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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOANNE M. OGDEN,

Plaintiff,

v.

PUBLIC UTILITY DISTRICT NO. 2
OF GRANT COUNTY, doing business
as Grant County PUD,

Defendant.

NO: 2:12-CV-584-RMP

ORDER GRANTING DEFENDANT’S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT is Defendant’s Motion for Summary Judgment,
ECF No. 40, amended as ECF No. 72. The Court has reviewed the record and the
pleadings contained therein, and is fully informed.

BACKGROUND

This case was first filed in October of 2012, and has been reassigned twice
and continued numerous times. The Court previously issued numerous orders
regarding the parties’ respective motions to strike, *see* ECF Nos. 141 and 143, and
Plaintiff’s motion for partial summary judgment, *see* ECF No. 172. The parties
and the Court, therefore, are familiar with the facts of this case, but the Court

1 nonetheless briefly summarizes the nature of this lawsuit. Plaintiff brings this suit
2 against her former employer, Grant County PUD (PUD), alleging violations of the
3 Family Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA),
4 and state law claims over which the Court exercises supplemental jurisdiction
5 pursuant to 28 U.S.C. § 1367.

6 Plaintiff, Joanne Ogden, was hired by PUD in 2007 as an Administrative
7 Support Services Supervisor in the Hydro Division, which was run by Director
8 Dawn Woodward. Plaintiff was placed on a “Career Path” that set out benchmarks
9 with corresponding wage increases.

10 On October 24, 2008, Plaintiff was diagnosed with cancer, and neither party
11 disputes that cancer is a disability as it relates to this suit. What happened at
12 Plaintiff’s workplace after that diagnosis serves as the basis for Plaintiff’s claims.
13 Plaintiff alleges causes of action regarding to whom that diagnosis was disclosed,
14 how she was treated, and her ability to exercise her rights as a disabled employee.
15 She took many separate periods of leave following her diagnosis, but only two are
16 at issue in this case: from February 25, 2010, to April 19, 2010, and from
17 September 10, 2010, to January 3, 2011. Plaintiff alleges that her FMLA rights
18 were violated in addition to violations of the ADA and state law claims.

19 Upon her return to work in January 2011, Plaintiff was assigned to a
20 Technical Writer position, a position to which she previously had applied, but had
21 withdrawn her application. After her return, Plaintiff felt that she faced retaliation

1 for exercising her rights, and felt discrimination: “isolation, shunning, public
2 humiliation, change in work location, demotion, and ultimately, constructive
3 discharge.” ECF No. 26 at 3. After Plaintiff complained to the PUD, she alleges
4 that only a “sham investigation” was completed, *see id.* at 4, and that her work
5 conditions only worsened until she resigned from the PUD in June of 2012.
6 Plaintiff seeks damages for past and future economic loss, emotional
7 distress/mental anguish, liquidated damages, prejudgment interest, and attorney’s
8 fees and costs.

9 ANALYSIS

10 The moving party is entitled to summary judgment when there are no
11 disputed issues of material fact when all inferences are resolved in favor of the
12 non-moving party. *Northwest Motorcycle Ass’n v. United States Dep’t of Agric.*,
13 18 F. 3d 1467, 1471 (9th Cir. 1994); FED. R. CIV. P. 56(c). If the non-moving party
14 lacks support for an essential element of their claim, the moving party is entitled to
15 judgment as a matter of law regarding that claim. *See Celotex Corp. v. Catrett*,
16 477 U.S. 317, 323. Importantly, at the summary judgment stage, the Court does
17 not weigh the evidence presented, but instead assumes its validity and determines
18 whether it supports a necessary element of the claim. *Id.* To prevail at the
19 summary judgment stage, a party must establish that a fact cannot be genuinely
20 disputed and that the adverse party cannot produce admissible evidence to the
21 contrary. FED. R. CIV. P. 56(c). Once the moving party has met their burden, the

1 non-moving party must demonstrate that there is probative evidence that would
2 allow a reasonable jury to find in their favor. *See Anderson v. Liberty Lobby*, 477
3 U.S. 242, 251 (1986).

4 As a preliminary matter, the Court addresses the nature of the filings in this
5 case. Significant issues repeatedly arose in the thousands of pages worth of filings
6 regarding Defendant’s motion for summary judgment. Evidence is defined as
7 “[s]omething (including testimony, documents, and tangible objects) that tends to
8 prove or disprove the existence of an alleged fact” *Evidence*, BLACK’S LAW
9 DICTIONARY (10th ed. 2014). An allegation alone does not constitute evidence, no
10 matter how many times that exact same allegation is repeated and refiled under
11 different headings, to support different claims, and in different documents.

12 Throughout this case, Plaintiff’s counsel has refiled the exact same
13 documents, motions, or quotes numerous times. Throughout Plaintiff’s responses
14 to Defendant’s motion, Plaintiff’s counsel attempts to create issues of material fact
15 by arguing that Defendant’s arguments are “demonstrably false,” or by making
16 other similar claims, *see e.g.*, ECF No. 94 at 11, instead of submitting evidence.
17 Evidence regarding the elements of a legal claim can create a genuine issue of
18 material fact; bare, conclusory allegations of demonstrable falsity cannot.

19 Additionally, Plaintiff’s Statement of Facts, ECF No. 101, contains legal
20 conclusions and summaries of testimony that are belied by the records upon which
21 they rely. Counsel repeatedly cites to his own declaration as support for “facts”

1 about which he has no personal knowledge. *See id.* Even more troubling, there is
2 mischaracterization of the evidence that counsel purports to summarize, and
3 deposition transcripts demonstrate that counsel sometimes attempts to finish a
4 witness's sentence to make the testimony consistent with counsel's theory of the
5 case. *See* ECF No. 95 at 70. Defendant has moved successfully to strike some of
6 the statements. *See* ECF No. 143. Despite these errors and shortcomings, and in
7 accordance with the summary judgment standard, the Court has viewed all
8 evidence in the light most favorable to Plaintiff.

9 Defendant moves this Court for summary judgment on eight different
10 grounds in an attempt to dispose of all of Plaintiff's claims which include federal
11 causes of action pursuant to the Family Medical Leave Act (FMLA) and the
12 Americans with Disabilities Act (ADA), and state causes of action for violations of
13 the Washington State Family Leave Act (WFLA), the Washington Law Against
14 Discrimination(WLAD), a "handbook claim," and for negligent infliction of
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1 emotional distress. This Court addresses each of Defendant’s arguments in favor
2 of summary judgment in turn.¹

3 **I. Defense argument #1 – Plaintiff has no claim under the FMLA.**

4 The Family Medical Leave Act provides eligible employees with certain
5 protections when enumerated circumstances require them to take time off from
6 work. The Act provides in relevant part, “an eligible employee shall be entitled to
7 a total of 12 workweeks of leave during any 12-month period for one or more of
8 the following: [including] a serious health condition that makes the employee
9 unable to perform the functions of the position of such employee.” 29 U.S.C. §
10 2612. In addition to mandating that employers allow such covered leave, the Act
11 provides that

12 any eligible employee who takes leave under section 2612 of this title for the
13 intended purpose of the leave shall be entitled, on return from such leave--
14 (A) to be restored by the employer to the position of employment held by the
15 employee when the leave commenced; or (B) to be restored to an equivalent

15 ¹ The Court proceeds by addressing the sections of Defendant’s motion in turn but
16 notes that many of Plaintiff’s claims apply to a number of the following sections.
17 For example, Plaintiff’s allegations of harassment or Defendant’s failure to
18 investigate complaints relate to Plaintiff’s claims under the FMLA, the ADA, and
19 other causes of action. Therefore, wherever the Court addresses one of Plaintiff’s
20 arguments, such discussion shall also apply to all other portions of this case where
21 that argument arises.

1 position with equivalent employment benefits, pay, and other terms and
2 conditions of employment.

3 29 U.S.C. § 2614.

4 An “eligible employee” is defined as one who has been employed “for at
5 least 12 months by the employer with respect to whom leave is requested under
6 section 2612 of this title; and for at least 1,250 hours of service with such employer
7 during the previous 12-month period.” 29 U.S.C. § 2611. The burden of proving
8 eligibility for the FMLA rests on a plaintiff who asserts a violation of an FMLA-
9 based right. *See Kohama v. McCabe*, 197 F. App’x 535, 537 (9th Cir. 2006)
10 (unpublished memorandum affirming the dismissal of a claim on summary
11 judgment for the Plaintiff’s inability to prove that he had worked the requisite
12 1,250 hours). “[T]o maintain a cause of action under the FMLA . . . Plaintiff must
13 show that she was still protected by the 12–week leave period mandated by the
14 FMLA.” *Farina v. Compuware Corp.*, 256 F. Supp. 2d 1033, 1054 (D. Ariz.
15 2003).

16 Pursuant to 29 C.F.R. § 825.200, if an employee meets the other qualifying
17 requirements, an employer may choose one of four different methods for
18 determining the twelve-month period in which the twelve weeks of leave
19 entitlement take place. They include:

20 (1) The calendar year; (2) Any fixed 12–month leave year, such as a fiscal
21 year, a year required by State law, or a year starting on an employee’s
anniversary date; (3) The 12–month period measured forward from the date
any employee’s first FMLA leave [] begins; or, (4) A “rolling” 12–month

1 period measured backward from the date an employee uses any FMLA leave
2 [].

3 29 C.F.R. § 825.200. As outlined in their leave policy, Defendant uses the third
4 method of calculating the twelve-month period.² See ECF No. 74-20.

5 Although Plaintiff only presents arguments regarding two periods of what
6 she claims were FMLA leave periods (February 25, 2010 – April 19, 2010, and
7 September 10, 2010 – January 3, 2011), there are nine separate periods that
8 provide context to the issue of Plaintiff’s FMLA eligibility. Defendant, through
9 the amended declaration of HR Professional II Karrie Buescher, ECF No. 74-1,
10 and her supporting documents, ECF Nos. (74-2)-(74-25), submits the following
11 arguments and information regarding each of the nine leave periods:

- 12 • October 27, 2008 - March 16, 2009: The first twelve weeks were
13 approved as FMLA leave, but the remaining eight weeks were not.

14 During this time period, Defendant also provided a letter to Plaintiff

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16 _____
17 ² Plaintiff alleges that although Defendant’s employee handbook refers to the third
18 method, “in practice the PUD did not follow option (3).” ECF No. 94 at 5.

19 However, the method that Plaintiff alleges that Defendant uses mirrors the third
20 method, just using different terminology. *Id.* Despite Plaintiff’s assertion that the
21 policy is not applied uniformly, there is no evidence to support this claim.

1 notifying her that she had exhausted her twelve weeks of FMLA leave on
2 January 19, 2009. *See* ECF No. 74-4.

3 The Court notes that although Defendant approved of Plaintiff's leave and
4 allowed her to extend beyond when she was eligible, Defendant did not have to do
5 so. In fact, Defendant could have terminated Plaintiff's employment entirely after
6 she did not return to work at the end of her twelve weeks of FMLA leave and
7 would have been in compliance with the express terms of the FMLA. *See Farina,*
8 *256 F. Supp. 2d at 1054.*

- 9 • August 3, 2009 – October 4, 2009: Again, by letter dated August 14,
10 2009, Defendant notified Plaintiff that she had exhausted her twelve
11 weeks of FMLA leave. *See* ECF No. 74-7.
- 12 • October 19, 2009 – December 14, 2009: Defendant was reminded by
13 letter on October 21, 2009, that she had exhausted her twelve weeks of
14 leave. *See* ECF No. 74-10. On October 27, 2009, Plaintiff would have
15 been entitled to another twelve weeks of FMLA leave had she worked
16 1,250 hours in the preceding twelve months. However, Defendant's
17 records show that Plaintiff only worked 746.50 hours in the twelve
18 months preceding October 27, 2009.
- 19 • December 14, 2009 – January 11, 2010: Plaintiff was working partial
20 days due to the limitations provided by her medical provider.

1 Defendant's records show that Plaintiff still had only worked 746.50
2 hours in the twelve months preceding December 14, 2009.

- 3 • February 25, 2010 – April 19, 2010: As of February 25, 2010,
4 Defendant's records show that Plaintiff only worked 1,069.50 hours in
5 the twelve months preceding February 25, 2010. Additionally, there is an
6 email between HR representatives Karrie Grant and Darla Shannon sent
7 on September 21, 2010, that documents their determination that
8 Plaintiff's FMLA leave had ended on March 26, 2010. *See* ECF No. 74-
9 23.

10 Again, since she had used more than twelve weeks of FMLA leave and was
11 not ready to return to work at the exhaustion of that time, Defendant could
12 justifiably have terminated Plaintiff's employment at this point.

- 13 • June 17, 2010 – June 21, 2010: Defendant's records show that she was on
14 leave, but was not eligible for FMLA leave because she only had worked
15 875.50 hours in the preceding year.
- 16 • September 10, 2010 – January 3, 2011: Defendant's records reflect that
17 Plaintiff only had worked 1,054.50 hours in the year preceding
18 September 10, 2010, making her ineligible for FMLA leave. She also
19 had exhausted her FMLA leave allotment until the beginning of her new
20 rolling year which would begin on October 27, 2010. On October 1,
21 2010, Defendant sent Plaintiff a letter stating:

1 Please be advised that your absence from work will be counted as leave
2 under the Family and Medical Leave Act (FMLA). Please note, you have
3 expired your 12 weeks of FMLA for the rolling year beginning 10-27-09.
4 Your next rolling year begins 10-27-10.

5 ECF No. 74-22. However, on October 27, 2010, Defendant's records reflect that
6 Plaintiff only had worked 994.50 hours in the preceding twelve months.

7 Therefore, Plaintiff did not return to work at the expiration of her twelve weeks of
8 FMLA leave, and was not eligible for a new entitlement of twelve weeks at the
9 start of her next rolling year.

- 10 • February 4, 2011 – August 8, 2011: Plaintiff received benefits while
11 being on short-term disability (STD) until August 4, 2011, which was
12 when she exhausted her 180 days of that benefit. She then used personal
13 leave (PL) from August 4, 2011– August 8, 2011. As of February 4,
14 2011, she only had worked 863.5 hours in the preceding twelve months.
- 15 • April 11, 2012 – June 13, 2012: In the year preceding this eight-week
16 period of leave, Defendant's records show that Plaintiff only had worked
17 1,190 hours, making her ineligible for FMLA leave.

18 Despite Defendant's detailed records outlining when Plaintiff was on leave
19 and which of those periods were or were not covered by the FMLA, Plaintiff
20 responds that Plaintiff was eligible for FMLA, especially during the periods from
21 February 25, 2010 – April 19, 2010, and September 10, 2010 – January 3, 2011,

1 and that she had not exhausted her FMLA entitlement of twelve weeks per twelve-
2 month period. *See* ECF No. 94 at 1-8.

3 Plaintiff cites to 29 C.F.R. § 825.110 for the proposition that, “[i]n the event
4 an employer does not maintain an accurate record of hours worked by an employee
5 . . . the employer has the burden of showing that the employee has not worked the
6 requisite hours.” *Id.* at 3. However, Plaintiff fails to provide any reason to doubt
7 the accuracy of Defendant’s extensive records.

8 Plaintiff’s counsel asserts that “Ogden worked more than 1,250 hours in 12
9 months preceding her February 25, 2010-April 19, 2010 and September 10, 2010-
10 January 3, 2011 leaves,” ECF No. 94 at 3, and to support that conclusory
11 allegation, argues that as a salaried employee, she “worked more than 8 hours per
12 day when she was not on leave, also including weekends, and she also performed
13 work while she was on FMLA leave.” *Id.* at 3-4. Although Plaintiff provides
14 declarations with conclusory allegations that give anecdotal evidence that
15 sometimes Plaintiff had long days or worked weekends or worked during leave,
16 Plaintiff fails to provide any record of those hours or any reason to dispute
17 Defendant’s records or calculations.

18 At the summary judgment stage, the Court views evidence in the light most
19 favorable to the non-moving party, but the only evidence before the Court supports
20 Defendant’s assertions that Plaintiff was not eligible for FMLA protection as she
21 alleges in this case. The Court finds that there is no genuine issue of material fact

1 regarding Plaintiff's eligibility for FMLA protection as it pertains to her claims for
2 two reasons. First, Plaintiff did not work the requisite 1,250 hours preceding either
3 disputed period (February 25, 2010 – April 19, 2010, or September 10, 2010 –
4 January 3, 2011). Second, and more importantly, she had exhausted her twelve
5 weeks of leave (during the period from September 10, 2010 – January 3, 2011) and
6 was not ready and/or willing to return to work at the expiration of that allotment.

7 It is not clear whether Plaintiff disputes that she had exhausted her twelve
8 weeks of leave during the period between September 10, 2010, and January 3,
9 2011. Plaintiff's counsel argues that "[t]he fact that she may have exhausted the
10 prior year's leave entitlement before then [referring to the start of a new rolling
11 year on October 27] does not eliminate her leave entitlement from that date going
12 forward." ECF No. 94 at 5.

13 Even if this Court ignores the fact that the only evidence before it supports
14 the conclusion that Plaintiff was not eligible for FMLA leave on September 10 due
15 to her insufficient hours worked, or that she would not be entitled to another twelve
16 weeks of FMLA leave on October 27, 2010, for the same reason, the
17 uncontroverted facts are: (1) Plaintiff was on leave that counted against the twelve-
18 week maximum allotment and (2) prior to the beginning of her new rolling year on
19 October 27, 2010, she had exhausted her leave and was not yet able to return to
20 work. Therefore, at the time that she exhausted twelve weeks of FMLA leave and
21

1 was not ready to return to work, Plaintiff was not entitled to any FMLA-based
2 rights.

3 Defendant was not required to restore Plaintiff to her same or equivalent
4 position, and could permissibly have terminated her employment when she
5 returned in January of 2011. *See Farina*, 256 F.Supp.2d at 1054 (“[S]he is only
6 entitled to an equivalent position under the FMLA if she was prepared to return to
7 work during a time designated as FMLA leave.”).

8 Plaintiff also attempts to rely on an estoppel theory to argue that Defendant
9 should be estopped from denying Plaintiff’s eligibility because the PUD had
10 approved her leave for February 25, 2010 – April 19, 2010, and September 10,
11 2010 – January 3, 2011. *See* ECF No. 94 at 6-7. Even if the Court ignores the
12 numerous letters that explained to Plaintiff that she had exhausted her FMLA
13 allotment of twelve weeks before or during both those time periods, Plaintiff’s
14 counsel only cites to his own Statement of Facts to support that the leave periods
15 were approved as FMLA leave. *Id.* at 7. As discussed previously, counsel’s
16 statements alone are not competent evidence.³

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18 ³ Plaintiff’s Statement of Facts also cites to declarations of Plaintiff and her
19 attorney. *See* ECF No. 101 at 3-4. These conclusory statements fail to create an
20 issue of material fact regarding approval of FMLA leave. Counsel also provides a
21 document, ECF No. 95-11, that refutes his assertions, as discussed below.

1 Additionally, Plaintiff appears to recognize that in order to prove estoppel
2 she must demonstrate that she relied on the PUD's designation of and approval of
3 FMLA leave. *See* ECF No. 94 at 7. Plaintiff argues that she "relied on the
4 approval in taking the leave. Otherwise, she would have would have (sic)
5 attempted to postpone surgery and/or forego leave to which she would otherwise
6 be entitled." *Id.* at 7-8. The evidence before the Court refutes her assertion.

7 For the period from February 25, 2010 – April 19, 2010, Plaintiff cites to a
8 letter from PUD stating that the leave would be counted as FMLA leave. *See* ECF
9 No. 95 at 99. In fact, that letter only approved STD leave until April 12, not April
10 19th, and informs her that the period of leave from February 25 until April 12
11 would count against her twelve-week allotment of FMLA. *See* ECF No. 95-11.
12 This misrepresentation by Plaintiff's counsel is material and relevant to this case
13 because Plaintiff repeatedly argues that she was forced to return to work while she
14 was still on FMLA leave on April 16, a position which the Court finds is not
15 supported by evidence and is not an accurate statement of the facts.

16 For the period from September 10, 2010 – January 3, 2011, Plaintiff argues
17 that Defendant "acknowledged the medical condition was covered under the Act,
18 and designated and approved the leave as FMLA-qualifying leave in its entirety."
19 Plaintiff misrepresents the record in a number of material ways. That letter, ECF
20 No. 74-22, states that Defendant approved STD leave from September 10, 2010,
21 until November 10, 2010, not until January 3, 2011. In addition to notifying

1 Defendant that this leave would count as leave under the FMLA, the very next
2 sentence reads, “Please note, you have expired your twelve weeks of FMLA for the
3 rolling year beginning 10-27-09.” ECF No. 74-22. Therefore, she was told by
4 Defendant accurately that she would be using more FMLA leave than she was
5 allotted.

6 Additionally, the Court notes that these letters, upon which Plaintiff alleges
7 she relied when scheduling her leave, were dated after she began both of these
8 relevant periods of leave. *See* ECF No. 74-22 and 95-11. Plaintiff’s own notes
9 demonstrate that she was sore and tired on September 10 and that her doctor told
10 her not to return to work until biopsy results came back from the lab. *See* ECF No.
11 102-6 at 10. Accordingly, there is no evidence to support her claim of reliance on
12 Defendant’s approval, especially since that “approval” was much more limited
13 than Plaintiff asserts and informed her that she already had exhausted her FMLA
14 leave. Plaintiff has not created a genuine issue of material fact regarding estoppel
15 and the Court rejects the theory as it pertains to her FMLA claims.

16 Although the Court focuses on specific time periods regarding FMLA leave
17 and eligibility, the Court notes that Defendant’s records, which Plaintiff fails to
18 refute with evidence, reflect that from the start date of Plaintiff’s first leave period
19 on October 27, 2008, to the date of her final resignation, she worked a total of
20 3,092 hours and was off work for 4,459 hours (3,983.5 of which were on leave).
21 *See* ECF No. 74-1 at 11. Therefore, she spent 59 percent of this period on leave

1 and 41 percent working. *Id.* at 12. The extensive record in this case demonstrates
2 a pattern of Plaintiff's being gone on FMLA or personal leave, being offended at
3 having to explain absences, and of the PUD nonetheless making adjustments to
4 allow her to take leave far beyond what the FMLA requires, while still having a
5 position for her whenever she was willing or able to work.

6 Therefore, the Court dismisses Plaintiff's FMLA claims due to her inability
7 to return to work at the expiration of her allotted twelve weeks per twelve-month
8 rolling year. However, the Court will address Plaintiff's individual FMLA claims.

9 **A. Plaintiff's FMLA Claims**

10 The FMLA provides two substantive causes of action when a plaintiff
11 suffers interference with an exercise of FMLA-based rights, and/or
12 retaliation/discrimination for the exercise of those rights. *See* 29 U.S.C. § 2615.

13 The statute reads in relevant part:

14 (a) Interference with rights

15 (1) Exercise of rights

16 It shall be unlawful for any employer to interfere with, restrain, or
deny the exercise of or the attempt to exercise, any right provided
under this subchapter.

17 (2) Discrimination

18 It shall be unlawful for any employer to discharge or in any other
manner discriminate against any individual for opposing any practice
made unlawful by this subchapter.

19 *Id.* Plaintiff alleges claims for both interference pursuant to 28 U.S.C. § 2615

20 (a)(1) and retaliation pursuant to subsection (a)(2). *See* ECF No. 26 at 5.

1 **1. Interference**

2 To make out a prima facie case for FMLA interference, a plaintiff employee
3 need establish that

4 (1) [s]he was eligible for the FMLA’s protections, (2) h[er] employer was
5 [s]he provided sufficient notice of h[er] intent to take leave, and (5) h[er]
6 employer denied h[er] FMLA benefits to which [s]he was entitled.

7 *Crawford v. JP Morgan Chase NA*, 983 F. Supp. 2d 1264, 1270 (W.D. Wash.
8 2013) (quoting *Sanders v. City of Newport*, 657 F.3d 772, 778 (9th Cir. 2011)).

9 Plaintiff’s response to Defendant’s motion alleges four ways in which
10 Defendant purportedly interfered with her FMLA rights: (1) “failing to reinstate
11 her to her position of Administrative Support Services Supervisor or an equivalent
12 position after she returned from leave,” (2) “delaying advancement after she
13 returned from leave,” (3) “requiring her to work while she was on leave,” and (4)
14 “failing to investigate complaints of discrimination and retaliation after she
15 returned from leave.” ECF No. 94 at 9.

16 Defendant’s case is largely premised on the allegation that Plaintiff was
17 “demoted” upon her return to work because she was transferred to a position as a
18 Technical Writer rather than being returned to her former position as
19 Administrative Support Services Supervisor. *See e.g.*, ECF No. 94. Plaintiff
20 recognizes that the position was the same pay, but argues in relevant part that the
21 position was not supervisory, presented less opportunities for advancement, was

1 less prestigious and was seen as such by other employees, and did not include the
2 benefits of being a supervisor. *Id.* at 10.

3 Taking all the evidence in the light most favorable to Plaintiff and even if
4 the Court completely rejects Defendant's proffered justifications for the transfer
5 (despite the evidence supporting them in the record), the Court finds no issue of
6 material fact regarding a violation of the FMLA for transferring Ogden to the
7 position of Technical Writer. As addressed previously, Plaintiff was not entitled to
8 any position when she returned from overusing leave beyond what she was entitled
9 to under the FMLA, but she was still provided with a position. The Court need not
10 determine whether there is a genuine dispute over whether or not the position was
11 a demotion because a demotion, or termination, would have been permissible.

12 Although Defendant provided numerous justifications for the transfer,
13 Plaintiff focuses only on a comment from Plaintiff's supervisor, Dawn Woodward,
14 who allegedly stated that the transfer was due to Plaintiff's "tagging in and tagging
15 out." *See* ECF No. 101 at 12. Even if that were the only true reason for her being
16 transferred, which the Court does not hold, it still would be a permissible
17 justification. Plaintiff used far more leave than was allowed under the FMLA, and
18 Defendant nonetheless returned her to a position that she had once applied for, but
19 that would not require supervising others. The Court finds that expecting a
20 supervising employee to be present when her subordinates are at work is a
21 reasonable expectation for an employer to impose, so long as that expectation does

1 not interfere with FMLA-based rights. Since Plaintiff was not able and willing to
2 return to work after the expiration of her allotted FMLA leave, Dawn Woodward
3 permissibly could transfer Plaintiff even if it had been due solely to her “tagging in
4 and tagging out.”⁴

5 Even if Plaintiff had been eligible for more FMLA leave in January of 2011,
6 which the Court finds that she was not, the Court notes that the evidence strongly
7 supports the fact that Ogden’s transfer was not a demotion. Plaintiff had applied
8 for the position previously while she was working as the Administrative Support
9 Services Supervisor, and she later withdrew her application. The Court notes that
10 Plaintiff’s reasons for withdrawing her application vary depending on which
11 evidence that the Court considers: Ogden’s declarations; her deposition testimony;
12 Plaintiff’s counsel’s summary of that testimony; or Plaintiff’s own text message.
13 However, the undisputed fact remains that she applied for a position with equal
14 pay that she now argues was a demotion.

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18 ⁴ The Court recognizes that Plaintiff provided a number of declarations with bare,
19 conclusory allegations that Woodward had a practice of “getting rid of” or
20 discriminating against people who used FMLA leave or were disabled. *See e.g.*,
21 ECF No. 96 at 5. There is no support in the record for these conclusory claims.

1 Plaintiff also alleges interference due to the fact that PUD “delayed”
2 Ogden’s advancement on the career path. ECF No. 94 at 13. Defendant cites 29
3 C.F.R. § 825.215(c)(2) for the rule that states:

4 if a bonus or other payment is based on the achievement of a specified goal
5 such as hours worked, products sold or perfect attendance, and the employee
6 has not met the goal due to FMLA leave, then the payment may be denied,
7 unless otherwise paid to employees on an equivalent leave status for a
8 reason that does not qualify as FMLA leave. For example, if an employee
9 who used paid vacation leave for a non-FMLA purpose would receive the
10 payment, then the employee who used paid vacation leave for an FMLA-
11 protected purpose also must receive the payment.

12 ECF No. 72 at 6-7.

13 With that regulation in mind, Defendant’s “delaying” Plaintiff’s
14 advancement is justified by considering the following simple and undisputed
15 assertions: advancement on the career path is based on completing certain steps.
16 *See* ECF No. 54-1. Plaintiff did not complete those steps, but was given more time
17 to do so. *See* ECF No. 95-15. Although Plaintiff had not yet completed those
18 steps, she still was given two separate pay raises on January 23, 2009, and on
19 August 27, 2010, as if she had satisfied all steps. *See* ECF No. 54 at 10. The pay
20 raise on August 27, 2010, only happened after Dawn Woodward recommended
21 that HR allow Plaintiff to receive the raise despite her not having finished the steps
on her path. *See* ECF No. 102-2.

Plaintiff attempts to create issues of material fact regarding the
postponement of the deadline for her to complete the steps on her career path by

1 arguing that she had “completed the career path learning curve to the extent
2 necessary to approve her step increase requirements by June 16, 2009.” ECF No.
3 94 at 13. Not only is this unsupported by anything beyond her own declaration and
4 that of her attorney, but Plaintiff also contradicts her own testimony with confusing
5 claims.

6 Ogden first claims that she was denied a pay (step) increase, “even though
7 she had completed the necessary criteria to receive a pay (step) increase,” but that
8 Woodward told her it was because “she did not have enough ‘face time’ – meaning
9 she had been off on FMLA leave.”⁵ ECF No. 101 at 7. Two sentences after
10 arguing that Plaintiff had completed all necessary steps but was denied a pay raise
11 for lack of “face time,” Plaintiff argues that she “put in a training request to attend
12 an educational seminar which would have filled a remaining task that Woodward
13 claimed was required before Ms. Ogden could have received a pay (step)
14 increase.” *Id.* She then alleges Woodward tore up the request and threw it away.
15 *Id.*

16 Additionally, Plaintiff’s counsel cites an unpublished Sixth Circuit case to
17 support his argument that “[w]here a detrimental decision regarding performance

18 ⁵ Plaintiff’s counsel cites to his own declaration to support a legal conclusion in his
19 Statement of “Facts” when he is speculating as to what Woodward meant by her
20 comment.
21

1 and salary is made in proximity to FMLA leave [and] the protected absences are a
2 factor in the decision, it can be inferred that the employer interfered with the
3 employee's rights." ECF No. 94 at 13. However, any time when Plaintiff was at
4 work would have been in close proximity to a leave of absence given the fact that
5 Defendant's records show that from the time Plaintiff first took a leave of absence
6 in 2008 until she left the PUD in 2012, Plaintiff was on leave for more time than
7 she was at work. Plaintiff's argument would require the Court to infer that every
8 adverse action be attributed to FMLA interference.

9 Taking Plaintiff's assertions to comprise one coherent story in the light most
10 favorable to Plaintiff, the Court concludes: Woodward told Plaintiff that she had
11 not completed all the steps necessary for a step increase but delayed Plaintiff's
12 deadline to complete those steps. *Id.* at 8. Even according to Plaintiff, she
13 "received the pay (step) increase despite the fact that the course Woodward
14 claimed was necessary remained incomplete." *Id.*

15 Importantly, the unfulfilled prerequisites that Plaintiff implies are figments
16 of Woodward's imagination were explicitly listed on Plaintiff's Career Path
17 Record, which Plaintiff signed in February of 2008. *See* ECF No. 54-1. The
18 evidence demonstrates that Plaintiff received numerous pay raises for which she
19 would have been ineligible had Woodward not extended her deadline, and
20 Woodward recommended that Ogden be given a raise on August 27, 2010.

1 Therefore, Plaintiff has suffered no disadvantage and has stated no basis for an
2 interference claim or any other legal cause of action..

3 Although the only “proof” that would support the allegation that Woodward
4 tore up and threw away Plaintiff’s request to attend trainings is Plaintiff’s own
5 declaration and that of her attorney, the alleged event is immaterial. Pursuant to 29
6 C.F.R. § 825.215(c)(2), Woodward could have denied pay increases and
7 advancement opportunities completely if Plaintiff had failed to meet requirements
8 due to her being on leave (absent evidence that she was being treated worse than
9 others who missed the same requirements due to non-FMLA leave), but
10 Woodward did not do so. Instead, Woodward provided Plaintiff with benefits that
11 she had not yet earned.

12 As it pertains to Plaintiff’s allegations regarding pay and the status of her
13 position, the Court recognizes that Plaintiff previously made vague allegations of
14 discrimination due to the way in which a subordinate was moved from her
15 supervision in 2009, which made her ineligible for a grade increase; or in the way
16 that she received a bonus payment as a lump sum rather than as a salary increase in
17 2010. *See e.g.*, ECF No. 102 at 11-12. Although Plaintiff does not refer to these
18 allegations in her opposition to Defendant’s motion for summary judgment, the
19 Court has reviewed the evidence and considers these claims. Plaintiff alleges that
20 her subordinate, Wendy Isensee, was receiving the same grade level of pay as she
21 was receiving in 2009, and when Plaintiff pointed this out to Woodward,

1 Woodward allegedly “told Ms. Ogden that she would move Isensee out from
2 underneath Ms. Ogden before she would give a grade increase to Ms. Ogden
3 because she did not feel she was worth the increase in pay.” ECF No. 95 at 71.

4 Regarding the bonus payment, Plaintiff alleges that she received a lump sum
5 payment equal to two percent of her salary instead of receiving a two-percent
6 increase to her salary amount, and seems to allege discrimination because some
7 other employees received a percentage increase. *See* ECF No. 95-7 at 17.

8 Specifically, she alleges that she was told that she received a lump sum because
9 she was on a “learning curve,” but that one of her subordinates, Wendy Isensee,
10 received the percent increase even though she was also allegedly on a learning
11 curve. *Id.* The Court finds that these allegations regarding the lump sum payment
12 or the removal of Isensee from underneath Ogden are not supported by evidence
13 and fail to create a genuine issue of material fact regarding any legal claim.

14 Plaintiff’s third claim for FMLA interference alleges that Defendant required
15 her to work while she was on FMLA leave. *See* ECF No. 94 at 12. Once again,
16 this claim is supported only by her own declarations and statement of facts.

17 Defendant admits to contacting and checking on Plaintiff, but there is no evidence
18 that she was required to do anything while on FMLA leave. The Court finds that
19 both parties recognize that Plaintiff came to work on April 16, 2010, to meet with
20 Woodward and Broadsworth on a day that Plaintiff alleges was intended for leave.

21 However, Plaintiff was given credit for the hours she put in on that day, *see* ECF

1 No. 74-19 at 14, and fails to provide any evidence that Defendant forced to her to
2 be there. In fact, as outlined above, the evidence Plaintiff has submitted
3 demonstrates that she only was approved for FMLA leave until April 12, ECF No.
4 95-11, so having a meeting on April 16 would have been outside of that window of
5 approved leave.

6 Furthermore, FMLA leave does not serve as a no-contact order on
7 employers regarding an affected employee. Therefore, Plaintiff fails to create a
8 genuine issue of material fact regarding her allegations of being forced to work
9 while on FMLA leave.

10 Plaintiff's fourth allegation of interference relies on her assertion that
11 Defendant failed to investigate her complaints of discrimination and rests solely on
12 her own conclusory statements. Plaintiff alleges that in addition to her own
13 complaints, there were other reports from other PUD employees, HR Generalist
14 Brook Fankhauser, and even an outside consultant, but "not a single investigation
15 was ever completed into allegations of discrimination / retaliation regarding Ms.
16 Ogden." ECF No. 94 at 24-25.

17 Contrary to Plaintiff's assertions, the record demonstrates that Defendant
18 extensively worked to investigate Plaintiff's claims, and it was Plaintiff who chose
19 not to pursue them any further before filing the present suit. The following quotes
20 from Plaintiff's own answers to Defendant's interrogatories demonstrate the
21 frivolity of this claim:

- 1 • “Darla asked me if I wanted to lodge a complaint and I said yes. We met
2 on March 15th, 2012 at Priest rapids Dam for almost 4 hours.”
- 3 • “About 9:20am (sic) on March 21, 2012, Darla arrived to give me the
4 draft version of my statement she had prepared . . . She told me than (sic)
5 she would be talking to Dawn about limiting contact hopefully today if
6 time permitted.”
- 7 • “On March 28, 2012, at about 12:15 Darla, called to let me know they
8 were meeting at HR at 1:30 p.m. Darla showed up at 1:55pm (sic). The
9 meeting lasted until 5:15pm.”
- “On April 2, 2012[,] Darla dropped off the edited version of my
statement . . . she asked that I make electronic changes.”
- “On April 10, 2012 Darla sent me an email asking if I had reviewed the
statement and made edits. I told her that my work load obligations had
taken priority. I started on FMLA leave and did not return to work until
June 13, 2012. There was [sic] no additional communications or follow
up from Human Resources on my complaint. The investigation just
stopped.”

10 ECF No. 95-7 at 29-33.

11 This record, in Plaintiff’s own words, establishes that Defendant continued
12 to investigate her complaints and the investigation only stopped when Plaintiff
13 decided not to respond because “her work load obligations took priority.”⁶ *Id.* at
14 32. Although the Court views evidence in the light most favorable to the non-
15 moving party, the evidence before the Court demonstrates that there is no genuine

16 ⁶ The Court accepts the validity of Plaintiff’s explanation that work took priority
17 despite her own notes from a few months before then in which Plaintiff says “I find
18 myself just staring into space . . . Usually after lunch I start counting down the time
19 I have left in the day.” ECF No. 102-6 at 29. Whether she was busy or not, the
20 investigation ended with her inaction.

1 issue of material fact regarding Defendant’s alleged failure to investigate. The
2 Court finds that Plaintiff’s allegation is unsupported by evidence and belied by the
3 record.

4 Plaintiff also alleges that no investigation even began “until just prior to Ms.
5 Ogden’s medical providers’ advisement that she must quit her job due to
6 discriminatory treatment.” ECF No. 94 at 25. Although Plaintiff alleges a number
7 of occasions when Defendant violated PUD policy that would require employees to
8 investigate her complaints, she has failed to provide evidence that Defendant did
9 not do so at each of the times when her concerns were raised. Accordingly,
10 Plaintiff fails to provide sufficient evidence to create a genuine issue of material
11 fact regarding this conclusory assertion.

12 The Court notes that throughout this litigation, Plaintiff brings claims based
13 upon allegations that are contradicted by her own actions. For example, she came
14 to work on the same day that Defendant’s counsel received a letter saying she was
15 “forced to quit,” *see* ECF No. 44-18 at 3, or she alleges that the “investigation just
16 stopped,” when the last communication from Defendant was asking Plaintiff if she
17 approved of the latest draft of her complaint. The investigation only ended due to
18 Plaintiff’s inaction and unwillingness to respond to Defendant’s good faith efforts
19 to address her complaints.

1 **2. Retaliation**

2 Plaintiff alleges retaliation both in the Second Amended Complaint, ECF
3 No. 26, and throughout this case.⁷ The court in *Crawford v. JP Morgan Chase NA*,
4 983 F. Supp. 2d 1264, 1269 (W.D. Wash. 2013), held that

5 [u]nder the *McDonnell Douglas* framework, a plaintiff must establish a
6 prima facie case of retaliation. [411 U.S. 792 (1973)]. To establish a prima
7 facie case of FMLA retaliation, a plaintiff must show (1) he availed himself
8 [of] a protected right under the FMLA, (2) he was adversely affected by an
9 employment decision, and (3) there is a causal connection between the two
10 actions. *Washington v. Fort James Operating Co.*, 110 F. Supp. 2d 1325,
11 1331 (D. Or. 2000). If a prima facie case is established, the burden shifts to
12 the employer to articulate a legitimate, nondiscriminatory reason for the
adverse action. *Sanders [v. City of Newport]*, 657 F.3d [772,] 777, n. 3 [9th
Cir. 2011]. If the employer articulates a legitimate reason for its action, the
burden shifts back to the plaintiff to show the reason given is pretext. *Id.*
Pretext can be proven indirectly, by showing the employer’s explanation is
not credible because it is internally inconsistent or otherwise not believable,
or directly, by showing unlawful discrimination more likely motivated the
employer.

13 As previously stated, the Court finds no genuine issue of material fact
14 regarding the first element: whether Plaintiff availed herself of a protected right
15 under the FMLA, because the only evidence before the Court establishes that she

16 _____
17 ⁷ There is a great deal of overlap between the factual bases for Plaintiff’s claims.
18 Therefore, the Court’s discussion of “retaliation” also addresses Plaintiff’s factual
19 arguments that she relies upon to claim discrimination, harassment, “isolation,
20 shunning, public humiliation, change in work location, demotion, and ultimately,
21 constructive discharge.” ECF No. 26 at 3.

1 was ineligible to do so at all times relevant to this suit. However, in light of the
2 extensive briefing by both parties regarding the second element, if the Court were
3 to accept that she had availed herself of an FMLA-protected right, the Court also
4 addresses whether there is a genuine issue of material fact regarding whether or not
5 she was “adversely affected” for doing so.⁸

6 Plaintiff’s opposition to Defendant’s motion for summary judgment cites to
7 Paul G. Mattiuzzi, Ph.D., *What is Workplace Retaliation?*, Everyday Psychology
8 (Aug. 23, 2015, 7:02 p.m.), [http://everydaypsychology.com/2012/03/what-is-
9 workplace-retaliation-itsabout.html#.Vdp7ZGC4mR](http://everydaypsychology.com/2012/03/what-is-workplace-retaliation-itsabout.html#.Vdp7ZGC4mR), for the elements of her claim,
10 and provides the following quotes: “What is workplace retaliation? It is not what
11 people think it is.” *See* ECF No. 94 at 23. “Retaliation is about discouraging
12 people from asserting their rights or complaining when such rights are denied.” *Id.*
13 “[R]etaliation is workplace terrorism, and you know it when you see it. That is the
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18 ⁸ Since Plaintiff relies on the same alleged facts to argue that she was adversely
19 affected and discriminated against for her disability in violation of the ADA, the
20 WLAD, and for her use of what she believed was FMLA leave, the Court’s
21 discussion of these facts applies to each of these claims.

1 objective test that defines retaliation.”⁹ *Id.* While it may be true that acts of
2 retaliation and discrimination that could serve as the basis for a viable legal claim
3 may be of varying natures, the Court finds that Plaintiff’s allegations of
4 Defendant’s actions do not constitute retaliation or discrimination.

5 Plaintiff provides bare, conclusory allegations of harassment, a hostile work
6 environment, and discrimination without any evidence to support those claims.
7 Plaintiff’s evidence, even viewed in the most favorable light, defeats her own
8 allegations of a hostile work environment. The evidence establishes a pattern of
9 PUD employees offering comfort, assistance, and friendly gestures, that are
10 rebuffed by Plaintiff as “objectionable” and “ambush[es],” to which she often
11 responded with rude comments. *See e.g.*, ECF No. 60-1. Plaintiff’s own notes
12 demonstrate that criticisms or sharing of concerns that others had expressed about
13 her were seen as harassment, and Defendant’s comforting comments were often
14 met with Plaintiff’s sarcasm and hostile responses. *See e.g.*, ECF No. 102-6 at 44
15 (4/10/2012 entry).

16 Plaintiff alleges conversations took place that demonstrated hostility or
17 discrimination, but the claims are belied by uncontroverted evidence. For
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20 ⁹ While an opinion from a psychology-focused blogpost may be an interesting
21 anecdote, it has questionable value regarding the elements of a legal claim.

1 example, Plaintiff relies on the fact that she requested a day off and that Woodward
2 “pried into” her reasons. She summarized the event as follows:

3 In the beginning of January 2010, I asked for a personal leave day for a
4 doctor’s appointment and for my husband’s birthday. My daughter also had
5 the day off that I was requesting off. Dawn pried into my reason for the
6 request and was not happy about me taking the day off because of a
7 company wide event. She expressed her displeasure not only with words but
8 also with body language that clearly told me that I should not be choosing
9 personal family time over a company wide event. It was unprofessional and
10 I felt as if I was a child being reprimanded by a parent. This was also
11 evident in the email communications between Dawn and I [sic] concerning
12 this particular request.

13 ECF No. 102 at 7. However, that email exchange demonstrates that Woodward
14 simply asked, “Why the PL request for 1/18/10 – that is the District Wide Event
15 day?” Plaintiff responded:

16 Yes I am aware that it is the DWE. For multiple personal reasons I wanted
17 to spend time in Bothell with my family :) Rick’s birthday, a very important
18 doctors [sic] appointment on Friday, and my daughter has the day off from
19 school.

20 ECF No. 102-4. Woodward’s response, which Plaintiff sees as unprofessional and
21 reprimanding, simply read, “OK. tx.” *Id.* Plaintiff also claims that Woodward
didn’t ask other employees the same question when they missed the district-wide
event, *see* ECF No. 95-7 at 14, but fails to provide any supporting evidence.

Furthermore, Plaintiff asked for the day off, and received exactly that; her
issue was with the fact that Woodward requested an explanation. It seems that the

1 only way Woodward could have pleased Plaintiff would have been to allow her to
2 take time off without question, whenever she wanted to do so, and for any reason.

3 A few more representative examples demonstrate the nature of Plaintiff's
4 allegations of a hostile work environment. Plaintiff had a problem with another
5 supervisor asking her whether she would be back from a different trip by a certain
6 date. The question that offended Plaintiff was simply whether or not she would be
7 returning to work on March 12, referring to her taking time off to travel to Las
8 Vegas to watch NASCAR. *See* ECF No. 102-6 at 34. Her notes from the very
9 next day express her displeasure with her supervisors' "ongoing questions and
10 harassment every time I want time off," and point out that when another employee
11 needed time to care for a grandchild born prematurely, that "d[id] not seem to be
12 an issue." *Id.* at 35. Plaintiff received the time off and was only asked when she
13 would return. The Court does not find such an inquiry, without more, to constitute
14 harassment or discrimination, but only an attempt to monitor employees.

15 Plaintiff's entire case rests on Plaintiff's allegations of hostility and
16 "bullying" by Dawn Woodward, but the evidence shows only a supervisor who
17 consistently expressed concern for Plaintiff. Plaintiff has failed to establish that
18 Woodward's gifts to Plaintiff of a plant or an encouraging poem, or Woodward's
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1 numerous attempts to say hello or check on Plaintiff, establish any hostility or
2 discrimination.

3 In Plaintiff's own words, after Woodward shared the fact that employees had
4 expressed concerns about Plaintiff's management style, which the Court sees as a
5 routine duty for a supervisor in Woodward's position, Plaintiff declined
6 Woodward's attempted hug, and stated, "I told her I did not believe anything she
7 said and had nothing more to say and asked her to leave." *Id.* at 12. Plaintiff's
8 other confusing allegations regarding an allegedly degrading "pinkie swear," or
9 how she was introduced as a "new employee," or of how she was fearful of
10 Woodward absent any evidence of a legitimate basis for that fear, fail to create an
11 issue of material fact regarding any legal claim.

12 Plaintiff also alleges hostility from other employees and a lack of
13 communication or shunning from other PUD staff. Another quote from her notes
14 demonstrates the nature of what she alleges was hostility:

15 "Byron [B]ird came and sat by me for a couple if (sic) moments and asked
16 for (sic) I was feeling and talked about his son leaving and his aging parents.
I told him I do one day at a time. I get tears every time I'm asked about my
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1 health. I don't trust my own gut right now or their motives. Real concern or
2 just fishing?"

3 *See* ECF No. 102-6 at 169. To support claims of "shunning," her factual assertions
4 are equally lacking and the basis of her feeling shunned seems only to be that
5 people did not talk to her as much as she would have liked. For example:

- 6 • After a coworker had a baby, Plaintiff stated, "I reached out to Lori and
7 wished her well and asked about the child and wanted to see the photos
8 that I had heard had been circulated. I (sic) the past Lori never had any
9 issues with sharing picture (sic) of her, her family, she played in a band
10 which she shared her music with me (sic). She did responds (sic) and told
11 me the Childs (sic) names and that she and the baby were doing well. I
12 never heard from her again. ECF No. 95-7 at 24-25.
- 13 • Referring to a coworker, Jessica Alleman, Plaintiff alleged that
14 "[e]verything (sic) I would walk in the door she would get on the phone or
15 appear that she was deep into a work project and did not notice me. I felt
16 rejected." *Id.* at 24.
- 17 • At a funeral for another coworker, she claimed that she had to sit alone,
18 then one sentence later stated that Donna Kennedy offered her a seat three
19 rows in front of her, but that she did not take it. Plaintiff describes how
20 people at the funeral avoided her and how she could "feel people looking
21 at [her]." *Id.* at 27.

22 These claims that a coworker responded to Plaintiff, but not to her
23 satisfaction, of a coworker working studiously during work hours, or of being
24 offered a seat at a funeral that Plaintiff rejected, are only a few representative
25 examples of a pattern where Plaintiff brings legal claims for not being treated
26 exactly as she wished.

27 Another illustrative example of the nature of Plaintiff's allegations is that to
28 support her claim of an adverse employment action, Plaintiff stated that she
29 "received telephone calls and emails inquiring about health and return to work over

1 a period of time” ECF No. 55-1 at 108. However, in her deposition
2 testimony, after not being able to state any specific issue that she had with any of a
3 number of such contacts, Plaintiff stated that “[i]t wasn’t necessarily the content of
4 what was in the email. It was the sheer volume of people continually asking about
5 my health.” *Id.* at 58. Therefore, Plaintiff attempts to prove an “adverse action”
6 based on people stopping by her office, emailing, or calling to ask her if she was
7 feeling alright. *See id.* However, if her coworkers were not stopping by, she
8 accused them of “shunning” her. *See* ECF No. 106-6. None of these allegations
9 support the existence of a material fact regarding any legal claim. The evidence
10 demonstrates that Plaintiff’s colorization of Defendant’s actions as harassing or
11 discriminatory are not supportable by evidence or logic.

12 Throughout this suit, Plaintiff also alleges that Defendant violated the law by
13 forcing her to disclose her personal medical information or sharing it against her
14 will. *See e.g.*, ECF No. 102 at 3. There is no evidence to support these bare,
15 conclusory allegations. This claim focuses heavily on two separate but related
16 meetings and on emails between PUD staff members. The first meeting occurred
17 on April 16, 2010, and was between Plaintiff, Mike Broadsworth, and Dawn
18 Woodward. Defendant claims that prior to that day, while Plaintiff was still out on
19 leave, numerous employees had complained about Plaintiff’s management style,
20 specifically that she tended to micromanage, preferred one-on-one meetings over
21 group meetings, would speak negatively about staff members, and did not timely

1 respond to employees' requests for time off or schedule changes. *See* ECF No. 73-
2 1 at 17 (citing ECF Nos. 47, 48, 50 and 51). Plaintiff does not dispute the fact that
3 those complaints were made, but only responds by criticizing the complaining
4 employees with allegations that "it was widely known that McIntyre, McMakin,
5 Isensee, and Harris [the complaining employees] were part of a clique of sorts and
6 was (sic) known to be destructive and cruel." ECF No. 101 at 43.

7 Defendant claims that the April 16, 2010, meeting was called in order to
8 address the concerns raised by Ogden's staff. *See* ECF Nos. 73-1 at 17 and 101 at
9 43. However, Plaintiff repeatedly asserts that instead of addressing staff concerns,
10 this meeting was called to force her to speak to her staff about her illness and
11 emotional issues at a later meeting. *See e.g.*, ECF No. 101 at 9. She claims to
12 have been "humiliated and angry after being told she would have to share her
13 private medical status and related emotional issues, and this caused her a great deal
14 of anxiety." *Id.* There is no evidence that Plaintiff was forced to speak about any
15 medical issues and only that she was asked to communicate with her employees at
16 a meeting on April 20th regarding the concerns of her staff.

17 Plaintiff's own notes state that Woodward told her that her staff felt
18 unsupported because of a lack of communication and that "[s]he strongly
19 encouraged me to talk to my staff about what my emotional state was because I
20 hurt their feelings by not disclosing." ECF No. 102-6 at 8. There is no allegation
21 that Woodward told her that she had to bring in pamphlets discussing the

1 emotional effects of cancer, which is what Plaintiff did at the April 20th meeting.
2 Instead, Plaintiff's notes state that "[s]he encouraged me to share my feelings with
3 the staff." *Id.* at 9.

4 Plaintiff's own descriptions of the meeting demonstrate that Woodward
5 asked her to discuss her emotional reactions to others since that had become a
6 work-related concern, but did not ask her to discuss the intimate details of her
7 cancer diagnosis. Therefore, the evidence, absent bare, conclusory allegations,
8 demonstrates that Woodward asked Plaintiff to address work-related concerns from
9 Plaintiff's staff, and Plaintiff instead made it about her disability when she
10 provided pamphlets and discussed her medical condition. Accordingly, there is no
11 genuine issue of material fact regarding Plaintiff's assertion that she was forced to
12 share medical information.

13 Separate from her claims of being forced to share medical information,
14 Plaintiff also alleges that Woodward and her secretary, Cindy McClure, were
15 sharing Plaintiff's personal medical information with PUD staff. *See e.g.*, ECF
16 Nos. 94 at 21 and 102 at 6. It is not clear what legal basis Plaintiff relies upon for
17 this claim, but Plaintiff cites this claim to support her allegations of retaliation (as
18 an adverse employment action) and as evidence of discrimination and harassment
19 in what she saw as a hostile work environment. *See* ECF No. 94 at 21.

20 The record is bereft of any evidence that would support the allegation that
21 the disclosure of Plaintiff's medical information was in retaliation for her exercise

1 of FMLA-based rights (or rights pursuant to the ADA or WLAD). The emails and
2 communications express relief at hearing good news regarding successful
3 surgeries, encourage positive thoughts and prayers on Plaintiff's behalf, and fit into
4 the pattern that defines this case: PUD employees reach out to Plaintiff to offer her
5 comfort, support, and encouragement, and Plaintiff interprets their actions as
6 retaliation, harassment, and the imposition of a hostile working environment. *See*
7 *e.g.*, ECF No. 54-4.

8 Plaintiff alleges that PUD's failure to keep her information confidential was
9 a violation of a state administrative code, WASH. ADMIN. CODE § 162-22-090(4).
10 *See* ECF No. 94 at 21. Although the regulation pertains to how health care
11 information should be dealt with, in context, it relates to when and how an
12 employer may permissibly seek health care information regarding a disabled
13 employee to determine the effects of the disability and to provide adequate
14 accommodations. *See* WASH. ADMIN. CODE § 162-22-090 (2016). Here, the only
15 health information that was allegedly disclosed was what Plaintiff and her
16 husband, Richard Ogden, shared with Defendant. The regulation does not apply to
17 Plaintiff's case.

18 Plaintiff's own deposition testimony illuminates the frivolity of this claim
19 regarding the disclosure of Plaintiff's medical information. Plaintiff first alleged
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1 that Woodward shared information regarding Plaintiff's hysterectomy and when
2 asked what basis she had for that belief, she responded,

3 "What I heard – and it's hearsay – is that she – and what she had personally
4 said to me was that I was extremely emotional, and I needed to get my
5 hormones in check; and I understood she shared some of this information
6 with other staff members."

7 ECF No. 55-1 at 31. This vague and speculative statement with no factual
8 supporting evidence does not support any claim for relief.

9 The evidence in the record demonstrates that Plaintiff's husband, Richard
10 Ogden, updated Woodward on Plaintiff's status eight-to-ten times, *see* ECF No.
11 55-2 at 4-5, in very broad terms. Mr. Ogden testified that Plaintiff "just wanted me
12 to tell her [Woodward] how the surgery went, I think, so you could kind of judge
13 how long she would be out for." *Id.* at 6. Therefore, any information that was
14 disseminated was voluntarily offered and broad and relevant to when Plaintiff
15 would possibly return to work.

16 Plaintiff makes a vague assertion that she may have told Woodward not to
17 share any medical information at an earlier time, but definitively states that in
18 January of 2010, she warned Woodward not to communicate anything about her
19 medical information to her staff. *See* ECF No. 55-1 at 50-52. However, Plaintiff's
20 descriptions of what she specified as impermissible disclosures are vague and
21

1 unclear. Her most specific recollection of any instruction to Woodward was “[t]hat
2 I wanted to keep all of my medical information private.” *Id.*

3 Similarly, Mr. Ogden does not allege that he asked Defendant not to share
4 the contents of his updates, and when asked whether he told Woodward not to
5 share the information in at least one of their conversations, he responded, “I had no
6 expectations one way or the other.” ECF No. 55-2 at 9. This deposition testimony
7 appears to conflict with his later declaration where he stated that on October 29,
8 2008, “I expected Woodward would handle the situation as a professional
9 manager; that she knew the rules; and that Joanne’s medical information would be
10 kept confidential.” ECF No. 100 at 2. Even if he or Plaintiff had stated that desire
11 at the very outset of Plaintiff’s diagnosis, the law does not punish employers for
12 expressing concern or forwarding such vague information.

13 A number of the emails that Plaintiff relies upon for this claim have been
14 submitted to the Court and they are void of any disclosure of sensitive medical
15 information. The text of the relevant emails establish that Defendant only shared
16 the limited information that Plaintiff’s husband chose to pass along at Plaintiff’s
17 request. *See* ECF No. 55-4. As an example, an email from Dawn Woodward prior
18 to Defendant’s warning not to disclose “medical information” read in its entirety:

19 I spoke with Rick shortly ago and Joanne is out of surgery. The Doc said
20 ‘everything looked pretty boring[,]’[] which is good news!! Joanne is in
21 some pain now and is being medicated :) Rick, Joanne, and family are
relieved with the outcome. Of course, there will be some follow up testing
to ensure no additional action is required. Joanne will be in the hospital until

1 Monday. Rick will keep us posted. Rick, Joanne and family are
2 appreciative of the prayers and well wishes! Jackie - please pass on to
secretarial group. Carol - please pass on to Tim and Chuck. Tx much!
Dawn

3 ECF No. 54-4. The text of the one email that Woodward sent after Plaintiff's
4 warning read only "FYI –Just spoke with Rick; Joanne is out of surgery and is
5 recuperating at home. Everything went fine." ECF No. 54-5 at 3. These emails
6 fail to support Plaintiff's bare, conclusory allegations of adverse employment
7 actions, harassment, the presence of a hostile work environment, or of Defendant's
8 revealing personal medical information without Plaintiff's permission.

9 Plaintiff's counsel also argues that Mike Broadsworth "ordered the staff not
10 to speak to Ms. Ogden" in January of 2011, ECF No. 101 at 15, apparently in an
11 attempt to "alienate Joanne in hope (sic) that she would quit," ECF No. 99 at 6.
12 However, Plaintiff fails to point out that her own attorney at the time had instructed
13 Defendant by letter (in bold letters): "Please be advised that you are not to have
14 any direct contact with Ms. Ogden. If you wish to discuss any matter concerning
15 her employment, you may contact me at the above address and number." ECF No.
16 44-1 at 2.

17 Plaintiff's then-attorney continued by warning Defendant that "[y]our
18 continued efforts to contact Ms. Ogden and continue her employment against her
19 wishes are considered ongoing harassment and retaliation." *Id.* Defendant is being
20 sued for complying with Plaintiff's attorney's instruction. If Defendant contacted
21

1 Plaintiff, Plaintiff warned that it would be “harassment and retaliation,” but if
2 Defendant instructed employees not to do so, as Mike Broadsworth allegedly did,
3 Plaintiff claims discrimination, shunning, and adverse employment actions.

4 Throughout this case, Plaintiff relies on her assertion that Woodward
5 suggested that she use a mood chart on her door to let people know what kind of
6 mood she was in. *See e.g.*, ECF No. 94 at 20-21. Even if the Court ignores
7 Defendant’s allegations that Woodward first introduced this “mood chart” as a
8 potential management tool in 2007, *see* ECF No. 73-1 at 18, or that it had been
9 used by the other supervisors in the past, *see* ECF No. 52 at 7, the Court fails to see
10 how Woodward’s suggestion amounts to an adverse employment action,
11 discrimination, harassment, contribution to a hostile work environment, or any
12 other legal claim that Plaintiff’s counsel ties to this allegation. Plaintiff may very
13 well have been upset and offended by the suggestion, but that is not the test of a
14 claim for discrimination or retaliation.

15 In dismissing a claim for retaliation, the Ninth Circuit Court of Appeals,
16 held that:

17 a supervisor’s laughing and stating that the plaintiff “got him on sexual
18 harassment charges,” the supervisor’s hostile stares, and increased criticism
19 were insufficient to preclude summary judgment dismissing the plaintiff’s
20 retaliation claim. *See also Brooks v. City of San Mateo*, 229 F.3d [917,] 929
21 [9th Cir. 2000] (stating that badmouthing an employee outside the job
reference context does not constitute adverse employment action); *Manatt [*
v. Bank of America, NA], 339 F.3d [792,] 803 [9th Cir. 2003] (“Mere
ostracism in the workplace is not grounds for a retaliation claim”); *cf.*
Ray [v. Henderson], 217 F.3d [1234,] 1243 [9th Cir. 2000] (definition of

1 “adverse employment action” “does not cover every offensive utterance by
2 co-workers, because offensive statements by co-workers do not reasonably
deter employees from engaging in protected activity”).

3 *Hardage v. CBS Broad., Inc.*, 427 F.3d 1177, 1189 (9th Cir. 2005) *amended on*
4 *denial of reh’g*, 433 F.3d 672 (9th Cir. 2006) *amended on denial of reh’g*, 436 F.3d
5 1050 (9th Cir. 2006). Furthermore . . .

6 even if . . . remarks collectively created a hostile work environment that
7 constituted retaliation, such harassment “is actionable only if it is
‘sufficiently severe or pervasive to alter the conditions of the victim’s
8 employment and create an abusive working environment.’”

9 *Id.*

10 Accepting Plaintiff’s evidence as true, the Court finds that suggesting the
11 use of a mood chart is not “sufficiently severe or pervasive” to sustain any legal
12 claim. In light of the fact that there is no genuine issue of material fact regarding
13 the elements of any viable legal claim, Woodward’s suggestion of a mood chart
14 does not serve as the basis for a cause of action.

15 Plaintiff’s counsel also attempts to create an issue of material fact by
16 disputing issues that are irrelevant to any legal claim. For example, Plaintiff’s
17 Statement of Facts alleges that Woodward was lying about having sympathy for
18 Plaintiff due to her having lost a friend to cancer because Woodward’s friend
19 apparently died after Plaintiff had already left the PUD. *See* ECF No. 101 at 29.

20 In a similar way, to contest Defendant’s assertion that Woodward and her
21 Administrative Assistant, Cindy McClure, drove to Ogden’s home to give her a

1 poem and to help her pack for her trip to Western Washington for surgery,
2 Plaintiff’s counsel argues, “Woodward and Cindy McClure did not help Ms.
3 Ogden pack.” *Id.* at 31.

4 At the summary judgment stage, the Court determines whether or not there
5 is any genuine issue of material fact, “material” being the operative word. Even if
6 Woodward lied about her friend or did not help Plaintiff pack her suitcase, those
7 facts are not material to this case.¹⁰ “Only disputes over facts that might affect the
8 outcome of the suit under the governing law will properly preclude the entry of
9 summary judgment. Factual disputes that are irrelevant or unnecessary will not be
10 counted.” *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

11 The Court finds that despite all of Plaintiff’s factual allegations, Plaintiff has
12 failed to create a genuine issue of material fact regarding any retaliation claim.

13 **II. Defense argument #2 - Plaintiff has no claim under the WFLA**

14 In relevant part, the Washington Family Leave Act states:

15 (1) Subject to RCW 49.78.260, an employee is entitled to a total of twelve
16 workweeks of leave during any twelve-month period for one or more of the
following: ... [including] (d) Because of a serious health condition that

17
18 ¹⁰ A material fact is defined as one that is “significant or essential to the issue or
19 matter at hand; esp., a fact that makes a difference in the result to be reached in a
20 given case. What constitutes a material fact is a matter of substantive law.” *Fact*,
21 BLACK’S LAW DICTIONARY (10th ed. 2014).

1 makes the employee unable to perform the functions of the position of the
2 employee.

3 “The Washington Family Leave Act ‘mirrors its federal counterpart and
4 provides that courts are to construe its provisions in a manner consistent with
5 similar provisions of the FMLA.’” *Crawford v. JP Morgan Chase NA*, 983 F.
6 Supp. 2d 1264, 1269 (W.D. Wash. 2013) (quoting *Washburn v. Gymboree Retail*
7 *Stores, Inc.*, 2012 WL 5360978, *7, 2012 U.S. Dist. LEXIS 156240, *21 (W.D.
8 Wash. Oct. 30, 2012). This argument should be analyzed under the same standards
9 applied to Plaintiff’s FMLA claims. In light of this Court’s granting summary
10 judgment on the FMLA claims based on the foregoing discussion, summary
11 judgment is properly granted regarding Plaintiff’s WFLA claims as well.

12 **III. Defense arguments #3 and 4 – Plaintiff has no claim for failure to
13 accommodate or for disability-based disparate treatment.**

14 **A. Americans with Disabilities Act**

15 The ADA prohibits discrimination against a qualified employee based on the
16 employee’s disability.¹¹ See 42 U.S.C. § 12112. Such discrimination can include:

17 (A) not making reasonable accommodations to the known physical or mental
18 limitations of an otherwise qualified individual with a disability who is an

19 ¹¹ “Disability” is defined as: “(A) a physical or mental impairment that
20 substantially limits one or more major life activities of such individual; (B) a
21 record of such an impairment; or (C) being regarded as having such an impairment
...” 42 U.S.C. § 12102.

1 applicant or employee, unless such covered entity can demonstrate that the
2 accommodation would impose an undue hardship on the operation of the
3 business of such covered entity; or (B) denying employment opportunities to
4 a job applicant or employee who is an otherwise qualified individual with a
disability, if such denial is based on the need of such covered entity to make
reasonable accommodation to the physical or mental impairments of the
employee or applicant.

5 42 U.S.C. § 12112(b)(5). Plaintiff alleges violations of the ADA for failing to
6 accommodate her and for disparate treatment due to her disability.

7 **1. Failure to accommodate**

8 In order to establish a prima facie case for failure to accommodate under the
9 ADA, a plaintiff must establish that

10 (1) [s]he is disabled within the meaning of the ADA; (2) [s]he is a qualified
11 individual able to perform the essential functions of the job with reasonable
12 accommodation; and (3) [s]he suffered an adverse employment action
because of [her] disability.

13 *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237 (9th Cir. 2012)
14 (citing *Allen v. Pac. Bell*, 348 F.3d 1113, 1114 (9th Cir. 2003) and 42 U.S.C. §
15 12112(a), (b)(5)(A) (requiring reasonable accommodation)).

16 The ADA defines “reasonable accommodation” as including:

17 (A) making existing facilities used by employees readily accessible to and
18 usable by individuals with disabilities; and (B) job restructuring, part-time or
19 modified work schedules, reassignment to a vacant position, acquisition or
20 modification of equipment or devices, appropriate adjustment or
21 modifications of examinations, training materials or policies, the provision

1 of qualified readers or interpreters, and other similar accommodations for
2 individuals with disabilities.

3 42 U.S.C.A. § 12111(9).

4 Defendant argues that Plaintiff admitted that Defendant approved every
5 request for medical leave Plaintiff ever made and that the only accommodation
6 denied was the extended work-from-home arrangement. *See* ECF Nos. 72 at 10
7 and 95 at 14-16. Defendant argues that Plaintiff was given the opportunity to work
8 from home “for precisely the period recommended by her provider.” *Id.*

9 The extensive record in this case establishes a long record of
10 accommodations being extended to Plaintiff and of Defendant’s pattern of
11 continuing to work with Plaintiff’s demands regardless of whether or not they were
12 reasonable. *See e.g.*, ECF No. 44-3, 44-4, 44-5, 44-(8-15). Viewing the evidence
13 in the light most favorable for the Plaintiff, the Court finds a history of Plaintiff’s
14 requesting numerous accommodations, but being unwilling to supply proof of the
15 reasonability of her proposed accommodations, and then pursuing litigation despite
16 Defendant’s efforts to accommodate her. *Id.*

17 In response to Defendant’s motion for summary judgment, Plaintiff narrows
18 her arguments regarding the alleged lack of accommodations to two claims: (a)
19 Defendant did not hold her position as an Administrative Support Services
20 Supervisor open, and (b) “PUD failed to follow through with a promised
21 accommodation to alter the chain of supervision so that Ogden would no longer be

1 supervised by Woodward.” ECF No. 94 at 16-17. Assuming without deciding that
2 Plaintiff was disabled within the meaning of the ADA, the Court will address the
3 second and third elements of a claim for failure to accommodate as it pertains to
4 these allegations.

5 **(a) Failure to hold Plaintiff’s position open**

6 Plaintiff alleges that her transfer to the position of Technical Writer was a
7 violation of the ADA because she was an eligible employee able to return to her
8 position with reasonable accommodations and that the transfer was an adverse
9 action due to her disability. ECF No. 94 at 16-17. Even though the Court finds, as
10 discussed previously, that the transfer to Technical Writer was not an adverse
11 action, the Court will analyze Plaintiff’s allegations and Defendant’s responses
12 regarding these claims.

13 Defendant provided numerous justifications for transferring Plaintiff to the
14 position including Plaintiff’s previously having expressed an interest in the
15 position, that it was a lateral move, and that the transfer would reduce the overall
16 headcount for the Hydro Division of the PUD which would help address budgetary
17 concerns that were due in part to a low snow-pack in the winter of 2009/2010. *See*
18 ECF No. 54 at 12-13. Plaintiff repeatedly asserts that these justifications are
19
20
21

1 pretext, *see e.g.*, ECF No. 94 at 17, but fails to provide evidence to create material
2 issues of fact regarding these justifications.

3 Defendant submitted numerous memoranda from before Plaintiff's transfer
4 that addressed the budget crisis and low snowpack, demonstrating these very real
5 concerns were at play long before Plaintiff was transferred. *See e.g.*, ECF Nos. 54-
6 6 and 54-7. Plaintiff responds by providing data for the winter of 2010/2011, *see*
7 ECF No. 95-9, when Defendant had referred to the previous year's snowpack,
8 2009/2010, and Plaintiff fails to refute the legitimacy of the budgetary concerns.
9 Instead, Plaintiff provides witness statements that allege, for example, that
10 "moving Joanne to the Technical Writer position did not change the hydro division
11 head count. It simply moved one employee from a position in hydro to a new
12 position in hydro that had previously been eliminated." ECF No. 98 at 2.

13 Plaintiff's argument fails to recognize that Technical Writer was a position
14 left vacant on the organizational chart in December of 2010. *See* ECF No. 54-12 at
15 7. In light of the fact that PUD had been operating with Ogden often absent from
16 her position as Administrative Support Services Supervisor, allowing that position
17 to be absorbed by the people who had covered for her absences and transferring
18 her to a vacant position meant not having to hire a new employee to fill the vacant
19 spot. Therefore, the transfer could lower costs in the future. The Court finds that

1 Plaintiff fails to create a genuine issue of material fact regarding Defendant's
2 proffered justifications.

3 Alternatively, even if the Court accepts Plaintiff's argument, despite
4 uncontroverted evidence rebutting it, that the transfer was solely due to Plaintiff's
5 "tagging in and tagging out," the transfer still would be a reasonable
6 accommodation. As stated by Defendant

7 [b]y January, 2011, when [Plaintiff] moved to Technical Writer, the District
8 had given her 25 weeks of leave and other accommodations, and her future
9 remained unclear. ECF No. 74-1 at 6:21-9:21; 74:14. (She subsequently
10 took nearly 74 additional weeks before resigning. *Id.*) By early 2011, the
11 District had the lawful authority to not only reassign her, but to discharge
12 her.

13 ECF No. 109 at 4.

14 Throughout this case, Plaintiff asserts the importance of her supervisory
15 duties as an Administrative Support Services Supervisor (in an attempt to support
16 her argument that the transfer was a demotion), but in doing so, she makes clear
17 how the transfer was necessary. Inherently, supervising others is an essential
18 function of a supervisory position, so her "tagging in and tagging out" which
19 amounted to her being gone from her worksite was a justifiable cause for
20 transferring her out of a position that required overseeing the work of others.

21 Plaintiff also fails to create a genuine issue of material fact regarding
whether or not the transfer was an "adverse employment action" due to her
disability. The ADA explicitly lists "reassignment to a vacant position" as a

1 “reasonable accommodation,” *see* 42 U.S.C.A. § 12111(9)(B), and as previously
2 discussed, there were numerous permissible justifications for the transfer. In an
3 attempt to argue that the transfer was intended to set her up to fail, Plaintiff alleges
4 that she did not have requisite knowledge or training for the position, and to
5 respond to Defendant’s assertion that she completed good work as a Technical
6 Writer, Plaintiff argues that she had to rely on the help of Jim Kennedy to do so.
7 *See* ECF No. 98 at 3. Having to work with other employees in order to succeed is
8 not evidence of a lack of necessary skills. As a matter of law, Plaintiff fails to
9 provide a genuine issue of material fact regarding Defendant’s argument that the
10 transfer was justified and permissible.

11 **(b) Defendant’s failure to remove Woodward as supervisor**

12 Plaintiff’s second claim for a lack of reasonable accommodation refers to the
13 fact that Dawn Woodward, director of the entire Hydro Division of the PUD, was
14 not completely removed from any supervisory authority over Plaintiff. Plaintiff
15 cites to *Snyder v. Medical Serv. Corp.*, 145 Wash. 2d 233, 241 (2000), as she
16 recognizes that “a change in supervision is not normally deemed to be a reasonable
17 accommodation.” *See* ECF No. 94 at 17. However, a closer review of the case
18 demonstrates a much stronger holding.

19 The *Snyder* court recognized that “several of the United States courts of
20 appeals have found there is no duty under the ADA to provide an employee with a
21 new supervisor as reasonable accommodation.” 145 Wash. 2d at 241. The Court

1 also held unequivocally, that “if [Plaintiff] can perform the job, then she has no
2 disability requiring accommodation simply because she has a personality conflict
3 with her supervisor.” *Id.*

4 Even though Defendant was under no obligation to do so, the record in this
5 case demonstrates an impressive attempt to appease Plaintiff’s request. Plaintiff
6 first requested this “accommodation” on a list of demands communicated through
7 her attorney stating in relevant part that “[u]nder no circumstances is Ms. Ogden to
8 work under the supervision of Ms. Woodward nor is Ms. Woodward to have any
9 supervisory or other control over Ms. Ogden or her work.” ECF No. 44-9 at 4.

10 Defendant responded to Plaintiff’s counsel by explaining that

11 [t]he technical writer position is part of the Hydro Division. Ms. Woodward
12 is the Director of that Division so she would technically be under Ms.
13 Woodward’s supervision. However, Ms. Ogden will report to the Training
14 & SOP Supervisor, who reports to the Hydro Operations Manager, which
15 would minimize, if not eliminate, the direct contact between Ms. Ogden and
16 Ms. Woodward. In addition, the District will remove Ms. Woodward from
17 any decisions regarding the material terms and/or conditions of Ms. Ogden’s
18 employment such as her compensation, evaluation of her work, discipline, or
19 promotion or transfer.

20 ECF No. 44-10 at 3.

21 Although the Court finds as a matter of law that Plaintiff’s requested
accommodation was unreasonable, the Court also finds that Defendant provided
reasonable accommodation.

Plaintiff relies on a maximum of a dozen brief encounters with Woodward
over the course of nearly a year and testified that assignments that came from

1 Woodward were assigned to her through David Beech. *See* ECF No. 95-18 at 39-
2 42. Those brief encounters with Ms. Woodward still bothered Plaintiff as she
3 testified that “[j]ust back to all the correspondence I had with her, whether it was
4 verbal or not, I found objectionable,” and she admits that her issue was with the
5 fact that she had to have any contact with Woodward at all. *Id.* Plaintiff fails to
6 create a genuine issue of material fact regarding any claim for a failure to
7 accommodate, and, therefore, the Court grants summary judgment on these claims.

8 **2. ADA – Disparate treatment**

9 Plaintiff also alleges disparate treatment due to her alleged disability. As
10 discussed in detail regarding her FMLA-based retaliation claim, Plaintiff fails to
11 create a genuine issue of material fact regarding her allegations of discriminatory
12 animus, harassment, public humiliation, shunning, isolation, or the existence of a
13 hostile work environment. Although the Court has addressed these broad
14 allegations previously, Plaintiff provides additional specific allegations to support
15 a claim of disparate treatment. *See* ECF No. 94 at 17-22.

16 Plaintiff alleges the following as adverse actions that Defendant took against
17 her due to her alleged disability: (1) Plaintiff was not reinstated as Administrative
18 Support Services Supervisor and was “demoted” to Technical Writer; (2) PUD
19 delayed Ogden’s career path, which delayed her salary increases; (3) PUD did not
20 provide training for Ogden to perform her new position as Technical Writer which
21 affected her ability to perform the job and to meet career path goals for

1 advancement; and (4) that PUD employees discriminated and retaliated against her
2 and did nothing to address her complaints to the point that Plaintiff's medical
3 doctor and counselor advised her to quit her job. *See id.* at 18-19.

4 Additionally, Plaintiff argues that there is evidence of discriminatory animus
5 on the part of the PUD.¹² *See id.* at 19-21. However, Plaintiff only provides bare,
6 conclusory allegations that rely upon the same factual underpinnings of her other
7 claims which the Court found are properly dismissed on summary judgment.

8 Plaintiff alleges that she was treated differently after she was diagnosed with
9 cancer; that Woodward also discriminated against other disabled employees; and
10 that Ogden was treated differently from people without disabilities when she was
11 forced to discuss her disease, told to post a smiling or frowning face on her door,

12
13
14
15
16 _____
17 ¹² Plaintiff's counsel lists different types of circumstantial evidence to support
18 allegations of animus, but there is insufficient evidence to support any of the
19 allegations. The Court has considered these allegations, which counsel describes
20 as "elements" of circumstantial evidence, and finds no genuine issue of material
21 fact.

1 or when she was “shunned.” *Id.* at 20. Again, these claims are unsupported by
2 evidence and fail to create a genuine issue of material fact.

3 In an effort to support her claims that Plaintiff “suffered a continual
4 progressively (sic) worsening deterioration of her work environment,” Plaintiff
5 also lists the following “adverse employment actions”:

- 6 • Public Humiliation:
 - 7 ▪ Woodward discussing Ms. Ogden’s medical condition with employees
 - 8 ▪ Woodward forcing Ms. Ogden to discuss her medical condition and emotional issues with staff;
 - 9 ▪ Woodward telling Ms. Ogden to post smiley face or frown face on her door to let staff know her mood;
 - 10 ▪ Forced to return to the PUD offices to work before she was ready – caused her to have events where she soiled her pants.
- 11 • Demotion. The transfer from Administrative Services Supervisor to Technical Writer was a demotion that involved a loss of prestige; a

1 move to an undesirable location; loss of management perks; and, a
2 dead-end career path.

- 3 • Shunning / Isolation
 - 4 ▪ Removing Ms. Ogden from the management building;
 - 5 ▪ Excluding her from social gatherings;
 - 6 ▪ Employees were told not to associate with Ms. Ogden;
- 7 • Bullying; Woodward persistently bullied Ms. Ogden;
- 8 • Interfering with wage step increases;
- 9 • Failing to fully accommodate her disability;
- 10 • Refusing to investigate complaints of discrimination / retaliation.

11 ECF No. 94 at 21.¹³

12 Plaintiff's allegations of adverse employment actions and of corresponding
13 discriminatory animus are not supported by evidence. Therefore, the Court finds
14 that Plaintiff's allegations are insufficient to support a genuine issue of material
15 fact and summary judgment is proper as to her claims of disparate treatment.

16 **B. Washington Law Against Discrimination**

17 "The WLAD encompasses two types of disability discrimination claims:
18 failure to accommodate claims and disparate treatment claims." *Daniel v. Boeing*
19 *Co.*, 764 F. Supp. 2d 1233, 1242 (W.D. Wash. 2011). The WLAD makes it an
20 "unfair practice" to "discriminate against any person in compensation or in other

21 ¹³ Plaintiff also cites to this list to support her claims of retaliation by arguing that
"each of the bullet-pointed examples of harassment above represents incidents of
retaliation and retaliatory animus taken against Ms. Ogden for exercising her rights
under the WLAD / ADA, FMLA and WSFLA." ECF No. 94 at 24.

1 terms or conditions of employment because of ... [among other reasons] the
2 presence of any sensory, mental, or physical disability.” WASH. REV. CODE §
3 49.60.180.

4 As recognized by a Washington state court in *Hegwine v. Longview Fibre*
5 *Co.*, 132 Wash. App. 546, 559, (2006) *aff’d*, 162 Wash. 2d 340 (2007), “RCW
6 49.60.180 does not set out the criteria for establishing a claim of sex or disability
7 discrimination. For this reason, our courts have considered interpretations of
8 analogous federal law in discrimination cases.”

9 Plaintiff’s WLAD claims rely upon the same factual allegations that the
10 Court previously addressed. In light of the Court’s granting summary judgment
11 regarding Plaintiff’s ADA claim, Plaintiff’s WLAD claims similarly fail.¹⁴

12 **IV. Defense argument #5 – Plaintiff has no claim for retaliation.**

13 A prima facie case of retaliation under either the ADA or the WLAD
14 requires that plaintiff demonstrate that “(1) plaintiff engaged in protected activity,

15 _____
16 ¹⁴ Plaintiff’s Second Amended Complaint also alleges “termination” as a violation
17 of the WLAD, but the uncontested fact is that she resigned from the PUD after the
18 PUD encouraged her to return after her previously revoked resignations. *See* ECF
19 No. (44-1)-(44-19). She alleges that she was forced to resign due to the conditions
20 of her employment, but that claim is addressed below under section V, regarding
21 “Constructive Discharge.”

1 (2) she suffered an adverse employment action, and (3) there was a causal link
2 between the two.” *Daniel*, 764 F. Supp. 2d at 1245 (citing *Pardi v. Kaiser Found.*
3 *Hosp.*, 389 F.3d 840, 849 (9th Cir. 2004); *Burchfiel v. Boeing Corp.*, 149 Wash.
4 App. 468, 482 (2009)).

5 Importantly,

6 [d]iscrimination and retaliation claims under the ADA are both subject to the
7 burden-shifting framework outlined in *McDonnell Douglas Corp. v. Green*,
8 411 U.S. 792, 802–04 [] (1973). *See Raytheon Co. v. Hernandez*, 540 U.S.
9 44, 49–50 & n. 3 [] (2003); *Brown v. City of Tucson*, 336 F.3d 1181, 1186–
10 87 [] (9th Cir. 2003); *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080,
11 1093 [] (9th Cir. 2001). Under that framework, an employee challenging an
12 adverse employment action has the initial burden of establishing a prima
13 facie case of discrimination (or retaliation). The burden then shifts to the
14 employer to provide a legitimate, nondiscriminatory (or nonretaliatory)
15 reason for the adverse employment action. If the employer does so, then the
16 burden shifts back to the employee to prove that the reason given by the
17 employer was pretextual. *See Raytheon*, 540 U.S. at 49–52 & n. 3; *Brown*,
18 336 F.3d at 1187; *Snead*, 237 F.3d at 1093.

19 *Curley v. City of N. Las Vegas*, 772 F.3d 629, 632 (9th Cir. 2014).

20 As the Court found above, Plaintiff has failed to create a genuine issue of
21 material fact regarding any “adverse employment action.” Accordingly, there can
22 be no basis for this claim, and summary judgment is properly granted on these
23 allegations of retaliation as well.

1 **V. Defense argument #6 – Plaintiff has no claim for constructive discharge.**¹⁵

2 Defendant argues that Plaintiff is essentially claiming that she was forced to
3 quit after the conditions of her employment were no longer bearable. “In order to
4 survive summary judgment on a constructive discharge claim, a plaintiff “must
5 show there are triable issues of fact as to whether ‘a reasonable person in [her]
6 position would have felt that [she] was forced to quit because of intolerable and
7 discriminatory working conditions.” *Hardage*, 427 F.3d 1177, 1184 *amended on*
8 *denial of reh’g*, 433 F.3d 672, *amended on denial of reh’g*, 436 F.3d 1050 (quoting
9 *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir. 1994)).

10 At the summary judgment stage, it is important to recognize that

11 [w]hether working conditions were so intolerable and discriminatory as to
12 justify a reasonable employee’s decision to resign is normally a factual
13 question for the jury. In general, however, a single isolated incident is
14 insufficient as a matter of law to support a finding of constructive discharge.
15 Thus, a plaintiff alleging a constructive discharge must show some
16 aggravating factors, such as a continuous pattern of discriminatory
17 treatment.

18 ¹⁵ Plaintiff argues that “proof of constructive discharge is not necessary to support
19 an award of damages under the WLAD.” ECF No. 94 at 19. However, her
20 complaint alleges constructive discharge, so the Court addresses this claim both as
21 its own basis for liability and insofar as it supports a discrimination claim.

1 *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1411-12 (9th Cir. 1996) (citing
2 *Sanchez v. City of Santa Ana*, 915 F.2d 424, 431 (9th Cir. 1990) (internal
3 quotations and citations omitted), *cert. denied*, 502 U.S. 815 (1991).

4 The court in *Schnidrig* affirmed the district court’s granting summary
5 judgment of a constructive discharge claim because the plaintiff’s “working
6 conditions were not so intolerable and discriminatory that a reasonable person
7 would feel forced to resign,” there were legitimate nondiscriminatory reasons for
8 each of the actions complained of by Schnidrig, and the district court “found no
9 evidence to suggest either that any of these actions were motivated to force
10 Schnidrig to resign or that they made Schnidrig’s working conditions intolerable.”
11 *Schnidrig*, 80 F.3d at 1412.

12 Even viewing all evidence in the most favorable light for Plaintiff, her
13 allegations are, as a matter of law, insufficient to sustain a claim for constructive
14 discharge past the summary judgment stage. Plaintiff’s taking offense at
15 coworkers for not talking to her as much as she would have liked, not being
16 acknowledged sufficiently at a funeral, receiving emails or visits asking how she
17 was feeling, being introduced as a “new employee,” ECF No. 102 at 23, having
18 “objectionable” interactions with her supervisor (both verbal and non-verbal), and
19 any and all of her other factual allegations fail to create genuine issues of material
20 fact regarding the “intolerable” nature of her work environment.

1 The record is devoid of any “aggravating circumstances,” even accepting all
2 of Plaintiff’s allegations as valid. The PUD has provided evidence that it
3 demonstrated significant efforts at making Plaintiff’s former workplace supportive
4 and encouraging.

5 **VI. Defense argument #7 – Plaintiff has no claim for breach of a specific
6 promise.**

7 Plaintiff’s counsel refers to this cause of action as a “handbook claim” and
8 argues that Defendant entered into an employment contract that created “an
9 atmosphere of job security and fair treatment with specific promises of specific
10 treatment in specific situations,” but that those promises were broken when
11 Plaintiff was mistreated. See ECF No. 26 at 8-9. Plaintiff’s counsel previously
12 relied on a very similar claim in another case in this district. See *Salazar v.*
13 *Monaco Enterprises, Inc.*, No. CV-12-0186-LRS, 2014 WL 1976601, at *3 (E.D.
14 Wash. May 15, 2014). As Judge Suko explained in the prior case:

15 *Korslund [v. DynCorp Tri–Cities Services, Inc.]*, 156 Wash. 2d 168 (2005)
16 sets forth a three-step test that applies when the parties have not agreed that
17 the provisions in an employee handbook constitute a contract, as is the
18 situation here. The employee must prove these three elements of the cause
19 of action [for breach of a promise of specific treatment]: (1) that a statement
20 (or statements) in an employee manual or handbook or similar document
21 amounts to a promise of specific treatment in specific situations, (2) that the
employee justifiably relied on the promise, and (3) that the promise was
breached. [*Id.*] at 178 (citations omitted).

Id. at *4. Plaintiff argues that the three listed elements “are questions of fact.”
ECF No. 94 at 26. To the contrary, elements are only elements. If there were

1 evidence disputing the applicability of those elements, then a question of fact
2 would exist.

3 To support this claim, Plaintiff alleges that Defendant’s handbook promises
4 that employees would not “suffer adverse employment action for taking FMLA
5 leave, being disabled, or complaining about discrimination or retaliation.” ECF
6 No. 94 at 26. Plaintiff continues by arguing that “PUD breached the promise of
7 specific treatment when it failed to protect her, and ultimately treated her so poorly
8 she was forced by her medical providers to quit her job.” *Id.*

9 Plaintiff is relying on the same factual assertions that underlie her other
10 claims that the Court determined are properly disposed of at this summary
11 judgment stage.¹⁶ In light of the fact that Plaintiff failed to present a genuine issue
12 of material fact regarding her allegations of adverse employment actions and poor
13 treatment, summary judgment likewise is granted on Plaintiff’s “handbook” claim.

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18 _____
19 ¹⁶ Although the Court has not previously addressed a claim for “failure to protect,”
20 it seems this allegation refers to Plaintiff not being protected from the alleged
21 actions that underlie her other claims, i.e., harassment, discrimination, etc.

1 **VII. Defense argument #8 – Plaintiff has no claim for negligent infliction of**
2 **emotional distress.**

3 In finding that an employer owed no duty of care to avoid negligently
4 inflicting emotional distress while dealing with an employee’s complaints about a
5 supervisor, the Supreme Court of Washington stated that they:

6 reexamined liability for negligent infliction of emotional distress in *Hunsley*
7 *v. Giard*, 87 Wash. 2d 424, 433[] (1976). There we held a cause of action
8 for same *does* exist in Washington but cautioned: “Not every act which
9 causes harm results in legal liability.” *Id.* at 434 []. As with any claim
sounding in negligence, where a plaintiff brings suit based on negligent
infliction of emotional distress “we test the plaintiff’s negligence claim
against the established concepts of duty, breach, proximate cause, and
damage or injury.” *Id.* at 434 [].

10 *Snyder v. Med. Serv. Corp. of E. Washington*, 145 Wash. 2d 233, 243 (2001). The
11 *Snyder* court cited *Bishop v. State*, 77 Wash. App. 228 at 234 (1995), for the
12 proposition that

13 [t]he utility of permitting employers to handle workplace disputes outweighs
14 the risk of harm to employees who may exhibit symptoms of emotional
15 distress as a result. The employers, not the courts, are in the best position to
16 determine whether such disputes should be resolved by employee
counseling, discipline, transfers, terminations or no action at all. While such
actions undoubtedly are stressful to impacted employees, the courts cannot
guarantee a stress-free workplace.

17 *Snyder*, 145 Wash. 2d at 245 (2001).

18 Plaintiff properly recognized the limitation on claims for negligent infliction
19 of emotional distress when they result from disciplinary acts or personality
20 disputes, but seems to argue that that is not what is at issue here. ECF No. 94 at
21 26-27. Once again, Plaintiff’s counsel listed the elements that a plaintiff must

1 prove to support this claim and concluded, “[e]ach of these issues is a question of
2 fact for the jury to resolve.” *Id.* at 27.

3 In responding to Defendant’s motion for summary judgment, Plaintiff only
4 offers bare, conclusory allegations, stating that “in the present case the subjective
5 intentional discriminatory and retaliatory conduct, was persistent and outrageous in
6 nature, causing Ogden to suffer severe emotional distress,” and cites to her own
7 statement of facts. *See* ECF No. 94 at 27. In order to proceed past a proper motion
8 to dismiss, a plaintiff must allege “more than labels and conclusions, and a
9 formulaic recitation of a cause of action’s elements will not do.” *Bell Atl. Corp. v.*
10 *Twombly*, 550 U.S. 544, 545 (2007). Plaintiff’s claim for negligent infliction of
11 emotional distress fails to clear that low hurdle, and it likewise falls far short of
12 raising an issue of material fact.

13 Plaintiff asserts that Defendant “owed Plaintiff a duty not to cause her severe
14 emotional harm by and through their discriminatory employment practices.” ECF
15 No. 94 at 27. Even if the Court concedes the existence of that duty, which the
16 Court does not, there is no evidence supporting a breach of that duty. Plaintiff
17 simply relies on the same factual basis that underlies this entire case to support this
18 claim. As previously discussed, she fails to present a genuine issue of material fact
19 regarding such “discriminatory employment practices” by relying solely on
20 conclusory allegations.

1 The Court notes that Plaintiff alleges “intentional” conduct in this claim for
2 “negligent” infliction of emotional distress, but under either theory, Plaintiff’s
3 claim fails to present a genuine issue of material fact. Therefore, the Court grants
4 summary judgment on Plaintiff’s claim for negligent infliction of emotional
5 distress.

6 **CONCLUSION**

7 Based on the foregoing considerations, the Court finds that there is no
8 genuine issue of material fact regarding any of Plaintiff’s claims. Accordingly, **IT**
9 **IS HEREBY ORDERED THAT:**

10 1. Defendant’s Motion for Summary Judgment, **ECF No. 40, amended as**
11 **ECF No. 72, is GRANTED.**

12 2. All of Plaintiff’s claims are **DISMISSED WITH PREJUDICE.**

13 3. All pending motions are **DENIED AS MOOT.**

14 The District Court Clerk is directed to enter this Order, enter Judgment for
15 Defendant, provide copies of this Order to counsel, and **close this case.**

16 **DATED** this 30th day of March 2016.

17 *s/ Rosanna Malouf Peterson*
18 **ROSANNA MALOUF PETERSON**
19 **United States District Judge**
20
21