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

DOLORES ROBERTSON,	§	NO. 1:17-CV-1195-DAE
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	
GREATER TEXAS FEDERAL	§	
CREDIT UNION,	§	
	§	
Defendant.	§	

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The matter before the Court is Defendant Greater Texas Federal Credit Union's ("Defendant" or "GTFCU") Motion for Complete Summary Judgment. (Dkt. # 14.) On March 27, 2019, a Status Conference was held and the parties agreed a hearing was not necessary on the Motion for Summary Judgment. At the Conference, Kell Simon, Esq., represented Plaintiff Dolores Robertson ("Plaintiff" or "Robertson") and Julie Tower, Esq., represented Defendant.

After careful consideration of the memoranda in support of and in opposition to the motion, the Court, for the reasons that follow, **DENIES** Defendant's Motion for Summary Judgment.

FACTUAL BACKGROUND

GTFCU is a financial organization that offers a wide array of financial services to its members. (Dkt. #14-1 at 1.) Robertson worked for GTFCU as a teller from 1992 until GTFCU terminated her employment in April 2017. (Id. at 3.) According to GTFCU, a teller's job duties consist of providing a variety of services for members, including making deposits and withdrawals, conducting wire transfers, opening accounts, and issuing money orders. (Id.) Robertson's job duties did not change during her employment. (Id.) Monica Caudle ("Ms. Caudle") became Robertson's supervisor in 1994 and remained her supervisor through the end of her employment. (Id.) Robertson was 47 years old on her date of hire and 72 at the time of her firing. (Id. at 3; Dkt. # 15 at 1.)

Robertson began having health problems in 2011, when she took FMLA leave for three weeks to undergo cancer treatment. (Dkt. #14-1 at 3–4.) Robertson also took time off work in 2013, for chemotherapy treatment. (Id.) She makes no complaint with respect to GTFCU's treatment of her during either of these episodes. (Id. at 4.) In July 2015, Robertson had a hysterectomy and took FMLA leave during the procedure and for recuperation, which lasted approximately six weeks. (Id.) According to Robertson, she believed that her time off for the hysterectomy irritated Ms. Caudle. (Id.)

At the end of 2015, Robertson was diagnosed with Meniere's disease. (Id. at 5.) Meniere's disease causes Robertson to feel dizzy and it affects her balance. (Id.) While it does not affect her ability to think, Robertson also believes Meniere's disease causes her to feel, as she describes, "foggy." (Id. at 6.)

Robertson's employment relationship with GTFCU began to seriously deteriorate in 2016. (Id. at 11.) On January 22, 2016, Robertson received a performance Memorandum that documented "ongoing and escalating performance issues." (Id.) The Memorandum detailed both Robertson's historical member services performance issues as well as escalating difficulties performing basic teller functions, including a recent $100 outage Robertson was responsible for. (Id.) Then, on February 5, 2016, Robertson received another performance Memorandum detailing another $100 outage from her drawer. (Id. at 12.) GTFCU warned Robertson that the Memoranda would serve as a written warning that her job was in jeopardy. (Id. at 13.)

Robertson's Annual Evaluation from GTFCU on April 23, 2016, reported a "fairly steep decline" in her performance over the past year. (Id.) This included completing tasks at a slower pace and unfamiliarity with GTFCU's mobile app. (Id.) The Evaluation also noted previously mundane tasks that now appeared to present difficulty for Robertson. (Id.) Robertson received an

additional performance Memorandum on October 12, 2016, which addressed ongoing diminishing performance. (Id. at 15.)

Finally, in February 2017, Robertson received another Memorandum detailing her violation of the Memorandum from October 2016, namely continued tardiness and a significant posting error to a member's account. (Id. at 17.) GTFCU suspended Robertson for two days and asked her to develop a Performance Improvement Plan ("PIP") by February 17, 2017, which she did and submitted. (Id. at 18.) Robertson claims that in 2017, she noticed a change in behavior from her manager, namely perceived suggestions that she should retire and comments tying Robertson's age to poor work performance. (Dkt. # 15 at 3.) Robertson filed a Charge of Discrimination ("Charge") with the Equal Employment Opportunity Commission ("EEOC") and Austin Equal Employment/Fair Housing Office on February 23, 2017. (Dkt. # 14-1 at 21.) In it, she alleges GTFCU discriminated against her on the basis of her age, 72, and her disability, which at the time she stated as cancer. (Id.) In an amendment to her Charge, Robertson states that her supervisor had also recently learned of her Meniere's disease. (Id. at 22.)

On March 14, 2017, Robertson accepted a non-negotiable item, which was marked "THIS IS NOT A CHECK," for deposit. (Dkt. # 14-1 at 18.) Robertson received a Memorandum for this mistake on March 16, 2017. (Id.)

Robertson testified that she had no idea how that had happened, and that she had never accepted a non-negotiable item before in her career. (Id.) April 2017 marked the end of the annual evaluation period for Robertson and she was due for another evaluation. (Id. at 19.) In the Pre-Review for her annual evaluation, Robertson noted that the past year had been a difficult year for her. (Id.)

Robertson fell on April 21, 2017, while at her doctor's office, and her husband subsequently contacted her supervisor, Ms. Caudle, to let her know Robertson would need two days off. (Dkt. # 14-2 at 146.) Ms. Caudle knew of Robertson's Meniere's diagnosis at the time of the fall. (Id. at 149.) GTFCU terminated Robertson's employment on April 27, 2017. (Dkt. # 14-1 at 20.) GTFCU alleges Robertson's fall played no role in her termination. (Id. at 6.)

GTFCU claims it ultimately terminated Robertson because she did not satisfactorily perform the fundamental aspects of her job, including knowing not to accept a non-negotiable item for deposit, listening and problem-solving, posting to accounts correctly, counting cash correctly, and maintaining a professional demeanor. (Id. at 20.) Robertson's supervisor, Ms. Caudle, made the decision to terminate her employment, in consultation with Human Resources Vice President ("HR VP") Tammy Carter and Chief Operating Officer Jason Goodman. (Id.)

PROCEDURAL HISTORY

On December 21, 2017, Plaintiff filed suit against Defendant in this Court. (Dkt. # 1 at 1.) Plaintiff's complaint alleges claims against Defendant for (1) age discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and the Texas Commission on Human Rights Act ("TCHRA"), Tex. Labor Code An. § 21.001 *et seq.*; (2) disability discrimination under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and the TCHRA, Tex. Labor Code An. § 21.001 *et seq.*; and (3) retaliation under the ADEA, ADA, and TCHRA. (Dkt. # 1 at 3–4.)

On December 6, 2018, Defendant filed a motion for summary judgment. (Dkt. # 14.) Plaintiff filed a response on January 18, 2019. (Dkt. # 15.) Defendant replied on February 1, 2019 (Dkt. # 16), and Plaintiff filed a sur-reply on March 15, 2019. (Dkt. # 21.) This case was transferred from U.S. District Judge Lee Yeakel to the undersigned on February 15, 2019. (Dkt. # 18.)

LEGAL STANDARD

"Summary judgment is appropriate only if 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" Vann v. City of Southaven, 884 F.3d 307, 309 (5th Cir. 2018) (citations omitted); see also Fed. R. Civ. P. 56(a). "A genuine dispute of material fact exists when the 'evidence is such that a reasonable jury could return a verdict for the nonmoving

party.'" Bennett v. Hartford Ins. Co. of Midwest, 890 F.3d 597, 604 (5th Cir. 2018) (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986)). "The moving party 'bears the initial responsibility 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.'" Nola Spice Designs, LLC v. Haydel Enter., Inc., 783 F.3d 527, 536 (5th Cir. 2015) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)).

"Where the non-movant bears the burden of proof at trial, 'the movant may merely point to the absence of evidence and thereby shift to the non-movant the burden of demonstrating . . . that there is an issue of material fact warranting trial.'" Kim v. Hospira, Inc., 709 F. App'x 287, 288 (5th Cir. 2018) (quoting Nola Spice Designs, 783 F.3d at 536). While the movant must demonstrate the absence of a genuine issue of material fact, it does not need to negate the elements of the nonmovant's case. Austin v. Kroger Tex., L.P., 864 F.3d 326, 335 (5th Cir. 2017) (quoting Little v. Liquid Air Corp., 37 F.3d 1069, 1076 n.16 (5th Cir. 1994)). A fact is material if it "might affect the outcome of the suit." Thomas v. Tregre, 913 F.3d 458, 462 (5th Cir. 2019) (citing Anderson, 477 U.S. at 248).

"When the moving party has met its Rule 56(c) burden, the nonmoving party cannot survive a summary judgment motion by resting on the mere allegations of its pleadings." Jones v. Anderson, 721 F. App'x 333, 335 (5th

Cir. 2018) (quoting Duffie v. United States, 600 F.3d 362, 371 (5th Cir. 2010)). The nonmovant must identify specific evidence in the record and articulate how that evidence supports that party's claim. Infante v. Law Office of Joseph Onwuteaka, P.C., 735 F. App'x 839, 843 (5th Cir. 2018) (quoting Willis v. Cleco Corp., 749 F.3d 314, 317 (5th Cir. 2014)). "This burden will not be satisfied by 'some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence.'" McCarty v. Hillstone Rest. Grp., Inc., 864 F.3d 354, 357 (5th Cir. 2017) (quoting Boudreaux v. Swift Transp. Co., 402 F.3d 536, 540 (5th Cir. 2005)). In deciding a summary judgment motion, the court draws all reasonable inferences in the light most favorable to the nonmoving party. Wease v. Ocwen Loan Servicing, LLC, 915 F.3d 987, 992 (5th Cir. 2019).

Additionally, at the summary judgment stage, evidence need not be authenticated or otherwise presented in an admissible form. See Fed. R. Civ. P. 56(c); Lee v. Offshore Logistical & Transp., LLC, 859 F.3d 353, 355 (5th Cir. 2017). However, "[u]nsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment." United States v. Renda Marine, Inc., 667 F.3d 651, 655 (5th Cir. 2012) (quoting Brown v. City of Hous., 337 F.3d 539, 541 (5th Cir. 2003)).

ANALYSIS

Defendant moves for summary judgment on all of Plaintiff's claims. Defendant argues that Plaintiff's claims for age and disability discrimination fail because Plaintiff cannot establish the necessary prima facie case, Defendant has offered a legitimate, nondiscriminatory reason for terminating Plaintiff's employment, and Plaintiff cannot establish pretext. (Dkt. # 14 at 2.) Similarly, Defendant argues Plaintiff's claim for retaliation fails because she cannot establish the requisite causal nexus between the adverse employment action and any alleged protected activity, Defendant has offered a legitimate, nonretaliatory reason for its decision, and Plaintiff cannot establish pretext. (Dkt. # 14 at 16.)

A. Age Discrimination

Defendant moves for summary judgment on Plaintiff's age discrimination claims under the ADEA and TCHRA and argues Plaintiff cannot establish a prima facie case nor show that Defendant's offered reasons for terminating her employment are pretextual. (Dkt. # 14 at 2.) In response, Plaintiff alleges that her supervisor called her an "old bird" and then Defendant fired her and replaced her with a 20-year-old woman. (Dkt. # 15 at 1.) She argues that while Defendant claims it fired her for performance-related issues, the record evidence shows that Defendant did not terminate the employment of younger bank tellers with similar performance issues.

A plaintiff may use either direct or indirect evidence in arguing age discrimination claims. McMichael v. Transocean Offshore Deepwater Drilling, Inc., 934 F.3d 447, 455 (5th Cir. 2019). Direct evidence proves the existence of a fact without any inferences or presumptions and typically takes the form of a discriminatory statement directly connected to the plaintiff's discharge. Id. at 456. If a plaintiff bases her claim on indirect evidence, courts employ the familiar framework that the Supreme Court established in McDonnell Douglas. Id. (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).[1] Plaintiff here offers indirect evidence of discrimination. (Dkt. # 14 at 3; Dkt. # 15 at 1.)

Under this framework, a plaintiff must first establish a prima facie case. Id. To establish a prima facie case, a plaintiff must show she 1) falls within the protected class, 2) is qualified for the position, 3) suffered an adverse employment decision, and 4) was replaced by someone younger or treated less favorably than similarly situated younger employees (i.e., suffered from disparate treatment because of membership in the protected class). Leal v. McHugh, 731 F.3d 405, 410–11 (5th Cir. 2013). After a plaintiff makes out her prima facie case,

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[1] The McDonnell Douglas framework remains the appropriate framework for ADEA claims based on indirect evidence. The Supreme Court has rejected the use of the Price Waterhouse framework or a combination of the two frameworks, as Defendant suggests is appropriate. Gross v. FBL Financial Services, Inc., 557 U.S. 167, 175 (2009) ("As a result, the Court's interpretation of the ADEA is not governed by Title VII decisions such as Desert Palace and Price Waterhouse.").

the burden shifts to the employer to provide a legitimate, nondiscriminatory reason for the employment decision. McMichael, 934 F.3d at 456. If the employer articulates such a reason, the plaintiff must rebut the employer's purported explanation by showing that the reason given is merely pretextual. Id.

To survive summary judgment, the plaintiff must offer enough evidence to raise a genuine question of fact regarding the defendant's reasons for firing her. McMichael, 934 F.3d at 456. The pretext inquiry asks the ultimate question of whether a jury could find that discrimination caused the termination. Goudeau v. National Oilwell Varco, L.P., 793 F.3d 470, 477 (5th Cir. 2015).

The ADEA and TCHRA involve a different causation inquiry for the McDonnell Douglas analysis. Reed v. Neopost USA, Inc., 701 F.3d 434, 440 (5th Cir. 2012). Under the ADEA, a plaintiff must prove that age was the "but for" cause of the challenged adverse employment action. Id. However, under the TCHRA, a plaintiff need only show that age was a motivating factor in the defendant's decision. Id. Plaintiff here makes age discrimination claims under both the ADEA and TCHRA.

1. Prima Facie Case

Plaintiff and Defendant agree that Plaintiff meets the first three prongs of the prima facie case; however, they disagree regarding whether Plaintiff meets the fourth prong. (Dkt. # 15 at 1.) To meet the fourth prong, a plaintiff must show

that her employer replaced her with a younger employee or treated her less favorably than similarly situated employees. Leal, 731 F.3d at 410–11. Plaintiff argues that she meets this prong, showing that Defendant replaced her with a 20-year-old woman. (Dkt. # 15, Exh. 6 at 8.) Defendant maintains that Plaintiff does not satisfy this fourth prong because Plaintiff has not shown that Defendant discharged her because of her age or treated her less favorably than similarly situated employees. (Dkt. # 14 at 5.)

Defendant's argument fails. Plaintiff has provided sufficient evidence that Defendant replaced her with a younger employee. (Dkt. # 15, Exh. 6 at 8.) In such case, Plaintiff does not need to show she was discharged because of her age or treated less favorably to meet the fourth prong of her prima facie case. Thus, Plaintiff has established a prima facie case, and the inquiry turns to whether the employer has provided a legitimate, nondiscriminatory reason for the employment decision. McMichael, 934 F.3d at 456.

2. Legitimate, Nondiscriminatory Reason

Defendant states it had legitimate, nondiscriminatory reasons for its decision to fire Plaintiff. (Dkt. 14 at 11.) Defendant points to Plaintiff's sustained performance issues, including consistent difficulty in balancing her drawer accurately, unprofessional comments to members, attendance issues, and critical mistakes in her usual duties as its reasons for terminating Plaintiff's employment.

(Id.) Defendant notes issues dating back a few years and points to Plaintiff's 2012 Performance Review, which stated Plaintiff's overall performance was declining. (Id.) Defendant points to Plaintiff's receival of a PIP in the spring of 2017, and then her making a significant error immediately following that. (Dkt. 14 at 12.) Defendant terminated Plaintiff's employment shortly thereafter. (Id.)

Defendant has provided a legitimate, nondiscriminatory reasons for its actions. Plaintiff does not contest these reasons. (Dkt. # 15 at 1.) Thus, the inquiry turns to whether those reasons amount to pretext for unlawful discrimination, and the burden shifts to Plaintiff.

3. Pretext

Plaintiff argues that a reasonable jury could find that Defendant's articulated reasons for her termination are pretext for unlawful discrimination. (Dkt. 15 at 1.) Plaintiff states that (1) Ms. Caudle's discriminatory statements in calling her an "old bird," (2) Defendant's treatment of similarly situated comparators, and (3) other facts all show Defendant's justification for termination is mere pretext. (Dkt. # 15 at 2.)

To show pretext, a plaintiff must present enough evidence for a reasonable jury to believe that Defendant's given reasons are pretext for unlawful discrimination. McMichael, 934 F.3d at 456–57. A plaintiff can show pretext and discriminatory motive by pointing to age-related comments made by a person in

charge of firing. Id. at 457. In indirect evidence cases, the plaintiff must show that the comments involve (1) discriminatory animus (2) on the part of a person that is either primarily responsible for the challenged employment action or by a person with influence or leverage over the relevant decisionmaker. Id. at 457–58; Goudeau, 793 F.3d at 475.

The pretext inquiry asks the ultimate question of whether a jury could find that discrimination caused the termination. Goudeau, 793 F.3d at 477. In Goudeau, the Fifth Circuit found doubts that the plaintiff raised regarding infraction warnings combined with ageist comments sufficient to defeat summary judgment. Id. at 478. Conversely, in McMichael, the Fifth Circuit found the employer commenting on the plaintiff's eligibility for retirement, in the context of a broader workforce reduction at that employer, did not amount to pretext for the reasons behind the plaintiff's employment termination. McMichael, 934 F.3d at 458. The court determined the statement did not reflect any stereotypes about age, evince a desire to replace older employees with younger ones, or suggest that the employer fired the plaintiff for his age. Id.

Here, Plaintiff points to three instances when her supervisor, Ms. Caudle, made remarks Plaintiff believes show discriminatory animus. First, Ms. Caudle began asking Plaintiff when she planned to retire approximately six months before Defendant terminated Plaintiff's employment. (Dkt. # 15-11 at 67.)

Second, Ms. Caudle called Plaintiff an "old bird" on multiple occasions. (Dkt. # 15-11 at 155.) Third, Ms. Caudle referenced Plaintiff's age when discussing poor work performance, such as her drawer not balancing, and told Plaintiff that Ms. Caudle's own mother could not do this job.[2] (Dkt. 15 # 1 at 2.)

Defendant counters that Ms. Caudle's comments amount to mere stray remarks, and they do not establish that Defendant acted with discriminatory animus. (Dkt. # 14 at 13.) Defendant further points to the fact that Plaintiff fails to allege that these comments were related to the decision to terminate Plaintiff's employment or that Ms. Caudle made them close in time to when Defendant terminated Plaintiff's employment. (Dkt. # 14 at 14.) Defendant finally argues that Plaintiff worked for Defendant for 32 years and states there is no evidence Ms. Caudle suddenly developed discriminatory age-based animus in 2017. (Id.)

The situation at hand more closely resembles Goudeau than it does McMichael. Ms. Caudle's alleged remarks were not mere indications of eligibility for some age-based program in the context of a broader workforce reduction or clear cut, nondiscriminatory reasons for termination. Rather, the Court finds that the remarks reflect age-biased stereotypes and appear tied to general commentary on Plaintiff's overall performance. They raise a sufficient question as to pretext to defeat Defendant's motion for summary judgment.

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[2] Plaintiff is 26 years older than Ms. Caudle. (Dkt. # 15-1 at 2.)

Defendant counters that there is important context surrounding these remarks and claims that Ms. Caudle made those remarks in response to Plaintiff's own commentary regarding her age and desire to retire. (Dkt. # 16 at 7). In a factual dispute on a motion for summary judgment the Court must draw all reasonable inferences in favor of the nonmoving party. Tiblier, 743 F.3d at 1007. Here, the number of remarks Ms. Caudle allegedly made in reference to Plaintiff's age allows for an inference in favor of Plaintiff that a jury could reasonably consider them to be evidence of bias due to Plaintiff's age.

Furthermore, in addition to the remarks regarding Plaintiff's age, Plaintiff argues that Defendant treated her differently than younger, similarly situated employees with similar performance issues. (Dkt. # 15 at 4.) Specifically, Plaintiff claims that two much younger employees made many more performance errors than Plaintiff, yet Defendant did not terminate their employment. (Id. at 5.) Defendant disputes this account, stating that Defendant terminated both employees Plaintiff refers to for similar performance issues. (Dkt. # 16 at 5.)

A plaintiff may use evidence of disparate treatment to show a genuine issue of material fact as to whether the defendant's reason for termination was pretextual. Moss v. BMC Software, Inc., 610 F.3d 917, 922 (5th Cir. 2010). Courts require an employee who proffers a fellow employee as a comparator to demonstrate that the employment actions at issue took place under nearly identical

circumstances. Lee v. Kansas City Southern Ry. Co., 574 F.3d 253, 260 (5th Cir. 2009). A court will consider the employment actions a plaintiff seeks to compare as nearly identical circumstances when the compared employees have the same job or responsibilities, share the same supervisor or have their employment status determined by the same person, and have essentially comparable violation histories. Id.

Here, Plaintiff identifies and provides evidence supporting her contention that two similarly situated, albeit younger, employees made more errors than her, yet Defendant did not terminate their employment. (Dkt. # 15 at 5.) Defendant strongly contests this, arguing GTFCU did terminate those employees and, furthermore, they were not similarly situated because they had different supervisors. (Dkt. # 16 at 6.) Plaintiff rebuts that Defendant allowed both younger employees to remain employed longer than Plaintiff once they had made the same number of errors she had, providing a comparison chart of their respective errors. (Dkt. # 21 at 3.) Plaintiff further argues that having different immediate supervisors does not mean they were not similarly situated, as HR VP Tammy Carter ultimately made all three employment decisions. (Dkt. # 21 at 7.)

Plaintiff correctly offers these employees as comparators of Defendant's treatment of similarly situated employees. First, the same person, HR VP Tammy Carter, determined all three employee's employment status. Second,

Plaintiff offers essentially comparable violation histories that, when all reasonable inferences are drawn towards Plaintiff, could indicate disparate treatment. Plaintiff specifically points to Ms. Carter's willingness to allow both similarly situated employees to remain employed after making as many or more errors than Plaintiff made, which indicates a fact issue. (Dkt. # 15 at 9.) Plaintiff provides a chart that outlines the respective number of infractions, showing both similarly situated employees committed more infractions than Plaintiff before Defendant terminated their employment. (Dkt. # 21 at 3.)

At this stage of proceedings, Plaintiff has raised sufficient evidence that a reasonable jury could conclude that she suffered disparate treatment due to her age. Taken as a whole, Plaintiff's demonstrations of disparate treatment and Ms. Caudle's remarks regarding Plaintiff's age suggest a reasonable jury could find the Defendant's stated reason for terminating Plaintiff's employment was mere pretext for age discrimination. Furthermore, the Court's finding that the evidence meets the ADEA standard necessarily means the evidence meets the lesser "motivating factor" standard under Texas law. Goudeau, 793 F.3d at 478.

Thus, the Court denies Defendant's motion for summary judgment on Plaintiff's claims for age discrimination under the ADEA and the TCHRA.

B. Disability

Defendant moves for summary judgment on Plaintiff's disability

discrimination claim on the basis that Plaintiff cannot establish a prima facie case of discrimination, Defendant has offered legitimate, nondiscriminatory reasons for firing Plaintiff, and Plaintiff cannot establish pretext. (Dkt. # 14 at 4.) Plaintiff counters that she has established an issue of fact as to whether Defendant regarded her as disabled and terminated her employment as a result of that, thus establishing her prima facie case. (Dkt. # 15 at 11.) While Plaintiff does not contest Defendant's stated reasons for firing her, she does argue that a reasonable jury could find Defendant's reasons to be pretextual. (Dkt. # 15 at 14.)

The ADA prohibits discrimination against employees on the basis of disability. Cannon v. Jacobs Field Services North America, Inc., 813 F.3d 586, 590 (5th Cir. 2016). In disability discrimination cases, a plaintiff may present her case through either direct or indirect evidence. Nall v. BNSF Railway Co., 917 F.3d 335, 340 (5th Cir. 2019). Plaintiff here relies on indirect evidence. In such cases, courts employ the well-known McDonnell Douglas burden-shifting analysis. Nall, 917 F.3d at 420. Under that framework, a plaintiff must first make out a prima facie case of discrimination by showing that (1) she has a disability or was regarded as disabled, (2) she was qualified for the job, and (3) she was subject to an adverse employment decision because of her disability. Id. at 341. If a plaintiff makes out her prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. Id. at

342. If the employer satisfies that burden, the burden shifts back to plaintiff to produce evidence that the employer's stated reason is pretextual. Id.

1. Prima Facie Case

Defendant argues that Plaintiff's prima facie case fails because she has not shown that she has a disability or that Defendant regarded her as disabled. (Dkt. # 14 at 6; Dkt. # 16 at 1.) Plaintiff responds that an issue of material fact exists with respect to whether Defendant regarded her as disabled and fired her due to a medical impairment known to Defendant. (Dkt. # 15 at 11.)

The ADA defines disability as (A) a physical or mental impairment that substantially limits one or more major life activities of such individual, (B) a record of such an impairment, or (C) being regarded as having such an impairment. Equal Opportunity for Individuals with Disabilities, 42 U.S.C.A. § 12102(1) (2009). The ADA goes on to clarify that an individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under the ADA because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. Id. § 12102(3)(A).

The Fifth Circuit has interpreted this requirement to mean that a plaintiff need only show that her employer perceived her as having an impairment and that it discriminated against her on that basis. Cannon v. Jacobs Field Serv. N.

Am., Inc., 813 F.3d 586, 591 (5th Cir. 2016). The ADAAA, or the 2008 amendments to the ADA, overruled prior authority that required a plaintiff to show that the employer regarded her as being substantially limited in a major life activity.[3] Id.

At the summary judgment stage, the Fifth Circuit has found employer e-mails that discuss the plaintiff's health condition and reference her symptoms plus necessary accommodations to establish that the employer regarded the plaintiff as disabled. Burton v. Freescale Semiconductor, Inc., 798 F.3d 222, 230 (5th Cir. 2015). The emails discussed the employee's symptoms and doctor's recommendations as well as how to handle health-related absences. Id. at 231. In that case, plaintiff's health condition was heart palpitations that she believed fumes at work may have caused. Id. at 225.

The Fifth Circuit similarly found that an email discussing plaintiff's physical condition and how it will limit his ability to perform his job duties as well as a physical report the employer conducted was sufficient to support a finding that the employer perceived him as disabled. Cannon, 813 F.3d at 592. The plaintiff

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[3] Defendant relies on authority prior to these amendments to argue that when an employer returns an employee to work after they learn of her health condition the employer cannot be held to have regarded the employee as disabled. (Dkt. # 14 at 10.) However, Defendant's cited authority, from 2003 and 1998, does not take into account this loosened standard from the amendments enacted after those cases. Defendant does not provide any authority for this proposition post-2008.

there had a shoulder injury that prevented him from raising his arm above shoulder level. Id. at 588.

Here, to show that Ms. Caudle regarded her as disabled, Plaintiff points to Ms. Caudle's awareness of her Meniere's diagnosis, extensive questioning of Plaintiff's husband regarding her fall that occurred the week prior to her firing, and an email sent January 2017 from Ms. Caudle to Ms. Carter, the HR VP, stating that Plaintiff did not "look well." (Dkt. # 15 at 12.) Plaintiff states the combination of this evidence raises an issue of fact as to whether Defendant regarded Plaintiff as disabled. (Id.) The Court agrees. The email stating that Plaintiff did not look well resembles the emails from Burton and Cannon discussing those employee's perceived disabilities. Burton, 798 F.3d at 230; Cannon, 813 F.3d at 592. The email combined with Ms. Caudle's questioning of Plaintiff's husband regarding the fall establishes, at the summary judgment stage, that Defendant regarded Plaintiff as disabled.

For the remaining two prongs of the prima facie case, Defendant originally misstates the appropriate prima facie case for disability discrimination and argues that Plaintiff cannot establish that she was treated less favorably than non-disabled employees, which is not a requirement. (Dkt. # 14 at 5–6.) The

appropriate third prong of the prima facie case is that the plaintiff was subject to an adverse employment decision because of her disability.[4] Nall, F.3d at 341.

Plaintiff states that Defendant fired her only days after her fall resulting from her Meniere's disease, arguing that this establishes the third prong of her prima facie case. (Dkt. # 15 at 12.) Plaintiff further argues the inference also arises because there was no performance-based triggering incident between the fall and her firing. (Dkt. # 15 at 13.) Defendant, in its reply, argues that the temporal proximity of Robertson's fall and her firing are insufficient to infer the third prong of the prima facie case. (Dkt. # 16 at 2.) It further argues Plaintiff's no-triggering incident argument ignores the fact that April 2017 was the time for Plaintiff's annual performance review. (Dkt. # 16 at 3.)

It is undisputed that Plaintiff suffered an adverse employment decision. Furthermore, the Fifth Circuit has ruled that in an employment case a plaintiff may show a causal connection through temporal proximity if the time between the protected activity and the adverse action is very close. Feist v. Louisiana, Dept. of Justice, Office of the Atty. Gen., 730 F.3d 450, 454 (5th Cir. 2013). Here, the time is mere days. Furthermore, Plaintiff and Defendant's back

[4] The Fifth Circuit acknowledged this splintering in its case law dealing with disability discrimination and what the necessary elements are to establish a prima facie case of discrimination. For the reasons the court articulated there, the prima facie analysis from Nall is likewise appropriate here. E.E.O.C. v. LHC Group, Inc., 773 F.3d 688 (5th Cir. 2014).

and forth regarding whether the fall or Plaintiff's failure to improve after Defendant placed her on a PIP ultimately led to her dismissal is a fact inquiry best left to a jury.

At this stage, the question is whether when viewed in the light most favorable to Plaintiff the evidence raises a genuine dispute of material fact regarding whether Plaintiff was fired on account of her disability. E.E.O.C., 773 F.3d at 701. The temporal proximity and the fact that nothing else occurred between the fall and Plaintiff's firing is sufficient. The burden shifts to the Defendant to provide a legitimate, nondiscriminatory reason for termination.

2. Legitimate, Nondiscriminatory Reason

Defendant has produced several legitimate, nondiscriminatory reasons for terminating Plaintiff's employment. Defendant points to Plaintiff's documented performance issues beginning the year before her discharge. (Dkt. # 14 at 11.) Plaintiff does not contest Defendant's reasons for terminating her employment. (Dkt. # 15 at 14.)

The inquiry then turns to whether those reasons amount to a pretext for unlawful discrimination, and the burden shifts to Plaintiff.

3. Pretext

Defendant states Plaintiff cannot offer any evidence that contradicts Defendant's stated reasons for her termination apart from a subjective belief that her supervisor began enforcing the rules differently. (Dkt. # 14 at 15.)

In the context of a summary judgment proceeding regarding a disability discrimination claim, the question before the court is whether the plaintiff raises a genuine issue of fact regarding pretext. Caldwell v. KHOU-TV, 850 F.3d 237, 242 (5th Cir. 2017). The question is not whether the plaintiff proves pretext. Id. While suspicious timing alone is not sufficient to establish pretext, suspicious timing combined with other significant evidence of pretext will allow a plaintiff to survive summary judgment. Burton, F.3d at 240.

In Burton, the Fifth Circuit found that evidence from the plaintiff's prima facie case, discussed above, combined with a two-week gap between the formal report of plaintiff's health problems and her firing plainly raised an inference of pretext. Id. Similarly, in Caldwell, the Fifth Circuit found that evidence including disparate treatment between how the defendant handled the plaintiff's performance issues versus another, non-disabled employee's issues to be beyond plaintiff's "own assertions" and significant enough to defeat summary judgment. Caldwell, 850 F.3d at 245.

Here, Plaintiff points to a change in how Defendant assessed her job performance following her Meniere's diagnosis and the temporal proximity between her fall and Defendant firing her, which is just a few days, to argue that Defendant's stated reasons are mere pretext. (Dkt. # 15 at 14.) Plaintiff points to these arguments in addition to her arguments in her prima facie case. Defendant counters that Ms. Caudle did write Plaintiff up for performance errors prior to her diagnosis, and that Plaintiff offers no support for the contention that Ms. Caudle started writing her up for things after the diagnosis that she had not done so previously. (Dkt. # 16 at 4.)

It is admittedly difficult for Plaintiff to prove a negative, i.e. that Ms. Caudle was not doing something prior to her diagnosis that she began doing after, since the proof Plaintiff could provide would just be a lack of record. However, what is clear is that Plaintiff's employment relationship with Defendant began to seriously decline in early 2016, and Plaintiff was diagnosed with Meniere's disease in late 2015. Accordingly, considering Plaintiff's prima facie case, her argument that Ms. Caudle began writing her up more frequently after her diagnosis, and the temporal proximity between her fall and her firing, the Court finds there is sufficient evidence of pretext to defeat summary judgment. While it is unclear that Plaintiff has proved pretext, that is not necessary at this stage of the proceedings.

Thus, the Court denies Defendant's motion for summary judgment on Plaintiff's disability discrimination claims under the ADA and TCHRA.

C. Retaliation

Defendant also moves for summary judgment on Plaintiff's retaliation claim, arguing that Plaintiff cannot establish a prima facie case of retaliation nor show that Defendant's legitimate, nonretaliatory reasons for firing Plaintiff are pretextual. (Dkt. # 14 at 16.) Defendant argues Plaintiff has failed to establish a causal connection between the protected activity and the adverse employment action, meaning her prima facie case fails. (Id.) Defendant further argues that Plaintiff has offered no evidence that Defendant's legitimate, nonretaliatory reasons for firing her were pretext for retaliation. (Id. at 18.)

Plaintiff claims Defendant unlawfully retaliated against her when it fired her for opposing discriminatory conduct. (Dkt. # 15 at 15.) Plaintiff claims she engaged in protected conduct when she filed the Charge with the EEOC on February 23, 2017. (Id.) She further claims Defendant subjected her to an adverse employment action when it terminated her employment and that a causal connection exists between her protected activity and the adverse action. (Id.)

The ADA, ADEA, and TCHRA prohibit an employer from discriminating against an employee for opposing an unlawful practice or asserting a charge, testifying, assisting, or participating in a related proceeding or

investigation. Goudeau, 793 F.3d at 478; Jenkins v. City of San Antonio Fire Dep't, 784 F.3d 263, 269 (5th Cir. 2015). To establish a prima facie retaliation case, a plaintiff must show that (1) she engaged in protected activity, (2) she suffered an adverse employment decision, and (3) a causal link exists between the protected activity and the adverse employment decision. Id. At the prima facie stage, a plaintiff can meet her burden of causation by showing close timing between her protected activity and the adverse employment action. Heggemeier v. Caldwell Cty., Texas, 826 F.3d 861, 870 (5th Cir. 2016).

Once a plaintiff has made a prima facie case, the employer must provide some legitimate, nondiscriminatory reason for the adverse action taken. Nall, 917 F.3d at 349; McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If the employer provides such a reason, the burden shifts back to the plaintiff to show a genuine issue of material fact that the employer's proffered reason is pretext for retaliation. Nall, 917 F.3d at 349. The plaintiff must demonstrate but-for causation at the pretext stage of the McDonnell Douglas framework. Garcia v. Prof'l Contract Servs., Inc., No. 18-50144, 2019 WL 4283577, at *5 (5th Cir. Sept. 11, 2019). To avoid summary judgment, a plaintiff must show a conflict in substantial evidence on the question of whether the employer would not have taken the action but for the protected activity. Feist, 730 F.3d at 454.

1. Prima Facie Case

Defendant does not contest the first two elements of Plaintiff's prima facie case of retaliation. (See Dkt. # 14 at 16.) Indeed, the record indicates that Plaintiff engaged in protected activity when she filed the Charge and that an adverse employment action occurred when Defendant terminated Plaintiff's employment on April 27, 2017, approximately two months later. (Dkt. # 15 at 15.) Instead, Defendant challenges the third element of Plaintiff's prima facie case, arguing Plaintiff cannot establish a causal connection between her protected activity and the adverse employment action. (Dkt. # 14 at 16.)

A causal link is established when the evidence demonstrates that the employer's decision to terminate was based in part on knowledge of the employee's protected activity. Nall, 917 F.3d at 349. Close timing between the protected activity and the adverse action may provide the causal connection needed to make out a prima facie case. Heggemeier, 826 F.3d at 870. Such temporal proximity must generally be very close. Feist, 730 F.3d at 454 (saying the court had found four months sufficient while five months not). Additional evidence of a causal link may include an employment record that does not support dismissal and an employer's departures from typical policies and procedures. Id. at 454–55.

Defendant terminated Plaintiff's employment roughly two months following the Charge. (Dkt. # 15 at 15.) In the Charge, Plaintiff complained Defendant had suspended her and subjected her to different terms and conditions of employment because of her age and disability. (Id.) The Fifth Circuit has previously held that a period of two months is close enough to show a causal connection for the purposes of surviving summary judgment. Jones v. Robinson Prop. Grp., L.P., 427 F.3d 987, 995 (5th Cir. 2005). Recently, the Fifth Circuit held that a temporal period of two-and-one-half months between the protected action and the adverse employment decision "fits comfortably within the time periods of both our case law and Breeden to establish causation." Garcia, 2019 WL 4283577 at *5 (citing Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268 (2001)).

Defendant further argues that temporal proximity alone is insufficient to establish a causal connection between the protected activity and adverse employment decision. (Dkt. # 16 at 8.) However, the Fifth Circuit has held such temporal proximity may be sufficient. Heggemeier, 826 F.3d at 870. Here, the two-month period fits comfortably within case law as close enough to establish temporal proximity and create the causal connection between Plaintiff's protected activity and Defendant's adverse employment decision. Accordingly, the Court finds Plaintiff has established her prima facie case of retaliation, and the burden

shifts to Defendant to provide some legitimate, nondiscriminatory reason for the adverse action taken. Nall, 917 F.3d at 349.

2. Legitimate, Nondiscriminatory Reason

Defendant has produced several legitimate, nondiscriminatory reasons for terminating Plaintiff's employment. Defendant points to Plaintiff's documented performance issues beginning the year before her discharge. (Dkt. # 14 at 17.) Plaintiff does not contest Defendant's alleged reasons for terminating her employment for purposes of this motion. (Dkt. # 15 at 15–16.)

Therefore, the burden shifts back to Plaintiff to show a genuine issue of material fact that the employer's proffered reason is a pretext for discrimination. Nall, 917 F.3d at 349.

3. Pretext

Plaintiff argues that a reasonable jury could find that Defendant's articulated reasons for firing her, namely her performance record, amounts to mere pretext for its intent to retaliate against Plaintiff for filing the Charge. (Dkt. # 15 at 15.) Plaintiff points to temporal proximity, changes in Ms. Caudle's attitude, and disparate treatment of similarly situated employees to support her argument. (Dkt. # 15 at 16.)

Temporal proximity allows a plaintiff to satisfy her prima facie case but does not, own its own, establish that a company's stated explanation for firing

an employee was mere pretext. Garcia, 2019 WL 4283577 at *6 (citing Strong v. Univ. Healthcare Sys., L.L.C., 482 F.3d 802, 808 (5th Cir. 2007)). Temporal proximity is still evidence of pretext, but it cannot alone show pretext because such a rule would "unnecessarily tie the hands of employers." Strong, 482 F.3d at 808 (citing Clark Cty. Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001)). A plaintiff's own subjective belief that the employer's proffered reason is false is also not sufficient to establish an issue of material fact on pretext. See Shackelford v. Deloitte & Touche, LLP, 190 F.3d 398, 408 (5th Cir. 1999). A plaintiff must provide specific evidence "which could support a finding that [h]e would not have [experienced an adverse employment action] in the absence of h[is] having engaged in protected conduct." Id. at 408–09. Notably, "The combination of suspicious timing with other significant evidence of pretext can be sufficient to survive summary judgment." Garcia, 2019 WL 4283577 at *6 (quoting Shackelford, 190 F.3d at 409).

In both Garcia and Shackelford, the Fifth Circuit found that the plaintiff had pointed to sufficient evidence beyond temporal proximity to create a genuine issue of material fact regarding pretext. Garcia, 2019 WL 4283577 at *6; Shackelford, 190 F.3d at 409. In Shackelford, the court found the combination of (1) temporal proximity, (2) dispute of events leading to termination, (3) employee warnings to plaintiff not to engage in protected activity, (4) and plaintiff's showing

of comparators sufficient to defeat summary judgment. Shackelford, 190 F.3d at 409. In Garcia, the court found (1) temporal proximity, (2) dispute of facts leading to termination, (3) similarly situated employee not being terminated for the same conduct, (4) harassment from supervisor following engagement in protected activity, (5) stated reason for plaintiff's termination not being recent but known for years, and (6) the company's financial risk if reported conduct was discovered sufficient to defeat summary judgment. Garcia, 2019 WL 4283577 at *6. The Fifth Circuit in Garcia distinguished the above two cases from those in which the court had affirmed summary judgment, noting the heavy reliance in the other cases on temporal proximity.[5] Garcia, 2019 WL 4283577 at *6.

Here, Plaintiff has offered the following combined showings of pretext in arguing that the Court should deny summary judgment: (1) temporal proximity, (2) aggravation from her supervisor towards Plaintiff after she filed the Charge, and (3) Defendant not disciplining a similarly situated employee for the same performance issues.

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[5] The Fifth Circuit upheld the district court's grant of summary judgment when the plaintiff's only evidence of pretext was temporal proximity. Strong, 482 F.3d at 808. Similarly, the court affirmed summary judgment when it held that evidence of temporal proximity combined with positive performance reviews did not create an issue of fact regarding pretext. United States ex rel King v. Solvay Pharm., Inc., 871 F.3d 318, 334 (5th Cir. 2017).

Plaintiff argues the temporal proximity, two months, between her filing of the Charge and Defendant's termination of her employment suggests Defendant's reasons for termination amount to mere pretext. (Dkt. # 15 at 16.) The Court has already discussed the relevance of temporal proximity in establishing a causal connection for Plaintiff's prima facie case. Likewise, the Court finds that the two month temporal proximity constitutes suspicious timing and will consider it in combination with other evidence of pretext to determine whether a genuine issue of material fact exists.

Beyond temporal proximity, Defendant counters that Plaintiff's vague testimony regarding Ms. Caudle's attitude does not create an issue of material fact regarding a causal connection. (Dkt. # 16 at 8.) Defendant focuses on Plaintiff's vagueness regarding how Ms. Caudle's attitude changed and inability to recall details. (Id.) In her deposition, Plaintiff states that Ms. Caudle asked Plaintiff why she filed the Charge, acted upset about the Charge, and then changed her attitude towards Plaintiff. (Dkt. #14-2 at 170–71.) At this stage of proceedings, and the corresponding need to draw all reasonable inferences in the light most favorable to the nonmoving party, the Court finds a jury could conclude Ms. Caudle's attitude toward Plaintiff changed for the worse following the Charge.

Finally, Plaintiff and Defendant heavily contest whether similarly situated employees who did not complain of discrimination of any kind in fact

were treated differently than Plaintiff. Specifically, Plaintiff points to another teller, Ms. Martinez, who accepted a non-negotiable instrument from a customer but Defendant did not discipline her in any way, whereas Defendant gave Plaintiff a warning Memorandum for the same conduct. (Dkt. # 15 at 16.) Defendant counters that Ms. Martinez is not similarly situated because she had a different supervisor at a different branch and that it did fire her. (Dkt. # 16 at 9.)

As discussed in the age discrimination section, Plaintiff may offer Ms. Martinez as a comparator because the same HR VP determined both of their employment statuses and she had a similar violation history. Furthermore, the fact that Defendant did also terminate Ms. Martinez's employment does not preclude Plaintiff from being allowed to compare the Defendant's treatment of similar performance violations over the course of each person's employment. Plaintiff offers a chart that lists all of Ms. Martinez's infractions and that highlights the discrepancies between Defendant's treatment of her and of Plaintiff. (Dkt. # 21 at 3.) Plaintiff further notes that after she received her final written warning she committed no additional infractions, yet Defendant fired her anyway. (Id. at 6.) Conversely, Defendant fired Ms. Martinez when she committed two additional infractions after receiving her final written warning. (Id.)

Beyond its opposition to Plaintiff's arguments for pretext, Defendant offers two additional supports that its legitimate, nondiscriminatory reasons for

firing Plaintiff do not amount to mere pretext. First, Defendant argues Plaintiff herself stated in her deposition that she did not believe Defendant fired her in retaliation. (Dkt. # 14 at 18.) Second, Defendant points to the fact that Plaintiff filed her charge after Defendant had already placed her on a PIP. (Dkt. # 16 at 9.) Defendant further argues that Plaintiff's failure to improve her performance following receipt of the PIP, rather than her filing the Charge, led Defendant to fire Plaintiff. (Id.)

With regard to Defendant's first point, Plaintiff states in her deposition that she believes Defendant fired her due to her age and health rather than in retaliation for the Charge. (Dkt. # 14-2 at 144–45.) However, Plaintiff goes on to say she that she cannot know for sure whether she was fired in retaliation for the Charge or not. (Id.) Plaintiff's subjective belief regarding whether Defendant fired her in retaliation is not sufficient to establish an issue of material fact on pretext. See Shackelford, 190 F.3d at 408. It follows that Plaintiff's uncertainty regarding Defendant's reason for firing her should not be greatly considered in analyzing pretext, but rather the inquiry should focus on the more concrete factors discussed above.

Turning to Defendant's second point, Plaintiff's perceived lack of improvement in the two months between her placement on a PIP and her firing is a factual determination best left to a jury. At this stage of the proceeding, Plaintiff's

placement on a PIP is insufficient to overcome Plaintiff's showing of temporal proximity, changes in supervisor attitude, and difference in treatment of similarly situated employees. As a result, the Court finds that Plaintiff has shown a conflict in substantial evidence on the question of whether the employer would not have taken the action but for the protected activity.

Accordingly, the Court denies summary judgment on Plaintiff's retaliation claim under the ADEA, ADA, and TCHRA.

D. Failure to Mitigate

Defendant further asserts the affirmative defense that Plaintiff has failed to mitigate her alleged damages. (Dkt. # 14 at 18.) Since the Court is denying Defendant's motion for summary judgment in full, the Court will reserve this issue for trial.

E. Compensatory Damages

Defendant also argues Plaintiff's claims for emotional distress damages under the ADEA should be barred because the ADEA does not allow for such damages. (Dkt. # 14 at 19.) However, Plaintiff responds that she does not seek emotional distress damages under the ADEA but rather under the TCHRA and ADA, which allow for such damages. (Dkt. # 15 at 18.) Defendant does not assert anything in its reply on this matter. Accordingly, the point is moot.

CONCLUSION

Based on the foregoing, the Court **DENIES** Defendant's Motion for Summary Judgment. (Dkt. # 14.) The case will be set for trial by separate order.

IT IS SO ORDERED.

DATED: Austin, Texas, September 26, 2019.

David Alan Ezra
Senior United States Distict Judge