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

10 BETHANY BREDIGER,

11 Plaintiff,

12 v.

13 GENERAL NUTRITION
CORPORATION, et al.

14 Defendants.
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CASE NO. C14-166 MJP

ORDER ON MOTIONS FOR
SUMMARY JUDGMENT

16 THIS MATTER comes before the Court on the parties' cross-motions for summary
17 judgment. (Dkt. Nos. 42, 45.) Having reviewed the motions, the responses (Dkt. Nos. 50, 54),
18 the replies (Dkt. Nos. 64, 67), and all related papers, the Court GRANTS in part and DENIES in
19 part GNC's motion for summary judgment and DENIES Plaintiff's cross-motion for partial
20 summary judgment.

21 **Background**

22 Plaintiff Bethany Brediger brings suit against her former employer General Nutrition
23 Corporation ("GNC") for employment discrimination on the basis of sex and sexual orientation
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1 and retaliation in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”), the
2 Washington Law Against Discrimination (“WLAD”), and the Fair Labor Standards Act
3 (“FLSA”), and for violations of Washington wage laws, unjust enrichment, and promissory
4 estoppel. (Dkt. No. 1 at 7–8.)

5 Plaintiff began working for GNC as a Store Manager in August 2011 in GNC’s Region 7.
6 (Dkt. No. 56 at 1.) Plaintiff alleges in April 2012, she was promoted to Senior Store Manager
7 with the promise that she would be paid for additional duties performed, but that GNC failed to
8 provide her with commensurate pay. (Id. at 2.) Around October of 2012, Plaintiff claims she
9 reported to Shane Von Behren, the Regional Sales Director (“RSD”) of Region 7, and to Patrick
10 McKewon, the Division Sales Director (“DSD”) of Regions 6 and 7, that she had not received
11 the pay she was promised and that certain female managers were being paid less commission
12 than male managers. (Id. at 5.) Plaintiff alleges that around this same time, Mr. Von Behren
13 looked at an assistant Store Manager in her presence and said “this is the nicest looking staff that
14 I’ve seen.” (Id. at 3.)

15 Plaintiff claims that GNC, in retaliation for her complaints, unfairly disciplined her for a
16 late store opening that did not violate its policy and demoted her from Senior Store Manager to
17 Store Manager in January 2013. (Id. at 5–7.) Plaintiff continued to complain to GNC about
18 perceived discrimination and retaliation throughout 2013, (see Dkt. Nos. 55-5 at 3, 55-6 at 2, 55-
19 7 at 10–11), and claims GNC both failed to appropriately respond to her complaints and
20 continued to retaliate and discriminate against her by, among other things, refusing to promote or
21 reinstate her as Senior Store Manager, issuing her an action plan for Key Performance Indicator
22 (“KPI”) sales goals, issuing a written warning for store standards, failing to inform her of a visit
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1 from upper management and then issuing her another warning related to store standards, and
2 then terminating her employment. (Dkt. No. 54 at 19.)

3 Plaintiff also alleges Thomas Friedman, who replaced Mr. Von Behren as RSD of Region
4 7 in April 2013, made derogatory comments about women and questioned her about her
5 sexuality. (Dkt. No. 56 at 3–4.) Plaintiff claims she continued to report to GNC about additional
6 perceived acts discrimination and retaliation until November 18, 2013, when her employment
7 was terminated for poor work performance. (Dkt. No. 55-8 at 10.)

8 Arguing that it had legitimate, non-discriminatory, non-retaliatory reasons for its actions,
9 that Plaintiff agreed to perform Senior Store Manager duties without pay, and that it did not
10 discriminate against Plaintiff on the basis of her sex or sexual orientation, GNC now moves for
11 summary judgment on all of Plaintiff’s claims. (Dkt. No. 45.) Plaintiff cross-moves for partial
12 summary judgment on her promissory estoppel and unjust enrichment claims. (Dkt. No. 42.)

13 **Discussion**

14 **I. Legal Standard**

15 **A. Summary Judgment**

16 Summary judgment is proper where “the movant shows that there is no genuine issue as
17 to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
18 56(a). The moving party bears the initial burden of demonstrating the absence of a genuine issue
19 of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In assessing whether a party has met
20 its burden, the underlying evidence must be viewed in the light most favorable to the non-
21 moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

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1 **II. GNC’s Motion for Summary Judgment**

2 **A. Retaliation**

3 Plaintiff asserts retaliation claims under WLAD and the FLSA.¹ To establish a prima
4 facie case of retaliation, a plaintiff must prove: (1) she engaged in statutorily protected activity;
5 (2) the defendant took an adverse employment action; and (3) there was a causal link between
6 the protected activity and the adverse action. See Harris v. City of Seattle, 315 F. Supp. 2d 1112,
7 1125 (W.D. Wash. 2004) (addressing retaliation claim under Washington law). Harassment in
8 retaliation for engaging in protected activity can be a form of adverse action in the retaliation
9 context if the harassment would dissuade a reasonable worker from engaging in protected
10 activity. See Ray v. Henderson, 217 F.3d 1234, 1245 (9th Cir. 2000).

11 Once the plaintiff establishes a prima facie case for retaliation, the burden shifts to the
12 defendant to articulate a legitimate, non-retaliatory reason for the adverse action. See Stewart v.
13 Masters Builders Ass’n of King and Snohomish Counties, 736 F.Supp.2d 1291, 1295 (W.D.
14 Wash. 2010) (applying burden shifting framework established by the Supreme Court in
15 McDonnell Douglas to FLSA retaliation case); see also Tyner v. Dep’t of Soc. & Health Servs.,
16 137 Wash. App. 545, 564 (2007) (the McDonnell Douglas “burden shifting scheme applies to
17 retaliation claims.”) If the defendant does so, the final burden rests with the plaintiff to
18 demonstrate that the asserted reasons are pretext for retaliation. Stewart, 736 F.Supp.2d at 1295.

19 Plaintiff has not put forth sufficient evidence to support a retaliation claim based on
20 harassment. However, as discussed below, Plaintiff has put forth sufficient evidence from which
21 a reasonable jury could conclude GNC took other adverse employment actions (i.e. issued
22 written warnings, demoted her, etc.) in retaliation for Plaintiff’s complaints.

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24 ¹ Plaintiff withdraws her Equal Pay Act claim. (Dkt. No. 54 at 24.)

1 Plaintiff argues GNC issued her a written warning related to a late store opening that did
2 not violate its policies, demoted her from Senior Store Manager to Store Manager, refused to
3 promote or reinstate her, issued her an action plan for her KPI scores, issued her a written
4 warning related to store conditions, failed to inform her of the visit from upper management and
5 then issued another warning related to store conditions, and then terminated her employment in
6 retaliation for her complaints. (Dkt. No. 54 at 19.) She contends “[t]he timing of each
7 employment action, shortly after each complaint, in addition to the lack of justification for the
8 adverse actions, creates a causal link between the protected activity and the adverse employment
9 actions.” (*Id.*) GNC argues it had legitimate, non-retaliatory reasons for its actions and that
10 Plaintiff cannot show those reasons are pretext for retaliation. (Dkt. No. 45 at 21–25.)

11 Each alleged adverse employment action occurred in close proximity to Plaintiff’s
12 complaints. See *Francom v. Costco Wholesale Corp.*, 98 Wash. App. 845, 862 (2000) (one
13 factor supporting retaliatory motive is the proximity in time between the protected activity and
14 the adverse action). Further, there is little evidence in the record that Plaintiff received any
15 warnings related to sales or store conditions before the end of 2012, when she first began making
16 complaints to her managers. In addition to evidence regarding timing, Plaintiff offers sufficient
17 circumstantial evidence of pretext to foreclose summary judgment on her retaliation claims.

18 GNC’s policy requires employees to notify their managers either before or after a late
19 store opening to avoid discipline. (Dkt. No. 55-2 at 55.) While GNC contends Plaintiff did not
20 notify Mr. Von Behren about at least one of her late store openings in the fall of 2012, resulting
21 in a written warning, (Dkt. No. 49 at 3), Plaintiff states in her declaration that she notified Mr.
22 Von Behren each time there was a late store opening. (Dkt. No. 56 at 6.) While GNC contends
23 Plaintiff was never promoted to Senior Store Manager and was asked to stop performing Senior
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1 Store Manager duties in January 2013 because of poor store conditions, (Dkt. No. 49 at 4),
2 Plaintiff offers evidence that she was promoted to Senior Store Manager, (Dkt. No. 58 at 3), and
3 that she was told to stop performing Senior Store Manager duties because of budget cuts,
4 unrelated to her performance. (Dkt. No. 56 at 6.)

5 GNC issued Plaintiff a 30-day action plan related to KPI sales goals on May 30, 2013.
6 (Dkt. No. 55-5 at 12.) While GNC contends that certain other managers who failed to meet KPI
7 sales goals were also issued action plans in May 2013, (Dkt. No. 48 at 2–3), Plaintiff offers
8 evidence that at least one Store Manager did not meet his KPI sales goals in April, May, June,
9 July, September, and November of 2013, (Dkt. No. 61 at 42–50), but was not issued an action
10 plan until August 2014. (Id. at 52.) And although GNC argues it stopped issuing action plans
11 for KPI sales goals after May 2013 because there were more urgent issues to concentrate on,
12 (Dkt. No. 69 at 4), Plaintiff offers evidence that she exceeded her KPI sales goals in three of four
13 measured categories in March and April of 2013, that she missed her KPI sales goals for the first
14 time in May 2013, and that her KPI sales numbers improved in both June and July of 2013.
15 (Dkt. No. 61 at 44–46.) Therefore, GNC’s decision to stop issuing action plans after May 2013
16 serves as circumstantial evidence of pretext.

17 Viewing these facts in the light most favorable to Plaintiff, the Court finds a reasonable
18 jury could find GNC retaliated against Plaintiff for her complaints. The Court, therefore,
19 DENIES GNC’s motion for summary judgment as to Plaintiff’s federal and state law retaliation
20 claims.

21 **B. Disparate Treatment**

22 Plaintiff asserts disparate treatment claims under WLAD and Title VII on the basis of sex
23 and sexual orientation. To establish a prima facie case of disparate treatment, a plaintiff must
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1 show: (1) that she is a member of a protected class; (2) that she is qualified for the employment
2 position or performing substantially equal work; (3) that she suffered an adverse employment
3 action, and (4) that similarly situated employees not in the same protected class received more
4 favorable treatment—i.e. comparators. Kang v. U. Lim Am., Inc., 296 F.3d 810, 818 (9th Cir.
5 2002); Davis v. West One Auto. Group, 140 Wash. App. 449, 459 (2007). As an alternative to
6 comparator evidence, the plaintiff can also provide evidence of “other circumstances surrounding
7 the adverse employment action [that] give rise to an inference of discrimination.” Peterson v.
8 Hewlett-Packard Co., 358 F.3d 599, 603 (9th Cir. 2004). Next the burden shifts back to the
9 employer to articulate a legitimate non-discriminatory reason for its decision. Wallis v. J.R.
10 Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994). Finally, the burden shifts back to the plaintiff to
11 show the reason offered is pretext for an underlying discriminatory motive. Chuang v.
12 University of Cal. Davis, 225 F.3d 1115, 1123, (9th Cir. 2000).

13 Plaintiff argues GNC discriminated against her on the basis of sex and/or sexual
14 orientation by “issuing numerous, unwarranted written warnings, demoting her, refusing to
15 promote or reinstate her, and ultimately by terminating her under false pretenses.” (Dkt. No. 54
16 at 20.) While an employee’s burden in opposing an employer’s motion for summary judgment is
17 minimal, Chuang, 225 F.3d at 1124, Plaintiff fails to meet this minimal burden with respect to
18 her disparate treatment claims. Although she discusses each alleged adverse employment action
19 in her response brief, (Dkt. No. 54 at 21–24), Plaintiff does not sufficiently identify comparators
20 who were treated more favorably and does not identify other evidence that would give rise to the
21 inference that GNC’s actions were motivated by her sex and/or sexual orientation. Indeed,
22 Plaintiff does little more than state in a conclusory fashion that GNC treated her differently than
23 other Store Managers who were not part of the relevant protected classes. (Dkt. No. 54 at 20.)
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1 Because no reasonable jury could find, based on the record before the Court, that GNC
2 discriminated against Plaintiff on the basis of sex and/or sexual orientation, the Court GRANTS
3 GNC's motion for summary judgment as to Plaintiff's disparate treatment claims.

4 **C. Hostile Work Environment**

5 To establish a hostile work environment under WLAD or Title VII, a plaintiff must show
6 the following: (1) she was subjected to verbal or physical conduct because of her membership in
7 a protected class; (2) the conduct was unwelcome; (3) the conduct was sufficiently severe or
8 pervasive to alter the conditions of employment and create an abusive work environment.

9 Manatt v. Bank of Am., NA, 339 F.3d 792, 798 (9th Cir. 2003); see also Loeffelholz v. Univ. of
10 Wash., 175 Wash.2d 264, 275 (2012).

11 Plaintiff alleges when she asked Mr. Friedman how best to train a female subordinate, he
12 recommended that she treat female employees like she was "their abusive boyfriend." (Dkt. No.
13 56 at 3.) She also alleges Mr. Friedman stated "I'm so stupid, I have a penis on my forehead."
14 (Id.) Plaintiff contends that Mr. Von Behren looked an Assistant Store Manager up and down in
15 her presence and said "this is the nicest looking staff that I've seen." (Id.) Plaintiff alleges Mr.
16 Friedman became aware of her sexual orientation in November 2012 when she brought her
17 girlfriend to a coworker's baby shower. (Id. at 4.) She claims Mr. Friedman made a comment to
18 her to the effect of "I heard you brought a friend" using a sarcastic tone. (Id.) Plaintiff also
19 alleges Mr. Friedman treated her in a rude, demeaning, hostile manner every time he interacted
20 with her. (Dkt. No. 54 at 21.) Plaintiff offers declarations from co-workers that represent,
21 generally, that Mr. Friedman treated Plaintiff unfairly and singled her out for criticism. (See e.g.
22 Dkt. Nos. 57, 60.)

1 GNC argues Plaintiff's hostile work environment claims should be dismissed because
2 Plaintiff cannot prove that any alleged harassment by GNC was sufficiently severe or pervasive.
3 (Dkt. No. 45 at 26.) Although it does not condone the alleged comments made by Mr. Von
4 Behren and Mr. Friedman, the Court agrees with GNC. Viewing these facts in the light most
5 favorable to Plaintiff, the Court finds no reasonable jury could find the harassment alleged by
6 Plaintiff was sufficiently severe or pervasive to create an abusive work environment. The Court,
7 therefore, GRANTS GNC's motion for summary judgment as to Plaintiff's hostile work
8 environment claims.

9 **D. Wrongful Withholding of Wages**

10 GNC argues the Court should grant summary judgment in its favor on Plaintiff's
11 withholding of wages claim under RCW 49.52.050 because, among other things, there is a "bona
12 fide dispute" as to the wages being owed. (Dkt. No. 45 at 27.)

13 "The critical determination in a case . . . for double damages is whether the employer's
14 failure to pay wages was 'willful.'" Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 159
15 (1998). Washington courts have recognized that an employer's failure to pay wages is not willful
16 where "a bona fide dispute existed between the employer and the employee regarding the
17 payment of wages." Id. at 160. "The dispute must be a 'bona fide,' i.e., a 'fairly debatable'
18 dispute over whether an employment relationship exists, or whether all or a portion of the wages
19 must be paid." Id. at 161.

20 Plaintiff alleges Chris Borden, the RSD for Region 7 in April 2012, promoted her to
21 Senior Store Manager. (Dkt. No. 56 at 2.) She contends she accepted the promotion with the
22 understanding that she would receive a pay increase once GNC filled the gaps in its budget.
23 (Dkt. No. 54 at 4.) GNC disputes that Plaintiff was officially promoted and argues that at most
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1 Plaintiff was considered a Senior Store Manager in training. (Dkt. No. 45 at 12.) GNC offers as
2 evidence a declaration from Mr. McKewon stating Plaintiff was never promoted to Senior Store
3 Manager. (Dkt. No. 47 at 3.) Plaintiff does not dispute that GNC never applied the Senior Store
4 Manager job code to her. (Dkt. No. 42 at 8); (Dkt. No. 44-16.) An internal email from Mike
5 Merchant to Lorraine Reidy in HR dated February 16, 2013 states “[w]e are not to pay her an
6 SSM wage as she was not an SSM!” (Dkt. No. 44-17.)

7 Viewing these facts in the light most favorable to Plaintiff, the Court finds a reasonable
8 jury could not escape the conclusion that a “fairly debatable” dispute exists as to whether GNC
9 owes Plaintiff additional wages for the Senior Store Manager duties she performed. The Court,
10 therefore, GRANTS GNC’s motion for summary judgment as to Plaintiff’s withholding of wages
11 claim.

12 **E. Unjust Enrichment and Promissory Estoppel**

13 On December 31, 2014, GNC tendered Plaintiff two checks: (1) a payroll check
14 representing the additional wages Plaintiff alleges are owed for Senior Store Manager duties
15 performed; and (2) a general check representing double damages, interest, and attorney’s fees.
16 (Dkt. No. 46-11 at 2.) Plaintiff accepted the first check but returned the second check. (Id. at 5–
17 6.)

18 GNC argues the Court should grant summary judgment in its favor because GNC
19 tendered a check for the alleged wages owed and Plaintiff accepted the check. (Dkt. No. 45 at
20 27.) When considering these claims, the Court balances the equities to determine whether
21 Plaintiff is entitled to relief. Because Plaintiff accepted a check representing the additional
22 wages she alleges GNC owes her, the Court cannot give Plaintiff equitable relief in the form of
23 damages for these claims. Any award of attorney’s fees and/or interest that Plaintiff might be
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1 entitled to would be cut off at the time GNC tendered the check for wages owed. Plaintiff failed
2 to mitigate her damages by continuing to pursue these claims despite GNC's tender of the
3 amount allegedly owed. On balance, the equities do not weigh in Plaintiff's favor. The Court,
4 therefore, GRANTS GNC's motion for summary judgment as to Plaintiff's promissory estoppel
5 and unjust enrichment claims.

6 **III. Plaintiff's Motion for Partial Summary Judgment**

7 Plaintiff brings her motion for partial summary judgment on her promissory estoppel and
8 unjust enrichment claims to recover prejudgment interest and attorney's fees related to these
9 claims. (Dkt. No. 42 at 9.) Because the Court has already granted summary judgment in GNC's
10 favor on these claims, the Court DENIES Plaintiff's motion for partial summary judgment.

11 **Conclusion**

12 The Court GRANTS in part and DENIES in part GNC's motion for summary judgment.
13 (Dkt. No. 45.) The Court DENIES Plaintiff's motion for partial summary judgment. (Dkt. No.
14 42.)

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

16 Dated this 2nd day of October, 2015.

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19 Marsha J. Pechman
20 United States District Judge
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