IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBARA COHEN,	:	CIVIL ACTION
	:	
v.	:	
	:	
PITCAIRN TRUST COMPANY,	:	NO. 99-5441

MEMORANDUM AND ORDER

MCLAUGHLIN, J. June 20, 2001

The plaintiff, Barbara A. Cohen, is suing her former employer, the defendant Pitcairn Trust Company ("Pitcairn"), for employment discrimination under Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e), et sea. ("TitleVII"), the Pennsylvania Human Relations Act, 43 Pa. C.S. § 951 et sea. ("PHRA"), and the Family Medical Leave Act, 29 U.S.C. § 2601, et sea. ("FMLA"). The plaintiff alleges that the defendant terminated her in August of 1998 because of her pregnancy. The defendant has filed a motion for summary judgment, claiming that its decision to terminate Cohen was based on her mediocre performance and poor work habits. I will grant the defendant's motion.

I. Backsround

A. Undisputed Evidence

The plaintiff was employed for approximately 10 years as an accountant by the defendant, a trust company offering tax services to its clients.[1] Over the course of her employment, the plaintiff took maternity leave on two occasions: once in **1993,** and again in 1994. On both occasions, the plaintiff took the full amount of time for which she was entitled to be paid, and she returned to work without incident. See Cohen Dep., Def. Ex. B, at 117-18.[2] At the time of her termination in August of **1998,** the plaintiff was pregnant with her third child and was planning to take maternity leave starting on October 23, **1998.** See Complaint at ¶ 14.

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[1] Unless otherwise noted, the facts are taken from the plaintiff's Response to Defendant Pitcairn Trust Company's Statement of Material Facts As To Which There Is No Genuine Issue To Be Tried (plaintiff's "Statement of Material Facts"). Hereinafter, the plaintiff's Statement of Material Facts will be cited to as "Pl. St.," followed by the paragraph number. The defendant's Statement of Material Facts will be cited to as "D. St.," followed by the paragraph number.

[2] Hereinafter, the defendant's exhibits attached to its motion for summary judgment will be labeled "D. Ex." followed by the exhibit letter and a page number. Exhibits attached to the plaintiff's response to the defendant's motion for summary judgment will be labeled "Pl. Ex." followed by the exhibit number and page number. Exhibits attached to the defendant's reply to the plaintiff's response will be labeled "D. Ex. Supp." followed by the exhibit letter and page number.

Initially, the plaintiff's job responsibilities as Senior Tax Accountant included tax research and analysis, and preparation of tax returns. Throughout the course of her employment, the plaintiff's work performance was mixed. After several good performance reviews in 1990 and 1991, the plaintiff was promoted to Assistance Vice President of the Tax Department in 1992. See D. Ex. D, at DBR-0131, et seq.; Pl. Resp. at 2. In her 1993 review, however, the plaintiff's supervisor wrote: "Barbara needs to improve her tax research and analytical capabilities. She needs to develop more initiative in presenting solutions to various tax situations and clients. Needs improvement in time management. Needs to improve knowledge of computers and their utilization in her job." The supervisor also wrote that the plaintiff "overall has done a good job. When I have given an assignment it has been completed in a timely fashion . . . does a good job of review." The plaintiff was rated as meeting expectations in all categories of evaluation.[3]

[3] The defendant's guidelines for performance evaluations states that a "meets expectations" rating indicates performance that "fully meet acceptable requirements for the position. Duties and responsibilities are consistently met and frequently exceeded. This level is that of a competent, knowledgeable and experienced employee." See Employee Perf. Rev. Guidelines, Pl. Ex. 7.

In 1994, the plaintiff was again evaluated as meeting expectations, but her supervisor also noted that she should "[t]ake more initiative to go beyond what is asked to be done."

The plaintiff's 1995 performance review stated: "when asked to complete a project she completes it in a timely fashion . . . . As far as review and preparation of returns she does an adequate job." The review also stated that "[i]t is important for this employee to know [a]s an officer she should be doing more than is asked. She has a '9 to 5' mentality. She is scheduled to work 8:45 to 5:30 which often is not adhered to . . . ." See File Mem. dated 11/28/95, D. Ex. R.

The record reflects that throughout 1995 and 1996, the plaintiff often came to work. late and left early. See Nave Email dated 4/28/96, D. Ex. R; Nave Email dated 7/2/96, D. Ex. R; Nave Email dated 8/7/96, D. Ex. R. After problems with the plaintiff's work performance continued, the plaintiff's job was restructured in September of 1996. The research and planning aspects were reassigned with her approval to a co-worker, Matthew Hilbert, and to her immediate supervisor, David Nave. The plaintiff then converted to a part-time employment schedule that required her to work 31 hours per week, or 1,420 hours per year. Her new position focused on compliance - i.e., the timely preparation, review, and filing of tax returns.

The plaintiff's review for **1996** recognized that her position "has been changed to a part-time position. The emphasis will be primarily compliance. Barbara has demonstrated an aptitude for this type of assignment." The reviewing supervisor went on to note that "the emphasis that **I** want placed in **1997** is that returns do not sit for any length of time before being reviewed. This was an issue last year. This is too much time spent on personal matters in the office."

In **1997,** the plaintiff's work evaluations showed that she met expectations in six categories and exceeded expectations in one ("Organization and Control"). They note that she "performed adequately," that "her organization and control was very **good,"** that she "did a good job in administering the tax compliance season" and that she "[s]howed good organization." The **1997** year-end review also states that "having said that, the goal for **1998** has to be a more timely filing of the returns, etc., some of which is out of Barbara's control." See **1997** Perf. Rev., Pl. Ex. 5.

In June of **1998,** the plaintiff informed her supervisors of her intent to take maternity leave in October of **1998.** See Pl. St. at ¶¶ **38-39;** Complaint at ¶ **14.** In an email sent to David Nave, the plaintiff presented her calculations for the number of hours that she was required to work before the commencement of

her leave.[4] This "tentative plan" counted the hours that the plaintiff would spend on leave towards her **1,420** hour annual commitment. See Cohen Email dated 6/8/98, D. Ex. V. The plaintiff also claimed that she was entitled to count vacation hours and holiday hours towards her **1,420** worked-hours requirement, rather than towards the 192-hour allowance for "time off." See Cohen Dep., Pl. Ex. 12, at 85, 88. Under these calculations, the plaintiff's worked-hours requirement would be satisfied sometime in August of 1998. Beyond that point and until the commencement of her leave, the plaintiff expected to be compensated on an overtime basis. See Cohen Dep., D. Ex. B, at **160-61.**

Around this time, the plaintiff was counseled on the duration, volume, and frequency of her personal telephone calls. Her supervisor stated that he did not "want to make a major issue of this situation. I am not saying there will be no personal phone calls." Nevertheless, he said that "[i]t has been brought to my attention by a number of employees the issue of your

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[4] There is some disagreement between the parties on the extent to which the email summarizes the content of the plaintiff's conversation with the office manager, Mary Elwell. **Whether** it **does or** does not accurately summarize the plaintiff's conversation with Elwell, there is no dispute that it represents the plaintiff's position as to her obligations to the defendant.

personal phone calls. They find these calls and the loudness of these calls to be a distraction to doing their job."

A few months later, the plaintiff's mid-1998 performance evaluation stated that the plaintiff met expectations and "performed the compliance function adequately." The evaluation again noted that the plaintiff "must reduce her personal phone calls, in particular the length and loudness of them. In view of the fact she is here limited hours, this activity should be at a bare minimum. It does not reflect well on the department as a whole."

On July 1, 1998, Pitcairn was reorganized and the plaintiff's department, the Tax Department, became part of the Client Services Department, which was headed by Daniel Geary. In mid-August, Geary met with Nave to discuss the status of the tax returns that were being prepared by Pitcairn for its clients. See Nave Dep., Pl. Ex. 1, at 156. Fulfilling compliance tasks had been the plaintiff's main responsibility since her job was restructured in 1996, and the plaintiff's resume states that she was "[r]esponsible for all tax department compliance" at Pitcairn. See Nave Ltr. dated 9/20/96, D. Ex. I; D. Ex. K. By August of 1998, only 78 of the 198 tax returns that Pitcairn was preparing, or forty percent (40%), were ready to be filed by the extended tax deadline of August 15, 1998. After discussing this

compliance rate, Geary and Nave discussed personnel issues, including the plaintiff's performance. See Nave Dep., Pl. Ex. 1, at 154, 158-59; Geary Dep., D. Ex. Supp. 9, at 32-39.

Around this time, Nave also asked the plaintiff for a copy of her July time sheet and questioned her calculations. The plaintiff gave to Nave a copy of the email from June 8, 1998, summarizing her view that she should be paid overtime for some of the hours that she would work in August. Nave took the email to discuss it with Geary. See Cohen Dep., Pl. Ex. 12, at 162-63.

After learning that 60% of the tax returns had missed the August 15 filing deadline, and after learning of the plaintiff's request for overtime pay, Geary then decided to review the plaintiff's personnel file to assess her performance. See Perf. Rev. dated 8/21/98, D. Ex. U, at 1; Geary Aff., D. Ex. C, at ¶¶ 3-5. Geary read through her file for several hours. The file contained a chronology of performance evaluations and other memoranda. See Geary Dep., D. Ex. Supp. 9, at 37, 39. On August 21, 1998, Geary prepared a performance review that examined "whether Ms. Cohen is performing up to standards given her level of responsibility and position within the Company." See Perf. Rev. dated 8/21/98, D. Ex. U, at 1. The review concluded that she was not, and recommended that she be terminated for the following reasons: "Inability to perform the required tasks as

evidenced by a 40% completion rate of 1997 tax returns; Poor worth ethic/ lack of ambition and motivation; No critical thinking skills in approaching tax issues; Poor attitude towards her job and the Company as evidenced by a disrespect for normal work hours and a flagrant abuse of using the phone for personal reasons." See Perf. Rev. dated 8/21/98, D. Ex. U, at 2. On August 25, 1998, Geary and Nave met with the plaintiff and announced their decision to terminate her employment with Pitcairn. See Nave Aff., D. Ex. A, at ¶ 11.

After her termination, the plaintiff contacted a headhunter in November of 1998 to search for an accounting position starting in January of 1999. In January, the headhunter notified the plaintiff of an available position which she was later offered, and which she ultimately accepted. The plaintiff began employment with the new company on March 1, 2000.

The plaintiff filed this action on November 2, 1999. The Complaint alleges that the defendant violated Title VII (Count I), the PHRA (Count II), and the FMLA (Count III) by terminating the plaintiff due to her pregnancy. The defendant has moved for summary judgment, claiming that its decision to terminate Cohen was based on her mediocre performance and poor work habits; that Cohen has failed to establish that these reasons are mere pretext; and that the damages she requests are improper.

B. Disputed Affidavits

The defendant has submitted the affidavits of three of the plaintiff's former co-workers, Janice Frye, Marian Kennedy, and Heather Kelly. Frye and Kennedy state that the plaintiff's personal phone calls "often lasted more than an hour and were conducted in a very loud voice," and did not significantly improve even after complaints were made. See Frye Aff., D. Ex. N; Kennedy Aff., D. Ex. O. Frye also states that the plaintiff frequently conducted other personal business during business hours, such as clipping shopping coupons and planning family events. See Frye Aff., D. Ex. N., at ¶ 6. Kelly, who decided to leave Pitcairn around the time of the plaintiff's termination due to her own pregnancy, states that Geary encouraged her to stay at Pitcairn and to return in the future if she ever changed her mind. See Kelly Aff., D. Ex. W.

The plaintiff argues that these affidavits, as well as the portions of Geary's and Nave's affidavits that reference these co-workers, must be excluded under Fed. R. Civ. P. 37(c). The plaintiff contends that the defendant failed to disclose these witnesses as required by Fed. R. Civ. P. 26. However, the plaintiff herself named these witnesses in her deposition, and the defendant supplemented its self-executing disclosures on

March 10, 2000 to include them. See Cohen Dep., D. Ex. Supp. 2, at 146-49; Lopez Ltr. dated 3/10/00, D. Ex. Supp. 1. The Court rejects the plaintiff's argument.

The plaintiff also argues that Kelly's affidavit is not based on personal knowledge, that it should be excluded under Fed. R. Evid. 404(a), and that Geary only encouraged Kelly to remain at Pitcairn to fabricate evidence of non-discrimination. See Pl. Resp. at 13-15, 20. The Court finds that Kelly's affidavit is based on personal knowledge and that there is no evidence to support the plaintiff's claim of fabrication. The Court, however, does not rely on these affidavits in reaching its decision.

11. Discussion

A. Legal Standard For Summary Judgment

A motion for summary judgment shall be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the initial burden of demonstrating that no genuine issue of material fact exists. Once the moving party has satisfied this requirement, the non-moving party must present evidence that there is a genuine issue of material fact. The

non-moving party may not simply rest on the pleadings, but must go beyond the pleadings in presenting evidence of a dispute of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-324 (1986). In deciding a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. Josev v. John R. Hollingsworth Corp., 996 F.2d 632, 637 (3d Cir. 1993).

B. Counts I and II -- Title VII and PHRA

1. Summary Judgment Under Title VII and PHRA

The decision whether to grant or deny summary judgment in an employment discrimination action under Title VII is governed by the Supreme Court's burden-shifting analysis in McDonnell-Douglas v. Green, 411 U.S. 792 (1973), recently clarified in Reeves v. Sanderson Plumbing Products, 120 S.Ct. 2097 (2000).[5] Under this analysis, the plaintiff must first make out a prima facie case of discrimination. If the plaintiff does so, the defendant must present a legitimate, non-discriminatory reason for the employment decision. Because the ultimate burden must always rest with the plaintiff, the defendant is not required to show by

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[5] Although this discussion focuses on the Title VII claim, the legal analysis is identical to, and treated coextensively with, that of the PHRA claim. See Gomez v. Allegheny Health Servs., Inc., 71 F.3d 1079, 1083-84 (3d Cir. 1995).

a preponderance of the evidence that it was, in fact, motivated by this particular reason. Rather, the defendant must merely present a reason for the action, which, if believed, would be legitimate and non-discriminatory.

In order to survive summary judgment, the plaintiff must then show that the reason presented by the defendant is pretextual, either by showing that the defendant's reason is "unworthy of credence," or by showing that the real motivation was more likely than not discriminatory. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981); Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994); Reeves, 120 S.Ct. at 2108.

As an initial matter, the defendant has agreed for purposes of this Motion that the plaintiff has established a prima facie case of discrimination under Title VII and the PHRA. See D. Mot. at 11. In turn, the plaintiff concedes that the defendant has articulated legitimate, non-discriminatory reasons for its decision to terminate Cohen. See Pl. Resp. at 17. The burden now shifts back to Cohen to show that the reasons presented by the defendant are pretextual.

2. Pretext Analysis

In order to defeat a summary judgment motion, Cohen must produce sufficient evidence to "allow a factfinder reasonably to infer that each of the employer's proffered non-discriminatory reasons" was a pretext. Fuentes, 32 F.3d at 764. The plaintiff does not have to "cast doubt on each proffered reason in a vacuum. . . . [T]he factfinder's rejection of some of the defendants' proffered reasons may impede the employer's credibility seriously enough so that a factfinder may rationally disbelieve the remaining proffered reasons, even if no evidence undermining those remaining rationales in particular is available." Fuentes, 32 F.3d at 764, n.7.

The plaintiff makes three arguments supporting her claim that the defendant's reasons are pretextual. First, she argues that she received positive performance evaluations and substantial bonuses. The plaintiff claims that these facts "belie[] Defendant's stated reasons for discharge." See Pl. Resp. at 17. Second, she argues that she was treated less favorably than Matthew Hilbert, who she claims was a similarly situated employee under Simpson v. Kay Jewelers, Div. of Sterling, Inc., 142 F.3d 639 (3d Cir. 1998). Third, she contends that the defendant "fabricated its articulated reasons" for terminating the plaintiff. See Pl. Resp. at 17-18.

a. Plaintiff's Work Performance

The plaintiff argues that the evidence of her work performance 'raises serious questions about Defendant's reasons for terminating Mrs. Cohen and is certainly sufficient, by itself, that a factfinder could reasonably find that Defendant's reasons are unworthy **of** credence." Specifically, the plaintiff contends that she "performed her job well and consistently received positive evaluations and substantial bonuses," and that this fact should preclude summary judgment under Brewer **v.** Quaker State Oil Refining Corp., 72 F.3d 326, 331 (3d Cir. 1995). See Pl. Resp. at **18.** The Court finds that the plaintiff's evidence is insufficient, and that it falls short of the situation described in Brewer.

The Brewer plaintiff was an oil salesperson whose employer had stressed that sales volume was the primary measure **of** performance. Despite being the top salesperson in his region, the plaintiff was terminated on performance grounds. The Third Circuit found that this constituted a contradiction in the evidence that demonstrated a triable issue of fact. See Brewer, 72 F.3d at 331. In contrast, the plaintiff's claim in this case that she "performed her job well and consistently received

positive evaluations and substantial bonuses" cannot be supported by the record.

As an initial matter, the bonuses received by the plaintiff were not tied to her individual performance. See Elwell Supp. Aff., D. Supp. Ex. 7.[6] They, therefore, do not undermine the defendant's stated reasons for terminating the plaintiff. With respect to performance reviews, the record does not support the plaintiff's statement that she performed well and consistently received positive reviews. The vast majority of the plaintiff's reviews were mediocre, and several were unmistakably negative. Since **1993**, the plaintiff received a rating of 'exceeds expectations" only once, in **1997**, and her overall rating for that year was still characterized as 'meets expectations." The plaintiff's ratings for all categories in **1993**, **1994**, and **1998** were 'meets expectations," and her ratings in 1995 and **1996** were either "meets" or "below expectations."

The plaintiff contends that the "meets expectations" ratings are sufficient to discredit the defendant's stated reasons, given that the defendant's guidelines on performance reviews defines

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[6] This affidavit relates only to the plaintiff's **1997** bonus. However, the plaintiff does not contest the defendant's general point, and has not presented any evidence showing that her bonuses from other years were tied to her individual performance.

such performance as "acceptable." The Third Circuit, however, has held that "[p]retext is not established by virtue of the fact that an employee has received some favorable comments in some categories or has, in the past, received some good evaluations." Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509, 528 (3d Cir. 1992). To establish pretext, the plaintiff must discredit the defendant's stated reason, and "[a]n employer rating an employee as competent discredits the employer's stated reason for discharging the employee . . . only when the employer's stated reason for discharge is the employee's general incompetence." Frieze v. Boatmen's Bank, 950 F.2d 538, 541 (8th Cir. 1991) (cited in Ezold, 983 F.2d at 528).

In this case, Pitcairn's stated reason for discharging the plaintiff was not her general incompetence. Rather, it was primarily her "[i]nability to perform the required tasks as evidenced by a 40% completion rate of *1997* tax returns." See Perf. Rev. dated 8/21/98, D. Ex. U, at 2. Regardless of how her supervisors may have assessed her general competence, the comments in the plaintiff's performance reviews support the validity of this stated reason. See 1996 Perf. Rev., D. Ex. J; 1997 Perf. Rev., Pl. Ex. 5.

This deficiency is especially serious in light of the 1996 restructuring that was effected to accommodate the plaintiff's

relative strength in compliance work. Even when the plaintiff's supervisors specifically emphasized the importance of meeting filing deadlines, the plaintiff's deficiency continued into **1997** and **1998**, culminating in a sub-40% compliance rate report in August of 1998. Unlike the defendant in Brewer, who terminated the plaintiff despite his unimpeachable success in the sole area identified by the defendant's own performance incentive program, Pitcairn has articulated a non-discriminatory reason for terminating the plaintiff that relates directly to an important measure of the plaintiff's job performance - the timely processing of tax returns.

Nor does the plaintiff present any evidence that the defendant's other stated reasons for discharge - poor work ethic, lack of critical thinking skills, and poor attitude – are pretextual. The record contains a plethora of evidence supporting these stated reasons. Although the plaintiff's need for critical thinking skills was minimized after the 1996 restructuring of the plaintiff's job duties, evidence of her poor work ethic and attitude appear throughout the record. For example, despite having received warnings about her telephone conversations as early as **1996**, the plaintiff continued to talk on the telephone in a loud and disruptive manner through her termination in **1998**. In addition, the plaintiff was warned in

1997 that there was "too much time spent on personal matters in the office." See 1996 Perf. Rev., D. Ex. J.

The plaintiff claims that Geary is "not a nice person" and that his beliefs about her performance are unfair. Even if this were true, it is irrefutable that Geary viewed her performance as inadequate and her work ethic as lacking. It is his perceptions that count, and not what the plaintiff claims is the objective truth. See Brewer, 72 F.3d at 332; Billet v. CIGNA Corp., 940 F.2d 812, 825 (3d Cir. 1991); Storti v. First Fidelity Bank, 1998 U.S. Dist. LEXIS 10457, *16 (E.D. Pa. July 16, 1988). Disagreement with the defendant's decisions is insufficient, as a matter of law, to survive summary judgment. See, e.g., Simpson, 142 F.3d at 647; Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108-11 (3d Cir. 1997); Fuentes, 32 F.3d at 765-66; Ezold, 983 F.2d at 528; Moore v. Acme Corrugated Box Co., US Dist. LEXIS 7243, *27 (E.D. Pa. May 18, 1998).

The plaintiff also criticizes what she calls the "casual manner" with which Geary handled her termination. Specifically, the plaintiff argues that Geary "1) did not know the duties Mrs. Cohen was performing, 2) did not know that Mr. Nave and Mr. Hilbert were also responsible for compliance, 3) failed to make even a cursory inquiry into the circumstances surrounding her performance, including the fact that Mrs. Cohen's performance had

been hindered by software problems and that she had been denied administrative support, and 4) never met with Mrs. Cohen about her performance." See Pl. Resp. at 18. With the possible exception of the fourth, these allegations are not supported by the record. Geary was aware of the plaintiff's duties and stated correctly that "her principal duties were compliance at that time." See Geary Dep., Pl. Ex. 11, at 29. Nave, the plaintiff's direct supervisor, stated that "her primary function was to review, process and get the returns completed," and the plaintiff herself stated that after 1996, her job consisted of "compliance work." See Nave Dep., D. Ex. DD, at 60; Cohen Dep., D. Ex. B, at 52-53. There is nothing in the record that contradicts Geary's characterization of the plaintiff's duties.

Geary also knew, contrary to the plaintiff's allegation, that Nave and Hilbert were also responsible for compliance. In his deposition, Geary stated that "the ultimate responsibility [for compliance] would go first to the manager in that department," i.e., Nave; that the plaintiff would be "the next one responsible"; and that Hilbert also 'had some compliance duties." See Geary Dep., Pl. Ex. 11, at 29. As for the alleged 'failure to make even a cursory inquiry," the record indicates that Geary reviewed the plaintiff's file for several hours before the termination decision was made. See Geary Dep., D. Ex. Supp.

9, at 39. The software problems were documented in the plaintiff's work evaluations, which were included in the file. See, e.g., 1998 Mid-Year Employee Perf. Update, D. Ex. L. Finally, the fact that Geary did not meet with the plaintiff is not dispositive. Pitcairn's internal structure was reorganized in July of 1998, and the plaintiff's department had been under Geary's supervision for approximately one month before performance issues came to Geary's attention. Geary conferred with Nave, the plaintiff's direct supervisor, and the two of them made the decision together. See Nave Aff., D. Ex. A, at ¶¶ 10-11; Geary Aff., D. Ex. C., at ¶ 6. In light of these factors, the plaintiff has failed to show that Geary's review and decision-making processes were casual.

Having reviewed the evidence presented by both parties, the Court concludes that a factfinder could not reasonably disbelieve the defendant's articulated reasons based on the evidence of the plaintiff's performance.

b. Matthew Hilbert

The plaintiff argues that she was treated less favorably than Matthew Hilbert, a Pitcairn employee whom the plaintiff claims was similarly situated under Simpson, 142 F.3d 639. In reply, Pitcairn contends that Hilbert was not similarly situated

to the plaintiff and thus is not a proper comparator. The Court declines to reach this issue, because even if Hilbert and the plaintiff were similarly situated at the time of the plaintiff's termination, the Court finds that Hilbert's continued employment does not constitute evidence of pretext. Both Hilbert and Cohen had displayed "performance problems and misconduct" before their jobs were restructured in 1996. After the restructuring, there were no further complaints about Hilbert's performance. In fact, Hilbert's reviews indicate that his performance was "excellent" and that he was a "valuable addition to the tax department." See D. Ex. Supp. 13-14. In contrast, the record shows that there were continuing problems with the plaintiff's job performance and work habits. Thus the disparate treatment between Hilbert and the plaintiff can be properly attributed to their disparate performances, and not to their genders.

c. Fabrication of Evidence

The plaintiff contends that there is "compelling evidence" of "post hoc fabrication" by the defendant. Primarily, the plaintiff claims that the performance review that was prepared by Geary and dated August 21, 1998, was drafted "after Mrs. Cohen was terminated and after Defendant was aware Mrs. Cohen filed a claim." The plaintiff's only evidence to support this allegation

is the fact that Geary's letter was not among the documents forwarded to her by the defendant on August 27, 1998. That package of documents purported to include all of the evaluations from the plaintiff's file as of August 25, 1998. See Pl. Resp. at 10, 20. The fact that the memorandum was not on file as of August 25 does not mean that it was fabricated. The memorandum could have been written on August 21, but not placed in the plaintiff's file until after August 25. Without more specific and implicating evidence, the Court rejects the plaintiff's claim of fabrication.

C. Count III -- FMLA

The plaintiff argues that the defendant interfered with her rights under the FMLA and/or retaliated against her for attempting to exercise those rights. The FMLA grants an "eligible employee" the right to 12 weeks of leave in connection with the birth of a child. See 29 U.S.C. § 2612(a)(1). After the period of leave, the employee is entitled to reinstatement to her former position or an equivalent one with the same benefits and terms. See 29 U.S.C. § 2614(a). The FMLA declares that it is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided" in the FMLA, and "to discharge or in any other manner

discriminate against any individual for opposing any practice made unlawful" under the FMLA. 29 U.S.C. § 2615(a)(1), (2).

Claims under the FMLA are generally analyzed using the McDonnell-Douglas burden-shifting framework.[7] See Chaffin v. John H. Carter Co., Inc., 179 F.3d 316 (5th Cir. 1999); Morsan v. Hilti, Inc., 108 F.3d 1319, 1325 (10th Cir. 1997); Keeshan v. Home Depot, U.S.A., Inc., 2001 WL 310601, *11 (E.D. Pa. Mar. 27, 2001); Baltuskonis v. U.S. Airways, Inc., 60 F. Supp.2d 445, 448 (E.D. Pa. Aug. 17, 1999) (citing Churchill v. Star Enterprises, 183 F.3d 184 (3d Cir. 1999)). Under this framework, the plaintiff has failed to establish a prima facie case, and has failed to discredit the defendant's legitimate reasons for its employment decision.

1. Prima Facie Case

To demonstrate a prima facie case under the Family Medical Leave Act, a plaintiff must show the following: (1) the plaintiff is protected under the FMLA; (2) the plaintiff suffered an

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[7] The Court notes that the Seventh Circuit has recognized a different framework to be used for claims that are based on the denial of substantive FMLA rights, such as entitlement to leave and entitlement to restoration in the same or an equivalent position. See Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 712-13 (7th Cir. 1997). The parties agree that the McDonnell-Douglas burden-shifting approach should be used in this case. See D. Mot. at 18; Pl. Resp. at 15.

adverse employment action; and (3) a causal connection exists between the adverse decision and the plaintiff's exercise of her FMLA rights. See Baltuskonis v. US Airways, Inc., 60 F. Supp. 2d 445 (E.D. Pa. 1999).

In this case, the plaintiff has shown the first two factors. However, the plaintiff presents no evidence of any causal connection between her termination and her request for maternity leave. She has not produced any direct evidence showing that her two supervisors, Geary and Nave, terminated her on the basis of her pregnancy or her attempt to take maternity leave. Instead, she speculates that there must be a causal connection because her termination occurred after she requested leave. The fact that the termination occurred close in time to the request for FMLA leave is not sufficient to carry the plaintiff's burden. See Baltuskonis, 60 F. Supp. 2d at 228-50; Bond v. Sterling, Inc., 77 F. Supp. 2d 300, 304 (N.D.N.Y. 1999); Dillon v. Carlton, 977 F. Supp. 1155, 1160 (M.D. Fla. 1997) ("The FMLA is not a shield to protect employees from legitimate disciplinary action by their employers if their performance is lacking in some manner unrelated to their FMLA leave."), aff'd 161 F.3d 21 (11th Cir. 1998); McCowan v. UOP, Inc., 1995 WL 519818, *7 (N.D. Ill. Aug. 30, 1995).

Even if the plaintiff were able to establish a prima facie case under the FMLA, her claim would still fail because she has not offered sufficient evidence of pretext in response to the defendant's legitimate reasons for termination. In a case similar to this one, McCowan, **1995** WL **519818,** the Northern District of Illinois held that poor performance, excessive absences and tardiness, and excessive personal phone calls constituted legitimate, nondiscriminatory reasons to terminate the plaintiff. The plaintiff did not dispute these reasons, but instead argued that she should not have been terminated because her performance was generally satisfactory. In granting summary judgment for the defendant, the court noted that:

> Evidence that the plaintiff's performance was generally satisfactory is insufficient because the issue is not whether the employer was correct in its assessment of the plaintiff, but whether the employer was honest in saying that it discharged the plaintiff for the reasons it has given.

Id. at *7.

Like the plaintiff in McGowan, Cohen merely disagrees with Pitcairn's decision without producing any evidence that the reasons for her termination are pretextual. Therefore, the Court grants summary judgment for the defendant on Count III of the plaintiff's Complaint. See Hodgens v. General Dynamics Corp.,

144 F.3d 151 (1st Cir. 1998) (finding that the plaintiff did not case doubt on the defendant's legitimate, nondiscriminatory reasons for his layoff); Munizza v. State Farm Mut. Auto. Ins. Co., 1996 US App. LEXIS 32870, *11 (9th Cir. 1996) (finding no pretext where poor performance was corroborated by plaintiff himself"); Bond, 77 F. Supp. 2d at 304 (finding that the plaintiff failed to present competent evidence of pretext); Chaffin v. John H. Carter Co., 1998 WL 19624, *4 (E.D. La. 1998) (finding that the plaintiff failed to produce evidence from which a reasonable factfinder could infer that the defendant lied); Garcia v. Fullbright & Jaworski, L.L.P., 1996 U.S. Dist. LEXIS 17084, *20 (S.D. Tex. Aug. 14, 1996) (finding that the articulated nondiscriminatory reasons for termination were not pretextual because poor performance was consistent and well documented).

Because summary judgment is granted on each of the three counts in the Complaint, the Court need not consider the defendant's arguments with respect to damages.

An Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBARA COHEN	:	CIVIL ACTION
v.	:	
PITCAIRN TRUST COMPANY	:	NO. 99-5441

ORDER

AND NOW, this 20th day of June, 2001, upon consideration of Defendant's Motion for Summary Judgment (Docket # 18) and all Responses thereto, and after an oral argument on the Motion, IT IS HEREBY ORDERED that the Motion is GRANTED for the reasons expressed in the Memorandum of today's date.

BY THE COURT:

Mary A. McLaughlin

MARY A. McLAUGHLIN, J.