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

10 TRUBY PETE, KATHY MCGATLIN,
11 and SHEILA GAVIGAN,

12 Plaintiffs,

13 v.

14 TACOMA SCHOOL DISTRICT NO. 10
15 d/b/a TACOMA PUBLIC SCHOOLS, et
16 al.,

17 Defendants.

CASE NO. 3:16-cv-05403-RJB

ORDER ON DEFENDANTS'
MOTION TO DISMISS PURSUANT
TO FED. R. CIV. P. 12(B)(6)

18 This matter comes before the Court on Defendants' Motion to Dismiss Pursuant to Fed.
19 R. Civ. P. 12(b)(6). Dkt. 6. The Court has considered the motion, Defendants' request for judicial
20 notice in support of their motion (Dkt. 7), Plaintiffs' Response (Dkt. 10), Defendants' Reply
21 (Dkt. 12), and the remainder of the file herein. Defendants' motion should be granted in part and
22 denied in part.

23 **BACKGROUND**

24 The Complaint is lengthy. *See* Dkt. 1-2. The Complaint is sixty-three pages, plus another
sixty-four page Appendix, and it is hardly a "short and plain statement" as contemplated by Fed.

1 R. Civ. P. 8 and WA CR8. For the sake of clarity and brevity, specific factual allegations are
2 discussed with relation to each cause of action. The case stems from a conflict between
3 Plaintiffs, employed as counselors (Pete and McGatlin) and a teacher (Gavigan), and Defendants,
4 the Tacoma School District (“the District”), along with administrators, Superintendent Santorno,
5 Principal Erwin, Assistant Principal Burke, HR Director Elijah, Assistant HR Superintendents
6 Rosellini and Nolan, and General Counsel McMinimee (the “individually named defendants”).

7 The Complaint alleges eight causes of action. The First Cause of Action, brought under
8 42 U.S.C. § 1983, alleges constitutional violations of Plaintiffs’ rights to free speech and to
9 substantive and procedural Due Process. Dkt. 1-2 at ¶¶5.1-5.58. The Complaint enumerates
10 twenty-two alleged free speech deprivations. *Id.* at ¶¶5.36-5.44. The Complaint alleges
11 substantive Due Process violations of Plaintiffs’ property interest in continued employment and
12 Plaintiffs’ liberty interest in their good names and reputations. *Id.* at ¶¶5.46, 5.47. The Complaint
13 alleges that Defendants violated Plaintiffs’ procedural Due Process on a number of grounds:
14 refusing to acknowledge Plaintiffs as whistleblowers, suing Plaintiffs “to invade their attorney
15 client privilege and confidential communications,” discriminating against Plaintiffs for relying
16 on independent counsel rather than counsel from their union, accusing Plaintiffs of falsely
17 stealing school records and disclosing confidential records in the press, criticizing and unfairly
18 scrutinizing Plaintiffs’ medical documentation for leave requests, and unfairly taking disciplinary
19 action against Plaintiffs. *Id.* at ¶¶5.48-5.53.

20 The First Cause of Action alleges claims, organized as follows: “Claims Against
21 Individuals in Individual Capacity,” “Claims Against District Based on Final Policy Maker,”
22 “Claims Against Pierce County Based on Ratification,” Claims Against District Based on
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1 Official Policy, Practice, or Custom,” and “Claims Against District Based on a Failure to
2 Supervise and Train.” Dkt. 1-2 at ¶¶5.15-5.35.

3 The Complaint alleges seven state law causes of action: abuse of process, invasion of
4 privacy/false light/defamation, constructive discharge in violation of public policy, breach of
5 contract, outrage, discrimination on the basis of age, disability, and race in violation of the
6 Washington Law Against Discrimination (WLAD), and violations of the Public Records Act
7 (PRA). Dkt. 1-2 at ¶¶5.59-5.120.

8 **REQUEST FOR JUDICIAL NOTICE**

9 The request for judicial notice is supported by the law and the facts and should be
10 granted.

11 **STANDARD FOR MOTION TO DISMISS**

12 Fed. R. Civ. P. 12(b) motions to dismiss may be based on either the lack of a cognizable
13 legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri*
14 *v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken
15 as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d
16 1295 (9th Cir. 1983). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not
17 need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement
18 to relief requires more than labels and conclusions, and a formulaic recitation of the elements of
19 a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65
20 (2007)(*internal citations omitted*). “Factual allegations must be enough to raise a right to relief
21 above the speculative level, on the assumption that all the allegations in the complaint are true
22 (even if doubtful in fact).” *Id.* at 1965. Plaintiffs must allege “enough facts to state a claim to
23 relief that is plausible on its face.” *Id.* at 1974.

1 If a claim is based on a proper legal theory but fails to allege sufficient facts, the plaintiff
2 should be afforded the opportunity to amend the complaint before dismissal. *Keniston v. Roberts*,
3 717 F.2d 1295, 1300 (9th Cir. 1983). If the claim is not based on a proper legal theory, the claim
4 should be dismissed. *Id.* “Dismissal without leave to amend is improper unless it is clear, upon
5 de novo review, that the complaint could not be saved by any amendment.” *Moss v. U.S. Secret*
6 *Service*, 572 F.3d 962, 972 (9th Cir. 2009).

7 DISCUSSION

8 1. Constitutional Violations

9 To state a civil rights claim under 42 U.S.C. § 1983, a plaintiff must set forth the specific
10 factual bases upon which she claims each defendant is liable. *Aldabe v. Aldabe*, 616 F.2d 1089,
11 1092 (9th Cir. 1980). Vague and conclusory allegations of official participation in civil rights
12 violations are not sufficient to support a claim under § 1983. *Ivey v. Board of Regents*, 673 F.2d
13 266 (9th Cir. 1982). A complaint must allege that (1) the conduct complained of was committed
14 by a person acting under color of state law, and that (2) the conduct deprived a person of a right,
15 privilege, or immunity secured by the Constitution or laws of the United States. *Parratt v.*
16 *Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S.
17 327 (1986).

18 Government actors may be excepted from § 1983 claims if they are shielded by qualified
19 immunity. “Qualified immunity “represents the norm” for government officials exercising
20 discretionary authority[.]” *Lacey v. Maricopa County*, 693 F.3d 896, 915 (9th Cir. 2012).

21 Analyzing qualified immunity is a two-pronged test, considering (1) whether the conduct
22 violated a constitutional right, and (2) whether the right was clearly established. *Saucier v. Katz*,
23 533 U.S. 194, 201 (2001).

1 Defendants makes several primary arguments: (1) the statute of limitations bars recovery
2 for acts outside of three-years, (2) the Complaint does not allege a plausible free speech
3 violation, because it does not allege a sufficient adverse conduct; (3) the Complaint does not
4 allege a plausible Due Process claim because none of the allegations constitute “deprivations” of
5 constitutional magnitude; and (4) even if Defendants’ conduct resulted in a constitutional
6 violation, Defendants’ alleged conduct is discretionary and not “clearly established.”

7 Plaintiffs’ Response is convoluted and aimlessly wanders. The Court will not attempt to
8 summarize Plaintiffs’ arguments.

9 Because the Court should dismiss without prejudice and with leave to amend four of the
10 five sets of claims, *see below*, assessing qualified immunity as to the remaining § 1983 claims,
11 “Claims Against District Based on Official Policy, Practice, or Custom,” is premature. Such an
12 assessment, if appropriate, should follow amendment and discovery. The parties should first
13 focus their discovery on issues of qualified immunity.

14 *a. “Claims Against Officials in Individual Capacity”*

15 The Complaint alleges that “the acts of the named defendant officials deprived
16 [Plaintiffs] of their First Amendment and Fourteenth Amendment (Due Process) rights . . . as
17 explained further below.” Dkt. 1-2 at ¶5.15. The subsequent paragraphs allege that the
18 individually named defendants “directed their subordinates in the acts and failures to act” and
19 “knew or reasonably should have known that their subordinates were engaging in these acts . . .
20 [and] failed to act to prevent” their actions. *Id.* at ¶¶5.16-5.19. The paragraphs “further below”
21 do not articulate a plausible theory of relief, and the Court should not be forced to construct one
22 on Plaintiffs’ behalf from the factual allegations. Defendants’ motion should be granted as to
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1 these claims. They should be dismissed without prejudice, and Plaintiffs should be given leave to
2 amend.

3 *b. “Claims Against District Based on Final Policymaker”*

4 According to the Complaint, “the individually named defendant officials . . . engag[ed] in
5 a series of retaliatory acts creating a hostile workplace and leading to the constructive discharge
6 and other harm.” Dkt. 1-2 at ¶5.20. The same officials “had final policy making authority from
7 defendant district concerning these acts . . . [and] were acting as final policymaker for defendant
8 district.” *Id.* at ¶¶5.21, 5.22. These claims resemble a theory of municipal liability, but the
9 Complaint makes no effort to connect this theory to specific conduct. Again, the Court will not
10 invent a plausible claim of relief. Defendants’ motion should be granted as to these claims. They
11 should be dismissed without prejudice, and Plaintiffs should be given leave to amend.

12 *c. “Claims Against Pierce County¹ Based on Ratification”*

13 The Complaint alleges these “claims” in a single paragraph that reads, “The school
14 district ratified the defendant officials [*sic*] acts and the basis for it, that is, the district knew of
15 and specifically approved of the adverse actions taken to harm the plaintiffs.” Dkt. 1-2 at ¶5.23.
16 This is insufficient. Defendants’ motion should be granted as to these claims. They should be
17 dismissed without prejudice, and Plaintiffs should be given leave to amend.

18 *d. “Claims Against District Based on Official Policy, Practice, or Custom”*

19 Relating to the alleged free speech deprivation, the Complaint alleges that “the district
20 has a permanent, widespread, and well-settled practice or custom . . . of failing to conduct
21 independent investigation of discrimination complaints and whistleblower complaints” and that

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23 ¹ Pierce County is not a named defendant, but judging by the paragraph following the
24 header, which refers only to “the school district,” the Court infers that Plaintiffs intended to
allege a claim against the District. *See* Dkt. 1-2 at ¶5.23.

1 Defendants failed to do so in this case. Dkt. 1-2 at ¶5.26. Elsewhere, the Complaint describes the
2 content, timing, and response by the District to Plaintiffs’ whistleblower complaint. *Id.* at ¶¶4.62-
3 4.66. This contains a plausible basis for relief. The issue of whether Plaintiffs’ alleged
4 whistleblower complaint implicated free speech concerns may depend on whether that complaint
5 was made by Plaintiffs in their personal or employment capacity, but that is an issue to be
6 resolved on a motion for summary judgment. *See Coomes v. Edmonds Sch. Dist. No. 15*, 816
7 F.3d 1255, 1260 (9th Cir. 2016); *Garcetta v. Ceballos*, 547 U.S. 410 (2006).

8 Defendants’ motion should be denied as to these claims.

9 *e. “Claims Against District Based on a Failure to Supervise and Train”*

10 The Complaint alleges that “the defendant district was deliberately indifferent to the
11 obvious consequences of its failure to supervise and train . . . which caused the [constitutional]
12 deprivation.” Dkt. 1-2 at ¶¶5.31, 5.32. The Complaint further alleges a failure to supervise and
13 train employees of policies for whistleblower, non-discrimination, and public records policies
14 and procedures. *Id.* at ¶5.35. The claims are not plausible, because while the Complaint may
15 allege the “what” of the District’s failure to train, the Complaint fails to articulate the “how,” by
16 failing to articulate how the District acted with deliberate indifference. *See City of Canton v.*
17 *Harris*, 489 U.S. 378, 392 (1989). Defendants’ motion should be granted as to these claims.
18 They should be dismissed without prejudice, and Plaintiffs should be given leave to amend.

19 **2. Abuse of Process**

20 “The great majority of legal authorities concur” that abuse of process is “a matter of
21 bringing action A to accomplish B.” *Batten v. Abrams*, 28 Wn. App. 737, 745 (1981). To allege a
22 claim for abuse of process, a plaintiff must plead (1) the existence of an ulterior purpose to
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1 accomplish an object not within the proper scope of the process, and (2) an act in the use of legal
2 process not proper in the regular prosecution of the proceedings. *Id.*

3 The Complaint alleges that Defendants filed a Family Education Rights and Privacy Act
4 (FERPA) lawsuit against Plaintiffs “for purposes of violating their First Amendment rights and
5 to deter their whistleblower activities.” Dkt. 1-2 at ¶5.59. The Complaint further alleges that
6 Defendants “used their lawsuit to attempt to invade . . . privileged communications with their
7 attorney” and that Defendants “repeatedly demanded access . . . even when such relief was
8 denied and where there is no such action.” *Id.* This may be a plausible claim for relief, but it
9 should have been alleged by Plaintiffs as a counterclaim in the FERPA lawsuit and is not
10 properly brought before this Court.

11 To this Court’s understanding, abuse of process claims are appropriately brought as
12 counterclaims, where one party is using an action “to compel the adverse party to do some
13 collateral thing which he could legally compelled to do” were it not for the action. *Fite v. Lee*, 11
14 Wn.App. 21, 28 (1974). *See, e.g., Saldivar v. Momah*, 145 Wn. App. 365 (2008), *Hough v.*
15 *Stockbridge*, 152 Wn. App. 328 (2009); *Saldivar v. Momah*, 145 Wn. App. 365 (2008); *Batten v.*
16 *Abrams*, 28 Wn.App. 737 (1981). The Court is aware of no authority for the proposition that a
17 party to a lawsuit, who could have—but did not—allege an abuse of process counterclaim, can
18 later allege an abuse of process claim arising within a case in another court.

19 As to this cause of action, Defendants’ motion should be granted. It should be dismissed
20 with prejudice.

21 **3. Invasion of Privacy/False Light/Defamation**

22 A false light claim arises when a defendant (1) publicizes a matter that places another in a
23 false light, (2) the false light would be highly offensive to a reasonable person, and (3) the
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1 defendant knew of or recklessly disregarded its falsity. *Eastwood v. Cascade Broad. Co.* 466
2 Wn.2d 466, 470–71 (1986). Similarly, pleading a defamation claim requires falsity, an
3 unprivileged communication, fault, and damages. *Mohr v. Grant*, 153 Wn.2d 812, 822 (2005),
4 *Corey v. Pierce Cty.*, 154 Wn. App. 752, 762 (2010). Invasion of privacy claims are derived
5 from the Restatement (Second) of Torts § 652D (1977), which states: “One who gives publicity
6 to a matter concerning the private life of another is subject to liability . . . if the matter publicized
7 is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate
8 concern to the public.” *Reid v. Pierce Cty.*, 136 Wn.2d 195, 205 (1998).

9 Defendants argue that the Complaint lacks specificity about what, when and to whom
10 Defendants published false statements. Defendants argue further that to the extent the Complaint
11 alleges publication of statements, the statements articulated are opinions or conclusions, not
12 facts.

13 Plaintiffs point to the “patently false factual publication that the [Plaintiffs] shared
14 confidential student records with the media. They did not.” Dkt. 10 at 18. Plaintiffs also point to
15 negative teacher performances evaluations disclosed to the media and academic waivers issued
16 by Assistant Principal Burke, which were issued “due to counselor errors” and the “disservice
17 received by this student in academic advising.” *Id.* See Dkt. 1-2 at 100.

18 Because Plaintiffs have made sufficiently-pleaded factual allegations, the Court assumes
19 their veracity and considers their plausibility. *Iqbal*, 556 U.S. at 664. The Complaint alleges that
20 Defendants published statements to the news media, including the “the controversial 2014 Burke
21 evaluations of Ms. Gatlin and Ms. Pete to the News Tribune . . . but failed to disclose any of the
22 requested positive evaluations,” under circumstances where Defendants knew the evaluations
23 were false. Dkt. 1-2 at ¶¶4.81, 5.63, 5.69. The Complaint alleges a plausible theory with
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1 sufficient specificity for either a defamation, false light, or invasion of privacy claim. And
2 Defendant has not provided ample authority to show evaluations are always opinion, with no
3 factual basis. As to this cause for relief, Defendants’ motion should be denied.

4 **4. Constructive Discharge in Violation of Public Policy**

5 “A constructive discharge occurs when, looking at the totality of the circumstances, ‘a
6 reasonable person in [the employee's] position would have felt that he was forced to quit because
7 of intolerable and discriminatory working conditions.’” *Sanchez v. City of Santa Ana*, 915 F.2d
8 424, 431 (9th Cir.1990), quoting *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir.1987)
9 (inner quotations omitted). *Sneed v. Barna*, 80 Wn.App. 843 (1996). Whether the working
10 conditions were sufficiently intolerable and discriminatory to justify resignation is ordinarily a
11 question of fact for the jury. *Thomas v. Douglas*, 877 F.2d 1428, 1434 (9th Cir.1989).

12 Defendants argue that the Complaint is insufficient as a matter of law because all three
13 plaintiffs remain employed by the District and continue to receive benefits. Defendants also
14 argue that the conduct alleged, even if true, does not rise to the level of “intolerable and
15 discriminatory” sufficient for a reasonable person to resign.

16 Plaintiffs argue that as to McGatlin, who is on medical leave and has applied for long-
17 term disability, the District has not promised to return her to work with full benefits (that the
18 District denied her when on medical leave), so she has been constructively discharged. As to
19 Gavigan and Pete, Plaintiffs argue that although they are still employed by the District, they have
20 been moved to different schools, receive less income and benefits, and are forced to endure
21 ongoing harassment.

22 *Campbell v. State*, 129 Wn. App. 10 (2005) addresses the dispositive issue to resolving
23 Defendants’ motion. In *Campbell*, the Washington Court of Appeals affirmed summary
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1 judgment of a constructive discharge claim in favor of a public university employer because the
2 employee did not resign from a position, but had instead been “reverted . . . from her secretarial
3 position to her prior custodial job.” *Campbell*, 129 Wn. App. at 18, 23-24. When the employee
4 “permanently left her position as secretary . . . she did not leave the employment[.]” *Id.* citing to
5 *Korslund v. Dyncorp Tri-Cities Servs., Inc.*, 121 Wn.App. 295, 315 (2004). In *Korslund*, 156
6 Wn.2d 168 (2005), the court analyzed whether a constructive discharge claim could be brought
7 when an employee left a job for medical leave without quitting or resigning. *Id.* at 178-80.
8 Finding in the affirmative, the court reasoned that constructive discharge is actionable “if the
9 employer makes working conditions so intolerable that the employee is forced to leave the
10 workplace for medical reasons rather than quit or resign.” *Id.* at 179, citing to *White v.*
11 *Honeywell, Inc.*, 141 F.3d 1270 (8th Cir.1998).

12 Applying *Campbell* and *Korslund* to this case, the constructive discharge cause of action
13 should be dismissed as to Pete and Gavin, who are both still employed by the District. *See* Dkt.
14 1-2 at ¶¶3.1-3.3, 5.80. The common thread of these discharge cases is that whether an employee
15 quits, resigns, or leaves for medical reasons, the employee *is no longer actively employed*, which
16 is not what the Complaint alleges as to Pete and Gavin. Demotion does not constitute
17 constructive discharge. As to McGatlin, who “has been forced to take medical leave,” *Id.* at
18 ¶5.80, the Complaint states a plausible claim for relief, where Defendants have “failed to make
19 reasonable accommodations in violation of non-discrimination policies and procedures.” *Id.* at
20 ¶5.78. The extent to which McGatlin still receives benefits and wages and is eligible for future
21 employment may or may not provide fodder for summary judgment, but based on the pleadings
22 Defendants’ motion should be denied.

1 As to this cause of action, Defendants’ motion should be denied, in part, as to McGatlin
2 and granted, in part, as to Pete and Gavin. As to Pete and Gavin, the cause of action should be
3 dismissed.

4 **5. Breach of Contract**

5 To bring a cause of action for breach of contract, a plaintiff must allege the existence of a
6 valid and enforceable contract, the plaintiff’s rights and defendant’s obligations under the
7 contract, defendant’s violation of the contract, and damage to the plaintiff. *Citoli v. City of*
8 *Seattle*, 115 Wn. App. 459, 476 (2002), citing to 17B C.J.S. Contracts § 640 p. 357 (1999).

9 Defendants argue that although the Complaint alleges the breach of an employment
10 contract with the District, the Complaint does establish that a contract existed, because “on
11 review . . . it becomes clear that Plaintiffs do not rely on any individual employment contract, but
12 on allegations of breach of policies, procedures, and state laws [generally] applicable[.]” Dkt. 6
13 at 17. Defendants’ employee handbook, Defendants contend, did not create any contractual
14 obligations, where Plaintiffs were not named and the handbook did not particularize job
15 responsibilities and work hours, and generally-applicable policies and state laws similarly fail for
16 the same reason. The cause of action also fails, Defendants argue, because even in Plaintiffs’
17 Response, Plaintiffs fail to specify what promises Defendants actually breached.

18 Plaintiffs distinguish Defendants’ authority, *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d
19 26, 29 (1998), where the Washington Court of Appeal affirmed dismissal of a breach of contract
20 claim because an employer handbook did not give rise to contractual obligations, by arguing that
21 *DePhillips* is a statute of limitations case that did not overrule common law on implied contracts,
22 and that *DePhillips* applies to “at will” employees working for a private employer, whereas
23 Plaintiffs are civil sector employees. Plaintiffs also argue that the Complaint alleges specific
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1 promises breached, “to include . . . failure to investigate [Plaintiffs’] whistleblower and retaliation
2 complaints, failure to appoint an administrative law judge, failure to protect [Plaintiffs] from
3 retaliation, and engaging in retaliation.” Dkt. 10 at 20.

4 The Complaint alleges that Plaintiffs “work for the defendant district subject to an
5 employment contract” and that “Defendants have caused the forced separation of Mrs. McGatlin
6 without just cause in violation of these contract terms[.]” Dkt. 1-2 at ¶¶5.81, 5.85. The
7 Complaint also alleges that, in exchange for consideration, Plaintiffs relied on the promise of
8 Defendants to provide for Plaintiffs, who are whistleblowers, “specific administrative remedies
9 to include prompt independent investigation, appointment of an administrative law judge, and
10 corrective action.” *Id.* at ¶¶5.86-5.92. On these facts, the Complaint states a claim for breach of
11 contract.

12 Defendants’ argument that the District’s employer handbook or policies cannot give rise
13 to contractual obligations is unavailing. The Complaint alleges the existence of an employment
14 contract, but even if the employment contract is co-extensive with the employer handbook or
15 employment policies, in the context of employment contracts, “employers can control the work
16 relationship,” so “the employer’s act in issuing an employee policy manual can lead to
17 obligations that govern the employment relationship.” *Thompson v. St. Regis Paper Co.*, 102
18 Wn. 2d 219, 229 (1984). Based on the pleadings, this argument should be rejected.

19 As to this cause of action, Defendants’ motion should be denied.

20 **6. Outrage**

21 To establish a tort of outrage claim, a plaintiff must show (1) extreme and outrageous
22 conduct, (2) intentional or reckless infliction of emotional distress, and (3) severe emotional
23 distress on the part of the plaintiff. *Dicomes v. State*, 113 Wn.2d 612, 630 (1989). Outrageous
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1 conduct is that “which the recitation of the facts to an average member of the community would
2 arouse his resentment against the actor and lead him to exclaim ‘Outrageous!’ ” *Browning v.*
3 *Slenderella Sys.*, 54 Wn.2d 440, 448 (1959) (quoting Restatement of Torts § 46(g) (Supp.1948)).

4 Defendants contend that the Complaint fails to state a claim because none of the alleged
5 acts by Defendant are “outrageous,” but rather were acts well within Defendants’ discretion.

6 Plaintiffs argue that Defendants have ignored the Complaint’s description of Defendants’
7 conduct, including Defendants’ initiation of a false lawsuit against Plaintiffs and Defendants’
8 publicized false accusations of Plaintiffs’ lack of professionalism and criminal misconduct.

9 The Complaint alleges that “in retaliation for [Plaintiffs’] reports to the media and to the
10 district that Lincoln High School was providing preferential services to select students,
11 manipulating graduation rates, and otherwise creating a second tier educational system for . . .
12 underachieving minorities[,]” Defendants sued Plaintiffs and published false statements about
13 Plaintiffs in the media. Dkt. 1-2 at ¶¶5.95, 5.96. Defendants’ conduct allegedly resulted in
14 emotional distress to Plaintiffs. *Id.* at ¶5.101. This is a plausible claim for relief.

15 As to this cause of action, Defendants’ motion should be denied.

16 **7. Discrimination in Violation of the WLAD**

17 The WLAD prohibits employers from discriminating based on age, disability, and race,
18 *inter alia*. RCW 49.60.180. The prima facie showing for age discrimination requires facts
19 sufficient to allege: 1) that the employee was within the statutorily protected age group, (2) was
20 discharged, (3) was doing satisfactory work, and (4) was replaced by a younger person.
21 *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn. 2d 355, 362 (1988). To establish a prima facie
22 claim of disability discrimination, the employee must show that she: (1) has a disability, (2) can
23 perform the essential functions of the job, and (3) was not reasonably accommodated. *Dedman v.*

1 | *Washington Pers. Appeals Bd.*, 98 Wn. App. 471, 478 (1999). Claims for disparate treatment
2 | based on race have four elements: (1) the employee is a member of a protected class, (2) the
3 | employee is qualified for the employment position, (3) the employee suffered an adverse
4 | employment action, and (4) similarly situated employees not part of the employee’s protected
5 | class received more favorable treatment. *Kang v. U. Lim. Am., Inc.*, 296 F.3d 810, 818 (9th
6 | Cir.2002). The prima facie claim for discrimination based on a hostile work environment has
7 | four elements: (1) harassment was unwelcome, (2) harassment was because of a protected class,
8 | (3) the harassment affected the terms and conditions of employment, and (4) the harassment is
9 | imputable to the employer. *Glasgow v. Ga-Pac. Corp.*, 103 Wn.2d 401, 406-07 (1985).

10 | Defendants argue that the Complaint fails to establish any connection between
11 | Defendants’ conduct and the alleged protected statuses of gender (all Plaintiffs), age (all
12 | Plaintiffs), race (Pete) and disability (Gavigan). Defendants contend that the Complaint contains
13 | only bare conclusions of discriminatory conduct, does not allege sufficient facts for a hostile
14 | work environment, fails to allege similarly situated people for a disparate treatment claim, and
15 | fails to articulate what accommodations the District failed to make as to any disability claim.

16 | Plaintiffs argue that the Complaint alleges: (1) prima facie evidence of age discrimination
17 | because they have all been replaced by younger employees under the age of 40; (2) denial of
18 | reasonable accommodation to Gavigan; and (3) a hostile workplace where Plaintiffs were asked
19 | to retire, unlike younger employees. Plaintiffs describe the “adverse actions” that Defendants
20 | have taken, including demoting Pete and Gavigan and transferring them to different schools, and
21 | insisting that McGatlin resign and removing her from leadership positions. Plaintiffs also engage
22 | in burden shifting analysis—appropriate for summary judgment pleadings, not a motion to
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1 dismiss—arguing that Defendants have not met their burden to show legitimate reasons for their
2 conduct.

3 The problem with this cause of action is twofold: lack of specificity, and lack of clarity.
4 In just seven short paragraphs, *see* ¶¶5.102-5.108, Plaintiffs broadly allege discrimination in
5 violation of the WLAD for failure to accommodate a disability (McGatlin), disparate impact
6 based on race (Gavigan), age discrimination (all Plaintiffs), and a hostile work environment (all
7 Plaintiffs), and incorporating the Complaint’s factual allegations is of minimal utility. The
8 Complaint alleges that “the district has failed to accommodate Mrs. Gavigan . . . [and] to engage
9 in an interactive process with her,” Dkt. 1-2 at ¶5.106, and incorporating facts alleged, the
10 Complaint alleges that “Ms. Gavigan sent to defendant McMinimee a letter formally request
11 ADA accommodation [but] the defendants responded claiming she did not have a disability.” *Id.*
12 at ¶4.110. However, the Complaint nowhere alleges what Gavigan’s disability is or what
13 accommodation the District failed to take, which is insufficient. *See Dedman v. Washington*
14 *Pers. Appeals Bd.*, 98 Wn. App. 471, 478 (1999).

15 Plaintiffs’ Response brief makes no mention of race discrimination as to Pete and appears
16 to abandon that claim to the extent it may have been alleged. The Complaint alleges that
17 Plaintiffs are all over the age of forty and were replaced by others under the age of forty, Dkt. 1-
18 2 at ¶5.104, but the Complaint does not connect that allegation to the factual circumstances, and
19 the Court will not invent a plausible theory on Plaintiffs’ behalf. Finally, the Complaint fails to
20 specify which of the protected classifications were the discriminatory basis for the hostile work
21 environment and thus apparently alleges that discrimination occurred as to all Plaintiffs by all
22 Defendants based on all of the alleged protected classes, *Id.* at ¶5.107, which is infeasible. *Iqbal*
23 and *Twombly* require more.

1 The Complaint fails to state a cause of action for violations of the WLAD, and Plaintiffs
2 should be given leave to amend. Should Plaintiffs elect to amend, Plaintiffs are strongly
3 encouraged to allege their WLAD cause of action as discrete claims between defined parties for
4 specifically-described conduct.

5 As to this cause of action, Defendants' motion should be granted and the cause of action
6 dismissed without prejudice with leave to amend.

7 **8. Violations of the Public Records Act (PRA)**

8 The PRA is a strongly worded mandate for broad disclosure of public records. *Burt v.*
9 *Dep't of Corr.*, 168 Wn.2d 828, 832 (2010) (quoting *Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716,
10 731 (2007)). It stands for the proposition that "full access to information concerning the conduct
11 of government on every level must be assured as a fundamental and necessary precondition to
12 the sound governance of a free society." *Progressive Animal Welfare Soc'y v. Univ. of Wash.*,
13 125 Wn.2d 243, 251(1994) (*PAWS*); RCW 42.17A.001(11). Agencies are required to disclose
14 any public record on request unless it falls within a specific, enumerated exemption. RCW
15 42.56.070(1).

16 Defendants concede that the Complaint describes Plaintiffs' PRA request, which is
17 attached as an exhibit to the Complaint, but Defendants argue that the Complaint fails to
18 articulate how the District's responses were deficient or which records were destroyed.

19 Plaintiffs argue that this cause of action could have been brought as a motion claiming to
20 have been denied the opportunity to inspect or copy a public record, shifting the burden to
21 Defendants to show the adequacy of their response, but in this case, Defendants have made no
22 effort to defend their response to Plaintiffs' PRA request.

1 The Complaint attaches an exhibit to the Complaint that allegedly is a copy of a PRA
2 request made by Plaintiffs to Defendants. Dkt. 1-2 at ¶5.111. Defendants allegedly failed to
3 timely respond to the request, illegally denied Plaintiffs’ right to inspect certain documents, and
4 destroyed documents. *Id.* at ¶¶5.113-5.119. Especially in this case, where the Complaint
5 incorporates Plaintiffs’ PRA request, from which much can be inferred, such as the date of the
6 PRA request and the scope of its content, the Complaint alleges a plausible PRA cause of action.
7 Plaintiffs’ description of the inadequacies of Defendants’ response is sufficient for purposes of
8 the Complaint. The adequacy of Defendants’ response to the PRA request is an issue reserved for
9 a motion for summary judgment. *See, e.g., Neighborhood All. of Spokane Cty. v. Cty. of*
10 *Spokane*, 172 Wn. 2d 702, 714–15 (2011). *Accord, e.g., Oglesby v. U.S. Dep’t of Army*, 920
11 F.2d 57, 68 (9th Cir.1990). As to this cause of action, Defendants’ motion should be denied.

12 *

13 Plaintiffs’ Complaint is unnecessarily lengthy. Much of the Complaint detracts from its
14 basic function, namely, to serve to put the parties on notice of the plaintiff’s claims. The
15 amended complaint, if any, should strive to be more concise—a short and plain statement
16 showing that Plaintiffs are entitled to relief. Fed. R. Civ. P. 8(a)(2). An amended complaint
17 should allege claims individually, not as groups of claims. For each claim, an amended
18 complaint should enumerate which plaintiffs allege that claim against which defendants, and it
19 should allege the basic facts connecting the claim to its elements, because a complaint fails to
20 state a claim where it only makes “naked assertion[s]” devoid of “further factual enhancement.”
21 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2008), quoting *Twombly*, 550 U.S. at 557. On the other
22 hand, lengthy recitations of evidentiary allegations are not required.

1 The Court recommends that any amended complaint include a re-write of all claims,
2 including those that have not been dismissed by this Order.

3 * * *

4 Therefore, Defendants' Request for Judicial Notice (Dkt. 7) is GRANTED, and it is
5 hereby **ORDERED** that Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6)
6 (Dkt. 6) is GRANTED IN PART and DENIED IN PART as follows:

7
8 (1) As to Plaintiffs' First Cause of Action under 42 U.S.C. § 1983, Defendants' motion is
9 denied as to Plaintiffs' Claims Against District Based on Official Policy, Practice, or
prejudice with leave to amend.

10 (2) As to Plaintiffs' Second Cause of Action for Abuse of Process, Defendants' motion is
11 granted. All claims are dismissed.

12 (3) As to Plaintiffs' Third Cause of Action for Invasion of Privacy/False
Light/Defamation, Defendants' motion is denied.

13 (4) As to Plaintiffs' Fourth Cause of Action for Constructive Discharge in Violation of
14 Public Policy, Defendants' motion is denied as to Plaintiff Kathy McGatlin. The
motion is otherwise granted. All other claims are dismissed.

15 (5) As to Plaintiffs' Fifth Cause of Action for Breach of Contract, Defendants' motion is
16 denied.

17 (6) As to Plaintiffs' Sixth Cause of Action for Outrage, Defendants' motion is denied.

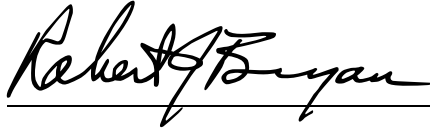
18 (7) As to Plaintiffs' Seventh Cause of Action for violations of the Washington Law
19 Against Discrimination, Defendants' motion is granted. These claims are dismissed
without prejudice with leave to amend.

20 (8) As to Plaintiffs' Eighth Cause of Action for violations of the Public Records Act,
21 Defendants' motion is denied.

22 (9) Any amended complaint should be filed on or before September 2, 2016.

23 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
24 to any party appearing *pro se* at said party's last known address.

1 Dated this 29th day of July, 2016.

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4 ROBERT J. BRYAN
5 United States District Judge
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