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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 KATHY MCGUIRE,

11 Plaintiff,

12 v.

13 THE STATE OF WASHINGTON,
14 DEPARTMENT OF TRANSPORTATION,
15 KERMIT WOODEN, NIKI PA VLECHEC
and TAM LE,

16 Defendants.

CASE NO. C09-5198RJB

**ORDER ON
DEFENDANTS'
MOTION FOR
SUMMARY JUDGMENT
and MOTION TO
STRIKE**

17 This matter comes before the Court on the Defendants' Motion for Summary Judgment
18 (Dkt. 19) and Defendants' Motion to Strike (Dkt. 36). The Court has reviewed the pleadings
19 filed regarding the motions and the record herein.

20 **I. FACTUAL AND PROCEDURAL BACKGROUND**

21 On April 13, 2009, Plaintiff filed this case, asserting that Defendants improperly demoted
22 and then discharged her from the Washington Department of Transportation ("DOT"). Dkt. 1, at
23 2-3.

24 **A. BASIC FACTS**

25 In the mid-1980's Plaintiff began working for Washington State in the Human Resources
26 Department. Dkt. 28, at 1. In 1998, she transferred into a DOT human resources field office,
27 first holding the position of a Human Resources Consultant 1 ("HRC1"). Dkt. 28, at 2. She
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1 eventually received a promotion to Human Resources Consultant 2 (“HRC2”). Dkt. 28, at 2-3.
2 Plaintiff states that while she worked in the field office, her duties required her to be a “jack of
3 all trades.” Dkt. 28, at 2. She states that she had exposure to a wide variety of duties from
4 providing information to managers to direct involvement with the termination of employees.
5 Dkt. 28, at 2.

6 In 2001, Plaintiff transferred to DOT’s main human resources department in Olympia,
7 Washington. Dkt. 28, at 2. Plaintiff’s position was reallocated downward twice while at the
8 main office. Dkt. 28, at 3. First, she reallocated back to HRC1. Dkt. 28, at 3. Adrienne
9 Sanders, one of Plaintiff’s supervisors until 2006, stated that Plaintiff’s position was reallocated
10 downward based on Plaintiff’s answers in a questionnaire regarding her duties. Dkt. 20, at 2.
11 Plaintiff’s pay became “Y-rated,” which meant that though her salary would not be reduced, she
12 would not receive any pay increases until her HRC1 wages exceeded her Y-rated salary. Dkt.
13 28, at 3. Plaintiff states that even though her duties did not change, on August 29, 2002, she was
14 again downgraded to the position of Human Resources Consultant Assistant. Dkt. 28, at 3. Ms.
15 Sanders states that Plaintiff’s position was downgraded because “the requirements of her
16 position did not require a professional level of skill and knowledge.” Dkt. 20, at 2.

17 Plaintiff states that while at the main office, she spent around 65% of her time working
18 on DOT’s human resources computer system - “Human Management Resource System.” Dkt.
19 28-2, at 8. Her duties included data entry and data analysis - checking, verifying, and resolving
20 issues “before processing personnel actions such as: new hires, promotions, transfers,
21 terminations, non-permanent appointment, etc.” Dkt. 28-2, at 8. She also monitored “salary
22 placement[s], periodic increment date[s], . . . and leave without pay.” Dkt. 28-2, at 8. Plaintiff
23 would input information about newly hired people, including whether they were eligible for
24 benefits. Dkt. 20, at 5. She also served as backup for the human resources benefits administrator
25 and the computer system’s security administrator. Dkt. 28-2, at 8. She states that she trained
26 newly hired people. Dkt. 28, at 3. She spent 25% of her time working with DOT managers
27 regarding personnel policies and procedures. Dkt. 28, at 3 and Dkt. 28-2, at 8. Plaintiff was one
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1 of two Human Resources Consultant Assistants in her department. Dkt. 21, at 3.

2 Ms. Sanders states that Plaintiff had difficulty with job performance. Dkt. 20, at 3. She
3 states that Plaintiff had accuracy problems with the data she inputted, one of her core duties.
4 Dkt. 20, at 3. Ms. Sanders also states that Plaintiff's written work was deficient. Dkt. 20, at 3-4.
5 Ms. Sanders states that accuracy issues and issues with Plaintiff's writing culminated in the
6 issuance of a memo of understanding on September 18, 2006. Dkt. 20, at 4. She states that
7 Plaintiff made sufficient improvement to keep her job, but still had to have third parties review
8 all Plaintiff's written communications. Dkt. 20, at 4.

9 In late 2007, a decision was made to reorganize the DOT's Human Resources office.
10 Dkt. 21, at 3. The two Human Resources Consultant Assistant positions (one of which Plaintiff
11 held) were reclassified into HRC 1 positions. Dkt. 21, at 3. About 50% of the time in these new
12 positions would be data entry, and 50% would be an active consulting component. Dkt. 21, at 3.
13 Niki Pavlicek, one of Plaintiff's supervisors, stated that she felt that neither Plaintiff nor the
14 other Human Resources Consultant Assistant were eligible to "be promoted to the new position
15 based upon the alteration in knowledge, skills, and ability" that was required of the new position.
16 Dkt. 21, at 3. Ms. Pavlicek stated that she thought the "consulting component of the job was not
17 a technical skill, but rather a talent that would be sought during interviews, whereas the data
18 entry component was something that it would be expected that an HRC hire would be able to
19 train to do." Dkt. 21, at 3-4. Kermit Wooden, the Director of DOT's Human Resources Office,
20 states that the decision to reclassify the positions was an effort to increase the efficiency of the
21 entire office, as several different people were performing similar work. Dkt. 22, at 2-3.

22 On October 15, 2007, Plaintiff's manager, Tam Le, recommended that her position be
23 upgraded to HRC 1. Dkt. 28-2, at 8.

24 On January 16, 2008, Plaintiff was given notice of her layoff, but was offered a position
25 as a Human Resources Consultant Assistant 2 with the office responsible for coordinating the
26 agency's drug and alcohol program. Dkt. 21, at 3-4. She accepted the position, but a few days
27 later, on January 26, 2008, she sent a notice that she was retiring. Dkt. 21-3. Plaintiff states that
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1 “due to the stressful work environment” she felt forced to retire. *Id.* She also points out that she
2 did not think the new position offered a flexible schedule. *Id.* Defendants state that the position
3 did have flexible hours. Dkt. 21, at 4. Defendants state that the other Human Resources
4 Consultant Assistant accepted the position after Plaintiff declined it. Dkt. 21, at 4.

5 Plaintiff did not apply for the newly reclassified HRC position. Dkt. 22, at 4.
6 Defendants maintain that despite the fact that Plaintiff had held a position as an HRC 1 in the
7 past, “not all of the positions are the same.” Dkt. 22, at 4. They emphasize that the reclassified
8 position was going to have a heavy emphasis on communication skills, an area in which Plaintiff
9 struggled. Dkt. 22, at 4. Her official Notice of Layoff stated that she was “ineligible to continue
10 in the position once it has been reallocated because [she did] not possess the required knowledge,
11 skill and abilities required of the position.” Dkt. 22-2, at 1.

12 Plaintiff states that as she entered data, she realized that Kermit Wooden, Director of
13 Human Resources for DOT, had made the decision to start paying on call/temporary workers
14 health insurance benefits. Dkt. 28, at 4. She asserts that it was not her job to address or report
15 this issue, but she felt that under the relevant regulations these workers did not immediately
16 qualify for benefits. Dkt. 28, at 4. She states that she began to emailing her concerns in
17 September of 2007. Dkt. 28, at 6. Plaintiff further notes that after she began to document her
18 concerns, her supervisor began keeping a log of “supposed data entry ‘errors’” in October of
19 2007. Dkt. 28, at 7. She states that Defendants also began to monitor her productivity at the
20 same time. Dkt. 28, at 7. She states that they appeared to have been monitoring the number of
21 times she inspected insurance issues. Dkt. 28, at 7.

22 Mr. Wooden acknowledges that Plaintiff raised issues regarding benefits given to part
23 time and temporary workers for several months prior to her resignation. Dkt. 22, at 5. He states
24 that there was extensive discussion of these issues at “the high levels of DOT,” of which Plaintiff
25 would not have been aware. Dkt. 22, at 5. He asserts that “there were issues related to ongoing
26 litigation involved with part time employees and confusion over application of unclear rules.”
27 Dkt. 22, at 5. He states that Plaintiff’s job did not include making decisions regarding who
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1 qualifies for health benefits. Dkt. 29-3, at 16. Mr. Wooden stated that he did not know of
2 Plaintiff's official whistleblower complaint, filed with the State Auditors Office, until after
3 January 28, 2008. Dkt. 22, at 5.

4 **B. PROCEDURAL BACKGROUND**

5 In her Complaint, Plaintiff makes federal claims against the Defendants for violation of
6 the Age Discrimination in Employment Act ("ADEA"), 42 U.S.C. § 623, *et seq.*, and for
7 retaliation under the First Amendment of the United States Constitution, actionable under 42
8 U.S.C. § 1983. Dkt. 1, at 3. She makes several state law claims including: a claim under the
9 Washington Law Against Discrimination ("WLAD"), RCW 49.60, *et seq.*, a claim for "whistle
10 blower protection as adopted for Washington State Employees," a claim for termination in
11 violation of public policy, and claims for intentional and negligent emotional distress. *Id.*
12 Plaintiff seeks monetary damages, costs, and attorneys' fees. *Id.*

13 **B. PENDING MOTIONS**

14 Defendants move to summarily dismiss Plaintiff's federal claims arguing that: 1) the
15 state and DOT are immune from Plaintiff's ADEA and 42 U.S.C. § 1983 claims due to the
16 Eleventh Amendment, and 2) Plaintiff's ADEA claims against the individual Defendants should
17 be dismissed because individuals are not liable under the ADEA. Dkt. 19. Defendants argue
18 that Plaintiff's First Amendment claim against the individual Defendants should be dismissed
19 because her speech was made as an employee and not a citizen, and there was no adverse
20 employment decision as a result of her speech. *Id.* Plaintiff responds, arguing that she has a
21 viable First Amendment claim against the individual defendants because raising issues about
22 benefits for on call workers was not a part of her job duties and she raised the issue repeatedly
23 before her position was reclassified. Dkt. 27.

24 As to Plaintiff's state law claims, Defendants argue that Plaintiff's WLAD claim should
25 be dismissed because she fails to meet two prongs of the test: 1) she did not apply for and was not
26 qualified for the promotion, and 2) that she was replaced by a younger person because the
27 position that she held was not the same as the newly created position. Dkt. 19. Defendants
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1 argue that Plaintiff's negligent and intentional infliction of emotional distress claims against the
2 State and DOT should be dismissed under the Eleventh Amendment, and that to the extent that
3 she is asserting such claims against the individual Defendants, they should be dismissed as
4 subsumed by her discrimination claims. *Id.* Defendants argue that Plaintiff's claim for wrongful
5 discharge in violation of public policy should be dismissed because she was not discharged. *Id.*
6 Defendants argue that her constructive discharge claim should be dismissed because Plaintiff did
7 not establish that the conditions of her job were so difficult or unpleasant that a reasonable
8 person in her shoes would have resigned. *Id.* Defendant lastly argues that Plaintiff's whistle
9 blower claim, brought under RCW 42.40 should be dismissed because as a matter of fact, she
10 was not a whistle blower, and no retaliation could have occurred. *Id.*

11 **II. DISCUSSION**

12 **A. SUMMARY JUDGMENT - STANDARD**

13 Summary judgment is proper only if the pleadings, depositions, answers to
14 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
15 genuine issue as to any material fact and the moving party is entitled to judgment as a matter of
16 law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the
17 nonmoving party fails to make a sufficient showing on an essential element of a claim in the case
18 on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317,
19 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could
20 not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v.*
21 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific,
22 significant probative evidence, not simply "some metaphysical doubt."); *See also* Fed. R. Civ. P.
23 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence
24 supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions
25 of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v.*
26 *Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

27 The determination of the existence of a material fact is often a close question. The court
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1 must consider the substantive evidentiary burden that the nonmoving party must meet at trial –
2 e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec.*
3 *Serv., Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of
4 the nonmoving party only when the facts specifically attested by that party contradict facts
5 specifically attested by the moving party. The nonmoving party may not merely state that it will
6 discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial
7 to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*).
8 Conclusory, non specific statements in affidavits are not sufficient, and missing facts will not be
9 presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888-89 (1990).

10 **B. ELEVENTH AMENDMENT IMMUNITY AND CLAIMS ASSERTED**
11 **AGAINST THE STATE AND DOT**

12 “As the Supreme Court has applied the Eleventh Amendment, an unconsenting State is
13 immune from suits brought in federal courts by her own citizens as well as by citizens of another
14 State.” *Pittman v. Oregon Employment Dept.*, 509 F.3d 1065, 1071 (9th Cir. 2007) (*internal*
15 *quotations omitted*). There are exceptions to Eleventh Amendment immunity. *Id.* For example,
16 sovereign immunity does not bar suits for prospective injunctive relief against individual state
17 officials acting in their official capacity. *Id.* Additionally, Congress, in some circumstances, can
18 abrogate Eleventh Amendment immunity. *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62 (2000).

19 1. *Federal Claims - ADEA and First Amendment*

20 Defendants properly point out that pursuant to the Eleventh Amendment, the state, its
21 agencies, and Defendants named in their official capacities have immunity from suit as to
22 Plaintiff’s ADEA claim and First Amendment claim brought under 42 U.S.C. § 1983. Dkts. 19
23 and 32 (*citing Kimel v. Florida Bd. Of Regents*, 528 U.S. 62 (2000) (holding Eleventh
24 Amendment immunity applies to State and State agencies for ADEA claims)). Plaintiff does not
25 meaningfully respond to the argument that her federal claims (the ADEA claim and First
26 Amendment claim brought under 42 U.S.C. § 1983) can not be brought against the State or its
27 agencies. To the extent that she makes such claims, they should be dismissed.

28 2. *State Claims*

1 “[S]tate law claims are barred by the Eleventh Amendment, which precludes the
2 adjudication of pendent state law claims against nonconsenting state defendants in federal
3 courts.” *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004).

4 The State and DOT move for dismissal of Plaintiff’s negligent and intentional infliction
5 of emotional distress claims based upon Eleventh Amendment immunity. Dkt. 19 and 32.
6 Plaintiff does not oppose dismissal of these claims. They should be dismissed under the
7 Eleventh Amendment against the State and DOT.

8 The State and DOT do not move for dismissal of the remaining state law claims based on
9 Eleventh Amendment immunity.

10 **B. FEDERAL CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS**

11 1. ADEA

12 Liability under the ADEA is limited to employers. *Miller v. Maxwell's Intern. Inc.*, 991
13 F.2d 583, 587 (9th Cir. 1993). Individual employees are not liable under the ADEA. *Id.* To the
14 extent that Plaintiff makes an ADEA claim against the individual Defendants, her claim should
15 be dismissed.

16 2. Retaliation in Violation of the First Amendment brought under 42 U.S.C.
17 § 1983

18 “[T]he Eleventh Amendment does not erect a barrier against suits to impose individual
19 and personal liability on state officials under § 1983,” however. *Hafer v. Melo*, 502 U.S. 21, 30-
20 31 (1991). Accordingly, the Defendants’ Motion for Summary Judgment dismissal of the First
21 Amendment claim, brought under § 1983 against the individual Defendants, in their personal and
22 individual capacities, should not be granted the basis of Eleventh Amendment Immunity.

23 A private right of action exists against government officials who, acting under the color
24 of state law, violate federal constitutional or statutory rights. *Jackson v. City of Bremerton*, 268
25 F.3d 646, 650 (9th Cir. 2001) (*citing* 42 U.S.C. § 1983). Plaintiff here alleges that the individual
26 Defendants retaliated against her for exercising her First Amendment rights. Dkt. 1. In order to
27 decide whether there is sufficient evidence to allow a claim of retaliation in violation of the First
28 Amendment, five questions must be answered: (a) whether the plaintiff spoke on a matter of

1 public concern; (b) whether the plaintiff spoke as a private citizen or public employee; (c)
2 whether the plaintiff's protected speech was a substantial or motivating factor in the adverse
3 employment action; (d) whether the state had an adequate justification for treating the employee
4 differently from other members of the general public; and (e) whether the state would have taken
5 the adverse employment action even absent the protected speech. *Eng v. Cooley*, 552 F.3d 1062,
6 1070 (9th Cir. 2009). Plaintiff bears the burden to establish the first three, then the burden shifts
7 to the employer. *Id.*, at 1071-72.

8 a. *Matter of Public Concern?*

9 “Speech involves a matter of public concern when it can fairly be considered to relate to
10 any matter of political, social, or other concern to the community.” *Eng*, at 1070 (*internal*
11 *citations omitted*).

12 The Defendants do not contest that raising issues regarding improper overpayment of
13 benefits to public employees is a matter of public concern.

14 b. *Private Citizen or Public Employee?*

15 “Statements are made in the speaker's capacity as citizen if the speaker ‘had no official
16 duty’ to make the questioned statements, or if the speech was not the product of ‘performing the
17 tasks the employee was paid to perform.’” *Eng*, at 1071 (*quoting Posey v. Lake Pend Oreille*
18 *School Dist. No. 84*, 546 F.3d 1121, 1127 n.2 (9th Cir. 2008)).

19 Defendants contest Plaintiff’s assertion that she was speaking as a private citizen when
20 she raised the issues regarding the benefits being given to on-call employees. Dkt. 19. Review
21 of the record indicates that there are issues of fact as to whether Plaintiff’s job responsibilities
22 included raising issues regarding these benefits. Plaintiff spent a majority of her time on data
23 entry and data analysis. Dkt. 28-2, at 8. That data analysis included checking, verifying, and
24 resolving issues before processing personnel actions. *Id.* She also monitored salary rates and
25 leave. *Id.* Plaintiff would input information about newly hired people, including whether they
26 were eligible for benefits. Dkt. 20, at 5. Mr. Wooden, the Human Resources Director,
27 acknowledges that Plaintiff’s job did not include making decisions regarding who qualifies for
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1 health benefits. Dkt. 29-3, at 16. Further, Defendants do not contest that it was not her job to
2 report problems of benefits given to on-call workers. Dkt. 32. In a summary judgment motion,
3 the facts must be viewed in a light most favorable to Plaintiff as to her employment
4 responsibilities. *Eng*, at 1071 (noting that if the facts demonstrate an official duty to utter the
5 speech at issue, then the speech is unprotected, and qualified immunity should be granted).
6 There are sufficient issues of fact to deny summary judgment on this portion of the test.

7 c. *Speech Was a Substantial or Motivating Factor in the Adverse*
8 *Employment Action?*

9 The free speech cases in which the Ninth Circuit has held that circumstantial evidence
10 created a genuine issue of material fact on the question of retaliatory motive, the plaintiff, in
11 addition to producing evidence that his employer knew of his speech, produced additional
12 evidence of at least one of the following three types. *Keyser v. Sacramento City Unified School*
13 *Dist.*, 265 F.3d 741, 751 (2001).

14 First, we have held that a plaintiff created a genuine issue of material fact where
15 he produced the additional evidence that the proximity in time between the
16 protected action and the allegedly retaliatory employment decision was one in
17 which a jury logically could infer that the plaintiff was terminated in retaliation
18 for his speech. Second, we have held that a plaintiff created a genuine issue of
19 material fact where he produced the additional evidence that his employer
20 expressed opposition to his speech, either to him or to others. Third, we have
21 held that a plaintiff created a genuine issue of material fact where he produced the
22 additional evidence that his employer's proffered explanations for the adverse
23 employment action were false and pretextual.

24 *Id.* at 751-752 (*internal quotation marks and citations omitted*).

25 Though thin, there are issues of fact as to whether Plaintiff's speech motivated
26 Defendants' decision to reallocate her position. First, construing the facts in light most favorable
27 to Plaintiff, she last raised her concerns within a short period of time (a few months) from when
28 the decision was made to reallocate her position. Dkt. 22, at 5. Defendants point out that they
knew of her opinion for at least a year prior to the reallocation and her position was not the only
position reallocated. Dkt. 19. That, however, does not necessarily negate the fact that her
position was reallocated due to an improper motive. It appears that Plaintiff had begun to
document her concerns in September of 2007 and was raising her concerns more and more

1 forcefully. Dkt. 28-2, at 21-26. Plaintiff was preemptively told in her notice that she was not
2 qualified for the reallocated position (Dkt. 22-2, at 1) despite the fact that she had held the
3 position before. Plaintiff has produced sufficient “additional evidence that the proximity in time
4 between the protected action and the allegedly retaliatory employment decision was one in
5 which a jury logically could infer that the plaintiff was terminated in retaliation for [her]
6 speech.” *Keyser*, at 751.

7 Secondly, Plaintiff has shown that not only did Defendants know of her opinion
8 regarding the payment of these benefits, but that they opposed her speech. *Id.*; Dkt. 22, at 5.
9 There are sufficient issues of fact as to this element to deny Defendants’ motion for summary
10 judgment.

11 d. *State Had an Adequate Justification for Treating the Plaintiff*
12 *Differently from Other Members of the General Public?*

13 Parties do not meaningfully address this element.

14 e. *State Would Have Taken the Adverse Employment Action Even*
15 *Absent the Protected Speech?*

16 The final element to be decided in determining whether there are issues of fact on
17 Plaintiff’s First Amendment retaliation claim, is whether the government can demonstrate that it
18 would have reached the same adverse employment decision even in the absence of the
19 employee’s protected conduct. *Eng*, at 1072. In other words, the government may avoid liability
20 by “showing that the employee’s protected speech was not a but-for cause of the adverse
21 employment action.” *Id.*, (citing *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S.
22 274, 287 (1977)). This question “asks whether the adverse employment action was based on
23 protected and unprotected activities, and if the state would have taken the adverse action if the
24 proper reason alone had existed.” *Id.* (internal citations omitted).

25 The Defendants argue that even if the Court finds that there are issues of fact regarding
26 whether Plaintiff spoke out as a citizen, and whether there is evidence in the record of an
27 improper motive behind the reclassification of her position, there is evidence that Defendants
28 would have still reclassified Plaintiff’s position. Dkt. 32. Defendants state that they reallocated

1 the position to “create efficiencies with limited resources.” *Id.* Plaintiff has shown that there are
2 issues of fact as to whether Defendants would have reallocated her position in the absence of an
3 improper motive and that they discouraged her from applying for the position. In any event, the
4 Ninth Circuit has held that the “*Mt. Healthy* but-for causation inquiry is purely a question of
5 fact.” *Id.* Accordingly, summary judgment on this issue should be denied.

6 C. STATE LAW CLAIMS

7 1. WLAD

8 Plaintiff brings a claim against Defendants for violation of her right to be free from
9 discrimination based upon her age pursuant to WLAD. Dkt. 1.

10 The State and DOT fail to raise Eleventh Amendment immunity to Plaintiff’s WLAD
11 claim. Even presuming that the State and DOT did intend to raise Eleventh Amendment
12 immunity, unlike in the federal anti-discrimination statutes, “[a] supervisor acting in the interest
13 of an employer who employs eight or more people can be held individually liable for his or her
14 discriminatory acts” under WLAD. *Brown v. Scott Paper Worldwide Co.*, 143 Wash.2d 349, 358
15 (2001). Accordingly, the merits of this claim will be addressed.

16 Washington courts have largely adopted the burden shifting scheme announced in
17 *McDonnell Douglas* to claims of employment discrimination cases brought under the WLAD.
18 *See Grimwood v. University of Puget Sound*, 110 Wash.2d 355, 362 (1988)(applying the
19 *McDonnell Douglas* test to claim of employment discrimination brought under WLAD);
20 *Coghlan v. American Seafoods Co. LLC*, 413 F.3d 1090, 1094 (9th Cir. 2005)(noting
21 Washington's employment discrimination law largely parallels federal law under Title VII, and
22 so treatment of a plaintiff’s Title VII claim thus applies also to his similar claim under the
23 WLAD); *Hernandez v. Space Labs Medical Inc.*, 343 F.3d 1107 (9th Cir. 2003)(applying
24 *McDonnell Douglas* burden shifting test to discrimination claim brought under Title VII and the
25 WLAD). The first step of the *McDonnell Douglas* test requires that plaintiff establish a
26 prima facie case of discrimination. *Id.* A plaintiff must establish that (1) she belongs to a
27 protected class, (2) she was qualified for the position (she was performing her job in a
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1 satisfactory manner), (3) she was subjected to an adverse employment action, and (4) she was
2 replaced by a person outside the protected class. *See Coghlan* at 1094; *McDonnell Douglas* at
3 802. In the second step of the *McDonnell Douglas* test, if the plaintiff succeeds in proving the
4 prima facie case, the burden shifts to the defendant to articulate some legitimate,
5 nondiscriminatory reason for the adverse employment action. *Id.* In the last step of the
6 *McDonnell Douglas* test, “should the defendant carry this burden, the plaintiff must then have an
7 opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by
8 the defendant were not its true reasons, but were a pretext for discrimination.” *McDonnell*
9 *Douglas* at 802.

10 Defendants acknowledge that Plaintiff meets the first and third prong of the prima facie
11 test. Defendants argue that she was not qualified for the promotion (element two) and she was
12 not replaced by someone outside the protected class (element four). Dkts. 19 and 32. Parties do
13 not address the other prongs of the burden shifting test.

14 There are issues of fact as to whether Plaintiff was qualified for the reallocated position.
15 Defendant points to job evaluations which are critical of Plaintiff’s communication skills. Dkts.
16 19 and 32. Defendants state that they did not think she had the communication or data entry
17 skills for the reclassified position. Dkt. 21, at 3. Plaintiff counters with evidence that she had
18 good job evaluations, and she had already held a position similar to the newly reallocated
19 position. Dkt. 28, at 2. Plaintiff’s showing is sufficient to deny summary judgment as to this
20 element.

21 Defendants’ motion regarding the fourth element should also be denied. Defendant
22 argues that she was not “replaced” by someone younger because her position was eliminated.
23 Dkt. 19. Defendants do not dispute that someone substantially younger than Plaintiff was given
24 the reallocated position. Moreover, Defendants do not dispute that Plaintiff was told, both
25 verbally and in writing that she was not qualified for the reallocated position, even though she
26 had held a similar position in the past. Defendants make much of the fact that Plaintiff did not
27 formally apply for the newly allocated position. Plaintiff made a sufficient showing that such
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1 application would be futile due to the letter she received and the discussions with her
2 supervisors. “Courts have generally held that the failure to formally apply for a job opening will
3 not bar a Title VII plaintiff from establishing a prima facie claim of discriminatory hiring, as
4 long as the plaintiff made every reasonable attempt to convey his interest in the job to the
5 employer.” See *E.E.O.C. v. Metal Service Co.*, 892 F.2d 341, 348-49 (3rd Cir. 1994). This is
6 true in failure to promote cases. *Id.* (citing *Holsey v. Armour & Co.*, 743 F.2d 199, 208-09 (4th
7 Cir.1984)(where employee was never asked to fill out an application, the employer had no blacks
8 in sales positions, and had actively discouraged black applicants, casual inquiry into the
9 possibility of promotion to a sales job sufficient for application); *Paxton v. Union Nat'l Bank*,
10 688 F.2d 552, 568 (8th Cir.1982) (where vacancy not posted and plaintiff did not hear about it
11 from any other source until the position was filled, expression of a general desire to advance in
12 bank was sufficient for application)). This is also true in failure to hire cases. *Id.* (*internal*
13 *citations omitted*). There are sufficient issues of fact as to whether she “replaced” by someone
14 younger.

15 Defendants’ motion to dismiss Plaintiff’s WLAD claim should be denied.

16 2. Termination in Violation of Public Policy and Constructive Discharge

17 “Washington law does not recognize a cause of action for constructive discharge; rather
18 the law recognizes an action for wrongful discharge which may be either express or
19 constructive.” *Snyder v. Medical Service Corp. of Eastern Washington*, 145 Wash.2d 233, 238
20 (2001). “A claim for wrongful discharge in violation of public policy may arise when an
21 employer discharges an employee for reasons that contravene a clear mandate of public policy.”
22 *Korslund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wash.2d 168, (2005)(citing *Gardner v.*
23 *Loomis Armored, Inc.*, 128 Wn.2d 931, 941 (1996)). The discharge may be either “express” or
24 “constructive.” *Id.* There are four elements to analyze for a wrongful discharge in violation of
25 public policy claim: (1) the existence of a clear public policy (the clarity element), (2)
26 discouraging the conduct in which Plaintiff engaged would jeopardize the public policy (the
27 jeopardy element), (3) the public-policy-linked conduct caused the dismissal (the causation

1 element), and (4) there must not be an overriding justification for the dismissal (the absence of
2 justification element). *Gardner* at 941.

3 Defendants State and DOT do not expressly move for dismissal of the termination in
4 violation of public policy and constructive discharge claims based upon Eleventh Amendment
5 immunity. Parties do not address whether a “constructive” termination in violation of public
6 policy claim could be asserted against supervisors. Defendants argue that termination in
7 violation of public policy claims in Washington must be based upon a termination. Dkt. 19
8 (*citing White v. State*, 131 Wash.2d 1, 18 (1997))(holding that a transfer is not sufficient to
9 constitute a “termination”). Defendants point out that plaintiff was offered a transfer, took the
10 position, and then quit. Plaintiff argues that she was constructively discharged. Dkt. 27.
11 Defendant’s Reply argues that Plaintiff does not respond, and then states that “the State reiterates
12 its argument that since Ms. McGuire resigned, she is not a member of the class that can raise a
13 wrongful discharge in violation of public policy claim.” Dkt. 32, at 10. Neither party addresses
14 the Washington Supreme Court’s holding in *Snyder* and *Korslund*.

15 Defendants do not address the first, second, or fourth element of the *Gardner* test. The
16 third element of the *Gardner* test is that the public-policy-linked conduct caused the dismissal.
17 Defendants, to some extent make arguments regarding causation. They argue that Plaintiff was
18 not constructively discharged because they did not make the conditions at work objectively
19 intolerable. Dkt. 19. Washington cases generally describe constructive discharge as involving
20 deliberate acts by the employer that create objectively intolerable conditions, thus forcing the
21 employee to quit or resign. *Korslund*, at 179. In *Korslund* the Washington Supreme Court found
22 that “an employee who is forced to permanently leave work for medical reasons may have been
23 constructively discharged. Deliberately creating conditions so intolerable as to make the
24 employee so ill that he or she must leave work permanently is functionally the same as forcing
25 the employee to quit.” *Id.* The Court went on to dismiss the plaintiff’s termination in violation
26 of public policy claim on other grounds. *Id.*

27 Plaintiff fails to point to sufficient evidence in the record that the State or DOT created
28

1 “objectively intolerable conditions” over “public-policy-linked conduct” such that a reasonable
2 person would quit. Plaintiff points to her testimony and resignation letter which indicates that
3 she was quitting “due to the stressful work environment” and the fact that she did not think the
4 position she briefly accepted had flexible hours. Dkt. 21-3. The position Plaintiff briefly
5 accepted in the agency’s drug and alcohol program was not in the same department as her old
6 one, negating her claim that her work environment was stressful. Defendants contend that she
7 did not even inquire into whether the new job had flexible hours. Moreover, Plaintiff fails to
8 point to any evidence in the record that her decision to quit was related to her “public-policy-
9 linked conduct.” Defendants’ motion to summarily dismiss Plaintiff’s constructive termination
10 in violation of public policy claim should be granted.

11 3. Termination in Violation of Whistle Blower Statute

12 Prior to the 2008 amendments, RCW 42.040.020(8) defined a “whistleblower” as an
13 “employee who in good faith reported, or who was believed to have reported, alleged improper
14 governmental action to the auditor” Plaintiff does not dispute that she filed her whistle
15 blower complaint with the state auditor after she resigned. She concedes that the timing and
16 manner of her reporting eliminates her from 42.40.020(8)’s protections. Dkt. 27. She argues
17 that a section “(b)” of the law which further defines a “whistle blower” as “(b) an employee who
18 in good faith identifies rules warranting review or provides information to the rules review
19 committee” may apply to her. Dkt. 27. Plaintiff makes no showing that she “identified rules
20 warranting review” to the “rules review committee.” Her claim under RCW 42.40 should be
21 dismissed.

22 4. Intentional and Negligent Emotional Distress

23 Plaintiff failed to contest Defendants’ motion to summarily dismiss her intentional and
24 negligent emotional distress claims as assert against all Defendants. Defendants’ motion as to
25 these claims should be granted and they should be dismissed.

26 **D. MOTION TO STRIKE**

27 Defendants move to strike the Supplemental Declaration in Support of Plaintiff’s motion
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1 (Dkt. 34). Dkt. 36. Defendants argue that Exhibits 1, 3, 4, and 5 are not relevant to the issues
2 raised in the summary judgment. *Id.* For the purposes of this motion alone, Defendants' motion
3 to strike Exhibits 1, 3-5 is granted. The pleadings were not needed to decide the motion.
4 Defendant's motion to strike Exhibit 2 to the supplemental declaration is denied, as to this
5 motion alone. Although unnecessary to decide the motion, the pleadings are of limited
6 relevance.

7 **III. ORDER**

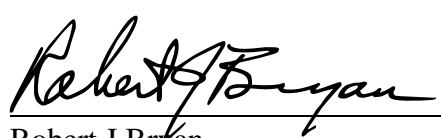
8 It is hereby **ORDERED** that:

- 9 • Defendants' Motion for Summary Judgment (Dkt. 19) is **GRANTED** as to the following
10 claims:
- 11 • ADEA as to all Defendants,
 - 12 • Retaliation for exercise of First Amendment rights as to the State and DOT,
 - 13 • Constructive termination in violation of public policy as to all Defendants,
 - 14 • Termination in violation of Washington's Whistle Blower statute, RCW
15 42.040.020, as to all Defendants,
 - 16 • Intentional and Negligent Infliction of Emotional Distress as to all Defendants,
- 17 • Defendants' Motion for Summary Judgment (Dkt. 19) is **DENIED** as to the following
18 claims:
- 19 • Retaliation for exercise of First Amendment rights as to the individual
20 Defendants,
 - 21 • WLAD claim as to the individual Defendants; and
- 22 • Defendants' Motion to Strike (Dkt. 36) is **GRANTED** as to Exhibits 1, 3, 4, and 5 of the
23 Supplemental Declaration in Support of Plaintiff's motion (Dkt. 34); and **DENIED** as to
24 Exhibit 2.
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The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 26th day of April, 2010.


Robert J Bryan
United States District Judge