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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 CINDY IMESON,

11 Plaintiff,

12 v.

13 EAGLE VIEW TECHNOLOGIES, INC.,

14 Defendant.

CASE NO. C13-468 MJP

ORDER DENYING IN PART AND
GRANTING IN PART MOTION FOR
SUMMARY JUDGMENT

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16 This matter is before the Court on Defendant's motion for summary judgment. (Dkt. No.
17 19.) The Court considered the motion, Plaintiff's response (Dkt. No. 23), Defendant's reply (Dkt.
18 No. 36), and all relevant documents. Embedded in Defendant's reply is an evidentiary objection
19 and motion to strike. (Dkt. No. 36 at 12.) The Court GRANTS Defendant's motion to strike and
20 Defendant's motion for summary judgment as to Plaintiff's claim for Intentional Infliction of
21 Emotional Distress. The Court DENIES the motion for summary judgment as to all other claims.

22 **Background**

23 Plaintiff Cindy Imeson began her employment with Defendant Eagle View Technologies,
24 Inc. ("Eagle View") on September 22, 2010. (Dkt. No. 1 at 3.) Imeson began with Eagle View as

1 an Inside Sales Account Manager in the corporate office. In December of 2011, Imeson was
2 promoted to Inside Sales Senior Account Manager with an increase in her base salary. (Id.)
3 Around the same time, Patrik Parsons became an Inside Sales Manager, serving in a supervisory
4 role to Imeson. (Id. at 4.)

5 On April 14, 2012, Imeson was rushed to the emergency room because of medical
6 problems that turned into a severe infection. (Dkt. No. 1 at 4.) On April 16, Imeson informed
7 Heidi Ellsworth, Vice President of Sales and Marketing at Eagle View, of her medical problems.
8 (Id.) Ellsworth expressed concern and asked Imeson to keep her informed. (Id.) Imeson also
9 notified Parsons. (Id.) Later in April, Plaintiff was informed by Human Resources Director Dana
10 Donaly that she had used all her paid time off and would need to take Family Medical Leave
11 (“FMLA”). (Id.)

12 Plaintiff returned to work part-time beginning May 9, 2012. (Dkt. No. 1 at 5.) The
13 following week she increased her time and eventually returned to a full time schedule. (Id.)
14 While Plaintiff was on FMLA leave her largest account, Solar City, was taken from her. (Dkt.
15 No. 1 at 5.) Defendant contends the decision to remove the Solar City account was made before
16 Imeson took FMLA leave due to Imeson’s previously expressed stress levels, but does not
17 dispute this planned removal was not discussed with Imeson prior to her FMLA leave. (Dkt. No.
18 19 at 10.) After a meeting set up by Ellsworth with Imeson and Parsons to discuss Imeson’s
19 concerns regarding the removal of the Solar City account, the account was returned to Imeson.
20 (Dkt. No. 1 at 5.) During the meeting, Imeson states she was made to discuss her medical
21 problems in front of Parsons. (Id.)

22 Ellsworth testified Imeson’s sales numbers began “downtrending” in the fall of 2011,
23 before she took FMLA leave. (Dkt. No. 22 at 91.) Ellsworth stated she spoke to Imeson about the
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1 | downtrending, but did not recall documenting any conversations. (Id. at 92.) Ellsworth also
2 | stated Imeson's accounts were not lower or further behind than the accounts of other employees.
3 | (Id. at 93.) Parsons also testified he had a conversation with Imeson about downtrending
4 | accounts, but likewise did not document a meeting. (Id. at 136.) Parsons also stated there were
5 | ongoing concerns related to Imeson undermining him as a manager, but due to the "close-knit"
6 | nature of the group, all communication was verbal. (Id. at 138.) Parsons does point to an E-Mail
7 | from Ellsworth intended to document a July 26, 2012 verbal meeting with Imeson in which a
8 | verbal warning was given. (Id. at 168.)

9 | Imeson asserts her performance level was high before and following her leave, and states
10 | she was specifically praised for outstanding performance during a performance as late as August
11 | 2012. (Dkt. No. 1 at 6.) For example, Imeson notes she was asked to travel to San Francisco to
12 | the headquarters of Solar City in April of 2012 to meet with representatives to discuss increasing
13 | the scope of the partnership between the two companies, as a result of her performance. (Id.) In
14 | both March and April of 2012 Imeson was formally recognized for outstanding sales numbers
15 | and exceeding sales goals. (Id.)

16 | From September 3-7 of 2012, Imeson took vacation which was approved in advance by
17 | Parsons. (Dkt. No. 33 at 6.) On September 24 and 25 of 2012, Imeson was ill and unable to go
18 | into work. (Id.) On September 24, 2012, Parsons sent an email to Donaly and Ellsworth asking to
19 | speak to them about putting Imeson on probation for attendance. (Dkt. No. 35-4 at 2.) Donaly E-
20 | Mailed Parsons on September 25, 2012, putting together an overview of Imeson's absences for
21 | the year. (Dkt. No. 35-6 at 2.) The E-Mail stated, "If the average person takes 3 weeks off per
22 | year, she is currently at 5.60 weeks. Even though her FMLA was approved, her absences are still
23 | 'excessive' when viewed with the average." (Id.) Donaly followed up with an E-Mail later that
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1 day, stating “One more thing: we can’t count her FMLA days for excessive absenteeism... only
2 the 7 days that she called out. When thinking about her non-FMLA sick days, is 7 days
3 considered excessive when compared to others on your team? It seems excessive when looked at
4 across the company but I want to make sure it is viewed that way per your specific team.” (Id.)

5 Imeson alleges during the months following her FMLA leave Parsons “gave her a hard
6 time” about taking leave. (Dkt. No. 1 at 6.) On September 26, 2012, Imeson brought in a doctor’s
7 note for two days missed for illness earlier that month. (Id.) Imeson alleges Donaly told her a
8 doctor’s note was unnecessary, but Imeson told Donaly she brought the note because Parsons
9 continued to comment on her absences, including stating in front of other team members that
10 Imeson was “the sickest person [he] has ever known.” (Id.) The same day, Imeson says Parsons
11 told her the two of them and Donaly were going to have a one-on-one meeting before the end of
12 the week. (Dkt. No. 33 at 7.)

13 On September 28, 2012, Imeson spoke to Donaly about her concerns related to Parsons.
14 (Dkt. No. 33 at 8.) She complained Parsons treated her negatively following her leave, and
15 expressed concerns about Parsons referring to female employees as cunts and yelling at them.
16 (Id.) Later that day, Imeson was informed she would not be meeting with Parsons at the
17 previously scheduled time because he took the day off. (Id.) Imeson E-Mailed Parsons
18 expressing her frustration about the meeting cancellation. (Id. at 9.)

19 On October 1, 2012, Parsons approached Imeson and asked if she had a few minutes,
20 taking her to meet in Donaly’s office. (Dkt. No. 33 at 9.) Imeson was given a Performance
21 Improvement Plan (“PIP”). (Dkt. No. 30 at 7.) Imeson asserts she glanced at the document but
22 did not read it completely. (Id.) At the bottom of each page of the PIP, the words “Proprietary
23 and Confidential” appear. (Dkt. No. 20 at 12-14.) Imeson expressed to Parsons and Donaly she
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1 had a hard time respecting Parsons as a manager because he referred to women as cunts. (Dkt.
2 No. 30 at 7.) Parsons first denied the allegation but eventually admitted he did use that language.
3 (Id.) Imeson states at the meeting Parsons produced a calendar to show Imeson’s missed days,
4 which included days she alleges she did not miss. (Id.) According to Imeson, there was no policy
5 at Eagle View about missing days and there was no set number of paid time off (“PTO”) days.

6 Imeson alleges one-on-one meetings had never been confidential in the past, and after the
7 PIP meeting she showed a co-worker a note saying she believed Parsons was trying to get her
8 fired within four weeks. (Dkt. No. 30 at 8.) The same day, Imeson says another co-worker asked
9 her how the one-on-one meeting went, and Imeson stated Parsons denied his use of derogatory
10 language towards women until pressed, and that she believed Parsons would try to get her fired
11 within four weeks. (Id.) On October 3, 2012, Parsons E-Mailed Donaly informing her he was
12 approached by Imeson’s co-workers and was told Imeson said she was getting fired in four
13 weeks. (Dkt. No. 20 at 18.) Donaly responded stating they had told Imeson this was “a 100%
14 private matter.” (Id.) On October 5, 2012, Imeson was given a notice of immediate termination
15 citing “insubordination” and referencing her discussion of the PIP with her co-workers. (Id. at
16 20.)

17 Imeson now brings claims for interference with FMLA rights, discrimination for
18 requesting FMLA rights, retaliation under the Washington Law Against Discrimination
19 (“WLAD”), and Intentional Infliction of Emotional Distress (“IIED”). (Dkt. No. 1 at 7-8.)
20 Defendant moves for summary judgment on all claims. (Dkt. No. 19.)

1 **Discussion/Analysis**

2 I. Standard for Summary Judgment

3 Summary judgment is warranted if no material issue of fact exists for trial. Warren v. City of
4 Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 516 U.S. 1171 (1996). The underlying
5 facts are viewed in the light most favorable to the party opposing the motion. Matsushita Elec.
6 Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). “Summary judgment will not lie if .
7 . . the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”
8 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party moving for summary
9 judgment has the burden to show initially the absence of a genuine issue concerning any material
10 fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159 (1970). If the moving party makes this
11 showing, the burden shifts to the nonmoving party to establish the existence of an issue of fact
12 regarding an element essential to that party’s case, and on which that party will bear the burden
13 of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). “A plaintiff alleging
14 employment discrimination need produce very little evidence in order to overcome an employer’s
15 motion for summary judgment. This is because the ultimate question is one that can only be
16 resolved through a searching inquiry - one that is most appropriately conducted by a factfinder,
17 upon a full record.” Davis v. Team Elec. Co., 520 F.3d 1080, 1089 (9th Cir. 2000)(internal
18 citations omitted).

19 II. Family Medical Leave Act Claims

20 The Family Medical Leave Act, 29 U.S.C. §2615(a), created two interrelated, substantive
21 rights: (1) the employee has a right to use certain amounts of leave for protected reasons, and (2)
22 the employee has a right to return to his or her job or an equivalent after using protected leave.
23 Sanders v. City of Newport, 657 F.3d 772, 777 (9th Cir. 2011). The FMLA places an affirmative
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1 | burden on an employer to notify employees of their rights under the Act. Bushfield v. Donahoe,
2 | 912 F. Supp. 2d 944, 952 (D. Idaho 2012). Section 2615(a)(2) makes it unlawful for employers
3 | to retaliate or discriminate against a person for opposing any violation of their FMLA right to
4 | leave. Section 2615(a)(1) makes it unlawful for an employer to “interfere with, restrain or deny”
5 | the exercise or attempt to exercise FMLA leave.

6 | A. Retaliation Claim

7 | “Under §2615(a)(2), it is ‘unlawful for any employer to discharge or in any other manner
8 | discriminate against any individual for opposing any practice made unlawful by this subchapter.’”
9 | Sanders, 657 F.3d at 777. An allegation under this section is a retaliation or discrimination
10 | claim. Id. In Bachelder v. Am. W. Airlines, Inc., the Ninth Circuit expressly did not decide
11 | whether the burden shifting framework articulated in McDonnell Douglas v. Green, 411 U.S.
12 | 792 (1973), should be applied to retaliation claims under §2615(a)(2). 259 F.3d 1112, 1125, n.
13 | 11 (9th Cir. 2001). The Ninth Circuit acknowledges, however, most other circuits have adopted
14 | some version of the McDonnell Douglas burden shifting framework. Sanders, 657 F.3d at 777.
15 | District Courts in the Ninth Circuit have used the McDonnell Douglas framework in the analysis
16 | of §2615(a)(2) claims. See, Bushfield, 912 F. Supp. 2d at 953.

17 | Under the McDonnell Douglas framework, a plaintiff must establish a prima facie case of
18 | retaliation. Id. To establish a prima facie case of FMLA retaliation, a plaintiff must show (1) he
19 | availed himself of a protected activity under the FMLA, (2) he was adversely affected by an
20 | employment decision, and (3) there is a causal connection between the two actions. Washington
21 | v. Fort James Operating Co., 110 F. Supp. 2d 1325, 1331 (D. Or. 2000). If a prima facie case is
22 | established, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason
23 | for the adverse action. Sanders, 657 F.3d at 777, n.3. If the employer articulates a legitimate
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1 reason for its action, the burden shifts back to the plaintiff to show the reason given is pretext. Id.
2 Pretext can be proven indirectly, by showing the employer’s explanation is not credible because
3 it is internally inconsistent or otherwise not believable, or directly, by showing unlawful
4 discrimination more likely motivated the employer. Id.

5 Issues of material fact preclude summary judgment on this claim. Imeson successfully
6 makes a prima facie case of FMLA retaliation: she complained to management that her job
7 duties were altered because she took FMLA leave, and that she experienced harassment from
8 Parsons related to her FMLA leave. (Dkt. No. 33 at 20.) Imeson was later terminated from her
9 position, and claims the motive for her termination was retaliation for her complaints. (Id.)
10 Defendant articulates a legitimate reason for Imeson’s termination: her breach of the PIP
11 confidentiality. (Dkt. No. 19 at 25.) Because Defendant articulates a legitimate reason for the
12 adverse action, Plaintiff must directly or indirectly show the given reason is pretext. (Id.)

13 Imeson puts forth indirect evidence of pretext substantial enough to preclude summary
14 judgment. While breach of confidentiality of the PIP is cited as a primary reason for Imeson’s
15 termination, Parsons testified Imeson did not actually reveal anything told to her in confidence at
16 the PIP meeting. (Dkt. No. 35-1 at 27.) The conflicting accounts of Imeson’s performance at
17 work in 2012 also create a material issue of fact. For example, Imeson’s receipt of the “500k
18 club” award for exceeding sales goals in April 2012 (Dkt. No. 19 at 8) conflicts with the notion
19 Defendant was concerned about Imeson’s performance as early as the beginning of 2012. (Id. at
20 12.) The evidence before the Court requires determinations of credibility, which are not
21 appropriate at the summary judgment stage. For this reason, summary judgment is DENIED.

1 B. Interference Claim

2 An interference claim is based on §2615(a)(1) which states, “[i]t shall be unlawful for
3 any employer to interfere with, restrain, or deny the exercise or the attempt to exercise” the
4 substantive rights guaranteed by FMLA. 29 U.S.C. §2615(a)(1). When an employee alleges she
5 was fired for taking FMLA leave, the claim is properly analyzed under the interference prong of
6 the FMLA statute. Xin Liu v. Amway Corp., 347 F.3d 1125, 1132 (9th Cir. 2003). The Ninth
7 Circuit does not apply the burden shifting framework of McDonnell Douglas Corp. v. Green to
8 interference claims. Denison v. Kaiser Found. Health Plan of the Northwest, 868 F. Supp. 2d
9 1065, 1080 (D. Or. 2012). To make an interference claim based on termination, a plaintiff must
10 show “by a preponderance of the evidence that her taking of FMLA-protected leave constituted a
11 negative factor in the decision to terminate her. She can prove this claim . . . by using either
12 direct or circumstantial evidence.” Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1124 (9th
13 Cir. 2001).

14 There are material issues of fact precluding summary judgment in favor of Defendant on
15 this claim. The Parties do not dispute that Imeson’s FMLA was properly taken; the Parties do
16 dispute whether the FMLA leave was a negative factor in her termination or alteration of her
17 employment responsibilities. Defendant argues the record establishes Imeson’s FMLA leave was
18 not a factor in the PIP or notice of termination, and notes the FMLA leave was not mentioned in
19 either document. (Dkt. No. 19 at 21.) Defendant also argues the fact Imeson was terminated four
20 and a half months after returning from FMLA leave shows a lack of connection between the
21 leave and termination. (Id.) Defendant further contends the Solar City account was not removed
22 due to the FMLA leave because Defendant intended to remove the account before the leave was
23 taken. (Id.) Although Persons testified the Solar City account was going to be taken from Imeson
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1 before she went on FMLA, there is no documentation to show this was the case. There is an E-
2 Mail from Parsons to Donaly sent on Friday, April 13, 2012, the day before Imeson went to the
3 emergency room, stating due to Imeson's stress level he intended to remove leadership
4 responsibilities and new customers, but the E-Mail does not mention removal of existing
5 accounts. (Dkt. No. 21 at 9.).

6 The documentation related to ongoing discussions of Imeson's leave and Imeson's
7 concerns about Parsons' treatment of her absences in the time between her return from FMLA
8 leave and her termination create issues of fact regarding the motive for her termination and
9 produce sufficient temporal proximity between the leave and termination. Defendant cites Swan
10 v. Bank of America for the proposition that four months between FMLA leave and termination
11 makes the leave too remote to establish causation. (Dkt. No. 19 at 21.) In Swan, however, the
12 Ninth Circuit found such a gap problematic when temporal proximity was the only connection
13 offered between the leave and the termination. 360 Fed. Appx. 903, 906 (9th Cir. 2009). Here,
14 temporal proximity is not the sole connection; Imeson offers evidence that her FMLA leave was
15 discussed and was considered an issue when she returned, such as the E-Mails from Parsons
16 regarding her absences and Parsons' comments to her about her illness. (Dkt. Nos. 35-6 at 2, and
17 35 at 4.) Whether or not the disputed facts and circumstantial evidence amount to a successful
18 FMLA interference claim is best left to the finder of fact, and summary judgment is DENIED.

19 III. Retaliation under WLAD

20 The WLAD prohibits employers from taking adverse employment actions against an
21 employee based on protected conduct. Hines v. Todd Pac. Shipyards Corp., 127 Wn. App. 356,
22 374 (2005). "To establish a prima facie case of retaliation, plaintiff must demonstrate that (1) she
23 engaged in statutorily protected activity; (2) defendants took some adverse employment action
24 against her; and (3) there is a causal connection between the protected activity and the

1 discharge.” Macon v. UPS, U.S. Dist. LEXIS 159202, *16-17 (W.D. Wash. Nov. 5, 2012).
2 Under WLAD, it is “an unfair practice for any employer . . . to discharge . . . or otherwise
3 discriminate against any person because he or she has opposed any practices forbidden” by the
4 WLAD. RCW 49.60.210. The conduct complained of by the plaintiff need not actually be
5 unlawful, so long as she reasonably believed the opposed practices to be unlawful. Renz v.
6 Spokane Eye Clinic, P.S. 114 Wn. App. 611, 619 (2002). The McDonnell Douglas burden
7 shifting framework, discussed above, applies to claims under WLAD. Id. at 618-19.

8 Imeson’s WLAD claim survives for the same reason the FMLA retaliation claim
9 survives. Imeson alleges she complained to Defendant about Parsons’ treatment of women and
10 his comments related to her FMLA absences. (Dkt. No. 33 at 21.) Imeson was fired, which is the
11 “ultimate adverse employment action.” Renz, 114 Wn. App. at 621. The disputed facts and
12 credibility issues surrounding the causal connection between the protected behavior and the
13 termination which precluded summary judgment on the FMLA claims also preclude summary
14 judgment here, and summary judgment on this claim is DENIED.

15 IV. Intentional Infliction of Emotional Distress

16 An Intentional Infliction of Emotional Distress (“IIED”) claim in Washington requires
17 (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress,
18 and (3) the actual result to the plaintiff of severe emotional distress. Kloepfel v. Bokor, 149
19 Wn.2d 192, 195-96 (2003). The conduct must be “so outrageous in character, and so extreme in
20 degree, as to go beyond all possible bounds of decency, and tend to be regarded as atrocious, and
21 utterly intolerable in civilized society.” Id. at 196. Although the elements of IIED are generally
22 factual questions for the jury, “a trial court faced with a summary judgment motion must first
23 determine whether reasonable minds could differ on whether the conduct was sufficiently
24 extreme to result in liability.” Strong v. Terrell, 147 Wn. App. 376, 385 (2008).

1 Summary judgment is appropriate on this claim because the conduct alleged is not
2 sufficiently extreme to amount to the tort of IIED. The allegations made by Imeson, including
3 her termination, the alleged improper removal of the Solar City account, and the alleged
4 inappropriate comments by Parsons do not rise to the level of IIED. The fact of discharge itself,
5 on its own, is not sufficient to support an IIED claim. Dicomes v. State, 113 Wn.2d 612, 630
6 (1989). The manner in which a discharge is accomplished may support an IIED claim, but here
7 Imeson was discharged with a letter, in a manner not alleged to be particularly outrageous. (Dkt.
8 No. 33 at 11.) Although Parsons' use of the word cunt in the business context is boorish and
9 misogynistic, it does not rise to the level of an IIED claim, particularly where it is unclear the
10 comments were directed at Imeson. Even if all of Plaintiff's allegations were taken as true, they
11 do not amount to an IIED claim and summary judgment is GRANTED in favor of Defendant on
12 the allegation of IIED.

13 V. Motion to Strike

14 Defendant moves to strike the statement in Plaintiff's declaration at paragraph 11 which
15 states, "While I was out on leave, Shannon Decker told me that Mr. Parsons was saying that I
16 was not coming back and he was implying to the team that perhaps I was not really sick." (Dkt.
17 No. 34 at 3.) Defendant argues this statement is hearsay and offered to prove the truth of the
18 matter asserted. (Dkt. No. 36 at 16.) Defendant argues the statement does not fall into the scope
19 of Federal Rule of Evidence 801(d)(2)(D), which states "[a] statement is not hearsay if [t]he
20 statement is offered against the party and is a statement by the party's agent or servant
21 concerning a matter within the scope of the agency or employment, made during the existence of
22 the relationship" because according to Defendant, Ms. Decker has no human resources related
23 responsibilities. (Id. at 16.)

1 The Court GRANTS the motion to strike. This statement creates two layers of alleged
2 hearsay: (1) Imeson recounting what Decker said; and (2) Decker recounting what Parsons said.
3 However, the statement is not being offered to prove the truth of what Parsons said; instead it is
4 being offered, at most, to prove the fact that he said it. Therefore, the second layer (Decker's
5 restatement of Parsons' alleged words) is not hearsay.

6 Imeson appears to be offering Decker's statements to prove Parsons made comments
7 about her while she was on FMLA leave, and therefore restates them to prove the truth of the
8 matter asserted, in which case the statement is impermissible hearsay. The Court GRANTS
9 Defendant's motion and STRIKES the statement for the purposes of summary judgment.
10 However, the Court notes the statement is not stricken in general and may be admissible at trial if
11 warranted by the circumstances and if a proper foundation is laid.

12 Conclusion

13 Issues of material fact and the need for credibility determinations preclude summary
14 judgment on all claims except the claim of IIED. Plaintiff fails to allege facts necessary to
15 support an IIED claim. Defendant's motion for summary judgment is DENIED, except it is
16 GRANTED as to Plaintiff's claim of IIED. Defendant's evidentiary motion to strike is
17 GRANTED for the purposes of summary judgment.

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19 The clerk is ordered to provide copies of this order to all counsel.

20 Dated this 14th day of March, 2014.

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23 Marsha J. Pechman
24 Chief United States District Judge