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DISTRICT OF ARIZONA
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Cynthia Quaranta,
Plaintiff,
vs.
Management Support, et al,
Defendants.

No. 01-0638-PHX-ROS
ORDER

Pending before the Court is Defendants' Motion for Summary Judgment [Doc. #34], filed March 8, 2002. Plaintiff Cynthia Quaranta is suing Defendants Management Support, the Frankel Family Trust (d/b/a Management Support), and Edward B. Frankel, Trustee ("Defendants") for discrimination of basis of sex (female / pregnancy) in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* Plaintiff filed a Response on April 10, 2002 [Doc. #40] and Defendants filed a Reply on April 29, 2002 [Doc. #46]. For the reasons explained in this Order, Defendants' Motion for Summary Judgment will be denied.¹

¹The Court vacated the hearing scheduled for November 8, 2002, because the parties submitted memoranda thoroughly discussing the law and evidence in support of their positions and oral argument would not have aided Court's decisional process. See Mahon v. Credit Bur. of Placer County, Inc., 171 F.3d 1197, 1200 (9th Cir. 1999); Partridge v. Reich,

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1 **I. Facts²**

2 Management Support is a property management company that manages residential
3 apartment properties in Arizona and other states. DSOF ¶1. On August 18, 1997,
4 Management Support hired Plaintiff, Cynthia Quaranta, for a data entry position at one of its
5 managed properties, the Meridian. DSOF ¶¶ 2, 3. Plaintiff's immediate supervisor was an
6 apartment manager, who was in turn supervised by a Regional Asset Manager. DSOF ¶¶ 4,
7 5. Though personnel changed over time, Plaintiff's apartment manager at the time of her
8 termination was Christie Murray ("Murray") and the Regional Asset Manager was Paul
9 Conrad ("Conrad"). DSOF ¶¶ 28, 37, PCSOF ¶40. Arizona employees of Management
10 Support are not eligible for leave under the Family Medical Leave Act ("FMLA") because
11 Management Support employs fewer than fifty employees in Arizona. DSOF ¶9.
12 Management Support does have a set of leave policies that allow an employee to take three
13 personal leave days per year plus a number of vacation days that accrue over time
14 (collectively "leave time"). PCSOF ¶¶11-14.

15 On or about December 8, 1997, Plaintiff learned she was pregnant. DSOF ¶16.
16 Plaintiff initially requested six weeks of leave to recover from giving birth, a request which
17 was rejected in a meeting on December 23, 1997 with Michael Kron ("Kron"), Chief
18 Operating Officer of Management Support. DSOF ¶¶ 23, 24. In May of 1998, Plaintiff
19 again made a request for six weeks of leave, which was denied by Conrad, though he
20 informed Plaintiff that she could use her accrued leave time to recover from giving birth.
21 PCSOF ¶31. Thereafter, Plaintiff applied for thirteen days of leave time in August. DSOF

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24 141 F.3d 920, 926 (9th Cir. 1998); Lake at Las Vegas Investors Group, Inc. v. Pacific Dev.
25 Malibu Corp., 933 F.2d 724, 729 (9th Cir. 1991), cert denied, 503 U.S. 920 (1992).

26 ²The facts are taken from Defendant's Statement of Facts ("DSOF") and Plaintiff's
27 Controverting Statement of Facts ("PCSOF"). Because the facts are viewed in the light most
28 favorable to the non-moving party on summary judgment, Defendant's Statement of Facts is
cited only when Plaintiff has admitted the relevant fact.

1 ¶32. Though Defendants now claim that Plaintiff was only eligible for eight days of leave
2 at that time, Conrad approved Plaintiff's request for thirteen days of leave. PCSOF ¶35.

3 Around June 15, 1998, Conrad hired Deborah Fisher ("Fisher") as an assistant
4 manager, and allegedly told her that she would move into the data entry position after
5 Plaintiff left. PCSOF ¶48. Plaintiff helped train Fisher to do the data entry work, but told
6 Fisher that she would be returning after her leave time expired. PCSOF ¶¶ 49, 51. After
7 Plaintiff was terminated, Fisher assumed Plaintiff's data entry role. Fisher Depo at 56-7.

8 On July 22, 1998, Plaintiff began to experience labor pains and called Murray to
9 inform her that she would not be coming into work that day. DSOF ¶39. According to
10 Plaintiff, the following day, Murray called her while Plaintiff was in the hospital recovering
11 from childbirth and told her she had been terminated. PCSOF ¶40. According to Murray's
12 testimony, Conrad ordered Murray to note that Plaintiff had voluntarily quit on Plaintiff's
13 checkout form. PCSOF ¶55. In early August, when Plaintiff returned to Meridian to
14 complete the administrative details of her termination, Plaintiff refused to sign the form
15 indicating that she had quit, and insisted she had been fired. PCSOF ¶55. On August 8,
16 1998, Plaintiff filed a charge of discrimination with the EEOC and on August 30 received
17 a Determination from the EEOC finding "reasonable cause to believe that [Defendants]
18 violated the Title VII in that [Defendants] terminated [Plaintiff] due to her pregnancy."
19 PCSOF ¶56. Aff of Brown, Exh. 6 to PCSOF. Thereafter, Plaintiff timely initiated this suit.

20 **II. Analysis**

21 **A. Legal Standards**

22 **1. Summary Judgment**

23 A court must grant summary judgment if the pleadings and supporting documents,
24 viewed in the light most favorable to the non-moving party, "show that there is no genuine
25 issue as to any material fact and that the moving party is entitled to judgment as a matter of
26 law." Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
27 Jesinger v. Nev. Fed. Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). Substantive law
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1 determines which facts are material, and “[o]nly disputes over facts that might affect the
2 outcome of the suit under the governing law will properly preclude the entry of summary
3 judgment.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see Jesinger, 24 F.3d
4 at 1130. In addition, the dispute must be genuine, that is, “the evidence is such that a
5 reasonable jury could return a verdict for the nonmoving party.” Anderson, 477 U.S. at 248.

6 Furthermore, the party opposing summary judgment “may not rest upon the mere
7 allegations or denials of [the party’s] pleadings, but . . . must set forth specific facts showing
8 that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); see Matsushita Elec. Indus. Co.,
9 Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Brinson v. Linda Rose Joint
10 Venture, 53 F.3d 1044, 1049 (9th Cir. 1995). There is no issue for trial unless there is
11 sufficient evidence favoring the non-moving party; if the evidence is merely colorable or is
12 not significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249-
13 50. However, because “[c]redibility determinations, the weighing of evidence, and the
14 drawing of inferences from the facts are jury functions, not those of a judge, . . . [t]he
15 evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn
16 in his favor” at the summary judgment stage. Id. at 255 (citing Adickes v. S.H. Kress & Co.,
17 398 U.S. 144, 158-59 (1970)); see Warren v. City of Carlsbad, 58 F.3d 439, 441
18 (9th Cir. 1995).

19 **2. Pregnancy Discrimination**

20 Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1), prohibits
21 discrimination on the basis of sex. In 1978, Congress passed the Pregnancy Discrimination
22 Act, amending Title VII to clarify that discrimination on the basis of sex includes
23 discrimination “on the basis of pregnancy, childbirth, or related medical condition.” 42
24 U.S.C. §2000e(k). The amendment also provides that “women affected by pregnancy,
25 childbirth or related medical conditions shall be treated the same for all employment-related
26 purposes ... as other persons not so affected but similar in their ability or inability to work...”
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1 Id. Pregnancy discrimination cases are thus analyzed under the familiar rubric of other Title
2 VII claims. Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir. 1998).

3 The analysis of a disparate treatment claim under Title VII is governed by McDonnell
4 Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973). Under the McDonnell Douglas
5 burden-shifting framework, a plaintiff must first establish a *prima facie* case of
6 discrimination, then the burden shifts to the defendant to articulate a legitimate
7 nondiscriminatory reason for its employment decision. See Llamas v. Butte Cmty. Coll.
8 Dist., 238 F.3d 1123, 1126 (9th Cir. 2001). In order to prevail, the Plaintiff must then show
9 that the employer's purported reason for the adverse employment action is merely a pretext
10 for a discriminatory motive. Id.

11 The plaintiff's *prima facie* case requires a showing that "give[s] rise to an inference
12 of unlawful discrimination." Id. (quoting Texas Dept. of Cmty Affairs v. Burdine, 450 U.S.
13 248, 253 (1981)). The plaintiff may establish a *prima facie* case by presenting direct
14 evidence of discriminatory intent. Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1220 (9th
15 Cir. 1998); see also Tempesta v. Motorola, Inc., 92 F.Supp.2d 973, 979-980 (D. Ariz. 1999).
16 Alternatively, a plaintiff can establish a *prima facie* case circumstantially, by meeting the
17 four requirements outlined in McDonnell Douglas: the plaintiff (1) is a member of a
18 protected class, (2) performed according to the employer's legitimate expectations, (3)
19 suffered an adverse employment action, and (4) was treated less favorably than other
20 employees similarly situated. See Chuang v. Univ. of Cal. Davis, Bd. of Trustees, 225 F.3d
21 1115, 1123 (9th Cir. 2000) (citing McDonnell Douglas, 411 U.S. at 802). Finally, "[t]he
22 requisite degree of proof necessary to establish a *prima facie* case for Title VII . . . claims on
23 summary judgment is minimal and does not need to rise to the level of a preponderance of
24 the evidence." Wallis v. J.R. Simplot Co., 26 F.3d 885, 859 (9th Cir. 1994).

25 "Once a *prima facie* case has been made, the burden of production shifts to the
26 defendant, who must offer evidence that the adverse action was taken for other than
27 impermissibly discriminatory reasons." Wallis, 26 F.3d at 899. The burden then shifts back
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1 to the plaintiff to show that the employer's stated reason is a pretext. See Godwin, 150 F.3d
2 at 1220 (9th Cir. 1998). At the pretext stage, "[w]hen the plaintiff offers direct evidence of
3 discriminatory motive, a triable issue as to the actual motivation of the employer is created
4 even if the evidence is not substantial." Id. at 1221. However, where plaintiff relies on
5 indirect evidence to show that the defendant's stated motive is not the actual motive, "[s]uch
6 evidence . . . must be 'specific' and 'substantial' in order to create a triable issue with respect
7 to whether the employer intended to discriminate on the basis of sex." Id. at 1222.

8 **B. Direct Evidence**

9 Plaintiff initially attempts to establish her *prima facie* case through use of direct
10 evidence. Direct evidence of discrimination is that which shows discriminatory animus
11 "without inference in presumption." Godwin, 150 F.3d at 1221 (quoting Davis v. Chevron,
12 U.S.A., Inc., 14 F.3d 1082, 1085 (5th Cir. 1994)). Here, Plaintiff claims that two of her
13 supervisors told her directly that she would be terminated once she gave birth.

14 First, Plaintiff claims that Kron told her, during a conversation in or around December
15 1997, that she would be terminated upon the birth of her child. PCSOF ¶24. However, the
16 undisputed evidence shows that this is not a completely accurate characterization of the
17 conversation. According to Defendant, DSOF ¶¶ 23, 24, Plaintiff met with Kron and asked
18 for six weeks of leave following the birth of her child, and Kron responded that if she took
19 six weeks off, it would be treated as a termination. Plaintiff admits these facts. PCSOF
20 ¶¶24, 25. Plaintiff testified that after Kron told her she could be terminated for six weeks of
21 leave, Kron said he would "look into it," and then nothing else was said. Quaranta Depo at
22 63-4. The reasonable interpretation of the Kron conversation is that Plaintiff would be
23 terminated if she took six weeks off, not that she would be terminated once she gave birth.
24 In fact, Plaintiff confirms that this was her contemporaneous understanding of the
25 conversation in her deposition.³ See Quaranta Depo at 63. Plaintiff provides no evidence
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27 ³Q: So it was your understanding that if you took one day off for your pregnancy, you
28 would be terminated?

1 that Kron told her that her pregnancy, and not a violation of the leave policy, would be
2 grounds for dismissal.

3 Next, Plaintiff claims that Conrad told her on or about May 5, 1998 that she would be
4 terminated upon giving birth. PCSOF ¶31. Again, Plaintiff's pleadings fail to clarify the full
5 extent of the conversation. Plaintiff conceded in her deposition that Conrad told her that she
6 would be terminated for taking six weeks leave, but that she could take her vacation time to
7 give birth, and still return to work.⁴ Quaranta Depo at 69, 76. When asked whether at the
8 end of the Conrad conversation, "you [Plaintiff] no longer believed that you would be fired
9 just simply by virtue of having the baby, correct?", she answered, "Not by virtue of having
10 a baby, no." Quaranta Depo at 76. Plaintiff's own admission establishes that she could be
11 terminated for taking off six weeks, but not for taking a shorter amount of vacation time to
12 recover from childbirth.

13 In sum, Plaintiff presents no direct evidence that she was terminated because of her
14 pregnancy. She concedes in her deposition that Kron and Conrad told her she would be
15 terminated if she wanted to take off more leave time than was allowed under company policy.
16 As further discussed in the next section, unexcused absences from work, even if due to
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19 A: No.

20 Q: What was your understanding?

21 A: I needed six weeks off to recover from the delivery, and it was that length of time.

22 Q: So your understanding when Mr. Kron said, if you take this much time off – if you
23 take six weeks off, that would be treated as a termination, was that your understanding?

24 A: Yes, that was my understanding."
25 Quaranta Depo at 63.

26 "Q: But if you wanted to take your vacation time to have the baby, you could?

27 A: I asked him if I could, and he said yes." Quaranta Depo at 69.

28 "Q: I see. So then you understood that you could take 10 days of vacation to have the
baby and return to work?

A: Yes.

Q: Is that your understanding?

A: Yes. That's when he told me, I had to fill out a form, and he would have to
approve it." Quaranta Depo at 76.

1 pregnancy, are permissible grounds for termination. See, e.g., Dormeyer v. Comerica Bank-
2 Illinois, 223 F.3d 579, 583 (7th Cir. 2000). The Pregnancy Discrimination Act does not
3 mandate a maternity leave policy, and the parties concede that Defendant was not required
4 by law to have one. DSOF ¶9, PCSOF¶9. Therefore, Kron and Conrad's stated reasons for
5 the threat of termination were neutral, and Plaintiff has no direct evidence of discrimination.

6 **C. Indirect evidence**

7 **1. *Prima facie* case**

8 **a. The legal standard**

9 Plaintiff also contends that she can make out a circumstantial case of discrimination
10 under the McDonnell Douglas model. However, the parties dispute the correct application
11 of the McDonnell Douglas framework regarding pregnancy discrimination cases. Generally,
12 a plaintiff must satisfy four elements to establish a *prima facie* case indirectly : (1) she
13 belongs to a protected class; (2) she was qualified for the position; (3) she was subject to an
14 adverse employment action; and (4) similarly situated individuals outside the protected class
15 were treated more favorably. Chuang, 225 F.3d at 1123 (9th Cir. 2000) (citing McDonnell
16 Douglas, 411 U.S. at 802). The two parties concede that Plaintiff meets the first three
17 elements of the framework. But the parties dispute whether Chuang states the correct test
18 for the fourth element in this case.

19 Defendants read the fourth element in Chuang to mean that Plaintiff must provide
20 evidence of similarly situated employees who were not terminated for taking vacation time
21 in excess of the company policy. According to Defendants, Plaintiff bears this burden of
22 comparison to other employees at the *prima facie* stage. Plaintiff, however, argues that the
23 fourth element of the framework can be satisfied merely by providing comparison to
24 Plaintiff's replacement after she was fired. Plaintiff contends that the fourth element should
25 be that "her position remained open and was ultimately filled by a non-pregnant employee."
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1 Atchley v. Nordam Group, Inc., 180 F.3d 1143, 1148 (10th Cir. 1999), Kerzer v. Kingly Mfg.,
2 156 F.3d 396, 401 (2d Cir. 1998).⁵

3 The two standards impose substantively different requirements on the plaintiff at the
4 *prima facie* stage. If a plaintiff was merely required to show that she was replaced by a non-
5 pregnant employee, then the burden will shift to the employer to show that the plaintiff was
6 terminated for neutral, work-based reasons, such as a violation of the leave policy. The
7 plaintiff then could provide evidence that the policy was applied pretextually, including
8 evidence that it was applied inconsistently. However, if the plaintiff must present evidence
9 of similarly situated individuals at the *prima facie* stage, but fails to do so, then the plaintiff
10 will never have the opportunity to show that the firing was pretextual. In many cases, this
11 sequence of proof will make no difference, though it will in a case where Plaintiff's best
12 evidence of pregnancy discrimination is that her employer hired and trained an employee to
13 be her replacement, and fired her in possible contravention of its own leave policies. The
14 employer might claim that it treated all its employees in such an equally shabby manner; the
15 issue is whether the Plaintiff must prove in her *prima facie* case that it did not, or wait to see
16 if Defendant offers this explanation as a defense.

17 After reviewing a number of Title VII cases, the Court concludes that plaintiff can
18 *either* show similarly situated individuals were treated differently *or* that she was replaced
19 by a non-pregnant employee, in order to make out a *prima facie* case. The Sixth Circuit has

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21 ⁵Plaintiff also proposes that the fourth element be phrased as the "protected activity
22 and the adverse employment action were causally connected," Gleklen v. Democratic
23 Congressional Campaign Comm., Inc., 199 F.3d 1365, 1368 (D.C.Cir. 2000), or that there
24 is "a nexus between her pregnancy and the adverse employment decision." Cline v. Catholic
25 Diocese of Toledo, 206 F.3d 651, 658 (6th Cir. 2000). Plaintiff's reliance on Gleklen is
26 clearly misplaced, since the cited passage is taken from an analysis of a retaliation claim.
27 However, Gleklen relies on Pendarvis v. Xerox Corp., 3 F.Supp.2d 53, 57 (D.D.C. 1998),
28 which holds that pregnancy discrimination can be shown either by proof of a causal nexus
or replacement by a non-pregnant employee. In Cline, the fourth element was not at issue,
and the logic behind the court's formulation is not explained. It is unclear whether the
"causal nexus" formulation would be interpreted, but it has no apparent parallels in disparate
treatment claims in the Ninth Circuit.

1 embraced this position, holding that "showing that similarly situated non-protected
2 employees were treated more favorably than plaintiff is not a requirement but rather an
3 alternative to satisfying the fourth element of the *prima facie* case - a plaintiff may satisfy
4 the fourth element by showing either that the plaintiff was replaced by a person outside the
5 protected class, *or* that similarly situated non-protected employees were treated more
6 favorably than the plaintiff." Clayton v. Meijer, Inc., 281 F.3d 605, 610 (6th Cir. 2002)
7 (quoting Talley v. Bravo Pitino Rest., Ltd., 61 F.3d 1241, 1247 (6th Cir. 1995)). The
8 Eleventh Circuit reached a similar result in a pregnancy discrimination case in Byrd v.
9 Lawrence Hosp., 30 F.3d 1380, 1383 (11th Cir. 1994) (rejecting argument that plaintiff who
10 was terminated for absenteeism without violating a policy must also prove that similarly-
11 situated employees were not fired). See also Armindo v. Padlocker, Inc., 209 F.3d 1319,
12 1321(6th Cir. 2000) (*per curiam*) ("A plaintiff alleging pregnancy discrimination need not
13 identify specific non-pregnant individuals treated differently from her, if the employer
14 violated her own policy in terminating her.").

15 Judge Posner, on whom Defendants rely in their briefs, outlines the same principle in
16 Troupe v. May Dep't Stores Co., 20 F.3d 734 (7th Cir. 1994), also a pregnancy discrimination
17 case. According to Judge Posner, "[t]hree types of circumstantial evidence of intentional
18 discrimination can be distinguished," and "[e]ach type of evidence is sufficient *by itself* ...
19 to support a judgment for the plaintiff." Troupe, 20 F.3d at 734 (emphasis added). One type
20 of evidence is that similarly situated employees were treated more favorably, while another
21 type is "evidence that the plaintiff was qualified for the job in questions but passed over in
22 favor of (or replaced by) a person not having the forbidden characteristic and that the
23 employer's state reason for the difference in treatment is unworthy of belief, a mere pretext
24 for discrimination." Troupe, 20 F.3d at 734.⁶

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27 ⁶Admittedly, the Court did not side with the plaintiff in Troupe. The Court clarified
28 that neither comparative nor pretext evidence was presented in that case. 20 F.3d at 736-37.

1 In addition, McDonnell Douglas itself describes the fourth step in terms of
2 comparison to an employee's replacement, not comparison to similarly situated individuals.
3 See McDonnell Douglas, 411 U.S. at 802 (describing fourth step as "after his rejection, the
4 position remained open and the employer continued to seek applicants from person's of
5 complainant's qualifications."). The Supreme Court also indicated that "[t]he facts
6 necessarily will vary in Title VII cases, and the specification ... of the *prima facie* proof
7 required from [a plaintiff] is not necessarily applicable in every respect to differing factual
8 situations." 411 U.S. at 802 n.13. See also Washington v. Garrett, 10 F.3d 1421, 1433-4 (9th
9 Cir. 1994) (in sex discrimination case, reinterpreting fourth element in cases involving
10 reductions of force instead of direct replacement).

11 Finally, Ninth Circuit precedent describes the fourth element of discrimination claims
12 in terms of *either* replacement or comparison to similarly situated individuals. In Wallis, the
13 Court described the fourth element of a *prima facie* case under the ADEA (which uses the
14 McDonnell Douglas framework) as "replaced by a substantially younger employee with equal
15 or inferior qualifications," but also noted that "[p]roof of the replacement element is not
16 always required." Wallis, 26 F.3d at 891. Therefore, Wallis suggests that comparison to
17 other individuals outside the employee's protected class is merely an alternative to showing
18 direct replacement by another employee. Similarly, in Villiarimo v. Aloha Island Air, Inc.,
19 281 F.3d 1054, 1062 (9th Cir. 2002), a sex discrimination case, the Court described the fourth
20 element as "similarly situated men were treated more favorably, or her position was filled by
21 a man." See also Nidds v. Schindler Elevator Corp., 113 F.3d 912, 917 (9th Cir. 1997) (in age
22 discrimination case, describing proof of replacement and comparison with similar individuals
23 as alternative ways of making *prima facie* case, and citing with approval Caldwell v.
24 Paramount Unified Sch. Dist., 41 Cal.App.4th 189, 200 (Cal. App. 1995), which interprets
25 fourth element of McDonnell Douglas as "others not in the protected class were retained in
26 similar jobs, and/or his job was filled by an individual of comparable qualifications not in the
27 protected class"). Indeed, the Ninth Circuit has held that a plaintiff can make a *prima facie*
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1 case of discrimination even if he or she is replaced by a member of the *same* protected class,
2 see Lyons v. England, 307 F.3d 1092 (9th Cir. 2002), though an employer can still use such
3 replacement evidence on rebuttal. In short, the Ninth Circuit has allowed a plaintiff to
4 establish the fourth element of a *prima facie* case even in situations farther afield than direct
5 replacement by a non-member of a protected class. Though Chuang states the fourth element
6 in slightly different terms than McDonnell Douglas and subsequent cases, Chuang does not
7 alter the substantive requirements of meeting the fourth element.

8 In response, Defendants rely on a number of cases from other circuits holding that
9 pregnancy discrimination plaintiffs must present evidence of similarly situated employees
10 to survive summary judgment. In Lang v. Star Herald, 107 F.3d 1308, 1312 (8th Cir. 1997),
11 for example, the Eighth Circuit held that "as the *prima facie* elements . . . demonstrate,
12 [plaintiff] must have evidence that she was treated differently than similarly situated
13 employees." See also Stout v. Baxter Healthcare Corp., 282 F.3d 856, 859-60 (5th Cir. 2002)
14 (same holding in Fifth Circuit); Dormeyer, 223 F.3d at 583 (same holding in Seventh
15 Circuit). Lang relies, on part, on the text itself of the Pregnancy Discrimination Act, which
16 states that "women affected by pregnancy ... shall be treated the same ... as other persons not
17 so affected but similar in their ability or inability to work." Id. (quoting 42 U.S.C.
18 §2000e(k)). Lang and its counterparts, however, neglect the first part of the Act, which
19 defines discrimination on the bases of sex under Title VII to include discrimination "because
20 of or on the basis of pregnancy." 42 U.S.C. §2000e(k). Pregnancy discrimination cases are,
21 statutorily, sex discrimination cases under Title VII, and under Ninth Circuit precedent, a
22 Title VII plaintiff can show she was treated in a discriminatory manner by showing that she
23 was replaced by a member of a non-protected class. Moreover, evidence of replacement only
24 establishes a *prima facie* case; after the defendant proffers a legitimate basis for the action,
25 absent evidence of pretext, mere evidence of replacement will be unlikely to be "specific"
26 and "substantial" enough to survive summary judgment. See Godwin, 150 F.3d at 1222. To
27 the extent that Lang and related cases even address similar fact patterns to Plaintiff's, they
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1 fail to explain why pregnancy discrimination cases should depart from Ninth Circuit
2 framework for all Title VII claims.

3 **b. Plaintiff's evidence**

4 Plaintiff is unable to show that other similarly situated employees who were not
5 pregnant were able to take additional leave time beyond company policy. Plaintiff submits
6 some evidence regarding two employees, Sue Arnold and Deborah Fisher, neither of whom
7 were pregnant. However, Plaintiff fails to provide sufficient evidence that those employees
8 were either similarly situated or granted additional leave time.

9 Plaintiff asserts that Sue Arnold, a manager at another Management Support property
10 in Arizona, took additional days off when she became ill but was not terminated. PCSOF
11 ¶50. Defendant has filed a Motion to Strike this evidence [Doc. #45], and it will be granted.
12 Plaintiff relies only on the testimony of Fisher, who said that Arnold's extra leave time was
13 "the talk of the office." Fisher Depo at 78. Fisher, however, had no personal knowledge of
14 the amount of Arnold's leave time or whether she exceeded her limit under company policy.
15 Fisher even conceded that she did not know Sue Arnold's last name. *Id.* Therefore, the
16 witness testimony lacks the requirement of personal knowledge. Fed. R. Evid. 602.

17 Fisher's testimony is also hearsay not subject to an exception. Fisher is purportedly
18 relying on some out-of-court statement ("the talk of the office") to prove the truth of Arnold's
19 absences, which is inadmissible hearsay under Fed. R. Evid. 802. Plaintiff argues that
20 Fisher's testimony is admissible to show Plaintiff's state of mind regarding whether she could
21 take additional leave time. However, Fisher never testified that she discussed Arnold's
22 absences with Plaintiff, and, more to the point, Plaintiff's state of mind would not prove the
23 truth of Arnold's absences. Finally, Plaintiff argues that Fisher was an agent of Management
24 Support or authorized to make representations about Arnold's leave time by Management
25 Support, such that her statements constitute admissions of a party-opponent under Fed. R.
26 Evid. 801(d)(2)(C) or (D). Plaintiff, however, only offers evidence that Fisher was entrusted
27 with assorted managerial tasks and data entry, and provides no evidence indicating that
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1 Fisher had any responsibilities associated with Management Support's leave policy. Thus,
2 the evidence does not establish that she had authority to speak on the subject and was
3 speaking on a matter "within the scope of agency or employment." Fed. R. Evid.
4 801(d)(2)(D). The evidence of Arnold's leave time will be stricken.

5 Plaintiff also offers evidence that Fisher herself took two weeks of vacation that were
6 in excess of her accrued leave time. Fisher Depo at 22. Fisher also testified, however, that
7 she negotiated time off for the pre-planned two-week vacation before she began work, and
8 that the vacation was "part of the agreement to hire." *Id.* Thus, Fisher was not "similarly
9 situated" in all relevant respects to Plaintiff, since she negotiated additional time off before
10 she was hired, while Plaintiff did not. *See Clayton*, 281 F.3d at 610-11. On the other hand,
11 because Fisher was allegedly hired to *replace* Plaintiff, the fact that she was given
12 opportunity to negotiate extra leave time independently supports an inference of
13 discrimination. *See Clayton*, 281 F.3d at 610 (showing replacement is alternative method of
14 proving *prima facie* case than showing comparison to similarly situated individuals).

15 Despite this lack of comparative evidence, Plaintiff meets the *prima facie* burden by
16 showing that Conrad hired Fisher as a replacement after being informed of Plaintiff's
17 pregnancy. Fisher has testified that when she was interviewed to be hired, Conrad told her
18 that she would be hired as an assistant manager, but then transferred to replace the current
19 data entry employee when that employee left.⁷ Fisher Depo at 18-20. Plaintiff trained Fisher
20 to do data entry work, and Fisher became aware that Plaintiff planned to return to work after
21 giving birth. *Id.* at 31, 33. Concerned for her job, Fisher asked Conrad about her duties if
22 Plaintiff returned from maternity leave. *Id.* at 70-1. Conrad assured Fisher that she could
23 keep her job, and Fisher "got the impression from [Conrad] that he didn't plan on bringing
24 Cynthia back." *Id.* at 70. Fisher did indeed take over data entry duties after Plaintiff was
25 terminated. *Id.* at 56-7. This evidence is sufficient to fulfill the *prima facie* requirements of

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27 ⁷Defendants make no objection to this testimony as hearsay, and presumably Conrad's
28 statements are admissible under Fed. R. Evid. 801(d)(1)(D), as statements of a party-
opponent's agent concerning a matter within the scope of agency or employment.

1 establishing that plaintiff was replaced by a non-pregnant employee. See Quaratino v.
2 Tiffany & Co., 71 F.3d 58, 65 (2nd Cir. 1995) (interviewing of non-pregnant woman for
3 plaintiff's job before beginning of plaintiff's maternity leave was "most significant" fact and
4 supported *de minimus* burden of proof at *prima facie* stage).

5 **2. Rebuttal and Pretext Evidence**

6 In answer to Plaintiff's *prima facie* case, Defendants contend that Plaintiff was fired
7 for violating Management Support's facially neutral leave policy. Defendants set forth a
8 number of cases to argue that a violation of leave policy is a permissible ground for
9 termination as a matter of law. Defendant's cases are insufficient to settle the issue, however,
10 because they do not consider circumstances where a plaintiff was able to prove that the
11 application of the policy was inconsistent or pretextual. See, e.g., Stout, 282 F.3d at 859-60
12 ("There is no evidence [plaintiff] would have been treated differently if her absences had
13 been due to some reason unrelated to pregnancy or if she had been absent the same amount
14 but not pregnant.").

15 Plaintiff has three items of evidence to rebut Defendant's contention that she was fired
16 for violating the leave policy. First, as discussed above in her *prima facie* case, Plaintiff can
17 show that her employer hired a replacement after being informed of her pregnancy and
18 allowed the new employee, Fisher, to negotiate for longer vacation time. Additionally,
19 Plaintiff presents some evidence that she was fired *before* her leave expired, in contravention
20 of Management Support's own policy. Finally, Defendants have given conflicting
21 explanations for Plaintiff's departure at different times, initially claiming she quit, but
22 recently claiming she was fired. These facts constitute specific and substantial evidence
23 raising an inference that Plaintiff was terminated because of her pregnancy.

24 Plaintiff claims that she was terminated on July 23, 1998, before her leave time
25 expired. Defendants respond that Plaintiff was terminated effective August 4, after her leave
26 time had expired. Defendants also contend that Plaintiff indicated before July 22 that she
27 would not return at the end of her leave time. Though there is some evidence to show that
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1 Plaintiff did not plan on returning after giving birth, there is sufficient evidence to raise a
2 genuine issue of material fact that Defendants terminated Plaintiff before the end of her leave
3 time and without knowing whether she planned to return.

4 Plaintiff called Murray to tell her that she was going into labor and would not be
5 arriving at work on July 22, 1998. DSOF ¶39, Quaranta Depo at 113. The next day, Murray
6 called and informed Plaintiff that she would be terminated in August after the expiration of
7 her vacation and sick days, apparently so that Plaintiff could retain health insurance coverage
8 throughout the month of August. PCSOF ¶40, Quaranta Depo at 115-7.⁸ Plaintiff testified
9 that she did not recall whether Murray gave her a reason for termination, and that she did not
10 ask. Quaranta Depo at 119-20. At no point in this sequence of events does Plaintiff state
11 that she affirmatively told Murray that she had planned to return at the expiration of her
12 approved leave time.

13 Defendants claim that they were under the impression that Plaintiff planned to take
14 six weeks of vacation. On June 23, 1998, Plaintiff sent an email to Christie Murray,
15 Meridian's apartment manager, which stated in part, "Due to my pregnancy, I will need
16 approximately six weeks of unpaid leave so that I may give birth and recover from my
17 delivery." Quaranta Depo at 86; Exh. 4. Plaintiff recounted her conversations with Kron and
18 Conrad, indicating that they told her that she could not take six weeks of unpaid leave. Id.
19 She also indicated she had not heard anything further from Kron or from "Corporate." Id.
20 She then wrote, "How will my termination be handled? Will I receive my accrued vacation
21 and personal time?" Id. This email could create the inference that Plaintiff planned to accept
22 termination rather than return to work.

23 On the other hand, Plaintiff has evidence that she gave Defendant notice that she
24 planned to return at the end of her leave. Plaintiff submitted a Vacation Request form on
25 May 11, 1998, requesting either August 3 to August 14 off, or alternatively, August 4 to

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27 ⁸The suggestion that Murray told Plaintiff she would be terminated in the July 23
28 conversation is flatly contradicted by Murray. Murray Depo at 45. The EEOC Letter
recounts Plaintiff's version of events. EEOC Letter, Aff. of Brown, Exh. 6 to PCSOF.

1 August 17 off. Quaranta Depo, Exh. 5. Conrad approved this vacation time on May 11.⁹
2 Quaranta Depo, Exh. 6; DSOF ¶36. Though the form does not indicate that the vacation days
3 are in anticipation of giving birth, Plaintiff testified that she planned the vacation days in
4 accordance with her expected delivery date. Quaranta Depo at 112.

5 Also, Murray has testified that Conrad knew Plaintiff was planning to return after her
6 leave expired. Murray testified that Conrad ordered her to indicate on Plaintiff's Termination
7 Checkout Sheet that Plaintiff had quit. Murray Depo at 42. Murray testified further, "I did
8 tell him that I disagreed, that to my knowledge, she had not quit, that I had not received
9 anything in writing, and that how were we sure that she wasn't going to come back at the end
10 of her vacation." *Id.* Murray claims that Conrad had no response, but merely to put down
11 that Plaintiff quit. *Id.* Murray's testimony raises the inference that Plaintiff would have been
12 terminated whether or not she returned from her leave.¹⁰ Moreover, it calls into question the
13 accuracy of the second part of Defendant's entry on the Checkout Sheet (which Plaintiff
14 refused to sign): "pregnant / wanted eight wks off." Aff. of Auzenne, Exh. 5 to PCSOF.¹¹

16 ⁹The parties dispute the actual significance of Conrad approving the leave request.
17 Defendant claims that Conrad approved the leave from an "operational standpoint. That is,
18 he believed that the Meridian could function without Plaintiff being present during that
19 time." DSOF ¶35. Defendant's only foundation for this evidence is the Affidavit of Michael
20 Kron, which is insufficient. Kron does not indicate how he obtained knowledge of Conrad's
21 reasons for approving the request. Supp. Aff. of Kron ¶4. He does not point to any record
22 showing such a reason nor elaborate on any knowledge that would support his conclusion
23 about Conrad's motivations. Nevertheless, Conrad's reasons or scope of authority are not
24 relevant for the purposes of resolving this motion, because Plaintiff was terminated before
25 she exhausted *any* vacation days. The number of days she *could* have taken is beside the
26 point.

24 ¹⁰Murray also testified that she and Conrad discussed whether or not to extend
25 Plaintiff's health benefits the day after Plaintiff gave birth. Murray Depo at 38. This
26 supports Plaintiff's testimony that she understood that she would be terminated, though not
27 until August, and indicates that Conrad was considering Plaintiff's termination before her
28 vacation days expired.

27 ¹¹To the Court's knowledge, neither party indicates *who* wrote that comment on the
28 Checkout Form, though Plaintiff both testified that she refused to sign it, and has never

1 In addition, Defendants' explanation for Plaintiff's dismissal has changed over time.
2 Murray testified that she was told by Conrad to indicate "Quit" rather than "Discharge" on
3 Plaintiff's Termination Checkout Sheet. Despite Plaintiff's refusal to sign the form, on
4 August 20, 1998, Dr. Frankel sent a letter to EEOC investigators that "Ms. Quaranta was not
5 discharged from her position but, rather, quit her position effective August 3, 1998." Aff.
6 of Auzenne, Exh. 5 to PCSOF. Defendant now contends that Plaintiff was terminated
7 because "she had exhausted all the leave to which she was entitled under Management
8 Support's policies." Def's Motion at 1-2. "[F]undamentally different justifications for an
9 employer's action would give rise to a genuine issue of fact with respect to pretext since they
10 suggest the possibility that neither of the official reasons was the true reason." Washington,
11 10 F.3d at 1434. "A rational trier of fact could find these varying reasons show that the
12 stated reason was pretextual, for one who tells the truth need not recite different versions of
13 the supposedly same event." Payne v. Norwest Corp., 113 F.3d 1079, 1080 (9th Cir. 1997).
14 See also Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 432 (1st Cir. 2000) ("when a
15 company, at different times, gives different and arguably inconsistent explanations, a jury
16 may infer that the articulated reasons are pretextual.")

17 In response, Defendants present a chart of the employment records of other employees
18 purporting to show that Management Support was consistent in timely discharging employees
19 for violating the company's leave policy. Aff. of Kron, Exh. 1 to DSOF. The chart is
20 inadequate to refute Plaintiff's evidence of pretext. Defendants make no attempt to comply
21 with the requirements of Fed. R. Evid. 1006 dealing with summaries of the "contents of
22 voluminous writings," including the requirements of producing or copying the original
23 writings. Moreover, the chart does not even approximate an explanation of the circumstances
24 of each employee's dismissal, because it simply lists dates of termination. Considering
25 Plaintiff's evidence of pretext, the burden is on Defendant to prove consistency. See Byrd,
26 30 F.3d at 1383 ("[The] only logical inference to be drawn in this case is that the [employer]

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28 indicated that she wanted more than six weeks off. Quaranta Depo at 79.

1 policy customarily was followed. A contrary result would amount to a presumption ... that
2 [the employer] commonly discharged employees for taking their allotted sick leave time. If
3 such is the case, then the burden [is] on [employer] to prove this unusual scenario.").

4 Plaintiff has presented specific and substantial evidence that Defendants' stated reason
5 for her dismissal was merely a pretext for discrimination. She was replaced in advance by
6 a non-pregnant employee, she was arguably terminated before the expiration of her leave
7 time, and Defendants' explanations for her dismissal have changed over time.

8 **III. Conclusion**

9 Defendants' Motion for Summary Judgment will be denied. Plaintiff has provided
10 substantial circumstantial evidence to create a genuine issue of material fact whether Plaintiff
11 was terminated on the basis of the pregnancy in violation of Title VII.

12 Accordingly,

13 **IT IS ORDERED** that Defendants' Motion for Summary Judgment [Doc. #34] is
14 **DENIED.**

15 **IT IS FURTHER ORDERED** that Defendants' Motion to Strike Certain Portions of
16 Plaintiff's Additional Undisputed Facts [Doc. #45] is **GRANTED.**

17 **IT IS FURTHER ORDERED** that Plaintiff's Motion to Strike Certain Portions of
18 Defendant's Statement of Facts in Support of Defendants' Motion for Summary Judgment
19 [Doc. #42] is **DENIED AS MOOT.**

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IT IS FURTHER ORDERED that the parties are to prepare a Joint Proposed Pretrial Order by May 2, 2003, including motions *in limine*, a jointly proposed statement of the case, and jointly proposed voir dire questions. The parties shall submit either individually five (5) additional voir dire questions or collectively ten (10) jointly proposed voir dire questions. The parties are directed to the Court's website at www.azd.uscourts.gov (under "Judicial Officer Information") for copies of the forms. Responses to motions *in limine* are due on May 16, 2003. The Final Pretrial Conference will be held on June 9, 2003 at 1:30 p.m.

DATED this 28 day of March, 2003



Roslyn O. Silver
United States District Judge