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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES BUSEY, an individual,

Plaintiff,

v.

RICHLAND SCHOOL DISTRICT,
RICHARD JANSONS, HEATHER
CLEARY, MARY GUAY, RICK
DONAHOE, and PHYLLIS
STRICKLER,

Defendants.

NO: 2:13-CV-5022-TOR

ORDER GRANTING
RECONSIDERATION AND
AMENDING THE SUMMARY
JUDGMENT ORDER

BEFORE THE COURT is Defendants’ Motion for Reconsideration Re: ECF No. 90 (ECF No. 92). This matter was submitted for consideration without oral argument. The Court—having reviewed the briefing, the record, and files therein—is fully informed. For the reasons discussed below, the Court grants Defendants’ motion for reconsideration and amends the summary judgment order at ECF No. 90.

1 **BACKGROUND**

2 This case concerns the termination of former Richland School District
3 Superintendent, James Busey. Following his termination in the winter of 2013,
4 Plaintiff filed suit against Richland School District and Richland School District
5 Board members, asserting violations of procedural due process under 42 U.S.C. §
6 1983, the Washington Law Against Discrimination (“WLAD”), state wage law,
7 and Washington’s Public Records Act. ECF No. 1 at 14. Plaintiff also requests a
8 declaratory judgment that he was terminated in violation of state law and that he
9 remained employed under his employment contract through June 2015. *Id.* at 15.

10 On December 22, 2015, this Court granted in part and denied in part
11 Defendants’ motion for summary judgment. ECF No. 90. In relevant part, this
12 Court declined to grant summary judgment in Defendants’ favor on Plaintiff’s
13 procedural due process and discrimination claims. *Id.* The parties have since
14 stipulated that Plaintiff’s Public Records Act claim should be dismissed and the
15 stipulated dismissal was granted. ECF No. 111.

16 In the instant motion for reconsideration, Defendants ask the Court to
17 reconsider its denial of Defendants’ summary judgment motion as it relates to
18 Plaintiff’s due process and marital discrimination claims. ECF No. 92. In so
19 requesting this relief, Defendants present additional evidence and argument not
20 previously presented to this Court. This Court directed Plaintiff to respond.

1 This Court grants Defendants’ motion for reconsideration in part. Pursuant
2 to Federal Rule of Civil Procedure 54(b), this Order amends and supersedes this
3 Court’s Order of December 22, 2015 (ECF No. 90). *See* Fed. R. Civ. P. 54(b)
4 (permitting the court to revise a non-final order “at any time before the entry of
5 judgment adjudicating all the claims and all the parties’ rights and liabilities”).

6 **FACTS¹**

7 Beginning on July 1, 2010, Plaintiff James Busey was employed as the
8 Superintendent of Richland School District and subject to the Superintendent’s
9 Employment Contract. ECF No. 78-1 at 3-4 (Deposition of Dr. Busey); *see* ECF
10 No. 1 at 18 (Employment Contract).

11 By November 2012, Dr. Busey and para-educator Debbie Hamilton had
12 been involved in a romantic relationship for about one year. ECF No. 78-1 at 6.
13 During that period, Dr. Busey and Ms. Hamilton frequently met off-campus
14 between the hours of 8 a.m. and 3 p.m.² and would engage in sexual intercourse in
15 Ms. Hamilton’s car in the parking lots of a retirement home and church. *Id.* at 9-12.

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¹ The following are the undisputed material facts unless otherwise noted.

18 ² It is unclear whether Dr. Busey and Ms. Hamilton met during the school day at
19 times other than designated breaks. Dr. Busey’s deposition testimony merely states
20 that the two “may” have met during the school day at times other than lunch. ECF

1 Dr. Busey and Ms. Hamilton would communicate through the school district
2 email system to arrange their off-campus meetings. *Id.* at 22. Dr. Busey would also
3 text Ms. Hamilton on his cellular phone, either paid for or issued by the Richland
4 School District. *Id.* at 23. By Dr. Busey’s own admission, use of his district email
5 and cell phone to arrange these meetings violated School Board Policy 9273,
6 which prohibits use of district property and equipment for “entertainment, personal
7 benefit or gain,” and which policy applied to Dr. Busey. *Id.* at 21-22, 24. That
8 being said, Dr. Busey maintains that no employee had ever been terminated or
9 even disciplined for using district email, cell phones, computers, or other
10 equipment to simply communicate or arrange meetings for personal purposes.
11 ECF No. 85 at 2 (Busey Declaration).³

12
13 _____
14 No. 78-1 at 9. Dr. Busey’s declaration explains that they met during lunch breaks,
15 as well as other designated breaks. ECF No. 85 at 2. When considering a motion
16 for summary judgment, this Court must make all reasonable inferences in favor of
17 the non-moving party, which here is Dr. Busey.

18 ³ In their reply briefing, Defendants object to several statements in Dr. Busey’s
19 declaration as lacking foundation, speculative, and containing inadmissible opinion
20 and hearsay. ECF No. 87 at 8-10. To the extent Dr. Busey’s declaration contains
inadmissible hearsay, this Court does not rely on these statements in ruling on

1 On November 8, 2012, Richland School District General Counsel, Galt
2 Pettett, advised Dr. Busey that he had learned Dr. Busey and a para-educator at
3 Jefferson Elementary School were involved in a relationship. ECF No. 78-1 at 5-6.
4 Dr. Busey acknowledged his relationship with Ms. Hamilton. *Id.* at 45. Mr. Pettett
5 advised Dr. Busey to report the matter to Rick Jansons, the chair of the Richland
6 School District Board. *Id.* at 43. Subsequently, Dr. Busey met with Mr. Jansons
7 and disclosed his “ongoing relationship” with Ms. Hamilton. *Id.* at 45-47. At the
8 time, Dr. Busey did not explicitly tell Mr. Jansons it was a sexual relationship, *id.*
9 at 47; however, Dr. Busey disputes that Mr. Jansons could have had any other
10 understanding, ECF No. 85 at 3.

11 After Dr. Busey’s disclosure, Mr. Jansons and Tony Howard of Human
12 Resources interviewed a number of people about Dr. Busey’s relationship with Ms.
13 Hamilton. ECF No. 78-1 at 50-51. Near the end of November, Mr. Jansons advised
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15 summary judgment; however, to the extent Dr. Busey’s declaration is based on
16 personal knowledge, this Court may consider these matters. *See Fed. R. Civ. P.*
17 56(c)(4) (“An affidavit or declaration used to support or oppose a motion must be
18 made on personal knowledge, set out facts that would be admissible in evidence,
19 and show that the affiant or declarant is competent to testify on the matters
20 stated.”).

1 Dr. Busey that the investigation had been completed and that Dr. Busey’s conduct
2 did not give rise to any breaches of contract or policy. *Id.* at 52. At that point in
3 time, Dr. Busey had not disclosed the off-campus meetings with Ms. Hamilton
4 during the school day or his communications with her through district email and
5 cell phone. *Id.* at 53-54 (“Q: Okay, and as of December 7th, 2012, had you advised
6 Rick Jansons that you had been meeting with Ms. Hamilton between the hours of 8
7 a.m. and 3 p.m. on school days in a parking lot for the purpose of having sexual
8 intercourse? A. No. Q. Do you know whether, as of December 7th, 2012, Rick
9 Jansons was aware of the personal e-mails that you and Ms. Hamilton had been
10 exchanging through your Richland School District accounts over the past year? . . .
11 A. I did not know that.”).

12 At some point between December 7, 2012, and December 10, 2012, Dr.
13 Busey and Ms. Hamilton’s relationship became public after information was given
14 to the Tri-City Herald, a local newspaper. *Id.* at 56. On December 10, 2012,
15 Richland School District placed Dr. Busey on paid administrative leave. *Id.* at 55.

16 Richland School District directed Alan Key—an employee of a third-party
17 administrator responsible for managing insurance risk pools, including the
18 insurance pool that insures Richland School District—to investigate allegations
19 about Dr. Busey’s conduct. ECF No. 84-4 at 2-4 (Key Deposition). Mr. Key
20 interviewed Dr. Busey on January 21, 2013, which interview was recorded. ECF

1 No. 78-2. Mr. Key started the interview by explaining he was asked by the School
2 Board to conduct an investigation and, although “still in the middle of that
3 investigation,” he was meeting with Dr. Busey in order to “give [him] an
4 opportunity to respond to what [Mr. Key was] investigating.” *Id.* at 2. During the
5 course of the interview the two discussed Dr. Busey’s relationship with Ms.
6 Hamilton; Dr. Busey’s personal use of district equipment, including email and cell
7 phone; and the possible impact the affair would have on Dr. Busey’s job, including
8 the perspective of Dr. Busey’s staff. *See id.* at 2-42.

9 Mr. Key reported the results of his investigation to the Richland School
10 District Board, ECF Nos. 78-5 at 4 (Key Deposition), and on January 22, 2013, the
11 Board determined that it had probable cause to terminate Dr. Busey’s employment,
12 ECF No. 77 at 10; although, Dr. Busey disputes this characterization, ECF No. 83
13 at 10. In a press release, the Richland School District publicly announced its
14 decision, indicating that it had “voted unanimously to terminate Dr. Busey as
15 superintendent of the Richland School District.” ECF No. 84-5. Three different
16 media outlets reported that Dr. Busey’s termination was effective immediately,
17 which reports were accompanied by Mr. Jansons’ statements. ECF Nos. 84-6, 84-

1 7, 84-8.⁴ The Richland School District sent Dr. Busey notice on January 23, 2013,
2 that his insurance coverage would end “[d]ue to [his] termination,” however, the
3 coverage was not set to expire until March 1, 2013. ECF No. 84-9 at 2.

4 On January 30, 2013, the Richland School District sent Dr. Busey a letter,
5 signed by Mr. Jansons, titled “Notice of Probable Cause for Discharge and
6 Nonrenewal Pursuant to RCW 28A.405.210 and RCW 28A.405.300.” ECF No.
7 78-3. Based on the Board’s review of all information from Mr. Key’s investigation,
8 including comments made by Dr. Busey during the interview the week before, the
9 Board found Dr. Busey had engaged in conduct that “materially and substantially
10 affected” Dr. Busey’s ability to perform his duties as Superintendent. *Id.* at 2.

11 Specifically, the Board found the following: that Dr. Busey had (1) engaged in “a
12 long-standing extramarital affair with a subordinate employee of the Richland
13 School District;” (2) engaged in inappropriate and unprofessional conduct with a
14 female professional “while . . . married;” (3) used district equipment for
15 “inappropriate personal reasons including pursuit of [his] inappropriate
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17 ⁴ In Defendants’ original statement of facts, they stated Dr. Busey was employed
18 until January 22, 2013. *See* ECF No. 77 at 1. However, they have since clarified
19 that Dr. Busey was paid through the end of February. *See* ECF No. 92-2 (Payroll
20 Record). That critical un rebutted fact necessitates the Court’s reconsideration here.

1 extramarital affair with a School District staff member;” (4) caused disruption and
2 unnecessary stress at Ms. Hamilton’s work site, an elementary school in the School
3 District; (5) threatened to go to the press and cause harm to the School District if
4 he was not reinstated or paid the full amount of his employment contract; (6)
5 informed the press of an issue not shared with the Board; and (7) created the
6 appearance of a conflict of interest and exposed the School District to potential
7 liability. *Id.* at 3. The Board concluded that probable cause existed for Dr. Busey’s
8 discharge, and in the letter’s closing, advised Dr. Busey of his right to challenge or
9 appeal the discharge and suggested Dr. Busey consult with an attorney. *Id.*⁵

10 Dr. Busey received the letter on February 4, 2013. ECF No. 78-1 at 57. On
11 February 14, 2013, Dr. Busey’s attorney, Brian Iller, sent a letter to Richland
12 School District’s attorney, Greg Stevens, asserting that Dr. Busey had not been
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14 ⁵ Defendants cite to Dr. Busey’s employment contract, which required that he
15 “devote his full time, skill, labor and attention” to his employment as
16 Superintendent. ECF No. 1 at 20. Although the Board found the above listed
17 conduct “materially and substantially affected [Dr. Busey’s] ability to perform the
18 duties of Superintendent of schools,” ECF No. 78-3 at 2, the Board did not cite this
19 provision of the contract in support of its termination decision. Thus, it is unclear if
20 this provision motivated the Board’s discharge decision.

1 given a pre-termination hearing and consequently remained employed as
2 Superintendent. ECF No. 1 at 30-39. In response, Mr. Stevens acknowledged Dr.
3 Busey's right to a hearing before the Board, pursuant to Dr. Busey's employment
4 contract, and invited Dr. Busey to let the Board know if he would like a hearing.
5 ECF No. 78-6. Mr. Iller responded on February 25, 2013, indicating that Dr.
6 Busey saw "no point" in having a hearing considering the circumstances. ECF No.
7 78-7. That same day, Dr. Busey filed suit with this Court. ECF No. 1.

8 Dr. Busey was paid through the end of February and his insurance coverage
9 continued until March 1. *See* ECF Nos. 84-9; 92-2 (Payroll Record).

10 DISCUSSION

11 Summary judgment may be granted to a moving party who demonstrates
12 "that there is no genuine dispute as to any material fact and the movant is entitled
13 to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the
14 initial burden of demonstrating the absence of any genuine issues of material fact.
15 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the
16 non-moving party to identify specific facts showing there is a genuine issue of
17 material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). "The
18 mere existence of a scintilla of evidence in support of the plaintiff's position will
19 be insufficient; there must be evidence on which the jury could reasonably find for
20 the plaintiff." *Id.* at 252.

1 For purposes of summary judgment, a fact is “material” if it might affect the
2 outcome of the suit under the governing law. *Id.* at 248. A dispute concerning any
3 such fact is “genuine” only where the evidence is such that the trier-of-fact could
4 find in favor of the non-moving party. *Id.* “[A] party opposing a properly supported
5 motion for summary judgment may not rest upon the mere allegations or denials of
6 his pleading, but must set forth specific facts showing that there is a genuine issue
7 for trial.” *Id.* (internal quotation marks and alterations omitted); *see also First Nat’l*
8 *Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968) (holding that a party
9 is only entitled to proceed to trial if it presents sufficient, probative evidence
10 supporting the claimed factual dispute, rather than resting on mere allegations).
11 Moreover, “[c]onclusory, speculative testimony in affidavits and moving papers is
12 insufficient to raise genuine issues of fact and defeat summary judgment.”
13 *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007); *see also*
14 *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081-82 (9th Cir. 1996) (“[M]ere
15 allegation and speculation do not create a factual dispute for purposes of summary
16 judgment.”).

17 In ruling upon a summary judgment motion, a court must construe the facts,
18 as well as all rational inferences therefrom, in the light most favorable to the non-
19 moving party, *Scott v. Harris*, 550 U.S. 372, 378 (2007), and only evidence which
20 would be admissible at trial may be considered, *Orr v. Bank of Am., NT & SA*, 285

1 F.3d 764, 773 (9th Cir. 2002). *See also Tolan v. Cotton*, 134 S. Ct. 1861, 1863
2 (2014) (“[I]n ruling on a motion for summary judgment, the evidence of the
3 nonmovant is to be believed, and all justifiable inferences are to be drawn in his
4 favor.” (internal quotation marks and brackets omitted)).

5 **A. Section 1983 Claim**

6 Plaintiff alleges, pursuant to 42 U.S.C. § 1983, that the Board members
7 violated his Fourteenth Amendment right to procedural due process by failing to
8 provide him with an adequate pre-termination hearing.

9 A cause of action pursuant to section 1983 may be maintained “against any
10 person acting under color of law who deprives another ‘of any rights, privileges, or
11 immunities secured by the Constitution and laws’ of the United States.” *S. Cal.*
12 *Gas Co. v. City of Santa Ana*, 336 F.3d 885, 887 (9th Cir. 2003) (quoting 42 U.S.C.
13 § 1983). The rights guaranteed by section 1983 are “liberally and beneficently
14 construed.” *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (quoting *Monell v. Dep’t*
15 *of Soc. Servs. of N.Y.*, 436 U.S. 658, 684 (1978)).

16 Defendants do not appear to dispute that the Board members acted under
17 color of state law. *See* ECF No. 76. Accordingly, the only issue for this Court’s
18 review is whether a genuine issue of material fact exists as to whether they
19 deprived Plaintiff of his constitutional right to procedural due process.

20 //

1 **1. Adequacy of Pretermination Procedures**

2 The Fourteenth Amendment prohibits states from “depriv[ing] any person of
3 life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV.
4 “Procedural due process rules are meant to protect persons not from the
5 deprivation, but from the mistaken or unjustified deprivation of life, liberty, or
6 property.” *Carey v. Piphus*, 435 U.S. 247, 259 (1978).

7 A procedural due process claim has two discrete elements. First,
8 the court “asks whether there exists a liberty or property interest which has been
9 interfered with by the State.” *Vasquez v. Rackauckas*, 734 F.3d 1025, 1042 (9th
10 Cir. 2013) (internal quotation marks and citation omitted). Second, the court
11 “examines whether the procedures attendant upon that deprivation were
12 constitutionally sufficient.” *Id.* “[T]he Due Process Clause provides that certain
13 substantive rights—life, liberty, and property—cannot be deprived except pursuant
14 to constitutionally adequate procedures.” *Cleveland Bd. of Educ. v. Loudermill*,
15 470 U.S. 532, 541 (1985).

16 Contrary to Plaintiff’s briefing, what process remains due is a question of
17 federal, not state, law. *Id.* (holding that what process is constitutionally sufficient is
18 “not to be found in the [state] statute”); *see also Ford v. Wainwright*, 477 U.S. 399,
19 428-29 (1986) (“[R]egardless of the procedures the State deems adequate for
20 determining the preconditions to adverse official action, federal law defines the

1 kind of process a State must afford prior to depriving an individual of a protected
2 liberty or property interest.”). “[A] plaintiff is not necessarily entitled, as a matter
3 of *federal due process*, to all of the procedures provided by state law.” *Whalen v.*
4 *Mass. Trial Court*, 397 F.3d 19, 22 n.2 (1st Cir. 2005) (emphasis added). Rather,
5 what process is constitutionally sufficient is a matter of federal law. *See id.* at 26
6 n.6 (“Although a property right in employment must arise from state law, what
7 process is due is a question of federal law.”); *Ciambriello v. County of Nassau*, 292
8 F.3d 307, 321 n.7 (2d Cir. 2002) (“[T]he issue of what process is due under the
9 Fourteenth Amendment is strictly a matter of federal, not state, law.”); *Gray v.*
10 *Laws*, 51 F.3d 426, 438 (4th Cir. 1995) (“The Constitution’s due process
11 requirements are defined by the Constitution and do not vary from state to state on
12 the happenstance of a particular state’s procedural rules.”). To find otherwise
13 would directly contravene clear precedent holding that violations of state law do
14 not give rise to section 1983 claims. *See, e.g., Ove v. Gwinn*, 264 F.3d 817, 824
15 (9th Cir. 2001) (“To the extent that the violation of a state law amounts to the
16 deprivation of a state-created interest that reaches beyond that guaranteed by the
17 federal Constitution, Section 1983 offers no redress.”).

18 As an initial matter, there can be no dispute that Dr. Busey’s interest in
19 continued employment is constitutionally protected. While the U.S. Constitution
20 does not define protected property interests, state law can. *Loudermill*, 470 U.S. at

1 538-39. RCW 28A.405.210 expressly protects certificated employees from
2 termination without cause. Defendants do not attempt to dispute that Washington
3 law creates a constitutionally protected interest in continued employment for
4 certificated teachers, like Dr. Busey.

5 It is similarly clear that Dr. Busey was due some pretermination process
6 before he was ultimately terminated. It is well-settled that a public employee with a
7 constitutionally-protected interest in his or her continued employment is entitled to
8 some form of process prior to being terminated. *Loudermill*, 470 U.S. at 542.

9 Generally, due process requires that an employee facing termination receive “oral
10 or written notice of the charges against him, an explanation of the employer’s
11 evidence, and an opportunity to present his side of the story.” *Id.* at 546. And, as
12 the Supreme Court emphasized, an employee’s opportunity to be heard must occur
13 *before* the employee is terminated. *Id.*

14 In the public employment context, “[t]he need for some form of
15 pretermination hearing . . . is evident from a balancing of the competing interests at
16 stake.” *Id.* at 542. The employee has a significant interest in retaining employment,
17 the government has an interest in expeditiously removing unsatisfactory employees
18 and avoiding administrative burdens, and both have an interest in preventing an
19 erroneous termination. *Id.* at 542-43. “[S]ome opportunity for the employee to
20 present his side of the case is recurringly of obvious value in reaching an accurate

1 decision.” *Id.* at 543. “Even where the facts are clear, the appropriateness or
2 necessity of the discharge may not be; in such cases, the only meaningful
3 opportunity to invoke the discretion of the decisionmaker is likely to be *before* the
4 termination takes effect.” *Id.* (emphasis added).

5 Here, Defendants assert that Dr. Busey’s termination went into effect on
6 February 15, 2013, which was 10 days after Dr. Busey received notice of probable
7 cause for his termination. In support, Defendants cite to state law, which expressly
8 states that an employee such as Dr. Busey remains employed until he is given an
9 opportunity to request a pre-termination hearing, and that Dr. Busey, according to
10 the payroll records, was paid through the month of February 2013. ECF No. 92 at
11 2-3. Plaintiff, however, maintains that his employment was terminated on January
12 22, 2013: the date the press reported that his employment was terminated effective
13 immediately and the School District issued a press release announcing his
14 termination. ECF No. 99 at 2.

15 This Court finds there is no genuine dispute that Dr. Busey’s employment
16 was terminated on or after February 15, 2013. First, pursuant to RCW
17 28A.405.300, Dr. Busey could not have been terminated before he was given
18 notice of probable cause of his termination and provided opportunity for a hearing.
19 In other words, any termination before this date would not have been given effect.
20 Here, Dr. Busey received notice of probable cause for his termination on February

1 4, 2013. Thus, he had 10 days from this date to request a hearing in writing in front
2 of an independent hearing officer. *See* RCW 28A.405.300. Second, Dr. Busey was
3 paid through the end of February 2013 and his insurance coverage did not expire
4 until March 1. Although Plaintiff highlights media coverage indicating this his
5 termination was effective immediately, the final termination decision, after the
6 Board’s initial probable cause finding, did not rest with the Board.⁶ If Dr. Busey
7 had timely requested a hearing, an independent hearing officer—appointed
8 pursuant to RCW 28A.405.310(4)—would be responsible for the decision whether
9 to restore Dr. Busey’s employment or uphold the Board’s probable cause finding
10 and carry out the termination. *See* RCW 28A.405.310(8). Accordingly, this Court
11 finds it is beyond dispute that Dr. Busey’s employment was not terminated until at
12 least February 15, 2013.

13 Keeping this termination date in mind, this Court finds a reasonable jury
14 could reach but one conclusion: Defendants afforded Dr. Busey sufficient

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16 ⁶ Even if Mr. Jansons, who had provided statements to several press outlets, had
17 said that Dr. Busey’s termination was “effective immediately,” the final
18 termination decision was not his or the Board’s to make. Rather, even if the
19 Board’s mind was made up, an independent hearing officer would be responsible
20 for the final decision. *See* RCW 28A.405.310.

1 pretermination process before terminating his employment in February 2013.⁷

2 Under the standard announced in *Loudermill*, Dr. Busey was entitled to some form
3 of a pretermination hearing that consisted of notice, an explanation of the evidence
4 against him, and an opportunity to be heard. Based on the evidence presented, even
5 when viewed in the light most favorable to Dr. Busey, this Court finds no genuine
6 issue of material fact as to whether Dr. Busey was afforded adequate due process.

7 First, there is no genuine dispute that Dr. Busey was given adequate notice
8 of charges against him in the Board's January 30 letter. In this letter, titled "Notice
9 of Probable Cause for Discharge and Nonrenewal Pursuant to RCW 28A.405.210
10 and RCW 28A.405.300," the Board explained that it had probable cause to
11 terminate Dr. Busey's employment and detailed the results of its findings. *See* ECF
12 No. 78-3.

13 Second, there is no genuine dispute that Dr. Busey was provided adequate
14 notice of the Board's contemplation of the dismissal action in the Board's January
15 30 letter. In the Ninth Circuit, notice of an employer's intent to terminate is an
16

17 ⁷ Defendants' continue to assert that Mr. Key's interview of Dr. Busey, conducted
18 on January 21, 2013, provided sufficient due process. Because disputed issues of
19 material fact still surround the adequacy of that interview, the Court does not rest
20 its summary judgment ruling on those events.

1 essential component of pre-termination due process. *Matthews v. Harney Cty., Or.,*
2 *Sch. Dist. No. 4*, 819 F.2d 889, 892 (9th Cir. 1987) (“On the issue of notice, we
3 read *Loudermill* to require, in advance of any pre-termination hearing (1) notice to
4 the employee as to the pendency or contemplation of a dismissal action, and (2)
5 notice as to the charges and evidence which give rise to that concern.”). Here, the
6 January 30 letter expressly stated that the Board was contemplating the discharge
7 of Dr. Busey. *See* ECF No. 78-3.

8 Third, there is no genuine dispute that Dr. Busey was provided an adequate
9 opportunity to respond to the charges against him and object to the necessity of a
10 dismissal action. Pursuant to RCW 28A.405.300, Dr. Busey had 10 days to request
11 a hearing in front of an independent hearing officer to argue that insufficient cause
12 existed for his discharge after receiving notice of the Board’s probable cause
13 determination. Here, Dr. Busey had received the Board’s letter on February 4,
14 2013. ECF No. 78-1 at 57. On February 21, 2013, after receiving a letter from Dr.
15 Busey’s attorney, Mr. Stevens, Richland School District’s counsel, expressly
16 invited Dr. Busey to let the Board know if he wanted a hearing. ECF No. 78-6.
17 Four days later, on February 25, 2013, Dr. Busey’s attorney responded on his
18 behalf, declining to request a hearing. ECF No. 78-7. Importantly, Dr. Busey was
19 paid through this date, ECF No. 92-2, and his insurance coverage continued
20 beyond this date, ECF No. 84-9 at 2.

1 In light of the following, this Court finds a reasonable jury could reach but
2 one conclusion, even when construing all evidence in the light most favorable to
3 Dr. Busey: Defendants afforded Dr. Busey adequate pretermination process
4 pursuant to the Supreme Court’s ruling in *Loudermill*. Accordingly, Defendants’
5 motion for summary judgment on Plaintiff’s due process claim (ECF No. 76) is
6 **GRANTED.**

7 **B. State Law Claims**

8 **1. Statutory Due Process**

9 Plaintiff’s Complaint requests that the Court enter declaratory judgment that
10 Defendants violated RCW 28A.405.300 and that Plaintiff remained employed and
11 entitled to compensation under his employment contract until June 30, 2015.

12 RCW chapter 28A.405 governs the process of terminating certificated
13 school district staff. Specifically, RCW 28A.405.300 provides the following
14 process:

15 In the event it is determined that there is probable cause or causes for
16 a . . . superintendent, or other certificated employee, holding a
17 position as such with the school district, hereinafter referred to as
18 “employee”, to be discharged or otherwise adversely affected in his or
19 her contract status, such employee shall be notified in writing of that
20 decision, which notification shall specify the probable cause or causes
for such action. . . . Such notices shall be served upon that employee
personally, or by certified or registered mail, or by leaving a copy of
the notice at the house of his or her usual abode with some person of
suitable age and discretion then resident therein. Every such employee
so notified, at his or her request made in writing and filed with the
president, chair of the board or secretary of the board of directors of

1 the district within ten days after receiving such notice, shall be granted
2 opportunity for a hearing pursuant to RCW 28A.405.310 to determine
3 whether or not there is sufficient cause or causes for his or her
4 discharge or other adverse action against his or her contract status.

4 RCW 28A.405.300. If the employee is not provided timely notice or an
5 opportunity for hearing, “such employee shall not be discharged or otherwise
6 adversely affected in his or her contract status for the causes stated in the original
7 notice for the duration of his or her contract.” *Id.* Conversely, if an employee is
8 provided notice and the opportunity for hearing and does not request a hearing,
9 “such employee may be discharged or otherwise adversely affected as provided in
10 the notice served upon the employee.” *Id.*

11 Regarding the substance of the notice, the Washington Supreme Court has
12 noted, this statutory scheme is “remarkably clear”: the school district must notify
13 the employee that it has probable cause to discharge the employee and the notice
14 must specify the cause or causes. *Martin v. Dayton Sch. Dist. No. 2*, 85 Wash.2d
15 411, 412 (1975) (interpreting RCW 28A.58.450, which was later recodified as
16 RCW 28A.405.300). “[The notice] need do no more, but it must reflect a decision
17 of probable cause, not a judgmental conclusion that the board’s mind is closed.” *Id.*

18 The statute does not explicitly define what constitutes “timely notice;”
19 however, it does state that an employee has ten days after notice is provided to
20 request a hearing. If no hearing is requested within this ten day period, the

1 employee may then be discharged as provided in the notice. *See* RCW
2 28A.405.300. Thus, in effect, it appears from the language of the statute that timely
3 notice is at least ten days before any discharge, during which period the employee
4 may request a hearing.

5 If a hearing is timely requested, RCW 28A.405.310 governs the hearing
6 procedure. Under this statutory provision, a hearing officer is appointed as follows:
7 First, the school board and the employee can either each appoint one nominee to
8 choose the hearing officer or stipulate as to the identity of the hearing officer.
9 Second, assuming no stipulation, the nominees jointly appoint a hearing officer; if
10 the nominees are unable to come to a consensus, the presiding judge of the superior
11 court for the county in which the school district is located has the duty to appoint a
12 hearing officer. RCW 28A.405.310(4). After the hearing, during which the parties
13 may call witnesses and present evidence in accordance with RCW 28A.405.310,
14 the hearing officer issues his or her final decision. RCW 28A.405.310(7)(c).
15 Importantly, if the hearing officer rules in favor of the employee, the employee is
16 restored to his or her employment position. *Id.*

17 Here, Defendants contend their January 30 letter satisfied RCW
18 28A.405.300: the District sent Dr. Busey the letter, cited the specific statute at
19 issue, and advised Dr. Busey of his right to appeal. Dr. Busey chose not to appeal
20 the Board's probable cause determination and similarly declined a subsequent

1 invitation to request a hearing. ECF No. 76 at 17. In response, Plaintiff highlights
2 that the notice and process afforded him occurred after the Board had decided to
3 terminate his employment as shown by its statements in several media outlets and
4 its own press release. ECF No. 82 at 14, 20.

5 This Court finds Defendants are entitled to summary judgment on this claim
6 as there is no genuine issue of material fact as to the Board's compliance with
7 RCW 28A.405.300. In a letter dated January 30, 2013, the Board notified Dr.
8 Busey in writing that it had probable cause to discharge Dr. Busey and detailed the
9 basis for its determination. ECF No. 78-3. After receiving this notice on February
10 4, 2013, Dr. Busey was afforded sufficient time to request a hearing and challenge
11 the Board's probable cause finding in front of an independent hearing officer
12 before his pay and insurance coverage were discontinued. Indeed, on February 21,
13 2013, Mr. Stevens, on behalf of Defendants, expressly invited Dr. Busey to request
14 a hearing before the Board to challenge the Board's letter, even though the 10 days
15 to request a hearing had already passed since Dr. Busey had received notice. *See*
16 ECF No. 78-6. On February 25, 2013, Dr. Busey's attorney expressly declined a
17 hearing on Dr. Busey's behalf. ECF No. 78-7.

18 In light of the foregoing, a reasonable jury could reach but one conclusion:
19 that Defendants complied with RCW 28A.405.300. Accordingly, Defendants'
20 motion as to this claim (ECF No. 76) is **GRANTED**.

1 **2. Marital Status Discrimination**

2 Plaintiff alleges the Richland School District and individual Board members
3 discharged him because of his marital status in violation of the WLAD.

4 Under the WLAD, “[i]t is an unfair practice for any employer . . . to
5 discharge or bar any person from employment because of . . . marital status”
6 RCW 49.60.180(2). Marital status is defined as “the legal status of being married,
7 single, separated, divorced, or widowed.” RCW 49.60.040(17). Examples of
8 marital discrimination include, but are not limited to, an employer’s refusal to hire
9 a single or divorced applicant because of a presumption that “married persons are
10 more stable” or an employer’s refusal to promote a married person because of a
11 presumption that he or she “will be less willing to work late and travel.” WAC
12 162-16-250.

13 To overcome summary judgment, a plaintiff must show that a reasonable
14 jury could find his or her protected trait was a substantial factor motivating the
15 employer’s adverse actions. *Scrivener v. Clark Coll.*, 181 Wash.2d 439, 445
16 (2014). In such a situation, a WLAD plaintiff is presented with a choice: either he
17 may produce direct evidence of discriminatory intent or, lacking such direct
18 evidence, proceed using the burden-shifting framework, announced by the
19 Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
20 *Scrivener*, 181 Wash.2d at 445; *Alonso v. Qwest Commc’ns Co., LLC*, 178

1 Wash.App. 734, 743 (2013); *see also Kastanis v. Educ. Emps. Credit Union*, 122
2 Wash.2d 483 (1993), *as amended by*, 122 Wash.2d (1994) (“The *McDonnell*
3 *Douglas* standard and the direct evidence method are merely alternative ways of
4 establishing a prima facie case.”).

5 Under the direct evidence test, relevant here, the court determines whether
6 the WLAD plaintiff has provided direct evidence that (1) the defendant employer
7 acted with a discriminatory motive and (2) the discriminatory motivation was a
8 significant or substantial factor in an employment decision. *Alonso*, 178 Wash.
9 App. at 744 (citing *Kastanis*, 122 Wash.2d 483). Direct evidence “includes
10 discriminatory statements by a decision maker and other smoking gun evidence of
11 discriminatory motive.” *Fulton v. State*, 169 Wash. App. 137, 148 n.17 (2012). A
12 defendant may then rebut this showing with evidence that “the same decision
13 would have been reached absent the discriminatory factor.” *Kastanis*, 122 Wash.2d
14 at 491.

15 This Court remains mindful that “[s]ummary judgment to an employer is
16 seldom appropriate in the WLAD cases because of the difficulty of proving a
17 discriminatory motivation.” *Scrivener*, 181 Wash.2d at 445.

18 Here, Dr. Busey presented direct evidence that Defendants acted with a
19 discriminatory motive and that such motivation was a substantial or significant
20 factor in their employment decision. In its letter of January 30, 2013, the Board

1 specifically stated that it based its probable cause decision at least in part on
2 Plaintiff's marital status: the Board twice classified Plaintiff's conduct as engaging
3 in an "extramarital affair" and further cited to the fact that Plaintiff met Ms.
4 Hamilton "while [he] was married." ECF No. 78-3 at 3. Express invocation of a
5 protected class—Plaintiff's married status—highlights the inappropriateness of
6 these statements, especially where there is no apparent reason for including them in
7 the first instance. Moreover, these statements, in a letter signed by Mr. Jansons on
8 behalf of the Board, were made by the decisionmaker responsible for the probable
9 cause determination that led to Dr. Busey's ultimate termination. *Fulton*, 169
10 Wash. App. at 148 n.17.

11 In response to Plaintiff's charge, Defendants maintain they would have
12 terminated Dr. Busey even if he had been unmarried. Defendants cite to Dr.
13 Busey's sexual relationship with Ms. Hamilton, a subordinate, while school was in
14 session; Dr. Busey's use of school equipment including email and his district-
15 issued cell phone to facilitate their off-campus meetings, which violated District
16 policy; and the negative impact Dr. Busey's conduct would have on his
17 effectiveness as a superintendent, most notably how his staff might view him
18 differently. ECF No. 76 at 15.

19 Plaintiff disputes Defendants' proffered reasons. Regarding his sexual
20 relationship with Ms. Hamilton, Plaintiff contends nothing in his contract prohibits

1 a consensual sexual relationship with other district employees over whom he
2 exercised no direct authority and which occurred during permissible personal
3 breaks and outside of school hours. ECF No. 82 at 18. Regarding use of district
4 equipment, Plaintiff notes that no one to his knowledge had been terminated, let
5 alone disciplined, for violating these policies. *Id.*

6 Before this Court considers whether a reasonable jury could find for Plaintiff
7 on his marital discrimination claim, the Court must determine whether Dr. Busey
8 has a viable claim in the first instance. As presented by Defendants, the threshold
9 issue is whether there is a relevant distinction here between Dr. Busey's marital
10 status and his conduct of engaging in an extramarital affair. ECF No. 92 at 20-21.

11 While an adverse employment action for conduct made without regard to an
12 individual's marital status would provide no basis for a marital discrimination
13 claim, this Court finds this cannot be the case when the status and conduct are so
14 directly linked. *See Veenstra v. Washtenaw Country Club*, 466 Mich. 155, 165
15 (2002) (“[A]dverse action against an individual for conduct, *without regard to a*
16 *protected status*, provides no basis for recourse under the Civil Rights Act.”). In
17 such a case as this—where Dr. Busey's marital status was referenced multiple
18 times in the notice letter from the Board in connection with his conduct—this
19 Court is unable to distinguish the concepts of Dr. Busey's status as a married man
20 and his conduct of engaging in an “extramarital” affair. It is certainly reasonable to

1 question why the Board expressly and repeatedly referenced Dr. Busey’s marital
2 status if this protected trait did not motivate its employment decision.

3 Having found that Dr. Busey has stated a valid marital status claim, this
4 Court finds a reasonable jury could find Dr. Busey’s marital status was a
5 substantial factor motivating the Board’s employment decision. Although
6 Defendants presented several seemingly legitimate non-discriminatory, conduct-
7 based reasons for Dr. Busey’s termination—especially that Dr. Busey had engaged
8 in an undisclosed relationship with a subordinate employee—it is for a jury to
9 weigh the evidence and decide whether Plaintiff’s direct evidence of
10 discrimination and evidence discounting Defendants’ reasoning demonstrates his
11 marital status was a substantial factor motivating Defendants’ employment
12 decision. Accordingly, Defendants’ motion for summary judgment on this claim
13 (ECF No. 76) is **DENIED**.

14 **3. Wage Law Claim**

15 Plaintiff alleges that Defendants have unlawfully withheld his wages in
16 violation of RCW 49.48.010 and 49.52.070.

17 Under RCW 49.48.010, when an employee ceases to work for an employer,
18 whether by discharge or voluntary withdrawal, the employer must pay the
19 employee the wages due to him or her. *Durand v. HIMC Corp.*, 151 Wash.App.
20 818, 829 (2009). RCW 49.52.070 provides the following civil remedy against the

1 employer for unlawfully withholding wages: “Any employer . . . who shall violate
2 any of the provisions of [RCW 49.52.050(2)] shall be liable in a civil action by the
3 aggrieved employee or his or her assignee to judgment for twice the amount of the
4 wages unlawfully rebated or withheld by way of exemplary damages, together with
5 costs of suit and a reasonable sum for attorney’s fees.” *See Schilling v. Radio*
6 *Holdings, Inc.*, 136 Wash.2d 152, 157-58 (1998).

7 The critical determination in these cases is whether non-payment is
8 “willful.” *Id.* at 159. Washington courts have generally construed willful to mean a
9 knowing and intentional act of a free agent. *Id.* at 159-60. In contrast, an
10 employer’s failure to pay wages is not willful when it is either due to (1)
11 carelessness or inadvertence or (2) the existence of a bona fide dispute. *Id.* at 160;
12 *see also Failla v. FixtureOne Corp.*, 181 Wash.2d 642, 655 (2014). To qualify as a
13 “bona fide” dispute, it must be “fairly debatable” as to whether an employment
14 relationship exists or whether the wages must be paid. *Schilling*, 136 Wash.2d at
15 161. Generally, the issue of whether the withholding of wages was “willful” is a
16 question of fact; however, if reasonable minds could reach but one conclusion from
17 those facts, the issue may be decided as a matter of law. *Failla*, 181 Wash.2d at
18 655.

19 This Court finds Defendants are entitled to summary judgment on this claim
20 as there can be no dispute that Defendants did not willfully withhold wages. Dr.

1 Busey’s employment was lawfully terminated in February 2013 pursuant to RCW
2 28A.405.300, as detailed above, and the payroll records show that Dr. Busey was
3 paid through the month of February. Accordingly, Dr. Busey has failed to show
4 what wages were wrongfully withheld.

5 To the extent Plaintiff is asserting that a jury award of damages pursuant to
6 his WLAD claim would lend support for wrongful withholding double damages
7 under RCW 49.52.050, this claim is inapplicable.

8 The key word in the statute is “obligated.” If the Washington
9 legislature intended for the provision to apply to a situation such as
10 Plaintiffs’, it could have stated that any employer who violates any
11 statute is subject to double damages. The insertion of the word
12 “obligated” indicates a pre-existing duty imposed by contract or
13 statute to pay specific compensation. Thus, a willful and intentional
withholding of accrued pay legally owed the employee would subject
the employer to double damages. Here, the Defendant’s “obligation”
to pay Plaintiffs the specific amount at issue had not legally accrued
prior to the jury verdict. It did not stem from a “statute, ordinance, or
contract;” rather, it resulted from a retrospective jury verdict.

14 *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1203 (9th Cir. 2002). The Ninth
15 Circuit’s reasoning in *Hemmings*, issued in the context of wage discrimination, is
16 instructive here: a retrospective jury award for violation of WLAD does not trigger
17 RCW 49.52.050 as WLAD damages are not wages the employer was “obligated”
18 to pay. *See id.* (“Washington courts have not extended RCW § 49.52.050 to
19 situations where employers violate anti-discrimination statutes.”); *Clipse v.*
20 *Commercial Driver Servs., Inc.*, 189 Wash. App. 776, 469-70 (2015) (citing

1 *Hemmings*, 285 F.3d at 1203-04, and holding that RCW 49.52.050 is inapplicable
2 to damages under the WLAD). Accordingly, Defendants' motion for summary
3 judgment on this claim (ECF No. 76) is **GRANTED**.

4 **ACCORDINGLY, IT IS ORDERED:**

5 1. Defendants' Motion for Reconsideration (ECF No. 92) is **GRANTED** in
6 part.

7 2. This Order **AMENDS and SUPERSEDES** this Court's Order of
8 December 22, 2015 (ECF No. 90).

9 3. Defendants' Motion for Partial Summary Judgment (ECF No. 76) is
10 **DENIED in part and GRANTED in part**. Defendants' motion is **GRANTED** as
11 to Plaintiff's claims under section 1983 for deprivation of procedural due process,
12 declaratory judgment under RCW 28A.405.300, and withholding of wages under
13 RCW 49.48.010 and 49.52.070. Defendants' motion as to Plaintiff's WLAD claim
14 is **DENIED** as indicated herein.

15 The District Court Executive is directed to enter this Order and provide
16 copies to counsel.

17 DATED March 23, 2016.



Thomas O. Rice
THOMAS O. RICE
Chief United States District Judge