

1 THE HONORABLE JOHN C. COUGHENOUR

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5
6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 SILVESTRE DUENEZ,

CASE NO. C16-1238-JCC

10 Plaintiff,

ORDER

11 v.

12 DAKOTA CREEK INDUSTRIES
13 INCORPORATED,

14 Defendant.

15
16 This matter comes before the Court on Plaintiff's motion for partial summary judgment
17 (Dkt. No. 23) and motion to strike (Dkt. No. 28). Having thoroughly considered the parties'
18 briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS
19 in part and DENIES in part the motion for summary judgment (Dkt. No. 25) and DENIES the
20 motion to strike (Dkt. No. 28) for the reasons explained herein.

21 **I. BACKGROUND**

22 Plaintiff Silvestre Duenez ("Duenez") worked as a painter for Defendant Dakota Creek
23 Industries ("Dakota") from May to September of 2013. (Dkt. Nos. 1 at 3, 24 at 140.) Dakota
24 builds and repairs ships, and Duenez worked as part of a team that was supervised by a foreman
25 and several "leads." (*Id.* at 32–33.) During his time at Dakota, Duenez worked under the
26 direction of foreman Joe Robinson ("Robinson") and lead Brian Magana ("Magana"). (*Id.*)

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1 Duenez, who was born in Mexico, believed that he was a frequent target of racially-
2 charged jokes and comments, often coming from Magana and Robinson. (Dkt. No. 24 at 8–9,
3 11–13, 136.) In August 2013, Duenez spoke with Dakota’s human resources manager, Aga
4 Samsel (“Samsel”), about some of the harassment he felt he was experiencing. (*Id.* at 136.)
5 Duenez told Samsel about a sexually-explicit bumper sticker that he thought Robinson had
6 placed on his truck. (*Id.*) The sign read “I’m not gay but my ass is.” (*Id.*) Duenez also told
7 Samsel that other employees made jokes about his accent and treated him differently. (*Id.*)

8 In early September, Duenez provided Samsel with a written complaint describing
9 additional allegations about Robinson’s actions. (*Id.* at 146–47.) Duenez alleged that he caught
10 Robinson using Duenez’s cellphone to take a picture of Robinson’s genitals. (*Id.* at 146.) Duenez
11 additionally wrote that Robinson had asked him to give the sexually-explicit bumper sticker back
12 to him, which made Duenez think Robinson had put the sticker on his truck. (*Id.*) Duenez also
13 wrote that Robinson had condoned the jokes made about Duenez’s accent. (*Id.* at 147.) Based on
14 the complaint, Samsel conducted an investigation in which she spoke to Magana, Robinson, and
15 others about Duenez’s allegations. (*Id.* at 146–153.) Samsel concluded that the allegation about
16 Robinson taking a picture of his genitals could not be corroborated. (*Id.* at 153.)

17 In addition to Duenez’s complaints to Samsel, it is undisputed that Duenez had received
18 write-ups for not following instructions, a safety violation, and failing to show-up for a
19 scheduled shift. (Dkt. No. 26 at 9–18.) On September 27, 2013, Samsel informed Duenez he was
20 being terminated by Dakota for not meeting expectations. (Dkt. No. 24 at 157.) Superintendent
21 Rick Kirschman (“Kirschman”) and Robinson were also involved in the decision to terminate
22 Duenez. (Dkt. No. 24 at 117, 161.)

23 Duenez brings claims against Dakota for harassment based on his race and sex, hostile
24 work environment, and retaliation under 42 U.S.C. § 1981, *et seq.* (“§ 1981”), Title VII of the
25 Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000(e), *et*
26 *seq.* (“Title VII”), and the Washington Law Against Discrimination, Revised Code of

1 Washington section 49.60, *et seq.* (“WLAD”) (Dkt. No. 23 at 3.) Duenez asks the Court to grant
2 partial summary judgment and rule that Dakota is liable for retaliation under state and federal
3 law. (*Id.* at 4.) Duenez also asks the Court to dismiss two of Dakota’s affirmative defenses (*Id.*)
4 Dakota asks the Court to deny Duenez’s motion in its entirety. (Dkt. No. 25 at 1.)

5 **II. DISCUSSION**

6 **A. Duenez’s Motion to Strike**

7 Duenez asks the Court to strike Kirschman’s declaration submitted with Dakota’s
8 response in opposition to summary judgment. (Dkt. No. 28 at 5). First, Duenez asserts that
9 Kirschman had no personal knowledge of Samsel’s investigation into his complaints, and
10 therefore Kirschman’s statements about the investigation are inadmissible hearsay. (*Id.* at 6.)
11 Duenez next argues that many of Kirschman’s statements contradict his deposition testimony and
12 his declaration is thus a “sham” that cannot be used to create genuine disputes of fact. (*Id.* at 8.)

13 “An affidavit or declaration used to support or oppose a motion must be made on
14 personal knowledge, set out facts that would be admissible in evidence, and show that the affiant
15 or declarant is competent to testify on the matters stated.” Fed R. Civ. P. 56(c)(4). Kirschman
16 can testify about Samsel’s investigation even though he wasn’t involved because Samsel
17 “reported to [Kirschman] the results of her investigation.” (Dkt. No. 27 at 3.) The Court
18 additionally finds that Kirschman’s statements about what Samsel told him could be admissible
19 as non-hearsay because they demonstrate his state-of-mind, which is relevant to basis for
20 Duenez’s termination. *See Jones v. Los Angeles Cmty. Coll. Dist.*, 702 F.2d 203, 205 (9th Cir.
21 1983) (out-of-court statements about employee’s performance and conduct were nonhearsay
22 because they were offered to show non-discriminatory motive for termination).¹

23 Under Ninth Circuit case law, “a party cannot create an issue of fact by an affidavit
24 contradicting his prior deposition testimony.” *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir.
25

26 ¹ The Court expresses no opinion as to whether specific statements are admissible.

1 2012) (citation and internal quotation marks omitted). But this sham affidavit rule “should be
2 applied with caution” because the Court must not make credibility determinations when
3 resolving a summary judgment motion. *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 998 (9th
4 Cir. 2009).

5 Duenez argues that Kirschman’s declaration is a sham because parts of it contradict his
6 deposition testimony. (Dkt. No. 28 at 8–9.) The Court cannot agree. Much of Kirschman’s
7 declaration either clarifies or elaborates on his deposition testimony. *See Van Asdale*, 577 F.3d at
8 999 (“[T]he non-moving party is not precluded from elaborating upon, explaining or clarifying
9 prior testimony elicited by opposing counsel on deposition and minor inconsistencies that result
10 from an honest discrepancy, a mistake, or newly discovered evidence afford no basis for
11 excluding an opposition affidavit.”) (internal quotation omitted). In his declaration, Kirschman
12 points to sections of his deposition not cited in Duenez’s motion that attempt to clarify his
13 statements about how Duenez’s complaints impacted the termination decision. (Dkt. No. 27 at
14 5.) Kirschman also elaborates on the reasons for Duenez’s termination. (*Id.*) The Court does not
15 find these statements contradictory, as Kirschman offered more than one reason in his deposition
16 for Duenez’s termination. (*See* Dkt. No. 24 at 110) (“I think it escalated. I think it went from he
17 was being written up and disciplined for not wearing the harness and he just blew up, and then
18 became, we’re terminating you. I don’t remember exactly. I just remember the outcome.”).

19 To the extent that Kirschman’s declaration testimony could be viewed as contradicting
20 his deposition testimony, the Court believes such inconsistencies are better addressed at trial.
21 Duenez’s motion to strike (Dkt. No. 28) is DENIED.

22 **B. Summary Judgment Standard**

23 Summary judgment should be granted “if the movant shows that there is no genuine
24 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
25 Civ. P. 56(a). Material facts are those that may affect the case’s outcome. *See Anderson v.*
26 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine if there

1 is enough evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* at
2 49. At the summary judgment stage, evidence must be viewed in the light most favorable to the
3 nonmoving party, and all justifiable inferences must be drawn in the nonmovant’s favor. *See*
4 *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 960 (9th Cir. 2011). “Credibility
5 determinations, the weighing of the evidence, and the drawing of legitimate inferences from the
6 facts are jury functions, not those of a judge” *Anderson*, 477 U.S. at 255.

7 **C. Federal Retaliation Claims**

8 Dakota asks the Court to apply the three-step burden shifting framework developed by
9 the Supreme Court in *McDonnell Douglas Corp. v. Green* to analyze the federal retaliation
10 claims. 411 U.S. 792, 802 (1973). (Dkt. No. 25 at 7–8); *see, e.g., Manatt v. Bank of Am., N.A.*,
11 339 F.3d 792, 800 (9th Cir. 2003) (applying the *McDonnell Douglas* framework to retaliation
12 claims brought under Title VII and § 1981). Under the *McDonnell Douglas* analysis, if a plaintiff
13 makes out a prima facie case of retaliation, the burden shifts to the defendant to provide a non-
14 discriminatory reason for the adverse employment decision. *Villiarimo v. Aloha Island Air, Inc.*,
15 281 F.3d 1054, 1064 (9th Cir. 2002) (citation omitted). If the defendant articulates such a reason,
16 the plaintiff must demonstrate that the defendant’s reason is merely a pretext for a discriminatory
17 motive. *Manatt*, 339 F.3d at 800.

18 Since Duenez moves for summary judgment on his retaliation claims and would bear the
19 ultimate burden of persuasion at trial, there is no need to apply the rigid *McDonnell Douglas*
20 framework. *See Poland v. Chertoff*, 494 F.3d 1174, 1189 n. 2 (9th Cir. 2007) (discussing the
21 differences between a plaintiff’s burden in making a prima facie case of retaliation under
22 *McDonnell Douglas* framework with a plaintiff’s ultimate burden of persuasion at trial). Instead,
23 the Court need only determine whether Duenez has shown that the undisputed material facts
24 demonstrate that he is entitled to judgment on his retaliation claims such that no reasonable trier
25 of fact could find for Dakota. *Anderson*, 477 U.S. at 251.

26 To prevail on his retaliation claims brought under Title VII and § 1981, Duenez must

1 prove by a preponderance of the evidence that: (1) he engaged in or was engaging in an activity
2 protected under federal law; (2) Dakota subjected him to an adverse employment action; and (3)
3 Duenez was subjected to the adverse employment action because of his participation in the
4 protected activity. Model Civ. Jury Instr. 9th Cir. 10.8 (2017); *see also, Jurado v. Eleven-Fifty*
5 *Corp.*, 813 F.2d 1406, 1412 (9th Cir. 1987) (“[f]acts sufficient to give rise to a Title VII claim
6 are also sufficient for a § 1981 claim”).

7 1. Protected Activity

8 Duenez asserts that he engaged in a protected activity when he made complaints to
9 Samsel about race and gender harassment. (Dkt. No. 23 at 14–15.) Under Title VII, it is unlawful
10 for an employer “to discharge any individual, or otherwise to discriminate against any
11 individual . . . because of such individual’s race, color, religion, sex, or national origin.” 42
12 U.S.C. § 2000e-2. In order to be a protected activity, the plaintiff’s opposition must have been
13 directed toward a discriminatory act by an employer or an agent of an employer. *See Silver v.*
14 *KCA, Inc.*, 586 F.2d 138, 140–42 (9th Cir. 1978). An employee engages in a protected opposition
15 activity when his complaints are “based on a ‘reasonable belief’ that the employer has engaged
16 in an unlawful employment practice.” *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 969
17 (9th Cir. 2002) (emphasis in original, citation omitted).

18 Duenez complained to Samsel twice before he was terminated. (Dkt. No. 24 at 136, 146.)
19 On August 28, 2013, Duenez met with Samsel and told her that he had found the sign on his car
20 that read “I’m not gay, but my ass is.” (*Id.* at 136.) Duenez thought Robinson was involved in
21 putting the sign on his car because Robinson had asked him to give it back several times. (*Id.*)
22 Duenez also told Samsel that other employees made jokes about his accent. (*Id.*)

23 Less than a week later, Duenez gave Samsel a written complaint with similar allegations.
24 (*Id.* at 146.) Duenez described the incident in which he walked into a company office to find
25 Robinson using Duenez’s cellphone to take a picture of his (Robinson’s) genitals. (*Id.* at 23–25.)
26 Duenez again describe the apparently homophobic sign on his car and wrote, “[Robinson] asked

1 me about 4 times about me giving the ‘sticker’ back to him. Then he told me let’s take a ride and
2 put it on someone else’s car, which I did not agree to.” (*Id.*) Duenez also wrote that Robinson
3 was involved in other employees’ jokes about Duenez, particularly “comments and
4 discriminatory remarks about Duenez’s speech and accent.” (*Id.* at 147.)

5 In her deposition, Samsel stated that she believed Duenez had “claimed that he was
6 discriminated because of his race.” (*Id.* at 34.) When asked if she believed Duenez had
7 complained about race discrimination Samsel stated “[p]ossibly, yes.” Samsel also stated that she
8 believed Duenez was making a sexual harassment complaint when he complained to her about
9 the incident involving Robinson taking a picture with his cellphone. (*Id.* at 35.) Kirschman stated
10 that he was aware of Duenez’s complaints about Robinson. (*Id.* at 53–55, 137–138.)

11 The Court finds that Duenez reasonably believed he was engaging in a protected activity
12 when he made his complaints to Samsel about Robinson. The reasonableness of Duenez’s belief
13 is supported by the nature of his complaints and the fact that both Samsel and Kirschman
14 acknowledged the complaints alleged racial and sexual harassment. (*Id.* at 34–35, 118, 146–147.)
15 Dakota counters that “considering that Plaintiff previously engaged in similar civil rights
16 litigation, a jury could reasonably conclude Plaintiff knew he heard only isolated comments from
17 others who were not in a position to terminate him, and that Plaintiff’s goal was to secure an
18 unwarranted promotion rather than in engage in protected activity.” (Dkt. No. 25 at 11.) Dakota
19 neither provides admissible evidence to support its argument, nor rebuts Duenez’s evidence that
20 he reasonably believed what he reported to Samsel amounted to discrimination.

21 For those reasons, the Court finds Duenez has met his burden on summary judgment to
22 demonstrate that he engaged in a protected activity when he complained to Samsel.

23 2. Adverse Employment Action

24 Duenez asserts that he experienced an adverse employment action when he was
25 terminated by Dakota. Adverse employment actions are actions by an employer that are “harmful
26 to the point that they could well dissuade a reasonable worker from making or supporting a

1 charge of discrimination.” *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 57 (2006). The
2 Ninth Circuit has observed that termination of an employee is commonly the adverse
3 employment decision at issue in retaliation cases. *See, e.g., Ruggles v. California Polytechnic*
4 *State Univ.*, 797 F.2d 782, 785 (9th Cir. 1986) It is undisputed that within a month of making his
5 complaints to Samsel, Duenez was terminated by Dakota. (Dkt. No. 24 at 136, 157.) The Court
6 concludes that Duenez suffered an adverse employment action when he was terminated.

7 3. Causation

8 Duenez asserts that Dakota, through its speaking agent Kirschner, admitted that it
9 terminated him because of the complaints he made to Samsel. (Dkt. No. 23 at 15.) A plaintiff is
10 subjected to an adverse employment action because of his participation in protected activity if
11 the adverse employment action would not have occurred *but for* that participation. *Univ. of Texas*
12 *Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013) (emphasis added).²

13 Duenez asserts that Kirschman admitted in his deposition that Duenez was fired because
14 of the complaints he made to Samsel. (Dkt. No. 23 at 16.) Duenez supports this conclusion by
15 pointing to the following testimony:

16 Goldsworthy³: You said something about expending a lot of energy on an
17 employee. Did Ms. Samsel feel that she was spending too much time investigating
18 complaints that Mr. Duenez was making?

19 Kirschman: No.

20 Goldsworthy: What did you mean by expending too much energy on him?

21 Kirschman: It seemed like we were spending more time with her in my office
22 telling me the direction she was going and what she was dealing with now, which
23 complaint now.

24 ² Duenez correctly points out that *Nassar* deals with Title VII retaliation claims and it is
25 unsettled whether that standard would apply to § 1981 claims. (Dkt. No. 23 at 16.) The Court
26 thinks the reasoning in *Nassar* would apply to a § 1981 claim and uses that standard in this case.

³ Duenez’s counsel, Richard Goldsworthy.

1 Goldsworthy: And so because of that you felt like it was the time to get rid of Mr.
2 Duenez?

3 Kirschman: At some point we would have come to that conclusion, that yeah,
4 we're probably justified now in being able to terminate.

5 Goldsworthy: At some point Dakota Creek did come to that conclusion; correct?

6 Kirschman: Yes.

7 (Dkt. No. 24 at 109.) Kirschman further testified that Duenez should have been fired because he
8 thought some of the information Duenez made in his complaints was untrue:

9 Goldsworthy: Okay. The issues that you were talking about are issues surrounding
10 his complaints to HR about supervisors and managers; is that correct?

11 Kirschman: Correct.

12 Goldsworthy: And those were the issues that led to his termination?

13 Kirschman: Not the complaints themselves. The amount of time that they
14 appeared to be mostly false accusations. My take is when somebody makes an
15 accusation, depending on how bad it is, it needs to stick to the guy that you're
16 talking about, or the guy that's making the complaint that's not found to be true.

17 (*Id.* at 132.) In a subsequent declaration, Kirschman specifically stated that he was bothered with
18 Duenez's uncorroborated allegation that Robinson used Duenez's cellphone to take a picture of
19 his genitals. Kirschman stated:

20 During the course of Ms. Samsel's investigation, however, Mr. Duenez back-
21 pedalled significantly from his charges. There were, in fact, no such photos on
22 Mr. Duenez's telephone, and although Mr. Duenez identified several Dakota
23 Creek employees who he said were witnesses to this supposed event, not a single
24 one confirmed this allegation of misbehavior on the part of Mr. Robinson.

25 (Dkt. No. 27 at 3–4.) Although Samsel's investigation did not conclude that Duenez's allegations
26 were false, she could not corroborate whether the situation with the pictures took place. (Dkt.
No. 24 at 149–153) (no one other than Duenez said the incident occurred and no pictures were
recovered.) A reasonable trier of fact could draw two inferences from the above testimony. First,
it could find, as Duenez argues, that Kirschman's termination decision was based on Duenez's

1 complaints to Samsel regarding racial and sexual discrimination. (Dkt. No. 23 at 10.)
2 Alternativley, a trier of fact could find that Kirschman’s termination decision was influenced by
3 Duenez complaints insofar as he thought the complaints lacked merit based on his understanding
4 of Samsel’s investigation.⁴ Drawing all inferences in favor of Dakota, there is a dispute of
5 material fact about how Duenez’s complaints influenced Kirschman’s decision to terminate him.

6 Duenez also treats Kirschman’s testimony about his complaints as if he was the only
7 person who made the termination decision. The evidence shows that Samsel, Robinson, and
8 Kirschman were all involved with the decision to terminate Duenez. (*See* Dkt. Nos. 24 at 61, 29-
9 1 at 6–7.) When Kirschman was asked who decided Duenez should be terminated he stated: “It
10 was probably a joint conversation with Joe, myself, Aga, maybe not all in the same room, us
11 having the same determination that it was time to go ahead and terminate.” (Dkt. No. 29-1 at 8.)
12 Samsel expressed to Duenez that he was fired for “not meeting expectations.” (Dkt. No. 24 at
13 157.) When Robinson, who signed Duenez’s termination paperwork, was asked why Duenez was
14 terminated, he stated, “He only worked there five months and had a bunch of write-ups and
15 wasn’t a great employee, so. I’m assuming that’s why.” (*Id.* at 95, 117.)

16 Nor were Kirschman’s statements regarding Duenez’s complaints the only basis that
17 Dakota offered to support Duenez’s termination. (*See* Dkt. No. 24 at 161.) There is undisputed
18 evidence that Duenez received a series of write-ups before and after he made his complaints to
19 Samsel. (Dkt. No. 26 at 9–15.) Before making the complaints, Duenez was given two written
20 warnings for not following instructions and for failing to wear a safety harness. (*Id.* at 9–15.)
21 After his complaints, and within a few days of termination, Duenez was written up by Robinson
22 for not showing up for a weekend shift. (*Id.* at 15.) Robinson also provided a written statement

23 ⁴ Duenez argues that Kirschman cannot testify about Samsel’s investigation because he
24 was not personally involved. (Dkt. No. 28 at 6.) The Court already addressed and rejected this
25 argument in its discussion of Duenez’s motion to strike. (*See supra* Part II.A.) To the extent there
26 are contradictions between Kirschman and Samsel’s deposition testimony regarding the
investigation and the reasons for Duenez’s termination, they must be considered and resolved by
the trier of fact. *Anderson*, 477 U.S. at 255.

1 that described that on the day Duenez was terminated, he was late to a morning meeting and got
2 into an argument with Robinson about his work assignment. (*Id.* at 17–18.)

3 The Court concludes there are disputes of material fact regarding the reasons for
4 Duenez’s termination. Viewing the evidence in the light most favorable to Dakota, the Court
5 cannot conclude that Duenez’s complaints of race and sex discrimination were the but-for cause
6 of his termination such that a reasonable trier of fact could not find for Dakota. Duenez’s motion
7 for summary judgment on Dakota’s liability pursuant to Title VII and Section 1981 is DENIED.

8 **D. State Retaliation Claim**

9 Under WLAD, a plaintiff in a retaliation case must prove that (1) he engaged in
10 statutorily protected activity, (2) he suffered an adverse employment action, and (3) the
11 statutorily protected activity was a substantial factor in the employer’s adverse employment
12 decision. *Francom v. Costco Wholesale Corp.*, 991 P.2d 1182, 1191 (Wash. Ct. App. 2000).
13 Unlike federal retaliation claims, the plaintiff need not show that retaliation was the only or “but
14 for” cause of the adverse employment action, but he or she must establish that it was at least a
15 substantial factor. *Allison v. Housing Auth.*, 821 P.2d 34, 38 (Wash. 1991).

16 In line with its earlier analysis, the Court finds that Duenez engaged in a statutorily
17 protected activity when he made complaints to Samsel and suffered an adverse employment
18 action when he was terminated. *See supra* Part II.C.1–2. Similarly, the Court cannot conclude, as
19 a matter of law, that Duenez’s complaints about race and sex discrimination were a substantial
20 factor in his termination. Although the substantial factor standard requires a lesser showing than
21 “but-for” causation, there are genuine disputes of material fact regarding the reasons for
22 Duenez’s termination. *See supra* Part II.C.3. Therefore, Duenez’s motion for summary judgment
23 on his WLAD retaliation claim is DENIED.

24 **E. Dakota’s Affirmative Defenses**

25 Duenez moves for summary judgment on two of Dakota’s affirmative defenses.⁵ First,

26 ⁵ Dakota voluntarily dismissed its affirmative defense of waiver. (Dkt. No. 25 at 17.)

1 Duenez asserts that Dakota has not produced any evidence to support its defense that Duenez
2 failed to mitigate his damages. (Dkt. No. 23 at 20.) Second, to avoid Duenez’s hostile work
3 environment claims, Duenez argues Dakota cannot assert the so-called *Faragher* defense. (*Id.* at
4 23–24.) This defense allows an employer to avoid being held vicariously liable for the
5 harassment of its employees if defendant exercised reasonable care to prevent and correct
6 harassing behavior. (*Id.* at 23–24.)

7 At trial, defendants have the burden of proof on their affirmative defenses. *Jones v.*
8 *Taber*, 648 F.2d 1201, 1203 (9th Cir. 1981). Accordingly, when a plaintiff moves for summary
9 judgment on an affirmative defense, it need only show that the nonmoving defendant does not
10 have enough evidence of an essential element to carry its ultimate burden of persuasion at trial.
11 *See Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000); *see also*
12 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23. The defendant must then “come forward with
13 ‘specific facts showing that there is a genuine issue for trial.’” *Matsushita Elec. Indus. Co. v.*
14 *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)).

15 1. Mitigation Defense

16 For both federal and state employment discrimination claims, defendants bear the burden
17 of proving a plaintiff failed to mitigate his damages. *See Sias v. City Demonstration Agency*, 588
18 F.2d 692, 696 (9th Cir. 1978); *Burnside v. Simpson Paper Co.*, 832 P.2d 537, 549 (Wash. Ct.
19 App. 1992). To meet its burden, the defendant must show (1) that the damage suffered by the
20 plaintiff could have been avoided, i.e. that there were suitable positions available with other
21 employers that plaintiff could have discovered and for which he was qualified, and (2) that
22 plaintiff failed to use reasonable care and diligence in seeking such a position after his
23 termination. *Sias*, 588 F.2d at 696.

24 Duenez asserts that Dakota has not put forward any evidence that demonstrates there
25 were suitable positions available for Duenez, or that he failed to use reasonable care and
26 diligence in seeking such positions. (Dkt. No. 23 at 21.) The Court agrees. Dakota does not

1 include any facts that would allow a jury to conclude it has met its burden to prove Duenez failed
2 to mitigate his damages by diligently seeking new employment. (Dkt. Nos. 9 at 5, 25 at 17.)
3 Dakota merely states “Plaintiff cannot establish as a matter of law that he diligently sought
4 employment for the entire time he seeks back pay and, thus, this defense remains appropriate.”
5 (Dkt. No. 25 at 17.)

6 It is not Duenez’s burden to disprove Dakota’s affirmative defense as a matter of law.
7 Duenez met his burden of production by demonstrating Dakota had failed to provide evidence to
8 prove the essential elements of its affirmative defense. *See Celotex Corp*, 477 U.S. at 322–23.
9 Dakota’s response is merely an attempt to shift its burden on summary judgment. Accordingly,
10 the Court GRANTS Duenez’s motion to strike Dakota’s mitigation defense.

11 2. Faragher Defense

12 Under federal law, “[a]n employer is subject to vicarious liability to a victimized
13 employee for an actionable hostile environment created by a supervisor with immediate (or
14 successively higher) authority over the employee.” *Faragher v. City of Boca Raton*, 524 U.S.
15 775, 807 (1998). In *Faragher*, the Supreme Court created an affirmative defense that allows
16 employers to avoid vicarious liability for the harassing conduct of its managers if: (1) the
17 employer exercised reasonable care to prevent and correct promptly any sexually harassing
18 behavior; and (2) the employee unreasonably failed to take advantage of any preventive or
19 corrective opportunities provided by the employer or to avoid harm otherwise. *Id.* The defendant
20 has the burden of proving both of these elements by a preponderance of the evidence.⁶ *Id.*

21 Duenez argues that Dakota cannot satisfy its burden under *Faragher* because the
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23 ⁶ Duenez asserts that Washington courts have not adopted the *Faragher* defense to hostile
24 work environment claims brought under WLAD. (Dkt. No. 23 at 24.) In fact, Washington courts
25 have split on this issue. *Compare Sangster v. Albertson’s, Inc.*, 991 P.2d 674 (Wash. Ct. App.
26 2000) (recognizing *Faragher* defense), with *Henningsen v. Worldcom, Inc.*, 843, 9 P.3d 948, 957
(Wash. Ct. App. 2000) (declining to apply *Faragher* defense). Since the Court determines
Dakota has not met its burden on summary judgment to present a *Faragher* defense for its
federal claims, it need not decide here whether the defense applies to a WLAD claim.

1 undisputed evidence shows Duenez made multiple complaints to Samsel after being harassed.
2 (Dkt. No. 28 at 13.) While Dakota provides evidence that Samsel conducted an investigation into
3 Duenez's complaints, it provides no evidence that Duenez unreasonably failed to take advantage
4 of any preventive or corrective opportunities provided by Dakota. (Dkt. No. 25 at 15.) Indeed,
5 the undisputed evidence demonstrates that Duenez made multiple complaints to Samsel and
6 cooperated during Samsel's investigation. (Dkt. No. 24 at 136, 146-47, 149-153.) Dakota has
7 provided no evidence that it took action against any employees based on Duenez's complaints or
8 provided him with any corrective or preventive opportunities. (*Id.* at 60-61.)

9 The Court thus GRANTS summary judgment and STRIKES Dakota's *Faragher* defense
10 as to Duenez's federal and state hostile work environment claims.

11 **III. CONCLUSION**

12 For the foregoing reasons, Plaintiff's motion for summary judgment (Dkt. No. 25) is
13 GRANTED in part and DENIED in part. Plaintiff's motion to strike (Dkt. No. 28) is DENIED.
14 In accordance with its above ruling, the Court FINDS the following:

15 1. Plaintiff engaged in protected activity under Title VII, § 1981, and WLAD for the
16 purpose of proving his retaliation claims.

17 2. Plaintiff suffered an adverse employment action under Title VII, § 1981, and WLAD
18 for the purpose of proving his retaliation claims.

19 3. The Court STRIKES defenses numbered 2, 3, and 6 from Defendant's answer.
20 Defendant is precluded from asserting these affirmative defenses at trial.

21 DATED this 19th day of January 2018.

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John C. Coughenour
UNITED STATES DISTRICT JUDGE