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

MELYNDA MICHELLE FISHER, Plaintiff, v. SETON FAMILY OF HOSPITALS, Defendant.	§ § § § § § § § §	1:18-CV-1108-RP

ORDER

Before the Court are the summary judgment motions filed by Plaintiff Melynda Michelle Fisher ("Fisher"), (Dkt. 28), and Defendant Seton Family of Hospitals ("Seton"), (Dkt. 27). Having considered the parties' arguments, the evidence, and the relevant law, the Court will deny Fisher's partial motion for summary judgment and grant in part and deny in part Seton's motion for summary judgment.

I. BACKGROUND

This is an employment discrimination case. Fisher started working as a medical assistant at Seton in July 2016. (Am. Compl., Dkt. 5, at 2). Between July 2017 and November 2017, Fisher took days off work to care for her mother who suffers from Alzheimer's Disease and requested those days be covered by Family Medical Leave Act ("FMLA") leave. (Fisher Dep., Dkt. 29-1, at 71–72). Seton's third-party leave administrator, Sedgwick Claims Management Services, Inc. ("Sedgwick"), approved of Fisher's request for leave on July 18, 2017. (Notice of Eligibility, Dkt. 27-10, at 3–4). The approval of her FMLA leave allowed Fisher to use up to five days per week to care for her mother. (Intermittent FMLA Approval Notice, Dkt. 28-6).

In August 2017, Kendall Sharp ("Sharp") became Fisher's supervisor, and she was aware of Fisher's need to take FMLA leave to care for her mother. (Sharp Decl., Dkt. 27-1, at 3; Sharp. Dep.,

Dkt. 28-3, at 4). From August 21, 2017 to November 13, 2017, Fisher utilized her approved intermittent FMLA leave approximately 41 times. (Sharp Decl., Dkt. 27-1, at 3). To properly report her FMLA leave, Fisher was required to (1) report FMLA related absences to Sedgwick on the same or next business day; (2) submit edits to her time card for FMLA leave; and (3) approve her timecard for each pay period. (Performance Coaching Report, Dkt. 27-3, at 8). Fisher most often texted Sharp to advise her supervisor when she planned to use FMLA leave, usually alerting Sharp of an absence the day before or day of the absence. (*See* Text Messages, Dkt. 27-6, at 22–71). Once Fisher reported her absences to Sedgwick, they would send Sharp a "Notice of Absence Report" for each absence Fisher had reported as covered by FMLA leave. (*See* Notice of Absence Reports, Dkt. 27-2).

After Fisher improperly reported her FMLA leave, she received coaching on how to properly report her FMLA leave on August 23, 2017. (Sharp Decl., Dkt. 27-1, at 3; Performance Coaching Report, Dkt. 27-3, at 8–9). During her coaching session, Fisher indicated that Sedgwick had not "explained to me in detail" how to properly report FMLA leave, but that "now [I] understand my responsibility . . . and will make sure on Fridays to sign on to approve—even if out of office." (Performance Coaching Report, Dkt. 27-3, at 9). During her coaching session, Fisher was warned that if she did "not meet the behavior expectations" for reporting FMLA leave, her absences would "be denied and [] subject to the attendance policy and managing time card policy" and that "further coaching or formal disciplinary action could result." (*Id.* at 8). According to Seton's policies, excessive unexcused absences or failure to file timekeeping procedures is considered conduct warranting "progressive discipline," whereas falsification of records or misstatement of fact warrants immediate discharge. (Dkt. 27-1, at 19–24; Associate Conduct and Discipline Policy, Dkt. 27-1, at 27–33; Guidelines for Non-Exempt Association, Dkt. 27-1, at 35–38) ("Three or more unscheduled absences during a 3 month period . . . will constitute excessive absences.").

This dispute centers around certain of Fisher's absences between October 25, 2017 and November 7, 2018. (Seton Mot. Sum. J, Dkt. 27, at 12–13; Fisher Statement of Facts, Dkt. 28-1, at 3–4). First, on October 25, Fisher missed work due to a migraine, and reported this absence as FMLA-related on October 26. (Oct. 25. Text Message, Dkt. 27-6, at 51; Oct. 26 Notice of Absence Report, Dkt. 27-10, at 27). Second, Fisher took FMLA-related leave on October 30, November 1 and November 2, but because the absences were not timely reported, Sedgwick denied them. (Dkt. 27-10, at 28–30; Denial Notice, Dkt. 27-2, at 111). Third, Fisher missed work on November 3, 6, and 7 due to a severe toothache and underwent a root canal on November 8. (Nov. 3–Nov. 8 Text Messages, Dkt. 27-6, at 56–61; Fisher Dep., Dkt. 29-1, at 10). Fisher brought her mother to her dentist appointments on November 6 and 7. (Fisher Dep., Dkt. 29-1, at 13).

Fisher texted Sharp about each of these absences and indicated when she was dealing with her own medical issues. (*See* Text Messages, Dkt. 27-6, at 22–71). Sharp believed that when Fisher missed work to care for her own medical issues, she could not report those absences as FMLA-related. (Dkt. 27-4, at 28). However, Fisher says that when she spoke to Sedgwick about the days she was absent for her root canal, Sedgwick informed her that since she had brought her mother to her dentist appointments, those days could be submitted under her FMLA leave. (Fisher Dep., Dkt. 29-1, at 11–12). Fisher thus submitted her absences on November 6 and 7 to Sedgwick as FMLA-related leave. (Nov. 6 & 7 Approval Notices, Dkt. 27-2, 107, 112; Dkt. 28-9). Fisher then called Sharp on November 8 to tell Sharp that she had taken her mother to the dentist appointments since her mother could not be left alone, though Seton disputes this fact. (Fisher Dep., Dkt. 29-1, at 11–12; *but see* Sharp Dep., Dkt. 27-4, at 27). Fisher was then absent from work between November 8 and November 12 while recovering from her root canal and did not report these days as FMLA-related. (River Rock Dental Note, Dkt. 31-1). The parties dispute whether the text message Fisher sent to Sharp on November 8 stating "I didn't file for fmla days off since this is about me" referred

to November 6 and 7, when Fisher was at the dentist, or to November 8 through 12, when Fisher was recovering from oral surgery. (Nov. 8 Text Message, Dkt. 27-6, at 64; *compare* Dkt. 27, at 13; *with* Dkt. 31, at 2).

Sedgwick sent Sharp a "Notice of Absence Report" showing that Sedgwick had approved of Fisher's absences on October 25 and November 3, 6, and 7 as FMLA-related. (Approval Notices, Dkt. 27-2, at 66, 107, 109, 112). Because Sharp thought Fisher was not able to use FMLA days for her own medical issues, Sharp asked Sedgwick to remove the FMLA approvals from its report. (Sedgwick Record, Dkt. 28-12; Nov. 8 Email, Dkt. 27-2, at 107). Sedgwick told Sharp that Fisher had in fact reported those days correctly since she was also caring for her mother while treating her own migraine on October 25, and while visiting the dentist on November 6 and 7. (Sedgwick Record, Dkt. 28-12). Sedgwick also told that Sharp that she could invite Fisher to apply for FMLA coverage for her own serious medical condition if Sharp still thought the days in question were not properly reported. (Sedgwick Record, Dkt. 28-12; Sharp Dep., Dkt. 27-3, at 11).

Based on Fisher's unexcused absences on October 30, 2017 and November 1 and 2, and supposedly falsely reported FMLA-related absences on October 25 and November 3, 6, and 7, Sharp contacted Human Resources Advisor Elena Rojo ("Rojo") to request Fisher's termination. (Sharp Dep., Dkt. 27-4, at 44; Nov. 14 Email, Dkt. 27-9, at 50). On November 14, 2017, Rojo approved Sharp's request to terminate Fisher's employment for providing false information to Sedgwick. (Rojo Dep., Dkt. 27-9, at 30–31, 36; Dkt. 27-9, at 48). The next day, Sharp terminated Fisher's employment. (Termination of Employment Report, Dkt. 27-3, at 3–4). Seton articulated three bases for Fisher's termination: (1) "providing false or misleading information or omitting material information in connection FML" on October 25, November 6 and 7; (2) "unscheduled and unexcused absences" between October 30 and November 1 and 2, 2017; and (3) "excessive unscheduled PTO" on November 19, October 25, and November 3 through 7, 2017. (*Id.* at 3). Since

under Seton's policies, falsification of information related to FMLA leave is considered "grounds for immediate termination," it was "unlikely" Fisher would have been terminated without the alleged misreporting of her absences on October 25 and November 3, 6, and 7. (Rojo Dep., Dkt. 27-9, at 36; Sharp Dep., Dkt. 27-4, at 46–47).

However, the parties dispute the reason that Fisher was fired. According to Seton, it terminated her employment because Fisher provided false or misleading information in connection with taking her FMLA leave in violation of Seton's policy for unscheduled and unexcused absences and excessive paid time off. (Dkt. 27, at 6; 15). Fisher, on the other hand, believes Seton used this reason as a pretext to fire her because she took FMLA leave and because of her association with a disabled person, her mother. (Dkt. 5, at 2). Fisher contends that she could use her FMLA leave when she needed to care for her mother while tending to her own medical issues, and that Seton's decision makers were aware of this fact yet nonetheless terminated Fisher's employment. (Dkt. 28, at 4–5).

Fisher filed the instant action on December 20, 2018. (Compl., Dkt. 1). Fisher asserts several causes of action against Seton: (1) associational discrimination in violation of the Americans With Disabilities Act, 42 U.S.C. 12101 *et seq.* ("ADA"); (2) associational disability discrimination in violation of the Texas Commission on Human Rights Act, Tex. Lab. Code § 21.001 *et seq.* ("TCHRA"); and (3) retaliation in violation of the Family Medical Leave Act ("FMLA"). (Am. Compl., Dkt. 5, at 2–3). Seton seeks summary judgment in its favor as to each of Fisher's claims. (Seton Mot. Summ. J., Dkt. 27, at 6). Fisher, meanwhile, seeks only partial summary judgment—she asks the Court to grant her judgment as a matter of law on her FMLA retaliation claim. (Fisher Mot. Summ. J., Dkt. 28, at 3).

II. LEGAL STANDARD

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A fact is material if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 326 (5th Cir. 2009) (quotations and footnote omitted). When reviewing a summary judgment motion, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255. Further, a court may not make credibility determinations or weigh the evidence in ruling on a motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

If the moving party does not bear the ultimate burden of proof, after it has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). When the movant bears the burden of proof, she must establish all the essential elements of her claim that warrant judgment in her favor. *See Chaplin v. NationsCredit Corp.*, 307 F.3d 368, 372 (5th Cir. 2002). In such cases, the burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 335 (5th Cir. 2017).

Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007). Furthermore, the nonmovant is required to identify specific evidence in the record and to articulate the precise

manner in which that evidence supports his claim. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006). Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.* 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).

III. DISCUSSION

A. Fisher's Partial Motion for Summary Judgment

Fisher moves for partial summary judgment on her FMLA retaliation claim. (Dkt. 28, at 3). Fisher argues that is undisputed that she took leave protected under the FMLA, was discharged by her employer, and that she was fired for taking protected leave. (Dkt. 28, at 3). Seton responds that the credible evidence demonstrates that (1) Sharp was supportive of Fisher's need to take FMLA leave to care for her mother; (2) Fisher falsely reported repeated absences in late October and early November 2017; and (3) Seton's decision makers held a good faith belief that Fisher had provided false information. (Resp., Dkt. 30, at 15). Seton also disputes that on November 8, 2017 Fisher told Sharp by phone that she had been taking care of her mother while at the dentist. (Dkt. 30, at 17–18).

Congress enacted the FMLA to permit eligible employees "to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition." *Elsensohn v. St. Tammany Parish Sheriff's Office*, 530 F.3d 368, 372 (5th Cir.2008). To make a prima facie case for retaliation under § 2615(a)(2), Fisher must show that: "[she] was protected under the FMLA; (2) [she] suffered an adverse employment decision; and either (3a) that [she] was treated less favorably than an employee who had not requested leave under the FMLA; or (3b) the adverse decision was made because [she] took FMLA leave." *Elsensohn v. St. Tammany Par. Sheriff's Office*, 530 F.3d 368, 372 (5th Cir. 2008). The Fifth Circuit has recognized that

the burden of establishing the "causal link" element of a prima facie case is not an onerous burden. *See Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1122 n.8 (5th Cir. 1998); *Vincent v. Coll. of the Mainland*, 2016 WL 5791197, at *10 (S.D. Tex. Sept. 30, 2016), *aff'd*, 2017 WL 2927630 (5th Cir. July 7, 2017). If a plaintiff carries her initial burden, the burden shifts to the defendant "to articulate a legitimate nondiscriminatory or nonretaliatory reason for the employment action." *Hunt v. Rapides Healthcare Sys.*, 227 F.3d 757, 768 (5th Cir. 1999). Plaintiff must then show either: (1) that Seton's proffered reason for her termination was a pretext for retaliation; or (2) that Seton had a retaliatory motive in addition to its legitimate reason. *Richardson v. Monitronics Int'l, Inc.*, 434 F.3d 327, 332 (5th Cir. 2005).

Since the parties do not dispute that Fisher was protected by the FMLA and suffered an adverse employment decision when she was terminated, the Court will only examine the third element of causation. Seton correctly points out that Fisher has not presented evidence suggesting that she was treated less favorably than any employee who did not request FMLA leave, thus the Court will assess whether she was terminated for taking FMLA leave. (Dkt. 30, at 19). "When evaluating whether the adverse employment action was causally related to the FMLA protection, the court shall consider the temporal proximity between the FMLA leave, and the termination.'" *Mauder v. Metro. Transit Auth. of Harris Cnty.*, 446 F.3d 574, 583 (5th Cir.2006) (internal citations and quotations omitted). Further, an employee "does not have to show that the protected activity is the only cause of [her] termination." *Id.* (citation omitted). An employee, however, "is required to show that the protected activity and the adverse employment action are not completely unrelated." *Id.* (citing *Medina v. Ramsey Steel Co.*, 238 F.3d 674, 684 (5th Cir. 2001)).

Having considered the undisputed facts, the Court concludes that Fisher has demonstrated a sufficient causal link to satisfy the third element of her *prima facie* case. Here, Seton does not dispute that Fisher's use of FMLA leave to care for her mother while at her dentist appointment on

November 8 was a valid use of her FMLA leave. (Cook Dep., Dkt. 28-4, at 6; Rojo Dep., Dkt. 28-5, at 8). Thus, Fisher's termination on November 15, 2017, within days of her last reported use of FMLA leave on November 7, 2017 during a period in which she could continue to lawfully exercise her right to FMLA leave, demonstrates a sufficient causal link between her use of protected leave and her termination. (Nov. 7 Approval Notices, Dkt. 27-2, at 112; Nov. 15 Termination of Employment Report, Dkt. 27-3, at 3–4); *see Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273–74 (2001) (per curiam) (noting that time periods of three and four months had been found by the appellate courts to be "very close" and holding that a period of twenty months was not "very close"); As such, Fisher has produced sufficient evidence to show that her termination was "not completely unrelated" to her exercise of her FMLA entitlements. *Medina*, 238 F.3d 674 at 684.

Having established the elements of her prima facie case, the burden next shifts to Seton to elaborate a non-discriminatory motive for its termination of Fisher. *Mauder*, 446 F.3d at 583; *Mead v. Lattimore Materials Co.*, No. 3:16-CV-0791-L, 2018 WL 807032, at *5 (N.D. Tex. Feb. 9, 2018). Anticipating Seton's argument that those who decided to fire Fisher held a good faith belief that she had falsely reported her absences as FMLA-related, Fisher argues that everyone involved in the decision to terminate Fisher knew that "it would be a valid, legitimate use of Ms. Fisher's FMLA leave" to bring her mother to her dentist appointments on November 6 and 7, 2017, and that there is no evidence that Fisher falsified her reports of FMLA leave. (Dkt. 28, at 7–11; Cook Dep., Dkt. 28-4, at 6; Rojo Dep., Dkt. 28-5, at 8) ("Q. And if Ms. Fisher had a doctor's appointment that she needed to go to but she had to take her mother with her because her mother couldn't be left alone, that would also have been a legitimate use of FMLA time. Correct? A. Yes.").

Seton responds that the relevant inquiry is not "whether Sharp was correct about Fisher's dishonesty, but whether she had a good-faith belief that dishonesty existed, and that such belief was the basis for the termination" (Dkt. 30, at 16). Seton relies heavily on *Trautman* to support this

argument, yet in *Trautman* the court declined to "presume the absences were covered by the FMLA . . . based on [plaintiff's] own interpretation" that her FMLA leave applied retroactively. *Trautman v. Time Warner Cable Texas, LLC*, 2017 WL 5985573, at *8 (W.D. Tex. Dec. 1, 2017), *subsequently aff'd sub nom. Trautman v. Time Warner Cable Texas, L.L.C.*, 756 F. App'x 421 (5th Cir. 2018). Here, in contrast, Fisher's absences to care for her mother while tending to her own medical issues were indisputably covered by her FMLA leave. (Cook Dep., Dkt. 28-4, at 6; Rojo Dep., Dkt. 28-5, at 8; Sedgwick Record, Dkt. 28-12).

Seton further argues that the evidence shows that "the decision-makers acted in good faith in making the FMLA determination since they relied on Sedgwick's report" when Fisher had told Sharp she was tending to her own medical issues on October 25, November 3, 6 and 7 but later reported those absences to Sedgwick as FMLA-related. (Dkt. 30, at 9, 16–17); *Trautman*, 2017 WL 5985573, at *8. Again, the Court notes that the absences at issue were clearly covered by the FMLA and Sedgwick, as the party with the sole discretion to approve Fisher's FMLA-related absences, indicated as much in its reports to Seton. (Sedgwick Record, Dkt. 28-12; Cook Dep., Dkt. 28-4, at 6) (confirming that neither Sharp nor Rojo needed to approve of Fisher's use of FMLA-leave).

At the heart of the parties' disagreement is a factual dispute as to whether Seton and its decision makers held a good faith belief that Fisher had falsified her FMLA reporting, and thus validly terminated her employment on this basis. *Jones v. Overnite Transp. Co.*, 212 Fed. Appx. 268, 275 (5th Cir. 2006) ("An employer can make an incorrect employment decision; if based on a good faith belief with no discriminatory influences, then the court will not try the validity of the reason."). The parties dispute two key facts: (1) whether Fisher called Sharp on November 8, 2017 to alert her that Fisher had taken her mother with her to her dentist appointments on November 6 and 7, (*compare* Dkt. 30, at 10–11; *with* Dkt. 31, at 3); and (2) whether Fisher's text to Sharp on November 8, 2017 stating that "I didn't file for fmla days off since this is about me" referred to Fisher's absences on

November 6 and 7, or those between November 8 and 12 when she was recovering from oral surgery, (*compare* Dkt. 30, at 10–11 n.33; *with* Dkt. 31, at 2). These facts are material because they are determinative in the Court's analysis as to whether Seton validly terminated Fisher's employment because its decision-makers held a good faith belief that Fisher had falsified her FMLA-leave reporting. As such, the Court finds that genuine issues of material fact preclude summary judgment on Fisher's FMLA retaliation claim. *See Holland v. Shinseki*, 2012 WL 162333, at *18 (N.D. Tex. Jan. 18, 2012) (denying summary judgment where "material issues of fact remain as to [Plaintiff]'s FMLA retaliation claim"). The Court will therefore deny Fisher's motion for partial summary judgment.

B. Seton's Motion for Summary Judgment

Seton moves for summary judgment on all of Fisher's claims. The Court will address each claim in turn.

1. Associational Discrimination Claim

Seton moves for summary judgment on Fisher's associational discrimination claims on multiple bases. First, Seton argues that Fisher's associational discrimination claims under the Americans with Disabilities Act ("ADA") and the Texas Commission on Human Rights Act ("TCHRA") are not recognized causes of action in the Fifth Circuit. (Dkt. 27, at 16). Seton next asserts that even if the Court were to address Fisher's associational disability discrimination claim, Fisher cannot establish a prima facie case of associational discrimination because she has not established that she was qualified for her position due to her excessive absences or that Seton's decision to terminate her arose from any animus toward Fisher "for associating with a disabled individual." (*Id.* at 17–19). Lastly, Seton contends that even if Fisher can establish a prima facie case, Seton has "articulated a legitimate, nondiscriminatory reason for Fisher's termination" because of her unexcused absences, and thus "Fisher cannot overcome Seton's legitimate business reason for her termination." (*Id.* at 19–22).

Fisher responds that although the Fifth circuit has not "explicitly recognized" a cause of action for associational discrimination under the ADA, it has nonetheless outlined the elements for establishing a prima facie case for such a claim and has disposed of such claims on the merits under the TCHRA. (Resp., Dkt. 31, at 14). Seton acknowledges that "some District courts nevertheless address these claims." (Dkt. 27, at 17) (citing *Lampkin v. Ajilon Professional Staffing*, 2013 WL 6200203, at *9 (S.D. Tex. Nov. 27, 2013)). This Court will do the same. Fisher argues that she has met her burden of establishing her associational discrimination claim under the ADA or TCHRA because she has shown that she was qualified for her job and that Seton's an adverse employment decision was directly related to her use of leave to care for her disabled mother. (Dkt. 31, at 15–17). Fisher further contends that she need not show that Seton's decision to fire her arose from any hostility towards her association with her mother given the temporal proximity between her taking of leave and her termination. (*Id.* at 16).

Courts in this circuit have used a four-part test for establishing a prima facie case of disability discrimination in violation of the association provision: (1) the plaintiff was "qualified" for the job at the time of the adverse employment action; (2) the plaintiff was subjected to adverse employment action; (3) the plaintiff was known by her employer at the time to have a relative or associate with a disability; (4) the adverse employment action occurred under circumstances raising a reasonable inference that the disability of the relative or associate was a determining factor in the employer's decision.[1] *Spinks v. Trugreen Landcare, L.L.C.*, 322 F. Supp. 2d 784, 795 (S.D. Tex. 2004); *Besser v.*

[1] The TCHRA "is modeled after federal civil rights law . . . [and] purports to correlate 'state law with federal law in the area of discrimination in employment.'" *Spencer v. FEI, Inc.*, 725 F. App'x 263, 267 (5th Cir. 2018) (citing *NME Hosps., Inc. v. Rennels*, 994 S.W.2d 142, 144 (Tex. 1999) (quoting *Schroeder v. Tex. Iron Works, Inc.*, 813 S.W.2d 483, 485 (Tex. 1991)). The Court will therefore analyze both claims under the terms of the ADA. Although the "TCHRA contains no provision that violations can be based on association with individuals with a disability or with individuals who are regarded as having a disability," *Spinks v. Trugreen Landcare, L.L.C.*, 322 F. Supp. 2d 784, 795 (S.D. Tex. 2004), for the purposes of resolving the pending motion for summary judgment, the Court will "[a]ssum[e] *arguendo* that an associational disability discrimination claim exists under Texas law." *Gomez v. Office Ally, Inc.*, 796 F. App'x 224, 225 (5th Cir. 2020).

Texas Gen. Land Office, No. 18-50291, 2020 WL 6476707, at *7 (5th Cir. Nov. 3, 2020). The parties only dispute the first and fourth elements, so the Court will limit is analysis to these parts of the test.

Seton argues that Fisher cannot establish a prima facie case of associational discrimination because she cannot show that she was qualified for her job or that there is any reasonable inference that Fisher's association with her mother was a determining factor in her termination. (Dkt. 27, at 17–19). First, Seton argues that Fisher cannot satisfy the first prong of showing that she was qualified for her job because "her repeated unexcused absences rendered her unqualified for her job." (Dkt. 27, at 17). Fisher responds that because nobody testified that Fisher's absences rendered her unqualified and her attendance issues were not the cause of her termination, "no reasonable jury could find that her missing work rendered her unqualified for her position." (Dkt. 31, at 15).

An individual is considered "qualified" if she can "perform the essential functions of the employment position that such individual holds or desires" with or without reasonable accommodation. *Starts v. Mars Chocolate N. Am., LLC*, 2014 WL 11510274, at *4 (W.D. Tex. Dec. 18, 2014), *aff'd sub nom. Starts v. Mars Chocolate N. Am., L.L.C.*, 633 F. App'x 221 (5th Cir. 2015) (citing 42 U.S.C. § 12111(8)). While Fisher's unexcused absences may have been "excessive" under Seton's attendance policy, it did not render Fisher unqualified for her job. Indeed, nothing in Seton's policies or guidelines suggest that Fisher's attendance record alone merited termination. Under Seton's Guidelines for Non-Exempt Associates, for example, "three or more unscheduled or unexcused absences during a 3-month period would constitute 'excessive absences,' for which disciplinary action would be implemented." (Associate Conduct and Discipline Policy, Dkt. 27-1, at 27–33; Guidelines for Non-Exempt Association, Dkt. 27-1, at 35–38). Furthermore, the cases Seton relies on for its assertion that Fisher's unscheduled and unexcused absences rendered her unqualified for her job all dealt with much larger numbers of absences than the 5 absences not covered by FMLA in the instant case. *See Starts*, 2014 WL 11510274, at *4 (finding plaintiff was not a qualified

individual under the ADA where she amassed 31.5 attendance incidents when only 8 were required for [employer] to take adverse employment action); *Harville v. Texas A & M Univ.*, 833 F. Supp. 2d 645, 650 (S.D. Tex. 2011) (finding plaintiff unqualified where her "number of absences far exceeded the amount of FMLA leave authorized by her current medical certification"). Given that Fisher's unexcused and unscheduled absences did not subject her to termination under Seton's own policies, the Court declines to grant Seton's motion for summary judgment on Fisher's associational discrimination claim on this basis.

Next, Seton argues that Fisher has not established a reasonable inference that her termination was causally connected to her association with her mother because she has provided "no evidence of discriminatory animus." (Dkt. 27, at 18). Fisher responds that "evidence of 'hostility' is not needed for a reasonable jury to connect Ms. Fisher's association with her mother to Seton's decision to terminate her employment." (Resp., Dkt. 31, at 15). Fisher instead argues that the temporal proximity between her taking of leave and her termination are sufficient to establish causation. (*Id.* at 16). However, while temporal proximity may suffice to establish a prima facie case of causation in support of a FMLA retaliation claim, temporal proximity without more "does not justify such an inference" between Fisher's termination and her mother's disability. *Magnus v. St. Mark United Methodist Church*, 688 F.3d 331, 338 (7th Cir. 2012).

Seton was aware of and accommodated Fisher's need to take time off to care for her disabled mother, and in fact terminated Fisher for her purported use of FMLA leave for her own medical issues rather than her mother's disability. (Sharp Dep., Dkt. 27-4, at 44; Rojo Dep., Dkt. 27-9, at 30–31, 36; Dkt. 27-9, at 48; Termination of Employment Report, Dkt. 27-3, at 3–4). There is simply no evidence on the record that the absences that led to Fisher's termination, although protected by the FMLA, "were attributed to [her mother's] disability in any way." *Rogers v. Int'l Marine Terminals, Inc.,* 87 F.3d 755, 761 (5th Cir. 1996) (affirming dismissal of ADA association claim

at summary judgment phase). As in *Rogers*, where the court found that there was "no evidence to substantiate the assertion that [defendant] terminated [plaintiff] because of his association with" his disabled wife where plaintiff was terminated for absences due to his own medical issues, Seton sought Fisher's termination because of absences that its decision makers believed were taken exclusively for Fisher's own medical issues rather than her mother's disability. *Id.*; (Nov. 14 Email, Dkt. 27-9, at 50). Furthermore, at least one court in this circuit has found that temporal proximity alone is insufficient to establish a causal nexus in support of an associational discrimination claim. *Spinks v. Trugreen Landcare, L.L.C.*, 322 F. Supp. 2d 784, 795 (S.D. Tex. 2004) (rejecting plaintiff's argument that causality could be established "based solely on the fact that [p]laintiff was terminated approximately three weeks after she asked for time off to care for her [disabled] sister").

Courts in other jurisdictions have similarly found that temporal proximity alone is insufficient to establish causation in support of a prima facie case of associational discrimination under the ADA. *See, e.g.*, *Trujillo v. PacifiCorp*, 524 F.3d 1149, 1157 (10th Cir. 2008) (finding that while temporal proximity should be given "considerable weight" in establishing casual nexus for associational discrimination claim, plaintiff cannot rely on "temporal proximity alone"); *Magnus*, 688 F.3d at 338 (although "temporal proximity can serve as an important evidentiary ally of the plaintiff" in making a prima facie case under the ADA's association provision, "it rarely is alone sufficient to create a triable issue on causation"). Given the weight of authority standing for the proposition that temporal proximity alone is insufficient to establish causation and the evidence on the record showing that Seton's decision to terminate Fisher was unrelated to her mother's disability, Fisher has not met her burden of establishing that her termination was causally related to her relationship with her disabled mother. Accordingly, Fisher's associational discrimination claims under the ADA and TCHRA must be dismissed.

2. FMLA Retaliation Claim

Seton also moves for summary judgment on Fisher's FMLA retaliation claim. Having found a genuine dispute of material facts as to whether Setons decision-makers held a good faith belief that Fisher had falsified her reported FMLA leave, the Court will similarly deny Seton's motion for summary judgment on Fisher's FMLA claim on this basis. *Supra*, section III(A).

IV. CONCLUSION

For these reasons, **IT IS ORDERED** that Fisher's Partial Motion for Summary Judgment, (Dkt. 28), is **DENIED**. **IT IS FURTHER ORDERED** that Seton's motion for summary judgment, (Dkt. 27), is **GRANTED IN PART** and **DENIED IN PART**. Specifically, Seton's motion is granted insofar as Fisher's claims of associational discrimination brought under the ADA and the TCHRA are dismissed. Seton's motion is denied in all other respects.

SIGNED on February 24, 2021.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE