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THE DISTRICT COURT OF GUAM

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MARLENE M. ONGESII,

CIVIL CASE NO. 15-00017

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Plaintiff,

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vs.

**DECISION AND ORDER DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

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GURUSAMY INC., dba HEALTH
SERVICES OF THE PACIFIC (HSP),

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Defendant.

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Before the court is Defendant Gurusamy Inc., dba Health Services of the Pacific's ("HSP") Supplemental Memorandum in Support of its Motion for Summary Judgment. *See* ECF No. 30, *see also* Mot. Summ. J., ECF No. 6. After reviewing the parties' submissions, and relevant caselaw and authority, and having heard argument from counsel on the matter, the court hereby **DENIES** HSP's Motion for Summary Judgment, for the reasons stated herein.

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I. BACKGROUND

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In September 2010, Marlene Ongesii started working for HSP as a part-time Medical Social Work Supervisor. Compl., pt. V ¶ D, ECF No. 1. In February 2012, after working with HSP for eighteen months, she received a positive work evaluation. *Id.*, pt. V ¶ F. She was given additional work hours and responsibilities, but without additional pay or benefits given to full-time employees. *Id.*, pt. V ¶¶ G, I. In October 2012, Ongesii's immediate supervisor, Sophia

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1 Mesa (“Mesa”), told Ongesii that she would be promoted to full-time status. *Id.*, pt. V ¶ J.
2 Ultimately, HSP refused to grant Ongesii full-time status and benefits, stating that Mesa did not
3 have authority to make that decision. *Id.*, pt. V ¶ J.

4 On October 24, 2012, HSP Administrator Albert Gurusamy took formal disciplinary
5 action against Ongesii, giving her a verbal warning for absences and for failing to follow through
6 with events she was tasked to coordinate. Mot. Summ. J., Def.’s Ex. E. at 2 (Disciplinary Action
7 Documentation), ECF No. 14-1. A Performance Improvement Plan was devised to monitor
8 Ongesii’s work for the next six months and, “[i]f work deviations [were] observed,” issue a
9 written warning. *Id.* Thereafter, “[a]ny further disciplinary actions [would] be termination from
10 employment.” *Id.* A follow-up was scheduled for April 24, 2013. *Id.*

11 Ongesii was a part-time employee being asked to perform work comparable to that of a
12 full-time employee. Compl., pt. V ¶ N, ECF No. 1. In January and April 2013, Ongesii reported
13 two instances of “unruly comment” by male coworkers, including a remark about her pregnancy.
14 *Id.* pt. V ¶ S.

15 On or about January 2013, Ongesii informed HSP that she was pregnant, and would be
16 having a cesarean section due to preexisting medical complications. Compl., pt. VI ¶ F, ECF
17 No. 1. HSP denied her leave under the Family and Medical Leave Act. *Id.*

18 On April 4, 2013, HSP issued Ongesii an Employee Performance Variance setting forth
19 various tasks that Ongesii needed to complete by specific deadlines in April and early May “or
20 disciplinary action [would] occur.” Mot. Summ. J., Def.’s Ex. F (Employee Performance
21 Variance, ECF No. 14-1).

22 On May 17, 2013, HSP issued a written notice of “Removal/Termination of
23 Employment.” Mot. Summ. J., Def.’s Ex. G at 1 (Disciplinary Action Documentation), ECF No.
24 14-1. HSP’s Disciplinary Action Documentation alleged Ongesii failed to accomplish the tasks

1 detailed in the April 4, 2013, Employee Performance Variance. *Id.* Ongesii was 33 weeks
2 pregnant at the time. Compl., pt. VI ¶ H, ECF No. 1. Her employment was terminated on May
3 21, 2013. Mot. Summ. J., Def.’s Ex. I (Letter, May 21, 2013), ECF No. 14-1.

4 On January 24, 2014, the U.S. Equal Employment Opportunity Commission (“EEOC”)
5 received Ongesii’s Charge of Discrimination. Mot. Summ. J., Def.’s Ex. 2, Notice of Charge of
6 Discrimination, Jan. 30, 2014), ECF No. 6-2. Under “Discrimination Based On,” Ongesii
7 checked only “sex.” *Id.* There was no check box for “gender” or “pregnancy,” but there was a
8 check box labeled “other.” *Id.* Ongesii’s narrative description of the particulars of her claim
9 reads as follows:

10 I was hired as a Social Work Supervisor on September 28, 2010. At the
11 time of my termination, I was also carrying out duties as a Hospice Volunteer
Coordinator/Hospice Bereavement Coordinator.

12 In January 20, 2013, I informed Ruth Gurusamy, Co-Owner, of my
13 pregnancy.

14 On April 4, 2013, I was issued an Employee Performance Variance by
15 Sophia Mesa, Director of Clinical Services.

16 On May 17, 2013, Albert Gurusamy, Administrator/Co-Owner, presented
17 me with a Disciplinary Action Documentation for alleged performance issues. In
18 this letter, I was offered the opportunity to resign in lieu of termination.

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20 On May 20, 2013, I submitted a rebuttal letter to both Mr. Gurusamy and
21 Ms. Mesa.

22 On May 21, 2013, Mr. Gurusamy terminated me from my position.

23 I believe that I have been discriminated against due to my sex (pregnant
24 female), in violation of Title VII of the Civil Rights Act of 1964. I also believe
pregnant females as a class have also been subjected to employment
discrimination.

Mot. Summ. J., Def.’s Ex. 2, Notice of Charge of Discrimination, Jan. 30, 2014), ECF No. 6-2.

On January 30, 2014, the EEOC sent a copy of the charge to HSP for a response. *Id.* On
February 23, 2014, HSP sent the EEOC its response, limited to the pregnancy discrimination
allegation. Mot. Summ. J., Def.’s Ex. 3 (Response to Notice of Charge of Discrimination, Feb.

1 23, 2014), ECF No. 6-2.

2 On December 8, 2014, the EEOC issued a Dismissal and Notice of Rights (right-to-sue
3 letter). Mot. Summ. J., Def.'s Ex. 1, (Dismissal and Notice of Rights, Dec. 8, 2014), ECF No. 6-
4 2).

5 On February 26, Ongesii received a copy of the right-to-sue letter via e-mail attachment,
6 and Ongesii confirmed receipt. Compl. at Ex. J, ECF No. 1-1.

7 On May 26, 2015, Ongesii, proceeding pro se, filed her Complaint. Compl. pt. I, ECF
8 No. 1. The first claim for relief related to sex/gender discrimination, the second claim related to
9 sex/pregnancy discrimination, the third claim related to retaliation, and the fourth claim set forth
10 a cause of action for constructive wrongful termination. *Id.* pt. V-VIII.

11 On June 16, 2015, HSP filed a Motion for Summary Judgment as to all four Title VII
12 claims, asserting that the civil action is time barred, that the only claim over which the court has
13 jurisdiction is for pregnancy discrimination, and that it wins on that charge as a matter of law.
14 Mot. Summ. J. at 5-13, ECF No. 6; *see also* Order at 1, ECF No. 23.

15 Ongesii opposed the Motion on July 9, 2015. Opp'n, ECF No. 9. HSP filed a Reply on
16 July 22, 2015. Reply, ECF No. 14.

17 This court heard the matter on February 26, 2016. Mins., ECF No. 22. On March 1,
18 2016, an order granting summary judgment in favor of HSP on the first, third, and fourth claims
19 for relief was issued. Order at 17, ECF No. 23. Consideration of the second claim for relief,
20 alleging sex/pregnancy discrimination, was deferred until the close of discovery on August 21,
21 2016. *Id.* Ongesii was granted leave to amend her complaint incorporating allegations material
22 to her sex/pregnancy discrimination claim, but was not permitted to add new counts or revive
23 dismissed counts. *Id.*

24 On March 15, 2016, Ongesii filed a First Amended Complaint. Am. Compl., ECF No.

1 28. HSP filed an Answer to the First Amended Complaint on March 28, 2016. Answer, ECF
2 No. 25.

3 On August 23, 2016, HSP filed a Supplemental Memorandum in Support of its Motion
4 for Summary Judgment, resubmitting the arguments set forth in its June 16, 2015, Motion for
5 Summary Judgment. Supp. Mem. In Supp. Mot. Summ. J. at 1, ECF No. 30. Ongesii filed her
6 Supplemental Opposition on September 13, 2016. Supp. Opp'n, ECF No. 33. HSP filed its
7 Supplemental Reply on September 27, 2016. Supp. Reply, ECF No. 34.

8 II. LEGAL STANDARD

9 “The court shall grant summary judgment if the movant shows that there is no genuine
10 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.
11 R. Civ. P. 56(a). A fact is material if it might affect the outcome of the suit under the governing
12 substantive law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual
13 dispute is “genuine” where “the evidence is such that a reasonable jury could return a verdict for
14 the nonmoving party.” *Id.*

15 A shifting burden of proof governs motions for summary judgment under Rule 56. *In re*
16 *Oracle Corp. Securities Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). The party seeking summary
17 judgment bears the initial burden of proving an absence of a genuine issue of material fact. *Id.*
18 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Where, as here, the nonmoving
19 party will have the burden of proof at trial, “the movant can prevail merely by pointing out that
20 there is an absence of evidence to support the nonmoving party’s case.” *Soremekun v. Thrifty*
21 *Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).

22 If the moving party meets its burden, the burden then shifts to the nonmoving party to set
23 forth “specific facts showing that there is a genuine issue for trial.” *Liberty Lobby*, 477 U.S. at
24 250. “The mere existence of a scintilla of evidence . . . will be insufficient” and the nonmoving

1 party “must do more than simply show that there is some metaphysical doubt as to the material
2 facts.” *Id.* at 252; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).
3 Viewing the evidence in the light most favorable to the nonmoving party, “[w]here the record
4 taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no
5 ‘genuine issue for trial.’” *Matsushita*, 475 U.S. at 587.

6 “Where the opposing party has not had sufficient time to complete discovery or otherwise
7 marshal facts to oppose the motion, application may be made under Rule 56(f) [now 56(d)] for a
8 continuance of the proceedings pending completion of discovery.” *THI-Hawaii, Inc. v. First*
9 *Commerce Financial Corp.*, 627 F.2d 991, 994 (9th Cir. 1980).

10 **III. DISCUSSION**

11 HSP maintains that no genuine issues of material fact remain as to Ongesii’s pregnancy-
12 based discrimination claim, which entitles it to judgment as a matter of law. Mot. Summ. J. at
13 10, ECF No. 6. Specifically, HSP asserts that it has presented legitimate, non-discriminatory
14 reasons for terminating Ongesii’s employment, including evidence detailing Ongesii’s history of
15 progressive disciplinary actions for failure to perform essential job functions predating her
16 pregnancy. *See* Supp. Reply at 1, ECF No. 34. In response, Ongesii contends that she has set
17 forth a prima facie case for employment discrimination, and that HSP’s reasons for terminating
18 her were pretextual. Supplemental Opp’n at 1-3, ECF No. 33.

19 The Ninth Circuit “analyze[s a] plaintiffs’ Title VII claims through the burden-shifting
20 framework of *McDonnell Douglas Corp. v. Green.*” *See Hawn v. Exec. Jet Mgmt., Inc.*, 615
21 F.3d 1151, 1155 (9th Cir. 2010) (citing 411 U.S. 792, 802 (1973)). Pregnancy discrimination
22 claims are analyzed under the same burden-shifting framework. *Garcia v. Courtesy Ford, Inc.*,
23 No. C06-855RSL, 2007 WL 1192681, at *2 (W.D. Wash. Apr. 20, 2007) (citations and footnote
24 omitted).

1 “[T]o show disparate treatment under Title VII[, a plaintiff] must first establish a prima
2 facie case of discrimination.” *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir.
3 2002) (citing *McDonnell Douglas Corp.* 411 U.S. at 802). The “degree of proof necessary to
4 establish a prima facie case for Title VII . . . on summary judgment is minimal and does not even
5 need to rise to the level of a preponderance of the evidence.” *Id.* (quoting *Wallis v. J.R. Simplot*
6 *Co.*, 26 F.3d 885, 889 (9th Cir. 1994)).

7 If a plaintiff sustains her burden of establishing a prima facie case of discrimination, “the
8 burden then shifts to the defendant to articulate a legitimate nondiscriminatory reason for its
9 employment decision.”¹ *Wallis*, 26 F.3d at 889 (quoting *Lowe v. City of Monrovia*, 775 F.2d
10 998, 1005 (9th Cir. 1985), *amended*, 784 F.2d 1407 (9th Cir. 1986); *see also Villiarimo.*, 281
11 F.3d 1054, 1062 (9th Cir. 2002) (citation omitted) (noting that the burden of production rather
12 than persuasion shifts to the employer). If the employer meets its burden, then a plaintiff must
13 “demonstrate that the employer’s alleged reason for the adverse employment decision is a pretext
14 for another motive which is discriminatory” to prevail. *Id.*

15 Pretext is established by “either directly persuading the court that a discriminatory
16 reason more likely motivated the employer or indirectly by showing that the employer’s
17 proffered explanation is unworthy of credence.” *Aragon v. Republic Silver State Disposal Inc.*,
18 292 F.3d 654, 658–59 (9th Cir. 2002), *as amended* (July 18, 2002) (quoting *Chuang v. Univ. of*
19 *Cal. Davis*, 225 F.3d 1115, 1124 (9th Cir. 2000)). Ongesii’s “evidence must be both *specific and*
20 *substantial* to overcome the legitimate reasons put forth by [the employer].” *Id.* (citations
21 omitted).

23 ¹ A defendant has not met its burden if it “has failed to introduce evidence which, *taken as true*, would
24 *permit* the conclusion that there was a nondiscriminatory reason for the adverse action.” *St. Mary's Honor Ctr. v.*
Hicks, 509 U.S. 502, 509–10, 113 S. Ct. 2742, 2748, 125 L. Ed. 2d 407 (1993) (citations omitted) (analyzing the
burden-shifting framework in the trial rather than summary judgment context).

1 Accordingly, this court must analyze: (A) whether Ongesii has set forth a prima facie
2 case for discrimination; (B) whether HSP has set forth a legitimate, nondiscriminatory reason for
3 Ongesii's termination; and (C) whether Ongesii's termination was pretextual.

4 **A. Prima Facie Case for Employment Discrimination.**

5 Ongesii argues that she has satisfied her burden of establishing a prima facie case for
6 pregnancy discrimination. To make out a prima facie case, Ongesii must demonstrate "that (1)
7 she belongs to a protected class; (2) she was qualified for the position; (3) she was subjected to
8 an adverse employment action; and (4) similarly situated men were treated more favorably, or
9 her position was filled by a man." *Villiarimo*, 281 F.3d at 1062 (citations omitted); *see also*
10 *Garcia*, 2007 WL 1192681, at *2 (citations omitted).

11 Ongesii must first show that at the time of her termination, she was a member of a
12 protected class. *See Villiarimo*, 281 F.3d at 1062 (citations omitted). Discrimination on the
13 basis of "pregnancy, childbirth, or related medical conditions" is prohibited by 42 U.S.C.
14 2000e(k); *see also Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 684,
15 103 S. Ct. 2622, 2631, 77 L. Ed. 2d 89 (1983) ("The Pregnancy Discrimination Act has now
16 made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on
17 its face, discrimination because of her sex."). Here, Ongesii has shown that she was pregnant at
18 the time of her termination from HSP, and that HSP was aware of her pregnancy at the time of
19 termination. Ongesii Decl. ¶ 3, ECF No. 33-1; *see also Mesa Decl* ¶ 13, ECF No. 14-1.² Thus,
20 the first element is satisfied.

21 Second, Ongesii must demonstrate that she was qualified for the position at issue.

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23 ² Although Mesa's Declaration asserts that HSP was not officially advised of her pregnancy until Ongesii's
24 May 20, 2013 letter, Mesa acknowledges that Ongesii mentioned her pregnancy to her earlier, "sometime around
April or May of 2013." *See Mesa Decl.* ¶ 13, ECF No. 14-1. This was prior to Ongesii's termination on May 21,
2013, and appears to be prior to the May 17, 2013 meeting offering Ongesii the option to resign in lieu of
termination. *See id.* ¶ 9. Ongesii claims she notified her superiors at HSP in January of 2013, and that she showed
them her ultrasound at that time. *See Ongesii Decl.* ¶ 3, ECF No. 33-1.

1 *Villiarimo*, 281 F.3d at 1062 (citations omitted). Ongesii asserts that this element is established
2 through paragraphs 3-5 of Mesa’s Declaration, which describes the circumstances of her initial
3 hire as a Medical Social Worker with HSP. Supp. Opp’n at 2, ECF No. 3, *see also* Mesa Decl.
4 ¶¶ 3-5, ECF No. 14-1. Hence, the second element is met.

5 Third, Ongesii must establish that she was subjected to an adverse employment action.
6 *Villiarimo*, 281 F.3d at 1062 (citations omitted). Because Ongesii has shown she was terminated
7 from her employment, the third requirement is satisfied. *See* Mesa Decl. ¶ 11, ECF No. 14-1.
8 Finally, Ongesii is required to prove that her position was filled by a man. *See Villiarimo*, 281
9 F.3d at 1062 (citations omitted). Ongesii’s position was filled by a male named Jared Ivy.
10 Ongesii Decl. ¶ 2, ECF No. 33-1. Accordingly, Ongesii has established the fourth requirement,
11 and all other requirements, for a prima facie employment discrimination case under Title VII.

12 **B. HSP Articulation of Legitimate, Nondiscriminatory Reason for Ongesii’s**
13 **Termination.**

14 Ongesii has sustained her burden of establishing a prima facie case of discrimination.
15 Consequently, the burden now shifts to HSP to “articulate a legitimate nondiscriminatory reason
16 for its employment decision. *Wallis*, 26 F.3d at 889 (citation omitted).

17 HSP contends that it has presented legitimate, non-discriminatory reasons for terminating
18 Ongesii’s employment, including evidence that detailed Ongesii’s history of disciplinary actions
19 for failure to perform essential job functions predating and unrelated to her pregnancy. *See*
20 Supplemental Reply at 1, ECF No. 34 (citing Mesa Decl. ¶¶ 8, 9, 14, ECF No. 14-1). HSP
21 presented evidence showing that Ongesii’s supervisor met with her on or about April 5, 2012 and
22 July 18, 2012, to address her deficient job performance in four areas, including (1) volunteer
23 recruitment, training, and maintenance, (2) bereavement scheduling and support groups, (3) staff
24 development, and (4) bereavement quality assurance. Mesa Decl. ¶ 6, ECF No. 14-1; *see also*
Mot. Summ. J., Def’s Ex. D (Follow-up Performance Evaluation, July 8, 2012), ECF No. 14-1

1 (setting weekly and short-term goals for performance improvement).

2 HSP also presented evidence showing formal disciplinary action against Ongesii on
3 October 24, 2012. *See* Mot. Summ. J., Def's Ex. E (Disciplinary Action Documentation), ECF
4 No. 14-1, *see also* Mesa Decl. ¶ 7, ECF No. 14-1. Ongesii was given a verbal warning for
5 absences and for failing to follow through with events she was tasked to coordinate and schedule.
6 *See* Def's Ex. E at 2 (Disciplinary Action Documentation), ECF No. 14-1; *see also* Mesa Decl. ¶
7 7, ECF No. 14-1. A plan to improve Ongesii's performance was implemented to monitor
8 Ongesii's work for the next six months. *Id.* The plan noted that a written warning would follow
9 any work deviations, and that termination would follow subsequent written warnings. *Id.*

10 The Disciplinary Action Documentation scheduled a follow-up for April 24, 2013, but an
11 Employee Performance Variance was issued on April 4, 2014. *See id.*, *see also* Mot. Summ. J.,
12 Def's Ex. F (Employee Performance Variance), ECF No. 14-1; Mesa Decl. ¶ 8, ECF No. 14-1.
13 The Employee Performance Variance included Performance Improvement Plan that listed
14 specific duties for Ongesii to focus on, and also warned that disciplinary action would occur if
15 the tasks were not completed. *See* Def's Ex. F (Employee Performance Variance), ECF No. 14-
16 1; *see also* Mesa Decl. ¶ 8, ECF No. 14-1. On May 17, 2013, however, Mesa informed Ongesii
17 that she had not made improvements in her job performance, and Ongesii was given the option to
18 resign in lieu of termination. Mesa Decl. ¶ 9, ECF No. 14-1.

19 As HSP has met its burden of presenting legitimate, non-discriminatory reasons for
20 termination, Ongesii must now establish that her termination was pretextual. *See Wallis*, 26 F.3d
21 at 889.

22 **C. Pretext.**

23 Ongesii submits a Declaration professing to rebut the reasons set forth for her termination
24 within Mesa's Declaration. Supplemental Opp'n at 2, ECF No. 33; *see also* Ongesii Decl., ECF

1 No. 33-1. HSP counters that Ongesii has failed to provide any evidence showing “that HSP’s
2 legitimate, non-discriminatory reasons for terminating her were pretextual.” Supplemental Reply
3 at 3, ECF No. 34.

4 “[T]he defendant’s articulation of a legitimate nondiscriminatory reason serves only to
5 shift the burden back to the plaintiff to raise a genuine factual question as to whether the
6 proffered reason is pretextual.” *Lowe*, 775 F.2d at 1008 (citation omitted). Ongesii can establish
7 that HSP’s articulated reasons were “pretextual ‘either directly by persuading the court that a
8 discriminatory reason more likely motivated [HSP] or indirectly by showing that the [HSP’s]
9 proffered explanation is unworthy of credence.’” *Chuang*, 225 F.3d at 1124 (quoting *Tex. Dep’t*
10 *of Comty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)).

11 When direct evidence is unavailable to a plaintiff, “the plaintiff may come forward with
12 circumstantial evidence that tends to show that the employer’s proffered motives were not the
13 actual motives because they are inconsistent or otherwise not believable.” *Godwin v. Hunt*
14 *Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998), *as amended* (Aug. 11, 1998).³

15 When direct evidence is available, a “plaintiff need produce very little evidence of
16 discriminatory motive to raise a genuine issue of material fact.” *Id.* (citations and internal
17 quotations omitted). Circumstantial and indirect evidence of pretext, on the other hand, “must be
18 ‘specific’ and ‘substantial’ in order to create a triable issue with respect to whether the employer
19 intended to discriminate on the basis of sex.” *Id.* (quoting *Bradley v. Harcourt, Brace & Co.*,
20 104 F.3d 267, 270 (9th Cir. 1996)⁴ (district court’s grant of summary judgment affirmed where

21
22 ³ In *Godwin*, the Ninth Circuit reversed the trial court’s grant of summary judgment where indirect and
23 direct evidence of discriminatory evidence presented genuine issues of fact as to whether employer’s
24 nondiscriminatory explanations were masked by discriminatory motives where plaintiff’s presented evidence that
her replacement received poor evaluations, that she got along well with most other employees, and where the
proffered reasons for the replacements selection were post-hoc and inconsistent with company documentation. 150
F.3d at 1222.

⁴ In *Bradley*, the Ninth Circuit held that plaintiff produced insufficient evidence to overcome summary

1 plaintiff “produced no meaningful evidence indicating either that [the employer’s] proffered
2 explanation was false”); *see also Collings v. Longview Fibre Co.*, 63 F.3d 828, 834 (9th Cir.
3 1995)⁵ (summary judgment proper where employees merely maintained they did not commit the
4 misconduct for which they were fired for, and failed to come forward with specific allegations of
5 pretext); *Wallis*, 26 F.3d at 890, 892, *as amended on denial of reh'g* (July 14, 1994)⁶ (“[W]here
6 the *prima facie* case consists of no more than the minimum necessary to create a presumption of
7 discrimination under *McDonnell Douglas*, plaintiff has failed to raise a triable issue of fact.”);
8 *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918 (9th Cir. 1996) (summary judgment proper
9 because circumstantial evidence of employer’s shifting explanations for layoff was not
10 “sufficiently probative”).

11 Here, Mesa’s Declaration sets forth areas of deficiency in Ongesii’s job performance.
12 Mesa Decl. ¶ 6, ECF No. 14-1. On or about April 5, 2012, and July 18, 2012, Mesa verbally
13 addressed four areas of inadequate performance, including (1) volunteer recruitment, training,
14 and maintenance, (2) bereavement scheduling and support groups, (3) staff development, and (4)
15 bereavement quality assurance. Mesa Decl. ¶ 6, ECF No. 14-1. Ongesii was also issued a verbal
16 warning on October 24, 2012 for failure to attend events she was asked to coordinate without
17

18 judgment where the only evidence of pretext was plaintiff’s “claim[] she had been performing her job adequately
19 and had received no feedback indicating otherwise” because “an employee’s subjective personal judgments of her
20 competence alone do not raise a genuine issue of material fact.” 104 F.3d at 270 (citing *Schuler v. Chronicle
21 Broadcasting Co., Inc.*, 793 F.2d 1010, 1011 (9th Cir. 1986)). The plaintiff also did not dispute asking a subordinate
22 to serve as a reference for her husband and lie for his benefit. *Id.* at 269-70.

23 ⁵ In *Collings*, the Ninth Circuit held that employees produced insufficient evidence to overcome summary
24 judgment where the only evidence of pretext was an explanation that they did not commit the alleged misconduct
forming the basis for their termination, and where there was no showing that the employer had any knowledge of the
alleged disability at issue. 63 F.3d at 834.

⁶ In *Wallis*, the Ninth Circuit held that plaintiff produced insufficient evidence to overcome summary
judgment where the only evidence of pretext was plaintiff’s representation that “the functions he performed continue
to be performed by other . . . employees and that supervisory duties remained at the corporate level,” and where no
evidence was provided proving direct, circumstantial or statistical age discrimination. 26 F.3d at 892 (footnote
omitted).

1 notice, and failure to delegate follow-up activities. *Id.* ¶ 7. Finally, Ongesii was issued an
2 Employee Performance Variance for failure to calendar HSP events, and for failure to provide
3 monthly bereavement tracking data to HSP’s quality assurance department. *Id.* ¶ 8. Ongesii
4 disputes the validity of the disciplinary actions referenced in Mesa’s Declaration. *See* Ongesii
5 Decl. ¶¶ 3-12, ECF No. 33-1.

6 **1. Volunteer Recruitment Training and Maintenance.**

7 Mesa represents that one of Ongesii’s areas of deficiency addressed during the July 18,
8 2012 meeting was “[Ongesii’s] continued failure to recruit volunteers since her April 5, 2012
9 evaluation.” Mesa Decl. ¶ 6(a), ECF No. 14-1. In response, Ongesii states that she recruited
10 volunteers and supervised social work interns, including a volunteer named Nicole Cruz and
11 various University of Guam students. *See* Ongesii Decl. ¶ 4, ECF No. 33-1. Furthermore,
12 Ongesii claims that she coordinated an event to attract volunteers on October 15, 2012. *Id.*

13 **2. Bereavement Scheduling and Support Groups and Staff Development.**

14 Mesa states that at the July 18, 2012, meeting, Ongesii was reminded that she was
15 required to attend a weekly Interdisciplinary Group meetings, and guide social worker Amanda
16 San Gill (“San Gill”) in her role to schedule hospice patients for Medical Social Services
17 (“MSS”), Volunteer Assistance, counseling, bereavement, and Spiritual Counseling. Mesa Decl.
18 ¶ 6(b), ECF No. 14-1. Ongesii was cited for failure to attend these weekly meetings, and for
19 failure to sufficiently supervise San Gill since her April 5, 2012, evaluation. *Id.*

20 Mesa also represents that “Ongesii was required to oversee all social work staff and
21 ensure compliance with Joint Commission and Medicare requirements.” Mesa Decl. ¶ 6(c), ECF
22 No. 14-1. Ongesii was reminded by Mesa at the July 18, 2012, meeting that she was required to
23 “define and monitor the activities of her staff,” and that she was required to attend intake
24 meetings, supervise and coordinate new MSS cases with her staff as required by her April 5,

1 2012, evaluation. *Id.*

2 In response, Ongesii claims that she “always attended the weekly intake meetings” with
3 the exception of one time that she was on leave. Ongesii Decl. ¶ 5, ECF No. 33-1. Furthermore,
4 Ongesii states that she supervised San Gill, submitted an evaluation for San Gill on January 11,
5 2013, supervised the National Family Caregiver Support persons, and prepared Hospice and
6 Bereavement calendars. *Id.*

7 **4. Bereavement Quality Assurance.**

8 Mesa asserts that she discussed Ongesii’s failure to provide necessary data regarding
9 HSP’s monitoring of patients’ families after death to HSP’s quality assurance department. Mesa
10 Decl. ¶ 6(d), ECF No. 14-1. This failure placed HSP at risk for receiving citations by The Center
11 for Medicare and Medicaid Services. Mesa Decl. ¶ 6(d), ECF No. 14-1. In response, Ongesii
12 states that she provided this data, but that “the system at HSP allowed the data that was
13 submitted to be[come] corrupted.” Ongesii Decl. ¶ 6, ECF No. 33-1. Once Ongesii realized the
14 data was getting corrupted, she notified her supervisors and co-employees, but was “never given
15 a one day deadline to provide the data.” *Id.* Eventually, this data was provided. *Id.*

16 **5. Failure to Attend Events.**

17 Mesa represents that on October 24, 2012, Ongesii was issued a verbal warning for
18 failure to attend and sufficiently coordinate various events. Mesa Decl. ¶ 7, ECF No. 14-1.
19 Ongesii was further informed that her work would be monitored over the course of the next six
20 months, further deviations could progress to written warnings or termination, and that a follow-
21 up date to measure improvement goals would occur in April of 2013. *Id.*

22 Mesa claims that Ongesii failed to attend an annual in-service event for clinical staff that
23 she was asked to coordinate, and also that she failed to provide any notice of her decision not to
24 attend. Mesa Decl. ¶ 7(a), ECF No. 14-1. In response, Ongesii maintains that she was ill during

1 this event, and gave notice via text message to Ruth Gurusamy that she was unable to attend.
2 Ongesii Decl. ¶ 7, ECF No. 33-1.

3 Mesa also represents that Ongesii coordinated a volunteer training event, but that she
4 failed to attend, and likewise failed to inform anyone that she would be absent and that other
5 employees would need to conduct the necessary training. Mesa Decl. ¶ 7(b), ECF No. 14-1.
6 Ongesii disputes the characterization of the event as a “training event,” and instead states that it
7 was an “orientation event.” Ongesii Decl. ¶ 8, ECF No. 33-1. Volunteers must first be
8 processed by Human Resources prior to training, and that Human Resources oriented and cleared
9 the volunteers. *Id.* Ongesii also claims that contrary to Mesa’s representation, she notified Mesa
10 by text message that she was unable to attend. *Id.*

11 Additionally, Mesa maintains that although Ongesii “initiated coordination and some
12 planning of an annual bereavement in-service,” that she “went off-island and failed to delegate
13 follow-up activities.” Mesa Decl. ¶ 7(c), ECF No. 14-1. This required other HSP employees to
14 make last minute arrangements to ensure the event could go forward. *Id.* Ongesii counters that
15 she coordinated the event, and secured the venue, food, bereaved clients, and the volunteers.
16 Ongesii Decl. ¶ 9, ECF No. 33-1. Prior to her trip, all of the planning was complete, and the
17 only task left to be completed was calling the guests and families to make sure they arrived. *Id.*
18 Ongesii delegated the task of making the calls to others, and the calls were made. *Id.* She
19 returned to Guam one day prior to the event, attended the event, and it was a success. *Id.*

20 **6. Failure to Calendar Activities for Ongoing Education and Seminars in 2013.**

21 On April 4, 2013, Ongesii was issued an Employee Performance Variance, in part for
22 failure to calendar activities for ongoing education and seminars. Mesa Decl. ¶ 8, ECF No. 14-1.
23 In response, Ongesii states that she was under the impression that the Education Department
24 coordinated these seminars. Ongesii Decl. ¶ 10, ECF No. 33-1. When asked to obtain a speaker

1 for a death and dying seminar, Ongesii obtained the speaker and was never informed of any other
2 education related responsibilities. *Id.*

3 **7. Failure to Schedule Monthly Bereavement Support Group Meetings.**

4 Another issue addressed within the April 4, 2013, Employee Performance Variance was
5 Ongesii's "failure to schedule monthly bereavement support group meetings since September of
6 2012." Mesa Decl. ¶ 8, ECF No. 14-1. Ongesii counters that she scheduled these meetings
7 between the dates of May 9, through June 14, of 2012, but was unable to continue doing so after
8 those dates because the staff necessary for the support groups left Guam and/or HSP. Ongesii
9 Decl. ¶ 11, ECF No. 33-1. The necessary personnel were not replaced until March or April of
10 2013, at which time the meetings resumed. *Id.* Ongesii projected future meetings, and
11 advertised the resumed meetings in Guam publications. *Id.*

12 **8. Failure to Provide Monthly Bereavement Tracking.**

13 Finally, Mesa claims that as of April 4, 2013, Ongesii failed to provide monthly
14 bereavement tracking data to HSP's quality assurance department. Mesa Decl. ¶ 8, ECF No. 14-
15 1. In response, Ongesii again represents that she provided the data, but that it became corrupted
16 when input into HSP's system. Ongesii Decl. ¶ 12, ECF No. 33-1.

17 **9. Analysis.**

18 In some ways, this case is similar to *Bradley* where the Ninth Circuit determined that
19 summary judgment was appropriate because "an employee's subjective personal judgments of
20 her competence alone do not raise a genuine issue of material fact." 104 F.3d at 270 (citation).
21 Ongesii's representation that she adequately coordinated volunteers, subordinates, and events
22 could be considered mere subjective assessments of her own performance. It is similarly
23 analogous to *Collings*, where summary judgment was appropriate where the only evidence of
24 pretext was the employees' explanation that they did not commit the alleged misconduct. 63

1 F.3d at 834.

2 This case diverges from *Bradley*, however, in that Ongesii has not admitted to
3 wrongdoing. 104 F.3d at 270. This case also departs from *Collings* in that HSP was aware, or
4 should have been aware, of Ongesii's pregnancy,⁷ whereas in *Collings*, 63 F.3d at 834, the
5 employer was unaware of the employees' disability. 63 F.3d at 834. Ongesii has shown that she
6 was pregnant at the time of her termination from HSP, and that HSP was aware of her pregnancy
7 at the time of termination. Ongesii Decl. ¶ 3, ECF No. 33-1; *see also* Mesa Decl. ¶ 13, ECF No.
8 14-1.

9 At the time of her termination, Ongesii was 33 weeks pregnant. *See* Compl., pt. VI ¶ H,
10 ECF No. 1. This case is comparable to *Cleese v. Hewlett-Packard Co.*, where the court held that
11 evidence of pretext sufficient to survive summary judgment was created by "the suspicious
12 timing" of plaintiff's termination. 911 F. Supp. 1312, 1320 (D. Or. 1995) (finding that the
13 suspicious timing of termination alone was "enough evidence to give rise to the inference that
14 [the employer] may have treated [plaintiff] differently than its non-pregnant employees"). There,
15 plaintiff "informed her supervisor in mid-April 1993 that she was pregnant; was placed on
16 unpaid leave on April 30, 1993; and was terminated on May 15, 1993." *Id.* The court
17 determined that "[t]he fact that she was terminated approximately one month after her pregnancy
18 became known to [her employer was] sufficient to raise a question concerning [her employer's]
19 motives in terminating her." *Id.* This is because questions related to an employer's intent to
20 discriminate are purely questions of fact," which is a question for the jury. *Id.* (quoting *Lowe*,
21 775 F.2d at 1008).

22 Like *Cleese*, the timing of Ongesii's termination is suspicious. Furthermore, to survive
23

24 ⁷ Ongesii Decl. ¶ 3, ECF No. 33-1 (Ongesii claims she notified her superiors at HSP in January of 2013 and showed them both her ultrasound at that time); *see also* Mesa Decl. ¶ 13, ECF No. 14-1 (Mesa acknowledges that Ongesii mentioned her pregnancy to her "sometime around April or May of 2013").

1 summary judgment, the evidence must be viewed in a light most favorable to the nonmoving
2 party. *Matsushita*, 475 U.S. at 587. Even though HSP presented evidence of deficiencies in
3 Ongesii's work performance, the court cannot say that a rational trier of fact would be unable to
4 find in favor of Ongesii in light of the evidence on the record. *See id.* Hence, Ongesii has
5 presented evidence raising a triable issue of material fact regarding whether HSP's proffered
6 reasons for termination were pretextual in a manner sufficient to overcome summary judgment.

7 VI. CONCLUSION

8 Ongesii sufficiently sets forth a prima facie case for sex discrimination on account of
9 pregnancy. Although HSP has met its burden of presenting legitimate, non-discriminatory
10 reasons for termination, Ongesii has presented a triable issue of fact regarding whether these
11 reasons were pretextual. Specifically, the timing of her termination is suspicious. Therefore,
12 HSP's Supplemental Motion for Summary Judgment is hereby **DENIED**.

13 **SO ORDERED.**



14 /s/ Frances M. Tydingco-Gatewood
15 Chief Judge
16 Dated: Dec 28, 2016