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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

SUSAN DUNN and HEIDI MASUNAGA,)
)
 Plaintiffs,)
)
 v.)
)
 REYNOLDS SCHOOL DISTRICT NO. 7))
 a political subdivision of the))
 State of Oregon and public))
 body corporate, and ROBERT))
 FISHER, an individual,))
))
 Defendants.)
)

No. CV-09-1259-HU

OPINION & ORDER

James Brown
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Attorney for Plaintiffs

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Attorneys for Defendants

1 HUBEL, Magistrate Judge:

2 Plaintiffs Susan Dunn and Heidi Masunaga bring claims for
3 violations of civil rights under 42 U.S.C. § 1983, wrongful
4 discharge, breach of contract, and wage claims, against the
5 Reynolds School District No. 7 and its former superintendent,
6 Robert Fisher. Defendants move for summary judgment as to all
7 claims against them, as well as for qualified immunity for Fisher.
8 All parties have consented to entry of final judgment by a
9 Magistrate Judge in accordance with Federal Rule of Civil Procedure
10 73 and 28 U.S.C. § 636(c)). For the reasons set forth below, I
11 grant defendants' motion, in part, and deny, in part.

12 **FACTS**

13 In the spring of 2009, plaintiff Susan Dunn was the principal
14 of Davis Elementary School. She had a three-year contract that
15 commenced July 1, 2008, and was scheduled to end on June 30, 2011.
16 Pl.'s Resp. Def.'s Concise Statement Material Facts at ¶ 8; Def.'s
17 Reply Pl.'s Concise Statement Material Facts at ¶ 1. Plaintiff
18 Heidi Masunaga was the principal for Alder Elementary School, and
19 also had a three-year contract that commenced on July 1, 2008 and
20 was scheduled to end on June 30, 2011. Id. Both schools are part
21 of defendant Reynolds School District No. 7 ("the District"), in
22 Fairview, Oregon.

23 As part of their compensation, the District provided group
24 health insurance to the plaintiffs. In addition, the District had
25 a medical reimbursement program. In order to obtain the
26 reimbursement benefit, the plaintiffs and other District employees
27 submitted documents reflecting health expenses, and District
28 administrators evaluated the documents before reimbursing the

1 plaintiffs. The "Memorandum of Agreement between Reynolds School
2 District and Reynolds Administrators' Association For 2003/04,
3 2004/05, 2005/06" outlined the reimbursement benefit as,

4 A. Medical Insurance:

5

6 3. The unused monthly portion of the budgeted
7 insurance/TSA benefit shall remain in a pool for use by
8 individual administrators to recover deductible or co-pay
9 costs incurred under the above insurance plans.

10 Decl. Barrett Mesereau Ex. 9, at 2. The "Memorandum of Agreement
11 between Reynolds School District and Reynolds Administrators'
12 Association For 2006/07, 2007/08, 2008/09" was more specific about
13 the benefit,

14 3. Administrators carrying individual or family medical
15 insurance through the District may be reimbursed for the
16 following:

17 a. Deductible costs for required medical procedures
18 and required prescriptions covered by the insurance
19 policy (e.g. insurance pays only 80%, reimbursable is
20 remaining 20%).

21 b. Co-pay costs for medical visits or hospitalization
22 (e.g. \$15.00 fee for a doctor appointment).

23 Reimbursement is not available for:

24 a. Alternative medical procedures or healthy life style
25 activities not covered by the insurance policy (e.g. spa,
26 health club, vitamins, etc.).

27 b. Surgery or medical procedures, or prescriptions of
28 an elective or optional nature even if covered by the
29 insurance policy (e.g. cosmetic surgery).

30 Id., Ex. 10, at 2.

31 On November 28, 2008, defendant Robert Fisher, the
32 superintendent of the District, sent the plaintiffs a letter
33 stating, in part,

34 The district made a series of errors in administering the

1 program.

- 2 ● The district did not pool the unused benefit dollars.
- 3 ● The district paid for elective procedures.
- 4 ● The district paid claims from documents that did not
contain sufficient information to determine if the
5 payment covered a co-payment or deductible.
- 6 ● The district paid claims for non-covered items -
effectively expanding the coverage to all out-of-pocket
7 medical expenses.

8 These errors are serious. They involve questionable use
of taxpayer dollars and they serve as an example of the
district's poor management practices. Being proactive,
I have board and legal support to:

- 9 ● Seek investigation into the practices to determine if
any crime has been committed in the administration of the
10 program.
- 11 ● Demand and pursue collection of all payments made to
administrators for elective procedures.
- 12 ● Bill and pursue collection of all payments for dental
services, eyewear and contact lenses, and goods and
13 services that were not covered by the insurance plan or
the reimbursement program.

14 Id. Ex. 3, at 1; Ex. 4 at 1. The letter indicated that a review
15 had been conducted of all records from July 1, 2002, through
16 November 28, 2008. In Dunn's case, the letter indicated she was
17 "paid \$3,508.40 in error." Id., Ex. 3, at 2. In Masunaga's case,
18 the letter indicated she was "paid \$5,755.51 in error." Id., Ex.
19 4, at 2. Both letters asked the plaintiffs to "[p]lease review the
20 enclosed copies of claims paid in error and respond to the district
21 regarding your plans for repayment by December 17, 2008." Id., Ex.
22 3, at 2; Ex. 4, at 2.

23 According to plaintiffs, Fisher told them "don't complicate
24 your lives by getting attorneys mixed up in this because . . . I'm
25 contacting the district attorney and this is a serious matter and
26 it involves public funds and misuse of public funds." Decl. Robert
27 Brown, Att. 8, at 4. Dunn and Masunaga, however, retained counsel,
28 who wrote in a letter dated January 12, 2009, "It has been reported

1 to me that the district's superintendent has intimated to one or
2 more of the district's administrators it would not be in their best
3 interests to involve legal counsel regarding these matters." Id.,
4 Att. 9, at 1; Att. 10, at 1.

5 The letter also formally alerted the District that plaintiffs
6 did not believe the district had a legal right to demand the
7 overpayments back, and asked that the Districts demands regarding
8 the alleged overpayments cease and desist.

9 On April 3, 2009, Fisher sent Dunn and Masunaga letters
10 restating the District's demands,

11 My review indicates that if you do not refund the medical
12 expense reimbursement that was improperly approved, you
13 may be in violation of ORS Chapter 244, as well as TSPC
14 Standards for Competent and Ethical Performance of Oregon
15 Educators, particularly OAR 584-020-0035(2)(a), which
16 states that educators must "adhere to the conditions of
17 a contract or the terms of appointment;" and (e) to "not
18 use the district's or school's name, property, or
19 resources for non-educational benefit or purposes without
20 approval of the educator's supervisor of the appointing
21 authority" - in this case the approval of the Board of
22 Directors, which adopted the administrators' agreement
23 and its terms.

18 Since you have not complied with my request for you to
19 reimburse the District during the last four months, on
20 behalf of the District, I am now giving you the following
21 directives.

22 You are to refund to the District the total . . . that
23 was paid to you as reimbursement for non-covered medical
24 expenses.

25 You are hereby directed further to submit a check to my
26 office for the full amount . . . made out to the
27 District, by April 22, 2009.

28 Failure to repay the reimbursement not authorized under
the terms and conditions of the Board-approved
administrators' agreement will be considered
insubordination on your part, because you will be
willfully disobeying an order that the superintendent of
the Reynolds School District has a right to give; and,
you will be considered also in neglect of your duties,
including your duty to accept only that compensation from

1 the District which was authorized by the Board-approved
2 administrators' agreement.

3 It is extremely important for you to know, to be
4 informed, and to be aware that both insubordination and
5 the neglect of duty are grounds for dismissal of a
6 contract administrator under ORS 342.865(1). Therefore,
7 it is my hope that you will comply with this directive.

8 Id. Att. 11, at 1-2; Att. 12, at 1-2.

9 On April 22, 2009, both plaintiffs submitted letters of
10 resignation to Fisher, effective June 30, 2009. Mersereau Decl.
11 Ex. 1, at 1; Ex. 2, at 1. Both plaintiffs mentioned in their
12 letters that they had many unused vacation days and expected to be
13 paid for them.

14 Fisher sent a follow-up letter on April 23, 2009, which
15 stated, in part,

16 On April 22, 2009, you willfully disobeyed my order and
17 did not repay the District. . . which you have been
18 notified would be considered insubordination.

19 Before I make my recommendation to dismiss you from the
20 Reynolds School District to the Board of Education, I am
21 scheduling a pre-termination hearing for you to respond
22 to the potential charges leading to your dismissal. The
23 hearing will be on Tuesday, April 28, 2009 . . . in my
24 office.

25 Id. Att. 13, at 1, Att. 14, at 1.

26 School board member Shelly Chase testified that her
27 understanding regarding Fisher's recovery method was that "if it
28 wasn't paid back, then the employees would be . . . [t]erminated."

29 Id. Att. 19, at 2. Later, Chase was "told [Dunn and Masunaga] had
30 not paid the money and [Fisher] was going to terminate them." Id.,
31 Att. 19, at 4. Another school board member, Richard Phelps,
32 testified that "if [Fisher] recommended [termination] to the board,
33 the board would stand behind it." Id., Att. 20, at 2. Yet another
34 school board member, Donna Edgley, characterized Fisher's strategy,

1 "It was, from the very, very beginning, this is what we're doing
2 and they're going to pay it back or they're not going to work here.
3 And that was it." Id., Att. 22, at 2.

4 Despite the resignation letters, Fisher moved forward and held
5 the scheduled April 28, 2009 pre-termination hearing. There are
6 few details about what happened at the pre-termination hearing. On
7 May 4, 2009, Fisher wrote the plaintiffs again:

8 Please be advised that I have accepted your resignation
9 effective June 30, 2009, in lieu of moving forward with
a recommendation for dismissal.

10 After reflecting upon your comments in your April 22,
11 2009, letter and the comments made at the hearing, I see
12 no reason to continue moving toward termination,
especially since you submitted your letter of resignation
. . . .

13 Now that I have accepted your resignation, please be
14 advised of the following:

15 1. You are required to use all of your unused vacation
days, which means your last workday will be May 20, 2009
. . . .

16 2. Please remove all of your personal belongings before
17 May 20, 2009, so that you will not return to your school
after your last day of work.

18 3. Unless you have received prior approval . . . you are
not to be on any school campus after your last workday.

19 4. If you prefer to move your resignation date prior to
20 May 20, 2009, and receive payment for your unused
vacation pay on your last day of work, please submit a
21 letter to Ken Richardson to that effect by 4:00 pm on
Wednesday, May 6, 2009.

22 Brown Decl. Att. 15, at 1; Att. 16, at 1. Fisher testified that he
23 changed the last day of employment for the principals in order "to
24 save money for the district." Att. 23, at 5.

25 For reasons that are not addressed, Fisher only held the job
26 of superintendent for 14 months. Att. 23, at 4. He left the
27 position the following school year.

28 ///

1 the existence of a material issue of fact implausible, that party
2 must come forward with more persuasive evidence to support his
3 claim than would otherwise be necessary. Id.; In re Agricultural
4 Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990);
5 California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics,
6 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

7 DISCUSSION

8 Plaintiffs brought claims for a violation of their civil
9 rights under 42 U.S.C. § 1983, wrongful discharge, breach of
10 contract, and wage claims under Oregon law. Plaintiffs also seek
11 injunctive relief, in the form of reinstatement in their former
12 positions and expungement of all references to their terminations
13 and the surrounding accusations from the District's records.
14 Before the court is the District's motion for summary judgment on
15 all of plaintiffs' claims except for injunctive relief. Defendants
16 also seek to establish that defendant Fisher is entitled to
17 qualified immunity on the § 1983 claims.

18 I. Constructive Discharge

19 The parties agree that a threshold issue is whether the
20 plaintiffs were constructively discharged. The standard differs
21 under federal and state law, and plaintiffs bring claims under
22 both.

23 A. Federal

24 When a plaintiff brings a § 1983 claim based on constructive
25 discharge, the court evaluates the alleged constructive discharge
26 under federal law. See e.g. Knappenberger v. City of Phoenix, 566
27 F.3d 936, 940-41 (9th Cir. 2009). In the Ninth Circuit, the
28 standard for constructive discharge differs depending on the

1 circumstances. In situations where an employee quits because of
2 the conditions of her working environment, the inquiry is whether
3 "working conditions bec[a]me so intolerable that a reasonable
4 person in the employee's position would have felt compelled to
5 resign?" Poland v. Chertoff, 494 F.3d 1174, 1184 (9th Cir. 2007).
6 A constructive discharge does not always, however, demand
7 "unendurable working conditions." See e.g. Kalvinskis v. Cal.
8 Institute of Tech., 96 F.3d 1305 (9th Cir. 1996). The Ninth
9 Circuit also recognizes "employment claims based on a theory of
10 coercion," where "a resignation may be found involuntary if, from
11 the totality of the circumstances, it appears that the employer's
12 conduct in . . . obtaining the resignation effectively deprived the
13 employee of free choice in the matter." Knappenberger, 566 F.3d at
14 941 (citations omitted). In such situations, "resignation may be
15 involuntary and constitute a deprivation of property for purposes
16 of a due process claim in the absence of intolerable working
17 conditions." Id.

18 In Kalvinskis, a long-time employee was effectively given a
19 choice between retiring and receiving his pension or remaining
20 employed, but having the disability benefits he was receiving
21 reduced to nothing. 96 F.3d at 1306. The Ninth Circuit held that,
22 because "a reasonable person in [his] position would feel he had no
23 choice but to retire," Kalvinskis's retirement was involuntary for
24 purposes of the ADEA's prohibition of retirement plans that require
25 or permit involuntary retirement. Id. at 1308. The court deemed
26 Kalvinskis's choice to be involuntary not because of discriminatory
27 or intolerable working conditions, but rather, "because of the
28 coercion inherent in the choice between retirement and a complete

1 deprivation of income." Id.; see also Lojek v. Thomas, 716 F.2d
2 675, 683 (9th Cir. 1983) (suggesting an employee coerced into
3 resigning could demonstrate he left his employment involuntarily).

4 Here, the evidence in the record shows that the plaintiffs
5 were given the ultimatum to pay thousands of dollars in a short
6 period of time, or be fired. There was no mechanism to contest the
7 validity or legality of the ultimatum. Plaintiff Dunn testified
8 that "if one is fired, that's a big black mark on your record" and
9 "you are not going to get another job." Brown Decl. Att. 7, at 7.
10 Plaintiff Masunaga testified, "Rather than being fired, I resigned
11 . . . [b]ecause I knew I needed a job, and I was not going to get
12 a job if I was going to be fired from the school district." Brown
13 Decl. Att. 8, at 4.

14 Given the coercion inherent in the ultimatum to pay a
15 substantial sum of money or be fired, and based on the evidence of
16 the negative effects of being fired, I find that, from the totality
17 of the circumstances, there is a question of fact whether the
18 District's conduct in obtaining the resignation of the plaintiffs
19 deprived Dunn and Masunaga of free choice in the matter,
20 effectively constructively discharging plaintiffs under federal
21 law.

22 B. Oregon Law

23 Plaintiffs argue that under Sheets v. Knight, 308 Or. 220, 779
24 P.2d 1000 (1989), an individual has been constructively discharged
25 if she resigned rather than be fired. The District responds that
26 Sheets was expressly overruled by McGanty v. Stadenraus, 321 Or.
27 532, 557, 901 P.2d 841,856-57 (1995), which holds,

28 to establish a constructive discharge, a plaintiff must

1 allege and prove that (1) the employer intentionally
2 created or intentionally maintained specified working
3 condition(s); (2) those working conditions were so
4 intolerable that a reasonable person in the employee's
5 position would have resigned because of them; (3) the
6 employer desired to cause the employee to leave
employment as a result of those working conditions or
knew that the employee was certain, or substantially
certain, to leave employment as a result of those working
conditions; and (4) the employee did leave the employment
as a result of those working conditions.

7 The Oregon Supreme Court, however, has held that McGanty did not
8 overrule Sheets with respect to the relevant issue. See Stupek v.
9 Wyle Laboratories Corp., 327 Or. 433, 439, 963 P.2d 678, 681
10 (1998). Although the Stupek court quoted the McGanty formulation
11 of the elements of constructive discharge, it also cited Sheets for
12 the proposition that "[a] forced resignation may support a claim
13 for wrongful discharge." Id. The Stupek court explained,

14 Where the employee unconditionally has been told 'resign
15 today or be fired,' the employer has decided that the
16 employment relationship is at an end and that the
17 employee shall leave. The employee merely selects the
manner in which the employer's will is accomplished.
Under such circumstances a fact finder may find that a
'resignation' was a discharge.

18 Id. (citing Sheets, 308 Or. at 227). In so explaining, the Supreme
19 Court effectively held that Sheets offers an alternative to
20 McGanty's requirement that working conditions were so intolerable
21 that a reasonable person in the employee's position would have
22 resigned because of them.

23 Here, the evidence demonstrates that Fisher insisted Dunn and
24 Masunaga would have to pay substantial sums of money to pay back
25 allegedly erroneous reimbursements they had received, if they
26 wanted to continue working for the District. Pay us back or be
27 fired. By April 23, 2009, Fisher knew Dunn and Masunaga were
28 substantially certain to leave their employment, one way or

1 another, because of the condition he'd imposed. No longer
2 requesting payment, he wrote,

3 On April 22, 2009, you willfully disobeyed my order and
4 did not repay the District the [money], which you have
5 been notified would be considered insubordination.
6 Before I make my recommendation to dismiss you from the
7 Reynolds School District to the Board of Education, I am
8 scheduling a pre-termination for you to respond to the
9 potential charges leading to your dismissal.

10 Brown Decl. Att. 13, at 1; Att. 14, at 1. In her words, Masunaga
11 resigned "in lieu of being terminated from my position." Brown
12 Decl. Att. 8, at 4. Dunn resigned "[b]ecause if [she] didn't
13 resign [she] would be fired." Brown Decl. Att. 7, at 7.

14 Viewed in the light most favorable to the nonmoving
15 plaintiffs, there is an issue of material fact whether a finder of
16 fact would find that in this case plaintiffs' resignations were
17 actually discharges. Defendants' motion for summary judgment on
18 the state law issue is denied.

19 II. Violation of Due Process Rights Under the Fourteenth Amendment

20 In their complaint, plaintiffs allege that "Defendant Fisher,
21 while acting under color of state law, effected taking of plaintiff
22 Masunaga's property in violation of her right to due process of
23 law" by "coercing her resignation terminating plaintiff's
24 employment [and] by depriving plaintiff access to the
25 judicial process for determination of a matter in dispute between
26 her and her employer." Compl. ¶ 35. Broadly construed, the
27 language of the complaint alleges two property interests each: a
28 property interest in the job of principal and a property interest
in the unused accrued vacation days. In addition, the language of
the complaint alleges a procedural due process violation.

1 A. Procedural Due Process

2 The Fourteenth Amendment protects against the deprivation of
3 property or liberty without due process. See Carey v. Piphus, 435
4 U.S. 247, 259 (1978); Brady v. Gebbie, 859 F.2d 1543, 1547 (9th
5 Cir. 1988). A § 1983 claim based upon the deprivation of
6 procedural due process thus has three elements: (1) a liberty or
7 property interest protected by the Constitution; (2) a deprivation
8 of the interest by the government; and (3) lack of process.
9 Portman v. County of Santa Clara, 995 F.2d 898, 904 (9th Cir.
10 1993).

11 1. Property Interest Protected by Constitution

12 a. Property Interest in Employment

13 An employee has a constitutionally protected property interest
14 in continued employment if he has a "reasonable expectation or a
15 'legitimate claim of entitlement' to it." Brady, 859 F.2d at
16 1547-48 (quoting Roth, 408 U.S. at 577.). A legitimate claim of
17 entitlement arises if it is created by existing rules or
18 understandings that stem from an independent source, such as state
19 law. See id. at 1548; see also Trivoli v. Multnomah County Rural
20 Fire Protection Dist. No. 10, 74 Or. App. 550, 554 (1985). A
21 statute, rule or contract may also confer the property interest.
22 Trivoli, 74 Or. App. at 554.

23 Here, the District concedes that both plaintiffs had contracts
24 for employment with it from July 1, 2008, through June 30, 2011.
25 Therefore, each had a constitutionally protected property interest
26 in continued employment through the end date of the contracts.

27 b. Property Interest in Unused Vacation Days

28 The Supreme Court has held,

1 The procedural component of the Due Process Clause does
2 not protect everything that might be described as a
3 'benefit': To have a property interest in a benefit, a
4 person clearly must have more than an abstract need or
5 desire and more than a unilateral expectation of it. He
6 must, instead, have a legitimate claim of entitlement to
7 it. Such entitlements are, of course, ... not created by
the Constitution. Rather, they are created and their
dimensions are defined by existing rules or
understandings that stem from an independent source such
as state law. . . . Our cases recognize that a benefit is
not a protected entitlement if government officials may
grant or deny it in their discretion.

8 Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 756 (2005)
9 (internal citations and quotations omitted).

10 The Ninth Circuit has never considered the precise question of
11 whether accrued leave is the type of property protected by the
12 Fourteenth Amendment. Portman v. County of Santa Clara, 995 F.2d
13 898, 906 (9th Cir. 1993). The Ninth Circuit declined to answer an
14 analogous question of whether accrued sick leave is protected. Id.
15 at 907. The court noted, however, that in the Sixth Circuit,
16 because deprivation of a specific employment benefit is a loss
17 which is easily defined, "entitlement to accumulated sick leave,
18 although a property interest, is not constitutionally protected."
19 Id. at 906 (citing Ramsey v. Bd. of Education, 844 F.2d 1268, 1272
20 (6th Cir. 1988)).

21 In a District of Arizona case analogous to the case at bar, a
22 school principal was asked to resign from her position while under
23 contract. Ordway v. Lucero, No. CV-04-1046-PCT-MHM, 2007 WL
24 951963, at *1 (D. Ariz. 2007). The principal brought a § 1983 case
25 against the school district, claiming among other things, a
26 violation of her due process rights with regard to non-payment of
27 her accrued sick leave. Id. at *6. The court noted that "the
28 written policy of the District is clear that in order to receive

1 payment for such leave upon separation, the employee must have ten
2 years of continuous service with the District." Id. at *7. Since
3 the principal in the case did not have ten years of service, the
4 court held that the principal did not have a property interest in
5 her unpaid leave. Id.

6 Here, the Reynolds Personnel Policy entitled "GCDC -
7 Administrator Vacation," dated January 4, 2007, read,

8 Vacation When Terminating. Administrators whose contract
9 year runs July 1 through June 30, and who have vacation
10 available as a benefit, will be paid for unused vacation
time, not to exceed forty-two days (forty-three days if
a leap year is involved).

11 Brown Decl. Att. 17, at 1.

12 The clear contractual language creates a property right in the
13 unused vacation days.

14 2. Deprivation of Interest by Government

15 Again, in the Ninth Circuit, "resignation may . . . constitute
16 a deprivation of property for purposes of a due process claim."
17 Knappenberger, 566 F.3d at 941. A school district, which is a
18 local governmental entity, qualifies as the government for purposes
19 of a § 1983 due process claim. See Plumeau v. Yamhill County
20 School Dist. No. 40, 907 F. Supp. 1423, 1435-36 (D. Or. 1995).

21 a. Deprivation of Employment by Government

22 I have already held that there is a material issue of fact
23 whether the plaintiffs' resignations were involuntary, and thus a
24 constructive discharge. Defendants do not contest that the
25 employer whose conduct obtained the resignation, Fisher, on behalf
26 of the District, qualifies as the government under this prong of
27 the test.

28 ///

1 b. Deprivation of Unused Vacation Days

2 Dunn and Masunaga's resignation letters set an effective date
3 of June 30, 2009, and set forth that they expected to be paid for
4 any unused vacation days in addition to being paid under the
5 contract through June 30. On acceptance of the resignations,
6 Fisher modified the terms of plaintiffs' resignations, and wrote:

7 1. You are required to use all of your unused vacation days,
8 which means your last workday will be May 20, 2009

9 4. If you prefer to move your resignation date prior to
10 May 20, 2009, and receive payment for your unused
11 vacation pay on your last day of work, please submit a
12 letter to Ken Richardson to that effect by 4:00 pm on
13 Wednesday, May 6, 2009.

14 Brown Decl. Att. 15, at 1; Att. 16, at 1.

15 There are situations in which an employer may legitimately
16 force an employee to use vacation days during a set period. For
17 example, under FMLA, "an employer may require the employee, to
18 substitute any of the accrued paid vacation leave. . . for [FMLA
19 leave] . . . for any part of the 12-week period of such leave." 29
20 U.S.C. § 2612(d) (2) (A); see also 29 C.F.R. § 825.207. "The logical
21 purpose underlying the substitution language in the FMLA and
22 accompanying regulations is to protect employers who offer paid
23 . . . leave benefits to their employees from having to provide both
24 the statutory 12 weeks of leave required by the FMLA and the paid
25 leave benefit separately." Strickland v. Water Works and Sewer Bd.
26 of City of Birmingham, 239 F.3d 1199, 1206 (11th Cir. 2001). By
27 analogy, the District could perhaps argue that it was not required
28 to both pay the plaintiffs through their desired resignation date
of June 30, as well as provide a lump sum for unused vacation days
after that date.

1 The District did not, however, make such an argument, whatever
2 its merits might be on these facts, in the motion. The District
3 argued first that the plaintiffs had no property interest in their
4 unused vacation days because it wasn't in the contract, and second,
5 that Dunn agreed to take her vacation days before leaving work-both
6 arguments, however, are controverted by evidence in the record.
7 Therefore, on the basis of the arguments in support of the motion,
8 I hold there is an issue of fact whether Fisher, acting on behalf
9 of the District, deprived the plaintiffs of their property right in
10 the unused vacation days.

11 3. Lack of Process

12 "The base requirement of the Due Process Clause is that a
13 person deprived of property be given an opportunity to be heard at
14 a meaningful time and in a meaningful manner." Brewster v. Bd. of
15 Educ. of Lynwood Unified School Dist., 149 F.3d 971, 984 (9th Cir.
16 1998). Depending on the circumstances, the hearing may be held
17 before or after the deprivation, so long as the opportunity to be
18 heard is meaningful. Id.

19 At times the question of whether a deprivation occurred
20 without due process requires an analysis of whether available state
21 law process can constitute "due process." Lujan v. G & G Fire
22 Sprinklers, Inc., 532 U.S. 189, 195-97 (2001). A "common law
23 breach of contract claim provides adequate process for the
24 deprivation of a property right derived from a contract, unless the
25 deprivation constitutes a denial of a present entitlement." DeBoer
26 v. Pennington, 287 F.3d 748, 750 (9th Cir. 2002). The Supreme
27 Court has described "present entitlement" as "a right by virtue of
28 which [one is] presently entitled either to exercise ownership

1 dominion over real or personal property, or to pursue a gainful
2 occupation." Lujan, 532 U.S. at 190.

3 In Lujan, a state agency determined that a subcontractor on a
4 public works project had violated the California Labor Code, and
5 issued notices directing the withholding of payment to the
6 subcontractor. Id. at 191-93. The subcontractor sued the state
7 parties under § 1983, claiming that the issuance of the notices
8 without a hearing violated its due process rights. Id. at 193.
9 The Court held that the subcontractor "ha[d] not been denied any
10 present entitlement," but merely a "payment that it contends it is
11 owed under a contract," which in turn is an interest "that can be
12 fully protected by an ordinary breach-of-contract suit." Id. at
13 196. (distinguishing the case from situations in which a claimant
14 is denied "a right by virtue of which he was presently entitled
15 either to exercise ownership dominion over real or personal
16 property, or to pursue a gainful occupation"). In summary, the
17 Court stated, "[w]e hold that if California makes ordinary judicial
18 process available to respondent for resolving its contractual
19 dispute, that process is due process." Id. at 197.

20 a. Lack of Process Regarding Employment

21 Here, defendants moved for summary judgment as to plaintiffs'
22 § 1983 claims on the basis that plaintiffs were not deprived of
23 their employment because they resigned. Defendants did not move
24 against this claim by attempting to show that the process afforded
25 Dunn and Masunaga was adequate.

26 I have already held there is an issue of material fact whether
27 the defendants deprived the plaintiffs of a property interest in
28 their jobs. The issue remains whether the plaintiffs were given an

1 opportunity to be heard at a meaningful time and in a meaningful
2 manner under Brewster.

3 The evidence in the record shows that Fisher held a pre-
4 termination hearing on April 28, 2009. There are few details in
5 the record about what transpired at the hearing. Fisher has not
6 established the absence of a material issue of fact whether Dunn
7 and Masunaga were afforded an opportunity to be heard in a
8 meaningful manner. Accordingly, defendant's summary judgment
9 motion as to this claim is denied.

10 b. Lack of Process Regarding Vacation Days

11 Under Lujan, plaintiffs' property right in their unused
12 vacation days is easily definable and governed by contract.
13 Plaintiffs allege they were entitled to payment for a specific
14 number of vacation days, presumably with each vacation day worth a
15 certain amount. Just as in Lujan, this property right can be fully
16 protected by an ordinary breach of contract suit. Therefore I find
17 that a typical state law breach of contract action would constitute
18 due process. There is nothing in the record suggesting they were
19 deprived of judicial process.

20 Accordingly, with respect to the claims for accrued vacation
21 days, I grant defendants' motion for summary judgment against the
22 § 1983 procedural due process claims.

23 B. Substantive Due Process

24 The substantive component of the Due Process Clause "forbids
25 the government from depriving a person of life, liberty, or
26 property in such a way that 'shocks the conscience' or 'interferes
27 with rights implicit in the concept of ordered liberty.'" Nunez v.
28 City of Los Angeles, 147 F.3d 867, 871 (9th Cir. 1998) (quoting

1 United States v. Salerno, 481 U.S. 739, 746 (1987)); Daniels v.
2 Williams, 474 U.S. 327, 331 (1986) (explaining that substantive due
3 process protects against government power arbitrarily and
4 oppressively exercised). "A threshold requirement to a substantive
5 or procedural due process claim is the plaintiff's showing of a
6 liberty or property interest protected by the Constitution."
7 Wedges/Ledges of Cal., Inc. v. City of Phoenix, 24 F.3d 56, 62 (9th
8 Cir. 1994). Most courts around the country have rejected the claim
9 that substantive due process protects the right to a particular
10 public employment position, and the Ninth Circuit has yet to decide
11 the issue. Engquist v. Oregon Dept. of Agric., 478 F.3d 985, 996-
12 97 (9th Cir. 2007).

13 The Supreme Court has not specified the boundaries of the
14 right to pursue a profession, but has identified it generally. See
15 Conn v. Gabbert, 526 U.S. 286, 291-92 (1999) (stating that there is
16 "some generalized due process right to choose one's field of
17 private employment"). The Court has noted, however, that cases
18 recognizing the right "all deal with a complete prohibition of the
19 right to engage in a calling, and not [a] sort of brief
20 interruption." Id. at 292. The Ninth Circuit has recognized the
21 liberty interest in pursuing an occupation of one's choice. See
22 Dittman v. Cal., 191 F.3d 1020, 1029-30 (9th Cir. 1999). A
23 plaintiff can make out a substantive due process claim if she is
24 unable to pursue an occupation and this inability is caused by
25 government actions that were arbitrary and lacking a rational
26 basis. Sagana v. Tenorio, 384 F.3d 731, 742-43 (9th Cir. 2004),
27 cert. denied, 543 U.S. 1149 (2005); Wedges/Ledges, 24 F.3d at 65.
28 But see Zorzi v. County of Putnam, 30 F.3d 885, 895 (7th Cir. 1994)

1 (holding that this occupational liberty is protected only by
2 procedural due process rights, and not substantive due process).

3 Almost all of the Ninth Circuit cases recognizing this
4 substantive due process right dealt with government legislation or
5 regulation, and not the acts of a government as an employer, which
6 allegedly prevented the plaintiff from pursuing a specific
7 profession. Engquist, 478 F.3d at 997. Substantive due process
8 claims for a public employer's violations of occupational liberty
9 are limited to extreme cases, such as a "government blacklist,
10 which when circulated or otherwise publicized to prospective
11 employers effectively excludes the blacklisted individual from his
12 occupation, much as if the government had yanked the license of an
13 individual in an occupation that requires licensure." Id. at 997-
14 98. (quoting Olivieri v. Rodriguez, 122 F.3d 406, 408 (7th
15 Cir.1997)). Put another way, "there is substantive due process
16 protection against government employer actions that foreclose
17 access to a particular profession to the same degree as government
18 regulation." Id. at 998.

19 In Engquist, the plaintiff worked for the Oregon Department of
20 Agriculture. Id. at 990. After a supervisor made repeated
21 statements about planning to fire the plaintiff, during a budget
22 crisis, the supervisor discharged the plaintiff. Id. at 991.
23 After being discharged, the plaintiff applied to roughly 200 jobs,
24 and was not offered a position by any employer. Id. After filing
25 suit against her former employer for violation of her substantive
26 due process rights, the plaintiff presented evidence that her
27 supervisors made defamatory statements about her to two or three
28 others in the industry. Id. at 999. There was no evidence,

1 however, that the defamatory statements were the cause of
2 plaintiff's inability to procure another job in her given field.
3 Id. Therefore, the Ninth Circuit held that the plaintiff "did not
4 present sufficient evidence to sustain her substantive due process
5 claim." Id.

6 1. Substantive Due Process Claim for Employment

7 Here, plaintiffs resigned in order to avoid a "black mark"
8 that might have inhibited their abilities to practice their chosen
9 profession. I held, above, that Fisher's conduct in obtaining the
10 resignations may equate to constructive discharge. Thus, the
11 plaintiffs might argue that Fisher's conduct related to their
12 constructive discharge rises to the level of making the plaintiffs
13 unable to pursue their profession. On the other hand, the
14 plaintiffs preemptively resigned, thus avoiding the damaging result
15 of the "black mark" and the corresponding inability to find
16 employment elsewhere as a principal. By analogy to contract law,
17 the plaintiffs mitigated the damage that might have occurred.

18 The facts of this case are less egregious than those of
19 Enquist, where the plaintiff was fired, the supervisor made
20 defamatory comments to others in the industry, and the plaintiff
21 unsuccessfully applied to two hundred jobs. In this case, the
22 evidence shows only that plaintiffs resigned or were constructively
23 discharged. There is no case law in the Ninth Circuit holding that
24 mere discharge, without more, could foreclose access to a
25 profession to the same degree as a government regulation, and thus
26 constitute a substantive due process violation.

27 Accordingly, to the extent plaintiffs' claim a violation of
28 substantive due process as to their employment, I grant summary

1 judgment to the defendants.

2 2. Substantive Due Process Claim for Benefits

3 There are no Ninth Circuit cases where a plaintiff has
4 succeeded in asserting a substantive due process claim for the
5 value of lost vacation days, or anything similar, upon termination.
6 Fisher's actions as to the vacation days did not deprive Dunn or
7 Masunaga of property in such a way that shocks the conscience or
8 interferes with rights implicit in the concept of ordered liberty.

9 Accordingly, to the extent plaintiffs claim a substantive due
10 process violation with respect to accrued vacation time, I grant
11 summary judgment to the defendants.

12 In summary, defendants' motion for summary judgment against
13 plaintiffs'

14 (1) procedural due process claims for employment is denied,

15 (2) procedural due process claims for unused vacation days is
16 granted, and

17 (3) substantive due process claims is granted.

18 III. Qualified Immunity

19 With respect to § 1983 claims that involve, as here, a defense
20 of qualified immunity, the United States Supreme Court has stated:

21 Section 1983 provides a federal cause of action against
22 any person who, acting under color of state law, deprives
23 another of his federal rights. 42 U.S.C. § 1983. In
24 order to prevail in a § 1983 action for civil damages
25 from a government official performing discretionary
26 functions, the defense of qualified immunity that our
cases have recognized requires that the official be shown
to have violated 'clearly established statutory or
constitutional rights of which a reasonable person would
have known.' Harlow v. Fitzgerald, 457 U.S. 800, 818
(1982).

27 Conn v. Gabbert, 526 U.S. 286, 290 (1999). A defendant is
28 entitled to qualified immunity for his "official conduct so long as

1 that conduct is objectively reasonable and does not violate
2 clearly-established federal rights." Cnty. House, Inc. v. City of
3 Boise, Idaho, ___F.3d___ , 2010 WL 3895700, 15 (9th Cir. 2010).

4 I have already held, above, that plaintiffs' § 1983 claims,
5 inasmuch as they intend to state a claim for substantive due
6 process, do not survive summary judgment. There is no need to
7 analyze qualified immunity for those claims. The issue, then, is
8 whether defendant Fisher met his burden of establishing that any
9 procedural due process claim raised by this factual record was not
10 clearly established at the relevant time.

11 I have previously noted in this opinion that defendant
12 Fisher's challenge was a challenge to whether a termination
13 occurred only. Having held there is a question of fact in this
14 regard, and without any challenge to the other aspects of a
15 procedural due process claim, nor to the law in that regard being
16 clearly established at the time of the acts in this case, Fisher
17 has failed to meet his burden of proving that he is entitled to
18 qualified immunity on the § 1983 claims. His motion is denied in
19 this regard.

20 IV. Wrongful Discharge under Oregon Law

21 Plaintiffs third and fourth claims for relief are for wrongful
22 discharge under Oregon law, for Dunn and Masunaga, respectively.

23 Under Oregon law, an employer may discharge an employee at any
24 time for any reason unless doing so violates a contractual,
25 statutory, or constitutional requirement. Babick v. Oregon Arena
26 Corp., 333 Or. 401, 407, 40 P.3d 1059 (2002) (citing Patton v. J.C.
27 Penney Co., 301 Or. 117, 120, 719 P.2d 854 (1986)). The tort of
28 wrongful discharge is a narrow exception to this general rule. Id.

1 Oregon courts have recognized two circumstances that give rise
2 to the common law tort of wrongful discharge: (1) discharge for
3 exercising a job-related right of important public interest and (2)
4 discharge for complying with a public duty. Babick, 333 Or. at
5 407, 40 P.3d 1059. Examples of the first category include
6 discharge for filing a worker's compensation claim (Brown v.
7 Transcon Lines, 284 Or. 597, 588 P.2d 1087 (1978)) and resisting
8 sexual harassment by a supervisor (Holien v. Sears, Roebuck & Co.,
9 298 Or. 76, 689 P.2d 1292 (1984)). Examples of the second category
10 include discharge for serving on jury duty (Nees v. Hocks, 272 Or.
11 210, 536 P.2d 512 (1975)), for reporting patient abuse at a nursing
12 home (McQuary v. Bel Air Convalescent Home, Inc., 69 Or. App. 107,
13 684 P.2d 21 (1984)), and for refusing to sign a false report
14 regarding a fellow employee's work-related conduct (Delaney v. Taco
15 Time Int'l Inc., 297 Or. 10, 681 P.2d 114 (1984)).

16 In Oregon, however, the tort of wrongful discharge was not
17 intended to be a tort of general application, but rather an
18 interstitial tort to provide a remedy when the conduct in question
19 is unacceptable and no other remedy is available. Cantley v. DSMF,
20 Inc., 422 F. Supp. 2d 1214, 12220 (D.Or. 2006) (citing Draper v.
21 Astoria School Dist., 995 F. Supp. 1122, 1128 (D.Or.1998)) (internal
22 quotation omitted). See also Walsh v. Consol. Freightways, Inc.,
23 278 Or. 347, 351-52, 563 P.2d 1205 (1977). "The underlying purpose
24 of that tort in this state is not to vindicate individual interests
25 of the employee by assuring that he or she receives the maximum
26 possible recovery, but rather to protect important public policies
27 by punishing conduct that thwarts those interests." Draper v.
28 Astoria Sch. Dist., 995 F. Supp. 1122, 1130 (D.Or. 1998). Thus, a

1 claim for common-law wrongful discharge is not available in Oregon
2 if (1) an existing remedy adequately protects the public interest
3 in question and (2) the legislature has intentionally abrogated the
4 common-law remedies by establishing an exclusive remedy regardless
5 whether the courts perceive that remedy to be adequate. Olsen v.
6 Deschutes Cnty., 204 Or. App. 7, 14, 127 P.3d 655 (2006).

7 When determining whether the plaintiff may pursue both a
8 common law claim for wrongful discharge and a § 1983 claim arising
9 from the same facts, "the question is not whether the existing
10 remedy [under § 1983] is 'the best possible remedy' or 'identical
11 to the tort remedy' but merely whether it is sufficient to
12 'adequately protect the employment related right.'" Draper, 995 F.
13 Supp. at 1134. Section 1983 generally provides an adequate remedy
14 to protect the public interest in certain employment-related rights
15 of a public employee and, accordingly, has operated to dismiss the
16 plaintiff's wrongful discharge claims in those cases on summary
17 judgment or in response to motions to dismiss. See, e.g., Shultz
18 v. Multnomah Cnty., No. 08-CV-886, 2009 WL 1476689, at *12 (D.Or.
19 May 27, 2009); Baynton v. Wyatt, 411 F. Supp. 2d 1223 (D.Or. 2006);
20 Carlton v. Marion Cnty., No. 03-CV-6202, 2004 WL 1442598 (D.Or.
21 Feb. 19, 2002); Minter v. Multnomah Cnty., No. 01-CV-352, 2002 WL
22 31496404 (D.Or. May 10, 2002).

23 In Baynton, the plaintiff was a human resources manager for
24 defendant the Port of Portland. 411 F.Supp.2d at 1224. The Port
25 performed a reorganization of labor, after which plaintiff was
26 asked to assume additional duties. Id. Plaintiff's supervisor
27 also discussed with her many policy issues, including public status
28 and management of resources, possible discrimination against

1 African American employees, unequal pay increases, compensation for
2 public employees, and pay increases for politically-connected
3 employees. Id. at 1224-25. Plaintiff was subsequently fired. Id.
4 at 1225. Plaintiff brought claims for wrongful discharge and under
5 § 1983. Id. Defendant moved to dismiss the wrongful discharge
6 claim on the basis that plaintiff already had an adequate statutory
7 remedy under § 1983. Id. Plaintiff argued that she may not have
8 an adequate remedy under § 1983 depending on the facts proven in
9 each claim and the defenses raised. Id. Judge King held that "a
10 plaintiff suing under § 1983 for First Amendment retaliation has
11 the same remedies as under her wrongful discharge claim, and the
12 analysis does not require the court to determine the merits of the
13 claim; rather the court evaluates whether the claim, if proven,
14 provides an adequate remedy." Id. The court held the plaintiff's
15 remedy under § 1983 was the same, if not better, than it would be
16 under the wrongful discharge claim. Id. On that basis, the court
17 dismissed the wrongful discharge claim. Id.

18 Here, if proven, Dunn and Masunaga's § 1983 claim provides an
19 adequate remedy. Therefore, the plaintiffs may not pursue both
20 claims. Accordingly, I grant the District's motion for summary
21 judgment as to the claims for wrongful discharge.

22 V. Breach of Contract

23 Plaintiffs' fifth, sixth, seventh, and eighth claims for
24 relief are for breach of contract related to pay for unused sick
25 days and for breach of the implied covenant of good faith and fair
26 dealing.

27 A. Unused Sick Pay

28 The District argues that there is no provision in the

1 Administrator Agreements that provides for payment for unused sick
2 days. But the plaintiffs point out that the Agreements each
3 contain a provision reading:

4 2. Fringe Benefits:

5 Any benefit granted to the Reynolds Education Association
6 . . . that is not covered in this agreement shall
7 automatically accrue to administrators covered by this
8 agreement (see Reynolds Education Association . . .
9 contract[]).

8 Mersereau Decl., Ex. 9, at 1; Ex. 10, at 1. In turn, the 2006-2009
9 agreement between Reynolds School District and the Reynolds
10 Education Association provides, in part,

11 4. Payment for Unused Sick Leave

12 The District will make payment for unused, accumulated
13 sick leave for employees retiring under the provision of
14 PERS with the following provisions:

15 a. Payments shall be \$50.00 per accumulated sick leave
16 day."

17 Brown Decl. Att. 18, at 3.

18 The District argues that because the Administrator Agreement
19 provision regarding Fringe Benefits only applies to benefits "not
20 covered in this agreement," and because benefits available upon
21 early retirement are covered in the Agreement on page 5, the pay
22 for unused sick days provision in the Reynold Education Association
23 agreement does not apply.

24 I am not persuaded by the District's reasoning. The plain
25 meaning of the Fringe Benefits clause is that if a specific benefit
26 is not addressed in the Administrator Agreement, but the specific
27 benefit is granted under the Reynolds Education Association
28 contract, then the party signing the Administrator Agreement gets
the benefit. The early retirement provision of the Administrator

1 Agreement does not explicitly address payment for unused sick
2 leave. In order to avoid inclusion of the unused sick leave
3 benefit under the Fringe Benefits clause, the Administrator
4 Agreement must contain explicit language that addresses unused sick
5 leave one way or another. It does not. Accordingly, defendants'
6 motion for summary judgment as to this claim is denied.

7 B. Breach of Covenant of Good Faith and Fair Dealing

8 In general, every contract has an obligation of good faith in
9 its performance and enforcement under the common law. Elliott v.
10 Tektronix, Inc., 102 Or. App. 388, 396, 796 P.2d 361, rev den, 311
11 Or. 13, 803 P.2d 731 (1990). "[A] party may violate its duty of
12 good faith and fair dealing without also breaching the express
13 provisions of a contract." Elliott, 102 Or. App. at 396. In
14 addition, a claim for breach of the duty of good faith and fair
15 dealing "may be pursued independently of a claim for breach of the
16 express terms of the contract." McKenzie v. Pac. Health & Life
17 Ins. Co., 118 Or. App. 377, 381, 847 P.2d 879 (1993), rev
18 dismissed, 318 Or. 476, 869 P.2d 859 (1994). The purpose of that
19 duty is to prohibit improper behavior in the performance and
20 enforcement of contracts, and to ensure that the parties "will
21 refrain from any act that would 'have the effect of destroying or
22 injuring the right of the other party to receive the fruits of the
23 contract.'" Iron Horse Eng'g v. Nw. Rubber, 193 Or. App. 402, 421,
24 89 P.3d 1249 (2004) (quoting Perkins v. Standard Oil Co., 235 Or.
25 7, 16, 383 P.2d 107 (1963)). Yet, the duty "cannot contradict an
26 express contractual term, nor otherwise provide a remedy for an
27 unpleasantly motivated act that is expressly permitted by the
28 contract." Zygar v. Johnson, 169 Or. App. 638, 645, 10 P.3d 326

1 (2000), rev den, 331 Or. 584, 19 P.3d 356 (2001).

2 The duty "does not operate in a vacuum[,]" rather it "focuses
3 on the 'agreed common purpose' and the 'justified expectations' of
4 the parties, both of which are intimately related to the parties'
5 manifestation of their purposes and expectations in the express
6 provisions of the contract." OUS v. OPEU, 185 Or. App. 506,
7 515-16, 60 P.3d 567 (2002). The common law implied duty of good
8 faith and fair dealing serves to effectuate the objectively
9 reasonable expectations of the parties. Klamath Off-Project Water
10 Users, Inc. v. Pacificorp, 237 Or. App. 434, 445 (2010).

11 In their complaint, Dunn and Masunaga each simply allege, "By
12 threatening and thereafter initiating plaintiff's dismissal for the
13 purpose of coercing her to pay money, which was not a lawful basis
14 for any adverse employment action, defendant Fisher acted unfairly
15 and in bad faith." Compl. ¶¶ 56, 66.

16 Without citing any law, the District simply argues that it did
17 not breach the implied covenant of good faith and fair dealing
18 because no one terminated the principals—they resigned.

19 I have already addressed the issue of resignation and held
20 there is a material issue of fact regarding whether the plaintiffs
21 were constructively discharged. Therefore, on the narrow basis of
22 defendants' motion as to this claim, the District's motion for
23 summary judgment as to this claim is denied. It remains to be seen
24 what will come of this claim at trial.

25 VI. Wage Claims

26 The plaintiffs argue that the provision for payment for unused
27 sick leave was compensation within the meaning of ORS 652.150, and
28 that failure to pay compensation for the unused sick leave was in

1 (1) granted with regard to plaintiffs' § 1983 claims for
2 substantive due process,

3 (2) granted with regard to procedural due process related to
4 unused vacation days,

5 (3) denied with regard to plaintiffs' § 1983 claim for
6 procedural due process related to employment,

7 (4) denied with regard to defendant Fisher's defense of
8 qualified immunity,

9 (5) granted with regard to plaintiffs' claims for wrongful
10 discharge,

11 (6) denied with regard to plaintiffs' claims for breach of
12 contract, and

13 (7) denied with regard to plaintiffs' wage claims.

14 IT IS SO ORDERED,

15
16 Dated this 15th day of November, 2010.

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18 /s/ Dennis J. Hubel

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20 Dennis James Hubel
21 United States Magistrate Judge
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