Case No. 22-1224

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SHARHEA L. WISE,

Plaintiff – Appellant,

v.

LOUIS DEJOY,
United States Postmaster General,

Defendant – Appellee.

On Appeal from the United States District Court for the District of Colorado (Civ. No. 20-cv-01559, Hon. Regina M. Rodriguez)

APPELLANT'S OPENING BRIEF

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PRIOR OR RELATED APPEALS

There are no prior or related appeals in this case.

STATEMENT OF JURISDICTION

Plaintiff-Appellant Sharhea Wise brought the claims in this suit under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, 42 U.S.C. §§ 2000e(k) & 2000e-2(a)(1); the Rehabilitation Act, 29 U.S.C. § 794(a); and the Americans with Disabilities Act, 42 U.S.C. §§ 12111(2), 12112(a), & 12112(b)(5)(A). Ms. Wise filed a Complaint of Discrimination on April 3, 2015 with the Equal Employment Opportunity Commission within the 180-day requirement. (Order, ROA at 456.)[1] On May 6, 2019, the EEOC entered judgement in favor of USPS, and affirmed the decision on March 4, 2020. (*Id*.) Ms. Wise initially filed her pro-se complaint on May 29, 2020, and an amended complaint on October 9, 2020.

The district court had jurisdiction pursuant to 28 U.S.C. § 1331, granted the Defendant-Appellee Louis DeJoy's (hereinafter "USPS") motion for summary judgment, and entered a final judgment on April 1,

[1] Citations to "ROA" are to the record on appeal, appellate ECF No. 19.

2022. (Final J., ROA at 471.) On June 23, 2022, the district court granted Ms. Wise an extension of time to July 25, 2022 to file her notice of appeal. (Docket, ROA at 3.) On July 25, 2022, Ms. Wise timely filed her notice of appeal. (Notice of Appeal, ROA at 479.) This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Did the district court err in finding that no reasonable juror could find that Ms. Wise had made out a failure-to-accommodate claim against USPS?

II. Did the district court err in finding that no reasonable juror could find that Ms. Wise had made out a retaliation claim against USPS?

INTRODUCTION

Pregnancy discrimination is a significant problem in American workplaces. In 2021 alone, the EEOC received over 2,000 pregnancy discrimination complaints, which led to over $14,000,000 in administrative relief.[2] Twenty-three percent of working mothers have

[2] Equal Employment Opportunity Commission, *Pregnancy Discrimination Charges FY 2010-FY 2021*, https://www.eeoc.gov/data/

considered leaving their jobs due to lack of reasonable accommodations.[3] Despite over a half-century of work to stamp out pregnancy discrimination, many women do not have access to the accommodations they need in the workplace for a healthy pregnancy.

In 2014, Ms. Wise was one such woman. Experiencing homelessness, Ms. Wise began working as a City Carrier Assistant ("CCA") for USPS in November of that year to get back on her feet and put a roof over her head. As a CCA, Ms. Wise was expected to perform the same tasks as other postal workers, including sorting and organizing parcels and packages, and going out on delivery routes. Seven weeks into her new job, Ms. Wise discovered she was pregnant with her first child and notified her superiors. Almost immediately, problems began to arise.

Days after discovering she was pregnant, Ms. Wise experienced unexpected abdominal pain and rushed to the hospital. Although she

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pregnancy-discrimination-charges-fy-2010-fy-2021 (last accessed Nov. 1, 2022).

[3] Ben Gitis et al., *BPC-Morning Consult: 1 in 5 Moms Experience Pregnancy Discrimination in the Workplace*, Bipartisan Policy Center (Feb. 11, 2022), *available at* https://bipartisanpolicy.org/blog/bpc-morning-consult-pregnancy-discrimination/.

provided her supervisors with documentation of her emergency visit, she received a formal reprimand for missing work.

Ms. Wise eventually received orders from her OB/GYN restricting her from lifting, pulling, or pushing packages over twenty pounds. Although her supervisors said they would accommodate her restrictions, Ms. Wise was admonished by her supervisors for trying to follow them, asked by her supervisors to perform duties that would violate them, and given no tools to aid her in staying within them. This lack of sympathy and help weighed heavily on Ms. Wise.

Eventually, Ms. Wise was pushed to a breaking point and resigned from USPS. However, the next day she returned and rescinded her resignation after being coaxed back by fellow employees. While USPS accepted her back, her supervisors didn't, suspending her for seven days, and then firing her two days later.

Ms. Wise sued, bringing claims for, among others, failure to accommodate under the ADA, and for retaliation in violation of the Rehabilitation Act. The district court granted summary judgment on both claims.

The district court was wrong.

As to the failure to accommodate claim, the district court erred because a reasonable juror, looking at the facts in the light most favorable to Ms. Wise, could have found that USPS failed to reasonably accommodate her disability when her supervisors repeatedly asked her to perform tasks that violated her accommodation and yelled at her when she performed her duties within her accommodation's restrictions. And as to the retaliation claim, the district court ignored significant evidence from which a reasonable juror could find either a causal connection between Ms. Wise's use of her accommodation and her firing, or that USPS's stated reasons for firing Ms. Wise were pretextual.

Thus, the lower court erred and should be reversed.

STATEMENT OF THE CASE

A. Despite Congressional Action, Pregnancy Discrimination Continues To Be Pervasive.

Prior to the 1970s, it was common for employers to have pregnancy dismissal policies that required pregnant employees to either quit or take unpaid leave during their pregnancy and for up to one-year after childbirth. *See, e.g.*, Deborah Dinner, *Recovering the* LaFleur *Doctrine*, 22 Yale J. L. & Feminism 343, 352-53 (2010). Women began challenging such policies after the passage of Title VII of the Civil

Rights Act in 1964, which made it illegal to "discriminate against individuals on the basis of his race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2.

While Title VII sought to forbid discrimination on the basis of sex, it did not specify protections for pregnancy. The ramifications of this omission became clear in 1976 when the Supreme Court held that a disability plan that excludes disability resulting from pregnancy does not violate Title VII. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 134 (1976) ("[L]awmakers are constitutionally free to . . . exclude pregnancy from the coverage of legislation such as this on any reasonable basis.").

In 1978, Congress responded to *Gilbert* and passed the Pregnancy Discrimination Act to amend Title VII's protections. That Act clarified that within the Civil Rights Act, "on the basis of sex" includes "on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes." 42 U.S.C. § 2000e(k).

In 1990, Congress expanded protections for employees who might be hindered due to a disability when they passed the Americans with

Disabilities Act. Congress found a problem some workers faced was that their employers failed to make reasonable accommodations for their disabilities. Testimony by the House Subcommittee on Select Education and Employment Opportunities, No. 101-51, pp. 53-73 (Sept. 13, 1989). Section 102(b)(5)(a) of the ADA specified that an employer's failure to make reasonable accommodations to the known physical limitations of an otherwise qualified employee would be considered discrimination.[4] *See* 42 U.S.C. § 12112(b)(5)(a).

Despite these legislative enactments, pregnancy discrimination remains a persistent problem today. Between 2010 and 2021, the EEOC received over 39,000 complaints of pregnancy discrimination in the workplace and secured almost $190,000,000 worth of administrative monetary benefits for complainants.[5] A 2022 survey found that twenty-

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[4] While pregnancy itself is not a disability under the ADA, the EEOC had made it clear that some pregnant workers may have one or more impairments related to their pregnancy that qualify as a "disability" and require an accommodation. Equal Employment Opportunity Commission, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* (June 25, 2015), https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues.

[5] *Pregnancy Discrimination Charges, supra* note 2.

percent of mothers feared telling an employer about a pregnancy for fear of discrimination or retaliation.[6] This kind of discrimination can have negative effects beyond work, including on the health of the mother and child.[7] Although Congress has attempted to end pregnancy discrimination, it is still a problem many women deal with.

B. Ms. Wise Needed An Accommodation For Her Pregnancy.

i. Ms. Wise was hired as a probationary employee in 2014 and shortly thereafter learned she was pregnant.

Ms. Wise was hired as a City Carrier Assistant ("CCA") in November 2014. At the time, Ms. Wise was experiencing homelessness and looking for a way to get back onto her feet. (Wise Dep., Ex. DD to Pl.'s Mot. Partial Summ. J., ROA at 160.) CCAs perform the same physically-demanding duties of a full-time employee, including sorting mail and parcels, loading them onto a gurney to load into delivery vehicles, loading tubs of packages and mail into the delivery vehicle, and finally delivering that mail door-to-door on foot with a large satchel

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[6] Ben Gitis et al., *supra* note 3.

[7] *See generally* Kaylee J. Hackney et al., *Examining the Effects of Perceived Pregnancy Discrimination on Mother and Baby Health*, 106 J. Applied Psych. 774 (2021).

hanging from their shoulder. (Creek EEOC Hr'g Test., Ex. L to Pl.'s Resp. Def.'s Mot. Summ. J., ROA at 314.)

USPS gives CCAs heightened scrutiny, such that forty percent of CCAs do not complete their probationary period. (Creek EEOC Hr'g Test., Ex. 1 to Def.'s Mot. Summ. J., ROA at 209.) After being on the job for only a few weeks, Ms. Wise received her first formal, written evaluation. (Sched. Order, ROA at 68.)[8] The evaluation was completed by Sandra Creek, Ms. Wise's initial manager at the Capitol Hill Postal Station. (Creek EEOC Hr'g Test., Ex. LL to Pl.'s Resp. Def.'s Mot. Summ. J., ROA at 335.) Although Ms. Wise initially received an "unsatisfactory" rating for some aspects of her job, Creek testified that this was commonplace for a first evaluation because the CCA is still developing his or her skill set. (*Id.* at 336; *see also id.* at 334 (noting that no employee would have all the USPS's "processes down" in the two weeks Ms. Wise had been on the job).) At that time, Ms. Wise was "progressing well" in her duties, was "consistent in her attendance," and "had a good attitude," so Creek thought she would do well working at

[8] The district court below included a list of "Undisputed Facts" within the Scheduling Order, including the date of her first evaluation.

the South Denver Postal Station. (*Id.* at 334.)

At South Denver, Ms. Wise was supervised by two men, Dean Lego (her immediate supervisor) and Ron Domingo (her second-level supervisor). (Statement of Undisputed Facts #10, Def.'s Mot. Summ. J., ROA at 172.) Because South Denver is a smaller station, both Lego and Domingo were involved in managing carriers on a day-to-day basis. (Lego EEOC Hr'g Test., Ex. 1 to Def.'s Mot. Summ. J., ROA at 196.)

On Christmas Day, Ms. Wise learned she was pregnant and notified Domingo the next day. (USPS Investigative Aff., Encl. 3 to Pl.'s Reply to Def.'s Resp. to Pl.'s Mot. Partial Summ. J., ROA at 405.) She then submitted medical documentation verifying her pregnancy on December 29, 2014. (Wise EEOC Investigative Aff., Exhibit MM to Pl.'s Resp. Def.'s Mot. Summ. J., ROA at 337.)

ii. Ms. Wise requested and received an accommodation and thereafter felt she was being treated differently by her supervisors.

A few days later, on January 3, 2015, Ms. Wise experienced unexpected abdominal pain and went to the emergency room to ensure there was nothing wrong with her pregnancy. (USPS Investigative Aff., Encl. 3 to Pl.'s Reply to Def.'s Resp. to Pl.'s Mot. Partial Summ. J., ROA

at 405.) When she returned to work later that day, Ms. Wise requested that Ms. Creek give her a light duty accommodation to ensure the safety of her child.[9] (Wise EEOC Hr'g Test., Exhibit O to Pl.'s Mot. Partial Summ. J., ROA at 136.) Ms. Creek refused to give her the appropriate paperwork to request such an accommodation and informed her that she would need a note from her OB/GYN. (*Id*.)

Two weeks later, Ms. Wise was able to visit an OB/GYN and was given a note recommending that she not lift, pull, or push more than twenty pounds. (Note from Yuko D'Ambrosia, M.D., Exhibit H to Pl.'s Resp. to Def.'s Mot. Summ. J., ROA at 127.) She then notified Lego and Domingo of her OB/GYN's recommendation, and they told her she could leave packages over twenty pounds at the station when she went on delivery routes. (Wise EEOC Hr'g Tr., Ex. 2 to Def.'s Mot. Summ. J., ROA at 221.) Domingo told Ms. Wise she did not have to lift packages over twenty pounds. (Wise EEOC Hr'g. Test., Exhibit O to Pl.'s Mot.

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[9] Ms. Wise's fear for her child were not unfounded. Jobs with high physical demands, such as prolonged standing or heavy lifting, may increase risks for adverse birth outcomes and may cause musculoskeletal injury to the mother, even early in the pregnancy. National Institute for Occupational Safety and Health, *Physical Job Demands-Reproductive Health* (June 2, 2022), https://www.cdc.gov/niosh/topics/repro/physicaldemands.html (last visited Nov. 1, 2022).

Partial Summ. J., ROA at 137.) However, this proved to be a challenge for Ms. Wise because she was not provided any tools to accurately tell which parcels exceeded twenty pounds. (USPS Investigative Aff., Ex. S to Pl.'s Mot. Part. Summ. J., ROA at 143.) Adding to this uncertainty, not every parcel at USPS has a weight written on the side of it. (Creek EEOC Hr'g Test., Ex. B to Pl.'s Mot. Partial Summ. J., ROA at 117.)

Despite doctor's orders and being told she could leave packages over twenty pounds, Ms. Wise found management did not honor her restrictions. For example, one day Ms. Wise was told by Domingo to leave some packages that were too heavy before executing her route. Later that day, however, Domingo called Ms. Wise and told her she had to return to retrieve and deliver the same, too-heavy packages. (Wise EEOC Hr'g Test., Ex. Q to Pl.'s Mot. Partial Summ. J., ROA at 140.)

A similar incident occurred with Lego. Ms. Wise was attempting to load a gurney while staying under the twenty-pound limit for packages recommended by her doctor. Lego yelled at her, stating she had to load the gurney "their way" and not the way she had been doing it to stay consistent with her light-duty accommodation. (USPS Investigative Aff., Encl. 3 to Pl.'s Reply to Def.'s Resp. to Pl.'s Mot.

Partial Summ. J., ROA at 404-05.) This caused Ms. Wise to cry. (Wise EEOC Hr'g Test, Ex. Q to Pl.'s Mot. Partial Summ. J., ROA at 140.)

On January 21, 2015, Ms. Wise received a letter of warning regarding unscheduled absences, stemming from her earlier emergency visits to the hospital out of concern for her pregnancy. (USPS Investigative Aff., Ex. Z to Pl.'s Mot. Partial Summ. J., ROA at 150.) When she received that letter, coupled with the treatment she had received from her supervisors, Ms. Wise felt overwhelmed by how challenging her time had been since notifying USPS of her pregnancy. (Wise EEOC Hr'g. Test., Ex. CC to Pl.'s Mot. Partial Summ. J., ROA at 159.) The letter of warning made her feel as if she was being punished for visiting the emergency room. (*Id.*) And because she was a probationary employee, she was also afraid to remind Lego or Domingo of her restrictions lest she lose her job. (Wise EEOC Hr'g. Test., Ex. 9 to Def.'s Resp. to Pl.'s Mot. Partial Summ. J., ROA at 368.)

iii. Ms. Wise was fired from USPS.

Shortly after these incidents and the letter, Ms. Wise was ordered to report to the Westwood Postal Station during a snowstorm. Ms. Wise had to take a bus to the station, which was a difficult one-hour trip due

to the snowy conditions of that day. (*Id.*, ROA at 369.) Because she was homeless, Ms. Wise did not own proper winter clothing or boots, and had to borrow some boots from another carrier so she could go on her route. (*Id.*) Ms. Wise left for her route but returned shortly after to talk to the supervisor at Westwood, Anita Chavez, about the challenges she was having with Lego and Domingo, and how she felt harassed. (Wise EEOC Test. Tr., Ex. CC to Pl.'s Mot. Partial Summ. J., ROA at 159.) Feeling as if she was at her limit, Ms. Wise offered her resignation to Chavez, with the reason listed as "Personal Reasons (Pregnancy)." (USPS Resignation Form, Ex. II to Pl.'s Mot. Partial Summ. J., ROA at 166.)

The same day, Ms. Wise received a phone call from Wanda Harris, another USPS employee, asking Ms. Wise to call her if she wanted her job back. (Wise EEOC Hr'g Test., Ex. CC to Pl.'s Mot. Partial Summ. J., ROA at 159.) Harris facilitated contact between Ms. Wise and Sharon White, the Capitol Hill station supervisor. (White EEOC Investigative Aff., Exhibit EE to Pl.'s Mot. Partial Summ. J., ROA at 161.) The next day, Ms. Wise contacted an Administrative Support Supervisor with the USPS to rescind her resignation, which White arranged. (Wise EEOC

Hr'g Test., Ex. 2 to Def.'s Mot. Summ. J., ROA at 226.) USPS policy states that to retract a letter of resignation, a written request must be submitted no later than close of business on the effective date of the resignation. (USPS Resignation Form, Ex. II to Pl.'s Mot. Partial Summ. J., ROA at 166.) Despite it being the next day, the Administrative Support Supervisor allowed Ms. Wise to retract her resignation. (Wise EEOC Hr'g Test., Ex. 2 to Def.'s Mot. Summ. J., ROA at 226-27; Rescission Letter, Ex. KK to Pl.'s Mot. Partial Summ. J., ROA at 168.) Ms. Wise then attempted to return to work.

However, Domingo refused to let Ms. Wise do so. Ms. Wise requested to speak with his supervisor to clear up the confusion and report discrimination; Domingo denied the request and sent Ms. Wise home. (Pl's. Resp. Def's. Disc. Requests, Ex. 6 to Def.'s Mot. Summ. J., ROA at 305.) The next day, January 23, Ms. Wise returned to work and was issued a letter of warning by Lego for not scanning packages properly on January 10. (Letter of Warning, Ex. 4 to Def.'s Mot. Summ. J., ROA at 257-58.)

On January 29, Ms. Wise received a seven-day suspension letter, citing her resignation and departure from her route on January 21,

2015, her unscheduled absences to go to the emergency room, and failure to scan two parcels on January 10. The letter warned that further violations of postal rules could result in termination. (Letter of Suspension, Ex. 4 to Def.'s Mot. Summ. J., ROA at 259-60.) Two days into her suspension, Domingo fired Ms. Wise, as witnessed by Lego, citing "unacceptable work performance." (Letter of Separation, Ex. 4 to Def.'s Mot. Summ. J., ROA at 262.) Domingo and Lego later testified they decided to fire Ms. Wise solely for her resignation and departure from her route on January 21, 2015. (Domingo EEOC Hr'g Test., Ex. D to Pl.'s Mot. Partial Summ. J., ROA at 123; Lego EEOC Hr'g Test., Ex. C to Pl.'s Mot. Partial Summ. J., ROA at 122) (testifying neither absences nor scans would lead to termination).)

C. Ms. Wise Filed Suit After Being Terminated.

Ms. Wise initially filed a Formal Complaint of Discrimination with the EEOC pursuant to 29 C.F.R. § 1614.103 as a federal employee. (Am. Compl., ROA at 38.) On May 6, 2019, the EEOC Administrative Judge issued an Order Entering Judgment in favor of USPS, which was affirmed on appeal on March 4, 2020 by the Equal Employment Opportunity Commission Office of Federal Operations. (*Id*., ROA at

39.) Ms. Wise timely filed this action within 90 days of the denial of her appeal, asserting, as is relevant to this appeal, claims against USPS for failure to accommodate her disability under the ADA and unlawful retaliation in violation of the Rehabilitation Act.[10] (*Id.*)

USPS moved for summary judgment. (Def.'s Mot. Summ. J., ROA at 169-91.) As to Ms. Wise's failure to accommodate claim, USPS argued that Ms. Wise could not show that USPS had failed to reasonably accommodate her disability, because she had not repeatedly reminded her supervisors of her accommodation when they asked her to perform actions that would exceed her doctor's weight limits, and thus had failed to adequately engage in the interactive process required by the ADA. (*See id.* at 187-90.)

As to Ms. Wise's retaliation claim, USPS argued that it failed for two reasons: (1) that there was no genuine issue of material fact from which a reasonable juror could find a causal connection between Ms. Wise's request for and exercise of her accommodation and USPS's decision to fire her, and (2) that even if Ms. Wise could make out her

[10] Ms. Wise brought other claims, but, for brevity's sake, focuses only on those claims relevant to this appeal.

prima facie case, USPS "had a legitimate, nondiscriminatory reason" for firing her. (*See id.* at 186-87.)

The district court agreed with USPS and granted the motion. (Order, ROA at 453.) As to the failure to accommodate claim, the district court found that Ms. Wise had failed to establish that USPS had refused to accommodate her disability. (*Id.* at 467.) The district court held that Ms. Wise had a duty to remind her supervisors about her accommodations every time her supervisors asked her to perform a task that exceeded her limits, and that her failure to do so constituted a failure of the "interactive process." (*Id.* at 470.)

As to the retaliation claim, the district court held that because Ms. Wise had received negative performance evaluations prior to her pregnancy accommodation, she could not show a causal connection between her accommodation and her firing. (*Id.* at 464-65.) The district court also held that even without the performance reviews, the "intervening event" of her resignation and departure from her route on January 21, 2015, gave USPS legitimate grounds to terminate her. (*Id.*) The district court did not address Ms. Wise's evidence of pretext.

This appeal followed.

SUMMARY OF THE ARGUMENT

The lower court erred in two ways and should be reversed.

As to the failure to accommodate claim, Ms. Wise put on sufficient evidence that a reasonable juror could find that USPS failed to accommodate her pregnancy because her supervisors did not adhere to the accommodations USPS ostensibly agreed to provide her. *See* part I.A. The district court erred in holding that Ms. Wise had a duty to repeatedly remind her supervisors that she had an accommodation in place. *See* part I.B. In the alternative, USPS should have known that the accommodation was not adequate and therefore had an independent duty to restart the interactive process. *See* part I.C.

As to the retaliation claim, the district court erred in holding that Ms. Wise could not establish a genuine issue of material fact from which a reasonable juror could find a causal connection between her firing and her pregnancy accommodation. First, the district court erred when it relied on Ms. Wise's negative performance reviews to find that a reasonable juror could not infer causation based on temporal proximity. USPS expressly disclaimed that those reviews were the basis for her firing, and thus they would not undermine diminish the inference a

juror could make. The district court also ignored Ms. Wise's non-temporal proximity evidence from which a reasonable juror could have inferred causation. *See* part II.A.

Second, the district court erred in applying the *McDonnell-Douglas* burden-shifting framework applicable to retaliation claims. USPS offered a legitimate, nondiscriminatory reason for firing Ms. Wise at step two of that framework. The district court accepted that reason, but did not proceed to step three of the framework as required and thus did not consider Ms. Wise's evidence that USPS's proffered reason was mere pretext. *See* part II.B.

The district court should be reversed.

ARGUMENT

I. A REASONABLE JUROR COULD FIND THAT USPS FAILED TO ACCOMMODATE MS. WISE.

Ms. Wise made out a prima facie case that USPS failed to reasonably accommodate her disability.[11] To make out a prima facie case for failure to accommodate, Ms. Wise needed only to show that

[11] Whether a plaintiff made out her prima facie case at the motion for summary judgment stage is reviewed de novo. *Aubrey v. Koppes,* 975 F.3d 995, 1004 (10th Cir. 2020). This issue was addressed by the district court. (Order, ROA at 467.)

(1) she was disabled, (2) she was otherwise qualified, (3) she requested a plausibly reasonable accommodation, and (4) USPS did not reasonably accommodate her disability. *See Aubrey*, 975 F.3d at 1005 (finding district court erred in granting summary judgment against plaintiff on failure to accommodate claim). The test is not onerous. *Id.* (citing *Osborne v. Baxter Healthcare Corp.*, 798 F.3d 1260, 1266 (10th Cir. 2015)). There is no dispute that Ms. Wise met the first three requirements: she was disabled, was otherwise qualified, and had requested a plausibly reasonable accommodation of not lifting, pushing, or pulling more than twenty pounds.[12]

Instead, USPS moved for summary judgment on the ground that it had not failed to reasonably accommodate her disability under the fourth element of the prima facie test, arguing that Ms. Wise had a duty

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[12] There is no question that Ms. Wise was disabled. (*See, e.g.*, Domingo EEOC Hr'g Testimony, Ex. F to Pl.'s Mot. Partial Summ. J., ROA at 125 (acknowledging her disability); OB-GYN Note, Ex. H to Pl.'s Mot. Partial Summ. J, ROA at 127.) She was otherwise qualified for her job. (*See, e.g.*, Domingo EEOC Hr'g Testimony, Ex. E to Pl.'s Mot. Partial Summ. J., ROA at 125; Creek Testimony, Ex. L to Pl.'s Mot. Partial Summ. J., ROA at 131–132.) And her light-duty accommodation was plausible, since it was granted by USPS (*see, e.g.*, Domingo EEOC Investigative Aff., Ex. J to Pl.'s Mot. Partial Summ. J., ROA at 129), and is a common accommodation granted by USPS (*see, e.g.*, Creek Testimony, Ex. L to Pl.'s Mot. Partial Summ. J., ROA at 131).

to repeatedly remind her superiors of her accommodations on the occasions when they asked her to violate her restrictions or yelled at her for performing tasks in a way that deviated from normal operations in order to fit within her restrictions. (*See* Def.'s Mot. Summ. J., ROA at 188-90.) The district court agreed, finding that it was Ms. Wise's responsibility to repeatedly remind her supervisors of her accommodation, and that any failure to do so defeated her claim that USPS did not reasonably accommodate her. (Order, ROA at 470.)

The district court erred, for three reasons. First, a jury could have found that USPS did not reasonably accommodate Ms. Wise's disability because her supervisors failed to abide by its terms from the start. *See* part I.A. Second, the district court erred in finding that Ms. Wise was required to repeatedly remind her supervisors of her accommodation to make out a prima facie case of failure to accommodate. *See* part I.B. Third, in the alternative, USPS should have known that the accommodation was not reasonable, renewing their obligation to engage in the interactive process to find a reasonable accommodation. In failing to do so, USPS violated the ADA's requirement that it provide Ms. Wise with reasonable accommodations. *See* part I.C.

A. A Reasonable Juror Could Find That Ms. Wise's Supervisors Did Not Reasonably Accommodate Her Restrictions.

USPS did not reasonably accommodate Ms. Wise's disability because her supervisors repeatedly tried to get her to not exercise her accommodation while performing essential functions. "[O]nce an employer agrees to provide a particular accommodation, it must act reasonably in implementing said accommodation." *Enica v. Principi*, 544 F.3d 328, 342 (1st Cir. 2008). An employer acts unreasonably, and thus fails to meet this obligation, when it ignores the terms of an accommodation it has agreed to grant to an employee or yells at the employee for using the accommodation provided. *See, e.g.*, *id.* at 343 (reversing grant of summary judgment because a reasonable jury could find employer did not reasonably accommodate employee when employer agreed to eliminate certain tasks but continued to require them); *E.E.O.C. v. Sears, Roebuck & Co.*, 417 F.3d 789, 803 (7th Cir. 2005) (reversing summary judgment because a reasonable jury could find employer did not reasonably accommodate employee when supervisor "yelled at" employee for using offered accommodation).

For example, in *Enica*, the nurse-plaintiff and her employer

agreed upon an accommodation of her disability that would not require her to walk long distances or do things she could not physically do. *Enica*, 544 F.3d at 342. However, within a few days of her employer agreeing to that accommodation, the plaintiff was assigned to, and received pressure from her supervisors to perform, walking rounds at the hospital. *Id.* at 343. The court found that because the employer had asked the nurse to violate the accommodation it had agreed to, there was a triable issue of material fact about whether the employer actually implemented the accommodation, and thus whether it had reasonably accommodated the employee. *Enica*, 544 F.3d at 343.

Similarly, in *Sears*, the court held that a juror could conclude that the employer failed to reasonably accommodate its employee because, among other things, when the employee attempted to use her accommodation she was yelled at and was prevented from using it. *Sears*, 417 F.3d at 803 (while one supervisor gave permission to use a shortcut as an accommodation, another "yelled at her" for trying to use it and blocked her from using it). Thus, the accommodation did not "consistently or effectively make the . . . facility accessible" to the employee. *Id*. *Cf. also, e.g.*, *Brown v. Potter*, 457 F. App'x 668, 671 (9th

Cir. 2011) (finding "a contested issue of material fact" as to reasonableness for a discrimination claim where plaintiff provided evidence that USPS supervisors were hostile and ignored the plaintiff's work restrictions).

Here, as in *Enica* and *Sears*, Ms. Wise's work restrictions were ignored by her supervisors, and she was yelled at when she used her accommodation. Ms. Wise's accommodation was that she would not have to lift, push, or pull anything that weighed more than twenty pounds, and that she could leave heavy packages behind and ask for help when in situations where she needed help performing her essential functions within her medical restrictions. (Wise EEOC Hr'g Testimony, Ex. O to Pl.'s Mot. Partial Summ. J., ROA at 137.) But Ms. Wise was never given a scale to weigh the packages and had no other way of knowing how much a package weighed, other than lifting it to find out. When Ms. Wise had packages that were too heavy for her, Domingo told her to leave them behind. However, when Ms. Wise exercised this accommodation, Domingo called her back to retrieve and deliver them. (Wise Dep., Ex. Q to Pl.'s Mot. Partial Summ. J., ROA at 140.)

Further, although Ms. Wise was told she could ask for help when

needed (*see* Creek EEOC Hr'g Test., Ex. L to Pl.'s Mot. Partial Summ. J., ROA at 131-32), when she did ask for help, she was not provided it but instead was yelled at and made to cry by her supervisor (*see* Wise Dep., Ex. R to Pl.'s Mot. Partial Summ. J., ROA at 141). Finally, Ms. Wise was required to load a cart and push it to her truck to load the truck with her mail delivery each day; but the cart by itself—before being loaded with mail—weighed twenty pounds, and thus when loaded always exceeded her work restrictions. (Domingo EEOC Hr'g Test., Ex. U to Pl.'s Mot. Partial Summ. J., ROA at 145.)

From these facts and the record as a whole, a reasonable jury could find that USPS did not reasonably accommodate Ms. Wise's medical restrictions.

B. A Reasonable Juror Could Find USPS Failed To Accommodate Ms. Wise's Disability Even Though She Did Not Repeatedly Remind Her Supervisors Of Her Accommodation.

That Ms. Wise did not repeatedly remind her supervisors of her accommodations does not change the analysis, because (1) Ms. Wise did not have an ongoing duty to do so to make out her prima facie case for failure to accommodate, or in the alternative, (2) a reasonable jury could find that to do so would be futile.

1. The district court erred as a matter of law in finding that Ms. Wise's failure to repeatedly remind her supervisors of her work restrictions meant that she had not fulfilled her duty to engage in the interactive process and thus could not demonstrate the fourth element of the prima facie test: that USPS failed to reasonably accommodate her disability. The interactive process is intended to help the parties determine the scope of an appropriate accommodation (the third element of the prima facie test), not to ensure that an agreed-upon accommodation is being adhered to once it is in place (which is part of the fourth element). *Cf. Tobin v. Liberty Mut. Ins. Co.*, 433 F.3d 100, 108-09 (1st Cir. 2005) (vacating and remanding district court judgment on reasonableness of accommodations, while nevertheless affirming district court's finding that parties adequately engaged in the interactive process); *Smith v. Midland Brake, Inc., a Div. of Echlin, Inc.*, 180 F.3d 1154, 1172 (10th Cir. 1999) ("The interactive process is typically an essential component of the process by which a reasonable accommodation can be determined."). The interactive process requires both parties to communicate in good faith to determine the employee's "precise limitations" and "find a reasonable accommodation for those

limitations" at the third step of the prima facie case. *Dansie v. Union Pac. R.R. Co.,* 42 F.4th 1184, 1193 (10th Cir. 2022) (citing *Aubrey*, 975 F.3d at 1009). But it does not require that the employee continually ask the supervisors to adhere to that accommodation after it has been granted. *Cf. Aubrey*, 975 F.3d at 1006-08 (whether the parties engaged in the interactive process is relevant to whether the plaintiff "establish[ed] that she requested a plausibly reasonable accommodation").

In *Aubrey*, for example, this court made clear that the inquiry of whether the parties engaged in the interactive process in good faith was a part of the inquiry into whether the employee requested a plausibly reasonable accommodation, the third element of the prima facie test. *See id.* That makes sense, because the purpose of the interactive process is to ensure that the employee communicates enough information to the employer so that the employer knows what impediment needs to be corrected so that the employer can satisfy its statutory obligation to accommodate an employee's disability. *Midland Brake, Inc.* 180 F.3d at 1172. The interactive process also allows the employer to communicate the extent to which it can accommodate the

employee. *Aubrey,* 975 F.3d at 1007 (arguing that a workable accommodation may not exist "but the ADA mandates that the employer work with the employee to try to find one"). Each side has different information that is "critical to determining whether there is a reasonable accommodation that might permit the disabled employee to perform the essential functions of her job," and that is why the interactive process relates to the availability of a plausibly reasonable accommodation—the third element of the prima facie test. *Id*. at 1007.

Here, however, the district court applied the interactive process requirement to the fourth element of the prima facie test: whether the accommodation was reasonable. (Order, ROA at 468.) Asking whether Ms. Wise repeatedly reminded her supervisors of her accommodation to determine whether the accommodation was reasonable upends the purpose of the fourth element, which is to gauge the employer's actions in accommodating (or not) the employee's limitations.

The interactive process is relevant only to whether Ms. Wise requested a plausibly reasonable accommodation—the third element of the prima facie test. USPS did not dispute that element below. (*See* Def.'s Mot. Summ. J., ROA at 188.) Thus, the district court erred as a

in applying the requirements of the interactive process to find that Ms. Wise failed to demonstrate that the accommodation was not reasonable.[13]

2. Based on these same facts, a reasonable jury could find that even if Ms. Wise was required to repeatedly remind her supervisors of her accommodation, her efforts would have been futile. When an employer has taken actions that signal to an employee that no further accommodations will be made, the employee does not need to make futile efforts to request modifications to accommodations. *Davoll v. Webb*, 194 F.3d 1116, 1133 (10th Cir. 1999). When a supervisor makes clear that accommodations are disfavored through words or actions, it would be futile to require the employee to continue to request accommodations from that supervisor. *Cf. Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1285 (7th Cir. 1996) ("Bultemeyer may have thought it was futile to ask, after Ms. Singleton told him that he would

[13] The district court's suggestion that Ms. Wise was required to repeatedly remind her supervisors of her accommodation was also impractical, as numerous packages each day, as well as the carts that Ms. Wise needed to use to load her vehicle, exceeded Ms. Wise's twenty-pound restriction. (*See* Domingo EEOC Investigative Aff., Ex. S to Pl.'s Mot. Partial Summ. J., ROA at 143; Domingo EEOC Hr'g Testimony, Ex. U to Pl.'s Mot. Partial Summ. J., ROA at 145.)

not receive any more special treatment.").

For example, in *Davoll*, plaintiffs were aware that their employer refused to reassign disabled employees, and thus this court held that the plaintiffs did not need to ask for accommodations because to do so would be futile. 194 F.3d at 1133. Similarly, Ms. Wise's supervisors had refused to adhere to her accommodations, so a reasonable jury could find that any reminders to do so would be futile. Ms. Wise was told to leave packages behind when they were too heavy but when she did exactly that, she was told to return and carry those packages. (Wise Dep., Ex. Q to Pl.'s Mot. Partial Summ. J., ROA at 140.) Ms. Wise was told to ask for help when she needed but when she did exactly that, she did not get the help she needed and was yelled at instead. (Wise Dep., Ex. R to Pl.'s Mot. Partial Summ. J., ROA at 141.) Working through her probationary period to create a better future for herself and her family, Ms. Wise did not want to lose her job. (Wise Dep., Ex. 5 to Def.'s Mot. Summ. J., ROA at 276.) She feared that continually asking for her accommodation would lead to her employer firing her, and so she did not speak up. A jury could find from these facts that she did not continue to remind her supervisors of her accommodation because it

would be futile to do so, considering her experiences thus far.

* * *

Thus, because either (1) a reasonable jury could find that Ms. Wise did not have to repeatedly remind her supervisors of her accommodation or (2) Ms. Wise's efforts would be futile, this court should find that the USPS failed to accommodate Ms. Wise's pregnancy.

C. In The Alternative, USPS Should Have Known That Ms. Wise's Accommodation Was Not Reasonable And Failed To Restart The Interactive Process.

Finally, in the alternative, USPS should have known that Ms. Wise could not perform an essential function of her job with the accommodation given, triggering its duty to further engage in the interactive process in good faith. Its failure to do so violated its duty under the ADA to provide a reasonable accommodation.

When an employer is aware of or has reason to be aware of its employee's desire for a reasonable accommodation, the employer's duty to engage in the interactive process is triggered. *Exby-Stolley v. Bd. of Cnty. Comm'rs*, 979 F.3d 784, 810 (10th Cir. 2020), cert. denied sub nom. *Bd. of Cnty. Comm'rs of Weld Cnty., Colo. v. Exby-Stolley*, 141 S. Ct. 2858 (2021) (citing *Dunlap v. Liberty Nat. Prods., Inc.*, 878 F.3d 794,

798 (9th Cir. 2017) and *Johnson v. Bd. of Trs. of Boundary Cty. Sch. Dist.*, 666 F.3d 561, 567 (9th Cir. 2011)). Summary judgment cannot be granted when a reasonable jury could find from the evidence in the record that an accommodation was ineffective, and that the ineffectiveness was due in part to the employer's failure to ensure that the offered accommodation would address the plaintiff's disability. *Cf., e.g.*, *Baldonado v. N.M. State Highway & Transp. Dep't*, No. CIV99366JCLCSACE, 2001 WL 37125361, at *8 (D.N.M. Jan. 12, 2001) (denying summary judgment where jury could find defendant failed to adequately engage in the interactive process, resulting in ineffective accommodation). *Cf. also, e.g.*, *Brown*, 457 F. App'x at 671 (finding "a contested issue of material fact" precluding summary judgment where plaintiff provided evidence that USPS supervisors were hostile and ignored the plaintiff's work restrictions).

For example, in *Baldonado*, a wheelchair-bound employee was assigned to work on the second floor of the employer's facility and requested to be moved to the first floor because, among other things, the employee was concerned about the lack of an evacuation plan for him in the event of an emergency. 2001 WL 37125361, at *7. Rather than

engage in the interactive process with the employee, the employer created an evacuation plan, purchased a stair evacuation device the employee could use, and trained other employees to assist in the event of an emergency. *Id.* But the employee provided some evidence in the record to suggest that the accommodation was nevertheless insufficient, because, for example, he could not lift himself up into the stair evacuation device if he were left alone. *Id.* The court held that a jury could find that the accommodation was insufficient because the employer had failed to engage in the interactive process, *see id.* at *8, and that this was a situation where the employer "knew or should have known that an accommodation was needed," and had an "independent duty" to engage the interactive process, *see id*. at *6.

In *Brown*, USPS had demonstrated that it was able to accommodate its disabled employee as needed because the employee had performed her essential functions with accommodations for nineteen years at one of the USPS stations she worked at. When the employee moved to a new station, there was evidence in the record that her supervisors demonstrated "hostility and derision" towards her and forced her to work "beyond her medical restrictions," which worsened

her physical condition. *Brown*, 457 F. App'x at 670-71. Based on this evidence, the court held that a jury could find that USPS had not acted in good faith in the interactive process, and there was "a contested issue of material fact as to whether that process was reasonable" sufficient to survive summary judgment. *See id.* at 671.[14]

Here, as in *Baldonado*, USPS should have known that its accommodation was not adequately enabling Ms. Wise to perform her duties. For example, her supervisors knew that the mail carts used to transport mail from the station to the trucks weighed twenty pounds when they were empty, and thus exceeded Ms. Wise's restriction on pushing or pulling more than twenty pounds any time they were filled with even a single package or stack of mail for delivery. (Domingo EEOC Hr'g Testimony, Ex. U to Pl.'s Mot. Partial Summ. J., ROA at 145; Domingo EEOC Hr'g Testimony, Ex. 1 to Def.'s Mot. Summ. J., ROA at 199-200). From that, as in *Baldonado*, a jury could find that USPS knew its accommodation was not reasonable and thus failed in its

[14] Although *Brown* involved a claim of disability discrimination, the court's analysis of the interactive process and the reasonableness of the employer's accommodations is analogous to the analysis under Ms. Wise's failure-to-accommodate claim.

duty to engage in the interactive process.

Like in *Brown*, USPS demonstrated that it was able to accommodate Ms. Wise because Domingo had personally supervised employees with the same accommodation of not lifting, pulling, and pushing more than twenty pounds in the past. (*See* Domingo EEOC Hr'g Testimony, Ex. E to Pl.'s Mot. Partial Summ. J., ROA at 124.) But, as in *Brown*, Ms. Wise's supervisors ignored her work restrictions and only partially addressed her limitation by telling her she could leave packages that were "thought to be over [twenty] lbs," and further noting that she "had the option of" splitting mail trays that were too heavy, while also yelling at her for not following standard procedures on stacking gurneys when doing so would violate her restrictions. (Domingo EEOC Investigative Aff., Ex. S to Pl.'s Mot. Partial Summ. J., ROA at 143; USPS Investigative Aff., Encl. 3 to Pl.'s Reply to Def.'s Resp. to Pl.'s Mot. Partial Summ. J., ROA at 404-05.)

* * *

Thus, for the reasons above, the district court erred in finding that no reasonable juror could find that Ms. Wise had established that USPS had failed to reasonably accommodate her disability.

II. A REASONABLE JUROR COULD FIND THAT USPS FIRED MS. WISE IN RETALIATION FOR HER ACCOMODATION.

Ms. Wise put on evidence from which a reasonable juror could find that USPS fired Ms. Wise in retaliation for her pregnancy accommodation under the Rehabilitation Act.[15]

The Rehabilitation Act prohibits recipients of federal funds from discriminating against otherwise-qualified individuals on the basis of a disability. 29 U.S.C. § 794(a). The Act allows plaintiffs employed by federal entities to bring the same claims against them recognized by the ADA, including retaliation. *See Reinhardt*, 595 F.3d at 1131.

To make a retaliation claim using indirect evidence, plaintiffs use a test derived from the *McDonnell-Douglas* burden-shifting framework. *Id.* As step one, a plaintiff must make a prima facie case that (1) she engaged in a statutorily protected activity at work, (2) she suffered a "materially adverse action" from her employer, and (3) a causal connection exists between the two. *Id.* The plaintiff's burden to

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[15] Whether a plaintiff has put on sufficient evidence from which a reasonable juror could find the plaintiff had made out a claim of retaliation is reviewed de novo. *Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ.*, 595 F.3d 1126, 1131 (10th Cir. 2010). This issue was addressed by the district court. (Order, ROA at 464-65.)

establish a prima facie case is "not onerous, but one easily met." *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 523 (6th Cir. 2008).

Once a plaintiff makes out her prima facie case at step one, the defendant at step two must produce a legitimate, nonretaliatory reason for the adverse action. *See Fassbender v. Correct Care Sols., LLC*, 890 F.3d 875, 884 (10th Cir. 2018) (discussing the *McDonnell-Douglas* framework in the context of a Title VII retaliation claim). Finally, at step three, if the defendant produces a legitimate, nonretaliatory reason, the plaintiff must be given the opportunity to rebut the defendant's reason with evidence it was pretext for retaliation. *Id.* The evidence of pretext a plaintiff provides may also bolster their prima facie case, since a reasonable juror can infer the employer sought to disguise an unlawful motive. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143 (2000).

As to the step one prima facie case, it is undisputed that Ms. Wise engaged in a protected activity—seeking, receiving, and exercising an accommodation for her pregnancy—and suffered a materially adverse

action when USPS fired her.[16] (*See* Def.'s Mot. Summ. J., ROA at 186-87 (not disputing protected activity or adverse action elements of prima facie case).) Instead, USPS moved for summary judgment against Ms. Wise's claim only on the basis that (A) at step one of the framework, Ms. Wise could not show a causal connection between her protected activity and her termination, and (B) in the alternative, at step two, USPS had a legitimate, nondiscriminatory reason for firing her. (*Id.*)

The district court granted USPS's motion. (Order, ROA at 464-65.) First, it held that because Ms. Wise received negative performance evaluations prior to her pregnancy accommodation, she could not show

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[16] Even if USPS sought to dispute these elements for the first time on appeal, Ms. Wise put on sufficient evidence from which a reasonable juror could find she both engaged in a protected activity and suffered a materially adverse action. Receiving accommodations for medical needs relating to a pregnancy qualifies as a protected activity. *See Jones v. Brennan*, No. 16-CV-0049-CVE-FHM, 2016 U.S. Dist. LEXIS 168309 at *9-10 (N. D. Okla. Dec. 6, 2016); *see also Foster v. Mt. Coal Co., LLC*, 830 F.3d 1178, 1187 (10th Cir. 2016) (seeking an accommodation is a "protected activity" under the ADA). And termination is indisputably a "materially adverse action." *Williams v. W.D. Sports, N.M., Inc.*,497 F.3d 1079, 1087 (10th Cir. 2007). Ms. Wise received a medical accommodation for her pregnancy and was fired sixteen days later. (Domingo EEOC Investigative Aff., Ex. J to Pl.'s Mot. Partial Summ. J., ROA at 129 (stating Ms. Wise alerted him to her accommodation request on January 15, 2015); Scheduling Order, ROA at 69 (noting Ms. Wise's date of termination on January 31, 2015, is undisputed).)

a causal connection between her accommodation and her firing at step one of the framework. (*Id.*) Second, the district court held that even without consideration of the performance reviews, the "intervening event" of her resignation and departure from her route on January 21, 2015, gave USPS legitimate grounds to terminate her. (*Id.*) But the district court did not continue on to step three of the framework to consider Ms. Wise's evidence that USPS's proffered reason for firing her was pretext.

The district court erred on both counts. Ms. Wise put on sufficient evidence from which a reasonable juror could find a causal connection between her accommodation and USPS's decision to fire her. *See* part II.A. Ms. Wise also put on evidence from which a reasonable juror could find USPS's asserted reason for firing her was pretextual, which the district court erred in not considering under step three. *See* part II.B.

A. Ms. Wise Introduced Sufficient Evidence From Which A Reasonable Juror Could Find A Causal Connection.

The district court erred in finding that Ms. Wise did not put on evidence from which a reasonable juror could conclude a causal connection existed between her pregnancy accommodation and USPS's

decision to fire her.

To satisfy the causal connection prong of a retaliation claim, a plaintiff need only provide evidence which suggests "circumstances that justify an inference of retaliatory motive." *Cox v. Council for Developmental Disabilities, Inc.*, No. CIV-12-0183-HE, 2013 WL 647390, at *4 (W.D. Okla. Feb. 21, 2013) (quoting *Proctor v. United Parcel Serv.*, 502 F.3d 1200, 1208 (10th Cir. 2007)). Such evidence includes, among other things, close temporal proximity between the protected activity and the adverse action; evidence suggesting pretext; and the prior treatment of a plaintiff by his or her employer. *Id.* (close temporal proximity); *Reeves*, 530 U.S. at 147 (pretext); *Gordon v. New York City*, 232 F.3d 111, 117 (2d Cir. 2000) (discriminatory treatment closely following a protected activity is proof of causation). Courts find a genuine issue of material fact sufficient to survive summary judgement so long as a plaintiff can put on some evidence that a reasonable juror could use to infer a retaliatory motive behind the employer's adverse action. *See*, *e.g.*, *Cox*, 2013 WL 647390, at *4.

Here, Ms. Wise put on evidence of temporal proximity as well as mistreatment from which a reasonable juror could find causation.

i. Ms. Wise put on sufficient evidence of temporal proximity from which a reasonable juror could find a causal connection.

1. A reasonable juror could find causation based on Ms. Wise's evidence of temporal proximity. When an adverse action against a plaintiff closely follows his or her protected activity, a reasonable juror can infer causal connection from temporal proximity alone. *Ramirez v. Okla. Dep't of Health*, 41 F.3d 584, 596 (10th Cir. 1994). For example, in *Ramirez*, this Court held that a six-week period between a protected activity and an adverse action was sufficient for a jury to infer a causal connection between the activity and adverse action, satisfying the causal connection element. *Id.*[17]

[17] Courts must still evaluate temporal proximity against the whole record to evaluate the strength of the inference a reasonable juror may make, such as the presence of "intervening events" that may explain the adverse action. *See Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 1001-02 (10th Cir. 2011). However, where, as here, those intervening events are offered by the defendant as a legitimate non-discriminatory reason for the adverse action at step two of the framework, a court should consider those intervening events at step two and proceed to consider any evidence of pretext offered by the plaintiff at step three. *See Gonzales v. Univ. of Colo.*, No. 18-cv-01178-RBJ, 2019 WL 10250757 at *7 (D. Colo. Nov. 21, 2019) (temporal proximity satisfied causal connection, and so the court analyzed contemporaneous events offered by defendant under step two as legitimate reasons to fire plaintiff). *See also* part II.B, *infra*.

Here, USPS fired Ms. Wise sixteen days after she requested and began receiving an accommodation for her disability, well within the six weeks *Ramirez* found could satisfy causal connection alone. (Domingo EEOC Investigative Aff., Ex. J to Pl.'s Mot. Partial Summ. J., ROA at 128 (accommodation on January 15, 2015); Scheduling Order, ROA at 69 (termination on January 31, 2015).) Thus, a reasonable juror could have relied on that proximity to find Ms. Wise met her burden to show causation in her prima facie case.

2. The district court found that temporal proximity would not be relied on by a reasonable juror because (a) Ms. Wise received negative performance reviews prior to requesting an accommodation, and (b) she resigned (and then rescinded that resignation), thus giving USPS a legitimate reason for firing her, which the district court found undermined the causal connection element of the prima facie case. (Order, ROA at 464-65.)

The district court erred on both lines of reasoning. First, as to the district court's finding that Ms. Wise's negative performance reviews mitigated the strength of temporal proximity, USPS specifically disclaimed those performance evaluations as reasons for her

termination. (Def.'s Reply to Pl.'s Resp. to Def.'s Mot. Summ. J., ROA at 414.) USPS's disclaimer undermines the district court's conclusion that a jury could not rely on temporal proximity to find a causal connection between Ms. Wise's accommodation and her firing, since the reviews *cannot* be the basis upon which the jury could find she was terminated. *See Cox,* 2013 WL 647390, at *4 (ultimate inquiry is whether circumstances of evidence can justify an inference of retaliatory motive).

With respect to its finding that a jury would not rely on close temporal proximity because the "intervening event" of Ms. Wise's resignation interrupted any causal link, the district court made two errors. (Order, ROA at 465.) For one, USPS never advanced that argument; USPS only offered her resignation as "a legitimate, nondiscriminatory reason to" fire her under step two of the burden-shifting framework. (*See* Def.'s Mot. Summ. J., ROA at 187.) Furthermore, as discussed below, the district court did not consider Ms. Wise's evidence of pretext to rebut USPS's claimed legitimate reason for termination, depriving Ms. Wise of the benefit of step three of the *McDonnell-Douglas* framework. *See* part II.B.

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Thus, the district court erred in finding that a jury could not rely on the evidence of temporal proximity put on by Ms. Wise to find a causal connection.

ii. Ms. Wise also provided sufficient other evidence—not addressed by the district court—to enable a reasonable juror to find a causal connection.

As noted above, a reasonable juror can find causation based on numerous types of evidence in addition to temporal proximity, including evidence that an employer mistreated an employee prior to the adverse action. *See, e.g.*, *Gillette v. Unified Gov't of Wyandotte Cnty./Kan. City*, No. 13-cv-2540-TJJ, 2015 WL 4898616 at *21-22 (D. Kan. Aug. 17, 2015). For example, in *Gillette*, the plaintiff put on evidence that her supervisor shook her fist, yelled, and threatened her with low wages and a lower job title during a meeting in which the plaintiff complained of sex discrimination. *Id.* The court found that a reasonable juror could look at this evidence to support a finding that the supervisor had a retaliatory motive when she later denied plaintiff a new position. *Id.*

Here, as in *Gillette*, Ms. Wise put on evidence that she received harsh treatment from her supervisors Lego and Domingo when she

refused to exceed her work restrictions. Domingo ignored her accommodation and required her to deliver heavy packages she had initially left behind with his permission. (Wise EEOC Hr'g Test., Ex. Q to Pl.'s Mot. Partial Summ. J., ROA at 140.) In another incident, Lego yelled at Ms. Wise, causing her to cry, when he rejected the manner in which Ms. Wise loaded her gurney in order to accommodate her medical needs. (Wise EEOC Hr'g Test., Ex. R to Pl.'s Mot. Partial Summ. J., ROA at 141.) These events occurred within the sixteen days between Ms. Wise's accommodation request and her firing. (*Id.*; Wise EEOC Hr'g Test., Exhibit Q to Pl.'s Mot. Partial Summ. J., ROA at 140.) Thus, in the light most favorable to Ms. Wise, a reasonable juror could consider the evidence of her supervisors' treatment of her when she used her accommodation to find a causal connection.[18]

Given the evidence of temporal proximity and prior mistreatment by her firing supervisors relating to her accommodation, this Court should find that Ms. Wise has created a genuine issue of material fact as to the causal connection prong of her prima facie case.

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[18] In addition, a reasonable juror could rely on the evidence of pretext discussed in part II.B.ii to find causal connection. *Reeves*, 530 U.S. at 147 (evidence of pretext can support finding of causation).

B. Ms. Wise Provided Sufficient Evidence From Which A Reasonable Juror Could Find USPS's Proffered Reason For Her Firing Was Pretextual.

The district court also erred in finding, in the alternative, that the intervening event of Ms. Wise's resignation undermined her ability to show a causal connection. First, the district court erred by considering USPS's proffered legitimate reason for firing Ms. Wise as an intervening event that broke the causal connection in step one of the *McDonnell-Douglas* framework, rather than as a legitimate reason offered at step two. In doing so, the district court deprived Ms. Wise of the chance to show that such reason was pretextual at step three of the framework. *See* part II.B.i. Second, this error was harmful, because Ms. Wise put into the record significant evidence of pretext from which a reasonable juror could find in her favor at step three. *See* part II.B.ii.

i. The district court erred by considering USPS's proffered legitimate reason under the causal connection prong.

The district court erred by depriving Ms. Wise of an opportunity to rebut as pretextual USPS's proffered reason for her firing under the *McDonnell-Douglas* framework.

In addition to claiming that Ms. Wise could not demonstrate causal connection, *see* part II.A, USPS also argued that even if Ms. Wise

could make her prima facie case in step one, USPS had a legitimate reason to terminate her in step two of the burden-shifting framework, which Ms. Wise could not rebut with evidence of pretext in step three. (Def's Mot. Summ. J., ROA at 186-87.) USPS cited her resignation and departure from her route, as well as her violation of "postal rules," on which USPS did not elaborate, as this reason. (*Id.*)

But rather than treat this argument as USPS's legitimate reason for terminating Ms. Wise, as USPS argued, the district court treated Ms. Wise's resignation as an "intervening event" that undermined the causal link between her accommodation and firing. (Order, ROA at 464-65.) In other words, the district court took evidence of USPS's legitimate reason for firing Ms. Wise under step two of the *McDonnell-Douglas* framework and used it in step one to find that Ms. Wise did not make out her prima facie case. (*Id.*) Critically, however, despite considering the "step two" evidence offered by USPS back at "step one," the district court did not consider Ms. Wise's "step three" evidence of pretext to rebut USPS's argument. (*Id.*) That was error.

As described earlier, the *McDonnell-Douglas* framework normally progresses as follows: in step one, the plaintiff must establish the

prima facie case. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (discussing framework's application to Title VII discrimination claims). Once the plaintiff does so, at step two the burden shifts to the defendant to provide a legitimate reason for their action against the plaintiff. *Id.* Finally, at step three the burden shifts back to the plaintiff to put on evidence from which a reasonable juror could find the defendant's proffered legitimate reason was mere pretext. *Id.* at 804.

The third step of this framework is critical, because liability for retaliation attaches based on the unlawful motive of the employer's action, not the unimpeachability of the client's conduct. *See id.* (discussing how Title VII does not permit employers to use otherwise legitimate reasons to disguise discrimination based on race).

To be sure, evidence that points to the true motives of the defendant can be used both to establish the causal connection element at step one, and to demonstrate that alternative reasons proffered by the defendant were mere pretext at step three. *See Wells v. Colo. DOT*, 325 F.3d 1025, 1218 (10th Cir. 2003); *see also Reeves*, 530 U.S. at 147. However, a district court errs when it chooses to treat "step two" evidence of a legitimate reason for firing as "step one" evidence that

there was no causal connection, without considering "step three" pretext evidence offered to rebut that legitimate reason, because it deprives the plaintiff of the full scope of the *McDonnell-Douglas* analysis. *See Li-Wei Kao v. Erie Cmty. Coll.*, No. 11-CV-415, 2015 WL 3823719 at *19-20 (W.D.N.Y. June 19, 2015).

Take, for example, *Kao*. There, a defendant argued in its motion for summary judgement on the plaintiff's retaliation claim that it had a legitimate reason—inappropriate jokes in the workplace—to terminate the plaintiff under step two. *See* Buffalo & Erie Cnty. Workforce Dev. Consortium, Inc.'s Mem. L. Supp. Mot. Summ. J., attached as Part 11 of Def.'s Mot. Summ. J., ECF No. 68, *Li-Wei Kao v. Erie Cmty. Coll.*, 11-cv-0415 (W.D.N.Y. July 29, 2013). As here, the district court recognized that the same legitimate excuse could also provide an "intervening event" that might undermine plaintiff's temporal proximity evidence, and thus might break the causal connection element of plaintiff's prima facie case. *Kao*, 2015 WL 3823719, at *19-20. However, as here, the plaintiff had contested this proffered legitimate reason for firing him with evidence of pretext. *Id.* Accordingly, to give the plaintiff the benefit of the full *McDonnell-Douglas* framework, the court evaluated

plaintiff's pretext evidence before deciding whether the legitimate reason proffered by defendant caused plaintiff's claim to fail for lack of a causal connection under step one. *Id*.

In contrast, here the district court treated Ms. Wise's resignation as an "intervening event" that undermined her showing of causal connection—even though USPS only offered it as a legitimate reason for firing her under step two of the *McDonnell-Douglas* framework—but did not give any consideration to Ms. Wise's evidence of pretext. Unlike *Kao*, the district court here thus gave USPS the benefit of considering "step two" evidence under step one to undermine Ms. Wise's prima facie case, without giving commensurate consideration to any of Ms. Wise's "step three" evidence of pretext.

Therefore, because the district court ignored the third step of the *McDonnell-Douglas* framework, this Court should reverse and remand. As demonstrated in the next section, the district court's error was harmful because Ms. Wise put on significant evidence from which a reasonable juror could find USPS's stated reason for firing Ms. Wise was pretext.

ii. The district court's error was harmful because Ms. Wise provided sufficient evidence of pretext.

Had the district court considered Ms. Wise's evidence of pretext under step three of the *McDonnell-Douglas* framework, it would have found a reasonable juror could conclude that USPS's proffered reason was pretextual.

At step three of the *McDonnell-Douglas* framework, the plaintiff must provide evidence that exposes "such weakness, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence," permitting an inference of improper motive. *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997) (quoting *Olson v. Gen. Elec. Astrospace*, 101 F.3d 947, 951-52 (3d Cir. 1996)). Evidence of pretext can include anything from prior mistreatment of the plaintiff; to temporal proximity in conjunction with additional evidence suggesting unlawful motive; to an employer offering contradicting or shifting explanations for termination. *Bradly v. Denver Health & Hosp. Auth.*, 734 F. Supp. 2d 1186, 1202 (D. Colo. 2010) (quoting *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1328 (10th Cir. 1999)) (prior

mistreatment); *Proctor*, 502 F.3d at 1213 (temporal proximity in connection to other evidence); *Fassbender*, 890 F.3d at 888 (shifting explanations).

For example, the fact that a city manager denied an officer a raise despite his police chief's recommendations constituted pretext evidence when that same city manager had expressed negative opinions about employing individuals, like the plaintiff, who had initiated actions against the state. *Miller v. Maddox*, 51 F. Supp. 2d 1176, 1992 (D. Kan. 1999). Likewise, this Court found that a jury could infer pretext from a plaintiff's evidence that her employer continually changed its explanation for what violation of its anti-fraternization policy they suspended and then fired her for. *Fassbender*, 890 F.3d at 881, 887.

In this case, Ms. Wise put on evidence of pretext based on shifting explanations for the discipline leading to her firing, poor previous treatment, and temporal proximity in conjunction with this evidence. None of this evidence was considered by the district court in its opinion.

1. With respect to shifting explanations, USPS initially claimed it fired Ms. Wise for her resignation and departure from her route on January 21, 2015, and for "violating postal rules." (Def.'s Mot. Summ.

J., ROA at 187.) However, like the defendant in *Fassbender*, Ms. Wise's firing supervisors offered differing reasons for the discipline which immediately led to her termination. When Lego and Domingo suspended Ms. Wise on January 29, 2015, they justified the action not only for her resignation, described as a "failure to follow instructions," but also improper scanning of some packages, described as "unacceptable work performance," and her absences due to medical complications from her pregnancy. (Letter of Suspension, Ex. 4 to Def.'s Mot. Summ. J., ROA at 259-61.) The letter did not imply the possibility of later termination for these reasons; it only raised the possibility of firing if she failed to meet "expectations" moving forward. (*Id.*) However, just two days later, Domingo and Lego fired Ms. Wise with a letter offering no explanation beyond "unacceptable work performance," the description they used for her failure to properly scan packages. (Letter of Separation, Ex. 4 to Def.'s Mot. Summ. J., ROA at 262.)

In contrast, Domingo later testified they suspended and then fired Ms. Wise for her resignation, disregarding the letter's assertion of her absences as a reason and waffling on whether the missed scans ("unacceptable work performance") constituted a true motivation for

their actions. (Domingo EEOC Hr'g Test., Ex. 2 to Def.'s Mot. Summ. J., ROA at 228-29.) Thus, a reasonable juror, in the light most favorable to Ms. Wise, could view Domingo's testimony that Ms. Wise's absences or scans didn't impact their decision to fire her as contradictory with the reasons Domingo and Lego cited as cause for the suspension leading to her termination.

2. Furthermore, while USPS has consistently cited to Ms. Wise's resignation as a legitimate reason for her termination, evidence shows USPS chose to welcome Ms. Wise back in its discretion despite the events of January 21, 2015. Ms. Wise only rescinded her resignation when another mail carrier, Wanda Harris, encouraged her to return. (*See* White EEOC Investigative Aff., Ex. EE to Pl.'s Mot. Partial Summ. J., ROA at 161.) Harris facilitated contact between Ms. Wise and White, the Capitol Hill supervisor who agreed with Harris and arranged for Ms. Wise to rescind her resignation with an administrative support supervisor. (*Id.*) But her rescission letter was received by USPS the day after her resignation, and thus fell outside of the time when USPS would ordinarily allow her to rescind. (Wise Resignation Form, Exhibit II to Pl.'s Mot. Partial Summ. J., ROA at 166.) Nevertheless, USPS

chose to reinstate her.

However, Domingo on his own initiative prevented Ms. Wise from returning to work, sent her home, and suspended her with Lego before firing her. (Pl.'s Resps. to Def.'s First Set of Discovery Reqs., Ex. 6 to Def.'s Mot. Summ. J., ROA at 305.) Given that Domingo and Lego—who had a history of not accommodating Ms. Wise's restrictions and yelling at her when she worked within them, *see supra* part II.A.ii—chose to go against USPS's decision to welcome Ms. Wise back and took the initiative to fire her, a reasonable juror could find retaliatory animus motivated Domingo and Lego.

3. Finally, in conjunction with this evidence, Ms. Wise may also point to the close temporal proximity between her accommodation and firing to support a finding of pretext. *Proctor*, 502 F.3d at 1213. A plaintiff may use temporal proximity to strengthen her showing of pretext under step three of the burden-shifting framework when she also provides additional evidence of pretext. *Id.* Here, only sixteen days elapsed between Ms. Wise's accommodation and her firing. A reasonable juror could consider this temporal proximity together with the other evidence of pretext, to find that USPS's stated reasons for

firing her were pretextual.

* * *

Ms. Wise provided sufficient evidence from which a reasonable juror could conclude USPS's reasons for her firing were mere pretext. Thus, the district court's failure to analyze step three of the *McDonnell-Douglas* framework was harmful, and the district court should be reversed.

CONLUSION

For the foregoing reasons, Ms. Wise respectfully requests that this Court reverse the district court and remand for further proceedings.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because of the importance of the issues presented in this appeal, counsel believes that the Court's decision-making process will be significantly aided by oral argument.

Respectfully submitted,

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November 3, 2022

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/s/ Matthew R. Cushing
Counsel for Appellant

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/s/ Matthew R. Cushing
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November 3, 2022

/s/ Matthew R. Cushing
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I hereby certify that on November 3, 2022, I electronically filed a copy of the foregoing brief with the Clerk of the United States Court of Appeals for the Tenth Circuit using the Court's appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users who will be served by the appellate CM/ECF system.

November 3, 2022

/s/ Matthew Cushing
Counsel for Appellant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Regina M. Rodriguez

Civil Action No. 1:20-cv-01559-RMR-MEH

SHARHEA L. WISE,

Plaintiff,

v.

LOUIS DEJOY,
United States Postal Services Postmaster General,

Defendant.

ORDER

Pending before the Court are Plaintiff's Motion for Partial Summary Judgment, ECF No. 39, and Defendant's Motion for Summary Judgment, ECF No. 40. For the reasons stated below, Plaintiff's Motion for Partial Summary Judgment, ECF No. 39, is DENIED, and Defendant's Motion for Summary Judgment, ECF No. 40, is GRANTED.

I. BACKGROUND[1]

Plaintiff Sharhea L. Wise worked as a probationary City Carrier Assistant ("CCA") for the United States Postal Service in Denver, Colorado from November 1, 2014 until January 31, 2015, when she was terminated. CCAs in Plaintiff's position are subject to

[1] The facts stated herein are take from Plaintiff's Amended Complaint, ECF No. 28; Defendant's Answer, ECF No. 29; Defendant's Statement of Facts in his Motion for Summary Judgment, ECF No. 40 at 3–12; Plaintiff's summary judgment briefing, ECF Nos. 39, 41, 43; and the exhibits cited in those documents. These facts are undisputed unless otherwise noted.

heightened scrutiny by management. On December 1, 2014, Plaintiff received a performance evaluation in which she was rated "unsatisfactory" in three out of six work areas—work quantity, work quality, and work methods—and in which it was noted that she needed to improve in scanning packages correctly.

On December 25, 2014, Plaintiff found out that she was pregnant, and the next day, she told her second-level supervisor, Ron Domingo. On December 31, 2014, Plaintiff received a second performance evaluation, in which she received the same unsatisfactory ratings, as well as an additional unsatisfactory rating for dependability. On January 3, 2015, Plaintiff informed another manager that she was pregnant and provided that manager with paperwork from her doctor. On January 15, 2015, Plaintiff gave a note from an obstetrics and gynecology doctor, recommending that she "not lift, pull, or push anything greater than 20 pounds," to Mr. Domingo. Plaintiff's immediate supervisor, Mr. Dean Lego, testified that he and Mr. Domingo discussed the restrictions in the doctor's note, and Plaintiff testified that Mr. Domingo and Mr. Lego told her that she could leave packages that were more than 20 pounds at the station. Mr. Lego testified that he believed that Plaintiff knew not to pick up packages that were too heavy for her and that she would tell management if she was in a situation in which this restriction was being exceeded. On January 16, 2015, the day after Plaintiff submitted the doctor's note, the Postal Service approved her request for "light duty" work. Plaintiff testified that she did not recall ever informing anyone that, at any point, her restrictions not to lift, pull, or push objects weighing more than 20 pounds were not being followed.

Sometime after January 15, 2015, Plaintiff was attempting to use a gurney to move mail to her delivery truck and asked Mr. Lego for help. Mr. Lego told Plaintiff she was not doing it the right way, yelled at her, and did not help her. Plaintiff testified that this was the only instance that she could recall asking for help to lift, pull, or push anything that exceeded her weight restrictions. Another time after January 15, 2015, there was an incident in which Mr. Domingo told Plaintiff to leave some packages at the station if she thought they were too heavy, which Plaintiff did. Later that day, Mr. Domingo called Plaintiff while she was out delivering mail and told her to come back to the station and deliver the packages. Plaintiff testified that she said "Okay" and delivered the packages; she does not recall reminding Mr. Domingo of her restrictions at that time.

On January 21, 2015, Plaintiff received a letter of warning regarding her unscheduled absences that took place on December 18, 2019, January 2, 2015, and January 12, 2015. At least one of these absences were due to Plaintiff's visit to the emergency room for care when she was feeling pregnancy-related pain and discomfort. Also on January 21, 2015, Plaintiff was assigned to deliver mail from a different postal station that day. However, Plaintiff did not complete the job; instead, about 20 minutes after she left for the delivery route, she returned to the station and spoke with the station manager about resigning. The station manager provided Plaintiff with a resignation form, on which Plaintiff wrote that the reason for her resignation was "Personal Reasons (Pregnancy)."

The next day, on January 22, 2015, Plaintiff rescinded her resignation. That same day, Plaintiff also received a letter of warning for unacceptable work performance

regarding packages that she failed to properly scan. In addition, about a week after the day that Plaintiff failed to deliver the mail, filled out the resignation form, and walked off the job, she received a seven-day paid suspension as a result of that incident. Finally, on January 30, 2015, Mr. Domingo decided to terminate Plaintiff's employment because of this incident, which he testified he considered to be egregious. He delivered a letter of separation to Plaintiff on January 31, 2015.

After her termination, "[o]n February 6, 2015, Plaintiff timely initiated formal contact with [t]he United States Equal Employment Opportunity Commission ('EEOC' or 'EEO') counselor," and "[o]n April 3, 2015, Plaintiff timely filed a Formal Complaint of Discrimination." ECF No. 28 ¶ 7; ECF No. 29 ¶ 7. "On May 6, 2019, the EEOC Administrative Judge issued an Order Entering Judgment in favor of Defendant," and after a Final Agency Decision issued, the Equal Employment Opportunity Commission Office of Federal Operations issued a decision on appeal on March 4, 2020, affirming the Final Agency Decision. ECF No. 28 ¶ 8; ECF No. 29 ¶ 8. The decision on appeal notified Plaintiff of the option to file a civil action in this Court within 90 days. ECF No. 28 ¶ 8; ECF No. 29 ¶ 8. On May 29, 2020, Plaintiff, proceeding *pro se*, filed an Employment Discrimination Complaint in this Court against Defendant, the Postmaster General for the United States Postal Service. ECF No. 1.

The Court granted Plaintiff leave to amend the Complaint on August 7, 2020, ECF No. 14, and Plaintiff timely amended her complaint on October 9, 2020, ECF No. 18. On December 7, 2020, the Court granted Plaintiff's Motion for Leave to Provide Limited Scope Representation Pursuant to D.C.COLO.LAttyR 2(b)(1) and LAttyR 5(a)-(b), ECF

No. 22, and Plaintiff's counsel was appointed. *See* ECF No. 23. On December 23, 2020, Plaintiff's counsel, with the written consent of Defendant, filed another Amended Complaint, ECF No. 28, which is now the operative pleading. Defendants filed an Answer on January 7, 2021. ECF No. 29.

In the Amended Complaint, Plaintiff brings claims for:

(1) disability discrimination in violation of the Pregnancy Discrimination Act and Section 501 of the Rehabilitation Act of 1973, ECF No. 28 ¶¶ 37–43;

(2) retaliation "for requesting a reasonable accommodation and opposing discrimination based on sex/pregnancy," in violation of the "anti-reprisal provision of Title VII and the Rehabilitation Act," *id.* ¶¶ 44–48;

(3) harassment and hostile work environment based on sex and reprisal, *id.* ¶¶ 49–55;

(4) failure to accommodate, *id.* ¶¶ 56–62; and

(5) sex-based discrimination in violation of "Title 7 of the Pregnancy Discrimination Act and Section 501 of the Rehabilitation Act of 1973," *id.* ¶¶ 63–66.

On October 1, 2021, Plaintiff filed her present Motion for Partial Summary Judgment. ECF No. 39. On October 4, 2021, Defendant filed his Motion for Summary Judgment. ECF No. 40. The motions are fully briefed and ripe for review.

II. LEGAL STANDARD

The Court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). "A fact is 'material if under the substantive law it is essential to the proper disposition of the claim.'" *Wright ex rel. Tr. Co. of Kan. v. Abbott Lab'ys, Inc.*, 259 F.3d 1226, 1231–32 (10th Cir. 2001) (quoting *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664,

670 (10th Cir. 1998)); *see also Anderson*, 477 U.S. at 248 ("As to materiality, the substantive law will identify which facts are material."). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248; *see also Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1136 (10th Cir. 2000). "[T]he dispute is 'genuine' if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Allen v. Muskogee, Okla.*, 119 F.3d 837, 839 (10th Cir. 1997); *see also Anderson*, 477 U.S. at 248. "To defeat a motion for summary judgment, evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise." *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 876 (10th Cir. 2004).

"[O]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). However, "the nonmovant that would bear the burden of persuasion at trial may not simply rest upon its pleadings" at this stage. *Adler*, 144 F.3d at 671. If the movant carries "the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law," then "the burden shifts to the nonmovant to go beyond the pleadings and 'set forth specific facts' that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." *Id.* at 670–71.

Ultimately, the Court's inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party

must prevail as a matter of law." *Anderson*, 477 U.S. at 251–52. "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249–50 (citations omitted).

III. ANALYSIS

Plaintiff seeks summary judgment in her favor on her fourth claim for relief for failure to accommodate, as well as her discrimination claims.[2] ECF No. 39 at 8–13. Defendant seeks summary judgment in his favor and dismissal of all claims. ECF No. 40 at 3, 13–22. For the reasons below, the Court DENIES Plaintiff's motion for partial summary judgment, ECF No. 39, and GRANTS summary judgment in favor of Defendant.

A. Counts 1 and 5: Discrimination Based on Sex and Pregnancy-Related Disability

Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, prohibits employers from "discharg[ing] any individual, or otherwise . . . discriminat[ing] against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1); *see EEOC v. TriCore Reference Lab'ys*, 849 F.3d 929, 933 (10th Cir. 2017). "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k); *see TriCore Reference*, 849 F.3d at 933. "[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all

[2] Although Plaintiff's brief does not specify, the Court interprets her arguments regarding "discrimination" as seeking summary judgment on her first and fifth claims. *See* ECF No. 39 at 11–13.

employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k).

"[A] plaintiff can prove disparate treatment either (1) by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or (2) by using the burden-shifting framework set forth in *McDonnell Douglas*." *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 213 (2015); *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Under *McDonnell Douglas*, the Court first asks whether the plaintiff has established a *prima facie* case. *See* 411 U.S. at 802. "To establish a prima facie disparate treatment claim, a plaintiff must present evidence that (1) she belongs to a protected class; (2) she suffered an adverse employment action; and (3) the adverse action occurred under circumstances giving rise to an inference of discrimination." *Luster v. Vilsack*, 667 F.3d 1089, 1096 (10th Cir. 2011) (quotations and citation omitted). "If a plaintiff makes this showing, then the employer must have an opportunity 'to articulate some legitimate, non-discriminatory reason for' treating employees outside the protected class better than employees within the protected class." *Young*, 575 U.S. at 212 (citing *McDonnell-Douglas*, 411 U.S. at 802). "If the employer articulates such a reason, the plaintiff then has 'an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant [*i.e.*, the employer] were not its true reasons, but were a pretext for discrimination." *Id.* (alteration in original) (citing *Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981)). "[L]iability in a disparate-treatment case depends on whether the protected trait actually motivated the employer's decision." *Young*, 575 U.S. at 212 (citation omitted).

Here, Defendant argues that "there is no direct evidence of employment discrimination . . . in this case." *See* ECF No. 40 at 13; ECF No. 41 at 16–25; *see also* ECF No. 39 at 11. Plaintiff testified that she did not recall or was not aware of any statements by Mr. Domingo, Mr. Lego, or Ms. Creek indicating any bias against women, pregnant women, or people with disabilities. ECF No. 40 at 15; *id.* ¶ 84 (citing ECF No. 40-5 at 33–34). However, Plaintiff argues that when she received a letter of warning after three unscheduled absences in which she sought medical care due to discomfort and pain related to her pregnancy, this was "per se discrimination." ECF No. 41 at 16–18; ECF No. 39 at 11–12. Plaintiff provides no direct evidence that this letter of warning was motivated by discriminatory animus related to her pregnancy, rather than by the unscheduled nature of the absences and the burden they placed on the employer. *Cf.* ECF No. 42 ¶ 41 (citing ECF No. 40-2 at 25–26) ("An unscheduled absence places a burden on the employees who are working because they still have to deliver the same mail; it also increases costs because of overtime."); *see also id.* ¶ 40 (citing ECF No. 40-1 at 11) ("If there is an excuse for an unscheduled absence provided afterwards, that does not change the fact that the absence was unscheduled; whether an absence is unscheduled or unexcused are two entirely different things."). Mr. Lego testified that unscheduled absences place a burden on fellow postal carriers and the Postal Service. *Id.* at 24; *id.* ¶ 41 (citing ECF No. 40-2 at 25–26). Mr. Lego also testified that he issued letters of warning to other employees for unscheduled absences, even if the absences were later excused because they were for a doctor's visit. *Id.* ¶ 42 (citing ECF No. 40-2 at 26).

Given that Plaintiff has not provided direct evidence of discrimination, the Court applies the *McDonnell Douglas* burden-shifting framework to Plaintiff's discrimination claims. Plaintiff alleges that she received discriminatory treatment when, "[a]fter learning of [her] disability," that is, her pregnancy and the pursuant accommodations, "Defendant took the adverse actions of disciplining her and terminating her." ECF No. 28 ¶¶ 39, 43, 65. Plaintiff argues that the letter of warning regarding her unscheduled absences, at least one of which was due to a doctor's visit related to her pregnancy, constituted disciplinary or adverse action. ECF No. 39 at 11. Further, Plaintiff was terminated on January 31, 2015.

First, Plaintiff has not established a *prima facie* case that the letter of warning regarding her unscheduled absences was discriminatory because, for the reasons stated above, she has not shown that she received it "under circumstances giving rise to an inference of discrimination." *See Luster*, 667 F.3d at 1096. Further, "[o]ne method by which a plaintiff can demonstrate an inference of discrimination is to show that the employer treated similarly situated employees more favorably." *Luster*, 667 F.3d at 1095. Plaintiff has provided no evidence of any such similarly situated employees who received better treatment and testified that she does not know of any other CCA who did not receive a letter of warning after three or more unscheduled absences. ECF No. 42 at 20; *id.* ¶ 43 (citing ECF No. 40-5 at 26). Even if the letter of warning did raise an inference of discrimination, Defendant has "articulate[d] some legitimate, non-discriminatory reason[s] for" his treatment of Plaintiff, i.e., that the unscheduled absences placed a burden on the Postal Service, as discussed above. *See Young*, 575 U.S. at 213. Plaintiff has not

"prove[n] by a preponderance of the evidence that the legitimate reasons offered by the defendant . . . were not [the] true reasons, but were a pretext for discrimination." *Young*, 575 U.S. at 212.

Regarding Plaintiff's termination, Plaintiff has similarly not fulfilled her burden to raise an inference that it "occurred under circumstances giving rise to an inference of discrimination." *See Luster*, 667 F.3d at 1096. She has not pointed to any "similarly situated employee[]" who was treated more favorably because she has provided no evidence of another employee who refused to complete a mail delivery and walked off the job who was not terminated or suspended as a result. *See id.* at 1095. Further, the fact that Plaintiff walked off the job because she was overwhelmed fulfills Defendant's burden of "articulat[ing] some legitimate, non-discriminatory reason for" its treatment of Plaintiff. *Young*, 575 U.S. at 213. Finally, Plaintiff has provided no evidence that this reason was merely pretextual. *See id.* Although she provides arguments and information to mitigate the negative performance reviews that she received leading up to the day that she walked off the job, these statements do not support a conclusion that her abandonment of the job was a mere pretext for discrimination.

Even drawing inferences from the underlying facts in a light most favorable to Plaintiff, the Court does not find that she has born the burden to "go beyond the pleadings and 'set forth specific facts' . . . from which the trier of fact could find" in her favor. *See Matsushita Elec. Indus.*, 475 U.S. at 587. Nor has Plaintiff, as movant, carried "the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law." *Adler*, 144 F.3d at 670–71.

Therefore, Defendant is entitled to summary judgment on Plaintiff's discrimination claims, ECF No. 28 ¶¶ 37–43, 63–66.

B. Count 2: Retaliation

"To establish a prima facie case of retaliation, a plaintiff must show '(1) protected employee action; (2) adverse action by an employer either after or contemporaneous with the employee's protected action; and (3) a causal connection between the employee's action and the employer's adverse action." *Kilcrease v. Domenico Transp. Co.*, 828 F.3d 1214, 1225 (10th Cir. 2016). Plaintiff has not established the third element—a causal connection between the adverse employment actions of her discipline and termination and her protected activity of requesting accommodations due to her pregnancy.

Causal connection between protected activity and adverse employment action can be established by temporal proximity between the two events. *See Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1178–79 (10th Cir. 1999). Here, the events at issue took place within a relatively close temporal proximity, between mid-December of 2014 and the end of January of 2015. ECF No. 40 ¶¶ 15–80; ECF No. 39 ¶¶ 7. However, Defendant points out that Plaintiff received a negative performance evaluation *before* she requested accommodations, received letters of warning for unscheduled absences, or was terminated, which undermines a causal connection between her protected activity and her discipline or termination. ECF No. 40 at 18; *id.* ¶ 7; ECF No. 41 at 3. Plaintiff attempts to minimize the negative performance evaluations by noting that she also received feedback that she was a "pretty steady worker" and that negative performance evaluations "are common for all new CCA[]s because their skillset has not yet been built."

ECF No. 41 at 24, 27–29. Nonetheless, Plaintiff does not dispute that she received the negative performance evaluations. *See* ECF No. 41 at 3.

Even if Plaintiff had not received negative performance evaluations prior to her request for accommodation, the Tenth Circuit has held that "evidence of temporal proximity has minimal probative value in a retaliation case where intervening events between the employee's protected conduct and the challenged employment action provide a legitimate basis for the employer's action." *Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 1001–02 (10th Cir. 2011); *see also Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1203 (10th Cir. 2006) (holding that "intervening events defeat any inference of retaliation"). The incident on January 15, 2021, in which Plaintiff walked off the job and refused to finish delivering the mail, constitutes an intervening event that "provide[s] a legitimate basis for the employer's action." *Twigg*, 659 F.3d at 1001–02. Hence, Plaintiff has not established that there is a genuine dispute of material fact that precludes summary judgment on her retaliation claim, and it should be dismissed.

C. Count 3: Harassment and Hostile Work Environment

Plaintiff also alleges that "[t]he adverse acts complained of were sufficiently severe and pervasive . . . and created an intimidating, hostile, and offensive working environment." ECF No. 28 ¶ 52. To make out a claim of discrimination "based on a hostile work environment," Plaintiff must "show (1) that she was discriminated against" because of her status in a protected group; and "(2) that the discrimination was sufficiently severe or pervasive such that it altered the terms or conditions of her employment and

created an abusive working environment." *Morris v. City of Colo. Springs*, 666 F.3d 654, 663 (10th Cir. 2012).

First, for the reasons stated above, *supra* Section III.A., the Court does not find that plaintiff has shown that she was discriminated against. Second, even if this first element had been met, in order to meet the second element, Plaintiff must demonstrate that the discriminatory conduct was "extreme" to show that it "amount[ed] to a change in the terms and conditions of employment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998). "[A] plaintiff may not predicate a hostile work environment claim on the run-of-the-mill boorish, juvenile, or annoying behavior that is not uncommon in American workplaces." *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1222 (10th Cir. 2015). "[T]he totality of the circumstances is the touchstone of a hostile work environment analysis," and "it is not enough that a particular plaintiff deems the work environment hostile; it must also be of the character that it would be deemed hostile by a reasonable employee under the same or similar circumstances." *Id.* (internal quotations and citations omitted).

Before she was terminated, Plaintiff received negative performance reviews, she received letters of warning, her immediate supervisor yelled at her because he believed that she did not load a gurney correctly, and her immediate supervisor told her to come back and carry packages that she had left at the station because she thought they would be too heavy to carry, due to her accommodation for her pregnancy. Drawing inferences from these facts in a light most favorable to Plaintiff, the Court does not find that they constitute "extreme" conduct that rises to the level of a hostile work environment. *See Faragher*, 524 U.S. at 778; *Matsushita Elec. Indus.*, 475 U.S. at 587; *Lounds*, 812 F.3d

at 1222. Therefore, Defendant is entitled to summary judgment on Plaintiff's harassment and hostile work environment claim, ECF No. 28 ¶¶ 49–55.

D. Count 4: Failure to Accommodate

The Americans with Disabilities Act ("ADA") prohibits employers from "discriminat[ing] against a qualified individual on the basis of disability in regard to . . . discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. §§ 12111(2), 12112(a); *see TriCore Reference*, 849 F.3d at 933. A "qualified individual" is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8); *see TriCore Reference*, 849 F.3d at 933. "[T]he term 'discriminat[ing] against a qualified individual on the basis of disability" includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business." 42 U.S.C. § 12112(b)(5)(A); *see TriCore Reference*, 849 F.3d at 933.

"[T]here are generally four elements [Plaintiff] had to show to establish a prima facie failure-to-accommodate claim: 1) she was disabled, 2) she was otherwise qualified, 3) she requested a plausibly reasonable accommodation, and 4) the [employer] refused to accommodate her disability." *Aubrey v. Koppes*, 975 F.3d 995, 1005 (10th Cir. 2020). Plaintiff has failed to establish that Defendant refused to accommodate her disability. Plaintiff testified that Mr. Domingo told her that she did not have to lift packages over 20

pounds and that she could leave such packages at the stations. ECF No. 40 ¶¶ 24, 25 (citing ECF No. 40-2 at 5–6). The accommodation at issue is therefore "that Plaintiff was required to tell a manager or another employee to assist with heavy packages." ECF No. 41 ¶ 18. Plaintiff appears to take issue with the fact that (1) her accommodation was not sufficient and (2) on two occasions, Defendant failed to abide by her accommodation.

First, Plaintiff argues that her accommodation was insufficient because, instead of requiring her to determine when she would need help with packages, Defendant should have weighed packages for her, or provided her with tools to do so, in order to ensure that she was not lifting, pulling, or pushing anything heavier than 20 pounds. ECF No. 39 at 9–10; ECF No. 41 at 14–15. Also, Plaintiff suggests in her Response to Defendant's Motion for Summary Judgment that Defendant should have provided her with leave as an accommodation. ECF No. 41 at 3, 17–18. However, to the extent these proposed alternative accommodations were reasonable, Plaintiff should have communicated with Defendant about the fact that she believed her accommodation was not sufficient. "The federal regulations implementing the ADA 'envision an interactive process that requires participation by both parties.'" *Templeton v. Neodata Servs., Inc.*, 162 F.3d 617, 619 (10th Cir. 1998). The Tenth Circuit "ha[s] also held that the Rehabilitation Act 'requires an interactive process." *Wilkerson v. Shinseki*, 606 F.3d 1256, 1266 (10th Cir. 2010) ("The obligation to engage in an interactive process is inherent in the statutory obligation to offer a reasonable accommodation to an otherwise qualified disabled employee."). "An employer cannot be expected to correct an impediment [in a provided accommodation] of which it was not aware." *McFarland v. City & Cnty. of Denver*, 744 F. App'x 583, 587

(10th Cir. 2018) (upholding summary judgment in favor of employer where the plaintiff's "failure to communicate with the City was the sole cause of the breakdown in the interactive process"). The fact that Plaintiff is now proposing alternative accommodations does not establish that Defendant failed to accommodate her condition.

In addition, Plaintiff alleges that there were two occasions on which Defendant allegedly failed to abide by Plaintiff's accommodation. ECF No. 39 at 10; ECF No. 40 at 20; ECF No. 41 at 15. First, she alleges that Mr. Domingo "told her to leave a heavy package but then called her on the street to come back and deliver it, which she did." ECF No. 41 ¶ 25. Second, Plaintiff alleges that Mr. Lego "tried to load her gurney differently and ask for help in pushing the gurney, and she was yelled at by Supervisor Lego that she couldn't do it 'her way', she had to do it 'their way,' and Plaintiff cried during this incident and received no assistance." *Id.* ¶ 26.

However, as stated above, Plaintiff's accommodation was that she would not be required to push, pull, or carry more than 20 pounds, and she could ask for help whenever she needed to. *Id.* ¶ 18. This accommodation, as well as Tenth Circuit case law, puts the responsibility on Plaintiff to communicate with her employer about whether her accommodation was being met. *See Templeton*, 162 F.3d at 619; *McFarland*, 744 F. App'x at 586–87. However, Plaintiff did not remind Mr. Domingo of her accommodation when he told her to come back to the station to carry packages that she had earlier decided were too heavy. ECF No. 41 ¶ 25; ECF No. 39 at 41. Also, Plaintiff does not allege that Mr. Lego yelled at her for refusing to push, pull, or carry more than 20 pounds while loading the gurney or that he was requiring her to do so. ECF No. 41 ¶ 26; ECF

No. 39 at 42–43. In fact, Plaintiff did not ask Mr. Lego why he was upset with her. ECF No. 41 ¶ 26; ECF No. 39 at 42. Plaintiff never told anyone at the Postal Service that she believed her accommodation was not being followed, which was a key part of the interactive process of the reasonable accommodation framework. ECF No. 40 ¶ 37 (citing ECF No. 40-5 at 32); *id.* at 20; *McFarland*, 744 F. App'x at 587; *Wilkerson*, 606 F.3d at 1266; *Templeton*, 162 F.3d at 619.

Given her failure to engage with the necessary interactive process for her employer to provide her with a reasonable accommodation, Plaintiff cannot establish a prima facie case of failure to accommodate. Therefore, Defendant is entitled to summary judgment on this claim, as well.

IV. CONCLUSION

For the reasons stated above, the Court DENIES Plaintiff's Motion for Partial Summary Judgment, ECF No. 39, and GRANTS Defendants' Motion for Summary Judgment, ECF No. 40. As such, Plaintiff's claims and this case are DISMISSED WITH PREJUDICE.

DATED: April 1, 2022

BY THE COURT:

REGINA M. RODRIGUEZ
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-01559-RMR-MEH

SHARHEA L. WISE,

Plaintiff,

v.

LOUIS DEJOY,
United States Postal Services Postmaster General,

Defendant.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order of Judge Regina M. Rodriguez entered on April 1, 2022, it is

ORDERED that Defendant's Motion for Summary Judgment, [ECF 40], is GRANTED. It is

FURTHER ORDERED that Summary judgment shall be entered in favor of the Defendants and against Plaintiff Sharhea L. Wise. It is

FUTHER ORDERED that Plaintiff's claims and this case are DISMISSED WITH PREJUDICE.

FURTHER ORDERED that Defendant shall have their costs by the filing of a Bill of Costs with the Clerk of this Court within fourteen days of the entry of judgment, pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

Dated at Denver, Colorado this 1st day of April, 2022.

FOR THE COURT:
JEFFREY P. COLWELL, CLERK

By: s/P Glover, Deputy Clerk