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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

Michelle Fitts,	:	
	:	
Plaintiff,	:	**Case No. 13-cv-0226 EFM**
	:	
v.	:	
	:	**Judge Ruger**
Buckeye Homes, Inc.	:	
	:	
Defendant.	:	
	:	

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case raises the singular question of why an employer would abruptly terminate one if its strongest employees shortly after learning she was pregnant. Michelle Fitts was by all objective metrics a stellar sales manager with few marks on her record. Prior to her pregnancy, Fitts was one of the fastest rising stars at Buckeye. But despite Fitts continuing to perform after she became pregnant, Buckeye suddenly decided that her work was not good enough anymore and terminated her without warning. Now Buckeye seeks summary judgment on the grounds that Fitts is precluded from suing as a matter of law because she failed to cooperate with the EEOC, and that no reasonable jury could find merit in her pregnancy discrimination claim. But neither text nor the purpose of Title VII requires cooperation with the EEOC to bring a discrimination suit to court, and Fitts has established both a prima facie case and evidence that Buckeye's nondiscriminatory reason for terminating her is merely pretextual. To grant summary judgment would be to deny the plaintiff her rightful day in court and undermine the very purpose of our judicial system. Michelle Fitts is entitled to have her case determined by a jury of her peers, which can only be granted by denying the defendant's motion for summary judgment.

STATEMENT OF MATERIAL FACTS

From September 2010 to her unexpected termination in May 2013, Michelle Fitts consistently performed as Sales Manager for the defendant Buckeye Homes, Inc. Fitts was a rising star, frequently exceeding Buckeye's sales projections by factors of three to ten. (Buckeye Homes Sales Report – Fitts attached as Ex. D). But Fitts's professional dream became an unexpected nightmare when she became pregnant. Her once supportive supervisor, Martin Cliff, suddenly became distant and uncommunicative, and a promising promotion soon slipped from Fitts's grasp. What once was a flourishing relationship eventually turned into an abrupt

termination that left Fitts unemployed, emotionally wounded, and confused as to what went wrong.

On September 1, 2010, Fitts began her career as a sales manager with Buckeye Homes. (Fitts Dep. 3:15, Apr. 26, 2014 attached as Ex. A). Buckeye defines success through sales, requiring each sale member to sell at least one home per month. The company imposes strict disciplinary policy to ensure sales: A written warning issued for every month where the quota wasn't met, with potential termination if the quota was not met for three consecutive months. (Fitts Dep. 4:18-19–5:1-2; Buckeye Discipline Policy at 42 attached as Ex. C).

Fitts embraced the challenge: During the first twenty months of her employment, she sold two-and-half times the number of homes expected of her, sometimes selling eight to ten houses in a single month. (Fitts Dep. 6:14-18; Sales Report). Even in the face of the economic downturn, Fitts only missed her quota twice, selling three times her expected quota for 9 consecutive months before her abrupt termination in May of 2013. (Sales Report; Fitts Dep. 14:7-8).

For the better half of her employment with Buckeye, Fitts received the unwavering support of her supervisor, Cliff Martin. (Fitts Dep. 8:18-20). When Fitts first started, it was clear Martin wanted her to succeed. Martin rewarded her with bonuses when she put up strong sales numbers, and offered additional resources to get her back on track when she was struggling during the economic downturn. (Fitts Dep. 6:14-15, 7:15-16; Warning E-mail, July 2, 2012 attached as Ex. E). Martin even sent an undercover buyer to assess Fitts's sales ability, later meting with her to address areas where she could improve. (Fitts Dep. 8:7-13). Confident Fitts could perform, Martin recommended promoting her to a more challenging sales site at Shaker Heights, which would increase Fitts's salary by almost $140,000. (Fitts Dep. 9:11-12, 5:19, 6:10, 9:17, Sales Report).

Fitts continued to put up strong sales numbers after becoming pregnant in November of 2012, selling in only 3 months what Buckeye expects their employees to sell in 2 years. (Fitts Dep. 11:18-19). She also continued to be communicative with Martin, sending him emails discussing how they can sell more homes (Fitts Dep. 13:15-16). Unfortunately for Fitts, her future career trajectory and Martin's attitude towards her changed dramatically. Shortly after Martin discovered her pregnancy, Fitts was passed over the for the promotion. At the holiday party on December 14, Martin overheard Fitts discuss her pregnancy with a co-worker. (Martin Dep. 10:8-9, Apr. 22, 2014 attached as Ex. B). Martin admits that it sounded to him like Fitts was pregnant, but claims that he wouldn't say he knew for certain. (Martin Dep. 10:12-14). Soon after, Martin decided to promote a man (Pete Carroll) over the pregnant Fitts. (Martin Dep. 9:22-23; Shaker Heights Transfer Email, Feb. 2, 2013 attached as Ex. F). While Martin told Fitts Carroll had more sales experience, he secretly confessed to another senior manager that he felt Pete was more likely to be committed to the company. (Transfer Email; Martin Dep. 11:12-13; Thanks Again Email, Feb. 5, 2013 attached as Ex. G). Looking back, Martin claims he was frustrated with Fitts at the time and wrote that email in the heat of the moment. (Martin Dep. 13:21-22, 14:1-2). Fitts never truly found out the real reason; Martin ignored her emails on the subject. (Fitts Dep. 13:13-15). To Fitts, it just seemed like for some reason Martin wasn't interested in supporting her anymore. (Fitts Dep. 13:9-10).

Over the next few months, the work atmosphere became toxic. When Fitts took a week of entitled sick leave for pregnancy complications, Martin expressed frustration with her absence. (Fitts Dep. 12:1-2; Martin Dep. 13:21-22). Instead of words of sympathy, Martin gave 80% of the commission of Fitts's homes to other sales managers, even though she did 99% of the work setting up those sales. (Fitts Dep. 12:10-11, 12:18-20; Commissions Email, Feb. 9, 2013 attached

as Ex. H). Martin felt Fitts shouldn't complain, that others in the same position wouldn't have given her anything. (Martin Dep. 14:18-19). When Fitts wrote to Martin asking that some things be fixed in the model unit in February, Martin never followed up on her requests, replying only that they were "big asks". (Sales Request Email, Feb. 11, 2013 attached as Ex. I).

The tension that built up finally snapped at the end of April, when Fitts missed her quota for the month. Without so much as a warning, Martin decided to fire her a week later. (Fitts Dep. 14:7-8). In doing so, Martin clearly violated Buckeye's discipline and discharge clause, which states, "employees will be given a written warning upon any failure…and three such consecutive warnings may be grounds for termination." (Discipline Policy at 42).

Admittedly, the black letter of the clause belies the practical application of the policy at Buckeye. While the policy included a fire at will clause, management was much more lax in applying the policy, issuing warnings only when it was clear the sales manager wasn't just having a bad month. (Discipline Policy at 42; Fitts Dep. 5:11-14; Martin Dep. 5:5-8). Some managers have missed multiple quotas without being terminated. (Fitts Dep. 5:10-14). Of the few times Fitts did miss her quota, she had only ever received one written warning. (Fitts Dep. 7:13-14; Warning Email, July 2, 2012). But given her strong sales record prior, neither the text of the policy nor how its apply would hold that Fitts should be terminated. The decision to terminate Fitts, then, was either an explicit violation or an anomalous application of an otherwise reasonably practical company policy. (Fitts Dep. 14:3-8).

When asked to explain what went wrong, Martin is adamant that the pregnancy did not factor into Fitts's eventual termination. (Martin Dep. 16:15, 16:23). Despite the fact that Fitts was fired after an incredible sales streak, Martin claimed Fitts just wasn't doing a good job anymore. (Sales Report; Martin Dep. 16:15-16). Additionally, Martin cited the poor maintenance

in the model units, maintenance that Fitts requested but Martin ignored, as part of the reason why she was fired. (Sales Request Email; Martin Dep. 15:14-15). In an ironic turn of events, all the changes that Fitts requested, changes that were previously ignored and contributed to her termination, were approved after Fitts was fired. (Martin Dep. 16:17-20).

After her termination on May 7, Fitts filed a Charge of Discrimination complaint with the Equal Employment Opportunity Commission (EEOC) on May 10. (Charge of Discrimination attached as Ex. L). When an EEOC representative left Fitts a voicemail asking to interview her, she wasn't sure that the interview mattered, since she knew that she would need a lawyer to help her in court. (Fitts Dep. 15:17-19–16:1-4). By the time formal requests started to reach Fitts's mailbox, she was already very close to delivering her baby. (EEOC Letter, July 23, 2013 attached as Ex. O; Fitts Dep. 15:1-2). The last letter prior to the EEOC closing its case arrived two days before Fitts's delivery. (EEOC Letter, Aug. 6, 2013 attached as Ex. N). Despite Fitts's inability to respond to the EEOC's requests, she nevertheless received a Notice of Right to Sue letter on November 8. (EEOC Letter, Nov. 8, 2013 attached as Ex. P). Fitts filed a pregnancy discrimination against Buckeye on December 12, 2013, within the 90 days stipulated by the notice. (Dismissal and Notice of Rights, Nov. 8, 2013 attached as Ex. Q).

ARGUMENT

Buckeye's motion for summary judgment must be denied because cooperation with the EEOC is not required to bring a pregnancy discrimination claim, and a reasonably jury could find that Fitts has established a prima facie case and provided sufficient evidence of pretext. When filing for summary judgment, the moving party bears the burden of providing "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits" demonstrating summary judgment is warranted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323

(1986). The court's role is not to weigh the evidence or determine the truth of the matter, but only to determine if a genuine issue for trial exists. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). To do so, it must view all evidence and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986).

Summary judgment should only be granted when the evidence plainly, palpably, and undisputedly demonstrates that (1) there is no genuine issue as to any material fact and that (2) the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a); *Smith v. Wal-Mart Stores, Inc.*, 167 F.3d 286, 296 (6th Cir. 1999). A genuine issue of material fact exists if a reasonable jury can find in favor of the nonmoving party on a disputed fact that may affect the outcome of the case. *Latowski v. Northwood Nursing Ctr.*, 549 F. App'x 478, 481 (6th Cir. 2013). If any reasonable jury could return a verdict for the nonmoving party, a trial is warranted and summary judgment must be denied. *Anderson*, 477 U.S. at 248.

This case presents two issues: (1) whether cooperation with the EEOC is a prerequisite to bringing a pregnancy discrimination suit, and (2) whether Buckeye violated Title VII by firing Fitts because of her pregnancy. First, Buckeye is not entitled to judgment as a matter of law because Title VII does not require cooperation with the EEOC. Second, a genuine issue of material fact exists regarding date Martin learned of Fitts's pregnancy, the resolution of which could lead a jury to find Buckeye's termination reason to be pretextual. In the alternative, taking the facts in the light most favorable to Fitts, Buckeye is not entitled to judgment as a matter of law on the pregnancy discrimination claim because it is more likely than not that Fitts has established a prima facie case and presented sufficient evidence that Buckeye's proffered reason for her termination was merely pretext.

I. BUCKEYE IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE COOPERATION WITH THE EEOC IS NOT NECESSARY TO SUSTAIN A TITLE VII PREGNANCY DISCRIMINATION SUIT.

Cooperation is not necessary to maintain a private sector claim under Title VII because the plain text has no such requirement, enforcing cooperation does not fulfill the purpose of Title VII, and deference should be given to the EEOC's administrative interpretation, which does not require cooperation for private-sector claims. It is well settled that plaintiffs must exhaust their remedy before filing suit, and that cooperation is required for federal employees. *Wade v. Sec'y of Army*, 796 F.2d 1369, 1377 (11th Cir. 1986). The circuits are split, however, on whether cooperation with the EEOC is required for private-sector employees. While the Tenth Circuit has held that private employees are required to cooperate, the Seventh Circuit has held that, as long as the employee has filed the proper paperwork with the EEOC and received a notice of right-to-sue, she can proceed with her claim in federal court. *Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304 (10th Cir. 2005); *Doe v. Oberweis Dairy*, 456 F.3d 704 (7th Cir. 2006).

The 7th Circuit's interpretation of the statute should be adopted. First, the plain text of Title VII plainly requires only proper filing and a notice of right-to-sue, and courts should enforce the text of the statute rather than reading in additional requirements. Second, a cooperation requirement does not forward the purpose of the Title VII legislation, but has the opposite effect of preventing legitimate claims from reaching court. Finally, the decision of the EEOC not to impose a cooperation requirement should be given deference.

A. The text of Title VII does not require cooperation with the EEOC.

Fitts has satisfied the textual requirements of Title VII by timely filing her complaint with the EEOC and waiting until she received her right-to-sue before filing her claim. In interpreting statutory text, the Supreme Court has held that no requirements beyond those specifically laid

out in the governing statute should be imposed, particularly if the additional requirements inhibit the review of employment discrimination claims in federal court. See *Mohasco Corp. v. Silver*, 447 U.S. 807, 816 (1980) (Holding that text of Title VII should be read literally, especially when nonprofessionals have been proceeding unassisted by lawyers); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-99 (1973). Although the court may conduct statutory construction if the statute lends itself to more than one interpretation, the court should do nothing more than enforce its terms when the text's meaning is plain and unambiguous. *See United States v. S.A.*, 129 F.3d 995, 998 (8th Cir. 1977); *but see Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (Holding that because the language of the Coal Act did not permit the commissioner to assign beneficiaries, the court must enforce that specific reading). While plaintiffs do need to exhaust administrative remedies before filing suit, in Title VII cases the Supreme Court has held that a plaintiff satisfies the jurisdictional prerequisites to a federal action (and by implication meets the exhaustion requirement) if she (1) files a charge with the EEOC within 180 days after the date of the complained-of employment action, and (2) waits until she receives a notification ("right-to-sue" letter) before filing suit. *McDonnell Douglas Corp.*, 411 U.S. at 798.

In this case Fitts, a nonprofessional operating without a lawyer, has clearly satisfied the plain statutory requirements of Title VII by timely filing her claim and waiting until she received her notice before filing suit. Fitts filed a claim with the EEOC three days after her termination and waited until she received a right-to-sue letter on November 8, 2013 before file a suit in federal court on December 12, 2013. (Martin Dep. 15:16-18; EEOC Letter, Nov 8, 2013; Compl.at ¶1). Fitts has therefore by definition satisfied all the requirements of Title VII and should not be barred from suing in federal court for failure to cooperate.

B. The purpose of the EEOC with respect to Title VII is to remedy discrimination, not prevent individuals from bringing suit in federal court.

Because the purpose of Title VII and the EEOC is to remedy employment discrimination, cooperation should not be a requirement for exhaustion because it prevents legitimate discrimination claims from reaching the court. Congress enacted Title VII to require eliminate discriminatory practices and the EEOC as an administrative agency to combat workplace discrimination. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971); *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 323 (1980) (Stating that the EEOC's purpose was to prevent persons from engaging in unlawful practices set forth in Title VII); *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1354-55 (6th Cir. 1975) (Noting that the EEOC was empowered in the 1972 Title VII amendment to prevent persons from engaging in unlawful employment practices).

Federal employees are required to cooperate with the EEOC to exhaust their remedies because the EEOC can directly provide a remedy through administrative processes, including damage awards if necessary 42 U.S.C. § 2000e-16(b); 29 C.F.R. § 1614.108-.110. But in the case of private-sector employees, the EEOC cannot enforce the statute administratively, only attempt to mediate the issue or bring an independent suit. 42 U.S.C. § 2000e-5; 29 C.F.R. § 1601.20. Consequently, imposing cooperation on private-sector claims does not directly further Title VII. Additionally, forcing cooperation could keep potential legitimate plaintiffs from their day in court, which is antithetical to the goals of both Title VII and the EEOC. *Alexander v. Gardner-Denver*, 415 U.S. 36, 60 n.21 (1974) (Stating it is the duty of the court keep open judicial forum for employment discrimination claims). Although EEOC mediation could possibly provide some judicial economy, the possible benefit of minimally reducing the docket does not outweigh the certain expense of meritorious claims being barred from court. *Compare Green v. Heidelberg U.S.A.*, 854 F. Supp 511, 513 (N.D. Ohio 1994) (Suggesting that the enforcing exhaustion and

cooperation ensures the EEOC gets the first opportunity at conciliation and reduces caseload), *with Doe*, 456 F.3d at 710 (Stating if [cooperation] is widely adopted, Title VII litigation would become protracted and complicated with little or no offsetting judicial economy benefits).

Because Fitts is a private-sector employee, the EEOC can only mediate a conversation between her and Buckeye. Although forcing Fitts to go through the EEOC channel may further judicial economy, barring her from filing suit for lack of cooperation prevents a clear legitimate case of workplace discrimination from judicial review. Allowing Fitts to file suit irrespective of her cooperation with the EEOC better fulfills the purpose of Title VII and the EEOC by enabling a private-sector employee with a valid claim to receive judicial remedy.

C. How the EEOC enacts its regulations should be given deference.

The court should give deference to the EEOC and not impose a cooperation requirement because the EEOC has consistently supported a regulatory policy that does not require cooperation to sustain a Title VII suit. Unless an agency action is arbitrary or capricious, courts must give deference to an agency's interpretation of its own regulations. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (Holding that the Supreme Court must give deference to the HSS regulation concerning Medicare program unless an alternative reading is compelled by the regulation's plain language). The interpretation of the controlling statute does need not be the best one by grammatical or any other standards, but rather only reasonable, to be entitled to deference. *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988). In *EEOC*, the Supreme Court recognized that the EEOC's interpretation of the word "terminate" under Title VII is entitled to deference. *Id* at 115.

The EEOC has in various cases spanning multiple circuits endorsed the position that neither Title VII nor its 29 C.F.R. §1601.18 dismissal procedure prohibits a private-sector

employee from filing a discrimination suit in court when she fails to cooperate with the EEOC. Brief for EEOC as Amici Curiae Supporting Appellant at 2-3, *Doe v. Oberweis Dairy*, 456 F.3d 704 (7th Cir. 2006) (No. 05-1998); Brief for EEOC as Amici Curiae Supporting Appellant at 16-17, *Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304 (10th Cir. 2005) (No. 03-3326). Although amicus briefs are given less deference, the consistent regulatory posture reflects a reasonable reading of the regulation's plain language that is neither arbitrary nor capricious. 29 C.F.R. § 1601.18; 42 U.S.C.S. §2000e-5(c), (e), (f)(1). Thus the court should give deference to the EEOC, and allow Fitts's claim to come to court by not imposing a cooperation requirement.

II. A REASONABLE JURY COULD CONCLUDE THAT BUCKEYE VIOLATED THE TITLE VII PREGNANCY DISCRIMINATION ACT BECAUSE FITTS HAS ESTABLISHED A PRIMA FACIE CASE, AND IT IS MORE LIKELY THAN NOT BUCKEYE'S NONDISCRIMINATORY REASON IS MERELY PRETEXTUAL.

A reasonably jury could conclude that Buckeye has violated the pregnancy discrimination act because Fitts has established a prima facie case and provided evidence that Buckeye's nondiscriminatory termination reason is merely pretextual. To sustain a claim for pregnancy discrimination, the plaintiff must first establish a prima facie case. *McDonnell Douglas Corp.*, 411 U.S. at 793. The burden then shifts to the employer to provide a "legitimate, non-discriminatory" reason for it actions. *Id.* Plaintiff then needs to demonstrate that the employer's reason was not credible, but merely pretext for discrimination. *Id*. Here, a reasonable jury could conclude that Fitts has established a prima facie case and more likely than not provided sufficient circumstantial evidence that Buckeye's proffered nondiscriminatory reason was merely pretext. Fitts has established a prima facie case because she is a qualified employee and the temporal proximity between her pregnancy and termination was sufficient to establish a nexus. The suspicious timing between Fitts's pregnancy and discriminatory actions by her employer,

violation of company policy, and discriminatory attitude and comments by her supervisor all suggest that Buckeye's nondiscriminatory reason for Fitts's termination was merely pretextual.

A. Fitts has established a prima facie case for pregnancy discrimination because she consistently met her sales quota before becoming pregnant, and Martin terminated her after he became aware she was pregnant.

Fitts has established a prima facie case for pregnancy discrimination because she consistently met or exceeded Martin's expectations becoming pregnant, and Martin terminated her shortly after learning of her pregnancy. In order to establish a prima facie case for pregnancy discrimination, plaintiff must show that (1) she was pregnant, (2) she was qualified for her job, (3) she was subject to an adverse employment decision, and (4) there is a nexus between her pregnancy and the adverse employment decision. *Cline v. Catholic Diocese*, 206 F.3d 651, 658 (6th Cir. 1999). Because the prima facie case is not meant to be onerous on the plaintiff, no significant amount of evidence is necessary to satisfy each element. *DeBoer v. Musashi Auto Parts, Inc.*, 124 F. App'x 387, 391 (6th Cir. 2005). Fitts was clearly pregnant, and her termination was an adverse employment action. *Latowski*, 549 F. App'x at 483 (Stating that termination constitutes an adverse employment decision). Additionally, Fitts was qualified for her job because she was meeting Martin and Buckeye's expectations prior to becoming pregnant. Furthermore, there is a nexus between her pregnancy and termination because of the temporal proximity between Martin learning of her pregnancy and her subsequent termination.

1. Fitts was qualified for her job.

Martin's testimony of Fitts received positive performance reviews and his satisfaction with her work demonstrates Fitts was qualified for her job. To establish job qualification for a prima facie case, plaintiff merely needs to show that she met the employer's expectations prior to and independent of the events that led to her termination. *Tysinger v. Police Dep't of Zanesville*,

463 F.3d 569, 573 (6th Cir. 2006). Either positive performance reviews or supervisor testimony attesting to qualification can demonstrate meeting the employer's expectations. *DeBoer*, 124 F. App'x at 390-91 (Holding that performance reviews and supervisor testimony established the employee's qualifications to be a supervisor). Any reason included in the explanation for adverse employment action cannot be considered as evidence of job qualification. *Cline,* 206 F.3d at 660-61 (Holding that the nondiscriminatory reason offered by the employer cannot also be used against the employee in the prima facie stage).

Like the evidence of performance review and supervisor testimony in *DeBoer*, Martin's testimonial that Fitts received multiple satisfactory evaluations and that he was really please with her work sufficiently establishes job qualification. (Martin Dep. 4:11-14, 5:10-15). Like the evidence against the employee's performance in *Cline,* evidence that Fitts occasionally missed her quota cannot be considered for the prima facie case. Given Martin's testimony that she has met the employer's expectations, a reasonable jury could find that Fitts was qualified for her job.

2. The temporal proximity between Fitts's pregnancy and termination sufficiently establishes a nexus.

A nexus exists between Fitts's pregnancy and termination because Martin fired her shortly after learning about her pregnancy. For a prima facie case, a nexus is established between the pregnancy and termination when the two events are temporally proximate. *Asmo v. Keane, Inc.*, 471 F.3d 588, 593 (6th Cir. 2006). A nexus is established if the employer knew about the pregnancy and made the adverse decision while she was pregnant. *Bergman v. Baptist Healthcare Sys.*, 167 F. App'x 441, 446 (6th Cir. 2006). In *Bergman,* the employee notified her employer of her pregnancy in April, and was terminated four months later in August. *Id* at 442-43. The court concluded that because the employer knew the employee was pregnant and terminated her after learning about her pregnancy, a nexus was sufficiently established. *Id*.

Like the employee in *Bergman* who was terminated four months after informing her employer of her pregnancy, Fitts also informed Martin of her pregnancy and was terminated four months later. Fitts formally notified Martin of her pregnancy on December 27, and was terminated the following year in early May. (Fitts Dep. 10:4, 14:7-8). Like the employer in *Bergman* who terminated the employee with knowledge of her pregnancy, Martin was fully aware that Fitts was still pregnant when her terminated her. (Fitts Dep. 10:4). Thus a jury would find that, given the temporal proximity between Fitts's pregnancy and termination and her employer's awareness of her pregnancy when he terminated her, a nexus between her termination and pregnancy has been sufficiently established.

B. Despite Buckeye alleging Fitts's poor performance and lapse in maintaining model homes, a reasonable jury could find those reasons to be merely pretext.

A reasonable jury could find that Fitts being passed up for a promotion days after Martin discovered she was pregnant, her termination in a manner violating Buckeye's discipline policy, and Martin's discriminatory email and frustration with her entitled pregnancy sick leave cumulatively demonstrate that Buckeye's "nondiscriminatory" reason was likely pretext. If the defendant provides a nondiscriminatory reason for termination, plaintiff can demonstrate pretext by showing that the reason offered is unworthy of credence. *Cline*, 206 F.3d at 667. Plaintiff achieves this by showing that the reason either (1) has no basis in fact; (2) did not actually motivate the employer's conduct; or (3) was insufficient to motivate the action. *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). To show the employer was not motivated by the nondiscriminatory reason, the employee need not prove that the proffered reason is false, nor the discriminatory reason true. *DeBoer*, 124 F. App'x at 393. Rather, the employee only needs only to show that the weight of circumstantial evidence suggests it is more likely than not that the employer's explanation was pretext. *Manzer*, 29 F.3d at 1084.

In determining whether pretext exists, courts consider the totality of circumstantial evidence. *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 356 (6th Cir. 1998) (holding that evidence of discrimination is evaluated comprehensively). Courts primarily consider the temporal proximity between pregnancy and any adverse treatment. *Asmo*, 471 F.3d at 598; *DeBoer*, 124 F. App'x at 394. Additionally, courts will assess whether the employer's actions are consistent with its disciplinary policy. *DeBoer*, 124 F. App'x at 394; *Shalka v. Fernald Envtl. Restoration Mgmt.*, 178 F.3d 414, 421-22 (6th Cir. 1999). Finally, courts consider other evidence, such as animus comments, reasonableness of employer decision, and the attitude of the supervisor. *Risch v. Royal Oak Police Dep't*, 581 F.3d 383, 393 (6th Cir. 2009); *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 576 (6th Cir. 2003); *Asmo*, 471 F.3d at 595.

1. There is temporal proximity between when Fitts became pregnant and the series of adverse employment decisions that culminated in her termination.

The decisions to pass over Fitts for promotion, cut her commissions, and eventually terminate her employment all occurring shortly after Buckeye learned of her pregnancy suggests pretext. Temporal proximity between pregnancy and any adverse employment treatment is strongly indicative of pretext, especially if such treatment was absent before the pregnancy. *See Asmo*, 471 F.3d at 598; *See also DeBoer*, 124 F. App'x at 394. Adverse treatment is not only limited to termination, but can include any negative treatment, including demotions and changes in employer attitude. *Asmo*, 471 F.3d at 598; *DeBoer*, 124 F. App'x at 394. Additionally, discipline problems prior to the pregnancy do not weaken the temporal proximity link if the supervisor was not concerned until after the pregnancy. *Compare Megivern v. Glacier Hill, Inc.* 518 F. App'x 385, 398 (6th Cir. 2013) *with DeBoer*, 124 F. App'x at 394. In *Asmo*, the employee was fired two months after she announced her pregnancy to her employer. 471 F.3d at 591-92. The court found that the temporal proximity could be used as indirect evidence to support a

claim of pretext. *Id* at 598. In *DeBoer*, the employee was demoted the day after she filed for pregnancy leave. 124 F. App'x at 390. The court recognized the suspicious timing between the pregnancy and demotion, but also noted that the employer, who had not been concerned with the employee's imperfect work, started to have negative reactions only after the employee became pregnant. *Id* at 394. The court found the behavior change particularly concerning, and concluded that the change combined with the timing of the demotion suggested pretext. *Id* at 389-94.

Applied to the present case, there exists a clear genuine issue of material fact that could affect the jury's determination on whether there is temporal proximity between Fitts's pregnancy and adverse employment action: the date Martin actually learned Fitts was pregnant. If, as Martin claims, he was not aware of Fitts's pregnancy until their conversation on December 27, his decision to promote a man over the pregnant Fitts after the Christmas party on December 14 could not be considered temporally proximate to Fitts's pregnancy. If, however, as Fitts claims, Martin overheard her conversation with her co-worker at the Christmas party and knew of her pregnancy then, his decision of promoting a man shortly after learning that Fitts was pregnant would be strong evidence of discrimination and pretext. Whether or not Martin knew of Fitts's pregnancy before making his promotion decision can materially affect the outcome of the pretext assessment, and by extension the case itself. Thus summary judgment should be denied because a genuine issue of material fact exists.

In the alternative, taking the evidence in the light most favorable to the nonmovant, a reasonable jury could find the suspicious timing between when Fitts became pregnant and losing her promotion, having her commissions lowered, and ultimately her termination to be evidence of pretext. Like the employee in *DeBoer* who was demoted only a day after she filed for maternity leave, and the employee in *Asmo* who was terminated three months after the employer

discovered her pregnancy, Fitts was passed over for promotion days after Martin learned of her pregnancy at the Christmas party and terminated a few months later. In that time, Fitts had her commission cut by 80% when she took a sick leave for her pregnancy she was legally entitled to take. Additionally, like the employer in *DeBoer* who was not concerned with performance evaluations until after the employee became pregnant, Martin only began to express negative reaction to Fitts's performance after he learned she was pregnant. While Martin knew of areas where Fitts could improve prior to her pregnancy, he was very positive in his evaluation of Fitts before she became pregnant, expressing satisfaction with her work and giving her multiple sales bonuses. (Fitts Dep. 6:14-15; Martin Dep. 5:10-15). It was only after discovering Fitts was pregnant that Martin started critiquing her sales quota and lack of model home maintenance. (Martin Dep. 16:15-16). In fact, in the time since Fitts became pregnant, there was not a single instance where Martin complimented any of her work, even though she continued to exceed her sales quota multiple times prior to her termination (Sales Report). The sudden change in Martin's behavior and the proximity of the lost promotion, commission cuts, and termination in relation to Fitts pregnancy, all could lead a reasonable jury to conclude there exists evidence of pretext.

2. Buckeye violated company policy when it terminated Fitts.

Buckeye expressly broke its discipline policy when it terminated Fitts because Fitts had not missed three consecutive quotas when she was fired. An employer's failure to follow a termination or demotion policy can constitute relevant evidence of pretext. *DeBoer*, 124 F. App'x at 394; *Skalka*, 178 F.3d at 421-22. Even if the discipline policy permits exceptions, failure to follow the guideline is nevertheless evidence of pretext. *DeBoer*, 124 F. App'x at 394. In *DeBoer*, the court held that a decision to break from an existing policy for establishes some probative value as to discrimination and pretext. *Id*. Similarly, in *Skalka*, the court held that the

employer's failure to follow what it believed to be conducive to a fair and objective layoff procedure was evidence to support a verdict in favor of the employee. 178 F.3d at 421-22.

Here, Buckeye's discipline policy clearly states that an employee could be terminated for sales-performance only after three consecutive warnings for failure to meet monthly quotas, a policy it violated when terminating Fitts. (Discipline Policy at 42). While Buckeye's policy allows for exceptions similar to the one in *DeBoer* through a fire-at-will clause, Buckeye's general practice is to follow the policy. A misses a quota with no warning email often reflects understanding by management that the missed quota was not the employee's fault, but rather a bad month. In addition, there are some sales managers who, even after missing their quota for consecutive months, were nevertheless not terminated. (Fitts Dep. 5:11-14). Thus, like the failure to follow a fair procedure in *Skalka*, the decision to fire Fitts for just a single month of missed sales without any warning email constitutes a significant departure from not only the letter of the established discipline policy, but also the spirit of how the policy is applied. Because Buckeye did not adhere to a fair disciplinary policy that it generally follows, its violation constitutes evidence of pretext, irrespective of whether the policy allows for exceptions.

3. Martin's discriminatory email, negative attitude towards Fitts's pregnancy, and unreasonable reason for her termination are additional evidence of pretext.

Other circumstantial evidence, such as discriminatory statements, employer attitude, and the reasonableness of the proffered explanation for terminating the employee can all be evaluated for pretext. Discriminatory statements by individuals who influence employment decisions are particularly suggestive of pretext. *Risch*, 581 F.3d at 393 ("Discriminatory statements made by individuals occupying managerial positions can be particularly probative of discriminatory workplace culture"); *Wells v. New Cherokee*, 58 F.3d 233, 237-38 (6th Cir. 1995). The individual need not have direct firing authority for his comment to be considered for pretext. *Wells*, 58 F.3d

at 237-38 (Holding that because the supervisor who made the comment and those with firing power jointly evaluate the employee, the supervisor's comments can be considered for pretext). Additionally, an employer's negative attitude towards the pregnancy itself can be also probative of pretext. *Asmo*, 471 F.3d at 595 (Finding that because the supervisor did not congratulate the employee on her pregnancy nor inquire as to how the company can accommodate her impending parenthood, his silence was indicative of pretext). Further, whether an employer's proffered explanation is reasonable can factor into the pretext analysis to the extent that the evaluation shows the employer's stated reason for employment action may not reflect the actual motivation. *See Wexler*, 317 F.3d at 576 (Holding the employee's demotion was unreasonable because the employer demoted the employee for something out of his control).

The weight of all other circumstantial evidence strongly suggests that Buckeye's reason for terminating Fitts was pretextual. Like the employer in *Asmo* who expressed apathy at the employee's pregnancy, Martin neither inquired into Fitts's pregnancy nor asked how the company could accommodate her pregnancy. When Fitts became asked to use her entitled sick leave, Martin offered no words of sympathy and actually expressed frustration, despite knowing she had a valid medical reason directly related to her pregnancy. (Fitts Dep. 12:1-11; Martin Dep. 13:21-22). Additionally, although he cannot directly fire Fitts, like the supervisor in *Wells* Martin's recommendation for termination is generally accepted. (Martin Dep. 3:15-19). Thus, when Martin writes in an email that he believes a male employee is more likely to be committed to the company than the pregnant Fitts, such discriminatory statement can and should be considered pretext. (Thanks Again Email). Further, like the employer in *Wexler* who unreasonably blamed the employee for lost sales, Martin unreasonably blames Fitts for failing to maintain the model homes. (Martin Dep. 15:14-15). Not only was Martin aware that the state of

the model home was not Fitts's fault, he directly created the condition that he then used to terminate Fitts. By failing to follow up on her request email. (Sales Request Email).

A reasonable jury could certainly find that the temporal proximity between when Fitts became pregnant and her lost promotion, cut commission, and final termination in a manner directly violating Buckeye's disciplinary policy, along with Martin's discriminatory email, negative attitude, and unreasonable rationale suggest a discriminatory animus towards Fitts and her pregnancy. When the totality of circumstantial evidence is taken into favor of the Fitts, a reasonable jury could conclude that it is more likely than not Buckeye's proffered reason for termination was merely pretext. Thus, Buckeye should not receive judgment as a matter of law on this issue, and summary judgment should be denied.

CONCLUSION

Michelle Fitts urges this court to deny Buckeye's motion for summary judgment because Title VII does not require cooperation with the EEOC to sustain a claim, and a reasonable jury could conclude Ms. Fitts sufficiently established a prima facie case and provided evidence that Buckeye's nondiscriminatory reason to terminate her was merely pretext. Ms. Fitts worked diligently to drive sales for Buckeye, and was repaid with a discriminatory email by her supervisor, slashed commissions, and sudden termination. That Ms. Fitts was unable to cooperate with the EEOC should serve as no barrier to her suit because there is no legal requirement for her to cooperate. Whether the Buckeye's adverse employment actions relate to Ms. Fitts's pregnancy, whether the emails and unreasonable excuses sufficiently demonstrate pretext, and ultimately whether Ms. Fitts was wrongfully terminated are all questions that should be evaluated by a jury of her peers. For these reasons, plaintiff implores the court to deny defendant's motion for summary judgment.

SIGNATURE PAGE

Respectfully Submitted,

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Dated: February 21, 2015

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, was served this day via email, to counsel for the Defendants at the following address:

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