The Honorable Kenneth Schubert
Noted for Hearing: July 8, 2016
Time: 10:30 a.m.
Trial Date: September 12, 2016

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
KING COUNTY

TONI GAMBLE,

Plaintiff,

vs.

CITY OF SEATTLE, a municipal corporation,

Defendant.

Case No.: 15-2-10231-1 SEA

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

In employment discrimination cases, the Washington Supreme Court has set a high bar to grant a summary judgment motion, writing that summary judgment is "seldom appropriate" and "should rarely be granted."[1] This is not that rare case. As with any motion under CR 56, the Court "must consider the material facts and all reasonable inferences therefrom in the light most favorable to the nonmovant party," in this case in Plaintiff's favor. Additionally, in cases alleging discrimination "the court must review the record 'taken as a whole,'"[2] and "[a]ll of the evidence - whether direct or indirect - is to be considered cumulatively."[3]

Defendant's motion is a one-sided presentation of evidence that focuses on many irrelevant points, while omitting discussion of several key facts. For example, despite recognizing that Plaintiff claims retaliation, Defendant offers no information about the facts or timing of Plaintiff's protected activities, nor does it acknowledge the adverse facts that it uncovered through its own investigation of Plaintiff's complaints. On the record cited herein, a jury may find Plaintiff was denied promotions to jobs for which she was well-qualified and otherwise treated adversely, creating an abusive working environment; and that a substantial factor for these actions was her disability, age, gender, and/or protected activities.

For purposes of Plaintiff's claims for disparate treatment and hostile work environment based on "disability," as defined by RCW 49.60.040(7)(a), it cannot be disputed Toni Gamble has a "record or history" of disability. Gamble suffers from a Category 3 permanent partial disability in the lumbar area.[4] Seattle City Light's attendance records for Ms. Gamble from 2010-2011 reflect that "a good portion of her absences were coded as either L&I Leave or unpaid FML. Ms. Gamble was out, either full time or half time, on L&I or FML from March 2,

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[1] Scrivener v. Clark College, 181 Wn.2d 439, 445, 334 P.3d 541 (2014), *quoting* Sangster v. Albertson's, Inc., 99 Wn. App. 156, 160, 991 P.2d 674 (2000).
[2] Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).
[3] Raad v. Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1194 (9th Cir. 2003).
[4] Tort Claim, at 5 (Manville Dec., Ex. A, at Ex. 16, p. 5).

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2010 - July 29, 2011." Ex. 9 at 12. In May 2012, Customer Care Director Kelly Enright responded to an email from Plaintiff's new manager David Wernli, who referred to Ms. Gamble's doctor as "a quack" and questioned the validity of Gamble's sick leave. Enright responded, "This is **why I was worried *before*** regarding attendance." Sheridan Dec., Ex. 1. Earlier that month, Enright and Wernli were the decision-makers who decided to select an inexperienced 31-year-old male job applicant over Ms. Gamble, who is 51 years old and had already performed in the vacant job successfully.

A few months later, after Wernli hired a new manager (Jon Trout) to supervise Gamble's work unit, he immediately began tracking Gamble's attendance. Trout also denied Gamble the ability to telecommute, an accommodation Plaintiff's prior manager, Bryan Leuschen, permitted and which Trout allowed others to do on projects similar to those for which he denied Gamble the work from home. When Plaintiff took sick leave as the result of FMLA-covered impairments, Trout tersely objected to the "consistency of [her] work schedule," causing Gamble to respond to the newly hired manager that he "should become familiar with our Sick Leave Policy before making these accusations[;] I am under the care of my physician for my illness and I will be contacting our HR Department regarding your treatment and accusations."[5] Not long after that, Gamble wrote the Division Director (Enright) about "issues with [the] new manager," asking "Do they just not like women?" Sheridan Dec., Ex. 24.[6] Enright did not report Gamble's allegations to H.R., nor did she meet with Gamble about the complaint.

Defendant claims that "Gamble has no direct evidence that City Light discriminated" against her,[7] yet it is undisputed that Trout violated company policies by making "derogatory

[5] Sheridan Dec., Ex. 2.
[6] All Exhibits reference the attachments to the Declaration of John P. Sheridan, unless stated otherwise.
[7] Def.'s Mot. at 15. " 'Direct ... evidence' includes discriminatory statements by a decision maker. Fulton v. State, Dep't of Soc. & Health Servs., 169 Wn. App. 137, 164, 279 P.3d 500 (2012).

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comments in front of his supervisors" about Plaintiff. Sheridan Dec., Ex. 3. Trout said that Gamble has "a perpetual excuse for not coming in to work" and "keeps sending in doctor's notes that she needs to stay home." Sheridan Dec., Ex. 4. After Plaintiff made a formal complaint of discrimination to H.R. regarding the new manager's treatment, there was an investigation that led to Trout being counseled to "exercise good judgment as a manager in his communication with staff concerning protected activity" and to "not make comments that could appear to discourage his staff from accessing or taking FML leave." *Id*. Gamble's use of leave was not just protected activity—to the extent it is the result of a disability, the law considers it "***part of the disability***" and not a separate basis for adverse action. *See, e.g.*, Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 152, 94 P.3d 930 (2004) (en banc).

Nevertheless, in February 2013, the new manger (Trout), with the review and approval of his superiors (Manager of Customer Engineering David Wernli and Division Director Kelly Enright) gave Plaintiff an unfair and overly critical performance evaluation, stating "Toni's reliability and productivity is hindered by extraordinarily large number of hours she is not at work. Based on the review of historical attendance records, over the past three years Toni has been absent from work a total of 3,682 hours, that's 59% of a normal full time work schedule of 6,420." This was a criticism both on Gamble's use of authorized vacation and her authorized absences resulting from a disability. Plaintiff's manager for many years, Bryan Leuschen testifies that "Toni never took unauthorized time off" and he "never felt that she wasn't pulling her weight. Toni did exactly what we wanted her to do." Sheridan Dec., Ex. 5 at ¶ 13.

After Gamble objected to H.R. about her non-selection for an out-of-class assignment to ESE; reported unfair accusations from Trout about her use of sick leave; and wrote the Division Director asking whether the two new mangers (Wernli and Trout) "just [do] not like women," Gamble received a *de facto* demotion, assigning her to do the work of a Senior ESR, rather than the Supervising ESR job she had been promoted to seven years earlier. Gamble was

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then also given an unfairly critical performance evaluation, which chastised her for her attendance record from the prior three years, without acknowledging that all of her leave was authorized and much of it was protected leave resulting from a disability. Since that time, Gamble has applied for a substantial number of jobs at City Light and experienced a pattern of rejection that was not present in her career before 2012, when Enright hired Wernli and Trout.

For such reasons and those that follow, the jury can reasonably find that Plaintiff was subjected to disparate treatment and a hostile work environment, where a "substantial factor" for Defendant's treatment of Plaintiff was her gender, age, record or history of a disability, and/or her protected activities, and that she was therefore subjected to unlawful retaliation. The Court should heed rule that summary judgment is "seldom appropriate" in these cases and deny Defendant's motion.

II. STATEMENT OF FACTS

A. The Customer Care division at Seattle City Light

Since 2007, Kelly Enright has been the Director of the Customer Care Branch at Seattle City Light. Sheridan Dec., Ex. 6 at 6:5-9. Enright reported to Phil West, who was a direct report to the Superintendent, Jorge Carrasco. *Id*., at 10:2-13. Enright's branch provides "cradle to grave customer service," including "customer service engineering, meter reading, technical metering, business process improvement, all of the customer account services including collections." *Id.*, at 6:17-20. Director Enright has numerous direct reports including managers over technical metering, meter reading and office services, account services, the business process improvement team, the electric service engineering group, the north service center and the south service center, the advanced metering program, and the mobile work force project. *Id.*, at 18:4-17. Enright has hiring authority for her division and must "sign off on every bit of paperwork that comes through for any hires that happen." *Id.*, at 12:19-13:5.

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From 1990, until he retired in 2012, Bryan Leuschen was the Manager over Customer Engineering at the South Service Center, supervising Electrical Service Representatives ("**ESR**") and reporting to Enright for most of that time. Sheridan Dec., Ex. 5 at ¶¶ 2-3, 7; Sheridan Dec., Ex. 6 at 47:5-8, 14:4-17. "Customer Engineering provides assistance to contractors, developers, and property owners with the installation of new or rewired electrical services." Sheridan Dec., Ex. 5 at ¶ 2. Leuschen states, "In a typical account, we would do an initial intake, give electrical design advice and regulation advice to the customer as to the process, inspect the customer's installation prior to having our crews come out, and coordinate with the crews and others, including the billing department." *Id.* Leuschen started with Seattle City Light as a Meter Reader; then became an ESR; Senior ESR; Supervising ESR (1980-1990); and finally a manager (1990-2012). He "never felt that not having a degree hurt [his] career." Sheridan Dec., Ex. 5 at ¶ 7.

B. Toni Gamble worked for Seattle City Light for over 25 years, gaining a wealth of knowledge, training, and experience as she was promoted through the ranks.

Plaintiff Toni Gamble is an experienced supervisor with a strong technical background, who from 1987 to 2012 had a record at Seattle City Light ("SCL") of advancing into more challenging roles and succeeding in "out-of-class" ("OOC") assignments. Gamble began her career at Seattle City Light ("SCL") in October 1987 as a utility construction lead worker. Gamble Dec., ¶ 1. In June 1996, after many years of obtaining experience at SCL and several promotions, including assignments as a Power Structures Mechanic and Electrician-Constructor Apprentice, Gamble became an Electrical Service Representative ("**ESR**"). She was promoted to Senior ESR in 1999, and was promoted by Bryan Leuschen to **Supervising ESR** in 2006.[8] From such time through 2012, she worked primarily in that job and in other roles as out-of-class ("OOC") assignments, including a stint as North Customer Electrical

[8] The promotion to Supervising ESR was an out-of-class assignment in 2006. Gamble was hired permanently for the position in 2007, with no gap in service. See Sheridan Dec., Ex. 8 Sheridan Dec., Ex. 5 at ¶8.

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Services Manager 2,[9] receiving positive performance reviews throughout. Gamble Dec., ¶ 5, Sheridan Dec., Ex. 8.

Leuschen testifies that Gamble "did her job fine" and was a "hard worker" to whom he gave positive performance evaluations and permitted to stand in for him when he was gone, reflecting "my trust in Toni." Sheridan Dec., Ex. 5 at ¶¶ 8, 15-17, Exs. 1-3. "City Light admits that up until 2012, Gamble received generally positive annual written performance evaluations, including, in general, ratings that she met or exceeded expectations." Sub# 14, Def.'s Answer, ¶ 2.24.;

C. In 2012, two new managers were hired: David Wernli and Jon Trout.

On March 28, 2012, David Wernli was hired as Manager of Customer Engineering. Sheridan Dec. Ex. 9 at 2. Wernli then alerted his old friend, Jon Trout, about an opening for the Customer Electric Service Manager position under him. Sheridan Dec., Ex. 10 at 51:22-55:1. Gamble applied for the job, attempting to follow Bryan Leuschen's career path, but Wernli hired Trout. *See* Sheridan Dec., Ex. 11 at 26:8-9; Sheridan Dec., Ex. 12; Sheridan Dec., Ex. 5 at ¶ 3. Wernli and Trout were both from outside of SCL and the public sector; neither had any knowledge or experience in power generation. Sheridan Dec., Ex. 11 at 6:23-7:19; Sheridan Dec., Ex. 5 at ¶ 9; Sheridan Dec., Ex. 13. Trout had not had a job supervising anyone for the prior seven years, as the sole employee of Trout LLC / Cheers Connection, a "specialty beer & wine marketer and event facilitator," who "sold wine on the Internet," organized wine-tasting events, and supplemented his income by consulting on "website design and … customer experience."[10] Sheridan Dec., Ex. 13; Sheridan Dec., Ex. 10 at 43:14-46:14. Trout also had a

[9] "[M]anager 2… is the position that Mr. Trout held." Sheridan Dec., Ex. 6 at 61:9-10.

[10] On his application to SCL, Trout claimed he was employed running his own business for seven years, through "present," the time he was applying. Sheridan Dec., Ex. 17. However, in his deposition Trout admitted that his sole proprietorship "wrapped up" in 2011 and that he spent months after that remodeling his home and applying for jobs. Sheridan Dec., Ex. 10 at 46:15-47:14. Unlike the resume given to SCL, in the deposition, Trout admitted that he "wasn't currently employed" when he applied to work at SCL. *Id*.

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record of domestic violence under the name Jon Maurer before changing his name to Jon Trout. Sheridan Dec., Ex. 14 at 125:8-131:14; Sheridan Dec., Ex. 10 at 43:14-46:14 at 22:6-28:11. A colleague described Wernli and Trout's learning curve at SCL after they hired them in 2012, as like "drinking from [a] fire hose." Gamble Dec., Ex. 16 at 13527-0001.

D. In April 2012, Gamble applied for an Electrical Service Engineer ("ESE") job, but a much younger male applicant who lacked her experience was selected.

On April 2, 2012, just days after having been hired himself, David Wernli was made hiring manager for an out-of-class ("OOC) **Electrical Services Engineer** ("**ESE**") job. *See* Sheridan Dec., Ex. 15; Wernli Dec., ¶ 3. Gamble had already worked out-of-class as an ESE for more than a year between 2009 and 2010, and had received glowing performance reviews for that assignment. Gamble Dec., ¶ 4; Sheridan Dec., Exs. 20 and 21. Manager Leuschen testifies, "ESE and ESR are not that different," noting "Jackie Smith went from senior ESR to the ESE position and did just fine." Sheridan Dec., Ex. 5, ¶ 18. Director Enright testified in a general sense "ESEs do a very similar thing" to ESRs and provide the same type of advice; the difference is "[m]ainly … the size of the service and the type of job" on which they're advising customers." *See* Sheridan Dec., Ex. 6 at 14:4-16:2.

Ian Cooper is an ESE. Sheridan Dec., Ex. 16 at 5:14. Like Ms. Gamble, Mr. Cooper has no engineering degree. *Id*., at 9:4-5. Cooper testified that the lack of an engineering degree has never been an issue with management or in his work, and was not a requirement for him when he was hired as an ESE in about 2010. *Id.*, at 9:4-8; 27:25-28:17. The Customer Care Director, Kelly Enright, was one of the hiring authorities when Cooper was promoted to ESE. *Id*., at 9:25-10:2. Prior to being promoted to ESE, Cooper, like Gamble, worked as an "out-of-class **ESR supervisor** for about a two to three-year time period," and then permanently as ESR Supervisor for "[n]ot a long time[,] [m]aybe a year or two." *Id*., at 7:15-22. Mr. Cooper testified that when Plaintiff Gamble worked with him during her prior out-of-class assignment

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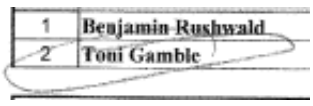
as an **ESE** (2010-11), she "did a fine job. She did as good a job as I did." Sheridan Dec., Ex. 16.

Ms. Gamble applied for the out-of-class **ESE** job posted in April 2012 and was unanimously rated "high" at the resume review stage. Wernli Dec., ¶ 3. She and a second candidate, Benjamin Rushwald, were given interviews. *Id*. At the time, Ms. Gamble was 53 years old and Mr. Rushwald was 31 years old. Sheridan Dec., Ex. 9 at 3. Rushwald had B.S. and M.S. degrees in Mechanical Engineering and had been working at SCL since only 2011, as a Power Analyst. Sheridan Dec., Ex. 18. He did not have Gamble's broad experience in the work performed by ESEs. ESE Ian Cooper was involved in training Rushwald after he was ultimately selected for the ESE job, and Cooper was asked in his deposition, "When [Rushwald] first came to you, what if anything, did he know about the position?" Cooper replied, "**Nothing, really**. I think he had some electrical background and had worked at City Light in another position, so was a member of City Light but **really had never done the type of work that an ESE does**." Sheridan Dec., Ex. 16 at 24:19-25:6.

The interview panel for the out-of-class ESE assignment included three persons; Director Enright, her subordinate (Manager Wernli), and Wernli's direct report, an ESE (Abdi Yussuf). *See* Sheridan Dec., Ex. 19; Sheridan Dec., Ex. 6 at 39:13-40:19. The panel unanimously rated both Ms. Gamble and Mr. Rushwald "high." Sheridan Dec., Ex. 19. According to SCL's investigation, "there was a lengthy discussion about which candidate was a better fit." Sheridan Dec., Ex. 9 at 3. On Director Enright's interview rating form, she wrote as to Mr. Rushwald, "very good technically," and as to Ms. Gamble, "strong background / could hit ground running." Sheridan Dec., Ex. 19 at CITYLIGHT016013. Director Enright also circled the name of Ms. Gamble—*not* Mr. Rushwald. 

Id.

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Manager Wernli wrote on his rating sheet about Mr. Rushwald, "Good on theoretical – **less electr. experience**," and about Gamble wrote only positive comments ("Good experience, good relationships, **good fit**"). *Id*. at CITYLIGHT016009 (bold added).

Director Enright later told SCL's investigator that "she, in consultation with the hiring panel, made the final decision that Mr. Rushwald was the best candidate." Sheridan Dec., Ex. 9 at CITYLIGHT015168. In defending that decision, Enright told the investigator, "[I]t is rare to have an ESE without an engineering degree." Sheridan Dec., Ex. 9 at CITYLIGHT015168. Again, Ian Cooper testified that he was promoted to ESE without an engineering degree, and that Director Enright was a hiring authority for his promotion. Sheridan Dec., Ex. 16 at 9:4-10:2; 27:25-28:17.

Director Enright admitted in her deposition to having prior knowledge about Gamble. Enright knew that Gamble "had back problems." Sheridan Dec., Ex. 6 at 47:13-48:21. Enright testified that at least by the time Gamble "was working in the ESE position in an out-of-class role [in 2009 and 2010] I became aware of that. … Because she had to miss time from work… [o]wing to back problems." *Id*.[11]

On May 10, 2012, H.R. informed Gamble that she was not selected for the OOC ESE position. Gamble immediately responded to H.R.'s email: "What? I did this job for over year!" Sheridan Dec., Ex. 22. H.R. then forwarded Gamble's email to Manager Wernli, who notified Director Enright of Gamble's opposition to their non-selection of her. *Id.* Wernli emailed Enright that he would talk with Gamble, writing, "If she is there would rather talk with her in-person (Can't remember if this is her day off…)". Sheridan Dec., Ex. 22 (ellipsis in original).

On May 21, 2012, Wernli emailed Director Enright to notify her Gamble was off work,

[11] Gamble's supervisor for the out-of-class ESE assignment, Margy Jones, wrote on her performance evaluation for the job that "Toni has very good attendance and always lets management as well as co-workers know when she is going to be un-available," rating her as "Exceeding Expectations" for Job Reliability/Initiative. Sheridan Dec., Ex. 20 at CITYLIGHT000183.

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having a hard time breathing; Enright responded, "That is sad that Toni is going through this...but not surprising about missing work." Sheridan Dec., Ex. 23. When Gamble emailed her supervisor, Bryan Leuschen, a note from her treating physician to return to work days later, copying Manager Wernli on the message, Wernli forwarded the information to Enright (dropping Leuschen off the email chain) and questioned the validity of the note, asking Enright, "Who is this quack?" Sheridan Dec., Ex. 1. Enright wrote in reply, "**This is why I was worried *before* regarding attendance**." *Id*. (emphasis added). In her deposition, when Enright was asked, " Did you have concerns that [Gamble] was missing too much work?" Enright denied any concerns: "No, I had concerns that the group was struggling to meet the needs of the business." Sheridan Dec., Ex. 6 at 73:1-25. Director Enright agreed that it would be improper to criticize or penalize an employee for taking approved vacation; and in Ms. Enright's words, "illegal" to criticize or penalize an employee for taking approved FMLA. *Id*. *See also* Sheridan Dec., Ex. 25 (City Light's FMLA Policy: "Supervisors must not reference an employee's FML absences in any discussions regarding absenteeism, productivity, performance, etc. The supervisor must not use the taking of FML as a basis for any adverse personnel action, nor as a reason to deny a benefit or working condition for which the employee would otherwise be eligible."). Director Enright admits that Gamble has never been accused or investigated for inappropriately taking time off. Sheridan Dec., Ex. 6 at 74:7-13.

E. Shortly after Wernli hired Trout, Gamble reported that Trout was mistreating her in regards to protected sick leave and treating her and other women differently.

On August 29, 2012, Jon Trout was hired by SCL and became the supervisor of Ms. Gamble. Sheridan Dec., Ex. 9 at 2. Within days (September 4, 2012), Trout was tracking Gamble's attendance. *See discussion, infra.* On September 11, 2012, Gamble emailed Trout about telecommuting, writing in relevant part:

> If you would like to discuss some telecommuting options, I would be happy to listen (see personnel rule 9.2…), in particular rule 9.2.3. When I chose the 'training

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> supervisor position' (I had previously supervised the Commercial ESR's) I was advised by my manager that there would be an opportunity for some telecommuting in this position. **This is especially useful when trying to complete a project without interruptions, such as researching to develop training programs, re-writing the RESC manual, up-dating CESIP documents**…. Occasionally, Snoqualmie Pass is closed, due to weather and avalanche control, and I have been able to use this option, with the consent of my Manager.

Sheridan Dec., Ex. 26 (bold added). At his deposition, Trout was shown the September 11th email and agreed he discussed telecommuting with Gamble. When asked, "Can you tell us why you told [Gamble] she could not telecommute?" Trout answered, "I made it a policy that **everyone** needed to report to the office because we were working with a lot of customers that needed people to be on site." Sheridan Dec., Ex. 14 at 84:13-85:12. On September 17, 2012, Trout similarly wrote Gamble, "[a]s for the topic of telecommuting, **I don't think telecommuting makes sense for any of our work activities in the customer care group**. **We all need to be present** in order to optimize our communication with each other and our customers." Sheridan Dec., Ex. 27 (emphasis added). In his declaration, Trout admits he allowed one of Gamble's coworkers to "work[] on **revising** the Residential Electrical Service Code [**RESC**]- a concrete project with a fixed and tangible deliverable." Trout Dec., ¶ 11. When Gamble asked on September 11th to "develop training programs, **re-writ**[**e**] **the RESC manual**, [or] up-dat[e] CESIP documents" from home, she was denied. Sheridan Dec., Ex. 27.

Between September and December 2012, Trout kept a "running log" in which he tracked Gamble's attendance. Sheridan Dec., Ex. 28; Sheridan Dec., Ex. 14 at 85:18-86:11. Trout's log references, *inter alia*, communications he received from Gamble about her being absent for doctor's appointments; for her own illness; for "family SL" [sick leave]; and related to her being late owing to the effects of medication. *See* Sheridan Dec., Ex. 28. In the log Trout kept, he included this quotation from an email Gamble sent him on October 2, 2012 in response to an email he sent her under the Subject line "Consistency of your work schedule": "Jon, Perhaps you should become familiar with our Sick Leave Policy before making these

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accusations. **I am under the care of my physician for my illness and I will be contacting our HR Department regarding your treatment and accusations**." Sheridan Dec., Ex. 28 at CITYLIGHT002890, 2892. Gamble made good on her promise. That same day, she forwarded the email chain with Trout to H.R., provided a copy to the Director of H.R., DaVonna Johnson, and asked how to "go about filing a complaint. Gamble Dec., Ex. 5 at GAM00042; Sheridan Dec., Ex. 2 at CITYLIGHT011322. Gamble was directed to Employee Relations, who she wrote, in relevant part, "This is one of many complaints that I have with this manager, not to mention other things that have been bothering me regarding the inconsistencies with the application of policies, OOC [out-of-class] assignments, and overtime." Gamble Dec., Ex. 5 at GAM00042.

On October 22, 2012, less than two months after Trout was made Gamble's manager, she was again emailing management to report Trout's adverse treatment. Gamble wrote Director Enright an email under the Subject line: "Issues with new manager," asking her "how [Trout] met the qualifications for this job?" Sheridan Dec., Ex. 24. Gamble wrote to Enright about Trout, *inter alia*:

> He is a terrible communicator and cannot seem to make up his mind on what direction he wants me to go in, with the training for our units. I have been pulled in at least 8 different directions and I get the feeling he is **setting me up for failure**. Whenever I think we have an understanding on something, he changes the game plan. When I deliver a finished training module, he thinks it is incomplete. He asks me to arrange the scheduling with the Supervisors, then he goes ahead and sets things up himself (without advising the supervisors or me). I have always strived to be a good communicator and employee, and have never had such a hard time pleasing anyone.
>
> For some reason both the managers [Trout and Wernli] think Jeff Jones is the greatest (what does that tell you about them) and he still can't show up for work on time. **Do they just not like women?** as both Annie & Melissa are getting the run around too.

Sheridan Dec., Ex. 24.

Director Enright responded to Gamble, "I am very sorry to hear this. Honestly I have heard nothing but good things about Jon. Thank you for bringing it to my attention. I will be

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investigating the allegations you have shared." *Id.* After receiving this email, Enright did not report Gamble's concerns to H.R., nor forward H.R. her email. Sheridan Dec., Ex. 6 at 69:11-70:6. Nor did Director Enright meet with Ms. Gamble. *Id*.; Gamble Dec., ¶ 34. Enright claims that after receiving the October 22nd email, she "start[ed] talking to the supervisors to get their impression of what was going on." Sheridan Dec., Ex. 6 at 64:10-65:20 (testifying she spoke with Allan Yamaguchi, Tief Weller, Anne Albertson, Max Castillo and "was having regular contact with Melissa Picken"). If true, Enright did not "document in any way the fact that [she] had these conversations." Sheridan Dec., Ex. 6 at 70:16-24. When Trout was asked in his deposition if Enright had discussed the content of Gamble's email with him, Trout answered, "I don't recall." Sheridan Dec., Ex. 10 at 64:7-66:23.

F. In December 2012, As The Result of Rushwald's Prior Selection (And Gamble's Non-selection) for OOC ESE, Rushwald Is Selected to Permanently Fill the ESE Job And Gamble Objects to the H.R. Director About His Selection.

In November 2012, SCL posted a request for applications relating to a permanent ESE assignment. Wernli Dec., ¶ 5. "This was the position for which Mr. Rushwald had previously been hired on an OOC basis." *Id*. Again, Gamble applied to be assigned the ESE job she had previously performed successfully on an OOC basis. On November 21, 2012, Ian Cooper (himself an ESE) rated resumes of six applicants for the job and gave Gamble's resume a "high" rating; while Trout, who lacked any experience in the position Gamble was applying for, rated Gamble's resume only "medium." Sheridan Dec., Ex. 29. On December 4, 2012, all six applicants were interviewed by hiring manager David Wernli and two others. Wernli Dec., ¶ 5. Wernli and the panel then rated Gamble "medium" and Rushwald "high," and selected Rushwald for the permanent ESE assignment. *Id*. Wernli testifies that Rushwald's "qualifications had improved since his hire in April 2012 … because he had been working OOC in the ESE position for more than six months." *Id*.

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On December 14, 2012, Gamble wrote the H.R. Director, DaVonna Johnson, who is a direct report to SCL Superintendent Jorge Carrasco, to file "an official complaint" about the hiring process for the Electrical Service Engineer job. Gamble Dec., Ex. 8. Gamble wrote that "the person chosen (Ben Rushwald) has minimal experience in this position or this type of work, compared to other candidates in the hiring process." She further stated, in part:

> He was also favored in the OOC hire earlier this year, as managements' excuse was that they 'wanted to give him a try.' This does very little for morale in the workgroup, where the focus is to promote from within, and the ESE's needed someone who could step in and help them with their workload. Ben Rushwald doesn't have the experience or training to do the job! … I feel very strongly that this hire is un-fair and has upper management involvement.

Gamble Dec., Ex. 8.

In the investigation that followed this complaint, Senior Electrical Engineer Specialist Minh Ta told the investigator he "believes that Ms. Gamble was more qualified for the job based on her experience than Mr. Rushwald." Sheridan Dec., Ex. 9 at 5. When Trout was asked in his deposition if "in your communications with Mr. Wernli you basically said that you felt that Ms. Gamble had serious problems regarding her attendance," Trout responded, "David Wernli and I both were concerned about Toni Gamble's attendance." Sheridan Dec., Ex. 14 at 108:3-8. Again, Wernli was the hiring manager when Ms. Gamble was rejected for the permanent ESE job.

G. After Gamble Complained About Trout, He Gave Her a *De Facto* Demotion, While Another Female Employee Complained to H.R. about His Treatment of Women.

In mid-December, Trout assigned Gamble, who was a ***Supervising*** ESR "to do the work of a Senior ESR in the Queen Anne and Magnolia neighborhoods." Sheridan Dec., Ex. 30 at 256:6-258:2. Gamble testified that while "[i]t wasn't a demotion in pay; it was kind of a demotion to me just because I got put in a lower position, and there were other people that probably could have done that, but yet I was sent there. So in my mind I felt like I was being punished." *Id*. For example, "[t]here was a person working out of class named Maneet Jain,

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who it was his job that [Gamble] was filling in. So why didn't they bring him back. He was in an out-of-class position, [Gamble] was in a permanent position." *Id*. at 258:16-22. While Senior ESR duties became Gamble's "main assignment," at the same time, she "had multiple jobs. [She] had also been asked to try to keep a training portion going, which was just not – [she] just didn't have enough time with the busy area that [she] was assigned to." Sheridan Dec., Ex. 31 at 198:20-199:5. A subsequent investigation by City Light included an interview of Supervising ESR Allan Yamaguchi regarding Gamble's complaints against Trout that confirms Gamble's perception of events. The investigator's notes of her interview with Yamaguchi state, *inter alia*:

> [Trout] elected her to be the training coordinator. With that, she had responsibility to develop training program and getting approved and implemented. Concept is good. But, in his opinion, **they set** [**her**] **up to fail**. T**hey kept changing her direction as training coordinator, her level of responsibility, the product having to develop, and then put into role of being service rep in a district. ESR role to deal with customers and then was still responsible for training piece as well** – although they understand that had ESR role as well. They asked her several times to produce this, but **she could not because she was busy**. … **Purposefully adding a lot of stuff on her plate.**

Gamble Dec., Ex. 16 at 13527-0001 – 0002.

Yamaguchi also reported to the investigator that he "he believes [Gamble] is legitimately using" her authorized leave. *Id.* at 13527-0002.

In mid-December, around the same time that Gamble sent her complaint to H.R. about her non-selection for ESE, a second complaint alleging discrimination in the Customer Care division was brought to H.R.'s attention. Director Enright testified that after Gamble wrote her in October about Mr. Trout, Enright began "having regular conversations" with Melissa Picken regarding Trout; and that on December 21, 2012, Enright "brought Melissa [Picken]'s concerns to HR," which led to an investigation into whether Trout's treatment of Picken was "gender discrimination." Sheridan Dec., Ex. 6 at 67:5-22. The investigation that was conducted by Kate McMahan included interviews of five Supervising ESRs, but curiously (given that Picken

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alleged gender discrimination) omitted any interview of Ms. Gamble, who had previously told Enright that Trout does "not like women." *See* Gamble Dec., Ex. 17 at 2, 9; Sheridan Dec., Ex. 24.[12]

H. Gamble Again Asked Trout To Be Allowed To Telecommute and Accused Him of Different Treatment When She Was Denied, After Which Trout Gave Her An Adverse Performance Evaluation.

On January 31, 2013, Ms. Gamble wrote Mr. Trout, in relevant part, "I would like to try and take care of some of my workload from home and answer customers inquiries (my e-mails are impossible to get through), perhaps 3-4 hours at the most each day?? I have research to do on many jobs that I can accomplish from home using my VPN account." Sheridan Dec., Ex. 32 at 1. Trout responded, "In regards to working from home: Your request is not approved. I think it would be much better to work on these Magnolia/ Queen Anne district projects from the NSC where you have all the resources you need." *Id*. Trout made no claim to Gamble at the time that he was applying a so-called "rule in the Customer Engineering group that an employee could only telecommute if he or she were working on a project with tangible and measurable benchmarks and had previously demonstrated reliability." *Compare* id. *with* Def.'s Mot. at 7, fn.2 (*citing* Trout Decl. ¶ 11); *see also* Sheridan Dec., Ex. 9 at 13. The City has identified no employee (other than Ms. Gamble) who was denied a request to telecommute based on application of such alleged rule. On January 31, 2013, in response to Trout again denying her request to telecommute, Gamble wrote:

> I had some work to take care of today, so I have already worked 2 hrs from home, due to my emergency. I know **you have allowed others to do this, so I'm not sure why you don't want me to keep somewhat caught up** on my work?? But that's fine with

[12] Four of the five Supervising ESRs that McMahan interviewed in the Picken's investigation were also interviewed by Meghan Frazer in the context of Toni Gamble's discrimination against Trout. *See id.*

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> me, if that's the level of customer service you want from me. This is not a frequent request, but **has been approved by you for others in the past.**

Sheridan Dec., Ex. 32 at 1.

Trout did not respond to explain why Gamble was being treated differently, but instead forwarded Gamble's email to his boss, Wernli. Sheridan Dec., Ex. 33.

On February 11, 2013, Employee Relations advisor and attorney Meghan Frazer interviewed Gamble about her complaints, and based on the information Gamble provided in the interview, the next day sent Gamble a formal EEO Complaint form to complete. *See* Sheridan Dec., Ex. 34. Gamble returned the complaint form on February 15, 2013, and as the basis for the complaint, checked boxes for "age," "disability," "gender," "family and medical leave," "failure to accommodate," and "retaliation." The narrative description stated in relevant part: "I have 2 new managers hired within the last year, Jon Trout & David Wernli, who have discriminated against me in the hiring process and day to day activities due to age, gender, FML, and accommodation issues. I have documented this treatment and have co-worker's statements to establish the discriminatory work environment that I am forced to endure." Sheridan Dec., Ex. 34.

On February 15, 2013, in an email to Trout Gamble wrote, "[a]s I have said before, you have approved work from home for other Supervisors and I feel that I am being discriminated against by you, regarding this issue and many other Supervisory issues as well." Sheridan Dec., Ex. 34. Trout did not address Gamble's accusation of discrimination when he replied, but did copy his manager (David Wernli) on the chain, ensuring that Wernli was also aware of Gamble's allegations. *Id.* Gamble, for her part, forwarded the email alleging discrimination to Director Enright, writing, "I feel that I cannot tolerate this harassment any longer, and request relief". Gamble Dec., Ex. 11.

Nine days later, on February 26, 2013, Trout gave Gamble an extremely critical performance evaluation, which David Wernli and Kelly Enright each reviewed and approved.

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See Sheridan Dec., Ex. 14 at 108:9-21. Upon receiving the evaluation, Gamble was compelled to write to investigator Frazer and to Labor Relations about it, reporting:

> [M]y performance evaluation mentions not only my current FML absences but also any time I was off over the last three years! This is outrageous, he has no idea what my past absences have been for! There are more 'observations' that he has made about me that are un-true. … [H]e has only worked here for 4 months, and he has stated that I was a bad supervisor when I supervised people years ago! …

Gamble Dec., Ex. 18. A copy of the signed Performance Evaluation was forwarded to Labor Relations and to investigator Frazer on March 1, 2013, with a note "to add this to the current claim I have regarding Jon Trout. This is personal assault against me not my performance. This PE is a lie, contradiction, immature, and breaches Personnel Rules regarding FML and L&I injury." *See* Sheridan Dec., Ex. 35. Among other things, the evaluation states:

> Toni's reliability and productivity is hindered by extraordinarily large number of hours she is not at work. Based on the review of **historical attendance records, over the past three years Toni has been absent from work a total of 3,682 hours, that's 59% of a normal full time work schedule of 6,420**. … Toni is expected to demonstrate a consistent pattern of attendance….

Id. at CITYLIGHT015329.

The evaluation also includes the enigmatically stated, in part:

> [Toni's] positive relationship qualities are undermined at times by Toni's habit of making **derogatory comments about other people behind their backs. In many cases these indirect negative remarks find their way back to their targe**t and serve to create an environment of mistrust and disrespect.

Id.

Although Wernli reviewed and approved this language, he testified that he did not recall Trout communicating that Gamble was making derogatory comments about other people, or Gamble being counseled or disciplined for such alleged conduct. Sheridan Dec., Ex. 11 at 49:17-50:6.

In his deposition, Trout confirmed that a copy of this performance evaluation is found

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in Trout's "Supervisor File." *Compare* Sheridan Dec., Ex. 10 at 16:16-18:5 (confirming CITYLIGHT 2866–2924 are Supervisor File) *with* Sheridan Dec., Ex. 36. He also testified that he did not believe the evaluation was changed at all after Gamble filed a grievance in regards to the evaluation. Sheridan Dec., Ex. 14 at 108:13-25. In the subsequent union grievance, Gamble claimed the evaluation was "designed to degrade, harass, and discriminate against" her, and she "corrected the record" providing a detailed response to each area of the evaluation. *See* Tort Claim, at 23-26 (Manville Dec., Ex. A, at Gamble Dep. Ex. 16, pp. 23-26 (Appx. D)).

In May 2013, while Gamble was on leave for a work-related injury, Meghan Frazer interviewed witnesses about her discrimination complaint. A draft report from the investigation was circulated that same month, leading Wernli to counsel Trout at the time about making "derogatory comments in front of his supervisors" about Ms. Gamble. Sheridan Dec., Ex. 3. Frazer's investigation found, *inter alia,* that Trout had told other supervisors that **Gamble has** "**a perpetual excuse for not coming in to work**" **and** "**keeps sending in doctor's notes that she needs to stay home**." Sheridan Dec., Ex. 4; Sheridan Dec., Ex. 9 at 23. After Frazer's report was made final, H.R. advised Director Enright to counsel Trout to "exercise good judgment as a manager in his communication with staff concerning protected activity," and to "not make comments that could appear to discourage his staff from accessing or taking FML leave," which Enright promised to do. Sheridan Dec., Ex. 4.

Frazer's investigation also confirmed that Gamble was not alone in feeling that Trout mistreats women. Melissa Picken told the investigator, "Trout does not treat women the same way he treats men" and "does not solicit input from women and ignores women." Sheridan Dec., Ex. 9 at 15. Trout testified that he gave Melissa Picken a performance evaluation that was "below average or needs improvement." Sheridan Dec., Ex. 14 at 97:9-14. The investigator interviewed Supervising ESR Allan Yamaguchi about Gamble's complaint against Trout and notes of that interview state, *inter alia*:

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> Why treat differentl[y]? Gut tells him its primarily personalities. Also **thinks there are some issues with women**. Yesterday's supervisory [meeting] was most classic example. Applauds work that Tief and him do, but leaves Melissa [Picken] out – just as important in work she does. **It was insulting**. **Melissa was sitting right next to him**.

Gamble Dec., Ex. 16 at 13527-0003; *accord id.* at 13527-0001 ("Treats Melissa differently? Yes. Whether conscious or not. He will talk to Tief and Him, but not stop at Melissa's office.")

Although the investigator found that Trout's derogatory comments about Gamble's use of leave violated City Light's policies, she declined to find that Trout or City Light engaged in unlawful discrimination. *See* Sheridan Dec., Ex. 9 at 1. Frazer no longer works for the City, having recently joined a law firm where she mostly defends municipalities. Sheridan Dec., Ex. 37 at 4:14-5:5. She testified that during her tenure at Seattle City Light she conducted "close to 50" investigations but cannot recall ever once making a finding of discrimination. *See* Sheridan Dec., Ex. 37 at 32:3-20. Even still, in the report concerning Gamble, Frazer recognized:

> Here, Ms. **Gamble's complaint likely establishes a *prima facie* case**, at least with respect to her claim under the ADEA.[13] With respect to her claim based on the ADEA, Ms. Gamble is 53 years old, applied for and was qualified for the OOC and permanent ESE position, was not offered the position, and the position went to a 31 year old.

Sheridan Dec., Ex. 9; Sheridan Dec., Ex. 37 at 39:25-40:6.

III. ISSUES PRESENTED

1. Whether Plaintiff raises a genuine issue of fact as to whether she was subject to disparate treatment based on her gender, age, and/or record or history of disability? Yes.

2. Whether Plaintiff raises a genuine issue of fact as to whether she was subject to a hostile work environment based on her gender and/or record or history of disability? Yes.

3. Whether Plaintiff raises a genuine issue of fact as to whether she was subject to retaliation in violation of the Washington Law Against Discrimination? Yes.

[13] ADEA is the Age Discrimination in Employment Act.

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IV. ARGUMENT AND AUTHORITY

A. Standard of Review

Under CR 56, all facts and inferences are viewed in the light most favorable to Ms. Gamble, as the Court "disregard[s] all evidence favorable to the moving party that the jury is not required to believe."[14] "The Court … may not make credibility determinations or weigh the evidence."[15] "[T]he court must review the record 'taken as a whole,'"[16] and "[a]ll of the evidence - whether direct or indirect - is to be considered cumulatively."[17] If there is a genuine issue as to any material fact, a trial is "absolutely necessary."[18]

"[S]ummary judgment to an employer is **seldom appropriate** in the WLAD cases because of the difficulty of proving a discriminatory motivation." Scrivener, 181 Wn.2d at 445, *citing* Sangster, 99 Wn. App. at 160 ("Summary judgment should rarely be granted in employment discrimination cases."); *accord* Davis v. West One Automotive Group, 140 Wn. App. 449, 456, 166 P.3d 807 (2007) (Stephens, J.). Plaintiffs "need produce very little evidence in order to overcome an employer's motion for summary judgment … [as] the ultimate question is one that can only be resolved through a searching inquiry – one that is most appropriately conducted by a factfinder, upon a full record." Chuang v. Univ. of Cal. Davis, 225 F.3d 1115, 1124 (9th Cir. 2000).

"[T]he employee's task at the summary judgment stage is limited to showing that a reasonable trier of fact could, but not necessarily would, draw the inference that [gender, age, disability, or retaliation] was a ['substantial factor'] in the decision."[19] Washington courts, while often utilizing the *McDonnell Douglas* approach, have repeatedly cautioned it is to be used

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[14] Reeves, 530 U.S. at 151.
[15] *Id.*, at 150.
[16] Reeves, 530 U.S. at 150.
[17] Raad v. Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1194 (9th Cir. 2003).
[18] Balise v. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963).
[19] *See* Johnson, 80 Wn. App. at 230; *accord* Scrivener, 181 Wn.2d at 445.

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"flexibly,"[20] and that "[a]bove all, it should not be viewed as providing a format into which all cases of discrimination must somehow fit." Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 363, 753 P.2d 517 (1988). "Proof of different treatment by way of comparator evidence is relevant and admissible but not required." Johnson v. Chevron U.S.A., Inc., 159 Wn. App. 18, 33, 244 P.3d 438, 446 (2010). "A plaintiff who chooses not to rely on *McDonnell Douglas* can still meet his or her burden of production in any way that yields evidence from which a rational trier of fact could find unlawful discrimination by a preponderance of the evidence." Parsons v. St. Joseph's Hosp. and Health Care Ctr., 70 Wn.App. 804, 809, 856 P.2d 702 (1993).[21] "[C]ircumstantial, indirect and inferential evidence will suffice to discharge the plaintiff's burden."[22]

B. Gamble raises an issue of fact as to whether she was subject to disparate treatment based on her gender, age, and/or record or history of disability.

Plaintiff succeeds on her disparate treatment claim by showing (1) that Defendant "did not promote" her and (2) that her disability, age, or gender was "a substantial factor" in the decision not to promote her. *See, e.g.,* Johnson v. Chevron U.S.A., Inc., 159 Wn. App. 18, 33, n.32, 244 P.3d 438 (2010), *citing* 6A Wash. Practice: Wash. Pattern Jury Instructions: Civil 330.01, at 307 (5th ed. 2005) ("Disparate Treatment—Burden of Proof"). It is undisputed that City Light took an adverse employment action by denying Ms. Gamble promotions. Kuest v. Regent Assisted Living, Inc., 111 Wn. App. 36, 44, 43 P.3d 23 (2002) ("[A]n adverse employment decision includ[es] … denial of promotion."). Thus, the only issue is whether

[20] *Id*., *citing Texas Dept. of Comm'y Affairs v. Burdine*, 450 U.S. 248, 253-55 (1981).
[21] *Accord* Lowe v. City of Monrovia, 775 F.2d 998, 1009 (9th Cir. 1985), amended, 784 F.2d 1407 (9th Cir. 1986) ("[A] plaintiff may establish a *prima facie* case of disparate treatment by satisfying the *McDonnell Douglas* four-part test, thereby creating a rebuttable presumption of discriminatory treatment, or by presenting actual evidence, direct or circumstantial, of the employer's discriminatory motive.").
[22] Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 180, 23 P.3d 440 (2001), *overruled in part on other grounds by* McClarty v. Totem Elec., 157 Wn.2d 214, 137 P.3d 844 (2006).

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Gamble's protected statuses (gender, age, and/or disability) were a "substantial factor" in such the denial of promotion.

> It is the plaintiff's burden at trial to prove that discrimination was a substantial factor in an adverse employment action, not the only motivating factor. An employer may be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions and still be liable….

Scrivener, 181 Wn.2d at 447 (discussing WLAD case). Substantial factor does ***not*** mean Gamble would have been promoted "but for" her gender, age, or disability. WPI 330.01.01; Wilmot, 118 Wn.2d at 71-73 ("[T]he plaintiff may respond to the employer's articulated reason … by showing that although the employer's stated reason is legitimate, [gender, age, or disability] was nevertheless a *substantial factor* motivating the employer")

1. There is ample evidence of animus toward Gamble's disability.

Relevant, circumstantial evidence of discrimination includes "remarks" about an employee's protected status, even if "not made directly in the context of an employment decision or uttered by a non-decision-maker." Scrivener, 181 Wn.2d at 450, n.3. Under the definition of disability applicable to WLAD claims, where disability includes a "record or history" of a disability, RCW 49.60.040(7)(a), in addition to "conduct resulting from a disability," Riehl, 152 Wn.2d at 152, Defendant's managers and decision-makers (Enright, Wernli and Trout) continually made critical and derogatory remarks about Gamble's disability. *See*, *e.g.*, Sheridan Dec., Ex. 1 (Emails dated 5/29/12, in which Wernli writes about Gamble's treating physician, "Who is this quack?" and Director Enright responds, "This is why I was worried before regarding attendance" within weeks of denying Gamble promotion); Sheridan Dec., Ex. 23 (Email dated 5/21/12, Enright writes: "That is sad that Toni is going through this...but not surprising about missing work."); Sheridan Dec., Ex. 4 (Trout says Gamble has "a perpetual excuse for not coming in to work" and "keeps sending in doctor's notes that she needs to stay home."); Sheridan Dec., Ex. 35 (Trout with the review and approval of Wernli and Enright, criticizes Gamble about her "attendance records, over the past three years"); and

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Sheridan Dec., Ex. 28 (Trout immediately begins tracking Gamble's absences and labels her "Dr. appt." an "excuse"). "When the plaintiff offers [such] direct evidence[23] of discriminatory motive … a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial." Estevez v. Faculty Club of University of Washington, 129 Wn. App. 774, 801, 120 P.3d 579 (2005).

2. The fact that Gamble's age and gender were factors in the denial of promotion can be inferred from the circumstances.

Using the "flexible" *McDonnell Douglas* framework, Gamble "can establish a prima facie case of … discrimination based on (1) her being a woman [or over 40 years old], (2) her being qualified for the position, (3) her not having been offered the position, and (4) [Defendant's] awarding the permanent position to a male [or significantly younger person]." *See* Fulton v. State, Dep't of Soc. & Health Servs., 169 Wn. App. 137, 156-57, 279 P.3d 500 (2012); Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 188, 23 P.3d 440 (2001), *overruled on other grounds by* McClarty v. Totem Elec., 157 Wn.2d 214, 137 P.3d 844 (2006), *citing* RCW 49.44.090; RCW 49.60.205. Investigator Frazer previously found that Gamble met this criteria and established a "prima facie" case of discrimination. *See* Sheridan Dec., Ex. 37 at 39:25-40:6; Sheridan Dec., Ex. 9 ("Ms. Gamble is 53 years old, applied for and was **qualified for the OOC and permanent ESE position**, was not offered the position, and the position went to a 31 year old" male); *see also* Sheridan Dec., Ex. 6 at 49:10-15 (Enright agreed "Gamble actually had worked in the position out of class before," so there was "no concern[] about whether she could do the job"). Having "establish[ed] a prima facie case, a "legally mandatory, rebuttable presumption of discrimination temporarily takes hold. Fulton, 169 Wn. App. at 149. Defendant's alleged legitimate discriminatory reason for selecting Rushwald over Gamble is

[23] " 'Direct ... evidence' includes discriminatory statements by a decision maker." Fulton v. State, Dep't of Soc. & Health Servs., 169 Wn. App. 137, 164, 279 P.3d 500 (2012).

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that he had degrees in mechanical engineering, which Gamble lacked. *See* Wernli Dec., ¶ 3. Enright told investigator Frazer,"[I]t is rare to have an ESE without an engineering degree and that she believes that a good educational background gives an ESE a 'leg up.'" Sheridan Dec., Ex. 9 at 4.

Gamble "satisf[ies] the pretext prong by offering sufficient evidence to create a genuine issue of material fact either (1) that the defendant's reason is pretextual or (2) that although the employer's stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer." Scrivener, 181 Wn.2d at 441-42. "Evidence of superior qualifications *alone* 'may suffice, at least in some circumstances, to show pretext.'" Dumont v. City of Seattle, 148 Wn. App. 850, 869, 200 P.3d 764 (2009) (emphasis in original). Here, a reasonable jury may find Gamble's qualifications were superior to Rushwald. She had previously performed successfully as an OOC ESE and had 25 years of experience at the utility, including many years of applicable experience as a Senior ESR and Supervising ESR, which perform work similar to the ESE work. *See* Sheridan Dec., Ex. 19 at CITYLIGHT016009 (Wernli writes for Rushwald, "Good on theoretical – **less electr**. **experience**," versus only positive comments for Gamble, "Good experience, good relationships, **good fit**"); and Sheridan Dec., Ex. 9 at 5 (Minh Ta told investigator "Gamble was more qualified for the job based on her experience than Mr. Rushwald."); *see generally*, Gamble Dec., Ex. 2.

In addition to superior qualifications, Gamble can also show pretext by "produc[ing] evidence from which a trier of fact could infer that the employer's 'articulated reasons' for the employment decision "were not really motivating factors for the decision" or "were not motivating factors in employment decisions for other employees in the same circumstances." Dumont, 148 Wn. App. at 867. Here, ESE Cooper testified that the lack of an engineering degree has never been an issue with management or in his work, and was not a requirement for

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him when he was hired as an ESE in about 2010. *Id.*, at 9:4-8; 27:25-28:17. The Customer Care Director, Kelly Enright, was one of the hiring authorities for Cooper to be promoted to ESE. Sheridan Dec., Ex. 16, at 9:25-10:2; Sheridan Dec., Ex. 6, at 54:21-55:23.

The jury can also find Enright's claim to the investigator that it is "rare to have an ESE without an engineering degree," Sheridan Dec., Ex. 9 at 4, has no basis in fact. Enright knew that Cooper, the most recent ESE to have been promoted during her tenure had no such degree, and in her deposition named only four (4) ESEs in the group at the time who had engineering degrees. Sheridan Dec., Ex. 6 at 54:4-24. That one out of five ESEs in the group lacked an engineering degree belies most common understandings of the term "***rare***." "[T]he trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." Hill, 144 Wn.2d at 184, *quoting* Reeves, 530 U.S. at 147. "Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" *Id*.

While Defendant will likely maintain that there were further considerations at play (*see* Wernli Dec., at ¶ 3, claiming "at the time of this hiring process the design engineering group at City Light was attempting to diminish the role of the ESEs, and we felt that hiring an ESE with an engineering degree would enhance the ESEs' stature"), Plaintiff is not required to show that discrimination was the "sole" or even "principal reason" for her non-selection.[24] "But for" causation is not required. *See* WPI 330.01.01.[25] Thus, it is not Plaintiff's burden to "disprove each of the [City]'s articulated reasons" for the non-selection. Scrivener, 181 Wn.2d at 447.

It is sufficient that the jury, considering all of the evidence in the light most favorable to Ms. Gamble, may reasonably find that Plaintiff's gender, age, and/or disability–statuses that all

[24] *See* Renz v. Spokane Eye Clinic, P.S., 114 Wn. App. 611, 621, 60 P.3d 106 (2002), *citing* Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn. 2d 46, 70-72, 821 P.2d 18 (1991).
[25] Wilmot, 118 Wn.2d at 71.

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contrasted with Mr. Rushwald—were a "substantial factor" in Plaintiff's non-selection. Thus, summary judgment as to Plaintiff's claim for disparate treatment should be denied.

C. Gamble raises an issue of fact as to whether she was subject to an abusive working environment based on her gender and/or record or history of disability.

To establish a prima facie hostile work environment claim, a plaintiff must show the following four elements: '(1) the harassment was unwelcome, (2) the harassment was because [plaintiff was a member of a protected class], (3) the harassment affected the terms and conditions of employment, and (4) the harassment is imputable to the employer.' Loeffelholz v. Univ. of Washington, 175 Wn.2d 264, 285 P.3d 854 (2012). For claims of disability-based harassment there is one additional element, that Plaintiff be "disabled within the meaning of the antidiscrimination statute";[26] however, that fact is undisputed here. In accordance with RCW 49.60.040(7)(a), Plaintiff has a record or history of disability at City Light, as well as an impairment that is "medically cognizable or diagnosable." *See, e.g.,* Sheridan Dec., Ex. 5 at ¶ 8, 10-12; Tort Claim, at 5 (Manville Dec., Ex. A, at Gamble Dep. Ex. 16, p. 5). Nor does Defendant dispute that Plaintiff's harassment was unwelcome, meaning that she "did not solicit" the treatment and viewed it as "undesirable or offensive."[27] Plaintiff repeatedly and consistently objected to her mistreatment. *See, e.g.*, Sheridan Dec., Ex. 2; Ex. 24; Gamble Dec., Ex. 19 (EEO Complaint); Gamble Dec., Ex. 18 (2/26/12 email to investigator re: performance review). Nor could the element of imputability be reasonably disputed, where as here Plaintiff alleges that "manager[s] … personally participate[d] in the harassment." Robel, 148 Wn.2d at 47 (affirming employer liability where the assistant deli manager who made work assignment for the deli participated in the harassment); *see also* Sheridan Dec., Ex. 6, at 69:11-70:6 (Enright admits she failed to report Gamble's October 22nd report regarding Trout and his treat of women to H.R., nor did she meet with Gamble after receiving the complaint).

[26] Robel v. Roundup Corp., 148 Wn.2d 35, 45, 59 P.3d 611 (2002).
[27] *See* Robel, 148 Wn.2d at 45.

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Thus, the only elements of the hostile work environment claim that are at issue are whether the harassment (1) was "because of" Plaintiff's protected status, *i.e.*, her disability and/or gender; and (2) affected the terms and conditions of employment. The record here presents issues of fact as to each of these elements.

1. The Harassment Is Because of Plaintiff's Disability

> [I]t is very difficult to prove what the state of a man's mind at a particular time is… Intent may be proved by circumstantial evidence. Indeed, in discrimination cases it will seldom be otherwise….

deLisle v. FMC Corp., 57 Wn. App. 79, 83, 786 P.2d 839 (1990).

While circumstantial evidence would suffice, in this case Gamble presents evidence of animus directly linked to her attendance record, which under Riehl is to be considered "part of the disability." *Accord* WPI 330.23 Comment ("Conduct or language 'directly or proximately related to' a disability is 'because of" a disability. Robel v. Roundup Corp., 148 Wn.2d 35, 45, 59 P.3d 611 (2002).") The same evidence of animus relevant to proving that Enright and Wernli (Mr. Trout's managers) denied Gamble promotions based on her disability is also evidence showing that Gamble's harassment was because of her attendance record and disability. *See* Section IV.B.1., *supra*. Trout's derogatory comments and unwarranted criticisms were aimed directly at Ms. Gamble's protected leave and thus her disability. *See*, *e.g.*, Sheridan Dec., Ex. 4 (stating she had "a perpetual excuse for not coming in to work" and "keeps sending in doctor's notes that she needs to stay home."); Sheridan Dec., Ex. 28 (tracking absences and referring to a "Dr. appt." as an excuse); Sheridan Dec., Ex. 35 (criticizing Gamble for her "attendance records, over the past three years"). Thus, there should be no dispute that Plaintiff has shown harassment by management was "because of" disability.

2. The Harassment Is Because of Plaintiff's Gender.

A jury can also reasonably find from the evidence that Gamble's harassment was because of gender. As long as the conduct is "because of sex," it need not be "sexual in nature"

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or "involve sexual advances, innuendo, or physical conduct to be actionable." Payne v. Children's Home Soc., 77 Wn.App. 507, 512-13, 892 P.2d 1102 (1995). Trout's negative treatment of other women shows that his treatment of Gamble was because of gender. "[I]n the civil employment context, evidence of employer treatment of other employees is not impermissible character evidence; rather it may be admissible to show motive or intent for …discharge." Brundridge v. Fluor Federal Servs., Inc., 164 Wn.2d 432, 444-46, 191 P.3d 879 (2008); *see also* Heyne v. Caruso, 69 F.3d 1475, 1479 (9th Cir. 1995) ("[A]n employer's conduct tending to demonstrate hostility towards a certain group is both relevant and admissible where the employer's general hostility towards that group is the true reason behind firing an employee who is a member of that group."); ER 404(b); s*ee also* Peone v. Mary Walker School Dist. No. 207, 2003 WL 25685232 *1 (E.D.Wash.) (other bad acts may be admissible on hostile work environment claim).

Here, there is evidence that Trout mistreated and harassed not only Ms. Gamble, but other women, including his ex-wife, who obtained a restraining order against him, and Ms. Gamble's co-worker, Melissa Picken, who filed her own gender discrimination complaint. *See* Sheridan Dec., Ex. 14, at 125:8-131:14; Sheridan Dec., Ex. 10, at 22:6-28:11; and Sheridan Dec., Ex. 9 at 15. The investigator's interview of Supervising ESR Allan Yamaguchi provides additional evidence from which to find that the adverse treatment of Gamble was based on her gender. Gamble Dec., Ex. 16 at 13527-0003 ("[**T**]**hinks there are some issues with women**. … [L]eaves Melissa out… It was insulting. Melissa was sitting right next to him.); *accord id.* at 13527-0001 ("Treats Melissa differently? Yes. Whether conscious or not. He will talk to Tief and Him, but not stop at Melissa's office.").

Also, to the extent the disparate treatment of Ms. Gamble in regards to promotion is shown to be based on gender, such "discrete act" while not forming part of the hostile work environment claim may still be cited as *evidence* used to create the inference that hostile acts

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that are part of the harassment claim were because of gender. *See* Broyles v. Thurston Cty., 147 Wn. App. 409, 434, 195 P.3d 985 (2008).

In its motion, Defendant mentions that as to Anne Albertson, Gamble "left her alone." *See* Def.'s Mot., at 9. However, such fact is a red herring and not determinative as to whether Ms. Gamble or Ms. Picken were treated differently because of sex. *See, e.g.,* Connecticut v. Teal, 457 U.S. 440, 455, 102 S. Ct. 2525, 73 L. Ed. 2d 130 (1982) ("Congress never intended to give an employer license to discriminate against some employees on the basis of … sex merely because he favorably treats other members of the employees' group."). "In other words, discrimination against one employee cannot be remedied solely by nondiscrimination against another employee in that same group." Chadwick v. WellPoint, Inc., 561 F.3d 38, 42 (1st Cir. 2009).

On the record presented here, a jury can reasonably infer that Trout's hostile acts toward Ms. Gamble and Ms. Picken were because of gender.

3. The Harassment Affected The Terms and Conditions of Employment

"A satisfactory finding on [the third] element should indicate '[t]hat the conduct or language complained of was so offensive or pervasive that it could reasonably be expected to alter the conditions of plaintiff's employment'" and "create an abusive working environment." Robel v. Roundup Corp., 148 Wn.2d 35, 46, 59 P.3d 611 (2002), quoting 6A WPI 330.23, at 240. Whether harassment is sufficiently severe or pervasive as to alter the conditions of employment and create an abusive working environment is a "question of fact" determined with regard to "the totality of the circumstances." Adams v. Able Bldg. Supply, Inc., 114 Wn.App. 291, 296, 57 P.3d 280 (2002); Loeffelholz v. Univ. of Wash., 175 Wn.2d 264, 275, 285 P.3d 854 (2012).

"**Hostile work environment claims** … occur[] over a series of days or perhaps years…. Such claims **are based on the cumulative effect of individual acts**.'" Antonius v.

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King County, 153 Wn.2d 256, 264, 103 P.3d 729 (2004).[28] "The standard for linking discriminatory acts together in the hostile work environment context is not high." *Loeffelholz*, 175 Wn.2d. at 276. In determining whether conduct is sufficiently severe or pervasive, the Court considers, *inter alia*, whether the conduct includes "public humiliation," false accusations of misconduct, and "whether the conduct interfered with the employee's work performance." Adams, 114 Wn.App. at 297; Ray v. Henderson, 217 F.3d 1234, 1245-46 (9th Cir. 2000). Notably, the Washington Supreme Court in Loeffelholz held that **a single comment** a supervisor made to a group of employees, saying he was going to return from military duty an "angry man," "could be severe enough, ***on its own***, to alter the conditions of employment and establish a hostile work environment." 175 Wn.2d at 277.

It is undisputed that Trout's offensive conduct toward Gamble included public humiliation. *See* Sheridan Dec., Ex. 3; Ex. 9 at 23 ("[I]t was inappropriate for him to mention this issue to his subordinates and Ms. Gamble's colleagues in a supervisor meeting."). Gamble answered in discovery, *inter alia*, that Trout "would always visit with the male supervisors, but did not visit either" Melissa or I. See Answer to Interrogatory No. 16 (Manville Dec., Ex. C, at 35). Gamble testifies that "[w]hen I would make a suggestion about a business decision, Mr. Trout would not discuss it with me and just tell me that he did not want to talk about it; the decision had been made." *Id.*

Other hostile acts forming the basis for the hostile work environment claim similarly relate to conduct which unreasonably inferred with Plaintiff's work performance. *See, e.g.,* Sheridan Dec., Ex. 24 ("I have been pulled in at least 8 different directions and I get the feeling

[28] *Id.*, *quoting Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 115, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002); *accord Loeffelholz v. Univ. of Wash.*, 162 Wn. App. 360, 363, 253 P.3d 483 (2011) *aff'd in part,* 175 Wn.2d 264, 285 P.3d 854 (2012) ("A hostile work environment claim is composed of a series of separate acts that collectively constitute one unlawful employment practice. A plaintiff is entitled to present evidence of harassment … to show the cumulative effect of the acts, provided some of the objectionable conduct occurred within the limitations period.")

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he is setting me up for failure. Whenever I think we have an understanding on something, he changes the game plan"); *accord* Answer to Interrogatory No. 1 (Manville Dec., Ex. C, at 8) and Gamble Dec., Ex. 16 at 13527-0001 – 0002. ("[T]hey set [her] up to fail. They kept changing her direction as training coordinator, her level of responsibility, the product having to develop, and then put into role of being service rep in a district. ESR role to deal with customers and then was still responsible for training piece as well – although they understand that had ESR role as well. They asked her several times to produce this, but she could not because she was busy. … Purposefully adding a lot of stuff on her plate.") The denial of telecommuting on tangible projects with deliverables, which Trout admits he let others do, but denied Gamble when she asked for the opportunity to "complete a project without interruptions, such as researching to develop training programs, **re-writing the RESC manual**, up-dating CESIP documents" likewise interfered with her work performance. *Compare* Ex. 26-27; *with* Trout Dec., ¶ 11 (recognizing that he permitted others to "**revis[e]** the Residential Electrical Service Code [**RESC**]" by telecommuting)

Ms. Gamble became "sick to [her] stomach, just having to defend [her]self every step of the way with" Trout. Manville Dec., Ex. A at Gamble Dep. Ex. 34. She suffers "depression as the result of [her] discrimination and hostile work environment and [is] prescrib[ed] drugs to help [her] condition." Answer to Interrogatory No. 11 (Manville Dec., Ex. C, at 29); Tort Claim at 6 (Manville Dec., Ex. A, at Gamble Dep. Ex. 16, p. 6 (Appx. D)) ("I have suffered severe emotional distress. I felt bullied and harassed. I have felt like a speck of dirt…."). In Davis v. W. One Auto. Grp., 140 Wn. App. 449, 458, 166 P.3d 807 (2007) the Court of Appeals in evaluating whether harassment was "sufficiently pervasive as to alter the conditions of employment and create an abusive working environment" noted that Plaintiff had similarly reported that he was "[p]robably mentally sick, drained," and that "[a]n inference could be drawn that this was the result of the hostile work environment." *Id*.

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Here, Gamble testifies in her discovery answers that Trout's treatment of her "discouraged [her] from using [her] FML, vacation and other leaves that were available to [her] by listing [her] time off for the past three years on [her] performance evaluation." Answer to Interrogatory No. 1 (Manville Dec., Ex. C, at 8). Such result was anticipated. *See* Sheridan Dec., Ex. 4 at ¶ 2. The adverse performance evaluation, issued to Gamble with upper management's review and approval, falsely accused Gamble of misconduct based on her attendance record where "a good portion of her absences were coded as either L&I Leave or unpaid FML," Sheridan Dec., Ex. 9 at 12, violating the exact letter of Seattle City Light's policies, and infringing upon Gamble's rights to use authorized sick leave. *See* Sheridan Dec., Ex. 25. (Policy: "Supervisors must not reference an employee's FML absences in any discussions regarding absenteeism, productivity, performance, etc. The supervisor must not use the taking of FML as a basis for any adverse personnel action, nor as a reason to deny a benefit or working condition for which the employee would otherwise be eligible."). The fact that Gamble was able to use the labor union's grievance process to subsequently have the evaluation revoked from one of her personnel files does not make Trout and his managers issuance of the improper evaluation any less of a hostile act.

These hostile acts, among many others, created a working environment that is any less abusive than the working environment that the Court in Loeffelholz held "could be severe enough," based on ***a single comment*** "***on its own***, to alter the conditions of employment and establish a hostile work environment." 175 Wn.2d at 277. The motion should therefore be denied as to Plaintiff's hostile work environment claim.

D. Gamble raises an issue of fact as to whether she was subjected to retaliation.

Plaintiff repeatedly engaged in protected activity, of which her management had notice. In May 2012 Gamble wrote to H.R. opposing her discriminatory non-selection for OOC ESE—opposition that both Wernli and Enright were immediately made aware of by H.R. *See* Ex. 22.

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After this, Trout is hired by Enright and Wernli as Gamble's new manager on August 29 and by September 4th, he is tracking her attendance including instances, such as one on September 4 where Gamble reports visiting her doctor and on September 13, becoming ill from medications. *See* Ex. 28.

In October, Gamble engaged in further protected activity when she opposed discriminatory treatment related to her disability and gender, sending emails opposing Trout's treatment to Trout, as well as to H.R., to the H.R. Director (DaVonna Johnson), and to the Customer Care Director two levels above Trout (Ms. Enright). *See* Ex. 1 ("[Y]ou should become familiar with our Sick Leave Policy before making these accusations. I am under the care of my I am under the care of my physician for my illness and I will be contacting our HR Department regarding your treatment and accusations."); and Ex. 22 ("Do they just not like women?").

When Trout was asked if Director Enright had shared with him the concerns Gamble presented in her October 22 email, in which she had claimed he was treating her and Melissa Picken differently, he answered that he "did not recall". Sheridan Dec., Ex. 10 at 64:7-66:23. The jury can reasonably infer that Enright did in fact make Trout aware of the October 22nd email claiming that Trout and Wernli do not like women.

In mid-December Trout assigned Gamble, who is a Supervising ESR, to do the work of Senior ESR at a different location (the North Service Center). The change effectively put her "in a lower position, and there were other people that probably could have done that, but yet [she] was sent there. So in [her] mind [she] felt like I was being punished." Sheridan Dec., Ex. 30 at 256:6-258:2. "NSC was a very busy location. Mr. Trout expected [Gamble] to do three different jobs, and still expected [her] to work on [her] training modules. Mr. Trout expected me to work as an ESR in the field, continue training and provide great customer service." See Gamble Dec., ¶ 42.

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Around this same time, beginning in December 2012 and continuing through February 15, 2013, Gamble made formal complaints to H.R. and to Director about her treatment by both Wernli and Trout. *See, e.g.,* Gamble Dec., ¶ 38-39, 50; Gamble Dec., Ex. 11.

On February 26, 2013, Gamble received the adverse evaluation that made inaccurate assertions, factual misstatements and accusations of poor performance. See Gamble Dec., ¶ 52. It appeared to Gamble that the evaluation, which Mr. Trout testified was reviewed and approved by David Wernli and Director Enright, was "designed to degrade" her and "to diminish [her] professional integrity and reputation." *Id*.

Gamble's de facto demotion and reassignment to the NSC and the adverse performance evaluation, which violated City Light's policy on protected leave, among many other acts, create an issue of fact as to whether Gamble was subject to unlawful retaliation.

"[P]roof of the employer's motivation must be shown by circumstantial evidence because the employer is not apt to announce retaliation as his motive." Kahn v. Salerno, 90 Wn. App. 110, 130, 951 P.2d 321, 332 (1998). Here, there is strong circumstantial evidence of retaliation from which the jury can infer retaliation, where Trout wrote to Gamble that her "habit of making derogatory comments about other people behind their backs" and "negative remarks find their way back to their target and serve to create an environment of mistrust and disrespect." See Gamble Dec., Ex. 13 at CITYLIGHT015329. Moreover, the proximity in time between Gamble's protected activities and her de facto demotion and adverse performance review is another factor suggesting a retaliatory motivation. *See* Estevez, 129 Wn. App. at 799. The deviation from established policies and procedures, criticizing Gamble for using protected leave in derivation of the leave policy is also evidence of a discriminatory motive. *See*, *e.g*., Lyons v. England, 307 F.3d 1092, 1101-02, 1115-16 (9th Cir.2002); Diaz v. Eagle Produce Ltd. Partnership, 521 F.3d 1201 (9th Cir. 2008); Nicholson v. Hyannis Air Service, Inc., 580 F.3d 1116, 1127 (9th Cir. 2009). And, where, as here, "the employee establishes that

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he or she participated in an opposition activity, the employer knew of the opposition activity, and he or she was discharged [or had other adverse action taken against him], then a rebuttable **presumption is created in favor of the employee that *precludes us from dismissing the employee's case***." Kahn v. Salerno, 90 Wn. App. 110, 131, 951 P.2d 321, 332 (1998).

While Defendant's managers aver they did not take into consideration any of Plaintiff's protected statuses, including her prior activities, on summary judgment, the Court is to "disregard all [such] evidence favorable to the moving party that the jury is not required to believe,"[29] and "the cause [should] proceed to trial in order that the opponent may be allowed to disprove [the] facts [averred in affidavits] by cross-examination and by the demeanor of the moving party while testifying." *See* Felsman v. Kessler, 2 Wn. App. 493, 496-97, 468 P.2d 691, 693 (1970).

Defendant does not dispute Plaintiff engaged in protected activity, but instead presents as an issue whether Plaintiff can show that "she suffered an adverse employment action." *See* Def.'s Mot. at 14. The acts alleged here are adequate to state a claims for retalation. In October 2012, in response to an inquiry about filing a complaint against Jon Trout, Employee Relations Coordinator Stefani Coverson wrote Gamble, in relevant part,

> Under the law and SCL policy, you have the right to not be retaliated against for filing a complaint…. A person suffers retaliation when an adverse employment action (e.g., discipline, alienation, humiliation, or **any act that would dissuade a reasonable person from engaging in the protected activity**) is taken against him/her because s/he has participated in an investigation, filed a complaint, or requested an accommodation.

Gamble Dec., Ex. 5.

The information Defendant gave to Gamble then is an accurate statement of the law. Under the WLAD's prohibition on retaliation, RCW 49.60.210, Plaintiffs may recover damages for **"any materially adverse [act**], **meaning that it would have " 'dissuaded a**

[29] Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 151, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

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reasonable worker from making or supporting a charge of discrimination'" and " 'whether a particular action would be viewed as adverse by a reasonable employee is a question of fact appropriate for a jury." Boyd v. State, Dep't of Soc. & Health Servs., 187 Wn. App. 1, 13-14, 349 P.3d 864, 870 (2015); *see also* Burchfiel v. Boeing Corp., 149 Wn. App. 468, 483, 205 P.3d 145, 152 (2009) ("Burchfiel showed other adverse employment action. … Ms. Thomas ordered a corrective action memo against him and put it in his personnel file.")

Mr. Trout's public humiliation of Gamble, telling other supervisors that she has a "perpetual excuse for not," his denial of benefits afforded to other employees (e.g., telecommuting on tangible projects), his reassignment of her and de facto demotion, and the papering of Gamble's file with untrue accusations that were approved by Trout, Wernli and Enright all present an issue of fact as to whether Gamble was treated in a "materially adverse" manner, such that she might be "dissuaded from making … a charge of discrimination.

V. CONCLUSION

Plaintiff respectfully requests that the Court deny the motion for summary judgment.

DATED this 27th day of June, 2016.

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CERTIFICATE OF SERVICE

I, Melanie Kent, certify under penalty of perjury under the laws of the State of Washington, that on June 27, 2016, I electronically filed the foregoing document with the Clerk of the Court using the ECR E-Filing system, and served the following persons using the ECR E-Serve system:

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