United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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Lyle W. Cayce
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No. 19-51100

ABEL CAMPOS,

Plaintiff—Appellant,

versus

STEVES & SONS, INCORPORATED,

Defendant—Appellee.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:18-CV-357

Before BARKSDALE, SOUTHWICK, and GRAVES, *Circuit Judges*.

LESLIE H. SOUTHWICK, *Circuit Judge*:

An employee seeks review of the district court's grant of summary judgment in favor of his employer on his state-law disability-discrimination and retaliation claims and his claims for retaliation and interference under the Family Medical Leave Act ("FMLA"). We REVERSE the judgment as to FMLA retaliation but AFFIRM in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

At the summary-judgment stage, the district court must view the evidence in the light favorable to the party opposing judgment. *Tolan v. Cotton*, 572 U.S. 650, 656–57 (2014). Consequently, we will view the events in this case through the nonmovant employee's relevant evidence, even if disputed, and the employer's undisputed evidence. We will identify some of the disputes as well.

Steves & Sons, Inc. manufactures wooden residential doors. The company hired Abel Campos as a welder in 2008. Later, Campos was promoted to a role requiring the maintenance and cleaning of the glue spreaders that are an integral part of the company's manufacturing process. This position required less welding but more physically demanding activities. Campos stated that his work with glue spreaders required standing, walking, sitting, and lifting objects up to 45 to 50 pounds. An engineer from Steves & Sons detailed that the glue-spreader-maintenance role required "the ability to squat and bend, climb stairs and ladders, walk throughout the plants, sit and stand for extended periods of time, . . . operate complex equipment and machinery," and regularly "lift heavy objects." While employed in this role in 2015, Campos learned that he needed open-heart surgery.

According to Campos, after he discussed his need for surgery with his supervisor, he was referred to the company's human-resources department. What occurred in his meeting with human resources is less clear. Campos stated that human resources provided FMLA paperwork, which his doctor filled out and Campos personally delivered to the company. The company's representative, though, stated that she was unaware of Campos's impending heart surgery until after he had undergone the surgery. Steves & Sons' human-resources representative maintained that she never received any FMLA paperwork from Campos.

Campos's last day at work was July 20, 2015, and his surgery took place a few weeks later on August 5. Campos experienced complications from the surgery, leaving him comatose and in critical condition for several weeks thereafter. Before he was released from the hospital, Campos received text messages from his supervisor that made him question his employment status. After receiving these messages, Campos confirmed with human resources that he still had a job. Thus, Campos understood he was still employed "as long as [he brought] in [his] release forms." Six weeks post-surgery, Campos left the hospital. He was not, however, able to return to work at that time.

On October 27, Campos returned to Steves & Sons with what he thought was an adequate release to return to work. This form-style document was signed by a licensed vocational nurse ("LVN"), not by his physician. The option on the document that the LVN had marked would apply was: "May return to work/school, no restrictions." No one at Steves & Sons suggested that the document was insufficient. There is disagreement as to whether Steves & Sons offered Campos an alternate position that Campos then rejected or instead simply terminated Campos's employment. Under either scenario, the company officially ended Campos's employment on November 30, 2015.

Following his termination, Campos filed for Social Security Disability benefits in December 2015. In March 2016, Campos filed a charge with the Equal Employment Opportunity Commission ("EEOC"), claiming discrimination based on disability and retaliation. He then filed suit in state court in November 2016. After Campos amended his complaint to include federal FMLA-related claims, Steves & Sons removed the case in April 2018 to the United States District Court for the Western District of Texas.

Steves & Sons eventually moved for summary judgment. When the district court granted the motion, it also granted the company's motion to strike several pieces of evidence that Campos used to support his response to the summary-judgment motion. Important for this appeal, the district court ruled that the release-to-work document completed by an LVN was inadmissible hearsay and unauthenticated. The district court further held that, even if considered, the LVN document "would not change the outcome as a matter of law."

Without the release to return to work, the district court found that Campos was not qualified to return to work. Not only could Campos not "establish that he was qualified at the time of his termination," but the district court also held that he "failed to show that a reasonable accommodation of his disability would have enabled him to perform the essential functions of his job." It thus concluded that Campos failed to show a *prima facie* case of discrimination. It also determined that even if Campos proved his *prima facie* case, Steves & Sons provided legitimate, nondiscriminatory reasons for the employment termination, which Campos failed to refute with substantial evidence of pretext or with evidence that his disability was a motivating factor.

Campos's failure-to-accommodate claim similarly failed for his inability to prove that he was a "qualified individual." There was evidence that Campos, upon presenting the release-to-work document, requested an accommodation that would allow him to attend dialysis treatment a few days per week. The district court found that this request was related to the glue-spreader position that had been filled during Campos's FMLA leave. This meant to the court that "[t]here [was] no indication in the record that Plaintiff requested, and Defendant rejected, a modified schedule with respect to the alternative position."

The FMLA retaliation and interference claims faced a similar fate. As to retaliation, the district court concluded that Campos demonstrated a *prima facie* case, which shifted the burden to Steves & Sons to present legitimate, nonretaliatory reasons for the termination. The district court concluded that "[f]or the same reasons as under the [Americans with Disabilities Act ("ADA")], the [c]ourt finds these to be sufficiently legitimate, non-retaliatory reasons." The court found no evidence of pretext or that Campos's use of FMLA was a motivating factor. Finally, the district court granted summary judgment on the interference claim. The court explained that because Campos received the maximum amount of FMLA leave before his termination, he could not show prejudice for any possible interference. Campos appealed.

DISCUSSION

We review a grant of summary judgment *de novo*. *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 386 (5th Cir. 2007). Such a judgment is proper only if "there is no genuine dispute as to any material fact." FED. R. CIV. P. 56(a). "We may affirm a summary judgment on any ground supported by the record, even if it is different from that relied on by the district court." *Holtzclaw v. DSC Commc'ns Corp.*, 255 F.3d 254, 258 (5th Cir. 2001).

Campos claims that Steves & Sons' actions were discriminatory and retaliatory in violation of the Texas Labor Code and, in the amended complaint, in violation of the FMLA. Though the district court read in ADA claims, these claims are not part of the complaint itself. Instead, the ADA is used to interpret the state-law disability-discrimination claims. Thus, the only claims before this court are (1) discrimination under Texas law,

(2) retaliation under Texas law, (3) interference with FMLA rights, and (4) retaliation under the FMLA.[1]

I. State-law claims

Campos brought two distinct state-law claims under Chapter 21 of the Texas Labor Code. We discuss them separately.

A. Chapter 21 disability discrimination

Texas law prohibits employers from discriminating against their employees based on disability. TEX. LAB. CODE § 21.051(1). Because the Texas statute parallels the ADA, we treat such claims similarly. *Pegram v. Honeywell, Inc.*, 361 F.3d 272, 285 & n.13 (5th Cir. 2004). Despite the similarity, pleading a related claim under Texas law does not mean that an equivalent ADA claim is actually raised. We conclude there is no ADA claim here.

A plaintiff can prove discrimination through direct or circumstantial evidence. *EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 694 (5th Cir. 2014). When circumstantial evidence is the basis for the claim, the *McDonnell Douglas* burden-shifting framework applies. *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). First, the employee has the burden to prove the *prima facie* elements: "(1) that he has a disability; (2) that he was qualified for the job; [and] (3) that he was subject to an adverse employment decision on account of his disability." *Moss v. Harris Cnty. Constable Precinct One*, 851 F.3d 413, 417 (5th Cir. 2017) (alteration in original). If the employee demonstrates the *prima facie* elements, the burden shifts to the employer to present legitimate, nondiscriminatory reasons for the adverse action. *LHC*

[1] The grant of summary judgment on Campos's failure-to-accommodate claim has not been challenged on appeal.

Grp., 773 F.3d at 694. If the employer submits such reasons, the burden shifts back to the employee to show that those reasons are pretextual. *Id.*

The standard of causation for reviewing pretext is less stringent under Texas state law than under federal law. *See Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473, 477, 479–80 (Tex. 2001). Though a "but for" standard would apply under federal statutes, the Texas framework applies a "motivating factor" standard in all state unlawful-employment-practice claims under Section 21.125 of the Texas Labor Code. *Id.* at 480. Because Section 21.125 includes disability discrimination, the motivating-factor test is applicable here. *See* TEX. LAB. CODE § 21.125(a).

We now examine whether Campos has proven the *prima facie* elements of disability discrimination. The district court determined that it was undisputed that Campos was disabled and suffered the adverse employment action of having his employment terminated. Without evaluating the accuracy of the district court's conclusion as to Campos's disability status, we focus our attention on whether Campos was qualified for the job. Qualified means that at the time of his discharge, "either (1) [he] could perform the essential functions of the job in spite of [his] disability," or "(2) that a reasonable accommodation of [his] disability would have enabled [him] to perform the essential functions of the job." *Moss*, 851 F.3d at 417 (alterations in original) (quoting *LHC Grp.*, 773 F.3d at 697).

Campos argues that the release signed by an LVN that asserted he could return to work without restrictions creates a genuine dispute of material fact as to whether he was qualified. We emphasize that as to the *prima facie* case, the question is whether there is some evidence that Campos was actually qualified to return to work. We will later discuss how the LVN document is relevant on a different issue.

Campos argues the disputes are whether the document itself was sufficient and whether it supersedes any subsequent medical statement that he was not qualified. In essence, Campos asserts that instead of reviewing other documentation from after his November 30 termination, the district court "should have focused on [his] medical records forming the basis of his request for FMLA leave and the medical release from University Health System that said, 'May return to work/school, no restrictions.'"

This key medical-release document was the subject of a motion to strike filed by Steves & Sons. The district court struck the release because it was unauthenticated and hearsay. Of course, defects in the form of evidence submitted for purposes of summary judgment may not require rejection at that time. "Although the substance or content of the evidence submitted to support or dispute a fact on summary judgment must be admissible . . . , the material may be presented in a form that would not, in itself, be admissible at trial." *Lee v. Offshore Logistical & Transp., L.L.C.*, 859 F.3d 353, 355 (5th Cir. 2017) (alteration in original) (quoting 11 MOORE'S FEDERAL PRACTICE–CIVIL ¶ 56.91 (2017)).

Nonetheless, there is a precondition for considering evidence in an improper form during summary judgment, namely, that the "the party submitting the evidence [must] show that it will be possible to put the information . . . into an admissible form." *Id.* (quotation marks and citations omitted). We examine the opportunities Campos had to establish the admissibility of the LVN document. Campos filed his response to the motion for summary judgment, and soon after, Steves & Sons filed a motion to strike the LVN document and other evidence. The motion to strike included the argument that the return-to-work document was unauthenticated and hearsay.

Campos timely responded to this motion to strike. Campos made three points about the LVN document: (1) it was a medical diagnosis that was admissible under Federal Rule of Evidence 803(4); (2) it was admissible pursuant to Rule 801(d)(2)(D) because it was adopted by the company; and (3) it was admissible because it was not offered for the truth of the matter asserted, only that the company received and accepted the document. Campos made no effort to support authenticity in that response or at any time prior to the court's granting the motion to strike in the summary-judgment order. In striking the LVN document, the district court explained the rejection of each of Campos's arguments concerning hearsay. The court then remarked on Campos's silence as to authenticity: "Plaintiff does not make any attempt at authentication or even recall having met a Denise Sanchez," who was the LVN who signed the document the day Campos provided it to the company's human-resources representative. Though we acknowledge that the severity of Campos's condition at points of his hospitalization may have impacted his ability to recall certain medical professionals who cared for him, the LVN document was signed by a single nurse at a point in time that Campos argues he was fully released to return to work.

Authentication is not an onerous requirement. "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." FED. R. EVID. 901(a). Rule 901(b) gives 10 examples of methods of authentication. None of those, nor any other approach, was utilized here. Indeed, the district court's observation that Campos was unfamiliar with the person who signed the document suggests the importance of authentication in this case.

Once the question of authentication was raised, Campos was on notice of the need to answer it, if possible. Neither in his initial response to the

motion to strike nor by filing a motion for reconsideration of the district court's order did Campos endeavor to authenticate that return-to-work document. We conclude that Campos never explained how the evidence he provided would "be . . . put . . . into an admissible form." *Lee*, 859 F.3d at 355 (quotation marks and citations omitted). It is not for this court to speculate how Campos should have authenticated the document or how Campos may have been able to admit the evidence contained in the inadmissible document at trial. He made no viable arguments to the district court as to the admissibility of the document or its contents, and he never explained how he would put the otherwise inadmissible evidence into an admissible form for trial.

Even more, in his briefing here, Campos does not argue that the district court improperly excluded the release to return to work. He simply explains that the excluded document proves that he was qualified. "We have held that failure to provide any legal or factual analysis of an issue on appeal waives that issue." *Douglas W. ex rel. Jason D.W. v. Hous. Indep. Sch. Dist.*, 158 F.3d 205, 210 n.4 (5th Cir. 1998). Here, by failing to brief the issue of the district court's decision to exclude the release to return to work, Campos has waived the issue.

Without the return-to-work document, Campos's arguments are unavailing. There simply is no medical evidence in the record except for Campos's own statements that he was qualified to return to work at any point, let alone before his FMLA leave expired. The questions of whether an LVN was a proper person to sign the return-to-work document and whether Steves & Sons accepted the document as a full release are not before us on this issue.

We now turn to the question of qualification. Two employment positions are relevant in our review of whether he was qualified to return to

work: (1) the glue-spreader role that he held prior to his surgery and (2) the steel-line job that the chief engineer at Steves & Sons offered Campos when he returned. The chief engineer described the steel-line job as better than Campos's previous role. He stated that the steel-line job was one "of equal pay and better status, better conditions, more friendly to [Campos] and his condition, and . . . a better job for advancement." Campos must show that he was qualified for at least one of those positions.

The company argued to the district court that "Campos lacks any evidence showing he was physically capable of performing all essential job functions of the Welder-Mechanic or Steel Line positions, with or without any reasonable accommodation, at the time of his separation from employment." Steves & Sons coupled that argument with the contentions that the release was unauthenticated and hearsay and that the signature of an LVN rather than a doctor prevented the document from establishing Campos's qualification for the roles.

Here, Steves & Sons' briefing of the steel-line position often argues that the steel-line job was "contingent" on a valid release to return to work, which it contends that Campos never provided. Steves & Sons also takes the position, though, that "the record presented to the district court was . . . devoid of any documentation or other admissible evidence showing that, at any time since his August 5, 2015 surgery, any physician has ever certified Campos' ability to perform the essential functions of his previous Welder-Mechanic position or the proposed steel-line position, with or without any reasonable accommodation." We do not resolve the argument that the release Campos presented was not in compliance with Steves & Sons' policy, in part because we have already decided that the district court properly granted the company's motion to strike that document. Instead, for the reasons we will explain, we conclude that Campos has not established that he was qualified for either position.

Before we review the evidence in the record on qualification, though, we find clarification on one point of the burden-shifting framework necessary. Whether Campos was qualified for either position is a separate question from whether his discharge was pretextual. *See, e.g.*, *LHC Grp.*, 773 F.3d at 694, 697. Qualification focuses on what Campos was physically capable of doing, while pretext seeks to confront the believability of Steves & Sons' stated reasons for the adverse employment action. We must determine whether Campos presented evidence that he could do the job at Steves & Sons with or without reasonable accommodations *before* we look at whether any of the reasons Steves & Sons provided were pretextual.

Campos's own testimony that he was qualified to return to work does not suffice. *See Burch v. City of Nacogdoches*, 174 F.3d 615, 622 (5th Cir. 1999). In *Burch*, the employee presented "self-serving testimony that he could have performed light-duty jobs from a physical standpoint." *Id.* When there is no medical release for returning to work, an employee's own assertions do not suffice "to rebut the [employer's] contentions that it did not discriminate against him." *Id.* Campos has no admissible release-to-work document and presents only his own testimony that he was physically capable of returning to work on October 27, 2015, or any time thereafter.

In addition to a lack of relevant evidence that he was qualified to return to work, Campos also made statements to the Social Security Administration just weeks after his termination that further undermine his testimony as to being qualified. Steves & Sons asserts that Campos should be judicially estopped from pursuing his claims based on these statements. That is a step beyond what our precedent allows. Because Campos did not receive disability benefits, judicial estoppel is inappropriate, but any contradictory assertions can properly "provide the basis for summary judgment if they

undermine the factual assertions necessary to" prove that the employee was qualified. *Giles v. Gen. Elec. Co.*, 245 F.3d 474, 484 (5th Cir. 2001).[2]

Between December 2015 and January 2016, Campos, with his daughter's help filling out the form, presented the following to the Social Security Administration:

> The severity of my injuries has prevented me from working most recently due to numerous complications since waking up from the coma. I experience total numbness in my arms, hands, back [and] feet. Along with tingling [and] numbness in my neck. Caused by a plate holding a few of my discs from being crushed. My motor skills have been greatly affected as well. Walking or sitting seems to be a task now. Or just causes major discomfort [and] pain in my hips [and] knees.

He also stated that he "cannot bend over to put pants on due to back" pain and that he "use[s] a chair to sit down while showering." He said, "I can no longer weld due to my injuries." When indicating the impact his illnesses had on daily activities, he asserted that his lifting, squatting, bending, standing, reaching, walking, kneeling, stair climbing, completing tasks, concentration, and the use of hands, had all been impacted "since waking up from [his] coma."

These statements undermine Campos's current assertions unless he adequately explains the inconsistencies. Such contradictory statements may coexist without conflict when an employee "contends that a reasonable

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[2] In *Giles*, the employee filed for disability prior to his employment termination. *Id.* at 480. Campos filed for disability approximately two weeks after he was terminated from his employment with Steves & Sons. Though the timing is different than in *Giles*, statements made so close in time to his termination are relevant for evaluating Campos's testimony as to his fitness to return to work, and they require adequate explanation when contradictions arise. *See also Reed v. Petroleum Helicopters, Inc.*, 218 F.3d 477, 480 (5th Cir. 2000).

accommodation would enable him to work at his old position, despite those impairments" that he admitted did exist. *See id.* at 485. Campos asserts that he has testified sufficiently to show that he "could perform [his] job[] with reasonable accommodation" and has satisfactorily explained any contradiction between his discrimination claim and his social-security application. There is no evidence, though, that Campos sought a reasonable accommodation that would allow him to fulfill the physical components of his job. He also does not explain how such a reasonable accommodation would have allowed him to perform the essential functions of his job given his limited physical abilities at that time. The only request for an accommodation Campos made was for a modified schedule to allow him to attend dialysis. Thus, Campos has not adequately explained away the contradictory statements he made in his application for social-security benefits.

We conclude that Campos fails to show he was qualified for either role. The glue-spreader position, which was the more physically strenuous of the two positions, exceeded Campos's physical abilities. We reiterate that the only stated accommodation Campos sought was time to attend dialysis treatment. He also fails to show that he was qualified for the steel-line role. The steel-line role was admittedly less strenuous than the glue-spreader role, as there would be "no bending and stooping and lifting [of] heavy objects." A stool would be available if Campos needed to sit occasionally. Despite this, the position still required that Campos "regularly lift and carry materials, squat and bend, climb stairs and ladders, walk throughout the plant, sit and stand for extended periods of time, concentrate on important tasks at hand, and operate heavy and complex equipment and machinery." We conclude that Campos has not shown that he was physically capable of performing the duties of the steel-line job either.

With no other request for accommodations outside of the ability to attend dialysis treatments nor any reasonable explanation to account for the contradictory statements about his physical capabilities made in the application for social security benefits, the district court properly granted summary judgment on Campos's disability discrimination claim under Chapter 21.

B. Chapter 21 retaliation

A claim of retaliation under Chapter 21 requires the plaintiff to prove: (1) "that he is engaged in a protected activity;" (2) "that an adverse employment action occurred;" and (3) "that a causal link existed between the protected activity and the adverse action." *Pineda v. UPS, Inc.*, 360 F.3d 483, 487 (5th Cir. 2004). The *McDonnell Douglas* burden-shifting framework applies. *See id.*

The Texas statute provides protection for an employee who "(1) opposes a discriminatory practice; (2) makes or files a charge; (3) files a complaint; or (4) testifies, assists, or participates in any manner in an investigation, proceeding, or hearing." TEX. LAB. CODE § 21.055. Steves & Sons asserts that the first protected activity under the Texas Labor Code occurred when Campos filed a charge of discrimination, which happened after his employment termination. This characterization appears to be correct, but the district court held that the Chapter 21 retaliation claim failed under the pretext and motivating-factor stage of the analysis.

We interpret Campos's claim to be that Steves & Sons retaliated for his taking FMLA leave and not for anything else he did. There is no authority that taking FMLA leave is a protected activity under this Texas statute.[3]

[3] Though not binding authority, other courts have concluded that Texas's statutes do not support this argument. *See, e.g.*, *Spinks v. Trugreen Landcare, L.L.C.*, 322 F. Supp.

"When [a federal court is] required to make an *Erie* guess, it is not our role to create or modify state law, rather only to predict it." *Lawrence v. Va. Ins. Reciprocal*, 979 F.2d 1053, 1055 (5th Cir. 1992). We conclude that the Texas Supreme Court would hold that retaliation under Chapter 21 does not occur, even if an employer adversely responds to an employee's filing an FMLA claim. Therefore, any genuine disputes of material fact on whether this employer did retaliate for that reason are irrelevant.

This court may affirm for any reason supported by the record. *See Holtzclaw*, 255 F.3d at 258. We use that authority to affirm the district court's dismissal of the state-law retaliation claim. Campos failed to support that he engaged in any protected activity under state law that led to retaliation by Steves & Sons.

II. FMLA claims

The FMLA generally provides for up to 12 weeks of leave in any 12-month period due to a serious health condition. 29 U.S.C. § 2612(a)(1)(D). Companies who employ 50 or more individuals within a 75-mile radius are subject to the FMLA's requirements. § 2611(2)(B)(ii). Steves & Sons makes no argument that it is not subject to the FMLA. Further, the employee requesting FMLA leave must have worked 1,250 hours with that employer during the previous 12-month period. § 2611(2)(A)(ii). Again, Steves & Sons

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2d 784, 796 (S.D. Tex. 2004) ("Even if the Court accepts that Ms. Spinks requested time off, that action alone does not constitute a protected activity. Engaging in a protected activity requires complaining of some sort of discrimination that is covered by the TCHRA."); *Galvan v. Spirit Truck Lines, Inc.*, No. 13-15-350-CV, 2016 WL 1274731, at *4 (Tex. App.—Corpus Christi–Edinburg Mar. 31, 2016, no pet.) ("Galvan does not explain how taking leave under the FMLA is opposing a discriminatory practice, making or [filing] a charge or complaint, or participating in an investigation, proceeding or hearing, and we have found no authority to support his argument.").

does not dispute that Campos satisfied this requirement. It is under this framework that we evaluate Campos's two remaining claims.

The FMLA creates two types of protections — entitlement rights (sometimes also called prescriptive rights) and proscriptive rights. *Mauder v. Metro. Transit Auth.*, 446 F.3d 574, 580 (5th Cir. 2006). Because Campos brings a claim under both, we later describe each right.

A. FMLA interference

Under the FMLA, any "eligible employee of a covered employer has the right to take unpaid leave for a period of up to 12 workweeks in any 12–month period when the employee has 'a serious health condition that makes [him or her] unable to perform the functions of [his or her] position.'" *Bocalbos v. Nat'l W. Life Ins. Co.*, 162 F.3d 379, 383 (5th Cir. 1998) (alterations in original) (quoting 29 U.S.C. § 2612(a)(1)(D)). Because Campos claims that Steves & Sons interfered with his FMLA rights, this claim falls under the entitlement provision.

A *prima facie* case of FMLA interference requires an employee to show that "(1) he was an eligible employee; (2) his employer was subject to FMLA requirements; (3) he was entitled to leave; (4) he gave proper notice of his intention to take FMLA leave; and (5) his employer denied him the benefits to which he was entitled under the FMLA." *Caldwell v. KHOU-TV*, 850 F.3d 237, 245 (5th Cir. 2017). The employee also must show that the violation prejudiced him. *Acker v. Gen. Motors, L.L.C.*, 853 F.3d 784, 788 (5th Cir. 2017).

The district court dismissed Campos's FMLA interference claim because he failed to show prejudice. This rationale originated in a Supreme Court holding that a violation of an FMLA regulation does not alone entitle the plaintiff to relief. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 90 (2002). We are to "conduct[] a case-by-case examination of whether a

plaintiff has been prejudiced by noncompliance with a regulation." *Downey v. Strain*, 510 F.3d 534, 541 (5th Cir. 2007). Campos relies on regulatory requirements that an employer must give employees certain documentation under the FMLA. Campos argues that the company's failure to give him the necessary documentation and the company's termination of Campos's employment while he was on FMLA leave were interferences.

First, he argues that the lack of proper documentation, such as the failure to provide the Designation Notice, created a *per se* violation. The lack of a Designation Notice can be interference if the employee can prove prejudice. *See id.* at 545. In *Downey*, the employee explained that had the company provided the proper notice, "she would have been able to postpone her surgery to another FMLA period[,] . . . allow[ing] her to exercise fully her right to take twelve weeks of protected leave each year under the FMLA, and her position in the crime lab would not have been jeopardized." *Id.* at 541. Here, though, Campos makes no assertion that the lack of documentation prejudiced him in any substantive way. Essentially, Campos's position is that he was prejudiced by the lack of an FMLA Designation Notice (and other statutory requirements) "because it proximately caused a confusing and indecipherable FMLA leave period, while also not setting forth the necessary requirement for Mr. Campos to return to work." Campos states that his FMLA time began on August 5, 2015, the date of his surgery. He does not present evidence that he would have altered his leave time, as he had not even presented the questionable return-to-work document prior to October 27. Without the return-to-work document, Campos cannot show that before his full 12 weeks of leave expired, he could have returned to work.

Second, Campos argues that the text-message conversation with his supervisor constitutes interference. This argument is untenable because Campos admits that the company immediately clarified that his position was preserved. Given the undisputed evidence that Steves & Sons assured

Campos of his employment immediately after the text conversation with his supervisor, no FMLA interference occurred.

The district court was correct in concluding that Campos did not show the prejudice necessary to prevail on an FMLA interference claim.

B. FMLA retaliation

The FMLA prohibits retaliation against those who exercise their FMLA rights. *Mauder*, 446 F.3d at 580. This is a proscriptive feature of the Act, *i.e.*, its focus is on what an employer may not do. *Id.* A *prima facie* showing of FMLA retaliation requires that a plaintiff show: (1) "he was protected under the FMLA;" (2) "he suffered an adverse employment action;" and (3) "he was treated less favorably than an employee who had not requested leave under the FMLA or the adverse decision was made because he sought protection under the FMLA." *Id.* at 583 (citing *Hunt v. Rapides Healthcare Sys.*, 277 F.3d 757, 768 (5th Cir. 2001)). This final element requires proof of a causal link. *Acker*, 853 F.3d at 790. The burden-shifting framework already described applies to FMLA retaliation as well. *Caldwell*, 850 F.3d at 245.

The district court concluded that the *prima facie* case was satisfied. Campos qualified for FMLA leave, which Steves & Sons admitted by putting Campos on FMLA leave during his hospitalization; Campos suffered an adverse employment action when the company terminated his employment on November 30; and there is the degree of temporal proximity that has been found to support a causal connection for purposes of a *prima facie* case. Here, the adverse employment action occurred approximately one month after Campos's FMLA leave expired, and we conclude that a month is close enough in time to create a causal connection. *See Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273–74 (2001) (holding that temporal connection must be "very close"); *see also Richard v. Cingular Wireless LLC*, 233 F.

App'x 334, 338 (5th Cir. 2007) (allowing two-and-a-half months to establish causation in a Title VII retaliation claim, a conclusion with which we agree). Thus, the burden shifts to Steves & Sons to offer legitimate, nonretaliatory reasons for the adverse action.

Steves & Sons presented the following to the district court as the reasons for terminating Campos's employment: (1) the lack of a compliant release to return-to-work document; (2) the expiration of Campos's FMLA leave a month prior to the employment termination; and (3) Campos's refusal to accept an alternative position. The district court found these to be legitimate and nonretaliatory. We examine each of these reasons.

The first reason causes us to revisit, briefly, the return-to-work document. Steves & Sons argues that this document did not conform with company policy and was not adequate to allow Campos to return to work. We already sustained the district court's decision to exclude that document from consideration on the issue of whether Campos was qualified to return to work because Campos has not challenged that ruling on appeal. The question as to retaliation, though, is not whether Campos was qualified to return to work. Instead, there needs to be evidence that Steves & Sons initially accepted this document as satisfying Campos's obligation to demonstrate he could return to work. As we will explain, the document itself need not be in evidence at this stage in the proceedings in light of other evidence that is.

The other evidence is deposition testimony. Campos testified that he gave the LVN note to Steves & Sons' human-resources representative, Susie Santana. Santana in her deposition acknowledged receiving the document, stated she may have been concerned about the lack of doctor's signature, but testified she neither contacted the LVN who signed the document nor told Campos that company policy required his doctor's signature. The "higher-

up" to whom Santana passed along the release-to-work document also indicated a concern with the signature but failed to recall ever asking Campos to provide a "compliant" note. Thus, without deciding what exactly Steves & Sons' policy requires, the testimony indicates that Campos provided a document, which Steves & Sons did not question prior to his termination. For purposes of summary judgment, Campos has provided evidence to rebut the first nonretaliatory reason Steves & Sons offered.

The second reason offered by Steves & Sons was that Campos was allowed all of his FMLA leave. Campos argues that the company cannot "conclusively establish that he 'exhausted his FMLA leave'" without the presence of an FMLA Designation Notice. The company did not complete an FMLA Designation Notice. For purposes of its motion for summary judgment, it simply accepted that Campos's leave began on August 5 and ended on October 28, 2015, the later of the possible dates presented in the record. Unlike in the discrimination context, we need not determine whether Campos was qualified for the position when he returned to work on October 27 with the release-to-work form. For the retaliation claim, we conclude that because Campos provided a form that the company accepted, a fact question exists as to the veracity of Steves & Sons' offered reason that he had exhausted FMLA leave.

Other evidence further undermines the conclusiveness of the fact that he exhausted his leave for the year on the overall question of whether he was being terminated for excessive use of FMLA leave. Campos offered audio recordings of meetings in which the chief engineer referred to Campos's "massive" FMLA leave and made statements about Campos "far exceed[ing] the FMLA thing." That engineer also discussed the unfortunate "turn[]" Campos's life had taken as a result of his open-heart surgery. Despite concluding that Campos did not show pretext, the district court did acknowledge that "it is questionable why [Steves & Sons] did not terminate

[Campos's employment] when he exceeded his FMLA leave in 2010 yet did so in 2015." The engineer's statements combined with the other evidence constitute some evidence of pretext, that the company did not want someone who would keep drawing on FMLA leave.

The company's third justification for terminating Campos's employment is that he did not accept an offered alternative position. There are recorded conversations and deposition testimony that leave unanswerable the question of whether there was in fact an offer of another position and a rejection.

We conclude all three reasons have been adequately rebutted for purposes of summary judgment. Our description of what the record shows constitutes "substantial evidence indicating that the proffered legitimate nondiscriminatory reason is a pretext for" retaliation. *See Laxton v. Gap Inc.*, 333 F.3d 572, 578 (5th Cir. 2003). Substantial evidence means that it is "of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions." *Id.* at 579.[4]

[4] In evaluating the FMLA retaliation claim at this stage in the burden-shifting analysis, we note an unaddressed issue in this circuit. We have held that "[t]he traditional *McDonnell-Douglas* framework does not always apply in FMLA retaliatory discharge cases." *Richardson v. Monitronics Int'l, Inc.*, 434 F.3d 327, 333 (5th Cir. 2005). Namely, "[t]he mixed-motive framework applies to cases in which the employee concedes that discrimination was not the *sole* reason for her discharge[] but argues that discrimination was *a* motivating factor." *Id.* Two more recent Supreme Court cases may have altered the ability to engage the mixed-motive framework in this context, and this court has not yet addressed the impact those cases have on an FMLA retaliation claim. *See, e.g.*, *Ion v. Chevron USA, Inc.*, 731 F.3d 379, 390 (5th Cir. 2013) ("We emphasize that we need not, and do not, decide whether *Nassar*'s analytical approach applies to FMLA-retaliation claims and, if so, whether it requires a plaintiff to prove but-for causation."). Though the district court used the mixed-motive framework, neither party argues on appeal that the mixed-motive framework applies. Thus, any argument about the continued application of the mixed-motive framework is not for this court's consideration. *See Amedee v. Shell*

There also is other, more general evidence Campos offers to support his pretext argument. *See Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 237 (5th Cir. 2015) (also examining general evidence of pretext); *Laxton*, 333 F.3d at 580 (same). Namely, Campos argues that Steves & Sons offered varying and contradictory reasons for terminating Campos to the EEOC and, at different times, to Campos himself. In addition to the three reasons already described, Campos states that he was told: (1) that he was permanently laid off; (2) that he was laid off for medical reasons; (3) that he was discharged for failing to pay insurance premiums; and (4) that he was discharged for failure to produce documentation of a permanent disability.

To show the significance of the inconsistencies, Campos relies on several cases. First, in *Burrell v. Dr. Pepper/Seven Up Bottling Group*, the company presented inconsistent explanations to the EEOC and then to the court for its failure to promote the plaintiff employee. 482 F.3d 408, 413 (5th Cir. 2007). The variance was rather minor — a lack of "purchasing experience" versus a lack of "purchasing experience in the bottling industry" — but we found that the differing statements created a legitimate fact dispute regarding the rationale for the promotion decision. *Id.* Campos also uses *Burton* as a guide for our review of the shifting reasons. *Burton* supports the idea that explanations for the termination that postdate the actual decision are "potentially manufactured" and indicative of pretext. 798 F.3d at 238.

We do not examine Campos's additional evidence, as we have already held that he rebutted his employer's reasons for the termination. Some of the allegedly inconsistent reasons identified here may just be variations on

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Chem., L.P., 953 F.3d 831, 835 n.4 (5th Cir. 2020). We leave clarification of the mixed-motive framework issue for another day.

the same theme and not really "shifting" for purposes of suggesting pretext. Still, there are ample fact questions for consideration on remand.

* * *

We AFFIRM judgment on all claims in favor of Steves & Sons except for FMLA retaliation. We REVERSE and REMAND for further proceedings solely on that claim.

JAMES E. GRAVES, JR., *Circuit Judge*, concurring in part and dissenting in part:

I agree with the majority that the district court erred in granting summary judgment in favor of Steves & Sons on Campos' Family Medical Leave Act (FMLA) retaliation claim. However, I would also conclude that the district court erred in granting summary judgment on Campos' state law discrimination and retaliation claims. Because I would reverse and remand on those claims as well, I respectfully dissent in part.

In 2015, Campos learned that he would need open heart surgery. Campos discussed the situation with his supervisor(s), who referred him to human resources (HR). As the majority acknowledges, what happened after that is largely in dispute. What's not in dispute is that Campos took leave under the FMLA, suffered serious complications as a result of the surgery and had to undergo a second surgery. What's also not in dispute is that Campos unsuccessfully attempted to return to work.

Campos says that he was terminated because of his disability. Specifically, Campos states that he received a text from his supervisor, Salgino Guerra, on September 9 that stated: "Hey Abel, I didn't forget you. I did talk to both Susie [Susana Santana -HR manager] and JP [Jim Parker – Chief Engineer]. You won't be able to work for us due to your condition. Sorry man. It's out of my hands."[1] Guerra also texted, "Susie did say you should start the process of filing for social security." Campos said he believed at that time he was terminated.

[1] Guerra testified that he may have texted or called Campos but he did not remember. Guerra still did not remember when presented with photographs of the texts. Guerra also testified that he did not know anything about Campos not making monthly insurance payments. Guerra said he thought Campos quit or turned down the steel line job.

However, Campos later talked with HR and verified that he was not terminated at that time. Parker later denied telling Guerra to fire Campos and both Parker and Santana denied knowledge of the texts prior to their depositions. Parker also denied having any knowledge of Campos applying for or receiving FMLA leave until after Campos was no longer working at Steves.

On October 27, Campos visited his doctor, who examined Campos, determined he was fully cleared to return to work and provided him with a release to return to work. However, the release from University Health System that said Campos may return to work with "no restrictions" was signed by a nurse. In any event, Campos and his daughter, Alexandria, took the release to Santana in HR. Santana approved Campos' return and told him to report to work in November. Campos also informed Santana that he needed to undergo dialysis and requested an accommodation of modified work hours so he could attend dialysis on Mondays, Wednesdays and Fridays after 4 p.m. Santana did not give Campos any indication that there was a problem with the release. Santana also said in her deposition testimony that Steves had the right to request "a fitness for duty certificate" from Campos but did not.

Campos later met with Parker, who Campos said scolded him for returning to work while on dialysis and would not allow the requested accommodation. Campos recorded a portion of this meeting as discussed in more detail below. Parker said that Campos told him he was 100 percent ready to go back to work. Parker also acknowledged that he never told Campos he needed a different release or that the release he provided was not sufficient.

Parker said he told Campos that his job had been filled, but that they had another job for him with equal pay and better conditions on the steel line.

Parker said he offered the position to Campos, but Campos wanted to think about it. However, Parker then admitted that Campos said he would take the job. Specifically, Parker said Campos replied, "It's not what I want. It's not what I want to do, but it's a job and I'll take it." Then Parker said he told Campos he needed to talk to the managers (Marshall Steves III and Gabe Davis) to make sure they would be okay with Campos taking the job first. Parker then said he and Campos would talk about it after Thanksgiving.

At the next meeting, of which Campos also recorded portions, Parker said he told Campos that the managers had approved Campos taking the job and went over the position in more detail. Parker also testified that, at the end of the meeting, Campos stood up, shook his hand, told him, "Thank you, Mr. Parker, for everything you've done. I appreciate it. And I just will do – I will go do something different." Parker said he took that to mean that Campos was quitting rather than accepting a position other than welder or working on the glue spreader, even though Campos had already accepted the job. However, Campos said Parker terminated him at that meeting, he believed because of his dialysis, the fact that Steves had already filled his position, and because they had no other position for him. Campos also said that Parker told him they would backdate his unemployment to the time of their first meeting.

Following the second meeting with Campos, Parker said he contacted Santana to let her know that Campos turned down the job. However, none of the paperwork said that Campos turned the job down. Instead, Santana prepared a termination report recommending "with some reservation" that Campos be terminated. Santana apparently then signed the form for Parker. Parker said that he assumed "with some reservation" meant Campos could be rehired. Santana also wrote in the additional comments section of the form: "Abel Campos was terminated because he exhausted his FMLA (and

was not making monthly payments on his insurance). And also for medical reasons."

Campos' daughter said she dropped off the payments for the insurance at Steves. She also had receipts. Santana said Parker told her to put that Campos failed to pay insurance premiums on the form. Further, Santana said Parker told her to document Campos as a permanent layoff. Santana also prepared an unemployment form that indicated Campos was terminated for "Medical Reasons Layoff." Parker said that HR had told him Campos exhausted his FMLA, but Steves was still going to offer him a different job with equal pay. Parker said, despite what the form said, Campos was not terminated. Parker also said he was "guessing" that medical reasons meant Campos did not have a proper medical release. However, none of the termination paperwork says anything about the release being insufficient.

Santana testified that she did not have any discussions with anyone while Campos was hospitalized about his inability to return to work. Further, Santana said she did not tell Guerra to tell Campos he should apply for Social Security benefits.

Parker said he did not know when Campos' FMLA leave began. However, Steves represented to the EEOC that Campos' leave began on July 20 and ended on October 12. Steves also represented to the EEOC that Campos had various medical restrictions that Campos had not conveyed to them on his return to work. Parker said during his deposition that those restrictions were based on things Guerra had told Parker before Campos' heart surgery. Steves also represented to the EEOC that there were no open positions that could accommodate Campos, stating, "Although Campos expressed interest in other positions, they were not open or required much more extensive sitting and standing than he was reportedly allowed to do."

This contradicts Parker's claims about the steel line position and that Campos turned down any job.

About a month after his termination, Campos filed for Social Security Disability, which was denied.[2] A few months later, Campos brought a charge of discrimination with the EEOC and later sued under the Texas Labor Code and the FMLA. The district court excluded Campos' release-to-work document as inadmissible hearsay and then granted Steves' motion for summary judgment on all claims. Campos then filed this appeal.

I. Whether the district court properly granted summary judgment on Campos' disability discrimination claim under Chapter 21 of the Texas Labor Code.

As the majority states, Campos must prove a prima facie case of discrimination. *See Moss v. Harris Cnty. Constable Precinct One*, 851 F.3d 413, 417 (5th Cir. 2017) ("(1) that he has a disability; (2) that he was qualified for the job; [and] (3) that he was subject to an adverse employment decision on account of his disability."). If Campos proves the prima facie elements, then

[2] Both the district court and the majority use information from Campos' application as proof that he was not qualified. However, Campos did not apply for disability until after Steves terminated his employment and told him to apply for disability. Also, statements written on a form by Alexandria in no way overcome the issues in this case. Regardless, the majority states that Campos failed to seek reasonable accommodations for the statements in the application, but overlooks the facts that Campos sought accommodations for dialysis and Parker claimed to have found Campos a better job that would have addressed any potential lingering recovery issues. Thus, there would have been no need for Campos to request any additional accommodations. Moreover, it is not Campos who fails to explain inconsistencies but rather Steves that fails to explain inconsistencies, as discussed herein. The majority simply ignores this and, instead, determines Campos was also unqualified for the steel-line position. The majority does so despite the fact that Steves did not argue that Campos was unqualified for the steel-line position but rather that he turned it down.

the burden shifts to Steves to present legitimate, non-discriminatory reasons for the adverse action. *EEOC v. LHC Grp., Inc.*, 773 F.3d 688, 694 (5th Cir. 2014) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). If Steves does so, the burden shifts back to Campos to show pretext. *Id.*

Like the district court, the majority concludes that Campos' prima facie case fails on the second factor – whether he was qualified. Specifically, that Campos is unable to establish he could either perform the job in spite of his disabilities or with reasonable accommodation. *See Moss*, 851 F.3d at 418. I disagree.

There is a genuine dispute of material fact as to whether Campos was qualified. Fed. R. Civ. P. 56. The majority concludes that Campos does not appeal the evidentiary ruling on the motion to strike the release-to-work document. However, Campos clearly asserts and briefs the issue of his qualification on appeal. Moreover, the motion to strike was granted pursuant to the Order on Motion for Summary Judgment, which Campos appeals.

Thus, I disagree with the majority that the court cannot rely on the release and that we are left with only Campos' word to consider. We have much more than his word to consider. There is contradictory testimony about Campos' termination and the record contradicts the finding that he was terminated for being unqualified.

None of Campos' termination paperwork alleged that he was not qualified or that he failed to provide an adequate release. Everyone involved from Steves said Campos was a good employee and qualified. Nobody ever suggested Campos was not qualified until after he was terminated. Campos did not tell Santana or Parker that he could not do the job. Both Santana and Parker said he told them he was 100 percent. Parker testified that he had no doubt that Campos could do the new job or he "wouldn't have offered it to him." Parker also acknowledged that Campos was a good employee with

common sense, maturity, a good work ethic and positive evaluations of his work. Also, at the time of his deposition, Campos said he was caring for his elderly father and doing welding and other work on the side.

Steves would have this court decide Campos' qualification by relying on a subsequent disability application that was denied while ignoring all of the evidence indicating that Campos was not fired because of an inadequate release. But it cannot be ignored that the record in this matter contradicts Steves' claims and provides support for Campos' assertions.

While the texts from Guerra may not establish interference, they do support Campos' assertion that Steves had already decided to get rid of him prior to the day he was terminated and regardless of any release. This supports Campos' state law retaliation claim under Tex. Lab. Code § 21.051(1). There is also evidence that Campos accepted the new position Parker later offered him. Parker's claim that Campos turned down the job is not supported by other evidence that was provided on various termination and unemployment forms, given to the EEOC, or offered via deposition testimony by Parker, Santana, Schram, Guerra, Alexandria or Campos.

Additionally, the transcript from Campos' recordings support Campos' claims. Parker accused Campos of far exceeding FMLA leave and blamed his health issues. Parker told Campos he had been replaced. Then he offered him a position on the steel line. Campos explicitly stated he would take the position. Campos also explicitly told Parker he was 100 percent released. After Campos accepted, Parker said he would need to check with the managers first.

During the second recording, it clearly appears that Parker rescinded the job offer. Parker repeatedly told Campos they did not have a place for him, it was just the wrong time of year, it might be different if they had a blockbuster year, and they did not have a position. Parker also told him they

would backdate his unemployment and would not oppose it. At one point, Campos told Parker, "I really wanted a job, Jim" and "Oh, gosh, Jim, this is just a blow to the freaking – I mean, this is just not what I wanted to hear. I've been praying every day all the time . . . – trying to get this job" Parker also told Campos he would call him if something came open or he would provide a job reference.

Steves takes issue with the recordings and asserts that Campos somehow manipulated them. However, on summary judgment, we view all evidence in the light favorable to Campos and draw all reasonable inferences in Campos' favor. *See Dediol v. Best Chevrolet, Inc.*, 655 F.3d 435, 439 (5th Cir. 2011). Further, the court must "refrain from making credibility determinations or weighing the evidence." *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007). Additionally, during Campos' deposition he was asked about the recordings and said they were still on his phone. Regardless, any dispute over the alleged manipulation of the recordings is clearly an issue of fact for trial.

As discussed in more detail below, there was no requirement that the release form be signed by a doctor and nobody ever told Campos it was not sufficient. Santana and Parker both testified that they did not tell him it was insufficient. Despite that, the release was excluded as hearsay because it was not authenticated on summary judgment.

Although Steves argued, in its motion to strike, that Campos did not specifically remember the nurse who signed it, the release clearly states it is from University Health System, the nurse's name is clearly legible (Denise Sanchez, LVN) and her phone number was included. Campos explained that he saw a lot of different doctors and nurses at the hospital and could not specifically remember all of them. He was also comatose and in critical condition for at least part of his hospitalization. It was also a teaching

hospital. Additionally, the release contained Campos' information, including various identification numbers, and the date.

It is unclear as to exactly how long Campos took leave because Steves never completed the proper documentation. Santana confirmed in her deposition testimony that neither she nor Steves completed a "Designation Notice" for FMLA. Additionally, the record offers multiple dates the leave could have started and ended.

Campos' last day of work was July 20, 2015. His surgery was on August 5, 2015. However, there was an issue as to whether Campos FMLA time began on July 20 or whether he used vacation time leading up to the surgery. Steves went with the August 5 date for purposes of summary judgment. The majority concludes that, without the release, Campos cannot show that before his FMLA expired he could have returned to work. However, that conclusion completely ignores the fact that Steves claimed Campos' exhaustion of FMLA leave as one of their possible reasons for firing him. Further, Campos says he attempted to return to work the day before his leave would have expired. Steves' acknowledged that Campos' leave was August 5, 2015 through October 28, 2015, for purposes of summary judgment. Campos returned on October 27, 2015, which supports his claim that he returned the day before his leave expired. Thus, Steves cannot claim exhaustion of FMLA leave as a reason for Campos' termination when a "Designation Notice" was never completed to determine when the FMLA ran out and, alternatively, when it conceded the dates for purposes of summary judgment.

Additionally, the claim that Campos failed to pay his insurance premiums is contradictory. Santana said she put it on the form because Parker told her to, but neither Santana nor Parker had knowledge of whether it was true. Also, there is no evidence indicating that anyone ever gave

Campos notice of any overdue insurance payment, and Campos' daughter testified at her deposition that she took the payments to Steves.

The district court erroneously claimed that the admission of the release would not change the outcome as a matter of law. Further, the district court appeared to rely on Campos' hospital discharge paperwork to find that there was a requirement that the release had to be signed by a physician. The district court said that Campos' hospital discharge paperwork from September 16 said that he should not return to work "until cleared by a clinic physician." The district court further added that Campos' testimony indicated that he "understood the requirement of obtaining a *physician's* release to return to work." (Emphasis original). However, the hospital discharge paperwork had nothing to do with Steves' policy or lack thereof.[3] Further, the deposition testimony the district court relied on did not say that Campos understood any written release must be signed by a doctor rather than anyone else on the doctor's behalf. Instead, it indicates that Campos understood that a doctor had to release him. He asserts that his doctor did release him on October 27, 2015. The release form that was provided to him was simply signed by another employee. Any issues with that could have been addressed at trial.

The district court also noted that Santana "harbored doubts as to its legitimacy because it was signed by an LVN rather than a physician, as required by company policy." But the portion of Santana's deposition testimony the district court cited to does not reference any actual company policy. Santana said she "believed" it "should be a doctor." Upon further

[3] Steves' policy simply said, in relevant part: "Employees medically released (full or partial) by their physician must report to the Company within three (3) working days of their release and provide a return to work medical certification." The policy does not state who must sign any release.

inquiry, Santana said: "I – just – to say no restrictions by an LVN, I'd rather hear it from a doctor saying that he has no restrictions and the policy – by going by the policy." It is unclear what Santana meant by "the policy," but she then clarified, "[t]hat was just in my opinion. In my opinion."

Santana also testified that she passed the release along to Karen Schram, her supervisor, and did not recall there being any issue with the form being signed by an LVN. Santana also testified that she never told Campos, Parker or anyone else of any problem with the release or any need for him to have it signed by the actual physician. She said it was the responsibility of "higher-ups" to decide whether to accept the release. Further, Santana never attempted to call the LVN at the phone number provided to verify the release. Also, Santana said that she did not recall any other communication with anyone regarding Campos until the day Parker called her and told her to put Campos on permanent layoff.

Schram testified that she did not recall having any involvement in the decision to terminate Campos. Schram also testified that she did not recall any claim that Campos was not making payments for his insurance.

Parker painted a different story during his deposition testimony. Parker said that Santana and Schram told him that Campos "needed to have a medical release other than from an LVN." Parker also stated "[t]hat's when I first heard about it. I never saw [the release]. I just heard it from them." Parker also said that they told him they had asked Campos to obtain a release signed by a doctor and "[t]hat they were waiting on one." Parker said he never told Campos there was any issue with the release and never asked him for a release signed by a physician. As discussed above, Parker said he told Campos he had already filled his position but offered him a new position on the steel line. The fact that Parker offered Campos a different

position casts doubt on any suggestion that Campos was not qualified. Parker explicitly stated that he had no doubt that Campos could still perform his job. Parker also acknowledged that Campos explicitly accepted the new position during their first meeting. There is an issue of fact as to whether Campos turned down the new position during his second meeting with Parker.

Both the district court and the majority fault Campos for not authenticating the release. As the majority states: "Although the substance or content of the evidence submitted to support or dispute a fact on summary judgment must be admissible . . . , the material may be presented in a form that would not, in itself, be admissible at trial." *Lee v. Offshore Logistical & Transp., L.L.C.*, 859 F.3d 353, 355 (5th Cir. 2017) (omission original). The majority concludes that Campos failed to provide evidence that it would be possible to put the information into admissible form. I disagree. Campos would have merely had to call his physician and/or Sanchez as a witness at trial to authenticate the release at trial. Further, there was no suggestion that the source of the release was somewhere other than University Health System.

Parker claims that Schram and Santana told him there was an issue with the release. Schram and Santana both deny telling Parker or anyone else that there was a problem with the release. Not only did Steves accept Campos' release, but Campos was then instructed on when to return to work. None of Campos' termination paperwork mentioned an issue with the release. Only after Campos was terminated did anyone suggest that the release was insufficient.

For these reasons, I would conclude that there is a genuine issue of fact with regard to whether Campos was qualified and he is, thus, able to demonstrate a prima facie case. Under the shifting burden, Steves argues various reasons for termination. However, for the reasons discussed above,

I conclude that Campos established a genuine issue of material fact as to whether these reasons were pretextual.

Because the district court erred in granting summary judgment on Campos' state law discrimination claim, I would reverse and remand on this issue. Thus, I respectfully dissent in part.

II. Whether the district court properly granted summary judgment on Campos' retaliation claims under Chapter 21 of the Texas Labor Code.

Under Texas law, Steves committed an unlawful employment practice if it retaliated or discriminated against an employee who: "(1) opposes a discriminatory practice; (2) makes or files a charge; (3) files a complaint; or (4) testifies, assists, or participates in any manner in an investigation, proceeding, or hearing." *See* Tex. Lab. Code §21.055. Further, as stated by the majority, Campos must first make a prima facie showing: "(1) that he is engaged in a protected activity; (2) that an adverse employment action occurred; and (3) that a causal link existed between the protected activity and the adverse action." *Pineda v. UPS, Inc.*, 360 F.3d 483, 487 (5th Cir. 2004). Upon that showing, the burden shifts to Steves to demonstrate a legitimate nondiscriminatory purpose. *Id.* If Steves does that, then Campos must establish pretext.

Noting that the prima facie case for retaliation is the same under FMLA and Chapter 21, the district court found that Campos established a prima facie case. But the district court determined that Campos' claim failed under Chapter 21 for the same reason as it found it failed under the FMLA, pretext. Here, the majority concludes and I agree that Campos' FMLA retaliation claim did not fail. However, with regard to Chapter 21, the majority repeats Steves' assertion that Campos did not engage in any protected activity until he filed his EEOC charge of discrimination after he

was terminated and says "[t]his characterization appears to be correct." The majority then notes that it can affirm for any reason supported by the record and concludes that the state statute does not provide protection for simply taking FMLA leave, and Campos suggests no other protected activity on which to base this claim. While acknowledging that they are nonbinding authority, the majority cites *Spinks v. TruGreen Landcare, L.L.C.*, 322 F. Supp. 2d 784, 796 (S.D. Tex. 2004), and *Galvan v. Spirit Truck Lines, Inc.*, No. 13-15-350-CV, 2016 WL 1274731, at *4 (Tex. App.—Corpus Christi—Edinburg March 31, 2016), as support.

Spinks is easily distinguished. In *Spinks*, the claim was that Spinks had suffered an adverse employment action and that TruGreen knew she had a daughter with a cleft palate and a sister who suffered from anxiety and severe depression. *Id.*, 322 F. Supp. 2d at 795. Spinks asserted that the district court should find an inference that the disability of relatives was a determining factor because she was terminated approximately three weeks after requesting leave to take care of her sister. *Id.* There was no indication that TruGreen had ever made any comments about Spinks' family members or their medical issues. The district court found that Spinks failed to establish a prima facie case, and that the "adverse employment action did not occur under circumstances that raise a reasonable inference that the disability of the relative or associate was a determining factor in the employer's decision." *Id.* at 796. In *Galvan*, the Texas Court of Appeals found that Galvan failed to explain how simply "taking leave under the FMLA is opposing a discriminatory practice, making or failing a charge or complaint, or participating in an investigation, proceeding or hearing, and we have found no authority to support his argument." *Id.* 2016 WL 1274731 at *4.

Here, various representatives of Steves, i.e., Parker, Santana and Guerra, repeatedly said the adverse employment action was because of Campos' medical issues and FMLA leave. Further, Campos complained by

repeatedly contacting them via telephone, texting and in person about the statements that were being made and the actions that were being taken prior to his termination. The circumstances of Campos' termination clearly raised a reasonable inference that his disability, medical issues, and/or FMLA leave were determining factors in Steves' decision. For these reasons, the district court erred in dismissing this claim. Thus, I would reverse and remand on this issue.

Conclusion

I would conclude that the district court erred in granting summary judgment on Campos' FMLA retaliation claim as well as his state law discrimination and retaliation claims. Because I would reverse and remand on all three of those claims, I respectfully dissent in part.