White v. Marquis Companies I, Inc.

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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON PORTLAND DIVISION

LINDSAY A. WHITE,

Plaintiff, v. MARQUIS COMPANIES I, INC.,

Defendant.

Case No. 3:18-cv-00613-YY FINDINGS AND RECOMMENDATIONS

YOU, Magistrate Judge:

FINDINGS Plaintiff Lindsay White brings this action against her former employer, defendant Marquis Companies I, Inc. Plaintiff alleges six claims for relief: pregnancy discrimination under 42 U.S.C. § 2000e (Title VII) (claim one) and O.R.S. 659A.030 (claim two); interference and retaliation under 29 U.S.C. § 2601 (the Family and

42 U.S.C. § 12181 659A.112 (claim six). This court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

Defendant moves for summary judgment on all claims. Mot. Summ. J., ECF #20. For 1 I. Underlying Facts A.

Plaintiff, a licensed practical nurse, began working for defendant as a full-time clinical instructor on March 1, 2016. Healy Decl., Ex. 1, at 64, ECF #22-1 (offer letter). position entailed directing the day-to-day functions of students in d training program and included work in both a classroom and clinical setting. Id. at 266 (job

description); White Decl. ¶ locations, which include facilities in Canby, Newberg, Tualatin, Forest Grove, and Wilsonville. Zahrte Decl. ¶ 3, ECF #23. Her work location and duties often varied depending on which locations in her territory were offering classes and what phase (classroom or clinical) those classes were at. Id. eastside locations. Id. ¶ 7.

B. Pregnancy Notification Plaintiff became pregnant in early 2017, and notified her supervisor, Hau Vung En ¶ 3, ECF #30. In May 2017, Kathy Zahrte rked and 2, ECF #23. When Zahrte, who had a two-year-old

ernity leave at Marquis. Id. ¶ 6;

1 Given the extensive briefing by the parties, the court finds this matter suitable for decision without oral argument pursuant to L.R. 7-1(d)(1). id., Ex. 1, ECF #23- -person conversations with Zahrte

9, ECF #22-1. Plaintiff concedes that Zahrte did not say or do anything inappropriate during those conversations. Id. at 9. C. FMLA Certification Requests

On June 29, 2017, plaintiff emailed Jennifer Duna -1. Dunaway sent that Id. at 91. Dunaway also referred plaintiff to the employee handbook Id. Dunaway

longer able to work or at the date of admit/birth. Your leave for pregnancy disability will end Id.

On July 5, 26, and 31, 2017, plaintiff missed work for pregnancy-related reasons. Dunaway Decl. ¶ 4, ECF #21.

On August 1, 2017, Dunaway emailed plaintiff that her paperwork had been due on July 24, 2017, and asked if she had completed it. Healy Decl., Ex. 1, at 91, ECF #22-1. Dunaway

Id.

policy in terms of when to return the paperwork? What does tracking my missed hours related to Id. at 90. Dunaway responded that defendant was required to give plaintiff 15 days to return the paperwork, but could allow an extension. Id. Dunaway also explained that if plaintiff did not complete the medical certification, she would be still eligible for 12 weeks or the hourly equivalent of parental leave under FMLA and OFLA after she was admitted to the hospital and the baby was born. Id. and days missed due to pregnancy or pregnancy disability are included in your protected time so

we have counted your absences on the 5th, 26th and 31th against your available OFLA and Id. Plaintiff responded thank you and asked for an extension, to which Dunaway Id. at 89.

The following day, plaintiff emailed Dunaway that she had consulted with her attorney and had more questions. Id.

whenev

used towards a leave in approx. Nov. What is the reason for this? How is this being justified? Id.

Dunaway responded by providing her with a link to the Department of Labor website regarding medical certification requirements. Id. at 88. Dunaway also told plaintiff that she could have additional time to complete her medical certification and explained that the Id. Dunaway included an additional link to a intermittently towa Id.

D. Original Certification Plaintiff submitted her leave paperwork on August 3, 2017. Healy Decl., Ex. 1, at 88, ECF #22-1 (email from plaintiff); id. at 104 (paperwork). The medical certification from id. at 106), and that plaintiff would need continuous leave between approximately November 3, 2017, and April 2, 2018 (id.).

ble to perform Id. at 107.

or to work on a less than fulltime schedule basis be Id. at 108. Additionally episodic flare-ups periodically preventing the patient from participating in normal daily activities or perfo Id. at 109.

E. Designation Notice Approval of FMLA/OFLA Leave Dunaway sent plaintiff a designation notice approving her FMLA/OFLA leave on August 7, 2017. Healy Decl., Ex. 1, at 110, 115, ECF #22-1. Id. [plaintiff] to take leave after her baby was born, along with intermittent leave for routine appointments and pregnancy- 3, ECF #21; see also id. ¶ 4 (noting three absences on July 5, 26, and 31, 2017).

F. Request for Less Clinical Work Thereafter, on August 29, 2017, plaintiff sent an email to her supervisor, Zahrte, in which she explained that, after experiencing issues with her pregnancy and speaking with her medical be able to do more than three days of clinical instruction in October because any more than that

-1. Plaintiff suggested that she could do the remaining two days of instruction in the classroom or Id. - related appointments. Id.

Id.

workload and allow me to use the intermittent leave that had been approved for me. I needed

Id. The c

Id. ¶ 7.

Id. Due in part to spending long hours in the clinical program, plaintiff had developed pregnancy-related medical issues, including contractions, swelling, fatigue, nausea, vomiting, constipation, headaches, sleep disturbances, and possibly high blood pressure. Healy Decl., Ex. 1, at 18, ECF #22-1.

Unlike clinical instruction, during classroom instruction, breaks and [a primary teacher ran the class and . [Walling] and [plaintiff] to cover for each other or trade duties when the need arose (i.e., switch could switch roles during this time in order to accommodate [her] need

Id.

Zahrte also may have been present. Healy Decl,, Ex. 1, at 18, ECF #22-1. During those meetings, plaintiff explained that she needed to adjust her schedule, needed to take leave, and needed to find a way to get some relief. Id. G.

On August 31, 2017, Dunaway emailed plaintiff additional medical certification ave request as protected under state and federal leave laws, we will need for you to get an updated medical certification for your -1. Dunaway explained that the deadline for returning the paperwork was Septe will be conditionally granted until we receive your paperwork and determine if your leave Id.

On September 5, 2017, Z draft October schedule-changes have not yet been made in regards to your request of a modified work schedule Id. at 163 (emphasis in original).

On September 6, 2017, p and stated Id. at 146. That same day, plaintiff received a , Kronos. White Decl. ¶ 11, ECF #30.

On September 7, 2017, plaintiff emailed Dunaway and said that her medical provider was

return the paperwork as soon as possible b ECF #22-

requested (per email) a modified work schedule and the original certification you sent in does not suppor Id.

On September 10, 2017, plaintiff emailed Dunaway and Zahrte explaining that she was Id. at 144. Plaintiff also no Id. Id.

anything in the employee handbook requiring her to resubmit paperwork, which would be an Id.

In response, Zahrte explained that the recertification was necessary because the July 27, Id. at 143. ot render you unable to perform any of your job functions, that you will be incapacitated only for a single continuous period of time between 11.3.17 and 4.2.18, and that it will not be necessary for you to be on intermittent leave or work less than full-t Id. Zahrte explained,

Id. Zahrte also explained that if plaintiff was stating that she ha to help us evaluate whether you are disabled and whether there are any reasonable

Id. Zahrte

Id. r intentions or our communications to you Id. Plaintiff did not respond. Zahrte Decl. ¶ 14, ECF #23.

H. Plaintiff States Intention to Work Part-Time On September 14, 2017, four days after she told defendant plaintiff emailed Zahrte a short letter declaring

her intention to move to part-time status within two weeks, by September 28, 2017. Healy Decl., Ex. 1, at 169, ECF #22-1. Pl Id. requesting a part- Id. at 170. The next day, Zahrte emailed plaintiff again,

will respond to your request as soon as possible, but first, please let me know the specific reason you are requesting a change from the full-time position for which you were hired to a part- Id. at 171. Plaintiff did not respond. Zahrte Decl. ¶ 15, ECF #23. LeVee, met with plaintiff in person. Healy Decl., Ex. 1, at 173, ECF #22-1 (meeting minutes).

Id.

Id. Notes from the meeting state:

o You have protected leave available to you, but the appropriate steps need to be

taken

Let us HELP YOU Id. It was again explained to plaintiff that the existing certification did not state she was unable to perform any of her job functions, she could not work less than full-time, or she would have episodic flare ups that periodically prevented her from participating in normal daily activities or performing her job functions. Id. onal paperwork [was] needed 2

Id. After the meeting, Zahrte emailed plaintiff recertification paperwork, including a cover :

Ms. [White] has exhibited an absence pattern consisting of calling in sick due to her condition typically on days surrounding her days off. She has had 13 absences since March 2017, that she says are related to her pregnancy. Out of these 13 absences, all but 4 have occurred on Mondays and/or Thursdays and Fridays or around a holiday, thereby extending the weekend/timeoff for Ms. [White]. Ms. end times, depending on class schedule. records are attached for your review. Note, the records are from two different timekeeping systems, as the company began transitioning to a new timekeeping system recently. Please review the documentation we are providing, and provide s] condition and her

2 As of August 28, 2017, plaintiff had no sick time available. Healy Decl., Ex. 1, at 177, ECF #22-1.

stated need for leave is consistent with her absence pattern. We are also attaching a new CHCP form and request that you complete it and return it to us no later than 15 days from the date of this letter. Id. at 176 (emphasis in original). Plaintiff did not submit this paperwork to her medical provider because she . . . that I had manipulated my time off . She did not think that her medical provider asked to comment on that erroneous insinuation. Id.

On September 26, 2017, days a week in this dept starting next week (Monday and Tuesday). I have tried to communicate

Id. at 203.

Zahrte responded later that day by email stating: During the meeting yesterday with you, me and Kathy, I again asked you to provide the reason you were requesting to change your employment status from full-time to part-time. You simply stated that your reason for requesting a change in status was because you had a desire to reduce your number of scheduled hours. When to work two days a week: on Mondays and Tuesdays. At this time, the Education Department does not have a part time Clinical Instructor position available to match your request, and you have provided us with no paperwork to support any medical need to move to a part-time schedule. Therefore, we are not able to approve your request to move from full-time to part-time. 3 Id. at 204. However, Zahrte went on to say:

3 Walling testified that defendant hired two part-time instructors one to do either classroom or clinical work and one to do clinical work but could not remember the exact times and months they were hired. Collins Decl., Ex. 3, at 12, ECF #31-2. According to Zahrte, those instructors, Michelle Zumwalt and Erika Nieto, were hired before plaintiff expressed her desire to work part- part- Id. In fact, they would have filled in for plaintiff had she submitted her FMLA recertification. Id.

Having said that, if you are asking for a job modification because you are unable to perform your job duties due to a health condition, as I told you in my 9/15/17 email, we will require ADA paperwork from your health care provider to help us evaluate whether you are disabled and whether there are any reasonable accommodations that will allow you to perform the essential functions of your job. You will be receiving the ADA paperwork today from Jennifer Dunaway, and you will need to provide this to us before we can evaluate possible accommodations. You will have 15 days to return this ADA paperwork. Id.

plaintiff that without documen Id. Zahrte told plaintiff that she was expected to work her normal full-time schedule, to be covered by OFLA/FMLA or any other protected leave, and you may be subject to appropriate disciplinary action if you do not remedy this situation and submit the appropriate completed Id. Again, Zahrte explained that defendant was waiting for clarification whether

Later that day, Zahrte sent plaintiff a second email, including ADA paperwork from Dunaway. Id. at 225. Za that plaintiff had 15 days to return the paperwork. Id. The attachments included a letter from Dunaway to plaintiff stating the following:

If the modification is necessary but not reasonable, or if it imposes an undue hardship, we will attempt to identify a vacant position for which you are qualified Your employment may be terminated if we have no vacant position for which you are qualified.

. Id. at 230 31. The attachments also included a letter that defendant had drafted for plaintiff to sign and give to her provider, including the following language:

By my signature below, I authorize you to discuss any of your responses with my

records pertaining to the medical condition for which I am seeking a modification. Id. at 232. I. Continuous Leave

Two days later, on September 28, 2017, plaintiff stated that she was beginning her full- time leave. Healy Decl., Ex. 1, at 245, ECF #22-1; White Decl. ¶ 19, ECF #30. Zahrte again asked plaintiff for an updated medical certification to address the change in circumstances:

When your OFLA/FMLA leave starts is dependent upon a valid health care provider certification. We have sent you the paperwork to allow you to obtain the certification from your health care provider multiple times. The only certification we have for you indicates that your leave is to start on approximately November 3, 2017. If there has been a change in your health condition that would warrant your leave starting earlier, we need to know that. You have been informed repeatedly, verbally and in writing, that we need the appropriate paperwork to whether any additional/early leave you are requesting is covered by OFLA and/or FMLA until you provide us with the paperwork. Healy Decl., Ex. 1, at 245 46.

On October 5, 2017, plaintiff responded with a one paragraph letter from her midwife rk schedule and other factors she will be taking her Id. at 247. Zahrte

Id. at 242.

Id. and insisted she did not have to submit paperwork or sign a waiver to allow anyone to see her medical records. Id. She also wrote:

I stated in May that I felt you were singling me out and discriminating against me and I continue to see that pattern today, even more aggressively. The paperwork that I have submitted is all I am going to submit. I am following federal and state law and Marquis FMLA policy. Id.

J. Recertification On October 10, 2017, plaintiff submitted a recertification from her provider. Id. at 248.

intermittently or to work on less than a full-time schedule basis because of the condition or

Id. at 253. With regard to frequency, the provider answered

Id. The

. walking, Id. at 254.

/OFLA continuous Id., at 272. Defendant advised plaintiff that her continuous leave and intermittent leave would be counted against her FMLA/OFLA leave entitlement. Id. Defendant also asked plaintiff to provide clarification from her provider regarding when her pregnancy disability would end so that Id. at 270.

K. Discussions Regarding Return to Work and Resignation Plaintiff had her baby on November 14, 2017. Id. at 276. On January 4, 2018, plaintiff

n on April 2, 2018. Id. Id.

In an email response dated January 16, 2018, Zahrte congratulated plaintiff on the birth of her child and reminded he to determine when to begin her parental leave. Id. at 276. Zahrte explained that:

presumably ended when your baby was born along with any additional time you may have been disabled post- eave under OFLA and FMLA began. 3) If plaintiff took the entire 12 weeks of parental leave after the birth of her child on November 14, 2017, her return-to-work date would be February 7, 2018. Plaintiff was not entitled to family medical leave past that date unless it was for additional OFLA leave, e.g., for a sick child. Id. at 276 77.

On January 29, 2018, plaintiff emailed Zahrte and En asking what her schedule would be and how she would be accommodated for breast feeding. Id. at 283.

On January 31, 2018, Zahrte asked plaintiff if she had experienced any pregnancy-related disability Id. of that date. Id. By separate email, Zahrte also told plaintiff that a schedule would be sent to her later that week and provided her with details regarding when and where she could express breast milk. Id. at 282 83. Zahrte sent plaintiff her schedule on February 9, 2018. Id. at 280. In response, plaintiff

Id.

On February 19, 2018, Zahrte emailed plaintiff stating she had not received a response s breastfeeding needs. Id. can make this transition back to work as smooth as possible. Please provide me with a response Id. The following day, on February 20, 2018, plaintiff and discriminatory behavior I have been subjected to during my pregnancy and postpartum

Id. at 306. II. Summary Judgment Standard

Under Federal Rule of Civil Procedure 56(a) if the movant shows that there is no genuine dispute as to any material fact and the movant is

initial responsibility of informing the court of the basis for the motion and identifying portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) Id. at 324 (citing Fed. R. Civ. P. 56(e)).

he matter, but only Balint v. Carson City, Nev., 180 F.3d 1047, 1054 (9th Cir. 1999) resolved against the moving parties and inferences are drawn in the light most favorable to the non- Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000).

right to a full trial, since discrimination claims are frequently difficult to prove without a full

McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1112 (9th Cir. 2004); see also Chuang v. Univ. of California Davis, Bd. of Trustees, 225 F.3d 1115, 1124 (9th Cir. 2000) an employment discrimination action need produce very little evidence in order to overcome an

e that can only be resolved through a searching inquiry one that is most appropriately conducted by a Schnidrig v. Columbia Mach., Inc., 80 F.3d 1406, 1410 (9th Cir. 1996)).

-moving party does have some Jernigan v. Alderwoods Grp., Inc., 489 F. Supp. 2d 1180, 1187 (D. Or. 2007).

not severe or pervasive enough to constitute a hostile work environment. Nelson v. Boeing Co., No. 19-35401, 2020 WL 3076243, at *1 (9th Cir. June 10, 2020) (finding district court properly granted summary judgment on hostile work environment claim because plaintiff failed ervasive to alter the conditions of his employment); Denning v. Cty. of Washoe 2020)

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; Vasquez v. Cty. of Los Angeles, 349 F.3d 634, 642 43 (9th Cir. 2003), as amended

Manatt v. Bank of Am., NA, 339 F.3d 792, 798 (9th Cir. 2003) conclude that the conduct of Manatts

co-workers and supervisor while offensive and inappropriate did not so pollute the workplace that it altered the conditions of her employment. Also, courts routinely

Jurado v. Eleven Fifty Corp., 813 F.2d 1406, 1409 (9th Cir. 1987) (citations omitted); see Pearson v. Reynolds Sch. Dist. No. 7, 998 F. Supp. 2d 1004, 1022 (D. Or. 2014) (granting summary judgment on Title VII disparate treatment claim where plaintiff failed to establish prima facie case). III. Federal and State Law Claims Analyzed Together

Plaintiff asserts both federal and state law claims in her complaint. Because each of plaintiff together with the federal claims. See, e.g., Hutton v. Elf Atochem N. Am., Inc., 273 F.3d 884, 892

4 Any unpublished decisions referred to herein are cited pursuant to Federal Rule of Appellate Procedure 32-1, which provides that a court may not prohibit or restrict the citation of unpublished federal judicial opinions issued on or after January 1, 2007, and applicable circuit court rules, such as Ninth Circuit Rule of Appellate Procedure 36-3, which allow citations to unpublished opinions issued on or after January 1, 2007, n.1 (9th Cir. 2001) The Oregon disability discrimination statute is modeled after the ADA. Heller v. EBB Auto Co., 8 F.3d 1433, 1437 n.2 (9th Cir. 1993) 659A.030], as id Doby v. Sisters of St. Mary of Or. Ministries Corp., No.

3:13-CV-0977-ST, 2014 WL 3943713, at *9 (D. Or. Aug. 11, 2014) (holding the OFLA is to be

Sanders v. City of Newport, 657 F.3d 772, 783 (9th Cir. 2011)). IV. Pregnancy Discrimination Pursuant to 42 U.S.C. § 2000e et seq. (First Claim) and

O.R.S. 659A.030 (Second Claim) In her response to the motion for summary judgment, plaintiff clarifies that she is alleging two types of pregnancy discrimination in her first and second claims:

of her request for a modified schedule to work less

limit her schedule to eight hours per day pursuant to intermittent leave and to work half days as intermitt 32, ECF #29; Compl. ¶ 26(c)); and

(2) Hostile work environment, which allegedly led to her constructive discharge, based accommodated; telling her there were no vacancies when there were; unjustified discipline; the

search for examples of Plaintiff being unable to do her job; the letter to the medical provider regarding her absences; and falsely telling Plaintiff that she had a below average evaluation that 32, 33 34, ECF #29.

Each claim is discussed separately below. A. Disparate Treatment Intentional Discrimination 1. Relevant Law

VII prohibits . . . i Ricci v. DeStefano, 557 U.S. 557, 577 (2009). Under Title VII, it is unlawful for an employer

individual with respect to his compensation, terms, conditions, or privileges of employment, religion 42 U.S.C. § 2000e- 2(a)(1). The 1978 Pregnancy Discrimination Act amended Title VII to make clear that Title

. . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or 42 U.S.C. § 2000e(k). Cleese v. Hewlett-Packard Co., 911 F. Supp. 1312, 1317 (D. Or. 1995).

Courts analyze Title VII disparate treatment claims through the burden-shifting framework of McDonnell Douglas v. Green, 411 U.S. 792 (1973). Hawn v. Exec. Jet Mgmt., Inc., 615 F.3d 1151, 1155 (9th Cir. 2010) McDonnell Douglas, to show disparate treatment under Title Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1062 (9th Cir. 2002). To establish a prima

to the protected class, that she sought accommodation, that the employer did not accommodate her, and that Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1354 (2015) description of the required elements for a Pregnancy Discrimination Act claim in Young is that Allred v. Home Depot USA, Inc., No. 1:17-CV-00483-BLW, 2019 WL 2745731, at *13 (D. Idaho June 28, 2019) (citing Hochberg v. Lincare, Inc. (affirming grant of summary judgment on the basis that plaintiff failed to raise a dispute of material fact related to adverse action)).

prima facie case for Title VII . . . claims on summary judgment is minimal and does not even need to rise to the level of a preponder Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994), as amended on denial of reh g Id. (citation and quotation marks omitted).

order to create a prima facie case is Simpson v. Lear Astronics Corp., 59 F.3d 176 (9th Cir. 1995) (citation omitted); see also Villiarimo, 281 F.3d at 1062 (recognizing that a prima

oyer may then seek to justify its refusal to accommodate the plaintiff by Young, 135 S. Ct. at 1354 (citing McDonnell Douglas, 411 U.S. at 802 establishes a prima facie case, the burden of production but not persuasion then shifts to the

Villiarimo, 281 F.3d at 1062 -

proffered reasons are in fact pretextu Young, 135 S. Ct. at 1354. A plaintiff may establish Chuang, 225 F.3d at 1124.

much greater than at the prima facie stage. Where an employee attempts to prove pretext with circumstantial to were not the actual motives because they are

Hire v. Hyperion Solutions Corp., No. CV 03 1744 ST, 2004 WL 2260669 (D. Or. Oct. 7, 2004) (quoting Godwin v. Hunt Wesson, Inc., 150 F.3d

1217, 1222 (9th Cir. 1998)). To survive summary judgment, a plaintiff must raise a genuine g decision was Dominguez Curry v. Nevada Transp. Dept., 424 F.3d 1027, 1041 42 (9th Cir. 2005).

2. Prima Facie Element Adverse Employment Action For an act to be an adverse employment action for purposes of Title VII discrimination, it materially affect the compensation, terms, conditions, or privileges of . . . Chuang, 225 F.3d at 1126 A plaintiff cannot establish not demoted, was not stripped of work responsibilities, was not handed different or more burdensome work responsibilities, was not fired or suspended, was not denied any raises, and was not reduced in salary or an Maxwell v. Kelly Servs., Inc., 730 F. Supp. 2d 1254, 1267 68 (D. Or. 2010) (quoting Kortan v. Cal. Youth Auth., 217 F.3d 1104, 1113 (9th Cir. 2000) adverse employment action. Sanchez v. Denver Pub. Schs., 164 F.3d 527, 532 (10th Cir. 1998).

In the Ninth Circuit, examples of adverse employment action in pregnancy discrimination cases include being fired, Linder v. Pac. Dataware, Inc., 142 F.3d 444 (9th Cir. 1998); being demoted and terminated, Hands v. Advanced Critical Care-Los Angeles, Inc., No. 2:14-CV- 06514-ODW, 2015 WL 114185, at *6 (C.D. Cal. Jan. 8, 2015); failing to make reasonable lactation accommodations and failing to return the plaintiff to her prior position, James v. Dependency Legal Grp., 253 F. Supp. 3d 1077, 1095 (S.D. Cal. 2015); giving a pregnant plaintiff the option of quitting or taking a short-term disability leave of absence at two-thirds pay, Kaiser v. Trace, Inc., 72 F. Supp. 3d 1126, 1133 (D. Idaho 2014); and failing to pay a severance and provide 60- of termination that other laid-off employees received, resulting in a lapse of insurance coverage, and miscoding the reason for termination, resulting in the initial denial of a claim for unemployment benefits, Wargnier v. Nat l City Mortg. Inc., No. 09-CV- 2721 W (BGS), 2012 WL 12953738, at *10 (S.D. Cal. Mar. 29, 2012).

3. Schedule Modification As an initial matter, d 17, ECF #20. Defendant would be unable to do more than three days of clinical instruction beginning in October 2017.

Healy Decl., Ex. 1, at 131, ECF #22-1. Defendant argues that plaintiff began her leave on September 29, 2017, before defendant could even provide her with the modification she requested.

favor. Moreover, at her deposition, plaintiff explained that before she sent the email, she spoke with Zahrte about switching her September and October shifts with Walling, but Zahrte refused her request, telling plaintiff that she was a clinical instructor and therefore had to perform more clinical than classroom instruction. Healy Decl., Ex. 1, at 24, ECF #22-1.

Nevertheless, the uncontroverted evidence in the record shows that plaintiff failed to provide defendant with recertification paperwork to support the schedule modification she was requesting. Under the FMLA, an employer is permitted to ask for recertification, even if the previous

certification was fewer than 30 days 5

prior, when: Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of the absence, the nature or severity of the illness, complications). For example, if a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine four days each, then the increased duration of absence might constitute a significant change in circumstances allowing the employer to request a recertification in less than 30 days. 29 C.F.R. § 825.308(c)(2); see Hoang v. Wells Fargo Bank, N.A., 724 F. Supp. 2d 1094, 1107 (D. Or. 2010) (explaining i]n the case of medical conditions, the (citing Bachelder v. America West Airlines, Inc., 259 F.3d 1112, 1130 33 (9th Cir. 2001)); see also Ridings v. Riverside Med. Ctr., 537 F.3d 755, 772 (7th Cir. 2008) Riverside was permitted by the FMLA to require Ridings to substantiate her continued need for a reduced schedule, and it terminated her in accordance with the FMLA and its employment policies, after giving her repeated opportunities to provide the information it had requested.

Courts have repeatedly held that a request for additional medical certification does not constitute an adverse employment action. See Tarpley v. City Colleges of Chicago

5 at 103, ECF #22-1, and defendant requested the recertification on August 31, 2017, id. at 147. 336, 348 (7th Cir. 2018) process, namely the review of her COAs and the requirement that she provide signed copies of medical certification forms, does not constitute an adverse employment action); Pierre v. Napolitano, 958 F. Supp. 2d 461, 479 (S.D.N.Y. 2013) (holding that request for medical documentation was not an adverse employment action); Wells v. Gates (4th Cir. 2009) (holding that a request for further medical documentation was not a materially adverse employment action); Franklin v. Potter, 600 F. Supp. 2d 38, 64 (D.D.C. 2009) (holding that plaintiff's failure to obtain light or limited duty because he did not comply with defendant's administrative requirements, particularly the submission of correct medical documentation, did not constitute an adverse employment action); Sebastian v. City of Chicago, No. 05 C 2077, 2008 WL 2875255, at *26 (N.D. Ill. July 24, 2008) (finding that plaintiff provide medical documentation action)).

Plaintiff contends that she was not required to submit a recertification because ite Decl. ¶ 10, ECF #30; see also id. ew medical certification since I had already 6

6 Also, during her deposition, plaintiff seemed to suggest that she needed nothing more to support a modification other than the fact she was pregnant and had requested it:

A: [M]y understanding is that without paperwork I would be

accommodated. Q: In what manner? A: With request. In regards to changing my schedule or altering my

workload to accommodate my pregnancy. Q: So you believed Marquis was required to provide those

modifications without paperwork from your doctor? did not state that intermittent leave would not take place; it simply stated that Plaintiff would not

termittently or to work on a

-1. Plaintiff argues that because she was not taking leave only intermittently, the original certification encompassed the broad range of modifications she was requesting. Resp. 17, ECF #29.

Healy Decl., Ex. 1, at 100, ECF #22-

and only two days a week pertained to the questions of whether she was unable to perform her job functions and needed to work less than a fulltime schedule. The original certification did not support for a modified schedule. As such, defendant was not only reasonably permitted, but also legally permitted, to ask for additional certification.

Also, importantly, upon finally receiving the recertification, defendant approved nce, and her position was waiting for her after she completed her leave. Id. at 252, 276. Thus, even viewing the facts in the light most favorable to plaintiff, there was no adverse employment action related to her requests for a

A: Specific paperwork, Marquis knew I was pregnant. Without

further paperwork, yes, I believe that. Healy Decl., Ex. 1, at 22, ECF #22-1. schedule modification. Because plaintiff has failed to establish the prima facie element of adverse employment action, her disparate treatment claim fails.

B. Hostile Work Environment 1. Relevant Law

A hostile work environment claim is cognizable under Title VII. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752 (1998) quid pro quo claims and hostile environment claims, . . . and said both were cognizable under Title Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) in an environment free from discriminatory intimid Id. To prevail on a hos with discriminatory intimidation . . . that [was] sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

Id. at 21. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) Meritor, 477 U.S. at

67 . . . does not suf Id. (quoting Meritor, 477 U.S. at 67 s, minor annoyances, and

Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) cannot immunize that employee from those petty slights or minor annoyances that often take pla Id. (citing 1 B. Lindemann & P. Grossman,

- see also Faragher, 524 U.S. at 788 (holding that solated incidents (unless extremely serious) are not

However Faragher, 524 U.S. at 788 (internal quotation marks and citation omitted). Otherwise

Harris, 510 U.S. at 22.

offensive, one that a reasonable person would find hostile or abusive, and one that the victim in Faragher, 524 U.S. at 787 must be assessed from the perspective of a reasonable person belonging to the . . . group of the McGinest, 360 F.3d at 1115.

[the court] conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive

utterance; and whether it unreasonably interferes with an employee's work pe Nichols v. Azteca Rest. Enterprises, Inc., 256 F.3d 864, 872 (9th Cir. 2001) (quoting Harris, 510

U.S. at 23 Id. (internal quotation marks omitted). appropriate to leave the assessment to the fact-finder than for the court to decide the case on Davis v. Team Elec. Co., 520 F.3d 1080, 1096 (9th Cir. 2008). However, as discussed below, this is not one of those close cases. 2. Analysis

Plaintiff contends that the following circumstances constituted a hostile work environment:

(1) (2)

ability to obtain educa 7

Resp. 34, ECF #29. The court assesses these allegations from the perspective of a reasonable pregnant woman. As discussed below, these allegations do not objectively rise to the level of severity and pervasiveness to constitute a hostile work environment.

7 In the Complaint, plaintiff also alleges that defen require Plaintiff to work even more clinical teaching hours, thereby necessitating that Plaintiff take full- evidence in the record that this happened. See Healy Decl., Ex. 1, at 25-26, ECF #22-1 (p had changed); Zahrte Decl. ¶ 13, ECF #23 (attesting that defendant did not modify schedule and that Walling, like Ms. White, was scheduled as she normally was for that month (precepting i. Acts of Intimidation

conversations with Plaintiff became increasingly more intimidating and confrontational as she

made it clear that

In late July and early August of 2017 I had some absences from work due to my pregnancy. At that point my pregnancy. Ms. Zahrte made it clear to me that absenteeism was not acceptable and that I was not being a team player. Things progressively got worse. Ms. Zahrte would show up at my work site unannounced at the end of my clinical workday. She did not do this to anyone else. On one occasion I had a

increased over time. White Decl. ¶ 6, ECF #30.

-1, and there ween her and defendant over the paperwork necessary to facilitate her request for a modified schedule. Id. at 30. As discussed above, defendant was permitted to ask for a recertification because the existing certification did not allow for the schedule modification that plaintiff was requesting. Where plaintiff failed to submit the necessary paperwork, despite numerous requests, it was not objectively intimidating for Zahrte to

on multiple occasions about the paperwork Marquis needed from her provider to make changes id clarify why she was seeking to go part- normal and expected components of employment. Hammett v. S.C. Dep't of Health & Envtl. Control, No. CA 3:10-932-MBS-SVH, 2013 WL 1316440, at *5 (D.S.C. Jan. 25, 2013), report and recommendation adopted, 2013 WL 1316434 (D.S.C. Mar. 28, 2013).

At her deposition, plaintiff also took issue with the September 25, 2017 meeting that she had with Zahrte and Vice President LeVee, which plaintiff characterizes as - out and say that I would lose my job and that I would be fired and that . . . these were disciplinary issues . . . [,] the air of the meeting [was] that I was in trouble, these things were not Id. Plaintiff believes that requiring her to meet with a higher-level executive, and not allowing her Id.

Again, meetings with supervisors are a normal part of the workplace environment, and there is nothing about a meeting to discuss paperwork and scheduling that is, in and of itself, forced to attend meetings with other employees without a witness or representative is insufficient to show that the alleged harassment was so severe and pervasive to constitute grounds for a hostile work environment Hammett, 2013 WL 1316440, at *5. to no acts that were objectively intimidating or abusive under Title VII. See Reply 3 n.2, ECF #36 (citing cases holding that beliefs and feelings are not evidence and do not create a genuine issue of material fact). To conclude that the September 25, 2 Sebastian, 2008 WL 2875255, at *27. Nurriddin v. Goldin, 382 F. Supp. 2d 79, 107 (D.D.C. 2005). Federal Id.; see also Denning at 548

for a hostile work environment claim); Smith v. Naples Cmty. Hosp., Inc. (11th Cir. 2011) annoyances and communication issues that did not come close to creating a hostile work ; Manatt, 339 F.3d at 798 (holding that -workers and supervisor while offensive and inappropriate did not so pollute the workplace that it altered the conditions of her employment). 8 ii. ADA Paperwork

Following some back-and-forth emails regarding the FMLA recertification paperwork,

Decl., Ex. 1, at 144, ECF #22-1. Approximately two weeks later, on September 26, 2017,

starting next week (Monday and Tuesda Id. at 203. Plaintiff contends that defendant created

8 Collins Decl., Ex. 3, at 12, ECF #31- le VII does not prohibit all Ware v. Billington, 344 F. Supp. 2d 63, 71 n. 1 (D.D.C. 2004) (internal citation omitted). Rather, to be actionable, the conduct must be severe or pervasive. a hostile work environment when Zahrte thereafter provided her with ADA paperwork, including -time positions were available. White Decl. ¶ 18, ECF #30.

The parties dispute whether defendant had a legal basis to provide plaintiff with ADA paperwork. Defendant claims it was reasonable to believe that plaintiff was asking for an ADA accommodation. Indeed, plaintiff had yet to submit any FMLA recertification paperwork and told defendant that her i.e., language that is consistent with the ADA. See 42 U.S.C. discriminate against a qualified individual on the basis of disability in

Zahrte Decl. ¶ 14, ECF #23.

of providing plaintiff with ADA paperwork did not create a hostile work environment. Unrealized threats to terminate employment may constitute the basis for a hostile work environment claim. See Burlington, 524 U.S. at 754 categorized as a hostile work environment claim which requires a showing of severe or pervasive

was ever carried out. See Tepperwien v. Entergy Nuclear Operations, Inc., 663 F.3d 556, 571 (2d Cir. 2011) threat to employee, or minor t Zahrte lied about whether there were part-time positions is scant at best. 9

Moreover, the act of providing plaintiff with ADA paperwork even when combined did not create a hostile work Inconvenient though it may have been to submit various paperwork while in the midst of contending with her health concerns, being required to submit standard paperwork and having that paperwork reviewed to ensure proper administration of her FMLA requests does not even come close to constituting a hostile work Tarpley

Finally, once plaintiff submitted the correct FMLA recertification, her FMLA leave was granted. There was no abuse or hostile work environment under these facts. See Smith, 433 F. (holding that annoyances and communication issues did not come close to creating Mason v. Geithner, 811 F. Supp. 2d 128, 196 97 (D.D.C. 2011), aff'd, (finding no hostile work environment where after the plaintiff completed his current project, he received the rotational work assignment he had requested the very next day).

iii. Discipline pattern of allegedly undeserved, excessive, and/or disproportionate discipline can form the basis for a viable hostile work environment claim, at least where the plaintiff provides

9 Zahrte has testified that these part-time instructors were hired before plaintiff indicated that she wanted to reduce her work hours, and that they would have filled in for plaintiff if she had submitted recertification paperwork indicating reduced hours were necessary. Zahrte Decl. ¶ 15 n.1, ECF #23. Walling testified about the existence of two part-time instructors, but could not remember the exact times and months they were hired. Collins Decl., Ex. 3, at 12, ECF #31-3. Plaintiff testified only that she believed these part-time instructors were hired after her. Healy Decl., Ex. 1, at 42, ECF #22-1. credible evidence that the alleged justification underlying that pattern of discipline is unlawful Motley-Ivey v. D.C., 923 F. Supp. 2d 222, 234 (D.D.C. 2013) (citing Che v. Mass. Bay Transp. Auth., 342 F.3d 31, 40 41 (1st Cir. 2003) (finding sufficient evidence to hostile work environment where, among other allegations, the plaintiff Wise v. Ferriero, 842 F. Supp. 2d 120, 126 27 (D.D.C. 2012) (denying motion to

dismiss hostile work environment claim where, among other allegations, plaintiff alleged that he

Plaintiff complains of an isolated incident of discipline on September 6, 2017, when she received a verbal warning for White Decl. ¶ 11, ECF #30. The record reflects that Zahrte began discussing the new system

with employees in May 2017, and it was implemented on July 1, 2017. Zahrte Decl. ¶ 3, ECF #38. Plaintiff contends that, when the new system was put in place, staff was told there would be Collins Decl., Ex. 3, at 9, ECF #31-3 (Walling dep. testimony). Indeed, defendant pro used to the system. Zahrte Decl. ¶ 3, ECF #38.

However, records show that well after the system was put in place, plaintiff failed to punch in twice on August 15, once on August 24, twice again on August 25, and once on September 5, 2017. Collins Decl., Ex. 4, at 81, ECF #31-3. Thus, when plaintiff received the verbal warning on September 6, 2017, it was after she had missed six punches and well past the grace period. This isolated incident of verbal discipline establishes no pattern of undeserved, excessive, or disproportionate discipline. showing defendant acted with a discriminatory motive, such discipline is insufficient to support her hostile work environment claim. , No. 18-CV-02187-MMC, 2019 WL 1861319, at *8 (N.D. Cal. Apr. 25, 2019) (citing Chamat v. Geithner 728, 730 (9th Cir. 2010) (affirming summary judgment in favor of employer where hostile work

Spillane v. Shulkin Cir. 2017) ially

Higdon v. Mabus, 5 F. Supp. 3d 1199, 1210 (S.D. Cal. 2014) (finding no severe and

questioned about a grievance, and transferred to a different position while the grievance was

resolved).

iv. Inability to Do Job

White Decl. ¶ 16, ECF #30. In particular, plaintiff cites to the September 25, 2017 meeting with Zahrte and Vice-President LeVee during which:

Ms. Zahrte asked me about an incident with a Hoyer lift. She thought that I had was unable to move it and had asked another staff member Sandra Hodge to move it for me. Ms. Zahrte saw this as an example of my physical inability to do my job. I told Ms. Zahrte that I was fully capable of moving the Hoyer lift and that Ms. Hodge had simply offered to get it for me. White Decl. ¶ 16, ECF #30; see also Healy Decl., Ex. 1, at 174, ECF #22-1 (meeting mintues tion of class: Need clarification Decl., Ex. 1, at 19, ECF #31-1.

Later, on January 29, 2018, plaintiff sent an email to Zahrte stating: The only issue that Sandra and I have faced is your (Katy) dishonesty in telling me that Sandra went to you and told you that I was unable to perform my job duties and that she had to retrieve the Hoyer lift during a rotation at the Tualatin facility. In this particular situation, Sandra offered to get the lift and refused to let me. I can only assume she did this because I was more than 32 weeks pregnant and offered it as a curtesy [sic] as I never voiced to anyone that 1 was incapable of doing my job. Healy Decl., Ex. 1, at 299, ECF #22-1. During her deposition, Zahrte testified that En had told her plaintiff was unable to get the Hoyer lift. Collins Decl., Ex. 1, at 11, ECF #31-1. However, Zahrte later learned that Hodge had offered to get it. Id. at 11 12. Zahrte described the matter a Id. Zahrte testified that she was not looking for instances in which plaintiff was unable to do her job,

Id. at 12.

conclude that Defendant To the contrary, other than this isolated incident and mere speculation, there is no evidence in the

record that Zahrte was looking f this incident does not support a claim for hostile work environment.

v. Letter Outlining 13 Absences ovider, , and asked for a written medical opinion ¶¶ 16, 26f, 32, ECF #1.

Under 29 C.F.R. § 825.308(c)(2), an employee ha[s] a pattern of using unscheduled FMLA leave . . . in conjunction with his or her scheduled days off. . . . was a pattern of absences, so we were trying to see if that was consistent with her needs for medical - Id.

The FMLA allows for recertification in this circumstance. Therefore, this conduct does not support a hostile work environment claim. See Sebastian, 2008 WL 2875255, at *26 (finding request that

plaintiff provide medical documentation for sick leave fell in the category of minor slights and annoyances).

vi. Expenses

September 25, 2017 meeting, Zahrte and LeVee explained to plaintiff that she had improperly

bypassed the procedure for obtaining an educational reimbursement by submitting her request for reimbursement directly to Amy Evinger. Healy Decl., Ex. 1, at 174, ECF #22-1. They explained ss to her supervisor, packet is filled out with letter of intent, qualifications must be met, grades are submitted for verification, then goes up the Id.

Thereafter, plaintiff and Zahrte exchanged a series of emails about the tuition reimbursement. In an October 5, 2017 email, plaintiff explained chain of command but was simply doing what I had been Instructed to do in the past. My Id. at 167. On November 8, 2017, Zarhte thanked plaintiff for her patience and told her that although she had not met the criteria of having above average evaluations, they were processing her request for payment as she had already started classes prior to the time her performance evaluation was conducted. Id. at 166. Defendant issued a check to plaintiff three days later on November 11, 2017. Zahrte Decl. ¶ 23, ECF #23.

Plaintiff responded by email on November 9, 2017, insisting that her evaluation was above average and that she still did not understand how she had failed to follow the protocol for the tuition reimbursement. Id. at 165. Plaintiff ad to hear that I am finally receiving the benefit, I believe this is further retaliatory behavior and discrimination Id.

On November 17, 2017, Zahrte sent plaintiff a lengthy email stating in part: In response to your email below, it should not be news to you that in both your December 2016 and August 2017 evaluations there were specific areas in which you were clearly notified that you needed to improve. We do try to be encouraging to employees in providing positive feedback as well as constructive criticism during evaluations, so while we may have praised you for the 4s you received, we also made it clear that there were areas in which you really needed to improve. In your December 2016 evaluation, you were told that you needed to arrive timely to work, provide students with positive feedback and check to make sure tasks were correctly completed. In your August 2017 evaluation, you were told that you needed to: improve your negative attitude and resistance to change and seek information in the spirit of teamwork and collaboration; improve in the area of getting along with your coworkers; and improve in the area of leadership with respect to your attitude and interpersonal relationships in order to be a good role model. [En] read your evaluation to you practically verbatim, so the fact that you had several 4s on your evaluation does not negate the fact that you were also made aware of the 2s and 3s you were receiving. As you requested, copies of your signed evaluations are attached. Id. at 162 63. Zahrte also explained the ways in which plaintiff failed to follow the proper procedure for obtaining reimbursement. Id. at 163 65 evaluation nevertheless

[W]e have taken into account your belief that your August 2017 evaluation was above average, and have decided that since your overall score was (slightly) closer to a 4 than to 3, we will consider that evaluation to be above average for purposes of the Education Benefit. Id. at 165.

1, at 297, ECF #22-1.

Zarhte responded to plaintiff by email on February 5, 2018, stating in part: I disagree with most of the statements you make in your email below, but I think it is counterproductive at this time to engage in further back and forth about these matters . . . [T]he tone of your email underscores my concerns about your approach to interpersonal communications with others. Id. Zahrte further stated:

because there seems to be a misunderstanding that I hope can be cleared up by my reiterating what I tried to communicate to you previously. I am not telling you that you are losing your benefit. I do not know whether you will be eligible for the benefit, but as I stated very clearly in my prior email to you . . . if you follow the protocol, and meet the requirements, you will be entitled to the benefit so long as the benefit is being offered by the company. That goes for you and every other Marquis employee. Id.

Thus, the record shows that plaintiff initially submitted an incomplete application for the education benefit, defendant provided plaintiff with guidance about how to properly submit her

C. Constructive Discharge Plaintiff also alleges that defendant constructively terminated her employment. Compl. ¶¶ Penn State Police v. Suders, 542 U.S. 129, 138

(2004). Id. at 147.

hostile work environment claim, it will be impossible for her to meet the higher standard of Brooks, 229 F.3d at 930 of constructive discharge because federal antidiscrimination policies are better served when the employee and employer attack discrimination within their existing employment relationship, rather than when the employee walks away and then later litigates whether his employment Poland v. Chertoff, 494 F.3d 1174, 1184 (9th Cir. 2007); see also Garmon v. Plaid Pantries, No. 3:12-CV-1554-AC, 2013 WL 3791433, at *26 (D. Or. July 19, 2013) Personal discomfort is not enough to sust

Here, there was no hostile work environment, as discussed above. Thus, plaintiff cannot meet the high bar necessary for a constructive discharge claim. V. Family Medical Leave Act Retaliation and Interference Pursuant to 29 U.S.C § 2601

(Third Claim) and O.R.S. 659A.183 (Fourth Claim) terrelated, substantive employee rights: first, the employee has a right to use a certain amount of leave for protected reasons, and second, the employee has a right to return to his or her job or an equivalent job after Bachelder, 259 F.3d at 1122

(citing 29 U.S.C. §§ 2612(a), 2614(a)); see also Foraker v. Apollo Grp., Inc., 427 F. Supp. 2d 936, 940 (D. Ariz. 2006) The act simply guarantees tha adverse employment actions

For this case, the pertinent portions of the FMLA provide as follows: (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. Although these two theories of recovery are both classified under the heading Sanders, 657 F.3d at 777 (citation omitted). In her

r 29 U.S.C. § 2615(a)(1). Resp. 15, ECF #23. She also claims she was constructively discharged for id. at 28-31, which is properly categorized as a retaliation claim under 29 U.S.C. § 2615(a)(2).

A. Interference

recognized in McDonnell Douglas prove this claim, as one might any ordinary statutory claim, by using either direct or circumstantial evidence, Sanders, 657 F.3d at 778 (quoting Bachelder, 259 F.3d at 1124) (alteration in original). To establish an FMLA interference claim, an employee must prove that (1) the employee was eligible for the covered by the FMLA, (3) the employee was entitled to leave under the FMLA, (4) the employee the employer denied the employee FMLA benefits to which the employee was entitled. 10

Escriba v. Foster Poultry Farms, Inc., 743 F.3d 1236, 1243 (9th Cir. 2014) (quoting Sanders, 657 F.3d at 778). Here, as defendant contends, there is no evidence of the fifth factor that defendant denied plaintiff the FMLA benefits to which she was entitled. Indeed, as defendant correctly -week leave allotment; (2) M -related leave; (3) plaintiff was never disciplined

34, ECF #20; see, e.g., Bender v. City of Clearwater, No. 8:04- CV-1929-T23EAJ, 2006 WL 1046944, at *11 (M.D. Fla. Apr. 19, 2006) (finding no valid claim of FMLA interference where plaintiff was granted 12 weeks of FMLA leave and had not shown right or benefit).

10 Both parties agree that this is the standard to be applied. See Mot. Summ. J. 33, ECF #20; Resp. 15, ECF # 29.

Plaintiff contends that defendant denied her FMLA leave when it refused to modify her schedule. Resp. 16, ECF #29. However, as discussed above, supra original certification did not support her request to do only classroom instruction and work only two days a week.

-time status, [defendant] may have been entitled to require a new certification from the medical provider. After all, the original certification stated that the employee did not need to work on less than a full--19, ECF #29. Plaintiff argues that defendant nevertheless denied her FMLA leave by

improperly applying ADA standards to her FMLA leave request. Resp. 18, ECF #30. However, what plaintiff ignores is that she had not yet provided

Healy Decl., Ex. 1, at 144, ECF #22-1. Moreover, rather than providing defendant with a recertification, plaintiff chose to begin her continuous leave. Even viewing the evidence in the light most favorable to plaintiff, it cannot be concluded that defendant denied her the FMLA benefits to which she was entitled.

B. Retaliation McDonnell Douglas burden shifting framework when analyzing FMLA retaliation Miller v. St. Charles Health Sys., Inc., No. 2:18-CV- 00762-SU, 2019 WL 6841970, at *9 (D. Or. Dec. 16, 2019) (quoting Schultz v. Wells Fargo, , 970 F. Supp. 2d 1039, 1058 (D. Or. 2013)); see also deBarros v. Wal-Mart Store, Inc., No. 6:11-cv-06116-AA, 2013 WL 3199670, at *4 (D. Or. June 19, 2013) (applying the McDonnell Douglas burden shifting framework to claims brought under both §§ 2615(a)(2) and (b)). in a protected activity under the FMLA; (2) an adverse employment action; and (3) a causal link Schultz, 970 F. Supp. 2d at 1058 (emphasis added) (citations omitted). The burden then shifts to the defendant to articulate legitimate, nondiscriminatory reason for the adverse employment Fonseca v. Sysco Food Servs. of Ariz., Inc., 374 F.3d 840, 849 (9th Cir. 2004). If the employer does so, then the plaintiff must show that the given reason is pretextual. Id. plaintiff can prove pretext either (1) indirectly, by showing that the s proffered explanation is unworthy of credence because it is internally inconsistent or otherwise not believable, or (2) directly, by showing that unlawful discrimination more likely motivated the Lyons v. England, 307 F.3d 1092, 1113 (9th Cir. 2002) (quotation omitted).

1. Prima Facie Element Adverse Employment Action In the context of an FMLA claim, adverse employment action is any action that is likely to deter [an employee] from engaging in protected Shepard v. City of Portland, 829 F. Supp. 2d 940, 960 (D. Or. 2011) (quoting Ray v. Henderson, 217 F.3d 1234, 1242 43 (9th Cir. 2000)) (alteration in original). A variety of actions have met this definition, including: a lateral transfer, or refusing a lateral transfer; undeserved negative performance evaluations or job references if motivated by retaliatory animus and not promptly corrected; being excluded from meetings, seminars and positions that would have made plaintiff more eligible for salary increases; being denied secretarial support; eliminating job responsibilities; and failure to be promoted or be considered for Id. (collecting cases).

Here, none of allegations constitutes an adverse employment action. As the court held Randle v. Tri-Cty. Metro. Transportation Dist. of Oregon, 171 F. Supp. 3d 1084 (D. Or. 2016), was delayed only because she did not comply with the proper policies and procedures to request leave . . . , not because of any interference defendant. Id. at 1091. If this court to accept theory, then any administrator requiring an employee to comply with policies and procedures to request leave under the FMLA could be considered to have interfered with the request in violation of the Id. As discussed extensively above, defendant was justified in requesting recertification paperwork from plaintiff, including clarification regarding her absences, which occurred around weekends. Like Randle, is no

evidence in the record that documentation policies were unreasonable. To the contrary, [defendant] produced evidence that request was ultimately granted because it allowed [plaintiff] to submit the necessary documentation outside of the customary . . . Id. at 1091 92. Additionally, p verbal discipline and meeting with supervisors not rise to the level of a materially adverse action in that it would not have dissuaded a reasonable worker from making a charge of Sebastian, 2008 WL 2875255, at *29 (finding cou and did not constitute adverse employment actions).

In short, plaintiff was not subjected to at transfer, undeserved discipline, excluded from meetings, denied a promotion, or given a negative performance evaluation that was not corrected, i.e., any of the acts that courts have found constitute an adverse employment action. See Shepard, 829 F. Supp. 2d at 960. Considering all of the circumstances in this case in the light most favorable to plaintiff, no reasonable jury would find that actions, either singly or in combination, were reasonably likely to deter an employee from engaging in protected activity. See Bollinger v. Thawley, 304 F. 612, 614 (9th Cir. 2008) harsh words or did not constitute action likely to deter employees from engaging in protected VI. Perceived Disability Discrimination Pursuant to 42 U.S.C § 12181 (Fifth Claim) and

O.R.S. 659A.112 (Sixth Claim) The ADA 42 U.S.C. § 12112(a). A disability is defined as, inter alia 42 U.S.C. § 12102(1)(C).

The court applies the McDonnell Douglas burden-shifting framework. See, e.g., Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (applying McDonnell Douglas burden shifting to an ADA disability discrimination claim). To establish a prima facie case for disability (1) he is a disabled person within the meaning of the statute; (2) he is a qualified individual with a disability; and (3) he suffered an adverse employment action because of his disability. Hutton, 273 F.3d at 891 (emphasis added) (citing Kennedy v. Applause, Inc., 90 F.3d 1477, 1481 (9th Cir. 1996)). For an act to be an materially affect the compensation, terms, conditions, or privileges of . . . Siring v. Oregon State Bd. of Higher Educ. ex rel. E. Oregon Univ., 977 F. Supp. 2d 1058, 1063 (D. Or. 2013).

In her fifth and sixth claims, plaintiff alleges that defendant engaged in the following acts:

a. Requiring Plaintiff to submit disability-related documentation for her pregnancy leave, to sign a waiver allowing full access to her medical records and insisting that medical records be subject to review by another physician; b. Threatening to move Plaintiff to another available position in order to accommodate her disability or, if another position was not available, to terminate employment; c. Constructively terminating employment. Compl. ¶¶ 55, 61, ECF #1.

As defendant correctly contends, unrealized threats of termination do not constitute an adverse employment action. See, e.g., Murray v. Town of N. Hempstead, 853 F. Supp. 2d 247, 269 (E.D.N.Y. 2012) Garcia v. Bd. of Regents of the Univ. of New Mexico, No. CIV 09-0203 RB/RHS, 2010 WL 2606285, at *8 (D.N.M. June 2, 2010) alleged threats regarding the contemplated reclassification of Ms. constitute adverse employment Early v. Wyeth Pharms., Inc., 603 F. Supp. 2d 556, 574

(S.D.N.Y.2009) adverse employment Delacruz v. Tripler Army Med., 507 F. Supp. 2d 1117, 1124-25 (D. Haw. 2007) (finding no adverse action where . . . [so] the proposed demotion was Dick v. Phone Directories Co., Inc., 397 F.3d 1256, 1268 69 (10th Cir. 2005) (observing that the unrealized threat of termination, without more, Davis v. Emery Worldwide Corp., 267 F. Supp. 2d 109, 124 (D. Me. 2003) (holding a threat, quickly withdrawn, does not constitute adverse employment action); Land v. Midwest Office Tech., Inc., 114 F. Supp. 2d 1121, 1141 (D. Kan. 2000) (holding unrealized threats fall short of actionable retaliation).

Moreover, defendant ultimately granted plaintiff FMLA leave. When a request for leave is delayed but ultimately granted, there is no adverse action. See Williams v. N.Y.C. Hous. Auth., No. 03-CV-7764, 2008 WL 2695139, at *3 (S.D.N.Y. June 29, 2008) delay in processing paperwork that does not materially change the terms and conditions of a plaintiff's employment is no . Because plaintiff has failed to establish the prima facie element of adverse employment action, her claim of perceived disability discrimination fails as well.

RECOMMENDATION GRANTED and this case should be dismissed with prejudice.

SCHEDULING ORDER These Findings and Recommendations will be referred to a district judge. Objections, if any, are due Tuesday, July 14, 2020. If no objections are filed, then the Findings and Recommendations will go under advisement on that date. If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will go under advisement.

NOTICE These Findings and Recommendations are not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of a judgment.

DATED June 30, 2020.

/s/ Youlee Yim You

Youlee Yim You United States Magistrate Judge