No. 25-

IN THE

Supreme Court of the United States

TONYA C. HUBER,

Petitioner,

v.

WESTAR FOODS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ALEXIS S. MULLANEY
FIEDLER LAW FIRM
17330 Wright Street,
Suite 102
Omaha, NE 68130

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
Box 353020
Seattle, WA 98195
(206) 660-8845
schnapp@uw.edu

Counsel for Petitioner

120590

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. In an employment action in which the plaintiff alleges the defendant engaged in unlawful intentional discrimination or retaliation, if the defendant moves for summary judgment, is a plaintiff who lacks "direct evidence" of retaliatory intent required "to establish retaliatory intent ... through the three-part *McDonnell Douglas* burden shifting framework," including establishing a prima facie case and demonstrating that the defendant's proffered explanation was a pretext?

2. Under the *McDonnell Douglas* burden shifting framework, if the defendant seeking summary judgment has articulated its claimed legitimate reason for the disputed employment action, is the plaintiff nonetheless still required to establish a prima facie case of unlawful motive?

PARTIES

The parties are Tonya C. Huber and Westar Foods, Inc.

DIRECTLY RELATED CASES

Huber v. Westar Foods, Inc., No. 23-1087, United States Court of Appeals for the Eighth Circuit, judgment entered May 30, 2025

Huber v. Westar Foods, Inc., No 8:CV229, United States District Court for the District of Nebraska, judgment entered January 17, 2023

Petitioner Tonya C. Huber respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on May 30, 2025.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Page

Page

Page

Page

Page

Page

Page

Page

Statutes and Rules

OPINIONS BELOW

The May 30, 2025, en banc opinion of the court of appeals, which is reported at 139 F.4th 615, is set out at pp. 1a-28a of the Appendix. The July 1, 2024 opinion of the court of appeals, which is reported at 106 F.4th 725, is set out at pp. 29a-71a of the Appendix. The January 17, 2023, decision of the district court, which is unofficially reported at 2023 WL 202295, is set out at pp. 72a-90a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on May 30, 2025. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

STATUTORY PROVISIONS INVOLVED

Section 102 of the Americans with Disabilities Act, 42 U.S.C. §12112(a), provides: "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

Section 105 of the Family and Medical Leave Act, 29 U.S.C. § 2615(a), provides

(a) Interference with rights

(1) Exercise of rights

It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination

It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

INTRODUCTION

Half a century ago, in *McDonnell Douglas Corp. v. Green*, this Court suggested a framework to be used by judges in bench trials of claims under Title VII of the Civil Rights Act of 1964. 411 U.S. 792 (1973). Bench trials of Title VII claims have long since largely disappeared, replaced by jury trials and pre-trial motions for summary judgment. Over the ensuing decades vexing problems have arisen in applying *McDonnell Douglas* in the resolution of summary judgment motions. Those difficulties affect not only litigation under Title VII, but also claims under the numerous other federal employment statutes to which *McDonnell Douglas* is today applied.

As Justice Thomas noted in his dissenting opinion in *Hittle v. City of Stockton*, 145 S.Ct. 759, 761-63 (2025)

(dissenting opinion), there has been an unprecedented chorus of opinions by lower court judges pointing to the problems that have arisen in applying *McDonnell Douglas* at summary judgment. Those opinions reflect decades of experience on the part of lower courts attempting to apply *McDonnell Douglas* in literally tens of thousands of cases. One of those opinions was written by then-Judge Kavanaugh, and several were written or joined by then-Judge Gorsuch.

The problems detailed by those lower court opinions have, unsurprisingly, given rise to deeply embedded circuit conflicts regarding *McDonnell Douglas*. The most fundamental conflict is regarding whether (absent "direct evidence") courts and litigants should be *required* to apply *McDonnell Douglas* at summary judgment, or ought to be permitted instead to utilize ordinary summary judgment standards, which are satisfied if there is a genuine issue of fact as to whether a defendant acted with an unlawful motive. Four circuits hold that utilization of *McDonnell Douglas*, although permissible, is not mandatory. Nine other circuits insist that utilization of *McDonnell Douglas* is mandatory in resolving a summary judgment motion unless the plaintiff has "direct evidence."

With regard to the meaning of *McDonnell Douglas* itself, the District of Columbia Circuit 17 years ago concluded, in an opinion by then-Judge Kavanaugh, that courts deciding summary judgment motions should *not* address whether the plaintiff had established a prima facie case (an element of the original *McDonnell Douglas* framework), if (as is essentially always the case) the defendant has offered a legitimate explanation for its actions. *Brady v. Office of Sergeant at Arms*, 520 F.3d

490, 493-94 (D.C. Cir. 2008). But the Fifth Circuit has emphatically rejected *Brady*, and the other circuits are divided about whether they should continue to address the existence of a prima facie case in that circumstance.

Whether *McDonnell Douglas* must be applied at summary judgment, and whether *Brady* is the correct application of that decision, are matters of enormous practical importance. Federal and state courts cite and apply *McDonnell Douglas* in about 2,000 cases every year. This Court has never held that *McDonnell Douglas* must be applied at summary judgment, and has not squarely addressed the *Brady* issue.

This case presents both of these recurring issues. The court of appeals held that, without direct evidence, the only way Huber could establish unlawful motivation was under *McDonnell Douglas*. 10a, 13a. And the court below insisted that Huber was required to establish a prima facie case (and had not done so regarding retaliation), even though the defendant had articulated a claimed lawful reason for its actions. 11a.

At the oral argument in *Ames*, after noting that the Court has never addressed the applicability of *McDonnell Douglas* to summary judgment, Justice Gorsuch commented, "[N]obody's asked us to do anything about it in this case." (Tr. 15). Petitioner is asking the Court to do something about it in the instant case. In his concurring opinion in *Ames v. Ohio Dep't of Youth Servs.*, Justice Thomas commented that "[i]n a case where that issue is squarely before us, I would consider whether the [*McDonnell Douglas*] framework should be used for that [summary judgment] purpose." 145 S.Ct. 1540, 1553

(2005) (concurring opinion). The issue is squarely before the Court here. The Court in *Ames* "assume[d] without deciding that the *McDonnell Douglas* framework applies at the summary-judgment stage of litigation." 145 S.Ct. at 1545 n.2. This is the case in which to address the correctness of that assumption.

STATEMENT OF THE CASE

Legal Background

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), established a framework for determining at bench trials of Title VII discrimination claims whether the defendant acted with an unlawful motive. The plaintiff must establish a prima facie case. If the trial judge believes the plaintiff's evidence, and concludes that a prima facie case exists, the defendant must articulate a legitimate, non-discriminatory reason for the disputed adverse employment action. If the employer does so, the burden of proof is on the plaintiff to show that the proffered reason was a pretext for discrimination. 411 U.S. at 802-03.

Subsequent decisions of this Court have established several significant limitations on the applicability of *McDonnell Douglas*. First, a plaintiff is not required to plead the existence of a prima facie case. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511-12 (2002). In the wake of *Swierkiewicz*, the lower courts have generally not applied *McDonnell Douglas* at the pleading stage. Second, *Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1983), held that when at trial a defendant articulates a legitimate discriminatory reason for the disputed employment

action, it is irrelevant whether the plaintiff established a prima facie case. The remaining issue is only whether the defendant engaged in unlawful discrimination. In the wake of *Aikens*, the lower courts do not at least ordinarily apply *McDonnell Douglas* in reviewing a jury verdict. Third, *McDonnell Douglas* does not apply if the plaintiff offers "direct evidence" of discrimination. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985).

At the time *McDonnell Douglas* was decided, Title VII only provided for equitable relief, and Title VII claims were adjudicated at bench trials. In 1991 Title VII was amended to authorize damages and jury trials; as a result, bench trials of Title VII claims have virtually disappeared. Since the enactment of Title VII, Congress has adopted a number of other employment statutes which provide for, and are usually adjudicated at, jury trials. The lower courts have generally assumed that *McDonnell Douglas* applies to claims under these other statutes to the same degree that it would apply to Title VII. Because of *Swierkiewicz* and *Aikens*, application of *McDonnell Douglas* is today largely limited to the resolution of summary judgment motions.

Factual Background

Tonya Huber has Type II insulin-dependent diabetes. In 2019 she had a severe hypoglycemic attack, which led to her dismissal, and ultimately to this litigation.

Huber at the time worked as the manager of one of several restaurants owned by Westar. Her duties included being at the restaurant at 5:00 a.m. to open it early in the morning. But on the morning of December 20, 2019,

after Huber awoke at 3:30 a.m., she began to experience a severe hypoglycemic attack. She was vomiting, in a stupor, disoriented, and (when she later attempted to speak) intermittently incoherent. After several hours, realizing that she was dangerously ill, Huber managed to drive herself three miles to her doctor's office. The doctor wanted Huber to go to the emergency room, but Huber was unwilling to do so. So Huber remained at the doctor's office for the rest of the day, on an IV drip and sedated. 3a, 31a-32a.

During the course of the day, Huber spoke by phone to her adult son and to her boyfriend. Both described her as incoherent. At the end of the day, the doctor's office refused to permit Huber to drive herself home. Huber telephoned her boyfriend for a ride, but she was still too impaired to be able to explain where she was. The boyfriend was able to use a tracking device on Huber's phone to locate her. He drove Huber home, where—still sedated and seriously ill—she slept until the next morning. 3a, 32a, 33a, 75a.

In the meanwhile, Westar learned around mid-morning that Huber had not come to work. Huber's supervisor, Cindy Kelchen, was unable to reach Huber by phone, so she called Huber's emergency contact, Huber's son. The son explained that Huber was seriously ill and had gone to the doctor. 3a, 32a, 75a.

At 7:45 a.m. the next day, as soon as she awoke, Huber called Kelchen to explain that she was very ill and still could not come to work. Huber sent Kelchen at the time a written note from Huber's doctor stating that she was sick and would need time off. Kelchen angrily demanded

to know why Huber had not called the day before. Huber attempted to explain her medical condition, and urged Kelchen to Google that condition to understand why it had prevented her from calling in. The doctor's note which Huber gave to Kelchen contained the telephone number of the doctor who had personally treated Huber the day before. Kelchen was shouting so loudly on the phone call that she could be heard by Huber's boyfriend, who was in the next room. 3a-4a, 33a, 75a-76a.

Within a few minutes after the call was completed, Kelchen spoke with Westar's president, and a decision was made to fire Huber. Huber, for several days unaware of that decision, repeatedly asked the company's human resources officials to send her the forms to apply for sick leave, but the forms were never sent. On December 26, the day after Christmas, while Huber was still out sick, Westar emailed Huber a letter notifying her that she had been dismissed. 4a, 34a-35a, 76a.

Proceedings Below

District Court

Huber filed suit in federal court, alleging that she had been fired because she had diabetes, in violation of the Americans with Disabilities Act, and in retaliation because she was seeking sick leave, in violation of the Family and Medical Leave Act.[1] After a period of discovery, Westar moved for summary judgment.

---

1. The complaint also alleged that Westar had violated the FMLA by denying Huber sick leave, and that the alleged discriminatory dismissal violated state law.

There were disputes about several important facts. The parties disagreed about whether Huber had violated company policy when she did not call in on December 20. Company policy required her to call in "if possible," and the parties disagreed about whether it would have been possible for her to call in that day, given her medical condition. With regard to Huber's claim of disability discrimination, Westar asserted that it did not learn that Huber even had diabetes until *after* the decision had been made to fire her. Huber, on the other hand, testified that she had personally explained her medical condition to both Kelchen and another supervisor. Huber asserted that on three occasions she had sought from her supervisors reasonable accommodations to deal with her diabetes, only to be rudely rebuffed. But the supervisors in question either denied those requests had ever been made, or insisted that they did not recall them.

The district court, despite these factual disputes, granted summary judgment. Applying well-established Eighth Circuit precedent, the court held that unless Huber had direct evidence she would have to establish the existence of an unlawful motive under *McDonnell Douglas*. 79a, 82a. The court concluded that the evidence relied on by Huber was not direct evidence. 82a. Because Westar had offered a legitimate reason for terminating Huber, Huber was required under *McDonnell Douglas* to demonstrate Wester's proffered explanation was pretextual. 83a. The district court concluded that the evidence Huber had provided was not sufficient prove pretext. 85a, 89a[2] The court therefore granted summary

2. The district court also granted summary judgment regarding Huber's claim that Wester had denied her medical leave in violation of the FMLA. 86a-89a.

judgment dismissing Huber's FMLA retaliation and ADA discrimination claims. 90a.

Court of Appeals

The panel which first heard the appeal overturned the grant of summary judgment regarding both the ADA discrimination claim and the FMLA retaliation claim. 37a-51a, 56a-58a. The panel held that Huber had adduced sufficient evidence as to both claims to permit the trier of fact to conclude that the defendant's explanation for her dismissal was pretextual. 47a-51a, 56a-58a. The panel reasoned that the question of pretext turned on a number of disputed subsidiary questions of fact. 46a, 50a, 51a n.5. One judge dissented, arguing that under *McDonnell Douglas* summary judgment was properly granted as to both the discrimination and the retaliation claims. 58a-71a.[3]

The Eighth Circuit granted rehearing en banc. By a vote of 6 to 5, the en banc court, applying *McDonnell Douglas*, concluded that Westar was entitled to summary judgment dismissing both Huber's discrimination claim and her retaliation claim, 1a-46a.[4]

The majority held that under Eighth Circuit precedent, Huber was required either to adduce direct evidence or to establish liability under the *McDonnell Douglas* burden-shifting framework. "Without direct evidence, the *only*

3. The panel also unanimously reinstated Huber's FMLA leave-denial claim. 8a.

4. The en banc court overturned the grant of summary judgment regarding Huber's FMLA leave-denial claim. 5a-8a.

option is to establish retaliatory intent circumstantially, though the three-part *McDonnell-Douglas* burden-shifting framework." 10a (emphasis added). "[T]here are two ways to establish the necessary causal link [between Huber's disability and her dismissal]: direct evidence or *McDonnell-Douglas* burden-shifting framework." 13a. The majority concluded that Huber's evidence of retaliation and discrimination was not "direct evidence." 9a-10a, 13a-14a.

Regarding Huber's FMLA retaliation claim, the court held that, even though Westar had proffered an explanation for the disputed dismissal, Huber was still required to establish a prima facie case of retaliation. To do so, the court held, Huber had to adduce evidence that "gives rise to an inference of a retaliatory motive." 11a (quoting *Hite v. Vermeer Mfg. Co.*, 446 F.3d 850 (8th Cir. 2006)). Huber's evidence of retaliation, the court concluded, "d[id] not create an inference that her firing was caused by retaliatory intent." *Ibid* (quoting *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1266 (8th Cir. 1997)). Furthermore, it held, Huber had failed to establish that Westar's proffered reason for firing her was a pretext for retaliation. 11a-12a.

Regarding Huber's ADA discrimination claim, the court held that determination of whether Huber had established a prima face case was unnecessary, because it concluded that Huber had failed to establish the Westar's explanation for firing her was a pretext for discrimination. 14a-21a.

Five members of the en banc court disagreed. The dissent assumed, as the majority had held, that Huber

had to establish liability under *McDonnell Douglas*. 14a-21a. Citing *Aikens*, the dissenters argued that because Westar had articulated its claimed justification for firing Huber, it was irrelevant whether Huber had established a prima facie case. 23a. The dissent insisted that Huber had adduced sufficient evidence of pretext regarding both of her claims, emphasizing that there were material subsidiary disputes of fact, several of which the dissenters believed the majority had resolved in favor of the defendant. 24a-28a.

REASONS FOR GRANTING THE WRIT

I. THERE IS A LONGSTANDING CIRCUIT CONFLICT REGRDING WHETHER, IN THE ABSENCE OF DIRECT EVIDENCE, *MCDONNELL DOUGLAS* MUST BE APPLIED AT SUMMARY JUDGMENT

This case presents a longstanding and deeply embedded conflict regarding claims of unlawful intentional discrimination and retaliation. Nine circuits hold that when summary judgment is sought regarding such a claim, and the plaintiff lacks "direct evidence" of illegal purpose, the motion most be defended and analyzed under the burden-shifting framework of *McDonnell Douglas v. Green*. Four circuits have for decades rejected that rule. Every circuit has long ago taken a position on this issue, which affects the disposition of hundreds of cases a year. Justice Gorsuch noted during the oral argument in *Ames* that there is a difference between the "many circuits" which require proof of pretext (a necessary element under *McDonnell Douglas*) and the "other circuits" which do not. Ames Tr. 29. The time has come to resolve that conflict.

Application of *McDonnell Douglas* to summary judgment regarding claims of discrimination and retaliation has long been required (absent direct evidence) in the First, Second, Third, Fifth, Sixth, Eighth, Tenth, District of Columbia and Federal Circuits.[5] The frequency

---

5. E.g., *O'Horo v. Boston Med. Ctr. Corp.*, 131 F.4th 1, 13 (1st Cir. 2025) ("Direct evidence of discriminatory intent is not required, but where, as here, it is not present, we employ the familiar burden-shifting framework outlined in *McDonnell Douglas Corp. v. Green*...."); *Brown v. Donat*, No. 24-1344-cv, 2025 WL 1430572, at *3 (2d Cir. May 19, 2025) ("[e]mployment discrimination claims brought under Section 1983 are analyzed under the burden-shifting framework for Title VII claims, set forth in *McDonnell Douglas Corp.*..."); *McCrorey v. City of Phila.*, No. 23-2539, 2025 WL 1392164, at *1 (3rd Cir. May 14, 2025) ("[w]e apply *McDonnell Douglas*'s burden-shifting framework when, as here, there is no direct evidence of retaliation"); *Whittington v. Harris County, Tex.*, No. 24-20172, 2025 WL 186495, at *3 (5th Cir. July 7, 2025) ("Whittington brings three race discrimination claims under Title VII. These claims sound in discriminatory termination, retaliation, and hostile work environment. Because Whittington presents no direct evidence of discrimination, we apply the framework of *McDonnell Douglas*...."); *Savel v. The Metrohealth Sys.*, No. 24-4025, 2025 WL 1826674, at *3 (6th Cir. July 2, 2025) ("Savel does not rely on direct evidence of religious discrimination, so the McDonnell Douglas framework applies"); *Pilot v. Duffy*, No. 24-2203, 2025 WL 1902620, at *3 (8th Cir. July 10, 2025) ("[c]laims lacking direct evidence of discrimination or retaliation under either statute are analyzed under the burden-shifting framework from *McDonnell Douglas*...."); *Laber v. Hegseth*, No. 23-3157, 2025 WL 1511795, at *5 (10th Cir. May 28, 2025) ("[a] plaintiff suing under the ADEA **...** may either present direct evidence of the employer's discriminatory intent or circumstantial evidence that creates 'an inference of a discriminatory motive using the tripartite *McDonnell Douglas* burden-shifting analysis.'") (quoting *Markley v. U.S. Bank Nat'l Ass'n*, 59 F.4th 1072, 1081 (10th Cir. 2023)); *Morter v. Hegseth*, No. 23-3157, 2025 WL 2047547, at *6 (D.C. Cir. July 22, 2025) ("[i]n Rehabilitation Act cases, this court applies a three-part burden-shifting framework. See **...** generally *McDonnell*

with which this issue arises, and thus its practical importance, is illustrated by the fact that appellate decisions reiterating this rule have been issued in seven of these nine circuits within the last three months.[6] That *McDonnell Douglas* must be applied in the absence of direct evidence is settled law in those nine circuits.

Five members of this Court have direct experience with this application of *McDonnell Douglas* to summary judgment motions. While serving on a court of appeals or district court, Justices Alito,[7] Sotomayor,[8] Kavanaugh,[9] Gorsuch[10] and Jackson[11] all wrote or joined opinions

---

Douglas....); *Moini v. Granberg*, No. 22-7101, 2024 WL 2106214, at *3 (D.C. Cir. May 1, 2024) ("[a]bsent direct evidence, we assess indirect evidence of racial discrimination under the *McDonnell Douglas* burden-shifting framework"); *Haddon v. Exec. Residence at White House*, 313 F.3d 1352, 1358-60 (Fed. Cir. 2002) (under Government Employees Rights Act, absent direct evidence, *McDonnell Douglas* standard applies).

6. Appellate decisions reiterating this rule were issued since mid-May 2025 in the Second, Third, Fifth, Sixth, Eighth, Tenth and District of Columbia Circuits.

7. E.g., *Showalter v. Univ. of Pittsburgh Med. Ctr.*, 190 F.3d 231, 235 (3d Cir. 1999).

8. E.g., *Demoret v. Zegarelli*, 451 F.3d 140, 151-52 (2d. Cir. 2006).

9. E.g., *Jackson v. Gonzalez*, 496 F.3d 703, 706 (D.C. Cir. 2007) (opinion by Kavanaugh, J.).

10. E.g., *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1195, 1202 (10th Cir. 2008).

11. E.g., *Rochon v. Lynch*, 139 F. Supp. 3d 394, 403-05 (D. D.C. 2014).

that applied *McDonnell Douglas* to summary judgment motions. They were of course required to apply *McDonnell Douglas* by controlling precedents in the circuit in the Second, Third, Tenth and District of Columbia Circuits.

The importance of this issue, and the degree to which it is deeply embedded in circuit precedent, is illustrated by the opinion below. The en banc majority opinion cited 24 Eighth Circuit decisions which hold that, in the absence of direct evidence, summary judgment motions in discrimination or retaliation cases are governed by *McDonnell Douglas*. These cited opinions involved both discrimination and retaliation claims, and arose under Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and section 1981. We set out excerpts from this body of caselaw in an appendix. 91a-97a. In three cases the court of appeals held that the plaintiff had failed to establish a prima facie case. In eighteen cases the court of appeals held that the plaintiff had failed to show pretext. Summary judgment was denied in only three cases.

On the other hand, the Fourth, Seventh, Ninth and Eleventh Circuits for several decades have emphatically rejected the rule that a summary judgment motion regarding a claim of unlawful motive must—in the absence of direct evidence—be defended and analyzed under *McDonnell Douglas*.

The Fourth Circuit has held since at least 2004 that a plaintiff relying on circumstantial evidence need not proceed under the *McDonnell Douglas* burden-shifting paradigm, but may simply argue that his or her circumstantial evidence is sufficient to support a finding of unlawful motivation. That rule dates from the Fourth

Circuit's en banc decision in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284-85 (4th Cir. 2004) (en banc). The Fourth Circuit emphasized the existence of those multiple methods in *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005).

> As we explained in *Hill*, a Title VII plaintiff may "avert summary judgment **...** through *two* avenues of proof." **...** (emphasis added). A plaintiff can survive a motion for summary judgment by presenting **...** circumstantial evidence that raises a genuine issue of material fact as to whether an impermissible factor such as race motivated the employer's adverse employment decision**....** Alternatively, a plaintiff may "proceed under [the *McDonnell Douglas*] 'pretext' framework....

The Fourth Circuit has repeatedly emphasized that *McDonnell Douglas* is only one of the two methods of establishing motive through circumstantial evidence.[12]

> [O]f course, a Title VII plaintiff need not rely on the [*McDonnell Douglas*] burden-shifting framework.... She can also, like a plaintiff in any other type of case, present "direct or circumstantial evidence" to prove her claim.... When that's the case, we "utilize ordinary principles of proof " and ask whether the

12. *McKensie-El v. Am. Sugar Ref., Inc.*, No. 21-1089, 2021 WL 5412341, at *1 (4th Cir. Nov. 19, 2021) (Title VII); *Ali v. BA Architects Eng'rs, PLC*, 832 Fed.Appx. 167, 170 (4th Cir. 2020) (section 1981); *Smyth-Riding v. Scis. and Eng'g Servs.,* LLC, 699 Fed.Appx. 146, 152 (4th Cir. 2017) (retaliation claims); *Arthur v. Pet Dairy*, 593 Fed.Appx. 211, 216 (4th Cir. 2015) (ADEA).

> plaintiff presented evidence of "sufficient probative force" to allow a jury to find for her.

Noonan v. Consolidated Shoe Co., Inc., 84 F.4th 566, 572 n.3 (4th Cir. 2023) (quoting *Spencer v. Va. State Univ.*, 919 F.3d 199, 207 (4th Cir. 2019) and *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 607 (4th Cir. 1999)).

The Seventh Circuit has held for three decades that a plaintiff need not rely on *McDonnell Douglas*. In *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736-37 (7th Cir. 1994), the court of appeals held that a plaintiff can succeed instead by adducing evidence that establishes a "convincing mosaic" of unlawful motive. *Ortiz v. Werner Enters. Inc.*, 834 F.3d 760 (7th Cir. 2016), explained that the Circuit's convincing mosaic standard requires only sufficient evidence to permit a reasonable jury to find the existence of an unlawful motive.

> That legal standard **...** is simply whether the evidence would permit a reasonable factfinder to conclude that the plaintiff 's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action. Evidence must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself—or whether just the "direct" evidence does so, or the "indirect" evidence.

Ortiz, the Seventh Circuit has since reiterated, makes clear that *McDonnell Douglas* is not the only means of establishing liability.[13]

---

13. *Mitchell v. Exxon Mobil Corp.*, No. 24-2823, 2025 WL 1924526, at *6 (7th Cir. July 14, 2025) ("a plaintiff does not have

The Ninth Circuit held in 2002 that that "nothing compels the parties to invoke the *McDonnell Douglas* presumption.... Evidence can be in the form of the *McDonnell Douglas* prima facie case, or other sufficient evidence—direct or circumstantial—of discriminatory intent...." *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855 (9th Cir. 2002), *aff'd sub nom. Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). Two years later that court of appeals announced the general rule that has since been the law in that circuit.

> Our decision in *Costa* establishes **...** "nothing compels the parties to invoke the *McDonnell Douglas* presumption." **...** Rather, when responding to a summary judgment motion, the plaintiff is presented with a choice regarding how to establish his or her case. McGinest may proceed by using the *McDonnell Douglas* framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated [the defendant].

---

to satisfy the *McDonnell Douglas* framework to succeed on a discrimination claim under Title VII"); *Arnold v. United Airlines, Inc.*, No. 24-2179, 2025 WL 1778643, at *3 (7th Cir. June 27, 2025) ("[o]ur case law recognizes two approaches for establishing such discrimination. Under the "holistic" approach, explicitly acknowledged in *Ortiz v. Werner Enterprises, Inc.*, ... we "look at the evidence in the aggregate to determine whether it allows an inference of prohibited discrimination." **...** Under the alternate route, a plaintiff can present her case by relying on the burden-shifting framework first enunciated in *McDonnell Douglas*...."); *Singmuongthong v. Bowen*, 77 F.4th 503, 507-08 (7th Cir. 2023) ("[a]lthough the *McDonnell-Douglas* test is one means of proving discrimination, it is not the only means of doing so").

McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004) (quoting *Costa*, 299 F.3d at 855) (footnotes omitted). Since 2004 the Ninth Circuit has consistently quoted and applied *McGinest* in a large number and wide variety of cases. *Morris v. W. Hayden Ests. First Addition Homeowners Ass'n, Inc.*, 104 F.4th 1128, 1140 (9th Cir. 2024) (Fair Housing Act); *Opara v. Yellen*, 57 F.4th 709, 721-22 (9th Cir. 2023) (ADEA and Title VII); *Metoyer v. Chassman*, 504 F.3d 919, 931 (9th Cir. 2007) (section 1981); *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1158 (9th Cir. 2013) (ADA),

In 2011 the Eleventh Circuit adopted the Seventh Circuit convincing mosaic standard.

> [E]stablishing the elements of the *McDonnell Douglas* framework is not, and never was intended to be, the sine qua non for a plaintiff to survive a summary judgment motion in an employment discrimination case....
>
> Rather, the plaintiff will always survive summary judgment if he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent.... A triable issue of fact exists if the record, viewed in a light most favorable to the plaintiff, presents "a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker."

Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328 (11th Cir. 2011) (footnote omitted) (quoting *Silverman v. Bd. of Educ. of City of Chicago*, 637 F.3d 729, 734 (7th

Cir. 2011)). The Eleventh Circuit has since made clear that its convincing mosaic standard requires only enough evidence to permit a reasonable jury to find the existence of an unlawful motive.

> *McDonnell Douglas* is "only one method by which the plaintiff can prove discrimination by circumstantial evidence." **...** A plaintiff who cannot satisfy this framework may still be able to prove her case with what we have sometimes called a "convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker."
>
> A "convincing mosaic" of circumstantial evidence is simply enough evidence for a reasonable factfinder to infer intentional discrimination in an employment action—the ultimate inquiry in a discrimination lawsuit....

Tynes v. Fla. Dep't of Juv. Justice, 88 F.4th 939, 946 (11th Cir. 2023) (quoting *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 768 n.3 (11th Cir. 2005) and *Smith v. Lockheed-Martin*).

> For decades we have explained that the *McDonnell Douglas* framework "is not the exclusive means" by which an employee can prove discrimination with circumstantial evidence....
>
> Without relying on the *McDonnell Douglas* framework, an employee may prove retaliation

> with any circumstantial evidence that creates a reasonable inference of retaliatory intent.

Berry v. Crestwood Healthcare LP, 84 F.4th 1300, 1310 (11th Cir. 2023) (quoting *Lee v. Russell County Bd of Education*, 684 F.2d 769, 773 (11th Cir. 1982)); see *Brown v. Jefferson Cty. Sheriff's Dep't*, 806 Fed.Appx. 698, 701 n.2 (11th Cir. 2020) ("[t]he *McDonnell Douglas* framework is not the only way to prove a claim of discrimination....); *Lewis v. City of Kennesaw*, 504 Fed.Appx. 880, 882 (11th Cir. 2013) ("[t]he *McDonnell Douglas* framework is not, however, the only way to use circumstantial evidence to survive a motion for summary judgment...."); *Oirya v. Auburn Univ.*, 831 Fed.Appx. 462, 464 (11th Cir. 2020) ("establishing the elements of the McDonnell Douglas framework is not the only way to survive summary judgment in an employment discrimination case").

In *Lee v. Safe-Dry Carpet and Upholstery*, No. 20-14275, 2021 WL 3829028, at *3 (11th Cir Aug. 27, 2021), the Eleventh Circuit reiterated this longstanding circuit precedent. "The *McDonnell Douglas* framework is *not the only option* for a plaintiff relying on circumstantial evidence to withstand a motion for summary judgment." (Emphasis added). That is in haec verba precisely the opposite of the Eighth Circuit standard applied in this case. "Without direct evidence, [Huber's] *only option* is to establish retaliatory intent circumstantially through the three-part *McDonnell-Douglas* burden—shifting framework." 10a (emphasis added).

II. THERE IS A LONGSTANDING CIRCUIT CONFLICT REGARDING WHETHER *AIKENS* SHOULD BE APPPLIED AT SUMMARY JUDGMENT

Aikens held in the context of a bench trial that once a defendant has put forward a claimed legitimate justification for the employment action in question, whether the plaintiff established a prima facie case is irrelevant, and the court should proceed to decide whether the plaintiff has proven discrimination. 460 U.S. at 724-25. The lower courts have consistently applied *Aikens* to jury trials as well as bench trials, but disagree as to whether *Aikens* should be applied at summary judgment.

The District of Columbia Circuit, most notably in an opinion by then-Judge Kavanagh, has repeatedly held that *Aikens* must be applied at summary judgment. *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 493-94 (D.C. Cir. 2008). But the Fourth, Fifth and (in an opinion by then-Judge Gorsuch) Tenth Circuits have expressly rejected *Brady*. The Seventh Circuit takes an intermediate position. The remaining circuits, including the Eighth Circuit, routinely decide whether the plaintiff established a prima facie case without discussing how that could be consistent with *Aikens*. Justice Thomas noted this conflict in his dissent in *Hittle*. 145 S.Ct. at 759. Several district courts have also described the conflict.[14]

---

14. *Pritchard v. Metro. Wash. Airports Auth.*, No. 1:18-cv-1432, 2019 WL 5698660, at *6 (E.D. Va. Nov. 4, 2019) ("see also *Pepper v. Precision Valve Corp.*, ... (4th Cir. 2013) (declining to adopt the rule from *Brady*"); *Lamb v. Spencer*, No. PX-16-2705, 2018 WL 6434512, at *6 n.8 (D. Md. Dec. 7, 2018) ("the Fourth Circuit has expressly declined to adopt the holding of *Brady*. *Pepper v. Precision Valve*

In *Brady*, then-Judge Kavanaugh spelled out why the holding in *Aikens* is applicable at summary judgment.

> [B]y the time the district court considers an employer's motion for summary judgment ... , the employer ordinarily will have asserted a legitimate, non-discriminatory reason for the challenged decision.... That's important because.... [a]s the Supreme Court explained a generation ago in *Aikens*: "Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant...." The *Aikens* principle applies, moreover, to summary judgment as well as trial proceedings....

520 F.3d at 286-87 (quoting *Aikens*, 460 U.S. at 715). In light of *Aikens*, *Brady* reasoned, judicial determination of whether a plaintiff had created a prima facie case is ordinarily a waste of time. "When resolving an employer's motion for summary judgment ... in employment discrimination cases, district courts often wrestle with the question whether the employee made out a prima facie case. But judicial inquiry into the prima facie case

---

Corp., ... "); *Zafar v. Abbott Labs., Inc.*, No. 1:15-CV-361, 2016 WL 3027196, at *2 n.2 (W.D. Mich. May 27, 2016) ("the Fourth, Fifth, and Tenth Circuits have declined to adopt *Brady*'s approach"); *Mabry v. Capital One, N.A.*, No. GJH-13-02059, 2014 WL 6875791, at *2 n.2 (D. Md. Dec. 3, 2014) ("Mabry appears to suggest that this Court adopt the approach taken by the United States Court of Appeal for the District of Columbia Circuit in *Brady*.... The Fourth Circuit has declined to follow that approach. See *Pepper v. Precision Valve Corp.* ....").

is usually misplaced." *Id. Brady* laid down the rule that has been followed ever since in the District of Columbia Circuit in claims under Title VII as well as other statutes forbidding discrimination or retaliation.

> Lest there be any lingering uncertainty, we state the rule clearly: In a Title VII disparate-treatment suit where an employee has suffered an adverse employment action and an employer has asserted a legitimate, non-discriminatory reason for the decision, the district court need not—and should not—decide whether the plaintiff actually made out a prima facie case under *McDonnell Douglas*.

520 F.3d at 494.

The Fifth Circuit has repeatedly refused to follow *Brady*, reasoning that it is inconsistent with established precedent in that circuit. The Fifth Circuit first rejected *Brady* in *Atterberry v. City of Laurel*, 401 Fed.Appx. 869, 871 n.1 (5th Cir.2010). "Atterberry argues we should follow *Brady*.... Whatever the merits of *Brady* may be, our rule of orderliness requires that we follow our own precedent." The Fifth Circuit rejected *Brady* again in *Stallworth v. Singing River Health Sys.*, 469 Fed.Appx. 369 (5th Cir.2012).

> Regarding her claim of disparate treatment, the district court determined that Stallworth failed to make a prima facie showing of discrimination. Stallworth urges us to follow *Brady* ... , and pretermit the issue whether she has made the requisite prima facie showing

> given that Singing River has offered legitimate, nondiscriminatory reasons for the challenged employment actions. She cites no precedent in this circuit for following *Brady*, and we decline to do so.

469 Fed.Appx. at 372.

In *Hague v. Univ. of Tx. Health Sci. Ctr.*, 560 Fed. Appx. 328 (5th Cir. 2014), a dissenting judge urged the panel to adopt *Brady*. 560 Fed.Appx. at 339-41 (Dennis, J. dissenting) (citing *Brady*). But the majority refused to do so.

> The dissent disagrees with our conclusion that on remand the district court must definitively address in the first instance whether Hague established a prima facie case. Instead, relying on ... *Aikens*, ... the dissent would hold that because [the defendant] produced legitimate, non-retaliatory reasons for the adverse employment action, it is irrelevant whether Hague actually established a prima facie case. However, this Court has repeatedly interpreted *Aikens* to apply only after a trial.... There is no authority in this Circuit that would allow the employee's burden of establishing a prima facie case to be extinguished simply because an employer exercises its right to challenge the prima facie case and also proffers a legitimate, nondiscriminatory reason for its decision....
>
> Because the instant case was not tried on the merits, *Aikens* does not apply.... [I]n two

> unpublished opinions this Court has expressly declined to adopt the rule that whether a plaintiff has established a prima facie case becomes irrelevant once the defendant produces legitimate reasons for the adverse employment action in a summary judgment case.... Accordingly, until the Supreme Court or this Court, sitting en banc, rules otherwise, we follow our precedent....

560 Fed.Appx. at 334-35.

In *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187 (10th Cir. 2008), in an opinion by then-Judge Gorsuch, the Tenth Circuit rejected the *Brady* rule.

> Some may question whether we should pause to assess the existence of a prima facie case when, at summary judgment, an employer puts forth a nondiscriminatory reason for its adverse employment action. See, e.g., ... *Brady v. Office of the Sergeant at Arms*.... Although we readily concede that the prima facie case requirement may sometimes prove a sideshow to the main action of pretext, this court has indicated that it reserves the right to undertake each step of the Supreme Court's *McDonnell Douglas* framework in analyzing discrimination and retaliation claims on summary judgment, and has not infrequently dismissed such claims for failure to establish a prima facie case.... And, so long as *McDonnell Douglas* remains the law governing our summary judgment analysis, it seems to us that if an employee fails to present

> even the limited quantum of evidence necessary to raise a prima facie inference that his or her protected activity led to an adverse employment action, it can become pointless to go through the motions of the remainder of the *McDonnell Douglas* framework to determine that unlawful retaliation was not at play.

323 F.3d at 1202 n.12.

The Fourth Circuit rejected *Brady* in *Pepper v. Precision Valve Corp.*, 526 Fed.Appx. 335, 336 n.* (4th Cir. 2013) ("We decline Pepper's invitation to adopt the holding of *Brady*.... See *Stallworth v. Singing River Health Sys.*, 469 Fed.Appx. 369, 372 (5th Cir. 2012) (unpublished) (declining to adopt *Brady*); *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1202 n.12 (10th Cir. 2008) (declining to adopt *Brady* and "reserv[ing] the right to undertake each step of the Supreme Court's *McDonnell Douglas* framework in analyzing discrimination and retaliation claims on summary judgment")).

The Seventh Circuit has adopted an intermediate position. Relying on this Court's decision in *Aikens*,[15] that court of appeals has repeatedly held that if an employer adduces a nondiscriminatory reason for its disputed action, the court "may skip the analysis"[16] of whether

15. E.g., *Nawrot v. CPC Int'l*, 277 F.3d 896, 906 (7th Cir. 2002); *Lindemann v. Mobil Oil Corp.*, 141 F.3d 290, 296 (7th Cir. 1998).

16. *Hagen v. Fond du Lac Sch. Dist.*, No. 24-1688, 2025 WL 1703668 at *3 (7th Cir. June 18, 2025); *Vassileva v. City of Chicago*, 118 F.4th 869, 874 (7th Cir. 2024); *Benuzzi v. Bd. of Educ. of City of Chicago*, 647 F.3d 652, 663 (7th Cir. 2011); *Adelman-Reyes v. St. Xavier Univ.*, 500 F.3d 662, 665 (7th Cir. 2007).

there is a prima facie case and decide the litigation based only on whether the plaintiff has demonstrated pretext. This differs from the District of Columbia standard, under which a court *must* skip over the prima facie case issue, and from the Fifth Circuit standard, under which a court *cannot* disregard a plaintiff 's failure to establish a prima facie case. In one case the Seventh Circuit admonished counsel for having wasted time briefing the prima facie case issue. "The parties' briefs devote unnecessary energy to the question whether Brown has established a prima facie case of discrimination. Once the employer provides a nondiscriminatory explanation for its decision, however, the question becomes whether that explanation is pretextual...." *Brown v. City of Indianapolis Dep't of Pub. Works*, 532 Fed.Appx. 642, 643 (7th Cir. 2013). But because the Seventh Circuit in other cases still does sometimes grant summary judgment for want of a prima facie case,[17] counsel have to brief and argue that issue despite the possibility that the court will deem it irrelevant.

The remaining circuits routinely decide whether or not a plaintiff has established a prima facie case, even though the defendant employer has set forth its claimed reason for the disputed action. See, e.g. 11a; *Brady v. Walmart Stores East I, LP*, No. 24-2408, 2025 WL 2026640, at *6 (8th Cir. July 21, 2025) (finding no prima facie case); *Johnson v. Westinghouse Air Brake Techs. Corp.*, 104 F.4th 674 (8th Cir. 2024) (finding no prima facie case); *Anderson v. KAR Global*, 78 F.4th 1031 (8th Cir. 2023) (finding prima facie case). That is precisely the practice which the District of Columbia Circuit held is inconsistent with *Aikens*.

17. *Mitchell v. Exxon Mobil Corp.*, No. 24-2823, 2025 WL 1924526, at *4 and *6 (7th Cir. July 14, 2025); *Arnold v. United Airlines, Inc.*, No. 24-2179, 2025 WL 1778643, at *3 (7th Cir. June 27, 2025).

III. THE QUESTIONS PRESENTED ARE MATTERS OF FEDERAL LAW THAT HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT

Whether litigants and courts should be required to apply *McDonnell Douglas* to summary judgment motions, and whether *Aikens* should be applied at summary judgment, are questions of federal law that have not been but should be settled by this Court. Sup. Ct. Rule 10(c). Although certiorari is only sparingly granted under Rule 10(c), review on that basis alone is warranted in this exceptional case.

The issues in this case present two unique circumstances. First, the problems that have arisen when courts attempt to apply *McDonnell Douglas* at summary judgment have led to an unprecedented chorus of judicial criticism from lower court judges who have to deal with those difficulties. "A remarkable number of lower court judges have gone out of their way to describe the chaos." *Hittle*, 135 S.Ct. at 762 (Thomas, J. dissenting.). We set forth in an appendix to this petition a list of the lower court opinions describing those difficulties. 98a-100a. There are 26 such opinions, some unusually detailed, signed or joined by 46 federal and state judges, including then-Judge Gorsuch and then-Judge Kavanaugh. Second, the problems detailed in those opinions affect an extraordinarily large number of cases. As of 2019, *McDonnell Douglas* had been cited in 57,000 lower court decisions. *Nall v. BNSF Railway Co.*, 917 F.3d 335, 351 n.4 (2d Cir. 2019) (Costa, J., dissenting). That decision continues to be cited about 2,000 times a year.

The most commonly identified problem with *McDonnell Douglas* is that the case law under that opinion has

become unworkably complicated, resulting in widespread confusion. Judge Wood deplored "the snarls and knots that the current methodologies used in discrimination cases of all kinds have inflicted on courts and litigants alike." *Coleman v. Donahoe*, 667 F.3d 835, 863 (7th Cir. 2012) (concurring opinion). "The framework's constituent details have grown increasingly intricate and code-like...." *Tynes v. Fla. Dep't of Juv. Justice*, 88 F.4th 939, 953 (11th Cir. 2023) (Newsome, J. concurring); see *Nall v. BNSF Railway Co.*, 917 F.3d 335, 351 (2d Cir. 2019) ("the 'kudzu' of employment law") (Costa, J. specially concurring); *Griffith v. City of Des Moines*, 387 F.3d 733, 747 (8th Cir. 2004) ("the complexities and insensibility of the *McDonnell Douglas* paradigm") (Magnuson, J. concurring specially).

In 2008 then-Judge Kavanaugh observed that

> the prima-facie-case aspect of *McDonnell Douglas* ... has not benefited employees or employers; nor has it simplified or expedited court proceedings. In fact, it has done exactly the opposite, spawning enormous confusion and wasting litigant and judicial resources.

Brady, 520 F.3d at 494. In 2016 then-Judge Gorsuch noted the "many complications and qualifications" in the application of *McDonnell Douglas* had created "special and idiosyncratic ... rules that depend on what kind of proof you allege, what kind of case you allege, and where in the life of the litigation you happen to find yourself." *Walton v. Powell*, 821 F.3d 1204, 1211-12 (10th Cir. 2016).

As early as 1989 Justice Kennedy warned that "[l]ower courts long have had difficulty applying

McDonnell Douglas." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 291 (1989) (Kennedy, J., dissenting)

In 2013 this Court recognized that "[t]he 'prima facie case and the shifting burdens confuse lawyers and judges....'" *Vance v. Ball State University*, 570 U.S. 421, 224 n.13 (2013) (quoting *Armstrong v. Burdette Tomlin Memorial Hospital*, 438 F.3d 240, 249 (3d Cir. 2006)). In his March 2025 dissenting opinion in *Hittle*, Justice Thomas pointed out that "[t]he application of *McDonnell Douglas* in this summary judgment context has caused significant confusion.... I am not aware of many precedents that have caused more confusion than this one." 145 S.Ct. at 761-63 (dissenting opinion).

In addition, there is concern that judges applying *McDonnell Douglas* often become preoccupied with its intricacies, having to define direct evidence, to sort out the complex circuit-specific standards regarding the elements of a prima facie case, and to determine the degree of specificity needed to prove pretext. "Rather than concentrating on what should be the focus of attention—whether the evidence supports a finding of unlawful discrimination—courts focus on the isolated components of the *McDonnell Douglas* framework, losing sight of the ultimate issue." *Wells v. Colo. Dep't of Transp.*, 325 F.3d 1205, 1221 (10th Cir. 2003) (Hartz, J., writing separately); see *Jenny v. L3Harris Techs., Inc.*, No. 24-4032, 2025 WL 2025312, at *6 (10th Cir. July 21, 2025) (Eid, J. concurring).

Perhaps most seriously, there is an increasing recognition that application of *McDonnell Douglas* at summary judgment can lead to dismissal of claims even though there is a genuine question of fact regarding the motive of the defendant.

> [O]ur increasingly rigid application of *McDonnell Douglas* may actually be causing us to get cases wrong—in particular, to reject cases at summary judgment that should, under a straightforward application of Rule 56, probably proceed to trial. A plaintiff who can marshal strong circumstantial evidence of discrimination but who, for whatever reason, can't check all of the *McDonnell-Douglas*-related doctrinal boxes ... may well lose at summary judgment....

Tynes v. Fla. Dep't of Juv. Justice, 88 F.4th 939, 955 (11th Cir. 2023) (Newsome, J. concurring). "Applying [the *McDonnell Douglas*] framework ... is too likely to cause us to reach a result contrary to what we would decide if we focused on 'the ultimate question of discrimination *vel non*.'" *Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160, 1167 (10th Cir. 2007) (en banc) (Hartz, J., concurring) (quoting *Aikens*, 460 U.S. at 714); see *Gossett v. Tractor Supply Co.*, 320 S.W.3d 777, 784 (Tenn. 2010) ("[a]pplying the *McDonnell Douglas* framework at the summary judgment stages can result in the grant of a summary judgment despite the presence of genuine issues of material fact.").

At the February 2025 oral argument in *Ames*, Justice Gorsuch pointed out that "the *McDonnell Douglas* . . third step has really caught up a lot of plaintiffs ... having to show that the—that the defendant's stated reasons for the adverse employment action are pretextual ... It could be that they ... are not pretextual, but there's still discrimination." Tr. 16; see Tr. 21 ("Justice Sotomayor: ... it could be ... a legitimate reason, as Justice Gorsuch said, but it still could have been based ... on race or sex or ... gender identity."). As Justice Thomas pointed out in his

concurring opinion in *Ames*, "[t]he *McDonnell Douglas* framework ... fails to encompass the various ways in which a plaintiff could prove his claim." 135 S.Ct. 315.

There has been no outpouring of support for *McDonnell Douglas* in response to this wave of judicial criticism. Even some judges who, bound by precedent, were once deeply involved in expounding the *McDonnell Douglas* rules have had second thoughts. *Tynes v. Fla. Dep't of Juv. Justice*, 88 F.4th 939, 958 (11th Cir. 2023) (Newsome, J. concurring) ("For a while now, I've uncritically accepted the *McDonnell Douglas* framework as the proper means of resolving Title VII cases on summary judgment.... I repent.... *McDonnell Douglas* masks and muddles the critical Rule 56 inquiry."). To some degree lower courts are continuing to apply *McDonnell Douglas* at summary judgment because they believe they are required to do so by this Court's decisions. *Paup v. Gear Prods., Inc.*, 327 Fed.Appx. 100, 113 (10th Cir. 2009) (per curiam) (opinion joined by Gorsuch, J.)

> [W]e are now at summary judgment obliged to apply the *McDonnell Douglas* framework ... [S]ome have criticized *McDonnell Douglas* as improperly diverting attention away from the real question ... —whether ... discrimination actually took place—and substituting a proxy that only imperfectly tracks that inquiry.... [B]ut *McDonnell Douglas* of course remains binding on us.

That is a problem which only this Court can solve.

IV. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED

This case presents an excellent vehicle for resolving both questions presented. The majority twice held that, under Eighth Circuit precedent, Huber was required either to adduce direct evidence or to establish liability under the *McDonnell Douglas* burden-shifting framework. 10a, 13a. The court of appeals specifically concluded that neither Huber's retaliation nor her discrimination claims were supported by direct evidence. 9a-10a, 13a-14a. Huber was required to establish a prima facie case of retaliation even though Westar had articulated a claimed legitimate reason for dismissing Huber. 11a. And both of Huber's claims were rejected because a majority of the court of appeals believed that she had not proven that the defendant's proffered explanation for her dismissal was pretextual, as *McDonnell Douglas* requires. 11a-12a, 14a-21a. The court of appeals' entire analysis of the evidence in this case was inextricably intertwined with and tainted by its application of controlling Eighth Circuit *McDonnell Douglas* precedent regarding direct evidence, prima facie case, and pretext.

CONCLUSION

Resolution of the questions presented in the manner which we urge will largely resolve the problems that have for so long vexed the lower courts attempting to apply *McDonnell Douglas* to summary judgment motions. Adoption of the District of Columbia's *Brady* decision will effectively end disputes about whether a plaintiff has established a prima facie case, because (as several members of this Court noted at the *Ames* argument) defendants invariably adduce some legitimate reason for their challenged actions. Holding that courts and litigants are not required in resolving summary judgment motions to proceed under *McDonnell Douglas* (even in the absence of direct evidence) will render largely irrelevant disputes about the meaning of pretext. Neither holding will require this Court to adopt, or the lower courts to interpret, any new legal standard. Litigants will be free (as they already are in several circuits) to simply argue that there is sufficient evidence to permit a reasonable jury to find the existence of the claimed unlawful motive. The Court can be "confident that lower courts know how to apply Rule 56 and make the familiar summary-judgment determinations." *Hittle*, 145 S.Ct. at 763 (Thomas, J., dissenting). That is the standard that the lower courts have for years applied in evaluating other summary judgment motions, including (as then-Judge Gorsuch noted in *Walton*, 821 F.3d at 1210) summary judgment motions in First Amendment discrimination and retaliation claims.

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

ALEXIS S. MULLANEY
FIEDLER LAW FIRM
17330 Wright Street,
Suite 102
Omaha, NE 68130

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
Box 353020
Seattle, WA 98195
(206) 660-8845
schnapp@uw.edu

Counsel for Petitioner

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED MAY 30, 2025

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

No. 23-1087

TONYA C. HUBER,

Plaintiff-Appellant,

v.

WESTAR FOODS, INC.,

Defendant-Appellee.

Equal Employment Opportunity Commission
Amicus on Behalf of Appellant(s)

Submitted: October 24, 2024
|
Filed: May 30, 2025

Before COLLOTON, Chief Judge, LOKEN, SMITH, GRUENDER, BENTON, SHEPHERD, KELLY, ERICKSON, GRASZ, STRAS, and KOBES, Circuit Judges, En Banc.

OPINION

STRAS, Circuit Judge, with whom LOKEN, GRUENDER, BENTON, GRASZ, and KOBES, Circuit Judges, join.

Appendix A

Tonya Huber suffered a diabetic episode that kept her out of work for several days. The question is what claims, if any, she has after Westar Foods, Inc. fired her for failing to notify a supervisor. An interference claim under the Family and Medical Leave Act survives, *see* 29 U.S.C. § 2615(a)(1), but we otherwise affirm the grant of summary judgment to Westar.

I.

Westar runs Hardee's restaurants across Nebraska and Iowa. Huber managed one, which meant a full-time schedule that often involved beginning her shift at 5 a.m. and opening the restaurant an hour later.

Huber had trouble following Westar's attendance policy, specifically the requirement that late or absent employees "call the management person in charge immediately." Her first violation involved leaving a shift without notifying her district manager. A few months later, she violated it twice more by missing a shift without notice and leaving another without "call[ing] . . . and speak[ing] directly" to her supervisor. At that point, Westar informed her that any "further unscheduled or unexcused absences" risked "further disciplinary action, up to and including termination."

Huber was also experiencing health difficulties. About two months into the job, she received a diabetes diagnosis, which required her to take insulin at work and eat meals during her shifts. According to Huber, her supervisors provided no help. One said that finding

a room-temperature location to store her insulin was a "[you] problem, not a [me] problem." Another, Cindy Kelchen, suggested she put it in a cooler. Later, when Huber struggled to find time to eat, Kelchen told her to get better at time management.

Diabetes also caused her to miss work. As relevant here, she woke up one morning feeling "out of it" and "in a complete fog," with a blood-sugar level "in the low 60s." She did not "know . . . who [she] was, what [she] was, [or] where help was." She drove herself to a nearby clinic, where a doctor placed her on an IV for the rest of the day. She made several calls to her boyfriend and son, but she does not remember any of them. They recalled her being "all over the place" and "very groggy, out of it."

Meanwhile, the Hardee's opened more than five hours late because she never notified anyone that she would be absent. Westar only found out when a customer called to complain that the restaurant was closed, which set off a flurry of activity. Kelchen eventually reached Huber's son, who explained that she was at the hospital because "her levels were off." Until then, *no one* at Westar had any idea she was ill.

Huber did not call until the next day, several hours after her next 5 a.m. shift was set to start. During the call, Huber told Kelchen what had happened and informed her that she needed to take sick leave. Huber did not remember the conversation clearly because she was still groggy, but her boyfriend, who had been sleeping in an adjacent room, did. According to him, Kelchen was "screaming" at her.

Kelchen's notes say that Huber had been at the doctor because "her levels of her diabetic w[ere] off." They also mention she had been "too drugged out [to call], couldn't concentrate, and . . . would contact [Kelchen] later." When Kelchen reminded Huber about "needing to make that simple phone call," she responded that she was "out of it" and "not making sense" because of "a serious medical happening." She pointed to a doctor's note she had just sent. When Kelchen asked Huber why she could drive to the doctor on her own, yet not "call at all" despite knowing she had to open both days, she had no response. About thirty minutes after the call, Westar's president decided to fire her.

Before she found out about Westar's decision, Huber tried to request FMLA leave for the days she missed. To her surprise, not only did Westar deny it for "fail[ing] to provide notice" of her request "as soon as possible and practical," but she had lost her job for once again "fail[ing] to follow [Westar's] notice procedures."

Based on these events, Huber filed this lawsuit alleging interference and retaliation under the FMLA and disability discrimination under the Americans with Disabilities Act and the Nebraska Fair Employment Practice Act. On cross-motions for summary judgment, the district court granted Westar's, which ended Huber's case.

II.

We review the district court's summary-judgment ruling de novo. *See Bharadwaj v. Mid Dakota Clinic*,

954 F.3d 1130, 1134 (8th Cir. 2020). "Summary judgment is appropriate when the evidence, viewed in a light most favorable to the nonmoving party, shows no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Id.* (citation omitted). A genuine issue for trial exists when "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

A.

The FMLA allows eligible employees to take unpaid leave "[b]ecause of a serious health condition." 29 U.S.C. § 2612(a)(1)(D). When employees seek leave, employers cannot "interfere with, restrain, or deny" it, *id.* § 2615(a)(1), nor retaliate against an employee who requests it, *id.* § 2615(a)(2). Huber alleged in her complaint that Westar did both when it terminated her.

1.

To succeed on an interference claim, Huber must show that "she was eligible for . . . leave," that Westar "knew she needed [it]," and that it "denied her a[] . . . benefit to which she was entitled." *Smith v. AS Am., Inc.*, 829 F.3d 616, 621 (8th Cir. 2016); *see Lovland v. Emps. Mut. Cas. Co.*, 674 F.3d 806, 811 (8th Cir. 2012) (stating that "terminating an employee while on FMLA leave" can be interference). Here, Westar's main argument is that it did not know about Huber's need for leave before it decided to fire her.

A jury could see things differently. *See Woods v. DaimlerChrysler Corp.*, 409 F.3d 984, 991 (8th Cir. 2005). An employee does not need to "invoke the FMLA by name." *Thorson v. Gemini, Inc.*, 205 F.3d 370, 381 (8th Cir. 2000). Rather, "the employer's duties are triggered when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave." *Id.* In this case, Huber provided Westar with a doctor's note explaining the seriousness of her condition, including the need to be off work while she recovered. Add the fact that Kelchen's notes from her call with Huber state that "her levels of diabetic w[ere] off," and a reasonable jury could conclude that Westar knew she "need[ed] FMLA leave" for a serious health condition. *Murphy v. FedEx Nat'l LTL, Inc.*, 618 F.3d 893, 903 (8th Cir. 2010) (citation omitted).

A jury could also find that she was entitled to it, despite the late notice. Employees must provide advance notice "[w]hen the leave is foreseeable." *Hager v. Ark. Dep't of Health*, 735 F.3d 1009, 1016 (8th Cir. 2013). When it is not, notice must be "as soon as practicable under the facts and circumstances of the particular case." *Id.* (quoting 29 C.F.R. § 825.303(a)). Westar questions whether a call the morning after she received emergency medical treatment was soon enough, given that she made several calls to her son and boyfriend in the meantime.

If Huber's account is to be believed, the answer is yes. "As soon as practicable" means what it says: when it is "both possible and practical" to give notice. *Spangler v. Fed. Home Loan Bank of Des Moines*, 278 F.3d 847,

852 (8th Cir. 2002) (quoting 29 C.F.R. § 825.302(b)). Evidence points both ways. On the one hand, her calls to her son and boyfriend suggest that she could have called Kelchen sooner, perhaps while at the clinic. On the other, she reported being "in a complete fog," under heavy medication, and "out of it." *See* 29 C.F.R. § 825.302(b); *see also id.* § 825.303(c) ("[I]f an employee requires emergency medical treatment, he or she would not be required to follow the call-in procedure until his or her condition is stabilized. . . ."). Exactly when it was "possible and practical" for Huber to notify Westar of her need for FMLA leave presents a classic jury question. *Spangler*, 278 F.3d at 852 (quoting 29 C.F.R. § 825.302(b)); *see Phillips v. Mathews*, 547 F.3d 905, 909 (8th Cir. 2008).

So does Westar's argument that it terminated Huber for the "wholly unrelated" reason that she violated the company's attendance policy. *See Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1051 (8th Cir. 2006) (noting that there is no interference when the "reason for dismissal is insufficiently related to FMLA leave"). Employees can be terminated while on leave if "the employer would have discharged" them anyway. *Throneberry v. McGehee Desha Cnty. Hosp.*, 403 F.3d 972, 980 (8th Cir. 2005). But not when the termination is "*connected with* [their] FMLA leave." *Dalton v. ManorCare of W. Des Moines, IA, LLC*, 782 F.3d 955, 960 (8th Cir. 2015) (emphasis added) (citation omitted).

Our decision in *Clinkscale v. St. Therese of New Hope*, 701 F.3d 825 (8th Cir. 2012), shows this principle at work. The issue there was whether a nurse who was fired for

"patient abandonment" could sue for interference when the "supposed abandonment . . . was precipitated by a panic attack—a symptom of her anxiety disorder and the reason she required medical leave." *Id.* at 828–29. We concluded that the answer was yes. *See id.* at 829. There, just like here, "the notice had been provided . . . late." *Id.* at 828. It did not matter. "Given the evidence suggesting a causal connection between [the nurse's] condition and her" alleged misconduct, the hospital could not "reasonably claim her termination bore no relation to her FMLA-qualifying condition." *Id.* at 829. The question went to a jury. *See id.*

Huber's evidence suggests the same causal relationship may be present here. Her alleged misconduct of failing to make a timely call to her supervisor was "precipitated by" her diabetic episode, "the reason she required medical leave." *Id.* "Given the evidence suggesting a causal connection between [Huber's] condition and her [violation of the attendance policy], the district court erred in concluding as a matter of law that" her misconduct was "not related" to a "serious health condition." *Id.* at 829; *see Stallings*, 447 F.3d at 1050 ("[A]n employee can prove interference with an FMLA right regardless of the employer's intent."); *see also Wallace v. FedEx Corp.*, 764 F.3d 571, 590 (6th Cir. 2014) (noting that a "failure to report for work" is not a "legitimate and independent reason for dismissal" when the "absences and cause for discharge relate directly to the FMLA leave"). "[A] jury must ultimately decide whether [Westar] denied [her] a benefit" under the FMLA. *Black v. Swift Pork Co.*, 113 F.4th 1028, 1032 (8th Cir. 2024).

2.

Retaliation claims are different. At their core, they are about discrimination, situations in which an employer treats an employee differently because of a request for a statutory benefit. *See Lovland*, 674 F.3d at 811–12. Unlike interference claims, the dispute often centers on whether an employer was motivated by "retaliatory intent." *Stallings*, 447 F.3d at 1051; *see Pulczinski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1006 (8th Cir. 2012) (requiring proof "that the employer was motivated by the employee's exercise of rights under the FMLA" when it took the adverse action). Here, Huber claims that Westar fired her because of her "use of leave." *Stallings*, 447 F.3d at 1051 (citation omitted). It treated her differently, in other words, because she engaged in protected conduct by seeking FMLA leave. *See Evans v. Coop. Response Ctr., Inc.*, 996 F.3d 539, 552 (8th Cir. 2021).

Retaliatory intent can be proven directly or indirectly. *See id.* at 551. Directly establishing it is rare, because it requires a "specific link" to "the challenged decision." *Ebersole v. Novo Nordisk, Inc.*, 758 F.3d 917, 924 (8th Cir. 2014). To qualify, the evidence "must be strong and clearly point to an illegal motive." *Id.* Nothing in this case rises to that level. Huber identifies a few stray comments by Kelchen and a prior supervisor months before Westar fired her. Among them were unhelpful suggestions about where she could store her insulin at work and to get better at time management, but none provide a "specific link" to FMLA leave, much less the request she made months later. *See Bone v. G4S Youth Servs., LLC*, 686

F.3d 948, 954 (8th Cir. 2012) (holding that comments made six months before the decision to fire an employee were not direct evidence of discrimination); *Browning v. President Riverboat Casino-Mo., Inc.*, 139 F.3d 631, 635 (8th Cir. 1998) ("'[D]irect evidence' does not include 'stray remarks in the workplace'. . . ." (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (O'Connor, J., concurring in the judgment))).

Without direct evidence, her only option is to establish retaliatory intent circumstantially, through the three-part *McDonnell-Douglas* burden-shifting framework. *See Ebersole*, 758 F.3d at 924; *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). The first step is to establish a prima facie case, which requires evidence that: "(1) she engaged in a protected activity; (2) she suffered a materially adverse employment action; and (3) a causal connection existed between the" two. *Boston v. TrialCard, Inc.*, 75 F.4th 861, 869 (8th Cir. 2023). If she overcomes that hurdle, the next step requires Westar to come up with "a legitimate, nondiscriminatory reason" for its actions. *Hudson v. Tyson Fresh Meats, Inc.*, 787 F.3d 861, 866 (8th Cir. 2015). At the final step, the focus shifts back to Huber to show that the nondiscriminatory reason was just a pretext for unlawful discrimination. *See id.*

Huber's retaliation claim likely does not make it past the first step, establishing a prima-facie case. Her causal chain is built entirely on timing: Westar's decision to fire her came just 30 minutes after she spoke to Kelchen about her diabetic episode and mentioned her need to

take off work, so requesting leave *must* have led to her firing. Temporal proximity between a protected activity and a decision to fire, demote, or take other adverse action against an employee *can* support an inference of causation. *See Hite v. Vermeer Mfg. Co.*, 446 F.3d 858, 866 (8th Cir. 2006). *But cf. Boston*, 75 F.4th at 869 ("Generally, more than mere temporal proximity between protected activity and adverse action is required."). But the ultimate question at step one remains whether the evidence "gives rise to an inference of a retaliatory motive." *Hite*, 446 F.3d at 866 (citation omitted).

On these facts, we doubt it does. Even taking the facts in a light most favorable to Huber, as we must, Kelchen confirmed during the call that Huber's diabetic episode created a need for FMLA leave *and* that she had violated the attendance policy twice more, despite receiving warnings that "further unscheduled or unexcused absences . . . may lead to further disciplinary action." The "coincidental timing" in this situation does not create an inference that her firing was caused by retaliatory intent. *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1266 (8th Cir. 1997).

Besides, even if the "coincidental timing" matters more at the pretext stage, *id.*, nothing would change, *see Smith v. Allen Health Sys., Inc.*, 302 F.3d 827, 834 (8th Cir. 2002) (observing that "the employee must . . . point to some evidence that the employer's [legitimate, nondiscriminatory reason] is pretextual"). Both before and after her firing, Westar consistently pointed to her violations as a legitimate, non- discrimination concern

about her performance. In these circumstances, when a violation of company policy was "a problem before the employee engaged in the protected activity," it both "undercuts the significance of the temporal proximity" and provides "an explanation" for it "other than a retaliatory motive." *Id.*; *see Wierman v. Casey's Gen. Stores*, 638 F.3d 984, 1001 (8th Cir. 2011) ("A plaintiff's prima facie retaliation case, built on temporal proximity, is undermined where the alleged retaliatory motive coincides temporally with [a] non-retaliatory motive."). Without *any* other evidence that Westar's "real reason" for firing her "was retaliation for her exercise of her [FMLA] rights," Huber has not "carried the burden" needed to survive summary judgment. *Smith*, 302 F.3d at 836.

B.

Much the same goes for Huber's disability-discrimination claims under the Americans with Disabilities Act and the Nebraska Fair Employment Practice Act. *See Ryan v. Cap. Contractors, Inc.*, 679 F.3d 772, 777 n.3 (8th Cir. 2012) (making clear that the analysis under the two statutes is the same). Now the focus shifts from her request for FMLA leave to her diabetes, which the parties agree is a disability. Also undisputed is that she "was qualified to perform the essential functions of the job." *Oehmke v. Medtronic, Inc.*, 844 F.3d 748, 755 (8th Cir. 2016). The disagreement is once again over causation: whether Westar's decision to fire Huber was "actually motivated" by her diabetes. *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52, 124 S.Ct. 513, 157 L.Ed.2d 357 (2003) (citation omitted); *see Lowery v. Hazelwood Sch. Dist.*,

244 F.3d 654, 657–58 (8th Cir. 2001) (requiring "evidence of a causal connection between . . . [the] disability and the adverse employment action"). Using analysis that resembles our treatment of Huber's FMLA retaliation claim, we conclude that no reasonable jury could conclude it was.

Just like under the FMLA, there are two ways to establish the necessary causal link: direct evidence or the *McDonnell-Douglas* burden-shifting framework. *See Lipp v. Cargill Meat Sols. Corp.*, 911 F.3d 537, 544 (8th Cir. 2018). This time, Huber claims to have direct evidence of discrimination in the form of "conduct or statements by [decisionmakers] that may be viewed as directly reflecting [an] alleged discriminatory attitude" toward her diabetes. *Id.* at 543 (citation omitted).

Huber relies on two facts: Kelchen's anger the morning after her diabetic episode and her supervisors' refusal to assist her in storing her insulin and taking meal breaks at work. Even if we assume Kelchen qualifies as a decisionmaker, *see Gruttemeyer v. Transit Auth.*, 31 F.4th 638, 648 (8th Cir. 2022) (noting that the focus is on "individuals with influence over decisionmaking"), neither *directly* establishes a discriminatory motivation for the firing. *See Torgerson v. City of Rochester*, 643 F.3d 1031, 1045–46 (8th Cir. 2011) (en banc).

Start with Kelchen's anger toward her during the call. It no doubt showed a lack of compassion for her situation, but an obvious explanation was the lack of a call the day before, which resulted in the restaurant opening several

hours late. It directly shows Kelchen *was* angry, but not *why* she was angry. *See Massey-Diez v. Univ. of Iowa Cmty. Med. Servs.*, 826 F.3d 1149, 1161 (8th Cir. 2016) (explaining when a statement is "blatant" enough to be direct evidence); *cf. Stacks v. Sw. Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1324 (8th Cir. 1994) (holding that a statement that women in sales were " 'the worst thing' that had happened to the company" was direct evidence of sex discrimination). Was it the absences, the restaurant opening late, the diabetes, or the failure to call? The evidence is just too vague to be direct. *See Torgerson*, 643 F.3d at 1045–46.

The statements by her supervisors are also indirect. Recall that she requested meal breaks and a place to store her insulin, but her supervisors did not help with either request. They no doubt could—and probably should—have done more, but their refusal is not direct evidence of disability discrimination for two reasons. First, the remarks may directly show indifference, but not a discriminatory attitude. *See Lipp*, 911 F.3d at 543 (explaining that a statement must "directly reflect[] the alleged discriminatory attitude" (citation omitted)). Second, no reasonable jury could find that the statements were direct evidence of disability discrimination because she cannot explain why, if Westar really did act because of her disability, it waited so long to fire her. They were, in other words, not "sufficiently related to [her] termination." *Quick v. Wal-Mart Stores, Inc.*, 441 F.3d 606, 609 (8th Cir. 2006).

Indirect evidence, however, still has a role to play under the *McDonnell-Douglas* burden-shifting framework. We

can assume, without deciding, that Huber has established a prima-facie case of disability discrimination. The burden then shifts to Westar to provide a legitimate, nondiscriminatory reason for its decision to fire her. *See Boston*, 75 F.4th at 867. The reason it offered was Huber's repeated violations of the company's attendance policy. *See Price v. S-B Power Tool*, 75 F.3d 362, 365–66 (8th Cir. 1996) (noting that "violat[ing] the company's attendance policy" is a "legitimate[,] nondiscriminatory reason for . . . dismissal").

Westar has consistently relied on this explanation. In fact, it became a focus even before the company decided to fire her, when Kelchen reminded Huber during the call about the "need[] to make that simple phone call" before missing work or coming in late. The termination letter, sent five days later, was even more explicit: her firing was due to the "fail[ure] to follow [Westar's] notice procedures for [her] absences" despite being "fully aware" of them after several warnings.

As is often the case, this discrimination claim comes down to pretext. To survive summary judgment, Huber's evidence must create a genuine dispute on the ultimate question, which is whether "discrimination was the real reason" for her firing. *Wilking v. County of Ramsey*, 153 F.3d 869, 874 (8th Cir. 1998) (citation omitted). Evidence that "the employer's explanation . . . has no basis in fact" or "that a [prohibited] reason more likely motivated the employer" can get her there, *Torgerson*, 643 F.3d at 1047 (alteration in the original) (citation omitted), but only if it would allow a reasonable jury to conclude that

discrimination *really* motivated the employer's decision. *See* Fed. R. Civ. P. 56(a). That is, the attendance policy was just an excuse for the decision to fire her. *See Raytheon*, 540 U.S. at 53, 124 S.Ct. 513 (noting that the claim requires the employer to act "based on [the employee's] status as disabled").

To make that point, she tries to establish pretext through what amounts to a strong prima-facie case. *See Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1135 (8th Cir. 1999) (en banc). Once again, the linchpin is timing: Kelchen's anger and the decision to fire her occurred while she was still recovering from her diabetic episode. *See Gibson v. Geithner*, 776 F.3d 536, 541 (8th Cir. 2015) (noting that "[p]roximity . . . can . . . establish causation for a *prima facie* case"). Further support can be found in the alleged hostility of her supervisors, who refused to reasonably accommodate her requests for meal breaks and storage of her insulin. *See Kells v. Sinclair Buick-GMC Truck, Inc.*, 210 F.3d 827, 833–34 (8th Cir. 2000) (noting that the plaintiff had "presented *prima facie evidence* of [his employer's] repeated denials of requests for reasonable accommodations" (emphasis added)), *abrogated on other grounds by Torgerson*, 643 F.3d at 1059. Viewed separately or together, however, neither creates a genuine issue of material fact on pretext. *See Torgerson*, 643 F.3d at 1052.

It is true that the timing looks bad for Westar. But as we have recognized before, close timing can rarely show pretext on its own. *See Corkrean v. Drake Univ.*, 55 F.4th 623, 632 (8th Cir. 2022). "[A]ttempt[ing] to prove pretext or actual discrimination," after all, "requires

more substantial evidence [than it takes to make a prima facie case] . . . because . . . [it] is viewed in light of the employer's justification." *Smith*, 302 F.3d at 834 (third alteration in original) (citation omitted). Even if the timing here is enough to establish a prima-facie case, it falls short of establishing pretext. The reason is the point we highlighted earlier: Westar's legitimate nondiscriminatory reason for firing her, the violations of the attendance policy, "coincide[d]" with her diabetic episode. *Id.* Given that the violations had posed a "problem before," it "undercuts the significance of the temporal proximity" and provides "an explanation . . . other than" discrimination. *Id.*

Kelchen's anger during the call is just another variation on the same theme. Although it is possible that it reflected animus toward Huber's diabetes, Huber has not shown why animus was the more likely explanation over the attendance-policy violations. *See Twymon v. Wells Fargo & Co.*, 462 F.3d 925, 935 (8th Cir. 2006). Nothing from the call, even when viewed in the light most favorable to her, rules out the nondiscriminatory reason, leading us right back to inferring discrimination based on temporal proximity. *See id.* (affirming summary judgment to the employer because the allegations of pretext did not "debunk[] the asserted rationale for . . . termination"); *see also Sprenger v. Fed. Home Loan Bank of Des Moines*, 253 F.3d 1106, 1111 (8th Cir. 2001) (requiring "more substantial evidence" because claims of pretext must be "viewed in light of the employer's justification"). The "coincidental timing" is not enough here, at least at the pretext stage. *Smith*, 109 F.3d at 1266.

Nor is Kelchen's statement disclaiming knowledge about Huber's diabetes.[1] To start, it is not even clear Kelchen "falsely denied" anything. *Post*, at 629. Read in context, the statement during her deposition was a reference to her lack of knowledge in the months leading up to the diabetic episode, not a claim that she did not learn about Huber's condition during the conversation occurring just minutes before the termination decision. *See Merechka v. Vigilant Ins. Co.*, 26 F.4th 776, 782 (8th Cir. 2022) (explaining that the nonmoving party only gets the benefit of "*reasonable* inference[s]" at summary judgment (emphasis added) (citation omitted)). The immediately preceding questions, after all, were about conversations that allegedly happened months before, like whether they "talked . . . about not having time to eat during her shift" or where she could "store her insulin."

Regardless, Kelchen's supposed denial adds little. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (explaining that we can infer discrimination from dishonesty *if* an employee disproves her employer's innocent explanation). Knowledge

1. The dissent emphasizes this point, even if Huber never has. Her opening brief barely mentions it. There is a reference to it in her reply brief, largely in response to Westar's assertion that it was "unaware of Huber's diabetes until after her termination." Raising a legal argument for the first time in a reply brief, however, is too late to preserve the point for appeal. *See Gatewood v. City of O'Fallon*, 70 F.4th 1076, 1079–80 (8th Cir. 2023) ("Appellate courts do not generally review arguments first raised in a reply brief." (citation omitted)); *see also ASARCO, LLC v. Union Pac. R.R. Co.*, 762 F.3d 744, 753 (8th Cir. 2014) ("Judges are not like pigs, hunting for truffles buried in briefs or the record." (citation omitted)).

and timing might matter in some discrimination cases, but not here when the *only* squabble is about exactly when Kelchen found out about Huber's diabetes. Neither the dissent nor Huber can point to *any* evidence rebutting Westar's legitimate nondiscriminatory "rationale for taking action," which was her repeated attendance-policy violations. *Bharadwaj*, 954 F.3d at 1135; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322–33, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (recognizing that a "failure of proof concerning an essential element of the nonmoving party's case" requires "entry of summary judgment" for the moving party). A single out-of-context statement about what Kelchen knew when—one that Huber herself barely relies upon—is not enough to create a genuine issue of material fact. *See Erickson v. Nationstar Mortg., LLC*, 31 F.4th 1044, 1048 (8th Cir. 2022) (explaining that a party opposing summary judgment "cannot force a trial merely to cross-examine [a] witness" unless "specific facts . . . undermine [her] credibility in a material way" (citation omitted)); *see also Reeves*, 530 U.S. at 147, 120 S.Ct. 2097 (noting that "dishonesty about a *material* fact" can be "affirmative evidence of guilt" (emphasis added) (citation omitted)).

It makes no difference that Huber's workplace misconduct was "related to [a] disability." *Raytheon*, 540 U.S. at 54 n.6, 124 S.Ct. 513; *see Bharadwaj*, 954 F.3d at 1134 n.2, 1135 (affirming summary judgment based on a clinic's determination that a doctor had an "inability to get along with others," which may have been a symptom of a perceived "mental impairment" (quoting 42 U.S.C. § 12102(1)(A))); *McNary v. Schreiber Foods, Inc.*, 535 F.3d 765, 769–70 (8th Cir. 2008) (affirming

summary judgment even though the employer's basis for termination, "sleeping on the job," was linked to the employee's fatigue-causing thyroid disorder). As other courts have concluded, terminating an employee for workplace misconduct, "even misconduct related to a disability," *Neal v. E. Carolina Univ.*, 53 F.4th 130, 152 (4th Cir. 2022) (citation omitted), is not discrimination "*on the basis of* disability," 42 U.S.C. § 12112(a) (emphasis added). *See Gruttemeyer*, 31 F.4th at 648 (requiring proof that the disability was a "motivating factor" for an employment decision). If the motivating reason for the dismissal was misconduct, not the underlying disability, there was no unlawful discrimination. *See Neal*, 53 F.4th at 152; *McElwee v. County of Orange*, 700 F.3d 635, 641 (2d Cir. 2012); *see also* U.S. Equal Emp. Opportunity Comm'n, *Applying Performance and Conduct Standards to Employees with Disabilities*, § III(B)(9) (2008) ("The ADA does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability.").

Whether Huber *actually* violated Westar's attendance policy is also beside the point. All that matters is whether the company "honestly believed" she did. *Twymon*, 462 F.3d at 935; *see McNary*, 535 F.3d at 769 (noting that whether the employer's belief was correct does not "create a factual dispute as to the issue of pretext" (citation omitted)). Recall that Huber told Kelchen during the call that she had driven herself to the clinic and called her son while she was there. These statements, as well as Kelchen's response, all point toward an honest belief that Huber could have called her the day before too. Even if Kelchen

was mistaken, it takes more to show that the reason for terminating her "ha[d] no basis in fact." *Torgerson*, 643 F.3d at 1047 (citation omitted); *see Pulczinski*, 691 F.3d at 1003 ("To prove that the employer's explanation was false, the employee must show the employer did not truly believe that the employee violated company rules.").

Finally, Kelchen's "dismissive attitude" when asked for accommodations does not create a genuine issue of material fact on pretext either. Telling Huber she could store her insulin in a cooler was unhelpful. As was urging her to become better at time management if she wanted a meal break during the day. But both occurred months before Westar terminated her. *See Henderson v. Ford Motor Co.*, 403 F.3d 1026, 1036 (8th Cir. 2005) (concluding that evidence that was "not close in time to the alleged adverse employment action" and that did not "relate[] to the legitimacy of [the] action" was insufficient to show pretext). More than "stray remarks . . . unrelated to the decisional process" were necessary to survive summary judgment. *Quick*, 441 F.3d at 609.

III.

We accordingly reverse the judgment in part, remand for further proceedings on the FMLA interference claim, and otherwise affirm.[2]

---

2. Huber also appeals the denial of her motions to strike and for partial summary judgment. Though they likely became moot after the district court granted Westar's summary-judgment motion, nothing stands in the way of reconsidering them on remand.

ERICKSON, Circuit Judge, with whom COLLOTON, Chief Judge, and SMITH, SHEPHERD, and KELLY, Circuit Judges, join, concurring in part and dissenting in part.

I concur with the court's conclusion in Part II.A.1 but disagree with its conclusion that Huber's retaliation claim and discrimination claims cannot survive summary judgment. Huber's evidence demonstrates a question of fact exists on the issue of whether Westar's stated reason for her termination was a pretext for disability discrimination.

The court suggests Huber may lack even a prima facie case of FMLA retaliation because she relies primarily on the striking overlap of her diabetic episode with the decision to terminate her employment. Unlike in typical proximity cases, where weeks or months separate protected activity from adverse action, Kelchen called Westermajer within minutes of learning that Huber's violations were caused by her diabetes. *Compare Littleton v. Pilot Travel Ctrs., LLC*, 568 F.3d 641, 643, 645 (8th Cir. 2009) (concluding a seven-month gap was unable to demonstrate causation), *with Smith v. Allen Health Sys., Inc.*, 302 F.3d 827, 833 (8th Cir. 2002) (concluding a two-week gap was "sufficient," albeit "barely so," to complete a plaintiff's prima facie case of FMLA retaliation). Although mere temporal proximity rarely links a protected activity to adverse action strongly enough to prove retaliation, "temporal proximity alone [may] be sufficient" if the distance is "very close." *Sisk v. Picture People, Inc.*, 669 F.3d 896, 900 (8th Cir. 2012) (cleaned up). Huber's connection is measured in minutes,

not months, so it falls on the right side of the line. *See Lightner v. Catalent CTS (Kansas City) LLC*, 89 F.4th 648, 656 (8th Cir. 2023) (holding that plaintiff presented submissible case where adverse action was taken within 48 hours); *Marez v. Saint-Gobain Containers, Inc.*, 688 F.3d 958, 963 (8th Cir. 2012) (similar).

In any event, because the record was fully developed on the motion for summary judgment, whether Huber properly made out a prima facie case is no longer relevant, and the court may turn directly to whether there is a genuine issue for trial on the question of discrimination. *See U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714–15, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983); *Johnson v. Ready Mixed Concrete Co.*, 424 F.3d 806, 810 (8th Cir. 2005). The court concludes Huber cannot show discrimination with suspicious timing evidence because her violations of the call-in policy overlapped with her diabetic episode such that the two cannot be disentangled. Then it dismisses her other examples of hostility on the basis that they fail to rule out Westar's explanation. These conclusions, however, rest on disputed facts that, if resolved in Huber's favor, constitute indirect evidence sufficient to allow a reasonable jury to conclude that Westar's decision to terminate Huber was rooted in prohibited reasons and those prohibited reasons "more likely motivated" Westar's termination decision. *Torgerson v. City of Rochester*, 643 F.3d 1031, 1047 (8th Cir. 2011) (en banc) (cleaned up).

As to Huber's FMLA retaliation claim, the court reworks the timeline to favor Westar. It states Kelchen "confirmed" during the December 21 call "that Huber's

diabetic episode created a need for FMLA leave *and* that she had violated the attendance policy twice more." The record, when viewed in a light most favorable to the nonmoving party as we must at this stage, shows something different. Kelchen learned of Huber's first violation on December 20, anticipated Huber would be absent the following day, and confirmed her suspicions when she spoke with Huber's replacement. Contrary to the court's suggestion, what Kelchen established during the December 21 call was not the fact of the violations, but the why: Huber's diabetes had left her delirious and incoherent for more than a day. A reasonable jury could conclude Kelchen's new understanding of Huber's medical needs more likely motivated her to terminate Huber than her preexisting knowledge of Huber's attendance policy violations.

The same goes for Huber's discrimination claims. Intentional discrimination "must be determined by a finder of fact making important credibility determinations." *Bassett v. City of Minneapolis*, 211 F.3d 1097, 1109 (8th Cir. 2000), *abrogated on other grounds by Torgerson*, 643 F.3d at 1059. Kelchen's notes from the December 21 call acknowledge Huber is "diabetic" and reference issues with her "levels" and "sugar level[s]." Yet Kelchen later falsely denied having "any knowledge prior to Tonya's termination that she had diabetes." This conflict puts Kelchen's credibility squarely at issue. *See Holland v. Gee*, 677 F.3d 1047, 1063 (11th Cir. 2012) (concluding decisionmaker's false denial that he knew plaintiff was pregnant could lead a jury to make an adverse credibility determination and find pregnancy was a motivating factor

for termination). A jury could well disbelieve Kelchen and conclude Kelchen's neutral explanations for her decision are an invention intended to mask discriminatory intent. *See Euerle-Wehle v. United Parcel Serv., Inc.*, 181 F.3d 898, 900 (8th Cir. 1999) (evaluating whether "the reason" for termination "was created to disguise an illegal discriminatory motive"); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (citing "the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt" (cleaned up)).

The court reassures that "in context, the statement during [Kelchen's] deposition was a reference to her lack of knowledge in the months leading up to the diabetic episode." When we look to context, we do so "in the light most favorable to the *nonmoving* party," drawing "all reasonable inferences in *its* favor," and leaving credibility determinations for the finder of fact. *Sherr v. HealthEast Care Sys.*, 999 F.3d 589, 597 (8th Cir. 2021) (cleaned up) (emphasis added). The court's optimistic interpretation in Kelchen's favor is not "the only reasonable inference," such that it is appropriate to take a credibility determination from the jury. *Merechka v. Vigilant Ins. Co.*, 26 F.4th 776, 782 (8th Cir. 2022) (cleaned up); *see also Hossaini v. W. Missouri Med. Ctr.*, 97 F.3d 1085, 1088 (8th Cir. 1996) ("[T]he court cannot weigh the evidence or grant summary judgment merely because it believes the nonmoving party will lose at trial."). Indeed, one may assume Kelchen learned of Huber's diabetes "just minutes before the termination," as the court does, and still note

she denied having such knowledge "at any point" before the termination.

The court credits Westar with a consistent focus on Huber's policy violations. But this "consistency" requires a generous reading of the record in Westar's favor. This assertion also runs through Kelchen, who spoke with Amy Rowe about Huber's prior violations of the attendance policy. She did the same thing before Rowe sent Huber's termination letter, which stressed that Westar cared only about Huber's failure "to follow the Company's notice procedures" on December 20 and 21. The persuasive force of Westar's consistency argument only works if the jury finds Kelchen credible, and a reasonable jury, when the facts are viewed in a light most favorable to Huber, would have more than ample reason to conclude she is not. It is difficult to imagine a lie more material than, in a case alleging disability discrimination, a supervisor's lie about her knowledge of her subordinate's disability. *See Reeves*, 530 U.S. at 147, 120 S.Ct. 2097; *cf. Lee v. State of Minn., Dep't of Com.*, 157 F.3d 1130, 1134–35 (8th Cir. 1998) (treating a supervisor's false statements as immaterial because they did not relate to a protected characteristic).

Credibility disputes aside, Westar's focus on its attendance policy looks different when viewed in a light most favorable to Huber. Westar handled her prior attendance issues with coaching sessions and warnings. Later, when Kelchen linked Huber's diabetes with a violation, Westar skipped past these steps and moved directly to termination. On a record like this one, Westar's deviation from established practice is as much

circumstantial evidence of pretext as it is evidence of Westar's consistently neutral focus. *See Erickson v. Farmland Indus., Inc.*, 271 F.3d 718, 727 (8th Cir. 2001) (noting evidence an employer varied from normal practice may suggest a "discriminatory attitude"). Put differently, the court credits Westar's consistency even though that evidence is also highly susceptible to an adverse interpretation. After all, while Westar has discretion over "business judgments" like employee discipline, it cannot use this discretion to disguise discrimination. *Kincaid v. City of Omaha*, 378 F.3d 799, 805 (8th Cir. 2004).

That principle is particularly important when Kelchen's few interactions with Huber reflect irritation with Huber's disability. For example, Kelchen refused to help Huber find a place to store her insulin or time for meal breaks so that she could take her insulin. A reasonable jury might conclude this indifference—repeated so soon before Huber's firing and considering Kelchen's false denial—shows Westar's focus on its attendance policy was really a practiced excuse for discrimination. *See Kells v. Sinclair Buick-GMC Truck, Inc.*, 210 F.3d 827, 834 (8th Cir. 2000) (observing "a reasonable jury could find that [the defendant] viewed with derision [the plaintiff's] requests for reasonable accommodations" and infer its "reasons for transferring and discharging [him] were also related to contempt towards his disability"), *abrogated on other grounds by Torgerson*, 643 F.3d at 1059; *cf. Henderson v. Ford Motor Co.*, 403 F.3d 1026, 1035–36 (8th Cir. 2005).

Finally, the court fragments Huber's evidence and then concludes that no piece rules out Westar's explanation.

At this stage, Huber need only present evidence that "a prohibited reason, rather than the employer's stated reason, actually motivated the employer's action." *Torgerson*, 643 F.3d at 1047; *see also Fitzgerald v. Action, Inc.*, 521 F.3d 867, 877 (8th Cir. 2008) (observing that "fact[s] which could cause a reasonable trier of fact to raise an eyebrow" provide "additional threads of evidence that are relevant to the jury" (cleaned up)). Huber's claim may proceed even if her proof of discrimination does not foreclose other possibilities. Huber has met that burden. On this record, a reasonable jury convinced that Kelchen is not credible could conclude Huber's termination was motivated by discriminatory attitudes.

Unresolved material factual disputes remain in this case, particularly with respect to Kelchen's credibility. These factual issues are properly left to the ultimate finder of fact to resolve. For these reasons, I respectfully dissent from the court's conclusions in Parts II.A.2 and II.B.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED JULY 1, 2024

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

No. 23-1087

TONYA C. HUBER,

Plaintiff-Appellant,

v.

WESTAR FOODS, INC.,

Defendant-Appellee.

Submitted: December 13, 2023
|
Filed: July 1, 2024

Before ERICKSON, MELLOY, and STRAS, Circuit Judges.

OPINION

MELLOY, Circuit Judge.

In December 2019, Tonya Huber experienced a diabetic episode that caused her to miss work. Days later, her employer, Westar Foods, Inc., fired her. Thereafter, Huber brought this action alleging disability

discrimination under the Americans with Disabilities Act ("ADA") and Nebraska Fair Employment Practice Act ("NFEPA"), as well as interference with and retaliation for exercising her rights under the Family and Medical Leave Act ("FMLA"). Westar filed a motion for summary judgment, which the district court granted. Huber appeals. We reverse and remand for further proceedings consistent with this opinion.

I.

On appeal from a grant of summary judgment, we view the facts in the light most favorable to Huber as the nonmoving party and draw all reasonable inferences in her favor. *Lightner v. Catalent CTS (Kansas City), LLC*, 89 F.4th 648, 651 (8th Cir. 2023).

Westar Foods operates a number of Hardee's restaurants in the Midwest, employing more than 200 people. In December 2018, Westar hired Huber as a store manager for a Nebraska Hardee's location. Prior to employment with Westar, Huber had worked in the fast-food industry for fifteen years. Westar hired Huber to work full-time at fifty hours per week. Huber's ten-hour shifts typically began at 5 a.m. and ended at 3 p.m., while Huber's duties included managing restaurant staff, overseeing store operations, and ensuring the store was opened each day.

Soon after Huber started working at Westar, she was diagnosed with diabetes. In March 2019, Huber had to start taking insulin, including at work. Over

the course of her employment, Huber's insulin dosage increased. To manage her diabetes, Huber needed a room temperature location where she could store her insulin. The restaurant's kitchen and office ran upwards of ninety degrees, and Huber struggled to find a room temperature place for insulin storage. As such, she asked her district manager at the time, Matt Thayer, for help finding suitable storage, but he responded, "That's a [you] problem, not a [me] problem." After Cindy Kelchen became Huber's district manager in September 2019, Huber renewed her request for help finding a room temperature location for her insulin, and Kelchen advised storing it in the freezer. When Huber pointed out that the freezer was not room temperature, Kelchen responded, "Then I don't know what to tell you."

In addition to insulin storage, Huber also needed to find time during her shift to eat a meal so she could take her insulin. Huber was often too busy to take meal breaks during her shifts, so she sought help from Kelchen. Kelchen responded by telling Huber to get better at time management.

In December 2019, Huber began to feel sick because of her diabetes. When Huber woke up for her shift on the morning of December 20, her blood glucose level was low, and she was experiencing symptoms consistent with hypoglycemia.[1] Indeed, because of her blood glucose level,

1. "Hypoglycemia is an abnormally low concentration of glucose in the blood which may lead to tremulousness, cold sweat, headache, hypothermia, irritability, confusion, hallucinations, bizarre behavior, and ultimately convulsions and coma." *Wood*

Huber "felt out of it" and did not know who or where she was. Huber realized she needed to go to work but then forgot and became confused as to what was happening or where she was supposed to be. Eventually, Huber was able to drive herself to a nearby doctor's office where she was given an IV and medications that sedated her.

Throughout the day of her stay at the doctor's office, Huber called her son and her boyfriend, Richard Grondin, on multiple occasions. One call to Grondin lasted 45 minutes. According to Grondin, Huber was groggy and incoherent when he spoke with her. Huber's son recalled that her communication was "all over the place" and difficult to comprehend. Huber does not remember these calls due to the impact of her diabetic episode.

On the day of the diabetic episode, Westar first discovered that Huber had not come into work when a customer notified Kelchen that Hardee's was not open. Kelchen tried calling Huber, who did not answer, so Kelchen called Huber's son, who was listed as her emergency contact. Huber's son told Kelchen that Huber was at the doctor's office, that her "levels were off," and that Huber would call back. Huber did not end up calling Kelchen that day.

The doctor's office kept Huber under its care until it closed for business. When Huber was discharged in the evening, the medical staff would not permit her to

---

v. Omaha Sch. Dist., 985 F.2d 437, 438 n.2 (8th Cir. 1993) (citing Dorland's Illustrated Medical Dictionary 804 (27th ed. 1988)).

drive because of her condition, so she called Grondin for a ride. Because of her state, Huber was unable to convey to Grondin the directions to where she was, "so he had to use an app to locate her." When they eventually arrived at Huber's home, Huber was delirious, disoriented, and ill, so Grondin decided to stay overnight out of concern for her safety.

Huber slept until 7:45 a.m. the next day, December 21. She had been scheduled to work at 5 a.m. that morning, but she was still ill and recovering from the medications administered at the doctor's office the day before. Westar's attendance policy has a "call-in" requirement, which states that if a store manager is going to be late for work or if they are unable to work, they must call their district manager immediately and at least two hours prior to the start of their shift "when possible." Additionally, the attendance policy states that "[t]exting, emailing or leaving a message is not" an acceptable way to notify management of an absence or tardiness. Huber was aware of the call-in policy, so immediately upon awaking, she called Kelchen and emailed her a doctor's note excusing her from work through December 26. On the call, Huber conveyed her experience and the nature of the diabetic episode to Kelchen. Kelchen took notes of the conversation and wrote that Huber was at the doctor's office because "her levels of her diabetic [sic] was off." During the call, Kelchen was yelling at Huber; indeed, her voice was so loud that it woke Grondin, who was asleep in an adjacent room. When Kelchen asked Huber why she did not notify her in accordance with the call-in policy on either December 20 or 21, Huber explained how the diabetic episode made it

extremely difficult to call, mentioning to Kelchen that she could do an internet search to understand the symptoms better. Kelchen did not understand or believe that Huber could not have called, especially when she was able to call her boyfriend and son and drive herself to the doctor's office. During the conversation, Kelchen asked Huber five times why she did not make a "simple phone call" to inform Westar about her absence.

Immediately following her call with Huber, Kelchen called Frank Westermajer, Westar's owner and president, to convey her conversation with Huber. It is undisputed that during the call, the decision was made to fire Huber when she returned from sick leave on December 26. The parties disagree as to whether Westermajer was the sole decision-maker, or whether Kelchen was also a decision-maker.

In the days following her diabetic episode, Huber continued to struggle with her health, experiencing fluctuating blood glucose levels that required hourly readings. On December 22, pursuant to her doctor's guidance, Huber emailed Kelchen and Amy Rowe, Westar's HR representative, requesting FMLA paperwork. Huber did not receive a response and followed up on December 23 to request FMLA forms ahead of a follow-up doctor's appointment that day. Rowe did not provide the paperwork but responded that she had the doctor's note excusing Huber from work and therefore needed nothing additional from Huber's doctor.

At the follow-up appointment, the doctor provided Huber with another note requiring her to be out of

work through January 2 due to her diabetes. After the doctor's appointment, Huber once again requested FMLA paperwork, but received no response. The next morning, on December 24, Rowe responded, once again not providing paperwork, but instead requesting a meeting that afternoon despite her awareness of Huber's medical leave. Rowe planned to fire Huber at the meeting. Huber, whose condition was not stable, responded by declining the meeting, providing the new doctor's note, and asking once again for the FMLA paperwork.

Because Huber's sick leave was extended, the December 26 meeting did not occur, and Rowe instead sent Huber a termination letter. The letter stated that the reason for the termination was because Huber "failed to follow the Company's notice procedures for [her] absences on December 20, 2019 and on December 21, 2019." The letter noted that Huber was "fully aware" of the company's notice procedures in part because the company had previously disciplined her for not abiding by them. The letter further explained that because Huber was "driving and in contact with [her] son" on the day of her diabetic episode, she "should have been able to provide notification of [her] absences to the Company . . . or at the very least prior to [her] scheduled shift on Saturday, December 21."

In addition to providing a reason for termination, Westar's letter also addressed Huber's FMLA request, stating that "[b]ased on [her] explanation that [she] drove [herself] to the clinic on December 20th and the circumstances on December 21, 2019," and because she had "failed to provide notice as soon as possible and practical

[and] did not request any need for an accommodation until after the unscheduled absences," her absences would not be covered under the FMLA.

Thereafter, Huber brought this lawsuit alleging Westar violated the ADA and NFEPA by discriminating against her on the basis of her diabetes. Huber also alleged that Westar interfered with her rights and retaliated against her in violation of the FMLA. Westar moved for summary judgment on all claims. Huber then filed a partial motion for summary judgment on Westar's affirmative defenses. Subsequently, Huber also moved to strike two affidavits that Westar filed in opposition to her partial motion for summary judgment. The district court granted Westar's motion for summary judgment. Additionally, the district court denied both of Huber's motions without further discussion. Huber now appeals.

II.

The Court "review[s] a grant of summary judgment *de novo*." *Wages v. Stuart Mgmt. Corp.*, 798 F.3d 675, 679 (8th Cir. 2015). "Summary judgment is proper if, after viewing the evidence and drawing all reasonable inferences in the light most favorable to the nonmovant, no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law." *Corkrean v. Drake Univ.*, 55 F.4th 623, 630 (8th Cir. 2022) (citation omitted); Fed. R. Civ. P. 56(a). "A court at this stage 'does not weigh the evidence, make credibility determinations, or attempt to discern the truth of any factual issue' but focuses on whether there are genuine disputes of material fact for

trial." *Walz v. Randall*, 2 F.4th 1091, 1099 (8th Cir. 2021) (quoting *Morris v. City of Chillicothe*, 512 F.3d 1013, 1018 (8th Cir. 2008)).

III.

We first address Huber's disability discrimination claim. Under the ADA, employers are prohibited from discriminating against qualified individuals on the basis of their disability. *Gruttemeyer v. Transit Auth.*, 31 F.4th 638, 646 (8th Cir. 2022); 42 U.S.C. § 12112(a)–(b).[2] To establish that an employer took an adverse employment action motivated by discriminatory animus, a plaintiff may present "evidence of disparate treatment or other proof that will vary according to the specific facts of the case." *Lipp v. Cargill Meat Solutions Corp.*, 911 F.3d 537, 543 (8th Cir. 2018). Such evidence can be "direct" or "indirect," terms that refer to the causal strength of the evidence, not necessarily whether evidence is circumstantial. *Id.*; *St. Martin v. City of St. Paul*, 680 F.3d 1027, 1033 (8th Cir. 2012). Direct evidence provides a strong causal

2. "The disability discrimination provision[s] in the NFEPA are patterned after the ADA, and the statutory definitions of 'disability' and 'qualified individual with a disability' contained in the NFEPA are virtually identical to the definitions of the ADA." *Ryan v. Cap. Contractors, Inc.*, 679 F.3d 772, 777 n.3 (8th Cir. 2012) (citation omitted) (discussing Neb. Rev. Stat. Ann. § 48-1102(9) & (10); 42 U.S.C. §§ 12102, 12111(8)). "In construing the NFEPA, Nebraska courts have looked to federal decisions, because the NFEPA is patterned after Title VII and the ADA." *Id. See also, e.g.*, *Haffke v. Signal 88, LLC*, 306 Neb. 625, 947 N.W.2d 103, 113–14 (2020). As such, our analysis and conclusions for Huber's ADA claims also apply to the NFEPA claims.

"link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." *St. Martin*, 680 F.3d at 1033 (quoting *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004)). "Direct evidence includes 'evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude,' where it is sufficient to support an inference that discriminatory attitude more likely than not was a motivating factor." *Lipp*, 911 F.3d at 543 (quoting *Schierhoff v. GlaxoSmithKline Consumer Healthcare, L.P.*, 444 F.3d 961, 966 (8th Cir. 2006)). Direct evidence often, though not always, comes in the form of blatant statements expressing discriminatory animus.

Indirect evidence, on the other hand, provides a weaker causal connection but may nonetheless establish discrimination. Where a plaintiff puts forth indirect evidence, we apply the *McDonnell Douglas* burden-shifting framework. *St. Martin*, 680 F.3d at 1033. Under the *McDonnell Douglas* framework, the plaintiff must first make a prima facie showing of discrimination by establishing: "(1) that the plaintiff was disabled within the meaning of the ADA; (2) that the plaintiff was qualified to perform the essential functions of the job; and (3) a causal connection between an adverse employment action and the disability." *Oehmke v. Medtronic, Inc.*, 844 F.3d 748, 755 (8th Cir. 2016). After the plaintiff establishes their prima facie case, the burden then shifts to the employer to put forth "a legitimate, nondiscriminatory reason for

the adverse action." *Id.* Finally, if the employer offers such a reason, the burden shifts back to the plaintiff, who must establish pretext, i.e., "that a [prohibited] reason more likely motivated the employer.'" *Torgerson v. City of Rochester*, 643 F.3d 1031, 1047 (8th Cir. 2011) (citation omitted) (alteration in original). Although the burden of production shifts, the burden of persuasion always remains with the plaintiff. *Donathan v. Oakley Grain, Inc.*, 861 F.3d 735, 740 (8th Cir. 2017).

The district court found that Huber did not present direct evidence, and we agree. Huber has offered no evidence with the causal strength to dispositively show disability discrimination; therefore, we apply the *McDonnell Douglas* burden-shifting framework. The burden for establishing a plaintiff's prima facie case is not onerous, and the district court assumed without determining that Huber met her prima facie burden. *Id.* The employer's burden is likewise not onerous, and the district court found that Westar offered a legitimate, nondiscriminatory reason for terminating Huber's employment. *Torgerson*, 643 F.3d at 1047. Finally, the district court found that Huber failed to show Westar's reason for firing her was pretextual.

Huber disputes the district court's conclusions. Specifically, Huber argues that genuine issues of fact exist as to whether Westar's reason for firing Huber was pretextual. When considering whether an employer's reason for firing is pretext, "the ultimate question is whether the plaintiff presents evidence of 'conduct or statements by persons involved in [the employer's]

decision-making process reflective of a discriminatory attitude sufficient to allow a reasonable jury to infer that that attitude was a motivating factor in [the employer's] decision to fire [the plaintiff].'" *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1135 (8th Cir. 1999) (en banc) (alterations in original) (quoting *Feltmann v. Sieben*, 108 F.3d 970, 975 (8th Cir. 1997)). There are at least two ways a plaintiff may show a question of fact exists regarding pretext: a plaintiff may present evidence that (A) "the employer's explanation is unworthy of credence . . . because it has no basis in fact" or (B) "a prohibited reason more likely motivated the employer." *Gardner v. Wal-Mart Stores, Inc.*, 2 F.4th 745, 748 (8th Cir. 2021) (alteration in original) (citations omitted).

A.

Huber first argues that Westar's reason for terminating her is "unworthy of credence" and "has no basis in fact." *Id.* Westar maintains that it terminated Huber because she violated the company call-in policy on December 20 and 21. Violation of company policies is a legitimate, nondiscriminatory reason for employment termination. *See, e.g.*, *Miner v. Bi-State Dev. Agency*, 943 F.2d 912, 913–14 (8th Cir. 1991). Huber disputes that she violated company policy on the days she was experiencing a diabetic episode. In rejecting Huber's argument, the district court concluded that even assuming Huber did not violate the call-in policy, Westar presented evidence that it had a "good-faith belief that she violated the call-in policy on both occasions."

In reaching its decision, the district court cited *Pulczinski*, where we held that "[t]aken alone, that the employer's belief turns out to be wrong is not enough to prove discrimination." *Pulczinski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1003 (8th Cir. 2012). Indeed, typically the "rule in discrimination cases is that if an employer honestly believes that an employee is terminated for misconduct, but it turns out later that the employer was mistaken about whether the employee violated a workplace rule, the employer cannot be liable for discrimination." *Richey v. City of Indep.*, 540 F.3d 779, 784 (8th Cir. 2008); *see also Pulczinski*, 691 F.3d at 1002. Therefore, "[i]f the employer takes an adverse action based on a good faith belief that an employee engaged in misconduct, then the employer has acted because of perceived misconduct, not because of protected status or activity." *Richey*, 540 F.3d at 784. "The relevant inquiry is whether the [employer] *believed* [the employee] was guilty of the conduct justifying discharge." *Id.* (quoting *Scroggins v. Univ. of Minn.*, 221 F.3d 1042, 1045 (8th Cir. 2000)) (alterations in original).

In *Pulczinski*, an employer had a genuine belief that the discharged employee had engaged in impermissible activity—specifically, activity that would slow down work. 691 F.3d at 1002. This activity was wholly unrelated to the employee's disability. *Id.* Following an unexcused absence, which the employee argued resulted from his disability, the employer, not believing the employee, conducted a formal investigation into the absence. *Id.* at 1001. During the investigation, the employer learned that the employee had planned to miss work that day to go gambling, encouraged his colleagues to come with him to the casino or to also

skip work, and actively discouraged his colleagues from working overtime. *Id.* Based on uncontroverted evidence, the employer terminated the employee not for missing work, which the plaintiff maintained was due to his disability, but rather for "attempting to cause a slowdown in work by discouraging others from working overtime." *Id.* The plaintiff sued.

On an appeal from a motion for summary judgment, the *Pulczinski* employee argued that the district court's decision should be reversed because there was "a genuine issue of fact about whether he truly discouraged overtime work," which the plaintiff argued showed pretext. *Id.* at 1003. We held that even if the employer erred in coming to its conclusion that the plaintiff had sought to cause a work slowdown, the reasoning, like the justification for termination, was unrelated to the plaintiff's disability. *Id.* at 1003–04. *See also, e.g.*, *Johnson v. Securitas Sec. Servs. USA, Inc.*, 769 F.3d 605, 612 (8th Cir. 2014) (applying good faith principle to age discrimination claim); *Liles v. C.S. McCrossan, Inc.*, 851 F.3d 810, 821–22 (8th Cir. 2017) (applying good faith principle to claim of sex discrimination); *Main v. Ozark Health, Inc.*, 959 F.3d 319, 324–26 (8th Cir. 2020) (same).

Notwithstanding the principle articulated in *Pulczinski*, an employer's argument of good faith will not always preclude a discrimination case from reaching a jury. Where an employer seeks to assert a good faith argument, the underlying "reasons for firing must be 'sufficiently independent from'" the protected status or activity. *Gilooly v. Missouri Dep't of Health & Senior*

Servs., 421 F.3d 734, 740 (8th Cir. 2005) (quoting *Womack v. Munson*, 619 F.2d 1292, 1297 (8th Cir. 1980)); *Richey*, 540 F.3d at 785. Thus, if the reason for an employer's adverse employment action is "so inextricably related to" the disability, "they cannot be considered independently of one another." *Womack*, 619 F.2d at 1297. Indeed, we recently explained that where "a disability caused missed work, and missed work caused termination, it [is not] much of a stretch to conclude that . . . [the] disability caused [the] termination." *Weatherly v. Ford Motor Co.*, 994 F.3d 940, 946 (8th Cir. 2021).[3]

---

3. We have explained that where, as here, the disability may have caused the conduct and the conduct caused the termination, "accommodation and termination claims are two sides of the same coin." *Weatherly*, 994 F.3d at 946; *see also Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1139–40 (9th Cir. 2001) ("Often [accommodation and discrimination] claims, are, from a practical standpoint, the same. For the consequence of the failure to accommodate is . . . frequently an unlawful termination. . . . For purposes of the ADA . . . conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination. The link between the disability and termination is particularly strong where it is the employer's failure to reasonably accommodate a known disability that leads to discharge for performance inadequacies resulting from that disability." (citations omitted)). Indeed, employers have a duty under the ADA to reasonably accommodate an employee's *known* disability. *See Kowitz v. Trinity Health*, 839 F.3d 742, 748 (8th Cir. 2016); *Ehlers v. Univ. of Minn.*, 34 F.4th 655, 661 (8th Cir. 2022) (explaining that an employer may violate the ADA where it fails to "make a good faith effort to assist the employee in seeking accommodation" and "the employee could have been reasonably accommodated but for the employer's lack of good faith").

Huber's case is distinguishable from *Pulczinski*[4] because a reasonable jury could conclude her diabetic episode was not independent from her firing. *Gilooly*, 421 F.3d at 740. Here, Huber was fired because she failed to call in to work on days she was experiencing a diabetic episode. As such, Huber argues that her disability precluded her from calling in. Kelchen, on the other hand, did not believe Huber and assumed she was able to abide by the call-in policy on the days of her diabetic episode. Westar's decision to terminate Huber was based on this assumption. Although Westar argues that its termination decision was underscored by Huber's failure to follow the call-in policy on two prior occasions, a factfinder could determine this evidence weighs in favor of Huber. Indeed, a factfinder may conclude that Westar's decision not to terminate Huber on two prior occasions, where her failure to call in was unrelated to her disability, only bolsters Huber's pretext argument.

In these situations, whether the employee's disability caused the conduct that violated company policy and

4. The dissent also cites two cases that are similar to *Pulczinski* and thus distinguishable from the facts here. In *McNary v. Schreiber Foods, Inc.*, the plaintiff asserted that he had not actually violated company policy when he was caught sleeping at work—the plaintiff never argued that his disability caused him to sleep. 535 F.3d 765, 768–70 (8th Cir. 2008). *Bharadwaj v. Mid Dakota Clinic* likewise is distinguishable, but there, in addition to the plaintiff never asserting that his disability was the cause of the conduct that led to his termination, it was questionable whether the plaintiff even had a disability. 954 F.3d 1130, 1134 n.2 (8th Cir. 2020). Here, no one disputes that Huber missed work because of her diabetic episode, and, as a result, a genuine issue of fact exists as to whether she was able to abide by the call-in policy.

whether the employer acted in good faith are both questions of fact. *See Townsend v. Bayer Corp.*, 774 F.3d 446, 461 (8th Cir. 2014). Therefore, we cannot say as a matter of law that Huber was capable of calling in during her diabetic episode on December 20 and 21, and a jury must decide whether Westar's termination decision was made in good faith or supports a showing of pretext.

B.

Huber also argues that "a prohibited reason more likely motivated" Westar's termination decision as evidenced by the actions of her two district supervisors, Kelchen and Thayer. *Gardner*, 2 F.4th at 748. The district court determined that Kelchen and Thayer were not decision-makers, and therefore did not consider their actions as evidence of pretext. Because the issue of who qualifies as a decision-maker is critical to whether Huber presented evidence of pretext sufficient to survive a motion for summary judgment, we address that first.

1.

Where an employer "attempt[s] to confine decisionmaking power to a small number of individuals, those individuals will have a limited ability to exercise independent discretion when making decisions and will likely rely on other workers who actually interact with the affected employee." *Vance v. Ball State Univ.*, 570 U.S. 421, 447, 133 S.Ct. 2434, 186 L.Ed.2d 565 (2013). "Under those circumstances, the employer may be held to have effectively delegated the power to take

tangible employment actions to the employees on whose recommendations it relies." *Id.* Thus, "[e]ven if an employer concentrates all decisionmaking authority in a few individuals, it likely will not isolate itself from . . . liability." *Id.* at 446–47, 133 S.Ct. 2434. Moreover, one need not be a "decision-maker" for an employer to face liability: "Evidence of discriminatory animus among individuals with influence over decisionmaking can be sufficient for a reasonable jury to conclude discrimination was a motivating factor." *Gruttemeyer*, 31 F.4th at 648; *see also Kiel*, 169 F.3d at 1135 (explaining that a factfinder will consider evidence of discriminatory animus by "persons involved" in the adverse employment action).

Huber argues that Kelchen and Thayer were decision-makers or had influence over the decision-making process, and therefore their actions should be considered for evidence of discriminatory animus. The district court concluded that only Westar's CEO, Westermajer, was a decision-maker, and therefore did not consider Kelchen and Thayer's actions as evidence of discriminatory animus. But it is undisputed that Kelchen and Thayer were Huber's direct supervisors, and as such, Huber went to them when she requested accommodations for her diabetes. A factfinder could interpret their responses to Huber's accommodation requests as exercising delegated decision-making authority.

Moreover, Kelchen called Westermajer immediately after her call with Huber to convey the conversation about Huber's missed absence. During that call, Westermajer made the termination decision. A reasonable factfinder

could determine that, at the very least, Kelchen wielded decision-making influence over Westermajer's termination decision. Accordingly, we conclude that Huber has presented sufficient evidence to raise a genuine issue as to whether Kelchen and Thayer were decision-makers or influenced the decision-making process.

2.

Because a factfinder could determine that Kelchen and Thayer were decision-makers or influenced the decision-making process, we consider whether their actions show that "a prohibited reason," i.e., discriminatory animus, more likely motivated Westar's termination decision. A plaintiff may raise a question of fact as to pretext by showing "'a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding . . . that an illegitimate criterion actually motivated' the adverse employment action." *Othman v. City of Country Club Hills*, 671 F.3d 672, 675 (8th Cir. 2012) (quoting *Torgerson*, 643 F.3d at 1044).

To support her pretext argument, Huber first asserts that Kelchen's comments and conduct show discriminatory animus. Comments "uttered by individuals closely involved in employment decisions may" provide evidence of discriminatory animus. *Beshears v. Asbill*, 930 F.2d 1348, 1354 (8th Cir. 1991). Moreover, where conduct and actions indicate contempt toward an employee's disability, we have found a question of fact exists regarding discriminatory animus. *Kells v. Sinclair Buick-GMC Truck, Inc.*, 210

F.3d 827, 833–34 (8th Cir. 2000), *abrogated on other grounds by Torgerson*, 643 F.3d 1031 (2011). Huber alleges that Kelchen displayed contempt and anger toward her when explaining her absence from work on account of her diabetic episode. Huber alleges that Kelchen was angry over the phone, which is corroborated by Grondin, who stated that he was awoken by Kelchen "screaming" through the phone at Huber and observed that Kelchen was not "very receptive" to what Huber was explaining. A factfinder could infer discriminatory animus from Kelchen's actions and words.

Second, Huber asserts that the close temporal proximity between Kelchen's angry call and Westar's termination decision is further evidence of discriminatory animus. Indeed, close temporal proximity between an employer's discovery of the disability and the adverse employment action can contribute to an inference of discrimination, though on its own this is typically not sufficient to establish pretext. *See Sprenger v. Fed. Home Loan Bank of Des Moines*, 253 F.3d 1106, 1114 (8th Cir. 2001); *Smith v. Allen Health Sys., Inc.*, 302 F.3d 827, 833 (8th Cir. 2002). We have clarified that an interval of two months is likely not enough, but "a matter of weeks" could contribute to a finding of discrimination. *See Sprenger*, 253 F.3d at 1113–14; *see also Kipp v. Mo. Highway & Transp. Comm'n*, 280 F.3d 893, 897 (8th Cir. 2002); *Allen Health Sys., Inc.*, 302 F.3d at 833–34. On the other hand, "a 'mere coincidence of timing' can rarely be sufficient." *Kipp*, 280 F.3d at 897 (citation omitted). Here, according to Kelchen's notes, she learned of Huber's disability and the nature of her diabetic episode during their phone call.

Immediately after ending the call, Kelchen spoke with Westermajer, during which time the decision was made to terminate Huber. On its face, this timing does not appear coincidental; rather, the timing of the call to Westermajer is strong evidence of pretext.

Huber also argues that Westar demonstrated discriminatory animus when it failed to help her with accommodations. We have held that "[f]ailing to provide an employee with reasonable accommodations can tend to prove that the employer also acted adversely against the employee because of the individual's disability." *Kells*, 210 F.3d at 834. As noted above, Huber presented evidence that Kelchen and Thayer were ambivalent toward Huber's insulin storage and meal break requests. Huber also provides evidence of Kelchen and Rowe's shared contempt toward accommodating her sick leave after the diabetic episode. Moreover, Kelchen not only yelled at Huber over the phone on December 21, Kelchen equivocated on whether she expected Huber to find coverage for her shifts despite her sick leave. Kelchen stated that Huber was expected to find coverage for her shifts while on medical leave, then backtracked and explained that employees with doctor's notes are not expected to find coverage during leave. Kelchen's expectation that Huber work while sick is further suggested in Kelchen's disciplinary notes from December 23, where she wrote that Huber provided "[n]o communication to [Westar] for her store responsibilities and coverage." Moreover, on December 24, Rowe and Kelchen requested a meeting with Huber even though they were aware of Huber's doctor's note excusing her from work through December 26. Reviewing the facts in

the light most favorable to Huber, a reasonable factfinder could interpret Westar as showing contempt toward Huber's disability accommodations.

For its part, Westar denies having ever known about Huber's diabetes until *after* the company had already decided to terminate her employment on December 21. Yet Westar's own records contradict this assertion. Both Kelchen's notes and the termination letter from Rowe suggest that the company knew about Huber's diabetes at least as early as Kelchen's call with Huber's son, who conveyed that Huber's "levels were low." Although "levels were low" did not explicitly say glucose or diabetes, a trier of fact could find that Westar knew nonetheless, especially since those exact words were used in the termination letter Westar sent Huber. Regardless, Westar's company notes confirm that immediately prior to Kelchen's call with Westermajer, Kelchen had learned from talking with Huber that the reason she missed work on December 20 and 21 was due to her diabetes. The fact that Westar was aware of Huber's disability yet continues to deny awareness is strong evidence of pretext. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (holding that a "trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose"); *see also Ridout v. JBS USA, LLC*, 716 F.3d 1079, 1086 (8th Cir. 2013) (same).

In sum, viewed in the light most favorable to Huber, genuine issues of fact exist regarding whether Westar's termination decision was motivated by discriminatory

animus and therefore whether its reason for firing Huber was pretext.[5]

IV.

We next turn to Huber's FMLA claims. The FMLA requires employers to provide 12 weeks of unpaid leave to employees who experience "a serious health condition that makes the employee unable to perform the functions

---

5. In concluding that "[n]o jury could find Westar liable for disability discrimination on this record," the dissent disregards the Court's standard of review and construes the facts in the light most favorable to Westar, not Huber. For example, the dissent splits hairs over whether a "cooler" or a "freezer" was involved, choosing to focus on the former even though the record reflects that both words were used, and, regardless, neither a cooler nor a freezer would have accommodated Huber's insulin storage. The dissent also omits the critical fact that Westar claims it was unaware of Huber's disability until after its termination decision. This is despite the fact that Kelchen's notes, taken immediately before the termination decision was made, reflect the company's awareness of Huber's diabetes. *Reeves*, 530 U.S. at 147, 120 S.Ct. 2097 (explaining that an employer's false explanation may indicate pretext).

Courts are not free to disregard standards of review. In fact, here we "are required to view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion.'" *Scott v. Harris*, 550 U.S. 372, 378, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (citation omitted) (alteration in original). Standards of review serve as procedural safeguards to place reasonable constraints on courts and insure we do not exceed our authority. These safeguards are especially important on an appeal from a grant of summary judgment where a plaintiff's Seventh Amendment right to a jury trial is implicated. *Harris v. Interstate Brands Corp.*, 348 F.3d 761, 762 (8th Cir. 2003).

of the employee's job." 29 U.S.C. § 2612(a)(1)(D); 29 C.F.R. § 825.112; *Darby v. Bratch*, 287 F.3d 673, 679 (8th Cir. 2002). Under the FMLA, an employee must notify their employer that they plan to take leave, while an employer is prohibited from "discriminating against employees for asserting rights under the Act." *Darby*, 287 F.3d at 679; 29 U.S.C. §§ 2612(e)(2), 2615(a)(2). Huber asserts two types of FMLA discrimination claims: interference and retaliation. 29 U.S.C. § 2615(a)(1)–(2). Huber argues that genuine issues of fact exist as to both her interference and retaliation claims against Westar. An interference claim "alleges that an employer denied or interfered with his substantive rights under the FMLA," while a retaliation claim "alleges that the employer discrimination against him for exercising his FMLA rights." *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1050 (8th Cir. 2006) (citing 29 U.S.C. § 2615(a)(1)–(2)). We address each of Huber's FMLA claims in turn.

A.

"An employer is prohibited from interfering with, restraining, or denying an employee's exercise of or attempted exercise[] of any right contained in the FMLA." *Stallings*, 447 F.3d at 1050 (8th Cir. 2006) (citing 29 U.S.C. § 2615(a)(1)). "An employer's action that deters an employee from participating in protected activities constitutes an 'interference' or 'restraint' of the employee's exercise of his rights." *Id.* "Interference includes . . . 'manipulation by a covered employer to avoid responsibilities under FMLA.'" *Id.* (quoting 29 C.F.R. § 825.220(b)).

To succeed on an FMLA interference claim, an employee need only show they were "denied substantive

rights under the FMLA for a reason connected with [their] FMLA leave." *Id.* Thus, to prevail on an FMLA interference claim the employee must establish (1) they were eligible for FMLA leave, (2) the employer was on notice of the need for FMLA leave, and (3) the employer denied the employee an FMLA benefit. *Smith v. AS Am., Inc.*, 829 F.3d 616, 621 (8th Cir. 2016). On appeal, Westar does not seriously contest that Huber became eligible for FMLA leave when her diabetic episode caused her to miss more than three days of work. *See Rankin v. Seagate Techs., Inc.*, 246 F.3d 1145, 1147–49 (8th Cir. 2001). Rather, the parties dispute whether Westar was on notice of Huber's eligibility for FMLA leave prior to the company's decision to terminate Huber's employment.

"An employee need not invoke the FMLA by name in order to put an employer on notice that the Act may have relevance to the employee's absence from work." *Thorson v. Gemini, Inc.*, 205 F.3d 370, 381 (8th Cir. 2000). "Under the FMLA, the employer's duties are triggered when the employee provides enough information to put the employer on notice that the employee may be in need of FMLA leave." *Spangler v. Fed. Home Loan Bank of Des Moines*, 278 F.3d 847, 852 (8th Cir. 2002) (citation omitted). For the employer to be on notice of the need for FMLA leave, they must be aware of a "serious health condition" and not simply that an employee is "sick." *Id.* at 852–53. A serious health condition would not typically include the common cold. *Rankin*, 246 F.3d at 1147. Instead, a serious health condition includes an "illness" or "impairment" that causes "[a] period of incapacity . . . of more than three consecutive calendar days" or "[t]reatment two or more times by a health care provider." *Id.* (citing 29 C.F.R. § 825.114(a)(2)); *see also* 29 U.S.C. § 2611(11)(B).

If a factfinder determines that an employer was on notice of an employee's serious health condition, the inquiry does not end there. First, the employee must have notified the employer as "soon as practicable." *Spangler*, 278 F.3d at 852 (quoting 29 C.F.R. § 825.302(a)). "This ordinarily means at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee." *Id.* (citation omitted) (alterations omitted). Moreover, there must be a causal connection between the termination and the employee's need for FMLA leave. *Stallings*, 447 F.3d at 1050–51.

Huber argues that she put Westar on notice of her need for FMLA leave at least as early as her December 21 call with Kelchen. Westar, on the other hand, asserts that Huber first notified them of her need for FMLA leave when she emailed her request for FMLA paperwork on December 22, after the decision to fire her had been made. As such, Westar argues that Huber failed to provide notification "as soon as practicable." Additionally, Westar argues that even if Huber had notified Westar as soon as practicable, Huber still could not establish FMLA interference because Westar terminated her "for reasons wholly unrelated" to her FMLA needs.

To resolve this issue, we find *Clinkscale v. St. Therese of New Hope* controls. 701 F.3d 825 (8th Cir. 2012). There, the employee was a nurse with undiagnosed situational anxiety disorder. *Id.* at 826. While at work one day, the employee had a panic attack. *Id.* During the attack, the employee spoke to her employer's HR department who

instructed her to go home. *Id.* The next day, the employee met with her personal physician regarding the panic attack, after which, she was given a doctor's note requiring her to take sick leave. *Id.* The employee promptly provided the doctor's note to her HR department, who in turn provided FMLA forms for her physician to complete. *Id.* Later that day, the employer called and fired her on grounds of patient abandonment. *Id.* at 827. The employee sued alleging FMLA interference. The employer contended that it had not interfered with the employee's FMLA rights, because the termination occurred before she put the employer on notice. *Id.* at 828. Furthermore, the employer argued that the employee was "terminated for reasons 'wholly unrelated to the FMLA.'" *Id.* at 827. The district court granted summary judgment to the employer.

In reversing the district court, we first considered whether the employee had put her employer on notice when she spoke with HR during her panic attack or when she provided her employer with a doctor's note and received FMLA paperwork. *Id.* at 827–28. We determined that whether the employer was on notice prior to its termination decision was a material question of fact for the jury. *Id.* Additionally, we held that the panic attack was the cause of the alleged patient abandonment and the reason for her need for FMLA leave. *Id.* at 828–29. We explained: "Given the evidence suggesting a causal connection between [the employee's] condition and her 'patient abandonment,' the district court erred in concluding as a matter of law that [the] 'refusal to work . . . [was] not related to a medical diagnosis of anxiety.'" *Id.* at 829.

Similarly, we conclude that genuine issues of fact exist here. We cannot determine as a matter of law: (1) whether Westar was on notice of Huber's need for FMLA leave prior to its decision to terminate her; (2) whether Huber notified Westar as soon as practicable; and (3) whether there is a causal connection between Huber's diabetic episode and her failure to abide by Westar's call-in policy. Indeed, viewing the facts in the light most favorable to Huber, a reasonable jury could determine that Westar was on notice of Huber's FMLA needs as early as Kelchen's call with Huber's son. This conclusion is buttressed by the fact that Huber had previously brought her disability to the attention of both Kelchen and Thayer when she requested accommodations related to her diabetes. Likewise, a jury could determine that Huber's call to Kelchen on the morning of December 21 was the soonest she could practicably notify Westar. If Westar was on notice, Rowe's refusal to provide Huber with FMLA paperwork on multiple occasions, along with Westar's termination of Huber, could constitute FMLA interference. Accordingly, we find that genuine issues of fact remain as to Huber's FMLA interference claim.

B.

Huber also asserts an FMLA retaliation claim. "The difference between [interference and retaliation] claims is that the interference claim merely requires proof that the employer denied the employee his entitlements under the FMLA, while the retaliation claim requires proof of retaliatory intent." *Stallings*, 447 F.3d at 1051. "Basing an adverse employment action on an employee's use of

leave, or in other words, retaliation for exercise of Leave Act rights, is therefore actionable." *Allen Health Sys., Inc.*, 302 F.3d at 832. Where a plaintiff asserts an FMLA retaliation claim, absent direct evidence, we use the same *McDonnell Douglas* burden-shifting framework as ADA discrimination claims. *Hudson v. Tyson Fresh Meats, Inc.*, 787 F.3d 861, 866 (8th Cir. 2015). A plaintiff must show: (1) they "engaged in protected conduct"; (2) they "suffered a materially adverse employment action"; and (3) "the materially adverse action was causally linked to the protected conduct." *Wierman v. Casey's Gen. Stores*, 638 F.3d 984, 999 (8th Cir. 2011). A "materially adverse action" is one that "deter[s] a reasonable employee from making a charge of employment discrimination." *Id.* (citation omitted). Termination from employment is a materially adverse action. *Id.* If a plaintiff establishes their prima facie case, the burden of production shifts to the employer to "articulate a legitimate, nondiscriminatory reason for its action," after which the burden shifts back to the plaintiff to show the employer's reason is pretextual. *Id.*

Regarding the first element of a plaintiff's prima facie case, an employee must provide their employer with notice as soon as practicable that they may need FMLA leave. *Id.* at 1000. Thus, here, as with Huber's interference claim, a genuine issue of fact exists regarding whether she provided notice to Westar of her need for FMLA leave and, if so, whether she provided Westar with notice as soon as practicable.

Regarding Huber's burden of showing both a causal connection between her FMLA rights and Westar's

termination decision, as well as pretext, we are faced with issues of fact similar to Huber's ADA discrimination claim. For example, the very close temporal proximity between Huber's exercise of her FMLA rights and Westar's adverse employment action may support a finding of causation or pretext. *See Allen Health Sys., Inc.*, 302 F.3d at 833 (finding two weeks between protected FMLA activity and adverse employment action were "extremely close in time" and therefore raised an issue of fact on retaliation). Moreover, because Westar's reason for terminating Huber may be causally connected to her need for FMLA leave, a genuine issue of fact remains. *See Wierman*, 638 F.3d at 1000 (finding that, on an FMLA retaliation claim, an employer's reason for terminating pregnant employee—because she "was tardy or absent from work for pregnancy-related reasons"—was intertwined with the employee's disability); *see also Clinkscale*, 701 F.3d at 828; *Caldwell v. Holland of Texas, Inc.*, 208 F.3d 671, 677 (8th Cir. 2000). Accordingly, we also find that genuine issues of fact remain for Huber's FMLA retaliation claim.

V.

For the foregoing reasons, we reverse and remand the district court's grant of summary judgment to Westar on Huber's ADA, NFEPA, and FMLA claims.[6]

---

6. Huber also appeals the district court's denial of her motion to strike and motion for partial summary judgment. The district court did not discuss these motions in its order granting summary judgment to Westar. Accordingly, to the extent the district court denied these motions, we vacate.

STRAS, Circuit Judge, concurring in part and dissenting in part.

The court takes a wrong turn in this case. Westar Foods, Inc., fired Tonya Huber after she violated the company's attendance policy for the third time in less than a year. No matter, the court says, a reasonable jury could find that the termination was "on the basis of" her diabetes, rather than her misconduct. 42 U.S.C. § 12112(a). Like the district court, I would come out the other way. No jury could find Westar liable for disability discrimination on this record.

I.

Everyone agrees on the basic facts. One morning when Huber was set to open the Hardee's location she managed on Westar's behalf, she had a diabetic episode that required medical attention. She made a few calls throughout the day, but none to Westar. Nor did she ask her boyfriend or son to call, so no one knew she was missing from work. Instead, Westar found out when a customer called to complain that the restaurant had not yet opened. And then the next day, she did not report her absence until it was too late, nearly three hours after the start of her shift.

She violated company policy both days. Employees must "call the management person in charge" two hours ahead of time, "when possible," if they will "be late" or not "able to work." Huber had violated this policy before, once within days of starting, when she abandoned her shift

without notifying a supervisor. Then, several months later, she received a written warning for "fail[ing] to call and notify her supervisor . . . that she was leaving her shift." In fact, according to the form, she had missed her previous shift too, also without providing sufficient notice.

The warning also notified her that "any further violations" could "lead to further disciplinary action, up to and including termination." It did little good because, just two months later, she once again failed to notify a supervisor about consecutive absences. At that point, Westar decided to terminate her.

II.

Despite the multiple violations, the court holds that a reasonable jury could conclude that the reason was her diabetes. 42 U.S.C. § 12112(a) (prohibiting discrimination "on the basis of disability"). That is, her diabetes "actually motivated" the decision to fire her, *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52, 124 S.Ct. 513, 157 L.Ed.2d 357 (2003) (citation omitted), not her repeated violations of the company's attendance policy. *See Lindeman v. Saint Luke's Hosp. of Kan. City*, 899 F.3d 603, 606 (8th Cir. 2018); *see also Wierman v. Casey's Gen. Stores*, 638 F.3d 984, 995 (8th Cir. 2011) (explaining that "violations of company policy" constitute a "legitimate, nondiscriminatory reason[] for termination"). In my view, neither conclusion is reasonable.

Start with the fact that Westar has consistently pointed to the attendance-policy violations as the "actual[]

motivat[ion]" for its decision. *Raytheon Co.*, 540 U.S. at 52, 124 S.Ct. 513 (citation omitted). When Huber finally called on that second morning, Cindy Kelchen, her supervisor, asked "why didn't you call?" And the termination letter, sent only a few days later, explained that Huber had "failed to follow the [c]ompany's notice procedures for [her] absences." Westar has never wavered from this explanation, even in its briefing. *See Pulczinski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1003 (8th Cir. 2012) (explaining that if an employer "honestly believed the nondiscriminatory reason [it] gave for the action, pretext does not exist" (citation omitted)).

Westar's actions matched its words. Each time there was a violation, it acted. *See Gibson v. Am. Greetings Corp.*, 670 F.3d 844, 855 (8th Cir. 2012) (emphasizing that the termination occurred "only after" the employee had accumulated prior "written warnings"). The first time Huber abandoned her shift, the company gave her an "Employee Coaching Tool" that stressed the importance of communicating schedule changes in advance. And the second time, it went a step further and warned Huber that another violation could result in termination. When she violated the attendance policy for the third time, the company followed through and terminated her. Each time, Westar made clear that the progressive disciplinary steps were for lack of communication, not because she had been sick. *See Raytheon Co.*, 540 U.S. at 52, 124 S.Ct. 513.

Nondiscriminatory explanations for an employment decision are given credence, absent a showing of pretext. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530

U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) ("[A]n employer [is] entitled to judgment as a matter of law if the record conclusively reveal[s] some other, nondiscriminatory reason for the employer's decision."). Pretext is usually established by showing that the "employer (1) failed to follow its own policies, (2) treated similarly[]situated employees in a disparate manner, or (3) shifted its explanation of the employment decision." *Winters v. Deere & Co.*, 63 F.4th 685, 690 (8th Cir. 2023) (citation omitted). None of these things happened here.

Instead, Huber relies on two types of evidence that plaintiffs typically use to establish their prima facie case, not pretext. *Cf. Reeves*, 530 U.S. at 143, 120 S.Ct. 2097 (noting that evidence can be relevant to both). The first is temporal proximity: the close timing between her diabetic episode and the decision to terminate her.[7] *See Gibson v. Geithner*, 776 F.3d 536, 541 (8th Cir. 2015) ("Proximity alone can be enough to establish causation for a *prima facie* case."). The other is alleged supervisor hostility to her past medical requests. *See Kells v. Sinclair Buick-GMC Truck, Inc.*, 210 F.3d 827, 833–34 (8th Cir. 2000) (noting that the plaintiff had "presented *prima*

7. The court's analysis is hard to square. At one point it says that Kelchen "learn[ing] of Huber's disability" shortly before the termination decision "is strong evidence of pretext." *Ante* at 740. Yet at another, it relies on her supervisors' "ambivalen[ce] toward [her] insulin[-]storage and meal[-]break requests," which occurred months earlier, as evidence of Westar's "discriminatory animus." *Id.* Kelchen cannot have first learned of the disability when Westar fired Huber because, by the court's own account, she knew months earlier.

facie evidence of [his employer's] repeated denials of requests for reasonable accommodations" (emphasis added)), *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031, 1059 (8th Cir. 2011) (en banc). Under our cases, however, neither is enough to get past summary judgment.

First up is temporal proximity. We have long held that "timing on its own is . . . *not* sufficient to show that an employer's non-discriminatory . . . reason . . . is merely pretext." *Cody v. Prairie Ethanol, LLC*, 763 F.3d 992, 997 (8th Cir. 2014) (first and second alterations in original) (emphasis added) (citation omitted). Indeed, if anything, the timing here weakens, rather than supports, Huber's case. *See Wierman*, 638 F.3d at 1001 (observing that "temporal proximity[] is undermined" when an alleged discriminatory "motive coincides temporally with the" nondiscriminatory one). After all, her diabetic episode coincided with yet another violation of Westar's attendance policy—a recurrent problem that the company had taken seriously from the start. *See Smith v. Allen Health Sys., Inc.*, 302 F.3d 827, 834 (8th Cir. 2002) ("Evidence that the employer had been concerned about a problem before . . . undercuts the significance of the temporal proximity.").

There are similar problems with Huber's hostility-to-diabetes evidence. Recall that Kelchen had responded to Huber's question about having time to eat during her shift with an insensitive comment about improving her time management. And then she later proposed storing her insulin in a cooler, which was not the room-temperature

solution Huber was seeking.[8] These comments, to the extent they show discriminatory bias, are so "vague and remote" in time, having come months earlier, that they do little to "link [the] termination with [her] diabetic condition." *Mathews v. Trilogy Commc'ns, Inc.*, 143 F.3d 1160, 1166 (8th Cir. 1998). The timing, in other words, "dilute[s] any inference of causation," *Brown v. City of Jacksonville*, 711 F.3d 883, 890 (8th Cir. 2013) (citation omitted), or "pretext," *Henderson v. Ford Motor Co.*, 403 F.3d 1026, 1036 (8th Cir. 2005). *See Sprenger v. Fed. Home Loan Bank of Des Moines*, 253 F.3d 1106, 1113–14 (8th Cir. 2001) (concluding there was not enough evidence of pretext, even though the employer acted against the employee "a matter of weeks" after learning about his disability).

Timing is less of a problem for Kelchen's comments the morning after the diabetic episode, but they still do not establish discriminatory bias or pretext. Huber's failure to call had led to serious problems the day before: the restaurant opened several hours late, which upset at least one customer. The conversation the next day then focused on why she did not call earlier. To be sure, Kelchen may

8. According to Huber's own deposition, the only *actual* evidence on the issue, it was a "*cooler*," not a freezer. (Emphasis added.) And Westar's human-resources representative did not try to schedule "a meeting" with Huber "despite her awareness of Huber's medical leave." *Ante* at 734. Rather, she asked whether Huber was "available to speak" with her and Kelchen over the phone, either that afternoon or later in the week. Neither of these interactions shows hostility toward Huber's diabetes, much less discriminatory animus. At most, they show indifference.

have acted unprofessionally by yelling, but her emphasis on the "need[] to make that simple phone call" confirms that she was upset about Huber's misconduct, not hostile toward her diabetes. *See Smith*, 302 F.3d at 834.

Finally, the comments of Huber's previous supervisor, Matt Thayer, are largely unhelpful because he played no role in terminating her. *See Arraleh v. County of Ramsey*, 461 F.3d 967, 975 (8th Cir. 2006) ("distinguish[ing] between comments . . . uttered by individuals closely involved in employment decisions" and those made "by nondecisionmakers" (citation omitted)). It is true that he rudely told her that the need to store her insulin at work was a "[you] problem, not a [me] problem," but the decision to fire her occurred three months after Kelchen had replaced him. And without "unequivocal[] pro[of]" that Westar "fail[ed] to accommodate" her, *Henderson*, 403 F.3d at 1035, these stray remarks, just like temporal proximity, do not provide enough for a "reasonable jury to infer that [disability] discrimination . . . was the real reason for [her] termination," *Winters*, 63 F.4th at 691. *See Sprenger*, 253 F.3d at 1111 ("Prov[ing] pretext or actual discrimination requires more substantial evidence" than a "prima facie case" because the evidence "is viewed in light of the employer's justification.").

III.

The court reaches a contrary conclusion by cobbling together a new intertwinement test that, until now, has not existed in the disability- discrimination context. *See ante* at 737 (focusing on whether the "adverse employment

action is . . . inextricably related to the disability" (citation omitted)). It will require an employer to show that its asserted justification is "sufficiently independent" of the employee's disability, *id.* (quoting *Gilooly v. Mo. Dep't of Health & Senior Servs.*, 421 F.3d 734, 740 (8th Cir. 2005)), even when an employee has repeatedly "violated a workplace rule" or "engaged in misconduct," *Richey v. City of Independence*, 540 F.3d 779, 784 (8th Cir. 2008).

The rule lacks a firm footing. The court claims that *Gilooly* established it, but it involved a situation that bears no resemblance to this one. An employee brought a Title VII *retaliation* claim after a Missouri agency fired him for allegedly lying about inappropriate conduct during a *sexual-harassment investigation*. *See Gilooly*, 421 F.3d at 737. To ward off the possibility of retaliation against employees who report this type of misconduct, we concluded that an employer's stated "reasons for firing must be sufficiently independent from the filing of [a Title VII] complaint." *Id.* at 740 (citation omitted). *Gilooly* was all about the unique circumstances that arise when retaliation and sexual harassment intersect, not run-of-the-mill discrimination.

Don't just take my word for it. *Gilooly* recognized the limits of its own holding when it said that it "cannot be true that a plaintiff can file false charges, lie to an investigator, and possibly defame co-employees, without suffering repercussions simply because the investigation was about sexual harassment." *Id.* That is, employers can still discipline employees for misconduct. And, as we later clarified, the holding was "narrow" in the sense that it

applied "when an employer's discipline was based *solely* on its disbelief of an employee's harassment complaint, without any independent corroboration." *Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 418 (8th Cir. 2010) (emphasis added). Here, there is no sexual harassment, alleged or otherwise. And "independent corroboration" exists based on Huber's prior violations and the undisputed fact that she missed the start of two consecutive shifts without calling. *Id.*

Nor does *Weatherly v. Ford Motor Co.*, 994 F.3d 940 (8th Cir. 2021), support the court's new intertwinement test. *See ante* at 737. By its own account, it was all about whether an administrative charge filed with the Equal Employment Opportunity Commission gave adequate notice of a disability- discrimination claim. *See Weatherly*, 994 F.3d at 946. "[C]onstru[ing] [the] administrative charge[] liberally" and noting that "th[e] issue [was] a close call," we concluded the plaintiff had exhausted his remedies "because an administrative investigation . . . would likely have included a look into whether [the employer] unlawfully discriminated against [him] when it terminated him despite his request for accommodation." *Id.* at 944, 946. To state the obvious, providing adequate notice of a possible claim is a far cry from conclusively establishing a violation. To the extent the court insists otherwise, it is saying something that *Weatherly* does not.

The rule is also inconsistent with the Americans with Disabilities Act itself, which prohibits discrimination "on the basis of disability." 42 U.S.C. § 12112(a). This language is causal, requiring, at a minimum, that the disability be

a "motivating factor for [the] termination," if not a but-for cause of it. *Gruttemeyer v. Transit Auth.*, 31 F.4th 638, 648 (8th Cir. 2022); *see Pulczinski*, 691 F.3d at 1002 (noting "doubts about the vitality" of the motivating-factor test).

The court's new test, however, is looser than either of those causal standards. The flip side of "sufficient[] independen[ce]," *ante* at 737, is "some connection." If there is some connection between the disability and the termination, such that there is not "sufficient[] independen[ce]" between the two, then the disability-discrimination claim goes to the jury. *Id.*

This case stands as a stark example. Huber had a diabetic episode, which in turn allegedly limited her ability to call into work before her shift. The inability to make the call, in turn, led to a violation of the company's attendance policy. The attendance-policy violation then led to her termination. Notwithstanding the attenuated causal chain, the court still sends the claim to the jury because the "diabetic episode was not independent from her firing." *Ante* at 738. The statute requires more: the termination must have been "on the basis of [her] disability," 42 U.S.C. § 12112(a), not just "not independent" from it, *ante* at 738.

Other courts have recognized as much. The Supreme Court, for example, has expressed skepticism about whether basing an employment decision on "workplace misconduct" would violate the Americans with Disabilities Act just because it was "related to [a] disability." *Raytheon Co.*, 540 U.S. at 54 n.6, 124 S.Ct. 513 (noting that it had "rejected a similar argument in the context of the Age

Discrimination in Employment Act"). Since then, other courts have outright rejected the possibility. *See, e.g.*, *Neal v. E. Carolina Univ.*, 53 F.4th 130, 152 (4th Cir. 2022) ("[M]isconduct—even misconduct related to a disability—is not itself a disability and may be grounds for dismissal." (citation omitted)); *McElwee v. County of Orange*, 700 F.3d 635, 641 (2d Cir. 2012) ("[W]orkplace misconduct is a legitimate and nondiscriminatory reason for terminating employment, even when such misconduct is related to a disability."); *see also Gillen v. Fallon Ambulance Serv., Inc.*, 283 F.3d 11, 28–29 (1st Cir. 2002) (rejecting it pre-*Raytheon*); *Newberry v. E. Tex. State Univ.*, 161 F.3d 276, 279–80 (5th Cir. 1998) (same); *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1196 (7th Cir. 1997) (same). And so has the Equal Employment Opportunity Commission. *See* U.S. Equal Emp. Opportunity Comm'n, *The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities* § III(B)(9) (2008) ("The ADA does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability.").

Not to mention that, under the court's new rule, some of our cases would now come out differently. One example is *McNary v. Schreiber Foods, Inc.*, 535 F.3d 765 (8th Cir. 2008). There, a company terminated an employee with Graves disease—a thyroid disorder that can cause fatigue—for sleeping on the job. *See id.* at 766 n.2, 768. Despite the fact that "the reason for [the] employer's adverse employment action [was] . . . inextricably related to [his] disability," *ante* at 737 (citation omitted), we affirmed the grant of summary judgment to the company, *see McNary*, 535 F.3d at 770.

The same happened in *Bharadwaj v. Mid Dakota Clinic*, 954 F.3d 1130 (8th Cir. 2020), which involved a medical clinic that "pushed [a doctor] out" because of the interpersonal difficulties that his "mental impairment" had created. *Id.* at 1134 n.2, 1136. Despite the lack of independence between the disability and alleged misconduct, which was "his inability to get along with others," we allowed the grant of summary judgment to the clinic to stand. *Id.* at 1135.[9]

The intertwinement rule also creates a lose-lose situation for employers: let employee misconduct go or risk drawn-out litigation. Suppose that Huber had been late twenty times without calling, or that she had yelled at a customer. Employers will now have to think twice about imposing discipline if there is any possibility that the misconduct lacked "sufficient[] independen[ce]" from an employee's disability. *Ante* at 737. And if they decide to do so anyway, courts and juries will now sit as "super[] personnel department[s] [to] reexamine[] [those] business decisions." *Wilking v. County of Ramsey*, 153 F.3d 869, 873 (8th Cir. 1998) (citation omitted).

IV.

The court's new intertwinement rule will make a mess. It is also wrong. As a unanimous Seventh Circuit

9. The court is right that the plaintiffs in *McNary* and *Bharadwaj* did not argue that their employers discriminated against them by terminating them for disability-related conduct. *See ante* at 738 n.4. But one likely explanation is that both plaintiffs knew that the argument would not succeed.

panel put it over 25 years ago, an "employer who fires a worker because [she] is a diabetic violates the Act; but if [the employer] fires [her] because [s]he is unable to do [the] job, there is no violation, even though the diabetes is the cause." *Matthews*, 128 F.3d at 1196. That statement rings as true today as it did then. I respectfully dissent from Parts III and V of the court's opinion.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, DATED JANUARY 17, 2023

UNITED STATES DISTRICT COURT,
FOR THE DISTRICT OF NEBRASKA.

2023 WL 202295
8:21CV229

TONYA C. HUBER,

Plaintiff,

v.

WESTAR FOODS, INC.,

Defendant.

Signed January 17, 2023

MEMORANDUM AND ORDER

Robert F. Rossiter, Jr., Chief United States District Judge

This matter is before the Court on three separate motions: a Motion for Summary Judgment filed by defendant Westar Foods, Inc. ("Westar") (Filing No. 38), a Motion for Partial Summary Judgment filed by plaintiff Tonya C. Huber ("Huber") (Filing No. 41), and Huber's Motion to Strike (Filing No. 55). For the following reasons, Westar's Motion for Summary Judgment is granted. Huber's motions are both denied.

Appendix C

I. BACKGROUND

A. Huber's Employment with Westar

Westar owns and operates seven Hardee's fast-food restaurants in Nebraska. Westar hired Huber as a store manager for their Elkhorn, Nebraska, location (the "Elkhorn store") in December 2018. Huber's responsibilities included "hiring, training, and discipline of crew members, managing the crew, overseeing costs, and maintaining the store." Huber was also responsible for ensuring the Elkhorn store was opened at 5:00 a.m. each morning. She was expected to work fifty hours per week.

Huber received Westar's employee handbook when she was hired, including Westar's attendance policy (the "attendance policy"). The attendance policy stated that an employee who would be late or absent must "call the management person in charge immediately so that enough time is given to cover [the employee's] position." An employee was expected to call "at least two-hours before [their] work shift [began] when possible." The attendance policy further specified the employee "must call and speak directly to the management person in charge" and that "[t]exting, emailing or leaving a message" were unacceptable ways to communicate tardiness or absences.

While working for Westar, Huber reported to three separate district managers at different times: a person named Stacy; Matt Thayer ("Thayer"); and Cindy Kelchen ("Kelchen"). On January 10, 2019, Huber received an "employee coaching tool," which reminded Huber of

the need for her to communicate scheduling changes in accordance with the attendance policy.

On October 30, 2019, Huber became ill with the stomach flu and missed all or part of her work shift. She sent a text message to a group of managers about her absence. The next day, her illness caused her to leave work early. Huber contends she also called her then-manager Kelchen, who "did not answer," but Kelchen denies ever receiving a call from Huber. Regardless, both parties agree Huber was disciplined through a formal write-up for violating the attendance policy.[1] They also agree that after Huber's write-up, Kelchen "sat down with Huber and discussed the importance of following the company's" attendance policy.

B. December 2019 Medical Incident

Huber was diagnosed with diabetes a few months after starting her employment with Westar. She required a daily insulin shot to manage the disease. She left her insulin at home on workdays until September 2019, when she began storing it in a safe in the Elkhorn store without issue. Huber contends she previously asked both Thayer and Kelchen about insulin storage in the workplace but received no assistance; Kelchen denies the conversation

1. Huber disputes that she actually violated the attendance policy in October 2019 but admits she was disciplined. The write-up form stated Huber was disciplined for failing to call Kelchen about the absences as required by the attendance policy. In a written comment on the write-up form, Huber stated only: "I did send a group text to all [district managers and Kelchen] asking for help."

occurred and Thayer does not recall. Huber never discussed insulin storage with Amy Rowe ("Rowe"), Westar's human resources representative.

Early in the morning of December 20, 2019, Huber was scheduled to open the Elkhorn store. In the days before, she had not been feeling well and "knew something was off." She did not make it to work that day. Instead, she drove herself to a nearby clinic and learned she was having a diabetic episode with low-blood-sugar levels. She spent the rest of the day receiving medical treatment at the clinic, including medication intravenously.

Huber spoke on the phone with her then-boyfriend, Richard Grondin ("Grondin"), several times throughout that morning and day. One call lasted around forty-five minutes. Huber says she does not remember the calls because the diabetic episode impacted her cognition and consciousness. She also spoke with her son, Trey Huber ("Trey"), to tell him she was at the doctor's office. Trey described Huber's communication as "all over the place" and said he found it difficult to understand her.

Huber never called Kelchen on December 20th to discuss her illness or absence. After Kelchen was unable to reach Huber that day, she called Trey, who informed Kelchen his mother was at the doctor's office or hospital. That night, Grondin drove Huber home from the clinic, and Huber "slept for most of the night into the next day."

The next morning, Huber was again scheduled to open the Elkhorn store at 5:00 a.m. She called Kelchen

around 7:45 a.m. and spoke to her for the first time about her medical incident. According to Huber, "[h]er call to Kelchen was her first interaction upon awakening from her post-sedation sleep." Huber gave Kelchen some details about her health condition and follow-up care.

Following the call, Huber sent Kelchen a copy of a doctor's note which stated: "Please excuse patient from work due to illness through 12/26/19." The note gave no further details.

Kelchen contends she then "relayed the events of the past two days to" Frank Westermajer ("Westermajer"), President of Westar, after her call with Huber. Westermajer claims he made the decision to terminate Huber at that point, after "learning of the events from Kelchen and conferring with Rowe." Rowe drafted Huber's termination letter.

The next day, Huber emailed Kelchen and Rowe to request "family medical leave paperwork for [her doctor] to fill out." After receiving no response, Huber sent a second email requesting the paperwork on December 23rd. On December 24th, Huber emailed an updated doctor's note to Kelchen and Rowe excusing Huber from work through January 2, 2020 for "acute illness, hypoglycemia, fever and debility." In response, Rowe attempted to schedule a phone call with Huber, but Huber stated she was "still not well enough to have a work related conversation."

Westar then terminated Huber effective December 26, 2019. The termination letter cited Huber's "fail[ure]

to follow the Company's notice procedures for [her] absences on December 20, 2019 and on December 21, 2019." The letter also stated her absences would "not be covered under the Family Medical Leave Act of 1993" because Huber "failed to provide notice as soon as possible and practical" and "did not request any need for an accommodation until after the unscheduled absences."

On June 17, 2021, Huber filed this lawsuit (Filing No. 1), asserting claims for disability discrimination in violation of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.*, and the Nebraska Fair Employment Practice Act ("NFEPA"), Neb. Rev. Stat. § 48-1101 *et seq.* Huber alleges Westar fired her "[f] ollowing reasonable requests for accommodation" and "[a]fter learning of [her] history of disability." Huber also brings interference and retaliation claims under the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601 *et seq.*

The parties filed cross-motions for summary judgment on September 9, 2022. Westar asks for "entry of summary judgment on all claims." Huber seeks partial summary judgment as to Westar's "affirmative defenses of failure to mitigate damages and after-acquired evidence." Huber also moved to strike two affidavits submitted by Westar in opposition to Huber's motion for partial summary judgment, arguing they "contain expert testimony" that was not timely disclosed. All three motions are now ripe for review.

II. DISCUSSION

A. Legal Standards

On cross-motions for summary judgment, the Court considers each motion separately, "viewing the evidence and drawing all reasonable inferences in the light most favorable to the nonmovant." *Corkrean v. Drake Univ.*, 55 F.4th 623, 630 (8th Cir. 2022) (quoting *Libel v. Adventure Lands of Am., Inc.*, 482 F.3d 1028, 1033 (8th Cir. 2007)). Summary judgment is required "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 'mere existence of a factual dispute is insufficient alone to bar summary judgment; rather, the dispute must be outcome determinative under prevailing law.' " *Corkrean*, 55 F.4th at 630 (quoting *Holloway v. Pigman*, 884 F.2d 365, 366 (8th Cir. 1989)). A genuine dispute exists only "if there is enough evidence 'that a reasonable jury could return a verdict for the nonmoving party.' " *Farver v. McCarthy*, 931 F.3d 808, 811 (8th Cir. 2019) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

At the summary-judgment stage, the Court "does not weigh the evidence, make credibility determinations, or attempt to discern the truth of any factual issue." *Walz v. Randall*, 2 F.4th 1091, 1099 (8th Cir. 2021) (quoting *Morris v. City of Chillicothe*, 512 F.3d 1013, 1018 (8th Cir. 2008)). "To defeat summary judgment, 'the nonmoving party must come forward with 'specific facts showing that there

is a genuine issue for trial.' " *Carter v. Atrium Hosp.*, 997 F.3d 803, 808 (8th Cir. 2021) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

B. Westar's Motion for Summary Judgment

1. Discrimination Claim

Huber claims there are material factual disputes regarding whether "Westar discriminated against [Huber] based on her disability" in violation of the ADA and NFEPA.[2] *See* 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a qualified individual on the basis of disability"); Neb. Rev. Stat. § 48-1107.01 (stating it is unlawful for a covered employer to "[d]iscriminate against a qualified individual with a disability because of the disability"). An employee can establish disability discrimination in one of two ways: through "direct evidence of disability discrimination" or through indirect evidence by "apply[ing] the burden-shifting framework" from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973). *Lipp v. Cargill Meat Sols. Corp.*, 911 F.3d 537, 544 (8th Cir. 2018).

---

2. Because NFEPA's disability-discrimination provision is "patterned after the ADA" and "the statutory definitions of 'disability' and 'qualified individual with a disability' contained in the NFEPA are virtually identical to the definitions of the ADA," the Court's analysis of Huber's ADA claim also applies to her NFEPA claim. *Ryan v. Cap. Contractors, Inc.*, 679 F.3d 772, 777 n.3 (8th Cir. 2012) (quoting *Orr v. Wal-Mart Stores, Inc.*, 297 F.3d 720, 723 (8th Cir. 2002)).

"Direct evidence includes 'evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude,' where it is sufficient to support an inference that discriminatory attitude more likely than not was a motivating factor." *Id.* at 543 (quoting *Schierhoff v. GlaxoSmithKline Consumer Healthcare, L.P.*, 444 F.3d 961, 966 (8th Cir. 2006)). Huber argues she "has presented direct evidence of disability discrimination."[3]

Huber points to incidents she characterizes as showing Westar's "history of acting with contempt towards her requests for accommodation" and "Westar's anger towards [her] regarding her disability and need for accommodation." She states that her two previous managers, Thayer and Kelchen, rejected her requests for help with insulin storage at the Elkhorn store. Huber testified that Thayer told her the insulin storage was a "[Huber] problem, not a [Thayer] problem." She further

3. Huber's complaint and summary-judgment briefing both mention Huber's "requests for accommodation" and Westar's denial of her requests. Her brief also states that Kelchen did not "engag[e] in an interactive process" with Huber. However, Huber's brief focuses on proving the elements of a disparate-treatment claim rather than a reasonable-accommodation claim. *See Nahal v. Allina Health Sys.*, 842 F. App'x 9, 10 (8th Cir. 2021) (per curiam) (discussing the "modified burden-shifting analysis" required for a reasonable-accommodation claim); *Garrison v. Dolgencorp, LLC*, 939 F.3d 937, 941 (8th Cir. 2019) (same). Because Huber does not discuss or analyze the elements of a reasonable-accommodation claim, the Court concludes her only disability-discrimination theory is a disparate-treatment claim.

testified Kelchen suggested freezer storage, and when Huber told her that would not work, Kelchen replied, "I don't know what to tell you." Huber also said Kelchen suggested Huber "do time management better" when Huber asked for assistance to ensure she could eat during her shifts. Kelchen and Thayer dispute or do not recall those interactions. Finally, Huber points to testimony showing Kelchen was "irate" in her December 21st phone call with Huber after learning of Huber's "diabetic episode and need for time off" immediately before Westar's decision to terminate Huber.

In response, Westar argues "Huber's characterization of alleged contempt or anger do not show direct evidence of discrimination." Westar contends that even if the "conversations did occur" as Huber stated, they do not provide a strong causal link between the "discriminatory bias" and Huber's termination. Westar points out that Kelchen and Thayer were "not decision makers" whose statements can be direct evidence of discrimination.

"Direct evidence of employment discrimination must be distinguished from stray remarks in the workplace, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process." *Quick v. Wal-Mart Stores, Inc.*, 441 F.3d 606, 609 (8th Cir. 2006) (citing *Clearwater v. Indep. Sch. Dist. No. 166*, 231 F.3d 1122, 1126 (8th Cir. 2000)). Huber points to the conversations with Kelchen and Thayer as direct evidence. Yet neither Kelchen nor Thayer were "decisionmakers," and neither made the ultimate decision to terminate Huber—Westermajer did. Further, the statements from

Kelchen and Thayer about her insulin and lunch breaks occurred months before she was terminated. There is insufficient direct evidence to "show a specific link between a discriminatory bias and the adverse employment action, sufficient to support a finding by a reasonable fact-finder that the bias motivated the action." *Button v. Dakota, Minnesota & E. R.R. Corp.*, 963 F.3d 824, 832 (8th Cir. 2020) (quoting *Torgerson v. City of Rochester*, 643 F.3d 1031, 1045-46 (8th Cir. 2011) (en banc)).

Because the record does not show direct evidence of disability discrimination, the Court turns to the McDonnell-Douglas burden-shifting framework. Huber can establish a prima facie case by showing she "(1) is disabled within the meaning of the ADA, (2) is a qualified individual under the ADA, and (3) has suffered an adverse employment action because of [her] disability." *E.E.O.C. v. Prod. Fabricators, Inc.*, 763 F.3d 963, 969 (8th Cir. 2014) (quoting *Hill v. Walker*, 737 F.3d 1209, 1216 (8th Cir. 2013)).

If Huber establishes a prima facie case, the "burden of production then shifts to [Westar] to show a legitimate, nondiscriminatory reason for the adverse action." *Oehmke v. Medtronic, Inc.*, 844 F.3d 748, 755 (8th Cir. 2016). If Westar produces such evidence, "the burden of production shifts back to [Huber] to show the proffered reason was mere pretext for intentional discrimination." *Farver*, 931 F.3d at 812. Huber "at all times bears the 'ultimate burden of persuasion.' " *Heisler v. Nationwide Mut. Ins. Co.*, 931 F.3d 786, 794 (8th Cir. 2019) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)).

The Court assumes without deciding that Huber has established a prima facie case of disability discrimination. *See Donathan v. Oakley Grain, Inc.*, 861 F.3d 735, 740 (8th Cir. 2017) ("The burden to show a prima facie case is not difficult." (quoting *Musolf v. J.C. Penney Co.*, 773 F.3d 916, 918 (8th Cir. 2014))). Still, Westar gives legitimate, non-discriminatory reasons for terminating Huber,[4] so Huber must meet her "ultimate burden" of producing evidence showing Westar's "justifications are mere pretext." *Torgerson*, 643 F.3d at 1046. "[P]roving pretext ... 'requires more substantial evidence than it takes to make a prima facie case' and 'evidence of pretext and discrimination is viewed in light of [Westar's] justification.' " *King v. Guardian ad Litem Bd.*, 39 F.4th 979, 987 (8th Cir. 2022) (quoting *Phillips v. Mathews*, 547 F.3d 905, 912-13 (8th Cir. 2008)).

There are at least two ways in which Huber can "demonstrate a 'material question of fact regarding pretext.' " *Gardner v. Wal-Mart Stores, Inc.*, 2 F.4th 745, 748 (8th Cir. 2021) (quoting *Torgerson*, 643 F.3d at 1047). She can show that Westar's "explanation is unworthy of credence ... because it has no basis in fact," or "persuad[e] the court that a prohibited reason more

4. Huber does not appear to dispute that Westar met its burden to present proof of a non-discriminatory, legitimate justification for Huber's termination. This burden is "not onerous," *Torgerson*, 643 F.3d at 1047, and the Eighth Circuit "has 'consistently held that violating a company policy is a legitimate, non-discriminatory rationale for terminating an employee.' " *Ebersole v. Novo Nordisk, Inc.*, 758 F.3d 917, 925 (8th Cir. 2014) (quoting *Twymon v. Wells Fargo & Co.*, 462 F.3d 925, 935 (8th Cir. 2006)).

likely motivated" Westar. *Id.* (quoting *Torgerson*, 643 F.3d at 1047). Ultimately, to survive summary judgment she "must point to enough admissible evidence to raise genuine doubt as to the legitimacy of [Westar's] motive." *Thompson v. Univ. of Ark. Bd. of Trs.*, 52 F.4th 1039, 1042 (8th Cir. 2022) (quoting *Fiero v. CSG Sys., Inc.*, 759 F.3d 874, 878 (8th Cir. 2014)).

Huber argues the evidence shows she "followed Westar's policy." Huber insists she never actually violated Westar's attendance policies—either in October 2019, when she received a write-up, or during her December 20th and 21st medical incident. She asserts that this, combined with Westar's "history of acting with contempt" toward her diabetes, are enough that a reasonable juror could find Westar's explanation is a pretext.

Huber has not put forth sufficient evidence that she did not violate the attendance policy on either occasion. But even if she had, it would still be insufficient to overcome summary judgment. She "must present sufficient evidence that [Westar] acted with an intent to discriminate, not merely that the reason stated by [Westar] was incorrect." *Pulczinski v. Trinity Structural Towers, Inc.*, 691 F.3d 996, 1003 (8th Cir. 2012). She would need to show that Westar "did not truly believe [she] violated company rules." *Id.* Huber has not adduced sufficient evidence disputing Westar's good-faith belief that she violated the attendance policy on both occasions.

Huber does not dispute she was previously disciplined for violating Westar's attendance policy. She also does not

deny that she did not call Kelchen at all on December 20th when she missed work because of her medical incident. She does not contest that the day of the medical incident, she drove herself to the clinic, spoke to Grondin on the phone several times, and spoke to Trey. Finally, she does not dispute that when Westar made the decision to terminate her, Kelchen knew that (a) Huber drove herself to the clinic on December 20th, and (b) called Trey on December 20th.

Ultimately, Huber "must do more than simply create a factual dispute as to the issue of pretext; [she] must offer sufficient evidence for a reasonable trier of fact to infer discrimination." *Vinh v. Express Scripts Servs. Co.*, 7 F.4th 720, 727 (8th Cir. 2021) (quoting *Wilking v. County of Ramsey*, 153 F.3d 869, 874 (8th Cir. 1998)). She has not done so. There is no genuine dispute that Westar had a good-faith belief Huber violated the attendance policy. Huber does not point to any evidence indicating Westermajer—who made the decision to terminate her—had discriminatory animus. Any discussion of Westar's "contempt" toward Huber's disability is largely "speculation and [Huber's] own suppositions." *Brandt v. City of Cedar Falls*, 37 F.4th 470, 481 (8th Cir. 2022).

2. FMLA Claims

The FMLA entitles an eligible employee to twelve weeks of leave during a twelve-month period if she has "a serious health condition that makes [her] unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). "An employee can bring three types of FMLA claims against her employer: interference,

retaliation, and discrimination." *Corkrean*, 55 F.4th at 630. Huber brings claims for interference and retaliation.

a. FMLA Interference

In an "interference" claim, an "employee alleges that the employer denied or interfered with her substantive rights under the FMLA." *Brandt*, 37 F.4th at 478 (quoting *Wierman v. Casey's Gen. Stores*, 638 F.3d 984, 999 (8th Cir. 2011)); *see also Corkrean*, 55 F.4th at 630 (explaining it is "unlawful for an employer to interfere with, restrain, or deny the exercise of or the attempt to exercise rights provided under the FMLA." (citing 29 U.S.C. § 2615(a)(1))).

To succeed on her interference claim, Huber must show "she was eligible for FMLA leave, the employer knew she needed FMLA leave, and the employer denied her an FMLA benefit to which she was entitled." *Smith v. AS Am., Inc.*, 829 F.3d 616, 621 (8th Cir. 2016) (citing *Hasenwinkel v. Mosaic*, 809 F.3d 427, 432 (8th Cir. 2015)). FMLA interference can include " 'refusing to authorize FMLA leave,' " *id.* (quoting *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1050 (8th Cir. 2006)), or "terminating an employee while on FMLA leave," *Lovland v. Emps. Mut. Cas. Co.*, 674 F.3d 806, 811 (8th Cir. 2012).

The parties primarily disagree on the second element: whether Westar had the proper notice that Huber needed FMLA leave. An employee "need not ... mention the FMLA" to seek leave for the first time, as long as the employer has "sufficient information ... to reasonably determine whether the FMLA may apply to the leave request." 29 C.F.R. § 825.303(b).

In Huber's view, the evidence shows Kelchen had notice of Huber's need for FMLA after their December 21st phone call. Huber points to Kelchen's personal notes about the call, where Kelchen writes that Huber said her "diabetic [sic] was off" and she "was having a serious medical happening," where she was "not making sense" and "[couldn't] concentrate." The notes also show Huber informed Kelchen she had a "follow up on Monday."

To Westar, the timing of the call, rather than the content, warrants summary judgment. In the event of a medical emergency, FMLA notice must be provided "as soon as practicable," 29 C.F.R. § 825.302(a), typically "the same day or the next business day," *id.* § 825.302(b). An employee generally must comply with the "employer's usual and customary notice and procedural requirements for requesting leave." *Id.* § 825.302(c). However, when an employee requires emergency medical treatment, she is not "required to follow the call-in procedure until [her] condition is stabilized, and [she] has access to, and is able to use, a phone." *Id.*

Westar points to several undisputed facts to argue Huber did not call Kelchen or otherwise provide notice to Westar "as soon as practicable." It is undisputed that Huber did not call Kelchen until 7:45 a.m. on December 21st, after experiencing a medical incident on December 20th that resulted in an unexplained work absence. Westar notes that on the morning of December 20th, "Huber admittedly was able to call her then-boyfriend [Grondin]... and talked to him for 45-minutes, prior to driving herself to the doctor's office." She spoke to Grondin "multiple

times" that day, yet "failed to attempt to contact Kelchen." Further, it is undisputed that Huber called Trey while she received medical treatment. In Westar's view, this evidence shows "Huber would have indisputably been capable of calling into [sic] Westar on the morning of December 20 to provide it with notice."

Even if there are fact issues regarding Huber's entitlement to FMLA leave, Huber cannot prove FMLA interference if Westar's "reason for dismissal is insufficiently related to FMLA leave." *Stallings*, 447 F.3d at 1051. "Termination is actionable under FMLA only if the employee was discharged because of her FMLA leave." *Hasenwinkel*, 809 F.3d at 433 (emphasis added). In other words, "an employer who interferes with an employee's FMLA rights will not be liable if the employer can prove it would have made the same decision had the employee not exercised the employee's FMLA rights." *Throneberry v. McGehee Desha Cnty. Hosp.*, 403 F.3d 972, 977 (8th Cir. 2005); *see also Bacon v. Hennepin Cnty. Med. Ctr.*, 550 F.3d 711, 715 (8th Cir. 2008) (affirming summary judgment on FMLA interference claim where employee failed to follow employer's "call-in policy" while on FMLA leave).

Westar argues and submits evidence showing Huber was "lawfully terminated for reasons wholly unrelated" to any FMLA request. In response, Huber contends her December 20th and 21st absences "were protected by FMLA, and thus could not be lawfully used as a basis for ... termination." This circular reasoning is unconvincing. Westar has submitted evidence showing it terminated Huber because of its good-faith belief she violated

Westar's attendance policy, not because of the absences themselves.

To survive summary judgment, Huber must adduce sufficient evidence to permit a reasonable juror to find in her favor "on more than mere speculation, conjecture, or fantasy." *Bharadwaj v. Mid Dakota Clinic*, 954 F.3d 1130, 1137 (8th Cir. 2020) (quoting *Barber v. C1 Truck Driver Training, LLC*, 656 F.3d 782, 801 (8th Cir. 2011)). Even viewing the evidence in the light most favorable to her, Huber has not met this burden.

b. FMLA Retaliation

A FMLA retaliation claim is one "where the employee alleges that the employer discriminated against her for exercising her FMLA rights." *Brandt*, 37 F.4th at 478 (quoting *Wierman*, 638 F.3d at 999). As with Huber's disability-discrimination claim, FMLA retaliation is evaluated under the McDonnell-Douglas burden-shifting framework, *see Wierman*, 638 F.3d at 999, and Huber retains the ultimate burden of "demonstrat[ing] that [Westar's] proffered reason is pretextual." *Corkrean*, 55 F.4th at 631 (quoting *Mitchell v. Iowa Prot. & Advoc. Servs., Inc.*, 325 F.3d 1011, 1013 (8th Cir. 2003)).

The parties' pretext arguments are basically the same as those made for the discrimination claim. Huber contends she was fired because "Kelchen was angry [she] required FMLA leave to get treatment for a serious health condition," and that Westar citing the attendance policy is "nothing more than an excuse to conceal its real

motivation." Westar, in turn, argues that "[b]eyond the fact that Hubar requested FMLA prior to her being notified of her termination," there is no evidence to suggest Westar's stated reason for her termination is untrue.

The Court reaches the same conclusion it did with Huber's discrimination claim. "[D]rawing all reasonable inferences in [Huber's] favor, [she] has failed to provide any record evidence to show that defendants' proffered reason for her termination 'was not the true reason, but rather a pretext for discrimination.' " *Brandt*, 37 F.4th at 481. *See also Corkrean*, 55 F.4th at 632 (explaining that in the FMLA retaliation context, "evidence that the employer had been concerned about a problem before the employee engaged in the protected activity undercuts the significance of the temporal proximity.") (quoting *Smith v. Allen Health Sys.*, Inc., 302 F.3d 827, 834 (8th Cir. 2002)).

IT IS ORDERED:

1. Defendant Westar Foods, Inc.'s Motion for Summary Judgment (Filing No. 38) is granted.

2. Plaintiff Tonya C. Huber's Motion for Partial Summary Judgment (Filing No. 41) and Motion to Strike (Filing No. 55) are denied.

3. This case is dismissed with prejudice.

4. A separate judgment will issue.

APPENDIX D — EIGHTH CIRCUIT OPINIONS CITED IN *HUBER V. WESTAR FOODS, INC.* APPLYING *MCDONNELL DOUGLAS V. GREEN* TO SUMMARY JUDGMENT

Boston v. Trialcard, Inc.
75 F.4th 861, 867 (8th Cir. 2023)
("Since Boston has no direct evidence of discrimination, we analyze her claims under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*") (section 1981; summary judgment affirmed; failure to establish pretext) (10a, 11a, 15a)

Corkrean v. Drake Univ.
55 F.4th 623, 630 (8th Cir. 2022)
("'we require proof of the employer's discriminatory intent.' . . . Such 'proof may come from direct evidence or indirect evidence using the *McDonnell Douglas* burden-shifting framework.'") (FMLA; summary judgment affirmed; failure to establish pretext) (16a)

Evans v. Coop. Response Ctr.
996 F.3d 539, 545 (8th Cir. 2021)
("To prove a claim of disability discrimination, an employee may rely on either direct or indirect evidence. . . . Evans stakes her ADA claims on the latter, arguing she presented sufficient evidence of discrimination under the familiar burden-shifting framework of *McDonnell Douglas* . . . .") (ADA; summary judgment affirmed; failure to establish prima facie case) (21a)

Bharadwaj v. Mid Dakota Clinic
954 F.3d 1130, 1134-35 (8th Cir. 2020)
("He does not have direct evidence of discrimination, so we evaluate them under the *McDonnell Douglas* burden-

shifting framework.") (footnote omitted) (Title VII and ADEA; summary judgment affirmed; failure to establish pretext) (4a, 19a)

Lipp v. Cargill Meat Sols. Corp.
911 F.3d 537, 544 (8th Cir. 2018)
("In the absence of direct evidence, we next address whether there is indirect evidence of disability discrimination. Where a plaintiff must rely on indirect evidence to prove intentional discrimination under the ADA, we apply the burden-shifting framework provided in *McDonnell Douglas Corp. v. Green.*") (ADA; summary judgment affirmed; failure to establish prima facie case) (13a. 14a)

Oehmke v. Medtronic, Inc.
844 F.3d 748, 755 (8th Cir. 2016)
("In the absence of direct evidence of discrimination, we apply the burden-shifting framework of *McDonnell Douglas Corp. v. Green.*") (ADA; summary judgment affirmed; failure to establish prima facie case) (-12a)

Massey-Diez v Univ. of Iowa Cmty. Med. Servs.
826 F.3d 1149, 1160 (8th Cir. 2016)
("In the absence of direct evidence of such a connection we have imported the burden-shifting framework from Title VII cases set out in *McDonnell Douglas Corp. v. Green.*") (FMLA; summary judgment affirmed; failure to establish pretext) (14a)

Hudson v. Tyson Fresh Meats, Inc
787 F.3d 861, 866-67 (8th Cir. 2015)
("Hudson offers no direct evidence that Tyson terminated him for exercising his FMLA rights. Therefore, his claim

is analyzed under the *McDonnell Douglas* framework.") (FMLA; summary judgment reversed) (10a)

Gibson v. Geithner
776 F.3d 536, 540-41 (8th Cir. 2015)
("To survive a motion for summary judgment, Gibson must show a prima facie case of retaliation and must show the proffered legitimate non-retaliatory reasons for his termination were pretextual. Because Gibson lacks direct evidence of retaliation, the burden-shifting analysis of *McDonnell Douglas Corp. v. Green* . . . applies.") (Title VII; summary judgment affirmed; failure to establish pretext) (16a)

Ebersole v. Novo Nordisk, Inc.
758 F.3d 917, 924 (8th Cir. 2014)
("We employ the *McDonnell Douglas* burden-shifting framework to determine whether the plaintiff has shown sufficient indirect evidence of illegal discrimination.") (FMLA; summary judgment affirmed; failure to establish pretext) (9a, 10a)

Pulczinski v. Trinity Structural Towers, Inc.
691 F.3d 996, 1002 (8th Cir. 2012)
("This court has considered FMLA discrimination claims under the *McDonnell Douglas* burden-shifting framework that is applied in Title VII cases.") (ADA; summary judgment affirmed; failure to establish pretext) (9a, 21a)

Bone v. G4S Youth Servs., LLC,
686 F.3d 948, 953 (8th Cir. 2012)
("Bone can survive summary judgment on her race and age discrimination claims either by providing direct

evidence of discrimination or by creating an inference of unlawful discrimination through the *McDonnell Douglas* analysis.") (footnote omitted) (ADEA and Title VII; summary judgment affirmed; failure to establish pretext) (10a)

Ryan v. Capital Contractors, Inc.
679 F.3d 772, 776-77 (8th Cir. 2012)
("In the absence of direct evidence of discrimination, we evaluate Ryan's wrongful termination claim under the familiar *McDonnell Douglas* framework.") (ADA; summary judgment affirmed; failure to establish pretext) (12a)

Lovland v. Employers Mut. Cas. Co.
674 F.3d 806, 811 (8th Cir. 2012)
("a retaliation claim under § 2615(a)(2) requires proof of an impermissible discriminatory animus, typically with evidence analyzed under the *McDonnell Douglas* burden-shifting framework at the summary judgment stage.") (footnote omitted) (FMLA; summary judgment affirmed; failure to establish pretext) (5a, 19a)

Torgerson v. Dity of Rochester
643 F.3d 1031, 1043-52 (8th Cir. 2011) (en banc)
("a plaintiff may survive the defendant's motion for summary judgment in one of two ways. The first is by proof of "direct evidence" of discrimination . . . . But if the plaintiff lacks evidence that clearly points to the presence of an illegal motive, he must avoid summary judgment by creating the requisite inference of unlawful discrimination through the *McDonnell Douglas* analysis, including sufficient evidence of pretext.") (Title VII;

summary judgment affirmed; failure to establish pretext) (13a, 14a, 15a, 21a)

Wierman v. Casey's Gen. Stores,
638 F.3d 984, 993 (8th Cir. 2011)
("Because Wierman does not identify direct evidence of pregnancy discrimination, she can preclude summary judgment only by creating an inference of discrimination under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*.") (Title VII; summary judgment affirmed; failure to establish pretext) (12a)

McNary v. Schreiber Foods, Inc.
535 F.3d 765, 768 (8th Cir. 2008)
("ADA . . . claims are analyzed under the well-known *McDonnell Douglas* burden shifting analysis.") (ADA; summary judgment affirmed; failure to establish pretext) (19a, 20a)

Twymon v. Wells Fargo & Co.
462 F.3d 925, 934 (8th Cir. 2006)
("we agree with the district court's conclusion that Twymon failed to produce direct evidence of racial discrimination . . . . We apply the framework set forth in *McDonnell Douglas Corp. v. Green* . . . to assess Twymon's claim based upon indirect evidence of discrimination.") (Title VII; summary judgment affirmed; failure to establish pretext) (17a, 20a)

Stallings v. Hussman Corp.
447 F.3d 1041, 1051 (8th Cir. 2006)
("Stallings failed to present any evidence that Hussmann or Groninger admitted to discriminating against him

because he used his FMLA for a legitimate purpose. Therefore, his retaliation claim must be analyzed under the *McDonnell Douglas* burden-shifting framework.") (FMLA; summary judgment reversed) (9a)

Sprenger v. Fed. Home Loan Bank of Des Moines
253 F.3d 1106, 1111 (8th Cir. 2001)
("Sprenger's claims are all subject to the well-worn burden-shifting mechanism of *McDonnell Douglas Corp. v. Green.*") (ADEA and ADA; summary judgment affirmed; failure to establish pretext) (17a)

Kells v. Sinclair Buick-GMC Truck, Inc.
210 F.3d 827, 835 (8th Cir. 2000)
("Kells argues at some length that Dave Sinclair Sr.'s telephonic comment presents direct evidence of age-related discriminatory animus . . . . The Sinclair comment is not direct evidence . . . The court was correct in applying an indirect evidence framework to Kells' ADEA claim. *McDonnell Douglas* provides a framework for analyzing employment discrimination charges which rely on inferential proof.") (ADEA; summary judgment reversed) (16a)

Kiel v. Select Artificials, Inc.
169 F.3d 1131, 1134-35 (8th Cir. 1999) (en banc)
("In an employment discrimination case, the plaintiff must initially present a prima facie case to survive a motion for summary judgment . . . . Select having proffered a non-discriminatory reason for terminating Kiel, the burden shifted to Kiel to present evidence that Select's reason was pretextual.") (ADA; summary judgment affirmed; failure to establish pretext) (16a)

Appendix D

Wilking v. County of Ramsey
153 F.3d 869, 872 (8th Cir. 1998)
("We utilize the well-known burden-shifting scheme set forth in *McDonnell Douglas Corp. v. Green*, . . . to analyze claims brought under the ADA.") (ADA; summary judgment affirmed; failure to establish prima facie case or pretext) (24a)

APPENDIX E — LOWER COURT OPINIONS REGARDING *MCDONNELL DOUGLAS V. GREEN*

Jenny v. L3Harris Techs., Inc., No. 24-4032, 2025 WL 2025312 (10th Cir. July 21, 2025) (Eid, J. concurring)

McNellis v. Douglas Cnty. Sch. Dist., 116 F.4th 1122, 1144 (10th Cir. 2024) (Hartz, J., concurring)

Tynes v. Fla. Dep't of Juv. Justice, 88 F.4th 939 (majority opinion joined by Grant, Jill Pryor, and Newsome, JJ.), 949-58 (Newsome, J., concurring) (11th Cir. 2023)

Lockhart v. Republic Servs., Inc., No. 20-50474, 2021 WL 4955241, at *3 (5th Cir. Oct. 25, 2021) (opinion joined by Wiener, Dennis and Duncan, JJ.)

Nall v. BNSF Railway Co., 917 F.3d 335, 350-52 (2d Cir. 2019) (Costa, J., specially concurring)

Walton v. Powell, 821 F.3d 1204 (10th Cir. 2016) (opinion joined by Gorsuch, Murphy, and Moritz, JJ.)

Brockbank v. U.S. Bancorp., 506 Fed. Appx. 604, 608-11 (9th Cir. 2013) (Ripple, J. concurring in part and dissenting in part)

Coleman v. Donahoe, 667 F.3d 835, 862-63 (7th Cir. 2012) (concurring opinion of Wood, J. joined by Tinder, and Hamilton, J.J.)

Provenzano v. LCI Holdings, Inc., 663 F.3d 806 (6th Cir. 2011) (opinion joined by Stranch, Griffin and Keith, JJ.)

Appendix E

Paup v. Gear Prods., Inc., 327 Fed. Appx. 100, 113 (10th Cir. 2009) (per curiam) (opinion joined by Murphy and Gorsuch, JJ.)

White v. Baxter Healthcare Corp., 533 F.3d 381, 398-402 (6th Cir. 2008) (opinion joined by Clay and Keith, JJ.)

Brady v. Office of Sergeant at Arms, 520 F. 3d 490, 493-94 (D.C. Cir. 2008) (opinion joined by Kavanaugh, Ginsburg, and Edwards, JJ.)

Zamora v. Elite Logistics, Inc., 478 F.3d 1160, 1167 (10th Cir. 2007) (en banc) (concurring opinion joined by Hartz and Tymkovich, JJ.)

Griffith v. City of Des Moines, 387 F.3d 733, 739-27 (8th Cir. 2004) (Magnuson, J., concurring specially)

Wells v. Colo. Dep't of Transp., 325 F.3d 1205, 1221-28 (10th Cir. 2003) (Hartz, J. writing separately)

Loeb v. Textron, Inc., 600 F.2d 1003, 1016 (1st Cir. 1979) (opinion joined by Coffin and Campbell, JJ.)

Dare v. Wal-Mart Stores, Inc., 267 F. Supp. 2d 987, 991 (D. Minn. 2003) (opinion by Magnuson, J.)

Peterson v. City College, 32 F. Supp. 2d 675, 683-84 (S.D. N.Y. 1999) (opinion by Chin, J.)

Cully v. Milliman & Robertson, Inc., 20 F. Supp. 2d 636, 641 (S.D. N.Y. 1998) (opinion by Motley, J.)

Appendix E

Lapsley v. Columbia University-College of Physicians and Surgeons, 999 F. Supp. 506, 513-14 (S.D N.Y. 1998) (opinion by Chin, J.)

Adams v. CDM Media USA, Inc., 346 P.3d 70, 93-94 (Haw. 2015) (opinion joined by McKenna, Pollack, and Alm J.J.)

Trott v. H.D. Goodall Hosp., 66 A.3d 7, 16-17 (Me. 2013) (Silver and Jabar, JJ., concurring)

Daniels v. Narraguagus Bay Health Care Facility, 45 A.3d 722, 729-32 (Me. 2012) (Alexander, Silver and Jabar, JJ., concurring)

Gossett v. Tractor Supply Co., 320 S.W.3d 777, 781-85 (Tenn. 2010) (opinion joined by Holder, C.J., and Wade and Lee, JJ.)

Curlee v. Kootenai County Fire & Rescue, 148 Idaho 391, 403-04 (2008) (opinion joined by Eisman, C.J. and Burdick, J. Jones, W. Jones and Horton, JJ.)

Heng v. Rotech Med. Corp., 688 N.W.2d 389, 400-01 (North Dakota) (2004) (opinion joined by Walle, C.J., and Kapsner, Maring, Neumann and Sandstrom, JJ.)