

Honorable Barbara Mack
Noted for Hearing:
June 17, 2016, 11:00 a.m.

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SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

MARIA LUISA JOHNSON, CARMELIA
DAVIS-RAINES, CHERYL MUSKELLY,
PAULINE ROBINSON, ELAINE SEAY-
DAVIS, TONI WILLIAMSON, and LYNDA
JONES

Case No.: 15-2-03013-2 SEA

Plaintiffs,

vs.

SEATTLE PUBLIC UTILITIES, a
department of the CITY OF SEATTLE, a
municipality,

Defendants.

**PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

1 **I. INTRODUCTION AND REQUEST FOR RELIEF**

2 In employment discrimination cases, the Washington Supreme Court has set a high
3 bar for granting a motion for summary judgment, writing that summary judgment is
4 “seldom appropriate” and “should rarely be granted.”¹ This is not that rare case. As with any
5 motion under CR 56, the Court “must consider the material facts and all reasonable
6 inferences therefrom in the light most favorable to the nonmovant party,” in this case the
7 Plaintiffs. Additionally, in discrimination cases, “the court must review the record ‘taken as
8 a whole,’”² and “[a]ll of the evidence - whether direct or indirect - is to be considered
9 cumulatively.”³

10 For years, Seattle Public Utilities (“SPU”)’s management was apathetic, declining
11 to implement policies or practices that would require escalating the approval for adjustments
12 made to utility accounts up to management. According to records of the City Auditor, until
13 at least April 2011, “there was no documented policy within the CCSS policies and
14 procedures manual that stated employees were not allowed to enter transactions on their
15 own utility accounts,” nor specifying that a supervisor was required to be involved in such
16 transactions. See Shaun Johnson Dec. (“S.J. Dec.”), Ex. 1. As a result, more than a third of
17 all employees with Consolidated Customer Service System (“CCSS”) access were found to
18 have made transactions on their own account or the account of someone they knew. Regan
19 Dec., ¶¶ 3, 6.⁴ The workforce was not plagued by a lack of ethics. It was led to believe that

21 ¹ Scrivener v. Clark College, 181 Wn.2d 439, 445, 334 P.3d 541, 545 (2014), quoting Sangster v. Albertson’s, Inc., 99 Wn. App. 156, 160, 991 P.2d 674 (2000).

22 ² Reeves, 530 U.S. at 150,

23 ³ Raad v. Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1194 (9th Cir. 2003).

24 ⁴ It is likely many more employees made transactions on the accounts of persons they knew, as SPU could
25 only discern the existence of relationships between employees and accountholders to the extent such
information was disclosed by employees, for example, on forms calling for the employee’s “emergency
contacts” or benefit beneficiaries. See, e.g., Cole Dec. (Robinson file) at JOHNSON000651 (noting
accountholder was found to be Ms. Robinson’s friend by referencing emergency contacts who Robinson had
disclosed). Employees’ transactions with persons for whom no relationship was ever disclosed went
undetected.

1 working on your own account or that of a relation was no different than working on any
2 other customer’s account and not against policy, as long as the employee treated the account
3 no differently than how utility employees handled other customer accounts.

4 In terms of how customer utility accounts were typically handled at SPU, the mantra
5 was “try to negotiate, and make sure the customer doesn’t ... lose their service.” See
6 Sheridan Dec., Ex. 1 at 178:23-179:10. SPU’s lack of internal controls meant Utility
7 Account Representatives (“UARs”) at the Call Center, like the Plaintiffs, exercised
8 considerable discretion in making adjustments to customer utility accounts. Regular,
9 everyday customers of SPU could set up multiple payment arrangements (or payment plans)
10 even after previous payment arrangements failed; could cancel payment arrangements that
11 were no longer feasible and create new ones with lower payments; and could have more
12 than one late fee waived.⁵ Management knew this was occurring and for years took no
13 action to limit the practices. Tighter controls would have meant it “take[s] longer” and
14 requires a “bit more effort,” *see* S.J. Dec., Ex. 2 and the Call Center was already under
15 pressure to meet performance metrics.

16 Very early on in SPU’s CCSS investigation—the same investigation which years
17 later would result in discipline for the Plaintiffs, as well as many other persons of color and
18 older workers—the Director of SPU, Ray Hoffman, was told that Call Center UAR
19 Supervisors had been interviewed and reported that “[t]he culture in the [Customer] Contact
20 Center was dysfunctional. Enforcement of policies and performance standards was viewed
21 as discouraged by the previous Division Director”; and while the “current Director's focus
22 on productivity and accountability is welcomed by most supervisors, ... challenges still
23 exist with the more tenured employees.” S.J. Dec., Ex. 4 (November 15, 2011 Summary of

24
25 ⁵ *See, e.g.*, S.J. Dec., Ex. 3 (“You cannot modify an arrangement once the arrangement has been saved. In order to make changes, you must **cancel the original plan and create a new plan with different terms (i.e., to lower payments, change the number of payments,** or correct an error).”)

1 Supervisor Interviews).

2 Plaintiffs acted in compliance with the practices and policies on which they were
3 trained and which were in place in the Customer Response branch at the time of their
4 alleged misconduct. SPU updated all of its policies and training just before the Plaintiffs
5 were disciplined to define how to handle transactions on one's own account or a co-worker
6 or relation's account. New policies and training were likewise developed regarding waiver
7 of fees and making of payment arrangements and similar types of adjustments. The City's
8 comprehensive overhaul of its policies and procedures is an admission that the policies that
9 previously existed at the time of the acts for which Plaintiffs were later disciplined were not
10 as clear as they needed to be. The Director of SPU, Ray Hoffman, admits that the internal
11 controls in place for customer utility account transactions before were inadequate.

12 Nevertheless, Hoffman and his managers (Guillemette Regan, Susan Sanchez, and
13 Debra Russell) scapegoated the Plaintiffs for management's failures, after critical reports by
14 the State Auditor's Office ("SAO") were issued regarding SPU's lack of internal controls.
15 The State Auditor wrote to the Mayor and City Council about the issue in 2009. SPU took
16 almost no action on the matter in 2010. The Seattle Times then pilloried SPU in 2011 for
17 failing to address the inadequate controls over utility accounts, and later for losing more
18 than a million dollars to an embezzler. Speaking to the Seattle Times in April 2011, SPU's
19 Director Mr. Hoffman promised the public that the utility had hired its own investigator to
20 address the issues. S.J., Dec., Ex. 15. Yet, the Certified Fraud Examiner who the utility hired
21 had her contract terminated almost immediately after it began. She was "ordered ... to stop
22 work, shred the documents, and send the city an invoice for work completed." The utility
23 did not hire another Certified Fraud Examiner to replace her. Instead, it kept the
24 investigation in-house, assigning the job to Guillemette Regan. Ms. Regan expressed a
25 belief that "groups of employees clustered by race (African American, Filipino American,

1 White American) ... exchange favors for others” of the same race and guided her
2 investigation of primarily Call Center employees—a population that SPU admits had more
3 people of color than other parts of SPU—in part using “anecdotal information linking
4 individuals to other individuals.” S.J. Dec., Ex. 5 at 2-3.

5 Ms. Regan asked for the City Auditor to assist SPU’s investigation through “data
6 mining,” and so as “to assure the State Auditor that [SPU] [was] being thorough and
7 objective; SPU did not request, nor anticipate, that the City Auditor would use the
8 information identified by SPU to conduct its own, separate effort.” S.J. Dec., Ex. 6. The
9 City Auditor’s office intended to “Review the control procedures over SPU’s customer
10 adjustment functions and determine where controls need to be improved.” Sheridan Dec.,
11 Ex. 5. Regan and SPU knew such a report by the City Auditor would be “a big problem and
12 ... look very bad for SPU,” and that it “jeopardized” the alleged legitimacy of the
13 disciplinary actions SPU management planned to take against lower-level employees in the
14 Customer Service branch that were predominantly persons of color. When SPU discovered
15 real fraud by favored employees, Hoffman and his managers avoided taking disciplinary
16 actions comparable to those issued to the Plaintiffs.

17 A reasonable jury could find that Defendant’s explanations for the actions taken
18 against the Plaintiffs are unworthy of credence, circumstantial evidence of intentional
19 discrimination. Many, if not most, of the allegedly improper CCSS transactions for which
20 Plaintiffs were disciplined pre-dated the time when SPU communicated a policy prohibiting
21 employees from making transactions on their own accounts or the accounts of friends,
22 family members, and co-workers. Moreover, in disciplining Plaintiffs and others for such
23 conduct, SPU managers exercised discretion in deciding which charges to pursue and what
24 level of discipline to recommend or issue. That meant in some cases, like that of Debra
25 Warren (Caucasian), Hoffman took into account the fact that Warren “had no prior

1 disciplinary action” and followed principles of progressive discipline, offering her a second
2 chance. In other cases, like those of Plaintiffs Luisa Johnson (Filipina) and Toni Williamson
3 (African-American), the employees were fired with no progressive discipline or second
4 chance. In the case of Teresa Flores, an administrative assistant to Customer Response
5 Division Director Debra Russell, SPU found she “misled investigators” about waiving a late
6 fee for her sister, and “improperly benefited from discounted utility rates” costing the utility
7 nearly \$2,000. She was issued just a one-day suspension for that conduct—the same
8 discipline given to Plaintiffs Carmelia Davis-Raines and Lynda Jones, who did not similarly
9 defraud the utility of thousands of dollars.⁶ The evidence presented shows genuine issues of
10 fact exist for the jury, including whether Defendant treated the Plaintiffs differently than
11 other employees engaging in acts of comparable seriousness, including employees who
12 were whiter, younger, or who had not engaged in protected activities. For such reasons and
13 all that follow, Defendant’s motion for summary judgment should be denied.

14 II. EVIDENCE RELIED UPON

15 Plaintiffs rely upon the declarations of John P. Sheridan, Shaun Johnson (“S.J.”),
16 Maria Luisa Johnson (“L.J.”), Carmelia Davis-Raines, Cheryl Muskelly, Pauline Robinson,
17 Elaine Seay-Davis, Toni Williamson, Lynda Jones, Verlene Davis, [REDACTED], and the
18 pleadings on file in this case.

19 II. STATEMENT OF FACTS

20 A. Seattle Public Utilities knew that it lacked adequate procedures and training for 21 employees making adjustments to customer utility accounts.

22 In 1997, “Seattle Public Utilities was created.... It was a merger of various city
23 departments.” Sheridan Dec., Ex. 2 at 6:19-7:11. In January 2009, Ray Hoffman was made
24 Director of SPU. Sheridan Dec., Ex. 2 at 40:16-17. Later that year, the Washington State

25 _____
⁶ Flores self-identifies as Native American / Alaskan Native. Cole Dec. (T.F. file).

1 Auditor conducted an audit of SPU. The report of the exit conference from the 2009 audit
2 was highly critical of the utility. The State Auditor reported, among other things, it had
3 “identified a weakness in internal control over utility customer accounts,” S.J. Dec., Ex. 7 at
4 3, and that it “wanted [SPU] to develop more policies and procedures” concerning the
5 handling of such accounts. Sheridan Dec., Ex. 3 at 33:10-34:11. The State Auditor sent the
6 Mayor and the Seattle City Council a “Management Letter” on June 22, 2009, noting:

7 We identified weaknesses in key controls over account adjustments. We found no
8 supervisory review of account adjustments is in place, which increases the risk of a
9 loss of public assets. We also learned the customer billing system can generate a
report on adjustments, but that function has not been activated.

10 We recommend the Utilities establish internal controls to ensure only authorized
11 adjustments are made to customer accounts. We also recommend Department of
12 Executive Administration establish citywide policies for monitoring of customer
account adjustments.

13 S.J. Dec., Ex. 8 at 2.

14 At the time, Guillemette Regan was Acting Director of Corporate Policy and
15 Performance. Sheridan Dec., Ex. 3 at 9:21-10:3. Before Regan, Ray Hoffman, the Director
16 of SPU, held the position from 2001-2008. S.J. Dec., Ex. 9. In April 2010, Regan was told
17 by the State Auditor’s office that the previously issued management letter about the
18 “utilities’ ability to establish effective internal controls over customer’s accounts” remained
19 “unresolved.” Sheridan Dec., Ex. 3 at 9:7-10:7; 97:2-8; S.J. Dec., Ex. 10. Regan admits that
20 the State Auditor continued raising these concerns into 2011. *Id.* Sheridan Dec., Ex. 3 at 33-
21 34.

22 **B. SPU discovered fraud and asked for help investigating it from the City Auditor,
23 which decided on its own that it needed to audit SPU’s internal controls.**

24 In October 2010, “while performing routine reconciliation of payment reports,” SPU
25 discovered that Associate Civil Engineer Joe Phan used his access to CCSS to create
“*fraudulent payments*” totaling \$1,049.49 for utility accounts connected to Mr. Phan’s

1 properties. Sheridan Dec., Ex. 4 at 625, 639. On December 7, 2010, SPU reported to the
2 Seattle City Auditor that Phan and a second SPU employee had utilized CCSS system
3 access rights to make inappropriate transactions. Sheridan Dec., Ex. 5. “SPU contacted [the
4 City Auditor] to ask that [it] assist them with this investigation” of these two employees. Ex.
5 6, at 6:9-7:21. The title that the City Auditor gave to this investigation at its inception
6 indicated it was a “fraud investigation,” but admits that changed with time. *See id.*; and
7 Sheridan Dec., Ex. 5 at 1. The original fraud investigation “morphed into different things”
8 and at some point the City Auditor “decided to conduct an audit of internal controls related
9 to utility account transactions,” an audit SPU had not requested, but which the City Auditor
10 deemed necessary. Sheridan Dec., Ex. 6 at 8:13-20, 11:10-17. In February 2011, when
11 Assistant City Auditor Robin Howe wrote in a draft memorandum concerning the fraud
12 investigation of Mr. Phan that, “per SPU policy, employees should not be entering any
13 transactions to their own accounts and certainly not posting payments,” Ms. Regan
14 responded, “I don’t believe we have an actual policy. ... If there is a policy, I would love to
15 see it.” S.J. Dec., Ex. 11; Sheridan Dec., Ex. 3 at 94:4-95:12. Such lack of internal controls
16 for making adjustments to utility accounts concerned Howe and the City Auditor’s office.
17 *See Sheridan Dec., Ex. 6 at 11:5-12:12.*

18 There was a third project, which “in the early phase [was] ... separate” both from the
19 fraud investigation involving Phan and from the audit of SPU’s internal controls, but which
20 was later “rolled... all into one.” The third project involved the City Auditor assisting SPU
21 in data mining. Sheridan Dec., Ex. 6 at 9:6-23. On or about February 1, 2011, the State
22 Auditor reported to SPU that it discovered that UAR Patricia Theofolis made a
23 Miscellaneous Decrease (“MISD”) of \$10 on her own utility account. S.J. Dec., Ex. 12.
24 “Following this communication from the State Auditor’s Office, SPU undertook a
25 comprehensive audit of all SPU employees with transactional access to the CCSS system.”

1 Sub #152 (Def.'s Answer to Third Am. Compl.) at 6 ¶ 2.39; accord Sheridan Dec., Ex. 7 at
2 43:20-44:5; Sanchez Dec., ¶ 3; Sheridan Dec., Ex. 6 at 13:12-17; Cole Dec. (P.Th. file) at
3 JOHNSON000713.

4 **C. Recognizing its procedures for customer utility account adjustments were**
5 **inadequate, SPU overhauled its procedures.**

6 On March 9, 2011, Debra Russell, the Director of the Customer Response branch
7 and head of SPU's Contact Center (or Call Center) sent an email to Labor Relations
8 Coordinator Charlene MacMillan-Davis, "Subject: "UAR Expectations." Ms. Russell wrote,
9 "What do you think about adding to the UAR Expectations the information that employees
10 should not access their own utility accounts?" MacMillan-Davis replied, "Let's not do it just
11 yet. With everything else going on related to this, I think it would be best to handle that
12 separately. We can - and should - add it once we have a comprehensive approach to
13 managing it." S.J. Dec., Ex. 13. Ms. Russell, in her deposition, could not explain why, in
14 March 2011, she needed to ask Labor Relations whether the prohibition on employees
15 accessing their own accounts ought to be "**added**" to the document stating expectations for
16 UARs, if Director Russell believed in fact that such a provision was already in place.
17 Sheridan Dec., Ex. 8 at 35:13-38:5. "Defendant admits that more than one UAR
18 Expectations document issued after the August 1999 Expectations for Utility Account
19 Representatives did not include the sentence, '[a]sk a Supervisor or Utility Account
20 Representative II to provide maintenance to your account and the accounts of your relatives,
21 friends, and co-workers.'" Sheridan Dec., Ex. 9 at Request for Admission No. 9.

22 In March 2011, SPU drafted a policy, CS-106, which "respond[ed] to a need to
23 clarify expectations related to employees performing transactions in our billing system."
24 Sheridan Dec., Ex. 10. The policy stated on its face that it was "new" and did not supersede
25 any prior policy. Hoffman Dec., Ex. D. The policy's stated purpose: "This policy

1 **establishes** employee expectations related to performing transactions involving customer
2 accounts in conformance with SMC 4.16.070” (the Code of Ethics). *Id.* The policy bars
3 employees from performing account transactions involving themselves or people they know.
4 *Id.*

5 While CS-106 states its “effective date” was March 28, 2011, procedures for
6 implementing the policy were not rolled out until July 2012. See, e.g., Sheridan Dec., Ex. 21
7 at JOHNSON084065. On April 15, 2011, after Deputy Director for the Customer Service
8 branch, Mike Mar, sent the City Auditor a copy of CS-106, along with draft “procedure(s) to
9 implement Policy CS-106,” Regan responded, writing the City Auditor’s office that “Mike
10 shouldn’t have sent that to you yet as no one else in SPU had seen it yet” and that “we want
11 to have something more polished before we send it to you for review.” Sheridan Dec., Ex.
12 10. Regan earlier explained to SPU Director Hoffman how she planned to get “policy
13 approval by the board in general ... without getting bogged down in first needing
14 procedures to be complete.” S.J. Dec., Ex. 14.

15 On April 15, 2011, in response to receiving a draft of the State Auditor’s 2011 audit
16 findings, Ms. Regan sent the State Auditor’s office a copy of the recently drafted CS-106,
17 writing that “[a]long with this policy will be a series of procedures to define other aspects of
18 accessing and making transactions on accounts. Still coming will be policies or director’s
19 rules redefining adjustments related to a variety of account activity, payment plan practices,
20 and more on low income rates....” S.J. Dec., Ex. 34. In comments made to the City Auditor
21 around the same time, Ms. Regan confirmed that “Customer Service has a **distinct lack of**
22 **documented policies and procedures.**” Sheridan Dec., Ex. 11. Director Hoffman similarly
23 admits that SPU at that time “didn’t have adequate controls over customer accounts.”
24 Sheridan Dec., Ex. 2 at 22:10-23.

1 **D. Hoffman announced terminations to the press and promised an “independent**
2 **investigator” would be hired for further investigations, but instead kept the**
3 **investigation that would include the Plaintiffs in-house, after the State Auditor**
4 **found policies and training did not clearly define the process for adjustments.**

5 On April 15, 2011, SPU put out a press release announcing that it had fired the two
6 employees who the City Auditor helped to investigate, emphasizing that “[r]evenue losses
7 to the utility are estimated to be less than \$2,000.” Sheridan Dec., Ex. 12. The press release
8 noted that an investigation was still ongoing and that Director Hoffman said the utility was
9 “hiring an independent investigator to aid in the inquiry.” *Id.* The Seattle Times published
10 an article based on the press release that same day, including Hoffman’s promise to hire an
11 outside investigator. *See* S.J. Dec., Ex. 15.

12 On May 17, 2011, the State Auditor issued a blistering audit of SPU, in which it
13 found that the “Utilities’ **policies and employee training do not clearly define the process**
14 **for adjustments,**” and “**recommend[s] the utilities adopt formal policies and establish**
15 **processes for determining when account adjustments are necessary.**” S.J. Dec., Ex. 16
16 at 13.

17 On June 6, 2011, not long after the State Auditor’s report is released, Linda
18 Saunders, CPA, the Certified Fraud Examiner (“CFE”) with Forensic Accounting who SPU
19 hired to conduct its CCSS investigation, is fired by SPU, just weeks after she was hired.
20 S.J. Dec., Ex. 17. Saunders is “ordered ... to stop work, shred the documents, and send the
21 city an invoice for work completed.” S.J. Dec., Ex. 17. Saunders is not replaced. Instead,
22 Ms. Regan takes on the task of performing the investigation Saunders was hired to do. *See*
23 Sheridan Dec., Ex. 3 at 98:1-99:22; 103:1-14; 105:3-10. Regan, who also acts as a public
24 disclosure officer for SPU, disputes that Saunders’ records were “public documents”
25 needing to be retained, and at the same time disputes the claim that SPU told Saunders to
shred her records. *See* Sheridan Dec., Ex. 3 at 105:11-25.

1 By June 7, 2011, the Seattle Times had learned about the State Auditor’s findings
2 and published an article headlined, “Audit questions 24.7 million in billing cuts to Seattle
3 utility customers. And the lead is, Seattle Public Utilities doesn’t have adequate controls
4 over customer accounts and may have lost millions in revenue to the city by reducing bills
5 without ensuring the reductions were legitimate, according to a draft state audit.” Sheridan
6 Dec., Ex. 2 at 20:5-25; S.J. Dec., Ex. 18. Director Hoffman has testified that, with respect to
7 the 2011 report by the State Auditor, the “customer account issue was a very small part of
8 the \$24.7 million.” Sheridan Dec., Ex. 2 at 22:10-23:2.

9 **E. SPU knew release of a report by the City Auditor on its lack of internal controls**
10 **would be “a problem for us,” jeopardizing its investigation and disciplinary**
11 **actions; the report’s release was delayed for years, as the utility took actions**
12 **against low-level workers who were predominantly persons of color while**
13 **taking no action against the managers who failed to implement controls.**

14 In July 2011, the City Auditor’s office met to discuss “strategy for drafting a memo
15 on CCSS Transaction Controls.” Sheridan Dec., Ex. 13 at 1. The memo “would be a
16 procedural review of the CCSS transaction procedures,” and Dave Jones, the City Auditor,
17 felt that his office already had conducted enough “audit fieldwork ... to draft such a memo.”
18 *Id.* However, the City Auditor’s office discussed “concerns about issuing a controls memo
19 over CCSS Transactions while SPU is in the middle of an investigation” and how it did not
20 “want to jeopardize the results of the investigation in any way.” Sheridan Dec., Ex. 13 at 2.
21 The notes of the meeting state that “[w]e discussed the question of waiting to issue a
22 controls memo until SPU has had time to complete their employee investigation project, but
23 decided against this.” *Id.*

24 The next month, August 2011, the City Council was “applying some pressure” to the
25 City Auditor’s office to complete “a ‘controls memo’ highlighting the internal control
weaknesses with the CCSS transaction processes ... as soon as possible.” S.J. Dec., Ex. 19
at 3. Nevertheless, the City Auditor’s report was not released until April 29, 2014, more

1 than two and a half years later. *See* S.J. Dec., Ex. 20. In the intervening period, all of SPU’s
2 disciplinary actions related to the CCSS system were taken. *See generally*, Cole Dec.
3 (employee discipline files).

4 In September 2011, SPU Director Hoffman attended a forum where he addressed
5 SPU’s Customer Service program. Notes of the meeting reflect that “[c]all center
6 improvement is a management focus area for SPU currently. They have identified a number
7 of performance problems and are working hard to correct them. It appears that many of the
8 **longest-term employees do not have the enthusiasm and commitment necessary to**
9 provide the desired response to customers.” S.J. Dec., Ex.21. SPU's Director of the Contact
10 Center wrote in her journal, what she described as just a thought, "Old people not bringing
11 them up to speed to changes, being communicated.” Sheridan Dec., Ex. 8 at 100:19-20. The
12 previous year, in July 2010, Roger Faustino, who at the time was working as a UAR in
13 SPU’s Call Center, posted on Facebook how he was “getting tired of the squawking from
14 the old hags at work about retirement. Everyone knows they were forced to retire early.
15 Give it up already, wrinkles.” Sheridan Dec., Ex. 14; Sheridan Dec., Ex. 15 at 11:13-13:20.
16 When asked why he made such a posting, Faustino testified, “[T]here was a lot of
17 commotion on the floor. There were people being released and let go without any
18 information. We would see employees literally leave and then their bosses were following
19 thereafter without any word from management whatsoever.” Sheridan Dec., Ex. 15 at 12:18-
20 13:2.

21 On December 2, 2011, SPU management (Hoffman and Regan) put out a press
22 release titled “Three workers fired in continuing utility billing investigation. *Losses to City*
23 *at this point estimated at about \$440.*” S.J. Dec., Ex. 35 (italics in original). Their
24 messaging that SPU management had taken action prior to any major losses occurring—in
25 contrast to what the State Auditor had earlier claimed in its May 2011 report—was soon

1 overtaken in the news cycle. Three months later, on March 2, 2012—long before any of the
2 disciplinary recommendations or decisions about the Plaintiffs were made—the Seattle
3 Times ran a story headlined, “Former city employee arrested in \$1 million theft from Seattle
4 Public Utilities.” S.J. Dec., Ex. 22. The story addressed additional fraudulent acts by Mr.
5 Phan, which SPU learned about after firing Phan in relation to the fraudulent payments
6 made using his CCSS access. *See id.*

7 In February 2012, with no internal controls memo still having been issued, the City
8 Auditor, David Jones, confirmed in an email to Ms. Regan that he intended to tell
9 Councilmember Burgess that the City Auditor “believe[s] it is appropriate for us to let SPU
10 complete the investigation and for us to shift the staff time devoted to this to other topics.”
11 After speaking with Mr. Jones, Ms. Regan responded by email that she “would add to your
12 statement that SPU also felt that the work the City Auditor is undertaking in 2012 overlaps
13 too much with [SPU’s] continued investigations into CCSS billing system transactions and
14 would benefit from greater separation **in order to avoid conflict or risk to the outcomes of**
15 **the investigations.**” Sheridan Dec., Ex. 16; Sheridan Dec., Ex. 17 at 222:1-224:16, 227:24.

16 In a meeting in March 2012, with Councilmember Jean Godden, a member of
17 central City Council staff, Meg Moorehead, asked Martin Baker, who worked in legislative
18 affairs at SPU, “for the ethnicity of the staff fired over accessing the billing system.”
19 Sheridan Dec., Ex. 2 at 146-152. Baker emailed Susan Sanchez, the Director (Hoffman),
20 and HR to report that “Meg keeps asking” this and to learn what information he could
21 provide in response. *Id.* Kim Collier, Deputy Director of HR, responded, “Susan [Sanchez]
22 and I talked about it since Meg asked her too,” and reported the following information could
23 be given, but it “should be provided verbally”:

24 POC = People of Color

25 % POC in SPU 40%

1 % POC in Customer Response Div 67%

2 % POC EE's Disciplined (billing system)* 50%

3 % POC of those disciplined that were termed* 60%

4 * includes 1 employee in Project Delivery

5 Do not provide: I have 6 total disciplined and/or termed. Is that the right number?

6 Sheridan Dec., Ex. 28.

7 SPU Director Hoffman has testified, "I knew that the composition of contact center
8 employees had more people of color than their distribution in the city population and than in
9 some of the other divisions within the department." Sheridan Dec., Ex. 8 at 145:4-7. Debra
10 Russell, the Director of the Call Center, was told "that there was a feeling of -- that the
11 Contact Center was like a plantation." She was told this by the Change Team, "a group that
12 was formed as part of the Race and Social Justice Initiative to -- where employees could go
13 to give their perception." Sheridan Dec., Ex. 8 at 107:18-25. A copy of the Race and Social
14 Justice Initiative Employee Survey for 2012 is provided as S.J. Dec., Ex. 23.

15
16 **1. SPU investigated Plaintiff Maria Luisa Johnson for engaging in conduct
17 that she was authorized to do at the time.**

18 Plaintiff Maria Luisa Johnson identifies as Asian. She was born in the Philippines
19 and speaks English as her third language. She is forty-four years old. L.J. Dec., ¶¶ 2-4. In
20 July 2012, Supervisor Alan Authers gave Ms. Johnson a document to sign. It was a written
21 prohibition related to accessing one's own utility account or the account of a friend or
22 family member. This is the first time Johnson recalls learning of any prohibition on working
23 on her own account. *See* Johnson Dec. and Sheridan Dec., Ex. 19, at 142. In her deposition,
24 SPU's Labor Relations Coordinator, Charlene MacMillan-Davis admits to writing, with
25 respect to Johnson's contention, that "she wasn't [previously] advised of policy 106" and
that UAR Supervisor Alan Authers was "wishy-washy at best about what he did to manage

1 the rollout [of CS-106] for his group.” Sheridan Dec., Ex. 18 at 31:8-32:16. When Mr.
2 Authers gave Plaintiff Johnson a document on the new policy to sign in July 2012, Johnson
3 signed it and then *self-reported* to Authers that she had in fact made payment arrangements
4 on her own account before she understood that it was prohibited. Sheridan Dec., Ex. 19 at
5 60:1-25.

6 Guillemette Regan interviewed Ms. Johnson about making allegedly improper
7 CCSS transactions on November 27, 2012, many months after she self-reported. Sub #152
8 (Def.’s Answer to Third Am. Compl.) at 13-14 ¶ 2.59. In her interview, Ms. Johnson was
9 asked about using her access to CCSS between October 2005 and June 2011 to make 25
10 payment arrangements on her own utility account and canceling 5 such payment
11 arrangements, which were rolled into new payment arrangements with either partial or no
12 payment made. *See* Cole Dec. (Johnson file) at JOHNSON000437, 439, and 443
13 (Attachment 3). Ms. Johnson testified that the creation and cancellation of these payment
14 arrangements were consistent with the policies and practices in place at the Call Center at
15 the time. *See* Declaration of Luisa Johnson. Testimony by Lynda Jones supports Ms.
16 Johnson. *See* Sheridan Dec., Ex. 20 at 191:11-25 (stating there was no policy for customers
17 to be “ineligible” for further payment arrangements after two payment arrangements were
18 broken in a year; “you could have several broken payment arrangements”). Notes of the
19 City Auditor’s office from May 2011 confirm Ms. Johnson’s testimony:

20 [T]here is no actual policy against canceling payment plans and then re-establishing
21 new plans and she [Linda Ferreira, Business Systems Analyst for SPU Customer
22 Service] said she believes many UARs do this. ... Guillemette [Regan] commented
23 that **SPU may not have sufficient grounds to terminate employees for canceling
24 and resetting payment plans (i.e., creating rolling payment plans) for other
25 employees because it has been a past practice tacitly allowed by Call Center
management. ... There are currently no system controls to prevent canceling a
payment plan, and then immediately setting the customer up with a new payment
plan. *This can be done over and over and over, and it is being done both by
employees for other employees and for regular customers.***

1 S.J. Dec., Ex. 24 at 2, 6; *see also* S.J. Dec., Ex. 25, notes of the City Auditor’s January 3,
2 2012 meeting (“Customers have been able to cancel a payment plan and then re-establish it
3 on the same day. This situation allows the customer to avoid late fees and system-driven
4 credit action steps because CCSS cannot keep up with the transactions. SPU Risk and
5 Compliance has seen many instances of this in looking at customer accounts. They believe
6 the **new payment plan policy** will address this problem.”); *see also* City Auditor’s draft
7 report, S.J. Dec., Ex. 26 (discussing the process available to receive new 60-day due dates
8 as “due date extension” allowed by CCSS and for which “neither SPU nor SCL policies
9 discussed parameters for setting up [the] new payment plan”). S.J. Dec., Ex. 19 at 3 (City
10 Auditor’s records dated August 4, 2011 state, “The CCSS Manual, which governs the
11 operations of the Call Center, does not specify a limit on the number of payment plans that a
12 customer can have (or break) annually.”); and S.J. Dec., Ex. 27 at 12 (stating alleged
13 prohibition on “allow[ing] a customer to establish a new payment plan if they have
14 “broken” two payment arrangements ... in the current year... is not stated in ‘Billing: SPU
15 Credit Policy’ in the SPU Knowledgebase.”)

16 The City Auditor’s draft report on CCSS transaction controls, which Regan told
17 Director Hoffman “is going to be a problem for us,” also stated that “Call Center
18 management indicated that UARs were not always requiring ... deposits to be made prior to
19 establishing a payment plan.” S.J. Dec., Ex. 26 at JOHNSON100939. SPU Director
20 Hoffman responded to this draft report stating, in relevant part, that “SPU revised its
21 payment plan policy at the **beginning of 2013 to prohibit due date extensions without**
22 **receiving payment of additional funds.**” Sheridan Dec., Ex. 21 at JOHNSON084054;
23 *accord id.* at JOHNSON084062 (stating that adoption of CS-310.1, effective May 1, 2013,
24 “should eliminate the opportunity for customers to receive multiple due date extensions
25

1 without making any payments”). None of Ms. Johnson’s due date extensions occurred after
2 the adoption of CS-310.1.

3 Additionally, Susan Sanchez testified that she kept a chart tracking some of the
4 investigated employees and indicated there that adjustments that Ms. Johnson made to her
5 own account were “consistent with a customer policy.” Sheridan Dec., Ex. 7 at 165:6-15.
6 Ms. Johnson was asked in the investigation about her having waived a late fee for herself.
7 As there were no other late payment penalty adjustments on her account, SPU agreed that
8 Ms. Johnson “would have been entitled to this one adjustment as a regular customer.” Cole
9 Dec. (Johnson file) at JOHNSON000439.

10 **2. SPU investigates Plaintiff Carmelia Davis-Raines for engaging in**
11 **conduct she was authorized to do at the time.**

12 Plaintiff Carmelia Davis-Raines is African-American and 57 years old. Davis-Raines
13 Dec. ¶ 2. On December 11, 2012, Regan interviewed Davis-Raines about making allegedly
14 improper CCSS transactions. Sub #152 (Def.’s Answer) at 27 ¶ 2.90. While Ms. Davis-
15 Raines was charged with “us[ing] her access to CCSS to waive a late fee and create 2
16 payment arrangements for her mother [in 2004 and 2005], ... all of those conflicted CCSS
17 transactions were *otherwise within SPU policies.*” Def’s Mot., at 10. Ms. Davis-Raines
18 testifies that these transactions in no way violated SPU’s policies and practices in place at
19 the time, as “[t]here was no policy prohibiting payment arrangements for friends or family”;
20 CS-106.1 was not yet in effect. Declaration of Carmelia Davis-Raines. The November 15,
21 2011 memo to Director Hoffman summarizing the investigatory interviews of the UAR
22 Supervisors supports her testimony. *See* S.J. Dec., Ex. 4 at 2-3 (“[A]ll of the supervisors
23 stated there is no specific written SPU policy or procedure that references a prohibition
24 against UARs executing transactions on their personal account, or the accounts of their
25 family members and friends”; UAR Supervisor Beverly Flowers said “it *is* acceptable for

1 UARs to do payment arrangements for themselves, a family member, friend, or for co-
2 workers, as long as it is within the policy guidelines which apply to any other customer”;
3 UAR Supervisor Roger Faustino said he “did not recall specifically learning that a UAR
4 should not touch family or friends’ accounts,” nor recall ethics training during his
5 orientation); accord S.J. Dec., Ex. 1 (stating that until April 2011, “there was no
6 documented policy within the CCSS policies and procedures manual that stated employees
7 were not allowed to enter transactions on their own utility accounts”).

8 “Defendant admits that no SPU manager received discipline for failing to create a
9 specific written policy prohibiting employees from performing transactions on their own
10 utility accounts.” Sheridan Dec., Ex. 9 at Request for Admission No. 6.

11 **3. In December 2012, Ms. Davis-Raines and four other Plaintiffs gave the**
12 **City a petition to stop discriminatory investigations and terminations.**

13 On December 20, 2012, five of the Plaintiffs (Davis-Raines, Robinson, Jones,
14 Muskelly, and Williamson), along with six other African-American employees from the
15 Customer Service branch, signed a Petition of Solidarity, stating in relevant part,

16 With the new efforts by the City of Seattle Human Resources Department to
17 enforce the new policy title ‘Customer Utility Account Transactions’ we have
18 concerns over the intent of this policy and the impact of its implementation on the
19 African American workers working for City of Seattle. ... It is of great concern that
the City of Seattle Human Resources Department would institute a new policy ...
and make these policies retro-active.

20 Creating a new policy that allows the City of Seattle to investigate employee’s
21 activities for the past 10 years is punitive! Employees, who engaged in the actions
22 that are now deemed to be infractions of employment, should be ‘Grandfathered in’
and not investigated and judged for actions that were not infractions of employment
at the time they were implemented.

23 We are asking for a Moratorium on terminations and investigations, a review of all
24 employees terminated for this policy and bring them back to work based on ‘Past
25 Practice’ and the commitment to support the ‘Just Cause’ clause in the Union
Contract that would allow employees to a process before termination. We have
provided this petition to the Seattle/King County Branch NAACP and the United

1 Black Christian Clergy, to present to you because of our concern for how the City
2 of Seattle specifically Seattle Public Utilities Contact Center investigations are
3 punitive, arbitrary and a direct violation of our union contract that adversely affect
communities of color who have had a long work history of employment with the
City of Seattle.

4 Hoffman Dec., Ex. C.

5 Verlene Davis, a Labor and Industries Representative for the NAACP, helped to
6 draft the petition and subsequently met with several City managers to highlight the concerns
7 the employees raised in it, which included meetings with Jennifer Kramer (HR), Laura
8 Southard (SPU-HR), Deputy Mayor Darryl Smith, and Mayor Mike McGinn in January
9 2013. Declaration of Verlene Davis. “SPU concedes ... that presenting the petition to SPU
10 is a WLAD-protected activity.” Mot., at 16. It also admits that in January 2013, SPU
11 Director Hoffman and the Deputy Director of the Customer Service Branch, Susan Sanchez,
12 received notice of the petition, before any investigatory reports regarding the Plaintiffs were
13 completed; before Sanchez made any recommendation about disciplining the Plaintiffs; and
14 before Hoffman issued any discipline to the Plaintiffs. *See* Hoffman Dec., ¶ 8; Sanchez
15 Dec., ¶ 8.

16
17
18 **4. In March 2013, SPU received the City Auditor’s draft report, which**
19 **Regan forwarded to Hoffman, stating it is “going to be a problem for**
us”—yet continued to pursue disciplinary actions against the Plaintiffs.

20 On March 13, 2013, the City Auditor sent the “initial draft report for [its] CCSS
21 Transaction Controls Review” to several SPU managers, including Ms. Regan, as well as to
22 the City Attorney’s Office. Regan forwarded a copy of the draft report to Director Hoffman,
23 with a one-line note: “This is going to be a problem for us.” S.J. Dec., Ex. 26. Shortly after
24 receiving the draft report, Regan drafted talking points concerning the CCSS audit for
25 meetings with the Mayor and Councilmember Jean Godden. S.J. Dec., Ex. 28. SPU’s

1 talking points stated that the “**audit, as written, potentially jeopardizes ... ongoing**
2 **investigations** and those still to be arbitrated.” S.J. Dec., Ex. 29.

3 At that time, the investigations into Plaintiffs Johnson and Davis-Raines were still
4 ongoing. *See* Cole Dec. (Johnson and Davis-Raines files). Between March 29 and May 2,
5 2013, Ms. Regan interviewed the five remaining Plaintiffs (Robinson, Jones, Muskelly,
6 Seay-Davis and Williamson) about making allegedly inappropriate CCSS transactions.

7 **5. SPU investigated Plaintiff Pauline Robinson for engaging in conduct**
8 **that she was authorized to do at the time.**

9 On March 29, 2013, Regan interviewed Plaintiff Pauline Robinson about making
10 allegedly improper CCSS transactions. Sub #152 (Def.’s Answer) at 35 ¶ 2.112. Robinson is
11 African-American and 65 years old. Robinson Dec., ¶2. While Ms. Robinson was charged
12 with “us[ing] her access to CCSS to create or cancel 7 payment arrangements for her
13 daughter and a friend” between 2001 and 2005, there is no dispute that all of these so-called
14 “conflicted CCSS transactions were **otherwise within SPU policies.**” Def.’s Mot., at 10;
15 Cole Dec. (Robinson file). Ms. Robinson testifies that the transactions in no way violated
16 SPU’s policies and practices in place at the time, as “[t]here was no policy prohibiting
17 payment arrangements for friends or family”; CS-106.1 was not yet in effect. Declaration of
18 Pauline Robinson; *accord* S.J. Dec., Ex. 4 at 2-3 (“[A]ll of the supervisors stated there is no
19 specific written SPU policy or procedure”; UAR Supervisor Flowers said “it is acceptable”;
20 UAR Supervisor Faustino said he “did not recall specifically learning that a UAR should not
21 touch family or friend’s accounts”); *accord* S.J. Dec., Ex. 1 (stating that until April 2011,
22 “there was no documented policy within the CCSS policies and procedures manual that
23 stated employees were not allowed to enter transactions on their own utility accounts”).

24 **6. SPU investigated Plaintiff Lynda Jones for engaging in conduct that she**
25 **was authorized to do at the time.**

1 On March 29, 2013, Regan interviewed Plaintiff Lynda Jones about making
2 allegedly improper CCSS transactions. Sub #152 (Def.’s Answer) at 39 ¶ 2.120. Jones is
3 African-American and 50 years old. Jones Dec., ¶¶ 2-3. While Ms. Jones was charged with
4 misconduct based on waiving a late fee for her daughter, there is no dispute that this so-
5 called “conflicted CCSS transaction ... was **otherwise within SPU policies.**” Def.’s Mot.,
6 at 10; Cole Dec. (Jones file). Ms. Jones testifies that this transaction in no way violated
7 SPU’s policies and practices she was trained on or made aware of, as CS-106.1 was not yet
8 in effect. *See* Declaration of Lynda Jones, ¶¶ 9-11; *accord* S.J. Dec., Ex. 4 at 2-3 (“[A]ll of
9 the supervisors stated there is no specific written SPU policy or procedure”; UAR
10 Supervisor Flowers said “it *is* acceptable”; UAR Supervisor Faustino said he “did not recall
11 specifically learning that a UAR should not touch family or friend’s accounts”); *accord* S.J.
12 Dec., Ex. 1 (stating that until April 2011, “there was no documented policy within the CCSS
13 policies and procedures manual that stated employees were not allowed to enter transactions
14 on their own utility accounts”).

15 **7. SPU investigated Plaintiff Cheryl Muskelly for engaging in conduct that**
16 **she was authorized to do at the time.**

17 On April 9, 2013, Regan interviewed Plaintiff Cheryl Muskelly about making
18 allegedly improper CCSS transactions. Sub #152 (Def.’s Answer) at 32 ¶ 2.100. Muskelly is
19 African-American and 56 years old. Muskelly Dec., ¶¶ 2-3. She was charged with making
20 “19 payment arrangement transactions for her tenants,” six of which Regan alleged had
21 violated a policy concerning payment arrangements. Cole Dec. (Muskelly file) at
22 JOHNSON000613-14. Ms. Muskelly testified that “[t]hese are payment arrangement
23 transactions that I was authorized to do for customers who called in to the Call Center.”
24 Muskelly Dec. Ms. Regan also concluded that with respect to a co-worker, Ms. Muskelly
25 made “three \$10 late fee adjustments and one payment arrangement which were [allegedly]

1 not per policy.” Cole Dec. (Muskelly file) at JOHNSON000614. Eight days after Muskelly
2 took these actions on the co-worker’s account, SPU received payment on the account for
3 more than 50% of the balance. See Cole Dec. (Muskelly file) at JOHNSON000617. Thus
4 both parties benefited from the transactions Muskelly made. Muskelly testified that “[t]hese
5 are payment arrangement transactions that I was authorized to do for customers who called
6 in to the Call Center.” Muskelly Dec.

7 As the draft reports of the City Auditor’s office acknowledge, “there is no minimum
8 balance threshold requirement for a delinquent customer to be eligible for a payment plan,”
9 and Call Center management knew UARs did not always require deposits. S.J. Dec., Ex. 1
10 at 4; S.J. Dec., Ex. 26 at 13. Similarly, “[t]here [were] no dollar limits on the amount of late
11 fees that UAR’s or other employees can rebate,” and late fees were “routinely waived.” S.J.
12 Dec., Ex. 26 at 10. see also S.J. Dec., Ex. 25 at 6 (stating the “Call Center is currently not
13 complying with the policy to limit late fee and interest charges to a one-time event.... The
14 Director said she is aware that Call Center representatives (UAR’s) have been reversing
15 charges multiple times for the same customer. She said that now management has recently
16 re-communicated the policy and insisted on compliance, she is receiving complaints from
17 customers who tell her that ‘they always got their fees waived in the past.’ Currently there is
18 no limit to the dollar amount of fees/charges that a UAR (i.e., non-management) can
19 waive”).

20 The transactions Ms. Muskelly made with respect to her co-worker’s account were
21 made in August 2011. As a result, Regan claimed that the transactions violated CS-106,
22 which states its effective date was March 28, 2011. Cole Dec. (Muskelly file) at
23 JOHNSON000614. Ms. Muskelly testified she was not aware of CS-106 until December
24 2012; but recalls “sometime in 2012” that her supervisor, Beverly Flowers, told her “we
25 should not be working on family/friends, and I – accounts.” Sheridan Dec., Ex. 22 at 231:7-

1 233:7. Muskelly then told her supervisor “That I did not know that I could not do payment
2 arrangements on my tenant account. ... Had I known I wasn’t supposed to do it, I would not
3 be doing it. But I did just what I would do for anybody else, a coworker or a citizen of
4 Seattle.” Sheridan Dec., Ex. 22 at 231:7-233:8.

5 **8. SPU investigated Plaintiff Elaine Seay-Davis for engaging in conduct**
6 **that she was authorized to do at the time.**

7 On April 11, 2013, Regan interviewed Plaintiff Elaine Seay-Davis about making
8 allegedly improper CCSS transactions. Sub #152 (Def.’s Answer) at 35 ¶ 2.80. Ms. Seay-
9 Davis is African-American and 65 years old. Seay-Davis Dec., ¶¶ 2-3. She has multiple
10 sclerosis. *Id.*, ¶ 8. Ms. Seay-Davis was charged with “us[ing] her access to CCSS to create
11 or cancel 9 payment arrangements for her daughter and a friend,” of which SPU alleges “at
12 least 2 of ... were not otherwise within SPU’s policies.” Def.’s Mot., at 10; Cole Dec.
13 (Seay-Davis file). Ms. Seay-Davis testifies that “[t]hese are payment arrangement
14 transactions that I was authorized to do for customers who called in to the Call Center.”
15 Seay-Davis Dec.

16 **9. SPU investigated Plaintiff Toni Williamson for engaging in conduct that**
17 **she was authorized to do at the time.**

18 On May 2, 2013, Regan interviewed Plaintiff Toni Williamson about making
19 allegedly improper CCSS transactions. Sub #152 (Def.’s Answer) at 18 ¶ 2.69.

20 Ms. Williamson is African-American and 53 years old. She provides declaration
21 testimony that the CCSS transactions for which she was investigated were all “[t]ransactions
22 that [she] was authorized to do for customers who called in to the Call Center.” *See*
23 Williamson Dec.

24 **10. The Plaintiffs were recommended for discipline, starting May 9, 2013.**
25

1 **a. Johnson was recommended for termination, then discharged.**

2 On May 9, 2013, Susan Sánchez gave Ms. Johnson a letter informing her that
3 Sánchez was recommending her termination and that pending a decision on that
4 recommendation, Johnson was being placed on paid administrative leave. Sub #152 (Def.’s
5 Answer) at 14 ¶ 2.60. On June 4, 2013, SPU Director Hoffman met with Ms. Johnson in a
6 *Loudermill* hearing. *Id.*, at 15 ¶ 2.62. Hoffman then sent Johnson a letter terminating her
7 employment on June 27, 2013. *Id.*

8 **b. Williamson was recommended for termination, then discharged.**

9 On June 20, 2013, Susan Sanchez gave Williamson a letter notifying her that she
10 was recommended for termination and was being placed on administrative leave, effective
11 immediately. Sub #152 (Def.’s Answer), at 18, ¶ 2.69. SPU Director Hoffman met with Ms.
12 Williamson in a *Loudermill* hearing on July 16, 2013, and sent Johnson a letter terminating
13 her employment on August 15, 2013.

14 **c. After she had retired, Muskelly was recommended for**
15 **termination and documents were placed in her personnel file**
16 **affirming that recommendation.**

17 In May 2013, Ms. Muskelly’s mother was injured in an automobile accident so
18 severely that she was in intensive care for five weeks, causing Ms. Muskelly “to catch a
19 plane the same day and fly home [to Louisiana] to take care of her.” Sheridan Dec., Ex. 22
20 at 41:7-42:4. She was on approved FMLA leave beginning around June 5, 2013. Sub #152
21 (Def.’s Answer) at 33, ¶ 2.103. While out-of-state caring for her mother, Muskelly was in
22 contact with co-workers and learned that some co-workers, like Toni Williamson, were told
23 they were being fired and “had been walked off the floor.” Sheridan Dec., Ex. 22 at 36:9-
24 37:13; 38:10-12; 40:1-20. With “[p]eople being walked off the floor,” Muskelly felt “it was
25 kind of like out of control” and it left her “stressed out,” beyond already feeling “stressed
out” over trying to care for her mother. Sheridan Dec., Ex. 22 at 36:9-37:23. As a result, Ms.

1 Muskelly retired, effective July 2, 2013. Sheridan Dec., Ex. 22 at 29:11-13. On October
2 29, 2013, Susan Sanchez sent Ms. Muskelly a letter notifying her that “had you not left
3 employment, my recommended discipline would have been that your employment be
4 terminated. Because you have voluntarily ended your employment with SPU, I am
5 recommending that my enclosed memo to the Director be placed in your personnel file, and
6 that your personnel record be amended to reflect that you are ineligible for rehire by any
7 City department.” Cole Dec. (Muskelly file) at JOHNSON000089. On November 20, 2013,
8 Director Hoffman signed a letter to Muskelly stating his decision would have been to
9 uphold the termination recommendation and that documents related to this action will be
10 added to your permanent personnel file. *Id.* at JOHNSON000088. The letter also said
11 Muskelly might grieve “this disciplinary action.” *Id.*

12 **d. Davis-Raines was issued a 1-day suspension.**

13 On August 13, 2013, Ms. Davis-Raines received a letter from Ms. Sanchez,
14 notifying her that she had been recommended for a three-day suspension without pay. Sub
15 #152 (Def.’s Answer) at 27-28, ¶ 2.91. On September 16, 2013, SPU Director Hoffman met
16 with Ms. Davis-Raines in a *Loudermill* hearing. Cole Dec. (Davis-Raines file) at
17 JOHNSON000009. On October 17, 2013, Director Hoffman issued Ms. Davis-Raines a
18 one-day suspension without pay. *Id.*, at 29, ¶ 2.93.

19 **e. Seay-Davis was recommended for termination, placed on**
20 **administrative leave, then retired to avoid losing access to her**
21 **retirement medical benefits.**

22 On August 15, 2013, Susan Sanchez gave Ms. Seay-Davis a letter notifying her that
23 she had been recommended for termination and was placed on administrative leave. Cole
24 Dec. (Seay-Davis file) at JOHNSON000107. The letter stated “[w]hile you are on
25 [administrative] leave, you are not to enter any SPU worksite or perform any work-related
activities unless directed to do so by a member of management or Human Resources.” *Id.*

1 Seay-Davis has multiple sclerosis and was informed by the retirement office that if
2 she was terminated, she would lose access to the medical benefits available under the
3 retirement program – benefits she perceived as vital to her continued existence, given the
4 exorbitant costs of her prescription medications – so in late September she gave notice of
5 her intent to retire, effective October 8. Sheridan Dec., Ex. 23 at 120:11-25; 122:3-123:6.
6 Ms. Seay-Davis testified she was “forced to retire” and that she “retired in lieu of being
7 fired in order to keep group medical.” Sheridan Dec., Ex. 23 at 122:3-123:13; 129:13-
8 130:6; 132:17. “On October 1, 2013, Ms. Seay-Davis and her union representative attended
9 a [name-clearing] hearing with SPU Director, Ray Hoffman.” Sub #152 (Def.’s Answer) at
10 24, ¶ 2.81. Ms. Seay-Davis shared with her union representative that she “was planning to
11 retire in order to keep her medical benefits” and wished to retire without SPU taking
12 disciplinary action. Sheridan Dec., Ex. 23 at 125:14-127:23. After the hearing, the union
13 representative gave this information to SPU. *Id.* SPU offered Ms. Seay-Davis an agreement
14 to sign that would remove the discipline documents from her file, but did not sign because
15 she “didn’t do anything wrong” and it said “yes, she did break the rules.” Sheridan Dec., Ex.
16 23 at 129:2-12. On January 28, 2014, Hoffman sent Seay-Davis a letter informing her that
17 had she remained employed by SPU, his decision would have been to impose an unpaid
18 suspension in response to the disciplinary recommendation. Cole Dec. (Seay-Davis file) at
19 JOHNSON000105. The letter was “added to [her] permanent personnel record to reflect this
20 determination.” *Id.* at JOHNSON000106.

21 **f. Ms. Robinson resigned, fearing she would lose her benefits if fired.**

22 Ms. Robinson retired effective July 2, 2013. Sheridan Dec., Ex. 24 at 22:7-13. She
23 has lupus and has survived bouts with brain cancer and breast cancer. Sheridan Dec., Ex. 24
24 at 23:6-23. After her interview with Regan and having seen “people being called in and then
25 walked off the floor,” she feared SPU was going to terminate her and that she would lose

1 her “City matched ... retirement benefits, as well as medical.” Sheridan Dec., Ex. 24 at
2 22:2-23:5; 24:8. For these reasons, she retired. *Id.* Through litigation, Robinson has learned
3 that Susan Sanchez had drafted a recommendation to take disciplinary action against her
4 and recently testified that she “would have recommended a 30-day suspension for Ms.
5 Robinson.” *See* Sanchez Dec., ¶ 7; Cole Dec. (Robinson file) at JOHNSON000102.

6 **g. Jones was issued a 1-day suspension.**

7 On July 9, 2013, Susan Sanchez gave Ms. Jones a letter recommending that she be
8 suspended for three days without pay. Sub #152 (Def.’s Answer) at 39, ¶ 2.120. On July 25,
9 2013, Director Hoffman gave Ms. Jones a one-day suspension without pay. *Id.* “[P]rior to
10 this suspension SPU had not disciplined Ms. Jones” for any prior misconduct; the majority
11 of her performance reviews were “meets standard” or “above standard.” *Id.*

12 **h. Hoffman publicized disciplining the Call Center employees.**

13 On November 15, 2013, SPU put out a press release announcing, “[M]isdeeds
14 uncovered ... have resulted in the termination of eight SPU employees and the suspension
15 of 15 others.” S.J. Dec., Ex. 30. The press release boasted that “[n]et losses to the utility
16 resulting from the improper activity are estimated at \$7,000,” a figure Director Hoffman
17 said was “relatively small,” and claimed that “[t]he full-scale records review, which
18 involved scrutinizing over a thousand utility accounts and many more thousands of data
19 records, was ordered by SPU Director Ray Hoffman after routine accounting revealed an
20 accounting discrepancy.” *Id.* The press release omits any discussion of the State Auditor’s
21 findings having been a catalyst for action, nor did it reference the auditor’s finding that the
22 “Utilities’ policies and employee training [did] not clearly define the process for
23 adjustments,” or the recommendation that “the utilities adopt formal policies and establish
24 processes for determining when account adjustments are necessary.” S.J. Dec., Ex. 16 at 13.

1 Instead, citing Personnel Rule 1.3, it implied that the Plaintiffs and others had received a
2 “fair and objective investigation.” *Id.*

3 **i. The City’s report is released at last in April 2014.**

4 More than a year after Regan told Hoffman that the release of the City Auditor’s
5 report “is going to be a problem for us” and opposed release of the report to the Mayor and
6 others, saying that it would jeopardize SPU’s pending investigations, a revised version of
7 the report was released on April 29, 2014. S.J. Dec., Ex. 31.

8 **j. Progressive discipline and “just cause” is required.**

9 The City’s personnel rules “provide for progressive discipline.” Sheridan Dec., Ex. 7
10 at 56:4-6; *accord* Personnel Rule 1.3.2(B), Sheridan Dec., Ex. 25. Additionally, under the
11 personnel rules, “[a] regular employee may be suspended, demoted or discharged *only for*
12 *justifiable cause.*” Personnel Rule 1.3.2 (D), Sheridan Dec., Ex. 25. That standard requires,
13 *inter alia*, that: “[t]he employee was informed of or reasonably should have known the
14 consequences of his or her conduct;” “[t]he rule, policy or procedure and penalties for the
15 violation thereof are applied consistently”; and “[t]he suspension or discharge is reasonably
16 related to the seriousness of the employee’s conduct and his or her previous disciplinary
17 history.” *Id.* Ms. Johnson and Ms. Williamson had no prior disciplinary record at SPU such
18 that their terminations by Director Hoffman might be warranted.

19 **10. Others engaged in acts of comparably serious misconduct and were not**
20 **similarly treated.**

21 **a. Debra Warren (Caucasian) was given a “last chance” not given to**
22 **Plaintiffs Johnson and Williamson.**

23 Plaintiffs Johnson and Williamson were terminated before being given any
24 opportunity to sign a “last chance” agreement. *See* Cole Dec. (Johnson and Williamson
25

1 files). In contrast, SPU offered Debra Warren (Caucasian) a “last chance.” *See id.* (D.W.
2 file).

3 Warren made 18 transactions on her personal utility accounts and 19 transactions on
4 accounts belonging to family members. ... Twelve of the transactions Ms. Warren made on
5 her own accounts were payment arrangements, many of which were in violation of the
6 payment arrangement policy due to prior failed payment arrangements, non-or insufficient
7 payment of amounts due, and carry forward of balances. Ms. Warren was also found to have
8 created a service order on her account in June of 2011, after Policy CS 106 – which
9 specifically prohibits working on one's own or family members' accounts – was
10 implemented and communicated to all employees with access to the billing system.
11 Cole Dec. (D.W. File) at JOHNSON000142 (emphasis in original).

12 Record of the City Auditor’s office show just how similar Ms. Warren’s conduct
13 was to the alleged misconduct of Ms. Johnson:

14 **Attachment L.**
15 Findings Summary, CCSS data mining
Mary Denzel, May 22, 2012
People who worked on their own accounts

Name/dept	Analytics Questions	Action	Date (approximate)	\$
Luisa Johnson/SPU	16 (pmnt arr own acct) 17 (canceled * own acct)	Made and canceled payment arrangements on spouse's account	2005, 2006, 2008 (2), 2010	116.46, 155.5, 241.8, 199.02, 299.99
Debra Warren/SPU	16 (pmnt arr own acct) 17 (canceled * own acct)	Payment arrangement to spouse's acct Cancel pmnt arr to spouse's account	2002, 2007, 2009, 2010	47.37, 143.69, 121.76, 162.37, 141.06, 230.01, 139.54, 140.05, 121.76
Kimberly	13 (adj own acct)	Adj to account, her address, brother's name	2010	Reversed \$30 or \$40

18 S.J. Dec., Ex. 5, at 4.

19 SPU’s investigation found that Warren “cancelled [a payment arrangement] in order
20 to align the payment dates with [her] pay days,” and that 5 of the payment arrangements she
21 created on her own account failed. Cole Dec. (D.W. File) at JOHNSON000138. Hoffman
22 wrote that Warren “misused [her] position as an SPU employee by accessing [her] account
23 for the purpose of managing it for [her] personal benefit,” and that her “responses
24 demonstrate an apparent failure or unwillingness to comprehend that working on your own
25 account is simply not acceptable.” *Id.* Ms. Sanchez recommended Warren be terminated.

1 Cole Dec. (D.W. File) at JOHNSON000140. Director Hoffman then met with Warren, who
2 is white, in a *Loudermill* hearing. Afterwards he wrote to her that he had considered, *inter*
3 *alia*, “the fact that [she] had no prior disciplinary action” and “decided to impose a thirty
4 (30) day suspension, in lieu of termination, on the condition that [she] enter into a last
5 chance agreement.” Cole Dec. (D.W. File) at JOHNSON000138. After Hoffman met with
6 Plaintiffs Johnson and Williamson, who are Filipino and African-American respectively, he
7 made no similar offer of mercy, instead terminating them both – despite a similar lack of
8 any prior disciplinary record – without any “last chance.” *Compare* Cole Dec. (Johnson and
9 Williamson files).

10 **b. Tanisha Wagner, born in 1983, was given a “last chance” not**
11 **given to older employees Johnson and Williamson, despite**
12 **misrepresenting her domestic partner status and “costing the city**
13 **\$13,811.”**

14 Tanisha Wagner was born in 1983, making her approximately 30 years old in 2013 –
15 substantially younger than Plaintiffs Johnson and Williamson, who were all over 40 in
16 2013. *See* Cole Dec. (T.Wa., Johnson, and Williamson files). Ms. Wagner benefited her
17 mother financially in a manner not available to the general public, deducting a late fee and
18 taking actions to avoid the failure of a payment arrangement and the accrual of late fees and
19 penalties. Cole Dec. (T.Wa. file) at JOHNSON000842. SPU also found that the younger
20 Ms. Wagner “misrepresented [her] relationship with [her] former domestic partner ‘in order
21 to continue providing him with medical benefit coverage from the City of Seattle though
22 [she] no longer met the requirements of a domestic partner relationship,’ costing the City \$
23 **13,811.82.”** *Id.* Ms. Sanchez recommended that Wagner be terminated. Cole Dec. (T.Wa.
24 file) at JOHNSON000129. After receiving such recommendation and Regan’s record of
25 investigation, Hoffman met with Ms. Wagner in a *Loudermill* hearing, and subsequently
gave the younger employee a 30-day suspension, in lieu of termination, on condition that

1 she sign a last chance agreement. Cole Dec. (T.Wa. file) at JOHNSON000126. Again,
2 Johnson and Williamson, who were older employees, were given no similar last chance
3 prior to being terminated. *See* Cole Dec. (Johnson and Williamson files).

4 **c. Teresa Flores defrauded SPU of nearly \$2,000; Warren**
5 **(Caucasian) was given a “last chance” not given to Plaintiffs**
6 **Johnson and Williamson.**

7 Teresa Flores is the administrative assistant to Customer Response Division Director
8 Debra Russell. Sheridan Dec., Ex. 26. She self-identifies as American Indian / Alaska
9 Native. Cole Dec. (T.F. file). She was “granted a level of CCSS access ... which allows her
10 to make certain types of transactions to customers’ accounts. [H]er duties include[] updating
11 customers addresses and contact information via the customer account screen or service
12 order.” Cole Dec. (T.F. file) at JOHNSON000245. SPU found that Flores “[a]ccessed and
13 made 16 transactions to her family member’s utility accounts and the account where she
14 resides, in violation of the City Ethics Code.” It also found that Flores made an adjustment
15 to her sister’s account, removing a \$10 late fee. It further found that Flores “[m]isled
16 investigators when she stated that she did not know how to make adjustments to customer
17 accounts regarding the transaction on her sister's account when, in fact, she had made more
18 than 140 similar transactions for other customers.” *Id.*, at JOHNSON000248.

19 The investigation also found that Flores had moved in with her mother in December
20 2010 and thus had a “financial interest” in her utility account. That account received a rate
21 for which only low-income customers were eligible, a fact which Flores admitted she was
22 aware of in 2011. Though Flores’ salary made the account no longer eligible for the
23 discounted rate, no change in household income was reported when the named
24 accountholder applied for recertification in November 2011. This caused the account in
25 which Flores had a financial interest to receive \$ **1,941.12** in ineligible funds. Guillemette
Regan had the improper discounts reversed, but was “discreet” (sic) in doing so. S.J. Dec.,

1 Ex. 32. While SPU’s investigation found “Flores improperly benefited from discounted
2 utility rates,” that finding was omitted from Susan Sanchez’s letter to Ray Hoffman,
3 recommending that Ms. Flores receive only a one-day suspension without pay. *Compare*
4 Cole Dec. (T.F. file) at JOHNSON000248 *with id.*, at JOHNSON 136244-45. After having
5 been found to have “misled investigators” about her ability to make adjustments and to have
6 improperly benefited from discounted rates, Hoffman met with Ms. Flores for a *Loudermill*
7 hearing, after which he imposed a one-day suspension. Cole Dec. (T.F. file) at JOHNSON
8 136240. Flores was not required to sign a “last chance” agreement or to waive any rights in
9 exchange for such leniency. *See id.* Plaintiffs Davis-Raines and Jones – who were not found
10 to have defrauded the utility of nearly \$2,000 in funds like Flores – nor even found to have
11 violated any alleged policies concerning the granting of payment arrangements or waiver of
12 fees – received the same level of discipline as Flores: a one-day suspension without pay. *See*
13 Cole Dec. (T.F. file) *compare with id.* (Davis-Raines and Jones files).

14 **d. In 2011, Nick Pealy was allowed to resign without having**
15 **disciplinary documentation placed in his file, was given a letter of**
16 **reference from Director Hoffman, and was paid \$70,000 after he**
17 **engaged in serious misconduct.**

18 Nick Pealy is white. Sheridan Dec., Ex. 29 at 174:21-22. He was an executive at
19 SPU who reported directly to the Director, Ray Hoffman. Sheridan Dec., Ex. 29 at 173:20-
20 23. In or about April 2011, Hoffman learned that Pealy circumvented the process for out-of-
21 class assignments, which required such jobs to be advertised so that persons could apply for
22 the job. Sheridan Dec., Ex. 29 at 176:2-23-179:6. Instead, Pealy inappropriately reassigned
23 a favored female employee to a job without advertising it – an employee who there was
24 innuendo “that there may have been a relationship between Mr. Pealy and this employee.”
25 *Id.* Hoffman learned at the same time that Pealy “had a reputation for establishing ...
working relationships with young women, and it was referred to as Nick’s chicks.” Sheridan

1 Dec., Ex. 29 at 179:17-25. He also learned that “Pealy had engaged in a practice of
2 donating significant quantities of sick leave to various women in various parts of the
3 organization, ... many of these employees were probably in their early 30s or their late
4 20s.” Sheridan Dec., Ex. 29 at 180:7-10. For his misconduct, Hoffman allowed Pealy to
5 resign in lieu of termination; the utility paid Pealy over \$70,000; and Director Hoffman
6 gave Pealy a letter of reference. Sheridan Dec., Ex. 29 at 188:3-189:14; S.J. Dec., Ex. 33.

7 In contrast to Plaintiff Cheryl Muskelly, who retired and then had documentation
8 placed in her file stating that she otherwise would have been terminated; or Plaintiff Seay-
9 Davis, who retired in lieu of being fired to keep her medical benefits and then had a letter
10 put in her permanent file from Hoffman saying that he would have given her an unpaid
11 suspension had she not retired -- no disciplinary documentation or record of investigation
12 was placed in Mr. Pealy’s permanent personnel file for his violation of personnel rules and
13 serious misconduct with female subordinates. *See* Sheridan Dec. ¶26.

14 e. **SPU allowed David Lindsay (Caucasian) to retire without SPU**
15 **marring his permanent record with disciplinary action.**

16 David Lindsay is White. SPU’s investigation “found 17 transactions made by [him]
17 on th[e] account [of his daughter], 10 of which had financial impact on the account.”
18 “Attempts to interview Mr. Lindsay began in July of 2013 and continued until he retired on
19 September 2, 2013.” After he retired, no letter was placed in Lindsay’s file similar to the
20 one placed in Ms. Muskelly or Ms. Seay-Davis’ file. *See* Cole Dec. (D.Li. file at
21 JOHNSON000467-68). His alleged conduct is comparable to Ms. Davis-Raines and Ms.
22 Jones who Susan Sanchez had recommended both receive 3-day suspensions. *Compare*
23 Cole Dec. (Davis-Raines and Jones files).

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III. ISSUE PRESENTED

Do the Plaintiffs raise a genuine issue of fact as to whether they were subject to disparate treatment based in substantial part on their race, age, and/or protected activity (retaliation)? Yes.

IV. ARGUMENT AND AUTHORITY

A. Standard of Review

Under CR 56, all facts and inferences are viewed in the light most favorable to Plaintiffs, as the Court “disregard[s] all evidence favorable to the moving party that the jury is not required to believe.”⁷ “The Court ... may not make credibility determinations or weigh the evidence.”⁸ “[T]he court must review the record ‘taken as a whole,’”⁹ and “[a]ll of the evidence - whether direct or indirect - is to be considered cumulatively.”¹⁰ If there is a genuine issue as to any material fact, a trial is “absolutely necessary.”¹¹

“[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 College, 181 Wn.2d 439, 445, 334 P.3d 541, 545 (2014), *citing* Sangster v. Albertson’s, Inc., 99 Wn. App. 156, 160, 991 P.2d 674 (2000) (“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.); *and* Johnson v. State Dept. of Soc. & Health Servs., 80 Wn. App. 212, 907 P.2d 1223 (1996) (“*Even if the defendant articulates a legitimate, nondiscriminatory reason for the challenged employment decision, thus shifting the burden to the plaintiff to prove that the articulated reason is pretextual, summary judgment is normally inappropriate.*”) Plaintiffs “need produce very

⁷ Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 151, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).
⁸ *Id.*, at 150.
⁹ Reeves, 530 U.S. at 150.
¹⁰ Raad v. Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1194 (9th Cir. 2003).
¹¹ Balise v. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963).

1 little evidence in order to overcome an employer’s motion for summary judgment ... [as]
2 the ultimate question is one that can only be resolved through a searching inquiry – one that
3 is most appropriately conducted by a factfinder, upon a full record.” Chuang v. Univ. of Cal.
4 Davis, 225 F.3d 1115, 1124 (9th Cir. 2000).

5 “[T]he employee’s task at the summary judgment stage is limited to showing that a
6 reasonable trier of fact could, but not necessarily would, draw the inference that [race, age,
7 or retaliation] was a [‘substantial factor’] in the decision.”¹² The burden to show a prima
8 facie case “is not onerous,” and “pretext may be demonstrated by direct or indirect
9 evidence, including evidence presented as part of the prima facie case.” Johnson, 80 Wn.
10 App. at 227, n.21, 229. Washington courts, while often utilizing the *McDonnell*
11 *Douglas* approach, have repeatedly cautioned it is to be used “flexibly,”¹³ and that “[a]bove
12 all, it should not be viewed as providing a format into which all cases of discrimination
13 must somehow fit.” Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 363, 753
14 P.2d 517 (1988).

15 “Proof of different treatment by way of comparator evidence is relevant and
16 admissible but not required.” Johnson v. Chevron U.S.A., Inc., 159 Wn. App. 18, 33, 244
17 P.3d 438, 446 (2010). “A plaintiff who chooses not to rely on *McDonnell Douglas* can still
18 meet his or her burden of production in any way that yields evidence from which a rational
19 trier of fact could find unlawful discrimination by a preponderance of the evidence.”
20 Parsons v. St. Joseph's Hosp. and Health Care Ctr., 70 Wn.App. 804, 809 (1993); *accord*
21 Lowe v. City of Monrovia, 775 F.2d 998, 1009 (9th Cir. 1985), amended, 784 F.2d 1407
22 (9th Cir. 1986) (“[A] plaintiff may establish a *prima facie* case of disparate treatment by
23 satisfying the *McDonnell Douglas* four-part test, thereby creating a rebuttable presumption
24

25 ¹² See Johnson, 80 Wn. App. at 230; *accord* Scrivener, 181 Wn.2d at 445.

¹³ *Id.*, citing *Texas Dept. of Comm’y Affairs v. Burdine*, 450 U.S. 248, 253-55 (1981).

1 of discriminatory treatment, or by presenting actual evidence, direct or circumstantial, of the
2 employer's discriminatory motive.”).

3 [I]t would be improper to require every plaintiff to produce direct evidence of
4 discriminatory intent. ... Courts have thus repeatedly stressed that ‘[c]ircumstantial,
indirect and inferential evidence will suffice to discharge the plaintiff's burden.’

5 Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 179-80, 23 P.3d 440 (2001) (*citing* Sellsted v.
6 Wash. Mut. Sav. Bank, 69 Wn. App. 852, 860, 851 P.2d 716, *review denied*, 122 Wn.2d
7 1018 (1993)), *overruled on other grounds by* McClarty v. Totem Elec., 157 Wn.2d 214, 137
8 P.3d 844 (2006); *accord* deLisle v. FMC Corp., 57 Wn. App. 79, 83, 786 P.2d 839 (1990).

9 “Proof that the defendant's explanation is unworthy of credence is simply one form
10 of circumstantial evidence that is probative of intentional discrimination, and it may be quite
11 persuasive.” Currier v. Northland Servs., Inc., 182 Wn. App. 733, 747, 332 P.3d 1006
12 (2014) (*quoting* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147, 120 S.Ct.
13 2097, 147 L.Ed.2d 105 (2000)), *review denied*, 182 Wn.2d 1006, 342 P.3d 326 (2015);
14 *accord* Hill, 144 Wn.2d at 184 (“[T]he trier of fact can reasonably infer from the falsity of
15 the explanation that the employer is dissembling to cover up a discriminatory purpose. Such
16 an inference is consistent with the general principle of evidence law that the factfinder is
17 entitled to consider a party's dishonesty about a material fact as ‘affirmative evidence of
18 guilt.’”) (*quoting* Reeves, 530 U.S. at 147). “[A] disparate treatment plaintiff can survive
19 summary judgment without producing any evidence of discrimination beyond that
20 constituting his prima facie case, if that evidence raises a genuine issue of material fact
21 regarding the truth of the employer's proffered reasons. Chuang, 225 F.3d at 1124, *citing*
22 Reeves, 530 U.S. 133 (holding that if factfinder rejects employer's proffered
23 nondiscriminatory reasons as unbelievable, it may infer “the ultimate fact of intentional
24 discrimination” without additional proof of discrimination).

1 **B. Plaintiffs present a convincing mosaic of circumstantial evidence from which a**
2 **jury could infer discriminatory motive.**

3 Plaintiffs have presented a significant volume of evidence from which the jury may
4 find that Defendant's stated reasons for investigating and disciplining the Plaintiffs are not
5 believable and that Defendant was "dissembling to cover up a discriminatory motive."
6 Policies about an alleged prohibition on transacting on the accounts of oneself, or the
7 accounts of friends and family, were not in place at the time of the acts for which Plaintiffs
8 were disciplined, as shown throughout the records of the City Auditor and in the
9 investigator interviews of the UAR Supervisors in November 2011, among many other
10 sources of evidence. *See, e.g.*, S.J. Dec., Ex. 4. Since at least, May 17, 2011, SPU was been
11 on notice that the "Utilities' policies and employee training do not clearly define the process
12 for adjustments" in general and that SPU still needed to "adopt formal policies and establish
13 processes for determining when account adjustments are necessary." S.J. Dec., Ex. 16 at 13
(Report of the State Auditor).

14 Despite knowing that it lacked policies, SPU proceeded to charge the Plaintiffs and
15 other employees who it knew would be predominantly persons of color working in the Call
16 Center with alleged breaches of a code of ethics on which they were not trained and had
17 never been told that it applied in the manner SPU sought to apply it in 2011-2013. The
18 predominantly white group of managers who had failed to implement proper controls were
19 not disciplined at all. While SPU's Director promise the public that an outside investigator
20 had been hired to spearhead a fair and objective investigation, the qualified, Certified Fraud
21 Examiner who it hired was promptly fired, ordered to shred her records, and not replaced.
22 Guillemette Regan replaced her and used "anecdotal" information to link employees to one
23 another, believing she would find employees grouped into racial "clusters." *See* S.J. Dec.,
24 Ex. 5 at 2-3. Debra Russell, Director of the Call Center supervisor heard complaints from
25 the Race and Justice Initiative's Change Team "that the Contact Center was like a

1 plantation.” Sheridan Dec., Ex. 8 (Russell Dep.) at 107:18-25.

2 Before the firings had begun in earnest, Hoffman complained openly about how the
3 Call Center’s “longest-term employees do not have the enthusiasm and commitment
4 necessary to provide the desired response to customers.” S.J. Dec., Ex.21. UAR Supervisors
5 told Hoffman how they perceived “challenges ... [to] exist with the more tenured
6 employees.” S.J. Dec., Ex. 4. Hoffman’s comparative treatment of substantially younger
7 employees like Tanisha Wagner, who cost the utility nearly **\$14,000**, yet was not
8 terminated, further support Plaintiffs claims of age discrimination.

9 **C. An issue of fact exists as to whether five of the Plaintiffs who signed the Petition
10 for Solidarity were retaliated against.**

11 “[P]roof of the employer’s motivation must be shown by circumstantial evidence
12 because the employer is not apt to announce retaliation as his motive.” Kahn v. Salerno, 90
13 Wn. App. 110, 130, 951 P.2d 321, 332 (1998). Hoffman and Sanchez both admit having
14 knowledge of the Petition for Solidarity prior to making decisions on discipline for the
15 Plaintiffs, but each testify by declaration that the Petition “played no role” in their decisions.
16 See Hoffman Dec., ¶8; Sanchez Dec., ¶8. On summary judgment, the Court is to “disregard
17 all [such] evidence favorable to the moving party that the jury is not required to believe,”¹⁴
18 and “the cause [should] proceed to trial in order that the opponent may be allowed to
19 disprove [the] facts [averred in affidavits] by cross-examination and by the demeanor of the
20 moving party while testifying.” See Felsman v. Kessler, 2 Wn. App. 493, 496-97, 468 P.2d
21 691, 693 (1970). Where, as here, “the employee establishes that he or she participated in an
22 opposition activity, the employer knew of the opposition activity, and he or she was
23 discharged [or had other adverse action taken against him], then a rebuttable **presumption**
24 **is created in favor of the employee that precludes us from dismissing the employee’s**

25

¹⁴ Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 151, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

1 *case.*” Kahn v. Salerno, 90 Wn. App. 110, 131, 951 P.2d 321, 332 (1998). Under the
2 WLAD’s prohibition on retaliation, RCW 49.60.210, Plaintiffs may recover damages for
3 “any materially adverse [act], meaning that it would have “ ‘dissuaded a reasonable worker
4 from making or supporting a charge of discrimination.”” and “ ‘whether a particular action
5 would be viewed as adverse by a reasonable employee is a question of fact appropriate for a
6 jury.” Boyd v. State, Dep’t of Soc. & Health Servs., 187 Wn. App. 1, 13-14, 349 P.3d 864,
7 870 (2015); *see also* Burchfiel v. Boeing Corp., 149 Wn. App. 468, 483, 205 P.3d 145, 152
8 (2009) (“Burchfiel showed other adverse employment action. . . Ms. Thomas ordered a
9 corrective action memo against him and put it in his personnel file.”)

10 **D. Elaine Seay-Davis suffered an adverse action when she was placed on paid**
11 **administrative leave, pending a decision on the recommendation that she be**
12 **terminated, which led to her being forced to resign.**

13 A jury could find that the City had taken an adverse employment action against Ms.
14 Seay-Davis, when it notified her of the recommendation of termination and placed her on
15 administrative leave. *See, e.g.,* Dahlia v. Rodriguez, 735 F.3d 1060, 1078 (9th Cir. 2013)
16 (holding in case alleging retaliation under First Amendment that “placement on
17 administrative leave can constitute an adverse employment action”); *see also* Chen v. City
18 of Medina, C11-2119 TSZ, 2013 WL 4511411, at *2 (W.D. Wash. Aug. 23, 2013) (noting
19 adverse employment actions at issue included: “being forced to resign” and “being placed
20 on paid administrative leave”); and Sheridan Dec., Ex. 23, at 122:3-123:13; 129:13-130:6;
21 132:17.

22 **E. Plaintiffs Seay-Davis, Muskelly, and Robinson dispute that their resignations**
23 **were “voluntary.”**

24 Plaintiffs do not concede that a constructive discharge must be proven for Plaintiffs
25 Seay-Davis, Muskelly, and Robinson, who each retired in advance of a final decision by
Director Hoffman. The WLAD “embodies a public policy of the ‘highest priority’” and is to

1 be “construed liberally” to accomplish its purposes. Martini v. Boeing Co., 137 Wn.2d 357,
2 364, 971 P.2d 45, 49 (1999). As a result, no constructive discharge need be proven to
3 recover the damages resulting from discriminatory actions. *Id.*, 137 Wn.2d at 367. “This
4 would be true even if the claim for discrimination and the claim for discharge arose from the
5 employer's same act.” *Id.*, 137 Wn.2d at 366. Even if constructive discharge were the
6 standard, the circumstances of the resignations of Seay-Davis, Robinson, and Muskelly—
7 including being forced to retire in lieu of an imminent termination, lest they risk losing
8 important medical and other retirement benefits, would meet the standard. See Nielson v.
9 AgriNorthwest, 95 Wn. App. 571, 578, 977 P.2d 613, 617 (1999) (“To establish
10 constructive discharge, the employee must first show a deliberate act by the employer that
11 made his working conditions so intolerable that a reasonable person would have felt
12 compelled to resign. ... It is the act, not the result, that must be deliberate. ... **Whether or**
13 **not conditions are intolerable is a question of fact.**”)

14 **F. It is a question of fact whether the comparators described herein—which are**
15 **“relevant and admissible but not required”—are similarly situated to Plaintiffs.**

16 Other employees are similarly situated to the plaintiff when they ‘have similar jobs
17 and display similar conduct.’ ... The employees need not be identical; they simply
18 must be similar ‘in all material respects.’ ... Materiality depends on the context and
19 is a question of fact that ‘cannot be mechanically resolved.’ ... [T]he similarly
20 situated inquiry... [‘]is not an unyielding, inflexible requirement that requires near
21 one-to-one mapping between employees’ because one can always find distinctions in
22 ‘performance histories or the nature of the alleged transgressions.’

20 Earl v. Nielsen Media Research, Inc., 658 F.3d 1108, 1114-15 (9th Cir. 2011) (*quoting in*
21 *part* Humphries v. CBOCS West, Inc., 474 F.3d 387, 405 (7th Cir. 2007), *aff’d* 553 U.S.
22 442, 128 S.Ct. 1951, 170 L.Ed.2d 864 (2008)).

23 “While some distinctions could be drawn between the behavior of the comparator
24 and [Plaintiffs], ... [t]urning summary judgment on such narrow questions as the distinction
25 between the behavior of the comparator and [Plaintiffs] defeats the fundamental concept of

1 allowing discrimination claims to be decided on the merits.” Johnson, 80 Wn. App. at 229-
2 30.

3 **VI. CONCLUSION**

4 For all of these reasons, the Court should deny the motion for summary judgment.

5
6 Respectfully submitted this 6th day of June, 2016.

7
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CERTIFICATE OF SERVICE

I, Melanie Kent, that on June 6, 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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s/Melanie Kent
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