element would  
14 not be satisfied). "A plaintiff may satisfy this element by demonstrating that the relevant individuals knew  
15 of or were familiar with the antidiscrimination laws and the employer's policies for implementing those  
16 laws." *Bruso v. United Airlines, Inc.*, 239 F.3d 848, 858 (7th Cir. 2001). The Court finds that sufficient  
17 evidence exists to support the knowledge element. Plaintiff's supervisors, Wallitner, Waingrow and  
18 Durgan, almost certainly knew that sexual harassment of the type alleged by Plaintiff was a violation of  
19 Title VII, as United's own anti-discrimination policy, which no doubt was implemented to assist United in  
20 complying with Title VII, prohibited "[d]isplay in the workplace of sexually suggestive objects or  
21 pictures[.]" (Def.'s Resp. 2 (Dkt. No. 72 at 3); Policy on Harassment & Discrimination (Dkt. No. 39-2 at  
22 30–31).) Hinkle testified that Defendant widely disseminated this policy to its employees, that all pilots  
23 had been provided a copy of the policy in their flight operations manuals, and that employees had  
24 received numerous live and online trainings on United's policy. (Hinkle Decl. ¶ 4 (Dkt. No. 73-2 at 2).)  
25 In addition, Hinkle referred Wallitner to United's Supervisor's Packet for Responding to a Sexual

1 Harassment Claim, which Wallitner used in conducting her interview of Plaintiff. (Pl.’s Mot. 4 (Dkt. No.  
2 50); Hinkle Dep. 86:24–92:1 (Dkt. No. 52-4 at 10–12).) As such, there is sufficient evidence from which  
3 a jury could reasonably conclude that Defendant acted in the face of a perceived risk that its actions  
4 violated federal law.

5 As the second step of the *Kolstad* framework, the plaintiff must “impute liability for punitive  
6 damages to [the employer].” *Kolstad*, 527 U.S. at 539. “Under this step, the plaintiff must show that the  
7 intentional discrimination by an employee is attributable to the employer by using traditional agency  
8 principles, e.g., that a managerial employee acted within the scope of his or her employment.” *Hemmings*  
9 *v. Tidyman’s Inc.*, 285 F.3d 1174, 1197 (9th Cir. 2002). The Court finds that the jury could reasonably  
10 conclude that Wallitner, Waingrow and Durgan were United’s managerial agents acting within the scope  
11 of their duties.

12 At the third step of the *Kolstad* framework, “the defendant employer may raise as an affirmative  
13 defense its good faith efforts to comply with Title VII, if such efforts were contrary to the actions of its  
14 managerial agents.” *Id.* at 1197–98. However, “[t]he affirmative defense is . . . unavailable to the  
15 employer for actions of agents sufficiently senior to be considered proxies [of the corporation].” *Id.* at  
16 1198. The jury should be permitted to determine whether Wallitner, Waingrow and Durgan were  
17 sufficiently senior management to be considered proxies of United. Further, although Defendant argues  
18 that it made a good faith effort to comply with Title VII, (Def.’s Mot. 21 (Dkt. No. 56 at 26)), the Court  
19 finds that whether Defendant did so is a jury question. Although United had in place an antidiscrimination  
20 policy and it educated its employees about the policy, Plaintiff should be permitted to show at trial that  
21 United’s managers disregarded the policy by failing to remedy the sexual harassment even though they  
22 knew about it. If the jury accepts Plaintiff’s version of the facts, it could conclude that United did not  
23 make a good faith effort to comply with Title VII despite its express antidiscrimination policy. *See, e.g.*,  
24 *Bruso*, 239 F.3d at 861 (holding that sufficient evidence existed to allow a jury to conclude that the  
25 airline “did not make a good faith effort to comply with Title VII despite its formal antidiscrimination

1 policy”); *Lowery v. Circuit City Stores, Inc.*, 206 F.3d 431, 446 (4th Cir. 2000) (holding that an  
2 employer’s written policy against discrimination “is not automatically a bar to the imposition of punitive  
3 damages”). Accordingly, the Court DENIES Defendant’s motion on the issue of Plaintiff’s punitive  
4 damages claim.

5 **4. Plaintiff’s Misconduct**

6 Finally, Defendant argues that Plaintiff’s purported misconduct in making certain false statements  
7 to the FAA limits her potential remedies. (Def.’s Mot. 21 (Dkt. No. 56 at 26).) In *McKennon v. Nashville*  
8 *Banner Publishing Company*, the Supreme Court held that, in a wrongful discharge case under the Age  
9 Discrimination in Employment Act, where a defendant employer discovered after-acquired evidence of an  
10 employee’s misconduct that was of “such severity that the employee would have been terminated on  
11 those grounds alone if the employer had known of it as the time of discharge[,]” the plaintiff employee’s  
12 remedies were limited. 513 U.S. 352, 361–63 (1995). In cases like *McKennon*, “neither reinstatement nor  
13 front pay is an appropriate remedy.” *Id.* at 361–62. In addition, back-pay liability is calculated from the  
14 date of the unlawful discharge to the date the misconduct was discovered. *Id.* at 362. Plaintiff in the  
15 instant case was not discharged by United, and she is not proceeding on a wrongful discharge theory.  
16 Rather, she argues that the hostile workplace sexual harassment and retaliation led to a medical condition  
17 that required her to be medicated and medically grounded. Accordingly, the Court is not entirely  
18 persuaded that the after-acquired evidence doctrine articulated in *McKennon* applies here. Even if it did  
19 apply, the Court is not persuaded at the summary judgment stage that Defendant has carried its burden of  
20 proving that Plaintiff’s remedies should be so limited.

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22 As such, the Court DENIES Defendant's motion for summary judgment on this issue. The Court also  
23 declines to strike the material Plaintiff finds objectionable. Defendant's Motion and the medical  
24 documents Defendant has submitted have been filed under seal and will remain under seal pursuant to the  
25 Court's orders.

1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court hereby DENIES Plaintiff's Motion for Partial Summary  
3 Judgment (Dkt. No. 50) and DENIES Defendant's Motion for Summary Judgment (Dkt. No. 56).

4 SO ORDERED this 4th day of November, 2008.

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8 John C. Coughenour  
9 UNITED STATES DISTRICT JUDGE  
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