



## DISCLOSURE MATERIALS

Certified B Corporations must complete a Disclosure Questionnaire to identify potentially sensitive issues related to the company (e.g. historical fines, sanctions, material litigation, or sensitive industry practices).

This component does not affect the company's score on the B Impact Assessment. If the company answers affirmatively to any items in the Disclosure Questionnaire and B Lab deems them to be material, the company must:

- 1) Be transparent about the disclosure issues identified on the company's public B Impact Report
- 2) Describe how the company has addressed this issue.
- 3) Demonstrate that management systems are in place to avoid similar issues from arising in the future.

In all cases, the Standards Advisory council reserves the right to refuse certification if the company is ultimately deemed not to uphold the spirit of the community.

In addition to the voluntary indication of sensitive issues in the Disclosure Questionnaire, companies pursuing Certification also are subject to background checks by B Lab staff. Background checks include a review of public records, news sources, and search engines for company names, brands, executives/founders, and other relevant topics.

Sensitive issues identified through background checks may or may not be within the scope of questions in the Disclosure Questionnaire, but undergo the same review process and are subject to the same possible review by the Standards Advisory Council, including ineligibility for B Corp Certification, required remediation, or disclosure.

**This document contains a copy of the company's completed Disclosure Questionnaire and related disclosure documentation provided by the company.**



DISCLOSURE QUESTIONNAIRE

Company Name: Northwest Permanente

Date Submitted: 9/23/2016

Industries & Products	Yes	No
Please indicate if the company is involved in production of or trade in any the following (check all that apply.)		
Any product or activity deemed illegal under host country laws or regulations		√
Alcohol (excluding beer and wine)		√
Commercial logging and logging equipment		√
Firearms, weapons or munitions		√
Genetically modified organisms		√
Mining		√
Nuclear Power		√
Fossil fuel-based oil or coal utility		√
Pornography		√
Tobacco		√
Wildlife or wildlife products regulated under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)		√
Penalties, Fines & Sanctions	Yes	No
Please indicate if the company has had any formal complaint to a regulatory agency or been assessed any fine or sanction in the past five years for any of the following practices or policies (check all that apply.)		
Animal welfare		√
Diversity and equal opportunity		√
Employee safety or workplace conditions		√
Environmental issues		√
Financial reporting		√
Geographic operations or international affairs		√
Investments or Loans		√
Labor issues (internal and supply chain)	√	
Marketing	√	
Political contributions		√
Product safety		√
Taxes		√
Other Disclosures		√

Practices	True	False
Please indicate if the following statements are true regarding whether or not the company engages in the following practices (check all that apply.) If the statement is true, select "True." If false, select "False."		
Company is formally registered in accordance with domestic regulations	√	
Company has not reduced or minimized taxes through the use of corporate shells or structural means	√	
Company facilities are not located adjacent to or in sensitive ecosystems	√	
No animal testing conducted	√	
Company or company supplier does not employ workers under the age of 15 (or other minimum work age covered by the International Labour Organization Convention No. 138 )	√	
Overtime work for hourly workers is voluntary (not compulsory)	√	
Company or company suppliers do not use any workers who are prisoners	√	
Company allows workers to freely associate and to bargain collectively for the terms of one's employment	√	
Outcomes	True	False
Please indicate if the following statements are true regarding if the company has experienced any of the following in the past 5 years (check all that apply.) If the statement is true, select "True." If false, select "False."		
Company and Significant Suppliers has not had an operational or on-the-job fatality	√	
Company and Significant Suppliers' sites have not experienced any accidental discharges to air, land or water of hazardous substances	√	
No construction nor operation of company facilities and Significant Suppliers' facilities have resulted in the relocation of any individuals or households near your facility	√	
No material litigation against company	√	
No material recalls due to quality control issues	√	

## B Corp Certification - Disclosure Questionnaire Documentation

PROVIDED BY:	Northwest Permanente			
UPDATED AS OF:	09/23/2016			
CATEGORY [1]	LABOR			
ISSUE DATE [2]	2014			
ISSUE DESCRIPTION [3]	Lawsuits filed by employees alleging (a) whistleblower retaliation; (b) gender discrimination; and (c) wrongful discharge			
SUMMARY OF ISSUE [4]	Three separate lawsuits were filed between April and September 2014. All three were employment related lawsuits that included charges of whistleblower retaliation, gender discrimination, and wrongful discharge. They are all still pending, with resolutions expected in 2017. NW Permanente has also shared that the CEO who initiated the reforms that triggered the lawsuits voluntarily resigned in early 2015 and is therefore no longer in charge of the company.			
SIZE/SCOPE OF ISSUE (e.g. \$, # of individuals affected)	3 employees involved			
RESOLUTION [5]	TBD			
IMPLEMENTED MGT PRACTICES [6]	N/A			
REPORT [7]	See Attached			
OTHER MANAGEMENT COMMENTS [8]	N/A			
CATEGORY [9]	MKTG			
ISSUE DATE [10]	April, 2013			
ISSUE DESCRIPTION [11]	Class action suit regarding HIV testing			
SUMMARY OF ISSUE [12]	A class action suit regarding the practice of testing patients for HIV without notifying them was filed. The company instituted a new protocol and placed lab orders for members between the ages of 50 and 65 to receive Human Immunodeficiency Virus "HIV" screening as part of their routine care without providing them the option of "opting-out" of HIV testing.			
SIZE/SCOPE OF ISSUE (e.g. \$, # of individuals affected)	~2,000 class members submitted claims			
RESOLUTION [13]	Payments made to appropriate claimants			
IMPLEMENTED MGT PRACTICES [14]	Developed new policies that require all patients have to consent before they are tested.			
REPORT [15]	<a href="http://www.stollberne.com/ClassActionsBlog/2014/01/07/kaiser-permanente-sued-in-class-action-regarding-hiv-testing/">http://www.stollberne.com/ClassActionsBlog/2014/01/07/kaiser-permanente-sued-in-class-action-regarding-hiv-testing/</a>			
OTHER MANAGEMENT COMMENTS [16]	N/A			

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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

JENNIFER LYCETTE, M.D.,  
Plaintiff,  
v.  
NORTHWEST PERMANENTE, P.C., a  
professional corporation, and DOES Nos.  
1-15,  
Defendants.

No. 140405109

**NORTHWEST PERMANENTE, P.C.’S  
MOTION FOR SUMMARY  
JUDGMENT AND MEMORANDUM IN  
SUPPORT**

**Oral argument requested**

**Hearing before Hon. Leslie Roberts,  
September 30, 2016, 4:00 p.m., Rm. 216**

**STOEL RIVES LLP**  
760 SW Ninth Avenue, Suite 3000, Portland, OR 97205  
Main (503) 224-3380 Fax (503) 220-2480

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**UTCR 5.050 INFORMATION**

Northwest Permanente, P.C. (“Northwest Permanente”) requests oral argument with official court reporting services. Northwest Permanente estimates that oral argument will require 60 minutes.

**MOTION**

Pursuant to ORCP 47, Northwest Permanente moves for summary judgment dismissing each of plaintiff’s claims because each is unsupported by any admissible evidence. Based on plaintiff’s admissions, there are no genuine issues as to any material facts, and Northwest Permanente is entitled to judgment as a matter of law.

Motion 1: Plaintiff’s retaliation claim under ORS 659A.233 should be dismissed because: (1) she has no evidence that she suffered any adverse action or was constructively discharged; and (2) she has no evidence that she suffered any alleged adverse actions *because of* her alleged whistleblower activity.

Motion 2: Plaintiff’s retaliation claim under ORS 441.057 should be dismissed for the same reasons.

Motion 3: Plaintiff’s retaliation claim under ORS 659A.199 should be dismissed for the same reasons.

Motion 4: Plaintiff’s claims under ORS 659A.030 should be dismissed. Her gender discrimination claims should be dismissed because: (1) ORS 659A.030 does not authorize disparate impact claims; (2) plaintiff has no evidence that Northwest Permanente’s policies regarding scheduling had a disparate impact on women; and (3) to the extent plaintiff alleges disparate treatment, she has no evidence that she suffered any adverse action *because of* her gender. Her retaliation claim under ORS 659A.030 should be dismissed for the same reasons as her first, second, and third claims.

Motion 5: Plaintiff’s claim for common law wrongful discharge should be dismissed for the same reasons as her first, second, third, and fourth retaliation claims.



1 because plaintiff makes more in her current job than she did during her employment with  
2 Northwest Permanente.

## 3 II. UNDISPUTED MATERIAL FACTS<sup>1</sup>

4 Throughout this litigation, plaintiff has attempted to cloud the issues through vague  
5 allegations based on nothing more than speculation, assumption, and unsupported rumor,  
6 often referring to events that had nothing to do with her own employment. At bottom, this is  
7 a straightforward, single-plaintiff employment case in which only a few material facts are  
8 relevant and necessary for the Court to make a fully informed decision.

### 9 A. Key Undisputed Material Facts.

10 Although Northwest Permanente discusses some of plaintiff's broader allegations in  
11 more detail below, following is a summary of key facts necessary to resolve Northwest  
12 Permanente's motions:

- 13 • Plaintiff was hired by Northwest Permanente as an oncology doctor in 2006. (Pl.  
14 Dep. 110:4-10, Ex. 5.)<sup>2</sup>
- 15 • Plaintiff's employment contract provided that she would work as a full-time  
16 physician and that she would be permitted to work less than full-time only at  
17 Northwest Permanente's discretion. (See Pl. Dep. 122:18-23, Ex. 8, ¶ 2, 138:25-  
18 140:10, Ex. 12, ¶ 2.) "Full-time" was 36 hours per week, which normally consisted  
19 of four nine-hour days. (Pl. Dep. 75:14-21.)
- 20 • Beginning in 2010, plaintiff was allowed to switch to a .89 "FTE" (or "full-time  
21 equivalent"). (Pl. Dep. 110:4-23.) She worked 3.5 days a week instead of four days a  
22 week. (*Id.*; see also Pl. Dep. 75:14-21.)

23 \_\_\_\_\_  
24 <sup>1</sup> For purposes of this motion, Northwest Permanente presents the facts in the light  
25 most favorable to plaintiff. If any of plaintiff's claims survive, Northwest Permanente  
reserves the right to dispute the facts at trial.

26 <sup>2</sup> Excerpts and exhibits from plaintiff's deposition are attached as Exhibit 1 to the  
Thompson Declaration.

- 1 • In the Oncology Department, physicians normally were responsible for a panel of  
2 patients assigned to them for treatment. (*See* Pl. Dep. 90:7-91:1.)
- 3 • On January 1, 2012, Dr. Weisz joined Northwest Permanente as its Executive  
4 Medical Director. (Weisz Dep. 19:11-19.)<sup>3</sup> The Northwest Permanente physician  
5 shareholders elected him to that position. (*See* Pl. Dep. 222:10-13.)
- 6 • The Oncology Department’s patient satisfaction scores, which included patients’  
7 satisfaction with their access to physicians, were very low. (*See* Pl. Dep. 256:18-  
8 257:20, Ex. 35.) Dr. Weisz told the Oncology Department that its focus needed to be  
9 patient-centered, and not physician-centered. (*See id.*; *see also* Pl. Dep. 201:22-  
10 203:4.)
- 11 • In November 2012, as part of the effort to increase patient satisfaction, Dr. Weisz  
12 announced a plan to require all oncology doctors either to work a full-time schedule  
13 to serve their patient panels (*i.e.*, a “1.0 FTE”) or split a 1.0 FTE and share a patient  
14 panel with another physician, effective February 2013. (Pl. Dep. 91:2-14, 236:7-20,  
15 Ex. 33, 242:18-20, 244:1-19, 250:19-252:11; Weisz Dep. 165:23-166:17.)
- 16 • Plaintiff discussed splitting a 1.0 FTE position with two other oncologists with  
17 reduced schedules, Dr. Phoebe Trubowitz and Dr. Kathleen Kemmer. (Pl. Dep.  
18 89:20-91:14, 247:7-250:12, Ex. 34.) Plaintiff was unwilling, however, to reduce her  
19 .89 FTE schedule below a .6 FTE, even though Dr. Kemmer had offered to split a 1.0  
20 FTE with her so they could do an equal job share, with each working .5 FTE. (*See* Pl.  
21 Dep. 90:7-91:1, 247:7-250:12, Ex. 34.) In February 2013, plaintiff resumed a 1.0  
22 FTE schedule. (Pl. Dep. 262:19-263:11, Ex. 37.) Her full-time annual salary was  
23 increased from \$328,800 to \$337,200. (Pl. Dep. 88:25-89:9, Ex. 2 at 3-4.)
- 24

25 \_\_\_\_\_  
26 <sup>3</sup> Excerpts from Dr. Weisz’s deposition are attached as Exhibit 2 to the Thompson Declaration.

- 1 • During her employment, plaintiff alleges that Northwest Permanente employees  
2 retaliated against her in the following ways:
- 3 ○ Dr. Weisz allegedly yelled at her during a 2012 departmental meeting (Pl.  
4 Dep. 40:10-42:8), decided to restrict physicians’ schedules (*id.*), denied her  
5 requests for external referrals of patients (Pl. Dep. 42:9-25), and engaged in  
6 miscellaneous other conduct, none of which rises to the level of an adverse  
7 action.
- 8 ○ Dr. Antoniskis suggested that plaintiff “needed to go see \* \* \* physician  
9 counseling.” (Pl. Dep. 46:22-49:10.) Dr. Antoniskis also refused to enter into  
10 a written agreement that that would have exempted plaintiff from the Board of  
11 Directors’ future decisions regarding physicians’ work schedules. (Pl. Dep.  
12 72:21-74:15.)
- 13 ○ Dr. Deming allegedly told plaintiff that she was “unengaged.” (Pl. Dep.  
14 50:22-52:8, 57:7-58:7, 60:2-14), “slammed the door” of plaintiff’s office (Pl.  
15 Dep. 49:11-23), and assigned her to work over a holiday weekend—but then  
16 took plaintiff off the schedule (Pl. Dep. 227:11-228:5, 370:21-23).
- 17 ○ Ms. Waind was merely present during meetings with Dr. Weisz and Dr.  
18 Deming. (Pl. Dep. 60:15-19, 61:24-63:2, 65:1-66:5.)
- 19 • On April 24, 2014, plaintiff gave notice of her resignation. (Pl. Dep. 313:20-315:7,  
20 Ex. 58.) She voluntarily resigned her employment with Northwest Permanente in  
21 July 2013 to take a new job with OHSU in Astoria, where she works part-time and  
22 makes more money than she did at Northwest Permanente. (*See* Pl. Dep. 12:14-20,  
23 13:17-15:1, 16:13-22.)
- 24 Based on those key facts, and as discussed further below, each of plaintiff’s claims fail as a  
25 matter of both law and undisputed fact.
- 26

1 **B. Factual Background.**

2 **1. Plaintiff Was Hired as a Full-Time Oncologist in 2006.**

3 Northwest Permanente hired plaintiff as an oncologist in 2006. (Pl. Dep. 110:4-10,  
4 Ex. 5.) Her initial employment contract with Northwest Permanente required her to work a  
5 full-time schedule, as defined by Northwest Permanente, unless Northwest Permanente, in its  
6 sole discretion, approved a lesser schedule. (Pl. Dep. 122:18-23, Ex. 8, ¶ 2.) In 2009,  
7 plaintiff became a Senior Physician; she entered into a new employment contract with the  
8 same provisions regarding her obligation to work full-time. (Pl. Dep. 138:25-140:10, Ex. 12,  
9 ¶ 2.) Both contracts also gave Northwest Permanente discretion to assign plaintiff’s duties,  
10 including where and when she worked. (*See id.*; Pl. Dep. 122:18-23, Ex. 8, ¶ 2.)

11 **2. Plaintiff Was Allowed to Reduce Her Schedule to a .89 FTE in 2010.**

12 In 2010, plaintiff negotiated with a male doctor to increase his schedule to full-time  
13 so she could reduce her schedule to spend more time with her family, which Northwest  
14 Permanente approved. (Pl. Dep. 110:11-111:8.) At this time, plaintiff’s supervisor was the  
15 Chief of the Oncology Department, Dr. Nagendra Tirumali. (*See* Pl. Dep. 80:1-4.)

16 **3. The Oncology Department Revised Its External Referral Process.**

17 Northwest Permanente physicians have a contractual obligation to provide medical  
18 care to members of the Kaiser Foundation Health Plan of the Northwest (the “Northwest  
19 Health Plan”). (*See* Odell Dep. 16:4-10.)<sup>4</sup> Under limited circumstances, a Northwest  
20 Permanente physician will refer a patient to a doctor not employed by Northwest  
21 Permanente. (*See* Odell Dep. 45:15-47:8.) The request for such an “external referral” is  
22 reviewed by other physicians at Northwest Permanente before it is granted to ensure that the  
23 request is, in fact, medically necessary and allowed under the patient’s contractual rights for  
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25 \_\_\_\_\_  
26 <sup>4</sup> Excerpts from Richard Odell’s deposition are attached as Exhibit 4 to the Thompson Declaration.

1 health care. (*See* Pl. Dep. 150:24-152:4.) If the request is granted, the outside physician is  
2 paid for his or her services. (*See* Odell Dep. 47:14-18.)

3 In 2010, Dr. Tirumali assigned Dr. Mark Rarick, an oncologist in plaintiff's  
4 department, the task of reviewing requests for external referrals for oncology patients. (*See*  
5 Pl. Dep. 143:4-144:8.) Dr. Rarick and the entire Oncology Department developed new forms  
6 and internal processes to streamline the external referral process in the Oncology Department  
7 and to provide consistent application of external referral criteria. (*Id.*; *see also* Pl. Dep.  
8 150:24-152:4.)

9 Plaintiff disagreed with a "single reviewer" model and expressed her disagreement  
10 with the new referral process and "ongoing problems" in the Oncology Department in March  
11 2011, well before Dr. Weisz was elected. (*See* Pl. Dep. 145:18-147:5, 149:13-150:14.)

12 **4. Dr. Weisz Joined Northwest Permanente in January 2012.**

13 Dr. Weisz joined Northwest Permanente as its new Executive Medical Director in  
14 January 2012. (Weisz Dep. 19:11-19.) He was charged with improving Northwest  
15 Permanente's operations to better serve patients. (Pl. Dep. 222:10-21.) As part of his overall  
16 review of how the organization was functioning, he examined the organization as a whole,  
17 focusing on each medical department, including the Oncology Department. He appointed  
18 Dr. Antoniskis as Director of Operations for Medical Specialties. (Antoniskis Dep. 21:25-  
19 22:12.)<sup>5</sup>

20 Dr. Weisz reviewed patient satisfaction surveys, or "Press Ganey scores," across all  
21 departments. (*See* Weisz Dep. 107:16-108:16.) The Oncology Department, in which  
22 plaintiff worked, had dismal patient satisfaction scores, and patient wait times to see their  
23 doctors were unacceptable to him. (*Id.*) As an oncologist himself, Dr. Weisz was committed

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26 <sup>5</sup> Excerpts and exhibits from Dr. Antoniskis' deposition are attached as Exhibit 3 to  
the Thompson Declaration.

1 to improving the Oncology Department, which was dysfunctional, non-collaborative, and  
2 physician-focused instead of patient-focused. (Pl. Dep. 169:10-13, 201:6-203:25, 223:1-17.)

3 Dr. Weisz also put increased focus on consistent and appropriate review of requests  
4 for external referrals from the various medical departments. His goal was for Northwest  
5 Permanente to provide as many medical services as possible with its own physicians, and to  
6 control the associated costs of care. (Pl. Dep. 101:11-103:14; Weisz Dep. 171:12-173:6.)

7 **5. The Salem Oncology Clinic Opened in July 2012.**

8 When Dr. Weisz joined the organization, Northwest Permanente treated Northwest  
9 Health Plan patients in Salem; however, there was no oncology clinic there, so cancer  
10 patients in the Salem service area were referred externally to non-Northwest Permanente  
11 physicians in that community. (See Second Am. Compl., ¶ 13; Weisz Dep. 171:12-173:6.)  
12 There were discussions about opening a Salem clinic for years before Dr. Weisz joined  
13 Northwest Permanente. (Pl. Dep. 174:4-13.) As part of his effort to better improve patient  
14 care in that community, Dr. Weisz committed to opening an oncology clinic in Salem by July  
15 2012. (See Pl. Dep. 105:1-16, 106:4-6.) Efforts to open and staff the new clinic started  
16 immediately. (See Pl. Dep. 105:12-16.)

17 Plaintiff and others in the Oncology Department expressed concern about staffing and  
18 coverage for the new clinic. On April 12, 2012, plaintiff sent an email to Dr. Tirumali  
19 expressing this concern. (Pl. Dep. 182:5-183:4, Ex. 25, 184:9-16.) Dr. Tirumali responded  
20 by indicating that plaintiff’s characterizations were not accurate, but that he understood she  
21 was “emotional” about the issue; he offered to discuss the issue further with her. (Pl. Dep.  
22 182:5-183:4, Ex. 25.) Plaintiff asked Dr. Tirumali whether he would have written the same  
23 email to a man, and Dr. Tirumali apologized. (Pl. Dep. 185:1-15.) The email was never  
24 discussed again, and plaintiff made no complaint to anyone about Dr. Tirumali’s stray

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1 comment. (Pl. Dep. 100:1-21.) Plaintiff does not identify Dr. Tirumali as one of the  
2 “wrongdoers” in her lawsuit.<sup>6</sup> (See Pl. Dep. 39:25-40:9.)

3 The Salem Oncology clinic opened on July 2, 2012. After its opening, plaintiff was  
4 never assigned to work in Salem, and despite her concern about “understaffing” during this  
5 period of transition, she never volunteered to increase her hours as Northwest Permanente  
6 continued its search to hire new doctors for the clinic. (Pl. Dep. 108:14-110:3, 184:5-8.)

7 In the late fall of 2012, Dr. Tirumali stepped down as the Chief of the Oncology  
8 Department. Dr. Weisz stepped in as Interim Chief of the Department in approximately  
9 November 2012. (See Weisz Dep. 152:17-153:10.)

10 **6. Plaintiff Had an Oral Dispute with Dr. Weisz During a November 2012**  
11 **Oncology Department Meeting.**

12 On November 14, 2012, plaintiff attended an oncology physician meeting led by Dr.  
13 Weisz. A number of issues were discussed, including ways to improve patient access to  
14 oncology physicians. (Pl. Dep. 236:7-237:8, Ex. 33.) As part of that discussion, Dr. Weisz  
15 suggested a number of ways that the Oncology Department could be more efficient,  
16 including that physicians could combine consultation appointments with bone marrow biopsy  
17 procedures into one appointment. (See Pl. Dep. 237:25-238:14, 242:18-244:6.) Plaintiff  
18 voiced her disagreement, at one point telling Dr. Weisz that he had not practiced oncology  
19 for years and did not know what he was talking about. (Pl. Dep. 217:2-218:20.) For a  
20 minute at most, Dr. Weisz raised his voice in response.<sup>7</sup> (Pl. Dep. 237:25-239:21.)

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23 <sup>6</sup> Around that same time, plaintiff also drafted a “Statement of Concern” regarding the  
24 opening of the Salem Clinic. Although the draft is mentioned in her complaint (Second Am.  
25 Compl., ¶ 16), she admitted in her deposition that she never shared the statement with Dr.  
Weisz and did not deliver the statement to any other supervisor or manager within Northwest  
Permanente. (Pl. Dep. 189:13-193:7, 439:14-21.)

26 <sup>7</sup> After this meeting, none of the oncologists in the department, including plaintiff,  
changed the way they previously ordered bone marrow biopsies. (Pl. Dep. 246:4-17.)

1 During the meeting, Dr. Weisz also announced that he wanted all patients to have  
2 access to their assigned physician at least four days a week. (*See* Pl. Dep. 247:7-250:12, Ex.  
3 34.) To achieve that goal, oncology physicians had to work full-time, or share a patient panel  
4 with two reduced schedules that added up to a 1.0 FTE. (Pl. Dep. 244:1-19, 250:19-252:11;  
5 Weisz Dep. 165:23-166:17; Antoniskis Dep. 199:24-201:11.) His articulated goal in doing  
6 so was to address patient satisfaction scores. (*See* Pl. Dep. 250:19-252:11.) At the time,  
7 there were nine oncologists in the department: five men and four women. (*See* Pl. Dep.  
8 77:9-13, 142:12-19.) Three women worked less than a 1.0 FTE at that time: plaintiff  
9 worked a .89 FTE, Dr. Trubowitz worked a .88 FTE, and Dr. Kemmer worked a .88. FTE.  
10 (Pl. Dep. 142:12-19; Antoniskis Dep. 197:17-198:12, Ex. 39.)

11 After the November 14, 2012 meeting, plaintiff never had another face-to-face  
12 interaction with Dr. Weisz again. (Pl. Dep. 43:1-12.) Other than a single email, plaintiff  
13 cannot identify any other direct communication that she had with Dr. Weisz after that  
14 meeting. (*See* Pl. Dep. 486:1-487:7.)

15 **7. Plaintiff Rejected the Option of Job-Sharing.**

16 Following the November 12 meeting, Dr. Kemmer approached plaintiff about job-  
17 sharing with her. Dr. Kemmer offered to work a .5 FTE and share a patient panel with  
18 plaintiff. Although plaintiff was willing to reduce her schedule from a .89 to a .6 FTE, she  
19 was unwilling to equally split a 1.0 FTE with Dr. Kemmer. (Pl. Dep. 247:7-252:11, Ex. 34.)  
20 As a result, Dr. Kemmer gave a 90-day notice of resignation. (*See id.*) Plaintiff also asked  
21 Dr. Trubowitz about a potential job-share; Dr. Trubowitz responded that she was unable to  
22 work a .5 FTE. (Pl. Dep. 89:20-90:6.)

23 **8. Dr. Weisz Explained His Rationale for the Scheduling Changes—to**  
24 **Increase the Quality of Patient Care and Access.**

25 On December 3, 2012, plaintiff asked Dr. Weisz by email when her schedule would  
26 be transitioned back to a 1.0 FTE, expressed her opinion about Dr. Kemmer's resignation as

1 a result of her unwillingness to equally split a 1.0 FTE, and asked that she be allowed to  
2 remain at .89 FTE, working only 3.5 days per week. (Pl. Dep. 253:21-254:13, Ex. 35 at 2,  
3 see Pl. Dep. 244:20-245:11.) Plaintiff copied the entire Oncology Department and Northwest  
4 Permanente’s Board of Directors; her email made no mention of discrimination. (*See id.*)

5 Dr. Weisz responded, copying the Chair of the Board of Directors, reiterating what he  
6 had been discussing with the Oncology Department for months: “The care experience is  
7 essential to providing an optimum experience for every patient and it is a foundational  
8 element of excellent physician practice. \* \* \* Not being in the clinic to care for your patients  
9 leads to fragmented care. In your absence, your patients either see another physician or  
10 clinician, or have to wait for their needs to be met, which is not acceptable. When we really  
11 look at what our patients are telling us in the form of direct feedback or objective survey  
12 information, it is clear that we have a challenge ahead of us.” (*Id.*)

13 Dr. Weisz included the results of recent oncology patient survey scores and noted that  
14 “[o]ur medical Oncology patients rate ‘physicians concerns for questions or worries’ at <40th  
15 percentile nationally, ‘ability to get desired appointment’ around the 10th percentile and  
16 ‘sensitivity to our patient needs’ at <10th percentile.” (*Id.*) Dr. Weisz also informed plaintiff  
17 that her transition from a 3.5-day workweek to a four-day, 1.0 FTE schedule would be  
18 effective February 1, 2013. (*Id.*)

19 **9. Plaintiff Expressed an Interest in Moving to the New Westside Medical**  
20 **Center in Hillsboro.**

21 In 2013, Northwest Permanente was scheduled to start providing medical services to  
22 Northwest Health Plan members in a new facility in Hillsboro, Oregon—the Westside  
23 Medical Center (“Westside”). In mid-December 2012, plaintiff expressed an interest in  
24 moving to the new facility. (Pl. Dep. 266:1-4.)

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1           **10. Dr. Deming Became Chief of the Oncology Department in January 2013.**

2           In 2013, Dr. Katie Deming was appointed the new Chief of the Oncology  
3 Department. (Pl. Dep. 80:1-4.) Dr. Deming continued discussions within the Oncology  
4 Department about which physicians would be interested in moving to Westside. (Pl. Dep.  
5 275:1-9.)

6           **11. In February 2013, Plaintiff Started Discussions with OHSU About**  
7           **Moving to Its Astoria Practice.**

8           By early February 2013, plaintiff was again actively looking for new work. On  
9 February 5, she reached out to an OHSU contact she heard about in November 2012, as well  
10 as a headhunter, to inquire about an OHSU position in Astoria. (See Pl. Dep. 276:10-278:1,  
11 Ex. 40 at 1, 41, 42.)

12           **12. Plaintiff Volunteered to Move to Westside Under Certain Conditions,**  
13           **While Planning to Leave Northwest Permanente.**

14           In early March 2013, Dr. Deming reached out to plaintiff and another oncologist, Dr.  
15 Sandeep Mashru, about their interest in moving to Westside. Dr. Deming explained that if  
16 she did not get volunteers, she would make the necessary reassignments to cover patient  
17 staffing needs for oncology. (See Pl. Dep. 278:20-280:1, Ex. 44.) Plaintiff indicated that she  
18 would be willing to move to Westside. (See *id.*)

19           By early April, plaintiff was arranging interviews with OHSU. (Pl. Dep. 281:17-23,  
20 Ex 46.) Yet, on April 12, 2013, less than two weeks before Dr. Deming had to finalize  
21 staffing at Westside, plaintiff again told Dr. Deming that she was interested in moving to  
22 Westside under certain conditions: (1) a guaranteed start time of 9:00 a.m. with a particular  
23 schedule for rounding, (2) a guarantee that a second oncologist would be hired to  
24 accommodate other scheduling needs, (3) that she not be required to do a rotation at the  
25 Sunnyside hospital, and (4) “a consensus from the group how my vacation time will be  
26 covered.” (Pl. Dep. 281:24-283:7, Ex. 47.)

1 Dr. Deming tried to see if plaintiff’s demands were workable. Dr. Deming consulted  
2 with Dr. Antoniskis, who agreed that a 9:00 a.m. start time for plaintiff would be feasible,  
3 and that once a second oncologist was hired, they could stagger plaintiff’s schedule. (See Pl.  
4 Dep. 296:21-297:11, Ex. 52.) As plaintiff admits, Dr. Deming again told plaintiff that she  
5 was “committed to making the schedule work for [plaintiff] and [her] family.” (Pl. Dep.  
6 281:24-283:7, Ex. 47 at 3.)

7 Four days later, on April 16, 2013, plaintiff visited Astoria, where the OHSU position  
8 she applied for was located, and reached out to Dr. Kemmer about how to submit her  
9 resignation to Northwest Permanente. (Pl. Dep. 282:12-15, 289:22-290:11, Ex. 50.)

10 On April 21, the day before Dr. Deming had to finalize the Westside coverage  
11 assignments, plaintiff confided in another oncologist that she was concerned Dr. Deming was  
12 going to demand an answer from her about moving to the new facility. She was advised to  
13 just say no, or to:

14 “say yes and ‘string [Dr. Deming] along, buying time with the  
15 fact that you must have certain things in writing to even  
16 consider moving ahead. This just puts it back on them and puts  
17 them more in a corner, making things even harder when you  
18 then definitely say no as I do not expect they have a backup  
19 plan. Mischievous thinking from me ;) but well can’t help but  
20 smile from where I sit.”

21 (Pl. Dep. 290:21-292:11, Ex. 51.) The next day, on April 22, plaintiff did just that—she  
22 stalled. She told Dr. Deming that Northwest Permanente would have to agree in writing and  
23 modify her employment contract to include her demands or she would not move to Westside.  
24 (See Pl. Dep. 298:21-299:22, Ex. 52.) That is the same day that plaintiff alleges Dr. Deming  
25 told her she was “unengaged.” (Second Am. Compl., ¶ 25; Pl. Dep. 297:12-298:16.)

26 That evening, plaintiff confided in Dr. Kemmer and others that she was just waiting  
27 for a job offer from OHSU so she could resign. (Pl. Dep. 303:2-21, Ex. 54, 305:1-306:24,  
28 Ex. 56 at 2.)

1           **13. On April 24, 2013, Plaintiff Submitted Her 90-Day Notice of Resignation**  
2           **After Receiving a Job Offer from OHSU.**

3           On the afternoon of April 23, OHSU extended plaintiff a job offer and told her that  
4 she would receive a formal offer letter the following week. (Pl. Dep. 303:22-304:25, Ex. 55.)  
5 On or about the same day, plaintiff met with an employment attorney, who advised plaintiff  
6 that she did not have evidence to support a discrimination claim and she should submit her  
7 resignation. (Pl. Dep. 305:24-306:16, Ex. 56.) The next day, plaintiff submitted her 90-day  
8 notice of resignation to Dr. Deming. (Pl. Dep. 313:20-315:7, Ex. 58.)

9           **14. After She Submitted Her Resignation, Plaintiff Complained That Dr.**  
10           **Deming Asked Her to Work a Fourth of July Weekend.**

11           Plaintiff worked for the next three months. On May 23, Dr. Deming asked plaintiff to  
12 provide coverage at the Sunnyside Medical Center from June 29 through July 5 because the  
13 physician assigned to work was on medical leave. (Pl. Dep. 360:18-361:9, Ex. 70.) In  
14 response, plaintiff stated she would go to Human Resources and Northwest Permanente's  
15 Board of Directors if she was not taken off the schedule because she had already worked a  
16 holiday weekend that year. (*See id.*) Physicians receive extra compensation for the time they  
17 spend providing call coverage. (*See* Pl. Dep. 77:19-22.)

18           Dr. Deming explained that she did not realize plaintiff had just worked a holiday  
19 weekend and was only trying to cover a shift, without any ulterior motive. (Pl. Dep. 360:18-  
20 361:9, Ex. 70.) Plaintiff reached out to Dr. Rasjad Lints, who handled Human Resources  
21 issues, and told him she wanted to make a formal complaint that Dr. Deming was retaliating  
22 against her for resigning by assigning her to work a holiday weekend. (Pl. Dep. 369:10-  
23 370:23.) Dr. Lints confirmed that Dr. Deming had discretion to set the schedule. (Pl. Dep.  
24 381:1-383:19.) Nonetheless, Dr. Deming withdrew her request for plaintiff to provide the  
25 coverage and the patient care was provided by other physicians in the department. (*See id.*,  
26 Pl. Dep. 370:21-23.)



1 *Settlemer*, 318 Or 196, 203, 864 P2d 372 (1993) (“The court must view the *admissible*  
2 evidence that is in the record in the light most favorable to the nonmoving party \* \* \*.”  
3 (emphasis added)).

4 If a non-moving party cannot meet her burden to show that genuine issues of fact  
5 exist, the Court shall grant summary judgment. ORCP 47. Plaintiff cannot meet that burden.

6 **B. Each One of Plaintiff’s Claims Fails Because She Suffered No Adverse Action.**

7 Each of plaintiff’s claims requires her to show that she suffered an adverse  
8 employment action. *See Steele v. Mayoral*, 231 Or App 603, 616, 220 P3d 761 (2009) (citing  
9 *Somoza v. University of Denver*, 513 F3d 1206, 1212 (10th Cir 2008)). For the purposes of a  
10 retaliation claim, an adverse employment action is an action that “‘might have dissuaded a  
11 reasonable worker from making or supporting a charge of discrimination.’” *Id.* at 616  
12 (quoting *Burlington N. & S.F.R. Co. v. White*, 548 US 53, 67-68, 126 S Ct 2405, 165 L Ed 2d  
13 345 (2006)). For the purposes of a discrimination claim, “[a]dverse employment actions  
14 include ‘actions that materially affect[] compensation, terms, conditions, or privileges’ of  
15 employment.” *James v. C-Tran*, 130 F App’x 156, 157 (9th Cir 2005) (second brackets in  
16 original) (quoting *Little v. Windermere Relocation, Inc.*, 301 F3d 958, 970 (9th Cir 2002)).

17 Plaintiff cannot show she suffered any actionable adverse employment action because  
18 none of the incidents that she alleges occurred during her employment amount to a legally  
19 cognizable alteration of her employment’s terms or conditions. She admits that she was  
20 never disciplined, counseled, or criticized regarding her patient care:

21 Q. \* \* \* [I]t’s true that you were never  
22 disciplined while you worked at Northwest Perm, were you?

23 A. Correct.

24 \* \* \* \* \*

25 Q. You were never coached or counseled about any  
performance issues, were you?

26 A. No.

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Q. And did anyone criticize your delivery of patient care?

A. Not that I can recall.

(Pl. Dep. 83:16-84:7.) Nor does her voluntary resignation to take a better-paying job qualify as an adverse action; for it to do so, plaintiff would need to establish that she was constructively discharged. She has no evidence to support such a claim. For those reasons, each of plaintiff’s claims fail as a matter of law.

**1. None of the Incidents That Occurred During Plaintiff’s Employment Qualify as Adverse Actions.**

Under either the retaliation or the discrimination standard, none of the incidents that plaintiff alleges from during her employment with Northwest Permanente qualify as adverse actions. Specifically:

- Plaintiff alleges that she was yelled at once for less than a minute by Dr. Weisz after she in essence told him that he was incompetent. (See Pl. Dep. 40:10-42:8, 237:25-239:21.) As a matter of law, that confrontation does not constitute adverse action. “Conduct such as unruly behavior during a meeting, derogatory e-mails, or an angry outburst and ostracism do not rise to th[e] level” of a “materially adverse action.” *Steele*, 231 Or App at 618 (citing *Somoza*, 513 F3d at 1214-15, 1217-18)); *Wood v. GCC Bend, LLC*, 270 F App’x 484, 486 (9th Cir 2008) (a supervisor’s “embarrassment of [an employee] in the workplace is not a change in the terms and conditions of employment under Oregon law” (citing *Doe v. Denny’s*, 327 Or 354, 359, 963 P2d 650 (1998))). Moreover, plaintiff admitted that the confrontation was an isolated incident, *i.e.*, that she had no further face-to-face interactions with Dr. Weisz following the meeting. (Pl. Dep. 43:1-12.)
- Plaintiff argues that the changes to physicians’ schedules also were retaliatory. (See Pl. Dep. 40:10-42:8.) However, plaintiff admits Northwest Permanente was well

1 within its contractual rights to define her work schedule and that she was hired to  
2 work full-time. (See Pl. Dep. 122:18-23, Ex. 8, ¶ 2, 138:25-140:10, Ex. 12, ¶ 2.)  
3 Exercising a contractual right is not an adverse action. And, as plaintiff admitted, she  
4 was not precluded from working a reduced schedule altogether; she just was not  
5 allowed to work the particular schedule she preferred:

6 Q. But you weren't willing to go down -- you were  
7 willing to -- and I'm having trouble with the logic,  
8 because you were willing to go to a .6, but not to a .5; at  
9 least that's what Dr. Kemmer told Dr. Antoniskis and  
10 Dr. Weisz with a copy to you.

11 Did you -- let me ask this. Did you send any  
12 e-mail to Dr. Antoniskis or Dr. Weisz saying no, no, no,  
13 that's not correct?

14 Did you make any effort to correct any of the  
15 information that Dr. Kemmer gave to them?

16 A. No, because she said .6 here.

17 Q. And she said that you wanted to do a .6?

18 A. Yes.

19 Q. That you were willing to do a .6?

20 So you were willing to do a .6, you were  
21 willing to do a .89, but you were not willing to do a .5,  
22 correct?

23 A. I was concerned that with the number of  
24 doctors in the department and no new-hires, that even  
25 though the job hours or FTE would be .5, that that would  
26 leave a lot of patients not cared for, so I didn't --

Q. Regardless -- regardless of your -- but you  
were willing to do a .6?

A. I was willing to consider a .6.

Q. But not a .5, right?

A. Correct.

(Pl. Dep. 249:12-250:12.) The fact that plaintiff was not able to work a *particular*  
schedule does not rise to the level of an adverse action. See *Smith-Barrett v. Potter*,  
541 F Supp 2d 535, 542 (WDNY 2008) (rejecting retaliation claim based on changes

1 to a plaintiff’s schedule partly because the “plaintiff’s status as a part-time flexible  
2 employee did not entitle her to any more hours than she was assigned, or to work a  
3 particular schedule”).

- 4 • Plaintiff also alleges that Dr. Weisz retaliated against her by denying her external  
5 referrals.<sup>8</sup> (See Pl. Dep. 42:9-25.) That was not an adverse action because it had no  
6 effect on *plaintiff’s* employment. Cf. *McGrath v. Nevada Dep’t of Pub. Safety*, No.  
7 3:07-CV-00292-LRH-VPC, 2009 WL 875508 at \*4 (D Nev Mar. 27, 2009) (holding  
8 that “a standard evaluation [that] would have no effect on any term of [a plaintiff’s]  
9 employment” was not an adverse action), *aff’d*, 373 F App’x 767 (9th Cir 2010).
- 10 • Plaintiff also raised a number of other unsupported allegations during her deposition  
11 regarding Dr. Weisz’s allegedly retaliatory behavior, most of which are based on pure  
12 speculation, and none of which is sufficient to show an adverse action. See generally  
13 *Steele*, 231 Or App at 618 (citing *Somoza*, 513 F3d at 1214-15, 1217-18). Plaintiff’s  
14 other insufficient allegations regarding Dr. Weisz include the following:
  - 15 ○ Dr. Weisz “threatened people.” (See Pl. Dep. 41:24-42:25.)
  - 16 ○ Dr. Weisz incorrectly “blamed three women in the department for poor  
17 performance scores for the entire department.” (See *id.*)
  - 18 ○ Dr. Weisz “flagged emails” and “kept files” on certain physicians.<sup>9</sup> (See *id.*; see  
19 also Pl. Dep. 45:20-46:21.)
- 20 • Dr. Antoniskis at one point allegedly suggested that plaintiff “needed to go see \* \* \*  
21 physician counseling.” (Pl. Dep. 46:22-49:10.) That suggestion, which was made in

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22 <sup>8</sup> This allegation is incorrect. Dr. Weisz was not reviewing external referrals; rather,  
23 Northwest Permanente was examining referrals across all departments, and Dr. Rarick was  
reviewing oncology referrals. (See Pl. Dep. 143:4-144:8.)

24 <sup>9</sup> Plaintiff may not rely on this allegation to support her retaliation or discrimination  
25 claims for two reasons: (1) she admitted that her speculative allegation arose only after her  
26 lawsuit was filed and she reviewed documents produced in discovery and (2) she bases this  
unfounded allegation on inadmissible hearsay statements from a colleague. (Pl. Dep. 440:13-  
441:15.) See also OEC 801-802.

1 the context of plaintiff complaining about her work-life balance, was not an adverse  
2 action. *See Pedicini v. United States*, 480 F Supp 2d 438, 455 (D Mass 2007) (“[A]  
3 supervisor’s suggestion that Plaintiff seek counseling [is not] a materially adverse  
4 action.”).

- 5 • Dr. Antoniskis declined to enter into a written agreement that would have exempted  
6 plaintiff from the Board of Directors’ future decisions regarding physicians’ work  
7 schedules. (Pl. Dep. 72:21-74:15.) That decision was not an adverse action; as  
8 plaintiff herself admitted, her request to be exempted from future scheduling changes  
9 would have given her a *unique* benefit among Northwest Permanente’s 1,200  
10 physicians. (*See* Pl. Dep. 74:2-9.) *See also Roth v. Maricopa Cty.*, No. CV-09-0355-  
11 PHX-FJM, 2010 WL 3081468 at \*3 (D Ariz Aug. 4, 2010) (“Plaintiff cannot prove  
12 [that his employer’s] failure to extend special treatment or defy office policy in order  
13 to prevent plaintiff from voluntarily resigning is based on retaliatory motive or likely  
14 to deter protected action.”), *aff’d*, 461 F App’x 589 (9th Cir 2011).
- 15 • None of the comments or requests plaintiff attributed to Dr. Deming rise to the level  
16 of an adverse action. *See Steele*, 231 Or App at 618 (citing *Somoza*, 513 F3d at 1214-  
17 15, 1217-18). Specifically:
  - 18 ○ Dr. Deming allegedly told plaintiff that she was “unengaged.” (*See* Pl. Dep.  
19 49:11-52:8, 57:7-58:7, 60:2-14.) This comment was made while plaintiff was  
20 actively engaged in looking for new employment. (*See* Pl. Dep. 290:21-292:11,  
21 Ex. 51.)
  - 22 ○ Dr. Deming acted “hostile” toward plaintiff after plaintiff indicated that she would  
23 not move to Westside, and at one point “slammed [a] door.” (*See* Pl. Dep. 49:11-  
24 23.)
  - 25 ○ Dr. Deming initially assigned plaintiff to be on call over the Fourth of July  
26 weekend, and then removed the assignment. (Pl. Dep. 227:11-228:5, 369:10-

1 370:23.) Plaintiff’s written employment contract permitted Northwest  
2 Permanente to set her schedule. (See Pl. Dep. 122:18-23, Ex. 8, ¶ 2, 138:25-  
3 140:10, Ex. 12. ¶ 2.) When plaintiff informed Dr. Rasjad (who handled Human  
4 Resources) of the situation, he confirmed that Dr. Deming had discretion to set  
5 the schedule. (Pl. Dep. 381:1-383:19.)

6 • Brooke Waind, an Oncology Department administrator, attended meetings with Dr.  
7 Weisz and Dr. Deming. (See Pl. Dep. 60:15-19.) Ms. Waind’s mere attendance at  
8 meetings is not an adverse action. See *Steele*, 231 Or App at 618 (citing *Somoza*, 513  
9 F3d at 1214-15, 1217-18).

10 To the extent based on incidents that occurred during her employment, each of  
11 plaintiff’s claims fails because she cannot show that any of those incidents amounted to an  
12 adverse action, which is an essential element to each claim brought in her lawsuit.

13 **2. Plaintiff Was Not Constructively Discharged.**

14 Plaintiff has no evidence that her working conditions were so intolerable that she was  
15 *forced* to resign. For that reason, her resignation also is not an adverse action, and each one  
16 of her claims fails.

17 **a. Legal Standard for Constructive Discharge.**

18 A plaintiff who resigns has suffered an adverse action only if she can establish that  
19 she was “constructively discharged.” *Nkrumah v. City of Portland*, 261 Or App 365, 372,  
20 323 P3d 453 (2014) (citing *Handam v. Wilsonville Holiday Partners, LLC*, 225 Or App 442,  
21 447, 201 P3d 920 (2009), *vac’d and rem’d on other grounds*, 347 Or 533, *adh’d to on*  
22 *remand*, 235 Or App 688, *rev den*, 349 Or 171 (2010)).

23 “[T]o establish a constructive discharge, a plaintiff must allege and prove that (1) the  
24 employer intentionally created or intentionally maintained specified working conditions; (2)  
25 *those working conditions were so intolerable that a reasonable person in the employee’s*  
26 *position would have resigned because of them*; (3) the employer desired to cause the

1 employee to leave employment as a result of those working conditions or knew that the  
2 employee was certain or substantially certain, to leave employment as a result of those  
3 working conditions; and (4) the employee did leave the employment as a result of those  
4 working conditions.” *Id.* at 373 (emphasis in original; internal quotation marks omitted)  
5 (quoting *McGanty v. Staudenraus*, 321 Or 532, 557, 901 P2d 841 (1995)).

6 To show a constructive discharge, an employee must offer evidence that would  
7 permit a reasonable juror to conclude that she experienced extreme and objectively  
8 intolerable working conditions. *Leonard v. Moran Foods, Inc.*, 269 Or App 112, 119, 343  
9 P3d 693 (“[P]laintiff ha[s] the burden of producing admissible evidence establishing facts  
10 that by themselves or by their reasonable inferences could cause a reasonable juror to find  
11 each element of plaintiff’s claim.” (internal quotation marks and citation omitted)), *rev den*,  
12 357 Or 324 (2015). Applying that standard, courts reject constructive discharge claims even  
13 where plaintiffs have alleged obscene or offensive comments by supervisors or coworkers.  
14 *See, e.g., Tomco v. Prada USA Corp.*, 484 F App’x 99, 100 (9th Cir 2012) (affirming  
15 summary judgment for employer in constructive discharge case on grounds that “a single  
16 instance in which a manager yelled at her is not sufficiently intolerable or aggravated so as to  
17 compel a reasonable employee to resign”).

18 Critically, a plaintiff pursuing a constructive discharge theory must offer evidence of  
19 even *more* extreme working conditions than would be required to show a hostile work  
20 environment. *Steele*, 231 Or App at 619-20 (citing *O’Brien v. Dep’t of Agriculture*, 532 F3d  
21 805, 810-11 (8th Cir 2008)). And, because even a supervisor’s repeated, obscene comments  
22 are insufficient to establish a hostile working environment, such evidence also is insufficient  
23 to establish constructive discharge. *See Kortan v. California Youth Authority*, 217 F3d 1104,  
24 1107 (9th Cir 2000) (finding no hostile work environment and affirming summary judgment  
25 for employer despite evidence that a supervisor referred to women as “castrating bitch,”  
26 “madonna,” or “regina” in front of plaintiff on several occasions and directly called plaintiff

1 “Medea”); *Adusumilli v. City of Chicago*, 164 F3d 353, 357, 361-62 (7th Cir 1998) (finding  
2 no hostile work environment claim and affirming summary judgment for employer where  
3 employee teased plaintiff, made sexual jokes, told her not to wave at police officers “because  
4 people would think she was a prostitute,” commented about low-neck tops, leered at her  
5 breasts, and touched her arm, fingers, or buttocks on four occasions), *cert den*, 528 US 988  
6 (1999).

7 Plaintiffs pursuing constructive discharge claims are *required* to offer—at  
8 minimum—evidence that their working conditions were consistently and pervasively  
9 intolerable. *McGanty*, 321 Or at 557 (reversing ORCP 21 dismissal of claim for constructive  
10 discharge where plaintiff alleged that, “for 19½ months, defendants ‘engaged in a course of  
11 [physical and verbal] conduct constituting a continuing pattern of sexual harassment and  
12 abuse of’ plaintiff” (brackets in original)); *see also Nichols v. Azteca Restaurant Enterprises,*  
13 *Inc.*, 256 F3d 864, 870, 872-73 (9th Cir 2001) (finding a hostile work environment when a  
14 male employee was subject to a relentless campaign of vulgarities, including “f-ggot” and  
15 “f--king female whore,” by both co-workers and supervisors at least once a week and often  
16 several times per day over several years of employment). As a matter of fact and law,  
17 plaintiff cannot meet that high burden, and her theory of constructive discharge fails.

18 **b. Plaintiff Cannot Establish the Second Element of a Constructive**  
19 **Discharge Because She Cannot Show Objectively Intolerable**  
**Working Conditions.**

20 Plaintiff’s allegations and the evidence upon which she relies fail even to come close  
21 to the level of a constructive discharge. Apart from a story that Dr. Weisz allegedly told  
22 regarding a female physician who told him she was happier at work than at home (*see* Pl.  
23 Dep. 69:1-13), the evidence on which plaintiff relies to support her claim of constructive  
24 discharge concerns the same handful of incidents described above. (*See* Section III.B.1,  
25 *supra.*)

26

1 None of those incidents, whether individually or collectively, amounted to a work  
2 environment that was “*so intolerable* that a reasonable person in [plaintiff’s] position would  
3 have resigned because of them.” *Nkrumah*, 261 Or App at 373 (emphasis omitted) (quoting  
4 *McGanty*, 321 Or at 557). If they had, plaintiff would have resigned immediately upon  
5 giving notice; instead, she worked for over 90 more days. (Pl. Dep. 19:6-21.) *See also*  
6 *Wood*, 270 F App’x at 486 (for purposes of a constructive discharge claim, “the five-month  
7 lapse between [the allegedly intolerable events or conditions] and [an employee’s] decision  
8 to resign defeats her claim of a causal relationship between the two events”).

9 Moreover, plaintiff’s claim that she was constructively discharged is undermined by  
10 her admission that she *wanted* to leave Northwest Permanente in part because her new job in  
11 Astoria is in a more desirable location. In deposition, she admitted that she resigned because  
12 she wanted to “mov[e] to a smaller community to raise [her] family.” (Pl. Dep. 276:10-  
13 277:10, Ex. 40.) As she told OHSU in an email shortly before she resigned, “a move to  
14 Astoria could be a good thing for our family.” (*See* Pl. Dep. 303:22-304:25, Ex. 55.) Given  
15 those admissions, and the absence of any evidence of objectively *intolerable* working  
16 conditions, plaintiff cannot establish the second element of her argument that she was  
17 constructively discharged.

18 **c. Plaintiff Cannot Establish the Third Element of a Constructive**  
19 **Discharge Because She Cannot Show That Northwest Permanente**  
**Intended Her to Quit.**

20 Plaintiff cannot also establish the third element of a constructive discharge, *i.e.*, that  
21 Northwest Permanente *wanted* her to resign. She has no evidence whatsoever that, following  
22 November 2012, any Northwest Permanente employee ever made any statement to the effect  
23 that he or she wanted plaintiff to quit. (*See* Pl. Dep. 92:8-98:9.) The only basis for her belief  
24 that anyone at Northwest Permanente wanted her to leave is inadmissible speculation about  
25 other employees and what would happen to her “career” if she stayed. (*See, e.g.*, Pl. Dep.  
26

1 61:15-23.) She admits that no Northwest Permanente employee ever said or did anything to  
2 suggest that they wanted her to resign:

3 Q. \* \* \* Did [Dr. Weisz] ever tell anybody, to your knowledge,  
4 that he didn't want you at Northwest Perm anymore?

5 A. I can't speak to that.

6 Q. I said, to your knowledge, did he ever say  
7 anything? Did he ever tell anyone that he wanted you to  
8 quit?

9 A. I don't know.

10 Q. To your knowledge, did anyone -- did Diana  
11 Antoniskis ever tell anybody that she wanted you to quit?

12 A. I don't know.

13 Q. To your knowledge, did Katie Deming ever tell  
14 anybody that she wanted you to quit?

15 A. I don't know.

16 Q. To your knowledge, did Brooke Waind ever tell  
17 anybody that she wanted you to quit?

18 A. I don't know.

19 (Pl. Dep. 92:22-93:18.)

20 Rather, Northwest Permanente did just the opposite. Shortly before her resignation,  
21 Dr. Antoniskis and Dr. Deming were actively attempting to retain her: plaintiff testified that  
22 "they were quite eager to have me take over the West Side position," and that when she  
23 spoke to Dr. Deming, Dr. Deming was "quite excited about it." (See Pl. Dep. 72:21-73:18.)  
24 She admits that Northwest Permanente wanted her to continue working into the indefinite  
25 future. (Pl. Dep. 278:22-279:19.)

26 Based on plaintiff's own testimony, no reasonably jury could conclude that Northwest  
Permanente wanted plaintiff to resign her employment. The undisputed material facts show  
that plaintiff was not constructively discharged.

1 **C. Plaintiff’s Claims of Retaliation Also Fail Because She Has No Evidence That**  
2 **She Suffered Any Adverse Action *Because of Her Alleged Whistleblower***  
3 **Activity.**

4 Plaintiff’s retaliation claims each fail for another independent reason: there is no  
5 evidence that Northwest Permanente took any adverse action against her *because of* any  
6 alleged protected activity.

6 **1. Legal Standard for Retaliation.**

7 To survive summary judgment, plaintiff must establish that (1) she engaged in  
8 protected activity;<sup>10</sup> (2) she experienced a materially adverse action, that is, an action that a  
9 reasonable employee would find materially adverse; and (3) a causal connection exists  
10 between her protected activity and the adverse action. *Steele*, 231 Or App at 616 (citing  
11 *Somoza*, 513 F3d at 1212). Plaintiff must offer evidence sufficient to establish that her  
12 protected activity was a “but for” cause of some adverse action. *See Whitley v. City of*  
13 *Portland*, 654 F Supp 2d 1194, 1223 (D Or 2009) (“[A] plaintiff must show that she would  
14 not have been terminated ‘but-for’ her engaging in protected activity, or that, ‘in the absence  
15 of the discriminatory motive, [plaintiff] would have been treated differently.’” (second  
16 brackets in original) (quoting *Hardie v. Legacy Health Sys.*, 167 Or App 425, 434-35, 6 P3d  
17 531 (2000)));<sup>11</sup> *Estes v. Lewis & Clark Coll.*, 152 Or App 372, 381, 954 P2d 792 (1998)  
18 (plaintiff must prove that Northwest Permanente had a “wrongful purpose” and that the  
19 “wrongful purpose \* \* \* [was] ‘a factor that made a difference’ in the discharge decision”  
20 (citation omitted)).

21 <sup>10</sup> The validity of plaintiff’s underlying alleged complaints is irrelevant. *Jensen v.*  
22 *Medley*, 170 Or App 42, 54, 11 P3d 678 (2000) (“Whether the report of suspected criminal  
23 activity ‘may later be proved to have been legitimate or not’ is, indeed, irrelevant to whether  
24 an employee had reasonable cause in reporting the suspected violation of the law at the time  
the report was made.” (emphasis omitted)), *aff’d in part, rev’d in part on other grounds*, 336  
Or 222 (2003).

25 <sup>11</sup> “In applying Oregon’s employment discrimination laws, [Oregon courts] may look  
26 to federal cases that interpret Title VII for their instructive value.” *Winnett v. City of*  
*Portland*, 118 Or App 437, 442, 847 P2d 902 (1993) (citing *Seitz v. Albina Human Resources*  
*Center*, 100 Or App 665, 672-73, 788 P2d 1004 (1990)).

1           **2. Plaintiff Has No Evidence That Northwest Permanente Took Any Action**  
2           **Against Her *Because of Her Alleged Whistleblowing Activity to Establish***  
3           **Causation.**

4           Plaintiff has no evidence that any Northwest Permanente employee ever took *any*  
5           action against her *because of* any alleged protected activity that she engaged in.<sup>12</sup> It is  
6           undisputed that several of the issues raised by plaintiff were departmental issues that the  
7           Oncology Department discussed as a whole and were working together to address. (*See Pl.*  
8           *Dep. 135:1-7, 198:23-199:14.*) Moreover, many of the issues plaintiff allegedly raised were  
9           ongoing issues that predated Dr. Weisz’s leadership—well before the time she alleges she  
10          was retaliated against. (*See Pl. Dep. 135:1-7, 137:9-138:2* (understaffing and low patient  
11          scores).)

12          Additionally, the undisputed facts show that all of Northwest Permanente’s decisions  
13          were made for legitimate business reasons, and not due to any retaliatory animus against  
14          plaintiff:

- 15          • Apart from the fact that it was not an adverse action, plaintiff’s November 2012  
16          confrontation with Dr. Weisz was, as a matter of law, not retaliatory. Her bare  
17          allegation that Dr. Weisz handled the incident unprofessionally is insufficient to  
18          establish that his behavior was *causally connected* to any of her alleged protected  
19          activity. *See Edwards v. N.Y. State Unified Ct. Sys.*, No. 12 CIV. 46 (WHP), 2012  
20          WL 6101984 at \*5 (SDNY Nov. 20, 2012) (rejecting “the familiar faulty syllogism:  
21          something bad happened to me at work; I am [a member of a protected class];

22          <sup>12</sup> It is questionable that plaintiff ever even engaged in any protected whistleblowing  
23          activity; Northwest Permanente does not concede that she did so. In her complaint, for  
24          example, she alleged that she discussed her “Statement of Concern” with “one of [Northwest  
25          Permanente’s] management physicians.” (Second Am. Compl., ¶ 16.) As she later admitted,  
26          though, that was not true: she never gave the document to any management-level Northwest  
27          Permanente physician. (*Pl. Dep. 189:13-193:7, 439:14-21.*) Plaintiff’s allegation in the  
28          complaint was false. Likewise, she also alleged in her complaint that she reported gender  
29          discrimination. (Second Am. Compl., ¶ 48.) She later admitted, though, that—apart from  
30          her response to Dr. Tirumali’s email in which he described her response as “emotional”—she  
31          never did so. (*See Pl. Dep. 98:22-101:1.*)

1 therefore it must have happened because I am [a member of a protected class]”  
2 (citation omitted)). As plaintiff herself acknowledged, “[i]t is unfortunately not  
3 illegal nor against any [Northwest Permanente] policies to be an unprofessional,  
4 unscrupulous, unethical, manipulative coworker/chief/ director.” (Pl. Dep. 393:17-  
5 394:14, Ex. 76.)

- 6 • Plaintiff also has no evidence that the decision to modify physicians’ schedules was  
7 retaliatory. There is no evidence that Northwest Permanente decided to change *all*  
8 physicians’ schedules because *plaintiff* had made any particular complaint. Rather,  
9 Northwest Permanente sought to increase physicians’ availability solely to improve  
10 patient care and patient satisfaction scores.

11 There also is no evidence that Northwest Permanente “singled out” plaintiff  
12 by adopting the policy or in the way it was implemented. The policy, without  
13 exception, applied to *each* physician in the Oncology Department. (See Pl. Dep.  
14 247:7-250:12, Ex. 34.) See also *EEOC v. Sw. Furniture of Wisc., LLC*, 703 F Supp  
15 2d 971, 977 (D Ariz 2010) (“[T]wo [other] employees were sent home, without pay,  
16 after a physical altercation. This demonstrates that Defendant’s policy is applied  
17 evenly, and that it was not applied to [the plaintiff] in retaliation for her complaint  
18 \* \* \*.”) At most, plaintiff can show that she disagreed with the decision, which is  
19 insufficient to establish a causal connection under the third element. See *Allen v.*  
20 *Johnson*, 795 F3d 34, 41 (DC Cir 2015) (“[M]ere disagreement with an employer  
21 about reasonable judgments \* \* \* that are especially subject to managerial discretion  
22 \* \* \* is not enough to sustain a Title VII claim.”).

- 23 • There is no evidence that the denial of plaintiff’s requests for external referrals had  
24 anything to do with her alleged protected activity. The sole purpose of improving the  
25 external referral process was to streamline the referral process in the Oncology  
26

1 Department and to provide consistent application of external referral criteria.

2 Plaintiff has no evidence to the contrary.

- 3 • There is no evidence that Dr. Weisz’s other alleged conduct—*i.e.*, his “threatening”  
4 plaintiff, or “blaming” her and her colleagues for the Oncology Department’s  
5 shortcomings—had anything to do with any of plaintiff’s alleged complaints.
- 6 • Dr. Antoniskis’ suggestion regarding counseling was not causally connected to any of  
7 plaintiff’s alleged protected activity. If anything, Dr. Antoniskis was seeking only to  
8 *help* plaintiff, not retaliate against her, when she suggested counseling. Dr.  
9 Antoniskis allegedly made the suggestion in response to a request from plaintiff for  
10 assistance in adjusting to the Oncology Department’s scheduling changes. (*See* Pl.  
11 Dep. 47:17-48:14.)
- 12 • There is no evidence that Dr. Antoniskis’ refusal to give plaintiff special treatment  
13 regarding scheduling was retaliatory. *See Roth*, 2010 WL 3081468, at \*3.
- 14 • Plaintiff has no evidence whatsoever—other than her vague allegation about a  
15 generalized “change in [Dr. Deming’s] behavior” after their seven years of working  
16 together—that any of Dr. Deming’s actions had anything to do with any of her  
17 alleged whistleblowing activity. (*See* Pl. Dep. 51:10-52:15.)
- 18 • Plaintiff also has no evidence whatsoever that Ms. Waind had any retaliatory animus  
19 of any kind. Other than Ms. Waind’s mere presence in meetings, plaintiff’s  
20 allegations concerning Ms. Waind’s interactions with *other* Northwest Permanente  
21 employees cannot support *her individual* retaliation claims. (*See* Pl. Dep. 61:15-  
22 63:2.)

23 There is no evidence that any of Northwest Permanente’s conduct toward plaintiff  
24 was causally connect to any of her alleged protected activity, even if such activity arguably  
25 even occurred. Her retaliation claims fail as a matter of law.

26

1 **D. Plaintiff’s Fourth Claim for Gender Discrimination Fails as a Matter of Fact and**  
2 **Law.**

3 Plaintiff’s fourth claim for gender discrimination claim fails as a matter of fact and  
4 law. She bases her claim on two distinct theories: disparate impact and disparate treatment.  
5 Both theories are meritless.

6 **1. Plaintiff’s Disparate Impact Claim Fails.**

7 Plaintiff’s disparate impact claim fails for at least two reasons. First, ORS 659A.030  
8 does not authorize a plaintiff to recover on a theory of disparate impact. Second, even if it  
9 did, plaintiff has no evidence that Northwest Permanente’s decision to require a physician to  
10 support an assigned patient panel with a 1.0 FTE or a shared 1.0 FTE created a disparate  
11 impact based on gender.

12 **a. ORS 659A.030 Does Not Authorize Plaintiff to Pursue a Disparate**  
13 **Impact Theory.**

14 When interpreting a statute, the court’s paramount goal is to “discern[] the  
15 legislature’s intent” in enacting it. *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009).  
16 Oregon’s statute prohibiting discrimination by private employers—on which plaintiff bases  
17 her disparate impact claim—was enacted in 1949. *See generally Portland State Univ.*  
18 *Chapter of Am. Ass’n of Univ. Professors v. Portland State Univ.*, 352 Or 697, 708, 291 P3d  
19 658 (2012). However, the U.S. Supreme Court “judicially embraced [the theory of disparate  
20 impact discrimination] *for the first time*” in 1971. *Nakashima v. Oregon State Bd. of Educ.*,  
21 344 Or 497, 509-10, 185 P3d 429 (2008) (emphasis added) (citing *Griggs v. Duke Power*  
22 *Co.*, 401 US 424, 431, 91 S Ct 849, 28 L Ed 2d 158 (1971)). When it enacted Oregon’s  
23 employment discrimination statute, the legislature could not possibly have intended to

24 ///  
25 ///  
26 ///

1 authorize a theory of recovery that did not yet exist and that would not be recognized for  
2 more than 20 years.<sup>13</sup>

3       Moreover, in the 45 years since the *Griggs* decision, the legislature could have chosen  
4 to amend ORS 659A.030 to authorize disparate impact claims. Its failure to do so confirms  
5 that disparate impact claims are not available under the statute. *See, e.g., Goldhammer v.*  
6 *Adult & Family Servs. Div.*, 53 Or App 322, 327, 632 P2d 10 (1981) (declining to interpret  
7 an Oregon statute in a manner consistent with federal law where “[t]he legislature could have  
8 chosen to amend” the statute to conform with federal law, but “ha[d] not done so”). In  
9 *Nakashima*, for example, the Oregon Supreme Court held that ORS 659.850—which  
10 prohibits discrimination in public schools, and which the legislature enacted four years after  
11 *Griggs*—authorized disparate impact claims because the statute expressly incorporates  
12 language from *Griggs*. *See* 344 Or at 509-10. *Nakashima* noted specifically that “[t]he  
13 distinctive ‘fair in form but discriminatory in operation’ terminology that the legislature used  
14 [in ORS 659.850] is, word-for-word, the phrase coined by the United States Supreme Court  
15 in” *Griggs*. *Id.* at 509. By contrast, neither the “distinctive ‘fair in form but discriminatory  
16 in operation’ terminology” nor any other language authorizing disparate impact claims  
17 appears in ORS 659A.030.

18       Though the legislature amended ORS 659A.030 and its predecessors several times  
19 since its original enactment, it never added language permitting a plaintiff to pursue a  
20 disparate impact claim under the statute. For that reason, plaintiff’s disparate impact claim  
21 fails.

22 ///

23 ///

24

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25       <sup>13</sup> As recently as 2013, the Oregon Court of Appeals suggested that whether ORS  
26 659A.030 authorizes disparate impact claims remains an open question. *See Doyle v. City of*  
*Medford*, 256 Or App 625, 647 n 14, 303 P3d 346 (2013) (collecting cases).

1                   **b. Even if Oregon Law Permitted Plaintiff to Pursue a Disparate**  
2                   **Impact Theory, Her Claim Still Fails on the Merits.**

3                   Even if plaintiff could pursue a disparate impact theory under ORS 659A.030, her  
4 gender discrimination claim still fails and Northwest Permanente is entitled to a judgment in  
5 its favor.

6                   “To establish a prima facie case of disparate impact under Title VII, [a] plaintiff[]  
7 must: (1) show a significant disparate impact on a protected class or group; (2) identify the  
8 specific employment practices or selection criteria at issue; and (3) show a causal  
9 relationship between the challenged practices or criteria and the disparate impact.”

10 *Hemmings v. Tidyman’s Inc.*, 285 F3d 1174, 1190 (9th Cir 2002); *see also Moore v. Hughes*  
11 *Helicopters*, 708 F2d 475, 481 (9th Cir 1983) (to prevail on her gender-based disparate  
12 impact claim, plaintiff “must show that a facially neutral employment practice has a  
13 ‘*significantly discriminatory*’ impact upon a group protected by” Oregon’s antidiscrimination  
14 laws (emphasis added) (citing *Connecticut v. Teal*, 457 US 440, 446, 102 S Ct 2525, 73 L Ed  
15 2d 130 (1982))). “Although statistical data alone, in a proper case, may be adequate to prove  
16 causation, the statistical disparities must be sufficiently substantial that they raise such an  
17 inference of causation.”<sup>14</sup> *Stout v. Potter*, 276 F3d 1118, 1122 (9th Cir 2002) (internal  
18 quotation marks and citation omitted).

19                   Plaintiff has no evidence that any “specific employment practices or selection  
20 criteria” caused a “*significant* disparate impact” on women. *Hemmings*, 285 F3d at 1190  
21 (emphasis added). The only “practice” on which plaintiff even arguably could base her

22 \_\_\_\_\_  
23 <sup>14</sup> Critically, in support of her disparate impact claim, plaintiff may not rely solely on  
24 evidence of Northwest Permanente’s allegedly discrimination intent. *Stout v. Potter*, 276  
25 F3d 1118, 1122 (9th Cir 2002) (“It is not sufficient to present evidence raising an inference  
26 of discrimination on a disparate impact claim. The plaintiff ‘must actually prove the  
discriminatory *impact* at issue.’” (emphasis added) (quoting *Rose v. Wells Fargo & Co.*, 902  
F2d 1417, 1421 (9th Cir 1990))). Accordingly, plaintiff’s conclusory assertions that Dr.  
Weisz wanted to rid the Oncology Department of women cannot defeat Northwest  
Permanente’s motion.

1 disparate impact claim is Northwest Permanente’s 2012 decision to modify oncology  
2 physicians’ schedules.<sup>15</sup> Of the nine physicians in the Oncology Department, the changes to  
3 physicians’ reduced schedules impacted—at most<sup>16</sup>—only the three physicians who then  
4 were .88 and .89 FTEs.

5 As numerous courts have recognized in the context of disparate impact claims, a  
6 “sample size” of nine total employees is too small to have any meaningful statistical value,  
7 much less to establish a “*significant* disparate impact.” *Id.* (emphasis added). For example,  
8 in *Palmer v. United States*, 794 F2d 534, 539 (9th Cir 1986), the Ninth Circuit held that  
9 sample sizes of seven, 13, and 15 employees were “too small to have any predictive value,”  
10 and “disregard[ed] it” because the “study fails to prove discriminatory impact.” (Citing  
11 *Morita v. S. Cal. Permanente Med. Grp.*, 541 F2d 217, 220 (9th Cir 1976), *cert den*, 429 US  
12 1050 (1977).)

13 Numerous other courts have reached similar conclusions based on substantially larger  
14 sample sizes than then one plaintiff proposes here. *See, e.g., Shutt v. Sandoz Crop Prot.*  
15 *Corp.*, 944 F2d 1431, 1433 (9th Cir 1991) (holding that 21 employees is an “exceedingly  
16 small class of employees” and that a group of 11 is too small to establish a statistical pattern);  
17 *Thomas v. Metroflight, Inc.*, 814 F2d 1506, 1509 (10th Cir 1987) (“[A] sample of two is too  
18 small to make even a 100% impact rate significant.”); *Harper v. Trans World Airlines, Inc.*,  
19 525 F2d 409, 412 (8th Cir 1975) (holding that a plaintiff’s statistical proof was unpersuasive  
20 because it was derived from only five married couples); *Robinson v. City of Dallas*, 514 F2d  
21 \_\_\_\_\_

22 <sup>15</sup> The undisputed facts show that Northwest Permanente did not, as plaintiff alleges,  
23 “*eliminat[e]* part-time medical oncologists” entirely. (*See* Second Am. Compl., ¶ 60  
24 (emphasis added).) Rather, it is undisputed that Northwest Permanente *allowed* physicians to  
share a single patient panel at a 1.0 FTE, and that at least one female physician (Dr. Kemmer)  
was willing to do so. (Pl. Dep. 247:7-250:12, Ex. 34.)

25 <sup>16</sup> However, to the extent Dr. Kemmer was unable to work a reduced schedule by job-  
26 sharing, it was not because of Northwest Permanente’s new policy, but rather because  
plaintiff refused Dr. Kemmer’s request that the two equally share a 1.0 FTE and a single  
patient panel.

1 1271, 1273 (5th Cir 1975) (holding that five employees is too small a number to determine  
2 whether rule has discriminatory effect); *Oliver v. Pac. Nw. Bell Tel. Co.*, 106 Wash 2d 675,  
3 682-83, 724 P2d 1003 (1986) (holding that a sample size of 18 employees is too small to be  
4 reliable in a disparate impact analysis).

5 Plaintiff's sample size is even *smaller* than the sample sizes that courts in the Ninth  
6 Circuit and elsewhere have rejected. It fails for the same reasons. Given her nine-employee  
7 sample size, plaintiff's evidence establishes nothing more than that the Oncology  
8 Department's three reduced-schedule physicians each happened to be women at the time  
9 Northwest Permanente implemented the policy change.<sup>17</sup> Because a sample size of nine  
10 employees is "too small to have any predictive value," *Palmer*, 794 F2d at 539, plaintiff  
11 cannot prove that the policy change regarding physician schedules disproportionately  
12 impacted women in general.

13 Based on the undisputed facts, no reasonable jury could conclude that Northwest  
14 Permanente's decision regarding full-time support of an assigned physician panel either by  
15 one physician or by two physicians job-sharing had a disparate impact on female physicians,  
16 if that claim is even available to plaintiff. Her disparate impact claim fails as a matter of law.

17 **2. Plaintiff's Disparate Treatment Claim Fails Because She Has No**  
18 **Evidence That She Suffered Any Adverse Action *Because of Her Gender.***

19 Like her disparate impact claim, plaintiff's individual disparate treatment claim fails  
20 as a matter of law. ORS 659A.030 prohibits an employer from making adverse employment  
21 decisions because of an individual's gender. To establish a violation of ORS 659A.030 and  
22 survive summary judgment, plaintiff must establish that the adverse employment action  
23 complained of was "because of" her gender. ORS 659A.030; *Durham v. City of Portland*,  
24 181 Or App 409, 423, 45 P3d 998 (2002); *Hardie*, 167 Or App at 435 (plaintiff has ultimate

25 \_\_\_\_\_  
26 <sup>17</sup> Plaintiff herself originally was able to assume a reduced schedule because another  
*male* physician agreed to switch to a full-time schedule. (Pl. Dep. 110:11-111:8.)

1 burden of establishing that absent a discriminatory motive, the employee would have been  
2 treated differently). Plaintiff at all times has the burden to show a causal connection between  
3 the adverse employment action she suffered and some decision makers’ discriminatory  
4 animus. In disparate treatment cases, the plaintiff must prove intentional discrimination.  
5 *Christianson v. Oregon*, 239 Or App 451, 457-58, 244 P3d 904 (2010) (affirming trial court’s  
6 decision that plaintiff did not make out failure to hire age discrimination claim because she  
7 had no evidence to rebut employer’s legitimate, nondiscriminatory reasons).

8 As discussed above, plaintiff admits she suffered no adverse employment action.  
9 Moreover, all of Northwest Permanente’s decision-making—including its policies regarding  
10 oncologists’ reduced schedules—was based on its desire to improve patient access and care.  
11 Plaintiff has no admissible evidence to rebut that fact. She cannot defeat summary judgment  
12 with her own subjective beliefs. *See Tolbert*, 312 Or at 495.

13 The *only* evidence upon which plaintiff can rely to support a disparate treatment  
14 claim based on gender is a stray comment by Dr. Tirumali stating that plaintiff was  
15 “emotional.” (*See* Pl. Dep. 182:5-183:4, Ex. 25, 184:9-16.) She admits, however, that Dr.  
16 Tirumali apologized, and that she never reported the incident to anyone at Northwest  
17 Permanente. (Pl. Dep. 100:1-21.)

18 Other than that lone, stray remark, plaintiff has no other evidence of any comments or  
19 conduct that even remotely implicates her gender. Isolated stray remarks are insufficient, as  
20 a matter of law, to defeat summary judgment on a plaintiff’s disparate treatment claim. *See*  
21 *Gomez v. Thrive Lifestyle Servs., LLC*, No. 3:12-CV-00766-ST, 2014 WL 4631201 at \*5 (D  
22 Or Sept. 15, 2014) (“[A] ‘stray remark’ that is ‘uttered in an ambivalent manner and [is] not  
23 tied directly to [the plaintiff]’s termination’ is insufficient to create an inference of  
24 discriminatory motive.” (second brackets added) (quoting *Nesbit v. PepsiCo, Inc.*, 994 F2d  
25 703, 705 (9th Cir 1993))). Because she has no evidence that she suffered any adverse action,  
26

1 as discussed above, much less any adverse action *because of* her gender, *see Durham*, 181 Or  
2 App at 423, plaintiff’s disparate treatment claim fails.

3 Plaintiff’s retaliation claim under ORS 659A.030 also fails. She admits that the *only*  
4 arguable complaint of gender discrimination she made was her response to Dr. Tirumali’s  
5 email about how she was “emotional.” As already discussed, she privately asked Dr.  
6 Tirumali if he would have made that statement to a man and he apologized. She never  
7 discussed that email with anyone, including any of the other Northwest Permanente  
8 employees who allegedly retaliated against her. (*See* Pl. Dep. 100:1-21.) Logically, if the  
9 persons who allegedly retaliated against her were unaware that she confronted Dr. Tirumali  
10 about the stray comment, their actions could not have been motivated by that supposed  
11 protected activity. Because all of Northwest Permanente’s decisions were taken for  
12 legitimate business reasons, plaintiff has no evidence that Northwest Permanente took any  
13 action against her *because of* any complaint of gender discrimination. (*See generally* Section  
14 III.C.2, *supra*.)

15 **E. Plaintiff’s Wrongful Discharge Claim Fails as a Matter of Fact and Law.**

16 Plaintiff’s wrongful discharge claim fails for at least two independent reasons. First,  
17 as discussed above, she cannot establish a “discharge” because she voluntarily resigned. (*See*  
18 Section III.B.2, *supra*.) *See Nkrumah*, 261 Or App at 372 (“Where \* \* \* the employee  
19 asserting a wrongful-discharge claim was not actually discharged, but quit his employment,  
20 the employee must also establish that he was ‘constructively discharged’ \* \* \*.”).

21 Second, as with her retaliation claim, to survive summary judgment plaintiff must  
22 establish a causal connection between her fulfillment of an important public duty and her  
23 discharge. *See id.* at 374 (“[T]he discharge must also be ‘wrongful’—that is, the plaintiff  
24 must have been forced to leave for a ‘socially undesirable motive,’ such as ‘for exercising a  
25 job-related right’ \* \* \*. \* \* \* [T]he intolerable conditions must be created *as the result of* the

26

1 employee’s fulfillment of—or attempt to fulfill—an important public duty.” (emphasis in  
2 original)).

3 As discussed above, plaintiff has no evidence that any of Northwest Permanente’s  
4 conduct had anything to do with any of the issues she raised during her employment. (*See*  
5 *generally* Section III.C.2, *supra*.) Her wrongful discharge claim fails as a matter of law.

6 **F. Plaintiff Is Not Entitled to Economic Damages for Lost Wages Because She**  
7 **Makes More in Her New Job Than She Did at Northwest Permanente.**

8 If any of plaintiff’s claims survive summary judgment, the undisputed facts establish  
9 that she is not entitled to economic damages based on her alleged lost wages. She resigned  
10 her employment with Northwest Permanente in July 2013 and immediately took a job with  
11 OHSU in Astoria. (*See* Pl. Dep. 12:14-20.) She makes the full-time equivalent of \$350,000  
12 per year and obtained a \$36,000 signing bonus when she began. (Pl. Dep. 13:17-15:1.)  
13 More recently, she received an additional \$25,000-per-year stipend. (Pl. Dep. 422:6-17.) At  
14 Northwest Permanente, by contrast, she made a full-time equivalent salary of only \$337,200  
15 per year. (*See, e.g.*, Pl. Dep. 88:25-89:9, Ex. 2.)

16 Because plaintiff now makes more than she did at Northwest Permanente, Northwest  
17 Permanente is entitled to summary judgment on the issue of her alleged lost wages. *See*  
18 *Prowell v. Kennedy Rest. & Bar Mgmt., Inc.*, No. CV-04-1559-PHX-DGC, 2006 WL  
19 1182027 at \*5 (D Ariz May 3, 2006) (granting summary judgment on the issue of damages to  
20 an employer where an employee’s “tax returns show[ed] that she made more money in [the  
21 two] years [following her termination] than she made while working” for the employer).

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**IV. CONCLUSION**

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2 Northwest Permanente’s motion for summary judgment should be granted, and  
3 plaintiff’s claims should be dismissed in their entirety. If any of plaintiff’s claims survive,  
4 Northwest Permanente is entitled to summary judgment on the issue of economic damages.

5  
6 DATED: August 12, 2016.

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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

RADHIKA BREADEN, MD, MPH,  
Plaintiff,  
v.  
NORTHWEST PERMANENTE, P.C., a  
professional corporation, and DOES Nos.  
1-15, inclusive,  
Defendants.

No. 14CV12719

**NORTHWEST PERMANENTE, P.C.’S  
MOTION FOR SUMMARY  
JUDGMENT AND MEMORANDUM IN  
SUPPORT**

**Oral argument requested**

**Hearing before Hon. Leslie Roberts,  
October 21, 2016, 11:00 a.m., Rm. 216**

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**UTCR 5.050 INFORMATION**

Northwest Permanente, P.C. (“Northwest Permanente”) requests oral argument with official court reporting services. Northwest Permanente estimates that oral argument will require 60 minutes.

**MOTION**

Pursuant to ORCP 47, Northwest Permanente moves for summary judgment dismissing each of plaintiff’s claims because each is unsupported by any admissible evidence. Based on plaintiff’s own admissions, there are no genuine issues as to any material facts, and Northwest Permanente is entitled to judgment as a matter of law.

Motion 1: Plaintiff’s retaliation claim under ORS 659A.233 should be dismissed because (1) it is barred by the applicable statute of limitations; (2) she has no evidence that she suffered any adverse action or was constructively discharged; and (3) she has no evidence that she suffered any alleged adverse actions *because of* her alleged whistleblower activity.

Motion 2: Plaintiff’s retaliation claim under ORS 441.057 should be dismissed because (1) she has no evidence that she suffered any adverse action or was constructively discharged; and (2) she has no evidence that she suffered any alleged adverse actions *because of* her alleged whistleblower activity.

Motion 3: Plaintiff’s retaliation claim under ORS 659A.199 should be dismissed because (1) it is barred by the applicable statute of limitations; (2) she has no evidence that she suffered any adverse action or was constructively discharged; and (3) she has no evidence that she suffered any alleged adverse actions *because of* her alleged whistleblower activity.

Motion 4: Plaintiff’s claims for gender discrimination and retaliation under ORS 659A.030 should be dismissed. Her gender discrimination claim should be dismissed because (1) it is barred by the applicable statute of limitations, and (2) plaintiff has no

1 evidence that any of Northwest Permanente’s policies or practices resulted in a disparate  
2 impact based on gender. Her retaliation claim under ORS 659A.030 should be dismissed  
3 because: (1) it is barred by the applicable statute of limitations; (2) she has no evidence that  
4 she suffered any adverse action or was constructively discharged; and (3) she has no  
5 evidence that she suffered any alleged adverse actions *because of* her alleged whistleblower  
6 activity.

7 Motion 5: Plaintiff’s claim for common law wrongful discharge should be dismissed  
8 because (1) she has no evidence that she suffered any adverse action or was constructively  
9 discharged; and (2) she has no evidence that she suffered any alleged adverse actions *because*  
10 *of* her alleged whistleblower activity.

11 Northwest Permanente’s motion is supported by the following memorandum, the  
12 accompanying declaration of Andrea H. Thompson, and the pleadings and other documents  
13 on file.

14 **MEMORANDUM**

15 **I. INTRODUCTION**

16 Plaintiff was a sleep physician at Northwest Permanente. In January 2012, plaintiff  
17 learned that one of her coworkers—Dr. Praseeda Sridharan—was going to take over the  
18 newly-created Sleep Division. Plaintiff, for purely personal reasons, despised Dr. Sridharan  
19 and made it clear almost immediately that she was not going to let Dr. Sridharan become her  
20 boss. She went on a nasty campaign against Dr. Sridharan, which ultimately was not  
21 successful, and plaintiff chose to leave to take another job. Dr. Sridharan, like Plaintiff, is  
22 also a woman of Indian descent and is the same age as plaintiff.

23 On September 3, 2012, plaintiff tendered a 90-day notice of resignation after she  
24 accepted a new job at another sleep clinic. Northwest Permanente accepted her voluntary  
25 resignation effective December 3, 2012. On January 4, 2013, plaintiff entered into a new  
26 agreement with Northwest Permanente to work as a temporary “locums tenens” for a few

1 hours each month in a new position outside the Sleep Division that did not involve any  
2 patient care. Plaintiff resigned from that temporary position in October 2013, while she was  
3 in negotiations to purchase the sleep clinic where she was working.

4 Plaintiff identifies five specific individuals who, she claims, discriminated and  
5 retaliated against her and forced her to resign: Dr. Sridharan, Richard Odell, Dr. Jeffrey  
6 Weisz, Dr. Diana Antoniskis, and “possibly” Dr. Steve Renwick. None of them was  
7 involved in her employment after she left the Sleep Division.

8 Plaintiff has no admissible evidence to support any of her claims. Her lawsuit is  
9 based solely on vague allegations about her interactions with her colleagues and a handful of  
10 other communications that she learned of only after this lawsuit was filed. None of that,  
11 individually or together, rises to the level of an adverse action, much less grounds to support  
12 a constructive discharge claim. Moreover, plaintiff has no admissible evidence *that any of*  
13 *Northwest Permanente’s employment actions*—or her own voluntary resignation—had  
14 anything to do with any of her alleged whistleblowing activity, which concerned referrals of  
15 patients to external providers and offering cab rides to certain appointments. Nor did any of  
16 Northwest Permanente’s actions have anything to do with plaintiff’s gender.

17 The undisputed facts demonstrate that plaintiff voluntarily resigned, suffered no  
18 actionable adverse action, was inappropriate toward other physicians and physician  
19 leadership, and that any issues she raised were addressed and resolved. Northwest  
20 Permanente neither retaliated nor discriminated against plaintiff. Plaintiff never suffered *any*  
21 adverse action. Northwest Permanente is entitled to summary judgment dismissing each of  
22 plaintiff’s claims as a matter of fact and law.

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1 **II. UNDISPUTED MATERIAL FACTS<sup>1</sup>**

2 This is a straightforward employment action. Plaintiff’s primary allegations  
3 constitute criticism about Northwest Permanente’s strategic business decisions, but those  
4 decisions were not personal in any way to her. The only “facts” she asserts regarding any  
5 such nexus are unsupported rumor.

6 **A. Key Undisputed Material Facts.**

7 Following is a summary of key undisputed facts necessary to resolve Northwest  
8 Permanente’s motions:

- 9 • Plaintiff was a Senior Physician at Northwest Permanente who developed a  
10 specialization in in sleep medicine. She started with Northwest Permanente as a  
11 physician in 2000; she became as Senior Physician and Shareholder in 2003. (*See Pl.*  
12 *Dep. 105:23-106:14, Ex. 24.*)<sup>2</sup>
- 13 • Around December 2010, plaintiff’s nanny told her that she was leaving her family to  
14 go to work full-time for Dr. Sridharan, one of plaintiff’s coworkers who also  
15 specializes in sleep medicine. (*Pl. Dep. 147:20-149:14.*)
- 16 • On January 1, 2012, Dr. Weisz joined Northwest Permanente as its Executive  
17 Medical Director. (*Weisz Dep. 19:11-19.*)<sup>3</sup> The Northwest Permanente physician  
18 shareholders elected him to that position. (*See Pl. Dep. 204:25-205:9.*)
- 19 • Soon afterward, Dr. Sridharan proposed to Northwest Permanente that it create a  
20 sleep medicine specialty group. At the time, sleep medicine physicians worked in the  
21 Pulmonology Department. (*Pl. Dep. 141:14-21.*) The proposal was approved and

22 \_\_\_\_\_  
23 <sup>1</sup> For purposes of this motion, Northwest Permanente presents the facts in the light  
24 most favorable to plaintiff. If any of plaintiff’s claims survive, Northwest Permanente  
25 reserves the right to dispute the facts at trial.

26 <sup>2</sup> Excerpts from plaintiff’s deposition are attached as Exhibit 1 to the Declaration of  
Andrea H. Thompson (“Thompson Declaration”).

<sup>3</sup> Excerpts from Dr. Weisz’s deposition are attached as Exhibit 2 to the Thompson  
Declaration.

- 1 Dr. Weisz selected Dr. Sridharan to head the new “Sleep Division” within the  
2 Pulmonology Department. (Weisz Dep. 39:19-40:2.)
- 3 • Plaintiff disagreed vehemently with Dr. Weisz’s selection of Dr. Sridharan to become  
4 head of the new Sleep Division—and plaintiff’s supervisor. She complained vocally  
5 to her colleagues about the decision. (*See, e.g.*, Pl. Dep. 274:22-276:3, Ex. 83.)
  - 6 • As soon as plaintiff learned that Dr. Weisz intended to appoint Dr. Sridharan to lead  
7 the Sleep Division, plaintiff began an all-out campaign to discredit and undermine  
8 Dr. Sridharan among her colleagues; for example, she described Dr. Sridharan in an  
9 email to two colleagues—including a friend who was also a Northwest Permanente  
10 board member—as “a complete Nazi.” (Pl. Dep. 195:20-25, Ex. 55.) Despite  
11 plaintiff’s campaign against Dr. Sridharan, Dr. Weisz chose Dr. Sridharan to head the  
12 new Sleep Division; the decision was formally announced on February 24, 2012. (Pl.  
13 Dep. 242:23-243:9, Ex. 71.) Rather than accept that decision, plaintiff continued to  
14 undermine Dr. Sridharan, referring to her as “batshit crazy” to others in the  
15 organization. (Pl. Dep. 274:22-276:3, Ex. 83.)
  - 16 • During her employment, plaintiff complained about Northwest Permanente’s efforts  
17 to internalize patient care, and about a capping policy to transport patients to certain  
18 medical appointments.
  - 19 • Other than an initial meeting and a March 2012 group meeting of the Sleep Division,  
20 plaintiff had no face-to-face contact with Dr. Weisz at any time during her  
21 employment. (*See* Pl. Dep. 281:2-15, Ex. 84.)
  - 22 • In August 2012, Dr. Gerald Rich accepted plaintiff’s application to work for him.  
23 Dr. Rich owned and operated a local sleep clinic. (*See* Pl. Dep. 617:13-618:1,  
24 Ex. 202, 618:21-619:2, Ex. 203.) Plaintiff submitted a 90-day notice of resignation to  
25 Northwest Permanente days later on September 3, 2012. (Pl. Dep. 24:12-25:2, Ex. 2.)  
26 Plaintiff’s last day of work in Northwest Permanente’s Sleep Division was

1 December 3, 2012. (Pl. Dep. 58:19-59:8, Ex. 10, 628:12-629:3.) Upon her  
2 resignation she relinquished her role and all rights as a Senior Physician and sold  
3 back all of her stock in Northwest Permanente. (See Pl. Dep. 39:23-40:4.)

- 4 • On January 4, 2013, plaintiff signed a new employment agreement with Northwest  
5 Permanente (effective December 4, 2012) to perform non-credentialed temporary  
6 work in Northwest Permanente’s Department of Medical Informatics (“DMI”) for a  
7 few hours a month. (Pl. Dep. 25:10-26:5, Ex. 3, 66:24-67:10, Ex. 16.) Under this  
8 new temporary contract, plaintiff did not see patients, did not practice sleep medicine,  
9 and had no contact with Dr. Sridharan, Dr. Antoniskis, Dr. Weisz, Mr. Odell, or  
10 Dr. Renwick. (See Pl. Dep. 61:16-63:11.)
- 11 • The work plaintiff did as a temporary employee for DMI was infrequent and  
12 performed from home while plaintiff was employed by Dr. Rich. (Pl. Dep. 41:7-14.)
- 13 • Ten months later, in October 2013, plaintiff submitted a 60-day notice of resignation  
14 for her DMI position, effective December 15, 2013. At that time, she was in active  
15 negotiations to purchase Dr. Rich’s sleep clinic, which she purchased in January 2014  
16 and still owns and operates. (See Pl. Dep. 84:22:-85:5, Ex. 20, 87:15-88:9, Ex. 22.)
- 17 • Plaintiff filed her original complaint on September 8, 2014—well over one year after  
18 she quit her job as a practicing sleep medicine specialist and her relinquishment of her  
19 Senior Physician status with Northwest Permanente.
- 20 • Plaintiff alleges that Dr. Sridharan, Mr. Odell, Dr. Weisz, Dr. Antoniskis, and  
21 “possibly” Dr. Renwick retaliated against her. She claims that they did so in the  
22 following ways:
  - 23 ○ Dr. Weisz and Mr. Odell allegedly made comments to their colleagues  
24 regarding their displeasure with plaintiff. Dr. Weisz allegedly “told  
25 Dr. Sridharan and Richard O’Dell [*sic*] and others that I needed to be silenced  
26 because of issues I had raised regarding the safety of patients and the

1 Medicare issue.” (Pl. Dep. 49:20-50:6.) Dr. Weisz also allegedly “referred to  
2 me snidely saying, saying something about \* \* \* ‘Well, I know where that  
3 complaint’s coming from,’ and said something rudely about me,” though  
4 plaintiff cannot recall who told her that. (Pl. Dep. 50:7-51:10.)<sup>4</sup>

5 ○ Dr. Weisz also allegedly was “putting pressure on” Dr. Sridharan and  
6 Mr. Odell “to get me fired,” although plaintiff was never fired or ever told that  
7 her employment was in jeopardy in any way; she was never even disciplined.  
8 (See Pl. Dep. 51:11-52:2, 519:16-24.) Later, in February 2013, Dr. Sridharan  
9 and Mr. Odell also allegedly “[s]poke to Leadership to try to force me out of”  
10 DMI, though, again, plaintiff was never terminated from her position in DMI  
11 or disciplined in any way. (Pl. Dep. 33:2-34:15; *see also* Pl. Dep. 60:3-61:1,  
12 71:23-74:10.) She continued working in her part-time position in DMI  
13 without incident until she voluntarily resigned from that job several months  
14 later, in October 2013. It is undisputed that she was never fired.

15 ○ Mr. Odell allegedly withheld pay for some of the work that plaintiff  
16 performed in DMI, both in 2012 (while she also was working in the Sleep  
17 Division) and 2013 (while she was working with Dr. Rich and performing  
18 only temporary work for Northwest Permanente). (Pl. Dep. 29:16-24, 32:2-13;  
19 *see also* Pl. Dep. 54:14-21.) However no wage-related allegations appear  
20 anywhere in plaintiff’s complaint; such claims are not at issue in this lawsuit.  
21 Moreover, plaintiff cannot identify who in particular was responsible for the  
22 alleged withholding and has no evidence that it ever occurred. (*See id.*) In  
23

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24 <sup>4</sup> Northwest Permanente expects plaintiff to rely on a June 2012 email in which  
25 Mr. Odell told Dr. Weisz and Dr. Antoniskis that they “got” Dr. Breaden and that she was  
26 “on track to be terminated.” However, plaintiff was never terminated; she continued to work  
in the Sleep Division for months after that exchange until she voluntarily resigned December  
2012.

- 1 particular, plaintiff admitted in her deposition that the final paycheck she  
2 received following her resignation from the Sleep Division included all of the  
3 amounts to which she was entitled. (Pl. Dep. 39:10-40:14, Ex. 6.)
- 4 ○ Dr. Sridharan once “shouted” at plaintiff during a meeting. (Pl. Dep. 279:9-  
5 280:11, Ex. 84.) Mr. Odell also allegedly once “screamed” at plaintiff during a  
6 phone call. (*See* Pl. Dep. 49:20-50:6.)
  - 7 ○ Mr. Odell sent “Multiple e-mails, intimidating me, regarding the cabbng  
8 policy and the Medicare issue.” (Pl. Dep. 54:22-55:7.)
  - 9 ○ In her deposition, plaintiff could not identify a single specific action that  
10 Dr. Antoniskis allegedly took in regard to her employment. (*See, e.g.*, Pl.  
11 Dep. 519:25-520:9.) Her allegations against Dr. Antoniskis appear to be  
12 based on her belief that Dr. Antoniskis was, in plaintiff’s words, one of Dr.  
13 Weisz and Mr. Odell’s “henchmen.” (Pl. Dep. 250:1-6, Ex. 74, 255:6-257:5.)
  - 14 ○ Plaintiff could not identify any action that Dr. Renwick allegedly took in  
15 regard to her employment. In fact, as late as August 24, 2012, plaintiff herself  
16 indicated that Dr. Renwick listened to her concerns and “was really great and  
17 really listened to me.” (Pl. Dep. 612:8-18, Ex. 199.)

18 Based on those key facts, and as discussed further below, each of plaintiff’s claims  
19 fails as a matter of both law and undisputed fact.

20 **B. Factual Background.**

21 **1. Plaintiff Was Hired as an Internal Medicine Physician in 2000 and**  
22 **Became a Sleep Specialist in 2007.**

23 Northwest Permanente hired plaintiff on January 1, 2000. (Pl. Dep. 105:23-106:14,  
24 Ex. 24.) She initially chose to specialize in internal medicine, but decided to pursue sleep  
25 ///  
26 ///

1 medicine in 2007. (*See* Pl. Dep. 140:13-141:5.) In 2012, she worked part-time at  
2 approximately 50% of a full-time schedule. (Pl. Dep. 17:20-19:7.)<sup>5</sup>

3           **2. In Late 2010 and Early 2011, Plaintiff Had a Personal Dispute with**  
4           **Dr. Sridharan Over a Shared Nanny.**

5           Dr. Sridharan was hired into the Pulmonology Department at about the same time as  
6 plaintiff, and helped plaintiff get the training she needed to become a sleep medicine  
7 specialist—they worked together as peers and studied together for their sleep medicine  
8 Boards. (Pl. Dep. 143:25-144:6; 150:6-11.) Unlike plaintiff, Dr. Sridharan had done a  
9 formal fellowship in sleep training. (Pl. Dep. 144:7-10.) Like plaintiff, Dr. Sridharan is an  
10 Indian-American woman. (Pl. Dep. 205:10-14.)

11           Around the end of 2010, plaintiff had a nanny working for her full-time. (Pl. Dep.  
12 145:24-146:9.) Dr. Sridharan talked with plaintiff about needing help at home and plaintiff  
13 suggested that they share her nanny. (Pl. Dep. 146:14-147:2.) They began sharing the nanny  
14 in December. (Pl. Dep. 147:20-148:7.) Shortly afterward, the nanny told plaintiff that  
15 Dr. Sridharan had offered her more money, and that she was leaving plaintiff’s family to go  
16 to work for Dr. Sridharan full-time. (Pl. Dep. 148:8-149:14.)

17           Plaintiff found the incident “stunning,” particularly because it occurred “a week  
18 before Christmas.” (*See* Pl. Dep. 147:20-149:14.) Dr. Sandra Barton, a fellow Northwest  
19 Permanente physician, member of the organization’s Board of Directors, and plaintiff’s  
20 personal friend, also noted that plaintiff was having “personal issues (nanny-stealing to  
21 start)” with Dr. Sridharan around that time. (Pl. Dep. 443:14-19, Ex. 134.) After the nanny  
22 incident, plaintiff cut off her personal relationship with Dr. Sridharan. (*See* Pl. Dep. 149:6-  
23 14.)

24

25 \_\_\_\_\_  
26 <sup>5</sup> Plaintiff’s lawsuit is not based on any allegation that she was denied the ability to  
work part-time. (Pl. Dep. 19:8-11.)

1           **3. Plaintiff Raised Concerns Regarding Northwest Permanente’s Cabbing**  
2           **Policy Related to the Internalization of Sleep Studies That Plaintiff**  
3           **Admits Were Addressed and Resolved by Northwest Permanente’s In-**  
4           **House Legal Counsel.**

4           Dr. Weisz joined Northwest Permanente as its new Executive Medical Director in  
5 January 2012. (Weisz Dep. 19:11-19.) He was charged with improving Northwest  
6 Permanente’s operations to better serve patients. (Weisz Dep. 64:7-19.) As part of his  
7 overall review of how the organization was functioning, he examined the organization as a  
8 whole, focusing on each medical department. He implemented a renewed focus on providing  
9 care internally within Northwest Permanente where possible to ensure accountability, control  
10 cost, and streamline and improve patient care. (*See id.*)

11           Related to that effort, Northwest Permanente’s Sleep Division implemented efforts to  
12 internalize sleep testing and studies. (*See Pl. Dep. 151:5-152:9.*) In early 2012, Northwest  
13 Permanente also developed an internal policy that allowed certain patients to take cabs to and  
14 from appointments, including those for sleep-related treatment and testing. (*See Pl. Dep.*  
15 *172:5-23.*) Plaintiff raised issues to her colleagues about the internalization and cabbing  
16 policies. She first raised these issues with Northwest Permanente in early 2012. (*See, e.g.,*  
17 *207:10-211:2.*) One of her concerns primarily focused on whether the cabbing policy  
18 complied with Medicare rules. (*See id.*)

19           However, plaintiff was assured that Northwest Permanente was handling the matters  
20 in an appropriate and fully compliant way. Plaintiff met with Northwest Permanente’s  
21 General Counsel, Molly Burns Herrmann, in June 2012 to discuss her concerns over the  
22 cabbing policy. (Pl. Dep. 513:15-514:8, Ex. 164.) Following the meeting, plaintiff wrote to  
23 Ms. Burns Herrmann and others: “Molly, thank you very much for taking the time to clarify  
24 these issues with me and address my concerns specifically with respect to the compliance  
25 rules \* \* \* and as my questions have been answered from a Compliance/Legal perspective, I  
26

1 am not sure that a meeting is still necessary at this point.” (*Id.*) In other words, plaintiff  
2 admits that any compliance concerns she raised were addressed in June 2012.

3 **4. Plaintiff’s Personal Unhappiness with Dr. Sridharan Escalated When**  
4 **Dr. Sridharan Became Plaintiff’s Supervisor.**

5 While Dr. Weisz was transitioning into his new role, Dr. Sridharan came to him and  
6 proposed that Northwest Permanente establish a group of physicians dedicated to sleep  
7 medicine. (*See Weisz Dep. 39:19-40:2.*) Northwest Permanente agreed to create a Sleep  
8 Division within the Pulmonology Department, and Dr. Weisz selected Dr. Sridharan to lead  
9 the new Division. (*See id.*) The new Division and Dr. Sridharan’s new role were announced  
10 on February 24, 2012 by Dr. Antoniskis. (Pl. Dep. 242:23-243:9, Ex. 71.) In her new role,  
11 Dr. Sridharan had supervisory authority over plaintiff. (Pl. Dep. 52:20-24.)

12 Even before Dr. Sridharan’s formal transition to head of the Sleep Division was  
13 announced, however, plaintiff developed increasing animosity toward Dr. Sridharan and  
14 escalated her campaign to undermine Dr. Sridharan among her colleagues and Northwest  
15 Permanente’s leadership. As plaintiff herself made clear in a January 28, 2012 email—sent  
16 before Dr. Sridharan became head of the Sleep Division—her dispute with Dr. Sridharan had  
17 nothing to do with any discrimination or retaliation. Rather, it centered on the interpersonal  
18 problems that had existed between them for years following the “nanny incident”:

19 “I know that Praseeda is probably going to be named as  
20 chief.

21 “I would like to go on record saying that I have found  
22 her leadership style very problematic at times. \* \* \* She has  
23 said things to me lately which I find stifling and meant to  
24 suppress my ability to express my opinion and have often  
found my opinions immediately and completely dismissed  
when I have called in for the Sleep meetings. This has been  
going on for months, and I have attributed it to our previous  
personal problems - perhaps it still is caused by that \* \* \*.”

25 (Pl. Dep. 188:20-191:2, Ex. 54; *see also* Thompson Decl., ¶ 6, Ex. 5 (plaintiff wrote in a  
26 January 28, 2012 email to Dr. Weisz that Dr. Sridharan “and I had a personal disagreement a

1 year ago, and since that time, we have had unfortunately bad communication and  
2 misunderstandings both at a professional and personal level.”.)

3 Almost immediately after learning that Dr. Sridharan would soon become her  
4 supervisor, plaintiff suggested on January 28, 2012 that the two women attend a mediation  
5 (Pl. Dep. 188:20-191:2, Ex. 54.) Yet, behind the scenes, plaintiff continued her campaign to  
6 undermine her former friend. In a February 1, 2012 email, plaintiff wrote:

7 “There is a doctor named Praseeda Sridharan who is  
8 going to be nominated as chief of the newly formed Sleep  
9 medicine dept. *I am distraught and feel like throwing up that*  
10 *she will be my boss*, she is incredibly unprofessional in her  
11 communication and recently forwarded an email I wrote to a  
12 colleague directly to Jeff Weisz without my permission just to  
13 get me fired/in trouble. \* \* \*

14 “*She is a complete Nazi* in her mentality about  
15 leadership – she censors us and we are not allowed to criticize  
16 or discuss things opening [*sic*].”

17 (Pl. Dep. 195:20-25, Ex. 55.) Two days after Dr. Sridharan was formally announced as the  
18 new head of the Sleep Division, plaintiff started to think about a new job. (Pl. Dep. 250:1-6,  
19 Ex. 74; *see also* Pl. Dep. 211:11-213:22, 317:17-21, Ex. 97.)

20 Plaintiff’s onslaught of attacks on Dr. Sridharan were not limited to her  
21 communications with her colleagues in the Sleep Division. On several occasions, she  
22 disparaged Dr. Sridharan directly to her friend Dr. Barton. (*See* Pl. Dep. 167:24-168:2.) On  
23 February 27, 2012—after she had already had a preliminary meeting with the mediator—  
24 plaintiff wrote the following about Dr. Sridharan to Dr. Barton:

25 “*The thing is, she’s batshit crazy.* \* \* \* [The  
26 m]ediation will at least be documented, but it doesn’t help with  
27 crazy ranting people. Praseeda’s email about kissing up to Jeff  
28 Weisz was exactly the tone of Cathy Chester’s – ‘I am your  
29 slave, tell me what to do . . . .’”

30 (Pl. Dep. 274:22-276:3, Ex. 83.)

31 ///

32 ///

1 Earlier that day, in the same email thread, plaintiff suggested to Dr. Barton that  
2 Dr. Sridharan had obtained her position as head of the Sleep Division solely because her  
3 husband held a high-level position at a local manufacturing company:

4 “Her husband is [a] VP of Leatherman and their  
5 employment website shows their comprehensive offering of  
6 Kaiser and I recalled that discussion of having [the company]  
7 sign up for Kaiser.

8 “Well, that’s a done deal, she wins. At least now it  
9 makes sense, *how the worst communicator and worst leader*  
10 *with much less seniority and experience than Rob got to be*  
11 *chief. Quid pro quo.*”

12 (*Id.*) Plaintiff admitted that those remarks about Dr. Sridharan were “really insulting” and  
13 “derogatory.” (Pl. Dep. 276:2-3, 278:21-279:4.) Similarly, on March 6, 2012, plaintiff wrote  
14 to Dr. Barton that:

15 “[Y]ou have someone like Praseeda who writes these  
16 illiterate rants that are controlling and show that she does not  
17 read anything that other people have written – damn it, aren’t  
18 there any NORMAL Indians out there? Seriously, this sounds  
19 awful, but Praseeda is making me hate being Indian myself  
20 because of her complete cultural insensitivity...”

21 (Pl. Dep. 289:7-13, 292:2-24, Ex. 87.)<sup>6</sup>

22 Plaintiff similarly disparaged Dr. Weisz. In a March 1, 2012 email following a  
23 meeting of the Sleep Division, plaintiff emailed Dr. Barton and another colleague at their  
24 personal email addresses with several gratuitous attacks on both Dr. Weisz and  
25 Dr. Sridharan:

26 <sup>6</sup> There are numerous other examples of plaintiff disparaging Dr. Sridharan’s  
leadership style in email to her colleagues. (*See, e.g.*, Pl. Dep. 296:10-297:19, Ex. 88 (“I  
don’t see Praseeda as long in that role \* \* \*. People like her always self-destruct, but  
unfortunately do damage prior to that. \* \* \* [I]n fact, she seems like a real anomaly of all the  
Indian people I’ve known in that all the others have been well-educated and even if their  
English isn’t perfect it still sounds educated and literate but she sounds completely illiterate  
which is the anomaly.”), 633:18-634:11, Ex. 213 (“I think I might have finally gone postal \*  
\* \* and bonked Praseeda over the head with the liquid nitrogen canister or something....”).)

1                   “Praseeda is a horrible leader and I am having a hard  
2 time seeing how I could be under her leadership \* \* \* .

3                   “Anyway, I just wanted to give you both my  
4 impressions of Jeff Weisz in action, such as it is. I was waiting  
5 to be wowed. \* \* \* And I was completely disappointed and  
6 after an hour and some, I came away thinking, ‘This???? This  
7 is what we got?? Ronald Reagan Lite?’”

8 (Pl. Dep. 279:9-12, Ex. 84.) Plaintiff admitted in her deposition that, other than an initial  
9 meeting, the hour-long group meeting she referred to in that email was the only time she *ever*  
10 had face-to-face contact with Dr. Weisz. (See Pl. Dep. 281:2-15.)

11           **5.       Following Mediation with Dr. Sridharan, Plaintiff Continued  
12               Undermining Dr. Sridharan While Also Looking for a New Job.**

13           On or about May 7, 2012, plaintiff and Dr. Sridharan met with a mediator, Tim  
14 Borne, to discuss their interpersonal issues. (Pl. Dep. 349:23-25, Ex. 113. ) Following the  
15 mediation, plaintiff agreed that she would communicate with kindness, professional courtesy,  
16 and transparency; both agreed to “publicly support one another with regards to the work and  
17 the running of the department, and when you are not in support, express that directly,  
18 privately.” (See *id.*) Despite her agreement, plaintiff continued badmouthing Dr. Sridharan  
19 with the same vitriol she had before. (See, e.g., Pl. Dep. 443:14-19, Ex. 134 (“If Praseeda  
20 was even a reasonable chief, all would be well, but it is not and it has nothing to do with the  
21 nanny thing – that whole incident just gave me an early glimpse into her modus operandi  
22 basically.”); see also Pl. Dep. 350:11-24.)

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26 ///

1 In May 2012, plaintiff wrote again that she would be seeking another job. (Pl. Dep.  
2 433:3-20.) On June 12, 2012, plaintiff sent a letter to Dr. Rich inquiring about a potential job  
3 with his sleep medicine practice. (Pl. Dep. 479:17-25, Ex. 149.) Later in June, she had  
4 decided that she would resign but was waiting in part because she would receive increased  
5 benefits after 10 years with the organization; at that point, she had only been with Northwest  
6 Permanente for 9.8 years. (Pl. Dep. 538:20-539:5, Ex. 171.) She was also looking for work  
7 in California, as her husband had previously been offered a job with Apple Computer there.  
8 (See Pl. Dep. 477:19-478:4, Ex. 146). She had received another job offer, but that offer was  
9 withdrawn. (See Pl. Dep. 604:21-25.)

10 **6. Plaintiff Resigned from Northwest Permanente on September 3, 2012 to**  
11 **Accept a Job with Dr. Rich.**

12 On August 28, 2012, plaintiff received a job offer from Dr. Rich. (Pl. Dep. 617:13-  
13 618:1, Ex. 202, 618:21-619:2, Ex. 203.) She described the job offer as “too good to be true.”  
14 (Pl. Dep. 617:13-618:1, Ex. 202.) Plaintiff immediately submitted her resignation from  
15 Northwest Permanente on September 3, 2012. (Pl. Dep. 24:12-25:2, Ex. 2.) That day,  
16 plaintiff indicated in an email that she was “leaving because of quality issues and concerns  
17 regarding the Division chief[’s] response to them and to the physicians,” and specifically  
18 asked Dr. Barton and another colleague not to tell others that her departure was due to  
19 “personal issue[s]” between her and Dr. Sridharan. (Pl. Dep. 626:20-627:9, Ex. 208.)

20 On November 1, 2012, plaintiff received a formal written job offer from Dr. Rich.  
21 (Pl. Dep. 37:16-22, Ex. 5.) On November 6, 2012, plaintiff received a separation letter from  
22 Northwest Permanente confirming that her “last working day with Northwest Permanente  
23 [would be] on 12/03/12.” (Pl. Dep. 39:10-40:14, Ex. 6.) She signed a Physician  
24 Employment Agreement with Dr. Rich on November 19, 2012. (Pl. Dep. 41:24-42:22,  
25 Ex. 8.)

26

1           When she resigned her position as a Senior Physician with Northwest Permanente,  
2 plaintiff sold back all of her stock in the organization. (Pl. Dep. 39:23-40:4.) On November  
3 28, 2012, plaintiff filled out an exit questionnaire regarding her employment with Northwest  
4 Permanente. (Pl. Dep. 46:3-23, Ex. 9.) Plaintiff made no mention whatsoever of any alleged  
5 retaliation, harassment, or gender discrimination. (*See id.*, Pl. Dep. 47:15-48:24.) In fact, in  
6 response to a question regarding whether she would consider rejoining Northwest  
7 Permanente in the future, she wrote, “Absolutely! I would be very happy to rejoin NWP in  
8 the future!” (Pl. Dep. 46:3-47:20, Ex. 9.)

9           **7. After Plaintiff Started Work with Dr. Rich, She Accepted a Part-Time**  
10           **Job with Northwest Permanente to Work in Its Department of Medical**  
11           **Informatics.**

12 Plaintiff’s last day of work in the Sleep Division at Northwest Permanente was  
13 December 3, 2012. (Pl. Dep. 25:10-26:5, Ex. 3, 58:19-59:8, Ex. 10.) She never again  
14 performed any work for Northwest Permanente’s Sleep Division; neither she nor Northwest  
15 Permanente ever requested that she do so. (*See* Pl. Dep. 45:15-21.) In fact, plaintiff did not  
16 treat a *single* Northwest Permanente patient in 2013. (Pl. Dep. 62:16-19.)

17           In October 2012, before leaving the Sleep Division but after she provided her 90-  
18 days’ notice and accepted a position with Dr. Rich’s clinic, plaintiff agreed to perform  
19 temporary work for Northwest Permanente in DMI after the end of her employment with  
20 Northwest Permanente in December as a Senior Physician in the Sleep Division. (Pl. Dep.  
21 25:10-26:5, Ex. 3, 66:24-67:10, Ex. 16.) She entered into a new temporary contract with  
22 Northwest Permanente on January 4, 2013 to perform DMI work. (*Id.*) The work plaintiff  
23 performed in DMI focused on medical informatics, *i.e.*, the use of information technology to  
24 improve the delivery of healthcare. Among other functions, DMI was responsible for  
25 improving the systems that Northwest Permanente uses to maintain, update, and use digital  
26 health records.

26

1 Plaintiff admits that her new position at DMI was “very different from a senior  
2 physician employment contract,” *i.e.*, her former position. (Pl. Dep. 35:4-13.) In her new  
3 role, she had no hospital privileges, was listed under a different specialty (“Medical  
4 Informatics”), and received a different pay rate. (Pl. Dep. 65:9-66:9, Ex. 14, 66:24-67:10,  
5 Ex. 16.) The new position also was based in a different location, in an administrative, non-  
6 clinical setting. (*See* Pl. Dep. 62:16-63:11.)

7 Plaintiff claims that, after she began in DMI, Dr. Sridharan and Mr. Odell again were  
8 “push[ing] \* \* \* to get rid of me.” (*See* Pl. Dep. 27:4-29:15; *see also* Pl. Dep. 32:14-33:21.)  
9 They allegedly did so in February 2013. (Pl. Dep. 77:5-22.) However, plaintiff could not  
10 identify during her deposition who told her that information or when she heard it, and she  
11 testified that the people she heard it from likely heard it secondhand themselves. (Pl. Dep.  
12 28:17-29:13; *see also* Pl. Dep. 60:3-61:15, 71:23-74:3.) Moreover, Plaintiff admits that she  
13 continued to work in DMI for “several more months” without any issues. (*See* Pl. Dep.  
14 78:12-13.) Plaintiff also had a completely different management structure. (*See* Pl. Dep.  
15 31:20-32:1.)

16 Plaintiff also made clear in her deposition that, after she started working in DMI,  
17 under her new contract, none of her former colleagues in the Sleep Division had any material  
18 impact on her job. After she heard about alleged the “pressure” to fire her from the DMI  
19 position, she spoke to one of her supervisors, Dr. Michael McNamara, who told her that she  
20 was “really valued,” that she was “doing great work,” and that “we want you here because  
21 you do good work, and we’re short in the department.” (Pl. Dep. 77:5-22.) Another of her  
22 supervisors in DMI, Dr. Homer Chin, “always treated [her] appropriately, [and]  
23 professionally,” that she “had great respect for him,” and that “he had great respect for  
24 [plaintiff]. He praised [plaintiff] consistently.” (Pl. Dep. 26:6-21.) For example, on  
25 October 12, 2012, a few months before the effective date of her resignation from the Sleep  
26 Division, Dr. Chin emailed her to say that “[y]our work for us has been invaluable, and I’m

1 glad that we will be able to continue having you do some of your time with us.” (Pl. Dep.  
2 643:20-25, Ex. 218.)

3 Plaintiff voluntarily submitted her resignation from DMI on October 16, 2013. (Pl.  
4 Dep. 84:22:-85:5, Ex. 20.) She wrote to several of her colleagues in DMI, including  
5 Dr. McNamara, that she was resigning “to increase my time at my clinical job [with  
6 Dr. Rich].” (*Id.*) Her email made no mention whatsoever of any retaliation or gender  
7 discrimination – instead, she announced the need to spend more time with her patients at  
8 Dr. Rich’s clinic, a business she was in the process of purchasing . (*See id.*)

9 It is undisputed that plaintiff voluntarily resigned from her position in DMI; she was  
10 not “fired.” (Pl. Dep. 29:5-15, 74:4-10.) She never even received any negative performance  
11 feedback during her time there. (*See* Pl. Dep. 75:12-20.)

12 **8. In 2014, Plaintiff Purchased Dr. Rich’s Practice, and Later Sued Him.**

13 Effective January 3, 2014, plaintiff entered into a stock purchase agreement to  
14 purchase Dr. Rich’s practice. (Pl. Dep. 87:15-88:9, Ex. 22.) She later sued Dr. Rich (and a  
15 law firm that was involved in the transaction related to her purchase of Dr. Rich’s sleep  
16 practice). She testified two separate times, under oath, in a subsequent deposition in the  
17 lawsuit, as well as in a separate declaration, that she left her employment with Northwest  
18 Permanente in December of 2012. (*See* Thompson Decl., ¶¶ 4-5, Exs. 3-4; *see also* Pl. Dep.  
19 89:2-21.)

20 **9. Through Her Employment in the Sleep Division and DMI, Plaintiff**  
21 **Suffered No Adverse Action.**

22 At no point during her employment as a sleep medicine specialist or during her  
23 subsequent part-time employment in DMI did plaintiff experience any adverse actions. She  
24 voluntarily resigned from both positions. (Pl. Dep. 24:12-25:2, Ex. 2, 84:24:-85:5, Ex. 20.)  
25 She also admits that she was never formally disciplined or counseled regarding her  
26 performance. (Pl. Dep. 95:16-21, 205:15-24.)

1 **III. ARGUMENT**

2 **A. Summary Judgment Standard.**

3 Summary judgment is appropriate where the record shows that there is “no genuine  
4 issue as to any material fact and that the moving party is entitled to a judgment as a matter of  
5 law.” *Love v. Polk County Fire Dist.*, 209 Or App 474, 476, 149 P3d 199 (2006) (quoting  
6 ORCP 47 C). A material fact is “one that, under applicable law, might affect the outcome of  
7 a case.” *Zygar v. Johnson*, 169 Or App 638, 646, 10 P3d 326 (2000). To withstand a motion  
8 for summary judgment, a plaintiff must establish there is a genuine issue of material fact in  
9 dispute. *See* ORCP 47 C.

10 In seeking to establish a genuine issue of material fact, a plaintiff may not rely on  
11 mere allegations, conclusory assertions, or subjective personal judgments. *See Tolbert v.*  
12 *First National Bank of Oregon*, 312 Or 485, 495, 823 P2d 965 (1991) (flat disbelief is not an  
13 inference that plaintiffs may invoke on summary judgment); *Blandino v. Fischel*, 179 Or App  
14 185, 192, 39 P3d 258 (uncontradicted testimony cannot be controverted on summary  
15 judgment simply by asserting it should not be believed; rather, plaintiff must present specific  
16 evidence on each element of claim), *rev den*, 334 Or 492 (2002). In opposing summary  
17 judgment, plaintiff may rely only on evidence that would be admissible at trial. *Hickey v.*  
18 *Settlemier*, 318 Or 196, 203, 864 P2d 372 (1993) (“The court must view the *admissible*  
19 evidence that is in the record in the light most favorable to the nonmoving party \* \* \*.”  
20 (emphasis added)). Specifically, “[w]hen a motion for summary judgment is made and  
21 supported \* \* \* an adverse party may not rest upon the mere allegations or denials of that  
22 party’s pleading, but the adverse party’s response, by affidavits, declarations or as otherwise  
23 provided in this section, must set forth specific facts showing that there is a genuine issue as  
24 to any material fact for trial.” ORCP 47 D.

25 If a non-moving party cannot meet her burden to show that genuine issues of fact  
26 exist, the Court shall grant summary judgment. ORCP 47. Plaintiff cannot meet that burden.

1 **B. Plaintiff’s First, Third, and Fourth Claims Fail Because They Each Are Based**  
2 **on Unactionable Conduct Outside the Applicable Statutes of Limitations.**

3 Plaintiff’s first, third, and fourth claims are based on conduct that occurred outside  
4 the statute of limitations. Those claims are time barred and fail on that independent basis.

5 The statute of limitations for plaintiff’s first, third, and fourth claims is one year. *See*  
6 ORS 659A.875(1); ORS 659A.885. It is undisputed that plaintiff’s last day of work in the  
7 Sleep Division, where all of the allegedly unlawful conduct occurred, was in 2012. (*See* Pl.  
8 Dep. 58:19-59:8, Ex. 10.) It also is undisputed that she filed her lawsuit on September 8,  
9 2014—nearly two years after her resignation from the Sleep Division. For those reasons,  
10 plaintiff’s first, third, and fourth claims are untimely. In a transparent attempt to resuscitate  
11 her untimely claims,<sup>7</sup> plaintiff has alleged instead that “in fact [her] employment actually  
12 continued until December 15, 2013.” (Third Am. Compl., ¶ 43.) That allegation fails as a  
13 matter of both fact and law.

14 First, no reasonable juror could conclude that plaintiff’s employment did not  
15 terminate when she left the Sleep Division. There is no dispute that plaintiff “resigned” from  
16 the position on which she bases her claim—*i.e.*, her position in the Sleep Division—effective  
17 December 3, 2012. (Pl. Dep. 58:19-59:8, Ex. 10.) Her Senior Physician Employment  
18 contract formally ended on that date. (*See* Pl. Dep. 39:10-40:14, Ex. 6.) In connection with  
19 her resignation, plaintiff was contractually required to sell back all of her stock in Northwest  
20 Permanente and conducted an exit interview. (*See* Pl. Dep. 39:23-40:14, Ex. 6, 46:3-23,  
21 Ex. 9.) Nowhere on her exit interview questionnaire that she filled out herself did she  
22 suggest that her employment was “continuing” in any way. (*See* Pl. Dep. 46:3-23, Ex. 9.)

23  
24 \_\_\_\_\_  
25 <sup>7</sup> Plaintiff’s original complaint tellingly omitted the date of her resignation from the  
26 Sleep Division. In light of that omission, plaintiff’s counsel *conceded* that plaintiff’s first,  
third, and fourth claims were untimely at the Rule 21 stage of this matter. Plaintiff alleged  
for the first time that her “employment actually continued” until December 2013 in her *third*  
amended complaint, that was filed well over a year after she initiated this lawsuit.

1           Additionally, plaintiff’s new position in DMI was separate and distinct from her old  
2 role; she admitted that it was “very different from a senior physician employment contract,”  
3 *i.e.*, her former position. (Pl. Dep. 35:4-13.) It was a temporary position that did not come  
4 with benefits. (*Id.*) Plaintiff did not treat a *single* patient while she worked in DMI. (Pl. Dep.  
5 62:16-19.) In her new position, she signed a new and distinct contract, had no hospital  
6 privileges, was listed as having a new specialty (“Medical Informatics”), and received a  
7 different pay rate. (Pl. Dep. 65:9-66:9, Ex. 14, 66:24-67:10, Ex. 16.) The new position also  
8 was based in a different location and reported to completely different management. (*See* Pl.  
9 Dep. 31:20-32:1, 62:16-63:11.) Moreover, as plaintiff concedes, she was then working at an  
10 entirely new full-time job for Dr. Rich and performed no work for Northwest Permanente’s  
11 Sleep Division after that point. (*See* Pl. Dep. 45:15-21.) For those reasons, no material  
12 aspect of plaintiff’s employment in the Sleep Division “continued” after her resignation.

13           Second, *regardless* of whether plaintiff’s resignation from the Sleep Division  
14 constituted a “termination” or a continuation of her employment, the statutes of limitations  
15 on her first, third, and fourth claims began to run at the time of her resignation from the Sleep  
16 Division. “A statute of limitations begins to run on the date on which the plaintiff’s claim  
17 ‘accrues.’” *Pouncil v. Tilton*, 704 F3d 568, 573 (9th Cir 2012) (citing *Lukovsky v. City and*  
18 *County of San Francisco*, 535 F3d 1044, 1048 (9th Cir 2008));<sup>8</sup> *see also Foster Grp., Inc. v.*  
19 *City of Elgin*, 264 Or App 424, 439, 332 P3d 354 (2014) (“Normally, a statute of limitations  
20 in a tort action begins to run the instant the claim or cause of action accrues. A cause of  
21 action accrues when” all of its elements are met, *i.e.*, when “the party owning it has a right to  
22 sue on it.” (internal quotation marks and citation omitted)); *see also T.R. v. Boy Scouts of*

23  
24

<sup>8</sup> “In applying Oregon’s employment discrimination laws, [Oregon courts] may look  
25 to federal cases that interpret Title VII for their instructive value.” *Winnett v. City of*  
26 *Portland*, 118 Or App 437, 442, 847 P2d 902 (1993) (citing *Seitz v. Albina Human Resources*  
*Center*, 100 Or App 665, 672-73, 788 P2d 1004 (1990)).

1 *Am.*, 344 Or 282, 292, 181 P3d 758 (2008) (a cause of action does not accrue until “all of  
2 the elements of the tort are present” (citation omitted)).

3       Based on plaintiff’s allegations, which concern events that took place while she was  
4 working in the Sleep Division, the elements of plaintiff’s first, third, and fourth claims were  
5 present as of the time of her December 3, 2012 resignation—regardless of whether that  
6 resignation is characterized as a “termination” or because she took an entirely new job with  
7 DMI as a “continuation” of her employment. Specifically, the Ninth Circuit has held that,  
8 like a termination, a job transfer is discrete act that can satisfy the “adverse action” element  
9 of a retaliation or discrimination claim—so long as the transfer is within the statute of  
10 limitations. *See Bagley v. Bel-Aire Mech. Inc.*, --- F App’x ---, No. 13-17386, 2016 WL  
11 1393428, at \*1 (9th Cir Apr. 8, 2016); *see also Raymond v. Sodexo Mgmt., Inc.*, No. CV 08-  
12 00695-PHX-EHC, 2008 WL 2783275, at \*2 (D Ariz July 16, 2008) (“Discrete acts include  
13 such actions as termination, failure to promote, refusal to hire, and *denial of transfer.*”  
14 (emphasis added) (citing *AMTRAK v. Morgan*, 536 US 101, 115, 122 S Ct 2061, 153 L Ed 2d  
15 106 (2002))). As discussed further below, plaintiff’s lawsuit is based almost entirely on  
16 alleged adverse actions that occurred on or before the date of her resignation from the Sleep  
17 Division. The handful of allegations she asserts took place after that date are, as a matter of  
18 law, not adverse actions. No reasonable juror could conclude that they led to her resignation  
19 from DMI; she admits that after learning of Dr. Sridharan and Mr. Odell’s alleged comments,  
20 she continued working at DMI for “several more months” without issue. (*See Pl. Dep.*  
21 78:12-13.)

22       The events on which plaintiff bases her first, third, and fourth claims, which are  
23 explained in detail above, allegedly occurred on or before December 3, 2012. Plaintiff did  
24 not file her lawsuit until nearly two years later in September 2014. For those reasons, her  
25 first, second, third, and fourth claims each are untimely based on the applicable one-year  
26 statute of limitations. Those claims should be dismissed.

1 **C. Each One of Plaintiff’s Claims Fails Because She Suffered No Adverse Action.**

2 Each of plaintiff’s claims requires her to show that she suffered an adverse  
3 employment action, which she cannot do. *See Steele v. Mayoral*, 231 Or App 603, 616, 220  
4 P3d 761 (2009) (citing *Somoza v. University of Denver*, 513 F3d 1206, 1212 (10th Cir  
5 2008)). For the purposes of a retaliation claim, an adverse employment action is an action  
6 that “‘might have dissuaded a reasonable worker from making or supporting a charge of  
7 discrimination.’” *Id.* at 616 (quoting *Burlington N. & S.F.R. Co. v. White*, 548 US 53, 67-68,  
8 126 S Ct 2405, 165 L Ed 2d 345 (2006)). For the purposes of a discrimination claim,  
9 “[a]dverse employment actions include ‘actions that materially affect[] compensation, terms,  
10 conditions, or privileges’ of employment.” *James v. C-Tran*, 130 F App’x 156, 157 (9th Cir  
11 2005) (second brackets in original) (quoting *Little v. Windermere Relocation, Inc.*, 301 F3d  
12 958, 970 (9th Cir 2002)).

13 Plaintiff cannot show that she suffered any actionable adverse employment action  
14 because none of the incidents that she alleges amount to a legally cognizable alteration of her  
15 employment’s terms or conditions. She admits that she was never formally disciplined or  
16 counseled regarding her performance. (*See* Pl. Dep. 95:16-21, 205:15-24.) Nor does her  
17 voluntary resignation qualify as an adverse action; for it to do so, plaintiff would need to  
18 establish that she was constructively discharged. She has no evidence to support such a  
19 claim. Each of plaintiff’s claims fails as a matter of law.

20 **1. None of the Incidents That Occurred During Plaintiff’s Employment**  
21 **Qualify as Adverse Actions.**

22 Under either the retaliation or the discrimination standard, none of the incidents that  
23 plaintiff alleges during her employment with Northwest Permanente qualify as adverse  
24 actions. Specifically:

- 25 • Plaintiff alleges that Dr. Weisz and Mr. Odell made comments that they were  
26 unhappy with plaintiff’s complaints. (*See, e.g.*, Pl. Dep. 49:20-51:10.) As a matter of

1 law, those comments could not have been adverse actions because they did not  
2 *actually* affect plaintiff’s employment in any way. *McGrath v. Nevada Dep’t of Pub.*  
3 *Safety*, No. 3:07-CV-00292-LRH-VPC, 2009 WL 875508, at \*4 (D Nev Mar. 27,  
4 2009) (holding that “a standard evaluation [that] would have no effect on any term of  
5 [a plaintiff’s] employment” was not an adverse action), *aff’d*, 373 F App’x 767 (9th  
6 Cir 2010).

7 • Plaintiff alleges that Dr. Weisz “put[] pressure on” Dr. Sridharan and Mr. Odell “to  
8 get me fired,” and that Dr. Sridharan and Mr. Odell in turn attempted pressure  
9 Northwest Permanente into terminating plaintiff during her employment with the  
10 Sleep Division. (*See* Pl. Dep. 33:2-34:15, 51:11-52:2, 60:3-61:1, 71:23-74:10.)  
11 Additionally, in February 2013, Dr. Sridharan and Mr. Odell also allegedly “[s]poke  
12 to Leadership to try to force me out of” DMI, though, again, it is undisputed that  
13 plaintiff was never terminated from her position in DMI. (*See id.*) Because the  
14 alleged “pressure” did not actually have any effect on plaintiff’s employment,  
15 whether in the Sleep Division or in DMI, it is not an adverse action. *McGrath*, 2009  
16 WL 875508, at \*4. Plaintiff admits that Dr. Weisz took no other alleged adverse  
17 actions against her. (*See* Pl. Dep. 49:20-51:13.)

18 • The single instances in which Mr. Odell and Dr. Sridharan allegedly “shout[ed]” and  
19 “yell[ed]” at plaintiff are, as a matter of law, insufficient to establish an adverse  
20 action. (*See* Pl. Dep. 49:20-50:6, 279:9-280:11, 391:9-392:10.) Her allegations  
21 regarding those interactions fail because “[c]onduct such as unruly behavior during a  
22 meeting, derogatory e-mails, or an angry outburst and ostracism do not rise to th[e]  
23 level” of a “materially adverse action.” *Steele*, 231 Or App at 618 (citing *Somoza*,  
24 513 F3d at 1214-15, 1217-18)); *Wood v. GCC Bend, LLC*, 270 F App’x 484, 486 (9th  
25 Cir 2008) (a supervisor’s “embarrassment of [an employee] in the workplace is not a  
26

1 change in the terms and conditions of employment under Oregon law” (citing *Doe v.*  
2 *Denny’s*, 327 Or 354, 359, 963 P2d 650 (1998))).

3 • Mr. Odell’s alleged “[m]ultiple e-mails” that “intimidat[ed]” plaintiff are not adverse  
4 actions. (Pl. Dep. 54:22-55:7.) Merely receiving an unpleasant email from a  
5 supervisor is not an adverse action because it would not “dissuade[] a reasonable  
6 worker from making or supporting a charge of discrimination.” *Steele*, 231 Or App  
7 at 616 (quoting *Burlington N. & S.F.R. Co.*, 548 US at 67-68).<sup>9</sup>

8 Each of plaintiff’s claims fails because she cannot show that any of the incidents that  
9 she complains of now amounted to an adverse action, an essential element to each claim  
10 brought in her lawsuit.

11 **2. Plaintiff Was Not Constructively Discharged.**

12 Plaintiff has no evidence that her working conditions were so intolerable that she was  
13 *forced* to resign. For that reason, her resignation from the Sleep Division (or from DMI) is  
14 not an adverse action, and each one of her claims fails.

15 **a. Legal Standard for Constructive Discharge.**

16 A plaintiff who resigns has suffered an adverse action only if she can establish that  
17 she was “constructively discharged.” *Nkrumah v. City of Portland*, 261 Or App 365, 372,  
18 323 P3d 453 (2014) (citing *Handam v. Wilsonville Holiday Partners, LLC*, 225 Or App 442,  
19 447, 201 P3d 920 (2009), *vac’d and rem’d on other grounds*, 347 Or 533, *adh’d to on*  
20 *remand*, 235 Or App 688, *rev den*, 349 Or 171 (2010)).

21 “[T]o establish a constructive discharge, a plaintiff must allege and prove that (1) the  
22 employer *intentionally* created or *intentionally* maintained *specified* working conditions;  
23 (2) those working conditions were *so intolerable* that a reasonable person in the employee’s  
24 position would have resigned because of them; (3) the employer *desired* to cause the

25 \_\_\_\_\_  
26 <sup>9</sup> Plaintiff admits that Mr. Odell took no other alleged action against her. (See Pl.  
Dep. 54:1-55:7.)

1 employee to leave employment as a result of those working conditions or *knew* that the  
2 employee was certain or substantially certain, to leave employment as a result of those  
3 working conditions; and (4) the employee did leave the employment as a result of those  
4 working conditions.” *Id.* at 373 (emphases added) (quoting *McGanty v. Staudenraus*, 321  
5 Or 532, 557, 901 P2d 841 (1995)).

6           **b. Plaintiff Cannot Establish the First Element of a Constructive**  
7           **Discharge Because She Has Failed to Identify Any “Specified”**  
8           **Working Conditions That Northwest Permanente “Intentionally”**  
9           **Created.**

9           Plaintiff’s wrongful discharge theory fails under the first element because she cannot  
10 identify any “specified” working conditions that Northwest Permanente “intentionally”  
11 created. The only evidence that arguably would qualify as such a “condition” concerns  
12 (1) two isolated instances in which Mr. Odell and Dr. Sridharan allegedly yelled at plaintiff,  
13 and (2) “[m]ultiple emails” that Mr. Odell sent to plaintiff regarding the issues she raised  
14 over the new cabbing policy. (*See* Pl. Dep. 49:20-50:6, 54:22-55:7, 279:9-280:11, Ex. 84.)  
15 Those minor, isolated events are not continuously-present “working conditions” that can  
16 support plaintiff’s constructive discharge theory. *See McGanty*, 321 Or at 557 (reversing  
17 motion to dismiss wrongful discharge claim based on constructive discharge theory based on  
18 an allegation of a ““*continuing pattern* of sexual harassment and abuse of” plaintiff”  
19 (emphasis added; citation omitted)). Plaintiff’s claims fail for that reason.

20           **c. Plaintiff Cannot Establish the Second Element of a Constructive**  
21           **Discharge Because She Cannot Show Objectively Intolerable**  
22           **Working Conditions.**

22           Plaintiff also has no evidence that any of her working conditions were so intolerable  
23 that they would have caused a reasonable person to resign. Her wrongful discharge theory  
24 fails under the second element as well.

25           To show a constructive discharge, an employee must offer evidence that would  
26 permit a reasonable juror to conclude that she experienced extreme and objectively

1 intolerable working conditions. *Leonard v. Moran Foods, Inc.*, 269 Or App 112, 119, 343  
2 P3d 693 (“[P]laintiff ha[s] the burden of producing admissible evidence establishing facts  
3 that by themselves or by their reasonable inferences could cause a reasonable juror to find  
4 each element of plaintiff’s claim.” (internal quotation marks and citation omitted)), *rev den*,  
5 357 Or 324 (2015). Applying that standard, courts reject constructive discharge claims even  
6 where plaintiffs have alleged obscene or offensive comments by supervisors or coworkers.  
7 *See, e.g., Tomco v. Prada USA Corp.*, 484 F App’x 99, 100 (9th Cir 2012) (affirming  
8 summary judgment for employer in constructive discharge case on grounds that “a single  
9 instance in which a manager yelled at her is not sufficiently intolerable or aggravated so as to  
10 compel a reasonable employee to resign”).

11 Critically, a plaintiff pursuing a constructive discharge theory must offer evidence of  
12 even *more* extreme working conditions than would be required to show a hostile work  
13 environment. *Steele*, 231 Or App at 619-20 (citing *O’Brien v. Dep’t of Agriculture*, 532 F3d  
14 805, 810-11 (8th Cir 2008)). And, because even a supervisor’s repeated, obscene comments  
15 are insufficient to establish a hostile working environment, such evidence also is insufficient  
16 to establish constructive discharge. *See Kortan v. California Youth Authority*, 217 F3d 1104,  
17 1107 (9th Cir 2000) (finding no hostile work environment and affirming summary judgment  
18 for employer despite evidence that a supervisor referred to women as “castrating bitch,”  
19 “madonna,” or “regina” in front of plaintiff on several occasions and directly called plaintiff  
20 “Medea”); *Adusumilli v. City of Chicago*, 164 F3d 353, 357, 361-62 (7th Cir 1998) (finding  
21 no hostile work environment claim and affirming summary judgment for employer where  
22 employee teased plaintiff, made sexual jokes, told her not to wave at police officers “because  
23 people would think she was a prostitute,” commented about low-neck tops, leered at her  
24 breasts, and touched her arm, fingers, or buttocks on four occasions), *cert den*, 528 US 988  
25 (1999).

26

1 Plaintiffs pursuing constructive discharge claims are *required* to offer—at  
2 minimum—evidence that their working conditions were consistently and pervasively  
3 intolerable. *McGanty*, 321 Or at 557 (reversing ORCP 21 dismissal of claim for constructive  
4 discharge where plaintiff alleged that, “for 19½ months, defendants ‘engaged in a course of  
5 [physical and verbal] conduct constituting a continuing pattern of sexual harassment and  
6 abuse of’ plaintiff” (brackets in original)); *see also Nichols v. Azteca Restaurant Enterprises,*  
7 *Inc.*, 256 F3d 864, 870, 872-73 (9th Cir 2001) (finding a hostile work environment when a  
8 male employee was subject to a relentless campaign of vulgarities, including “f-ggot” and  
9 “f--king female whore,” by both co-workers and supervisors at least once a week and often  
10 several times per day over several years of employment). As a matter of fact and law,  
11 plaintiff cannot meet that high burden, and her theory of constructive discharge fails.

12 None of the incidents described above, whether individually or collectively,  
13 amounted to a work environment that was ““so intolerable that a reasonable person in  
14 [plaintiff’s] position would have resigned because of them.”” *Nkrumah*, 261 Or App at 373  
15 (emphasis omitted) (quoting *McGanty*, 321 Or at 557). If they had, plaintiff would have  
16 resigned immediately upon giving notice; instead, she worked for over 90 more days in the  
17 Sleep Division.<sup>10</sup> (*See* Pl. Dep. 24:12-25:2, Ex. 2, 25:10-26:5, Ex. 3, 58:19-59:8, Ex. 10.)  
18 *See also Wood*, 270 F App’x at 486 (for purposes of a constructive discharge claim, “the  
19 five-month lapse between [the allegedly intolerable events or conditions] and [an  
20

21 \_\_\_\_\_  
22 <sup>10</sup> To the extent plaintiff premises her constructive discharge claim on her *subsequent*  
23 resignation from DMI, that claim also fails as a matter of law. Plaintiff similarly provided  
24 another 90-day notice when she resigned from her DMI position. Further, the *only* allegation  
25 from the time after she resigned her position with the Sleep Division is the “push” that  
26 allegedly took place to force her out of DMI, which, as explained above, is not actionable.  
(*See* Pl. Dep. 27:4-29:15, 32:14-33:21.) Additionally, plaintiff admitted in her deposition  
that her work environment and interactions with her DMI supervisors in 2013 were  
consistently positive, and that even after she learned second hand about alleged “pressure” to  
force her out, she continued working for several more months without issue. (*See, e.g.*, Pl.  
Dep. 26:6-21, 77:5-22, 78:12-13, 643:20-25, Ex. 218.)

1 employee’s] decision to resign defeats her claim of a causal relationship between the two  
2 events”).

3 Moreover, plaintiff’s claim that she was constructively discharged is undermined by  
4 her admissions that she *wanted* to leave Northwest Permanente for other reasons. She wrote  
5 as early as May 2012—four months before she gave notice of her resignation—that she  
6 would be seeking other work. (*See* Pl. Dep. 433:3-20.) When she eventually received a job  
7 offer from Dr. Rich, she described the job offer as “too good to be true.” (Pl. Dep. 617:13-  
8 618:1, Ex. 202.) Moreover, at the time of her resignation, plaintiff admitted that she hoped to  
9 be able to rejoin Northwest Permanente in the future. (Pl. Dep. 46:3-47:20, Ex. 9.) She  
10 further admitted that she was receiving good feedback on her performance from her  
11 immediate supervisors in the months before she resigned. (Pl. Dep. 77:6-22.) Given those  
12 admissions, and the absence of any evidence of objectively *intolerable* working conditions,  
13 plaintiff cannot establish the second element of her argument that she was constructively  
14 discharged.

15 **D. Plaintiff’s Retaliation Claims Also Fail Because She Has No Evidence That She**  
16 **Suffered Any Adverse Action *Because of Any Alleged Whistleblower Activity.***

17 Plaintiff’s retaliation claims each fail for another independent reason: there is no  
18 evidence that Northwest Permanente took any adverse action against her *because of any*  
19 alleged protected activity.

20 **1. Legal Standard for Retaliation.**

21 To survive summary judgment, plaintiff must establish that (1) she engaged in  
22 protected activity;<sup>11</sup> (2) she experienced a materially adverse action, that is, an action that a

23 \_\_\_\_\_  
24 <sup>11</sup> The validity of plaintiff’s underlying alleged complaints is irrelevant. *Jensen v.*  
25 *Medley*, 170 Or App 42, 54, 11 P3d 678 (2000) (“Whether the report of suspected criminal  
26 activity ‘may later be proved to have been legitimate or not’ is, indeed, irrelevant to whether  
an employee had reasonable cause in reporting the suspected violation of the law at the time  
the report was made.” (emphasis omitted)), *aff’d in part, rev’d in part on other grounds*, 336  
Or 222 (2003).

1 reasonable employee would find materially adverse; and (3) a causal connection exists  
2 between her protected activity and the adverse action. *Steele*, 231 Or App at 616 (citing  
3 *Somoza*, 513 F3d at 1212). Plaintiff must offer evidence sufficient to establish that her  
4 protected activity was a “but for” cause of some adverse action. *See Whitley v. City of*  
5 *Portland*, 654 F Supp 2d 1194, 1223 (D Or 2009) (“[A] plaintiff must show that she would  
6 not have been terminated ‘but-for’ her engaging in protected activity, or that, ‘in the absence  
7 of the discriminatory motive, [plaintiff] would have been treated differently.’” (second  
8 brackets in original) (quoting *Hardie v. Legacy Health Sys.*, 167 Or App 425, 434-35, 6 P3d  
9 531 (2000))); *Estes v. Lewis & Clark Coll.*, 152 Or App 372, 381, 954 P2d 792 (1998)  
10 (plaintiff must prove that Northwest Permanente had a “wrongful purpose” and that the  
11 “wrongful purpose \* \* \* [was] ‘a factor that made a difference’ in the discharge decision”  
12 (citation omitted)).

13 **2. Plaintiff Has No Evidence That Northwest Permanente Took Any Action**  
14 **Against Her Because of Her Alleged Whistleblowing Activity to Establish**  
15 **Causation.**

16 Plaintiff has no evidence that any Northwest Permanente employee ever took *any*  
17 action against her, much less *because of* any alleged protected activity that she engaged in. It  
18 is undisputed that several of the issues raised by plaintiff were broader departmental issues.

19 Moreover, many of the issues plaintiff allegedly raised were ongoing issues that  
20 predated Dr. Weisz’s leadership—well before the time plaintiff alleges she was retaliated  
21 against. Plaintiff admitted in her deposition, for example, that Northwest Permanente’s  
22 Pulmonology Department had been working in developing a protocol for home sleep studies  
23 as early as 2011. (*See* Pl. Dep. 151:5-152:9.) At that time—before Dr. Weisz arrived—  
24 Northwest Permanente also was considering new policies regarding transporting patients who  
25 were unable to drive themselves to and from appointments. (*See* Pl. Dep. 207:10-18, 208:8-  
26 24.)

1           Additionally, the undisputed facts show that all of Northwest Permanente’s decisions  
2 were made for legitimate business reasons, and not due to any retaliatory animus against  
3 plaintiff:

4       • Apart from the fact that they do not qualify as adverse actions, plaintiff’s allegations  
5 concerning the comments by Dr. Weisz and Mr. Odell regarding their displeasure  
6 with her, which are described above, are too vague to establish any retaliatory  
7 animus. In each case, plaintiff heard about the comments secondhand, and can offer  
8 only general summaries of what was said. (*See, e.g.*, Pl. Dep. 26:17-29:24, 32:2-13,  
9 49:20-51:10, 54:14-21.) For example, regarding the “pressure” that Mr. Odell  
10 allegedly put on plaintiff’s supervisors to fire her from DMI following her resignation  
11 from the Sleep Division, plaintiff testified simply that she “heard \*\*\* that there was a  
12 push from Dr. Sridharan and \* \* \* Mr. O’Dell [*sic*] to get rid of me.” (Pl. Dep.  
13 26:17-28:1.) When pressed, however, plaintiff could not identify who in particular  
14 allegedly told her of the alleged “push,” :

15                       It was Mr. O’Dell, *and I can’t recall who told me.* I believe it  
16                       may have been Scott Dunlap and Stu Levy who may have  
17                       heard it from Kathy Poteraj, or Dr. McNamara. Dr. McNamara  
18                       and Kathy Poteraj were married, *and so I can’t honestly*  
19                       *remember who told me.*

20           (*See* Pl. Dep. 28:15-29:3 (emphases added).)

21           Those allegations (based purely on inadmissible hearsay) are insufficient to  
22 state a claim, much less to withstand summary judgment. *See Patton v. Thomas*,  
23 No. 3:10-CV-01333-MO, 2011 WL 4544072, at \*2 (D Or Sept. 29, 2011) (dismissing  
24 complaint because the plaintiff’s allegations were “too vague” and noting that  
25 “[p]laintiff does not connect [the allegedly retaliatory] activity to any defendant, nor  
26 does he connect it to” his alleged protected activity). The same is true of plaintiff’s  
allegations regarding Dr. Weisz, Dr. Sridharan, and Mr. Odell allegedly “putting  
pressure” on Northwest Permanente to terminate her; plaintiff cannot clearly say how

1 the “pressure” was applied, much less connect it to any of her alleged protected  
2 activity. *See id.*

- 3 • Plaintiff has no evidence that Mr. Odell’s and Dr. Sridharan’s alleged “shout[ing]”  
4 and “yell[ing]” at her on two separate and isolated occasions were motivated by any  
5 of her alleged protected activity. Her bare allegation that they handled the  
6 interactions unprofessionally cannot establish that their conduct was *causally*  
7 *connected* to any of her alleged protected activity. *See Edwards v. N.Y. State Unified*  
8 *Ct. Sys.*, No. 12 CIV. 46 (WHP), 2012 WL 6101984, at \*5 (SDNY Nov. 20, 2012)  
9 (rejecting “the familiar faulty syllogism: something bad happened to me at work; I  
10 am [a member of a protected class]; therefore it must have happened because I am [a  
11 member of a protected class]” (citation omitted)).
- 12 • The same is true of Mr. Odell’s “intimidat[ing]” emails. The fact that the emails  
13 allegedly were intimidating is insufficient to show that they were causally connected  
14 to any of her alleged protected activity. *See Patton*, 2011 WL 4544072, at \*2.

15 In addition to the fact that *none* of those instances qualifies as an adverse action, there  
16 is no evidence that any of Northwest Permanente’s conduct toward plaintiff was causally  
17 connect to any of her alleged protected activity, even if such activity arguably even occurred.  
18 Plaintiff’s retaliation claims fail as a matter of law.

19 **E. Plaintiff’s Fourth Claim for Gender Discrimination Fails as a Matter of Fact and**  
20 **Law.**

21 Plaintiff’s fourth claim for gender discrimination claim fails. Nowhere has plaintiff  
22 ever even meaningfully articulated the *theory* underlying her gender discrimination claim,  
23 much less backed it up with any admissible evidence. Although plaintiff testified in her  
24 deposition that she is pursuing a disparate *treatment* claim, her complaint alleges only a  
25 disparate *impact* claim on the basis of unidentified “policies and practices.” (*See* Third Am.  
26 Compl. ¶¶ 74-82.) For that reason, she may not pursue a disparate treatment claim. *See Bova*

1 *v. City of Medford*, 262 Or App 29, 37, 324 P3d 492 (2014) (holding that “the trial court  
2 erred in allowing the plaintiffs’ age discrimination claim \* \* \* to proceed to trial on a theory  
3 of disparate impact, which was not pleaded”). Additionally, much of that part of plaintiff’s  
4 complaint is simply copy/pasted verbatim from the original complaint filed against  
5 Northwest Permanente by Dr. Jennifer Lycette, whom plaintiff’s counsel also represents.  
6 (*See* Thompson Decl., ¶ 7, Ex. 6 (Breaden Compl. ¶¶ 74-82; Lycette Compl., ¶¶ 68-72).)

7 Plaintiff’s disparate impact claim fails as a matter of fact and law. “To establish a  
8 prima facie case of disparate impact \* \* \* [a] plaintiff[] must: (1) show a significant disparate  
9 impact on a protected class or group; (2) identify the specific employment practices or  
10 selection criteria at issue; and (3) show a causal relationship between the challenged practices  
11 or criteria and the disparate impact.” *Hemmings v. Tidyman’s Inc.*, 285 F3d 1174, 1190 (9th  
12 Cir 2002).<sup>12</sup> The record is devoid of any evidence in support of those elements. As  
13 discussed above, plaintiff suffered no actionable adverse employment action. The only  
14 “practice” or “criteria” that even *arguably* would support plaintiff’s theory concerns changes  
15 to other physicians’ part time work schedules, which she does not allege and were changes  
16 that, as plaintiff candidly admitted in her deposition, had nothing *whatsoever* to do with her  
17 and did not impact her in any way. (Pl. Dep. 18:13-19:11.) Moreover, plaintiff had no  
18 evidence that even remotely suggests that any of Northwest Permanente’s actions were based  
19 on her gender.

20 Plaintiff’s retaliation claim under ORS 659A.030 also fails. Because all of Northwest  
21 Permanente’s decisions were taken for legitimate business reasons, plaintiff has no evidence  
22 that Northwest Permanente took any action against her *because of* any complaint of gender  
23 discrimination. (*See generally* Section III.D.2, *supra*.)

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25 <sup>12</sup> It is unclear whether disparate impact claims are even available under  
26 ORS 659A.030. *See Doyle v. City of Medford*, 256 Or App 625, 647 n 14, 303 P3d 3Nor46  
(2013) (collecting cases).

1 **F. Plaintiff’s Wrongful Discharge Claim Fails as a Matter of Fact and Law.**

2 Plaintiff’s wrongful discharge claim fails for at least two independent reasons. First,  
3 as discussed above, she cannot establish a “discharge” because she voluntarily resigned. (*See*  
4 Section III.C.2, *supra.*) *See Nkrumah*, 261 Or App at 372 (“Where \* \* \* the employee  
5 asserting a wrongful-discharge claim was not actually discharged, but quit his employment,  
6 the employee must also establish that he was ‘constructively discharged’ \* \* \*.”).

7 Second, as with her retaliation claim, to survive summary judgment plaintiff must  
8 establish a causal connection between her fulfillment of an important public duty and her  
9 discharge. *See id.* at 374 (“[T]he discharge must also be ‘wrongful’—that is, the plaintiff  
10 must have been forced to leave for a ‘socially undesirable motive,’ such as ‘for exercising a  
11 job-related right’ \* \* \*. \* \* \* [T]he intolerable conditions must be created *as the result of* the  
12 employee’s fulfillment of—or attempt to fulfill—an important public duty.” (emphasis in  
13 original)).

14 As discussed above, plaintiff has no evidence that any of Northwest Permanente’s  
15 conduct had anything to do with any of the issues she raised during her employment. (*See*  
16 *generally* Section III.D.2, *supra.*) Her wrongful discharge claim fails as a matter of law.

17 **IV. CONCLUSION**

18 Northwest Permanente’s motion for summary judgment should be granted, and  
19 plaintiff’s claims should be dismissed in their entirety.

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