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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAN WILSON,

Plaintiff,

v.

SAFEWAY INC., a foreign
corporation, d/b/a SAFEWAY STORE
#3521 (SAFEWAY),

Defendant.

NO: 2:16-CV-0405-TOR

ORDER GRANTING DEFENDANT’S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT is Defendant Safeway Inc.’s Motion for Summary Judgment (ECF No. 21). The Court held a hearing in Spokane, Washington on September 11, 2018 and heard oral argument from the parties. The Court has reviewed the files and the record, and is fully informed. For the reasons discussed below, Defendant’s Motion (ECF No. 21) is **granted**.

ORDER GRANTING DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT ~ 1

1 **STANDARD OF REVIEW**

2 A movant is entitled to summary judgment if “there is no genuine dispute as
3 to any material fact and that the movant is entitled to judgment as a matter of law.”
4 Fed. R. Civ. P. 56(a). A fact is “material” if it might affect the outcome of the suit
5 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
6 (1986). An issue is “genuine” where the evidence is such that a reasonable jury
7 could find in favor of the non-moving party. *Id.* The moving party bears the
8 “burden of establishing the nonexistence of a ‘genuine issue.’” *Celotex Corp. v.*
9 *Catrett*, 477 U.S. 317, 330 (1986). “This burden has two distinct components: an
10 initial burden of production, which shifts to the nonmoving party if satisfied by the
11 moving party; and an ultimate burden of persuasion, which always remains on the
12 moving party.” *Id.*

13 Only admissible evidence may be considered. *Orr v. Bank of America, NT*
14 *& SA*, 285 F.3d 764 (9th Cir. 2002). The nonmoving party may not defeat a
15 properly supported motion with mere allegations or denials in the pleadings.
16 *Liberty Lobby*, 477 U.S. at 248. The “evidence of the non-movant is to be
17 believed, and all justifiable inferences are to be drawn in [the non-movant’s]
18 favor.” *Id.* at 255. However, the “mere existence of a scintilla of evidence” will
19 not defeat summary judgment. *Id.* at 252. Further, the court need not, and will
20 not, “scour the record in search of a genuine issue of triable fact.” *Keenan v.*

1 *Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). The opposing party must present
2 significant and probative evidence to support its claim or defense. *Intel Corp. v.*
3 *Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991).
4 “[U]ncorroborated and self-serving testimony” alone will not create a genuine
5 issue of material fact. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061
6 (9th Cir. 2002).

7 **BACKGROUND¹**

8 The instant action involves several claims by Plaintiff Dan Wilson against
9 his past-employer, Defendant Safeway Inc., for alleged (1) disability
10 discrimination in violation of the Washington Law Against Discrimination
11 (WLAD), RCW § 49.78.010, *et seq.*, (2) violation of the Washington Family Leave
12 Act (WFLA), RCW 49.78.010, *et seq.*, and (3) wrongful discharge in violation of
13 public policy. ECF No. 1-1 at 5-6, ¶¶ 3.1-5.5.

14 Plaintiff began working at Safeway in 1985. ECF No. 22 at 2. By August
15 2001, Plaintiff was promoted to Acting Meat Department Manager and then Meat
16 Department Manager soon thereafter. ECF No. 22 at 2. Unbeknownst to

17
18 ¹ The underlying facts are generally not in dispute. The facts are
19 predominately gleaned from the deposition of Plaintiff or otherwise supported by
20 uncontradicted affidavits.

1 Defendant, Plaintiff began drinking around two bottles of wine (or eight drinks)
2 per day during 2014. ECF No. 23-1 at 5.

3 **A. Plaintiff's work performance before taking leave**

4 Jackie Katanik, District Manager for Safeway, oversaw several Safeway
5 stores (including overseeing sales, gains, profits, food safety, safety of stores, and
6 their store standards and services), including the Safeway where Plaintiff worked.
7 Ms. Katanik became familiar with Plaintiff in March, 2014. ECF No. 27-1 at 4, 6.
8 Around this time, Ms. Katanik first started inspecting the East Wenatchee store and
9 identified problems in the meat department: "it was not dating the cooler. Their
10 trim pans, it was old meat, a ton of out-of-stocks. The Department was just filthy
11 dirty and not being cleaned on a regular basis and temps weren't being adhered to."
12 ECF No. 27-1 at 8. Ms. Katanik testified that Plaintiff had other issues:

13 Just leading his team and getting, you know, the job done. And, you know,
14 when you'd go in in the morning, he wasn't, you know, filling the holes,
15 making a proper cutting list. And he wasn't leading his team. The
department was running him. It wasn't him running the department.

16 ECF No. 27-1 at 9. Ms. Katanik did not see improvement in the Meat department
17 while Plaintiff remained in his position. ECF No. 27-1 at 13.

18 Jason Helaas, the "meat merchandiser" for Safeway, ECF No. 23-1 at 23,
19 who oversees the meat departments within "District 31" for Safeway, ECF No. 24
20 at ¶ 4, visited Plaintiff's meat department on April 29, 2015. ECF No. 25 at ¶ 10.

1 Jason Helaas wrote a letter to Laura Villalobos, then Store Director (*a.k.a.* Store
2 Manager), ECF No. 27-1 at 59, expressing his concern about Plaintiff not working
3 during his shifts and the condition of the meat department:

4 While visiting your store today, I was questioning why The Meat Manager
5 wasn't working the Tuesday after inventory--again? After digging in further
6 I found "many"- "many" clocking issues that should have been addressed
7 (probably) months ago (maybe longer)... I had Jean Luc pull clocking data
8 on Dan (Meat mgr) and what I found was **extremely shocking!** (I have
9 attached the date from the last month). . . . You are in the middle of a
10 service crises – not to mention being short handed in the meat department –
11 and you allow Dan the freedom to come and go when he pleases???? I am
12 already disappointed with standards and service in the meat department and
13 for you to allow this is very concerning to me. I need to see immediate
14 disciplinary action Also I need 100% commitment from Dan that he
15 will run this shop to the best of his ability and strive to the best **or** step aside.
16 I am done with his lack of enthusiasm and unwillingness to build his team in
17 a positive way. I need a leader in the meat department, not a person who is
18 milking the clock waiting for retirement. It is easy to see with my eyes what
19 your customer are seeing everyday. . . Let's get it fixed! Thanks

20 ECF No. 25-1 at 2 (emphasis in original). Notably, Plaintiff testified that he was
praised for leaving work early. ECF No. 26 at 3, ¶ 10.

Jeffrey Mullings, a Meat Department Manager for Safeway at a different
store location (Store Number 1449), filled in for Plaintiff at Plaintiff's store (Store
Number 3521) in early May of 2015. ECF No. 24 at ¶ 5. According to Mr.
Mullings:

While filling in for [Plaintiff], I noticed in the meat department quite a few
violations of Safeway's policies and procedures. For example, in the cooler,
I found undated or out of date product, which are policy violations. I also
observed trimming violations. Meat trimmings larger than the size of a golf

1 ball should be repurposed into meat products, such as stir-fry or stew meat.
2 I found many trimmings as large as my hand discarded in the meat lugger (a
3 container), another policy violation. During my time at Store Number 3521,
4 meat department staff informed me that [Plaintiff] frequently was not
5 following the schedule as he had been arriving to work late, leaving work
6 early, and frequently taking two (2) hour lunches. These schedule violations
7 surprised me as the Store Managers expect the Meat Department Managers
8 to follow the posted schedules. I reported these violations and employee
9 concerns to Jean-Luc Gibassier. Jean-Luc told me that he was going to
10 address these issues with [Plaintiff] when [Plaintiff] returned to work. A day
11 or two later, Jean-Luc again asked me to cover [Plaintiff's] shift at Store
12 Number 3521. Jean-Luc told me that [Plaintiff] had showed up to his shift
13 an hour and a half late, and that when [Plaintiff] eventually came to work,
14 Jean-Luc sent [Plaintiff] home.

15 ECF No. 24 at ¶¶ 6-8.

16 In early May, 2015, Plaintiff arrived late for work² because he fell asleep
17 before his shift and received a Corrective Action Notice. ECF Nos. 25 at 4, ¶ 11;
18 23-1 at 82. According to another Corrective Action Notice, Plaintiff also left work
19 early around this time. ECF Nos. 23-1 at 35; 25-3. Plaintiff testified that his

20 ² It is unclear exactly what days Plaintiff worked in May and when he was
late, *see* ECF Nos. 25 at 6, ¶ 17; 31 at 9-10, ¶ 14, but it is undisputed Plaintiff
arrived late for work at least once and was suspended that day, ECF No. 23-1 at 41
(Plaintiff recounting he was suspended on a day where he was late). The exact
dates and the number of late arrivals is not material given the plethora of other
work-place violations.

1 supervisor, Jean Luc Gibassier, suspended him and told him to go home after he
2 arrived late for work. ECF No. 23-1 at 40-41; *see* ECF No. 25-3 at 2. Mr.

3 Gibassier explained:

4 I suspended [Plaintiff] because he had many, many, not only late, but also
5 leaving early. Pretty much making his own schedule. That was the -- the
6 start. I said, you know, I cannot – “That doesn’t work here. You cannot
7 make your own schedule.”

8 ECF No. 30-2 at 3.

9 In early May 2015, Vice President of Safeway, Dan Valenzuela, visited
10 Plaintiff’s department and was upset and not pleased with the condition. ECF No.
11 23-1 at 32-34. After the visit, Safeway management began drafting a Corrective
12 Action Notice to deliver to Plaintiff. ECF Nos. 25 at 4; 25-2. According to the
13 Corrective Action Notice, the meat rack was “way below gold standards” on May
14 6, 2015 when “our president, Dan Valenzuela paid us a visit,” including violations
15 of “proper handling of meat products, quality of wrapping, [and] proper trimming”
16 resulting in “lost revenues, high shrink, [and] loss of customer confidence.” ECF
17 No. 25-2 at 2.

18 According to another Corrective Action Notice, a May 11, 2015 audit
19 “found several critical violations”, including “no dates on product in the meat
20 cooler”; no country of origin (COOL) information on case products in the meat
cooler; “[p]re-trim violations; “[n]o stickers on several Hamburger meat

1 packages”; [b]oxes on the floor in the Meat cooler”; and the “[w]hole Department
2 not on schematics.” ECF No. 25-4 at 2. These failures violated Safeway policies,
3 ECF Nos. 25 at ¶¶ 15-16; 25-4 at 2, and Defendant explains that failure to abide by
4 COOL practices could result in negative surveillance audits with the U.S.
5 Agriculture Department. ECF No. 25 at ¶ 16. According to the Notice, the impact
6 of the violations included “lost revenues, high shrink, loss of customer confidence,
7 potential COOL fines, [and] health department fines.” ECF No. 25-4 at 2.

8 **B. Leave**

9 “*A few days after*” Gibassier suspended Plaintiff, Plaintiff applied for
10 medical leave of absence so he could attend an alcohol detoxification and
11 treatment program. ECF No. 23-1 at 41. Plaintiff requested a leave of absence
12 beginning May 11, 2015 and ending on July 2, 2015. ECF Nos. 27-1 at 118; 23-1
13 at 85. Safeway provisionally granted Plaintiff’s request on May 18, 2015, ECF
14 No. 23-1 at 87, and formally granted Plaintiff’s request for medical leave on June
15 19, 2015, ECF No. 23-1 at 89.

16 Plaintiff planned on going to an alcohol rehabilitation program immediately,
17 but was not able to get in until July 2, 2015; Plaintiff completed the alcohol
18 rehabilitation program by the end of July, 2015, but his doctor did not release him
19 to go back to work until November 4. ECF No. 27-1 at 118. Pursuant to the
20

1 doctor's orders, Plaintiff requested an extended leave of absence by a couple of
2 months. ECF Nos. 23-1 at 44; 25-8. Notably:

- 3 • Plaintiff's doctor wrote a letter to Plaintiff dated July 6, 2015
4 "confirm[ing] that [Plaintiff's] disability is being extended for at least
5 the next two months as [Plaintiff is] just now being admitted for
6 inpatient treatment of alcoholism." ECF No. 25-8.
- 7 • In a letter from Defendant to Plaintiff dated July 14, Defendant
8 informed Plaintiff that his FMLA leave ended August 4, 2015 and that
9 Defendant approved of Plaintiff's leave of absence until September 3,
10 2015. ECF No. 25-9 at 2.
- 11 • Plaintiff's doctor wrote a letter to Plaintiff dated September 18, 2015
12 in which he states: "[d]ue to worsening medical condition [you] are
13 advised not to return to work for 2 weeks, until next follow up." ECF
14 No. 25-10 at 2.
- 15 • Plaintiff's doctor wrote a letter to Plaintiff dated October 28, 2015 in
16 which he states: "[t]his is to confirm that you are able to return to
17 work full-time without restriction on 11/04/2015." ECF No. 25-10 at
18 3.

- 1 • In a letter from Defendant to Plaintiff dated November 5, 2015,
2 Defendant informed Plaintiff that he was approved for leave until
3 November 4, 2015. ECF No. 25-11 at 2.

4 **C. Planned return to work**

5 Plaintiff contends he was terminated on July 29, 2015, because he “had
6 contacted Peggy to come back to work and [he] wasn’t being put back to work.”
7 ECF No. 27-1 at 119. “Peggy” is a union representative, not a Safeway employee.
8 ECF No. 27-1 at 119. Plaintiff admits he was not medically cleared to go back to
9 work until November and testified that, although the doctor did not release him,
10 “[h]e would have released me at any day.” ECF No. 27-1 at 119. At the hearing,
11 Plaintiff’s counsel explained that when Plaintiff learned he may not get his position
12 as meat department manager in July, Plaintiff worked with his doctor to extend his
13 medical leave. In other words, Plaintiff claims he could get his doctor to release
14 him for work any day, despite that his doctor wrote on July 6, 2015 that Plaintiff’s
15 disability is being extended at least 2 more months. ECF No. 25-8. At the hearing,
16 the Court asked Plaintiff’s counsel to identify the facts supporting his contention
17 that Plaintiff attempted to return to work in July and that Safeway would not let
18 him. Counsel for Plaintiff cited to Plaintiff’s own testimony where Plaintiff
19 mentioned he talked with Peggy Vines, a union representative, not a Safeway
20 employee or agent. *See* ECF No. 27-1 at 103 (discussed return to work with Peggy

1 Vines), 112 (discussion with Peggy Vines), 119 (discussing contact with Peggy
2 Vines), and 120 (bald statement that Safeway did not put Plaintiff back to work).

3 Plaintiff later worked with his union and Safeway for a planned return to
4 work in November, 2015. However, Defendant did not then have an open meat
5 department manager position and the Collective Bargaining Agreement between
6 Safeway and its union employees (including Defendant) would not allow Plaintiff
7 to “bump” another meat department manager out of position; rather, the union and
8 Safeway reached an agreement that Plaintiff would return as a meat cutter. ECF
9 Nos. 25 at 7, ¶ 22; 25-12.

10 According to Mr. Mullings, he was informed that Plaintiff would be
11 transferring to his store. Mr. Mullings testified he was “excited about the prospect
12 of [Plaintiff] working in my department because [Plaintiff] was experienced and
13 [Mr. Mullings] was planning on taking vacation time.” ECF No. 24 at 3, ¶ 11. Mr.
14 Mullings recalled the following:

15 [Plaintiff] was scheduled for three shifts in mid-November. I recall
16 [Plaintiff] informing me via text or phone call at some point that he came to
17 the store personally to view his shift schedule; I did not see or speak to him
18 if he did. On the day before his first scheduled shift, [Plaintiff] called me
19 and asked for that day off. I asked Berman [the store manager], who refused
20 the request, and relayed the denial to [Plaintiff]. [Plaintiff] did not show up
for his first scheduled shift. I called to ask where he was, and [Plaintiff] told
me [he] probably wouldn’t be coming in at all and that his lawyer said this
was in his best interest. [Plaintiff] did not show for his second and third
shift. None of these absences were excused. A few days after [Plaintiff]
missed his third and final scheduled shift, he called me and informed me he

1 would not be coming back at all, and that his lawyer advised him that would
2 be in his best interests.

3 ECF No. 24 at 3, ¶¶ 12-14. According to Plaintiff, Mr. Mullings told Plaintiff that
4 he “would be highly scrutinized” and that Mr. Mullings would “write [Plaintiff] up
5 for corrective actions at every point in time he could.” ECF No. 27-1 at 116. Mr.
6 Mullings denies this occurred. ECF No. 24 at 3-4, ¶ 15.

7 Defendant deemed Plaintiff’s three consecutive no-shows to be a voluntary
8 resignation pursuant to Safeway policy and administratively terminated his
9 employment on November 25, 2015. ECF No. 22 at 4-5, ¶ 6.

10 Plaintiff filed suit in the Douglas County Superior Court on September 19,
11 2016 and Defendant removed the matter to this Court based on diversity
12 jurisdiction, 28 U.S.C. § 1332(a). ECF No. 1.

13 DISCUSSION

14 Defendant argues that Plaintiff’s claims fail as a matter of law. ECF No. 21
15 at 6-7. For the reasons discussed below, the Court agrees.

16 A. **Washington Law Against Discrimination (WLAD)**

17 Plaintiff alleges that his disability was a substantial factor in his termination
18 and that Defendant failed to accommodate Plaintiff’s disability. Plaintiff argues
19 Defendant is therefore liable for discrimination under the Washington Law Against
20 Discrimination (WLAD).

1 1. *Discrimination*

2 The WLAD “makes it an unfair practice for any employer ... [t]o discharge
3 or bar any person from employment because of . . . the presence of any sensory,
4 mental, or physical disability.” *Brownfield v. City of Yakima*, 178 Wash. App. 850,
5 873 (2014) (quoting Wash. Rev. Code § 49.60.180). “An employee claiming
6 discrimination must first prove a prima facie case of discrimination and, if he or
7 she does so, then the burden shifts to the employer to present evidence suggesting a
8 nondiscriminatory reason for [the termination].” *Id.* (quoting *Swinford v. Russ*
9 *Dunmire Oldsmobile, Inc.*, 82 Wash.App. 401, 413-14 (1996)). “If the plaintiff
10 establishes a prima facie case, the burden of production—but not persuasion—then
11 shifts to the employer to articulate some legitimate, nondiscriminatory reason for
12 the challenged action.” *Villiarimo*, 281 F.3d at 1062 (citing *McDonnell Douglas v.*
13 *Green*, 411 U.S. 792, 802 (1973)). “If the employer does so, the plaintiff must
14 show that the articulated reason is pretextual ‘either directly by persuading the
15 court that a discriminatory reason more likely motivated the employer or indirectly
16 by showing that the employer’s proffered explanation is unworthy of
17 credence.’” *Id.* (quoting *Chuang v. University of California Davis*, 225 F.3d 1115,
18 1123 (9th Cir. 2000) (quoting *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S.
19 248, 256 (1981))).

1 To avoid summary judgment, a plaintiff “must do more than establish a
2 prima facie case and deny the credibility of the [defendant’s] witnesses.” *Bradley*
3 *v. Harcourt, Brace & Co.*, 104 F.3d 267, 270 (9th Cir. 1996). “A plaintiff cannot
4 create a pretext issue without some evidence that the articulated reason for the
5 employment decision is unworthy of belief.” *Brownfield*, 178 Wash. App. at 874
6 (quoting *Kuyper v. Dep’t of Wildlife*, 79 Wash.App. 732 (1995)). Rather, the
7 plaintiff must produce “specific, substantial evidence of pretext.” *Id.* (citation
8 omitted). “To do this, a plaintiff must show, for example, that the reason has no
9 basis in fact, it was not really a motivating factor for the decision, it lacks a
10 temporal connection to the decision or was not a motivating factor in employment
11 decisions for other employees in the same circumstances.” *Id.* (quoting *Kuyper*, 79
12 Wash.App at 738-39). “Although a plaintiff may rely on circumstantial evidence
13 to show pretext, such evidence must be both specific and substantial.” *Villiarimo*,
14 281 F.3d at 1062 (citing *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th
15 Cir.1998)).

16 First, Plaintiff has not presented a prima facia case of discrimination. “The
17 elements of a prima facie case of disparate treatment disability discrimination are
18 that the employee was: [1] disabled, [2] subject to an adverse employment action,
19 [3] doing satisfactory work, and [4] discharged under circumstances that raise a
20 reasonable inference of unlawful discrimination.” *Brownfield*, 178 Wash. App. at

1 873. (quoting *Callahan v. Walla Walla Hous. Auth.*, 126 Wash.App. 812, 819–20
2 (2005)). Plaintiff has failed to demonstrate he was doing satisfactory work.
3 Indeed, the evidence in the record clearly demonstrates Plaintiff was not fulfilling
4 the standards required by Safeway, to say the least, before taking leave, and then
5 he failed to even show up for work upon return from leave.

6 Second, Defendant has presented ample evidence demonstrating its decision
7 to offer Plaintiff a different position and, later, to terminate Plaintiff was based on
8 valid work-place concerns, and Plaintiff has failed to show the reason is pretextual.
9 It is undisputed that Defendant put Plaintiff in the position as a meat cutter because
10 the meat department manager position was no longer open and Safeway could not
11 “bump” the meat department manager to give Plaintiff the position. Further, it is
12 undisputed that Defendant terminated Plaintiff pursuant to store policy (three no-
13 shows is a voluntary quit) after Plaintiff chose to not show up for three shifts in a
14 row, telling his meat department manager he was not coming back upon advice of
15 counsel.

16 Plaintiff has presented no evidence that would persuade the court a
17 discriminatory reason more likely motivated the employer. Plaintiff has also failed
18 to provide any evidence that the employer’s proffered explanation is unworthy of
19 credence. Notably, Plaintiff claims he was “unjustly terminated for putting
20 [himself] into rehab[,]” ECF No. 27-1 at 117, but he admitted that he had no facts

1 to support the contention, ECF No. 27-1 at 119-20. Although the complained of
2 actions took place after Plaintiff took leave to attend alcohol rehabilitation, (1) the
3 position Plaintiff wanted was not open because Plaintiff left for six months and
4 Safeway had to fill the vacant position and (2) Plaintiff was terminated after not
5 returning to work, which happened after he took leave, so the proximity of time is
6 incidental and fully explained. Further, although Plaintiff asserts he would be
7 subjected to scrutiny and would be written up if he made a mistake, this is a
8 reasonable condition of employment given Plaintiff's past poor performance and
9 Defendant's legitimate interest in maintaining its policies, especially health and
10 safety issues in the meat department. Moreover, increased scrutiny is not an
11 adverse action. *See Kortan v. California Youth Auth.*, 217 F.3d 1104, 1112-13 (9th
12 Cir. 2000) (finding there was no adverse action taken despite the plaintiff's claim
13 of "increased criticism" at the workplace).

14 While Plaintiff asserts he tried to return to his position in late July and
15 Defendant did not let him, *see* ECF Nos. 1-1 at 4, ¶ 2.4; 27-1 at 119, it is
16 undisputed that Plaintiff was not cleared to return back to work by his doctor until
17 November. Indeed, as noted above, Plaintiff's doctor wrote a letter to Plaintiff
18 dated July 6, 2015 "confirm[ing] that [Plaintiff's] disability is being extended for at
19 least the next two months as [Plaintiff is] just now being admitted for inpatient
20 treatment of alcoholism." ECF No. 25-8. In a letter from Defendant to Plaintiff

1 dated July 14, Defendant informed Plaintiff that his FMLA leave ended August 4,
2 2015 and that Defendant approved of Plaintiff's leave of absence until September
3 3, 2015. ECF No. 25-9 at 2. These letters directly contradict Plaintiff's claim that
4 he was able and willing to return to work at the end of July, yet Defendant did not
5 let him. Moreover, the Court does not ignore the fact that Plaintiff claims he could
6 have convinced his doctor to release him for work any day, but neither the Plaintiff
7 nor his doctor did so. ECF No. 27-1 at 119. In any event, Plaintiff has not
8 presented any evidence Safeway would not let him return to work in July; the only
9 thing Plaintiff points to is his own deposition where he mentions he spoke with a
10 union representative, not Safeway. This settles the issue as to whether Plaintiff
11 attempted to return to work in July.

12 Plaintiff otherwise argues that Defendant treated other similarly situated
13 employees differently than Plaintiff, but Plaintiff does not point to anyone that
14 deliberately declined to show up for work three times without being terminated.
15 Nor does Plaintiff point to any employee with such drastic failures to abide by
16 company policies.

17 2. *Failure to Accommodate*

18 "[E]mployers have an affirmative obligation to reasonably accommodate the
19 sensory, mental, or physical limitations of [] employees unless the employer can
20 demonstrate that the accommodation would impose an undue hardship on the

1 conduct of the employer’s business.” *Doe v. Boeing Co.*, 121 Wash. 2d 8, 18
2 (1993) (citing WAC 162–22–080). “[T]he scope of an employer’s duty to
3 accommodate an employee’s condition is limited to those steps reasonably
4 necessary to enable the employee to perform his or her job.” *Id.* (citation omitted).

5 Plaintiff does not identify any request Defendant actually denied. Rather, it
6 is undisputed that Defendant fulfilled every request to accommodate Plaintiff’s
7 alleged disability. Defendant granted every leave request and allowed Plaintiff to
8 return to work after taking a six-month leave of absence. While Plaintiff wanted
9 his position as meat department manager, this request was not a request to
10 accommodate his disability, as there is nothing that precluded Plaintiff from
11 working as a meat cutter. Defendant necessarily filled the meat department
12 manager position while Plaintiff was on extended leave, leave that exceeded the
13 12-week FMLA grace period, and was prohibited from “bumping” the manager
14 pursuant to the union contract.

15 **3. Conclusion**

16 Defendant has not presented any evidence that Defendant discriminated
17 against Plaintiff because of his disability or otherwise failed to accommodate his
18 disability. Defendant is entitled to summary judgment on this issue.

19 //

20 //

1 **B. Washington Family Leave Act (WFLA)**

2 Plaintiff claims Defendant is liable under the Washington Family Leave Act
3 because Defendant did not return Plaintiff to his original position upon returning to
4 work and Defendant retaliated against Plaintiff for taking leave.

5 “The WFLA is patterned on and construed in accordance with the FMLA.”
6 *Shelton v. Boeing Co.*, 702 F. App’x 567, 568 (9th Cir. 2017). “The FMLA . . .
7 simply guarantees that an employee’s taking leave will not result in a loss of job
8 security or in other adverse employment actions.” *Xin Liu v. Amway Corp.*, 347
9 F.3d 1125, 1132 (9th Cir. 2003). As such, the FMLA generally requires an
10 employer to return an employee to the same position after taking sick leave and
11 prohibits employers from considering “the taking of FMLA leave as a negative
12 factor in employment actions.” *Id.*; 29 U.S.C. § 2614(a); 29 C.F.R. § 825.220(c);
13 *see Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1125 (9th Cir. 2001).

14 **1. Right to position held before taking leave**

15 Under the FMLA, although employees (generally) have a right to be
16 returned to their position upon returning to work, this is only available if the
17 employee returns to work within the allotted 12 weeks for medical leave, and it is
18 undisputed Plaintiff did not return to work until well-beyond the running of the 12
19 weeks. *Hibbs v. Dep’t of Human Resources*, 152 Fed. App’x 648, 649 (9th Cir.
20 2005) (“The protections of the FMLA—entitling an employee to return to his job

1 as if he had never left, ...do not survive the expiration of the twelve-week FMLA
2 period.”). Plaintiff claims he attempted to return before the 12 week period ended
3 in late July, but at this time he was in the midst of a 2-month extension of leave
4 pursuant to his doctor’s order (dated 7/6/2015), following his own request for leave
5 (approved 6/17/2015), as discussed above.

6 2. **“Interference” with FMLA rights**

7 “[A]n employee may prevail on a claim that an employer interfered with her
8 rights by terminating her in violation of FMLA by showing, ‘by a preponderance
9 of the evidence that her taking of FMLA-protected leave constituted a negative
10 factor in the decision to terminate her.’” *Xin Liu*, 347 F.3d at 1135-36 (quoting
11 *Bachelder*, 259 F.3d at 1125). The Ninth Circuit has expressly held that the
12 *McDonnell Douglas* burden shifting approach (applied to disability discrimination
13 claims) does not apply to FMLA interference claims.

14 A plaintiff “can prove this claim, as one might any ordinary statutory claim,
15 by using either direct or circumstantial evidence, or both.” *Xin Liu*, 347 F.3d at
16 1136 (quoting *Bachelder*, 259 F.3d at 1125). For example, in *Bachelder*, the
17 employer’s stated reason for termination – her absences – was direct evidence the
18 absences (assuming they were absences covered by the FMLA) were a “negative
19 factor” in the decision to terminate the employee. In *Xin Liu*, on the other hand,
20 the Ninth Circuit found there was sufficient indirect evidence to support the

1 plaintiff's claim that her employer considered her leave as a "negative factor" in
2 her termination. *Id.* at 1137; *see also Allison v. Hous. Auth. of City of Seattle*, 118
3 Wash. 2d 79, 97-98 (1991).

4 In *Xin Liu*, the plaintiff worked for Amway as a scientist researching and
5 developing plant concentrates. 347 F.3d at 1130. Liu went on maternity leave,
6 and her supervisor had to work on nights and weekends to "pick up the slack". *Id.*
7 A few weeks before her planned return to work, her supervisor called her to
8 confirm her return date; Liu asked for an extension and her supervisor denied her
9 request immediately. *Id.* A week later, the supervisor again demanded that Liu
10 provide a firm return date. *Id.* Liu asked for an extension again and her supervisor
11 ultimately agreed to a shorter extension than she requested. *Id.* Liu again
12 requested an extension of leave to help her terminally ill father in China. Her
13 supervisor refused repeatedly, but eventually gave Liu a one-week extension after
14 Liu contacted the Human Resources Department. *Id.* at 1130-31. Shortly before
15 Liu had planned to leave for China, her supervisor requested she visit the company
16 for her annual performance evaluation. *Id.* at 1131. At the meeting, her supervisor
17 told her he was assigning her primary project to another employee and that the
18 company was downsizing. *Id.* The supervisor gave her a score 19% lower than
19 her previous evaluation she had received six months earlier. *Id.*

20 Liu's score placed her at the bottom of her department. [Her supervisor]
gave her the lowest possible score, a "one," in several categories including

1 written communication, a category in which she had excelled in her previous
2 evaluation. He also gave her a “one” in several “soft skills” such as
3 “encourages self-development” and “holds people accountable for meeting
4 goals.” During the entire year of 1998, [the supervisor] did not give a “one”
5 to a single employee other than Liu. Liu’s prior evaluation under her former
6 supervisor, David Groh, was very positive. He gave her very high scores, a
7 3.1 overall, and remarked that she was an excellent scientist with very good
8 written communication skills. Scores in her department ranged from 2.8 to
9 3.1, making Liu’s score one of the two highest in a department of four.
10 Groh testified that he could not recall ever criticizing her work either to her
11 directly or to any other supervisor.

12 *Id.* at 1131 (footnote omitted).

13 The Ninth Circuit reviewed the evidence in detail, finding there was
14 sufficient evidence for a jury to find Liu taking leave was a factor in her
15 termination:
16

17 Liu’s evidence that [her supervisor’s] subjective evaluation served as the
18 central, if not sole, factor in her termination is significant. Where
19 termination decisions rely on subjective evaluations, careful analysis of
20 possible impermissible motivations is warranted because such evaluations
are particularly “susceptible of abuse and more likely to mask
pretext.” *Weldon v. Kraft, Inc.*, 896 F.2d 793, 798 (3d Cir. 1990) (internal
citation omitted); *see also Lujan v. Walters*, 813 F.2d 1051, 1057 (10th Cir.
1987) (noting that “subjective criteria as ‘dedicated’ and ‘enthusiasm’ may
offer a convenient pretext for giving force and effect to prejudice, and can
create a strong inference of employment discrimination”). Here, Liu’s
lowest scores were, as [the supervisor] explained, in “soft skills” that
“cannot be taught,” such as “being upbeat.” A jury could find these
categories vague enough to be suspect given the surrounding events.

The 19% drop in overall score from her former employee evaluation may
also create an inference of impermissible motivation. *See Winarto v.*
Toshiba Am. Elecs. Components, Inc., 274 F.3d 1276, 1286 (9th Cir. 2001)
(holding that “[a]n unwarranted reduction in performance review scores can
constitute evidence of pretext in retaliation cases” under Title VII), *cert.*
dismissed, 537 U.S. 1098 (2003); *cf. Hodgens*, 144 F.3d 151, 170-171 (1st

1 Cir. 1998) (holding that prior bad performance over two year span in
2 evaluations weakened support for allegation that the employee’s termination
was in violation of FMLA).

3 This evidence, combined with [the supervisor’s] behavior toward Liu
4 regarding her leave suggests that the evaluation may have been tainted with
his attitude towards her leave. His repeated denials of her leave and
5 comments about his increased work-load support this contention. Finally,
the proximity in time between the leave and her termination also provides
6 supporting evidence of a connection between the two events. *Hodgens*, 144
F.3d at 168 (holding that the “close temporal proximity between two events
7 may give rise to an inference of causal connection.”).

8 *Id.* at 1136-37 (footnote omitted; citations altered).

9 Here, as discussed above, Plaintiff has not presented any evidence that
10 Defendant considered Plaintiff’s taking of leave a “negative factor” in assigning
11 Plaintiff to the meat cutter position and then terminating him after he failed to
12 show up for work. Unlike in *Xin Liu*, there is nothing in the record showing
13 Defendant or any of its agents complained about Plaintiff taking leave. While
14 Plaintiff was written up for poor performance, this occurred *before Plaintiff*
15 *requested leave* and the evidence supports the legitimacy of the evaluation(s).
16 Further, unlike in *Xin Liu*, the evaluations were not based on subjective categories,
17 but rather reflected the objective factual findings of his performance. Finally,
18 although Plaintiff was assigned a different position and terminated *after* taking
19 leave, it is undisputed that Defendant could not return Plaintiff to his original
20 position because that position had been filled (and they could not “bump” the

1 person holding the position pursuant to an agreement with the union) and
2 Defendant was terminated after he failed to show up for work. Plaintiff asserts he
3 was told that he would be highly scrutinized and written up, but this scrutiny and
4 attention to policies is clearly reasonable in light of Plaintiff's past performance.
5 Moreover, mere threats of increased criticism do not constitute an adverse
6 employment action. *See Kortan*, 217 F.3d at 1112-13 (finding there was no
7 adverse action taken despite the plaintiff's claim of "increased criticism" at the
8 workplace).

9 This is not a case where there is at least "thin" evidence of an improper
10 motive. *See Allison v. Hous. Auth. of City of Seattle*, 118 Wash. 2d at 97-98 ("thin,
11 but sufficient testimony" where employer made remarks about "little old ladies",
12 became hostile towards the plaintiff after learning her true age, and gave the
13 plaintiff an allegedly unwarranted reprimand, among other things). Rather, this
14 case is more like *Shelton v. Boeing*, 702 F. App'x at 568, where there is simply no
15 evidence to support Plaintiff's claim of improper motive. In *Shelton v. Boeing*, the
16 Ninth Circuit affirmed the district court's grant of summary judgment to the
17 defendant, explaining no reasonable jury could find for the plaintiff where:

18 [the defendant] submitted evidence showing that it administered the [adverse
19 actions] because he refused to comply with his manager's instructions to
20 contact her directly before taking any absence, not because he exercised his
right to FMLA leave" and the plaintiff "provided no additional evidence that
could possibly establish that the nature of his FMLA leave was a negative
factor, or even a factor at all, in Boeing's decision to discipline him.

1 *Shelton v. Boeing Co.*, 702 F. App'x at 568. As in *Shelton*, the Defendant here has
2 presented ample evidence supporting the legitimacy of its actions and Plaintiff has
3 not presented any evidence to the contrary, as discussed above.

4 **C. Termination in violation of public policy**

5 A claim for wrongful discharge is a “narrow exception” to Washington’s
6 general rule of employment at will. *Martin v. Gonzaga University*, ___ Wash.2d
7 ___, 2018 WL 4355364, *4 (Sept. 13, 2018). “[T]o prevail on a cause of action, a
8 plaintiff employee must demonstrate that his or her “discharge may have been
9 motivated by reasons that contravene a clear mandate of public policy[,]” then,
10 “the burden shifts to the employer to prove that the dismissal was for reasons other
11 than those alleged by the employee.” *Id.* (citing *Thompson v. St. Regis Paper Co.*,
12 102 Wash.2d 219, 232-33 (1984)). The tort for wrongful discharge in violation of
13 public policy has generally been limited to four scenarios: “(1) where employees
14 are fired for refusing to commit an illegal act; (2) where employees are fired for
15 performing a public duty or obligation, such as serving jury duty; (3) where
16 employees are fired for exercising a legal right or privilege, such as filing workers’
17 compensation claims; and (4) where employees are fired in retaliation for reporting
18 employer misconduct, i.e., whistle-blowing.” *Id.* (citing *Gardner v. Loomis*
19 *Armored, Inc.*, 128 Wash.2d 931, 936, 913 P.2d 377 (1996)). Only when a claim
20 does not fall within one of these four categories may the more refined Perritt

1 analysis be applied. *See Martin*, 2018 WL 4355364, *4 (citing, inter alia, *Rose v.*
2 *Anderson Hay & Grain Co.*, 184 Wash.2d 268, 277-78, 287 (2015) (“We note that
3 in other instances, when the facts do not fit neatly into one of the four above-
4 described categories, a more refined analysis may be necessary. In those
5 circumstances, the courts should look to the four-part Perritt framework for
6 guidance. But that guidance is unnecessary here.”). The Perritt test has four
7 factors: “(1) The plaintiffs must prove the existence of a clear public policy (the
8 clarity element). (2) The plaintiffs must prove that discouraging the conduct in
9 which they engaged would jeopardize the public policy (the jeopardy element). (3)
10 The plaintiffs must prove that the public-policy-linked conduct caused the
11 dismissal (the causation element). (4) The defendant must not be able to offer an
12 overriding justification for the dismissal (the absence of justification element).”
13 *Martin*, 2018 WL 4355364, *4 (citing *Gardner*, 128 Wash.2d at 936 and HENRY
14 H. PERRITT JR., *WORKPLACE TORTS: RIGHTS AND LIABILITIES* (1991)).

15 Plaintiff argues the “WLAD expresses a clear policy against discharge from
16 employment because of discrimination.” ECF No. 28 at 16. However, as
17 discussed above, Plaintiff has not presented any evidence supporting his claim of
18 discrimination/retaliation/interference, however phrased. As such, even if the
19 Court were to adopt Plaintiff’s theory of liability, Plaintiff has not demonstrated an
20

1 adverse action was taken with an improper motive and Defendant has clearly
2 shown there was an “overriding justification for the dismissal” in any event.

3 **ACCORDINGLY, IT IS HEREBY ORDERED:**

4 Defendant Safeway Inc.’s Motion for Summary Judgment (ECF No. 21) is
5 **GRANTED.**

6 The District Court Clerk is directed to **enter** this Order and Judgment
7 accordingly, provide copies to counsel, and **close** the file.

8 **DATED** September 25, 2018.



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