IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

LINDA HEINEN

Plaintiff,

vs.

KOHL'S DEPARTMENT STORES, INC. and HOLLY "RENEE" HENSON,

Defendants.

Case No. 18-2-00746-6

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT RESPONSE BRIEF

I. INTRODUCTION & SUMMARY OF THE ARGUMENT

Linda Heinen diligently worked for Kohl's for nearly 10 years. Her performance was objectively above average if not excellent. Notwithstanding the year Ms. Heinen took six weeks of medical leave (2016), her District's performance consistently ranked in or near the top 25% of all Kohl's Districts nationwide. And during the year prior to her termination, Ms. Heinen's sales performance ranked her district in the top 23, out of 80 districts; she had no prior disciplinary record at the company, and in fact, received numerous performance awards, including a 2016 $30,000 "long term incentive award…intended to retain key leaders." As a District Manager, Ms.

Heinen led a team of Kohl's Store Managers. One of those store managers was Mike Brumbles, the manager of Kohl's Coeur D'Alene, Idaho store. Mr. Brumbles is disabled. From April 2017 through December 2017, Ms. Heinen, verbally opposed what she believed to be an unethical and illegal plan by Kohl's to fire Mr. Brumbles on account of his disability. The illegal termination plan was orchestrated by her boss (Renee Henson) and her boss's boss (Peter Riley). In making her good-faith protest to the discrimination against Mr. Brumbles, Ms. Heinen relied on an express promise contained in Kohl's Ethical Standards Policy that she would not be retaliated against for protesting illegal or unethical activity. Kohl's fired Ms. Heinen in early January 2018 inventing "poor leadership" as a pretext for her termination. Ms. Heinen then sued Kohl's for age discrimination, disability discrimination, retaliation, breach of a promise, and violation of the Washington Family Medical Leave Act (WFMLA). Kohl's now seeks to dismiss the breach of promise and WFMLA claim. Kohl's motion should be denied because:

1. Issues of material fact exist as to whether Kohl's Ethical Standards Policy conferred an enforceable promise. The Ethical Standards and Responsibilities Policy ("Policy") empowers managers like Ms Heinen to "exemplify the highest standards of ethical business conduct and encourage the discussion of the ethical and legal implications of business decisions." The Policy further states "individuals who report an ethical or legal concern in good faith will never be subject to retaliation." The Policy itself does <u>not</u> contain any disclaimer that "this document doesn't modify the at-will employment relationship." Kohl's claims it does, but that assertion is belied by the facts. Instead, Kohl's defense obfuscates the issue by producing language from a separate "Executive Policy Acceptance" coversheet which requires new hires to acknowledge comprehension of the Kohl's Ethical policies but then agree that policies could change and that

the policies themselves are not a legal contract in an "at-will" employment arrangement. To quote the Kohl's Ethical Standards Policy: "One of the truest clichés around the world is that 'actions speak louder than words.' The policy is effective when leaders model it, and Associates read it, understand it, and live up to it." The defense's argument on this point is irrefutably weak: sign, Ms. Heinen, that you comprehend written policies, but don't complain if our actions (read: firing you or a disabled store manager) violate said policy standards.

2. Contrary to Kohl's convenient re-interpretation of the law, proximity in time between the protected activity (taking medical leave) and the adverse action (employment termination) is not the only type of evidence required to prove an employment discrimination claim, including claims under the WFMLA. And in this case circumstantial evidence does exist which raises a genuine issue of material fact because: a) Kohl's did not follow its progressive discipline policy by not informing Ms. Heinen of any alleged performance defects; b) Kohl's did not fire other management employees with documented performance issues - - - issues ranging from workplace dishonesty to $2 million dollar discrimination jury verdicts to screaming in the ear of a disabled Kohl's worker - - - yet fired Ms. Heinen for "poor leadership"; and c) Kohl's fired Ms. Heinen, the only more-than-two-week WFMLA taker but did not fire lesser performing employees. In short, Ms. Heinen took lengthy medical leave; Kohl's didn't like it, and Kohl's found a reason to fire her under the guise "poor leadership" which, given its subjective nature, is also circumstantial evidence of illegal workplace discrimination.

II. FACTS

1. Ms. Heinen worked for Kohl's for nearly ten years as a District Manager, i.e. the leader of more than ten Kohl's stores, their employees, and inventory. (Heinen Decl. ¶2) Ms.

Heinen's immediate boss was Renee Henson, leader of Kohl's Region 10, and Ms. Henson's boss was Peter Riley, the leader of Kohl's Territory 3. (Heinen Decl. ¶ 3) Supporting Mr. Riley in a HR capacity was Brenda DeWeese. *See infra.*

2. Beginning in August 2016 Ms. Heinen took six weeks of WFMLA medical leave—from August 1, 2016 through September 18, 2016—to address depression stemming from her having to treat her alcoholic husband of 32 years. (Heinen Decl. ¶4) During August 2016, Ms. DeWeese and Mr. Riley spoke about Ms. Heinen when Ms. DeWeese first joined Mr. Riley's team and, as part of that conversation, had a "kind of get to know the market [to] understand the district managers" type chat. (Crotty Decl. at Ex. A *citing* DeWeese Dep. 9:19-25; 10:1-12; 12:15-25; 13:1) When Ms. DeWeese first joined Mr. Riley's team, she (DeWeese) also learned "Linda was on an LOA", i.e. medical leave of absence. (DeWeese Dep. 99:2-11) Ms. DeWeese did discuss, with Ms. Heinen and Ms. Henson, Ms. Heinen's leave of absence. (DeWeese Dep. 56:22-25; 57:1-25)

3. Taking extended leave from Kohl's is called "careeracide," and once Ms. Heinen returned to work following the medical leave the "temperature changed" insofar as Ms. Henson treated Ms. Heinen more coldly as Ms. Henson was more curt, abrupt, and not as involved with assisting Ms. Heinen in making decisions. (Heinen Decl. ¶4) One of Ms. Heinen's employment benefits was that Kohl's, via its agent Sedgwick, would pay Ms. Heinen compensation for the work time missed during the above described WFMLA leave because her depression qualified as a short-term disability. (Heinen Decl. ¶ 5; Crotty Decl at Ex. B *citing* 30(b)(6) Dep. – Henson 24:2-10) At or near the time she returned to work, Ms. Heinen made this disability compensation benefit claim, but had that claim denied in mid-September 2016. (Heinen Decl. ¶5) Ms. Heinen appealed

the denial, the denial was ultimately overturned on or about February 13, 2017, and Kohl's then paid Ms. Heinen the $7,548 owing to her under the policy. (Heinen Decl. ¶5) As standard policy, the Sedgwick updates Kohl's Territory 3 via a "TR3sedgwickupdates@kohls.com" email address when workers, including during this period Ms. Heinen, make disability benefit claims or appeals regarding denials of those claims. (Crotty Decl. at Ex. B *citing* 30(b)(6) Dep. – Henson 28:1-25; 29:1-14) At deposition Kohl's CR 30(b)(6) witness claimed ignorance of what TR3sedgwickupdates@kohls.com meant; thus a jury will have to determine the meaning and purpose of that email address especially in light of Mr. Riley's professed ignorance about Ms. Heinen's taking of FMLA. *See id.* Within months of receiving the disability appeal determination (April 2017), Ms. Henson asked Ms. Heinen, out of the blue, "When are you going to retire?" (Heinen Decl. ¶5)

4. All Kohl's employees are referred to as "Associates." (Pankratz Decl. Ex. B, pgs. 45-45 *citing* Moon Dep.) Kohl's policy requires Associates to be counseled, in writing, if their poor performance could lead to termination. (Crotty Decl. at Ex. C *citing* Moon Dep. 29:2-14; Moon Dep. Ex. 3 *citing* KOHLS000159) Ms. Heinen was never counseled, warned, or told that her alleged "poor leadership" could/would lead to her termination. (Heinen Decl. ¶6)

5. Kohl's policy requires that an Associate be given written notice before his or her employment is terminated for poor performance. (Moon Dep. 28:15-25; 29:1-14) Mr. Moon's testimony is consistent with Kohl's Policy 601, pg. 6 which states that Kohl's Associates are given progressive discipline. (Moon Dep. Ex. 3 *citing* KOHLS000159) Any deviations of the progressive

discipline policy must be approved by Kohl's HR yet Kohl's did not do so in Ms. Heinen's case. (Heinen Decl. ¶6)[1]

6. Peter Riley, Brenda DeWeese, Renee Henson, and Jolene Christensen (another Kohl's HR employee) made the decision to fire Ms. Heinen. (DeWeese Dep. 54:15-25; 55:1-25)

7. Kohl's stated reasoning for firing Ms. Heinen (poor leadership) is pretextual for at least three reasons. First, Ms. Henson, who declares that Ms. Heinen was a poor leader, gave Ms. Heinen a positive performance review in 2016, stating, in part, that Ms. Henson was "a leader that values action, communication, and a focus on achievement. Ms Henson also wrote to Ms. Heinen, "you have built a team that can achieve anything" (Heinen Dec. ¶7; Crotty Decl. at Ex. E *citing* Henson Dep. 158:2-25; 159:1-14 & Ex. 59) Ms. Heinen received numerous formal accolades from co-workers, supervisors (Mr. Riley included) and others regarding her leadership. (Heinen Decl. ¶7) In fact, in 2017 Ms. Heinen received a $30,000 "equity award" described as a "long term incentive award… intended to retain key leaders." (Heinen Decl. ¶7) Second, Ms. Heinen's replacement, Ms. Appleyard, a woman under 40 who never took medical leave, had notable issues with "poor leadership" but was never disciplined. For example, Ms. Appleyard repeatedly lost her composure, yelling at Mr. Brumbles, a Kohl's store manager who served under both Appleyard and Heinen; Ms. Heinen never lost her professionalism in this manner. (Crotty Decl. at Ex. F *citing*

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[1] Kohl's has taken the position that Policy 601's progressive discipline procedure do not apply to District Managers, yet it cannot point to a single document backing its self-serving, after-the-fact position. (Crotty Decl. Ex. D *citing* Kohl's 30(b)(6) - DeWeese Dep. 39:3-6; 42:7-20) In fact, Kohl's position is contrary to the admitted testimony of Mr. Moon a speaking agent for Kohl's which creates a credibility issue that cannot be resolved at summary judgment.

Brumbles Dep. 20:2-25; 21:1-25) Ms. Appleyard would yell at Mr. Brumbles in front of Mr. Brumbles' peers; Ms. Heinen would not. (Brumbles Dep. 22:4-10) Ms. Appleyard's yelling at Mr. Brumbles interfered with a "brain break" formal accommodation that Mr. Brumbles had been granted due to a head injury disability (Brumbles Dep. 22:16-25; 23:1-25; 33:11-18) Mr. Brumbles complained, to Kohl's HR, about Ms. Appleyard's treatment of him but never complained to Kohl's HR (or management) about Ms. Heinen's treatment of him. (Brumbles Dep. 35:6-25; 36:1-10)

8. When asked to compare the leadership styles of Ms. Appleyard and Ms. Heinen Mr. Brumbles testified:

> Q. Would you say that Jenny Appleyard's leadership style is different than Linda Heinen's?
> A. Yes.
> Q. How so?
> A. Linda really cared about the team and all of the managers and leaders. She was firm, but cared. There was a—there was a balance there. Jenny, I don't feel there's any connection, that she really cares that I'm there or not. (Brumbles Dep. 36:12-24)

9. Kohl's did not fire other employees who displayed horrid leadership (Bill Schutte and Danielle Maksic) but fired Ms. Heinen, who by all indication was an award-winning leader. Ms. Maksic was a peer of Ms. Heinen who worked as the District Loss Prevention Manager (DLPM). (Heinen Decl. ¶8) At one point Ms. Heinen, who had to work with Ms. Maksic on a routine basis, reported that Ms. Maksic was abusing Kohl's resources, by claiming to be working but not actually working. (Heinen Decl. ¶8) Ms. Maksic's supervisor eventually disciplined Ms. Maksic, but they did so in writing, on 12/1/2016. (Crotty Decl at Ex. G *citing* KOHLS002062-64) No such record of discipline exists for Ms. Heinen's reportedly "poor leadership;" in fact, Ms.

Heinen was never disciplined (neither in writing nor orally) during her extended tenure at Kohl's (Heinen Decl. ¶9) Ironically, a post hoc example Ms. Henson gave to support the pre-text of Ms. Heinen's "poor leadership" was Ms. Heinen's reported "inability" to get along with Ms. Maksic, when, in reality, Ms. Heinen, professionally initiated a form of standard accountability the co-worker who misrepresented (read: lied about) being at work when in reality she was not. (DeWeese Dep. 24:15-25; 25:1-24; Kohl's 002062-63)[2] And while Ms. Henson initially professed ignorance of whether Ms. Maksic was formally "written up" for violating Kohl's workplace policy, Ms. Henson later revealed that she was well aware and actually "coached" Ms. Maksic about the breaches of policy which gave rise to Ms. Maksic's discipline. (Henson Dep. 73:6-25; 74:1-25; 75:1-25; 76:1-13) As it relates to Mr. Schutte, Ms. DeWeese was also aware of the fact that Kohl's did not fire William Schutte, a Kohl's District Manager who had a $2.1 million harassment jury verdict rendered against him. (DeWeese Dep. 74:4-25; 75:1-25; 76:1-25: 77:1-15 & Exs. 9 – 10) Ms. DeWeese agrees that one of HR's jobs is to be "fair and consistent," but she could not answer the question of whether allowing Mr. Schutte to retire in due course versus firing Ms. Heinen after no progressive discipline qualified was "fair and consistent" treatment (DeWeese Dep 79:1-16)

10. The only District Manager that Ms. Henson supervised during 2015, 2016, and 2017 who took more than 15 days FMLA was Ms. Heinen. (Kohl's 30(b)(6) Dep. – Henson 31:25; 32:1-4) Kohl's further admits that, "[t]here are no district managers, other than Linda Heinen, who reported to Renee Henson, who took more than two weeks of FMLA-approved leave in 2017 and

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[2] As an aside, Ms. Maksic, the person who Ms. Heinen allegedly didn't get along with, sent Ms. Heinen a kind text upon finding out that Kohl's fired Ms. Heinen. (Heinen Decl. ¶8)

whose performance was assessed at the October 2017 Talent Builder meeting." (Kohl's 30(b)(6) Dep. – Henson 34:2-23)

11. Kohl's contends that Ms. Henson first brought up the idea of firing Ms. Heinen at the October 2017 Talent Builder Meeting. (Moon Dep. Ex. 4) Twice each year, generally in October and April, Kohl's convenes "Talent Builder" meetings, attended by Kohl's Regional Management, including Peter Riley, in which the performance of District Managers (like Ms. Heinen) is discussed. (Heinen Decl. ¶5) As of the October 2017 talent builder meeting, Ms. Heinen's district was ***the most profitable*** of all the districts that fell under Ms. Henson's command. (Kohl's 30(b)(6) Dep. DeWeese 58:1-25; 59:1-15; 64:16-25 & Ex. 19 *citing* KOHLS002207) As of December 2017, Ms. Heinen's District (D 60) was ranked 23 out of 80 Kohl's districts nationwide, and 5 out of 18 districts in Territory 3. (Kohl's 30(b)(6) Dep. - Henson 36:9-12; Henson Dep. 156:6-11 & Ex. 55)

12. Kohl's has produced no evidence that any of the District Managers whose quantifiable and objectively measurable performance ranked below Ms. Heinen's were fired.

13. October 2017 was also the first Talent Builder meeting *after* Ms. Heinen opposed Ms. Henson's (and later Mr. Riley's) stated desire to first target and then fire Mr. Brumbles and Ms. Heinen based her good faith opposition on the promise contained in the Kohl's Ethical Standards policy—a policy that Ms. Heinen was aware of and relied on when she opposed Ms. Henson and Mr. Riley's targeting of Mr. Brumbles. (Heinen Decl. ¶9)

III. ARGUMENT

A. Summary judgment is rarely granted in employment discrimination cases.

As a starting point, "[s]ummary judgment for an employer is seldom appropriate in employment discrimination cases because of the difficulty of proving discriminatory motivation." *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.*, 189 Wn.2d 516, 527–28 (2017). Furthermore, on summary judgment all reasonable inferences must be made in favor of the non-moving party. *Stout v. Warren*, 176 Wn.2d 263, 268 (2012).

B. Ms. Heinen creates triable issues of fact regarding her breach of promise claim.

Kohl's argues that Ms. Heinen's breach of promise claim fails because (1) Kohl's Ethical Standards Policy is a "generalized employment policy" that does not promise specific treatment in a specific situation and did not modify the "at will" relationship, (2) Ms. Heinen did not justifiably rely on the promise and (3) Ms. Heinen must prove a WLAD retaliation claim in order to prove a breach of promise claim. Kohl's arguments fail for the following reasons.

Regarding point (1), in making its argument, Kohl's relies on the 1984 *Thompson v. St. Regis Paper* Washington State Supreme Court case for the proposition that a breach of promise claim requires proof "(1) that a statement (or statements) in an employee manual or handbook or similar document amounts to a promise of specific treatment in specific situations, (2) that the employee justifiably relied on the promise, and (3) that the promise was breached." (Def. Mot. Summ. J. p. 7) However, Kohl's conveniently ignores the 2017 *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Ct.* Washington Supreme Court case which applied the above-referenced rule to a contract (like Kohl's Ethical Standards Policy), reversed the Division III Court of Appeals, and found that issues of fact existed as to the plaintiff's breach of contract claim. 189 Wn. 2d 516, 539–40 (2017). *Mikkelsen* held "whether an employment policy manual issued by an employer

contains a promise of specific treatment in specific situations, whether the employee justifiably relied on the promise, and whether the promise was breached are questions of *fact*." *Mikkelsen,* 189 Wn.2d at 540. *Mikkelsen* involved an employer policy containing a disclaimer that read, "[t]he rules set out here are intended only as guidelines, and do not give any employee a right to continued employment or any particular level of corrective action" but the *Mikkelsen* court nonetheless found "the policy could plausibly be read as constituting a promise for specific treatment that modifies Mikkelsen's at-will employment status." *Id.* at 543.

With *Mikkelsen* in mind, the evidence shows that Kohl's Ethical Standards and Responsibilities Policy creates a *promise* specific treatment in a specific situation, here the promise that a Kohl's Associate (read: Heinen) will *never be subject to retaliation* for reporting an ethical or legal concern:

> Individuals who report and ethical or legal concern in good faith will *never* be subject to retaliation. Any Associate responsible for retaliation against an individual who in good faith reports a known or suspected violation will be subject to disciplinary action, up to and including termination and possible legal action. Associates who knowingly submit false reports will also be subject to disciplinary action, up to and including termination. (Pankratz Decl. Ex. B *citing* Kohl's Ethical Standards and Responsibilities KOHKLS000310)(emphasis added)

It bears repeating: Kohl's Ethical Standards Policy states that it will **"never"** retaliate if an employee, in good faith, reports an ethical *or* legal concern, and that policy contains no "at-will" modification clause. Use the of the term **"never"** in an employment policy is similar to terms such as "shall", "will" and "must", indicating that Kohl's intended the provision to be mandatory and not advisory. *See Stewart v. Chevron Chem. Co.*, 111 Wn.2d 609, 613-14 (1988).

The Kohl's Ethical Standards policy goes on to state, in part: **Fair Treatment**

> Kohl's is firmly committed to the fair and equitable treatment of all its Associates and qualified applicants for employment. *Id.* KOHLS000311.

Tellingly, the Kohl's Ethical Standards policy contains ***NO*** "at will" type disclaimer. (Pankratz Decl. Ex. B *citing* Kohl's Ethical Standards and Responsibilities KOHKLS000308-325). Recognizing this, Kohl's tries to bootstrap an "[o]ur relationship is at-will and may be ended with or without cause" provision contained in the Kohl's Associate Handbook. (Pankratz Decl. Ex. A *citing* Exhibit 5 to Heinen's Deposition, KOHLS000168) The Court should ignore Kohl's slight of hand: Kohl's Ethical Standards Policy contains a promise of no retaliation for a good faith report of a legal or ethical concern and that policy, a stand-alone document Ms. Heinen was entrusted to uphold, undisputedly contains no "at-will" disclaimer.

Second, Kohl's presents no evidence that Ms. Heinen did not justifiably rely on the promise contained in the Kohl's Ethical Standards Policy. In fact, Ms. Heinen declares that she relied on that promise in opposing Ms. Henson and Mr. Riley's stated desire to fire Mr. Brumbles prior to her termination on January 5, 2018, and provides no evidence to contradict this evidence. (*See* Fact Section ¶13); *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 522 (1992).

Third, Ms. Heinen does not need to prove a WLAD retaliation claim in order to prove a breach of promise claim for one claim is a tort (WLAD retaliation) whereas the other claim (breach of contract) is contract-based. Indeed, *Mikkelsen* evaluated both WLAD gender and age discrimination claims along with a breach of promise claim and it did not hold (or even address) the issue of whether proof of a WLAD claim was required to prevail on a breach of promise claim. But more to the point, the Kohl's Ethical Standards policy does not limit itself to the reporting of "legal" violations but also protects Kohl's Associated who report "ethical" violations. *See supra.*

Accordingly, the Kohl's Ethical Standards policy's words undercut Kohl's argument that Heinen must prove her WLAD claim in order to prove her breach of promise claim. Lastly, Kohl's citation to *Anaya v. Graham* does not help. For that case involved dismissal of an outrage claim (read: not a breach of promise claim) because the WLAD claim duplicated the outrage claim as to the issue of damages.

Kohl's motion for summary judgment regarding the breach of promise claim fails.

C. Triable issues of fact exist as to Ms. Heinen's WFMLA claim for the simple reason that a plaintiff does not always need to establish temporal proximity to prevail on an employment discrimination claim.

Ms. Heinen brings WFMLA interference and retaliation claims. The WFMLA "mirrors its federal counterpart and provides that courts are to construe its provisions in a manner consistent with similar provisions of the FMLA." *Poe v. Waste Connections US, Inc.*, 371 F. Supp. 3d 901, 913 (W.D. Wn. 2019). And "In order to prevail on an FMLA claim, a plaintiff need only prove by a preponderance of the evidence that [their] taking of FMLA-protected leave constituted a negative factor in the decision to terminate [them]." *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1125 (9th Cir. 2001). A plaintiff "can prove this claim, as one might any ordinary statutory claim, by using either direct or circumstantial evidence." *Poe,* 371 F. Supp. 3d at 913. Kohl's argues that Ms. Heinen's WFMLA claim should be dismissed because Kohl's did not fire Ms. Heinen until 16 months after her return to work. (Kohl's Mot Summ. J. p. 13-14) Kohl's argument fails for a myriad of reasons, for the circumstantial evidence makes clear that Ms. Heinen's taking of WFMLA was a negative factor.

First, proximity in time[3] between the protected activity (medical leave) and adverse action (firing) is not the only means available to establish causation in an employment case. *Lindsey v. Clatskanie People's Util. Dist.*, 140 F. Supp. 3d 1077, 1088 (D. Or. 2015)("Timing is not sufficient in all cases; if the temporal proximity is not 'very close,' evidence other than timing is required to satisfy the causation element.); *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 448 (2014)(setting out numerous ways that illegal discrimination can be proven in an employment case). Illustrated somewhat differently, temporal proximity is *a type* of evidence, but not the *only* evidence one can use to prove a discrimination case. Kohl's argument is analogous to saying that the state, in a murder trial, can't prove its case unless the state possesses the gun used in the murder. Moreover, this "proximity in time trumps all" argument would allow a sophisticated employer (like Kohl's) to avoid liability by simply waiting a token period of time between the protected activity and retaliatory termination. If proximity in time becomes a requisite factor, a company faced with changing economic conditions could, when faced with a decision to fire employees, simply scan its records for employees who had a history of taking leave, use that leave taking factor as part of the firing process, and wait to apply that factor until years after the medical leave occurred. Indeed, courts recognize that employees can prove discrimination (of which WFMLA retaliation is a

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[3] As it relates to the issue of proximity in time, Ms. Heinen's termination date *does* suggest retaliation given the timescale of her career with Kohl's. Put differently, from 2009-2016, Kohl's found no issues with her performance and, in fact, advanced Ms Heinen with generous praise and bonuses. Only after the 2016 FMLA leave, does "poor leadership" emerge as pretext for ageism/ableism concerns. Moreover, proximity in time also exists, quite notably, between Ms. Henson's early discussion of retirement/termination and Ms. Heinen's successful appeal which awarded her the plaintiff disability compensation Kohl's had originally refused to pay (February 13, 2017). Equally concerning is the termination's blatant proximity to Ms. Heinen's resistance to the unethical treatment of Mr. Brumbles' disability accommodation (beginning April 30, 2017 and escalating thru December 2017).

species) through other circumstantial evidence such as (a) deviation from policies, (b) "proof that the defendant's explanation is unworthy of credence" and (c) the employer treating similarly situated workers differently. *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1117 (9th Cir. 2011)("A plaintiff may also raise a triable issue of pretext through evidence that an employer's deviation from established policy or practice worked to her disadvantage."); *Currier v. Northland Servs., Inc.*, 182 Wn.App. 733, 748 (2014)(explanation unworthy of credence is circumstantial evidence); *Billings v. Town of Steilacoom*, 408 P.3d 1123, 1136 (Wash. Ct. App. 2017)("The employee shows pretext if the proffered justifications have no basis in fact, are unreasonable grounds upon which to base the termination, or were not motivating factors in employment decisions for other similarly-situated employees.").[4]

Second, strong and substantial evidence exists showing that Ms. Heinen's taking of medical leave was a negative factor in Kohl's decision to fire her.

- ***Kohl's did not follow its progressive discipline policy*** regarding Ms. Heinen. Kohl's policy requires that an Associate (Heinen) be given written notice before his or her employment is terminated but that did not happen in this case. *See* Fact Section ¶5.
- ***Kohl's stated reasoning for firing Ms. Heinen (poor leadership) is unworthy of credence*** for the following reasons.

[4] There is no requirement that Ms. Heinen and Ms. Maksic and/or Mr. Schutte share the same supervisor or do the same job because it is "important not to lose sight of the common-sense aspect of the similarly situated inquiry [as it] is not an unyielding, inflexible requirement that requires near one-to-one mapping between employees because one can always find distinctions in performance histories or the nature of the alleged transgressions." *Earl,* 658 F.3d at 1114–15.

- Ms. Henson claims Ms. Heinen was a poor leader but gave Ms. Heinen a positive leadership certificate in either 2016 or 2017 and lauded Ms. Heinen's leadership on Ms. Heinen's 2016 performance review. Facts ¶7. Ms. Heinen received a $30,000 leadership retention incentive and received positive leadership accolades from co-workers and supervisors. Facts ¶7.
- Ms. Heinen's replacement, Ms. Appleyard who never took medical leave, yelled at Mr. Brumbles (Heinen did not), yelled at Mr. Brumbles in front of his peers (Heinen did not), and yelled in a manner that interferes with a "brain break" accommodation that Mr. Brumbles had regarding a head injury disability (Heinen did not). Facts ¶7. The reasonable inference being, if Kohl's is so concerned about District Manager "leadership" then why hasn't Kohl's fired (or even disciplined) Ms. Appleyard for her disparaging treatment of Mr. Brumbles? Answer: Appleyard is young and has no history of taking medical leave which makes her a cheaper employee for Kohl's as opposed to an aging Heinen who does (at least once) apply for leave.

- ***Kohl's use of subjective criteria upon which it bases an employment decision (e.g. leadership) is also probative of pretext.*** In analogous cases courts have found that subjective job criteria—including, unquestionably, an employee's subjectively described leadership quality—"present potential for serious abuse and should be viewed with much skepticism. Use of subjective job criteria … provides a convenient pretext for discriminatory practices. Subjective criteria may easily be asserted as the reason for an adverse employment decision when, in fact, the reason

was discriminatory" especially when Ms. Heinen's performance as District Manager was evaluated by objective criteria.[5] *See Nanty v. Barrows Co.*, 660 F.2d 1327, 1334 (9th Cir. 1981) *overruled on other grounds by O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756 (9th Cir. 1996).

- ***Kohl's did not fire similarly situated employees who broke company rules, were found liable—to the tune of $2 million dollars—for discrimination, or whose performance ranked worse than that of Ms. Heinen's.*** Danielle Maksic worked with Ms. Heinen, was found to have violated Kohl's workplace rules, but was not fired. Facts ¶9. Ms. Heinen was the one who reported Ms. Maksic for violating workplace rules only to have Ms. Henson use Ms. Henein's alleged inability to get along with Ms. Maksic as an example of Ms. Heinen's "poor leadership." Facts ¶9. Kohl's District Manager William Schutte had a $2.1 million harassment jury verdict rendered against him, Ms. DeWeese was aware of Mr. Schutte and the verdict (after all Ms. DeWeese signed a declaration on Kohl's behalf in another case involving Mr. Schutte), claimed that one of HR's jobs is to be "fair and consistent" but she could not answer the question of whether allowing Mr. Schutte to retire but firing Ms. Heinen was "fair and consistent." Facts ¶9. Additionally, as of the October 2017 talent builder meeting, Ms. Heinen's district was the most profitable of all the districts that fell under Ms. Henson's command. Facts ¶11. As

[5] The objective criteria upon which Kohl's evaluates District Managers set out on KOHLS002207 and KOHLS001815. (See Crotty Decl Ex. B *citing* Henson Dep. Ex. 55; Crotty Decl Ex D *citing* 30(B)(6) DeWeese Dep. Ex. 19)

of December 2017, Ms. Heinen's District (D 60) was ranked #23 out of 80 Kohl's districts, and #5 out of 18 districts in Territory 3. Facts ¶11. However, Ms. Heinen was the only District Manager that Ms. Henson supervised during 2015, 2016, and 2017 who took more than 15 days FMLA leave. Kohl's further admits that, "[t]here are no district managers, other than Linda Heinen, who reported to Renee Henson, who took more than two weeks of FMLA-approved leave in 2017 and whose performance was assessed at the October 27th Talent Builder meeting." Facts ¶11. Taken together the inference is that Kohl's fired Ms. Heinen even though her performance was objectively better than *all* of the District Managers in Region 10 regarding profitability and objectively better than 75% of all Kohl's District Managers nationwide—the only difference being that Ms. Heinen had a history of taking extended medical leave whereas other District Managers whose performance was worse than that of Ms. Heinen's did not.

Third, that Mr. Riley allegedly did not know of Ms. Heinen's medical leave absence is not dispositive as Ms. Henson undisputedly knew about the leave, and it was Ms. Henson who initially recommended that Ms. Heinen's employment be terminated. Further, Ms. DeWeese and Mr. Riley spoke about Ms. Heinen in August 2016 when Ms. DeWeese first joined Mr. Riley's team, and, as part of that conversation had a "kind of get to know the market…understand the district managers" type chat. Facts ¶2. When Ms. DeWeese first joined Mr. Riley's team, she (DeWeese) also learned "Linda was on an LOA", i.e. medical leave of absence. Facts ¶2. And while Ms. DeWeese cannot recall the specifics of that August 2016 conversation a reasonable inference is that Ms. Heinen's medical leave was discussed in August 2016 because that is the same month that Ms. Heinen took

medical leave. Indeed, Ms. DeWeese did discuss, with Ms. Heinen and Ms. Henson, Ms. Heinen's leave of absence. Facts ¶2. Further, the financial effects of Ms. Heinen's leave taking did not end in September 2016; they continued on until mid-February 2017 with Ms. Heinen appealing Kohl's denial of her application for disability compensation and, then—within two months of her successful appeal and within days of the April Talent Builder where her name came up—Ms. Heinen is asked by Ms Henson when was she "going to retire?" Taken together, the reasonable inference is that Kohl's management learned of Ms. Heinen's FMLA and subsequent appeal of the benefit denial, discussed that in the April 2017 talent builder meeting, had Ms. Henson ask Ms. Heinen when she was going to retire shortly thereafter, and when Ms. Heinen did not give an answer to Kohl's liking, the company began manufacturing its baseless "poor leadership" justification to terminate Ms. Heinen's career in a timeline amenable to Kohl's.

IV. CONCLUSION

Defendant's Motion for Summary Judgment should be denied.

DATED this February 5th 2020.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies on the date below written, I caused a true and correct copy of the foregoing document to be served on the following attorney, via the method indicated:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this declaration was executed on 2/5/2020, at Spokane, Washington.

Matthew Z. Crotty