

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jan 26, 2024

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROBERT THEODORE KINNUNE,

Plaintiff,

v.

STATE OF WASHINGTON; and
WASHINGTON STATE
DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Defendants.

No. 2:23-CV-00026-MKD

ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF’S
MOTION FOR PARTIAL SUMMARY
JUDGMENT

AND

DENYING DEFENDANTS’ MOTION
FOR SUMMARY JUDGMENT

ECF Nos. 38, 43

Before the Court are Plaintiff Robert Theodore Kinnune’s Motion for Partial Summary Judgment, ECF No. 38, and Defendants Washington State and Washington State Department of Social and Health Services’ (collectively “DSHS”) Motion for Summary Judgment, ECF No. 43. On January 19, 2024, the Court held a hearing on the motions. ECF No. 65. Eric Gilman and James Beck

1 appeared on behalf of Mr. Kinnune. Taylor Hennessey appeared on behalf of
2 DSHS.

3 Mr. Kinnune alleges that DSHS discriminated against him, retaliated against
4 him, and failed to rehire him, in violation of the Uniformed Services Employment
5 and Reemployment Rights Act (“USERRA”), 38 U.S.C. § 4301, *et seq.*, and the
6 Washington Law Against Discrimination (“WLAD”), RCW 49.60, *et seq.* ECF
7 No. 2-2. Mr. Kinnune moves for summary judgment on his USERRA failure-to-
8 reemploy claim, and on certain elements of his discrimination and retaliation
9 claims. ECF No. 38. DSHS moves for summary judgment on Mr. Kinnune’s
10 failure-to-reemploy claim, and on certain elements of Mr. Kinnune’s
11 discrimination and retaliation claims. ECF No. 43.

12 For the reasons stated at the hearing and set forth below, Mr. Kinnune’s
13 Motion for Partial Summary Judgment is **GRANTED in part** and **DENIED in**
14 **part**. DSHS’s Motion for Summary Judgment is **DENIED**.

15 **BACKGROUND**

16 The following factual background is undisputed. Mr. Kinnune is a member
17 of the United States Army Reserve. ECF No. 57 at 1 ¶ 1. On May 2, 2016, DSHS
18 hired Mr. Kinnune as full-time Chaplain at Eastern State Hospital (“ESH”). ECF
19 No. 57 at 1 ¶ 3.

1 On June 20, 2018, the Department of the Army ordered Mr. Kinnune to
2 report for active duty, beginning July 23, 2018, and ending July 22, 2019. ECF
3 No. 57 at 4 ¶¶ 18-21. Mr. Kinnune informed his supervisors at ESH on June 21,
4 2018. ECF No. 57 at 4 ¶ 19. Prior to being called to active duty, Mr. Kinnune had
5 no disciplinary actions, complaints, or documented performance issues recorded
6 against him. ECF No. 57 at 4 ¶ 23.

7 While Mr. Kinnune was on military leave, DSHS hired April Ross, an intern
8 that worked under Mr. Kinnune, as interim chaplain. ECF No. 57 at 4 ¶ 25.
9 During Mr. Kinnune's military leave in January 2019, Ms. Ross wrote a six-page
10 complaint against Mr. Kinnune that include allegations of sexual misconduct with
11 patients, bullying, misogyny, and discrimination against LGBTQ+ individuals.
12 ECF No. 57 at 5-6 ¶¶ 32.

13 On April 8, 2019, the Army extended Mr. Kinnune's tour to June 30, 2020.
14 ECF No. 57 at 7 ¶ 44. Mr. Kinnune informed DSHS on June 5, 2019. ECF No. 57
15 at 7 ¶ 45. On May 5, 2020, the Army extended Mr. Kinnune's tour to August 29,
16 2020. ECF No. 57 at 8 ¶ 50. Mr. Kinnune informed DSHS on May 12, 2020.
17 ECF No. 57 at 8 ¶ 51.

18 On June 26, 2020, Mr. Kinnune reapplied for his job. ECF No. 57 at 10 ¶¶
19 71-72. In anticipation of Mr. Kinnune's return, DSHS employees held a number of
20 meetings and collected documents. ECF No. 57 at 10-11 ¶¶ 74-86.

1 On August 28, 2020, DSHS managers and employees scheduled a meeting
2 with Mr. Kinnune to discuss the terms of his return. ECF No. 38-1 at 14 ¶ 86; ECF
3 No. 49 at 12 ¶ 86. On September 1, 2020, Mr. Kinnune returned to ESH full-time.
4 ECF No. 44 at 5 ¶ 23; ECF No. 59 at 5 ¶ 23.

5 Following his return, Mr. Kinnune was dissatisfied with the conditions and
6 circumstances of his employment. ECF No. 44 at 5 ¶ 21; ECF No. 59 at 4-5 ¶ 21;
7 ECF No. 57 at 13 ¶ 97, 14 ¶¶ 102, 109. On September 23, 2020, Mr. Kinnune
8 requested leave to work with the Spokane County Sheriff Department, which
9 DSHS granted. ECF No. 57 at 15 ¶ 116. On September 24, 2020, Mr. Kinnune
10 reported to human resources that he believed he had experienced a hostile work
11 environment at ESH. ECF No. 57 at 14 ¶ 109. On January 26, 2021, ESH sent
12 Mr. Kinnune a letter indicating that DSHS completed an investigation into his
13 claims. ECF No. 44 at 6 ¶ 26; ECF No. 46-2 at 6; ECF No. 59 at 5 ¶ 26.

14 In December 2020, Mr. Kinnune's supervisor admonished him for sending a
15 holiday email to ESH staff. ECF No. 57 at 15-16 ¶¶ 117-119. In May 2021,
16 DSHS opened an investigation into whether Mr. Kinnune misrepresented his leave
17 of absence. ECF No. 57 at 16 ¶¶ 120-123. DSHS closed the investigation with no
18 adverse findings against Mr. Kinnune. ECF No. 57 at 16 ¶ 122.

19 On August 16, 2021, ESH sent a letter to Mr. Kinnune directing him to
20 return to ESH on September 30, 2021. ECF No. 39-3 at 166 (referencing an

1 August 16, 2021 letter); ECF No. 45-12 at 2 (referencing an August 16, 2021
2 letter). On September 23, 2021, Mr. Kinnune, through counsel, sent a letter to
3 DSHS explaining that Mr. Kinnune could not return to ESH, as he believed ESH
4 violated federal and state laws. ECF No. 38-1 at 20 ¶ 125; ECF No. 39-3 at 166;
5 ECF No. 49 at 17 ¶ 125. On October 1, 2021, DSHS’s counsel spoke with
6 Mr. Kinnune’s counsel, who clarified that Mr. Kinnune would resign from ESH.
7 *See* ECF No. 45-12 at 2. Mr. Kinnune maintains that his resignation was not
8 voluntary. ECF No. 59 at 5-6 ¶ 27. On October 4, 2021, DSHS told Mr. Kinnune
9 that his effective last day would be October 5, 2021. ECF No. 45-12 at 2.

10 On November 16, 2022, Mr. Kinnune filed a complaint in the Superior Court
11 of Washington for Thurston County, No. 22-2-03157-34. ECF No. 1 at 1. He
12 alleges violations of (1) the Uniformed Services Employment Reemployment
13 Rights Act of 1994 (“USERRA”), 38 U.S.C. §§ 4301-4333, and (2) the
14 Washington Law Against Discrimination (“WLAD”), RCW 49.60. ECF No. 2-2.
15 On January 6, 2023, Defendants removed to this Court. ECF No. 1.

16 **LEGAL STANDARD**

17 A district court must grant summary judgment “if the movant shows that
18 there is no genuine dispute as to any material fact and the movant is entitled to
19 judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*,
20 477 U.S. 317, 322-23 (1986); *Barnes v. Chase Home Fin., LLC*, 934 F.3d 901, 906

1 (9th Cir. 2019). “A fact is ‘material’ only if it might affect the outcome of the
2 case, and a dispute is ‘genuine’ only if a reasonable trier of fact could resolve the
3 issue in the non-movant’s favor.” *Fresno Motors, LLC v. Mercedes Benz USA,*
4 *LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014) (quoting *Anderson v. Liberty Lobby,*
5 *Inc.*, 477 U.S. 242, 248 (1986)). The court “must view the evidence in the light
6 most favorable to the nonmoving party and draw all reasonable inference in the
7 nonmoving party’s favor.” *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 459 (9th Cir.
8 2018).

9 The moving party bears the initial burden of demonstrating the basis for its
10 motion and identifying the portions of the record and the evidence that show the
11 absence of a genuine dispute of material fact. *Celotex*, 477 U.S. at 323 (quoting
12 former Fed. R. Civ. P. 56(c)). After the moving party has satisfied its burden, to
13 survive summary judgment, the non-moving party must demonstrate with evidence
14 on the record “specific facts” showing that there is a genuine dispute of material
15 fact for trial. *Celotex*, 477 U.S. at 324. “The mere existence of a scintilla of
16 evidence in support of the plaintiff’s position will be insufficient[.]” *Anderson*, 477
17 U.S. at 252. A party may move for summary judgment on part of a claim or
18 defense. Fed. R. Civ. P. 56(a).

19 “Credibility determinations, the weighing of the evidence, and the drawing
20 of legitimate inferences from the facts are jury functions, not those of a judge”

1 *Anderson*, 477 U.S. at 255. “[W]hen parties submit cross-motions for summary
2 judgment, [e]ach motion must be considered on its own merits,” but the court must
3 consider all evidence before it when separately reviewing the merits of each
4 motion. *Fair Hous. Council of Riverside Cnty., Inc. v. Riverside Two*, 249 F.3d
5 1132, 1136 (9th Cir. 2001) (second alteration in original).

6 DISCUSSION

7 Mr. Kinnune moves for partial summary judgment, asking the Court to
8 decide as a matter of undisputed fact and law that (1) Mr. Kinnune was entitled to
9 reemployment under USERRA, (2) DSHS failed to reemploy Mr. Kinnune as
10 required under USERRA, (3) Mr. Kinnune was entitled to USERRA and WLAD’s
11 anti-discrimination provisions due to his protected status, and (4) Mr. Kinnune was
12 entitled to USERRA and WLAD’s anti-retaliation provision due to his protected
13 activity. ECF No. 38. DSHS moves for summary judgment, arguing that (1)
14 DSHS met its reemployment obligations under USERRA, and that Mr. Kinnune
15 cannot establish (2) a hostile work environment, (3) an adverse employment action,
16 (4) discriminatory motive, or (5) that any alleged USERRA violations were willful.
17 ECF No. 43.

18 A. USERRA Reemployment

19 Congress enacted USERRA to ease the burden of military service on
20 servicemembers’ civilian careers and employment. *Belaustegui v. Int’l Longshore*

1 & *Warehouse Union*, 36 F.4th 919, 923 (9th Cir. 2022) (quoting 38 U.S.C. §
2 4301(a)(1)). USERRA provides that “any person whose absence from a position
3 of employment is necessitated by reason of service in the uniformed services shall
4 be entitled to the reemployment rights and benefits . . . of this chapter[.]” 38
5 U.S.C. § 4312(a). The Ninth Circuit has instructed that USERRA is to be
6 “liberally construed for the benefit of those who left private life to serve their
7 country in its hour of great need.” *Belaustegui*, 36 F.4th at 923 (quoting *Ziober v.*
8 *BLB Res., Inc.*, 839 F.3d 814, 819 (9th Cir. 2016)) (quotation marks omitted).

9 Mr. Kinnune argues that he is entitled to reemployment under USERRA as a
10 matter of law, and the parties each seek summary judgment on the question of
11 whether DSHS met its reemployment obligations. ECF No. 38 at 12-15; ECF No.
12 43 at 9-12.

13 *1. Mr. Kinnune was Entitled to Reemployment Under USERRA*

14 *i. Mr. Kinnune Meets USERRA Statutory Prerequisites*

15 USERRA rights are subject to a number of prerequisites: The
16 servicemember must “(1) properly notify their employers of the need for a service-
17 related absence, (2) take cumulative absence of no more than five years[,] and (3)
18 properly report to work or reapply for employment, depending upon the length of
19 the absence.” *Wallace v. City of San Diego*, 479 F.3d 616, 625 (9th Cir. 2007)
20 (citing 38 U.S.C. § 4312(a)(1)-(3)).

1 DSHS concedes that Mr. Kinnune met the statutory prerequisites and that he
2 is entitled to USERRA reemployment. ECF No. 38 at 13; ECF No. 48 at 8-9.
3 Moreover, the parties' stipulated facts indicate that Mr. Kinnune is entitled to
4 reemployment under USERRA: Mr. Kinnune communicated his initial deployment
5 orders and extensions to DSHS, his period of service lasted just over two years,
6 and he notified DSHS of his return and reported for work. ECF No. 57 at 4-13 ¶¶
7 18-97. There is no factual or legal dispute that Mr. Kinnune met USERRA's
8 statutory prerequisites.

9 ii. DSHS Has Not Alleged the Statutory Affirmative Defenses to
10 Mr. Kinnune's USERRA Reemployment Claim

11 USERRA provides affirmative defenses that, if established, allow an
12 employer to evade the duty to reemploy a returning servicemember, as follows:
13 (1) the employer's circumstances have so changed as to make reemployment
14 impossible or unreasonable; (2) employment would impose undue hardship (in
15 certain circumstances); or (3) the employment that the servicemember left was for
16 a brief, nonrecurrent period. 38 U.S.C. § 4312(d)(1)(A)-(C); *see also United States*
17 *v. Nevada*, 817 F. Supp. 2d 1230, 1241-42 (D. Nev. 2011) (citing 38 U.S.C.
18 § 4312(d)(1)(A)-(C)). The burden to prove any of these affirmative defenses is
19 with the employer. 38 U.S.C. § 4312(d)(2); *Nevada*, 817 F. Supp. 2d at 1242.

20 Mr. Kinnune highlights that DSHS did not plead any statutory affirmative
defenses to his USERRA reemployment claim. ECF No. 38 at 13 (citing ECF No.

1 6-1 (Answer)). DSHS agrees that none of the statutory affirmative defenses listed
2 in 38 U.S.C. § 4312(d)(1)(A)-(C) apply. ECF No. 48 at 8-10.

3 Therefore, no disputes of fact preclude a finding that Mr. Kinnune is entitled
4 to USERRA’s reemployment provisions as a matter of law. Mr. Kinnune’s motion
5 is granted in part, to the extent that it seeks a judicial determination on that
6 question.

7 *2. Genuine Factual Disputes Preclude Summary Judgment on Whether*
8 *Mr. Kinnune was Reemployed as Required under USERRA*

9 USERRA provides that

10 . . . an eligible servicemember whose period of service
11 exceeded 90 days is entitled to reemployment “in the
12 position of employment in which the person would have
13 been employed if the continuous employment of such
14 person with the employer had not been interrupted by such
15 service, or a position of like seniority, status and pay, the
16 duties of which the person is qualified to perform.”

17 *Belaustegui*, 36 F.4th at 923-24 (quoting 38 U.S.C. § 4313(a)(2)(A)¹). “This
18 position is known as the ‘escalator position,’” which is meant to ensure “that a
19 returning service member not be removed from the progress (escalator) of his
20 career trajectory.” *Id.* at 924 (quoting 20 C.F.R. § 1002.191; *Huhmann v. Fed.*

18 ¹ USERRA provides other procedures and standards for servicemembers who are
19 not qualified for the position sought upon return or who incurred a disability in
20 military service which are not at issue, here. *See* 38 U.S.C. § 4313(a)(2)-(4).

1 *Express Corp.*, 874 F.3d 1102, 1105 (9th Cir. 2017)). The “escalator position” is
2 determined through a “reasonable certainty” test, which asks what position “the
3 returning servicemember ‘would have attained with reasonable certainty if not for
4 the absence due to uniformed service.’” *Id.* (quoting 20 C.F.R. § 1002.191). The
5 returning servicemember is also “‘entitled to the seniority and other rights and
6 benefits determined by seniority’ that he or she would have attained but for the
7 period of military service.” *Id.* (quoting 38 U.S.C. § 4316(a)).

8 However, “the statute does not ‘freeze’ the employee’s job as it stood when
9 the employee deployed.” *Mustafa v. Yuma Reg’l Med. Ctr.*, No. CV-21-00161-
10 PHX-ROS, 2023 WL 155856, at *4 (D. Ariz. Jan. 11, 2023). “Rather, this
11 ‘escalator provision’ contemplates time moving forward in the civilian workplace
12 while the employee undertakes military service and aims to slot the employee back
13 into employment as if he had never left.” *Id.* (citing *Vahey v. Gen. Motors Co.*,
14 985 F. Supp. 2d 51, 60-61 (D.D.C. 2013)); *see also* 20 C.F.R. § 1002.194
15 (“Depending on the circumstances, the escalator principle may cause an employee
16 to be reemployed in a higher or lower position, laid off, or even terminated.”).

17 The parties do not dispute that Mr. Kinnune’s pay, benefits, field of work,
18 and hospital where he worked remained the same following his return from
19 service. *See* ECF No. 38 at 13-15; ECF No. 43 at 10-12. Instead, Mr. Kinnune
20 argues that “DSHS failed to return him to a position of like status.” ECF No. 53 at

1 2; ECF No. 38 at 15. More specifically, Mr. Kinnune argues that certain
2 conditions and responsibilities of his employment changed upon his return from
3 service. ECF No. 38 at 14-15.

4 DSHS argues that it returned Mr. Kinnune to “the exact same position from
5 which he left.” ECF No. 43 at 12. DSHS argues that any changes to
6 Mr. Kinnune’s position would have occurred as a consequence of natural
7 developments at ESH in his absence, regardless of his military leave. ECF No. 43
8 at 11-12.

9 The parties each move for summary judgment in their favor on the
10 sufficiency of Mr. Kinnune’s position at ESH upon his return to work. ECF No.
11 38 at 13-15; ECF No. 43 at 10-12. The Court considers the facts as presented by
12 the parties.

13 i. Ethics Committee and CISM Team

14 It is undisputed that, when Mr. Kinnune left, he was “chair” of the Ethics
15 Committee and “leader” of the CISM Team. ECF No. 57 at 3 ¶¶ 13-14. It is also
16 undisputed that when Mr. Kinnune returned, those positions were occupied by
17 Ms. Ross. *Compare* ECF No. 44 at 4 ¶ 20 *with* ECF No. 59 at 4 ¶ 20; ECF No. 57
18 at 9-10 ¶ 70. It is undisputed that the Ethics Committee and the CISM Team were
19 disbanded in March 2019 and later reconstituted, all while Mr. Kinnune was away.
20 ECF No. 57 at 12-13 ¶¶ 94-95.

1 The disparity in Mr. Kinnune’s pre- and post-leave positions on the Ethics
2 Committee and CISM Team are likely probative of a change in Mr. Kinnune’s
3 “seniority [and] status” before and after his military service. *See Nichols v. Dep’t*
4 *of Veterans Affs.*, 11 F.3d 160, 162 n.* (Fed. Cir. 1993) (“Two illustrations of the
5 common meaning of the word ‘status’ are: A relative position in a ranked group or
6 in a social system . . . [,] and [t]he rights, duties, capacities and incapacities which
7 determine a person to a given class.”) (quotations omitted). However, this fact is
8 insufficient basis to grant summary judgment for two reasons.

9 First, the Court lacks factual context necessary to determine the seniority
10 and status afforded to the “leaders” of the Ethics Committee and CISM team
11 before and after Mr. Kinnune’s military service. It is not clear that these groups
12 were identical, before disbandment and after reconstitution, in anything other than
13 name. Mr. Kinnune offers little more than a bare assertion that he was denied
14 “leadership positions.” ECF No. 53 at 2. To conclude that Mr. Kinnune was
15 denied like status upon his return, the Court must understand what the roles
16 entailed, before and after his leave. For example, in *Nichols*, the Federal Circuit
17 was able to perform a side-by-side comparison of the position that the plaintiff
18 should have had versus the one he was given. *See* 11 F.3d at 163-64. Here, the
19 record does not illustrate the day-in and day-out status and responsibilities that
20 came with the leadership positions that Mr. Kinnune claims he was denied.

1 Second, Mr. Kinnune is entitled only to his escalator position, which must be
2 understood in light of the developments at ESH while he was away. *See*
3 *Belaustegui*, 36 F.4th at 924; *Mustafa*, 2023 WL 155856, at *4. Neither party has
4 explained why the groups were disbanded and reconstituted, or why Ms. Ross was
5 appointed to lead them. Several questions of fact exist concerning the nature of
6 these positions, their importance to Mr. Kinnune’s employment, and whether they
7 should be included in Mr. Kinnune’s escalator position.

8 ii. Increased Supervision, Different Job Expectations, and
9 Changed Duties

10 Mr. Kinnune argues that, when he returned, he was “given a new [Position
11 Description Form (“PDF”)] that, among other things, significantly increased the
12 level of oversight to which he would be subject from the lowest level of
13 supervision to the highest”; and a new “Work Instructions/Expectations” form that
14 changed the standards of his position. ECF No. 38 at 15. He also argues that,
15 when he returned, he was given “menial tasks” that were not part of his role before
16 he left. ECF No. 38 at 4-5.

17 These facts may support Mr. Kinnune’s claims but, at this stage, fail to
18 establish as a matter of law that Mr. Kinnune was denied reemployment as
19 required under USERRA. Mr. Kinnune compares his case to *Nichols*. ECF No. 38
20 at 14 (citing 11 F.3d at 161-64). The comparison demonstrates why summary
judgment is inappropriate in this case.

1 *Nichols* was an appeal of a Merit Systems Protection Board (“MSPB”)
2 decision that Nichols was not denied USERRA reemployment rights. *See* 11 F.3d
3 at 161-64. The Federal Circuit reversed the MSPB decision because Nichols’s
4 position upon return lacked the status and seniority that he enjoyed before
5 departing for military service. *Id.* at 163-64. Specifically, in his previous position,
6 Nichols “was the boss, and supervised a number of staff chaplains,” but upon his
7 return, “he ha[d] no staff at all to assist with the wide range of responsibilities
8 assigned.” *Id.* at 163. The Federal Circuit underscored the lack of guidance
9 Nichols was given in his new position, the fact that the old position still existed but
10 was occupied by a new employee, and the reduction in authority upon his return.
11 *Id.* at 163-64.

12 Because the position that Nichols left still existed when he returned, but was
13 occupied by another employee, there was little guesswork for the court in
14 comparing his past and present positions. *Id.* at 163-64. Here, the comparison is
15 not as clear. The Court lacks factual context illustrative of the level of supervision,
16 expectations of the job, and the assigned duties that Mr. Kinnune left, for
17 comparison with the job he had upon his return.

18 The PDFs may serve as evidence that Mr. Kinnune was subject to increased
19 supervision when he returned. *See* ECF No. 39-2 at 45, 157; *see also* ECF No. 39-
20 1 at 62. However, more important is the actual level of supervision imposed on

1 Mr. Kinnune before and after his military service, and the record lacks sufficient
2 detail supporting summary judgment for either party on that question. *See* ECF
3 No. 48 at 12-13 (disputing that the position description forms did not change the
4 level of supervision to which Mr. Kinnune was subject). Further, it is unclear
5 whether the structural changes at ESH would have resulted in increased
6 supervision of Mr. Kinnune’s position, whether or not he left for military service.
7 *See* ECF No. 39-1 at 62-63.

8 As for the “menial duties” that Mr. Kinnune was given upon his return, there
9 is evidence that Mr. Kinnune volunteered for those tasks, though he now contends
10 they were beneath his station. *Compare* ECF No. 62 at 2 *with* ECF No. 53 at 3.

11 The record does not conclusively establish that Mr. Kinnune was denied the
12 opportunity to perform tasks of like seniority and status as those he performed
13 before he left. *See Nichols*, 11 F.3d at 163-64. Such a determination is further
14 clouded by the fact that Mr. Kinnune worked for ESH for just a few weeks before
15 he requested leave to work with the Spokane County Sheriff Department. ECF
16 No. 38-1 at 19 ¶ 116. Whether Mr. Kinnune was “denied” the opportunity to
17 perform tasks akin to those he performed before his military service, or whether he
18 left before he was given that opportunity, is a question of fact.

1 iii. Miscellaneous Incidentals of Employment

2 Mr. Kinnune argues that DSHS failed to properly reemploy him because the
3 following had changed when he returned: (1) “DSHS . . . fired the on-call chaplain,
4 Hill, who had been hired to support Kinnune”; (2) “Kinnune lost his private
5 office”; and (3) “he went from being ESH’s sole full-time Chaplain—a position
6 held by a single person since at least 1989—to being a co-Chaplain with Ross.”
7 ECF No. 38 at 15.

8 Each of these facts is presented without factual context. For example,
9 Mr. Kinnune implies that, by denying him an “on-call chaplain” like Mr. Hill,
10 DSHS denied him an employee under his supervision. ECF No. 38 at 15; ECF No.
11 53 at 3. The evidence does not indicate that Mr. Hill worked under Mr. Kinnune’s
12 direction; rather, it indicates that Mr. Hill was there to cover when Mr. Kinnune
13 was out. ECF No. 39-1 at 33. Mr. Kinnune argues that he lost a “private office,”
14 but the evidence indicates that, in his absence, remodeling and restaffing occurred
15 and he may have lost his “private office” even if he never left. ECF No. 39-1 at
16 116. It may be that ESH had one chaplain from 1989 to Ms. Ross’s hiring, but
17 Mr. Kinnune asks the Court to perform the impossible task of deciding, as a matter
18 of undisputed fact, that the hospital’s religious and spiritual needs had not changed
19 during his absence. The task is better suited for a fact finder.

1 None of the incidentals of Mr. Kinnune’s job constitute, as a matter of
2 undisputed fact and law, a “benefit of employment” under USERRA, which is
3 statutorily defined as the “terms, conditions, or privileges of employment,
4 including any advantage, profit, privilege, gain, status, account, or interest . . . that
5 accrues by reason of an employment contract or agreement or employer policy,
6 plan, or practice.” *Belaustegui*, 36 F.4th at 926 (quoting 38 U.S.C. § 5303(2)).
7 Moreover, whether Mr. Kinnune would have lost these incidentals regardless of his
8 military leave remains in genuine dispute, as his ESH appears to have been fairly
9 dynamic. *See Mustafa*, 2023 WL 155856, at *4 (“the statute does not ‘freeze’ the
10 employee’s job as it stood when the employee deployed”). Mr. Kinnune has failed
11 to demonstrate the lack of a genuine dispute of fact precluding summary judgment
12 in his favor.

13 iv. DSHS’s Motion for Summary Judgment on USERRA
14 Reemployment

15 DSHS’s motion for summary judgment fails for the same reason as
16 Mr. Kinnune’s—several factual disputes exist. DSHS argues that “[n]one of
17 [Mr. Kinnune’s] criticisms are valid,” ECF No. 43 at 12, and that “[Mr.] Kinnune
18 was offered the exact same job,” ECF No. 48 at 12.

19 Yet, DSHS admits that Mr. Kinnune was not returned to the same positions
20 on the Ethics Committee and CISM Team. ECF No. 48 at 12. DSHS concedes to
a factual dispute over whether the PDFs establish that Mr. Kinnune was subjected

1 to increased supervision. ECF No. 48 at 13-14. And, regarding changes to the
2 incidentals of Mr. Kinnune’s employment, DSHS only argues that it had the
3 authority to make such changes under the employee collective bargaining
4 agreement. ECF No. 48 at 13. That DSHS had the contractual authority to make
5 certain changes may indicate that those changes would have been made regardless
6 of Mr. Kinnune’s military service. A contract cannot supersede USERRA. DSHS
7 could have violated USERRA, even if it had the contractual authority to make
8 changes to Mr. Kinnune’s job.

9 In short, DSHS admits that many issues of fact preclude summary judgment
10 on the question of whether Mr. Kinnune was properly reemployed under
11 USERRA. The parties’ motions for summary judgment on the question of
12 USERRA reemployment are denied.

13 **B. USERRA and WLAD Discrimination and Retaliation Claims**

14 USERRA prohibits employment discrimination against persons for their
15 “membership, application for membership, performance of service, application for
16 service, or obligation” to a uniformed service. 38 U.S.C. § 4311(a). Further,
17 USERRA prohibits retaliation against persons for their exercise of USERRA
18 rights. 38 U.S.C. § 4311(b). The Ninth Circuit applies “a two-part test to § 4311
19 discrimination claims. An employee [(1)] ‘first has the burden of showing, by a
20 preponderance of the evidence, that his or her protected status was a substantial or

1 motivating factor in the adverse employment action; [(2)] the employer may then
2 avoid liability only by showing, as an affirmative defense, that the employer would
3 have taken the same action without regard to the employee's protected status.”
4 *Belaustegui*, 36 F.4th at 924 (quoting *Huhmann*, 874 F.3d at 1105).

5 WLAD “proscribes discrimination in employment on the basis of sex, race,
6 sexual orientation, and other protected characteristics. . . . WLAD also prohibits
7 employers from retaliating against employees who oppose discriminatory
8 practices.” *Cornwell v. Microsoft Corp.*, 430 P.3d 229, 234 (Wash. 2018) (citing
9 RCW 49.60.030; RCW 49.60.210(1)). A WLAD discrimination plaintiff must
10 demonstrate that their protected status was a “substantial factor” in an employer's
11 adverse employment action. *Scrivener v. Clark Coll.*, 334 P.3d 541, 546 (Wash.
12 2014). A WLAD retaliation plaintiff establishes a prima facie case of retaliation
13 by demonstrating “three things: (1) the employee took a statutorily protected
14 action, (2) the employee suffered an adverse employment action, and (3) a causal
15 link between the employee’s protected activity and the adverse employment
16 action.” *Id.* (citations omitted).

17 “Once the plaintiff establishes a prima facie case, the burden of production
18 shifts to the employer to articulate a legitimate, nondiscriminatory reason for the
19 adverse employment action.” *Scrivener*, 334 P.3d at 546. If the defendant meets
20 that burden, then the plaintiff must “produce sufficient evidence that [the

1 defendant’s] alleged nondiscriminatory reason” is pretextual. *Id.* (citation and
2 quotations omitted). “Evidence is sufficient to overcome summary judgment if it
3 creates a genuine issue of material fact that the employer’s articulated reason was a
4 pretext for a discriminatory purpose.” *Id.* (citations omitted).

5 The parties seek summary judgment on various portions of the
6 discrimination and retaliation claims at issue.²

7
8 ² Mr. Kinnune’s motion references RCW 38.40.060 and RCW 73.16.033, which he
9 argues “provide[] for paid military leave for army personnel” and “a right to
10 reemployment analogous to what is provided by USERRA.” ECF No. 38 at 19.
11 He extrapolates that “[t]hese state-protected rights . . . are inextricably connected to
12 [Mr.] Kinnune’s ‘military status,’ are therefore protected under RCW 49.60.180[]”
13 and RCW 49.60.210. ECF No. 38 at 19. In other words, Mr. Kinnune argues that
14 WLAD extends to his right to reemployment under state law, folding any alleged
15 discrimination for military leave or retaliation for exercising state reemployment
16 rights into his WLAD claim. ECF No. 38 at 19. Mr. Kinnune did not plead a
17 cause of action for discrimination or retaliation due to his military absence, or
18 efforts at reemployment, under state law. ECF No. 2-2. As DSHS has noted,
19 Mr. Kinnune’s complaint alleges only his “military status” as the basis of his
20 WLAD claims. ECF No. 2-2 at 7; ECF No. 48 at 17. Mr. Kinnune does not

1 1. *Mr. Kinnune was a Member of a Protected Class Under USERRA and*
2 *WLAD and Engaged in Protected Activity*

3 USERRA provides that “[a] person who is a member of . . . a uniformed
4 service shall not be denied initial employment, reemployment, retention in
5 employment, promotion, or any benefit of employment by an employer on the
6 basis of that membership.” 38 U.S.C. § 4311(a). “Military status” is among
7 WLAD’s protected classes. RCW 49.60.030(1).

8 Employers may not retaliate against employees for exercising USERRA
9 rights. *Wallace*, 479 F.3d at 624-25, 625 n.1. Under WLAD, an employee’s
10 complaints that conditions of employment are not in compliance with law, or
11 efforts to oppose unlawful practices, are protected activity. *Currier v. Northland*
12 *Servs., Inc.*, 332 P.3d 1006, 1012-13 (Wash. 2014); *Coville v. Cobarc Servs., Inc.*,
13 869 P.2d 1103, 1106 (Wash. Ct. App. 1994).

14 DSHS does not dispute that Mr. Kinnune is a member of a protected class
15 under USERRA and under WLAD. ECF No. 43 at 14-16; ECF No. 62 at 7-9

16 _____ address the issue in reply. ECF No. 53.

17 The Court considers Mr. Kinnune’s military leave of absence related to his
18 “military status” under WLAD. RCW 49.60.030(1). The Court declines to
19 entertain any cause of action based upon other Washington statutory provisions
20 until such causes of actions are stated in an amended pleading.

1 (conceding that Mr. Kinnune’s military status may serve as the basis of USERRA
2 and WLAD discrimination claims). Further, DSHS “concedes that [Mr.] Kinnune
3 took some protected actions under USERRA.” ECF No. 62 at 8. DSHS does not
4 dispute that Mr. Kinnune engaged in protected activity when he (1) communicated
5 military orders to DSHS in June 2018, April 2019, and May 2020; (2) sought
6 reemployment after his military service ended; (3) emailed DSHS managers on
7 August 30, 2020, about USERRA rights; (4) communicated with a DSHS manager
8 on September 2, 2020, and forwarded material on USERRA; (5) reported a hostile
9 work environment on September 24, 2020; and (6) participated in ESH fact-finding
10 related to his hostile work environment report. ECF No. 48 at 16.

11 The parties disagree as to whether Mr. Kinnune engaged in protected
12 activity in two situations: when he (1) spoke about changes to his job with
13 supervisors on August 28, 2020; and when he (2) reported an email that a
14 supervisor sent to him, related to holiday communications in late 2020. ECF No.
15 48 at 16; ECF No. 53 at 8-10. The Court briefly summarizes the undisputed facts
16 related to each situation.

17 Barbara “Joey” Frost was Kinnune’s supervisor, and Ronda Kenney was
18 DSHS’s Chief Operations Officer. ECF No. 57 at 2 ¶ 7, 4 ¶ 19. Mr. Kinnune met
19 with Ms. Frost and Ms. Kenney on August 28, 2020, to discuss his return to work
20 on August 31, 2020. ECF No. 57 at 12 ¶ 86. The specifics of what was discussed

1 at the meeting are disputed, but the parties broadly agree that Mr. Kinnune's
2 supervisors told him what the details of his role would be upon his return. *See*
3 ECF No. 38-1 at 14-15 ¶¶ 86-90; ECF No. 49 at 12-13 ¶¶ 86-90. Mr. Kinnune was
4 hesitant to accept the conditions of employment discussed at the meeting. ECF
5 No. 39-3 at 55 (communication record regarding meeting).

6 There is evidence suggesting that Mr. Kinnune may have asserted his
7 USERRA rights during the meeting. When asked whether Mr. Kinnune
8 “specifically raised his rights as a military service member during that meeting,”
9 Ms. Kenney testified, “I don’t remember that conversation, but if he says he did
10 that, then I’m sure he said something.” ECF No. 39-1 at 164. The day after the
11 meeting, Mr. Kinnune sent an email to Ms. Frost and Ms. Kenney in which he
12 raised the Servicemembers Civil Relief Act (“SCRA”) and linked to a Justice
13 Department website concerning the SCRA. ECF No. 39-3 at 29. In a second
14 email sent on August 30, 2020, Mr. Kinnune clarified that the “correct” and
15 “actual” law was USERRA and provided a link to a Justice Department website
16 concerning USERRA. ECF No. 39-3 at 29.

17 While Mr. Kinnune “need not cite the appropriate sections of the statute
18 when seeking reemployment or notify the employer of its legal obligation to
19 reemploy him,” he must assert some legal right for a communication to be
20 considered protected activity. *Wallace*, 479 F.3d at 625. There is a genuine

1 dispute of fact as to whether Mr. Kinnune asserted his legally protected rights
2 during the August 28, 2020 meeting with his supervisors.

3 Mr. Kinnune also argues that he engaged in protected activity on
4 December 14, 2020. ECF No. 53 at 9-10. On December 13, 2020, while on leave
5 with the Sheriff's Office, Mr. Kinnune sent a holiday email from his personal
6 account to DSHS employees. ECF No. 39-3 at 142-43. The next day, Ms. Frost
7 responded, telling Mr. Kinnune to refrain from sending emails to DSHS staff from
8 his personal account while he was on leave and to refrain from including "religious
9 connotations" in his email communications. ECF No. 39-3 at 141-42.

10 Mr. Kinnune forwarded Ms. Frost's email to his supervisors and human resources
11 and expressed his concerns that it was a "reprisal." ECF No. 39-3 at 137-38.

12 Mr. Kinnune explained that he believed Ms. Frost had retaliated against his hostile
13 work environment complaint. ECF No. 39-3 at 138. Mr. Kinnune indicated that
14 he would be consulting a USERRA lawyer and called for an investigation. ECF
15 No. 39-3 at 138-39.

16 DSHS argues that "[Ms.] Frost's response to [Mr.] Kinnune's 2020 holiday
17 email is insufficient to be an 'adverse employment action.'" ECF No. 48 at 17-18.

18 DSHS appears to misunderstand Mr. Kinnune's motion. Mr. Kinnune seeks a
19 judicial finding that his December 14, 2020 email was a protected activity, not that
20 Ms. Frost's response to that email was an adverse employment action. ECF No. 38

1 at 20. There is no factual dispute about the content of the email and the Court
2 concludes that the email constitutes protected activity, as Mr. Kinnune expressed a
3 legal right and cited to USERRA. ECF No. 39-3 at 137-38.

4 In summary, there remains no genuine dispute of fact that Mr. Kinnune was
5 a member of a protected class for USERRA and WLAD purposes and that he
6 engaged in protected activity by attempting to assert his rights under those statutes,
7 as listed above. There is a genuine dispute of fact as to whether Mr. Kinnune
8 engaged in protected activity during the August 28, 2020, meeting with his
9 supervisors. The Court finds no genuine dispute that Mr. Kinnune’s December 14,
10 2020, email was protected activity. ECF No. 39-3 at 138.

11 *2. Adverse Employment Action*

12 An adverse employment action under federal or state law is established
13 where a plaintiff “show[s] that a reasonable employee would have found the
14 challenged action materially adverse,” in that it would have “dissuaded a
15 reasonable worker from making or supporting a charge of discrimination.”
16 *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006) (citation and
17 quotations omitted); *see also Espinoza v. City of Seattle*, 458 F. Supp. 3d 1254,
18 1271 (W.D. Wash. 2020); *Boyd v. State*, 349 P.3d 864, 870 (Wash. Ct. App. 2015).
19 “[W]hether a particular action would be viewed as adverse by a reasonable
20 employee is a question of fact appropriate for a jury.” *Boyd*, 349 P.3d at 870

1 (citing *Burlington*, 548 U.S. at 71). In the context of a USERRA claim, an
2 “adverse employment action” may be found in the denial of benefits or promotions
3 that should have been attained if the employee were given his escalator position,
4 with reasonable certainty. *See Huhmann*, 874 F.3d at 1108-09.

5 i. Miscellaneous Adverse Employment Actions

6 DSHS argues that “[Mr.] Kinnune lacks any evidence to demonstrate an
7 adverse employment action.” ECF No. 43 at 17. Mr. Kinnune responds that the
8 evaluation of whether an employment action was “adverse” is a factual question
9 inappropriate at summary judgment, and that this factual question must be
10 addressed as to each of the employment actions he alleges were adverse, which
11 include the following: (1) DSHS “removed” him as leader of the Ethics Committee
12 and CISM Team; (2) DSHS subjected him to increased oversight; (3) DSHS
13 changed the expectations of his employment; (4) his supervisors unjustly wrote
14 him up; (5) his supervisors threatened him with future discipline; (6) he was given
15 “menial duties,” (7) DSHS fired his support chaplain; (8) DSHS took away his
16 private office and cell phone; (9) DSHS refused to allow him to work for a regional
17 CISM Team; (10) his supervisor admonished him for sending a holiday greeting;
18 (11) DSHS denied him procedural protections when he complained of harassment;
19 (12) DSHS subjected him to a meritless investigation. ECF No. 58 at 9-13.

1 Many of these arguments cover factual ground also relevant to
2 Mr. Kinnune's USERRA reemployment claim. As the Court explained above,
3 several factual disputes exist as to whether Mr. Kinnune should have been
4 reappointed to leadership positions on the Ethics Committee and CISM Team,
5 whether, upon his return, he lost status, was assigned lesser duties, or lost benefits.
6 *See* discussion *supra* Part A.2. Those same facts, if found in Mr. Kinnune's favor,
7 may support his discrimination and retaliations claims if he can further show that
8 he was denied the benefits of his escalator position because he was a member of
9 the uniformed services or exercised his USERRA rights. *See Huhmann*, 874 F.3d
10 1105-09. Issues of fact preclude a finding that he was denied those benefits of
11 employment, and if so denied, whether a reasonable employee would consider the
12 denial a "materially adverse" employment action. *See Boyd*, 349 P.3d at 870.

13 Separately, Mr. Kinnune offers incidents of allegedly unjustified discipline,
14 threats of future discipline, the denial of his request to work for a regional CISM
15 Team, and the denial of procedural protections in response to his complaints of
16 harassment, as adverse employment actions. ECF No. 58 at 9-13. DSHS replies,
17 summarily and incorrectly, that "[t]he only qualifying incident of discrimination
18 [Mr.] Kinnune identifies is a 'hostile work environment' that [led] to his
19 constructive discharge." ECF No. 62 at 7-8. Hostile work environment and
20

1 constructive discharge, discussed below, are two of several alleged incidents of
2 adverse employment actions. ECF No. 58 at 9-13.

3 The relevant case law is replete with adverse employment actions that are
4 more plainly “adverse,” for example: a terminated contract, *Currier*, 332 P.3d at
5 1013-14, poor performance ratings leading to termination, *Cornwell*, 430 P.3d at
6 236, a denied promotion, *Belaustegui*, 36 F.4th at 925-26, or a denied bonus,
7 *Huhmann*, 874 F.3d at 1109. However, the Court finds there is a genuine dispute
8 of material fact as to the severity of the employment actions against Mr. Kinnune
9 experienced and, more importantly, whether those actions would have dissuaded a
10 reasonable worker from making a charge of discrimination. *See Burlington N. &*
11 *Santa Fe Ry.*, 548 U.S. at 68.

12 DSHS cites out-of-circuit authority to argue that reprimands should not be
13 considered an adverse employment action. ECF No. 48 at 15, 17-18 (citing
14 *Sweeney v. West*, 149 F.3d 550, 556 (7th Cir. 1998). The case predates *Burlington*
15 *N. & Santa Fe Ry.*, a key Supreme Court case addressing the question. *See* 548
16 U.S. at 68. In addition, the Ninth Circuit has more recently explained that “merely
17 investigating an employee—regardless of the outcome of that investigation—likely
18 can support” a retaliation claim, as can “intentionally unfavorable assignments,”
19 *Campbell v. Haw. Dep’t of Educ.*, 892 F.3d 1005, 1022 (9th Cir. 2018) (citations

1 omitted), and “undeserved poor performance ratings,” *Emeldi v. Univ. of Or.*, 673
2 F.3d 1218, 1225 (9th Cir. 2012).

3 Mr. Kinnune has put forth evidence suggesting that he was the subject of
4 unjustified admonishments from supervisors, ECF No. 39-3 at 54-55; that he was
5 denied the benefit of internal procedures meant to safeguard against unwarranted
6 accusations of misconduct, ECF No. 39-1 at 14-15; that, when he complained of
7 harassment, his complaint was not properly investigated, ECF No. 60; and that he
8 was investigated for something that did not warrant an investigation, ECF No. 39-1
9 at 168-69. These actions, particularly when taken together, could support a
10 reasonable fact finder’s conclusion that Mr. Kinnune was subjected to one or more
11 adverse employment actions.

12 DSHS’s motion for summary judgment on the question of whether
13 Mr. Kinnune suffered an adverse employment action is denied.

14 ii. Hostile Work Environment and Constructive Discharge

15 District courts in this circuit have recognized that hostile work environment
16 claims are cognizable under USERRA. *See, e.g., Montoya v. Orange Cnty.*
17 *Sheriff’s Dep’t*, 987 F. Supp. 2d 981, 1013 (C.D. Cal. 2013); *Belaustegui v. Int’l*
18 *Longshore & Warehouse Union*, No. 19-cv-9955-FLA (AFMx), 2021 WL
19 1742247 (C.D. Cal. Apr. 26, 2021), *vacated on other grounds*, 36 F.4th 919
20 (2022). WLAD also provides a remedy for a hostile work environment, applying a

1 similar standard. *Blackburn v. Dep't of Soc. & Health Serv.*, 375 P.3d 1076, 1081
2 (Wash. 2016).

3 A plaintiff establishes a hostile work environment by demonstrating
4 “behavior sufficiently severe or pervasive to alter the conditions of their
5 employment.” *Pa. State Police v. Suders*, 542 U.S. 129, 133 (2004) (citation,
6 alteration, and quotations omitted). Courts consider the “totality of the
7 circumstances” when evaluating whether a hostile work environment exists,
8 including whether the conduct was both subjectively and objectively abusive.
9 *Washington v. Horning Bros., LLC*, 339 F. Supp. 3d 1106, 1117 (E.D. Wash.
10 2018). Courts should consider the “frequency of discriminatory conduct; its
11 severity; whether it is physically threatening or humiliating, or a mere offensive
12 utterance; and whether it unreasonably interferes with an employee’s work
13 performance.” *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116
14 (2002).

15 Similarly, a plaintiff may establish a hostile work environment under WLAD
16 by demonstrating “that the harassment (1) was unwelcome, (2) was because of a
17 protected characteristic,^[3] (3) affected the terms or conditions of employment, and

18
19 ³ The Court considers the discriminatory motive factor for Mr. Kinnune’s
20 USERRA and WLAD claims below. This section addresses only whether the

1 (4) is imputable to the employer.^[4]” *Blackburn*, 375 P.3d at 1081.

2 “Constructive discharge occurs when, looking at the totality of the
3 circumstances, a reasonable person in the employee’s position would have felt that
4 he was forced to quit because of intolerable and discriminatory working
5 conditions.” *Wallace*, 479 F.3d at 625. “Whether working conditions were so
6 intolerable and discriminatory as to justify a reasonable employee’s decision to
7 resign is normally a factual question.” *Id.* at 626.

8 Similarly, under Washington law, “[t]he elements of a claim of constructive
9 discharge are that (1) the employer deliberately made working conditions
10 intolerable, (2) a reasonable person in the employee’s position would be forced to
11 resign, (3) the employee resigned because of the intolerable condition and not for
12 any other reason, and (4) the employee suffered damages as a result of being
13 forced to resign.” *Peiffer v. Pro-Cut Concrete & Breaking, Inc.*, 431 P.3d 1018,
14 1031 (Wash. Ct. App. 2018).⁵

15
16 _____
conduct may amount to a hostile work environment as a matter of law.

17 ⁴ This element is not in dispute. *See* ECF Nos. 38, 43.

18 ⁵ In Washington, “constructive discharge” is one way for a plaintiff can establish
19 the “tort for wrongful discharge in violation of public policy,” which “is a narrow
20 exception to the at-will doctrine.” *Peiffer*, 431 P.3d at 1031. The parties do not

1 DSHS argues that “[Mr.] Kinnune is unable to show that any hostile work
2 environment is . . . sufficiently severe, or that any conduct relates to his protected
3 class.” ECF No. 43 at 14. Citing the same list of adverse employment actions
4 summarized above, *see* discussion *supra* Part B.2.i, Mr. Kinnune argues that
5 “[t]aken together, each of the above adverse employment actions coalesced to
6 create a hostile work environment” and that “DSHS employees engaged in a
7 coordinated and covert effort to create a work environment that was so hostile,
8 unfair, and intolerable that Kinnune would resign in frustration.” ECF No. 58 at 9-
9 10.

10 The Ninth Circuit has cautioned district courts not to usurp the role of the
11 fact finder on the question of whether the circumstances of employment amount to
12 constructive discharge. *Wallace*, 479 F.3d at 628. As explained above, there
13 remain outstanding questions of fact surrounding a number of employment actions
14 that may be materially adverse.

15
16
17 _____
18 raise the issue, but there may be a question whether Mr. Kinnune has sufficiently
19 pleaded the tort. *See* ECF No. 2-2. Given the similarities between the federal and
20 state standards for constructive discharge, the Court proceeds to its analysis, but
the parties may wish to brief the issue further in advance of trial.

1 In addition to those circumstances already discussed, the evidence indicates
2 that in January 2019, Ms. Ross publicly accused Mr. Kinnune of sexual
3 misconduct, bullying, and discrimination, which included accusations of criminal
4 conduct. ECF No. 39-1 at 35-51, 111-16, 135-42. There is a hole in the record as
5 to what became of these accusations. It is not clear if they were investigated,
6 redressed, or reported. Matthew McCord, Investigations Manager for ESH,
7 submits a declaration discussing the procedural irregularities surrounding this
8 accusation and the other, later investigations that involved Mr. Kinnune. ECF No.
9 60. With these procedural irregularities as a backdrop, the record provides
10 sufficient circumstantial evidence for a reasonable fact finder to find a pattern of
11 harassment sufficiently severe and pervasive to have altered the conditions of
12 Mr. Kinnune's employment and forced him out of ESH. *See Pa. State Police*, 542
13 U.S. at 133; *Blackburn*, 375 P.3d at 1081. DSHS's motion for summary judgment
14 on Mr. Kinnune's hostile work environment claim is denied.

15 3. *Discriminatory Motive*

16 A USERRA discrimination or retaliation plaintiff must demonstrate "that his
17 or her protected status was a substantial or motivating factor in the adverse
18 employment action." *Belaustegui*, 36 F.4th at 924. A WLAD discrimination
19 plaintiff must demonstrate that his protected status was a "substantial factor" in an
20 adverse employment action. *Scrivener*, 334 P.3d at 546. A WLAD retaliation

1 plaintiff must demonstrate “a causal link between the employee’s protected activity
2 and the adverse employment action.” *Cornwell*, 430 P.3d at 234. At summary
3 judgment, a WLAD plaintiff’s burden is “one of production, not persuasion.”
4 *Cornwell*, 430 P.3d at 412.

5 It is undisputed that DSHS supervisors and employees knew of
6 Mr. Kinnune’s protected status and that at least some of his actions were protected
7 activity. ECF No. 48 at 16; ECF No. 62 at 8; *see Cornwell*, 430 P.3d at 235 (a
8 plaintiff may rely on the fact that “the employer had knowledge of the action” as
9 evidence of discrimination sufficient to survive summary judgment.). Mr. Kinnune
10 offers sufficient evidence that the adverse employment actions against him were
11 motivated by retaliation for exercising his USERRA and WLAD rights and were
12 discriminatory based on his military status.

13 First, Mr. Kinnune’s supervisor, Ms. Frost, admits that “every single written
14 criticism of Mr. Kinnune’s performance [came] after he went on military service
15 leave.” ECF No. 39-1 at 74. Proximity in time between a protected activity and
16 adverse employment action may support a finding of discriminatory motive.
17 *Cornwell*, 430 P.3d at 236-37 (citing *Raad v. Fairbanks N. Star Borough Sch.*
18 *Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003)).

19 Second, Mr. Hill testified that, while Mr. Kinnune was on leave, ESH staff
20 expressed “frustration” about Mr. Kinnune’s rehiring after service leave, and

1 Ms. Frost and Ms. Ross made “increasingly negative comments” about him,
2 indicating their preference that Mr. Kinnune not return. ECF No. 39-2 at 28, 32.
3 Mr. Hill was asked not to tell Mr. Kinnune about such conversations. ECF No. 39-
4 2 at 25-27, 32. The HR Business Partner for ESH, Amy Jo Carlson, testified that it
5 was her “feeling” that Ms. Frost did not want Mr. Kinnune back at ESH, and that
6 circumstances surrounding his return were “really odd.” ECF No. 61 at 54-56. A
7 USERRA plaintiff may rely upon evidence that military service strained relations
8 with his employer, for an inference of discriminatory motive. *Wallace*, 479 F.3d at
9 625 (“evidence in the record suggests [the plaintiff’s] relationship with his
10 superiors was strained at least in part due to his military service, which permits an
11 inference that adverse employment actions were taken . . . because of his exercise
12 of rights protected by USERRA.”).

13 Third, there is evidence that Ms. Frost admonished Mr. Kinnune for using a
14 personal email address but did not do the same to Ms. Ross. ECF No. 61 at 39-40.
15 And, as discussed above, there is evidence that Mr. Kinnune was
16 disproportionately subject to disciplinary write-ups following his return from
17 military service. Disparate treatment of employees may serve as circumstantial
18 evidence of discriminatory intent. *Munoz v. InGenesis STGI Partners, LLC*, 182 F.
19 Supp. 3d 1097, 1104 (S.D. Cal. 2016).

1 Fourth and finally, and as discussed above, there is evidence that DSHS
2 employees did not adhere to DSHS policies governing the investigation of
3 misconduct and harassment as related to Mr. Kinnune by (1) failing to investigate
4 Mr. Kinnune’s alleged misbehavior, (2) failing to properly investigate
5 Mr. Kinnune’s complaints of harassment, and (3) investigating Mr. Kinnune in an
6 unusual manner. ECF No. 58 at 16 (highlighting evidence of departure from
7 policies). An employer’s failure to follow its own policies may serve as
8 circumstantial evidence of discriminatory motive. *Munoz*, 182 F. Supp. 3d at
9 1104.

10 Mr. Kinnune has presented sufficient evidence of discriminatory motive;
11 DSHS’s motion for summary judgment on his discrimination and retaliation claims
12 is denied.

13 4. *Affirmative Defenses*

14 An employer is not liable for discrimination under USERRA if it shows, as
15 an affirmative defense, “that the employer would have taken the same action
16 without regard to the employee’s protected status.” *Wallace*, 479 F.3d at 624
17 (quoting *Leisek v. Brightwood Corp.*, 278 F.3d 895, 899 (9th Cir. 2002)).⁶

18
19 ⁶ DSHS is “not offering an affirmative defense as to [Mr.] Kinnune’s WLAD
20 discrimination claim.” ECF No. 48 at 15.

1 Mr. Kinnune argues that “DSHS has not asserted any affirmative defense to
2 justify acts of discrimination.” ECF No. 38 at 18. DSHS argues that its failure to
3 plead should be excused as there is no prejudice. ECF No. 48 at 14 (citing *Garcia*
4 *v. Salvation Army*, 918 F.3d 997, 1008 (9th Cir. 2019)). DSHS seeks permission to
5 argue “that any discriminatory action would have been taken in the absence of
6 [Mr.] Kinnune’s military service.” ECF No. 48 at 14-15.

7 Courts will entertain a meritorious affirmative defense raised for the first
8 time at summary judgment where there is no prejudice. *Garcia*, 918 F.3d at 1008-
9 09. There is no prejudice “where an ‘affirmative defense would have been
10 dispositive’ if asserted ‘when the action was filed.’” *Id.* (quoting *Owens v. Kaiser*
11 *Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001)).

12 As an initial observation, the affirmative defense that DSHS seeks to raise
13 would not have been dispositive if raised in its Answer, as it presents significant
14 disputes of fact. Adding to the confusion, DSHS fails to argue that it would have
15 undertaken any particular adverse employment action against Mr. Kinnune without
16 regard to Mr. Kinnune’s protected status or protected activity. ECF No. 48 at 15.
17 Instead, DSHS argues that it undertook no adverse employment actions against
18 Mr. Kinnune. ECF No. 43 at 2; ECF No. 48 at 15; ECF No. 62 at 7.

19 In other words, DSHS asks permission to assert an affirmative defense but
20 offers no argument or evidence to support it. To be excused for a failure to plead

1 an affirmative defense, at minimum, the movant must demonstrate the affirmative
2 defense is available. *See, e.g., Garcia*, 918 F.3d at 1008; *Owens*, 244 F.3d at 713.
3 DSHS has not done so.

4 However, Mr. Kinnune bears the burden for his USERRA reemployment
5 claim and must demonstrate that he was denied the benefits and status of his
6 “escalator position.” *Belaustegui*, 36 F.4th at 923. To oppose Mr. Kinnune’s
7 reemployment claim, DSHS may argue and present evidence indicating that
8 Mr. Kinnune’s escalator position was the one he received. Much of this same
9 evidence would likely be presented as an “affirmative defense” to Mr. Kinnune’s
10 discrimination and retaliation claims. *Belaustegui*, 36 F.4th at 924.

11 The Court agrees that DSHS has not justified its failure to plead that it
12 “would have taken the same action without regard to [Mr. Kinnune’s] protected
13 status.” *Belaustegui*, 36 F.4th at 924. However, as a practical matter, argument
14 and evidence indicating that the changes in Mr. Kinnune’s employment would
15 have occurred due to operational changes at ESH remains relevant and admissible
16 in response to Mr. Kinnune’s reemployment claim.

17 Insofar as Mr. Kinnune seeks to preclude argument that any alleged adverse
18 employment actions would have occurred regardless of his military leave or status,
19 DSHS has not demonstrated a genuine intent to present such a line of argument,
20 and the Court considers the request moot.

1 **C. Liquidated Damages/Willfulness**

2 38 U.S.C. § 4323(d)(1)(C) provides for liquidated damages where a
3 USERRA violation was willful. A violation is willful “if the employer either knew
4 or showed reckless disregard for whether its conduct was prohibited by
5 [USERRA].” 20 C.F.R. § 1002.312; *see also Hazen Paper Co. v. Biggins*, 507
6 U.S. 604, 615 (1993) (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S.
7 111, 133 (1985)). “An intent to violate the statute is not necessary; but it is also
8 not sufficient that the employer simply knew of its potential applicability. . . .
9 Plaintiff has the burden of proving willfulness, which may be shown by
10 circumstantial evidence.” *Nevada*, 817 F. Supp. 2d at 1251 (citing *Trans World*
11 *Airlines*, 469 U.S. at 126-28, 126 n.19). There must be more than mere knowledge
12 of the potential applicability of the statute. *Paxton v. City of Montebello*, 712 F.
13 Supp. 2d 1017, 1021 (C.D. Cal. 2010).

14 DSHS argues that there is no evidence it acted willfully or with reckless
15 disregard, as it sought the advice of counsel when Mr. Kinnune mentioned
16 USERRA. ECF No. 43 at 20. Mr. Kinnune explains that DSHS has refused to
17 produce its communications with the Attorney General’s Office, asserting
18 privilege. ECF No. 58 at 20. Mr. Kinnune argues that DSHS may not abuse the
19 attorney-client privilege by pursuing an argument that is indisputable without
20 access to the privileged materials. ECF No. 58 at 20.

1 The Court agrees that “parties in litigation may not abuse the privilege by
2 asserting claims the opposing party cannot adequately dispute unless it has access
3 to the privileged materials.” *United States v. Sanmina Corp.*, 968 F.3d 1107, 1117
4 (9th Cir. 2020) (quoting *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir. 2003)).
5 As the record stands, DSHS shall not be permitted to argue to the fact finder that
6 its consultations with counsel evidence a lack of willfulness. DSHS may move for
7 reconsideration along with evidence demonstrating that it has disclosed sufficient
8 material for Mr. Kinnune to dispute the theory, or for a limited late disclosure of
9 relevant evidence to remedy the disparity, if it intends to pursue the theory.

10 More importantly for the purposes of summary judgment, even if DSHS
11 employees consulted with counsel about their USERRA obligations, the fact would
12 not be legally dispositive of the question of willfulness. DSHS cites to *Paxton* to
13 establish that it is entitled to summary judgment on willfulness. ECF No. 43 at 19-
14 20; ECF No. 62 at 9-10. In *Paxton*, the plaintiffs moved, upon a set of stipulated
15 facts, for an award of liquidated damages, which the Central District of California
16 denied. 712 F. Supp. 2d at 1018-21.

17 Here, there are many relevant facts in dispute, and it is DSHS’s burden to
18 demonstrate that it is entitled to judgment as a matter of law. A review of the
19 record indicates that DSHS has failed to do so. There remains little explanation for
20 DSHS’s departure from standard procedure related to the various investigations

1 involving Mr. Kinnune. *See* ECF No. 39-1 at 35-51, 111-16, 135-42; ECF No. 60.
2 DSHS employees expressed dissatisfaction with their obligation to rehire
3 Mr. Kinnune, and there is little explanation for why the circumstances of
4 Mr. Kinnune’s position changed upon his return from military service. ECF No.
5 39-2 at 25-28, 32; ECF No. 61 at 54-56. Here, as in *Nevada*, 817 F. Supp. 2d at
6 1250-51, and *Montoya*, 987 F. Supp. 2d at 1022, there are issues of fact that
7 preclude summary judgment on the question of willfulness. DSHS’s motion is
8 denied.

9 Accordingly, **IT IS HEREBY ORDERED:**

10 1. Mr. Kinnune’s Motion for Partial Summary Judgment, **ECF No. 38**, is
11 **GRANTED in part** and **DENIED in part**.

12 2. DSHS’s Motion for Summary Judgment, **ECF No. 43**, is **DENIED**.

13 **IT IS SO ORDERED.** The District Court Executive is directed to file this
14 order and provide copies to counsel.

15 **DATED** January 26, 2024.

16 *s/Mary K. Dimke*
17 MARY K. DIMKE
18 UNITED STATES DISTRICT JUDGE
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20