

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
WASHINGTON

Andrea Garcia v. Walmart Inc., doing business as Walmart 2269, and
Wal-Mart Associates, Inc.

Garcia · No. 1:23-CV-03116-MKD · Decided January 5, 2026

SUMMARY

The court addresses cross-motions for summary judgment in Andrea Garcia’s employment case against Walmart and Wal-Mart Associates. The claims include retaliation under Title VII and the Washington Law Against Discrimination, wrongful discharge in violation of public policy, and negligent supervision. The court finds multiple material factual disputes concerning Garcia’s reports of sexual harassment, Walmart’s knowledge, the timing and basis of her termination, and the treatment of attendance occurrences, and therefore grants and denies the motions in part.

CASE DETAILS

COURT	United States District Court for the Eastern District of Washington
WRITING FOR THE COURT	Mary K. Dimke
JURISDICTION	U.S. District Court for the Eastern District of Washington
DECIDED	January 5, 2026
DOCKET	1:23-CV-03116-MKD
DISPOSITION	other
PROCEDURAL POSTURE	Cross-motions for summary judgment in an employment and civil-rights action involving alleged retaliation, wrongful discharge in violation of public policy, negligent supervision, and respondeat superior, together with motions concerning affirmative defenses.
STANDARD OF REVIEW	Summary judgment is proper under Federal Rule of Civil Procedure 56(a) when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court views the evidence in the light most favorable to the nonmoving party and does not make credibility determinations, weigh evidence, or draw disputed factual inferences.
PRECEDENTIAL VALUE	Unpublished federal district court order; persuasive but not precedential under ordinary federal appellate precedent rules.

TOPICS

retaliation

title vii

wrongful termination

summary judgment

civil procedure

PRACTICE AREAS

employment law

civil rights

civil procedure

torts

QUESTIONS PRESENTED

1. Whether either party was entitled to summary judgment on Garcia's Title VII retaliation claim.
2. Whether either party was entitled to summary judgment on Garcia's Washington Law Against Discrimination retaliation claim.
3. Whether either party was entitled to summary judgment on Garcia's wrongful-discharge-in-violation-of-public-policy claim.
4. Whether defendants were entitled to summary judgment on Garcia's negligent-supervision claim.
5. Whether the respondeat-superior claim should be dismissed because the underlying claims were not all resolved in defendants' favor.
6. Whether defendants' affirmative defenses concerning bona fide reasons, legitimate nondiscriminatory factors, good faith, and same action presented issues for the jury.
7. Whether Garcia was entitled to summary judgment on the failure-to-mitigate, avoidable-consequences, and failure-to-state-a-claim defenses.

HOLDINGS

1. Neither side was entitled to summary judgment on the Title VII retaliation claim because material factual disputes existed regarding the decisionmaker's knowledge of Garcia's protected complaint, the timing and circumstances of the termination, the exercise of discretion over attendance occurrences, causation, and pretext.
2. Neither side was entitled to summary judgment on the WLAD retaliation claim because the same factual disputes that precluded judgment on the Title VII retaliation claim also precluded judgment on the state-law retaliation claim.
3. Neither side was entitled to summary judgment on the wrongful-discharge claim because Garcia presented sufficient evidence to create factual disputes regarding whether her protected reporting was a significant factor in her termination and whether defendants' attendance explanation was pretextual.
4. Defendants were entitled to summary judgment on the negligent-supervision claim because Garcia identified no evidence that the assistant manager acted outside the scope of employment or that the other elements of negligent supervision were satisfied, and the claim was duplicative of the retaliation claims.
5. The respondeat-superior claim was not dismissed because the court declined to grant summary judgment on three underlying claims.
6. Garcia was entitled to summary judgment on the failure-to-mitigate affirmative defense, and the defense was dismissed.

7. Garcia was entitled to summary judgment on the defense that she unreasonably failed to use employer procedures or avoid consequences because defendants withdrew the defense.
8. Garcia was entitled to summary judgment on defendants' failure-to-state-a-claim affirmative defense because that defense is not a proper affirmative defense under Ninth Circuit authority.

KEY QUOTATIONS

“The Court must grant summary judgment “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”” (at 4)

“Temporal proximity can stand alone as evidence of causation in retaliation contexts, but only when the temporal proximity between the employer’s knowledge of the protected conduct and the adverse employment action is ‘very close.’” (at 13)

“The tort of negligent supervision is not a cognizable claim when an employee acts within the scope of her employment.” (at 25)

FACTUAL BACKGROUND

Andrea Garcia worked as an overnight stocker at Walmart in Yakima, Washington. She reported alleged sexual harassment by a coworker and later reported the alleged harassment and an assistant manager's failure to report it to Walmart's Ethics Department; the investigation substantiated the harassment allegation but not the failure-to-report allegation. Garcia was terminated shortly thereafter, allegedly either on May 9 or May 15, 2022, with defendants attributing the termination to five attendance occurrences and Garcia contending that the attendance rule was applied retaliatorily because managers had discretion to override occurrences or decline to terminate other employees.

PROCEDURAL HISTORY

Garcia sued Walmart Inc. and Wal-Mart Associates, Inc. after her termination from employment. Both sides moved for summary judgment. After a December 9, 2025 hearing, the court granted in part and denied in part both motions, granting defendants summary judgment on negligent supervision and granting plaintiff summary judgment on several affirmative defenses, while leaving the retaliation, wrongful-discharge, and respondeat-superior claims for further proceedings.

DISPOSITION

other

CASES CITED

- Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986)
- Barnes v. Chase Home Fin., LLC, 934 F.3d 901, 906 (9th Cir. 2019)
- Fresno Motors, LLC v. Mercedes Benz USA, LLC, 771 F.3d 1119, 1125 (9th Cir. 2014)
- Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 252, 255 (1986)

- *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 459 (9th Cir. 2018)
- *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1064 (9th Cir. 2002)
- *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003)
- *Hashimoto v. Dalton*, 118 F.3d 671, 679 (9th Cir. 1997)
- *Yartzo v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987)
- *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1124 (9th Cir. 2004)
- *Karthauser v. Columbia 9-1-1 Commc'ns Dist.*, 647 F. Supp. 3d 992, 1020 (D. Or. 2022)
- *Clark County School District v. Breeden*, 532 U.S. 268, 273 (2001)
- *Van Asdale v. International Game Technology*, 577 F.3d 989, 1003 (9th Cir. 2009)
- *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 929 (9th Cir. 2004)
- *Thomas v. City of Beaverton*, 379 F.3d 802, 812 (9th Cir. 2004)
- *Miller v. Fairchild Indus.*, 885 F.2d 498, 507 (9th Cir. 1989)
- *Milligan v. Thompson*, 42 P.3d 418, 424 (Wash. Ct. App. 2002)
- *Martin v. Gonzaga Univ.*, 425 P.3d 837, 843-44 (Wash. 2018)
- *Gardner v. Loomis Armored, Inc.*, 913 P.2d 377, 379 (Wash. 1996)
- *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1089 (Wash. 1984)
- *Dicomes v. State*, 782 P.2d 1002, 1006 (Wash. 1989)
- *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 821 P.2d 18, 29, 32 (Wash. 1991)
- *Mackey v. Home Depot USA, Inc.*, 459 P.3d 371, 387 (Wash. Ct. App. 2020)
- *McDaniels v. Group Health Co-op.*, 57 F. Supp. 3d 1300, 1317 (W.D. Wash. 2014)
- *Briggs v. Nova Servs.*, 147 P.3d 616, 622 (Wash. Ct. App. 2006)
- *Richards v. Healthcare Res. Grp., Inc.*, 131 F. Supp. 3d 1063, 1076 (E.D. Wash. 2015)
- *Evans v. Tacoma Sch. Dist. No. 10*, 380 P.3d 553, 564 (Wash. Ct. App. 2016)
- *Francom v. Costco Wholesale Corp.*, 991 P.2d 1182, 1193 (Wash. Ct. App. 2000)
- *Bradley v. Swedish Health Servs.*, 2023 WL 8879121 (W.D. Wash. Dec. 22, 2023)
- *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002)
- *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 515-16 (9th Cir. 2000)
- *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999)
- *Sias v. City Demonstration Agency*, 588 F.2d 692, 696 (9th Cir. 1978)
- *Burnside v. Simpson Paper Co.*, 832 P.2d 537, 529 (Wash. Ct. App. 1992), *aff'd*, 864 P.2d 937 (Wash. 1994)
- *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 898 P.2d 284 (Wash. 1995)
- *E.E.O.C. v. Fred Meyer Stores, Inc.*, 954 F. Supp. 2d 1104, 1128 (D. Or. 2013)
- *E.E.O.C. v. Chris the Crazy Trader Inc.*, 2025 WL 958486, at *8 (D. Colo. Mar. 31, 2025)
- *Kaiser v. CSL Plasma Inc.*, 240 F. Supp. 3d 1129, 1134 (W.D. Wash. 2017)
- *Vargas v. County of Yolo*, 2016 WL 3916329, at *5 (E.D. Cal. July 19, 2016)

OPINION

1 FILED IN THE U.S. DISTRICT COURT EASTERN DISTRICT OF WASHINGTON 2 Jan 05,
2026 3 SEAN F. MCAVOY, CLERK 4 5 UNITED STATES DISTRICT COURT 6 EASTERN
DISTRICT OF WASHINGTON 7 ANDREA GARCIA, No. 1:23-CV-03116-MKD 8 Plaintiff,
ORDER GRANTING IN PART AND DENYING IN PART 9 v. DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND 10 WALMART INC., doing business as GRANTING IN PART
AND WALMART 2269, WAL-MART DENYING IN PART PLAINTIFF'S 11 ASSOCIATES,
INC., MOTION FOR SUMMARY JUDGMENT 12 Defendants.

ECF Nos. 67, 74 13 14 Before the Court is Defendants' Motion for Summary Judgment, ECF No.
15 67, and Plaintiff's Motion for Summary Judgment, ECF No. 74. The Court held a 16 hearing on
December 9, 2025. ECF No. 106. Ada Smoke and Rolf Toren 17 represented Plaintiff. Stephen
Kendall represented Defendants.

The Court has 18 reviewed the record, heard from counsel, and is fully informed. For the reasons
19 stated on the record and as explained more fully below, the Court denies in part 20 and grants
in part both motions. 1 BACKGROUND 2 The undisputed relevant facts are as follows. Plaintiff
was an 3 Associate/Overnight Stocker at Walmart in Yakima, Washington. ECF No. 97 at 2 4 ¶ 3.

During Plaintiff's employment, Jandi Jones was the Store Manager and 5 Kristina Escobar was the
Assistant Manager. Id. at 2 ¶¶ 1-2. In March 2022, 6 Plaintiff reported to Assistant Manager
Escobar information regarding harassment 7 by Jonathan Mariscal that she received from
coworkers. Id. at 2 ¶ 4.

In March or 8 April 2022, Plaintiff reported to Store Manager Jones that Mr. Mariscal was 9
making associates uncomfortable; Store Manager Jones asked Plaintiff if she has 10 spoke with
Assistant Manager Escobar. Id. at 2 ¶¶ 5-6. 11 Plaintiff subsequently reported the alleged sexual
harassment and Assistant 12 Manager Escobar's alleged failure to report this harassment to
Walmart's Ethics 13 Department.

Id. at 2 ¶ 7. Ethics opened an investigation into (1) the alleged sexual 14 harassment by Mr.
Mariscal, and (2) the alleged failure to report by Assistant 15 Manager Escobar. Id. at 3 ¶ 9. As
part of the investigation, Mr. Martin asked 16 Assistant Manager Escobar to put Plaintiff on Zoom
for her interview. Id. at 3 ¶ 17 10.

The Ethics investigation substantiated the allegations against Mr. Mariscal, 18 who was
terminated, but did not substantiate the allegations against Assistant 19 Manager Escobar. Id. at 3 ¶
11. 20 1 Plaintiff alleges that she was terminated by Assistant Manager Escobar on 2 May 9, 2022.
Id. at 3 ¶ 13. Assistant Manager Escobar alleges she terminated 3 Plaintiff on May 15, 2022, for
attendance related issues.

Id. at 3 ¶ 14. Plaintiff 4 had five occurrences/points.¹ Id. Plaintiff had five attendance points
because she 5 received 0.5 points for leaving early on April 28, 2022, after she received 6

permission from a manager. Id. at 4 ¶¶ 15-16. Defendants contend that the fact 7 Plaintiff received permission to leave early did not mean that her absence was 8 authorized or protected.

Id. at 4 ¶ 15. 9 On May 14, 2022, Plaintiff called Coach Hernandez, to report that she was 10 terminated on May 9, 2022, and that another associate with more occurrences was 11 not terminated. Id. at 4 ¶ 19. Plaintiff also reported to Ethics that she was 12 wrongfully terminated by Assistant Manager Escobar. Id. at 4 ¶ 20. Plaintiff 13 reported to Store Manager Jones that she was wrongfully terminated.

Id. at 4 ¶ 21. 14 Store Manager Jones pulled Plaintiff's attendance records to verify their accuracy. 15 16 17 18 1 Defendant's policy states that if an employee "accumulate[s] five (5) or more 19 occurrences/points in a rolling six-month period [they] will be subject to 20 termination." ECF No. 72-3 at 2. 1 LEGAL STANDARD 2 The Court must grant summary judgment "if the movant shows that there is 3 no genuine dispute as to any material fact and the movant is entitled to judgment as 4 a matter of law." Fed.

R. Civ. P. 56(a); see also *Celotex Corp. v. Catrett*, 477 U.S. 5 317, 322-23 (1986); *Barnes v. Chase Home Fin., LLC*, 934 F.3d 901, 906 (9th Cir. 6 2019) (citation omitted). "A fact is 'material' only if it might affect the outcome of 7 the case, and a dispute is 'genuine' only if a reasonable trier of fact could resolve 8 the issue in the non-movant's favor." *Fresno Motors, LLC v. Mercedes Benz USA, 9 LLC*, 771 F.3d 1119, 1125 (9th Cir.

2014) (quoting *Anderson v. Liberty Lobby, 10 Inc.*, 477 U.S. 242, 248 (1986)). 11 The moving party bears the initial burden of "informing the district court of 12 the basis for its motion" and identifying the portions of the record and the evidence 13 that demonstrate the absence of a genuine dispute of material fact. *Celotex*, 477 14 U.S. at 323.

After the moving party has satisfied its burden, to survive summary 15 judgment, the non-moving party must demonstrate with evidence on the record, 16 "specific facts" showing that there is a genuine dispute of material fact for trial. Id. 17 at 324. "The mere existence of a scintilla of evidence in support of the plaintiff's 18 position will be insufficient[.]" *Anderson*, 477 U.S. at 252.

19 The Court "must view the evidence in the light most favorable to the 20 nonmoving party and draw all reasonable inference in the nonmoving party's 1 favor." *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 459 (9th Cir. 2018) (citation 2 omitted). "Credibility determinations, the weighing of the evidence, and the 3 drawing of legitimate inferences from the facts are jury functions, not those of a 4 judge...." *Anderson*, 477 U.S. at 255.

5 DISCUSSION 6 The parties cross-move for summary judgment as to all of Plaintiff's claims, 7 and Plaintiff separately seeks summary judgment on Defendants' affirmative 8 defenses. The Court first addresses Plaintiff's claims and then addresses 9 Defendants' affirmative defenses. 10

A. Retaliation – Title VII 11 Defendant seeks summary judgment on the retaliation claim pursuant to 12 Title VII on the basis that “Plaintiff has no evidence to support causation.

Even if 13 she did, Defendant has irrefutable evidence of a non-retaliatory reason for 14 Plaintiff’s termination.” ECF No. 67 at 9. Plaintiff, in turn, asserts that “the 15 timing supports the causal link.” ECF No. 74 at 16. 16 The McDonnell Douglas burden-shifting test applies to Title VII retaliation 17 claims. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1064 (9th Cir.

2002). 18 To establish a prima facie case of retaliation, a plaintiff “must put forth evidence 19 sufficient to show that (1) she engaged in a protected activity, (2) she suffered an 20 adverse employment action, and (3) there was a causal link between her activity 1 and the employment decision.” *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir.

2003) (citing *Hashimoto v. Dalton*, 118 F.3d 671, 679 3 (9th Cir. 1997)). “Causation sufficient to establish the third element of the prima 4 facie case may be inferred from circumstantial evidence, such as the employer’s 5 knowledge that the plaintiff engaged in protected activities and the proximity in 6 time between the protected action and the allegedly retaliatory employment 7 decision.” *Yartsoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir.

1987). “If a prima 8 facie case is established, the burden then shifts to the employer to proffer an 9 alternative explanation for its action, which the employee may attempt to rebut.” 10 *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1124 (9th Cir. 2004). 11 Here, the parties do not dispute that Plaintiff engaged in a protected activity 12 when she reported sexual harassment or that she suffered an adverse employment 13 action when she was terminated.

ECF No. 67 at 9; ECF No. 74 at 15. The parties 14 only dispute whether Plaintiff has established a “causal link” and, if so, whether 15 Defendant has established an alternative explanation for its action and whether 16 Plaintiff has rebutted such an explanation. 17 1. Causation 18 Defendant asserts that Plaintiff cannot establish causation because: (1) “Ms.

19 Escobar was not aware, or even suspected, that Plaintiff had made a failure to 20 report complaint regarding her,” (2) “Ms. Escobar continued to approve Plaintiff’s 1 absences after Plaintiff had already lodged her ethics report,” (3) “Ms. Escobar did 2 not proactively seek to terminate Plaintiff,” (4) “the temporal gap between the 3 protected activity and adverse action [is] anywhere from seven to eight weeks,” 4 and (5) “Plaintiff cannot establish that other employees who did not make a report 5 received more favorable treatment.” ECF No. 67 at 9-11.

Plaintiff, in turn, asserts 6 that Ms. Escobar fired Plaintiff seven days after her interview with Ethics and that 7 Ms. Escobar “could have overrode Garcia’s last.5 occurrence that put her over 5-8 point threshold, as she had done in past for other employees, or she could have 9 elected to not fire her, as she had also done for other employees. ECF No. 74 at 10 16.

11 First, Defendant points to Ms. Escobar's deposition testimony to assert that 12 she was not aware of the complaint against her. ECF No. 67 at 9. During her 13 deposition, Ms. Escobar testified: 14 Q Were you ever told by anybody at Walmart in 2022 That the investigation into you, your failure to report Ms. Garcia 15 reporting to you the original harassment, was ever closed?

A No. 16 Q Were you ever told whether or not the allegations against you for failure to report were ever substantiated or 17 unsubstantiated? A I didn't even know I had stuff against me. I didn't know 18 this stuff was against me. I had no idea she reported any of this against me. I thought it was against -- all the stuff was, like, 19 Jonathan and -- and everybody.

I had no idea I was even involved in it. 20 1 Q I thought you testified that Mr. Martin had asked you during the investigation interview if Ms. Garcia had previously 2 reported the harassment to you, right? A Right. 3 Q And you're saying that he never shared with you that one of the allegations was against you for not reporting it? 4 A No. 5 ECF No. 69-2 at 8.

6 Plaintiff, in turn, points to the deposition testimony of both Mr. 7 Martin and Ms. Escobar. Mr. Martin testified: 8 Q So is my understanding correct that during your interview with Ms. Escobar on April 26, 2022, you had told her 9 that you're investigating sexual harassment in the workplace? A Yes. 10 Q And you also told her that same day that you were investigating her failure to report when Ms. Garcia reported the 11 sexual harassment to her, correct?

A From what I recall, that would be right. 12 ECF No. 76-3 at 12. 13 Ms. Escobar testified: 14 Q Okay. What do you recall Mr. Martin telling you? 15 A I just remember him asking -- telling me if Andrea had reported it to me, and then I said yes. And if he gave me -- if she 16 gave me names, and I told him no. 17 ECF No. 83-1 at 27-28.

Thus, there is a dispute of material fact as to 18 whether Ms. Escobar knew that Plaintiff has made a complaint against 19 her. 20 1 Second, Defendant asserts that Ms. Escobar continued to approve Plaintiff's 2 absences after Plaintiff had already lodged her ethics report, that "[o]n April 18, 3 2022, Ms. Escobar removed 1.5 occurrence points from Plaintiff's balance," and 4 that this "cuts against Plaintiff's argument that a retaliatory motive led to 5 Plaintiff's termination." ECF No. 67 at 10 (citing ECF No. 69-1 at 23-24 6 (deposition testimony of Plaintiff who testified that Ms. Escobar processed her 7 April 3, 2022, 2 absence, which was after her conversation with Ms. Escobar and 8 her complaint to Ethics); ECF No. 79 at 21 (lines 89 and 93 of chart showing that 9 on April 18, 2022, Ms. Escobar approved two absences for Plaintiff—one for 10 "Protected PTO reduce to 0.5 occurrence - authorized" and one for "Prior approval 11 from manager -- authorized"))).

Plaintiff, in turn, asserts that Ms. Escobar was not 12 interviewed by Ethics (and learned of Plaintiff's complaint against her) until April 13 26, 2022, which is after she removed the

occurrence points on April 18, 2022. 14 Thus, there is material dispute of fact as to whether Ms. Escobar knew about 15 Plaintiff's complaint against her when she removed these occurrences.

16 17 18 2 The deposition testimony references both April 3, 2024, and April 3, 2022. The 19 reference to April 3, 2024, appears to be a mistake, as Plaintiff was terminated in 20 May 2022. 1 Third, Defendant asserts that Ms. Escobar did not proactively seek to 2 terminate Plaintiff, but did so because of a May 14, 2022, email from Mr. 3 Hernandez that contained a list of nineteen associates with five or more 4 occurrences.

ECF No. 67 at 10 (citing ECF No. ECF No. 79 at 16). There is a 5 dispute of fact as to when Ms. Escobar terminated Plaintiff. Defendant asserts that 6 Plaintiff was terminated on May 15, 2025. ECF No. 67 at 10; see also ECF No. 79 7 at 17 (listing Termination Date of May 15, 2022). Plaintiff asserts that she was 8 terminated on May 9, 2022, before the email from Mr. Hernandez.

ECF No. 84 at 9 16 (citing ECF No. 76-4 at 9 (Plaintiff's deposition testimony that she was 10 terminated on May 9, 2022); ECF No. 79 at 21 (chart of absences noting 11 "Associate no longer employed" starting May 9, 2025)).

Thus, there is a material 12 dispute of fact as to whether Ms. Escobar terminated Plaintiff before receiving this 13 email. 14 Fifth, Defendant asserts that the temporal gap between Plaintiff engaging in 15 protected activity and Plaintiff's termination is seven to eight weeks. ECF No. 67 16 at 10. Defendant relies on the date Plaintiff reported the sexual harassment to Ms. 17 Escobar—on or about March 25, 2022, ECF No. 69-1 at 11, and the date 18 Defendant alleges Plaintiff was terminated—May 15, 2022.

ECF No. 79 at 17.3 19 20 3 Defendant's brief, ECF No. 67, references "2025" rather than "2022." This appears 1 Defendant appears to imply that this gap prevents the Court from finding temporal 2 proximity. 3 Plaintiff, in turn, asserts that Ms. Escobar did not have a reason to retaliate 4 until she learned about Plaintiff's complaint against her during her interview with 5 Mr. Martin.

ECF No. 84 at 17 (citing ECF No. 76-3 at 12 (Mr. Martin deposition); 6 ECF No. 83-1 at 27-28 (Ms. Escobar deposition)). Further, Ms. Escobar knew that 7 Plaintiff had spoken with Ethics on May 2, 2022, as she facilitated the logistics of 8 the interview. ECF No. 83-1 at 25 (Ms. Escobar deposition); ECF No. 76-5 at 3 9 (Interview Report stating that Mr. Martin interviewed Plaintiff on May 2, 2022).

10 Plaintiff asserts that Ms. Escobar fired Plaintiff seven days later on May 9, 2022. 11 ECF No. 84 at 17 (citing ECF No. 76-4 at 9; ECF No. 79 at 21). 12 "Temporal proximity can stand alone as evidence of causation in retaliation 13 contexts, but only when the temporal proximity between the employer's 14 knowledge of the protected conduct and the adverse employment action is 'very 15 close.'" *Karthauser v. Columbia 9-1-1 Commc'ns Dist.*, 647 F. Supp. 3d 992, 16 1020 (D.

Or. 2022) (citing *Clark Cnty. School Dist. v. Breeden*, 532 U.S. 268, 273 17 (2001)) (other citations omitted). “The Ninth Circuit has considered temporal proximity of several months or less sufficient to support an inference of causation.” 19 20 to be a typographical error. 1 Id. (citing *Van Asdale v. Int’l Game Tech.*, 577 F.3d 989, 1003 (9th Cir. 2 2009) (two-and-one-half months); *Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 3 917, 929 (9th Cir.

2004) (three months); *Thomas v. City of Beaverton*, 379 F.3d 4 802, 812 (9th Cir. 2004) (seven weeks); *Miller v. Fairchild Indus.*, 885 F.2d 498, 5 507 (9th Cir. 1989) (two months)). 6 Here, there is a material dispute of fact as to whether Ms. Escobar learned 7 Plaintiff had made a complaint against her during her interview with Mr. Martin on 8 April 26, 2022, ECF No. 76-5 at 6, and as to the date of Plaintiff’s termination.

9 Assuming Ms. Escobar did learn about Plaintiff’s complaint during her interview 10 on April 26, 2022, and terminated Plaintiff on May 9 or May 15, 2022, this is only 11 a temporal gap of 13 to 19 days, which reasonably could establish causation. 12 Sixth, Defendant asserts that “Plaintiff cannot show other employees who 13 did not make a report received more favorable treatment.” ECF No. 67 at 11.

In 14 response, Plaintiff correctly argues that “comparators are not required for 15 retaliation claims.” ECF No. 84 at 17; see *Karthausser*, 647 F. Supp. 3d at 1020. 16 Nevertheless, as noted on the record during the hearing, Plaintiff has adduced 17 significant evidence of Defendants’ managers exercising discretion to drop other 18 employees’ absence occurrences.

See, e.g., No. 76-1 at 32-33, 35-40; ECF No. 83- 19 1 at 33, 37, 39, 40. These competing assessments raise questions of fact for a jury. 20 2. Alternative Explanation 1 Defendant asserts that even if Plaintiff has established a prima facie case of 2|| retaliation, Defendant has established “a nonretaliatory purpose for Plaintiff’s 3|| termination—attendance.” ECF No. 67 at 11.

Walmart’s Attendance Policy states, 4|| “Each unauthorized absence will result in occurrences/points as noted in the chart 5|| below. If you accumulate five (5) or more occurrences/points in a rolling six- 6|| month period you will be subject to termination.” ECF No. 72-3 at 2. Walmart 7|| has two types of PTO: “ 8 Regular PTO is good for just about anything, anytime—as long as you make a request and get approval before you 9 take off.

Protected PTO Is intended for when you’re out sick, need to care for family, or something else comes up 10 that keeps you away, from car trouble to any other reason. Even if you use it at the last minute, it’ll protect you when 11 having an unplanned absence. 12}} ECF No. 72-2 at 2. 13 Defendant asserts that between December 10, 2021, and April 14|| 28, 2022, Plaintiff had accrued 5 occurrence points: 15 7 = 12/10/2021 0.5 16 17 8 Tota: = [Ss 19 20 ORDER _ 12 1 ECF No. 67 at 13 (citing ECF No 79 at 11-14; ECF No. 69-1 at 16-17 (deposition 2 testimony of Plaintiff regarding the five unexcused absences)).

3 “Plaintiff does not dispute Defendant’s attendance policy or that she had 4 incurred 5 points at the time of her firing.” ECF No. 84 at 18. However, Plaintiff 5 asserts that Defendant’s explanation is pretextual and that Ms. Escobar “had the 6 power to override occurrences, and had the power to elect to not fire an employee 7 despite the employee incurring 5 or more occurrences and no PPTO to cover, as 8 she has done in the past for other employees who did not report her to Ethics.” Id. 9 at 18-19.

Plaintiff points to the deposition testimony of Ms. Jones who testified 10 that in 2022 managers at her store, including Ms. Escobar, could “override 11 occurrence points for the associates.” ECF No. 76-1 at 34-40, 68, 74-75. Ms. 12 Jones also testified that if an associate became sick during their shift and needed to 13 leave early but did not have enough PPTO that they could incur a 0.5 occurrence, 14 which a member of the management team could override.

Id. at 39-40. 15 Plaintiff also points to a chart of Ms. Gonzalez’s occurrences, which show that Ms. 16 Escobar overrode an “ABSENT_NO_CALL” on May 25, 2022, noting “Associate 17 called facility directly – authorized” and an “EARLY_OUT” on December 28, 18 2022, noting “Prior approval from manager.” ECF No. 77 at 5-6; see also ECF 19 No. 83-1 at 33-34 (deposition testimony of Ms. Escobar regarding Ms. Gonzalez’s 20 1 occurrences during which Ms. Escobar testified she dropped Ms. Gonzalez down 2 to zero based on prior approval from manager for December 27, 2022).

3 Defendant, in turn, asserts that it is “misleading” for Plaintiff to assert that 4 employees are not terminated at five occurrences. ECF No. 87 at 7. “Ms. Jones 5 referred to newer employees ‘who did not know about’ leaves of absence, 6 employees who took sick leave but ‘didn’t call,’ employees who qualify for a 7 ‘medical leave’ through Sedgwick, or long-term employees who ‘don’t deal with’ 8 leaves frequently.” ECF No. 87 at 7 (citing ECF No. 89-2 at 13-14). “Ms.

Jones 9 states she would assist such employees to determine if they ‘need to go on a 10 leave’” and that “[s]uch leaves would constitute protected time” but that “the 11 attendance policy applies equally to all associates.” Id. (citing ECF No. 89-2 at 13- 12 14). Defendant also asserts that the “override” referenced by Plaintiff is called the 13 “extraordinary circumstances” approval and that “[i]t would be unusual and 14 unexpected for [this] exception to be used in Plaintiff’s case.” Id. at 8 (citing ECF 15 No. 89-2 at 23-25).

These competing assessments raise questions of fact for a jury. 16 The Court thus declines to grant summary judgment to either party on this 17 claim given multiple disputes of material fact, as discussed above and on the 18 record. 19 20 1 B. Retaliation – WLAD 2 Under WLAD, an employee may establish a retaliation through the 3 McDonnell Douglas burden-shifting test.

Milligan v. Thompson, 42 P.3d 418, 424 4 (Wash. Ct. App. 2002). A plaintiff must show that “(1) he engaged in a statutorily 5 protected activity, (2) [the defendant] took adverse employment

action against him, 6 and (3) there is a causal link between the activity and adverse action.” Id. (citation 7 omitted). Once the plaintiff establishes a prima facie case, the burden shifts to the 8 defendant to present evidence of a legitimate, nonretaliatory reason for its actions, 9 and then the plaintiff must present evidence that the reason is pretextual.

Id. 10 RCW 49.60.210 establishes three categories of whistleblowing activities 11 protected under WLAD. As relevant here, the first category protects an employee 12 against the “unfair practices” of discrimination or discharge for opposing 13 “practices forbidden” by RCW 49.60. RCW 49.60.210(1). With regard to “unfair 14 practices of employers,” these “practices forbidden” include discrimination by an 15 employer based on an individual’s “age, sex, marital status, sexual orientation, 16 race, creed, color, national origin, citizenship or immigration status, honorably 17 discharged veteran or military status, or the presence of any sensory, mental, or 18 physical disability or the use of a trained dog guide or service animal by a person 19 with a disability.” RCW 49.60.180(1)-(4).

20 1 Because the same analysis applies for this claim as for the Title VII 2 retaliation claim, the Court declines to grant summary judgment to either party on 3 this claim given multiple disputes of material fact. 4 C. Wrongful Discharge in Violation of Public Policy 5 Defendant seeks summary judgment on the wrongful discharge claim on the 6 same basis as the retaliation claims —“Plaintiff cannot show evidence of caution, 7 and, even if she could, Defendant has ample evidence of a legitimate, 8 nonretaliatory reason for Plaintiff’s termination in the form of her attendance 9 policy violation.” ECF No. 67 at 16.

Plaintiff, in turn, seeks summary judgment 10 on this claim in its entirety, or in part, on the basis that “[t]he first and second 11 elements are undisputedly met” and “[t]he timing and knowledge of ASM 12 Escobar’s action supports this element.” ECF No. 74 at 17. 13 “[T]he tort for wrongful discharge in violation of public policy has 14 generally been limited to four scenarios:” 15 (1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or 16 obligation, such as serving jury duty; (3) where employees are fired for exercising a legal right or privilege, 17 such as filing workers’ compensation claims; and (4) where employees are fired in retaliation for reporting employer 18 misconduct, i.e., whistleblowing.

19 20 1 *Martin v. Gonzaga Univ.*, 425 P.3d 837, 843 (Wash. 2018) (quoting *Gardner v. 2 Loomis Armored, Inc.*, 913 P.2d 377, 379 (Wash. 1996)) (quotation marks omitted) 3 (paragraph breaks added). 4 For a wrongful discharge claim that falls under one of these categories to be 5 successful, a plaintiff must first show that the “discharge may have been motivated 6 by reasons that contravene a clear mandate of public policy.” Id. at 844 (quoting 7 *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1089 (Wash.

1984)). “‘The 8 question of what constitutes a clear mandate of public policy is one of law’ and can 9 be established by prior judicial decisions or constitutional, statutory, or regulatory 10 provisions or schemes.” Id. (quoting *Dicomes v. State*, 782 P.2d 1002, 1006 11 (Wash. 1989)). A plaintiff’s “mere opinion” about what constitutes a clear 12 mandate of public policy will not suffice.

Id. 13 After meeting that initial step, a plaintiff must “show that the public-policy- 14 linked conduct was a ‘significant factor’ in the decision to discharge the worker... 15 and may do so by circumstantial evidence.” Id. (quoting *Wilmot v. Kaiser 16 Aluminum & Chem. Corp.*, 821 P.2d 18, 29, 32 (Wash. 1991)). If the plaintiff 17 successfully presents a prima facie case, “the burden then shifts to the employer to 18 ‘articulate a legitimate nonpretextual[,] nonretaliatory reason for the discharge.’” 19 Id. (quoting *Wilmot*, 821 P.2d at 29).

This burden is one of production, not 20 persuasion. In other words, “[t]he employer must produce relevant admissible 1 evidence of another motivation, but need not do so by the preponderance of 2 evidence necessary to sustain the burden of persuasion, because the employer does 3 not have that burden.” *Wilmot*, 821 P.2d at 29 (citation omitted). If the employer 4 succeeds in articulating such a reason, the burden shifts back to the plaintiff to 5 demonstrate either that the reasons proffered are in fact pretextual, or that even if 6 the employer’s justification is legitimate, “the public-policy-linked conduct was 7 nevertheless a substantial factor motivating the employer to discharge the worker.” 8 *Martin* 425 P.3d at 844 (quoting *Wilmot*, 821 P.2d at 31) (alteration omitted).

9 The parties do not dispute the first and second elements; Plaintiff reported 10 employer misconduct and Plaintiff was discharged. Again, however, the parties 11 dispute whether Plaintiff can establish causation and, if so, whether Defendant has 12 evidence of another motivation. ECF No. 67 at 15; ECF No. 74 at 17.

In 13 particular, Defendant asserts that Plaintiff cannot rely solely on temporal 14 proximity. ECF No. 67 at 17. However, Washington courts have found temporal 15 proximity can be used to establish a prima facie case. See *Mackey v. Home Depot 16 USA, Inc.*, 459 P.3d 371 (Wash. Ct. App. 2020) (“Here, [the plaintiff’s] 17 termination occurred just 12 days after she complained to [the store manager] 18 about [another manager’s] behavior.

This proximity in time between the complaint 19 and the termination is sufficient to create a reasonable inference that, for purposes 20 of showing a prima facie case, [the plaintiff’s] complaint was a significant factor in 1 the decision to terminate [the plaintiff].”). While temporal proximity can be used 2 to establish a prima facie case, it is not sufficient to show that retaliation was a 3 significant motivating factor in the termination.

Id. at 387 (“But in the pretext step, 4 the employee has the burden of establishing a question of fact as to motivation 5 regardless of the employer’s evidence that there was a legitimate, 6 nondiscriminatory reason for the termination. That burden necessarily must 7 involve more than mere temporal proximity.”). While Defendant asserts that 8 Plaintiff has “nothing more than temporal proximity,” ECF No. 67 at 16, Plaintiff 9 has also presented evidence of other employees with five or more occurrences who 10 were not terminated, as noted above and discussed on the record.

11 Because the analysis here is substantially similar to that of the retaliation 12 claims, the Court declines to grant summary judgment to either party on this claim 13 given multiple disputes of material fact. 14 D. Negligent Supervision 15 Defendant moves for summary judgment on this claim on the basis that: (1) 16 the elements of the claim are not met and (2) the claim is duplicative of the 17 retaliation claims.

ECF No. 67 at 17-18. Plaintiff states that she is moving for 18 summary judgment on this claim, ECF No. 74 at 2, but does not then address it in 19 her motion. 20 1 There are four elements in a Washington negligent supervision claim: (1) an 2 employee of the defendant acted outside the scope of her employment, (2) the 3 employee presented a risk of harm to others, (3) the employer knew or should have 4 known in the exercise of reasonable care that the employee posed a risk to others, 5 and (4) the employer’s failure to supervise the employee was the proximate cause 6 of the plaintiff’s harm.

McDaniels v. Group Health Co-op., 57 F. Supp. 3d 1300, 7 1317 (W.D. Wash. 2014) (citing Briggs v. Nova Servs., 147 P.3d 616, 622 (Wash. 8 Ct. App. 2006)). The tort of negligent supervision is not a cognizable claim when 9 an employee acts within the scope of her employment. Richards v. Healthcare 10 Res. Grp., Inc., 131 F. Supp. 3d 1063, 1076 (E.D. Wash. 2015); Evans v. Tacoma 11 Sch.

Dist. No. 10, 380 P.3d 553, 564 (Wash Ct. App. 2016) (“In fact, an injured 12 party generally cannot assert claims for negligent hiring, retention, supervision or 13 training of an employee when the employer is vicariously liable for the employee’s 14 conduct.”). 15 First, Defendant asserts “there is no evidence that Ms. Escobar acted outside 16 the scope of her employment with Walmart.” ECF No. 67 at 17.

The Amended 17 Complaint alleges that “[e]ach Defendant is, and at all times herein mentioned was, 18 an agent of the other and acting within the course and scope of their employment 19 with WALMART, INC. d/b/a WALMART #2269 and WAL-MART 20 ASSOCIATES, INC. in causing harm as alleged herein.” ECF No. 23 at 2-3 ¶ 5. 1 Plaintiff does not cite to any evidence that Ms. Escobar acted outside the scope of 2 her employment.

See ECF No. 84 at 20. 3 Second, Defendant asserts that Plaintiff has not established the other three 4 elements, namely that “there is not evidence that Ms. Escobar posed a risk of harm 5 to Plaintiff, much less that Walmart was or should have been aware of a risk of 6 harm.” ECF No. 67 at 18. Again, Plaintiff does not point to any evidence 7 establishing these elements.

See ECF No. 84 at 20. 8 Third, Defendant asserts that “Plaintiff’s negligence claim is duplicative of 9 her retaliation claims” and that a “duplicative negligent supervision and failure to 10 train claim is properly dismissing in such cases.” ECF No. 67 at 18. Defendants 11 are correct that Washington courts have dismissed negligent supervision claims as 12 duplicative of retaliation claims.

See *Francom v. Costco Wholesale Corp.*, 991 13 P.2d 1182, 1193 (Wash. Ct. App. 2000) (“[T]he Francoms rely on the same facts to 14 support both their discrimination claim and their negligent supervision or retention 15 claim. Just as with their claim for negligent infliction of emotional distress, the 16 claim is duplicative, and the superior court properly dismissed it.”), as amended on 17 reconsideration (Feb.

29, 2000); *Bradley v. Swedish Health Servs.*, 2023 WL 18 8879121 (W.D. Wash. Dec. 22, 2023) (same) (citing *Francom*, 991 P.2d at 1193). 19 The Court thus grants summary judgment to Defendants on the negligent 20 supervision claim, as Plaintiff has not pointed to any evidence to establish the 1 elements of the claim and, even if Plaintiff had, Washington courts dismiss 2 negligent supervision claims if they are duplicative of discrimination claims.

3 E. Respondeat Superior 4 Defendant seeks summary judgment on this claim on the basis that the Court 5 should grant summary judgment on the underlying claims and “[w]ithout an 6 underlying claim for relief, it logically follows that respondeat superior is 7 inapplicable.” ECF No. 67 at 19.

Because the Court has declined to grant 8 summary on three of Plaintiff’s claims, it declines to dismiss this claim. 9 F. Defendants’ Affirmative Defenses 10 1. Bona fide reasons 11 The Answer states that “Defendants acted with bona fide reasons for 12 believing that their conduct complied with the law and without malice or 13 recklessness toward Plaintiff’s legal rights.” ECF No. 25 at 17 ¶ 109.

14 Plaintiff asserts this is not an affirmative defense. ECF No. 74 at 18 (citing 15 *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002) (“A 16 defense which demonstrates that plaintiff has not met its burden of proof is not an 17 affirmative defense.”)). 18 Defendant, in turn, asserts that “[e]mployers may ‘establish an affirmative 19 defense to punitive damages liability when they have a bona fide policy against 20 discrimination,’” and that “Walmart has multiple policies regarding discrimination 1 and retaliation, and it requires all employees to attend training regarding their 2 requirements.” ECF No. 87 at 15 (first quoting *Passantino v. Johnson & Johnson 3 Consumer Prods., Inc.*, 212 F.3d 493 (9th Cir.

2000); then citing ECF Nos. 69-1 at 4 5-7, 90 at 2-8 (Global Discrimination and Harassment Prevention Policy)). 5 In *Passantino*, the Ninth Circuit explained that there are two separate 6 inquiries when evaluating the availability of punitive damages in a Title VII case: 7 first, whether the underlying conduct was sufficiently culpable to warrant an award 8 of punitive damages; and second, if so, whether the employer has “establish[ed] an 9 affirmative defense to punitive damages liability,” which arises “when they have a 10 bona fide policy against discrimination, regardless of whether or not the prohibited 11 activity engaged in by their managerial employees involved a tangible employment 12 action.” *Id.* at 515-16.

13 As for the first inquiry, “the standard governing the availability of punitive 14 damages in Title VII cases requires proof of ‘malice or reckless indifference’ to the 15 rights guaranteed by Title VII.” *Id.* at 516.

Thus, “an employer may be liable for 16 punitive damages in any case where it discriminates in the face of a perceived risk 17 that its actions will violate federal law.... [A]lthough egregious conduct could be 18 evidence of intent to break the law, such conduct [is] not required to establish 19 punitive damages liability.

Thus, in general, intentional discrimination is enough 20 to establish punitive damages liability.” *Id.* at 515 (simplified). However, 1 *Passantino* also identified three scenarios in which punitive damages may be 2 unavailable even if intentional discrimination is shown: 3 [*Kolstad v. Am. Dental Ass’n*, 527 U.S. 526 (1999)] acknowledged that there could be some instances in which intentional discrimination did not give rise 4 to punitive damages liability.

The Court set forth three areas in which the factfinder could find intentional discrimination but the defendant would 5 nonetheless not be liable for punitive damages. First, if the theory of discrimination advanced by the plaintiff was sufficiently novel or poorly 6 recognized, the employer could reasonably believe that its action was legal even though discriminatory.

Second, the employer could believe it had a 7 valid BFOQ [bona fide occupational qualification] defense to its discriminatory conduct. Third, in some (presumably rare) situations, the 8 employer could actually be unaware of Title VII's prohibition against discrimination. Common to all of these exceptions is that they occur when 9 the employer is aware of the specific discriminatory conduct at issue, but nonetheless reasonably believes that conduct is lawful.

Under such 10 circumstances, an employer may not be liable for punitive damages. 11 *Id.* Given the disputes of material fact, a reasonable juror could conclude that the 12 evidence is sufficient to satisfy this first inquiry.

As to the second inquiry, this 13 turns on “[a] determination regarding the status of the principal actors,” which “is 14 crucial to the outcome,” because although “*Kolstad* established that, under some 15 circumstances, corporations may not be subject to punitive damages for actions 16 taken

by their 'managerial' employees, it did nothing to eliminate the rule 17 established in earlier cases that an individual sufficiently senior in the corporation 18 must be treated as the corporation's proxy for purposes of liability." Id. at 516.

19 Given the disputes of material fact, the Court concludes this issue presents a 20 question of fact for the jury. 1 2. Legitimate non-discriminatory factors/good faith/same action 2 The Answer states that "[w]ithout assuming any burden of proof not 3 imposed by law, Defendants' actions with regard to Plaintiff were based on 4 legitimate nondiscriminatory factors, were taken in good faith, and Defendants 5 would have taken the same actions regardless of Plaintiff's protected status or 6 activities, if any." ECF No. 25 at 18 ¶ 110.

7 Plaintiff asserts this is not an affirmative defense. ECF No. 74 at 18 (citing 8 Zivkovic, 302 F.3d at 1088). Defendant responds that this is an applicable 9 affirmative defense to punitive damages liability. ECF No. 87 at 15. 10 The same analysis with respect to the first affirmative defense applies here. Given 11 the disputes of material fact, the Court concludes this issue presents a question of 12 fact for the jury.

13 3. Plaintiff failed to mitigate damages 14 The Answer states that Plaintiff has failed to mitigate her alleged damages. 15 ECF No. 25 at 18 ¶ 110. "The burden of proving a failure to mitigate damages in 16 an employment discrimination suit is on defendant." *Sias v. City Demonstration* 17 Agency, 588 F.2d 692, 696 (9th Cir. 1978) (citation omitted). "To satisfy this 18 burden, defendant must establish (1) that the damage suffered by plaintiff could 19 have been avoided, i.e. that there were suitable positions available which plaintiff 20 could have discovered and for which he was qualified; and (2) that plaintiff failed 1 to use reasonable care and diligence in seeking such a position." Id. (citations 2 omitted); see also *Burnside v. Simpson Paper Co.*, 832 P.2d 537, 529 (Wash.

Ct. 3 App. 1992) ("Neither party cites any Washington cases dealing directly with the 4 issue of mitigation of damages in the context of an age discrimination claim, and 5 we have found none. Federal case law, however, places the burden of proving a 6 failure to mitigate damages in an employment discrimination suit on the 7 defendant."), *aff'd*, 864 P.2d 937 (Wash.

1994), and abrogated on other grounds 8 by *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 898 P.2d 284 (Wash. 1995). 9 Plaintiff asserts that she "is not seeking wage loss or economic damages, and 10 therefore, this defense does not apply and should be stricken." ECF No. 74 at 19. 11 Defendants acknowledged they have "located no authority in the [Ninth] Circuit 12 explicitly analyzing the failure to mitigate defense as applied to emotional distress 13 damages, [but] other jurisdictions have held that that this practice is reasonable and 14 permissible." ECF No. 87 at 15.

15 Courts within the Ninth Circuit have held that a failure to mitigate damages 16 does not apply to emotional distress damages. See, e.g., *E.E.O.C. v. Fred Meyer* 17 Stores, Inc., 954 F. Supp. 2d

1104, 1128 (D. Or. 2013) (“Title VII claimants do not have a duty to mitigate emotional damages.”), on reconsideration in part (Sept. 19, 2013); *E.E.O.C. v. Chris the Crazy Trader Inc.*, 2025 WL 958486, at *8 (D.

Colo. 20 Mar. 31, 2025) (“As an initial matter, the Court agrees with EEOC that a mitigation of damages defense is available only when the lawsuit seeks backpay.”) 2 (citations omitted). Persuaded by these decisions, the Court grants summary judgment to Plaintiff on this defense and dismisses it. 4 4. Plaintiff unreasonably failed to avail herself of the policies and procedures adopted by her employer/avoidable consequences 5 doctrine 6 Defendant “withdraws this defense.” ECF No. 87 at 16.

The Court thus 7 grants summary judgment to Plaintiff on this defense and dismisses it. 8 5. Failure to state a claim upon which relief can be granted 9 Defendants “maintain[] this defense to preserve a potential judgment on the 10 pleadings under FRCP 12(c).” ECF No. 87 at 16. 11 “Courts in the Ninth Circuit have routinely held that ‘failure to state a claim’ 12 is not a proper affirmative defense.” *Kaiser v. CSL Plasma Inc.*, 240 F. Supp. 3d 13 1129, 1134 (W.D.

Wash. 2017) (citing *Vargas v. Cnty. of Yolo*, 2016 WL 3916329, 14 5 (E.D. Cal. July 19, 2016); see also *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 15 1088 (9th Cir. 2002) (“A defense which demonstrates that plaintiff has not met its 16 burden of proof is not an affirmative defense.”).

The Court thus grants Plaintiff’s 17 motion with respect to this affirmative defense and dismisses it. 18 CONCLUSION 19 For the reasons explained on the record and discussed above, the Court 20 grants in part and denies in part both motions. 1 Accordingly, IT IS HEREBY ORDERED: 2 1. Defendants’ Motion for Summary Judgment, ECF No. 67, is 3 GRANTED in part and DENIED in part.

4 2. Plaintiff’s Motion for Summary Judgment, ECF No. 74, is GRANTED 5 in part and DENIED in part. 6 IT IS SO ORDERED. The District Court Executive is hereby directed to 7 enter this Order and provide copies to counsel. 8 DATED January 5, 2026. 9 s/Mary K. Dimke MARY K. DIMKE 10 UNITED STATES DISTRICT JUDGE 11 12 13 14 15 16 17 18 19 20