IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

FEET FIRST INC,	CASE NO.: 2015 CV 03837
Plaintiff(s),	JUDGE MICHAEL W. KRUMHOLTZ
-vs-	**DECISION, ORDER AND ENTRY OVERRULING THE APPEAL OF FEET FIRST, INC.**
PAULETTE R NEER et al,	
Defendant(s).	

This matter is before the Court on the Complaint of Petitioner, Feet First, Inc. ("Feet First"), for review of the June 25, 2015 Final Order of the Ohio Civil Rights Commission, filed July 23, 2015. On July 28, 2015, Respondent, the Ohio Civil Rights Commission (the "Commission"), filed the record. On September 4, 2015, Feet First filed its Brief. The Commission filed its Brief on September 8, 2015, and Feet First filed its Reply Brief on September 21, 2015. This matter is ripe for decision.

I. FACTS AND PROCEDURAL HISTORY

The Court incorporates the Facts and Procedural History section from its December 3, 2014 Decision, Order and Entry Remanding the Matter for Further Proceedings in Montgomery County Common Pleas Court Case Number 2014 CV 2366 ("December 3 Decision")[1]. As such, the facts and the procedural history will not be restated here.

[1] Case No. 2015 CV 3837 is the subsequent appeal filed after Case No. 2014 CV 2366 was remanded.

The Court finds the following facts and procedural history relevant in deciding the current motion pending before the Court:

In the December 3 Decision, this Court remanded the matter back to the Commission after finding that the Administrative Law Judge ("ALJ") applied the incorrect standard when evaluating Paulette Neer's ("Ms. Neer") retaliation claim. After the case was remanded, briefs were filed by the Commission and Ms. Neer on January 30, 2015 and February 17, 2015, respectively. *See, April 7, 2015 ALJ's Amended Findings of Fact, Conclusions of Law, and Recommendations* ("April 7 Findings of Fact"), p. 5. On February 18, 2015, the Commission filed its Reply. *Id.* Relying on evidence previously adduced during the June 17, 2008 hearing and the June 26, 2012 hearing, the ALJ found that Feet First, Inc. ("Feet First") retaliated against Ms. Neer. *Id.* at p. 31. The ALJ determined that the Commission did not establish a *prima facie* case of pregnancy discrimination. *Id.* at p. 17. The Commission adopted the ALJ's Recommendations on June 25, 2015. *Cmpl., Ex. A*; *Commission Brief*, p. 4.

Ms. Neer's employment as a receptionist for Feet First began in August of 2004. *April 7 Findings of Fact*, p. 7; Vol. I Tr. p. 20:15-21. Approximately one and half years later, in January of 2006, Ms. Neer discovered she was pregnant. *April 7 Findings of Fact*, p. 8; Vol. I Tr. p. 28:7-9. On January 17, 2006, Ms. Neer informed her co-workers and boss, Dr. Keane, that she was pregnant. *April 7 Findings of Fact*, p. 8; Vol. I Tr. p. 28:9-25, 29. Following Ms. Neer's announcement, a meeting was held February 2, 2006, during which Ms. Neer was informed that her position could not be held open for her after she had her baby. *April 7 Findings of Fact*, p. 8; Vol I Tr. p. 30:17-25, 31:1-15. Dr. Keane did tell Ms. Neer that a letter of recommendation would be signed for her so that other employment could be obtained. Vol. I Tr. p. 33:19-25, 34:1-4. On February 14, 2006, Ms. Neer met with two of her co-workers whom inquired as to why Ms. Neer was being so quiet. *April 7 Findings of Fact*, p. 9; Vol. I Tr. p. 35:14-23. Ms. Neer explained she was upset because her understanding was that she would be losing her job after having the baby and

that she had contacted an attorney. *April 7 Findings of Fact*, p. 9; Vol. I Tr. p. 35:17-23; 36:8-22. Ms. Neer stated that the attorney would be sending Feet First a letter regarding her rights as a pregnant woman. *April 7 Findings of Fact*, p. 9; Vol. I Tr. p. 36:19-22. Later during the same day, February 14, 2006, Ms. Neer's co-workers informed Dr. Keane that Ms. Neer had contacted an attorney. *April 7 Findings of Fact*, p. 9; Vol I. Tr. p. 125: 14-20, 126:1-6.

On February 15, 2006, Ms. Neer's co-worker called Ms. Neer to tell her (Ms. Neer) not to come in to work, which was not unusual if the weather was bad. *April 7 Findings of Fact*; Vol. I Tr. p. 37:21-25, 38:1-15. Ms. Neer then contacted her attorney, Jason Matthews, and requested that he fax a letter to Feet First regarding Ms. Neer's rights as a pregnant person. *April 7 Findings of Fact*, p. 10; Vol I. Tr. p. 38:20-25, 39:1-10. The same day, Attorney Matthews faxed Feet First the letter, dated February 15, 2006. Vol. I Tr., Ex. 10. The next day, February 16, 2006, Feet First responded with a letter dated February 16, 2006. Vol. I Tr., Ex. 12. The letter stated that Ms. Neer had been terminated as of February 14, 2006 and that she was no longer welcome on the premises of Feet First. *Id.* Further, the letter stated that Feet First would forward Ms. Neer's personal effects and her last paycheck to Attorney Matthew's office. *Id.*

Feet First asserts that it terminated Ms. Neer because, in essence, she was "uncooperative and dishonest," having created a toxic work environment. *April 7 Findings of Fact*, p. 27; Vol. II Tr. p. 35:11-12. Feet First refers to five specific incidents which created the toxic work environment. *Feet First Brief*, p. 3. One incident was the "no-solicitation policy incident." *Id.* Dr. Keane, Ms. Neer's boss and owner of Feet First, explained that Feet First had a no solicitation policy but that Ms. Neer sold products for AVON and LTD Commodities during work hours. *Id.* at p. 4; Vol. II Tr. p. 54:4-16. A second incident was the "'Shelly's boyfriend' incident." *Feet First Brief* at p. 4. According to Dr. Keane, Ms. Neer would make innuendos in front of patients and other employees that Shelly, a co-worker, was having an affair with Dr. Keane. *Id.*; Vol. II Tr. p. 50:18-22, 51:3-21. At one point, Shelly became so upset that she went to the office manager crying.

Feet First Brief, p. 4; Vol. II Tr. p. 51:16-21. A third incident was the "parking lot incident." *Feet First Brief* at p. 5. Dr. Keane explained that when he arrived to work one day at the hospital, he observed Ms. Neer park in an "inappropriate place," which was a place for his elderly, handicapped patients to park. *Id.*; Vol. II Tr. p. 42:1-7. Dr. Keane told Ms. Neer twice to move her car and Ms. Neer refused. *Feet First Brief* at p. 5; Vol. II Tr. p. 42:12-25, 43:1-13. Dr. Keane was upset about Ms. Neer's refusal because this refusal could have affected Dr. Keane's hospital privileges. *Feet First Brief* at p. 6; Vol. II Tr. p. 48:13-23. A fourth incident encompassed a number of incidents involving a "disregard for employment duties." *Feet First Brief* at p. 6. Dr. Keane testified that Ms. Neer failed to update patient charts with information such as a patient's medication, that she did not follow the proper policy for scheduling meetings with drug sales representatives, and that she failed to organized Dr. Keane's continuing education requirements. *Id.* at p. 6-7; Vol. II Tr. p. 55:18-25, 56:3-4, 58:18-25, 59:1-17. Dr. Keane agreed with his office manager's assessment that Ms. Neer seemed very unhappy at Feet First. *Feet First Brief* at p. 7; Vol. II Tr. p. 60:16-24. A fifth incident was the "Dena Spencer incident." *Feet First Brief* at p. 7. Dr. Keane explained that Ms. Spencer, who was very upset, approached the office manager because Ms. Spencer was under the impression she was going to be fired. *Id.*; Vol. II Tr. p. 38:6-13. Ms. Spencer conveyed that she got this impression from Ms. Neer. *Feet First Brief* at p. 7; Vol. II Tr. p. 38:14-16.

The ALJ, as the trier of fact, did not find Dr. Keane's (Feet First's) reasons for terminating Ms. Neer to be credible. *April 7 Findings of Fact*, p. 30. Ms. Neer was never formally or informally disciplined for any employment incident. *Id.*; Vol. I. Tr. p. 106:11-25, 107:8-14; 108:2-10. Ms. Neer, in fact, received a merit raise in the summer of 2005. *April 7 Findings of Fact* at p. 30; Vol. I. Tr. p. 109:10-19, Commission Ex. 2. The ALJ emphasized that Feet First was prepared to give Ms. Neer a letter of recommendation. *April 7 Findings of Fact* at p. 30.

II. LAW AND ANALYSIS

A. Legal Standards

1. Standard of Review

Pursuant to R.C. 4112.06, the "findings of the commission as to the facts shall be conclusive if supported by reliable, probative, and substantial evidence on the record and such additional evidence as the court has admitted considered as a whole." R.C. 4112.06(E). Thus, "a trial court, in reviewing an appeal from an [Ohio Civil Rights Commission] decision, must affirm [the Commission's] finding . . . if the finding is supported by reliable, probative and substantial evidence on the entire record." *Ohio Civil Rights Comm. v. Kent State Univ.*, 129 Ohio App.3d 231, 242, 717 N.E.2d 745 (11th Dist.1998), citing *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civil Rights Comm.*, 66 Ohio St.2d 192, 200, 421 N.E.2d 128 (1981) (citations omitted). "Where such evidence exists, it is improper for a court to substitute its judgment for that of the administrative agency." *Dayton Power & Light Co. v. Ohio Civil Rights Comm.*, 33 Ohio St.3d 73, 74, 514 N.E.2d 1132 (1987). Because the evidentiary standards in R.C. 119.12 and R.C. 4112.06 of reliable, probative and substantial evidence are the same, "case law regarding the scope of review under R.C. 119.12 applies to appeals taken pursuant to R.C. 4112.06." *Kent State Univ.* at 243, citing *Plumbers & Steamfitters* at 200. "Reliable, probative, and substantial evidence" is defined as:

> (1) 'Reliable' evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) 'Probative' evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) 'Substantial' evidence is evidence with some weight; it must have importance and value.

Bartchy v. State Bd. of Educ., 120 Ohio St.3d 205, 2008-Ohio-4826, 897 N.E.2d 1096, ¶ 39, citing *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St. 3d 570, 571, 589 N.E.2d 1303 (1992).

A trial court "is not free to independently determine the facts of the underlying controversy." *Jetters v. Spectra-Physics Laserplane*, 2d Dist. Montgomery No. 16150, 1997 Ohio App. LEXIS 2623, * 6 (May 16, 1997). The trial court "must give due deference to the administrative resolution

of evidentiary conflicts." *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111, 407 N.E.2d 1265 (1980). For instance, "when the evidence before the court consists of conflicting testimony of approximately equal weight, the court should defer to the determination of the administrative body, which, as the fact-finder, had the opportunity to observe the demeanor of the witnesses and weigh their credibility." *Id.*

2. Retaliation Claim

Generally, "federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) et seq., Title 42, U.S. Code, is . . . applicable to cases involving alleged violations of R.C. Chapter 4112." *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, 879 N.E.2d 174, ¶ 12, quoting *Plumbers & Steamfitters* at 196. Pursuant to R.C. 4112.02, it is an

> unlawful discriminatory practice . . . [f]or any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under section 4112.01 to 4112.07 of the Revised Code.

Greer-Burger at ¶ 13, quoting R.C. 4112.02(I). When there is no direct evidence of discrimination, a three-step burden-shifting framework is applied. *Wholf v. Tremco Inc.*, 2015-Ohio-171, 26 N.E.3d 902, ¶ 30 (8th Dist.).

First, to establish a *prima facie* case for such retaliation, a claimant "must prove that (1) she engaged in a protected activity, (2) the defending party was aware that the claimant had engaged in that activity, (3) the defending party took an adverse employment action against the employee, and (4) there is a causal connection between the protected activity and adverse action." *Greer-Burger* at ¶ 13, citing *Canitia v. Yellow Freight Sys., Inc.*, 903 F.2d 1064, 1066 (6th Cir.1990). A claimant is not "required to conclusively establish all the elements of [a] discrimination claim in the prima facie case." *Wholf* at ¶ 31, citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). Second, if a claimant establishes a *prima facie* case, the "burden then shifts to the employer to 'articulate some legitimate, nondiscriminatory reason' for its actions." *Greer-*

Burger at ¶ 14, quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Third, if the employer then "satisfies this burden, the burden shifts back to the [claimant] to demonstrate 'that the proffered reason was not the true reason for the employment decision.'" *Greer-Burger* at ¶ 14, quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). This third step may be established by showing either that an employer's proffered reason "1) had no basis in fact, 2) did not actually motivate the action, or 3) was insufficient to warrant the adverse action." *Deiters v. Brennan*, 620 Fed.Appx. 413, 415-416 (6th Cir.2015). Ultimately, a retaliation claim "must be proved according to the traditional principles of but-for causation." *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2532, 186 L.Ed.2d 503 (2013). *See also, Deiters* at 416; *Montell v. Diversified Clinical Servs.*, 757 F.3d 497, 504 (6th Cir.2014). This "requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Nassar* at 2532. In other words, a claimant "must ultimately prove, by a preponderance of the evidence, that the [claimant's] protected activity was the determinative factor in the employer's adverse employment action." *Wholf* at ¶ 43.

When determining whether a causal connection exists between the protected activity and the adverse action in the *prima facie* case, temporal proximity can be enough. *Montell* at 505. Thus, when "an adverse employment action occurs very close in time after an employer learns of a protected activity, such temporal proximity between events is significant enough to constitute evidence of a causal connection for the purposes of satisfying a prima facie case of retaliation." *Id.*, quoting *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 525 (6th Cir.2008). However, when "some time elapses between when the employer learns of a protected activity and the subsequent adverse employment action, the employee must couple temporal proximity with other evidence of retaliatory conduct to establish causality." *Id.* Further, "'an employer proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of

causality,' . . . but where an employer deviates from those lines, temporal proximity can certainly be evidence of causality." *Montell* at 507, citing *Clark Cty. School Dist. v. Breeden*, 532 U.S. 268, 272, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001).

B. Analysis

The primary issue raised in the administrative appeal is that the Commission failed to apply the appropriate "but-for" standard in finding that Feet First retaliated against Ms. Neer. The second issue raise in this appeal is that the Commission erred in finding that the non-retaliatory reasons for Ms. Neer's termination were insufficient. The Court will address both these issues at the same time in evaluating the three-step burden shifting framework used to establish a retaliation claim.

1. First Step: *Prima Facie* Case

The Ohio Civil Rights Commission's June 25, 2015 Order is supported by reliable, probative, and substantial evidence on the record. No argument was advanced that Ms. Neer did not engage in a protected activity, that being Ms. Neer's making good faith complaints about pregnancy discrimination and consulting with an attorney regarding this. *See, April 7 Findings of Fact*, p. 24. Similarly, no argument was advanced that Feet First was not aware that Ms. Neer had engaged in this activity. Even if this argument was made, Ms. Neer's co-workers informed Dr. Keane on February 14, 2006 that Ms. Neer had met with an attorney regarding what Ms. Neer felt was discriminatory employment practices. No argument is advanced that Feet First did not take an adverse employment action against Ms. Neer: Ms. Neer was in fact terminated. Thus, the Court finds that the Commission's finding that the first three prongs of the *prima facie* retaliation case were met is supported by reliable, probative and substantial evidence on the record.

The Ohio Civil Rights Commission's finding that Ms. Neer established the fourth prong of the *prima facie* case of retaliation is supported by reliable, probative, and substantial evidence. In evaluating this fourth prong, the Court finds the *Wholf* case instructive. In *Wholf*, the trial court found that the plaintiff "failed to establish that the alleged retaliation was the 'but-for' cause of [the]

adverse employment action." *Wholf*, 2015-Ohio-171, 26 N.E.3d 902 at ¶ 19 (8th Dist.) The Court of Appeals held that the trial court

> erroneously imposed the burden on [the plaintiff] to conclusively prove the causation element in his prima facie case, when his initial burden only required production of some evidence as to each element of the prima facie case. Therefore, the trial court misapplied the 'but-for' standard of causation in this case, and as a result, erroneously concluded that [the plaintiff] failed to establish his prima facie case of retaliation in the first stage of the *McDonnell Douglas* analysis.

Id. at ¶ 56. In reaching this conclusion, the Court of Appeals explained that the *Nassar* case clarified the causation standard that "has been applied in retaliation cases since the Supreme Court decided *Price Waterhouse* in 1989." *Id.* at ¶ 42. It further noted that the *Nassar* case did not mention "the term 'prima facie case,' nor [did] it refer to the *McDonnell Douglas* burden shifting framework." *Id.* at ¶ 43. Rather, it is the plaintiff's burden to "ultimately prove, by a preponderance of the evidence, that the plaintiff's protected activity was the determinative factor in the employer's adverse employment action." *Id.*

On February 14, 2006, Ms. Neer informed her co-workers during a meeting that she had met with an attorney about employment policies that Ms. Neer believed constituted pregnancy discrimination. The co-workers informed Dr. Keane that same day about Ms. Neer's beliefs and that she had met with an attorney. The next day, February 15, 2006, Ms. Neer was instructed not to come in to work. The attorney Ms. Neer had consulted, Attorney Matthews, then faxed a letter to Feet First regarding Ms. Neer's rights as a pregnant person. On February 16, 2006, two days after Feet First was informed of Ms. Neer's protected action, it sent a letter by fax not to Ms. Neer, but rather to Attorney Matthews, stating that Ms. Neer's employment was terminated. This temporal relationship is significant enough to constitute evidence of a causal connection in the *prima facie* case. February 14, 2006, the day Ms. Neer informed Feet First that she had spoken with an attorney regarding her rights as a pregnant person, was Ms. Neer's last day at Feet First. Ms. Neer's termination occurred very close in time after Feet First learned of her protected activity. As the *Wholf* court explained, the "but-for" standard for causation does not need to be applied in the *prima*

facie case. Thus, the Court finds the Commission's finding on the fourth prong of the *prima facie* retaliation case is supported by reliable, probative and substantial evidence on the record.

2. Second Step: Legitimate, Non-Discriminatory Reason

Feet First's legitimate, nondiscriminatory reason for terminating Ms. Neer's employment was that Ms. Neer was uncooperative and dishonest, having created a toxic work environment. *See, April 7 Findings of Fact* at p. 27. Dr. Keane testified as to five different examples of incidents involving Ms. Neer which created this toxic work environment. These incidents are: 1) the no-solicitation policy incident; 2) the Shelly's boyfriend incident; 3) the parking lot incident; 4) a general disregard for employment duties; and 5) the Dena Spencer incident. Thus, the Court finds that the Commission's finding that Feet First met its burden to articulate a legitimate, non-discriminatory reason for terminating Ms. Neer is supported by reliable, probative and substantial evidence on the record.

3. Third Step: Proffered Reason Pre-textual

The Commission adopted the ALJ's finding that Feet First's reasons for terminating Ms. Neer's employment were not credible, after hearing the testimony of Dr. Keane and weighing its credibility. *See, April 7 Findings of Fact* at p. 30. Though Dr. Keane testified that Ms. Neer created a "toxic" work environment, Ms. Neer received a merit raise in the summer of 2005 and was never formally or informally disciplined for any employment incident. Further, Feet First was prepared to provide Ms. Neer a letter of recommendation for other employment in the event no position was available at Feet First when she returned from pregnancy leave. The Court must give due deference to the ALJ's resolution of the evidentiary conflicts between the testimonial evidence (adopted by the Commission) because the ALJ, as the fact-finder, had the opportunity to observe the demeanor of the witnesses and weigh their credibility. Reliable, probative, and substantial evidence established that the proffered reason was insufficient to warrant the adverse action. If the proffered reason was insufficient, then the only reason for Ms. Neer's termination was her engaging in

protected activity. Though Ms. Neer would not have been guaranteed a job when she returned from pregnancy leave, Feet First would have provided her a position if there was an opening. However, with Ms. Neer's termination, she not only had no possibility of returning to Feet First, but she was ordered to stay away from the premises. Thus, as the Commission found, Ms. Neer's protected activity was the determinative factor in the employer's adverse employment action. *See, April 7 Findings of Fact* at p. 27, 30, 31. Therefore, the Court finds the Commission's finding that Feet First's reason for Ms. Neer's termination was pre-textual is supported by reliable, probative and substantial evidence on the record.

III. CONCLUSION

Accordingly, the Court **AFFIRMS** the Ohio Civil Rights Commission's June 25, 2015 Final Order and **OVERRULES** the appeal of Feet First, Inc.

SO ORDERED:

JUDGE MICHAEL W. KRUMHOLTZ

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GREGORY B O CONNOR
(937) 427-1367
Attorney for Plaintiff, Feet First Inc

MICHAEL P MCNAMEE
(937) 427-1367
Attorney for Plaintiff, Feet First Inc

JASON P MATTHEWS
(937) 470-5227
Attorney for Defendant, Paulette R Neer

DUFFY JAMIESON
(614) 466-7900
Attorney for Defendant, Ohio Civil Rights Commission

Tina Reiter, Bailiff (937) 225-4440 reitert@montcourt.org

General Divison
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Type: Decision Confirming Admin. Agency Decision

Case Number: 2015 CV 03837

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So Ordered