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UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHINGTON

CHRIS NEESE BLACKMAN, Plaintiff, vs. OMAK SCHOOL DISTRICT AND KENNETH ERIK SWANSON, Defendants.	No. 2:18-CV-00338 TOR PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT 06/09/2020 – 1:30 PM With Oral Argument Spokane, Washington

I. INTRODUCTION

Defendants hired Chris Blackman in 2016 to fix a failing middle school. By all accounts, Dr. Blackman's performance was excellent. (SOF ¶31) Kathy Curtiss, a third party consultant charged with helping fix Omak Middle School, puts Dr. Blackman in the top one percent of educators she has worked with in 40 years. (SOF ¶14, 32) Dr. Blackman's supervisor, Erik Swanson, gave her a proficient performance review and told Ms. Curtiss how much he "appreciated Dr. Blackman,

her leadership style, perspective, and voice." (SOF ¶33, 39) Subordinate employees Zack Rees, Vanessa Ibarra, and Michelle Covey describe her as "dedicated to students" and "a hard worker." (Ibarra Decl. ¶3; Reese Decl. ¶3; Covey Decl. ¶3)

From date of hire to the end of employment none of Dr. Blackman's supervisors told her any aspect of her performance was lacking or that her career was in jeopardy. (SOF ¶ 40, 92) Instead Defendants were fine with letting Dr. Blackman fight it out at Omak Middle School. To that end, Mr. Swanson and Omak School District HR ignored Dr. Blackman's requests for workplace accommodations necessary to address her depression and anxiety. (SOF ¶54, 62-63)

But Defendants' view of Dr. Blackman changed starting on October 26, 2017. First, on that day Dr. Blackman reported to Dr. Swanson and others that the District was illegally using Associated Student Body (ASB) funds. (SOF ¶69-70) Second, Dr. Blackman opposed Dr. Swanson's instruction that the ASB fund misuse be hidden from state auditors. (SOF ¶71) And third, Dr. Blackman (in early November 2017 during an administrative team meeting) told Dr. Swanson and others that the District's non-payment of overtime compensation "violated wage law" and that she would not sit idly by and let that happen. (SOF ¶79-80) And it was only then, when Dr. Blackman put the District's finances (and Dr. Swanson's reputation) in jeopardy that, Dr. Blackman's performance became an issue. Indeed, Dr. Swanson admits that

he decided to end Dr. Blackman's employment on November 19, 2017, (ECF No. 29-1, ¶23) and communicated that decision to Dr. Blackman on November 30th.

November 30, 2017, began just like any other day for Dr. Blackman. She went to work, chatted with her secretary (Vanessa Ibarra) and sometime during the latter part of the day got summoned to Dr. Swanson's office. (SOF ¶8) When Ms. Ibarra learned that Dr. Blackman was headed to Dr. Swanson's office she asked Dr. Blackman "you're coming back right?" *Id.* To which Dr. Blackman replied "yeah, why wouldn't I?" *Id.* Dr. Blackman then met with Dr. Swanson and he fired her. (SOF ¶91-92, 98) Later that day and after having fired Dr. Blackman, Dr. Swanson convened a meeting with the Omak Middle School staff in the school's library whereupon he told those present that Dr. Blackman had "resigned for mental health reasons." (SOF ¶106) This announcement stunned those present. (SOF ¶107) At no time had Dr. Blackman ever let on to any of her staff that she was planning on resigning. (Reese Decl ¶10-12; Ibarra Decl. ¶7; Covey Decl. ¶4) She had been scheduled to meet with Omak Middle School science teacher Zack Reese that afternoon to finalize Reptile Man's[1] visit that evening. Shocked, Mr. Reese called

[1] Reptile Man is a local personality who owns a lot of reptiles and takes them to schools for presentations. Mr. Reese and Dr. Blackman were working together to facilitate Reptile Man's visit to the middle school that evening. (SOF ¶90)

Dr. Blackman and said "you resigned" to which Dr. Blackman replied "no, they let me go." *Id.* What Dr. Blackman told Mr. Reese on November 30th is the position Dr. Blackman has maintained throughout: Defendants fired her within weeks of her reporting, to Dr. Swanson, the District's illegal use of ASB funds and opposing, to Dr. Swanson, the District's failure to pay overtime to its classified workers.[2] (SOF ¶98, 114)

Defendants ignore all of this and claim that Dr. Blackman's case fails primarily because (a) she was not fired but "resigned" and (b) "lacks evidence that she was removed from her position because of an ASB or overtime wages complaint." Those arguments fail.

Regarding point (a), the question of whether an employee voluntarily resigned or was fired is an issue of material fact. *See Little v. Windermere Relocation, Inc.* 301 F.3d 958, 971 (9th Cir. 2002) (Reversing summary judgment

[2] Tellingly, the Defendants **do not dispute** Dr. Blackman's protected activity (reporting ASB fund misuse/opposing wage law violations), instead Defendants' witnesses claim that they "do not recall" Dr. Blackman's protected activity. All told, Defendants' witnesses say "do not recall" 30 times. (ECF 29-1, ¶26, 33; ECF 29-2, ¶5; ECF 29-3, ¶6, 7, 8, 10, 14, 19, 21, 25; ECF 29-4, ¶6, 8; ECF 29-5, ¶7-8; ECF 29-6¶5-7, 10, 11; ECF 29-7, ¶6, 8-9, 11-12; ECF 29-8, ¶6) (Emphasis Added)

in wrongful discharge case in part because issues of fact existed as to whether plaintiff resigned or was terminated). Defendants concede that Dr. Blackman "contends that she did not offer to resign" but cite a legally and factually distinguishable 4th Amendment *Scott v. Harris* case for the proposition that "[n]o reasonable jury could find that Plaintiff did not communicate her verbal resignation." (ECF No. 28, p. 4 Page ID. 288, pg. 4 of 36, ll. 14-15) *Harris* involved a highspeed chase between a criminal suspect and an officer with the suspect testifying in blatant contradiction to the videotaped event. And while Defendants' *Harris*-based argument might just carry the day if Dr. Blackman's "resignation" was videotaped, that is not the case here. Nevertheless, any alleged confusion on Defendants' part as to whether Dr. Blackman "resigned" was put to bed on December 8, 2017, when Dr. Blackman told Swanson:

> As you well know I never told you that I would resign, let alone resign for medical reasons from my position with the Omak School District. Let me be clear: I have not resigned and I never provided you any oral or written documentation that I intended to resign. (SOF ¶114)

Regarding point (b), Defendants do not dispute Dr. Blackman's ASB fraud/overtime wage non-payment complaints, instead they conveniently "don't recall" her making those claims. (*See e.g.* ECF No. 29-1¶26, ECF 29-2, ¶5; ECF 29-6, ¶12) And while "[f]ailure to recall can be very useful because it avoids the risk of contradiction or perjury…a failure to recall does not even satisfy the burden

of production." *Pinholster v. Ayers*, 590 F.3d 651, 701 (9th Cir. 2009) *reversed on other grounds Cullen v. Pinholster*, 563 U.S. 170 (2011). Such is the case here. In fact, Defendants' professed ignorance of Dr. Blackman's protected activity coupled with the close proximity between that activity (October-November 2017) and termination (November 2017) is sufficient causation evidence that should allow this case to go to a jury. *See Ray v. Henderson*, 217 F.3d 1234, 1244 (9th Cir. 2000) (proximity in time); *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 646-47 (4th Cir. 2002) (jury's pretext finding supported by testimony of decision maker who was "unable to recall many details"); *Kahn v. Salerno*, 90 Wn. App. 110, 130-31 (1998) (Proximity in time coupled with satisfactory performance evaluations creates a rebuttable presumption that defeats summary judgment in retaliation cases). Additionally, three other pieces of circumstantial evidence are probative of causation: (a) Defendants' failure to follow District Policy 5280 requiring Dr. Blackman be put on notice of probable cause for discharge issues pre-termination;[3] (b) Defendants' claimed issues with Dr. Blackman's performance that did not become terminable offenses until *after* Dr. Blackman's October – November 2017 oppositional activity;[4] and (c) Swanson using the same scheme (say you resign

[3] (*compare* SOF ¶5-7 *with* SOF ¶40, 92)

[4] (SOF ¶40)

or I will fire you) in forcing Dr. Blackman's predecessor (Kathy Miller) out.[5] *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1117 (9th Cir. 2011)(Deviation from workplace discipline policies evidence of pretext); *Daoud v. Avamere Staffing, LLC*, 336 F. Supp. 2d 1129, 1137 (D. Or. 2004)(not informing plaintiff of alleged performance defects until after protected activity supports reasonable inference that performance defects did not trigger termination); *Heyne v. Caruso*, 69 F.3d 1475, 1480 1482 (9th Cir. 1995)("other act" evidence admissible in employment discrimination case to establish motive, intent, plan, and preparation).

As a result, genuine issues of material fact exist warranting a trial of this matter on Dr. Blackman's claims under 42 U.S.C. § 1983, wrongful discharge, retaliation under RCW 49.46.100 and the Fair Labor Standards Act ("FLSA") 29 U.S.C. § 215(a) (3), breach of promise, disability discrimination and invasion of privacy, false light and defamation.[6]

II. ARGUMENT

A. Summary judgment is rarely appropriate for employment discrimination cases.

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[5] (SOF ¶27)

[6] Dr. Blackman after completing discovery is not resisting summary judgment on her claims for breach of contract and blacklisting.

In employment cases involving a protected activity or protected characteristic, a plaintiff needs to produce "very little evidence" to overcome the employer's motion for summary judgment. *Chuang v. Univ. of California Davis, Bd. of Trustees*, 225 F.3d 1115, 1124 (9th Cir. 2000) (*citing Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996). This is especially the case relating to state law claims of discrimination and wrongful discharge where "[s]ummary judgment to an employer is seldom appropriate in the WLAD cases because of the difficulty of proving a discriminatory motivation." *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 445 (2014).

B. Plaintiff's First Amendment retaliation claim should not be dismissed because issues of fact regarding whether Dr. Blackman spoke as a public employee or private citizen and whether her protected speech was a motivating factor in her dismissal.

Defendants claim that since it was allegedly within Dr. Blackman's job duty to address ASB fraud and overtime non-payment her First Amendment claim fails. (ECF No. 28, pg. 19, PGID 303) Defendants made nearly the same argument on its FRCP 12(b) (6) motion which the Court rejected and should reject again. (ECF No. 15, pg. 18-19)(*Citing City of San Diego v. Rose*, 543 U.S. 77, 80 (2004); *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1103 (9th Cir. 2011)).

A First Amendment retaliation claim requires proof that: "(1) the plaintiff spoke on a matter of public concern; (2) the plaintiff spoke as a private citizen or

public employee; (3) the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) the state had an adequate justification for treating the employee differently from other members of the general public; and (5) the state would have taken the adverse employment action even absent the protected speech." *Id. citing Clairmont,* 632 F.3d 1103.

Regarding point (1), misuse of public funds, wastefulness, and inefficiency in managing and operating governmental entities are matters of public concern for purposes of First Amendment retaliation. *Keyser v. Sacramento City of Unified School Dist.*, 265 F.3d 741, 747 (9th Cir. 2001) (quoting *Roth v. Veteran's Admin.*, 856 F.2d 1401, 1405 (9th Cir. 1988)). Dr. Blackman spoke about ASB fraud and overtime non-payment. (SOF ¶69-72; 74-80) Those are matters of public concern.

Regarding point (2), "the determination whether the speech in question was spoken as a public employee or a private citizen presents a mixed question of fact and law." *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008) (*citing Garcetti*). Factors germane to whether a worker spoke pursuant to her job duties or as a public citizen include:

> (a) Whether the worker directed his speech inside or outside the regular chain of command as keeping the issue within the chain of command is more consistent with speaking pursuant to job duties. *Dahlia v. Rodriguez*, 735 F.3d 1060, 1074-1075 (9th Cir. 2013).
> (b) Whether the speech was made pursuant to a normal departmental procedure/routine report as doing so is consistent with speaking pursuant to job duties; however, "if a public employee raises within the

> department broad concerns about corruption or systemic abuse, it is unlikely that such complaints can reasonably be classified as being within the job duties of an average public employee, except when the employee's regular job duties involve investigating such conduct, e.g., when the employee works for Internal Affairs or another such watchdog unit." *Dahlia*, 735 F.3d at 1075.
>
> (c) Whether the employee spoke in direct contravention to his or her supervisor's orders for "when a public employee speaks in direct contravention to his supervisor's orders that speech may often fall outside of the speaker's professional duties." *Id.* at 1075-1076.

Dr. Blackman directed her ASB objection to Dr. Swanson and others outside of her chain of command. (SOF ¶69, 71) Dr. Blackman opposed the District's non-payment of overtime speech to at least seven others, including those outside of her chain of command. (SOF ¶80) Dr. Blackman was a middle school principal. (SOF ¶ 31) Determining or otherwise addressing the illegality of district-wide misuse of ASB funds, addressing Mr. Swanson's desire to cover up the misuse of ASB funds (i.e. "concerns about corruption or systemic abuse"), or opposing the District's non-payment of overtime compensation did not fall within her day-to-day job duties as a middle school principal. (SOF ¶71) And Dr. Blackman's objection to Swanson's plan to keep ASB auditors away is an example of Dr. Blackman acting in contravention of Swanson's action. (SOF ¶71) Accordingly, issues of fact exist as to whether Dr. Blackman spoke as a public employee or public citizen.

Regarding points (3), (4), & (5), the closeness in time, inability of Dr. Swanson and others to "recall" Dr. Blackman's oppositional activity, Defendants'

non-adherence to District pre-termination discipline procedure, and after the fact claims about Dr. Blackman's alleged performance defects are sufficient evidence to establish causation for the purposes of a First Amendment retaliation claim. As to the "after the fact" argument, Defendants appear to claim that Dr. Blackman was placed on administrative leave (or fired) because of alleged "increasing concern about programs and school climate raised by parents, students and staff from February 2017 onward." (ECF 29-1, ¶22-23) However, Dr. Swanson's declaration does not claim that Dr. Blackman's performance was the reason that caused him to fire her (or put her on administrative leave), instead he vaguely uses concerns about programs and school climate without directly attributing those concerns to Dr. Blackman. *See id.* But to the extent Dr. Swanson blames Dr. Blackman for the school's poor climate material issues of fact exist as to the cause of that poor culture for Ms. Ibarra, Mr. Reese, Ms. Curtis, and others declare that Dr. Blackman's performance was exemplary and that any poor climate was caused by a husband and wife teacher pair bent on undermining Dr. Blackman's attempt to make a dysfunctional school better. (SOF ¶35, 43, 44, 45) More to the point, Dr. Blackman was never told by Dr. Swanson that she would be fired (or put on administrative leave) if her performance did not improve (SOF ¶40) and courts hold that acceptance of allegedly poor performance until oppositional activity is evidence of pretext which is precisely what happened here as Swanson apparently had no issue

with Dr. Blackman's alleged contribution to poor school climate until *after* Dr. Blackman raised the ASB and overtime issues. *See Daoud*, 336 F. Supp. 2d at 1137.

C. Issues of fact exist as to whether the school board ratified Swanson's violation of Blackman's First Amendment rights.

The District asserts that Dr. Blackman's 42 U.S.C. § 1983 claim should be dismissed under *Monell v. New York Dep't of Social Servs*, 436 U.S. 658, 691-94 (1978). "In order to set forth a claim against a municipality under 42 U.S.C. § 1983 a plaintiff must show that the defendant's employees or agents acted through an official custom, pattern or policy that permits deliberate indifference to, or violates, the plaintiff's civil rights; or that the **entity ratified the unlawful conduct**." *Shearer v. Tacoma School Dist. No. 10*, 942 F. Supp. 2d 1120, 1135-36 (citing *Monell v. Dep't of Social Servs*, 436 U.S. at 690-91; *Larez v. City of Los Angeles*, 946 F. 2d 630, 646-47 (9th Cir. 1991). (Emphasis Added.)

Here Swanson admits to telling the Omak School Board of his decision to place Dr. Blackman on leave. (ECF 29-1, ¶23) Tellingly, Omak School Board member Dennis Carlton submits a declaration (presumably written by Omak's attorneys (see footer with Moberg's law firm on it)) that is silent on what Dr. Swanson told the school board regarding Dr. Blackman and the reasons for Dr. Swanson placing Blackman on leave (or firing her). (ECF No. 29-8) The import of this omission is telling insofar as the District seeks summary judgment on *Monnell*

liability without submitting any testimony from any board member outright denying that its actions were not taken in violation of Dr. Blackman's First Amendment rights. In this case, summary judgment should be denied because sufficient evidence exists in the record creating a genuine issue of material fact as to whether Dr. Blackman's constitutional right to procedural due process (more on that below) was violated when the Board put the proverbial cart before the horse and ratified Dr. Swanson's decision to terminate her as principal without providing her pre-termination notice of the proposed action to remove her for probable cause, the complete reasons for the proposed removal, and an opportunity to respond before she was terminated as principal of OMS. *See infra Loudermill*, at 546; SOF ¶86, 87, 91, 101. It is undisputed that whether Dr. Swanson was a policymaker or not, his decision to remove or discharge Dr. Blackman without providing her pre-termination notice was ratified by the District's school board on November 13, 2017. *Shearer*, 942 F. Supp. 2d at 1135-36; (SOF ¶101)

D. The court has already ruled that Swanson is not entitled to qualified immunity.

The District previously tried to establish that Swanson was not entitled to qualified immunity and the Court rejected that argument holding:

> However, in 2017, "both the constitutional protection of employee speech and a First Amendment cause of action for retaliation against protected speech were clearly established." *Coszalter v. City of Salem*, 320 F.3d 968, 989 (9th Cir. 2003). Moreover, as early as 2001, the

> Ninth Circuit held that employee speech made to a non-public audience regarding misuse of funds was protected by the First Amendment. *Keyser v. Sacramento City Unified School District*, 265 F.3d 741, 745, 747-48 (9th Cir. 2001). Thus, at the time of the alleged First Amendment violations in this case, relevant legal precedents were sufficiently specific to put Defendant Swanson on notice that his actions were potentially unconstitutional. Defendant Swanson is therefore not entitled to qualified immunity. (ECF 15, pg. 19)

Nothing has changed. The qualified immunity defense fails.

E. Dr. Blackman's Constitutional Due Process claim should proceed to trial because being placed on paid administrative leave is an adverse employment action.

A procedural due process claim has two discrete elements. First, the court "asks whether there exists a liberty or property interest which has been interfered with by the State." *Vasquez v. Rackauckas*, 734 F.3d 1025, 1042 (9th Cir. 2013). Second, the court "examines whether the procedures attendant upon that deprivation were constitutionally sufficient." Id. "[T]he Due Process Clause provides that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). Under Washington law, Dr. Blackman was a "certificated employee" who could only be terminated for cause. RCW 28A.400.210; RCW 28A.400.300. The sufficient cause requirement applies to dismissals occurring during the school year. *Butler v. Republic School District*, 34 Wn. App. 421, 423 (1983). Dr. Blackman had a property right in continued

employment which could not be deprived without due process of law before she was notified of her removal on November 30, 2017. *Board of Regents v. Roth*, 408 U.S. 564, 576-578 (1972); *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 11-12 (1978); *Goss v. Lopez*, 419 U.S. 565, 573-574 (1975).

"[R]egardless of the procedures the State deems adequate for determining the pre-conditions to adverse official action, federal law defines the kind of process a State must afford prior to depriving an individual of a protected liberty or property interest." *Ford v. Wainwright*, 477 U.S. 399, 428-429 (1986). ["M]inimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Vitek v. Jones*, 445 U.S. 480, 491 (1980). The Court in the *Loudermill* decision captured the essence of what due process means:

> An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). We have described "root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); see *Bell v. Burson*, 402 U.S. 535, 542 (1971). This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment. *Board of Regents v. Roth*, 408 U.S., at 569-570; *Perry v. Sinderman*, 408 U.S. 593, 599 (1972).

Dr. Blackman's position supporting her 42 U.S.C. § 1983 due process claim is the District and Dr. Swanson failed to provide her with pre-termination notice and an opportunity to be heard before she was terminated. *Loudermill*, 470 U.S. at 546.

The District and Dr. Swanson do not appear to dispute this but instead assert that Dr. Blackman voluntarily resigned, was placed on paid administrative leave until the end of her contract, and therefore her procedural due process rights were not implicated. (ECF 28, pg. 17-18) Defendants cite a series of inapposite and non-Ninth Circuit cases that should be disregarded. To wit:

- *Cummings v. City of New York*, 2020 U.S. Dist. LEXIS 31572 (Plaintiff had no property interest in her job because she was a probationary teacher, and under New York law, a probationary employee has no property interest in her job) - - not the case here.
- *Waronker v. Hempstead Union Free Sch. Dist.*, 788 Fed. Appx. 788, (2nd Cir. 2019) (Procedural due process claim dismissed under FRCP 12(b) (6) because under circuit precedent an employee who is suspended and placed on paid administrative leave, as opposed to terminated, is not deprived of a protected property interest) - - not the case here
- *Vosburgh v. Burnt Hills*, 2019 U.S. Dist. LEXIS 11656 (Under New York Law a substitute teacher placed on a District's DO NOT CALL list does not have a protected property interest in his employment) - - - not the case here.
- *Eggers v. Moore*, 257 Fed. Appx. 993 (6th Cir. 2007) (No process was due teacher when she was placed on paid administrative leave because she "has not been terminated or been disciplined in any way") - - not the case here.
- *O'Connor v. Pierson*, 426 F.3d 187 (2nd Cir. 2005) (tenured teacher who otherwise had a property interest in his job under Connecticut law

> was not denied procedural due process when he was placed on paid sick leave and received constitutionally sufficient notice and opportunity to be heard in writing both before and after his sick leave ran out.)

However, placing an employee on administrative leave and non-renewal of a year-to-year employment contract can be considered an adverse action. *Acosta v. Brain*, 910 F.3d 502, 513 (9th Cir. 2018) (affirming district court's finding that placement of employee on paid administrative leave was retaliatory conduct); *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003) (placement on paid leave can constitute sufficient adverse action for a retaliation claim, as can the non-renewal of a year-to-year contract.); *Dahlia*, 735 F.3d at 1078 (9th Cir. 2013) ("Under some circumstances, placement on administrative leave can constitute an adverse employment action."); *Ortiz v. Alvarez*, 341 F. Supp. 3d 1087, 1102–03 (E.D. Cal. 2018)("Although the Ninth Circuit has not explicitly addressed this issue, it has suggested that non-renewal of a contract may constitute an adverse action to support a § 1983 claim for violation of free speech"). Indeed "other circuit courts have determined that non-renewal of an employment arrangement does constitute an adverse action in the context of discrimination statutes." *Id. citing Leibowitz v. Cornell Univ.*, 584 F.3d 487 (2d Cir. 2009); *Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 320 (3d Cir. 2008); *Carter v. Univ. of Toledo*, 349 F.3d 269, 270–71 (6th Cir. 2003); *Minshall v. McGraw Hill Broadcasting Co., Inc.*, 323

F.3d 1273, 1279–82 (10th Cir. 2003); *Mateu-Anderegg v. School Dist. of Whitefish Bay*, 304 F.3d 618 (7th Cir. 2002)).

Whether Dr. Blackman verbally resigned or was terminated on November 30, 2017, without being provided a pre-termination notice and opportunity to respond is a disputed material fact. (SOF ¶89-105, 114) Whether Dr. Blackman abandoned her job or not is also a disputed material fact that must be resolved by a jury because it was not until Dr. Blackman objected to the District's termination of her employment and served the District with her tort claim notice that the District offered her a new job - - - a job the District knew she would not take given the fact that Dr. Blackman had already moved to Walla Walla and was seeking employment elsewhere. (SOF ¶115)

F. Dr. Blackman's wrongful discharge in violation of public policy claim is proper because issues of fact exist as to whether she was fired and she did not need to follow any procedure to bring that claim.

The tort of wrongful discharge in violation of public policy applies: (1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or obligation, such as serving on jury duty; (3) where employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims; and (4) where the employees are fired in retaliation for reporting employer misconduct, i.e., whistleblowing. *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 936 (1996). Dr. Blackman's claim falls into the

fourth category, whistle-blowing, because she alleges that she was fired in retaliation for reporting concerns about the illegal use of ASB funds and her opposition to the District and Dr. Swanson refusing to abide by the wage and hour laws under Washington and Federal Law. Defendant appears to acknowledge this but claims, without citation to evidence, that the Defendants did not know about the oppositional activity. (ECF 28, pg. 8) But issues of fact exist on that point: Blackman claims that she vehemently opposed the ASB fraud and overtime nonpayment and the Defense witnesses do not dispute her testimony but instead claim to "not recall" hearing it. Such repeated "non recalls" from decision makers both creates an issue of fact and is evidence of pretext. *See supra.*

The Defense goes on to claim that Dr. Blackman needed to follow District Procedures before bringing her wrongful discharge claim. (ECF 28, pg. 9) However, the wrongful termination tort is independent of any policy or statute and she does not have to exhaust administrative remedies. *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 283-84 (2015); *Becker v. Community Health Systems, Inc.*, 184 Wn.2d 252 (2015); *Rickman v. Premera Blue Cross*, 184 Wn.2d 300 (2015). ("[T]he existence of alternative statutory remedies, regardless of whether or not they are adequate, does not prevent the plaintiff from bringing a wrongful discharge claim.") *Rose*, 184 Wn.2d at 274. Additionally, a common law tort of wrongful discharge against public policy is not precluded by the existence of a non-

exclusive statutory remedy, regardless of the adequacy of the remedy. *Rose*, 184 Wn.2d at 284 ("Common law remedies should be preempted by statutory law only where the legislature either implicitly or explicitly expresses an intent to do so.").

For the reasons previously stated, sufficient evidence exists in the record that Dr. Blackman's public-policy-linked conduct was the cause of her termination.

G. Dr. Blackman's claims under RCW 49.46.100 and 29 U.S.C. § 215(a) (3) survive summary judgment.

Defendant claims that Dr. Blackman's FLSA and MWA retaliation claims fail because "Plaintiff lacks evidence that Dr. Swanson understood that she made a complaint about failure to pay overtime" and that Defendants' supposed "non retaliatory" reasons for discharging/adversely treating her cannot be established as pretextual. (ECF 28, pg. 10-11) Both arguments fail.

As a starting point, internal complaints are sufficient to trigger the FLSA's anti-retaliation protections so long as the employee "communicates the *substance* of [her] allegations to the employer (e.g., that the employer has failed to pay adequate overtime, or has failed to pay the minimum wage), [she] is protected by § 215(a)(3) [and] the employee may communicate such allegations orally or in writing, and need not refer to the statute by name." *Lambert v. Ackerley*, 180 F.3d 997, 1008 (9th Cir. 1999) (emphasis in original).

First, Dr. Blackman testified unequivocally that she told Dr. Swanson and others that in a November 2017 administrative team meeting (in which the non-payment of overtime was brought up by Dr. Swanson) she told Dr. Swanson and others that "the District was violating the wage law." (SOF ¶80) Dr. Blackman raised the non-payment of overtime on behalf of Mr. Reese after Mr. Reese was unsuccessful in getting workers to come forward to claim their unpaid wages (they were all afraid of being retaliated against). (SOF ¶ 75-76) Dr. Blackman then relayed Dr. Swanson's response ("oh shit, this isn't good") to Mr. Reese. (Reese Decl. ¶9) Dr. Blackman raised the issue with Ms. Olson, Rachelle Gaines, and Scott Haberle and then made clear in the November 2017 administrative meeting that "wage law" was being violated and she would not sit idly by in letting that happen. (SOF ¶77-80) Tellingly none of the Defense witnesses who signed declarations supporting Defendants' summary judgment motion "recall" any of this. *See supra.* And it bears repeating "[f]ailure to recall can be very useful because it avoids the risk of contradiction or perjury [but] a failure to recall does not even satisfy the burden of production." *Pinholster v. Ayers*, 590 F.3d at, 701. Such is the case here.

Second, the closeness in time, inability to recall, and questionable nature of the Defendants' stated reason for getting rid of Dr. Blackman (claiming she was a poor performer but not telling her any of this until *after* her protected activity), and

deviation from pre-termination notice policies are all pretextual evidence warranting a trial on these claims. *See supra.*

H. Dr. Blackman's Wrongful Discharge Breach of Promise Claim survives summary judgment.

Defendants claim Dr. Blackman's wrongful discharge claim fails because "plaintiff was not discharged", "no justifiable reliance," and "no breach of promise." (ECF 28, pg. 12-13) The "plaintiff wasn't discharged" claim was previously addressed. As it relates to justifiable reliance and no breach of promise contentions, District has certain policies approved by its Board that applied to Dr. Blackman as a certificated employee who could not be discharged for cause or retaliated against. (SOF ¶5-7) Those policies contained mandatory language creating enforceable promises that the District was obligated not to breach. *Stewart v. Chevron Chem. Co.*, 111 Wn.2d 609, 613-614 (1988) (discussing whether statements in an employment policy were mandatory or discretionary).

Summary judgment should be denied on the breach of promise claim. The policies contained enforceable promises. (SOF ¶5-7) Dr. Blackman asserts that she was aware of and relied upon these policies. (*See* Blackman Decl. pg. 2 ¶ 5) And there is a genuine issue of material fact whether the policies were breached warranting a trial on this particular claim.

I. Dr. Blackman's disability discrimination and failure to accommodate claims survive summary judgment.

Under RCW 49.60.180, a disabled employee has a cause of action for at least two different types of discrimination: disparate treatment and failure to accommodate. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 145 (2004). Defendants argue both claims fail because there is no proof that plaintiff was "disabled or perceived to be disabled," lack of pretext, and (as it relates to the failure to accommodate claim) plaintiff failed to give notice of the disability and how it affected her ability to do her job. (ECF 28, pg. 24, 26-27)

Dr. Blackman has presented a *prima facie* case of disparate treatment. SOF 39-43, 50-54, 91. Further, there is sufficient evidence in the record that the District and Dr. Swanson's reasons for terminating her was a pretext or discrimination was a substantial factor motivating the District and Dr. Swanson especially when looking at the proximity in time between her termination and notice to the employer of her disability and satisfactory work performance. SOF 67-68, 81-85. Mr. Reese testified that Swanson told the staff that Dr. Blackman "resigned for mental health reasons." SOF 106.

Regarding the failure to accommodate claim, plaintiff must prove that (1) she had a sensory, mental, or physical impairment that is medically recognizable or diagnosable, exists as a record or history, or is perceived to exist; (2) the impairment had a substantially limiting effect upon her ability to perform the job such that

accommodation was reasonably necessary; (3) she was qualified to perform the essential functions of the position; (4) she either gave the employer notice or the employer knew of the impairment; and (5) upon notice, the employer failed to reasonably accommodate the impairment. *Hale v. Wellpinit School Dist. No. 49,* 165 Wn.2d 494, 502-03 (2009). Temporary conditions or impairments under the WLAD are protected. *See* RCW 49.60.040(7). Once an employee provides notice of her need for accommodation, the employer has a duty to engage in the *interactive process* with the employee to identify and implement appropriate reasonable accommodations.[7] *See Goodman v. Boeing Co.*, 127 Wn.2d 401, 408 (1995) (noting that once an employee gives the employer notice of the disability, "[t]his notice then triggers the employer's burden to take 'positive steps' to accommodate the employee's limitations."); *Holland v. Boeing Co.*, 90 Wn.2d 384, 388-89 (1978). The employee's notice burden at the outset does not include "informing the employer of the full nature and extent of the disability." *Goodman*, 127 Wn.2d at 408. Lastly, "what constitutes a reasonable accommodation depends on the facts and circumstances of each case and generally is a question of fact for the jury."

[7] Neither Dr. Swanson nor Leanne Olson the Director of Human Resources had ever heard of the term *interactive process.* SOF __.

Banks v. Yoke's Foods, Inc., No. 2:14-CV-0319-TOR, 2014 WL 7177856, at *4 (E.D. Wn. Dec. 16, 2014).

In this case, Dr. Blackman clearly had protected disabilities under the post-2007 WLAD definition of disability and has provided substantial evidence that her disabilities had a substantially limiting effect upon her ability to perform her job as a principal such that accommodation was necessary. SOF 54. There is also sufficient evidence in the record that she was qualified to perform the essential functions of her job as a principal SOF 39; that she gave the District and Dr. Swanson notice of her impairments SOF 55-67; and that upon notice the District and Dr. Swanson failed to reasonably accommodate the impairments SOF 84-85.

Genuine issues of material fact exist precluding summary judgment on the failure to accommodate claim.

J. Dr. Blackman's invasion of privacy, false light, and defamation claims.[8]

[8] The District claims that Dr. Blackman is a public figure or official and therefore a higher standard (actual malice or reckless disregard for the truth should apply as opposed to a negligence standard. This matter has not been resolved in pre-trial dispositive motions. Regardless of which standard applies, genuine issues of material fact exist precluding summary judgment. SOF 98, 106-113.

Washington has adopted the Restatement (Second) of Torts § 652D (1977) which provides the general rule for invasion of privacy. *Reid v. Pierce County*, 136 Wn.2d 195, 205 (1998). It states:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public. *Reid*, 136 Wn.2d at 205.

A "false light" invasion of privacy claim requires a defendant to "publicize" a matter placing another in a false light where: "(a) the false light would be highly offensive to a reasonable person and (b) the [defendant] knew of or recklessly disregarded the falsity of the publication and the false light in which the other would be placed." *Eastwood v. Cascade Broad. Co.*, 106 Wn.2d 466, 470-471 (1986). "Publicity" means "communication to the public at large so that the matter is substantially certain to become public knowledge, and that communication to a single person or a small group does not qualify." *Fisher v. Dep't of Health*, 125 Wn. App. 869, 879 (2005); *La Mon v. City of Westport*, 44 Wn. App. 664, 669 (1986).

A defamation plaintiff must show four essential elements: a defamatory and false statement, an unprivileged publication, fault, and damages. *La Mon v.*

Westport, 44 Wn. App. 664, 667 (1986) When a statement is defamatory per se, "damage to the plaintiff is said to be 'presumed,' and the jury, without any further data, is at liberty to assess substantial damages, upon the assumption that the plaintiff's reputation has been injured and his feelings wounded." *Canfield v. Clark*, 196 Wn. App. 191, 199 (2016).

In this case, the District without Dr. Blackman's permission, invaded her privacy, cast her in a false light and defamed her when Dr. Swanson told the staff at OMS that she "had resigned for mental health reasons" and discussed her alleged "mental instability" with the staff. Thereafter, the District, again without Dr. Blackman's permission, falsely told students, parents, and the community in North Eastern Washington that Dr. Blackman had allegedly "resigned for medical reasons."

Here on all three common law claims, genuine issues of material fact exist precluding summary judgment. SOF 106-115.

III.CONCLUSION

Dr. Blackman respectfully requests that the Court deny Defendants' motion for summary judgment because genuine issues of material exist warranting a trial of this matter on all claims in dispute.

DATED this 4th day of May, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2020, I electronically filed the above-captioned document with the Clerk of the Court using the CM/ECF System which will cause the attorneys who have appeared in this action to be served with this document.

DATED this 4th day of May, 2020.

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