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United States District Court,
N.D. Georgia, Atlanta Division.

Eve **WEXLER**, Plaintiff,
v.
KENNESAW PEDIATRICS, P.C., Defendant.

CIVIL ACTION NO. 1:16-CV-1491-TCB-JSA
|
Signed 05/02/2017

Attorneys and Law Firms

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ORDER AND FINAL REPORT AND RECOMMENDATION ON A MOTION FOR SUMMARY JUDGMENT

JUSTIN S. ANAND, UNITED STATES MAGISTRATE JUDGE

***1** Plaintiff Eve **Wexler** ("Plaintiff" or "Dr. **Wexler**") filed the above-styled civil action on May 9, 2016. Plaintiff alleges that she was employed by Defendant Kennesaw Pediatrics, P.C. ("Defendant" or "Kennesaw Pediatrics") from December 23, 2013 until May 15, 2014, when her employment was terminated. Plaintiff claims that she was discriminated against on the basis of her pregnancy-related medical condition in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII"), as amended by the Pregnancy Discrimination Act ("PDA").

The action is before the Court on the Defendant's Motion for Summary Judgment [23] and the Plaintiff's Motion for Oral Argument [36]. For the reasons discussed below, the undersigned **RECOMMENDS** that Defendant's Motion for Summary Judgment [23] be **DENIED**, and that Plaintiff's claim be allowed to proceed. The undersigned **DENIES** Plaintiff's Motion for Oral Argument [36] as moot.

I. FACTS

Unless otherwise indicated, the Court draws the following facts from "Defendant's Statement of Material Facts" [23-2] ("Def. SMF") and "Plaintiffs' [sic] Statement of Material Facts as to Which There Exist Genuine Issues to be Tried" [34-1] ("Pl. SMF"). The Court also draws some facts from "Plaintiffs' [sic] Response to Defendant's Statement of Undisputed Facts as to Which There is no Genuine Issue to be Tried" [35] ("Pl. Resp. SMF") and "Defendant's Response to Plaintiffs' [sic] Statement of Material Facts as to Which There Exist Genuine Issues to be Tried" [41] ("Def. Resp. SMF").

For those facts submitted by the Defendant that are supported by citations to record evidence, and for which the Plaintiff has not specifically disputed and refuted with citations to admissible record evidence showing a genuine dispute of fact, the Court deems those facts admitted, pursuant to Local Rule 56.1B. *See* LR 56.1(B)(2)(a)(2), NDGa ("This Court will deem each of the movant's facts as admitted unless the respondent: (i) directly refutes the movant's fact with concise responses supported by specific citations to evidence (including page or paragraph number); (ii) states a valid objection to the admissibility of the movant's fact; or (iii) points out that the movant's citation does not support the movant's fact or that the movant's fact is not material or otherwise has failed to comply with the provisions set out in LR 56.1 B.(1).").

The Court has excluded assertions of fact by either party that are immaterial or presented as arguments or legal conclusions, and has excluded assertions of fact unsupported by a citation to admissible evidence in the record or asserted only in the party's brief and not the statement of facts. *See* LR 56.1B, NDGa ("The court will not consider any fact: (a) not supported by a citation to evidence ... or (d) set out only in the brief and not in the movant's [or respondent's] statement of undisputed facts."). The Court has also viewed all evidence and factual inferences in the light most favorable to Plaintiff, as required on a defendant's motion for summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *McCabe v. Sharrett*, 12 F.3d 1558, 1560 (11th Cir. 1994); *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 469 (11th Cir. 1993).

***2** Both parties have objected to some of the opposing party's proffered facts on the ground that an asserted fact is not relevant or material to the claims and defenses presented in this case. The Court nevertheless includes some of those facts because they provide background information that is helpful to explain the context of the parties' asserted facts and contentions. The parties also attempt to dispute some of the opposing party's proffered facts, but the majority of these disputes are over minor and immaterial issues. Accordingly, the Court will not rule on each and every objection or dispute presented by the parties, and will discuss those objections and disputes in the analysis section only when necessary to do so regarding a genuine dispute of a material issue of fact.

Dr. Long opened Kennesaw Pediatrics in May of 2003. Pl. SMF at ¶ 1; Def. Resp. SMF at ¶ 1. Dr. Brugner joined Dr. Long approximately a year and a half later. Pl SMF at ¶ 2; Def. Resp. SMF at ¶ 2. Dr. Maria Axelrod joined Kennesaw Pediatrics in April 2013. Pl. SMF at ¶ 5.

Plaintiff Eve **Wexler** M.D. worked as a pediatrician for Defendant Kennesaw Pediatrics, P.C. from December 23, 2013 until she was fired on May 15, 2014, without being given 60 days' notice. Def. SMF at ¶ 1; Pl. SMF at ¶¶ 6, 8. Dr. **Wexler** was a party to an employment agreement with Kennesaw Pediatrics. Def. SMF at ¶ 2; Pl. SMF at ¶ 7. Plaintiff's contract stated in part:

> The practice may terminate Physician for cause at any time. The Practice may terminate Physician without cause upon sixty days' written notice ... "Cause" shall mean the Physician (I) fails to fulfill or maintain, for any reason, his or her obligations hereunder, including but not limited those set out in Section 4 hereof to maintain hospital staff privileges and a Georgia medical license, (ii) commits acts involving dishonesty, deceit, fraud, theft, embezzlement and the like or conviction of any felony, (iii) becomes dependent or addicted to alcohol or any drug, or (iv) fails to perform adequately his or her duties as a medical doctor, as determined in good faith by the Practice.

Pl. SMF at ¶ 7. The employment agreement also contains a non-solicitation clause that states in relevant part:

> From and after the commencement of Physician's employment with the Practice, Physician is subject to the non-solicitation covenants in this Section 7.2. Physician will not, directly or indirectly, alone or in any capacity, solicit or in any manner attempt to solicit or induce any person or persons employed by the Practice before or during the Restricted Period to terminate his or her employment with the Practice and accept employment elsewhere. [1]

Def. SMF at ¶ 3; Pl. Resp. SMF at ¶ 3; Def. Ex. 2.

Dr. **Wexler** received good reviews from Dr. Long, her supervisor, in January 2014 and in early May 2014. Def. SMF at ¶ 4; Pl. Resp. SMF at ¶ 4; Pl. SMF at ¶ 51. In addition, Dr. Jagdish Seth, another doctor at the practice, testified that "everybody liked Dr. **Wexler**. We all really enjoyed working with her." Pl. SMF at ¶ 54. Dr. **Wexler**, after receiving the May 2014 positive review, indicated to Drs. Long and Brugner that she was happy at Kennesaw Pediatrics. Def. SMF at ¶ 5; Pl. Resp. SMF at ¶ 5. Notwithstanding these positive reviews, and unknown to Defendant, Plaintiff continued to look for other jobs. Def. SMF at ¶ 6; Pl. Resp. SMF at ¶ 6.

On May 14, 2014, Plaintiff approached Dr. Seth. Def. SMF at ¶ 9; Pl. Resp. SMF at ¶ 9. Dr. **Wexler** testified that "at the urging of Dr. Axelrod, I asked Dr. Seth if she had ever thought about opening her own practice." Def. SMF at ¶ 7; Pl. Resp. SMF at ¶ 7. Dr. Axelrod cannot recall who decided to include Dr. Seth in the conversations related to the idea of opening a new practice. Pl. SMF at ¶ 95. Dr. **Wexler** had not approached Dr. Seth about the idea of opening a practice before she spoke with Dr. Axelrod about it. Pl. SMF at ¶ 97.

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***3** Dr. Seth testified that Plaintiff "had already talked to another doctor" and that Plaintiff and Dr. Axelrod "were in conversation about starting their own practice ... And [Plaintiff] wanted to know if I would be interested in joining them." [2] Def. SMF at ¶ 11. Specifically, Dr. Seth testified that Plaintiff told her that she wanted to open a practice with Dr. Axelrod, a fellow female physician at Kennesaw Pediatrics, and that she would like Dr. Seth to join her in opening the practice. Def. SMF at ¶ 13; Pl. Resp. SMF at ¶ 13. Dr. Seth further testified that Plaintiff said she was planning to open a practice, wanted Dr. Seth to join, and that she had already talked to another doctor about it. Def. SMF at ¶ 13; Pl. Resp. SMF at ¶ 13. Dr. **Wexler** said "this is just a dream when Dr. Seth asked for details." Pl. SMF at ¶ 100.

Dr. Long testified that on May 15, 2014, one of his employees told him that he needed to speak with Dr. Seth. Pl. SMF at ¶ 110. Dr. Long then called Dr Seth, and she came to his office. Pl. SMF at ¶ 111. Dr. Long testified that Dr. Seth told him "Mark, I know you're planning a retreat to Mexico for all of us and you need to understand something. You're not aware of this and I just feel awful. I just feel awful. Dr. **Wexler** approached me about starting her own practice and she wanted me to join her and Dr. Axelrod in going off and starting this new practice and she intends to ask some of your nurses to quit and leave with them too." Pl. SMF at ¶ 112; Def. SMF at ¶ 14; Long Dep. at 36. Dr. Long also testified that Dr. Seth said "Dr. **Wexler** approached me and she told me about the plan and she wanted to sit down and have a sitdown dinner with her and Dr. Axelrod to formalize the plan and discuss it in details and figure out all the details." Pl. SMF at ¶ 113. When Dr. Long asked when the dinner was, Dr. Seth told him that there was no set date yet. Pl. SMF at ¶ 113.

However, Dr. Seth testified that Dr. Long called her on the phone and asked her "Did Dr. **Wexler** ask you to leave the practice with her?" Pl. SMF at ¶ 115. Dr. Seth then testified that she said "yes" and did not mention Dr. Axelrod's name at the time. Pl. SMF at ¶ 115; Pl. Resp. SMF at ¶ 11; Seth Dep. at 20-21, 35. Moreover, Dr. Long did not ask Dr. Seth for any corroborating evidence during the call. Pl. SMF at ¶ 119. Later on, in a second conversation, Dr. Seth more fully communicated the context and details to Dr. Long. [3] Def. SMF at ¶ 12; Pl. Resp. SMF at ¶ 12. Dr. Long also testified that his conversation with Dr. Seth occurred on the same day that he fired Dr. **Wexler**. Long Dep. at 39. However, Dr. Long testified that he only spoke with Dr. Seth once, and that it was in person, before he terminated Dr. **Wexler**. Long Dep. at 36-39.

Dr. Long testified that there is no formal policy into investigating whether an employee has breached her contract or committed a misdeed. Pl. SMF at ¶ 109. Plaintiff testified that Dr. Long confronted her and said "I heard that you have been soliciting my employees to open another practice." [4] Def. SMF at ¶ 10; Pl. Resp. SMF at ¶ 10. Plaintiff then started to reply, but was only able to say "[t]hat's not" before Dr. Long interrupted her. Def. SMF at ¶ 10; Pl. Resp. SMF at ¶ 10. Plaintiff testified that she was not going to deny it, but that she was "going to tell him what happened." Def. SMF at ¶ 10; Pl. Resp. SMF at ¶ 10. The phone call during which Dr. Long fired Dr. **Wexler** was brief. Pl. SMF at ¶¶ 135-37.

***4** Dr. Long testified that he spoke to Drs. Seth, Axelrod, and **Wexler** about the alleged solicitation activities on the same day. Pl. SMF at ¶ 116. Dr. Seth testified that she spoke to Dr. Long on the same day as her "solicitation activities." Pl. SMF at ¶ 118. Dr. Axelrod testified that Dr. **Wexler** was called into Dr. Long's office, where she was fired, before Dr. Long called Dr. Axelrod on the phone to find out what happened. Pl. SMF at ¶ 104. However, Dr. Long claims that after he spoke with Dr. Seth, he asked Dr. Axelrod whether she had discussed leaving the practice and starting her own. Pl. SMF at ¶ 120. Dr. Long testified that Dr. Axelrod admitted that she had discussions with Dr. **Wexler**. Pl. SMF at ¶ 120. Dr. Long also testified that Dr. Axelrod told him that she and Plaintiff had decided to approach Dr. Seth and that Plaintiff was going to be the one to speak with her. Pl. SMF at ¶ 121. Dr. Long says that he asked Dr. Axelrod whether she intended to carry out the plan, and Dr. Axelrod told him there was no official plan, after which Dr. Long hung up the phone. Pl. SMF at ¶ 122.

Dr. Axelrod testified that Dr. Long called her and asked "if anyone had approached [her] to discuss about opening a practice." Pl. SMF at ¶ 123. Dr. Axelrod further testified that she told Dr. Long that Dr. **Wexler** had approached her and they had discussed opening an office without having to do hospital rounds. Pl. SMF at ¶ 124. Dr. Axelrod testified that they had no plan to open a practice. Pl. SMF at ¶ 125. Dr. Axelrod also testified that her call with Dr. Long lasted 10-15 minutes. Pl. SMF at ¶ 126.

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Dr. Axelrod did not think Dr. Long believed she was serious about opening a practice with Dr. **Wexler**.[5] Pl. SMF at ¶ 127. Dr. Long did not ask Dr. Axelrod for any corroborating evidence regarding the alleged solicitation activities because it did not occur to him. Pl. SMF at ¶ 128. Dr. Long took no notes and did not create any filed of the events that transpired on May 15, 2014. Pl. SMF at ¶ 147.

Dr. Long believes that Dr. Axelrod engaged in solicitation activities and that he could have fired her for cause. Pl. SMF at ¶¶ 129-130. Dr. Long also claims that he believed that Dr. Axelrod was genuinely sorry that she engaged in solicitation activities and that was why Dr. Long was no longer concerned about Dr. **Wexler's** solicitation activities. Pl. SMF at ¶ 131. Dr. Axelrod does not believe that she did anything wrong, but she was concerned about her job and thought "he could fire me." Pl. SMF at ¶ 132; Def. Resp. SMF at ¶ 132. Dr. Axelrod does not know the official reason why Plaintiff was fired. Pl. SMF at ¶ 172.

Defendant fired Plaintiff on May 15, 2014 ostensibly because Dr. Long believed Plaintiff had solicited Dr. Seth and then denied doing so. Def. SMF at ¶ 15. That day, the first birthday of Dr. **Wexler's** child, Dr. **Wexler** was not scheduled to work and was not in the office. Def. SMF at ¶ 26; Pl. Resp. SMF at ¶ 26. The letter and proposed draft Separation Agreement state "[t]he reason for the termination is that it was in appropriate [sic], and a violation of your employment agreement, to solicit our physicians and nurses to go into practice with you." Def. Ex. 22. It does not mention lying as a reason for Plaintiff's termination. Pl. SMF at ¶ 92; Def. Resp. SMF at ¶ 92. It does, however, include the language: "your actions were a breach of your contract as well as your duties of loyalty and faithful service." Def. Resp. SMF at ¶ 92.

Dr. Long testified that he asked Dr. **Wexler** whether she had "made any plans or made any attempts to leave the practice and take any employees with [her]" and that she denied having done that. Def. SMF at ¶ 16; Pl. SMF at ¶ 140. Then, he fired her. *Id.* However, Plaintiff denies that Dr. Long asked her any questions. Pl. Resp. SMF at ¶ 16; **Wexler** Dep. at 22, 10-23. Moreover, Plaintiff testified that she did not deny Dr. Long's accusation, but rather was not given the opportunity to answer. Def. SMF at ¶ 17; Pl. Resp. SMF at ¶ 17; Pl. SMF at ¶ 141. Plaintiff only managed to say "that's not" in response to Dr. Long's accusations, and then Dr. Long told Dr. **Wexler** he thought she was lying, did not trust her, and that she was formally terminate. Def. Resp. SMF at ¶ 141; Pl. SMF at ¶ 142. Dr. Long testified that he would not have interpreted Plaintiff's alleged statement of "that's not" as a denial of anything. Pl. Resp. SMF at ¶ 17. In addition, Plaintiff testified that she "was not going to deny it" when Dr. Long said "I heard that you have been soliciting my employees" but instead was going to explain what happened. Def. SMF at ¶ 18; Pl. Resp. SMF at ¶ 18; **Wexler** Dep. at 24, 102. Plaintiff also stated that Dr. Long eventually accused her of violating the non-solicitation clause. Def. SMF at ¶ 23; Pl. Resp. SMF at ¶ 23. However, Dr. Long fired Plaintiff before she had the opportunity to discuss anything with him. Pl. SMF at ¶¶ 157, 159. Dr. Long did not mention either Dr. Seth or Dr. Axelrod during the phone call. Pl. SMF at ¶¶ 155-56; Def. Resp. SMF at ¶¶ 155-56. Dr. Long did not ask for corroborating emails or evidence from Plaintiff. Pl. SMF at ¶ 143.

***5** According to Dr. Long, he made the decision to terminate Dr. **Wexler** during the brief phone call he had with her. Pl. SMF at ¶ 144. Dr. Long testified that his conversation with Dr. **Wexler** on May 15, 2014 went as follows:

> I said Dr. **Wexler**, I need to ask you a question and I need an honest answer. I said have you made any plans or made any attempts to leave the practice and take any employees with you? No. No. I don't know what you're talking about. I've not done anything like that. Are you sure? Yes. I don't know what you're talking about. I don't know what you're talking about. So you have not approached any of the physicians or any of the employees and have no plans to leave the practice and take any employees or physicians with you? No. No, I have not. That's when I said Dr. **Wexler**, I believe you to be lying to me and I don't trust any of your answers and you're formally terminated.

Def. SMF at ¶ 21; Long Dep. at 38.

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Dr. Long testified that he would not have fired Dr. Wexler for solicitation if she had not denied it. Pl. SMF at ¶ 145. Dr. Long further testified that he would not have fired Plaintiff if she had done what Dr. Axelrod did, *i.e.*, told the truth about soliciting other employees. Pl. SMF at ¶¶ 146, 148. Dr. Long believed that Dr. Wexler was very serious about her solicitation activities. Pl. SMF at ¶ 149.

Dr. Brugner testified that Dr. Axelrod would have been fired for doing what Dr. Wexler did. Pl. SMF at ¶ 163. Dr. Brugner also testified that she was not aware of anyone who had violated the contract. Pl. SMF at ¶ 164. Dr. Brugner also stated that the only thing she knows about Dr. Long's motives in firing Plaintiff was that "he was concerned that she was soliciting physicians to try to take them away from his practice, to a different practice." Pl. SMF at ¶ 165. In fact, Dr. Brugner said the only negative thing Dr. Long told her about Plaintiff was that she was "soliciting other physicians to try to start a new practice." Pl. SMF at ¶ 166. It was Dr. Brugner's understanding that if Plaintiff had "not approached other physicians regarding opening up a new practice, she would not have been fired." Pl. SMF at ¶ 167. Dr. Brugner never mentioned that Plaintiff's lying, comments, or statement related to her solicitation activities caused her to be fired. Pl. SMF at ¶ 168.

Dr. Long testified that Dr. Wexler was soliciting his employees to open a competing practice. Pl. SMF at ¶ 70. In particular, Dr. Long testified that he believed Plaintiff was planning to approach his current nurse managers, Maggie and Melissa, in addition to Dr. Seth. Pl. SMF at ¶ 70; Long Dep. at 122-24. In each of their depositions, Dr. Axelrod, Dr. Wexler, and Dr. Seth never mention the idea of asking any nurses to join them in their alleged solicitation activities. Pl. SMF at ¶ 71.

Dr. Wexler testified that she "viewed the discussions with Dr. Axelrod as a dream, a joke, and as something that maybe one day we could do, but not at any time in the near future." Def. SMF at ¶ 24; Pl. Resp. SMF at ¶ 24; Wexler Affidavit at ¶ 39. Dr. Long testified that he spoke with Dr. Axelrod before he fired Plaintiff. Def. SMF at ¶ 25. Dr. Axelrod testified that Dr. Long called her and asked her whether anyone had asked her about opening a practice, and she answered that Plaintiff had. Pl. Resp. SMF at ¶ 25. Dr. Long then told Dr. Axelrod that he had fired Plaintiff. Pl. Resp. SMF at ¶ 25. Dr. Axelrod testified that she thought Dr. Long had already fired Plaintiff when they spoke but is unsure. Def. SMF at ¶ 27; Pl. Resp. SMF at ¶ 27. In any case, when Dr. Long called Dr. Axelrod to ask whether anyone had approached her about opening a medical practice, she said that Dr. Wexler had, admitted having conversations with Dr. Wexler about opening a new practice, and stated she had no intention of leaving. Def. SMF at ¶ 28; Pl. Resp. SMF at ¶ 28; Axelrod Dep. at 43-45.

***6** The primary reason for Plaintiff considering opening a medical practice with Dr. Axelrod was dissatisfaction with the schedule. Def. SMF at ¶ 34; Pl. Resp. SMF at ¶ 34. By May 2014, both Drs. Axelrod and Wexler were unhappy with the work environment at Kennesaw Pediatrics. Pl. SMF at ¶ 67. On April 22, 2014, Dr. Long admonished Dr. Wexler in an email for asking about her schedule as it relates to her childcare needs. Pl. SMF at ¶ 55. On May 11, 2014, Mother's Day, Dr. Long accused Plaintiff in an email of refusing to work.[6] Pl. SMF at ¶ 68. The next day, Plaintiff and Dr. Axelrod began to discuss their difficulties with the scheduling and Dr. Long's emails. Pl. SMF at ¶ 69.

Dr. Wexler testified that Dr. Axelrod broached the idea of opening a new practice. Pl. SMF at ¶ 72. Dr. Axelrod testified that Dr. Wexler asked her if she was "ever interested in thinking about opening a practice." Pl. SMF at ¶ 73. Dr. Axelrod told Plaintiff that her husband always suggested that she open a practice. Pl. SMF at ¶ 74. Dr. Wexler responded that her husband said the same thing, and Dr. Axelrod then said "we should open a practice together." Pl. SMF at ¶ 74. Dr. Wexler believed these conversations were a way to vent and bond with a co-worker. Pl. SMF at ¶ 75. Dr. Axelrod testified that she and Dr. Wexler had conversations about opening a practice once or twice. Pl. SMF at ¶ 78; Axelrod Dep. at 34. Dr. Axelrod did not believe these conversations violated her contract, or that there was anything wrong with engaging in conversations about thinking about being interested in opening a practice. Pl. SMF at ¶¶ 77, 80. Nor did Dr. Axelrod believe there was anything wrong with choosing a location for a hypothetical practice. Pl. SMF at ¶ 81.

Plaintiff and Dr. Axelrod's discussions lasted for less than one minute and included no serious or casual plans to actually open a new practice. Pl. SMF at ¶¶ 82-84, 90-91. Dr. Wexler was intrigued by the idea, but no specifics with regard to dates, insurance, or rent were mentioned, and no background research was conducted. Pl. SMF at ¶¶ 85-86.

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In addition, there was no request made to open a practice, no jobs were offered, no one was asked to leave their current position, no one was offered a job, and neither Dr. Axelrod nor Dr. Wexler opened a practice. Pl. SMF at ¶¶ 86-89. In fact, Dr. Wexler did not take Dr. Axelrod's proposal seriously. Pl. SMF at ¶ 101.

Dr. Wexler sent Dr. Axelrod an email on May 12, 2014 asking whether June 1 would be a good date to have dinner with their kids and discuss the new practice. Def. SMF at ¶ 35; Pl. Resp. SMF at ¶ 35. Dr. Axelrod responded "June 1st works for me. Do you want to talk to Jagdish on wednesday [sic]? I am really excited about the idea!" Def. SMF at ¶ 36; Pl. Resp. SMF at ¶ 36. Plaintiff then wrote back "Yes, I'll talk to her then and go from there. And so am I! Can you tell?!" Def. SMF at ¶ 36; Pl. Resp. SMF at ¶ 36. Plaintiff testified that the "idea" about which she was excited referred to the dinner with two colleagues. Def. SMF at ¶ 37; Pl. Resp. SMF at ¶ 37. Dr. Long testified that he did not see this email until Dr. Axelrod showed it to him on September 17, 2014. Def. SMF at ¶ 38.

***7** Dr. Wexler testified that she was fired because she told Dr. Long that she was going to take pumping breaks at work for two more weeks. Def. SMF at ¶¶ 32, 61; Pl. Resp. SMF at ¶¶ 32, 61. It was on or around May 1, 2014, during the performance review meeting with Drs. Brugner and Long, that Dr. Wexler told Dr. Long she was still taking pumping breaks and that she would be pumping for an additional two weeks. Def. SMF at ¶¶ 33, 46; Pl. Resp. SMF at ¶¶ 33, 46. Dr. Wexler testifies that Dr. Long became angry when he heard this and said that she was supposed to be done in May. Def. SMF at ¶ 47, Pl. Resp. SMF at ¶ 47. Dr. Long denies this. Def. SMF at ¶ 47; Pl. Resp. SMF at ¶ 47. Plaintiff was concerned that Dr. Long would fire her then and there. Pl. SMF at ¶ 63. Plaintiff explained that, in an attempt to wean from the pump, she had already cut out one break and would be cutting the other in two weeks. Pl. SMF at ¶ 64. Dr. Wexler thought this would make Dr. Long happy, and she was surprised by his angry response. Pl. SMF at ¶ 65.

Dr. Long was satisfied with Dr. Wexler's employment prior to her termination. Pl. SMF at ¶ 66. Dr. Brugner testified that Dr. Long told Plaintiff "it was fine" for her to continue to take pumping breaks. Def. SMF at ¶ 48; Pl. Resp. SMF at ¶ 48. Moreover, Plaintiff testified that Dr. Long thought she was already done pumping. Pl. SMF at ¶ 62. However, Dr. Long testified that he knew, or at least thought, Plaintiff would be continuing to pump at work prior to the meeting in May 2014 because the Scheduling Coordinator, Shavonn Ring, had already told him. Def. SMF at ¶ 49; Pl. Resp. SMF at ¶ 49. At the time Plaintiff was fired, she had only one or two weeks of pumping left. Def. SMF at ¶ 60; Pl. Resp. SMF at ¶ 60.

Plaintiff told Dr. Long via email on March 6, 2014 that she would not be pumping at work after May, once her son turned one. Def. SMF at ¶ 50; Pl. Resp. SMF at ¶ 50. Plaintiff emailed Ms. Ring on February 4, 2014 to schedule pumping breaks and notified her that she would be finished pumping in the middle of May. Def. SMF at ¶ 51; Pl. Resp. SMF at ¶ 51. On April 2, 2014, Plaintiff informed Ms. Ring that she would no longer need the morning pumping break beginning May 5, but would need the afternoon break for an additional three weeks. Def. SMF at ¶ 52; Pl. Resp. SMF at ¶ 52. Dr. Long testified that he was aware that Plaintiff had requested that Ms. Ring schedule one pumping break plus lunch pumping. Def. SMF at ¶ 59; Pl. Resp. SMF at ¶ 59; Long Dep. at 26. Plaintiff testified that she was accommodated to pump at work, Dr. Long testified that he would accommodate employees who wanted to pump, Dr. Brugner testified that it was not unusual for employees to pump at work, and Dr. Seth testified that she knew of employees who pumped at work. Def. SMF at ¶ 53; Pl. Resp. SMF at ¶ 53.

When Plaintiff was hired, Dr. Long knew she had an infant son and would be pumping at work. Def. SMF at ¶ 54; Pl. Resp. SMF at ¶ 54; Pl. SMF at ¶ 27. Dr. Long instructed Ms. Ring to accommodate Plaintiff's pumping needs. Def. SMF at ¶ 55; Pl. Resp. SMF at ¶ 55; Pl. SMF at ¶ 35. Dr. Long also told Plaintiff she could pump, but that it would impact her bonus.[7] Pl. SMF at ¶ 28. Dr. Long believes that breastfeeding employees are not as profitable as non-breastfeeding employees. Pl. SMF at ¶ 31. Dr. Long also told Plaintiff that he did not have to provide pumping breaks for her because she was a salaried employee. Pl. SMF at ¶ 29.

Plaintiff testified that when she first started at Kennesaw Pediatrics, someone told her to pump in the bathroom. Def. SMF at ¶ 68; Pl. Resp. SMF at ¶ 68; Pl. SMF at ¶ 30. However, Dr. Long did not tell Plaintiff to pump in the bathroom. Def. SMF at ¶ 69; Pl. Resp. SMF at ¶ 69. Dr. Wexler complained to Dr. Brugner that telling her to pump breast milk in the bathroom was illegal. Pl. SMF at ¶ 32. Dr. Long then called Dr. Wexler into his office and

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told her not to throw around the word illegal. Pl. SMF at ¶ 33. Dr. Wexler believed this was a warning not to assert her right to pump and that if she spoke up again she would lose her job. Pl. SMF at ¶ 34. In January, Plaintiff requested a different location to pump. Def. SMF at ¶ 70; Pl. Resp. SMF at ¶ 70. Another office was provided as a pumping location, and a lock was installed on the door for privacy. Def. SMF at ¶ 71; Pl. Resp. SMF at ¶ 71.

***8** Ms. Ring scheduled Plaintiff for two thirty-minute pumping breaks per day, plus lunch. Def. SMF at ¶ 56; Pl. Resp. SMF at ¶ 56. Plaintiff recalls having two pumping breaks each day. Def. SMF at ¶ 57; Pl. Resp. SMF at ¶ 57. At Plaintiff's request, the time of the afternoon break was changed in January 2014. Def. SMF at ¶ 58; Pl. Resp. SMF at ¶ 58. Plaintiff testified that Dr. Long's response to her request was "[o]h, so you need more time for them to fill up" said in an "off-hand derogatory tone." Def. SMF at ¶ 67; Pl. Resp. SMF at ¶ 67; Pl. SMF at ¶ 52; Wexler Declaration at ¶ 15. At the same time, Dr. Long made a rude gesture. Pl. SMF at ¶ 52. Dr. Long testified that it is possible that he made a comment to Dr. Wexler regarding the time it would take for her breasts to refill between pumping sessions. Pl. SMF at ¶ 53.

Dr. Long estimated that Plaintiff's pumping for the additional week or two in May 2014 would have cost Kennesaw Pediatrics approximately $336.58. Def. SMF at ¶ 78; Pl. Resp. SMF at ¶ 78. In addition, measuring this cost by reference to lost revenue, Dr. Long estimates the cost would be no more than $1,080. Def. SMF at ¶ 79; Pl. Resp. SMF at ¶ 79. Dr. Long further testified that it is very expensive to recruit physicians, costing anywhere from $10,000 to $30,000. Def. SMF at ¶ 80; Pl. Resp. SMF at ¶ 80.

Dr. Axelrod, like Plaintiff, is female. Def. SMF at ¶ 39; Pl. Resp. SMF at ¶ 39. Dr. Axelrod was, at the time of her affidavit, a board certified pediatrician. Def. SMF at ¶ 40; Pl. Resp. SMF at ¶ 40. Dr. Axelrod and Plaintiff had the same position at Kennesaw Pediatrics. Pl. SMF at ¶¶ 103, 106. They were both part-time, general pediatricians. Pl. SMF at ¶ 103. Both doctors were working two days per week at the time Dr. Wexler was fired, and neither doctor was doing rounds at the hospital when Dr. Wexler was fired. Pl. SMF at ¶ 107.

Plaintiff did not obtain privileges at Wellstar Kennestone Hospital while she was employed at Kennesaw Pediatrics, although she applied for them. Def. SMF at ¶¶ 41, 43; Pl. Resp. SMF at ¶¶ 41, 43. Plaintiff's employment agreement provided that she was to maintain privileges at Wellstar and two other hospitals. Def. SMF at ¶ 42; Pl. Resp. SMF at ¶ 42. In addition, the employment agreement states "[i]f Physician obtains hospital privileges on the Medical Staff of each of Wellstar Kennestone Hospital, Marietta Georgia, Northside Hospital, Atlanta and Children's Healthcare Of Atlanta At Scottish Rite Hospital within two months of signing this Agreement (not the Start Date), she is entitled to an additional $5,000 bonus (the "Privileges Bonus")." Pl. Resp. SMF at ¶ 42; Def. Ex. 2. Under the employment agreement, Plaintiff also received a signing bonus, but she was not entitled to a productivity bonus in the first six months. Def. SMF at ¶ 45; Pl. Resp. SMF at ¶ 45.

Kennesaw Pediatrics filed a complaint against Plaintiff in the Superior Court of DeKalb County on July 29, 2014, alleging that Plaintiff breached her employment contract for failing to return her signing bonus. Def. SMF at ¶ 71; Pl. Resp. SMF at ¶ 71. Defendant amended the complaint on September 28, 2015. Def. SMF at ¶ 74. Dr. Long testified that these complaints were not filed in retaliation against Plaintiff, who filed an EEOC complaint on October 24, 2014. Def. SMF at ¶¶ 72-75. Plaintiff's EEOC complaint identifies May 15, 2014 as the earliest and latest dates on which discrimination allegedly occurred. Def. SMF at ¶ 75; Def. Ex. 5. The EEOC complaint does not mention retaliation. Def. SMF at ¶ 76; Pl. Resp. SMF at ¶ 76.

While Plaintiff was employed at Kennesaw Pediatrics, because she lacked hospital privileges, she could not do hospital rounds and was limited in the type of call she could handle. Def. SMF at ¶ 44; Pl. Resp. SMF at ¶ 44. Plaintiff testified that Dr. Long chastised her for low productivity and that this was really harassment for her pumping breaks. Def. SMF at ¶ 62; Pl. Resp. SMF at ¶ 62. Dr. Long testified that he did not harass Plaintiff over her pumping breaks. Def. SMF at ¶ 63; Pl. Resp. SMF at ¶ 63. Dr. Long testified that he discussed productivity bonuses with Plaintiff only once or twice. Def. SMF at ¶ 64; Pl. Resp. SMF at ¶ 64. Plaintiff, however, testified that she and Dr. Long had several discussions regarding her productivity as a physician/employee and with respect to promised bonuses. Pl. Resp. SMF at ¶ 64.

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***9** Dr. Long claims that Plaintiff made it clear to him that she was eager to get a productivity bonus and would keep asking about it and how to maximize it. Pl. SMF at ¶ 46. Dr. **Wexler**, however, testified that she never asked Dr. Long about how she could achieve a productivity bonus during or prior to her employment at Kennesaw Pediatrics. Pl. SMF at ¶ 37. Dr. Long testified that he would not have given Dr. **Wexler** unsolicited advice about increasing her productivity bonus in her first six months of employment. Pl. SMF at ¶ 47.

Plaintiff emailed with Dr. Long about an AFLAC insurance policy to cover a potential future pregnancy. Pl. SMF at ¶ 36. Dr. Brugner testified that whether or not a physician takes a pumping break does not impact the amount of a bonus she could receive. Pl. SMF at ¶ 40. In 2014, no doctors at Kennesaw Pediatrics received a bonus. Pl. SMF at ¶ 41. Neither Dr. Axelrod nor Dr. Seth received a bonus in 2015 either. Pl. SMF at ¶¶ 9, 42.

Plaintiff forwarded an email to Dr. Long containing a question from a mortgage broker/underwriter regarding a minimum base pay because Plaintiff's contract had language indicating her hours could be increased or decreased due to the fact that her employment was on an "as needed" basis. Pl. Resp. SMF at ¶ 65; Pl. SMF at ¶ 44. Dr. Long responded on February 26, 2014 and wrote that Plaintiff's productivity was "not on par with others" and that her productivity was affected by pumping. Def. SMF at ¶ 65; Pl. Resp. SMF at ¶ 65; Pl. SMF at ¶ 44. Dr. **Wexler** did not believe her productivity was lower because of her pumping breaks, though she was told that by Dr. Long. Pl. SMF at ¶ 48. Dr. **Wexler** saw the same number of patients as the other doctors when she was assigned to the adolescent center. Pl. SMF at ¶ 49. Dr. Brugner testified that Dr. **Wexler** kept up with her workload. Pl. SMF at ¶ 50.

Dr. Amy Levine interviewed for a job at Kennesaw Pediatrics while she was pregnant. Pl. SMF at ¶ 10. She was hired by Kennesaw Pediatrics on September 1, 2010 under a part-time contract. Def. SMF at ¶ 81; Pl. Resp. SMF at ¶ 81. Dr. Levine wanted a full-time position, but she was hired part-time instead. Pl. SMF at ¶ 11. Dr. Long told Dr. Levine that she would have a full-time job within a few months. Pl. SMF at ¶ 11. Though Dr. Levine did not have a full-time contract, she worked a fulltime schedule. Def. Resp. SMF at ¶ 12.

At the time Dr. Levine was hired, Dr. Long knew she would be pumping at work. Def. SMF at ¶ 82; Pl. Resp. SMF at ¶ 82. Dr. Levine pumped at work when she started, and she was given pumping breaks. Def. SMF at ¶ 83; Pl. Resp. SMF at ¶ 83. Dr. Levine testified that the only issue with pumping that she encountered while working for Kennesaw Pediatrics was finding a place to do it because there was a camera, that was somehow connected to Dr. Long's office, in her office, where she originally pumped. Def. SMF at ¶ 84; Pl. Resp. SMF at ¶ 84; Levine Dep. at 18-23, 46. Dr. Levine asked for additional hours in April 2011 and was given them, such that she was working essentially a full-time schedule. Def. SMF at ¶ 85. However, Dr. Long denied her request for a full-time contract when she asked for one in April 2011. Def. SMF at ¶ 86; Pl. Resp. SMF at ¶ 86.

Dr. Levine took out AFLAC insurance through Kennesaw Pediatrics in April 2011 because she wanted to get pregnant again. Pl. SMF at ¶ 18. Dr. Levine did not believe Dr. Long would learn about this, but he did. Pl. SMF at ¶¶ 19-20. Once he learned about this, Dr. Long asked her if she was pregnant and asked how he could know that she would continue to work full-time hours if she got pregnant. Pl. Resp. SMF at ¶ 85. Dr. Long told Dr. Levine that he did not want to "put [her] full-time" if she was "going to get pregnant and stay home." Pl. SMF at ¶ 20; Levine Dep. at 9. Dr. Levine told Dr. Long that she "needed the money" because she has student loans and that she needed to work full-time, and was going to work full-time, whether she was pregnant or not. Pl. SMF at ¶ 21.

***10** Dr. Levine believed Dr. Long was discriminating against her due to the possibility that she might become pregnant when he refused to give her a full-time guaranteed contract. Def. SMF at ¶ 87; Pl. Resp. SMF at ¶ 87. Dr. Long testified that Defendant kept Dr. Levine as a part-time employee because it allowed for greater scheduling flexibility. Def. SMF at ¶ 96. Dr. Levine feared her hours would be cut back, and believed she was being treated differently, and unfairly, from another female doctor, Sarah Yount, who had a full-time contract. Def. SMF at ¶ 88; Pl. Resp. SMF at ¶ 88. For example, Dr. Long told Dr. Levine that he would not increase her hours because she was not board certified, but Dr. Yount, who was hired at the same time as Dr. Levine, had failed her boards twice and had not re-taken them. Pl. SMF at ¶ 24. Dr. Levine testified that she believes Dr. Yount was hired

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under a full-time schedule. Def. SMF at ¶ 89; Pl. Resp. SMF at ¶ 89.

Dr. Levine received a job offer in December 2011 from another employer, and she accepted it and left Kennesaw Pediatrics. Def. SMF at ¶¶ 90-91; Pl. Resp. SMF at ¶¶ 90-91. Under Dr. Levine's Separation Agreement, she paid $5,000 in order to be released from her non-compete clause with Defendant. Def. SMF at ¶ 92. Dr. Long testified that Dr. Levine left Kennesaw Pediatrics solely because of this other job and that he never made comments to her that she might interpret as objectionable. Pl. SMF at ¶¶ 13-14. However, Dr. Long once told Dr. Levine to "stand over by the space heater to dry up your eggs." Pl. SMF at ¶ 22; Levine Dep. at 10. Dr. Levine acknowledged that this was meant to be a joke, but it hurt her feelings because she was having infertility problems. Def. Resp. SMF at ¶ 22; Levine Dep. at 10, 39. Dr. Long also made a comment about Dr. Levine's big house and rich husband. Def. SMF at ¶ 95; Pl. Resp. SMF at ¶ 95.

Dr. Levine testified that while she was working at Kennesaw Pediatrics, from September 2010 to December 15, 2011, she, Dr. Long, and others interviewed Dr. Laura Verigan for a job at Kennesaw Pediatrics. Def. SMF at ¶ 98; Pl. Resp. SMF at ¶ 98. Dr. Levine further testified that Dr. Verigan was either undergoing or had undergone in vitro fertilization ("IVF") at the time she was interviewed. Def. SMF at ¶ 99; Pl. Resp. SMF at ¶ 99. Dr. Levine testified that Dr. Long told Dr. Levine that Dr. Verigan was having twins and he "didn't want any part of that." Pl. Resp. SMF at ¶ 99. Dr. Verigan, however, testified that she had her twins from an IVF procedure in 2008, interviewed with Dr. Long in early 2009, and that Dr. Long did not initially offer her a job but did offer her a part-time job later in 2009, which she declined. Def. SMF at ¶ 100; Pl. Resp. SMF at ¶ 100. Dr. Verigan also testified that she interviewed with Dr. Brugner and never interviewed with Dr. Levine. Def. SMF at ¶¶ 102-103; Pl. Resp. SMF at ¶¶ 102-103. In fact, Dr. Verigan did not interview with Kennesaw Pediatrics while Dr. Levine was employed there. Def. SMF at ¶ 106; Pl. Resp. SMF at ¶ 106.

After Dr. Levine left Kennesaw Pediatrics, she worked with Dr. Verigan–beginning in 2012. Def. SMF at ¶ 104; Pl. Resp. SMF at ¶ 104. Dr. Verigan testified that she probably discussed her twins and IVF pregnancy with Dr. Levine during that time. Def. SMF at ¶ 105; Pl. Resp. SMF at ¶ 105. Dr. Levine later testified via declaration that it is possible that Dr. Verigan was not the candidate that Dr. Long was referring to when he made the comments about IVF and wanting nothing to do with twins. Def. SMF at ¶ 108; Pl. Resp. SMF at ¶ 108. Dr. Levine further stated that she worked with Dr. Verigan later, at a different medical practice, and might have learned about Dr. Verigan's IVF procedure and twins. Def. SMF at ¶ 108; Pl. Resp. SMF at ¶ 108. Dr. Levine stated that "I am confident in my recollection that Dr. Long made this comment about a candidate, although I cannot say with certainty which candidate it was about." Pl. Resp. SMF at ¶¶ 98, 110; Levine Declaration at ¶ 5.

***11** Dr. Long testified that he has no knowledge of any woman whom he interviewed who had IVF and twins during Dr. Levine's tenure with Kennesaw Pediatrics. Def. SMF at ¶ 111; Pl. Resp. SMF at ¶ 111. Dr. Brugner testified that the only person she interviewed who had ever discussed having twins through an IVF procedure was Dr. Verigan. Def. SMF at ¶ 112; Pl. Resp. SMF at ¶ 112. Moreover, Dr. Brugner testified that she interviewed all the candidates who came in to interview during the time Dr. Levine worked for Defendant and that to the best of her knowledge, no one interviewed during Dr. Levine's tenure who had or was having twins through an IVF procedure. Def. SMF at ¶ 112; Pl. Resp. SMF at ¶ 112.

II. DISCUSSION

A. *Summary Judgment Standard*

Summary judgment is authorized when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 175 (1970); *Bingham, Ltd. v. United States*, 724 F.2d 921, 924 (11th Cir. 1984). The movant carries this burden by showing the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In making its determination, the court must view the evidence and all factual inferences in the light most favorable to the nonmoving party.

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Once the moving party has adequately supported its motion, the nonmoving party must come forward with specific facts that demonstrate the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The nonmoving party is required "to go beyond the pleadings" and to present competent evidence designating "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324. Generally, "[t]he mere existence of a scintilla of evidence" supporting the nonmoving party's case is insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

When considering motions for summary judgment, the court does not make decisions as to the merits of disputed factual issues. *See Anderson*, 477 U.S. at 249; *Ryder Int'l Corp. v. First American Nat'l Bank*, 943 F.2d 1521, 1523 (11th Cir. 1991). Rather, the court only determines whether there are genuine issues of material fact to be tried. Applicable substantive law identifies those facts that are material and those that are irrelevant. *Anderson*, 477 U.S. at 248. Disputed facts that do not resolve or affect the outcome of a suit will not properly preclude the entry of summary judgment. *Id.*

If a fact is found to be material, the court must also consider the genuineness of the alleged factual dispute. *Id.* An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is "merely colorable" or is "not significantly probative." *Id.* at 250. A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 242. Moreover, for factual issues to be genuine, they must have a real basis in the record. *Matsushita*, 475 U.S. at 587. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Id.* at 587 (quoting *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968)). Thus, the standard for summary judgment mirrors that for a directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 259.

B. *Plaintiff's Title VII Claim*

***12** Plaintiff alleges sex discrimination on the basis of a pregnancy-related medical condition under Title VII, as amended by the PDA. In doing so, the Complaint refers to two separate legal theories. First, Plaintiff alleges single-motive discrimination, arguing that Defendant, motivated by Plaintiff's sex/gender, discriminated against Plaintiff by discharging her and then suing her. Second, Plaintiff alleges a mixed-motive theory in the alternative, arguing that Defendant "motivated in part by Plaintiff's status as a female and motivated in part by other reasons, discriminated against Plaintiff in violation of Title VII by discharging her and then suing her." Complaint [1] at 14. The Court will analyze the claim under both alternative theories.

1. Standards of Proof Under Title VII

Title VII of the Civil Rights Act of 1964 provides that it is unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). To prevail on a Title VII claim, a plaintiff must prove that the defendant acted with discriminatory intent. *Hawkins v. Ceco Corp.*, 883 F.2d 977, 980-981 (11th Cir. 1989); *Clark v. Huntsville City Bd. of Educ.*, 717 F.2d 525, 529 (11th Cir. 1983).

"Discrimination claims brought under Title VII are typically categorized as either mixed-motive or single-motive claims." *Quigg v. Thomas Cnty. Sch. Dist.*, 814 F.3d 1227, 1235 (11th Cir. 2016). An employee can succeed on a mixed-motive claim by showing that illegal bias, such as bias based on sex or gender, was a motivating factor for an adverse employment action, even though other factors also motivated the action. *See id.* By contrast, single-motive claims, *i.e.*, pretext claims, require a plaintiff to show that bias was *the* true reason for the adverse action. *Id.* Both single-motive and mixed-motive claims can be established with either direct or circumstantial evidence. *Id.*; *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Direct evidence is defined as evidence "that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." BLACK'S LAW DICTIONARY 596 (8th ed. 2004); *see also Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1226 (11th

Cir. 1993); *Carter v. City of Miami*, 870 F.2d 578, 581-82 (11th Cir. 1989); *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1528 n.6 (11th Cir. 1987). Only the most blatant remarks whose intent could only be to discriminate constitute direct evidence. *Clark*, 990 F.2d at 1226; *Carter*, 870 F.2d at 581. Evidence that only suggests discrimination, *see Earley v. Champion Intern. Corp.*, 907 F.2d 1077, 1081-82 (11th Cir. 1990), or that is subject to more than one interpretation, *see Harris v. Shelby Cnty. Bd. of Educ.*, 99 F.3d 1078, 1083 n.2 (11th Cir. 1996), does not constitute direct evidence. "[D]irect evidence relates to actions or statements of an employer reflecting a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee." *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990); *see also Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 641-42 (11th Cir. 1998).

Because direct evidence of discrimination is seldom available, a plaintiff must typically rely on circumstantial evidence to prove discriminatory intent. In both mixed-motive and single-motive discrimination claims, circumstantial evidence may be sufficient to prove a plaintiff's case. *See Quigg*, 814 F.3d at 1237; *Holifield v. Reno*, 115 F.3d 1555, 1561-62 (11th Cir. 1997); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1527-1528 (11th Cir. 1997).

***13** For single-motive discrimination claims, under the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), a plaintiff is first required to create an inference of discriminatory intent, and thus carries the initial burden of establishing a *prima facie* case of discrimination. *McDonnell Douglas*, 411 U.S. at 802; *see also Jones v. Bessemer Carraway Medical Ctr.*, 137 F.3d 1306, 1310, *reh'g denied and opinion superseded in part*, 151 F.3d 1321 (11th Cir. 1998); *Combs*, 106 F.3d at 1527.

Demonstrating a *prima facie* case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination. *Jones*, 137 F.3d at 1310-1311; *Holifield*, 115 F.3d at 1562; *see Burdine*, 450 U.S. at 253-54. Once the plaintiff establishes a *prima facie* case, the defendant must "articulate some legitimate, nondiscriminatory reason" for the adverse employment action. *McDonnell Douglas*, 411 U.S. at 802; *Jones*, 137 F.3d at 1310. This burden is "exceedingly light" in comparison to the burden required if the plaintiff has presented direct evidence of discrimination. *Smith v. Horner*, 839 F.2d 1530, 1537 (11th Cir. 1988). If the defendant is able to carry this burden and explain its rationale, the plaintiff, in order to prevail, must then show that the proffered reason is merely a pretext for discrimination. *See Burdine*, 450 U.S. at 253-54; *Perryman v. Johnson Prods. Co.*, 698 F.2d 1138, 1142 (11th Cir. 1983).

A plaintiff is entitled to survive a defendant's motion for summary judgment if there is sufficient evidence to demonstrate the existence of a genuine issue of material fact regarding the truth of the employer's proffered reasons for its actions. *Combs*, 106 F.3d at 1529. A *prima facie* case along with sufficient evidence to reject the employer's explanation is all that is needed to permit a finding of intentional discrimination. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133 (2000); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993); *Combs*, 106 F.3d at 1529.

This *McDonnell Douglas-Burdine* proof structure "was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983); *see also Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 594 (11th Cir. 1987). The Eleventh Circuit has held that this framework of shifting burdens of proof is a valuable tool for analyzing evidence in cases involving alleged disparate treatment, but the framework is only a tool. *Nix v. WLCY Radio/Rahall Comm.*, 738 F.2d 1181, 1184 (11th Cir. 1984). The "ultimate question" is not whether a plaintiff has established a *prima facie* case or demonstrated pretext, but "whether the defendant intentionally discriminated against the plaintiff." *Id.*, 738 F.2d at 1184 (quoting *Aikens*, 460 U.S. at 713-14); *see also Jones*, 137 F.3d at 1313. The plaintiff retains the ultimate burden of proving that the defendant is guilty of intentional discrimination. *Burdine*, 450 U.S. at 253.

Nevertheless, "establishing 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." *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011). A plaintiff also may defeat a motion for

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summary judgment by presenting "a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker." *Id.* (internal quotation marks omitted).

***14** In the mixed-motive claim context, the Eleventh Circuit has rejected the *McDonnell Douglas* framework as "inappropriate" and "overly burdensome." *Quigg*, 814 F.3d at 1237. In particular, the Eleventh Circuit found that there is a "clear incongruity between the *McDonnell Douglas* framework and mixed-motive claims" because in order to meet her burden under *McDonnell Douglas*, a plaintiff must show that her employer's purported legitimate reason for terminating her employment never motivated the termination. *Id.* But, under a mixed-motive claim, it is an essential part of the theory of causation that an employer's legitimate reason may have partially motivated the termination decision–so long as the employer was also motivated by an illegitimate reason. *Id.* Accordingly, the *Quigg* test only requires a plaintiff to offer evidence that the defendant took an adverse employment action against her and that a protected characteristic was a motivating factor for the defendant's action. *Id.*

2. Pregnancy Discrimination

Plaintiff has brought claims of pregnancy discrimination under Title VII, as amended by the Pregnancy Discrimination Act of 1978 ("PDA"), 42 U.S.C. § 2000e(k). Congress added Section 701(k) to Title VII in 1978 specifically to add discrimination on the basis of pregnancy and pregnancy-related conditions as a type of sex discrimination. This section, the PDA, provides in relevant part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work ....

42 U.S.C. § 2000e(k); *see also Byrd v. Lakeshore Hosp.*, 30 F.3d 1380, 1381-1382 (11th Cir. 1994).

Congress passed the PDA to reverse the holding in *General Electric Company v. Gilbert*, 429 U.S. 125, 136 (1976) that an otherwise comprehensive disability insurance plan did not violate Title VII when it failed to cover pregnancy-related disabilities. *See Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678–79 (1983); *Byrd*, 30 F.3d at 1383. "Rather than introducing new substantive provisions protecting the rights of pregnant women, the PDA brought discrimination on the basis of pregnancy within the existing statutory framework prohibiting sex-based discrimination." *Armstrong v. Flowers Hosp. Inc.*, 33 F.3d 1308, 1312 (11th Cir. 1994). The PDA was designed to ensure that pregnant employees are given the same opportunities and benefits as non-pregnant employees who are similarly limited in their ability to work. *See Byrd*, 30 F.3d at 1382. If an employee's pregnancy actually prevents her from fulfilling the duties of her position, her employer is not obligated to give her preferential treatment. *Spivey v. Beverly Enterprises, Inc.*, 196 F.3d 1309, 1312 (11th Cir. 1999) ("The PDA does not require that employers give preferential treatment to pregnant employees.").

Because discrimination on the basis of pregnancy or a pregnancy-related condition is a type of discrimination based on sex, courts have applied the same analysis to claims of pregnancy discrimination that they apply to other claims of sex discrimination, including the *McDonnell Douglas* framework described above in cases involving circumstantial evidence of discrimination. *See Armstrong*, 33 F.3d at 1312–13 (citing *Maddox v. Grandview Care Ctr., Inc.*, 780 F.2d 987, 989 (11th Cir. 1986)); *Byrd*, 30 F.3d at 1381-1383.

Direct evidence in pregnancy discrimination cases is generally in the form of an admission by a decisionmaker that an employee's pregnancy affected an employment decision, such as suspending or terminating an employee because she was pregnant or delaying hiring an applicant until after she has delivered her baby. *See, e.g., EEOC v. Wal-mart Stores, Inc.*, 156 F.3d 989, 990–92 (9th Cir. 1998); *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 421 (1st

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Cir. 1996); *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994).

***15** Here, Plaintiff has alleged two, alternative theories of sex discrimination because of a pregnancy-related medical condition. First, Plaintiff alleges single-motive discrimination on the basis of sex or a pregnancy-related medical condition. In the alternative, Plaintiff alleges a mixed-motive claim of discrimination. In a single-motive discrimination claim under Title VII, courts will apply the *McDonnell Douglas* burden-shifting test. In mixed-motive cases, the Eleventh Circuit applies the test set out in *Quigg v. Thomas Cnty. Sch. Dist.*, 814 F.3d 1227 (11th Cir. 2016).

In the Complaint, Plaintiff asserts that Defendant discriminated against her on the basis of her sex (female) in violation of Title VII. Specifically, Plaintiff alleges that Defendant's decision to terminate her was at least partially motivated by the fact that Plaintiff was taking pumping breaks at work. Plaintiff contends that Defendant's purported reason for her termination, that she had allegedly been soliciting Defendant's employees, is merely pretextual. Plaintiff does not contend that she has produced any direct evidence of any discriminatory intent, and the undersigned finds that she has not done so. Thus, Plaintiff's claim of single-motive sex discrimination rests purely on circumstantial evidence and must be analyzed under the *McDonnell Douglas-Burdine* framework. Plaintiff's claim of mixed-motive sex discrimination, which also rests entirely on circumstantial evidence, must be analyzed under *Quigg*.

3. *Single-Motive Claim*

a. Plaintiff's *Prima Facie* Case

Under the *McDonnell Douglas-Burdine* framework, a plaintiff can generally establish a *prima facie* case of unlawful discrimination under Title VII by showing that: 1) she is a member of a protected class;[8] 2) she was subjected to an adverse employment action by her employer; 3) she was qualified to do the job in question; and 4) her employer treated similarly situated employees outside her protected classification (*i.e.*, those of a different sex, race, or religion) more favorably than it treated her. *See McDonnell Douglas*, 411 U.S. at 802; *see also Wright v. Southland Corp.*, 187 F.3d 1287, 1290 (11th Cir. 1999); *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997).

In this case, Defendant does not contest that Plaintiff was subjected to an adverse employment action, in the form of termination,[9] or that she was qualified for the job. Instead, Defendant argues that Plaintiff cannot establish a *prima facie* case of discrimination on the basis of pumping at work because she did not have a pregnancy-related medical condition and because she has failed to show that a similarly situated employee was treated more favorably than she was.

(1) Plaintiff's Pregnancy-Related Medical Condition

***16** Defendant contends that although pumping, or expressing breast milk, is a pregnancy-related medical condition within the meaning of 42 U.S.C. § 2000e(k), it "has located no case authority discussing when a pregnancy related medical condition based on pumping ceases." Def. Br. [23-1] at 5. Thus, Defendant argues that the Court should look to Section 7 of the Fair Labor Standards Act ("FLSA"), as amended by the Patient Protection and Affordable Care Act ("ACA"), because it provides that "a non-exempt employee has a right to pump at work until the child's first birthday." Def. Br. at 6 (citing 29 U.S.C. § 207(r)). Defendant also points out that the Equal Employment Opportunity Commission's (the "EEOC's") guidelines state "[e]mployers must provide 'reasonable break time' for breastfeeding employees to express breast milk until the child's first birthday." Def. Br. at 6. Defendant claims that because it cannot find case law establishing at what point pumping ceases to be a pregnancy-related medical condition, the Court should adopt "the one-year rule under that [sic] FLSA and under the EEOC's Enforcement Guidance and hold that, absent some special showing or medical evidence, the condition ceases at the child's first birthday." *Id.* at 7. Therefore, because May 15, 2014 was Plaintiff's child's first birthday, and the date that Plaintiff was fired, she no longer had a pregnancy-related medical condition.

The Court cannot agree with Defendant's argument. Courts in the Eleventh Circuit have made clear that "lactating is a medical condition related to pregnancy and childbirth, and ... a lactating employee may not be treated differently in the workplace from other employees with similar abilities to work." *Hicks v. City of Tuscaloosa*,

2015 WL 6123209, at *19 (N.D. Ala. Oct. 19, 2015). Defendant points to absolutely no basis for the Court to impose an arbitrary one-year expiration date for such anti-discrimination protections. Nothing in the plain language of the PDA, much less any legislative history or relevant case law, suggests such a limitation. That the FLSA separately requires, and the EEOC guidelines suggest, that pumping break accommodations be affirmatively provided up to one year are beside the point. Plaintiff is not alleging a denial of any accommodation for requested pumping breaks. Plaintiff, rather, alleges that she was granted those accommodations but nevertheless was terminated because Dr. Long discriminated against her on the basis of her pumping. In other words, he treated her differently than other employees because of her need to pump breast milk. While the obligation to affirmatively accommodate pumping under the FLSA may not extend beyond one year, the PDA does not suggest that employment discrimination against women who pump is permitted beyond that point. Thus, without any other authority on the question, the Court declines to create a new, arbitrary, one-year deadline after which discrimination against mothers who pump breast milk at work is permitted.

Defendant makes two other arguments, neither of which the undersigned finds persuasive. First, Defendant argues that because Plaintiff stopped taking two pumping breaks per workday on May 5, 2014, "arguably" she no longer had a pregnancy-related medical condition. That is, Defendant contends that "if she did not need an afternoon break, she did not need a mid-morning break either, at least not for medical reasons." Def. Br. at 7. Defendant cites to no case law or medical evidence to support this proposition. Second, Defendant argues that at the time Plaintiff was terminated, she had only one or two weeks of pumping left, and therefore "the medical condition had ended." Def. Br. at 7. Here, again, Defendant cites to no case law to support this claim, nor does it cite to any medical evidence in the record.

Accordingly, because the Eleventh Circuit has held that discrimination on the basis of an employee's need to lactate constitutes pregnancy discrimination, the undersigned finds that Plaintiff has established that she had a pregnancy-related medical condition for purposes of her *prima facie* case.

(2) Comparators

Defendant next argues that Plaintiff cannot make out a *prima facie* case because she has failed to establish that there is a suitable comparator. In general, a plaintiff disciplined or terminated for alleged misconduct or poor job performance may establish a *prima facie* case of discrimination under Title VII by showing that: (1) she is a member of a protected class; (2) she was qualified for the job for which she was disciplined; and (3) the misconduct for which she was disciplined or terminated was identical or at least similar to conduct engaged in by an employee outside the protected class, who was not disciplined or terminated. *See Wright*, 187 F.3d at 1290; *Holifield*, 115 F.3d at 1562; *Nix v. WLCY Radio/Rahall Comm.*, 738 F.2d 1181, 1185 (11th Cir. 1984); *Anderson v. Dunbar Armor, Inc.*, 678 F.Supp.2d 1280, 1308 (N.D. Ga. 2009) (Martin, J.).

***17** To make this comparison, a plaintiff must first identify an employee outside of her protected class to which she is "similarly situated in all relevant respects." *Holifield*, 115 F.3d at 1562; *see also Knight v. Baptist Hospital of Miami*, 330 F.3d 1313, 1316 (11th Cir. 2003); *Silvera v. Orange Cnty. Sch. Bd.*, 244 F.3d 1253, 1259 (11th Cir. 2001). In addition, the plaintiff must point to evidence that the identified comparator committed the same or similar infractions as the plaintiff, but did not receive similar disciplinary treatment from the employer. Indeed, the plaintiff must show that the comparator's misconduct was "nearly identical" to the alleged misconduct of the plaintiff in order "to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges." *Burke-Fowler v. Orange Cnty., Florida*, 447 F.3d 1319, 1323 (11th Cir. 2006) (quoting *Maniccia v. Brown*, 171 F.3d 1364, 1368 (11th Cir. 1999)); *see also Silvera*, 244 F.3d at 1259; *Nix*, 738 F.2d at 1185. If a plaintiff fails to show the existence of a similarly situated employee, summary judgment is appropriate if no other evidence of discrimination is present. *Holifield*, 115 F.3d at 1562.

Here, Plaintiff points to Dr. Axelrod as a comparator. It is undisputed that Dr. Long discovered that Dr. Axelrod was also discussing potentially opening a practice and competing with Kennesaw Pediatrics. Dr. Long did not fire Dr. Axelrod, who unlike Plaintiff was not suffering from a pregnancy-related medical condition. Thus, Plaintiff argues, Dr. Long's disparate treatment of

herself as compared to Dr. Axelrod allows the inference, for purposes of the *prima facie* case, that Plaintiff was discriminated against on the basis of her pregnancy-related medical condition. Defendant argues that Dr. Axelrod is not a suitable comparator because (1) Plaintiff solicited Dr. Seth, and Dr. Axelrod did not and (2) Dr. Axelrod admitted that she had discussions about opening a practice with Plaintiff, and Plaintiff denied it. [10]

It is undisputed that Dr. Axelrod and Plaintiff had the same position within Kennesaw Pediatrics. Both were part-time employees, subject to the same contract and rules governing workplace conduct, and both were supervised by Dr. Long. Dr. Long testified that he could have fired Dr. Axelrod, just as he fired Plaintiff, for engaging in solicitation activities, in violation of her employment agreement. In fact, Dr. Long testified that neither Dr. Axelrod nor Plaintiff would have been fired so long as they did not lie about the allegations against them. Thus, Dr. Long distinguishes Plaintiff from Dr. Axelrod by claiming that Plaintiff denied any solicitation activity, while Dr. Axelrod acknowledged the conduct and apologized.

Dr. Long claims that he spoke with Drs. Seth, Axelrod, and **Wexler** on the same day that he fired Dr. **Wexler**, but there is some dispute as to the timeline. Plaintiff contends, based on Dr. Axelrod's testimony, that Dr. Long fired her before he spoke with Dr. Axelrod. Defendant asserts that Dr. Long spoke with Dr. Axelrod prior to speaking with, then firing, Plaintiff. In any event, the dispute as to the order of events does not impact the Court's analysis.

Dr. Seth testified that she told Dr. Long that Plaintiff and Dr. Axelrod wanted to meet with her about starting a new practice, though it was Plaintiff who actually spoke with Dr. Seth at the time. Dr. Long testifies that Dr. Axelrod admitted to engaging in solicitation activities, but he claims that Dr. **Wexler** denied doing any such thing. Plaintiff disputes Dr. Long's version of his conversation with her, claiming that he did not allow her an opportunity to explain herself. In fact, Plaintiff testifies that she was only able to say "that's not" in response to Dr. Long's accusations before she was fired.

***18** Plaintiff makes much of the fact that there is a factual dispute as to whether Dr. Long knew whose idea it was to approach Dr. Seth because there are emails confirming it was Dr. Axelrod's idea to do so. However, Dr. Long testified that he did not see those emails prior to terminating Plaintiff's employment, and Plaintiff has provided no evidence to rebut that.

Regardless, however, the Court finds that Dr. Axelrod is a suitable comparator to Plaintiff for purposes of the flexible, and not onerous, *prima facie* test. From Dr. Axelrod's testimony, it appears that she was given a chance to explain her activities to Dr. Long. Plaintiff testifies, however, that she was given no such opportunity. Even if Plaintiff spoke with Dr. Long after he had spoken with Dr. Axelrod, as Defendant contends, the fact that Dr. Axelrod had a chance to explain herself, but Plaintiff did not, in itself suggests that Dr. Long had already made up his mind as to terminating Plaintiff. Plaintiff's conversation with Dr. Long was brief, lasting for only a couple of minutes. Dr. Axelrod, by contrast, testified that her conversation with Dr. Long lasted for 10 or 15 minutes–demonstrating another difference between Dr. Long's treatment of Plaintiff and Dr. Axelrod. Moreover, the supposed distinction that Dr. Axelrod did not lie, but Plaintiff did, is in dispute. Plaintiff denies lying, claims she was only able to say "that's not," and Dr. Long specifically testified that he would not have interpreted "that's not" as a denial. In addition, Defendant did not mention Plaintiff lying anywhere in the Separation Agreement and only drew that distinction after Plaintiff had filed her EEOC charge.

Taking Plaintiff's evidence as true, and drawing all reasonable inferences in her favor, Dr. Axelrod is a suitable comparator. The fact that Dr. Axelrod was not disciplined for soliciting other employees, but Plaintiff was terminated for the same conduct, is sufficient for purposes of meeting Plaintiff's very light burden to show a *prima facie* case of discrimination.

b. Defendant's Legitimate Non-Discriminatory Reason

Once a plaintiff has stated her *prima facie* case for discrimination under Title VII, the *McDonnell Douglas-Burdine* burden-shifting framework requires the defendant to proffer a legitimate, non-discriminatory reason for its employment decision. *McDonnell Douglas*, 411 U.S. at 802. This burden is "exceedingly light" and requires only that the employer articulate a clear and reasonably specific basis for its actions. *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 769–70 (11th Cir. 2005).

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In this case, the Court concludes that Defendant has presented sufficient evidence that it had legitimate non-discriminatory reasons for terminating Plaintiff's employment. Defendant purports to have terminated Plaintiff's employment because she solicited Dr. Seth, and then she denied doing it. As explained above, Dr. Long testified that he was told Plaintiff had expressed interest in starting a separate medical practice and had asked at least one other doctor, Dr. Seth, if she was interested. Plaintiff's employment agreement contained clear language prohibiting solicitation. It was on this basis that Defendant purported to terminate Plaintiff, according to the Separation Agreement. Moreover, Dr. Long testified that Plaintiff's dishonesty contributed to his decision to terminate her.

***19** Thus, the Court finds that Defendant has presented evidence that it had a legitimate reason to terminate the Plaintiff's employment that was unrelated to her pregnancy. Under the *McDonnell Douglas* framework, the burden shifts to Plaintiff to present sufficient evidence that the Defendant's alleged reason for her termination was a pretext for unlawful discrimination.

c. Pretext

Upon a defendant's showing of legitimate, non-discriminatory reasons for terminating a plaintiff, the plaintiff must present evidence that the defendant's proffered reasons were mere pretext for discriminatory intent. *See Burdine*, 450 U.S. at 253–54. A plaintiff may carry her burden of showing that the employer's proffered reasons are pretextual by showing that they have no basis in fact, that they were not the true factors motivating the decision, or that the stated reasons were insufficient to motivate the decision. A plaintiff can either directly persuade the court that a discriminatory reason more likely motivated the employer or show indirectly that the employer's ultimate justification is not believable. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1522 (11th Cir. 1991). In other words, the plaintiff has the opportunity to come forward with evidence, including the previously produced evidence establishing the *prima facie* case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision. *Burdine*, 450 U.S. at 256; *McDonnell Douglas*, 411 U.S. at 804.

A plaintiff may carry her burden of establishing pretext by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997). However, "[a] reason is not pretext for discrimination unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Brooks v. Cty. Comm. of Jefferson Cty., Ala.*, 446 F.3d 1160, 1163 (11th Cir. 2006) (emphasis in original) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993)).

Because a plaintiff bears the burden of establishing that a defendant's reasons are a pretext for discrimination, a plaintiff "must present 'significantly probative' evidence on the issue to avoid summary judgment." *Young v. General Foods Corp.*, 840 F.2d 825, 829 (11th Cir. 1988) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986)). "Conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [a defendant] has offered extensive evidence of legitimate, non-discriminatory reasons for its actions." *Young*, 840 F.2d at 830; *see also Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1228 (11th Cir. 1993).

Defendant argues that Plaintiff cannot provide any evidence that calls into doubt the fact that Dr. Long believed Plaintiff was soliciting Dr. Seth, and that regardless of the objective truth of Plaintiff's intentions, Dr. Long's decision was not discriminatory.[11] Though it is true that "[t]he pretext inquiry focuses on [the employer's] perception of the facts available to [it] at the time of the decision, rather than on [Plaintiff's] beliefs," *Melton v. Nat'l Dairy LLC*, 705 F. Supp. 3d 1303, 1320 (M.D. Ala. 2010), Dr. Long's testimony cannot overcome the other evidence of pretext set forth by Plaintiff.

***20** Plaintiff has set forth evidence that weakens Defendant's purported legitimate non-discriminatory reasons for choosing to terminate Plaintiff. Defendant asserts that it had legitimate non-discriminatory reasons for terminating Plaintiff's employment–namely that Plaintiff solicited Dr. Seth and then denied it. However, Dr. Long testified that he did not choose to terminate

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Plaintiff based on the fact that she had solicited Dr. Seth. Instead, Dr. Long's entire justification for terminating Plaintiff rests on a disputed (and relatively minor) distinction–that Plaintiff did not admit engaging in solicitation. Under Plaintiff's version of the conversation between herself and Dr. Long, however, the only basis that Dr. Long had for believing Plaintiff solicited or was more responsible for solicitation than Dr. Axelrod is because he had a conversation with Dr. Axelrod, but refused to hear Plaintiff out. Based on Plaintiff's testimony, in combination with Dr. Long's assertion that he would never take "that's not" for a denial of anything, Dr. Long had no basis to believe that Plaintiff had lied. And, indeed, there is no contemporaneous statement that refers to a lie nor does the Separation Agreement reference anything with regard to that.

Moreover, Plaintiff has produced evidence of various statements made by Dr. Long that indicate a bias against pregnancy and pregnant employees because he associates pregnancy, and its after-effects, with decreased productivity in the workplace. Plaintiff testified that Dr. Long told her that she was less productive because of her pumping breaks and therefore her bonus would be lower. **Wexler** Dep. at 50. These statements arguably evidence a bias against Plaintiff due to her pumping.

Not all of the "me too" evidence produced by Plaintiff is necessarily admissible. However, the Court finds that the statements made by Dr. Long as to his perceptions of the negative effects of pregnancy on productivity–to Plaintiff and to Dr. Levine–are admissible. Though the statements may not be sufficient standing alone to survive summary judgment, in combination with the other evidence put forth by Plaintiff, the Court finds the statements relevant and material. *See Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1285 (11th Cir. 2008) (finding that evidence from employees other than the plaintiff of race discrimination by the defendant was admissible to prove the intent of the defendant to discriminate and retaliate). Specifically, Dr. Levine testified that Dr. Long, upon learning that she had taken out an insurance policy, told her he did not want to give her a full-time contract if she was going to become pregnant. Dr. Long also told Dr. Levine to "go stand over by the space heater to dry up your eggs." In addition, Dr. Levine testified that Dr. Long had made a comment to her that he would not hire an interviewee because he did not want to deal with an employee who was undergoing IVF and had twins or was having twins. [12]

As to Defendant's argument that pumping for one or two weeks is too trivial to be the basis of an employment decision, the Court cannot find that alone eliminates all issues of fact. Defendant contends that it would have been an extremely costly choice to fire Plaintiff because of her pumping when she was only going to be pumping once per day for another couple of weeks. Due to the expense of recruiting physicians, and the trivial cost to Kennesaw Pediatrics if one of its doctors pumps once a day for two weeks, Defendant argues it would be illogical to terminate Plaintiff because of her pumping. And Defendant questions why an employer who tolerated an employee's pumping for a year would suddenly fire her because she announced she would be extending that pumping by a few weeks. These are certainly strong factual points that a jury may very well find to be persuasive. But it is not for the Court to find in favor of the best or most persuasive argument. The Court's role, rather, is limited to determining whether there are any material issues of fact for a factfinder to resolve. The Court simply cannot conclude otherwise here.

***21** A jury could find explanations for this timing consistent with Plaintiff's claims of discrimination. A jury that believes that Dr. Long harbors a discriminatory animus against pregnancy and pumping could conclude that Dr. Long nevertheless refrained from terminating Plaintiff until he felt like had a defensible pretext. Thus, the jury could find that when Dr. Long learned of the discussions between Plaintiff and Dr. Axelrod, he used that as a basis to fire Plaintiff, which is why he did not also discipline Dr. Axelrod. And the jury could believe that Dr. Long, who for many months bitterly tolerated the perceived productivity drain of Plaintiff's pregnancy, may have been frustrated by hearing that Plaintiff's pumping would actually continue beyond the originally anticipated time, and that he simply made an impulsive decision to fire her. After all, Plaintiff specifically testified that Dr. Long was *angry* and "extremely upset" when she informed him she would need to continue pumping. **Wexler** Dep. at 65, 67. A jury could assume that a decision made in anger may not always seem cost-effective in retrospect.

In Defendant's Reply brief, it makes arguments that misrepresent Attorney **Wexler's** questioning during Dr. Seth's deposition and misrepresent the meaning of an

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Affidavit sworn to by Plaintiff in April 2016 in the course of the state court litigation that is ongoing. First, Defendant claims that Plaintiff's attorney "testified that Dr. **Wexler** denied the entire conversation had taken place with Dr. Seth." Def. Reply Br. at 14-15. This statement is incorrect for two reasons: (1) Plaintiff's attorney did not "testify" at all when questioning a witness during her deposition and (2) the portion of the deposition cited involves Plaintiff's attorney asking a hypothetical question of the witness–and is not an admission that Plaintiff was lying, as Defendant claims. Second, Defendant argues that because Plaintiff swore in April 2016 that one of the reasons Dr. Long claimed to have fired her was because she lied, that is somehow evidence that Dr. Long had been claiming Plaintiff lied all along. However, Plaintiff never disputes the fact that Dr. Long eventually, after she filed her EEOC charge, began to claim that Plaintiff lied about her solicitation activities and that was a second reason for her termination. The issue is that Dr. Long never mentioned lying at the time Plaintiff was fired. There is nothing to indicate that Plaintiff's April 2016 awareness is at all material or relevant to what Dr. Long told her contemporaneously to when she was fired. Defendant's arguments here are wholly without merit.

Defendant next argues that because Plaintiff told Dr. Long at her performance review in early May 2014, two weeks before she was fired, that she was happy working at Kennesaw Pediatrics, she must have been lying. Specifically, Defendant contends that Plaintiff cannot have been happy because she was planning on opening her own practice and taking Drs. Axelrod and Seth with her. Though Defendant acknowledges that "her deception at her review was not the specific reason for her firing," it notes that this was a breach of Plaintiff's employment agreement and grounds for termination. This argument, too, is meritless. Even if it were true that this could be the basis for a person's termination under Plaintiff's employment agreement, that is not the basis Defendant claims. Defendant cannot obtain summary judgment by arguing that it could have fired Plaintiff for reasons that it did not fire her. That is, just because an employer *could have* terminated an employee for a legitimate reason, if that is not the reason given, it is irrelevant and when proffered after the fact, it would be immediately rejected as pretextual.

Finally, Defendant argues that because Plaintiff told Dr. Long she would be taking a pumping break at work for two more weeks, Kennesaw Pediatrics was entitled to fire her, because Kennesaw Pediatrics was not required to make this accommodation. Again, however, a defendant cannot obtain summary judgment by arguing it could have fired the plaintiff for reasons that it did not fire her. Thus, the reasoning above applies in equal force here, and Defendant's contention is without merit.

***22** Though it is not necessarily pretext for a defendant to add new justifications for an adverse employment action later on, in this case, Defendant holds Plaintiff's lying out as a major material difference between Dr. Axelrod and Plaintiff. However, Defendant has provided no evidence contemporaneous to Plaintiff's termination that supports the contention that Plaintiff was fired because she lied. Though Defendant attempts to say that the Separation Agreement did contemplate that Plaintiff had lied because it includes language that Plaintiff was in "violation of [her] duties of loyalty and faithful service," a jury could question whether this highly general language truly encompasses both Plaintiff's violation of her non-solicitation obligations and also the supposedly more important fact of her dishonesty. All of these facts are sufficient to combine to viable evidence of pretext, and summary judgment should be denied.

4. *Mixed-Motive Analysis*

Under the *Quigg* framework, adopted from the Sixth Circuit's ruling in *White v. Baxter Healthcare Corp.*, 533 F.3d 381 (6th Cir. 2008), a plaintiff asserting a mixed-motive claim will survive a defendant's summary judgment motion so long as she produces evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against her and (2) a protected characteristic was *a* motivating factor for the defendant's adverse employment action. *See Quigg v. Thomas Cnty. Sch. Dist.*, 814 F.3d 1227, 1232-33 (11th Cir. 2016). With a mixed-motive claim, the Court must determine "whether the plaintiff has presented sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that her protected characteristic was a motivating factor for an adverse employment decision." *Gosa v. Wal-Mart Stores East, LP*, 2017 WL 457198, at *8 (S.D. Ala. Feb. 2, 2017) (quoting *Quigg*, 814 F.3d at 1239) (quotation marks and other citations omitted). The test, therefore, is more lenient for a plaintiff than that required to bring a single-motive claim.

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Defendant argues that Plaintiff has failed to plead or testify to a mixed-motive claim. The Court disagrees. At the threshold, Plaintiff did plead a mixed-motive theory as an alternative basis for her pregnancy discrimination claim. *See* Compl. at ¶ 105 ("Alternatively, Defendant motivated in part by Plaintiff's status as a female and motivated in part by other reasons, discriminated against Plaintiff in violation of Title VII by discharging her and then suing her.").

Defendant cites *Bush-Butler v. Mayor & Alderman of Savannah*, 2016 WL 5724442, at *4-5 (S.D. Ga. Sept. 29, 2016), in support of its argument that Plaintiff has failed to plead or testify to a mixed-motive claim. In *Bush-Butler*, the court found that the *Quigg* mixed-motive test did not apply to the plaintiff's claims because the plaintiff had "not alleged a claim of mixed-motive discrimination." *Id.* at *5. Specifically, the court found that the plaintiff had "not alleged in her complaint that her race or gender was merely a 'motivating factor' in her termination." *Id.* Notably, the court goes on to state that even if the plaintiff had pleaded such a claim, her failure to provide information indicating that race or gender influenced her firing means that she should not survive summary judgment regardless. *Id.*

Thus, even the case cited by Defendant does nothing to support its argument. Had Plaintiff failed to plead a mixed-motive claim in her Complaint, then *Bush-Butler* would be instructive. However, Plaintiff did plead a mixed-motive claim in her Complaint. Thus, *Bush-Butler* is only instructive in that the court made clear that the issue, had the plaintiff properly pled a mixed-motive complaint, would have been the plaintiff's failure to present facts supporting her claims of race and gender discrimination. Here, by contrast, Plaintiff has adduced evidence from which a jury could determine that Defendant fired Plaintiff at least in part due to her purported solicitation activities and in part due to sex discrimination because of Plaintiffs pumping. The Court will not reiterate that evidence here, as it is outlined above in detail under Plaintiff's single-motive claim.

***23** Accordingly, the Court finds that Plaintiff has adequately set forth a claim for mixed-motive sex discrimination on the basis of her pregnancy-related medical condition.

III. CONCLUSION

For the above reasons, **IT IS RECOMMENDED** that Defendant's Motion for Summary Judgment [23] be **DENIED**, and that Plaintiff's claim be allowed to proceed under either theory of causation presented in the Complaint. Further, the undersigned **DENIES** Plaintiff's Motion for Oral Argument [36] as moot.

As this is a Final Report and Recommendation, there is nothing further in this action pending before the undersigned. Accordingly, the Clerk is **DIRECTED** to terminate the reference of this matter to the undersigned.

IT IS SO ORDERED AND RECOMMENDED this 2nd day of May, 2017.

All Citations

Not Reported in Fed. Supp., 2017 WL 3034734

Footnotes

1 Plaintiff objected to Defendant's statement that Section 7.2 prohibits Plaintiff from directly or indirectly soliciting persons employed by the practice, so the Court includes the direct text for the sake of specificity. However, the Plaintiff's objection is overruled, because the cited evidence clearly supports Defendant's assertion.

2 Plaintiff objects to this fact, and others throughout her responses to Defendant's Statement of Material Facts, because it, among other things, "relies upon the credibility" of the witnesses. This objection is not one contemplated by Local Rule 56.1, and the Court will not consider these particular credibility objections for purposes of summary judgment.

3 Plaintiff here objects on grounds that Defendant's stated fact is vague and ambiguous. Plaintiff then goes on to state "[o]therwise, denied." Pl. Resp. SMF at ¶ 12. However, Plaintiff does not cite to evidence as to why it is denied. Local Rule 56.1 does not allow for a plaintiff to "deny" facts put forth by the other side just because she disagrees with them. Unless Plaintiff cites to evidence in the record that disputes the fact at issue, the Court will not consider these conclusory denials.

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4 Defendant has here, and in other paragraphs throughout its Statement of Material Facts, copied portions of deposition testimony in wholesale. Plaintiff objects on the ground that this violates Local Rule 56.1. Because Plaintiff was able to respond to Defendant's facts, the Court will consider the facts presented.

5 Defendant's objection, that Plaintiff's fact is not supported by the evidence cited, is sustained. Although the Court is to construe the facts in the light most favorable to Plaintiff, Plaintiff's statement is unsupported by the evidence. In fact, Dr. Axelrod testified that she thought Dr. Long could fire her because "if he thought that we were trying to seriously do this, he could say, I don't want you to work here anymore." Axelrod Dep. at 45. That does not indicate that because she was not fired, Dr. Axelrod believes Dr. Long did not take this seriously, as Plaintiff appears to contend.

6 Defendant objects to Plaintiff's characterization that Dr. Long "falsely accused" Plaintiff of anything. As to that, the Court sustains Defendant's objection. However, Dr. Long did email Plaintiff telling her that she would have to work the days on which she was scheduled and had no right to refuse to work. Plaintiff responded with confusion, telling Dr. Long that she was "not sure what this is in reference to" and had "never refused to work any day" that she was scheduled to work. Long Dep., Pl. Ex. 8 [31-13].

7 Defendant objects to a portion of Plaintiff's stated fact—that Dr. Long's response was "immediately cold and terse." Pl. SMF at ¶ 28; Def. Resp. SMF at ¶ 28. The Court has excluded Plaintiff's characterization of the response, and sustains Defendant's objection as to that portion of Plaintiff's stated fact.

8 Although courts continue to include the requirement that a plaintiff establish as part of a *prima facie* case that he or she is a member of a "protected class," it is clear that individuals of any sex, race, or religion may pursue claims of employment discrimination under Title VII. *See Wright v. Southland Corp.*, 187 F.3d 1287, 1290 n.3 (11th Cir. 1999) (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-80 (1976)). Thus, the key element of the *prima facie* case is establishing that persons outside of the plaintiff's protected classification (*i.e.*, those of a different sex, race, or religion) were treated more favorably by the employer. *See Wright*, 187 F.3d at 1290 n.3.

9 Defendant does, however, object to Plaintiff's claim that the lawsuit brought after Plaintiff was terminated was an adverse employment action, and this Court agrees. This action occurred after Plaintiff's employ ended and therefore necessarily was not an adverse employment action.

10 Defendant also argues that "Dr. Axelrod is not a suitable comparator for Dr. **Wexler's** gender (sex) discrimination claim–as distinct from her 'pregnancy related medical condition claim—because Dr. Axelrod is female and so is Dr. **Wexler**." Def. Br. at 11. However, Plaintiff does not set forth a separate sex discrimination claim or make argument to support a separate sex discrimination claim, so the Court does not consider this.

11 Defendant also argues that the fact that Plaintiff got positive performance reviews soon before she was terminated, that her pumping was accommodated, and that Dr. **Wexler** "solicited Dr. Seth" based on her own testimony such that Defendant had good cause to fire her somehow negates any suggestion of a discriminatory motive. None of this, however, negates Dr. Long's various statements, discussed below, nor does it necessarily mean that Dr. Long was not fed up with Plaintiff's pumping over time. Moreover, the question is not whether Defendant had good cause to terminate Plaintiff's employment; rather, the question is whether that stated reason is just pretext for a discriminatory motive.

12 Defendant disputes the accuracy of Dr. Levine's recall–because she first identified the interviewee as Dr. Verigan and then realized this could not have been correct. Dr. Levine's testimony makes clear, however, that she knows Dr. Long made this statement, even if she cannot remember who it was about. While Dr. Levine's recollection may be subject to some questioning, the Court at this juncture is not permitted to reject evidence submitted by a non-movant on such a basis.

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