

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Mar 30, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TRENA BULTENA,

Plaintiff,

v.

WASHINGTON STATE
DEPARTMENT OF AGRICULTURE,

Defendant.

No. 1:15-CV-03076-SMJ

**ORDER RULING ON MOTIONS
FOR SUMMARY JUDGMENT**

Before the Court are Defendant Washington State Department of Agriculture (the Department)'s Motion for Summary Judgment, ECF No. 67, and Plaintiff Trena Bultena's Motion for Summary Judgment, ECF No. 71 as amended by ECF No 117. A hearing was held on March 23, 2018, in Spokane, Washington, and the Court took the matter under advisement. The Court also heard argument on the Department's motion to strike Bultena's statement of facts, ECF No. 86, and orally denied the motion. This Order memorializes and supplements the Court's oral ruling.

Bultena worked as a fruit inspector for the Department's Fruit and Vegetable Program from 2002 to 2013. In her final two years of employment, Bultena's frequent tardiness became an issue. Although she was scheduled to begin her shift

1 at 8:00 a.m., she frequently arrived to work after 8:00 a.m. Bultena attributed her
2 late arrival to her inability to hear her alarm clock in the morning due to her
3 permanent hearing loss. Bultena requested a later start time as a reasonable
4 accommodation. The Department did not approve this accommodation. Bultena also
5 attempted to use FMLA leave to cover the periods of her shift for which she was
6 late, but the Department denied FMLA leave on the grounds that Bultena did not
7 have a qualifying condition. Bultena was moved to the Yakima Office in February
8 2012 while an investigation was pending. On May 17, 2013, Bultena was terminated
9 due to her frequent, persistent tardiness.

10 Bultena now brings claims against the Department for disability and gender
11 discrimination under the Washington Law Against Discrimination (WLAD), Wash.
12 Rev. Code (RCW) § 49.60, violation of the Washington Family Leave Act
13 (WFLA), RCW § 49.78, hostile work environment, and wrongful termination.¹ The
14 Department moves for summary judgment on all remaining claims and Bultena filed
15 a cross motion for partial summary judgment on the WLAD and WFLA claims.
16 Bultena's claims for disparate treatment based on disability, gender discrimination,
17 and hostile work environment fail because she cannot make out a prima facie case

18
19 ¹ Plaintiff's complaint alleges several other causes of action, which Defendants
20 address in their motion for summary judgment, however the parties indicated at the
hearing that Bultena has abandoned the ADA, Rehabilitation Act, FMLA, Equal
Pay Act, invasion of privacy, and negligent hiring and supervision claims.
Accordingly, those claims are dismissed.

1 on the undisputed facts in the record and her wrongful discharge claim is statutorily
2 precluded. However, genuine issues of material fact preclude summary judgment
3 on the failure to accommodate and WFLA claims. Accordingly, the Department's
4 motion for summary judgment is granted in part, and Bultena's motion for summary
5 judgment is denied in full.

6 **BACKGROUND**

7 **A. Undisputed Facts**

8 Plaintiff Trena Bultena was an agricultural inspector with the Department's
9 Fruit and Vegetable Program from 2002 through 2013. ECF No. 69 at 165. Fruit
10 and Vegetable Program inspectors inspect quality, condition, and phytosanitary
11 criteria of fresh produce. The Fruit and Vegetable Inspection Program is an entirely
12 self-supporting, fee-for-service program that does not accept federal funds and is
13 not supported by state funding. *Id.* at 10–11.

14 Bultena's performance evaluations from 2002 through 2005 were
15 complimentary of her job performance. *Id.* at 104–11. Bultena's 2005–2006 annual
16 performance evaluation raised concerns about her tardiness. *Id.* at 113. Bultena
17 provided a written rebuttal to her evaluation. *Id.* at 115. She attributed her tardiness
18 to a back injury, which she treated with narcotic pain relievers, her children failing
19 to wake her, and her hearing loss. *Id.* Bultena indicated that she expected her
20 tardiness issues to resolve when her back healed. *Id.* Bultena received a

1 supplemental evaluation a few months later indicating she had resolved her issues
2 relating to tardiness. *Id.*

3 In September 2010, Bultena received her 2009–2010 performance
4 evaluation. *Id.* at 121. She received favorable comments on her technical skill, but
5 tardiness was again noted as an issue. *Id.* Bultena was advised that her tardiness
6 causes delays in scheduling and getting out to the warehouses. *Id.* Expectations for
7 the following year included her need to communicate more professionally, remain
8 open minded, to show up for work on time, and to discontinue the practice of using
9 annual leave to cover for late arrivals. *Id.* Bultena signed the evaluation and
10 expectations without providing any additional comments. *Id.*

11 In March 2011, Bultena inquired about late arrival as a reasonable
12 accommodation for her on-going tardiness. *Id.* at 124. Human Resource Consultant
13 Barbara Hoff asked for current information from a medical professional laying out
14 Bultena's limitations and suggesting possible accommodations. *Id.* Bultena
15 indicated that it would be difficult for her to find time to see a doctor to obtain this
16 information given her work schedule. *Id.* at 126. Hoff emailed Bultena twice in May
17 and again in July asking for the required documentation. *Id.* at 126–27.

18 On September 26, 2011, Bultena received her 2010–2011 evaluation. *Id.* at
19 132. Bultena's continuing frequent tardiness was noted. *Id.* In October 2011, the
20 Department relocated Bultena to Agricultural Inspector 4. *Id.* at 135. In February

1 2012, Bultena was assigned to the Yakima office pending an investigation that
2 resulted from complaints by two warehouses. *Id.* at 137.

3 In April 2012, the Department arranged for an evaluation at Thompson
4 Audiology and Hearing Center, by Dr. Rodney Thompson and a vocational work
5 evaluation at Whitmer & Associates. Dr. Thompson's report included the finding
6 that Bultena had moderate hearing loss in both ears. *Id.* at 140. He recommended
7 two options to help her wake up in the morning: a specialized alarm for hearing
8 impaired individuals and/or an inexpensive vibrating alarm watch. *Id.* The
9 vocational recommendations from Whitmer & Associates noted that "a vibrating
10 wristwatch is likely the best option for getting Ms. Bultena out of bed on time." *Id.*
11 at 148.

12 Bultena did not appear to implement the recommendations and persisted in
13 her request that the Department allow her to arrive to work late. In July 2012,
14 Bultena requested to use FMLA to excuse her continued tardiness. ECF No. 69 at
15 54. The request was denied on the basis that Bultena did not qualify for FMLA
16 leave.

17 Bultena submitted to the Department two FMLA certifications indicating her
18 eligibility for FMLA leave—one in July 2012 and one in April 2013. The 2012
19 certification was written by Dr. Reinmuth, who was Bultena's primary care provider
20 from 2010 to 2012. ECF No. 74 at 233. The certification stated:

1 The need for estimated medical leave began retroactive to at least July
2 06, 2011. The need for leave is estimated to continue for at least twelve
3 months. Medical leave is the most effective accommodation since the
4 employer will not accommodate a flexible schedule, telecommuting, or
5 schedule adjustments to facilitate timely arrival expectations. VRC
6 Whitmer notes that ‘other accommodations are too burdensome or
costly.’ The only effective option for Trena to meet her medical
necessities without schedule changes, flexible schedule, or
telecommuting options is to take leave as needed because she cannot
meet the changes made to scheduling after she accepted the position
without accommodation.

7 *Id.* at 234.

8 The April 2013 certification was written by Dr. Lefors, who had been
9 Bultena’s primary care provider from July 2012 to the date the letter was written.

10 *Id.* at 170. The certification indicated that “medical leave is the most effective
11 accommodation since employee will not accommodate a flexible schedule.” *Id.*

12 Bultena’s employment with the Department was terminated on May 17,
13 2013. *Id.* at 152. Following her employment at the Department, Bultena worked at
14 Elevate Learning from July to December 2015. While there, Bultena reported for
15 shifts as early as 5:00 a.m. *Id.* at 93. Bultena worked for Valley Water/Lab Test in
16 late 2015 to early 2016. *Id.* at 159. Her shifts there began at 8:00 a.m., and she had
17 no accommodation to permit a late start. Most of the time, Bultena was either early
18 or on time for her shifts at Lab Test. From September 6, 2017, to November 4, 2017,
19 Bultena worked at 11-R Sales/Evans Fruit. *Id.* at 160. For 20 of the 37 total shifts

1 Bultena worked at 11-R Sales, Bultena started work very early in the morning—
2 usually around 5:00 a.m. *Id.* at 161.

3 Bultena currently works full time at Foothills Irrigation, and has done so since
4 March 2016. *Id.* at 163. Her shift at Foothills Irrigation begins at 8:00 a.m., and
5 Bultena has no reasonable accommodation to permit a later start. Most of the time,
6 Bultena is either early or on time for her 8:00 a.m. shift. *Id.* at 91–92.

7 **B. Evidentiary Objections**

8 At the hearing, defense counsel raised an evidentiary objection to a report
9 included by Bultena in her statement of facts. The report (the “Intravaia Report”)
10 was produced by Intravaia Risk Management Group, LLC, an outside human
11 resources consulting agency, regarding alleged misconduct by Ken Frazier, a
12 manager at Washington State Department of Agriculture. The investigation found
13 by a preponderance of the evidence that Frazier violated the Department’s
14 discrimination and harassment prevention policies. The report also noted that
15 Charles Dragoo and Karen Cozetto appeared to collude with and protect Frazier.
16 Bultena seeks to use the report to establish a pattern of discrimination and failure to
17 appropriately respond to harassment at the Department. The Department contends
18 that the report should be excluded as irrelevant, unduly prejudicial, inadmissible
19 hearsay, and impermissible character evidence. For the reasons set out below, the
20 Court agrees.

1 Rule 56 of the Federal Rules of Civil Procedure requires that a motion for
2 summary judgment be supported or opposed by “citing to particular parts of the
3 record” including “depositions, documents, electronically stored information,
4 affidavits or declarations, stipulations, admissions, interrogatory answers, or other
5 materials.” Fed. R. Civ. P. 56(c)(1)(A). While the evidence need not be in a
6 presently admissible form, it must be capable of being admitted in a form that would
7 be admissible in evidence in order to be considered by the court on summary
8 judgment.

9 Relevance is the threshold evidentiary hurdle all admissible evidence must
10 meet. Rule 401 of the Federal Rules of Evidence states that relevant evidence is
11 evidence “having any tendency to make the existence of any fact that is of
12 consequence to the determination of the action more probable or less probable than
13 it would be without the evidence.” Fed. R. Evid. 401. Rule 403 states that
14 “[a]lthough relevant, evidence may be excluded if its probative value is
15 substantially outweighed by the danger of unfair prejudice, confusion of the issues,
16 or misleading the jury, or by considerations of undue delay, waste of time, or
17 needless presentation of cumulative evidence.”

18 The Intravaia Report is relevant because the prior actions of Frazier, Dragoo
19 and Cozetto have some tendency to make facts at issue in this case more likely.
20 Dragoo and Cozetto were involved in overseeing Bultena’s employment. Dragoo

1 oversaw Bultena's work when she was assigned to the Yakima office and met with
2 her on at least one occasion regarding her tardiness. ECF No. 74 at 88. Likewise,
3 Frazier was one of Bultena's superiors during certain periods of her employment at
4 the Department. *See id.* at 213. Thus, the findings in the Intravaia Report that these
5 individuals violated certain department policies has some tendency to make
6 Bultena's claims of harassment or discrimination more likely.

7 Importantly, the relevance of the Intravaia Report derives from its tendency
8 to show propensity, which is not permissible in civil trials. The Ninth Circuit has
9 recognized that past discriminatory conduct is admissible only Sound "in rare and
10 narrow circumstances in discrimination cases to show an employer's state of mind
11 with respect to the protected class." *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174,
12 1208 n.3 (9th Cir. 2002) (citing *Becker v. ARCO Chem. Co.*, 207 F.3d 176, 194–
13 203 (3d Cir. 2000)). Bultena has not established that the Intravaia report falls into
14 this narrow exception. This is especially true because the report focuses on
15 discriminatory conduct primarily directed at Hispanic individuals and short-term
16 employees. The report identifies only one instance that could be interpreted as
17 sexual harassment, and further states that Frazier was an "equal opportunist" with
18 respect to his inappropriate conduct. ECF No. 74 at 260.

19 Moreover, even if the Intravaia Report were admissible under 404(b), the risk
20 of prejudice substantially outweighs the report's limited probative value. A jury

1 would likely have difficulty understanding why they are being asked to evaluate the
2 context and severity of conduct directed at individuals other than Bultena, who
3 belong to classes to which Bultena does not, perpetrated by individuals other than
4 Bultena's direct managers. Further, it would create the problem of several trials
5 within the trial, which would be confusing and time-consuming. Accordingly, the
6 Intravaia Report would not be admissible at trial, and it will not be considered as
7 part of the summary judgment record here.

8 **LEGAL STANDARD**

9 Summary judgment is appropriate if the "movant shows that there is no
10 genuine dispute as to any material fact and the movant is entitled to judgment as a
11 matter of law." Fed. R. Civ. P. 56(a). Once a party has moved for summary
12 judgment, the opposing party must point to specific facts establishing that there is
13 a genuine dispute for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). If
14 the nonmoving party fails to make such a showing for any of the elements essential
15 to its case for which it bears the burden of proof, the trial court should grant the
16 summary judgment motion. *Id.* at 322. "When the moving party has carried its
17 burden under Rule [56(a)], its opponent must do more than simply show that there
18 is some metaphysical doubt as to the material facts. . . . [T]he nonmoving party must
19 come forward with 'specific facts showing that there is a genuine issue for trial.'"
20 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986)

(internal citation omitted). When considering a motion for summary judgment, the Court does not weigh the evidence or assess credibility; instead, “the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Sgt. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). “In short, what is required to defeat summary judgment is simply evidence ‘such that a reasonable juror drawing all inferences in favor of the respondent could return a verdict in the respondent’s favor.’” *Zetwick v. Cty. of Yolo*, 850 F.3d 436, 441 (9th Cir. 2017) (quoting *Reza v. Pearce*, 806 F.3d 497, 505 (9th Cir. 2015)).

DISCUSSION

A. WLAD Disability Discrimination Claims

Bultena brings claims for disability discrimination under the WLAD for disparate treatment and failure to accommodate. Bultena cannot establish a prima facie case for her disparate treatment claim, but questions of fact preclude summary judgment in favor of either party on her failure to accommodate claim.

1. Disparate Treatment

To establish a prima facie case of disability discrimination under the WLAD, Bultena must show that (1) she was disabled, (2) she was performing her job satisfactorily, and (3) she suffered an adverse employment action. *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.*, 404 P.3d 464, 473 n.3 (Wash. 2017). Where, as here, the plaintiff relies on circumstantial evidence, Washington courts use the

1 burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411
2 U.S. 792 (1973). *See Mikkelsen*, 404 P.3d at 471. Under this framework, Bultena
3 must first make a prima facie showing of disability discrimination. The burden then
4 shifts to the Department to present legitimate reasons for the adverse action. If the
5 Department meets that burden, the burden shifts back to the employee to
6 demonstrate a genuine issue of material fact regarding whether the employer's
7 reasons were pretext. *Id.* at 471.

8 As the basis for her disparate treatment claim, Bultena alleges that she was
9 transferred from the warehouse to the office due to her request for an
10 accommodation and later terminated because of her inability to arrive to work on
11 time. However, the Department asserts that Bultena was transferred pending an
12 investigation based on complaints from two warehouses and terminated due to her
13 excessive tardiness. ECF No. 69 at 137. Bultena further asserts that the fact she
14 was terminated based on tardiness—which she alleges stemmed directly from her
15 disability—establishes discriminatory treatment. However, other than the fact of
16 termination itself, Bultena cannot produce evidence to show that the Department
17 acted with discriminatory intent. She alleges that, while other employees were
18 allowed a ten-minute grace-period, she was not given such lenience. However, the
19 record shows that Bultena was reprimanded for only the times when she arrived
20 more than ten minutes late. *See* ECF No. 74 at 83. Because Bultena cannot point

1 to any evidence to show the Department's proffered reason for her termination
2 was pretext, she cannot establish a prima facie case for disparate treatment under
3 the WLAD. The Department is therefore entitled to summary judgment on this
4 claim.

5 **2. Failure to accommodate**

6 To establish a prima facie case of failure to accommodate, Bultena must
7 establish that (1) she had a sensory, mental, or physical impairment that
8 substantially limited a major life activity, (2) she was qualified to perform the
9 essential functions of the job, (3) she gave the Department notice of the disability
10 and its substantial limitations, and (4) upon notice, the Department failed to
11 affirmatively adopt available measures that were medically necessary to
12 accommodate the abnormality. *Davis v. Microsoft Corp.*, 70 P.3d 126, 130 (Wash.
13 2003).

14 The record establishes that Bultena had a disability that impacted a major life
15 activity. *See* ECF No. 69 at 140 (audiology report showing moderate hearing loss).
16 The record also shows that Bultena was qualified to perform her job. *See id.* at 113–
17 21 (performance evaluations). Her work evaluations were complimentary and
18 consistently gave her high marks on her inspections. *Id.* The record further
19 establishes that Bultena gave the Department notice of her hearing loss. *See id.* at
20 124 (correspondence between Bultena and Barbara Hoff). The outcome of the

1 Department's motion for summary judgment therefore turns on whether the
2 Department failed to adopt a medically necessary accommodation to enable Bultena
3 to perform the functions of her position.

4 There is a question of fact as to whether a later start time was medically
5 necessary to accommodate Bultena's disability. In support of her case, Bultena
6 points to certifications from her primary care providers, Dr. Lefors and Dr.
7 Reinmuth, which stated that Bultena was "not able to perform the functions of her
8 job without effective accommodation to arrival times." ECF No. 74 at 232; *id.* at
9 171. However, a vocational work evaluation report indicated that Bultena could
10 perform the functions of her job and could improve her ability to wake up on time
11 through the use of a vibrating alarm clock. ECF No. 69 at 144–50. Bultena also
12 reported for work on time for several months in 2006 after she was initially
13 confronted about her tardiness, *see* ECF No. 74 at 45, and she was able to arrive on
14 time in her subsequent positions without a late start time accommodation. *See* ECF
15 No. 69 at 160–62 (shift records from Evans Fruit); *id.* at 163 (records from Foothills
16 Irrigation Inc.).

17 There is also a question of fact as to whether the accommodation would
18 impose an undue hardship on the Department. The Ninth Circuit has recognized
19 that "an employer has a duty to accommodate an employee's limitations in getting
20 to and from work." *Livingston v. Fred Meyer Stores, Inc.*, 388 Fed. App'x 738, 740

1 (9th Cir. 2010); *see also* *Humphrey v. Memorial Hospitals Ass’n*, 239 F.3d 1128,
2 1135 (9th Cir. 2001); *Colwell v. Rite Aid Corp.*, 602 F.3d 495, 506 (3d Cir. 2010).
3 However, an employer is not required to provide an accommodation that
4 compromises an essential function of the job. *See Dedman v. Wash. Personnel App.*
5 *Bd.*, 989 P.2d 1214, 1219 (Wash. Ct. App. 1999). The Department argues that
6 Bultena’s 8:00 a.m. arrival was an essential function of the job. There is some
7 evidence in the record to support this position. Namely, the deposition testimony of
8 Department employees that tardiness impacted productivity and negatively affected
9 the Department’s relations with the warehouses for which it worked. *See* ECF No.
10 69 at 31–32 (deposition of Robert Newell); *id.* at 41 (deposition of Jim Nelson).
11 However, there is also evidence that shifts with start times other than 8:00 a.m. were
12 available and that employees were permitted to arrive after the scheduled work time.
13 ECF No. 74 at 213 (“It is the practice in the district where Trena works to not
14 document it or require a leave slip if an employee is less than 10 minutes late. Any
15 more than that, they are required to submit a leave request.”).

16 Because genuine issues of material fact remain regarding the necessity and
17 feasibility of Bultena’s requested accommodations, neither party is entitled to
18 summary judgment on this claim.
19
20

1 **B. Washington Family Leave Act**

2 The Washington Family Leave Act is Washington’s version of the Federal
3 Medical Leave Act. The WFLA mirrors the federal framework.² WFLA leave must
4 be taken concurrently with leave under the FMLA. Like the FMLA, the WFLA
5 provides 12 weeks of unpaid leave for certain medical reasons, birth or placement
6 of a child, and care of family members with a serious health condition. Leave can
7 be used intermittently or to reduce the employee’s schedule.

8 To qualify for WFLA leave, the employee must suffer from a serious health
9 condition. A serious health condition includes “[a]ny period of incapacity or
10 treatment for such incapacity due to a chronic serious health condition.” RCW
11 49.78.020(16)(a)(ii)(C). Section 49.78.010(14) defines a period of incapacity as “an
12 inability to work, attend school, or perform other regular daily activities because of
13 the serious health condition, treatment of that condition or recovery from it, or
14 subsequent treatment in connection with such inpatient care.”

15 The parties here dispute whether Bultena suffered from a “serious health
16 condition” as defined under the WFLA. The FMLA³ creates a scheme for the
17

18 ² The parties agree that the Department, a state agency, is immune from suit for
19 damages under the FMLA. However the Department does not assert immunity from
the WLFA and argues the claim on the merits. Because the Department does not
raise immunity, the Court will assess the WFLA claim on the merits.

20 ³ RCW § 49.78.410 provides that the WFLA must be construed “to the extent
possible, in a manner consistent with similar provisions” of the FMLA.

1 medical determination of whether an employee has a serious health condition. 29
2 C.F.R. § 825.307. The employee may submit a FMLA certification to the employer.
3 If the certification is sufficient, the employer may then require the employee to get
4 a second opinion from a health care provider of the employer's choice. *Id.* If the
5 two opinions differ, the employer may require the employee to seek a third opinion
6 from a physician chosen by both the employer and employee. *Id.* This final opinion
7 is controlling. Costs associated with obtaining the second and third opinions are at
8 the employer's expense. *Id.*

9 Unfortunately, the parties here did not engage in the process outlined above.
10 After Bultena requested an accommodation and use of her protected leave in March
11 2011, the Department's human resources consultant, Barbara Hoff, contacted
12 Bultena on several occasions requesting medical certification of her eligibility for
13 protected leave. ECF No. 69 at 129. Bultena did not provide this documentation. In
14 July 2011, Hoff sent Bultena a letter denying her accommodation request due to a
15 lack of medical documentation. *Id.* In April 2012, the Department arranged for
16 Bultena to receive an audiological evaluation and a vocational work evaluation
17 report. Neither indicated that Bultena required an accommodation or protected leave
18 regarding her tardiness. In July 2012, Bultena's primary care provider at the time,
19 Dr. Reinmuth, provided an FMLA certification indicating Bultena qualified for
20 protected leave five times per week for up to one hour each morning. In April 2013,

1 Bultena submitted a substantially identical FMLA certification from her new
2 primary care provider, Dr. Lefors.

3 On the facts outlined above, the Court cannot say that either party is entitled
4 to judgment as a matter of law. A question of fact remains as to whether Bultena
5 had a serious health condition requiring WFLA leave. Neither the audiological
6 evaluation nor the vocational work evaluation report specifically address WFLA or
7 FMLA eligibility. However, both specifically address the underlying condition
8 giving rise to the alleged qualifying condition—Bultena’s hearing loss—and neither
9 recommend a late start time as a necessary accommodation. Further, the FMLA
10 certifications provided by Drs. Reinmuth and Lefors were vague and appeared to
11 rely primarily on Bultena’s self-reported symptoms as the basis for the certification.
12 Finally, the fact that Bultena routinely arrived to work within one half hour of her
13 scheduled start time raises a question as to whether she was truly “incapacitated”
14 within the meaning of the WFLA. For these reasons, the question of whether
15 Bultena was entitled to protected leave is properly reserved for trial.

16 **C. Sex Discrimination under WLAD**

17 Bultena’s complaint alleges that the Department treated Bultena and other
18 female employees differently than similarly situated male employees in the terms
19 and conditions of employment. She further alleges that managers “repeatedly
20 engaged in conduct and used demeaning degrading phrases related to women and

gender that were not used in reference to male employees” and that the conduct was widespread and commonly known and therefore imputable to the Department as a whole. ECF No. 1 at 11.

The undisputed facts do not support a prima facie case for sex discrimination. Bultena appears to assert a theory of direct evidence of sex discrimination. However, she has been unable to point to any evidence in the record that bears this out. She asserts that she was passed over for opportunities, but the record does not show that she ever applied for a promotion. She asserts that she was singled out for discipline for tardiness, but the record shows that male employees were subject to the same discipline. ECF No. 74 at 187. Further, she alleges that she was subject to demeaning verbal comments, but she can identify only a few, isolated instances over the span of several years. ECF No. 89 at 85–87. Accordingly, other than her own conclusory allegations, Bultena is unable to show any evidence to support a claim for sex discrimination.

Even if the Court were to analyze Bultena’s claim under the *McDonnell Douglas* burden-shifting framework for circumstantial evidence, it would still fail. It is undisputed that Bultena is a member of a protected class (women), and that she suffered an adverse employment action (termination). The burden would then shift to the Department to offer a legitimate nondiscriminatory reason for Bultena’s termination. The Department asserts that it terminated Bultena because of her

1 frequent tardiness. The burden then shifts back to Bultena to show that the
2 Department's reasoning was pretextual. For the same reasons articulated above,
3 Bultena cannot meet this burden. There is no evidence in the record to establish a
4 nexus between Bultena's termination and her sex. Accordingly, the Department is
5 entitled to summary judgment on this claim, as well.

6 **D. Hostile Work Environment**

7 Under both state and federal law, to establish a prima facie case for a hostile
8 work environment claim, the plaintiff must show that (1) he or she was subjected to
9 unwelcome hostile or abusive conduct, (2) the conduct was based on the plaintiff's
10 protected status, (3) the conduct was sufficiently severe to affect the terms and
11 conditions of employment, and (4) the hostile or abusive conduct is imputable to
12 the employer. *See Glasgow v. Georgia-Pacific Corp.*, 693 P.2d 708, 712 (Wash.
13 1985).

14 Bultena's response brief states that WSDOA created a hostile work
15 environment by "refusing to accept Trena's requests for accommodations as
16 legitimate and continuing to disregard her doctor's notes and refusing the schedule
17 change even when it was readily attributable to the department." ECF No. 88 at 16.
18 This statement constitutes the entirety of Plaintiff's briefing on the matter. As
19 presented to the Court, this is insufficient to establish a case for a hostile work
20 environment.

1 When asked at her deposition, Bultena identified the following allegedly
2 offensive conduct: (1) Ken Crow telling her to “act like a grownup,” and once
3 chasing her down the hall while yelling at her; (2) Denny Davis on one occasion
4 saying she was strong “for a girl”; and (3) Rocky Weible asking men for help with
5 supervisory duties. ECF No. 69 at 85–87. Even working from these facts, Bultena
6 cannot establish a hostile work environment claim. Other than the comment that she
7 was strong for a girl, Bultena has produced no evidence that the above-cited
8 behavior was based on her protected status—either her sex or her disability. Further,
9 there is no evidence that any alleged harassment was “severe and pervasive.” “To
10 constitute a hostile [work] environment, the frequency and severity of the offensive
11 conduct must be such as to affect the terms and conditions of employment.” *Adams*
12 *v. Able Bldg. Supply, Inc.*, 57 P.3d 280, 283 (Wash. Ct. App. 2002). Bultena cannot
13 point to any evidence that would show the above-cited conduct was so severe as to
14 impact the terms and conditions of her employment.

15 **E. Wrongful Discharge**

16 Bultena also asserts a claim for wrongful discharge in violation of public
17 policy. This claim is entirely duplicative of her disability discrimination claim under
18 the WLAD. Washington courts have not yet determined whether the WLAD
19 precludes common law claims for wrongful termination. However, an order written
20 by Judge Thomas O. Rice in this district held that the statutory remedy bars the

1 common law action. *Lee v. Rite Aid Corp.*, 917 F. Supp. 2d 1168, 1178 (E.D. Wash.
2 2013). This opinion is very thorough and well-reasoned and the Court sees no
3 reason to deviate from Judge Rice's holding on the issue. Accordingly, because
4 Bultena had a statutory remedy for disability discrimination under the WLAD—
5 which she utilized—her claim under the common-law tort of wrongful discharge is
6 statutorily precluded.

7 Accordingly, **IT IS HEREBY ORDERED:**

8 **1.** Defendant's Motion for Summary Judgment, **ECF No. 67**, is
9 **GRANTED** in part, and **DENIED** in part.

10 **A.** Defendant's motion is **GRANTED** with respect to Plaintiff's
11 ADA, Rehabilitation Act, FMLA, Equal Pay Act, invasion of
12 privacy, and negligent hiring and supervision claims.

13 **B.** Defendant's motion is **GRANTED** with respect to the WLAD
14 disparate treatment and gender discrimination claims, the hostile
15 work environment claim, and the wrongful termination claim.


16 **C.** Defendant's motion is **DENIED** with respect to the WLAD
17 failure to accommodate claim and the WFLA claim.

18 **2.** Plaintiff's Motion for Summary Judgment, **ECF No. 71** as amended
19 by **ECF No. 117**, is **DENIED**.
20

1 **3.** Defendant's Motion to Strike 72 Statement of Facts, **ECF No. 86**, is
2 **DENIED.**

3 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and
4 provide copies to all counsel.

5 **DATED** this 30th day of March 2018.

6 
7 SALVADOR MENDEZ, JR.
 United States District Judge