**Ryan Miller**
**Kehner, Silver, & Simon, LLP**
**1375 East 9th Street**
**Cleveland, OH 44114**
**(216) 429-7668**

**Attorney for Defendant**
**Buckeye Homes, Inc.**

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

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| **MICHELLE FITTS** | : | **Case No. 13-cv-0226 EFM** |
| **Plaintiff,** | : | |
| **v.** | : | |
| **BUCKEYE HOMES, INC.** | : | |
| **Defendant.** | : | |

# MEMORANDUM OF LAW IN SUPPORT OF BUCKEYE HOMES'S MOTION FOR SUMMARY JUDGMENT

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## INTRODUCTION

Plaintiff Michelle Fitts has developed a habit of failing to finish what she starts. Throughout her final year employed with defendant Buckeye Homes ("Buckeye"), she repeatedly failed to fulfill her most basic job responsibility—closing home sales. Angry about her warranted discharge, Ms. Fitts hastily filed an employment discrimination claim with the Equal Employment Opportunity Commission (EEOC). Bizarrely, over the next six months, she then failed to pursue the claim and instead stonewalled the EEOC's earnest attempts to investigate her claim. And finally, she initiated this lawsuit under the Pregnancy Discrimination Act of 1978 (PDA), but then failed to produce evidence that in any way challenges the real reason for her discharge: she was a bad worker. Ms. Fitts did not meet her monthly sales quotas in three months of her final year with Buckeye; she ignored job responsibilities like cleaning model homes to attract buyers; and after being passed over for a transfer, she took a week of abruptly announced and unexplained sick leave when Buckeye was at its busiest.

In an employment discrimination action under the PDA, a complainant cannot receive judgment unless she proves that: 1) she exhausted her administrative remedies with the EEOC before filing suit, and 2) the employer's consideration of her pregnancy motivated an unlawful employment practice. Ms. Fitts failed to exhaust her administrative remedies because it is undisputed that she did not perform a single action to cooperate with the EEOC's investigation of her claim. She also cannot dispute repeated months of missed sales quotas, poor site visit evaluations, and straining Buckeye's sales team by inexplicably being out of work when she was most needed, all of which exclusively explains her discharge. Without a genuine dispute as to the material facts relating to Ms. Fitts's failure to exhaust administrative remedies or her poor job performance, Buckeye is entitled to summary judgment.

## STATEMENT OF MATERIAL FACTS

Buckeye is a local Cuyahoga County business that builds and sells affordable townhouses in several Cleveland neighborhoods. (Deposition of Michelle Fitts, dated Apr. 26, 2014 ("Fitts Dep."), attached as Exhibit ("Ex.") A, at 3:7-8). The heart of the company is its team of sales managers who command all phases of sales—maintaining homes, guiding buyers through homes, and most importantly, closing the sale. (Fitts Dep. at 3:11-13, 4:9-11). A sales manager only needs to sell one home per month to meet Buckeye's sales quota. (Fitts Dep. at 6:12-13).

Buckeye hired Michelle Fitts as a sales manager in September of 2010 and assigned her to the Cuyahoga Heights site. (Fitts Dep. at 3:4, 3:15). In her first paid sales position out of college, Ms. Fitts's job performance was inconsistent and unpredictable (Fitts Sales Report, attached as Ex. D). During her first twenty months on the job, most months she failed to surpass the bare minimum required of her, selling just one home. (Fitts Sales Report). Although she had brief spurts of promise, receiving small bonuses in December of 2011 and March of 2012, she was never able to sustain success. (Fitts Sales Report).

Starting in May of 2012, Ms. Fitts's job performance deteriorated from inconsistent to unacceptable. (Fitts Sales Report). Two months in a row, she failed to sell a single home. (Fitts Sales Report). Her supervisor, Clifford Martin, gave her a written warning, and, trying to rekindle whatever motivation she previously had, emailed asking how he could help improve her sales performance. (Emails Between Martin and Fitts Re: Warning - Missed Sales Quotas, dated July 2, 2012, attached as Ex. E). Ms. Fitts ignored her supervisor's question, and blamed her work performance on the economy. (Martin and Fitts Warning - Missed Quotas Emails).

Mr. Martin tried to get to the bottom of Ms. Fitts's poor performance. (Martin Dep. at 6:23-7:1). After her second month without a single sale, Mr. Martin sent an undercover buyer to

Ms. Fitts's site, standard industry practice, and the resulting report explained her lagging numbers. (Martin Dep. at 7:2; Undercover Buyer Report, dated July 9, 2012, attached as Ex. J). Of the eight sections in the report, seven highlighted basic performance failures—she did not introduce herself, ask qualifying questions, accompany the undercover buyer in a home tour, or provide an updated floor plan. (July 9, 2012 Undercover Buyer Report). Worse, even though Ms. Fitts knew one of her basic job responsibilities was to maintain and clean model homes, the report revealed severe shortcomings. (July 9, 2012 Undercover Buyer Report). Several lights did not work, and the carpeting was noticeably dirty. (July 9, 2012 Undercover Buyer Report).

Following the abysmal report and two straight months of producing no sales, Buckeye's senior management was convinced that Ms. Fitts should be let go. (Fitts Dep. at 8:18-20; Martin Dep. at 7:11-13). But Mr. Martin convinced management to reconsider. (Fitts Dep. at 8:17-20; Martin Dep. at 7:13-17). While he told Ms. Fitts that she would not be let go, he made clear that this would probably be her "last chance." (Fitts Dep. at 8:17-20; Martin Dep. at 7:15-17). Mr. Martin received a second undercover buyer report from Ms. Fitts's site in September. (Undercover Buyer Report, dated Sept. 14, 2012, attached as Ex. K). Although the report was an improvement, there were still problems—she arrived ten minutes late, took a personal phone call in front of a potential buyer, and failed to build a personal rapport. (Sept. 14, 2012 Undercover Buyer Report). Trying to motivate Ms. Fitts to better commit herself to her work, Mr. Martin tried a new strategy. (Martin Dep. at 8:2-20). In early November he told her she was one of several sales managers being considered for a transfer to a different site, Shaker Heights, where home prices and commissions were higher. (Fitts Dep. at 9:10-14; Martin Dep. at 8:4-20).

Ms. Fitts's sales continued to lag though; she barely met her quotas in November and December of 2012, selling just one home each month. (Fitts Sales Report). During this time,

although Mr. Martin may have heard drunken chatter about Ms. Fitts and pregnancy at a December 14 Buckeye holiday party, Ms. Fitts did not inform Mr. Martin of her pregnancy until December 27. (Fitts Dep. at 10:1-4, 11:1-6; Martin Dep. at 9:14-16, 10:1-15). With Ms. Fitts's sales struggling, a different sales manager, Pete Caroll, with strong sales numbers and more experience was selected for the transfer just before Christmas. (Martin Dep. at 9:22-23, 11:10-13). Because the position was not starting until mid-February of 2013, sales managers, including Ms. Fitts, were not informed until early February. (Martin Dep. at 11:1-5).

With too many homes sitting empty at Ms. Fitts's Cuyahoga Heights site, management decided to slash home prices in January of 2013. (Martin Dep. at 11:21-12:5). The price reduction strategy worked, allowing Ms. Fitts to sell twenty-one homes during the first quarter of 2013. (Fitts Dep. at 11:12-15; Fitts Sales Report). At the same time, Ms. Fitts's workplace behavior became more erratic. (Martin Dep. at 13:7-16). After Mr. Martin informed Ms. Fitts that she was not selected for the Shaker Heights transfer, she suddenly took off with sick time for the entire first week of February without explanation. (Fitts Dep. at 12:1-3; Martin Dep. at 12:11-13:16). The timing of her abrupt absence could not have been worse, as the price drop necessitated as many sales managers as possible to handle the increased demand. (Martin Dep. at 13:7-16). Incredulous, Mr. Martin lamented Ms. Fitts's absence to a colleague, adding that her lack of commitment vindicated the decision to transfer Mr. Caroll, rather than Ms. Fitts. (Email Between Martin and O'Dell Re: Thanks again, dated Feb. 5, 2013, attached as Ex. G). Shorthanded, Mr. Martin scrambled to find replacements for Ms. Fitts. (Martin Dep. at 14:5-6).

When Ms. Fitts returned, and just a few weeks after Buckeye had slashed prices, Ms. Fitts emailed Mr. Martin with "ideas" to sell more homes—further lowering prices, waiving homeowners' fees, providing free upgrades, and running commercials. (Emails Between Fitts

and Martin Re: Sales Requests, dated Feb. 11, 2013, attached as Ex. I). Mr. Martin replied that these were "big asks" and instead offered iPad incentives. (Fitts and Martin Sales Requests Emails; Fitts Dep. at 13:19-20). Because Buckeye was already settling for reduced profits following the January price slash, it did not resort to a further drop until several months later. (Martin Dep. at 16:17-23).

Ms. Fitts failed to sell any homes for the third time in April of 2013. (Fitts Sales Report). This time, on May 6, Mr. Martin directly visited Ms. Fitts's site and found her homes dirty and poorly maintained. (Fitts Dep. at 14:11-13; Martin Dep. at 15:13-16). The next day, he met with senior management, and because they all agreed Ms. Fitts had run out of motivation and chances, she was let go (Martin Dep. at 15:16-18). Although company policy sets forth optional guidelines for issuing warnings, Ms. Fitts's discharge was consistent with provisions reserving to the company the complete and sole discretion to discharge employees. (Buckeye Homes Empl. Handbook §24 at 42-43 ("Empl. Handbook"), attached as Ex. C).

Ms. Fitts filed a charge of discrimination under Title VII with the EEOC on May 10. (Charge of Discrimination, dated May 10, 2013, attached as Ex. L). However, this was her sole communication with the EEOC, as she repeatedly stonewalled its efforts to investigate her claim over the course of the next six months. (Fitts Dep. at 16:1-18:15). Ms. Fitts did not answer a phone call from the EEOC on June 27, 2013. (Letter Between EEOC and Fitts Re: Fitts v. Buckeye Homes, Inc., dated July 23, 2013 ("July 23 Letter"), attached as Ex. O). Nor did she respond to a voicemail the EEOC left requesting an interview with her to help investigate her claim. (July 23 Letter). Not reaching Ms. Fitts by phone, the EEOC wrote to her on July 23 again requesting an interview. (July 23 Letter). Ms. Fitts ignored the letter. (Fitts Dep. at 16:12-14). She also ignored an August 6 letter from the EEOC that, in addition to requesting an interview

and documents, made clear that her charge would be dismissed for failure to cooperate if she failed to respond. (Fitts Dep. at 16:18-18:1). In issuing Ms. Fitts a right to sue on November 8, the EEOC dismissed her claim specifically for failure to cooperate. (Fitts Dep. at 18:6-15).

## STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Facts must be viewed in the light most favorable to the nonmovant only if there is a genuine dispute, and material facts are limited to those that could affect the suit's outcome. *Scott v. Harris,* 550 U.S. 372, 380 (2007); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the nonmovant bears the burden of proof at trial and fails to establish a genuine dispute for any element to her claim, summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

## ARGUMENT

Buckeye is entitled to summary judgment because even viewing the facts as favorably to Ms. Fitts as the record permits, a rational trier of fact could only conclude that Ms. Fitts failed to exhaust her administrative remedies, and that her poor job performance alone explains her discharge. In an employment discrimination lawsuit under Title VII of the Civil Rights Act of 1964, as amended by the PDA, a complainant cannot receive judgment unless she proves that: 1) she exhausted her administrative remedies with the EEOC prior to filing to suit, and 2) the employer's consideration of her pregnancy motivated an unlawful employment practice. 42 U.S.C. §§ 2000e(k), 2000e-2(a), 2000e-2(m), 2000e-5(e), (f); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973); *Parsons v. Yellow Freight System, Inc.*, 741 F.2d 871, 873 (6th Cir. 1984). There is no dispute as to Ms. Fitts's failure to exhaust administrative remedies because she did not perform a single action to cooperate with the EEOC's investigation of her

claim. There is also no dispute that Ms. Fitts failed to sell and maintain homes, which exclusively explains her discharge. With no disputes relating to her failure to exhaust administrative remedies or her poor job performance, Buckeye is entitled to summary judgment.

## I. BUCKEYE IS ENTITLED TO SUMMARY JUDGMENT BECAUSE MS. FITTS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES BY OBSTRUCTING THE EEOC'S INVESTIGATION OF HER CLAIM, THEREBY THWARTING CONGRESS'S INTENDED DISPUTE RESOLUTION FRAMEWORK.

Without even considering the merits of Ms. Fitts's pregnancy discrimination claim, summary judgment is appropriate because she was completely uncooperative when the EEOC attempted to investigate her claim, thus failing to exhaust administrative remedies. Before a Title VII complainant may seek relief in court, she must first exhaust her administrative remedies with the EEOC. 42 U.S.C. §§ 2000e-5(e), (f); *McDonnell Douglas*, 411 U.S. at 798; *Parsons*, 741 F.2d at 873. A Title VII complainant does not exhaust her administrative remedies unless she: 1) files a timely charge of discrimination with the EEOC, 2) receives a right to sue letter, and 3) cooperates with the EEOC's investigation of her claim. 42 U.S.C. §§ 2000e-5(e), (f); *Shikles v. Sprint/United Management Co.*, 426 F.3d 1304, 1314-15 (10th Cir. 2005); *Green v. Heidelberg U.S.A.*, 854 F. Supp. 511, 513 (N.D. Ohio 1994). If the Title VII complainant fails to satisfy at least one exhaustion requirement, the employer is entitled to summary judgment. *See, e.g.*, *Younis v. Pinnacle Airlines, Inc.*, 610 F.3d 359, 362 (6th Cir. 2010); *Ward v. Hickory Steak House*, 73 Fed. App'x 798, 800 (6th Cir. 2003). Ms. Fitts filed a timely charge of discrimination on May 10, 2013 and received a right to sue letter on November 8, 2013. (May 10, 2013 Charge of Discrimination; Nov. 8, 2013 EEOC and Fitts Letter). However, because she ignored all of the EEOC's attempts to investigate her claim, she was uncooperative, constituting an undisputed failure to exhaust administrative remedies that entitles Buckeye to summary judgment.

Cooperation, and therefore exhaustion, requires a good faith effort by the Title VII complainant to provide all relevant information to the EEOC. *Shikles*, 426 F.3d at 1317. Refusal or failure to provide information sufficient to evaluate the claim's merits is not a good faith effort and does not constitute cooperation. *Id.* In *Shikles*, the complainant did not put forth a good faith effort to cooperate when he and his attorney cancelled three scheduled interviews with an EEOC investigator, failed to submit requested information, and repeatedly failed to return the investigator's phone calls. *Id.* at 1307; *see also Green*, 854 F. Supp. at 513 (holding that the complainant had not exhausted administrative remedies because he ignored several EEOC information and interview requests over the course of several months).

Congressional intent, EEOC rules, precedent, and policy goals all favor requiring complainants to cooperate in good faith before satisfying Title VII's statutory exhaustion prerequisites to filing suit. *Shikles*, 426 F.3d at 1309-1313. First, when a Title VII complainant does not cooperate with the EEOC in good faith and instead files suit, she shatters Congress's intended dispute resolution framework. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *Shikles*, 426 F.3d at 1313. The Supreme Court has recognized that, to achieve Title VII's mission of eliminating workplace discrimination, "Congress created the EEOC...to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit." *Alexander*, 415 U.S. at 44. In doing so, Congress found inherent value in alternative dispute resolution and saw "[c]ooperation and voluntary compliance...as the preferred means for achieving [Title VII's] goal." *Alexander*, 415 U.S. at 44; *see also Jackson v. Richards Med. Co.* 961 F.2d 575, 581 (6th Cir. 1992) (Title VII embodies Congress's preference that workplace discrimination claims be resolved with the EEOC, rather than through litigation) (citing 42

U.S.C. § 2000e et seq.). Thus, not requiring good faith cooperation to exhaust administrative remedies is antithetical to Congress's vision of meaningful dispute resolution outcomes.

Second, administrative dispute resolution reduces the burden on courts by screening cases. *See, e.g.*, *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979) ("Congress intended through [Title VII] to screen from the federal courts those problems of civil rights that could be settled...in a voluntary and localized manner.") (internal quotation omitted); *Young v. DaimlerChrysler Corp.*, 52 Fed. App'x 637, 639 (6th Cir. 2002) (the EEOC's conciliation procedures are specifically aimed at avoiding litigation). Allowing uncooperative complainants to file suit incentivizes them to simply clog the court system with a claim that could have been resolved more swiftly and cheaply. *Doe v. Oberweis Dairy*, 456 F.3d 704, 710 (7th Cir. 2006).

Third, noncooperation wastes the EEOC's valuable time and resources that would be better spent on other, possibly more meritorious, claims. *Hill v. Potter*, 352 F.3d 1142, 1146 (7th Cir. 2003). In this sense, noncooperation is "a worse form of [failure to exhaust] than merely inadvertent inaction." *Id.* Fourth, the desirability of cooperation is built into the EEOC's own rules, acknowledging that failures to respond to the EEOC essentially waste claims. *See* 29 C.F.R. § 1601.18(b) (2007). Fifth, even if the EEOC's dispute resolution mechanisms are unsuccessful, a cooperative process at least whittles down issues, promoting more efficient litigation if a court eventually becomes involved. *Oberweis*, 456 F.3d at 709.

In all, given that a Title VII complainant's stonewalling undermines Congress's intent, judicial efficiency, administrative efficiency, and other perhaps more meritorious workplace discrimination claims, why should that complainant be permitted to seek redress in a federal court? *Shikles*, 426 F.3d at 1313. Without a convincing answer, good faith cooperation must be considered inherent in and integral to Title VII's statutory framework. *Id.* at 1314-15. An

opposing view suggests that exhaustion of administrative remedies under Title VII does not require good faith cooperation because that standard is unclear. *Oberweis*, 456 F.3d at 710-11. In *Oberweis*, a high school age ice cream shop employee claiming Title VII sexual harassment did exhaust her administrative remedies even though she declined the EEOC's request to interview her, as recommended by her therapist. *Id.* at 711. Instead, her attorney provided information allowing the EEOC to interview witnesses and offered to answer any question the EEOC would have asked in an interview. *Id.* Fearing that this conduct could be labeled uncooperative in a future case, the *Oberweis* court declined adoption of a good faith cooperation rule. *Id.* at 711-12.

In this case, because Ms. Fitts did not even take one action to cooperate with the EEOC, *Oberweis's* concerns over drawing a line between good and bad faith cooperation are inapplicable. Whereas the *Oberweis* complainant helpfully directed the investigator to witnesses and offered to answer questions through her intermediary attorney, there is no dispute that Ms. Fitts failed to make a single contact with the EEOC after filing her charge. (Fitts Dep. at 15:17-18:15). Further, although both Ms. Fitts and the *Oberweis* complainant technically denied the EEOC's interview requests, Ms. Fitts simply ignored the EEOC, whereas the *Oberweis* complainant at least explained in good faith that she was heeding her health professional's concerns. Therefore, the ambiguities of the *Oberweis* complainant's cooperation are not applicable to Ms. Fitts's six months of conceded stonewalling; no sensible interpretation of good faith cooperation could include doing nothing. A grant of summary judgment to Buckeye requires only the narrow ruling that Ms. Fitts's undisputedly nonexistent cooperation is not good faith cooperation, precluding exhaustion of administrative remedies.

Moreover, Ms. Fitts's obstruction undermines everything for which Title VII stands, as did the noncooperation of the complainants in *Green* and *Shikles*, who failed to respond or

interview. During the six months that Ms. Fitts obstructed her investigator by ignoring two letters, a phone call, and a voicemail, Ms. Fitts essentially made a mockery of what the *Alexander* Court recognized as Congress's desired dispute resolution. (Fitts Dep. at 15:17-18:15). Her noncompliance diverted valuable EEOC time and resources from a claimant who was actually willing to have her case resolved. Moreover, in opposition to what the *Oscar Mayer* Court saw as Title VII's aim to administratively screen out claims to avoid burdening courts, Ms. Fitts proceeded to clog the federal court system with a claim that could have been resolved over a year ago. If nothing else, her good faith cooperation could have, as the court in *Oberweis* recognized, at least better focused this litigation. In short, Congress's intent, policy goals, and precedent all favor finding that Ms. Fitts's undisputed lack of cooperation precludes exhaustion of her administrative remedies, warranting summary judgment for Buckeye.

## II. REGARDLESS OF MS. FITTS'S FAILURE TO EXHAUST, BUCKEYE IS ENTITLED TO SUMMARY JUDGMENT BECAUSE MS. FITTS'S DISCHARGE SOLELY RESULTED FROM HER OWN POOR JOB PERFORMANCE.

Even if this Court finds that Ms. Fitts exhausted her administrative remedies, Buckeye is still entitled to summary judgment because her discharge resulted solely from her own failure to meet sales quotas and maintain model units. A PDA complainant cannot receive judgment unless she proves that her employer's consideration of her pregnancy motivated an unlawful employment practice, such as discharge. 42 U.S.C. §§ 2000e(k), 2000e-2(a), 2000e-2(m). Without direct or statistical evidence of disparate treatment, a Title VII complainant may only establish this motivation circumstantially under a three-step burden shifting framework: 1) the complainant has the burden of establishing a prima facie case of disparate treatment; 2) the employer rebuts the complainant's case with evidence that the complainant was discharged for a legitimate, nondiscriminatory reason; and 3) the complainant has the burden of proving that the

employer's reasons were a pretext for disparate treatment. *McDonnell Douglas*, 411 U.S. at 802-04; *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 248-49 (1981); *Raciti-Hur v. Homan*, 181 F.3d 103, No. 98-1218, 1999 WL 331650, at *3 (6th Cir. 1999).

In this case, there is no direct or statistical evidence of disparate treatment in the record, so Ms. Fitts must pursue a claim under the *McDonnell Douglas* framework. First, Ms. Fitts cannot even meet her initial burden of forming a prima facie case because her discharge occurred four and a half months after Buckeye learned of her pregnancy. Second, assuming Ms. Fitts meets this initial burden, Buckeye easily meets its rebuttal burden because Ms. Fitts's subpar job performance—failure to meet sales quotas and maintain model townhouses—exclusively explains her discharge. Third, Ms. Fitts cannot prove pretext because she had been warned that she was on her "last chance" long before her pregnancy, and she has not produced any evidence comparing her treatment to other employees. Because Ms. Fitts does not dispute any of these facts relating to her poor job performance, summary judgment for Buckeye should be granted.

### A. Buckeye is entitled to summary judgment because Ms. Fitts cannot prove a temporal correlation between Buckeye's learning of her pregnancy and her discharge, precluding her establishment of a prima facie case.

Ms. Fitts cannot establish a prima facie case under *McDonnell Douglas* because approximately four and a half months passed between Buckeye learning of Ms. Fitts's pregnancy and her discharge, and she has submitted no evidence of disparate treatment. A complainant relying on circumstantial evidence cannot receive judgment under Title VII without establishing a prima facie case of discriminatory treatment. *McDonnell Douglas*, 411 U.S. at 802. A complainant cannot establish a prima facie case unless she proves by a preponderance of the evidence that: 1) she was pregnant, 2) she was qualified for her job, 3) she was subjected to an adverse employment decision, and 4) there is a nexus between her pregnancy and the adverse

employment decision. *Id.*; *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000). The record demonstrates that Ms. Fitts was pregnant; that she was qualified based on her satisfactory, if inconsistent, sales during the beginning of her Buckeye career; and that she was subjected to an adverse employment decision when she was discharged. However, Ms. Fitts has failed to meet her burden of proving a nexus because more than four months passed between Buckeye learning of her pregnancy and her discharge, and she has submitted no evidence of unfavorable treatment compared to similar employees.

A complainant must establish a nexus by demonstrating a short time frame between her employer learning of her Title VII-protected status and the adverse employment decision, generally two months or less. *See, e.g.*, *Asmo v. Keane, Inc.*, 471 F.3d 588, 593-94 (6th Cir. 2006) (two months is sufficient); *Cooper v. City of N. Olmsted*, 795 F.2d 1265, 1272 (6th Cir. 1986) (four months is insufficient). Here, whether Mr. Martin first learned of Ms. Fitts's pregnancy during the December 14, 2012 holiday party or her December 27, 2012 disclosure, there were at least four months and ten days between Buckeye learning of Ms. Fitts's pregnancy and her discharge on May 7, 2013. (Fitts Dep. at 10:1-11:9; Martin Dep. at 9:14-10:15). This time span exceeds that in *Cooper*, where four months was insufficient to establish temporal proximity. Therefore, even viewing the facts as favorably to Ms. Fitts as the record permits, she is unable to establish a nexus based on temporal proximity between her pregnancy and discharge.

If the temporal connection is insufficient, the complainant cannot establish a nexus without demonstrating that another similarly situated employee received benefits denied to her. *Compare Latowski v. Northwoods Nursing Ctr.*, 549 Fed. App'x 478, 483-84 (6th Cir. 2013) (holding that the pregnant complainant established a nexus with evidence that the employer nursing home treated other CNAs with similar lifting restrictions more favorably by assigning

them, and not the complainant, to light lifting duty), *with Schlett v. Avco Fin. Servs., Inc.*, 950 F. Supp. 823, 829 (N.D. Ohio 1996) (holding that the complainant failed to establish a nexus through her vague, unsubstantiated claims that her non-pregnant replacement received preferential treatment). Here, in contrast to the *Latowski* complainant's vivid comparisons to other CNAs, there is virtually no evidence in the record relating to other Buckeye sales managers. The evidence produced by Ms. Fitts most resembles that of the *Schlett* complainant--sparse and not indicative of any causal connection. In all, because Ms. Fitts has failed to meet her burden of producing evidence of a nexus between her pregnancy and discharge, she cannot establish a prima facie case under *McDonnell Douglas*, entitling Buckeye to summary judgment.

### B. Buckeye easily meets its burden of articulating a legitimate, nondiscriminatory reason for Ms. Fitts's being let go because her failure to meet sales quotas and maintain model units alone resulted in her discharge.

Buckeye let Ms. Fitts go solely because she failed to meet Buckeye's low sales quota three times and keep model townhouses clean over the course of her final year with Buckeye, constituting a legitimate, nondiscriminatory reason for her discharge. If a complainant is successful in establishing a prima facie case, the burden shifts to the employer to rebut the complainant's case. *Burdine*, 450 U.S. at 253. A defendant successfully rebuts the prima facie case simply by producing evidence that the complainant was discharged for legitimate, nondiscriminatory reasons. *Id.* It is generally all but a foregone conclusion that the employer meets this burden. *See, e.g., DeBoer v. Musahi Auto Parts, Inc.*, 124 Fed. App'x 387, 392 (6th Cir. 2005) (holding that the employer met its burden with evidence that other employees complained about the Title VII claimant). Here, Buckeye easily meets its burden because, to a far greater degree than the disliked *DeBoer* complainant, Ms. Fitts repeatedly failed to accomplish what she described as her most basic job responsibilities. (Fitts Dep. at 3:5-13). During her final

year with Buckeye, Ms. Fitts sold no homes in three separate months, and Mr. Martin twice discovered her complete failure to clean model homes, as evidenced by dirty carpeting and burned out light bulbs. (Fitts Sales Report; July 9, 2012 Undercover Buyer Report; Martin Dep. 15:13-16). Because Ms. Fitts cannot dispute her failure to perform these basic job responsibilities, Buckeye easily meets its burden of articulating a legitimate, nondiscriminatory reason for her discharge.

### C. A reasonable trier of fact could not find that Buckeye's reasons for discharge are pretextual because Ms. Fitts had been warned that she was on her "last chance" with the company long before her pregnancy, and she has not produced evidence comparing her treatment to other employees.

Ms. Fitts cannot meet her pretext burden because her failure to meet sales quotas dated back to months before her pregnancy, she knew she was on her "last chance" with the company, and she has not compared her performance or treatment to other employees. When the employer meets its burden under *McDonnell Douglas*'s second step, the complainant cannot withstand summary judgment unless she proves by a preponderance of the evidence that the employer's legitimate, nondiscriminatory reasons were pretextual. *McDonnell Douglas*, 411 U.S. at 804-05; *Burdine*, 450 U.S. at 253. The heightened burden precludes a successful claim unless the complainant introduces additional evidence beyond that established in her prima facie case. *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). The complainant only demonstrates pretext if she shows that the employer's reasons: 1) have no basis in fact, 2) did not actually motivate the employer's action towards the complainant, or 3) were insufficient to warrant the challenged conduct. *Manzer*, 29 F.3d at 1084. First, there are no factual disputes relating to Ms. Fitts's sales numbers or performance evaluations, excluding this factor from this pretext analysis. Second, regardless of occasional bright spots in Ms. Fitts's performance, she was put on warning of her poor performance long before her pregnancy, precluding even an

inference of pretext. Third, because Ms. Fitts has failed to establish that her treatment differed from other similarly situated employees, she cannot prove that her discharge was unwarranted or excessive. Because no rational trier of fact would find a genuine dispute as to any of these material facts, Buckeye is entitled to summary judgment.

**1. Ms. Fitts cannot establish that Buckeye had an ulterior motive in discharging her because, dating back to before her pregnancy, Buckeye's concern has centered solely on her job performance, not her pregnancy.**

Because Buckeye has consistently maintained that Ms. Fitts was let go for poor sales and home maintenance, and there is no evidence of negative reactions to her pregnancy from Buckeye management, Ms. Fitts cannot establish pretext. If a complainant attempts to demonstrate pretext by proving that the employer's reasons for discharge were not its true motivations, she is unsuccessful unless her evidence establishes that it is more likely than not that the employer's explanation is a cover-up. *Manzer*, 29 F.3d at 1084. When the employer's reasons for discharging the complainant center on unmet sales expectations and other basic performance failures, the complainant's evidence of occasionally positive sales numbers and performance reviews do not override to prove pretext. *Wolf v. Antonio Sofo & Son Imp. Co.*, 919 F. Supp. 2d 916, 925-26 (N.D. Ohio 2012). In *Wolf*, the PDA complainant could not prove that the food distributor employer's stated reason for discharge—failure to meet yearly case sale quotas and hold events to sell new products—was pretextual, despite positive elements in her performance evaluations, an alleged promotion to a new territory, and sporadic sales growth. *Id.*

Here, she cannot prove that Buckeye's explanation for her discharge amounts to a cover-up because, like the PDA claim in *Wolf*, her poor sales override occasionally positive aspects of her job performance. Like the *Wolf* complainant, viewing all evidence in Ms. Fitts's favor, she can point to isolated manifestations of positive performance—small bonuses and the Shaker

Heights transfer consideration, for example. (Martin Dep. at 5:12-15, 8:1-17). But just as in *Wolf*, because closing sales is at the heart of a sales manager's responsibilities with Buckeye, a bad sales record trumps. While Ms. Fitts's sales had one bright spot during her final year, the first quarter of 2013, all parties acknowledge that Buckeye's price slash precipitated steady sales across the board. (Fitts Dep. at 11:10-15). Further, Ms. Fitts's work performance was arguably worse than that of the *Wolf* complainant due to a host of issues beyond sales figures. These included, but were not limited to chatting on the phone in front of a customer, ignoring her supervisor's offer to help improve her performance, unprofessional correspondence with her supervisor, taking a full week of sick time with no explanation in the middle of a sales bonanza, and asking for a slew of unrealistic sales perks. (Fitts Dep. at 7:15-20, 12:1-3, 13:14-23; Sept. 14, 2012 Undercover Buyer Report). Importantly, none of these performance failures are in dispute, and therefore, Ms. Fitts's intermittent indications of positive performance do not support pretext.

A supervisor's reaction to a pregnancy announcement supports pretext only if the complainant specifically identifies a muted or adverse reaction in the record. *Asmo*, 471 F.3d at 594-95. In *Asmo*, the complainant established pretext only because she was able to point to the record's detailed description of her supervisor's outlier reaction to her pregnancy disclosure. Disclosing that she was pregnant with twins over a conference call, all of the complainant's coworkers congratulated her, while her supervisor remained silent and then moved on to the next business topic. The coworkers' enthusiastic responses juxtaposing that of the supervisor supported pretext, along with the unusual force of announcing twins. *Id.* In this case, Ms. Fitts cannot establish pretext through Mr. Martin's reaction to her pregnancy disclosure because she has failed to meet her burden of producing even vague evidence of the nature of the disclosure, in contrast to the *Asmo* complainant's vivid recollection. (Fitts Dep. at 10:10-12). Even if we

inappropriately construct Mr. Martin's reaction to be unenthusiastic, going beyond interpreting the record favorably to Ms. Fitts, his response is still distinguishable; Ms. Fitts did not have twins, which justified a more overwhelming announcement, and there is no evidence of other celebratory coworkers. (Fitts Dep. at 10:10-12). Because Ms. Fitts failed to meet her burden, she cannot establish pretext through Buckeye's response to her pregnancy announcement.

Lastly, plausibly offensive supervisor comments do not support pretext if they are removed from the complainant's being let go. *Suits v. The Heil Co.*, 192 Fed. App'x 399, 402-03 (6th Cir. 2006) (holding that a supervisor's comments—e.g. "How are you going to come back to work...and leave that baby? You know you are not going to be able to do that."—did not support pretext because they preceded the employee's discharge by at least three months). Here, there are no offensive comments in the record relating to Ms. Fitts's pregnancy sufficiently close to her discharge on May 7, 2013. Although Mr. Martin emailed a coworker on February 5, 2013 to lament Ms. Fitts's lack of company commitment following her unexplained week of time off, the three month buffer between the comments and the discharge preclude any pretextual meaning, as it did in *Suits*. (Martin Dep. at 13:4-16). Even considering the facts as favorably to Ms. Fitts as the record permits, drawing an unfair inference that Mr. Martin's comments referred to Ms. Fitts's pregnancy, the lack of temporal proximity to her discharge is dispositive.

**2. Ms. Fitts cannot prove pretext by establishing that her discharge was excessive because she has failed to compare herself to other coworkers**

Because Ms. Fitts has submitted no evidence permitting a comparison between her treatment and a similarly situated employee, she cannot prove pretext by unwarranted discharge. If a complainant attempts to demonstrate pretext by showing that the employer's reasons were insufficient to warrant the discharge, she cannot succeed without "comparables evidence." *Tysinger v. Police Dept. of City of Zanesville*, 463 F.3d 569, 573-74 (6th Cir. 2006); *Manzer*, 29

F.3d at 1084. That is, a complainant can only prove that her discharge was excessive by demonstrating that employees engaging in substantially identical work were treated more favorably. *Tysinger*, 463 F.3d at 573-74; *Manzer*, F.3d at 1084; *Majer v. Lexion Med., LLC*, No. 1:09CV00836, 2011 WL 2149152, at *11 (N.D. Ohio June 1, 2011). The only other sales manager identified in the record is Mr. Caroll, and although he received the Shaker Heights transfer, he and Ms. Fitts were not similarly situated because he had more experience and a strong sales record, unlike Ms. Fitts. (Martin Dep. at 11:9-13). Even if Mr. Martin chose Mr. Caroll after he found out about Ms. Fitts's pregnancy, his superior work performance precludes any pretextual meaning. Even taking inferential liberties, Ms. Fitts cannot prove disparate treatment.

Moreover, even if a complainant identifies an employer's policy as comparables evidence, an employer's straying from written policy when discharging an at-will employee is not pretext because an at-will employee has no right to any specific procedure. *Wolf*, 919 F. Supp. 2d at 926; *see also DeBoer*, 124 Fed. at 394 (6th Cir. 2005) (holding that, although there is "small probative value" in an employer letting go of the complainant without following a written policy warning system, the evidence is far from independently sufficient to establish pretext). Here, although there was not strict adherence to Buckeye's optional guidelines for warning a sales manager who has not met a quota, because Ms. Fitts was an at-will employee, Buckeye's policy is irrelevant under the *Wolf* standard. (Empl. Handbook; Fitts Dep. at 5:6-8). Additionally, the sole bolded text in Buckeye's policy makes clear that the company retains the right to determine appropriate discipline case-by-case, just as the *Wolf* policy made the at-will nature of employment clear. (Empl. Handbook). Even if there is small probative value in Ms. Fitts's discharge without warning under the *DeBoer* standard, a finding of pretext requires an

accumulation of additional evidence. Regardless, Buckeye made it clear to Ms. Fitts in July of 2012, long before her pregnancy, following two months of no sales and the abysmal first undercover buyer report, that Ms. Fitts would probably only get one "last chance." (Fitts Dep. at 8:17-20; Martin Dep. at 7:15-17). Buckeye therefore had already honored whatever value its policy places in a warning system before Ms. Fitts was even pregnant.

In all, without comparables evidence, an indication of Buckeye's negative reaction to her pregnancy, and more convincing evidence that she was performing satisfactorily when she was discharged, Ms. Fitts cannot demonstrate even a semblance of evidence that Buckeye's reasons for discharge are pretextual. Because there is no genuine dispute as to any of the material facts relating to Ms. Fitts's burden to demonstrate pretext, Buckeye is entitled to summary judgment.

## CONCLUSION

Viewing all of the facts as favorably to Ms. Fitts as the record permits, Buckeye is entitled to summary judgment at every step of her PDA claim. Buckeye is entitled to summary judgment because there is no dispute that Ms. Fitts undermined the entire Title VII dispute resolution model when she failed to exhaust her administrative remedies by stonewalling the EEOC. It is entitled to summary judgment because there is no dispute that four and a half months passed between Buckeye's knowledge of Ms. Fitts's pregnancy and her discharge, an insufficient temporal correlation to establish a prima facie case. And finally, it is entitled to summary judgment because no rational jury could conclude that Ms. Fitts's unpredictable and half-hearted work performance is a less likely explanation for her discharge than whatever specter of discrimination she has devised. If this Court finds that Ms. Fitts did not meet her burden to just one element of her claim, Buckeye is entitled to summary judgment.

**DATED:** **February 21, 2015**

**Respectfully submitted,**

**KEHNER, SILVER, & SIMON, LLP**

**By:** **s/Ryan Miller**
**Ryan Miller**

**1375 East 9th Street**
**Cleveland, OH 44114**
**(216) 429-7668**

**Attorney for Defendant**
**Buckeye Homes, Inc.**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Motion for Summary Judgment of Defendant Buckeye Homes, Inc. was served this day via email to counsel for Plaintiff at the following address:

Eleanor Barrett, Esq.
Barrett, Bradley, & Lin LLP
1111 Superior Avenue
Cleveland, OH 44114
Email: ebarrett@bbandl.com
Attorney for Plaintiff

/s/ Ryan Miller
Dated: February 21, 2015