

APPENDIX

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Appendix A

Order of the United States Court of Appeals for the Sixth Circuit,
Leavy v. Federal Express Corporation, No. 25-6162
(July 24, 2026) 1a-4a

NOT RECOMMENDED FOR PUBLICATION

No. 25-6162

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jul 24, 2026
KELLY L. STEPHENS, Clerk

BRENDA KAY LEAVY,	)	
	)	
Plaintiff-Appellant,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE WESTERN DISTRICT OF
FEDERAL EXPRESS CORPORATION,	)	TENNESSEE
	)	
Defendant-Appellee.	)	

ORDER

Before: BOGGS, THAPAR, and READLER, Circuit Judges.

Brenda Kay Leavy, proceeding pro se, appeals the district court's order denying her motion to vacate the judgment, filed under Federal Rule of Civil Procedure 60(b)(4). This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a)(2). For the reasons that follow, we affirm.

In 2019, Leavy sued her former employer, FedEx, alleging that FedEx wrongfully terminated her employment as an executive assistant after she was diagnosed with breast cancer and took intermittent leave under the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601, et seq. FedEx maintained that Leavy's position was eliminated as part of a reduction in force. After searching for another position at FedEx to no avail, Leavy retired. Leavy claimed that FedEx terminated her employment on the basis of her disability, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq., interfered with her rights under the FMLA, and retaliated against her for exercising her rights under the FMLA. Leavy and FedEx filed cross-motions for summary judgment, and the district court ruled in favor of FedEx on all claims. We

affirmed the district court's judgment. *Leavy v. Fed. Express Corp.*, No. 21-5882, 2022 WL 19039658, at *6 (6th Cir. Dec. 20, 2022).

In November 2025, Leavy moved to vacate the judgment under Rule 60(b)(4), asserting that "the judgment is void on its face due to lack of jurisdiction and denial of due process." Leavy argued that the district court lacked jurisdiction when it entered judgment because it relied on the magistrate judge's report and recommendation without conducting a de novo review of her objections. She further argued that the district court deprived her of an opportunity to be heard when it dismissed her claims without a hearing. In support of her motion, Leavy submitted a memorandum arguing the merits of her underlying claims. The district court denied Leavy's motion, finding that her "jurisdictional and due process arguments [we]re frivolous, contradicted by the record, and not filed within a reasonable time."¹

On appeal, Leavy argues that the district court's "judgment is void because it was entered without adversarial evidentiary testing, a meaningful opportunity to be heard, and without adjudication of disputed material facts." She devotes much of her brief to arguing the merits of her underlying claims and maintains that summary judgment in favor of FedEx was improper because there were disputed issues of fact.

Rule 60(b)(4) permits a district court to relieve a party from a final judgment if the judgment is "void." "A judgment is void under 60(b)(4) 'if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law.'" *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 108 (6th Cir. 1995) (quoting *In re Edwards*, 962 F.2d 641, 644 (7th Cir. 1992)). A Rule 60(b)(4) motion must be brought within a "reasonable time." Fed. R. Civ. P. 60(c)(1); see *In re Vista-Pro Auto., LLC*, 109 F.4th 438, 444 (6th Cir. 2024), *aff'd sub nom. Coney Island Auto Parts Unlimited, Inc. v. Burton Tr. for Vista-Pro Auto., LLC*, 607 U.S. 155 (2026). We review de novo a district court's denial of a Rule

¹ In the same order, the district court also denied Leavy's motion for sanctions. Leavy does not appeal that aspect of the court's order.

60(b)(4) motion. *Northridge Church v. Charter Township of Plymouth*, 647 F.3d 606, 611 (6th Cir. 2011).

The district court did not err in denying Leavy relief under Rule 60(b)(4). First, as the plaintiff commencing the action, Leavy availed herself of the court's personal jurisdiction, and she raised claims under federal law, establishing the court's subject-matter jurisdiction. *See* 28 U.S.C. § 1331. Second, contrary to Leavy's assertion, the district court thoroughly considered Leavy's objections to the magistrate judge's report and recommendation and reviewed de novo those findings and rulings to which Leavy objected. Third, the district court did not violate Leavy's due-process rights by not holding a hearing because the case was decided on summary judgment. *Himes v. United States*, 645 F.3d 771, 784 (6th Cir. 2011). Finally, Leavy filed her Rule 60(b) motion more than four years after the judgment without providing any reason for the delay. This did not satisfy the "reasonable time" requirement. Fed. R. Civ. P. 60(c)(1); *In re Vista-Pro Auto.*, 109 F.4th at 442 (describing a four-year delay as unreasonable). Ultimately, Leavy has attempted to use Rule 60(b) to relitigate her case, which she cannot do. *See Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 385 (6th Cir. 2001) ("Rule 60(b) does not allow a defeated litigant a second chance to convince the court to rule in his or her favor.").

For these reasons, we **AFFIRM** the district court's order.

ENTERED BY ORDER OF THE COURT


Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Kelly L. Stephens
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

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Filed: July 24, 2026

Mr. Barak Jonathan Babcock
Federal Express Corporation
Employment Litigation
3620 Hacks Cross Road
Third Floor, Building B
Memphis, TN 38125

Ms. Brenda Kay Leavy
5036 Overview Ridge Cove
Memphis, TN 38141

Re: Case No. 25-6162
Brenda Leavy v. Federal Express Corporation
Originating Case No. 2:19-cv-02705

Dear Ms. Leavy and Counsel:

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Patricia Elder
Senior Case Administrator
Direct Dial No. 513-564-7034

cc: Ms. Wendy R. Oliver

Enclosure

Mandate to issue

Appendix B

Order of the United States District Court for the Western District of Tennessee

Denying Motion to Vacate Judgment Under Federal Rule of Civil Procedure 60(b)(4)

(Dec. 18, 2025) 5a-6a

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

BRENDA KAY LEAVY,

Plaintiff,

V.

FEDEX CORPORATION,

Defendant.

Case No. 2:19-cv-02705-JTF-tmp

ORDER DENYING MOTIONS TO VACATE JUDGMENT AND FOR SANCTIONS

Before the Court are two post-judgment motions filed by Plaintiff Brenda Kay Leavy. On November 13, 2025, Leavy filed a Motion to Vacate Judgment pursuant to Rule 60(b)(4). (ECF No. 70.) On December 4, 2025, Plaintiff filed a Motion for Sanctions pursuant to Rule 11(c). (ECF No. 73.) For the reasons that follow, both motions are **DENIED**.

Leavy argues that Court lacked jurisdiction to enter Judgment and dismissed her case without due process. (ECF No. 70.) Leavy's jurisdictional and due process arguments are frivolous, contradicted by the record, and not filed within a reasonable time. *See* Fed. R. Civ. P. 60(c)(1). Judgment was entered in this case on August 23, 2021, after the Court considered Leavy's objections to and adopted the Magistrate Judge's recommendation that FedEx's summary judgment motion be granted. (ECF Nos. 49, 52–53.) The Sixth Circuit has decided all issues in this case and rejected Leavy's arguments. (*See* ECF Nos. 63–69.) Leavy's Rule 60 Motion (ECF No. 70) is **DENIED**.

After the Judgment of this Court was affirmed on appeal, and Leavy's motions to recall the Sixth Circuit's mandate and for sanctions in the appellate court were denied, she filed the sanctions

motion before the Court. (*See* ECF Nos. 63–69, 73.) The Sixth Circuit, in denying her motions, also found that Leavy was a persistent filer of “frivolous documents” and imposed filing restrictions. (*See* ECF No. 69.) As a threshold matter, it appears that Leavy failed to comply with Rule 11’s requirement that a sanctions motion be served on the allegedly offending party 21 days before being served on the Court. *See* Fed. R. Civ. P. 11(c)(2). (*See* ECF No. 73 at 10.) Additionally, it appears that Leavy’s sanctions motion is frivolous and merely rehashes the arguments she made regarding her allegations of Family and Medical Leave Act violations and that the proffered reasons for her termination were pretextual. Those arguments have been addressed and rejected on the merits by this Court and the Sixth Circuit. Leavy’s Motion for Sanctions (ECF No. 73) is **DENIED**.

Leavy is cautioned that additional frivolous filings may result in sanctions, including filing restrictions.

IT IS SO ORDERED this 18th day of December, 2025.

/s/ **John T. Fowlkes, Jr.**

JOHN T. FOWLKES, JR.
UNITED STATES DISTRICT JUDGE

Appendix C

Order of the United States Court of Appeals for the Sixth Circuit Denying
Petition for Rehearing and Rehearing En Banc
(Sept. 21, 2026) 7a–8a

No. 25-6162

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED Sep 21, 2026 KELLY L. STEPHENS, Clerk

BRENDA KAY LEAVY,

Plaintiff-Appellant,

v.

FEDERAL EXPRESS CORPORATION,

Defendant-Appellee.

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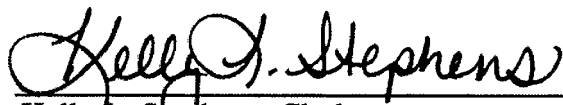
O R D E R

BEFORE: BOGGS, THAPAR, and READLER, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Kelly L. Stephens
Clerk

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Filed: September 21, 2026

Ms. Brenda Kay Leavy
5036 Overview Ridge Cove
Memphis, TN 38141

Re: Case No. 25-6162
Brenda Leavy v. Federal Express Corporation
Originating Case No. 2:19-cv-02705

Dear Ms. Leavy,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Kelly Stephens
En Banc Coordinator: Beverly
Direct Dial No. 513-564-7077

cc: Mr. Barak Jonathan Babcock

Enclosure

Appendix D

Leavy v. Federal Express Corporation, No. 21-5882

(Dec. 20, 2022) 9–19a

NOT RECOMMENDED FOR PUBLICATION

No. 21-5882

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Dec 20, 2022
DEBORAH S. HUNT, Clerk

BRENDA KAY LEAVY,

Plaintiff-Appellant,

v.

FEDERAL EXPRESS CORPORATION,

Defendant-Appellee.

)
)
)
) ON APPEAL FROM THE UNITED
) STATES DISTRICT COURT FOR
) THE WESTERN DISTRICT OF
) TENNESSEE
)
)

ORDER

Before: BOGGS, THAPAR, and READLER, Circuit Judges.

Brenda Kay Leavy, proceeding pro se, appeals the district court's grant of summary judgment in favor of the defendant, Federal Express Corporation ("FedEx"), in her employment discrimination action. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Leavy was hired by FedEx in March 1992. In June 2004, she accepted a position as an Executive Administrative Assistant in the Human Resources Department for Vice Presidents and Staff Vice Presidents. On October 1, 2016, Leavy began working for Staff Vice President of Human Resources Karen S. Galambos as an Executive Administrative Assistant.

In February 2018, Leavy informed Galambos that she had been diagnosed with breast cancer. Leavy utilized sick leave to have surgery, and on March 18, 2018, she requested intermittent leave under the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601–20, for her morning radiation treatments. As part of the FMLA paperwork provided in connection with this request, Leavy received a notice of employee rights and responsibilities under the FMLA.

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The request for intermittent leave was approved, and Leavy received written notice confirming her intermittent leave from March 16, 2018, to June 13, 2018. The letter confirming Leavy's intermittent leave advised her that, if she needed additional time off, she needed to advise Aetna, the third-party entity that managed FedEx's FMLA claims. In a June 19, 2018, letter, Leavy was notified that her intermittent leave had been closed because she had completed her radiation treatment.

In October 2018, Galambos informed Leavy that her position was being eliminated under FedEx's Staffing Effectiveness Policy because Galambos no longer needed a dedicated Executive Administrative Assistant. Under the policy, Leavy's compensation and benefits remained unchanged until she accepted another position with FedEx or resigned or until the expiration of 60 calendar days from her receipt of the Staffing Effectiveness letter notifying her of the elimination of her position. The policy also permitted Leavy to request an additional 90 days of unpaid leave to obtain another position within FedEx. On November 30, 2018, Leavy retired from the company.

In 2019, Leavy filed an employment discrimination complaint against FedEx in the district court. She alleged that FedEx terminated her employment on the basis of her disability (breast cancer), in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–213; interfered with her rights under the FMLA; and retaliated against her for exercising her rights under the FMLA.

Leavy moved for summary judgment. In support of her claims, Leavy asserted that Galambos gave her a performance review in May 2018 while she was taking intermittent leave under the FMLA, which violated the FMLA and "was discriminatory in that no one else in the Human Resources Department received the outdated job performance review at that time other than [her]." Noting Galambos's statement in the performance review that Leavy had "had a tough year," Leavy argued that Galambos "clearly based the review on [her] disabling medical condition when evaluating her performance," which also violated the ADA and the FMLA. The full text of Galambos's comment in the evaluation reads,

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Brenda has had a tough year but has kept the office running and kept a positive attitude. I appreciate the care she puts into travel[] plans, which run smoothly. An opportunity for Brenda is to be accountable for predicting needs/questions and having answers readily available on her own. Brenda is happy to pursue something when provided specific direction but I'm not always available to provide it. I look forward to a productive FY19.

Galambos gave Leavy an overall rating of "4 – good solid performance."

Leavy further asserted that, after her breast-cancer diagnosis and treatment, Galambos "revoke[d] her responsibilities to embarrass her in front of the other employees" and made denigrating comments about her work, such as, "We're *already* accommodating you," and "just because you're on FMLA doesn't mean you can put your work off on others." And although her complaint did not include a claim of race discrimination under Title VII of the Civil Rights Act of 1964, *see* 42 U.S.C. §§ 2000e to e-17, Leavy, who is African American, alleged that the decision to eliminate her position was based on her race. Finally, Leavy alleged, without supporting evidence, that FedEx "unofficially filled" her position with Tamara Turner as a "Project Manager" in the Human Resources Department and "position[ed] her outside Ms. Galambos['s] office and ha[d her] doing exactly the same work as Ms. Leavy's former job."

FedEx filed a cross-motion for summary judgment and a response opposing Leavy's summary-judgment motion. FedEx argued that the decision to eliminate Leavy's position was based on legitimate, non-discriminatory reasons and not due to her disability or her exercise of her FMLA rights. In a supporting affidavit, Galambos explained that, during Leavy's tenure as her Executive Administrative Assistant, Galambos "had to become more involved in managing [her] meetings, work schedule and daily office tasks." She detailed instances when Leavy made incorrect entries on her calendar, failed to notify her of meeting cancellations, and failed to notify her of important telephone calls, including one from the FedEx President and CEO, and she provided copies of emails that documented these incidents. Galambos stated that she eventually revoked Leavy's access to her email account "because her responses to emails and actions on emails [she] received in [her] inbox were sporadic, not consistent, and added confusion to which emails had been responded to and acted upon." She explained,

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Because I began calendaring my own meetings, answering my own phone calls, making my own travel arrangements, and managing my email inbox, I determined that the position of Executive Administrative Assistant reporting to me was redundant and unnecessary for me in conducting business. Therefore, and in accordance[], with FedEx policy, I decided to eliminate the Executive Administrative Assistant position and the position remains eliminated through present day.

Galambos further explained that neither Turner nor the employee who now maintains an office where Leavy used to sit provides administrative support to her and that neither filled Leavy's former position. She also attested that she did not consider Leavy's disability when reviewing her work performance for the 2018 fiscal year, noting that she gave Leavy a positive review and stated that she looked forward to a productive fiscal year 2019.

A magistrate judge recommended denying Leavy's motion for summary judgment and granting summary judgment to FedEx. First, the magistrate judge concluded that Leavy was not entitled to summary judgment on any purported claim of race discrimination under Title VII because she failed to plead that claim in her complaint and acknowledged in her deposition that she was bringing only ADA and FMLA claims. Second, the magistrate judge found that Leavy could not establish a prima facie case of disability discrimination under the ADA because she could not show that FedEx replaced her or left her position open while it looked for other applicants. The magistrate judge also considered whether Leavy had met the heightened standard applicable to workforce-reduction cases and found her unsupported and conclusory allegations insufficient to defeat summary judgment. The magistrate judge further explained that, even if Leavy could make out her prima facie case, Galambos's affidavit and supporting evidence articulated a legitimate, non-discriminatory reason for the adverse employment action, and Leavy failed to point to any evidence in the record to show that this stated reason was a pretext for discrimination. Finally, the magistrate judge determined that FedEx was entitled to summary judgment on Leavy's claims of FMLA interference and retaliation. Over Leavy's objections, the district court adopted the magistrate judge's report and recommendation and granted summary judgment in favor of FedEx.

Leavy raises several arguments on appeal: (1) the magistrate judge and the district court should not have required her to comply with the requirements of the court's Local Rule 56.1(a) and Federal Rule of Civil Procedure 56 given her pro se status; (2) she suffered from a qualifying disability—breast cancer; (3) the district court improperly applied the standard for reduction-in-force cases when evaluating her disability discrimination claim; (4) FedEx failed to provide a reasonable accommodation and failed to engage in the interactive process required under the ADA; and (5) the district court incorrectly denied her claims under the FMLA. In addition, Leavy seeks recusal of the district court judge.

We review a district court's grant of summary judgment de novo, viewing the facts in the light most favorable to the non-moving party. *Flagg v. City of Detroit*, 715 F.3d 165, 178 (6th Cir. 2013). Summary judgment is appropriate "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 *Estate of Smithers ex rel. Norris v. City of Flint*, 602 F.3d 758, 761 (6th Cir. 2010).

Leavy first challenges the district court's treatment of FedEx's proffered facts as undisputed because she failed to submit a separate statement of material facts as required by Local Rule 56.1(a). She contends that, because she was proceeding pro se, she should not have been "held to the same high standards of perfection as lawyers." But pro se litigants are expected to comply with the procedural rules that govern civil cases. See *McNeil v. United States*, 508 U.S. 106, 113 (1993). The district court did not err in pointing out Leavy's failure to comply with this rule. Moreover, Leavy does not point to any facts that she believes the district court failed to consider as a result of her failure to comply with Local Rule 56.1(a). The magistrate judge and the district court thoroughly considered the evidence and arguments Leavy put forth in support of her motion for summary judgment and concluded that she failed to raise a genuine dispute of material fact as to any of her claims.

Next, Leavy argues that the district court improperly granted summary judgment to FedEx on her disability discrimination claim under the ADA because it (1) did not consider her breast-cancer diagnosis a qualifying disability, (2) applied the heightened standard for reduction-

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in-force cases, and (3) failed to consider FedEx's failure to offer her a reasonable accommodation.

Under the ADA, an employer cannot discriminate against a qualified individual on the basis of disability in regard to the terms, conditions, privileges, or termination of employment. 42 U.S.C. § 12112(a). To establish a prima facie case of employment discrimination through indirect evidence under the ADA, a plaintiff must show that (1) she is disabled; (2) she is otherwise qualified for the position, with or without reasonable accommodation; (3) she suffered an adverse employment decision; (4) the employer knew or had reason to know of her disability; and (5) the position remained open while the employer sought other applicants or the disabled individual was replaced. *Whitfield v. Tennessee*, 639 F.3d 253, 258-59 (6th Cir. 2011). Once a plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse employment action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). If the defendant does so, the burden shifts back to the plaintiff to prove that the defendant's stated reason is a pretext for discrimination. *Id.* In summary-judgment proceedings, the district court must consider whether there is sufficient evidence to create a genuine dispute of material fact at each stage of the *McDonnell Douglas* analysis. *Rachells v. Cingular Wireless Emp. Servs., LLC*, 732 F.3d 652, 661 (6th Cir. 2013).

Leavy contends that, in finding that she failed to establish a prima facie case of disability discrimination, the district court improperly concluded that breast cancer is not a qualifying disability and applied the heightened standard applicable to reduction-in-force cases. But the district court ultimately concluded that, even if Leavy had established a prima facie case of discrimination, she failed to meet her burden of proving that FedEx's stated reasons for her termination were a pretext for discrimination. This conclusion was not in error.

"A plaintiff will usually demonstrate pretext by showing that the employer's stated reason for the adverse employment action either (1) has no basis in fact, (2) was not the actual reason, or (3) is insufficient to explain the employer's action." *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 393 (6th Cir. 2008). The magistrate judge acknowledged Leavy's assertion that her mistakes at work were the result of a "mental impairment that was triggered after the

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physical impairment and discrimination” but explained that there was no evidence in the record to support this assertion and that, in any event, Leavy did not “actually dispute the fact that these errors occurred.” What is more, although Galambos cited several issues she had with Leavy’s performance—none of which she had raised in Leavy’s last performance review—she did so only to explain the impetus behind her absorbing the functions and duties of the role herself, which led her to conclude that the position was redundant and unnecessary. The fact that the position remains eliminated belies any argument that Galambos’s identification of performance issues only after Leavy’s illness and FMLA leave proves pretext.

The magistrate judge also correctly rejected as speculative Leavy’s argument that, if FedEx were eliminating positions due to staffing effectiveness, it would have instead eliminated another Vice President’s executive assistant who worked only part-time. *See Gunn v. Senior Servs. of N. Ky.*, 632 F. App’x 839, 847 (6th Cir. 2015). The decision to eliminate Leavy’s position was not based on an enterprise-wide policy that the executive-administrative-assistant position was redundant or unnecessary. Rather, as Leavy acknowledged, the decision was solely within Galambos’s discretion. Although Leavy named other administrative assistants whose positions were not eliminated, these individuals reported to other Vice Presidents. Thus, any assertion that these other executive-assistant positions should have also been eliminated under a staffing-effectiveness plan was speculative and failed to raise a genuine dispute of fact as to pretext.

Leavy’s appellate brief fails to point to any evidence of pretext that the district court overlooked. Instead, she seems to rely solely on the fact that her position was eliminated after she was diagnosed with breast cancer and concludes that her termination was necessarily based on discriminatory animus. Leavy’s conclusory allegations, conjecture, and subjective beliefs about FedEx’s motives do not suffice to raise a genuine dispute of material fact. *See Arendale v. City of Memphis*, 519 F.3d 587, 605 (6th Cir. 2008) (“Conclusory assertions, supported only by Plaintiff’s own opinions, cannot withstand a motion for summary judgment.”); *Hartsel v. Keys*, 87 F.3d 795, 801 (6th Cir. 1996) (noting that conclusory statements, subjective beliefs, or intuition cannot defeat summary judgment).

Leavy devotes much of her appellate brief to arguing that FedEx failed to provide her a reasonable accommodation for her disability and failed to engage in the interactive process required under the ADA. These arguments cannot be considered on appeal because Leavy did not raise a failure-to-accommodate claim in the district court. *See Jolivet v. Husted*, 694 F.3d 760, 770 (6th Cir. 2012).

Finally, Leavy challenges the district court's denial of her claims of interference and retaliation under the FMLA. "There are two theories of recovery under the FMLA: an interference (or entitlement) theory and a retaliation (or discrimination) theory." *Hunter v. Valley View Local Schs.*, 579 F.3d 688, 691 (6th Cir. 2009).

To prevail on an FMLA interference claim, a plaintiff must establish that (1) she was an eligible employee as defined under the FMLA; (2) her employer was a covered employer as defined under the FMLA; (3) she was entitled to leave under the FMLA; (4) she gave the employer notice of her intention to take FMLA leave; and (5) her employer denied FMLA benefits to which she was entitled.

Novak v. MetroHealth Med. Ctr., 503 F.3d 572, 577-78 (6th Cir. 2007). To establish an FMLA retaliation claim, a plaintiff must show that her employer discriminated or retaliated against her "for taking FMLA leave." *Hunter*, 579 F.3d at 690.

The district court correctly granted judgment in favor of FedEx on Leavy's claim of FMLA interference because she provided no evidence that she was denied FMLA benefits. *See Tennial v. UPS*, 840 F.3d 292, 308 (6th Cir. 2016). Indeed, Leavy did not dispute that her request for intermittent FMLA leave was granted and that she continued to work for FedEx during and after her intermittent leave. *See id.*; *Tuttle v. Metro. Gov't of Nashville*, 474 F.3d 307, 321 (6th Cir. 2007). She asserts in her appellate brief that she "provided sufficient certification requesting additional time" but points to nothing in the record to substantiate this assertion. Leavy states that her physician certified that she was "incapacitated from work for eight . . . weeks" and thus FedEx should not have required or allowed her to work during that time. But again, she does not identify any evidence in the record to support this statement. And regardless of what her doctor certified, the record reflects that Leavy requested only intermittent leave and that request was granted.

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The district court also correctly granted judgment to FedEx on Leavy's FMLA retaliation claim. The magistrate judge concluded that the proximity in time between Leavy's return from FMLA leave and the elimination of her position—more than four months—“standing alone and under the facts of this case, [wa]s insufficient to establish causation.” Leavy pointed to her 2018 performance review in an effort to show pretext and a retaliatory animus, but, as the magistrate judge found, the performance review failed to show that Galambos improperly considered her FMLA leave, and there was no language in the review that evinced a retaliatory intent. Leavy also argued, as she does in her brief, that FedEx's retaliatory animus was established by its failure to transfer her to another position in violation of its Staffing Effectiveness Policy, the fact that it did not eliminate other Executive Administrative Assistant positions, and its inconsistent reasoning for terminating her. As noted above, Leavy's argument about other Executive Administrative Assistant positions not being eliminated was based solely on speculation. And her claim that FedEx failed to comply with its Staffing Effectiveness Policy is unsupported by the record. As the district court noted, the policy states, “It is the responsibility of affected employees to take personal initiative and accountability for pursuing other positions with guidance from management and Human Resources.” And emails Leavy exchanged with FedEx Human Resources that she submitted in support of her summary-judgment motion indicate that Human Resources was working with Leavy to help her find an open position and secure interviews. The fact that she was not ultimately hired for a new position does not establish pretext. Nor does Leavy's unsupported claim that FedEx provided inconsistent reasons for her termination. FedEx consistently maintained that Leavy's position was eliminated due to a reduction in force.

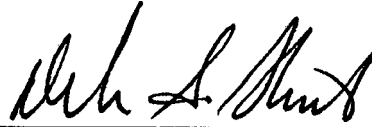
Finally, Leavy argues for the first time on appeal that the district judge should recuse himself. Leavy failed to raise this issue in the district court in a motion to recuse or otherwise; thus, the issue is forfeited for appellate purposes. *See Enertech Elec., Inc. v. Mahoning Cnty. Comm'rs*, 85 F.3d 257, 261 (6th Cir. 1996). Moreover, Leavy's argument that the district court was biased in favor of FedEx due to it being one of the biggest employers in Memphis is entirely baseless.

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- 10 -

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", written over a horizontal line.

Deborah S. Hunt, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 12/20/2022.

Case Name: Brenda Leavy v. Federal Express Corporation

Case Number: 21-5882

Docket Text:

ORDER filed : AFFIRMED. Mandate to issue, pursuant to FRAP 34(a)(2)(C), decision not for publication. Danny J. Boggs, Circuit Judge; Amul R. Thapar, Circuit Judge and Chad A. Readler, Circuit Judge.

The following document(s) are associated with this transaction:

Document Description: Order

Notice will be sent to:

Brenda Kay Leavy
5036 Overview Ridge Cove
Memphis, TN 38141

A copy of this notice will be issued to:

Mr. Barak Jonathan Babcock
Mr. Thomas M. Gould

Appendix E

Order of the United States District Court for the Western District of Tennessee

Granting Summary Judgment and Dismissing the Action

(Aug. 23, 2021) 20a–35a

Plaintiff objects to the Chief Magistrate Judge's determination that Defendant's proffered statements of fact should be considered undisputed. (ECF No. 49, 4.) In the Report and Recommendation, the Chief Magistrate Judge determined that Plaintiff failed to comply with Local Rule 56.1(a) because Plaintiff did not submit "a separate, concise statement of the material facts." (ECF No. 48, 2.) Thus, the Chief Magistrate Judge deemed Defendant's proffered facts as undisputed. (*Id.* at 3.) Plaintiff argues this was error because, as a *pro se* party, her pleadings should be held a lower standard. (ECF No. 49, 4–5.) However, whether Plaintiff's pleadings should be held to a more favorable standard is not the issue. The issue is whether Plaintiff is required to adhere to this Court's Local Rules and the Federal Rules of Civil Procedure in opposing and moving for summary judgment. The Sixth Circuit has explained that a *pro se* nonprisoner litigant "should expect no special treatment which prefers [her] over others who are represented by attorneys." *Brock v. Hendershott*, 840 F.2d 339, 343 (6th Cir. 1988). Thus, Plaintiff's objection on this point is **DENIED**.

Second, Plaintiff objects to the Chief Magistrate Judge's determination that sanctions against Defendant are unwarranted. (ECF No. 49, 5.) However, Plaintiff provides no authority to support an imposition of sanctions against Defendant for characterizing Plaintiff's conviction for driving while intoxicated as an arrest. Accordingly, Plaintiff's objection on this issue is **DENIED**.

Next, Plaintiff asserts Galambos made disparaging comments to Plaintiff. Plaintiff states that Galambos told Plaintiff that "we're already accommodating you" and "just because you're on FMLA leave doesn't mean that you can put your work off on others." (ECF No. 49, 2.) Plaintiff further states that Galambos instructed co-workers not to copy Plaintiff on communications, making Plaintiff's job duties more difficult to perform. (ECF Nos. 49, 2 & 39-6, 3–4.) Ultimately, as explained in the Report and Recommendation, such allegations are unrelated to the decision to

eliminate Plaintiff's position and would be insufficient to change the outcome in this case. Plaintiff has not provided authority to counter this conclusion. Accordingly, this objection is **DENIED**.

Finally, Plaintiff contends that Defendant considered Plaintiff's disability when conducting her 2018 fiscal year performance review, which Galambos issued on May 31, 2018, because Plaintiff was on FMLA leave at that time. (ECF No. 49, 3.) Further, Plaintiff asserts that Defendant considered Plaintiff's purported disability because Galambos referred to the disability by stating in the review that Plaintiff "had a tough year." (ECF Nos. 49, 3 & 39-11, 11.) Plaintiff further states that no other Human Resources employees received a performance review at that time. (ECF No. 49, 3.) Again, there is no support in the record for these allegations. Further, these events standing alone would be insufficient to change the Court's conclusion. Thus, Plaintiff's objection on this point is **DENIED**.

LEGAL STANDARD

Congress passed 28 U.S.C. § 636(b) "to relieve some of the burden on the federal courts by permitting the assignment of certain district court duties to magistrates." *United States v. Curtis*, 237 F.3d 598, 602 (6th Cir. 2001). Pursuant to the provision, magistrate judges may hear and determine any pretrial matter pending before the Court, except various dispositive motions. 28 U.S.C. § 636(b)(1)(A). Upon hearing a pending matter, "the magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact." Fed. R. Civ. P. 72(b)(1); *see also Baker v. Peterson*, 67 F. App'x 308, 310 (6th Cir. 2003). Any party who disagrees with a magistrate's proposed findings and recommendation may file written objections to the report and recommendation. Fed. R. Civ. P. 72(b)(2).

The district court reviews a magistrate judge's proposed findings and recommendation. The standard of review that is applied depends on the nature of the matter considered by the

magistrate judge. *See Baker*, 67 F. App'x at 310 (citations omitted) (“A district court normally applies a ‘clearly erroneous or contrary to law’ standard of review for nondispositive preliminary measures. A district court must review dispositive motions under the *de novo* standard.”). Upon review of the evidence, the district court may accept, reject, or modify the proposed findings or recommendations of the magistrate judge. *Brown v. Bd. of Educ.*, 47 F. Supp. 3d 665, 674 (W.D. Tenn. 2014); *see also* 28 U.S.C. § 636(b)(1). The court “may also receive further evidence or recommit the matter to the [m]agistrate [j]udge with instructions.” *Moses v. Gardner*, No. 2:14-cv-2706-SHL-dkv, 2015 U.S. Dist. LEXIS 29701, at *3 (W.D. Tenn. Mar. 11, 2015). “Within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations.” Fed. R. Civ. P. 72(b)(2). “When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.” Fed. R. Civ. P. 72(b) advisory committee notes.

The Court notes that “[o]verly general objections do not satisfy the objection requirement.” *Spencer v. Bouchard*, 449 F.3d 721, 725 (6th Cir. 2006). Furthermore, “[f]ailure to identify specific concerns with a magistrate judge’s report results in treatment of a party’s objections as a general objection to the entire” report and recommendation. *McCready v. Kamminga*, 113 F. App'x 47, 49 (6th Cir. 2004). In turn, “[a] general objection is considered the equivalent of failing to object entirely.” *Id.* A district judge should adopt the findings and rulings of the magistrate judge to which no specific objection is filed. *Brown*, 47 F. Supp. 3d at 674.

ANALYSIS

The Report and Recommendation recommends that Plaintiff’s Motion for Summary Judgment be denied and that Defendant’s Motion for Summary Judgment be granted. As

explained below, the Court denies Plaintiff's legal objections and **ADOPTS** the Report and Recommendation.

I. Summary Judgment Standard

In evaluating a motion for summary judgment, federal courts are guided by Rule 56 of the Federal Rules of Civil Procedure, which provides that summary judgment shall be granted "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). The moving party can meet this burden by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his case. *See* Fed. R. Civ. P. 56(c); *see also Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) ("The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment.") (internal quotation marks omitted).

When confronted with a properly supported motion for summary judgment, the nonmoving party must set forth specific facts showing that there is a genuine dispute for trial. *See* Fed. R. Civ. P. 56(c). The nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (citing *DeLuca v. Atl. Refining Co.*, 176 F.2d 421, 423 (2d Cir. 1949)). Furthermore, one may not oppose a properly supported summary judgment motion by mere reliance on the pleadings. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Instead, the nonmovant must present "concrete evidence supporting its claims." *Cloverdale Equip. Co. v. Simon Aerials, Inc.*, 869 F.2d 934, 937 (6th Cir. 1989) (citations omitted); *see* Fed. R. Civ. P. 56(c)(1). The district court does not have the duty to search the record for such evidence. *See* Fed. R. Civ. P. 56(c)(3);

InterRoyal Corp. v. Sponseller, 889 F.2d 108, 111 (6th Cir. 1989). The nonmovant has the duty to point out specific evidence in the record that would be sufficient to justify a jury decision in his favor. *See* Fed. R. Civ. P. 56(c)(1); *InterRoyal Corp.*, 889 F.2d at 111.

Where—as is the case here—there are “cross-motions for summary judgment, ‘the court must evaluate each party’s motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration.’” *McKay v. Federspiel*, 823 F.3d 862, 866 (6th Cir. 2016) (quoting *Taft Broad. Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991)). “The fact that both parties have moved for summary judgment does not mean that the court must grant judgment as a matter of law for one side or the other[.]” *Craig v. Bridges Bros. Trucking LLC*, 823 F.3d 382, 387 (6th Cir. 2016) (citation omitted).

II. Plaintiff’s Motion for Summary Judgment

A. Title VII Claim

The Chief Magistrate Judge determined that Plaintiff was not entitled to summary judgment as to any Title VII claim because Plaintiff did not assert such a claim in her Complaint and acknowledged during her deposition that she was not asserting such a claim. (ECF No. 48, 18.) Plaintiff has not objected to this determination. Accordingly, the Court adopts the Report and Recommendation and concludes that Plaintiff is not entitled to summary judgment on a Title VII claim.

B. ADA Claim

Plaintiff moves for summary judgment on her claim under the Americans with Disabilities Act (“ADA”). The Chief Magistrate Judge determined that Plaintiff is not entitled to summary judgment on her disability discrimination claim. (ECF No. 48, 24.) In discrimination cases involving only indirect evidence, the *McDonnell Douglas* burden-shifting framework applies.

Ferrari v. Ford Motor Co., 826 F.3d 885, 891 (6th Cir. 2016) (citing *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1179–82 (6th Cir. 1996)). Accordingly, Plaintiff must initially establish a *prima facie* case of discrimination by showing that (1) she is disabled, (2) she is otherwise qualified for the position, with or without reasonable accommodation, (3) she suffered an adverse employment decision, (4) Defendant knew or had reason to know of Plaintiff's disability, and (5) the position remained open while Defendant sought new applicants or Plaintiff was replaced. *See id.* at 891–92 (citations omitted).

The Chief Magistrate Judge determined that Plaintiff could not establish a *prima facie* case of disability discrimination because Plaintiff could not establish the fifth element—that Plaintiff was replaced or Defendant sought other applicants. (ECF No. 48, 19–20.) The Chief Magistrate Judge found that Plaintiff was eliminated as part of a work force reduction. (*Id.* at 20–21.) A plaintiff is not terminated in the context of a work force reduction if they are replaced after termination. *See Geiger v. Tower Auto.*, 579 F.3d 614, 623 (6th Cir. 2009) (citation omitted). Plaintiff contends that Defendant “unofficially filled” Plaintiff's former position with Tamara Turner. Without pointing to any evidence in the record, Plaintiff asserts that Turner works in Human Resources as a “Project Manager” and sits outside Galambos' office and performs the same work as Plaintiff's former position. (ECF No. 49, 8.) This allegation lacks support in the record and is purely speculative. Thus, the Court concludes that Plaintiff was terminated as part of a work force reduction. As a result, to establish the final element of her *prima facie* case, she must point to “additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons.” *Geiger*, 579 F.3d at 624 (citation omitted). Plaintiff's Objections purportedly attempt to make this showing by pointing to Galambos' alleged comment to Plaintiff that “[j]ust because you are on FMLA, doesn't

mean that you can put your work off on others.” (ECF No. 49, 6.) However, the Chief Magistrate Judge considered this argument and rejected it in the Report and Recommendation. (ECF No. 48, 29.) Plaintiff has pointed to no authority to support deviation from that determination. Plaintiff provides no evidence beyond this bare allegation that she was impermissibly singled out. Accordingly, Plaintiff has failed to establish a *prima facie* case of disability discrimination.

The Chief Magistrate Judge also found that Plaintiff did “not attempt to establish that ‘she was treated less favorably than a similarly situated, non-protected employee.’” (ECF No. 48, 22 n.10) (quoting *Day v. Krystal Co.*, 471 F. Supp. 2d 874, 884 (E.D. Tenn. 2007)). In her Objections, Plaintiff alleges she “was treated less-favorably than McCrae, Harrison and Northcott.”² (ECF No. 49, 7.) Plaintiff contends that these individuals “were not subjected to an annual performance review which considered their leave or disabling medical conditions[.]” However, Plaintiff’s fiscal year 2018 performance review does not support the assertion that her disability and leave were factors in her performance evaluation. (See ECF No. 26-1, 2.) While these employees may not have been terminated, Plaintiff adduces no evidence from which the Court can conclude they are similarly situated. See *Jones v. Potter*, 488 F.3d 397, 405 (6th Cir. 2007) (“[T]he individuals with whom the plaintiff seeks to compare his/her treatment must . . . have been subject to the same standards, and engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it.” (quoting *Gray v. Toshiba Am. Consumer Prods.*, 263 F.3d 595, 599 (6th Cir. 2001))). Finally, even if Plaintiff has established a *prima facie* case, as explained below, Plaintiff is still not entitled to summary judgment on her disability discrimination claim.

² Per Plaintiff’s Motion for Summary Judgment, Stacy McCrae, Donna Harrison, and Donna Northcott are Executive Administrative Assistants for executives in FedEx’s Human Resources department. (ECF No. 26, 4.) McCrae and Harrison “report to Ms. Judy Edge, FedEx’s Corporate Vice President for Human Resources.” (*Id.*)

The Chief Magistrate Judge found that even if Plaintiff established a *prima facie* case of disability discrimination, Defendant has articulated a legitimate, nondiscriminatory reason for eliminating Plaintiff's position. (ECF No. 48, 22.) The Chief Magistrate Judge found Defendant has explained that Galambos took over Plaintiff's job duties because Plaintiff made mistakes with scheduling meetings, failed to effectively communicate with Galambos, and was unreliable with answering phone calls and emails. (*Id.* at 22–23.) Plaintiff does not specifically object to this finding. Therefore, the burden would shift to Plaintiff to show that Defendant's legitimate, nondiscriminatory reason is pretextual. *Ferrari*, 826 F.3d at 892 (quoting *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1186 (6th Cir. 1996)). The Chief Magistrate Judge determined that Plaintiff did not proffer sufficient evidence to support a showing of pretext. (ECF No. 48, 24.)

“[P]laintiff can show pretext in three interrelated ways: (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the employer's action, or (3) that they were insufficient to motivate the employer's action.” *Ferrari*, 826 F.3d at 895 (quoting *Romans v. Mich. Dep't of Human Servs.*, 668 F.3d 826, 839 (6th Cir. 2012)). Plaintiff's Objections do not attempt to argue that Plaintiff did not commit the mistakes referred to by Defendant in articulating its legitimate, nondiscriminatory reason. Instead, it appears that Plaintiff contends that Defendant's legitimate explanation was not the true reason for the elimination of her position. Plaintiff speculates that it was illogical to eliminate Plaintiff's position pursuant to “staffing effectiveness” because it left Galambos without an Executive Administrative Assistant while Judy Edge retained two Executive Administrative Assistants—one of whom is part-time. (ECF No. 49, 7.) Plaintiff provides little detail and no other factual basis for this opinion. This mere speculative assertion, unsupported by evidence in the record, is insufficient to establish pretext.

Plaintiff also asserts that Defendant violated its own staffing effectiveness policy because Defendant allegedly did not attempt to place Plaintiff in another position. (ECF No. 49, 13.) However, Plaintiff has not explained how this allegation and the fact that Defendant did not hire Plaintiff to a new position should amount to a finding of pretext. Without factual support showing that Plaintiff was discriminated against in searching for other jobs with Defendant, the outcome of the staffing effectiveness process is insufficient to establish pretext.³ See e.g., *Adebisi v. Univ. of Tenn.*, 341 F. App'x 111, 113 (6th Cir. 2009) (“A plaintiff’s ‘conclusory allegations and subjective beliefs . . . are wholly insufficient evidence to establish a claim of discrimination as a matter of law.’” (quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 585 (6th Cir. 1992))). For the same reason, Plaintiff’s unsupported assertions regarding the logic of a reduction in force eliminating her position are not helpful to Plaintiff. Moreover, Plaintiff argues that Defendant has changed its reasons for the elimination of Plaintiff’s position since such action was taken. (ECF No. 49, 14–15.) However, this is not supported by the record, as Defendant has consistently maintained that Plaintiff’s position was eliminated pursuant to a reduction in force. Accordingly, Plaintiff is not entitled to summary judgment on her disability discrimination claim.

C. Family and Medical Leave Act (FMLA) Claims

1. *FMLA Interference*

To establish an FMLA interference claim, Plaintiff must demonstrate that “(1) [she] is an eligible employee, (2) the defendant is an employer as defined under the FMLA, (3) the employee was entitled to leave under the FMLA, (4) the employee gave the employer notice of [her] intention to take leave, and (5) the employer denied the employee FMLA benefits to which [she] was

³ An exhibit identified in Plaintiff’s Objections—the Staffing Effectiveness Policies and Procedures—states: “It is the responsibility of affected employees to take personal initiative and accountability for pursuing other positions with guidance from management and Human Resources.” (ECF No. 39-8.)

entitled.” *Tennial v. UPS*, 840 F.3d 292, 308 (6th Cir. 2016) (citing *Walton v. Ford Motor Co.*, 424 F.3d 481, 485 (6th Cir. 2005)); *see also Wysong v. Dow Chem. Co.*, 503 F.3d 441, 447 (6th Cir. 2007) (“If an employer takes an employment action based, in whole or in part, on the fact that the employee took FMLA-protected leave, the employer has denied the employee a benefit to which he is entitled.”). The Chief Magistrate Judge concluded that Plaintiff could not establish a claim for FMLA interference because she was never denied FMLA leave. (ECF No. 48, 25.) In her Objections, Plaintiff states that Defendant interfered with her FMLA rights “when Galambos considered both her serious medical condition and leave from work in a performance review issued on May 31, 2018.” (ECF No. 49, 9.) However, even examining the fiscal year 2018 performance review, the record is devoid of evidence that Plaintiff’s leave and medical condition were considered or utilized as factors in assessing Plaintiff’s job performance or eliminating Plaintiff’s position. (See ECF No. 39-11, 11.) Accordingly, the Court adopts the Chief Magistrate Judge’s conclusion that Plaintiff has not established a claim for FMLA interference because she was never denied FMLA benefits and because there is no evidence her FMLA leave was used as a factor in the decision to eliminate Plaintiff’s position. Plaintiff is thus not entitled to summary judgment on her FMLA interference claim.

2. *FMLA Retaliation*

To establish a *prima facie* FMLA retaliation claim, Plaintiff must demonstrate that (1) she engaged in activity protected under the Act, (2) her exercise of protected rights was known to Defendant, (3) Defendant subsequently subjected Plaintiff to an adverse employment action, and (4) “there was a causal connection between the protected activity and the adverse employment action.” *Tennial*, 840 F.3d at 308 (citing *Arban v. W. Pub. Corp.*, 345 F.3d 390, 404 (6th Cir. 2003)). The Chief Magistrate Judge determined that Plaintiff had not established the fourth

element because the temporal proximity between her FMLA leave and the elimination of her position could not, standing alone, establish a causal connection. (ECF No. 48, 26.) Plaintiff has not specifically objected to this conclusion and has offered only the temporal proximity and the performance review as evidence of a causal connection. For the reasons previously provided, the performance review is not indicative of retaliatory intent. As to the temporal proximity, nearly four months elapsed between Plaintiff's return from FMLA leave and the elimination of her position. Under Sixth Circuit precedent and the facts of this case, the Court adopts the determination of the Report and Recommendation and concludes that this amount of time does not demonstrate a causal connection and thus fails to establish a *prima facie* case of retaliation. *See Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 525 (6th Cir. 2008) ("Where an adverse employment action occurs very close in time after an employer learns of a protected activity, such temporal proximity between the events is significant enough to constitute evidence of a causal connection But where some time elapses . . . the employee must couple temporal proximity with other evidence").

Even if the temporal proximity in this case were sufficient to establish a *prima facie* case of retaliation under the FMLA, the burden would shift to Defendant to articulate a legitimate, nondiscriminatory explanation for the elimination of Plaintiff's position. *Skrjanc v. Great Lakes Power Serv. Co.*, 272 F.3d 309, 315 (6th Cir. 2001). Defendant has met this burden by stating that Plaintiff's position was eliminated pursuant to a reduction in force resulting from the determination that Plaintiff's position was redundant. Plaintiff would thus be required to show that Defendant's legitimate explanation is pretextual. As explained in addressing Plaintiff's disability discrimination claim, Plaintiff cannot make this showing. Plaintiff has not identified any competent evidence tending to indicate that her FMLA leave was considered by Defendant in

eliminating Plaintiff's position. Accordingly, Plaintiff is not entitled to summary judgment on her FMLA retaliation claim. Plaintiff's Motion for Summary Judgment is **DENIED**.

III. Defendant's Motion for Summary Judgment

A. ADA Claim

The Chief Magistrate Judge concluded that Plaintiff could not establish a *prima facie* case of discrimination under the ADA because Defendant did not replace Plaintiff or leave Plaintiff's position open while searching for a replacement. (ECF No. 48, 27–28.) The Report and Recommendation also determined that, given the reduction in force standard, Galambos' alleged statement regarding Plaintiff's FMLA leave is insufficient to create a genuine dispute of material fact because it was unrelated to the decision to eliminate Plaintiff's position. (*Id.* at 29.) Plaintiff has not countered this conclusion.

Further, the Chief Magistrate Judge concluded that even if Plaintiff could establish a *prima facie* case of discrimination under the ADA, Defendant had articulated a legitimate non-discriminatory explanation for the elimination of Plaintiff's position. (ECF No. 48, 29.) The burden then shifts to Plaintiff "to create a genuine issue as to whether the rationale is pretextual." *Ferrari*, 826 F.3d at 895 (quoting *Whitfield v. Tennessee*, 639 F.3d 253, 260 (6th Cir. 2011)). In this regard, the Chief Magistrate Judge rejected Plaintiff's assertion that Defendant's explanation is pretextual because it would be more logical to eliminate another part-time Executive Assistant's position. (ECF No. 48, 30.) Plaintiff makes the same argument at this stage of the litigation, and the Court finds it insufficient because, as the Chief Magistrate Judge concluded, it is entirely speculative and not supported by any facts. Because Plaintiff has failed to establish a *prima facie* case of discrimination, and because Plaintiff has failed to create a genuine issue regarding pretext,

Defendant is entitled to summary judgment on Plaintiff's disability discrimination claim under the ADA.

B. FMLA Claims

1. *FMLA Interference*

The Report and Recommendation recommends summary judgment in favor of Defendant on Plaintiff's FMLA interference claim because Plaintiff has not established that she was denied FMLA benefits as required for the *prima facie* showing. (ECF No. 48, 31.) In her Objections, Plaintiff argues that Defendant interfered with her FMLA rights "when Galambos considered both her serious medical condition and leave from work in a performance review[.]" (ECF No. 49, 9.) As explained above, examining the performance review in question, there is no basis upon which to conclude that Galambos used Plaintiff's medical condition or leave from work as factors in evaluating Plaintiff's work performance or eliminating Plaintiff's position. There is no evidence that Defendant "somehow used the leave against [Plaintiff] and in an unlawful manner[.]" *Wysong v. Dow Chem. Co.*, 503 F.3d 441, 447 (6th Cir. 2007) (quoting *Bradley v. Mary Rutan Hosp.*, 322 F. Supp. 2d 926, 940 (S.D. Ohio 2004)). This is insufficient at the summary judgment stage. Because Plaintiff has not created a genuine issue regarding denial of FMLA benefits, Plaintiff's FMLA interference claim fails as a matter of law. Defendant is entitled to summary judgment on Plaintiff's FMLA interference claim.

2. *FMLA Retaliation*

Finally, the Chief Magistrate Judge determined that Defendant is entitled to summary judgment on Plaintiff's FMLA retaliation claim because the temporal proximity standing alone was insufficient to establish a causal connection between Plaintiff's FMLA leave and the elimination of Plaintiff's position. (ECF No. 48, 31–32.) In her Objections, Plaintiff again relies

on the fact that her position was eliminated nearly four months after she returned from FMLA leave. (ECF No. 49, 11.) As explained above, this length of time alone does not establish—or raise a genuine dispute as to—a causal connection. *See Mickey*, 516 F.3d at 525. Further, Plaintiff's Objections are not responsive to this conclusion. Accordingly, Plaintiff has not established a *prima facie* case of retaliation under the FMLA. Additionally, even if Plaintiff has established a *prima facie* case of FMLA retaliation, Defendant has articulated a legitimate, nondiscriminatory reason for the elimination of Plaintiff's position—that Plaintiff's position was redundant and unnecessary. Plaintiff has not raised a genuine dispute that Defendant's explanation is pretextual. Plaintiff's Objections assert that the elimination of her position rather than other positions is illogical, but this assertion is entirely speculative and, as explained, is not supported by any facts.⁴ Overall, Plaintiff's attempts to raise a genuine dispute as to pretext are conjecture and are insufficient. *See Grizzell v. City of Columbus Div. of Police*, 461 F.3d 711, 724 (6th Cir. 2006) (alteration in original) (“It is well settled that ‘[m]ere personal beliefs, conjecture and speculation are insufficient to support an inference of [] discrimination.’” (quoting *Woythal v. Tenn Corp.*, 112 F.3d 243, 247 (6th Cir. 1997))). Accordingly, Defendant is entitled to summary judgment on Plaintiff's FMLA retaliation claim. Defendant's Motion for Summary Judgment is **GRANTED**.

CONCLUSION

For the reasons provided above, the Court **ADOPTS** the Chief Magistrate Judge's Report and Recommendation. Plaintiff's Motion for Summary Judgment is **DENIED**. Defendant's

⁴ As explained above, the Court similarly rejects Plaintiff's attempt to raise a genuine dispute as to pretext by arguing that Defendant violated its staffing effectiveness policy.

Motion for Summary Judgment is **GRANTED**. Plaintiff's Complaint is **DISMISSED** with prejudice.⁵

IT IS SO ORDERED this 23rd day of August, 2021.

s/John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
United States District Judge

⁵ In her Objections, Plaintiff asserts reasonable accommodation discrimination under the ADA. (ECF No. 49, 11.) However, in her Complaint, Plaintiff checked the "discriminatory conduct" boxes only for termination of employment and retaliation; Plaintiff left the "[f]ailure to accommodate my disability" box blank. (ECF No. 1, 4.) Accordingly, Plaintiff cannot now assert a claim for failure to accommodate under the ADA.

Appendix F

Letter from Patricia J. Elder, Senior Case Manager, United States Court of Appeals for the Sixth
Circuit

(Mar. 8, 2023) 36a

(19 of 19)

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Deborah S. Hunt
Clerk

Tel. (513) 564-7000



Filed: March 08, 2023

Ms. Brenda Kay Leavy
5036 Overview Ridge Cove
Memphis, TN 38141

Re: Case No. 21-5882, *Brenda Leavy v. Federal Express Corporation*.
Originating Case No. 2:19-cv-02705

Dear Ms. Leavy:

Enclosed please find, unfiled, your motion to vacate this Court's December 20, 2022 order. Please be advised that your case is closed and no further action will be forthcoming from this Court.

Sincerely yours,

s/Patricia J. Elder
Senior Case Manager
Direct Dial No. 513-564-7034

cc: Mr. Barak Jonathan Babcock

Appendix G

Letter from Kelly L. Stephens, Clerk of Court, United States Court of Appeals for the Sixth
Circuit

(May 8, 2024) 37a–38a

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
501 POTTER STEWART U.S. COURTHOUSE
100 EAST FIFTH STREET
CINCINNATI, OHIO 45202-3988

Kelly L. Stephens
Clerk

513-564-7070

May 8, 2024

Ms. Brenda Kay Leavy
5036 Overview Ridge Cove
Memphis, TN 38141

RE: Case No. 21-5882, *Brenda Leavy v. Federal Express Corporation*
Originating Case No. 2:19-cv-02705

Dear Ms. Leavy:

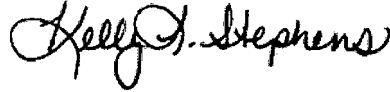
My office has received your "Emergency Motion for Order Requiring Clerk to File Plaintiff-Appellant's Motions" submitted via email on April 16, 2023. I write briefly to explain that I believe my office has handled your previous filings in good faith and without intent to frustrate you, and that we did so consistently with the Court's rules on how a case proceeds after the issuance of a mandate. Nonetheless, I will refer your motion to a three-judge panel for review and decision.

When all appellate court relief has been exhausted following a decision on petition for rehearing of a decision (or the expiration of the time for filing thereof), a formal mandate issues with a copy of the judgment, court's opinion, and any direction about costs. FRAP 41(a). "A mandate is the document by which this court relinquishes jurisdiction and authorizes the originating court or agency to enforce this court's judgment." 6 Cir. I.O.P. 41(a)(1). A mandate remains in place unless recalled. FRAP 41, 6 Cir. R. 41, 6 Cir. I.O.P. 41.

Returning a filing not contemplated by the authorities cited above after a mandate has issued is not a rejection as to form. It is rather a reflection that the case is considered closed and final, and that no action has occurred recalling this Court's mandate so that it may entertain further motions or requests for relief. Thus, you were advised "[s]o long as your case remains closed and mandated, additional filings will not be accepted." Letter from Patricia Elder, April 11, 2024.

However, in light of your repeated concerns, your emergency motion will be treated similarly to a request for reconsideration of a clerk's order pursuant to 6 Cir. R. 45(c) and submitted to the Court for review.

Sincerely,

A handwritten signature in black ink, appearing to read "Kelly L. Stephens". The signature is fluid and cursive, with the first name "Kelly" being more prominent.

/s/ Kelly L. Stephens
Clerk of Court

Cc: Mr. Barak Jonathan Babcock

Appendix H

Completed Aetna Leave of Absence Medical Certification of Dr. Lee Schwartzberg,
R.39-9, PageID 443–449

(Mar. 27, 2018) 39a–45a

aetna**Leave of Absence Certification:
Employee's Serious Health Condition¹**

Return completed form to: Aetna Life Insurance Company
 PO Box 14560
 Lexington, KY 40512-4560
 Fax #: 1-866-667-1987

SECTION I: For completion by the EMPLOYEE**INSTRUCTIONS to the EMPLOYEE:**

Please complete Section I before giving this form to your medical provider. The FMLA permits an employer² to require that you submit a timely, complete, and sufficient medical certification to support your request for FMLA leave due to your own serious health condition.

If requested by your employer, completion of this certification is needed for you to get or keep the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a delay or denial of your FMLA request. 20 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form. 29 C.F.R. § 825.305(b).

Your Last Name: LEAVY First Name: BRENDA Middle Initial: K Date of Birth: [REDACTED]
 Employer Name: FedEx Corporation Job Title: Executive Admin. Asst.

Job Description & Essential Job Functions (Please describe with details):

Assist Staff Vice President of Human Resources

How many hours are you scheduled to work each week? 40

Please circle your scheduled work days: SAT SUN MON TUE WED THUR FRI

If your schedule varies each week, please check here: ☐

On the days that you work, are you scheduled to work the same number of hours each day? ☒ Yes ☐ No

What time are you scheduled to begin and end your work day? Begin 8:30am End 5:00pm

Are you paid overtime if you work more than 40 hours in a week? ☐ Yes ☒ No

What is the reason for your FMLA request?

☒ Employee's serious health condition (other than pregnancy)

☐ Pregnancy/Childbirth - Estimated Date of Delivery: _____

Employee Signature Brenda Leavy

Date 3-22-18

¹ This form may be used for certification of leave under the federal Family and Medical Leave Act (FMLA) as well as state leaves and employer's company leaves.

² Reference to your employer extends to Aetna in its capacity as your employer's third party administrator.

SECTION II: For Completion by the HEALTH CARE PROVIDER**INSTRUCTIONS to the HEALTH CARE PROVIDER:**

Your patient, referred to here as "the employee," has requested leave under the FMLA. Please answer all applicable sections fully and completely. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "as medically necessary," "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Please limit your responses to the condition for which the employee is seeking leave, and be sure to sign the form on the last page.

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information" as defined by GINA includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Employee's Name: Brenda Leavy

Provider's name and business address: Lee Schwartzberg, MD The West Clinic
7945 Wolf River Blvd
Germantown, TN 38138

Type of practice / Medical specialty: Oncology

Telephone: (901) 683-0055 Fax: ()

PART A: MEDICAL FACTS

1. Please provide the following information regarding the employee's medical condition.

Approximate date condition commenced: 2/6/18

Probable duration of condition: lifetime surveillance

Mark below as applicable:

Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?

☐ Yes ☒ No

If yes, dates of admission and duration of stay:

Dates you treated the patient for the condition requiring leave: 2/6/18, 2/21/18, 3/1/18, 3/14/18, 3/22/18

Most recent date of treatment by you or another provider: 3/23/18

Will the patient need to have treatment visits at least twice per year due to the condition? ☒ Yes ☐ No

Will the patient need to be treated again in the future for this condition? ☒ Yes ☐ No If yes, please provide dates of any such treatments that have been scheduled, or, if no future treatments have been scheduled, please indicate when and how often they will be needed.

5 x week (Mon-Fri-) lasting 2-8 hrs / 1 day each

Has medication, other than over-the-counter medication, been prescribed? ☒ Yes ☐ No

Has the patient been referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)? ☐ Yes ☒ No

- 2 Is the medical condition pregnancy? ☐ Yes ☒ No

If yes, expected delivery date: _____

3. Use the information provided by the employer, if available, to answer these questions. If the employer has not provided a list of the employee's essential functions or a job description, please answer these questions based upon the employee's own description of his or her job functions.

Is the employee unable to perform any of his or her job functions due to the condition? ☒ Yes ☐ No

If yes, identify the job functions the employee is unable to perform:

Unable to work

4. If the treating provider is a chiropractor, does the treatment being provided to the employee consist of manual manipulation of the spine to correct a subluxation as demonstrated by an X-ray? ☐ Yes ☒ No U/A
5. Describe other relevant medical facts, if any, related to the patient's condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

Right Breast Cancer, Needs to remain off work while completing Radiation treatments.

PART B: AMOUNT AND NATURE OF LEAVE NEEDED

6. When will the employee be incapacitated from work? (Please select and complete one of the options below.)

☒ From 4/3/18 through 5/27/18, with an expected return to work on 5/28/18.

(If the employee will also need to be absent from work intermittently due to his or her condition before or after this time period, please complete question 7. If the employee will need to work a consistently reduced number of hours due to his or her condition before or after this time period, please complete question 8.)

☐ Beginning on _____ and lasting for the following period of time: _____.

(If the employee will also need to be absent from work intermittently due to his or her condition before or after this time period, please complete question 7. If the employee will need to work a consistently reduced number of hours due to his or her condition before or after this time period, please complete question 8.)

☐ The employee will need to be absent from work intermittently, not for a specific timeframe. (Please complete question 7.)

☐ The employee can continue working, but will need to work a consistently reduced number of hours per day or per week. (Please complete question 8.)

FML Cert-E01

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FD002310000140000000100J01115A 100P

7. If the employee will need to be absent intermittently, please provide the following information. The employee's work schedule may be available on page 1 for reference.

N/A How long will the employee be affected by this condition? _____

Will the condition cause episodic or unpredictable flare-ups periodically requiring the employee from performing his or her job functions? ☐ Yes ☐ No

Is it medically necessary for the employee to be absent from work during these flare-ups? ☐ Yes ☐ No

If yes, please explain: _____

If you answered yes to both prior questions, please estimate the frequency of flare-ups and the duration of related incapacity that the employee may experience over the next 6 months, based on the employee's medical history and your knowledge of the medical condition (e.g., 1 episode every 3 months last for 2 days):

FREQUENCY: _____ time(s) every: _____ ☐ week(s) _____ ☐ month(s)

(Example: 1 time(s) every: _____ ☐ week(s) 3 ☒ month(s) to indicate "once every 3 months")

DURATION: _____ ☐ hour(s) _____ ☐ day(s) per episode

(Example: _____ ☐ hour(s) 2 ☒ day(s) per episode to indicate "2 days per episode")

Will intermittent absences be required due to follow-up or other medical appointments? ☐ Yes ☐ No

If yes, please estimate the frequency of these appointments and the duration of absence required for these appointments, including the time it may take for the employee to travel to the appointments (e.g., 1 time every 3 months lasting 2 hours):

FREQUENCY: _____ time(s) every: _____ ☐ week(s) _____ ☐ month(s)

(Example: 1 time(s) every: _____ ☐ week(s) 3 ☒ month(s) to indicate "once every 3 months")

DURATION: _____ ☐ hour(s) _____ ☐ day(s) per appointment

(Example: 2 ☒ hour(s) _____ ☐ day(s) per appointment to indicate "2 hours per appointment")

8. If the employee's condition will require him or her to work a reduced work schedule, please provide the following information. The employee's regular work schedule may be available on page 1 for reference.

N/A Is it medically necessary for the employee to be absent from work during these flare-ups? ☐ Yes ☐ No

If yes, please explain: _____

How long will the employee be affected by this condition? _____

How many hours will the employee be able to work per day? _____

MON _____ TUES _____ WED _____ THURS _____ FRI _____ SAT _____ SUN _____

OR: how many hours will the employee be able to work per week? _____

What medical restrictions will the employee have, if any, while working these reduced hours: _____

When will the employee be able to resume his or her regular work schedule? _____

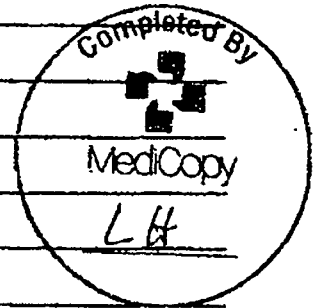
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LEAVY WEST RECORDS0166

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

P/A



Signature of Health Care Provider

Lee Schwartzberg, MD

Date

3/27/18



PO Box 14560
Lexington, KY 40512-4560

Phone: 1-800-757-0207
Fax: 1-866-667-1987

April 2, 2018

BRENDA LEAVY

Dear Brenda K Leavy:

Good news - your claim is approved

Your intermittent claim (claim # [REDACTED]) your own health condition is approved for you to be out of work from time to time, from March 16, 2018 through June 13, 2018.

You're eligible for job protection under the Federal leave law listed below:

About your leave(s)

Federal Family and Medical Leave Act (FMLA)

Under FMLA, eligible employees can take up to 12 weeks of unpaid leave in a 12-month period for the following reasons:

- Because you have a serious health condition that keeps you from doing your job
- Caring for a child, spouse, or parent with a serious health condition
- Birth of a child
- Placement of a child for adoption or foster care
- To deal with certain arrangements when your spouse, son, daughter, or parent is serving in the military and deployed to a foreign country

A "child" includes a biological child, adopted child, or foster child, as well as a child you're acting in a parent-like role for. You can take FMLA to care for a child with a serious health condition as long as they're younger than 18 years old. You may be able to take FMLA to care for a child 18 or older, if they have a disability that makes them unable to care for themselves.

If you're caring for a covered service member with a serious injury or illness and you're that person's spouse, son, daughter, parent or next of kin, you can take up to 26 weeks of unpaid leave in a 12-month period.

You should tell us and your employer that you'll be out of work 30 days in advance. If you don't know that far in advance, let both of us know as soon as possible.

Here's what this means to you

You can take time off as medically necessary for [REDACTED] 953. If you need to take time off, follow these steps:

1. Let your manager know that you're going to be out
2. Call us and tell us what day(s) or times you need to take off

It's important that you tell us when you take time off as soon as you can, or the time requested may be denied. Usually, if you can return to work you should be able to report your time off to us on the same day. Make sure you review FedEx Corporation's policy about when to report time off. Also, the time that you take off has to fall within your approved time of as medically necessary. If the time off falls outside of this, you'll need to let us know why you need the extra time.

If you need to be out of work from time to time later than June 13, 2018, make sure you let us know.

- Make sure that you keep your manager up to date on the days you'll be out of work.
- Make sure you talk to your manager and to us if you want to make any changes to your leave.

We're here to help you

For questions about this letter or your claim, you can call us at **1-800-757-0207** or visit us at **www.aetnadisability.com**.

Sincerely,
Katherine Lee
Care Management Associate
Extension 8609003388

Enclosure:

Appendix I

Relevant Excerpt from FedEx's District-Court Summary-Judgment Memorandum Characterizing
Petitioner's Condition as Temporary..... 46a

Tire & Rubber Co., 932 F.2d 510, 517 (6th Cir. 1991). It is the first and fifth elements that Leavy cannot prove.

1. Leavy's temporary condition was not substantially limiting a major life activity.

Similar to the plaintiff in *Alderdice v. American Health Holding, Inc.*, 118 F.Supp.2d 856 (S.D. Ohio 2000), Leavy's temporary condition is not substantially limiting under the factors enumerated in 29 C.F.R. § 1630.2(j)(2). As part of her *prima facie* case, Leavy must demonstrate she was disabled within the meaning of the ADA statute. *Alderdice*, 118 F.Supp.2d at 863. A disability within the meaning of the ADA, is "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; . . . or being regarded as having such impairment." *Id.* (quoting 42 U.S.C. § 12102(2)). The term "substantially limits" means an inability to perform or a significant restriction on the ability to perform as compared to the average person in the general population. *Id.* (citing *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 633 (6th Cir. 1998); 29 C.F.R. § 1630.2(j)(1)). "Major life activities include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.* (quoting 29 C.F.R. § 1630.2(j)(1)). Whether Leavy's breast cancer is a qualifying disability under the ADA is an individualized inquiry to be determined on a case-by-case basis. *Id.* (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139, 2142, 144 L.Ed.2d 450 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 119 S.Ct. 2162, 2169, 144 L.Ed.2d 518 (1999); *Bragdon v. Abbott*, 524 U.S. 624, 641-642, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998)).

There is no doubt Leavy's breast cancer constituted a physical impairment, and FedEx is not arguing that cancer can never be a disability for purposes of an ADA claim. But in order for Leavy to prove her cancer was a disability, she must also show that her physical impairment substantially limited a major life activity. *Alderdice*, 118 F.Supp.2d 856, 863. In determining whether an impairment substantially limits a major life activity, the Court must consider: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long-term

Appendix J

Relevant Excerpt from FedEx's Sixth Circuit Appellee Brief Conceding Petitioner's Disability
for Purposes of Appeal..... 47a



motions.”) However, the Court chose in this case to proceed with its analysis of the merits notwithstanding her failure. Thus, this Court does not need to address Ms. Leavy’s argument that she should have been held to a different standard because all of Ms. Leavy’s claims were analyzed on the merits.

C. The District Court Correctly Granted Summary Judgment and Dismissed Ms. Leavy’s ADA Discrimination Claim.

The District Court correctly dismissed Ms. Leavy’s ADA claim. Ms. Leavy asserts that District Court’s Order is erroneous because the District Court: (1) did not consider her cancer a disability; (2) applied an erroneous heightened standard for a reduction in force case; and (3) failed to consider her failure to accommodate claim. These arguments are unpersuasive.

1. The District Court determined that Ms. Leavy was disabled.

Contrary to Ms. Leavy’s arguments on appeal, the District Court determined that her cancer, which was in remission at the time of her position elimination, qualified as a disability under the ADA. *See Order at PageID 650* (determining that Ms. Leavy satisfied the first four elements of her *prima facie* case including that she is disabled, otherwise qualified for the position and that FedEx knew of her disability.) FedEx concedes for purposes of this appeal that Ms. Leavy was disabled under the ADA.

2. Ms. Leavy’s claim fails under either standard applied.

Ms. Leavy argues that the District Court applied the wrong standard when