NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JESSE L. WESLEY III, Plaintiff-Appellant, v. TOWN SQUARE MEDIA WEST CENTRAL RADIO BROADCASTING; et al., Defendants-Appellees.	No. 16-35852 D.C. No. 1:15-cv-03012-LRS MEMORANDUM* (Filed May 15, 2018)

Appeal from the United States District Court
for the Eastern District of Washington
Lonny R. Suko, District Judge, Presiding

Submitted May 11, 2018**
Seattle, Washington

Before: GOULD and IKUTA, Circuit Judges, and TUNHEIM,*** Chief District Judge.

Plaintiff Jesse Wesley III (Wesley) was fired by his employer, Townsquare Media West Central Radio Broadcasting (WCRB) in June 2013. He sued WCRB

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable John R. Tunheim, Chief United States District Judge for the District of Minnesota, sitting by designation.

and related companies (collectively Defendants) for violating the Washington Law Against Discrimination (WLAD) by engaging in disparate treatment and retaliation.[1] The district court granted summary judgment for Defendants concluding that as a matter of law Wesley had not established a *prima facie* case of disparate treatment. Wesley then moved to amend the summary judgment order because the district court did not address the retaliation claim. When denying Wesley's motion to amend judgment, the district court concluded that Wesley would not be able to establish a *prima facie* case of retaliation. Wesley appeals both orders. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the district court.

Wesley contends that the district court erred by granting summary judgment for Defendants on his disparate treatment claim. We review *de novo* a district court's grant of summary judgment. *See Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1065 (9th Cir. 2003). The district court correctly concluded that Wesley could not establish a *prima facie* case for disparate treatment because he did not establish an element, that he was performing his job satisfactorily. *See Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.*, 404 P.3d 464, 470 (Wash. 2017). The undisputed evidence in the record showed that Wesley's team, for which he was responsible in his managerial position, was not meeting its budget goals in 2012-2013. Additionally, Wesley's team and his customers complained about his lack of attentiveness and leadership. The district court did not

[1] Wesley alleged other claims, but did not appeal the district court's entry of judgment for Defendants on those claims.

err by granting summary judgment for Defendants on Wesley's disparate treatment claim.

Wesley also contends that the district court erred by treating Defendants' motion for summary judgment as a case ending motion when Defendants had not moved for summary judgment on his retaliation theory of discrimination. We review for abuse of discretion a district court's denial of a motion to amend judgment. *See Int'l Rehab. Scis. Inc. v. Sebelius*, 688 F.3d 994, 1000 (9th Cir. 2012). Although the district court cursorily rejected Wesley's retaliation theory for the same reasons it rejected Wesley's claim for disparate treatment, the record supports the conclusion that Wesley did not establish a *prima facie* case of retaliation under the WLAD. Under section 49.60.210(1) of the Revised Code of Washington, an employee establishing a *prima facie* case of retaliation must allege that he or she opposed any practices forbidden by the statute, or filed a charge, testified, or assisted in any proceeding under the statute. *See Lodis v. Corbis Holdings, Inc.*, 292 P.3d 779, 787 (Wash. Ct. App. 2013). Wesley asserts that his protected activity was taking medical leave, but the act of taking medical leave is not a protected activity under the statute. There is no evidence that Defendants opposed Wesley's request for leave or that Wesley made any complaints about Defendants' grant of leave. We affirm the district court's conclusion that Defendants were entitled to summary judgment on Wesley's retaliation claim.

AFFIRMED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

JESSE L. WESLEY, III, Plaintiff, v. TOWN SQUARE MEDIA WEST CENTRAL RADIO BROADCASTING; TOWN SQUARE MEDIA TRI-CITIES, LLC; and TOWNSQUARE MEDIA YAKIMA, LLC, Defendants.	NO. 1:15-CV-03012-LRS **ORDER DENYING MOTION TO AMEND JUDGMENT** (Filed Oct. 3, 2016)

BEFORE THE COURT is Plaintiff's "Motion To Amend Judgment Pursuant To FRCP 59." (ECF No. 63). This motion is heard without oral argument.[1]

I. BACKGROUND

Plaintiff asks the court to reconsider its "Second Amended Order Granting Motion For Summary Judgment" (ECF No. 62) to the extent that order granted summary judgment to Defendants on Plaintiff's Washington Law Against Discrimination (WLAD) disability discrimination claims. Plaintiff further alleges that

[1] Notwithstanding Plaintiff's request for oral argument, the court exercises its discretion to hear Plaintiff's motion without oral argument. LR 7.1(h)(3)(B)(iv).

Defendants did not seek summary judgment on his "claim for retaliatory termination for availing himself of accommodation pursuant to the Americans with Disabilities Act [ADA] . . . and Washington Law Against Discrimination. . . . "[2]

II. DISCUSSION

A. Rule 59(e) Standard

A motion to alter or amend judgment under Fed. R. Civ. P. 59(e) is "an extraordinary remedy which should be used sparingly." *McDowell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999). It is available in four situations: (1) where the motion is necessary to correct "manifest errors of law or fact upon which the judgment rests;" (2) where the motion is necessary to present newly discovered or previously unavailable evidence; (3) where the motion is necessary to "prevent manifest injustice;" and (4) where the amendment is justified by an intervening change in controlling law. *Allstate Insurance Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011). A Rule 59(e) motion may not be used to "relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2810.1 (2d ed. 1995).

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[2] No ADA claim is pled in Plaintiff's First Amended Complaint (ECF No. 4) and so no ADA claim was addressed in the court's summary judgment order. There is no ADA claim.

B. WLAD Disparate Treatment Claim

In analyzing Plaintiff's disparate treatment claim under the WLAD, this court assumed Plaintiff was disabled prior to June 2013, but that he nonetheless failed to establish the second element of the *prima facie* case because he failed to produce admissible evidence raising a genuine issue of material fact that he was adequately performing his job. (ECF No. 62 at p. 10). This court did consider Plaintiff's Ex. 1, notwithstanding the fact it was not properly authenticated by him. (ECF No. 62 at pp. 6-8). The court specifically considered the spreadsheets in Ex. 1 showing sales by account executives of the Digital Sales Team for the months of January 2013 through April 2013. Plaintiff observed that these spreadsheets showed that in those months, team sales reached 59%, 71% and 88% of the goals, and he asserted that these "are similar to the numbers that Defendants' replacement employee produced and Defendants allege to be satisfactory." (ECF No. 62 at p. 8). Citing the Declaration of Amy Yoerger, this court concluded there was "nothing in the record to substantiate the assertion that those numbers have ever been satisfactory to Defendants." (*Id.*).

In his motion to amend judgment, Plaintiff now contends that "[w]hat also creates a genuine issue of fact as to the second element of Plaintiff's disparate treatment claim is that . . . Yoerger's declaration and charts of Plaintiff's performance as measured by the 'Digital Revenue at % of Budget' (ECF 58, Exhibit B)

are completely inconsistent with the SSF §30 charts."[3] This is a new argument which Plaintiff did not previously tender in opposition to Defendants' summary judgment motion. It is inappropriate to bring it up for the first time on a motion to amend judgment. Moreover, as Plaintiff acknowledges, the "charts" appended to Yoerger's declaration (ECF No. 58, Ex. B) are the very same spreadsheets in Plaintiff's Ex. 1 which the court considered and on which Plaintiff premised his argument that he was satisfactorily performing his job.

Plaintiff was on medical leave for a brief period of time from April 22, 2013 through May 10, 2013. (ECF No. 62 at p. 11, n. 5). He contends this "shows that the results that Defendants are claiming were not satisfactory were partly the responsibility of Ms. Yoerger when Plaintiff was on medical leave." This too appears to be a new argument advanced for the first time in Plaintiff's motion to amend judgment. In any event, it is not persuasive considering the limited period of leave involved during which Ms. Yoerger assumed Plaintiff's duties.

In its summary judgment order, this court also noted that Plaintiff failed to offer any evidence rebutting Defendants' evidence of "complaints made to WCRB employees and clients regarding Plaintiff's lack of engagement, lack of leadership, and not being present either because he was often absent or late to work, and being disengaged [from] the AEs." (ECF No.

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[3] "SSF" refers to Defendants' Separate Statement of Facts at ECF No. 42.

62 at p. 8). Plaintiff notes he took time off for his depression "and that it would not be reasonable to expect him to maintain leadership and responsiveness when he was on leave." Once again, the period of leave was brief and began in late April 2013, shortly after Defendants were informed by Plaintiff that his brother had committed suicide and that Plaintiff was suffering from depression. (Defendants' Separate Statement of Facts, ECF No. 42 at Paragraphs 31-33). Plaintiff does not account for the many months prior to April 2013 during which Defendants considered Plaintiff's job performance to be unsatisfactory as set forth in Defendants' Statement of Facts Nos. 16, 17-32, 35-39, and 41, all of which are undisputed.[4]

C. WLAD Failure To Accommodate Claim

Without citation to the record, Plaintiff asserts Defendants did not allow him to work part-time upon his return to work. Plaintiff, however, admitted that WCRB granted his request to work part-time between May 13 and May 24, 2013. (ECF No. 62 at p. 11, n. 6).

Citing *Griffith v. Boise Cascade, Inc.*, 111 Wn.App. 436, 442, 45 P.3d 589 (2002), Plaintiff contends Defendants failed to determine the extent of Plaintiff's

[4] As this court indicated in its summary judgment order, all of Defendants' statements of fact cited in that order were considered to be undisputed for the reasons set forth in Defendants' Reply Statement of Facts. (ECF No. 62 at p. 3). This court did **not** consider Defendants' Statement of Facts Nos. 49-50 and 71-72 which Plaintiff contends are inadmissible collateral impeachment evidence and hearsay.

disability and how it could be accommodated. Plaintiff ignores, however, the fact that he also had a duty to give his employer notice of the abnormality and its accompanying substantial limitations. *Davis v. Microsoft Corporation*, 149 Wn.2d 521, 532, 70 P.3d 126 (2003). The undisputed facts are that until April 2013, Plaintiff did not provide his employer with such notice. (ECF No. 42 at Paragraphs 38-41). It was not until April 2013 that Plaintiff divulged he was having difficulty because of his brother's suicide and that he was suffering from depression. (*Id.* at Paragraphs 32 and 57).

Plaintiff's contention that "Defendants do not claim to have [taken] any action to determine the extent of Plaintiff's disability" and "do not claim to have helped Plaintiff continue working in his position" rings hollow in light of his admission that he did not request any disability accommodation when he returned to work on May 27, 2013. (ECF No. 62 at p. 11, n. 7). There was no reason for Defendants to require Plaintiff to undergo a medical evaluation, as asserted by Plaintiff, when the record indicates Plaintiff was seeking medical help on his own accord. (ECF No. 50-1). Because of Plaintiff's refusal to return to work as an Account Executive (AE) after returning from medical leave in late May 2013, Defendants were not obligated to offer that position again to Plaintiff after he continued to not meet expectations in his capacity as Digital Sales Manager (DSM). (ECF No. 42 at Paragraph 68). Moreover, all of these appear to be arguments which Plaintiff could have raised in his initial opposition to the summary judgment motion, but failed to do so.

D. Alleged WLAD Retaliatory Termination

The alleged failure of Defendants to move for summary judgment on Plaintiff's alleged retaliatory termination claim is something Plaintiff could have argued in his opposition to Defendants' summary judgment motion. He did not do so and this court did not separately analyze such a claim.

Paragraph 4.2 of the First Amended Complaint (ECF No. 4) alleges Defendants undertook "retaliatory adverse employment actions against [Plaintiff], who was doing satisfactory work, in the form of termination." This paragraph was pled as part of Plaintiff's WLAD Disability Discrimination cause of action. In his motion to amend judgment, Plaintiff indicates the statutorily protected activity he was retaliated against for was his seeking of a reasonable accommodation for his disability. As set forth in the court's summary judgment order, and reiterated in the present order, Plaintiff was not performing satisfactory work and Defendants reasonably accommodated him considering the limited extent to which Plaintiff advised them of his alleged disability and its limitations, and considering that he requested no additional accommodation once he returned to work on a full-time basis. A retaliatory termination claim fails for the same reason that Plaintiff's disparate treatment and accommodation claims fail.

III. CONCLUSION

For the reasons set forth herein, the court's Judgment in favor of Defendants does not rest upon a manifest error of law or fact and is not manifestly unjust. Accordingly, Plaintiff's "Motion To Amend Judgment Pursuant To FRCP 59" (ECF No. 63) is **DENIED**.

IT IS SO ORDERED. The District Executive shall enter this order and forward copies of the same to counsel.

DATED this 3rd day of October, 2016.

s/Lonny R. Suko

LONNY R. SUKO
Senior United States District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

JESSE L. WESLEY, III, Plaintiff, v. TOWN SQUARE MEDIA WEST CENTRAL RADIO BROADCASTING; TOWN SQUARE MEDIA TRI-CITIES, LLC; and TOWNSQUARE MEDIA YAKIMA, LLC, Defendants.	No. 1:15-CV-3012-LRS **SECOND AMENDED**[1] **ORDER GRANTING MOTION FOR SUMMARY JUDGMENT** (Filed Jul. 27, 2016)

BEFORE THE COURT is Defendants' Motion For Summary Judgment (ECF No. 41). This motion is heard without oral argument.

I. BACKGROUND

Plaintiff's First Amended Complaint (ECF No. 4) alleges causes of action against his former employer for disability discrimination in violation of the Washington Law Against Discrimination (WLAD), RCW 49.60 *et seq.*, age discrimination in violation of the WLAD and RCW 49.44.090, and violation of the federal Family and Medical Leave Act (FMLA), 29 U.S.C.

[1] The order is further amended to correct some non-substantive grammatical and punctuation errors.

§2601 *et seq.,* and the Washington Family Leave Act (WFLA), RCW 49.78 *et seq*.. Plaintiff alleges the violation of his leave rights and the discrimination against him resulted in termination of his employment.

II. DISCUSSION

A. Summary Judgment Standard

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court. *Zweig v. Hearst Corp.*, 521 F.2d 1129 (9th Cir.), *cert. denied*, 423 U.S. 1025, 96 S.Ct. 469 (1975). Under Fed. R. Civ. P. 56, a party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505 (1986); *Semegen v. Weidner*, 780 F.2d 727, 732 (9th Cir. 1985). Summary judgment is precluded if there exists a genuine dispute over a fact that might affect the outcome of the suit under the governing law. *Anderson,* 477 U.S. at 248.

The moving party has the initial burden to prove that no genuine issue of material fact exists. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348 (1986). Once the moving party has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* The party opposing summary judgment must go beyond the pleadings to designate specific facts

establishing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548 (1986).

In ruling on a motion for summary judgment, all inferences drawn from the underlying facts must be viewed in the light most favorable to the nonmovant. *Matsushita*, 475 U.S. at 587. Nonetheless, summary judgment is required against a party who fails to make a showing sufficient to establish an essential element of a claim, even if there are genuine factual disputes regarding other elements of the claim. *Celotex*, 477 U.S. at 322-23.

B. Facts

Defendants' summary judgment motion is timely and their Statement of Facts (ECF No. 42) complies with LR 56.1(a). There is no basis for striking the motion. On the contrary, Plaintiff's Responsive Statement of Facts (ECF No. 50) does not refer to the specific portion of the record – i.e., the specific portion of Exs. 1, 2, 3 and 4 attached to the Responsive Statement of Facts – where the alleged responsive fact is found. Moreover, Plaintiff simply denies certain of the facts set forth by Defendants, but does not support these denials with any citation to the record whatsoever. All of Defendants' statements of fact cited in this order are considered to be undisputed for the reasons set forth in Defendants' Reply Statement of Facts (ECF No. 56).

C. FMLA and WFLA

Excluded from FMLA coverage is "any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50." 29 U.S.C. §2611(2)(B)(ii). The WFLA contains the identical exclusion. RCW 49.78.020(4)(b) provides: "'Employee' does not mean a person who is employed at a worksite at which the employer defined in (a) of this subsection employs less than fifty employees if the total number of employees employed by that employer within seventy-five miles of that worksite is less than fifty."

Plaintiff was hired by Town Square Media West Central Radio Broadcasting (WCRB) to work at its Yakima, Washington location as a Digital Sales Manager (DSM) beginning August 16, 2011. (Defendants' Statement of Facts Nos. 9, 13 and 14, ECF No. 56). He worked at that location until his termination on June 27, 2013. (Defendants' Statement of Facts No. 12). In addition to its Yakima worksite, WCRB has a Pasco worksite. (Defendants' Statement of Facts No. 69). Plaintiff contends that these two worksites are within 75 miles of each other and therefore, WCRB is subject to the FMLA and the WFLA.

Title 29, Part 825 of the Code of Federal Regulations contains regulations promulgated pursuant to the FMLA. 29 C.F.R. §825.111(b) provides that "[t]he 75-mile distance is measured by surface miles, using

surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the employee needing leave is employed." Pursuant to Fed. R. Evid, 201, this court takes judicial notice that it is 88.8 miles from the Townsquare Media location in Yakima (4010 Summitview) to the Townsquare Media Tri-Cities location in Pasco (2621 West A Street) via Interstate 82. (https://www.google.com/maps). Plaintiff is obviously aware of this since his argument is that using global positioning system coordinates (GPS), it is only 73.186 miles between the two locations "as the crow flies."

As a matter of law, none of the Defendants are subject to the FMLA or the WFLA and therefore, they are entitled to judgment as a matter of law on those claims.[2]

D. Age Discrimination

RCW 49.60.180(2) makes it unlawful for employers to discharge or bar any person from employment because of *age. Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 179, 23 P.3d 440, 445 (2001). The United States Supreme Court has created a three step burden shifting protocol to use when evaluating motions for judgment as a matter of law in which the plaintiff lacks direct evidence of discrimination. *McDonnell Douglas*

[2] The WFLA "mirrors" the FMLA and provides that courts are to construe its provisions in a manner consistent with provisions of the FMLA. *Crawford v. JP Morgan Chase NA*, 983 F.Supp.2d 1264, 1269 (W.D. Wash. 2013).

Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973). Washington courts have adopted this protocol. *Hill* 144 Wn.2d at 180. Although the ultimate burden of persuasion that the defendant unlawfully discriminated against the employee lies with the plaintiff at all times, the *McDonnell Douglas* protocol imposes three additional burdens of production that shift between the plaintiff and the defendant. *Id.* at 180-181. If any of these burdens of production are not met, the opposing party is entitled to judgment as a matter of law. *Id.* at 180.

The first burden of production requires the plaintiff to set forth a *prima facie* case of unlawful discrimination. *Id.* at 181. To make out a *prima facie* case of wrongful discharge due to age, a plaintiff must show that he or she (1) was within the statutorily protected age group; (2) was discharged by the defendant; (3) was doing satisfactory work; and (4) was replaced by a significantly younger person. *Id.* at 188. The statutorily protected age group includes those 40 years of age or older. RCW 49.44.090. Circumstantial, indirect, and inferential evidence will suffice to discharge the plaintiff's burden. *Hill*, 144 Wn.2d at 180.

If a *prima facie* case of discrimination is established, the second step of the *McDonnell Douglas* protocol imposes a burden on the defendant to "produce admissible evidence of a legitimate, non-discriminatory explanation for the adverse employment action sufficient to raise a genuine issue of fact as to whether the defendant discriminated against the plaintiff." *Id.* If the employer's burden of production is met, the

presumption of discrimination raised by the *prima facie* case is rebutted. *Rice v. Offshore Sys., Inc.*, 167 Wn.App. 77, 89, 272 P.3d 865, *review denied*, 174 Wn.2d 1016, 281 P.3d 687 (2012).

If an employer produces a legitimate, non-discriminatory reason for the employee's discharge, the third and final step of the *McDonnell Douglas* protocol requires the employee resisting summary judgment to "produce evidence that raises a genuine issue of material fact on whether the reasons given by the employer for discharging the employee are unworthy of belief or are mere pretext for what is in fact a discriminatory purpose." *Id.* at 89. However, circumstantial evidence will suffice; the employee need not supply direct evidence or even "evidence beyond that offered to establish the prima facie case." *Id.* The employee must only "meet his burden of production to create an issue of fact, but is not required to resolve that issue on summary judgment." *Id.* Accordingly, summary judgment in favor of employers is seldom appropriate in discrimination cases. *Id.*

Plaintiff was 40 years old at the time of his discharge in June 2013. He turned 40 on February 20, 2013. (Defendants' Statement of Facts No. 73, ECF No. 56). This places Plaintiff inside the protected class outlined in RCW 49.44.090. A 37 year old, Josh Richardson, born October 31, 1976, was hired after Plaintiff's termination and began working at WCRB in August 2013. (Defendants' Statement of Facts Nos. 75 and 76, ECF No. 56). Although Plaintiff was replaced by someone outside the protected class, the person he was

replaced by was not "significantly younger" than him. Indeed, he was less than four years younger than Plaintiff. See *Scholz v. SCAFCO Corp.*, 2015 WL 2452641 at *6 (Wash. App. Div. 3 2015) (50 year old and 57 year old not "significantly younger" than 58 year old plaintiff). Therefore, Plaintiff has not satisfied the fourth element of a *prima facie* case of age discrimination.

Furthermore, Defendants have produced admissible evidence of a legitimate, non-discriminatory explanation for Plaintiff's termination, namely that Plaintiff was not satisfactorily performing his job. In response, Plaintiff has not produced evidence which, even if admissible, raises a genuine issue of material fact that this explanation is unworthy of belief or is mere pretext for what is in fact a discriminatory purpose. Plaintiff's "Ex. 1" (ECF No. 50-1) is an unauthenticated document which Defendants' counsel asserts was part of an attempted discovery production by Plaintiff's counsel after the close of discovery.

According to Plaintiff, the first page of his Ex. 1 is an e-mail from "Defendant's executive, Pip Dicker, congratulat[ing] Plaintiff . . . for being a top performer for the entire year 2012." As part of their reply, Defendants submit a declaration from Aimee Yoerger (ECF No. 58) who was Director of Sales for Townsquare Media in Yakima from July 2010 to June 30, 2014, and in that capacity, supervised the Plaintiff during his employment. She notes that the email from Pip Dicker, dated January 4, 2013, "relates to the Seize the Deal platform, which was one specific digital revenue type."

The subject line of the email refers to "STD Sales Summary/Ranking – December 2012-Final." According to Yoerger in Paragraph 3 of her Declaration:

> However 2012 **Budgeted** Seize the Deal revenue accounted for 12.3% of the total budgeted digital market revenue. (For Seize the Deal only, final total market performance in 2012 contributed 22.6% of our total market digital goal. While Seize the Deal was an important sales component[,] it was ancillary to the corporate's focus of the "Big 3" which were: Display, Loyalty, and Online Radio. These were the areas under Mr. Wesley's leadership that the digital team was not meeting corporate expectations. In 2012, total market Display revenue attainment was $42,092, 50% of total budget of 83,400; total market Loyalty revenue attainment was $83,525, 79% of total budget of $105,480, and total market Streaming "On Line Radio" revenue attainment was $92,185, 91% of total budget of $101,000.

(Emphasis in original).

Although Plaintiff contends his results were "extraordinary" as documented by Pip Dicker's e-mail, he does not explain why they would be considered "extraordinary." Yoerger's declaration explains why they were not "extraordinary" when considering all components of Defendants' digital revenue stream.

Pages 2-5 of Ex. 1 are spread sheets for the months of January 2013 through April 2013 showing sales by account executives of the Digital Sales Team.

According to Plaintiff, these spread sheets show that he exceeded his personal sales goal budget by 105%, 108% and 219% in January, February and March 2013. He says that in those same months, team sales reached 59%, 71% and 88% of the goal which he asserts "are similar to the numbers that Defendants' replacement employee produced and Defendants allege to be satisfactory."

According to Yoerger in Paragraph 4 of her Declaration: "The spreadsheets reflect each individual AE's [Account Executive's] sales and goals related to 'Sales on the Books' for digital revenue only, and 'Seize the Deal.' As the digital manager, Mr. Wesley was responsible to make sure the digital team met their collective goal, which was never met as demonstrated by the . . . spreadsheets." Even if Plaintiff is accurate in saying the team sales percentages for January, February and March 2013 are similar to the numbers that Defendants' replacement employee (Josh Richardson) produced beginning in August 2013, there is nothing in the record to substantiate the assertion that those numbers have ever been satisfactory to Defendants.[3] To the contrary, the expectation was that 100% of the budget would be met each month and that meeting 80% of the budget was like getting a "C" grade. (Defendants' Statement of Material Fact No. 28). And

[3] Defendants acknowledge that when Richardson became DSM in August 2013, "there was an initial dip in performance in September 2013, but then digital sales began a regular increase, steady toward meeting the required budget with 76.3% in October 2013, 80.6% in November 2013, and 97.8% in December 2013." (ECF No. 41 at p. 9).

Yoerger herself was demoted from Sales Manager to Account Executive for failing to meet the required budget in July 2014. (Defendants' Statement of Material Fact No. 74).

Furthermore, what Plaintiff fails to rebut with any evidence of his own is Defendants' evidence regarding "complaints made to WCRB employees and clients regarding Plaintiff's lack of engagement, lack of leadership, and not being present either because he was often absent or late to work, and being disengaged [from] the AEs." (Defendants' Statement of Fact No. 16; see also Defendants' Statement of Fact Nos. 17-32; 35-39; 41; 70).

Plaintiff's failure to produce evidence raising a genuine issue of material fact that Defendant's proffered non-discriminatory reason for his termination is unworthy of belief or is mere pretext for what is in fact a discriminatory purpose means that he has also failed to establish the second element of a *prima facie* case of age discrimination: that his work performance was satisfactory.[4]

E. Disability Discrimination

It is unlawful for an employer to discriminate against any person in the terms or conditions of employment, or discharge any employee because of the

[4] Plaintiff's First Amended Complaint does not set forth a hostile work environment claim and therefore, the court will not consider such a claim on summary judgment.

presence of any sensory, mental, or physical disability. RCW 49.60.180(1)-(3). Under the WLAD, a disabled employee has a cause of action for (1) disparate treatment and (2) failure to accommodate. *Hines v. Todd Pacific Shipyards Corp.*, 127 Wn.App. 356, 370, 112 P.3d 522 (2005). Plaintiff alleges claims for both disparate treatment and failure to accommodate.

Washington courts have adopted the *McDonnell Douglas/Burdine* three-part burden allocation framework for disparate treatment cases. *McDonnell Douglas, Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089 (1981). The plaintiff has the initial burden to prove a *prima facie* case. The plaintiff must show: 1) he or she was disabled; 2) he or she was able to perform his job; 3) he or she was fired and not rehired; and 4) a nondisabled person was hired. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 94 P.3d 930 (2004). If the plaintiff establishes a *prima facie* case, the burden shifts to the defendant to present evidence of a legitimate nondiscriminatory reason for its actions. The burden then shifts back to the plaintiff to produce evidence that the asserted reason was merely pretext. *Hines*, 127 Wn. App. at 371. To survive summary judgment, the plaintiff must show a reasonable judge or jury could find his or her disability was a substantial motivating factor for the employer's adverse actions. *Id.*

The record is unclear if Plaintiff was suffering from any type of disability prior to his termination in June 2013. Even assuming he was, however, he cannot

meet the second element of the *prima facie* case. For reasons already discussed, he has failed to produce admissible evidence raising a genuine issue of material fact that he was adequately performing his job.

An employer is required to reasonably accommodate a disabled employee unless the accommodation would be an undue hardship. *Pulcino v. Federal Express Co.*, 141 Wn.2d 629, 639, 9 P.3d 787 (2000). The burden is on the employee to present a *prima facie* case of discrimination, including medical evidence of disability. *Id.* at 642. A *prima facie* case of failure to reasonably accommodate a disability under the WLAD includes: (1) the employee had a sensory, mental, or physical abnormality that substantially limited his or her ability to perform the job; (2) the employee was qualified to perform the essential functions of the job in question; (3) the employee gave the employer notice of the abnormality and its accompanying substantial limitations; and (4) upon notice, the employer failed to affirmatively adopt measures that were available to the employer and medically necessary to accommodate the abnormality. *Davis v. Microsoft Corporation*, 149 Wn.2d 521, 532, 70 P.3d 126 (2003).

An employer's responsibility to provide reasonable accommodation requires it to: (1) determine the extent of the employee's disability and how it could be accommodated; (2) take affirmative steps to help the employee continue working in his existing position; (3) take affirmative steps to inform the employee of job opportunities within the company; and (4) consider the employee for and move him into openings for which he

is qualified. *Griffith v. Boise Cascade, Inc.*, 111 Wn.App. 436, 442, 45 P.3d 589 (2002). An employer is not required to offer the exact accommodation an employee desires. *Doe v. Boeing Co.*, 121 Wn.2d 8, 20, 846 P.2d 531 (1993).

Plaintiff asserts that his "counselor informed Defendants through the FMLA leave request paperwork that he had major depression and had to have time off work and then come back on a part-time basis." According to Plaintiff, he "was granted time off[5], but was denied the ability to work part-time[6] or work from home." Once again, as a threshold matter, it is unclear whether Plaintiff was in fact suffering from a disability prior to June 2013. In any event, however, nothing in the record suggests that Plaintiff requested to work from home as an ongoing accommodation. (Defendants' Statement of Material Facts No. 55, ECF No. 56).[7] As a result, he did not provide Defendants with an opportunity to evaluate whether such an accommodation would allow him to perform the essential functions of his job or would cause an undue hardship on his employer, WCRB. And Plaintiff has offered no evidence that working from home or working part-time would

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[5] WCRB granted Plaintiff medical leave for the period from April 22, 2013 through May 10, 2013. (ECF No. 50-1, Request For Admission No. 34).

[6] WCRB granted Plaintiff's request to work part-time during the period between May 13, 2013 and May 24, 2013. (ECF No. 50-1, Request For Admission No. 35).

[7] Plaintiff admits he did not request any disability accommodation from WCRB when he returned from medical leave on May 27, 2013. (ECF No. 50-1, Request For Admission No. 38).

have allowed him to perform his job and would otherwise have constituted a reasonable accommodation.

III. CONCLUSION

Defendants' Motion For Summary Judgment (ECF No. 41) is **GRANTED**. Defendants are awarded judgment on all of the claims asserted by Plaintiff in his First Amended Complaint.

IT IS SO ORDERED. The District Executive shall enter Judgment accordingly, forward copies of the Judgment and this Order to counsel, and close this file.

DATED this 26th day of July, 2016.

s/Lonny R. Suko

LONNY R. SUKO
Senior United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JESSE L. WESLEY III, Plaintiff-Appellant, v. TOWN SQUARE MEDIA WEST CENTRAL RADIO BROADCASTING; et al., Defendants-Appellees.	No. 16-35852 D.C. No. 1:15-cv-03012-LRS Eastern District of Washington, Yakima ORDER (Filed Jul. 9, 2018)

Before: GOULD and IKUTA, Circuit Judges, and TUNHEIM,* Chief District Judge.

The panel judges have voted to deny Plaintiff-Appellant's petition for panel rehearing. The petition for panel rehearing is DENIED.

The full court has been advised of Plaintiff-Appellant's Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. The Petition for Rehearing En Banc is also DENIED.

* The Honorable John R. Tunheim, Chief United States District Judge for the District of Minnesota, sitting by designation.

App. 28

Case # 16-35852

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Jesse L. Wesley, III,
Plaintiff – Appellant

v.

Town Square Media West Central Radio Broadcasting; Town Square Media Tri-Cities LLC; Town Square Media Yakima, LLC.
Defendants – Appellees.

Appeal from United States District Court Eastern District of Washington at Yakima

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Appellant's Opening Brief

(Filed Feb. 22, 2017)

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[4] **I. Jurisdictional Statement**

The United States Federal district trial court has subject matter jurisdiction over this case because it presents a federal question pursuant to 28 U.S.C. §1331. This Court has jurisdiction pursuant to 29 U.S.C. § 1291 because this is an appeal of a final decision of the trial court. On July 26, 2016, the trial court granted summary judgment for Appellee and entered final judgment in favor of Appellee. On August 22, 2016, Appellant filed motion to amend judgment. On October 3, 2016, the trial court denied Appellant's motion to amend judgment. On October 17, 2016, Appellant filed Notice of Civil Appeal. This is an appeal from a final order and there are no issues pending relating to this case in the lower court.

II. Statement of Related Cases and Corporate Disclosure

There are no related cases. Appellant is not a coporation [sic]

III. Statement of issues presented

a. Whether Appellee met its burden on summary judgment that there were no genuine issue of material facts on each of the elements of the claim of disparate treatment disability discrimination to grant it summary judgment?

[5] b. Whether Appellant's motion for summary judgment was a partial summary judgment motion because there are causes of action that were not addressed?

IV. Statement of the Case

Appellant, Jesse Wesley, began working for Appellant on August of 2011. Excerpts of Record (ER), 152. Mr. Wesley had satisfactory performance in his position and received commendations from the executive team during the end of 2012 and beginning of 2013. ER 61-70. Mr. Wesley suffered from depression and he gave notice to his supervisor. ER 139, 141. Mr. Wesley's brother passed, and he was diagnosed with severe depression and his doctor ordered him to take a month off of work from April 22, 2012 [sic] to May 31, 2013 and this leave was granted by Appellee. ER 137. During the time that he was on leave, it was his supervisor's, Ms. Yoerger, responsibility to ensure that sells [sic] budgets and team performance of the office were maintained. ER 127. The results of the sells [sic] numbers decreased substantially and the budgets were not met during April of 2013, while under the responsibility of Ms. Yoerger. ER 65-70. Shortly after his return from medical leave, Appellee was dismissed allegedly for not meeting the sells [sic] budget, for having too many absences, not exhibiting good [6] leadership, and for not being truthful. ER 153. Ms. Yoerger based her opinion that Mr. Wesley was not being truthful with her on hearsay statements of co-workers who said that he was out partying. ER 110. Appellee also alleged that

Mr. Wesley lied about whether he was drinking when he got in a car accident and provided text messages without context to support their allegations. ER 135.

Appellee filed its motion for summary judgment on all issues except Mr. Wesley's claims of retaliation. ER 151-173. Appellee had ample notice that the main part of Mr. Wesley's claim was a claim of retaliation based on Family Medical Leave Act (FMLA), Americans with Disabilities Act (ADA) and Washington State Law against discrimination because this was pleaded in Mr. Wesley's complaint and Appellees denied these allegations in their answer. ER 184, 186, 187, 194-197. Furthermore, the claims of retaliation were also noted in the parties' joint discovery report. ER 194-197. Despite having notice of this claim. Appellee did not include this claim in its motion for summary judgment. ER 151-173.

V. Summary of the Argument

The basis for this appeal is that Appellees's motion for summary judgment was only a partial summary judgment, not dispositive, [7] because it did not address all of Appellant's claims. Appellee [sic] did not address Appellant's claim for retaliatory termination for availing himself of accommodation pursuant to the ADA, Washington Law Against Discrimination, and FMLA, which is an independent cause of action. *Coons v. Secy of U.S. Dept. of the Treasury*, 383 F.3d 879, 887 (9th Cir. 2004).

Furthermore, the evidence that was presented did create a genuine issue of material fact to survive

summary judgment on all the elements for Appellant's claims for ADA and WLAD disability discrimination.

VI. The Evidence Before This Court Created a Genuine Issue of Material Fact For Trial on Appellant's ADA And WLAD Claims

A de novo standard of review is applied to a district court's grant of summary judgment. *Ralph C. Wilson Industries, Inc. v. Chronicle Broadcasting Co.*, 794 F.2d 1359, 1362 (9th Cir.1986). Under Fed. R. Civ. P. 56, a party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505 (1986); *Semegen v. Weidner*, 780 F.2d 727, 732 (9th Cir. 1985). Summary judgment is precluded if there exists a genuine dispute over a fact that might affect [8] the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248.

The moving party has the initial burden to prove that no genuine issue of material fact exists. Matsushita Elec. *Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348 (1986). Once the moving party has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Id. The party opposing summary judgment must go beyond the pleadings to designate specific facts establishing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548 (1986).

In ruling on a motion for summary judgment, all inferences drawn from the underlying facts must be viewed in the light most favorable to the nonmovant. *Matsushita*, 475 U.S. at 587. Nonetheless, summary judgment is required against a party who fails to make a showing sufficient to establish an essential element of a claim, even if there are genuine factual disputes regarding other elements of the claim. *Celotex*, 477 U.S. at 322-23.

i. Disparate Treatment Standard

[9] Courts have adopted the McDonnell Douglas/Burdine three-part burden allocation framework for disparate treatment cases. *McDonnell Douglas, Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089 (1981). The Appellant has the initial burden to prove a prima facie case. The Appellant must show: 1) he or she was disabled; 2) he or she was able to perform his job; 3) he or she was fired and not rehired; and 4) a nondisabled person was hired. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 94 P.3d 930 (2004). If the Appellant establishes a prima facie case, the burden shifts to the Appellee to present evidence of a legitimate nondiscriminatory reason for its actions. The burden then shifts back to the Appellant to produce evidence that the asserted reason was merely pretext. *Hines v. Todd Pacific Shipyards, Corp.*, 127 Wn. App. 356, 371 (Wash. App. Div. 1 2005). To survive summary judgment, the Appellant must show a reasonable judge or jury could

find his or her disability was a substantial motivating factor for the employer's adverse actions. Id.

1. Appellant Provided Information to Establish a Genuine Issue of Fact as to Disparate [10] Treatment

Mr. Wesley provided documentation and Appellee granted him medical leave for depression. ER137. This creates, at least, a genuine issue of fact as to whether Appellant was disabled.

The fact that Mr. Wesley was doing staifactory [sic] work is admitted by Ms. Yoerger when she states "Mr. Wesley always made sure that he met his own AE goals." ER 55. What also creates a genuine issue of fact is that when Mr. Wesley was on leave for his medical condition, Ms. Yoerger was responsible for taking over his responsibilities, which shows that the results that Appellees are claiming were not satisfactory were partly the responsibility of Ms. Yoerger when Appellant was on medical leave. Again, this creates a genuine issue of fact and any inference needs to be in favor of Appellant.

The third and fourth elements of Appellant's prima facie claim are not disputed; Appellant was terminated and not rehired, and a nondisabled person was hired. ER 153.

The reasons that the Court found that Appellees terminated Appellant were that he failed to meet his budget, his attendance was inconsistent, he was not

responsive to clients or subordinates, he lacked leadership and he was untruthful at times. As mentioned above, there is [11] a genuine issue of fact as to whether Appellant was failing at meeting his budget and in terms of attendance Appellees acknowledge that Mr. Wesley took time off for his depression. As to Appellant lacking leadership or not being responsive, Appellees have admitted that Appellant took leave for his depression, and it would not be reasonable to expect him to maintain leadership and responsiveness when he was on leave. Appellees admit that when Appellant was on leave, Ms. Yoerger was responsible for maintaining the sales budget percentages. Finally, the only instance of "untruthfulness" that Appellees' [sic] cite is inadmissible collateral impeachment evidence and hearsay. This creates a genuine issue of material fact that Appellees' reasons to terminate Appellant were pretext. For these reasons summary judgment should be reversed.

VII. Appellant's Claim of Retaliatory Termination Has Not Been Addressed

Appellant's First Amended Complaint alleges that Appellees took "retaliatory adverse employment actions against Wesley, who was doing satisfactory work, in the form of termination." ER 184, 186, 187. The elements of a retaliation claim are (1) the employee engaged in a statutorily protected activity, (2) an adverse employment action was [12] taken, and (3) the statutorily protected activity was a substantial factor in the employer's adverse employment decision. *Francom v.*

Costco Wholesale Corp., 98 Wn.App. 845, 861-62, 991 P.2d 1182, 1191 (Div. III, 2000). Seeking reasonable accommodation for disability constitutes a statutorily protected activity. *Coons*, 383 F.3d 879, 887 (9th Cir. 2004). This claim was not addressed at all in Appellee's motion for summary judgment. ER 151-173.

Fed. R. Civ. P. 56 provides that "[a] party may move for summary judgment, identifying **each claim** or defense – or the part of each claim or defense – on which summary judgment is sought." (Emphasis added). Appellees sought summary judgment only on Appellant's claims under FMLA, WFLA, ADA, WLAD and age discrimination, but did not seek summary judgment on Appellant's claim of retaliation. Appellant's summary judgment motion was a partial summary judgment motion. Therefore, it is necessary to amend the summary judgment accordingly.

VIII. Prayer For Relief

Appellant hereby prays this Court vacate and remand the lower court's judgment.

DATED this 23rd day of February, 2017

[13] Respectfully submitted,
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Attorney for Appellant, Jesse L. Wesley III

[14] I hereby certify that the above brief contains no more than 14,000 words.

/S/ Favian Valencia
Favian Valencia

[15] 9th Circuit Case Number(s) 16-35852

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/s/Favian Valencia