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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DIONDRE COBB,

Plaintiff,

v.

ALASKA AIRLINES INC,

Defendant.

Case No. C20-828 TLF

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

This matter comes before the Court on Defendant Alaska Airlines, Inc.'s ("Alaska") Motion for Summary Judgment on Plaintiff Diondre Cobb's claims (Dkt. 41). Mr. Cobb has opposed Alaska's motion (Dkt. 44) and Alaska has filed a reply (Dkt. 48) in support of the motion¹.

Mr. Cobb alleges that Alaska: (i) discriminated and retaliated against him due to a disability in violation of the Americans with Disabilities Act (ADA), and Washington Law Against Discrimination ("WLAD"); (ii) interfered with his use of FMLA leave; (iii) retaliated against him for his use of FMLA leave; and (iv) did not pay him all statutory paid sick leave he was due. Dkt. 1-1.

¹ Mr. Cobb filed a surreply on January 19, 2022. Because the surreply did not comply with Local Rule 7(g)(2), it has been stricken from the record. Dkt. 55.

1 There is no genuine dispute of material facts regarding each of plaintiff's claims.
2 Therefore, the Court GRANTS Alaska's motion for summary judgment. Plaintiff's claims
3 are dismissed with prejudice.

4 I. FACTUAL AND PROCEDURAL BACKGROUND

5 Mr. Cobb began working for Alaska on February 5, 2018 as a Customer Service
6 Agent. Dkt. 42, Declaration of Katheryn Garceau, at ¶3. Mr. Cobb was a member of a
7 bargaining unit represented by the International Association of Machinists and
8 Aerospace Workers ("IAMAW"). *Id.* at ¶4. The relevant collective bargaining agreement
9 ("CBA") provided plaintiff with 8 hours of accrued sick leave for each month of his
10 employment, prorated based on the number of hours worked versus vacation, sick
11 leave, or workers' compensation. Dkt. 42, Garceau Decl., at ¶4; Exhibit B.

12 Alaska began applying protected paid sick leave as of January 1, 2018. *Id.* at ¶5.
13 This provided employees, including Customer Service Agents, with one hour of
14 "protected" sick leave for every 40 hours worked. *Id.* Employees would not be
15 disciplined for using protected sick leave. *Id.* at ¶6. If an employee used time off that
16 was taken in excess of their protected sick leave, they would be allowed to use non-
17 protected sick leave accrued under the terms of the CBA. *Id.*

18 The use of non-protected sick leave could result in attendance occurrences that
19 could lead to discipline under the terms of the CBA. *Id.* But, if an employee traded a
20 shift with another qualified employee, they would not be disciplined under the
21 attendance policy and would not use any accrued sick leave. *Id.* at ¶19.

22 Mr. Cobb was issued a formal oral warning for violating Alaska's attendance
23 policy for arriving late to work on March 1, 2018, and again on September 7, 2018 --

1 and also for being absent on July 7, July 8, July 9, and September 11, 2018. Dkt. 42,
2 Garceau Decl, at ¶8; Exhibit D. In addition, Mr. Cobb was issued a written warning on
3 December 28, 2018 after being absent on November 23, December 10, and December
4 21, 2018. *Id.* at ¶9.

5 On or around February 19, 2019, Mr. Cobb applied for intermittent FMLA leave
6 after disclosing to a supervisor that he had a health condition that may require him to
7 take time off of work. *Id.* at ¶ 12. On February 23, 2019, Alaska approved Mr. Cobb's
8 intermittent FMLA leave for two absences per week from February 16, 2019 until
9 September 26, 2019. *Id.*

10 Pursuant to Alaska's policy, employees and their families cannot use travel
11 privileges while they are on FMLA leave of absence unless they are flying to receive
12 medical treatment. Dkt. 42, Garceau Decl, at ¶¶13-14.

13 Although Mr. Cobb's intermittent FMLA approval was limited -- two days per
14 week -- he was at times absent more than two days a week. *Id.* at ¶ 16. On June 14,
15 2019, Alaska issued Mr. Cobb a final warning based on his failure to comply with
16 Alaska's attendance policies. *Id.* at ¶18; Exhibit J.

17 On July 8, 2019, Mr. Cobb requested to trade his August 9, 2019 shift to Fatima
18 Hameed, another Customer Service Agent. *Id.* at ¶20. Ms. Hameed accepted the trade.
19 *Id.*; Exhibit L. He requested to trade his August 10 shift with another Customer Service
20 Agent, Savannah Shane. *Id.* at ¶22. Ms. Shane accepted this trade request. *Id.*

21 Mr. Cobb used his travel privileges on July 9, 2019, to make a reservation for a
22 flight to Hawaii leaving on August 7, 2019. *Id.* at ¶ 21; Exhibit M. He used his privileges
23 to book another flight from Hawaii to Portland on August 11, 2019. *Id.* at ¶ 26.

1 On July 20, 2019, Alaska informed Mr. Cobb that Ms. Hameed was not qualified
2 to cover his lead shift and therefore his August 9 trade was canceled. Dkt. 42, Garceau
3 Decl, at ¶23. He was told to find another trade to cover his shift. *Id.* Without finding
4 another trade, Mr. Cobb traveled to Hawaii with his two cousins on August 7 using his
5 travel privileges for both himself and one of his cousins. *Id.* at ¶24.

6 Mr. Cobb called out from work on August 9, 2019 and cited FMLA as his reason
7 for being absent. *Id.* at ¶25. He called out again on August 12, 2019 citing FMLA and
8 missed his scheduled shift that day. *Id.* Mr. Cobb had arrived in Portland, Oregon late
9 evening on August 11, 2019. *Id.* at ¶26.

10 Mr. Cobb states he was ill in Hawaii and contacted a neurologist that week to
11 discuss his symptoms. Dkt. 45, Plaintiff's Motion to Seal, at Exhibit 13. When Mr. Cobb
12 returned to work on August 17, he was questioned about his absences on August 9 and
13 August 12, and specifically his trip to Hawaii. Dkt. 42, Garceau Decl. at ¶27.

14 On August 26, Alaska formally discharged Mr. Cobb after conducting an
15 investigation for violating the following rules of conduct: "Rule #1. Report to work as
16 scheduled and on time...Rule #15. Falsification of records, concealing defective work,
17 or misrepresentation of facts including time records and job applications will not be
18 tolerated. Rule #31. Dishonesty such as theft or pilferage of company property, the
19 property of our customers or employees, or the misappropriation of funds, or
20 misrepresentation to obtain pay, benefits, or privileges including fraudulent use of sick
21 leave will be grounds for dismissal....". *Id.* at Exhibit P.

22 After Alaska discharged Mr. Cobb from employment, he filed a grievance with the
23 IAMAW, claiming that his termination violated FMLA laws. Dkt. 42-2, Declaration of
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1 Laura Crisp at ¶3. On August 29, 2019, Alaska and IAMAW held the “first step hearing”
2 for Mr. Cobb’s grievance. *Id.* at ¶4. Alaska issued its decision the following day. *Id.*
3 Neither Mr. Cobb nor the IAMAW pursued the grievance further. *Id.* at ¶5.

4 Mr. Cobb then filed a complaint with the Equal Employment Opportunity
5 Commission (“EEOC”). The EEOC concluded that it was unable to establish that Alaska
6 violated any statutes. Dkt. 44, Plaintiff’s Response, at Exhibit 1, Declaration of Diondre
7 Cobb.

8 On April 27, 2019, Mr. Cobb filed a complaint against Alaska in King County
9 Superior Court. Dkt. 1. The case was removed to this Court on June 1, 2020. *Id.*

10 II. DISCUSSION

11 A. Summary Judgment Standard

12 Summary judgment is supported if the materials in the record “show that there is
13 no genuine issue as to any material fact and the movant is entitled to judgment as a
14 matter of law.” Federal Rule of Civil Procedure (FRCP) 56 (a). The moving party bears
15 the initial burden to demonstrate the absence of a genuine dispute of material fact for
16 trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A genuine dispute concerning a
17 material fact is presented when there is sufficient evidence for a reasonable jury to
18 return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
19 252 (1986). In this context, materiality means the fact is one that is “relevant to an
20 element of a claim or defense and whose existence might affect the outcome of the
21 suit”; thus, materiality is “determined by the substantive law governing the claim.” *T.W.*
22 *Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

1 The non-moving party is required to show that genuine issues of material fact
2 “can be resolved only by a finder of fact *because they may reasonably be resolved in*
3 *favor of either party.*” *California Architectural Building Prods., Inc. v. Franciscan*
4 *Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987) (quoting *Anderson*, 477 U.S. at
5 250) (emphasis in original). When the Court considers a motion for summary judgment,
6 “[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to
7 be drawn in [their] favor.” *Anderson*, at 255. Yet the Court is not allowed to perform the
8 jury’s function – the Court may not weigh evidence, draw legitimate inferences from
9 facts, or decide credibility. *Id.*

10 If the moving party meets their initial burden, an adverse party may not rest upon
11 the mere allegations or denials of his pleading; his or her response, by affidavits or as
12 otherwise provided in FRCP 56, must set forth specific facts showing there is a genuine
13 issue for trial. FRCP 56(c). The Court may not disregard evidence solely based on its
14 self-serving nature. *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 497 (9th Cir. 2015).
15 “The district court can disregard a self-serving declaration that states only conclusions
16 and not facts that would be admissible evidence.” *Id.*

17 B. Alaska’s Requests to Strike

18 Alaska asks the Court to strike the following evidence: plaintiff’s declarations
19 paragraphs 6-12 and 14-17, exhibits 2, 4-6, 9, 11, 14 and 18, and plaintiff’s cousin, Eric
20 Layton’s declaration paragraphs 2-6 and 9-14. Dkt. 48 at 3. “Factual disputes that
21 are irrelevant or unnecessary” to the claims at issue “will not be counted” when the court
22 considers granting summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
23 248 (1986); *see also T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d
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1 626, 630 (9th Cir. 1987) (“Disputes over irrelevant or unnecessary facts will not preclude
2 a grant of summary judgment.”). But that does not mean that irrelevant facts must
3 be stricken from a summary judgment motion. *Compare* Fed. R. Civ. P. 56 (no section
4 on striking “irrelevant” portions of summary judgment motion), *with* Fed. R. Civ. P. 12(f)
5 (“The court may strike from a pleading an insufficient defense or any redundant,
6 immaterial, impertinent, or scandalous matter.”).

7 Any irrelevant facts will remain simply that—irrelevant—and will not influence the
8 court’s consideration of the motion’s merits. Thus, the Court denies Alaska’s request to
9 strike the aforementioned paragraphs and exhibits.

10 As for the remaining exhibits and paragraphs that Alaska seeks to strike, at
11 the summary judgment stage, the Court does “not focus on the admissibility of the
12 evidence’s form,” but rather on the admissibility of its contents. *Fraser v. Goodale*, 342
13 F.3d 1032, 1036 (9th Cir.2003). The contents in the declarations and exhibits can be
14 admitted into evidence at trial in a variety of ways. Thus, the Court denies Alaska’s
15 request to strike the remaining exhibits and paragraphs of plaintiff’s and Mr. Layton’s
16 declarations.

17 C. Exhaustion of Administrative Remedies

18 Alaska argues that plaintiff’s federal discrimination claims must be dismissed
19 because he failed to file a charge of discrimination with the EEOC pursuant to 42 U.S.C.
20 § 12117. Dkt. 41 at 12. Yet Mr. Cobb did file a charge of discrimination with the EEOC.
21 Dkt. 44, Plaintiff’s Response, at Exhibit 1, Cobb Decl. Alaska acknowledged this
22 oversight and instead presented a new argument on reply that Mr. Cobb’s claims should
23 be dismissed because they are barred by the relevant statute of limitations. Dkt. 48 at 8.

1 On January 31, 2022, this Court entered a Minute Order providing the parties
2 additional time to file supplemental briefing solely on the issue of whether any or all of
3 Mr. Cobb's claims are barred by the relevant statute of limitations. Dkt. 55. Alaska did
4 not file a supplemental brief by the Court's deadline. Thus, the Court declines to
5 consider Alaska's statute of limitations argument presented for the first time in its reply
6 brief. Dkt. 48 at p. 8.

7 D. Americans with Disabilities Act, and Washington Law Against
8 Discrimination

9 "Whether a person is disabled under the ADA is an 'individualized inquiry.'" *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483, 119 S.Ct. 2139, 144 L.Ed.2d 450
10 (1999). Under the ADA, an "individual with a disability" is covered by the protections of
11 the statute. 42 U.S.C. §§ 12101, 12102(1). The ADA prohibits employers who are
12 covered by the statute from "discriminat[ing] against a qualified individual on the basis of
13 disability in regard to job application procedures, the hiring, advancement, or discharge
14 of employees, employee compensation, job training, and other terms, conditions, and
15 privileges of employment." 42 U.S.C. § 12112(a). A "qualified individual" is defined as
16 "an individual who, with or without reasonable accommodation, can perform the
17 essential functions of the employment position that such individual holds or desires." 42
18 U.S.C. § 12111(8). The ADA definition of "disability" is "a physical or mental impairment
19 that substantially limits one or more major life activities of [an] individual; a record of
20 such an impairment; or being regarded as having such an impairment." 42 U.S.C. §
21 12102(1).
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1 Claims of discrimination under the ADA are analyzed under the burden-shifting
2 framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Snead v.*
3 *Metropolitan Property & Cas. Ins. Co.*, 237 F.3d 1080, 1092-1094 (9th Cir. 2001).

4 Regarding discharge, the plaintiff must establish a prima facie case that he was
5 discharged on the basis of a disability; the employer is then required to introduce
6 admissible evidence of a legitimate non-discriminatory reason for the discharge; if that
7 evidence is introduced, then the burden shifts back to the plaintiff to produce evidence
8 and carry the burden of persuasion that the employer's proffered reason is a pretext.
9 *Snead v. Metropolitan Property & Cas. Ins. Co.*, 237 F.3d 1080, 1092-1094 (9th Cir.
10 2001).

11 Regarding plaintiff's claim of retaliation, under the ADA, 42 U.S.C. § 12203(a),
12 "No person shall discriminate against any individual because such individual has
13 opposed any act or practice made unlawful by this Act or because such individual made
14 a charge, testified, assisted, or participated in any manner in an investigation,
15 proceeding, or hearing under this Act." With respect to the retaliation cause of action,
16 the Title VII burden-shifting framework of *McDonnell Douglas* applies. *T.B. ex rel.*
17 *Brenneise v. San Diego Unified School Dist.*, 806 F.3d 451, 472-473 (9th Cir. 2015).

18 The plaintiff must present a prima facie case "(a) that he or she was engaged in
19 protected activity, (b) that he or she suffered an adverse action, and (c) that there was a
20 causal link between the two." *Emeldi v. Univ. of Or.*, 673 F.3d 1218, 1223 (9th Cir.
21 2012). The standard for determining whether a causal link exists is but-for causation.
22 *T.B. ex rel. Brenneise v. San Diego Unified School Dist.*, 806 F.3d at 473. If the plaintiff
23 makes a prima facie showing, then the burden shifts to the defendant to offer legitimate
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1 reasons for the adverse action. *See, Hashimoto v. Dalton*, 118 F.3d 671, 679-680 (9th
2 Cir. 1997). Proximity in time is not, standing alone, sufficient evidence to refute
3 proffered legitimate reasons. *See Hashimoto v. Dalton*, at 680. Making a prima facie
4 showing is a necessary, but not a sufficient condition for surviving a motion for summary
5 judgment. *T.B. ex rel. Brenneise v. San Diego Unified School Dist.*, 806 F.3d at 473.

6 The Washington Law Against Discrimination (WLAD) prohibits an employer from
7 discharging an employee because of certain protected characteristics, including a
8 “sensory, mental, or physical disability.” RCW 49.60.180(2). Violation of this provision
9 supports a discriminatory discharge claim. *See Mikkelsen v. Pub. Util. Dist. No. 1 of*
10 *Kittitas County*, 189 Wash.2d 516, 526 (2017). The WLAD also prohibits an employer
11 from retaliating against an employee for opposing any discriminatory practices forbidden
12 by the WLAD. RCW 49.60.210. *See Cornwell v. Microsoft Corp.*, 192 Wash.2d 403, 411
13 (2018). Because direct evidence of discriminatory intent is rare, an employee “may rely
14 on circumstantial, indirect, and inferential evidence to establish discriminatory
15 action.” *Mikkelsen*, 189 Wash.2d at 526.

16 Where the employee lacks direct evidence, Washington has adopted the three-
17 step evidentiary burden-shifting framework announced in *McDonnell Douglas Corp. v.*
18 *Green*, 411 U.S. 792 (1973) for discriminatory discharge claims. *Mikkelsen*, 189
19 Wash.2d at 526-27; *Scrivener v. Clark Coll.*, 181 Wash.2d 439, 445-46 (2014).

20 The evidentiary burden-shifting framework under WLAD is the same for
21 retaliation claims as for discrimination claims. *Cornwell*, 192 Wash.2d at 411. And the
22 same general framework applies to wrongful discharge in violation of public policy
23 claims. *Martin v. Gonzaga Univ.*, 191 Wash.2d 712, 725-26 (2018).

1 First, an employee must make a prima facie case of discriminatory discharge by
2 showing they were: (1) within a statutorily protected class, (2) discharged by the
3 defendant, and (3) doing satisfactory work. *Mikkelsen*, 189 Wash.2d at 527, 404 P.3d
4 464. Where the employee establishes a prima facie case, a rebuttable presumption of
5 discrimination exists. *Id.* The requisite degree of proof necessary to establish a prima
6 facie case is minimal. See *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654,
7 659 (9th Cir. 2002).

8 Second, the burden shifts to the employer, who must “ ‘articulate a legitimate,
9 nondiscriminatory reason’ ” for the discharge. *Id.* The employer is not required to
10 persuade the court that it actually was motivated by the nondiscriminatory reason, only
11 that the employer’s evidence if taken as true would permit the conclusion that there was
12 a nondiscriminatory reason. *Id.* at 533.

13 Third, if the employer meets this burden, the employee must produce sufficient
14 evidence showing that the employer's alleged nondiscriminatory reason for the
15 discharge was a “pretext.” *Id.* at 527. “ An employee may satisfy the pretext prong by
16 offering sufficient evidence to create a genuine issue of material fact either: (1) the
17 defendant's reason is pretextual or (2) although the employer's stated reason is
18 legitimate, discrimination nevertheless was a substantial factor motivating the
19 employer.” *Id.* The employee is not required to show that discrimination was the only
20 motivating factor for the discharge because an employer's decision may be based on
21 both legitimate and illegitimate reasons. *Id.* at 534.

1 Here, Mr. Cobb has no direct evidence that Alaska terminated him because of his
2 disability, as retaliation, or in violation of public policy. Therefore, the *McDonnell*
3 *Douglas* burden-shifting framework applies.

4 The parties dispute whether Mr. Cobb was within a statutorily protected class and
5 whether he was doing satisfactory work. Alaska simply states that Mr. Cobb does not
6 have a disability. The ADA definition of “disability” is “a physical or mental impairment
7 that substantially limits one or more major life activities of [an] individual; a record of
8 such an impairment; or being regarded as having such an impairment.” 42 U.S.C. §
9 12102(1). Under the WLAD, a “disability” means the “presence of a sensory, mental, or
10 physical impairment that: (i) is medically cognizable or diagnosable; or (ii) exists as a
11 record or history; or (iii) is perceived to exist whether or not it exists in fact.” RCW
12 49.60.040 (7)(a). Mr. Cobb only states that he suffers from a “health condition,” but does
13 not specify what those conditions are or how those conditions qualify as a disability
14 under WLAD.

15 With respect to whether Mr. Cobb established that he was doing satisfactory
16 work, Mr. Cobb states that he was ill during the time in question and did not fraudulently
17 use his FMLA leave. Dkt. 45 at 8. Alaska presents evidence that Mr. Cobb’s work was
18 not satisfactory and terminated Mr. Cobb after conducting an investigation, which
19 concluded that Mr. Cobb violated Alaska’s Rules of Conduct.

20 Despite the ambiguity about the nature of Mr. Cobb’s alleged disability, and
21 Alaska’s evidence that Mr. Cobb’s work was not satisfactory, when reviewing a
22 summary judgment motion the Court draws all reasonable inference in favor of the non-
23 moving party; Mr. Cobb’s declaration must be taken as true. *Keck v. Collins*, 184
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1 Wash.2d 358, 368 (2015). Thus, for purposes of summary judgment, the Court will
2 analyze the case by assuming Mr. Cobb established a prima facie case that he was
3 disabled and that he has presented a prima facie case of discriminatory discharge.

4 Assuming Mr. Cobb made a prima facie case, the burden shifts to Alaska. For
5 this stage in the *McDonnell Douglas* framework, the employer only has a burden of
6 production, not persuasion, and is not required to persuade the court that it was actually
7 motivated by the nondiscriminatory reasons. *Mikkelsen*, 189 Wash.2d at 533. The
8 employer need only introduce “ ‘evidence which, *taken as true*, would *permit* the
9 conclusion that there was a nondiscriminatory reason for the adverse
10 action.” *Id.* (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993)).

11 Here, Alaska met its burden to show a legitimate, non-discriminatory reason for
12 discharging plaintiff. The defendant submitted evidence that the reason Alaska
13 terminated Mr. Cobb was because Alaska found that Mr. Cobb fraudulently invoked the
14 FMLA on August 9, 2019 and August 12, 2019 when actually his absences were part of
15 a pre-planned trip to Hawaii, and he did not consult with Alaska prior to leaving for his
16 trip about invoking FMLA on August 9 or August 12.

17 Further, in his deposition, Mr. Cobb admitted that he had “no plans of being at
18 work” the week of August 9, 2019 through August 12, 2019. Dkt 42 at Exhibit B, 174:18-
19 21. He also knew that when he left for Hawaii on August 7, 2019, he did not have
20 coverage for his August 9 shift. *Id.* at 166:4-11. The evidence shows there is no genuine
21 dispute of material fact that there was a nondiscriminatory reason for terminating
22 plaintiff. The defendant has met its burden of production, and no reasonable jury could
23 find for plaintiff on this issue.

1 Because Alaska met its burden, the final step of the *McDonnell Douglas*
2 framework shifts the burden back to plaintiff, to establish pretext. The ways that an
3 employee can show that a stated reason for termination was a pretext include, but are
4 not limited to, “that the reason has no basis in fact, it was not really a motivating factor
5 for the decision [or] it lacks a temporal connection to the decision or was not a
6 motivating factor in employment decisions for other employees in the same
7 circumstances.” *Kuyper v. Dep’t of Wildlife*, 79 Wash. App. 732, 738-39, 904 P.2d 793
8 (1995)).

9 Mr. Cobb argues that his presented evidence is sufficient to establish a genuine
10 question of material fact as to pretext because, he asserts, the investigation’s findings
11 were not accurate and thus, Alaska’s stated reason for terminating him had no basis in
12 fact. Specifically, plaintiff claims that Alaska’s findings were false in light of the fact that
13 plaintiff “reached out to a referred neurologist that same week complaining of his
14 symptoms” and he filed an application with the Employment Security Department (ESD)
15 to obtain unemployment benefits. See Dkt. 44 at Exhibits 13, 15.

16 Plaintiff argues that “the [ESD] stated that Plaintiff was terminated for taking sick
17 leave that Plaintiff was paid for and that the defendant broke several State laws in doing
18 so.” *Id.* at Exhibit 15; Dkt. 44 at 5. Plaintiff also claims that Alaska did not state in the
19 termination letter that his employment was terminated because he fraudulently invoked
20 FMLA leave and it was instead due to unsatisfactory attendance. Dkt. 45 at 8.

21 However, none of the evidence that Mr. Cobb relies on shows that Alaska’s
22 reason for terminating him – i.e., dishonesty in invoking FMLA -- was a pretext for
23 discrimination. First, even though Mr. Cobb submitted his neurologist referral form, he
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1 nonetheless did not intend to be at work due to his pre-planned trip to Hawaii. Even if
2 this pre-planned trip to Hawaii was, in some way, related to his illness, plaintiff did not
3 consult with Alaska before leaving for his trip on August 7.

4 Further, plaintiff's termination letter detailed the events leading up to and during
5 plaintiff's Hawaii trip and then explained that Alaska was terminating him for failure to
6 report to work as scheduled, for falsifying records or misrepresenting facts, dishonesty,
7 and misrepresentation to obtain pay, benefits or privileges. Dkt. 42 at Exhibit P.

8 Finally, with respect to the Employment Security Department application plaintiff
9 submitted after he was terminated, the letter he received in return states, in part, "the
10 company determined, after a review of the facts and circumstances, that claimant failed
11 to comply with company policies and meet the company's expectations regarding work
12 related behavior and performance." This is not inconsistent with Alaska's termination
13 letter, and it did not assert that Alaska "broke several state laws." Dkt. 44 at Exhibit 15.

14 Mr. Cobb did not present any evidence to dispute that Alaska actually concluded,
15 based on uncontroverted facts from the investigation, that he violated Alaska's rules of
16 conduct. And he did not present any evidence that this conclusion was not the actual
17 reason he was terminated. Thus, there is no genuine issue of material fact regarding
18 whether Alaska's reason for terminating Mr. Cobb was pretextual, and the Court grants
19 Alaska's motion for summary judgment on this claim.

20 Plaintiff has failed to present evidence supporting his claim of ADA or WLAD
21 retaliation. There is no evidence indicating that prior to his termination plaintiff opposed
22 any practice made unlawful by or the ADA or the WLAD, or that the defendant took
23 negative employment action because plaintiff instituted or participated in ADA or WLAD
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1 proceedings or inquires. Accordingly, no reasonable jury could conclude that
2 defendant retaliated against plaintiff for opposing any practice made unlawful by
3 the ADA or WLAD, or for participating in or instituting ADA or WLAD proceedings.
4 Summary judgment on the retaliation claim is therefore appropriate.

5 E. FMLA and WFLA Claims

6 The Family Medical Leave Act, 29 U.S.C. § 2615(a), created two interrelated,
7 substantive rights: (1) the employee has a right to use certain amounts of leave for
8 protected reasons, and (2) the employee has a right to return to his or her job or an
9 equivalent after using protected leave. *Sanders v. City of Newport*, 657 F.3d 772, 777
10 (9th Cir.2011). The FMLA places an affirmative burden on an employer to notify
11 employees of their rights under the Act. *Bushfield v. Donahoe*, 912 F.Supp.2d 944, 952
12 (D. Idaho 2012).

13 Under Section 2615(a)(2) it is unlawful for employers to retaliate or discriminate
14 against a person for opposing any violation of their right to take FMLA-protected leave.
15 Section 2615(a)(1) makes it unlawful for an employer to “interfere with, restrain or deny”
16 the exercise or attempt to exercise FMLA leave. The Washington Family Leave Act
17 “mirrors its federal counterpart and provides that courts are to construe its provisions in
18 a manner consistent with similar provisions of the FMLA.” *Washburn v. Gymboree*
19 *Retail Stores, Inc.*, No. C11-822RSL, 2012 WL 5360978, *7(W.D.Wash. Oct. 30, 2012).

20 1. Interference Claim

21 29 C.F.R. § 825.220(a)(1) provides that “[a]n employer is prohibited from
22 interfering with, restraining, or denying the exercise of (or attempts to exercise) any
23 rights” under the FMLA. To prevail on a claim of interference, the employee “need only
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1 prove by a preponderance of the evidence that [the] taking of FMLA-protected leave
2 constituted a negative factor in the decision to terminate.” *Bachelder v. America West*
3 *Airlines, Inc.*, 259 F.3d 1112, 1125; *see also* 29 C.F.R. § 825.220(c) (“[E]mployers
4 cannot use the taking of FMLA leave as a negative factor in employment actions, such
5 as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under no
6 fault attendance policies.”). A plaintiff may prove their claim by using either direct or
7 circumstantial evidence, or both. *See Bachelder*, 259 F.3d at 1125.

8 As previously discussed, Alaska presented evidence that it terminated plaintiff for
9 dishonesty in requesting FMLA leave. Plaintiff has a history of receiving FMLA leave
10 without any negative repercussions from Alaska.

11 Plaintiff argues that he has brought evidence showing he was not dishonest in
12 taking FMLA leave because he was ill during his trip. But plaintiff’s allegation of illness
13 during the Hawaii trip does not support an inference that Alaska impermissibly used
14 plaintiff’s taking of FMLA leave as a factor in the decision to terminate plaintiff. Plaintiff
15 has provided no basis for the Court to infer that Alaska relied on anything other than
16 plaintiff’s dishonesty , i.e., that his absences were part of a pre-planned trip to Hawaii
17 rather than an illness -- -- and dishonesty is a lawful basis for termination.

18 Therefore, no reasonable fact finder could determine that plaintiff’s taking FMLA-
19 protected leave was a negative factor in Alaska’s decision to terminate his employment.
20 The Court grants Alaska’s motion for summary judgment on plaintiff’s FMLA
21 interference claim.

22 2. Retaliation Claim

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1 The FMLA contemplates two types of retaliation claims. First, the FMLA prohibits
2 an employer from “discriminat[ing] against any individual for opposing any practice
3 made unlawful by [the FMLA].” 29 U.S.C. § 2615(a)(2). Second, the FMLA prohibits an
4 employer from discriminating against any individual for instituting or participating
5 in FMLA proceedings or inquiries. 29 U.S.C. § 2615(b).

6 Plaintiff does not present evidence supporting either type of retaliation. There is
7 no evidence indicating that prior to his termination plaintiff opposed any practice made
8 unlawful by FMLA or that he instituted or participated in FMLA proceedings or inquires.
9 Accordingly, no reasonable jury could conclude that defendant retaliated against plaintiff
10 for opposing any practice made unlawful by the FMLA or for participating in or instituting
11 FMLA proceedings. Summary judgment on this claim is therefore appropriate.

12 F. RCW 49.46.210

13 RCW 49.46.210 provides that employees in the State of Washington shall accrue
14 at least one hour of paid sick leave for every forty hours worked. RCW 49.46.210(1)(a).
15 Further, “[a]n employer may require employees to give reasonable notice of an absence
16 from work, so long as such notice does not interfere with an employee's lawful use of
17 paid sick leave.” RCW 49.46.210(f). An employer may require verification that an
18 employee's use of paid sick leave is for an authorized purpose if the absence exceeds
19 three days. RCW 49.46.210(g).

20 Alaska presented evidence to show that it did not discipline Mr. Cobb for taking
21 any protected sick leave nor was Mr. Cobb denied protections under Washington’s paid
22 sick leave law. Dkt. 42 at ¶¶8, 9, 18, 29. Further, plaintiff testified during his deposition
23 that he only “felt like” he did not get paid his protected sick leave. *Id.* at Exhibit A,
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1 155:11-15. Plaintiff did not have a specific number, nor did he have any records to show
2 which specific days he may have challenged. *Id.* at 156:9-19.

3 Mr. Cobb’s “hunch” without more is insufficient to defeat summary judgment.
4 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (explaining
5 that in response to a motion for summary judgment, “the nonmoving party must do more
6 than show there is some metaphysical doubt as to the material facts at issue”); *Harper*
7 *v. Wallingford*, 877 F.2d 728, 731 (9th Cir.1989) (noting that a “mere disagreement or
8 bald assertion” that a genuine dispute as to a material fact exists will not
9 preclude summary judgment). Thus, the Court grants Alaska’s motion for summary
10 judgment on this claim.

11 II. CONCLUSION

12 Based on the foregoing, the Court grants summary judgment for Alaska on all
13 claims. Thus, plaintiff’s complaint is dismissed with prejudice.

14 Dated this 14th day of March, 2022.

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Theresa L. Fricke
19 United States Magistrate Judge
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