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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BRITTANY EASTON,  
Plaintiff,

v.

ASPLUNDH TREE EXPERTS, CO.,  
Defendant.

Case No. C16-1694RSM

ORDER GRANTING DEFENDANT’S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT

**I. INTRODUCTION**

This matter comes before the Court on Defendant’s Motion for Partial Summary Judgment. Dkt. #36. Defendant seeks dismissal of Plaintiff’s claim for past and future lost wages, which purportedly arise from a claim for retaliatory discharge. *Id.* Defendant argues that because Plaintiff failed to plead such a cause of action, and has failed to provide a calculation of damages as required under the Federal Rules of Civil Procedure, the unpled claim and request for associated damages must be dismissed. *Id.* Plaintiff responds that Defendant has been on notice of a claim for retaliatory discharge since she filed her EEOC complaint prior to litigation, and that she has provided sufficient damages information, and therefore her claims should not be dismissed. Dkt. #40. For the reasons set forth below, the Court disagrees with Plaintiff, and GRANTS Defendant’s Motion for Partial Summary Judgment.

1 **II. BACKGROUND<sup>1</sup>**

2 This is an employment action in which Plaintiff raises claims for violations of  
3 Washington’s Law Against Discrimination (“WLAD”) based on sex (female), intentional  
4 infliction of emotional distress, respondeat superior, negligent hiring and supervision and  
5 failure to train, and hostile work environment. Dkt. #1-1. Plaintiff alleges that she had been  
6 hired by Defendant as a flagger and was subsequently sexually harassed by her male  
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9 \_\_\_\_\_  
10 <sup>1</sup> While the Court recognizes that on summary judgment it is required to view the facts in the  
11 light most favorable to the non-moving party, the Court notes that Plaintiff has failed to  
12 provide a statement of facts that comports with Federal Rule of Civil Procedure 56. *See* Dkt.  
13 #40 at 2. Indeed, Plaintiff asserts one paragraph of conclusory statements as her factual  
14 background, without a single citation to the record. Under Rule 56,

15 A party asserting that a fact cannot be or is genuinely disputed must  
16 support the assertion by:

17 (A) citing to particular parts of materials in the record,  
18 including depositions, documents, electronically stored  
19 information, affidavits or declarations, stipulations (including  
20 those made for purposes of the motion only), admissions,  
21 interrogatory answers, or other materials; or

22 (B) showing that the materials cited do not establish the  
23 absence or presence of a genuine dispute, or that an adverse  
24 party cannot produce admissible evidence to support the fact.

25 Fed. R. Civ. Pro. 56(c). Further,

26 If a party fails to properly support an assertion of fact or fails to  
27 properly address another party’s assertion of fact as required by [Rule](#)  
28 [56\(c\)](#), the court may:

29 ...

30 (2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting  
materials — including the facts considered undisputed — show  
that the movant is entitled to it. . . .

1 supervisor. Dkt. #1-1 at ¶¶ 1-10. Plaintiff further alleges that after she reported the  
2 harassing behavior to another foreman and a supervisor, she suffered retaliation, Defendant  
3 failed to take appropriate corrective action, and she was eventually laid off. *Id.* at ¶¶ 12-32.  
4

5 Plaintiff earned her flagger’s card and joined the union in Grays Harbor County,  
6 where she was first dispatched out of the union hall. Typically, members of a union “wait  
7 until your name comes up to go out and work.” Dkt. #38, Ex. 1 at 46:5-7. Her first job was  
8 with Davey Tree Service, however, “they lost the contract for Grays Harbor and Asplundh  
9 took over.” *Id.* at 13:8-21. Plaintiff has acknowledged that flagging jobs are typically short  
10 term. For example, Plaintiff was a flagger for Coats, where she worked for only a week until  
11 “the job ended,” and also for Stebbins until “the job ended.” *Id.* at 37:8-25, 38:1-17, and  
12 153:17-158:2. Further, she worked as a short-term flagger for BC Traffic, Chicks of All  
13 Trades, and Rognlin, among others, and also switched unions to get more jobs. *Id.* at 38:1-3,  
14 38:24-39:3, and 163:7-24.  
15  
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17  
18 Plaintiff began working for Defendant when it needed flaggers to assist with a  
19 Contract for Vegetation Management Services and Emergency Storm Response that  
20 Defendant had with the PUD. She was one of two flaggers for that job. Dkt. #1-1 at ¶ 6 and  
21 Dkt. #37 at ¶ 3. Plaintiff alleges that while she performed her flagging duties from October  
22 2014 to August 7, 2015, a male supervisor sexually harassed her. Dkt. #1-1. She reported  
23 the behavior, and Plaintiff was placed with a different crew. Dkt. #38, Ex. 1 at 57:15-16.  
24 Shortly after that, Plaintiff was laid off; however, she was rehired again on or around  
25 September 27, 2015, and continued working until she was laid off again in late October  
26 2015. Dkt. #1-1 at ¶ 6.  
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1 Jeff McClain, the Contract Construction Superintendent for the PUD, oversaw and  
2 administered the Contract for Vegetation Management Services and Emergency Storm  
3 Response. Dkt. #37 at ¶¶ 2-3. The Contract was a “time and materials” contract. *Id.* at ¶ 4.  
4 “The total amount of work to be performed under th[at] Contract is the amount that the  
5 District requires, in its sole discretion.” *Id.* at ¶ 4. Under the contract, the PUD scheduled  
6 the work of Defendant at its sole discretion. *Id.* at ¶ 5.  
7  
8

9 In August 2015, and at various times thereafter, Mr. McClain directed Defendant,  
10 through its General Foreman Robert Fly, to conduct work that did not require flaggers. *Id.* at  
11 ¶ 6. He did this in order to reduce the costs being incurred by the PUD. *Id.* Defendant laid  
12 off its two flaggers as a result. Defendant explained to Plaintiff that the lay-off was “due to  
13 budget cuts.” Dkt. #38, Ex. 1 at 18:19-21, Ex. 2 at 37:22-38:4 and Ex. 3 at 105:6-17. Brief  
14 layoffs due to budget concerns were standard for the industry. *Id.*, Ex. 3 at 97:8-10.  
15 Defendant rehired Plaintiff again when the “the contract construction supervisor for the PUD  
16 told us that they had work that they need flaggers for.” Dkt. #38, Ex. 3 at 110:1-5.  
17  
18

19 Plaintiff alleges in her Complaint that  
20

21 [She] complained [] to Mr. Fly on or around August 6, 2015. She was  
22 laid off the following day under the pretense of budget constraints.  
23 Plaintiff alleges that she was in fact fired for her complaints of Mr.  
24 Mel’s inappropriate, harassing, and discriminatory behavior. . . .

25 Dkt. #1-1 at ¶ 24. She does not address the fact that she was rehired again on or around  
26 September 27, 2015, and continued working until she was laid off again in late October  
27 2015, although she included the fact in her Complaint. Dkt. #1-1 at ¶ 6. Plaintiff did not  
28 plead a cause of action for retaliatory discharge. *See* Dkt. #1-1 at ¶¶ 33-45.  
29

30 On December 21, 2016, Plaintiff provided her Initial Disclosures to Defendant. In  
those Disclosures she stated that she had “not determined all damages and claims for special  
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1 and general damages and Plaintiff will supplement this information.” Dkt. #38, Ex. 4 at 5.  
2 She further stated that she may seek “compensatory damages for back pay, front pay, lost  
3 benefits and medical expenses.” Dkt. #38, Ex. 4 at 5. On August 31, 2017, Plaintiff  
4 provided Supplemental Disclosures to Defendant repeating the same verbiage. *Id.*, Ex. 5 at  
5 4. Subsequently, in her discovery responses, Plaintiff objected that inquiries about the  
6 amount of her wage loss claim was “beyond the scope of permissible discovery,” but  
7 answered:  
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9  
10 Plaintiff has yet to consult with an economic loss or vocational expert to  
11 determine the actual damages. Plaintiff will supplement with that  
12 information as soon as it becomes available.

13 *Id.*, Ex. 6 at 10. Plaintiff does not dispute that, to date, she has not provided Defendant with  
14 a specific calculation of her alleged wage loss damages.  
15

### 16 III. DISCUSSION

#### 17 A. Legal Standard on Summary Judgment

18 Summary judgment is appropriate where “the movant shows that there is no genuine  
19 dispute as to any material fact and the movant is entitled to judgment as a matter of law.”  
20 Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In ruling  
21 on summary judgment, a court does not weigh evidence to determine the truth of the matter,  
22 but “only determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco, Inc.*, 41  
23 F.3d 547, 549 (9th Cir. 1994) (citing *Federal Deposit Ins. Corp. v. O’Melveny & Meyers*,  
24 969 F.2d 744, 747 (9th Cir. 1992)). Material facts are those which might affect the  
25 outcome of the suit under governing law. *Anderson*, 477 U.S. at 248.  
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29 The Court must draw all reasonable inferences in favor of the non-moving party.  
30 See *O’Melveny & Meyers*, 969 F.2d at 747, *rev’d on other grounds*, 512 U.S. 79 (1994).

1 However, the nonmoving party must make a “sufficient showing on an essential element of  
2 her case with respect to which she has the burden of proof” to survive summary judgment.  
3 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Further, “[t]he mere existence of a  
4 scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be  
5 evidence on which the jury could reasonably find for the plaintiff.” *Anderson*, 477 U.S. at  
6 251.  
7

### 8 **B. Plaintiff’s Alleged Claim for Retaliation**

9 Defendant argues that Plaintiff’s claim for past and future wage loss should be dismissed  
10 because she failed to plead a cause of action for retaliatory discharge. Dkt. #36 at 10-11.  
11 Plaintiff responds that she sufficiently pled a cause of action for retaliatory discharge because  
12 she included the necessary factual allegations in her Complaint, and because she had pled  
13 retaliatory discharge in her initial EEOC charge prior to litigation. Dkt. #40 AT 8-9. The Court  
14 is not persuaded.  
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18 As an initial matter, the Court notes that Plaintiff did not include an actual Cause of  
19 Action for retaliatory discharge. *See* Dkt. #1-1 at ¶¶ 33-45. Instead, she pleaded five causes of  
20 action as follows: 1) violation of Washington’s Law Against Discrimination (“WLAD”) based  
21 on sex (female); 2) intentional infliction of emotional distress; 3) respondeat superior; 4)  
22 negligent hiring and supervision and failure to train; and 5) hostile work environment. *Id.*  
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25 Rule 8 of the Federal Rules of Civil Procedure provides that a pleading must contain  
26 “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed.  
27 R. Civ. P. 8(a)(2). This requirement operates, in part, to ensure that a defendant has notice of  
28 the legal claims being brought against it, so that it may effectively defend itself. The  
29 allegations contained in Plaintiff’s alleged fact section of her Complaint do not satisfy the  
30

1 “short and plain statement” requirement included in Rule 8. Plaintiff alleges that she was  
2 laid off as a result of her complaints, under the pretext of budgetary constraints. Dkt. #1-1 at  
3 ¶ 24. However, because she failed to plead a corresponding cause of action for retaliatory  
4 discharge, she does not identify any legal basis for her claim. Plaintiff’s failure to  
5 specifically allege the elements of retaliatory discharge restricted Defendant’s ability to  
6 respond to the alleged cause of action or to conduct discovery on that cause of action, and  
7 makes it nearly impossible for the Court to evaluate the sufficiency of her allegations.  
8 Indeed, the Court cannot even determine whether she asserts a cause of action under state or  
9 federal law. As a result, the Court agrees that Plaintiff has failed to plead a cause of action for  
10 retaliatory discharge, and will be precluded from pursuing such a cause of action in this  
11 litigation.  
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15         Likewise, Plaintiff will be precluded from offering evidence of lost past and future  
16 wages. Under Federal Rule of Civil Procedure 26(a)(1)(A)(iii), Plaintiff was required to  
17 provide “a computation of each category of damages claimed” and to make available “the  
18 documents or other evidentiary material, unless privileged or protected from disclosure, on  
19 which each computation is based . . . .” Plaintiff argues that her production of tax documents  
20 and her own anticipated testimony has provided Defendant with enough information about  
21 her wage loss. The Court disagrees. At no point in this litigation did plaintiff quantify —  
22 even roughly — the amount of actual damages she suffered as a result of her layoff. In fact,  
23 she states she does not intend to ask for any specific amount at trial. However, making  
24 certain documents available and promising that someone (in this case Plaintiff) will testify  
25 regarding damages is not a “computation” and fails to apprise Defendant of the extent of its  
26 exposure in this case.  
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1 Rule 37(c)(1) prohibits a party from using evidence at trial that was not properly  
2 disclosed as required under Rule 26(a). This sanction is “self-executing,” and no showing of  
3 bad faith or willfulness is required. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d  
4 1101, 1106 (9th Cir. 2001). Plaintiff has made no attempt to show that her failure to comply  
5 with Rule 26(a) was justified, and offers no authority for her position that she was exempted  
6 from Rule 26 disclosure requirements by virtue of the fact that she does not intend to ask for  
7 a specific amount of lost wages at trial. Having failed to show that the lack of disclosure was  
8 substantially justified, Plaintiff will not be permitted to offer evidence of actual damages,  
9 including any of her own testimony as to her wages, hours and benefits while working at  
10 Asplundh, or what she was earning before compared to what she is earning now.  
11  
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#### 13 IV. CONCLUSION

14  
15 Having reviewed Defendant’s Motion for Partial Summary Judgment, the Opposition  
16 thereto and Reply in support thereof, along with the supporting Declarations and Exhibits and  
17 the remainder of the record, the Court hereby finds and ORDERS:  
18

- 19 1. Defendant’s Motion for Partial Summary Judgment (Dkt. #36) is GRANTED, and  
20 Plaintiff is precluded from pursuing a claim for retaliatory discharge and from  
21 presenting any evidence of wage loss damages, as discussed above.  
22
- 23 2. Plaintiff shall proceed in this litigation on the Causes of Action asserted in her  
24 Complaint at ¶¶ 33-45  
25

26 DATED this 15 day of November, 2017.  
27

28 

29 RICARDO S. MARTINEZ  
30 CHIEF UNITED STATES DISTRICT JUDGE