IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MARK GILLEY, Plaintiff, v. MW BUILDERS, INC. and MW BUILDERS OF TEXAS, INC., Defendants.	§ § § § § § § § § §	1:18-CV-25-RP

ORDER

Before the Court is a motion for summary judgment filed by Defendant MW Builders, Inc. ("MW Builders"). MW Builders fired Plaintiff Mark Gilley's ("Gilley") in May 2017. The dispute in this case concerns the motivation underlying Gilley's termination. MW Builders says that Gilley's termination was justified based on his poor performance history. Gilley, on the other hand, attributes his termination to his disability and leave under the Family and Medical Leave Act ("FMLA"). Having considered the parties' submissions, the record, and the applicable law, the Court finds that the motion should be denied.

I. BACKGROUND

The basic facts in this case are not disputed. MW Builders is a general contractor. (Dkt. 20-1, ¶ 1). MW Builders hired Gilley in 1997. (*See* 2016 Performance Review, Dkt. 21-1, at 2). Between January 2014 and May 15, 2017, Gilley worked for MW Builders as a construction superintendent. (Gilley Dep., Dkt. 20-2, at 48:22–50:10, 147:11–13). Gilley supervised and managed assistant superintendents, carpenters, laborers, and subcontractors. (*Id.* at 50:24–51:10, 52:10–11). Gilley was also responsible for ensuring that subcontractors completed their work timely and consistent with their contracts, as well as ensuring safety compliance. (*Id.* at 53:14–55:8, 55:17–22).

Gilley reported to two supervisors as a construction superintendent: MW Builders's general superintendent, Billy Byers, ("Byers") and MW Builders's vice president of operations, Jason Oldham ("Oldham"). (*Id.* at 48:22–49:11, 50:8–18, 119:12–120:2). Byers supervised Gilley in 2015–2016 on at least four different construction projects, including the Cibolo Walmart, Mars Petcare, and Southwest Contract projects. (*Id.* at 64:1–14; Byers Dep., Dkt. 20-3, at 9:24–10:19, 11:8–10, 26:16–23, 29:1–4). Oldham supervised Gilley after Byers departed from the Southwest Contract project in fall 2016. (Gilley Dep., Dkt. 20-2, at 119:12–120:2, 129:1–7).

In June 2016, Gilley was diagnosed with cardiomyopathy. (Gilley Dep., Dkt. 20-2, at 98:9–99:5; 99:16–25). At the time, Gilley did not require any medical procedures, and he was released to return to work without restrictions. (*Id.* at 100:1–11, 102:9–12). But over the next year, Gilley required was granted a series of three FMLA leave periods as a result of medical issues related to his heart condition. First, Gilley required surgery for a defibrillator implant after experiencing pain, heart palpitations, and an irregular heartbeat, (*id.* at 106:8–17, 107:16–108:2), and was provided paid FMLA leave from September 20, 2016, through October 23, 2016, (*id.* at 115:24–116:6). Next, Gilley collapsed on the job when his defibrillator shocked him, (*id.* at 120:20–121:24), so he was once again provided paid FMLA leave, this time from December 21, 2016, through January 16, 2017. (*Id.* at 123:20–124:25, 125:6–16, 125:22–126:2). Finally, Gilley was provided paid FMLA leave in March 2017 to receive a heart catheterization. (*Id.* at 141:4–20, 142:6–143:2).

On May 15, 2017, after the Southwest Contract project finished, Oldham terminated Gilley. (*Id.* at 147:11–148:1). Gilley alleges that the reasons provided for his termination are false. (*See, e.g.*, Compl., Dkt. 1, ¶ 10). He asserts causes of action under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., ("ADA") and the Texas Commission on Human Rights Act, Tex. Labor Code § 21.001 et seq., ("TCHRA") for discriminating against him on the basis of disability. (Compl., Dkt. 1, ¶¶ 11–16). Gilley also asserts two causes of action under the Family and Medical Leave Act

("FMLA"): He alleges that Defendants interfered with his right to take FMLA leave and that Defendants retaliated against him for taking FMLA leave. (*Id.* ¶¶ 17–18). MW Builders seeks summary judgment on all Gilley's claims. (Dkt. 20).

II. LEGAL STANDARD

Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). "A fact issue is 'material' if its resolution could affect the outcome of the action." *Poole v. City of Shreveport*, 691 F.3d 624, 627 (5th Cir. 2012).

If the burden at trial rests on the nonmovant, the party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant does so, the burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986); *Wise v. E.I. Dupont de Nemours & Co.*, 58 F.3d 193, 195 (5th Cir. 1995). After the nonmovant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the nonmovant, summary judgment will be granted. *Miss. River Basin All. v. Westphal,* 230 F.3d 170, 175 (5th Cir. 2000).

The Court must view the evidence in the light most favorable to the nonmovant and draw all inferences in the nonmovant's favor, *Rosado v. Deters*, 5 F.3d 119, 122–23 (5th Cir. 1993), and cannot make credibility determinations or weigh the evidence, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). That said, when one party's version of the facts "is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the

facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007). "A party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts." *Anderson*, 477 U.S. at 248 (citations and quotation marks omitted).

III. SUMMARY JUDGMENT EVIDENCE

Viewed in the light most favorable to Gilley, the summary judgment evidence is as follows. MW Builders maintains a "progressive discipline" system, a policy stating that poor performance should be documented contemporaneously, and annual performance evaluations. (*See* Oldham Dep., Dkt. 23-2, at 32:9–36:22). However, aside from formal, annual evaluations, there is no "prescriptive path" for feedback. (*Id.* at 33:14–17, 34:8–15, 35:3–14). When an employee has performance issues, that employee typically receives feedback from their supervisor formally through the annual evaluation format and informally through discussions with a supervisor on site visits. (*Id.* at 29:14–20). A manager normally has verbal discussions or warnings to make the employee aware of performance issues. (*Id.* at 32:12–18, 33:6–13). Performance issues may also result in written warnings that serve as documentation. (*Id.* at 31:11–32:18, 35:18–36:6).

From early 2015 through the summer of 2016, Gilley was the senior superintendent on the Cibolo Walmart project. (Gilley Dep., Dkt. 20-2, at 21:21–62:2, 71:16–72:5, 98:6–8). Byers occasionally visited the project site, and he told Gilley that he needed to be more visible on the project site after finding Gilley in his office. (*Id.* at 86:10–87:9). Also during that project, an electrical subcontractor complained to Gilley and Oldham that the project was being delayed and was not being managed properly. (*Id.* at 77:7–13; Subcontractor E-mail, Dkt. 20-2, at 98–103). Gilley disagrees with the complaints. (Gilley Dep., Dkt. 20-2, at 76:19–77:13).

Gilley received his 2015 performance review from Byers on January 29, 2016. (Gilley Dep., Dkt. 20-2, at 92:15–23; 2015 Performance Review, Dkt. 21-1, at 2–7). Gilley's overall performance

was rated as "Expected Performance." (*See* 2015 Performance Review, Dkt. 21-1, at 5). The review noted one of Gilley's opportunities for improvement as ensuring "quality assurance as work is being installed in place" and communication. (*Id.* at 3). Specifically, the review noted that Gilley should communicate issues to the subcontractor office. (*Id.*). The review also set a personal growth objective to "be more communicative to team and use the support structure" available. (*Id.*). Separately, Byers commented that "it has been brought to my attention from coworkers that one of [Gilley's] weaknesses has become time spent in the field. . . . One of [Gilley's] goals that I put down is to challenge him to spend more time in the field." (*Id.* at 7). The goal was for Gilley to "[s]pend about 70% of each day in the field monitoring the work in place." (*Id.*; *see also* Oldham Dep., Dkt. 23-2, at 63:11–18, 65:6–15). The goal was to be measured by "coworkers, PM, PE, [and] Assistant Superintendent[s]." (2015 Performance Review, Dkt. 21-1, at 7). Gilley does not think that the statement about his presence in the field was a true assessment. (Gilley Dep., Dkt. 20-2, at 93:2–3). In the short term, Gilley also set a short-term goal "[t]o have more opportunities to experience different types of construction (i.e. tilt wall, multi-story)." (2015 Performance Review, Dkt. 21-1, at 4). Gilley acknowledged that he understood Byers's expectations in the review. (Gilley Dep., Dkt. 20-2, at 95:1–19).

In February 2016, one of the subcontractors for the Cibolo Walmart project e-mailed Gilley and MW Builders's project manager because one of its representatives was unable to find Gilley on site. (Gilley Dep., Dkt. 20-2, at 85:8–86:9). Gilley says he was present on site during that time (*Id.*).

By the time Gilley was diagnosed with cardiomyopathy in June 2016, the Cibolo Walmart project had finished, and Gilley was assigned to assist another superintendent on a Mars Petcare project. (Gilley Dep., Dkt. 20-2, at 101:24–102:23). Gilley acknowledged that one of his responsibilities was to help with safety issues. (*Id.* at 101:22–23). In September 2016, Mars Petcare's project manager e-mailed MW Builders to express concern about a lack of workers wearing safety

glasses and the cleanliness of the project. (*Id.* at 103:17–104:22; Subcontractor E-mail, Dkt. 20-2, at 117–18). In response, Sparky Campbell ("Campbell"), MW Builders's Operations Manager at the time, e-mailed Gilley and the other superintended of the Mars Petcare project to tell them to "get our A-Game going." (Gilley Dep., Dkt. 20-2, at 108:17–109:10; Campbell E-mail, Dkt. 20-2, at 121).

On September 19, 2016, Gilley went to the emergency room for pain, heart palpitations, and an irregular heartbeat. (Gilley Dep., Dkt. 20-2, at 106:9–23). Gilley had surgery for a defibrillator implant on September 22, 2016. (*Id.* at 107:18–108:2; Gilley E-mail, Dkt. 21-1, at 9). MW Builders's Human Resources representative sent Gilley FMLA paperwork and a request that Gilley's doctor provide certification of his health condition and need for leave. (Gilley Dep., Dkt. 20-2, at 109:12–110:8; FMLA paperwork, Dkt 20-2, at 131–36). The FMLA paperwork included a job description for the superintendent position. (FMLA paperwork, Dkt 20-2, at 135–36). The description included heavy physical demand requirements, such as lifting heavy items (50–75 pounds) and recurring bending, crouching, stooping, stretching, reaching, climbing, or similar activities. (*Id.* at 136). Gilley's physician indicated that Gilley would be "incapacitated for a single continuous period of time due to his . . . medical condition" from September 20, 2016, through October 23, 2016. (Certification, Dkt. 21-1, at 13). The certification also noted that Gilley would be unable to perform some of his job functions during that time—he could not lift more than 10 pounds—and he could not raise his left arm above should height. (*Id.* at 12, 13).

A few days after Gilley's surgery, he returned to the Mars Petcare work site. (Gilley Dep., Dkt. 20-2, at 114:21–115:4). When he arrived, he spoke with Byers and Campbell. (*Id.* at 115:5–9). They reminded Gilley of his work restrictions and noted that he did not have a return-to-work form. (*Id.* at 115:10–13). Gilley also says that Byers told him he was "a liability to Mars" and "forced" him to take FMLA leave. (*Id.* at 118:24–119:7). Gilley got the return-to-work form the next day, but he was denied the opportunity to work on "light duty." (*Id.* at 115:18–20). Gilley says that MW Builders

should have allowed him to work light duty instead of taking FMLA leave. (*See id.* at 117:7–16, 118:19–119:7). Gilley was paid during the entire FMLA leave period. (*Id.* at 119:8–10). Gilley returned to work, but not on the Mars Petcare project. (*Id.* at 116:12–14, 119:12–20). Instead, MW Builders assigned Gilley to start a new project: the Southwest Contract. (*Id.* at 116:17–19). The Southwest Contract project was a "tilt wall," consistent with Gilley's goal to work on from his 2015 performance review. (*Id.* at 90:14–17, 91:2–9, 116:12–25).

On December 21, 2016, Gilley collapsed on site after his defibrillator shocked him, and he was taken to the hospital. (*Id.* at 120:20–121:24). Oldham was told that some safety posters were not displayed around the site as required. (*Id.* at 150:8–19; Oldham Dep., Dkt. 23-2, at 91:2–21).[1] MW Builders's Human Resources representative again sent Gilley FMLA paperwork, including the superintendent job description and a request for certification from Plaintiff's health care provider. (Gilley Dep., Dkt. 20-2, at 123:13–19; FMLA Paperwork, Dkt. 20-2, at 139–45). The certification, dated January 3, 2017, indicated that Gilley would require leave from December 21, 2016, through January 10, 2017. (Certification, Dkt. 21-1, at 18, 20). But Gilley was not released to return to work until January 16, 2017. (Return to Work Letter, Dkt. 21-1, at 23–24). Gilley was released with restrictions to minimize strenuous activity and not to lift over 50 pounds. (*Id.* at 24).

Shortly after Gilley returned to work, Oldham conducted his 2016 performance review. (Gilley Dep., Dkt. 20-2, at 127:19–129:7; 2016 Performance Review, Dkt. 21-1, at 26–34). In that review, Oldham rated Gilley's overall performance as "Marginal/Needs Improvement."[2] (2016 Performance Review, Dkt. 21-1, at 30). Oldham noted that "While Marc has been dependable in the past we have seen a drastic change in him since prior to his last review. I discussed with Marc the

[1] Gilley explains that the posters were posted at one point, but the tape did not adhere to the wall, so they fell. (Gilley Dep., Dkt. 20-2, at 150:8–14). By the time Gilley returned to work, someone secured the posters with push pins. (*Id.* at 150:15–18).

[2] Gilley argues that this was the first time he had received a negative rating on a performance review. (Pl.'s Resp. Mot. Summ. J., Dkt. 23, at 1, 13–14, 15). In reviews provided from 2005 through 2007, Gilley's overall performance rating was "Meeting Expectations." (*See* Performance Reviews, Dkt. 23-5, at 1–12).

concern we had about him being more involved in the field, communicating with subcontractors, and ensuring the work is put in place correctly the first time." (*Id.* at 27). Oldham also observed that at Gilley's last review, they discussed a concern over his lack of presence and involvement in the field and made a commitment to improve in that area, but that the same concern remains. (*Id.* at 30). Oldham also commented that at the Southwest Contract site, it was revealed that the safety posters, clinic information, and the job-site safety manual were not properly posted or completed. (*Id.*). Oldham also expressed frustration for "having to remind Marc to think about the project schedule, to forward think in terms of upcoming activities, to push subcontractors, and not settle for excuses." Gilley attributed the dependability issue to his health, which Oldham acknowledged, but Oldham also stated that "our concern extends beyond that." (*Id.* at 27). Oldham called for Gilley to "focus on improving his ability to drive subcontractors to completion, not accept their excuses, and focus on aggressive management of a project's schedule" and that he should be "constantly in the field checking and pushing the work to a successful end." (*Id.*). The review set the same goal as his 2015 review: to spend "about 70% of each day in the field monitoring the work in place." (*Id.* at 31). Again, the goal was to be measured by "coworkers, PM, PE, [and] Assistant Superintendents." (*Id.*).

Oldham included more feedback than the 2015 review, however. In Gilley's personal growth objectives section, he noted: "We want Marc to be healthy and capable of performing his duties. I would like to see Marc continue to focus personally on healthier habits to promote improvement in his lifestyle." (*Id.* at 27). As an action step, Oldham suggested Gilley "Listen to your doctors. Listen to your wife."[3] (*Id.*). Oldham concluded by stating: "Upon Marc's completion of his current assignment a meeting will be scheduled to discuss the path forward, opportunities available, and to develop an action plan for improvement in the areas of concern mentioned." (*Id.* at 30).

[3] The parties dispute the motivations behind these comments. Oldham argues that he was hopeful that Gilley was taking care of himself so his health would improve. (Oldham Dep., Dkt. 23-2, at 85:16–87:17). Gilley, however, felt that Oldham made his medical condition a company concern. (Gilley Dep., Dkt. 20-2, at 136:5–137:5).

Gilley did not rebut the performance review. (Gilley Dep., Dkt. 20-2, at 129:22–24). But he was "triggered" by the comments and felt that Oldham made his medical condition a concern with the company, but he did not report the comment or complain about it to anyone. (Gilley Dep., Dkt. 20-2, at 136:5–137:5). Gilley says that after his diagnosis, he noticed MW Builders's attitude toward him changed, and he felt that those he interacted with, including Oldham, were "standoffish." (*Id.* at 137:6–138:9). Gilley did not report these feelings to anyone or contact human resources. (*Id.* at 138:10–18). Gilley did not think his job was in jeopardy because previously he had received good remarks, including in his 2015 Performance Review. (*Id.* at 138:19–23).

In March 2017, Gilley needed a heart catheterization. (Gilley Dep., Dkt. 20-2, at 141:4–20). Just like before, MW Builders's human resources representative sent him FMLA paperwork and a request for a certification from his health care provider. (Gilley Dep., Dkt. 20-2, at 141:4–20; FMLA Paperwork, Dkt. 20-2, at 156–63). Gilley was again granted FMLA leave between March 13 and March 19, 2017, and his doctor indicated that he could return to work without restriction on March 20, 2017. (Certification, Dkt. 20-2, at 166–68). Gilley was paid during the FMLA leave period. (Gilley Dep., Dkt. 20-2, at 142:13–15). When he returned, he returned to the Southwest Contract warehouse project with the same pay and job responsibilities. (*Id.* at 142:16–24).

After Gilley returned to work, Oldham would visit the site once every one or two weeks, and the two would walk the site together. (*Id.* at 144:4–12). Oldham's periodic visits would typically last between 30 minutes to over an hour. (Oldham Dep., Dkt. 23-2, at 53: 3–11). According to Gilley, the two did not discuss any issues during that time. (Gilley Dep., Dkt. 20-2, at 144:13–14). Oldham did tell Gilley that he was still hearing concerns about Gilley's on-site presence, but Gilley says that he was on site every day that he was not on leave. (*Id.* at 144:23–145:3; Oldham Dep., Dkt. 23-2, at 54:6–20). Oldham was supposed to measure his progress towards his goal to spend 70 percent of his time in the field, but no monitoring took place. (Oldham Dep., Dkt. 23-2, at 65:25–66:6).

The dispute about Gilley's on-site presence largely stems from how often Oldham observed Gilley in his truck. Oldham said he saw Gilley in his truck for more than half the duration of his site visits. (Oldham Dep., Dkt. 23-2, at 53:3–18). Oldham commented to Gilley about sitting in the truck and said that being in the truck did not count as being on site. (Gilley Dep., Dkt. 20-2, at 145:4–18). Gilley, however, says that he did not sit in his truck all the time; he just happened to be in the truck at lunchtime when Oldham saw him. (*Id.*). Oldham concedes that he did not know how much time Gilley spent on site. (Oldham Dep., Dkt. 23-2, at 59:14–25). Nor could Oldham recall if he ever asked how much time Gilley spent in his truck or in the building on the job site, and he did not document the time Gilley spent in either location. (Oldham Dep., Dkt. 23-2, at 60:11–23, 61:18–63:10). Oldham also could not recall if he told Gilley that being in his truck was not the same as being on site. (*See* Oldham Dep., Dkt. 23-2, at 57:12–58:2). Oldham did not document how often he observed Gilley in his truck. (Oldham Dep., Dkt. 23-2, at 53:24–54:5). And based on Oldham's deposition, it is not clear whether "on-site" included Gilley's truck. (*See* Oldham Dep., Dkt. 23-2, at 54:6–12 (noting that on-site would include Gilley's truck); *id.* at 56:23–57:11 (noting that during Gilley's termination conversation, "on-site" meant being physically on the slab or in the building); *id.* at 66:6–15 (defining "in the field" as "in the field, on-site, or in the building" as opposed to being in an office)). According to Gilley, he set up his truck as a mobile office in order to spend more time in the field, outside of the project office. (Gilley Decl., Dkt. 23-1, ¶ 2). At this point, Gilley thought that MW Builders was "looking for a reason to fire me." (Gilley Dep., Dkt. 20-2, at 145:19–24).

Ultimately, the Southwest Contract project was completed within budget but was delayed due to weather delays and owner changes. (Oldham Dep., Dkt. 23-2, at 83:19–84:11). After the project finished, MW Builders terminated Gilley on May 15, 2017, in a meeting with Oldham and MW Builder's then-President, Jason Evelyn ("Evelyn"). (Gilley Dep., Dkt. 20-2, at 147:11–148:1, 152:16–18; Oldham Dep., Dkt. 23-2, at 42:14–43:13). Oldham says he made the decision to

terminate Gilley "due to continual performance issues and the lack of an opportunity that we felt comfortable assigning him to, based on his past performance and continued poor performance." (Oldham Dep., Dkt. 23-2, at 47:16–22). Oldham and Evelyn said that Gilley was sitting in his truck too much, that Gilley had missed some safety meetings, that the required safety posters were not posted, and that Gilley had not completed the site-specific safety manual. (Gilley Dep., Dkt. 20-2, at 149:16–150:9, 153:25–154:8).

Gilley does not remember Oldham or Evelyn expressing concern about poor management. (*Id.* at 150:19–24). Oldham did not document issues with subcontractors failing to comply with safety procedures, (Oldham Dep., Dkt. 23-2, at 91:22–92:21), and he could not identify any specific instance of Gilley failing to quality control the work performed, (*id.* at 90:11–21). Oldham similarly could not recall documenting any instance showing a lack of cleanliness, (*id.* at 72:14–20), or failure to communicate subcontractor issues (*id.* at 74:10–21, 82:14–83:6, 84:17–25). Gilley believes he was terminated because of his disability because he thought his supervisors' attitude changed when he got sick, and that MW Builders began to develop a "paper trail" to terminate him. (Gilley Dep., Dkt. 20-2, at 164:20–165:4).

Oldham has since identified the following consistent performance issues that justified termination: "not being . . . on site as a superintendent, not being in the building to . . . properly [quality control] the work going into place, . . . to not . . . enforce the overall safety policy of our company on the project, . . . taking care of general clean-up, . . . as well as communicating subcontractor issues." (Oldham Dep., Dkt. 23-2, at 50:9–23). Gilley never requested any accommodation for his cardiomyopathy, other than his request for "light duty" in October 2016. (Gilley Dep., Dkt. 20-2, at 161:14–18). MW Builders never denied any of Gilley's requests for FMLA leave. (*Id.* at 163:8–10). And each time Gilley took FMLA leave, he was restored to his position of superintendent with the same pay and responsibilities. (Gilley Dep., Dkt. 20-2, at 165:12–24).

IV. DISCUSSION

A. ADA & TCHRA Discrimination

Both the ADA and the TCHRA prohibit discrimination against qualified individuals based on disability.[4] 42 U.S.C. §12112(a); Tex. Labor Code § 21.051. "In employment discrimination cases, a plaintiff may present his case by direct or circumstantial evidence, or both." *Nall v. BNSF Ry. Co.*, -- F.3d --, 2019 WL 638011, at *3 (5th Cir. Feb. 15, 2019) (quoting *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 896 (5th Cir. 2002)). Here, Gilley provides circumstantial evidence that he was discriminated against based on his disability. Accordingly, the Court analyzes his claim under the burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *Nall*, 2019 WL 638011, at *3. Gilley must first establish a prima facie case of discrimination based on disability. *Id.* at *4. Gilley's burden at this stage of the case "is not onerous." *Reed v. Neopost USA, Inc.*, 701 F.3d 434, 439 (5th Cir. 2012) (quoting *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 633–34 (Tex. 2012)). If a plaintiff is able to establish a prima facie case for unlawful discrimination, he is entitled to a "presumption of discrimination." *Id.* MW Builders can rebut the presumption of discrimination "by articulating legitimate business reasons for the adverse action." *Rodriguez v. Eli Lilly & Co.*, 820 F.3d 759, 765 (5th Cir. 2016). If MW Builders does so, the burden shifts back to Gilley "to produce evidence from which a jury could conclude that [MW Builders's] articulated reason is pretextual." *Nall*, 2019 WL 638011, at *4 (quoting *Cannon v. Jacobs Field Servs. N. Am., Inc.*, 813 F.3d 586, 590 (5th Cir. 2016)).

[4] The TCHRA was "modeled after federal civil rights law," and the TCHRA "purports to correlate state law with federal law in the area of discrimination in employment." *NME Hosps., Inc. v. Rennels*, 994 S.W.2d 142, 144 (Tex. 1999). Texas courts "look to analogous federal precedent for guidance when interpreting" the TCHRA. *Id.* (citations and quotation marks omitted). Accordingly, the Court will analyze Gilley's TCHRA claim under the same standards as his ADA claim.

1. Prima Facie Case

To establish a prima facie case of discrimination based on disability, a plaintiff must show: "(1) that he has a disability; (2) that he was qualified for the job; (3) that he was subject to an adverse employment decision on account of his disability." *E.E.O.C. v. LHC Group, Inc.*, 773 F.3d 688, 697 (5th Cir. 2014). For purposes of its motion for summary judgment, MW Builders only contests that Gilley was subject to an adverse employment decision based on his disability.[5] (Mot. Summ. J., Dkt. 20, at 7 n.3). The ADA does not require discrimination be the "sole causation" of exclusion; rather, "[t]he proper causation standard under the ADA is a 'motivating factor' test." *Pinkerton v. Spellings*, 529 F.3d 513, 518 (5th Cir. 2008). In the Fifth Circuit, temporal proximity is sometimes sufficient to establish causation for a plaintiff's prima facie case. *See Porter v. Houma Terrebonne Hous. Auth. Bd. of Comm'rs*, 810 F.3d 940, 948 (5th Cir. 2015). Though an adverse action must be "very close" in time to establish causation, the Fifth Circuit has accepted a two-and-a-half month gap as sufficiently close. *See id.* at 948 n.37.

Gilley says that after he disclosed his cardiomyopathy, he was prevented for working for six weeks: Byers and Campbell initially did not allow Gilley to return to work on the Mars Petcare project.[6] After he was allowed to return, Gilley was assigned to the Southwest Contract project after his return even though the Mars Petcare project was ongoing. (Resp. Mot. Summ. J., Dkt. 23, at 18;

[5] MW Builders does not contest either that Gilley had a disability or that Gilley was qualified for the job. (Mot. Summ. J., Dkt. 20, at 7 n.3). Accordingly, the Court does not reach these issues and assumes without deciding that Gilley has met these elements of his prima facie case for purposes of this motion.

[6] As evidence of discrimination, Gilley says that Byers told him he could not be at the Mars Petcare site in October 2016 because the clients "think you're a liability." (Mot. Summ. J. Dkt. 23, at 2, 15). Gilley was terminated about seven months later, in May 2017 by Oldham. MW Builders argues that this comment is a "stray remark" because Gilley does not offer evidence that the remark was proximate in time to his termination, that it was made by the individual decision maker responsible for his termination, or that it was related to the employment decision at issue. (Def.'s Reply Mot. Summ. J., Dkt. 24, at 7 n.1). "In order for comments in the workplace to provide sufficient evidence of discrimination, they must be '1) related [to the protected class of persons of which the plaintiff is a member]; 2) proximate in time to the [complained-of adverse employment decision]; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue.'" *Rubinstein*, 218 F.3d at 400–01 (quoting *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1996)). Gilley identifies his termination as the adverse employment action and attributes the termination to Oldham. (*See* Compl., Dkt. 1, ¶¶ 10, 15–16; Pl.'s Response Mot. Summ. J., Dkt. 23, at 17). The Court agrees with MW Builders that the remark does not alone provide sufficient evidence of discrimination. Gilley has not shown that it was proximate to his termination, that it was made by Oldham, or that it related to his termination.

see also TWC Charge, Dkt. 23-2, at 1; Gilley Decl., Dkt. 23-1, ¶ 10). Gilley also observes that after he disclosed his cardiomyopathy, he received his first negative performance review in nineteen years, and he was fired at the conclusion of his last project. (Resp. Mot. Summ. J., Dkt. 23, at 18–19).

Gilley has offered some evidence that his termination resulted from impermissible discrimination based on his disability. It is undisputed that Gilley worked for MW Builders for nearly twenty years. Gilley was diagnosed with cardiomyopathy in June 2016, after which he began taking leave to treat his condition. In 2017, on his first performance review upon returning to work after his second period of FMLA leave when his defibrillator shocked him, Gilley received his first negative rating. (*Id.* at 18; Gilley Decl., Dkt. 23-1, ¶ 13). In that review, Oldham explicitly referenced Gilley's health, stating that "We want Marc to be health and capable of performing his duties. I would like to see Marc continue to focus personally on healthier habits to promote improvement in his lifestyle." (Resp. Mot. Summ. J., Dkt. 23, at 19; *see also* Oldham Dep., Dkt. 23-2, at 23; Gilley Dep., Dkt. 20-2, at 72; Performance Review, Dkt. 21-1, at 27). The review also recommended that Gilley "Listen to your doctors. Listen to your wife." (Performance Review, Dkt. 21-1, at 27). Gilley was terminated at the conclusion of his last project, less than two months after he took FMLA leave related to his condition. This evidence is sufficient for Gilley to show a causal link between his disability and his termination for a disability discrimination claim at the prima facie stage.

2. Legitimate, Non-Discriminatory Reason

Next, the Court considers whether MW Builders can articulate a legitimate, non-discriminatory reason for Gilley's termination. If it does, the presumption raised by Gilley's prima facie case is rebutted and drops from the case. *Squyres v. Heico Cos.*, 782 F.3d 224, 231 (5th Cir. 2015). Defendant's "burden is one of 'production, not persuasion' and 'involves no credibility assessment.'" *Id.* The Fifth Circuit has repeatedly held that a charge of "poor work performance" is

adequate when coupled with specific examples. *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 231 (5th Cir. 2015).

MW Builders has offered a legitimate, non-discriminatory reason for Gilley's termination: Gilley was terminated for his deficient performance. MW Builders notes that Gilley was diagnosed with cardiomyopathy in June 2016. (Gilley Dep., Dkt. 20-1, at 98:9–99:5, 99:16–25). Gilley admitted that in 2015, Byers addressed the same performance concerns that resulted in his termination. (*See* Mot. Summ. J., Dkt. 20, at 7; Gilley Dep., Dkt. 20-2, at 86:10–87:9, 95:1–19, 138:19–139:21). Specifically, Gilley's 2015 performance review identified that Gilley should spend more time in the field and noted additional communication and quality assurance concerns. (Mot. Summ. J., Dkt. 20, at 7; *see* 2015 Performance Review, Dkt. 21-1, at 7). Gilley's 2016 review noted the same concerns—Gilley needed to be more involved in the field, communicate proactively with subcontractors, and ensure work was done correctly the first time. (Mot. Summ. J., Dkt. 20, at 8; *see* 2016 Performance Review, Dkt. 21-1, at 27, 30). Thus, according to MW Builders, Oldham decided to terminate Gilley after repeatedly addressing the same deficient performance concern. (Mot. Summ. J., Dkt. 20, at 8).

Gilley also says that after he disclosed his cardiomyopathy, he was prevented for working for six weeks: Byers and Campbell initially did not allow Gilley to return to work on the Mars Petcare project, Gilley was "forced" to take six weeks of FMLA leave because he was perceived to be a "liability." (Resp. Mot. Summ. J., Dkt. 23, at 17–18). After his return, Gilley was assigned to the Southwest Contract project even though the Mars Petcare project was ongoing. (*Id.*). The implication in this argument is that placing Gilley on paid FMLA leave and reassigning him to a different project upon his return was itself an adverse employment action related to Gilley's disability.

MW Builders disputes the implication on both accounts. (*See* Reply Mot. Summ. J., Dkt. 24, at 8). First, although it is an open question as to whether paid FMLA leave can serve as an adverse

employment action, *see McCoy v. City of Shreveport*, 492 F.3d 551, 560–61 (5th Cir. 2007), "it is not contrary to the FMLA for an employee to be placed on involuntary FMLA leave." *Willis v. Coca Cola Enters., Inc.*, 445 F.3d 413, 417 (5th Cir. 2006). MW Builders says it placed Gilley on paid FMLA leave because he had not obtained a full medical release. (Reply Mot. Summ. J., Dkt. 24, at 8). Oldham played no role in that decision. (*Id.*). Gilley also acknowledged that it was his condition, not MW Builders, that forced him to take FMLA leave. (Gilley Dep., Dkt. 20-2, at 162:19–163:7). Second, MW Builders contends that the Southwest Contract project involved "tilt wall," which is the type of project that Gilley requested to lead. (Mot. Summ. J., Dkt. 20, at 4; 2015 Performance Rev., Dkt. 21-1, at 4). At the very least, MLW Builders has articulated a legitimate, non-discriminatory reason for each of these actions.

MW Builders has pointed to specific concerns about Gilley's performance raised in his performance reviews. Because MW Builders need only articulate, not prove, a legitimate non-discriminatory reason for its employment decision, the Court finds that MW Builders's reasons are sufficient to shift the burden back to Gilley.

3. Pretext

Gilley now has the burden to present evidence suggesting that he was discharged because of his disability. *Nall*, 2019 WL 638011, at *4. To satisfy his burden, Gilley must offer sufficient evidence that either (1) MW Builders's explanation for his termination is pretext for discrimination, or (2) MW Builders's stated reason is one reason for its conduct, but discrimination is a motivating factor. *See Autry v. Fort Bend Indep. Sch. Dist.*, 704 F.3d 344, 347 (5th Cir. 2013). "A plaintiff may show pretext either through evidence of disparate treatment or by showing that the employer's proffered explanation is false or unworthy of credence." *Caldwell v. KHOU–TV*, 850 F.3d 237, 242 (5th Cir. 2017) (quoting *Jackson v. Cal–W. Packaging Corp.*, 602 F.3d 374, 378–79 (5th Cir. 2010)). "An explanation is false or unworthy of credence if it is not the real reason for the adverse employment

action." *Id.* (quoting *Laxton v. Gap Inc.*, 333 F.3d 572, 578 (5th Cir. 2003)). The "motivating factor" test provides that "discrimination need not be the sole reason for the adverse employment decision so long as it actually plays a role in the employer's decision making process and has a determinative influence on the outcome." *Delaval v. PTech Drilling Tubulars, L.L.C.*, 824 F.3d 476, 479–80 (5th Cir. 2016) (quoting *LHC Grp.*, 773 F.3d at 702) (cleaned up).

"In the context of a summary judgment proceeding, the question is not whether the plaintiff proves pretext, but rather whether the plaintiff raises a genuine issue of fact regarding pretext." *Caldwell*, 850 F.3d at 242 (quoting *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 646 (5th Cir. 1985), *abrogated on other grounds by St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993)). Additionally, on a motion for summary judgment, the Court must accept the evidence of the nonmovant as credible and draw all justifiable inferences in his favor. *Anderson*, 477 U.S. at 255. "[A]n employee's subjective belief of discrimination alone, however genuine, is not sufficient to warrant judicial relief." *Auguster v. Vermillion Par. Sch. Bd.*, 249 F.3d 400, 403 (5th Cir. 2001).

Gilley does not argue that he was treated differently than any other employee, but that MW Builders failed to follow its own policy, procedures, and management practices in communicating feedback and progressive discipline. (Resp. Mot. Summ. J., Dkt. 23, at 5). Gilley also refutes the underlying factual validity of MW Builders's justifications for his termination. (*Id.* at 6–15). In essence, his pretext argument boils down to two reasons. First, Gilley says that termination was not justified based on his employment record. (*See id.* at 9–14). Although MW Builders noted on-site presence as a performance goal, MW Builders never gave Gilley a negative performance rating on his performance review before his diagnosis. Second, Gilley also argues that MW Builders's departure from its policies and procedures shows that he was terminated because of his disability. (*See id.* at 4–6, 14–15). Gilley says that MW Builders provides no contemporaneous documentation or communication that it was concerned about his ongoing performance. (*See id.* at 6).

The Court concludes that there are genuine issues of fact that preclude summary judgment as to whether MW Builders had legitimate, non-discriminatory, non-pretextual reasons to terminate Gilley. It is undisputed that Gilley's performance reviews raised the issue of his on-site presence before and after his diagnosis. But Gilley has presented evidence that Oldham did not know how much time Gilley was spending on site, or that MW Builders tracked Gilley's time spent in the field according to the terms of his 2015 performance review. (*See id.* at 5–6, 9; Oldham Dep., Dkt. 23-2, at 14–16). Oldham was only on site about one hour per week, and he does not recall ever asking how much time Gilley spent on site. (*See* Oldham Dep., Dkt. 23-2, at 16–17). Gilley, however, says that he spent every day on site, setting up his truck as an office so he could spend more time in the field. (*See* Resp. Mot. Summ. J., Dkt. 23, at 8; Gilley Decl., Dkt. 23-1, ¶ 2; Oldham Dep., Dkt. 23-2, at 15–16). And Gilley notes that there is no evidence he failed to properly control the quality at the Southwest Contractor project site. (*See* Resp. Mot. Summ. J., Dkt. 23, at 9; Oldham Dep., Dkt. 23-2, at 24). Although Gilley did not dispute the concerns raised in his performance reviews, either before or after his diagnosis, only the 2016 review included a "needs improvement" overall performance rating. (*See* Gilley Dep., Dkt. 20-2, at 92:15–93:16, 94:16–18, 139:22–24).

There is conflicting evidence as to whether the reasons provided are worthy of credence. Drawing all inferences in Gilley's favor, the justifications for terminating Gilley arise largely from his 2016 performance review in January 2017, just months before his termination. The 2016 review was the first review after Gilley's diagnosis, and it was the first time he was given an overall negative performance rating. Oldham explicitly referenced Gilley's health issues in addition to repeating concerns about Gilley's on-site presence. (2016 Performance Review, Dkt. 21-1, at 27). But at no point did Oldham unequivocally testify that Gilley's job was in jeopardy based on his performance review, (*see* Oldham Dep., Dkt. 23-2, at 15), and Oldham could not say how many hours per day Gilley spent on site, (*see id.* at 16). Additionally, the review noted that MW Builders would set an

action plan following the end of his current project. (2016 Performance Review, Dkt. 21-1, at 30 ("Upon Marc's completion of his current assignment a meeting will be scheduled to discuss the path forward, opportunities available, and to develop an action plan for improvement in the areas of concern mentioned."). That action plan was never developed—Gilley was terminated. On the record before the Court, and drawing all inferences in Gilley's favor, a reasonable jury could conclude that Gilley's alleged disability was a motivating factor in Oldham's decision to terminate him.

B. FMLA

The FMLA entitles employees to take reasonable leave for medical reasons. 29 U.S.C. § 2601(b)(2). Employers subject to the FMLA are prohibited from "interfer[ing] with, restrain[ing], or deny[ing] the exercise of or the attempt to exercise, any right provided under this subchapter." 29 U.S.C. § 2615(a)(1). Interference includes "not only refusing to authorize FMLA leave, but discouraging an employee from using such leave." *Bell v. Dall. Cty.*, 432 F. App'x 330, 334 (5th Cir. 2011) (quoting 29 C.F.R. § 825.220(b)). The FMLA also prohibits employers from discharging, retaliating, "or in any other manner discriminat[ing] against any individual for opposing" an employer's unlawful FMLA practices. 29 U.S.C. § 2615(a)(2). Upon the employee's timely return, the employer must reinstate the employee "to the same position as previously held or a comparable position with equivalent pay, benefits, and working conditions." *Cuellar v. Keppel Amfels, L.L.C.*, 731 F.3d 342, 345 (5th Cir. 2013) (quoting *Smith v. E. Baton Rouge Par. Sch. Bd.*, 453 F.3d 650, 651 (5th Cir. 2006)). The FMLA finally prohibits employers from:

> discharg[ing] or in any other manner discriminat[ing] against any individual because such individual . . . has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter; . . . has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or . . . has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

29 U.S.C. § 2615(b). In his complaint, Gilley alleges that Defendants violated both the FMLA's anti-interference provision and the FMLA's anti-retaliation provision. (Compl., Dkt. 1, ¶ 17 ("Defendants violated 29 U.S.C. §2615(a) and 29 U.S.C. §2615(b).")).

1. Interference

In order to establish a prima facie case of interference under the FMLA, an employee must show: "(1) he was an eligible employee; (2) his employer was subject to FMLA requirements; (3) he was entitled to leave; (4) he gave proper notice of his intention to take FMLA leave; and (5) his employer denied him the benefits to which he was entitled under the FMLA." *Caldwell*, 850 F.3d at 245. Gilley is not required to show any discriminatory intent; he need only show an act of interference. *Cuellar*, 731 F.3d at 350. Gilley "must at least show that the defendant interfered with, restrained, or denied her exercise or attempt to exercise FMLA rights, and that the violation prejudiced her." *Id.* at 347. Once Gilley establishes a prima facie case, MW Builders must provide a legitimate, non-discriminatory reason for the employment action. *Caldwell*, 850 F.3d at 245. The burden then shifts back to the plaintiff to "raise an issue of material fact that the employer's proffered reason was pretextual." *Id.*

MW Builders argues that it is entitled to summary judgment on Gilley's FMLA interference because there is no evidence that Defendants denied Gilley the benefits he was entitled to under the FMLA. (MW Builders Mot. Summ. J., Dkt. 20, at 15). Although Gilley nominally includes an FMLA interference claim in his complaint, (*see* Compl., Dkt. 1, ¶ 17 ("Defendants violated 29 U.S.C. §2615(a) and 29 U.S.C. § 2615(b).")), his allegations are more consistent with an FMLA retaliation claim—he alleges that was terminated after availing himself of a protected right under the FMLA. (*Id.* ¶ 18). The record shows, and Gilley admits, that Gilley was never denied FMLA leave when requested. (*See* Gilley Dep., Dkt. 20-2, at 163:8–10). Accordingly, there is no dispute on this issue, and MW Builders is entitled to judgment as a matter of law on Gilley's FMLA interference claim.

2. Retaliation

In the absence of direct evidence, the Fifth Circuit applies the mixed-motive framework to FMLA retaliation claims. In order to survive summary judgment under this burden-shifting framework, an employee must first establish a prima facie case of FMLA retaliation. *Richardson v. Monitronics Int'l, Inc.*, 434 F.3d 327, 333 (5th Cir. 2005). The burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action. *Id.* If the employer carries this burden, the burden then shifts back to the employee to offer sufficient evidence to create a genuine issue of material fact that the employer's reason is pretext for discrimination or that discrimination was among the reasons for the adverse action. *Id.* If the employee meets that burden, an employer may still escape liability by proving that it would have taken the same adverse employment action despite its retaliatory motive. *Id.* "The employer's final burden is effectively that of proving an affirmative defense." *Id.* (internal quotation marks omitted).

a. Prima Facie Case

In order to establish a prima facie case for retaliation under the FMLA, a plaintiff must show: (1) he engaged in protected activity under the FMLA by requesting or taking leave, (2) he suffered an adverse employment action, and (3) he was either treated less favorably than a similarly situated employee who had not requested leave or the adverse action was made because he sought protection under the FMLA. *See Acker v. General Motors, L.L.C.*, 853 F.3d 784, 790 (5th Cir. 2017) (quoting *Mauder v. Met. Transit Auth. of Harris Cty.*, 446 F.3d 574, 583 (5th Cir.), *cert denied*, 549 U.S. 884 (2006)). "The third element requires the employee to show 'there is a causal link' between the FMLA-protected activity and the adverse action." *Id.* (quoting *Richardson v. Monitronics Int'l Inc.*, 434 F.3d 327, 332 (5th Cir. 2005)).

MW Builders does not dispute the first or second elements, focusing its argument on the third element of causation. (Def.'s Mot. Summ. J., Dkt. 20, at 13–14). MW Builders argues that

Gilley has not offered any comparator that is similarly situated, (*id.*), and that "temporal proximity alone is insufficient to prove but for causation," (*id.* at 14 (quoting *Strong v. Univ. Healthcare Sys., L.L.C.*, 482 F.3d 802, 808 (5th Cir. 2007))). Evaluating causation in FMLA retaliation cases is a "highly fact specific" inquiry. *Perkins v. Child Care Assocs.*, 2018 WL 5046255, at *4 (5th Cir. Oct. 16, 2018) (unpublished) (citing *Nowlin v. Resolution Tr. Corp.*, 33 F.3d 498, 508 (5th Cir. 1994)). In making the causation inquiry, a court "shall consider the temporal proximity between the FMLA leave, and the termination." *Mauder*, 446 F.3d at 583 (internal quotation marks omitted). In relying on temporal proximity to show causation, the timing must be "very close." *Feist v. Louisiana*, 730 F.3d 450, 454 (5th Cir. 2013) (quoting *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273–74 (2001)). A time lapse of up to four months has been found sufficient to satisfy the causal connection requirement. *See Evans*, 246 F.3d at 354 (quoting *Weeks v. NationsBank, N.A.*, No. 3:98–CV–1352M, 2000 WL 341257, at *3 (N.D. Tex. Mar. 30, 2000)). But a plaintiff "cannot, with each protected activity, re-start 'the temporal-proximity clock'" by alleging an employee "repeatedly engaged in protected activity" over a period of time. *Perkins*, 2018 WL 5046255, at *4 (quoting *Alkhawaldeh v. Dow Chem. Co.*, 851 F.3d 422, 428 n.23 (5th Cir. 2017)).

Gilley argues that causation is shown by the fact that his employment record does not support dismissal, combined with MW Builders's departure from typical policies and procedures. (Resp. Mot. Summ. J., Dkt. 23, at 4). Gilley also argues that each time he took FMLA leave, he suffered an adverse consequence, culminating in his termination. (*Id.* at 16). Gilley requested and received FMLA paid leave three times between June 2016 and March 2017. After his first FMLA leave, Gilley alleges that he was denied the opportunity to work on the Mars Petcare project, and instead required to take leave.[7] (*Id.* at 2, 17–18). Gilley received his first overall poor rating on his performance review following his second FMLA leave from December 2016 through January 2017,

[7] *See supra* note 5.

and Oldham terminated Gilley less than two months after his last FMLA leave in March 2017. (*Id.*). Gilley also argues that Oldham's behavior toward him changed for the worse after he first took FMLA leave, which supports finding that his termination and FMLA leave are causally linked. (*Id.* at 17–18). Finally, Gilley argues that when he was diagnosed with cardiomyopathy and began taking FMLA leave, his supervisors' attitudes toward him changed. (*Id.*). For example, Oldham no longer invited him to lunches, was unfriendly toward Gilley, and no longer socialized or went hunting with Gilley.[8] (Resp. Mot. Summ. J., Dkt. 23, at 17–18).

MW Builders's motion for summary judgment on Gilley's prima facie FMLA retaliation claim is denied, however, for the same reasons discussed above related to his ADA claim. The causation factor of the prima facie case for retaliation is not as stringent as the "but for" causation standard. *Evans*, 246 F.3d at 354. While the plaintiff bears the initial burden, it is not an onerous one. *Burdine*, 450 U.S. at 253. "The plaintiff only needs to show that the protected activity and the adverse employment action were not completely unrelated." *Hardtke v. Hartford*, No. SA–04–CA–1006 NN, 2006 WL 2924942, at *6 (W.D. Tex. Oct. 10, 2006). It may be the case that temporal proximity could be insufficient to show a causal link between FMLA leave and termination, but the two-month gap between Gilley's termination and protected FMLA suffices for Gilley to meet his minimal burden to establish the causation element for his prima facie FMLA retaliation case.

b. Legitimate, Non-retaliatory Reasons

Having concluded that Gilley has established a prima facie case for retaliation, MW Builders must now "articulate a legitimate, non-discriminatory reason for the adverse employment action." *Richardson*, 434 F.3d at 333. MW Builders has done so here. MW Builders argues that Gilley was

[8] Contrary to MW Builders's arguments, Gilley's prima facie case does not rest on his subjective belief of discrimination alone. (Mot. Summ. J., Dkt. 20, at 8–9). It is true that "an employee's subjective belief that he suffered an adverse employment action as a result of discrimination, without more, is not enough to survive a summary judgment motion." *Douglass v. United Servs. Automobile Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996). But here, Gilley's subjective belief that Oldham's "attitude changed" provides support for his broader discrimination argument. Viewed alongside the temporal proximity between his final FMLA leave and termination, as well as the comments regarding Gilley's health on his 2016 performance review, can support an inference that Gilley was terminated as a result of his FMLA leave and disability.

terminated for performance deficiencies documented in both his 2015 and 2016 performance reviews. (Mot. Summ. J., Dkt. 20, at 9). Terminating an employee whose performance is unsatisfactory according to management's business judgment is a legitimate, non-discriminatory reason. *See Medina v. Ramsey Steel Co.*, 238 F.3d 674, 684–85 (5th Cir. 2001) (finding that defendant satisfied burden of articulating legitimate, non-discriminatory reason for termination where defendant alleged poor work performance supported with documented evidence in work file).

Gilley also says that after he disclosed his cardiomyopathy, he was prevented for working for six weeks: Byers and Campbell initially did not allow Gilley to return to work on the Mars Petcare project, Gilley was "forced" to take six weeks of FMLA leave because he was perceived to be a "liability." (Resp. Mot. Summ. J., Dkt. 23, at 17–18). After his return, Gilley was assigned to the Southwest Contract project even though the Mars Petcare project was ongoing. (*Id.*). The implication in this argument is that placing Gilley on paid FMLA leave and reassigning him to a different project upon his return was itself an adverse employment action related to Gilley's disability.

First, MW Builders argues that "it is not contrary to the FMLA for an employee to be placed on involuntary FMLA leave," *Willis v. Coca Cola Enters., Inc.*, 445 F.3d 413, 417 (5th Cir. 2006), and that that Gilley's FMLA leave was necessary because Gilley had not obtained a full medical release. (Reply Mot. Summ. J., Dkt. 24, at 8). Oldham played no role in that decision. (*Id.*). Gilley also acknowledged that it was his condition, not MW Builders, which forced him to take FMLA leave. (Gilley Dep., Dkt. 20-2, at 162:19–163:7). Second, MW Builders contends that the Southwest Contract project involved "tilt wall," which is the type of project that Gilley requested to lead. (Mot. Summ. J., Dkt. 20, at 4; 2015 Performance Rev., Dkt. 21-1, at 4). At the very least, MLW Builders has articulated a legitimate, non-discriminatory reason for each of these actions.

c. Pretext

Gilley refutes each of the six justifications Oldham provides for terminating Gilley. (*See* Resp. Mot. Summ. J., Dkt. 23, at 6–15). In making the pretext evaluation, the Court need not determine the truth of what was said, or whether MW Builders made a correct decision to terminate Gilley, but whether MW Builders's decision to terminate Gilley was motivated by retaliation for protected FMLA activity. "In the context of a summary judgment proceeding, the question is not whether the plaintiff proves pretext, but rather whether the plaintiff raises a genuine issue of fact regarding pretext." *Caldwell*, 850 F.3d at 242 (quoting *Thornbrough*, 760 F.2d at 646).

Gilley has raised a genuine issue of material fact regarding whether MW Builders's proffered justifications for terminating him are pretextual. When an employer opts to have a disciplinary system that involves lesser sanctions, an employer's failure to follow that system may give rise to inferences of pretext. *Goudeau v. Nat'l Oilwell Varco, L.P.*, 793 F.3d 470, 477 (5th Cir. 2015). Here, Gilley was never put on an action plan as specified by his 2016 performance review. And there is a genuine issue as to (1) whether Oldham documented Gilley's deficient performance, and (2) the extent of the warnings provided about Gilley being on site. Based on the timing of Gilley's periods of FMLA leave, combined with these facts and viewed most favorably to Gilley, a reasonable jury could find that MW Builders's reasons for terminating Gilley are pretextual.

3. Interference with Proceedings or Inquiries

Gilley also appears to allege that Defendants interfered with FMLA proceedings. (Compl., Dkt. 1, ¶ 17 ("Defendants violated 29 U.S.C. §2615(a) and 29 U.S.C. §2615(b)."). The FMLA prohibits employer interference in ongoing FMLA proceedings or inquiries. 29 U.S.C. § 2615(b). It is unlawful for an employer to terminate an individual for filing an FMLA charge, giving any information connected with an FMLA inquiry or proceeding, or testifying in an FMLA inquiry or proceeding. *Id.* By its terms, § 2615(b) requires a showing that the employee participated in some FMLA proceeding—either by filing a charge, testifying, or giving information. Gilley's complaint

never alleges that he testified or gave information related to an FMLA proceeding, and he did not file an FMLA charge until after his termination. MW Builders is entitled to judgment as a matter of law on Gilley's FMLA interference with proceedings claim.

V. CONCLUSION

For the reasons stated above, **IT IS ORDERED** that Defendant's Motion for Summary Judgment, (Dkt. 20), is **GRANTED IN PART**. It is **GRANTED** with respect to Plaintiff's FMLA claims for interference and interference with proceedings or inquiries. Defendant's motion is **DENIED** with respect to Plaintiff's ADA and TCHRA discrimination claims, as well as Plaintiff's FMLA retaliation claim.

SIGNED on March 27, 2019.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE