2013 WL 2327017 (Mich.App.) (Appellate Brief)
Court of Appeals of Michigan.

Rodica Silvia BIRIS, Plaintiff-Appellant,
v.
INGHAM COUNTY MEDICAL CARE FACILITY, Ingham County Department of Human Services Board, and Fred Frye, an individual, Defendants-Appellees.

No. 310375.
January 16, 2013.

Ingham County Circuit Court Case No.: 11-000743-CD
Oral Argument Requested

Brief On Appeal By Defendants-Appellees Ingham County Medical Care Facility, Ingham County Department of Human Services Board and Fred Frye Exhibit (Bound Separately)

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Defendants do not disagree with plaintiff's statement regarding jurisdiction.

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I

WHETHER SUMMARY DISPOSITION OF THE WHISTLEBLOWER PROTECTION ACT CLAIM WAS PROPER, AS PLAINTIFF FAILED TO ESTABLISH A GENUINE ISSUE OF MATERIAL FACT AS TO EACH OF THE ELEMENTS OF THIS CLAIM AND/OR DEFENDANTS ESTABLISHED A LEGITIMATE BUSINESS REASON THAT WAS NOT REBUTTED BY PLAINTIFF?

Plaintiff-Appellant asserts the answer is “No.”

Defendants-Appellees Ingham County Medical Care Facility, Ingham County Department Of Human Services Board and Fred Frye submit the answer is “Yes.”

The trial court held the answer is “Yes,” finding no causation, as well as an unrebutted legitimate reason.

II

WHETHER PLAINTIFF'S PUBLIC POLICY CLAIM WAS PROPERLY DISMISSED FOR THE ABSENCE OF A GENUINE ISSUE OF MATERIAL FACT, AND/OR AS BARRED AS THE WPA IS THE SOLE EXCLUSIVE REMEDY AND/OR AS BARRED BY GOVERNMENTAL IMMUNITY?

Plaintiff-Appellant asserts the answer is “No.”

Defendants-Appellees Ingham County Medical Care Facility, Ingham County Department Of Human Services Board and Fred Frye submit the answer is “Yes.”

The trial court held the answer is “Yes,” on the ground that the WPA is plaintiff's sole remedy.

*1 COUNTERSTATEMENT OF FACTS

Plaintiff Rodica Biris has appealed from the order of Ingham County Circuit Court Judge Clinton Canady III granting summary disposition to defendants and dismissing plaintiff's wrongful discharge action. Plaintiff had alleged that she was terminated from her employment with the Ingham County Medical Care Facility in violation of the Whistleblower Protection Act (Complaint, Count I), and/or public policy (Count II), and that she had been subjected to intentional infliction of emotional distress (Count III). Plaintiff on appeal challenges only the dismissal of Counts I and II.

Underlying Facts: Plaintiff's “Protected Activity.”

Plaintiff began working for defendant Ingham County Medical Care Facility (“ICMCF” or “Facility”) on May 9, 2005. (Audit report, exhibit A to motion for summary disposition, hereinafter “MSD”.) ICMCF is a skilled nursing facility providing skilled nursing and rehabilitation services to its residents and patients. ICMCF is operated by defendant Ingham County Department of Human Services Board. Plaintiff was hired by ICMCF while she was working toward her certified nurse aide certification. At ICMCF, a certified nurse aide (CNA) is responsible for the daily care of nursing home residents such as feeding, bathing, and assisting the residents. (ICMCF job description, MSD exhibit B).

Nursing homes are heavily regulated under State and Federal law, and each nursing home has regulatory and ethical duties to ensure safety of its residents. This includes requirements to “self-report” allegations of **abuse**, neglect, or injuries of unknown origin within 24 hours to the State, and then follow up with a “five day” ***2** report. (Affidavit of Mark Stevens, ICMCF administrator, MSD exhibit C.) This means that if a resident wakes up with a bruise from an unknown source it must be reported. Likewise, when a family member complains that a nursing home employee is mistreating a resident, that must also be reported and the incident must be thoroughly investigated. ICMCF follows these regulations and has self-reported these types of situations. (See MSD exhibits C and D.)

On April 17, 2011, a family member of a resident at ICMCF reported to the Facility's Director of Nursing (“DON”), Julie Pudvay, that her mother, “EM,” was **abused** by a CNA, Ronda Vermillion. The basis for the daughter's claim was that she had been told by four CNAs, including plaintiff, that Ms. Vermillion was too “rough” with EM, did not allow her enough time on the bedpan, and was loud. (Plaintiff's dep, pp 92-93, pp 95-96, 4/22/11 ICMCF Investigation Report by DON Julie Pudvay, p 35, MSD exhibit BB.)

This complaint by a resident's family member (not a complaint by plaintiff) led to a full-scale internal investigation by the Facility, and the submission by the Facility to the State of Michigan of the required 24-hour and five day self-reports. (MSD exhibit C, Pudvay dep, pp 13-14.) CNA Ronda Vermillion was suspended pending the outcome of the investigation. (*Id.*)

As part of the investigation, ICMCF interviewed 50 staff members, including several interviews of plaintiff, along with 72 residents, including EM's roommate. (MSD exhibit BB.) After plaintiff was interviewed by her supervisor, Sue Overly, plaintiff was asked to prepare an incident report describing what she stated - that she had seen Ms. Vermillion be rough and mean with residents, and that plaintiff had told ***3** this to the resident's daughter. (Plaintiff's appeal exhibit E.) Plaintiff prepared the report sometime before April 29. (Plaintiff's dep, pp 95-105.)

The Facility 5-Day Investigation Report to the State, prepared by DON Pudvay on April 22, 2011, described the Facility's exhaustive investigation of the allegation regarding CNA Vermillion. DON Pudvay noted that of the 50 staff interviewed, only plaintiff stated that CNA Vermillion had placed EM in a chair and then went on break, or told the resident she would put her on the bed pan after break. (MSD exhibit BB, p 036.) Ms. Pudvay concluded, based on the multitude of interviews, that CNA Vermillion did not commit willful or intentional **abuse**, but noted that Ms. Vermillion, a large woman, was known to be loud. The report concluded that Ms. Vermillion would be provided with communications training on how to improve her tone and mannerisms when interacting with residents. (*Id.*)

The State of Michigan later conducted its own two-day investigation of the complaint on May 5 and May 6. Like the Facility, the State also cleared Ms. Vermillion. (State Report, MSD exhibit D at 928; Pudvay dep, pp 33-36, 38, MSD exhibit K.)

Plaintiff would later allege that she was terminated in retaliation for her protected activity in participating, with 50 other staff members, in the April 2011 investigation by the Facility of the complaint by a daughter of a resident regarding Ms. Vermillion that resulted in a finding of no neglect, and no action taken against the Facility by the State.

***4 Underlying Facts: Plaintiff's Refusal To Obtain Medical Certification Of Fitness For Duty After Losing Consciousness While Assisting A Patient.**

While transporting a resident in a wheelchair on April 30, 2011, plaintiff appeared to lose consciousness or “pass out,” and fell against the wheelchair. This was according to information provided to the Facility by several coworker eye witnesses during the subsequent State-required investigation of this incident. (Unusual Occurrence Report, Bates 374-376, MSD exhibit L, Henry dep, pp 14-17, MSD exhibit N, Smith dep, pp 6-7, MSD exhibit O.) Eye witnesses Nurse Shauna Smith and fellow CNA Tamekia Henry reported, and in discovery here testified, that plaintiff was “passed out,” with her eyes rolled back in her head, and was not alert. (Henry dep, pp14-17, MSD exhibit N, Smith dep, pp 6-7, MSD exhibit O.) A maintenance employee and the son of the resident plaintiff was transporting had to help plaintiff to a chair. (MSD exhibit Q, Frye dep, p 11, MSD Exhibit W, correspondence to plaintiff.) [1]

Plaintiff was called to meet with the Human Resources Director, defendant Fred Frye, on the next workday, Monday, May 2, after Mr. Frye reviewed the Facility incident report and plaintiff's coworkers' statements describing the event on April 30. Concerned that it would not be safe for plaintiff to work with **elderly** residents of the Facility after this passing out event, Mr. Frye requested that plaintiff not return to work until she saw a physician, and could provide a physician certification that plaintiff was ***5** safe to work with residents. (Frye dep, pp 10-13.) Unbeknownst to defendants at the time, after plaintiff was sent home, on May 2, she contacted a lawyer. (Plaintiff's dep, p 117.)

Plaintiff met with Mr. Frye again on the next day, Tuesday, May 3, 2011. Plaintiff surreptitiously recorded this meeting. (See MSD exhibit R, transcription of plaintiff's recording.) Plaintiff presented a note from her psychiatrist, Dr. Domino, that stated that that he could not “guarantee” plaintiff would not have another panic attack. The note did not provide a certification that

plaintiff could return to work. Plaintiff claimed that Mr. Frye at the first meeting the day before had requested a physician certification that "guaranteed" that she would never again have another panic attack, which Mr. Frye denied. (Frye dep, pp 9-15).

During this meeting, Mr. Frye repeatedly offered plaintiff leave from work under the Family Medical Leave Act (FMLA) (the Act allows an employee to take up to three months of leave for a qualifying medical condition). (MSD exhibit R, 5/3/11 Tr, pp 7, 11, 16.) Plaintiff at the time argued that she was only having a "panic attack," and that she could still work, and repeatedly refused to take FMLA leave. (MSD exhibit R, 5/3/11 Tr, pp 10, 11, 13, 16.)

After further discussion, Mr. Frye offered to send plaintiff to the WorkHealth-Occupational Clinic to undergo a fitness-for-duty examination, and set up an appointment for plaintiff. Mr. Frye indicated that if WorkHealth said plaintiff could work, she could work. Mr. Frye further indicated, however, that if WorkHealth said she could not work, plaintiff still could take FMLA, *or go back to her own physician,* ***6** *whose recommendation as to whether she was fit for work defendants would follow.* Plaintiff agreed. (MSD exhibit R, 5/3/11 Tr, pp 7, 10-12, 14-16.)

MR. FRYE: Well, what made - I'm going to send you to WorkHealth, my doctor.

MS. BIRIS: For what?

MR. FRYE: For a fitness-for-duty exam, to see if, you know - if my doctor says you can work, then you can work. But if he says, no, because of these panic attacks, either I'm gonna send her back to her own physician or, you know, whatever, we're gonna go - I'll have to go with what your physician says.

But if he says to me, Fred, she can work without panic - with these panic attacks and there's not gonna be any problem, we'll go with that.

MS. BIRIS: Okay, I don't have a problem. Go ahead. [MSD exhibit R, Tr 5/3/11, pp 10-11.]

Plaintiff was seen that same day at Work Health Occupational Clinic by Physician Assistant, David Walker. (MSD exhibit M, Walker 5/3/11 report.) Plaintiff claimed to have experienced similar "panic attacks" on 5 occasions previously, and was just referred to a psychiatrist in the last month. The Physician Assistant concluded, and on May 3 reported to defendants, that plaintiff was not safe to work. (*Id.*)

Mr. Walker opined that plaintiff's self-described "catatonic" state of April 30, 2011, was atypical of a mere panic disorder (as plaintiff characterized her condition). (*Id.*, p 377). Mr. Walker further expressed concern that plaintiff was taking up to five Xanax tablets per day. Mr. Walker concluded, "I do not feel comfortable allowing Ms. Biris to come back to work at this time. She has taken doses of Xanax a controlled drug that can and does cause central nervous side effects that could include undue ***7** sedation, confusion, disorientation, that are alleged to be part of her 'anxiety attack."' (*Id.*, p 379.)

Mr. Walker in his first report also summarized plaintiff's complaints to him that she felt harassed at work, picked on and persecuted. He also noted that plaintiff claimed that she had reported "client **abuse**" at work 2, 4 and 6 months previously, but further claimed that her employer had "done nothing about it." (5/3/11 Report, MSD exhibit M.) (Plaintiff's representations in this regard were odd: in discovery in this matter, plaintiff conceded that she *never* reported or made a complaint about any of the multiple incidents of misconduct by other CNAs she claimed to have seen when working at the Facility, and only provided information regarding CNA Vermillion in response to an investigation by the Facility. (MSD exhibit F, plaintiff's dep, pp 65-93, 136-144.))

On May 4, Mr. Frye again met with Silvia Biris, as well as her union steward, to discuss the results of Mr. Walker's evaluation (a meeting that plaintiff again secretly recorded; see MSD exhibit S). Mr. Frye during this meeting again repeatedly offered FMLA

leave to plaintiff. Plaintiff's own union steward also repeatedly urged that plaintiff agree to take FMLA. (MSD exhibit S, 5/4/11 Tr, pp 17, 18, 21, 24.) The steward warned plaintiff that the employer would probably tell her to take FMLA or resign. (*Id.*, p 6.)

Mr. Frye repeated several times during this third, May 4 meeting that plaintiff would have to remain off work until she could obtain physician certification that she was safe to do her job. (MSD exhibit S, 5/4/11 Tr, pp 12, 19-20, 23.) It is undisputed that Mr. Frye emphasized to plaintiff that he was not asking that plaintiff's physician ***8** "guarantee" that she would not have another episode (as plaintiff claimed to believe). (Id, pp 23-24.) Mr. Frye indicated he just wanted something from plaintiff's physician that was more specific, that would indicate the treatment protocol to get plaintiff's attacks "under control," and whether plaintiff was "safe to work." (*Id.*)

In a supplemental May 5 note, Physician Assistant Walker again set forth his own impression that plaintiff harbored animosity toward her employer, as evidenced by plaintiff's statements to Mr. Walker that she "repetitively went out of her way on several occasions to report 'alleged physical **abuse** or assault" with investigations by the facility and the State of Michigan showing no wrongdoing had been done. Mr. Walker felt this could be considered "paranoid ideations" and could "make her work situation tenuous" from plaintiff's perspective. (Supplemental note, exhibit O to plaintiff's response to MSD, Walker Affidavit, exhibit A to defendant's reply.) [2]

Plaintiff's assertion that she was then unable to obtain a clearance from her own doctor as safe to work because Dr. Domino made a request for plaintiff's medical record at WorkHealth that was "totally ignored by ICMCF and WorkHealth" (Brief, pp 12, 20, 23), has no support in the record. Mr. Frye testified that he explained to plaintiff that she should have her psychiatrist, Dr. Domino, contact PA Walker directly for his records, and that Mr. Walker was anticipating this call and was ready to assist. (Frye dep, pp 24-25.) In the supplemental May 5 note, following a ***9** phone discussion with Mr. Frye, Mr. Walker indicated that he was more than willing to talk with plaintiff's psychiatrist if plaintiff provided him with the appropriate release. (MSD response exhibit O.)

While plaintiff below attached to her response an authorization and record request by Dr. Domino (Response, exhibits P, Q), there was no evidence whether or when WorkHealth received these documents. Dr. Domino testified no one asked him to perform a fitness for duty examination of plaintiff. (Domino dep, pp 30-31, MSD exhibit DD.) More importantly, there is no evidence that defendants were ever advised that plaintiff was having difficulty in obtaining records, or that this was the reason she did not provide a physician certification.

Indeed, defendants heard nothing from plaintiff after May 4, until receipt of a May 10, 2011, letter from plaintiff's attorney, who requested "clarification" of ICMCF's position regarding plaintiff's employment. (MSD exhibit T.) There was no suggestion in this letter that plaintiff or her physician was having difficulty obtaining records, or that this was the reason plaintiff had not provided her physician's certification that she was safe to work. (*Id.*)

Defendants responded, through counsel, that they could not bring plaintiff back to work as matters stood, because of the physician and physician assistant certification from WorkHealth-Occupational Clinic that plaintiff could not perform the essential functions of her job. (MSD exhibit U.) Counsel for defendants indicated that Ms. Biris still had not provided a physician certification, and that ICMCF was attempting to engage in the interactive process with plaintiff as required by the ***10** Americans with Disabilities Act. Defendants urged plaintiff's attorney to have plaintiff contact ICMCF to discuss getting her back to work. (*Id.*)

When ICMCF still did not receive from plaintiff a physician certification that she was safe to work, ICMCF itself took affirmative steps to try to get plaintiff back to work. By letter of May 13 to plaintiff, HR Manager Mr. Frye advised plaintiff that ICMCF had arranged for an Independent Medical Examination (IME) with a neuro-psychiatrist, Dr. Stehouwer, who could analyze plaintiff's condition. ICMCF indicated that the fee for this examination would be paid by ICMCF. (Letter, MSD exhibit V.) ICMCF in this letter reiterated that it was not asking that a physician "guarantee" that plaintiff would not have an episode,

but only that plaintiff was medically fit to perform the essential functions of her job, without being a danger to herself or residents. (Id.) The Facility had no prior relationship with Dr. Stehouwer. (Frye dep, p 26.)

ICMCF staff also followed up via telephone, leaving voice messages for plaintiff regarding the IME on May 13, 15, 17, and 18. (HR note, MSD exhibits W, Schutte Dep, p 7, MSD exhibit X.) The facility also provided Dr. Stehouwer with plaintiff's job description, and a list of questions seeking to determine the severity of plaintiff's condition, if it could be controlled, if she could see the episodes coming in advance, and attempting to determine if plaintiff was safe to work. (MSD Exhibit Y.)

There was no communication from plaintiff. On May 20, 2011, defendants' counsel received correspondence from plaintiff's counsel. In this letter, counsel, for the first time, asserted that the action by ICMCF taking plaintiff off work pending certification she was safe to work was fabricated by the facility, and was a pretext for retaliation against plaintiff for having reported on a fellow CNA's improper and ***11** **abusive** behavior toward a patient, in violation of the Whistleblower Protection Act. (Letter, MSD exhibit Z.) This was a reference to plaintiff's participation, along with dozens of others, in the Facility's investigation of CNA Ronda Vermillion, that resulted in a finding of no **abuse** by both the Facility and, later, the State of Michigan. Plaintiff's counsel in this letter further asserted that plaintiff was fully capable of performing her job, and that plaintiff had been experiencing occasional “panic attacks” for the last five years, and that her condition had not significantly changed. (Id.) There was no physician certification to support this claim by counsel.

Further - despite the May 13 email from defense counsel urging plaintiff to follow up with ICMCF, the letter from Fred Frye, and the numerous voice messages from ICMCF trying to get her back to work - plaintiff, by counsel, now claimed that she had been constructively discharged from her employment. (Letter, MSD exhibit Z.) Plaintiff, who was a union member, never grieved this alleged “discharge.”

Chronology

4/17/2011	Resident EM's family member reports to the Facility that CNA Brenda Vermillion was rough with the resident (An allegation of neglect)
4/17-29/2011	Plaintiff, who allegedly observed this treatment, is contacted and asked by her Supervisor to prepare an incident report. Plaintiff does so.
4/30/2011	Plaintiff appears to lose consciousness and falls against a resident's wheelchair, as reported by plaintiff's coworkers.
5/2/2011	Plaintiff has a first meeting with HR Director Fred Frye, who requests physician certification that plaintiff is safe to return to work.
5/3/2011	Second meeting with Mr. Frye. Plaintiff presents a note from her psychiatrist that he cannot “guarantee” she won't have another event. Mr. Frye offers to send plaintiff to WorkHealth for evaluation. Mr. Frye also indicates he will allow plaintiff to return work if either WorkHealth or her personal psychiatrist indicates she is safe for work.
5/3/2011	Plaintiff sees Physician Assistant Walker, who reports that plaintiff is not safe to return to work.
5/4/2011	Third meeting with Mr. Frye, along with plaintiff's union steward. Mr. Frye advises plaintiff she must remain off

	work until she can obtain a physician's certification that she is safe to do her job.
5/10/2011	Defendants receive a letter from plaintiff's attorney requesting clarification of defendants' position regarding plaintiff's employment.
5/13/2011	Defendants notify plaintiff that they have arranged for an independent medical examination with a neuropsychologist at defendants' expense.
5/13, 15, 17 and 18/2011	Defendants leave voice messages for plaintiff regarding the IME.
5/20/2011	Receipt of correspondence from plaintiff's counsel asserting that defendants were retaliating against plaintiff for having "reported" CNA Vermillion, and claiming that plaintiff had been constructively discharged.

***12 Procedural History**

Plaintiff filed a complaint alleging that she was terminated for participating in the investigation of the complaint regarding rough treatment by CNA Ronda Vermillion of a resident. Plaintiff alleged that she was terminated from her employment with the Ingham County Medical Care Facility in violation of the Whistleblower Protection Act (Complaint, Count I), and/or public policy (Count II), and ***13** that she had been subjected to intentional infliction of emotional distress (Count III). Defendants brought a motion for summary disposition. (MSD.)

In granting the motion at a hearing on May 2, 2012, Judge Canady first concluded that plaintiff had not established a prima facie case as to the Whistleblower claim, because there was no proof of a causal connection between plaintiff's protected activity in participating in the investigation of CNA Ronda Vermillion, and an adverse employment action (assuming that there was any adverse employment action, which defendants disputed as plaintiff failed to return to work). (Tr 5/2/12, pp 53-55.)

For the Court, the important one was there a causal connection between the protected activity and the first employment action. And the Court can't find any causal connection between that. She simply participated in the investigation. It's undisputed that she had an episode that jeopardized a patient's safety. And I think in a medical care facility, that's a primary concern. [Tr 5/2/12, p 53.]

Rejecting plaintiff's argument that there was evidence of pretext because the employer's request for medical certification was unreasonable, the court further found that even if plaintiff had established a prima facie case, the employer had articulated a legitimate business reason for plaintiff's termination:

So even if the Court were to find that there is a prima facie case, which I do not, I would think that there is a legitimate business reason in this matter. I think the fact that Mrs. Biris was unable to return to work, she was offered the opportunity for a medical examination at the employer's expense, she chose not to go there because she felt it was going to be futile, left her in the same position she was before that she was unable to work. So she was unable to work until other documentation had been provided. And here the employer was prepared to pay the cost of getting that, and really could be looked at as assisting her to get that by paying for this other evaluation while they were waiting for Dr. Domino. [Tr, p 57.]

***14** With respect to the public policy claim, the court held that the WPA was plaintiff's exclusive remedy, and thus the public policy claim was preempted. (Tr, p 58.)

Plaintiff has appealed and defendants submit this brief in support of the trial court's grant of summary disposition.

*15 STANDARD OF REVIEW

A decision on a motion for summary disposition is reviewed de novo. Maiden v Rozwood, 461 Mich 109, 118; 597 NW2d 817 (1999). When the moving party can show either that an essential element of the nonmoving party's case is missing, or that the nonmoving party's evidence is insufficient to establish an element of its claim, summary disposition for the absence of a genuine issue of material fact under MCR 2.116(C)(10) is properly granted. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

ARGUMENT

I SUMMARY DISPOSITION OF THE WHISTLEBLOWER PROTECTION ACT CLAIM WAS PROPER, AS PLAINTIFF FAILED TO ESTABLISH A GENUINE ISSUE OF MATERIAL FACT AS TO EACH OF THE ELEMENTS OF THIS CLAIM AND/OR DEFENDANTS ESTABLISHED A LEGITIMATE BUSINESS REASON THAT WAS NOT REBUTTED BY PLAINTIFF.

The trial court properly granted summary disposition and dismissed plaintiff's claim of unlawful retaliation under the Whistleblower Protection Act (WPA), MCL 15.362. Plaintiff failed to show she could establish factual support for two of the three the prima facie elements of her WPA claim because (a) plaintiff failed to show that she suffered an adverse employment action because she resigned, and/or (b) plaintiff failed to demonstrate a causal link between her resignation and her alleged whistle-blowing report. Further, even if plaintiff established a prima facie case, defendants came forth with a legitimate business reason for the alleged termination, that was not rebutted by plaintiff.

*16 A. Elements Of A Participation Claim Under The Whistleblower Protection Act.

The Michigan Whistleblower Protection Act (WPA) prohibits an employer from retaliating against an employee who reports or is about to report to a public body a suspected violation of a law or regulation, or because the employee has been requested to participate in an investigation. Section 2 of the Act, MCL 15.362, provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

A plaintiff must establish three elements to make a prima facie case under § 2. These are: (1) the plaintiff engaged in protected activity; (2) the plaintiff was discharged or discriminated against; and (3) a causal connection exists between the protected activity and the adverse employment action. *West v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003).

There are three types of protected activity: (1) reporting to a public body a violation of law, regulation, or rule; (2) being about to report such a violation; and (3) being asked by a public body to participate in an investigation, hearing, or inquiry held by that public body, or in a court action. *Truel v City of Dearborn*, 291 Mich App 125, 138; 804 NW2d 744 (2010). Plaintiff's theory here was as what is now called a “type III” whistleblower (formerly called a type II)-that she was terminated in ***17** retaliation for, and because of, her participation in an investigation of a complaint of patient **abuse** by a coworker.

A plaintiff may prove unlawful retaliation by direct or circumstantial evidence. *Sniecinski v Blue Cross Blue Shield of Mich*, 469 Mich 124, 132; 666 NW2d 186 (2003). In a case such as this involving circumstantial evidence, a plaintiff must proceed by using the burden-shifting approach of *McDonnell Douglas Corp v Green*, 411 US 792 (1973). *See, Taylor v Modern Engineering, Inc*, 252 Mich App 655, 659; 653 NW2d 625 (2002). The burden-shifting approach allows a plaintiff to present a rebuttable prima facie case on the basis of proofs from which the trier of fact could infer that the plaintiff was the victim of unlawful retaliation. See *Sniecinski*, 469 Mich at 134.

Only if the plaintiff has successfully proven a prima facie case circumstantially under the Act, does the burden shift to the defendant to articulate a legitimate business reason for the adverse employment action. *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 659. If the defendant produces evidence establishing the existence of a legitimate reason for the adverse employment action, the plaintiff then has the opportunity to prove that the legitimate reason offered by the defendant was not the true reason, but was only a pretext for the real reason of unlawful discrimination. *Id.*

Importantly, the Michigan Supreme Court has held that "mere disproof of an employer's proffered 'nondiscriminatory' reason [for an adverse employment action] is insufficient to survive summary disposition, *unless such disproof also raises a triable question of discriminatory motive, not mere falsity.*" ***18** *Lytle v Malady*, 458 Mich 153, 181; 579 NW2d 906 (1998) (emphasis added). Where, as here, the defendant has come forth with evidence of business justification, in order for plaintiff's claim to survive the motion for summary disposition, plaintiff must "demonstrate that the evidence in the case ...is 'sufficient to permit a reasonable trier of fact to conclude that [plaintiff's protected activity] was a motivating factor in the adverse action taken by the employer...."' *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 659; 653 NW2d 625 (2002), quoting *Hazle v Ford Motor Co*, 464 Mich 456, 465; 628 NW2d 515 (2001).

B. Plaintiff's WPA Claim Was Properly Dismissed As She Failed To Establish A Prima Facie Case, As There Was Insufficient Evidence Of Either A Constructive Discharge Or A Causal Connection Between Such Alleged Discharge And Plaintiff's Protected Activity.

(1) Plaintiff did not suffer an adverse employment action and cannot prove "constructive discharge."

Plaintiff was never terminated. In fact, defendants were in the process of attempting to secure an independent medical examination, at facility cost, for her to return to work when plaintiff unilaterally declared that she was "constructively discharged." Her "constructive discharge" came days after her attorney and defense counsel discussed her status and the need to participate in the interactive process. The trial court did not directly find that plaintiff had created a question of fact as to whether there had been an adverse employment action, indicating only that "Maybe it could be a fact question as to whether or not she was discharged." (Tr 5/2/12, p 53.)

Although the trial court did not rest its dismissal on this ground, it serves as an additional or alternative ground upon which to affirm the judgment below. A trial court's decision granting summary disposition will be affirmed either for the reasons ***19** given by the court or for other grounds supported by the record, even if not addressed by the trial court. *Outdoor Systems, Inc v City of Clawson*, 262 Mich App 726, 720 n 4; 686 NW2d 815 (2004), *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000). Likewise, a trial court's decision should be affirmed on any appropriate ground, even that rejected by the trial court. *Middlebrooks v Wayne County*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994), *Vandenberg v Vandenberg*, 253 Mich App 658; 660 NW2d 341 (2002).

Individuals who are constructively discharged are treated in law as if their employer had actually fired them. *Champion v Nation Wide Security, Inc*, 450 Mich 702, 710; 545 NW2d 596 (1996) overruled not in relevant part by *Hamed v Wayne County*, 490 Mich 1; 803 NW2d 237 (2011). However, "a constructive discharge occurs only where an employer or its agent's conduct is so severe that a reasonable person in the employee's place would feel compelled to resign." *Champion v Nation Wide Security, Inc*, 450 Mich 702, 710 (1996).

> A constructive discharge is established where an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation or, stated differently, when working conditions become so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign. [*Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487-488; 516 NW2d 102 (1994) (quotation marks and citation omitted).]

See also *Saroli v Automation & Modular Components*, 405 F3d 446, 451 (CA 6, 2005) ("To demonstrate a constructive discharge, Plaintiff must adduce evidence to show that 1) the employer... deliberately create[d] intolerable working conditions, as perceived by a reasonable person, and 2) the employer did so with the intention of forcing the employee to quit.")

***20** In *Champion*, the plaintiff was forcibly raped by her supervisor while at work and did not return. This was held sufficient to be considered a constructive discharge. Plaintiff must show that the "employer deliberately made an employee's working conditions so intolerable that the employee was forced to resign." Ml Civ. JI 105.05. A reasonable person test is used to determine intolerable circumstances. *Id*, see also *Jacobson v Parda Fed Credit Union*, 457 Mich 318, 326; 577 NW2d 881 (1998).

Defendants' conduct could not be perceived by a reasonable person as so intolerable that an employee would feel compelled to resign. Here, there was simply no evidence that offering FMLA to plaintiff more than nine times, offering to pay for an IME, and/or seeking to engage in the interactive process, created such an "intolerable" working environment that a reasonable person would feel compelled to resign. On May 3, Mr. Frye offered to send plaintiff to the WorkHealth-Occupational Clinic to undergo a fitness-for-duty examination. Mr. Frye indicated that if WorkHealth said plaintiff could work, she could work. Mr. Frye further indicated, however, that if WorkHealth said she could not work, plaintiff still could go back to her own physician, whose recommendation as to whether she was fit for work defendants would follow. Plaintiff agreed. (MSD exhibit R, 5/3/11 Tr, pp 7, 10-12, 14-16.) Plaintiff's representation on appeal (brief, pp 10, 20), that at the May 3 meeting defendants would not allow plaintiff an opportunity to obtain a note from her doctor indicating she could safely return to work is a misrepresentation of the conversation plaintiff herself recorded. (Id.)

***21** The physician assistant, Mr. Walker, recommended in his written report that plaintiff not be allowed to return to work until she could meet with her treating physician to address Mr. Walker's concerns about excessive Xanax use while on the job. (MSD Exhibit M.) Thereafter, plaintiff was informed she still had the options of going on FMLA leave, or providing a note from her physician that she could safely return to work (MSD exhibit S, 5/4/11Tr, pp 12, 19-20, 23), and then later of the third alternative of attending an employer paid IME by a specialist. Plaintiff's own physician, Dr. Domino, agreed that plaintiff should have seen another physician for an IME before returning to work. (Domino dep, pp 30-31.)

Plaintiff's assertion that she was then unable to obtain a clearance from her own doctor as safe to work because Dr. Domino made a request for plaintiff's medical record at WorkHealth that was "totally ignored by ICMCF and WorkHealth" (Brief, pp 12, 20, 23), has no support in the record. As set forth above, Mr. Frye explained to plaintiff that she should have her psychiatrist, Dr. Domino, contact PA Walker directly for his records, and that Mr. Walker was anticipating this call and was ready to assist. (Frye dep, pp 24-25.) In the supplemental May 5 note, Mr. Walker indicated that he was more than willing to talk with plaintiff's psychiatrist if plaintiff provided him with the appropriate release. (MSD response exhibit O.)

While plaintiff below attached to her response an authorization and record request by Dr. Domino (Response, exhibits P, Q), there was no evidence whether or when WorkHealth received these documents. Dr. Domino testified no one asked him to perform a fitness for duty examination of plaintiff. (Domino dep, pp 30-31, MSD exhibit DD.) More importantly, there is no evidence that defendants were ever ***22** advised that plaintiff was having difficulty in obtaining records, or that this was the reason she did not provide a physician certification.

Rather, defendants heard nothing from plaintiff after May 4, until receipt of the May 10, 2011 correspondence from her attorney. (MSD exhibit T.) There was no suggestion in this letter, however, that plaintiff or her physician was having difficulty obtaining records, or that this was the reason she had not provided her physician's certification that she was safe to work. (Id.)

Defendants responded, through counsel, that they could not bring plaintiff back to work as matters stood, because of the physician assistant certification from WorkHealth-Occupational Clinic that plaintiff could not perform the essential functions of her job. (MSD exhibit U.) Counsel for defendants indicated that Ms. Biris still had not provided a physician certification, and that ICMCF was attempting to engage in the interactive process with plaintiff as required by the Americans with Disabilities Act. Defendants urged plaintiff's attorney to have plaintiff contact ICMCF to discuss getting her back to work. (*Id.*)

When ICMCF still did not receive from plaintiff a physician certification that she was safe to work, ICMCF itself took affirmative steps to try to get plaintiff back to work. By letter of May 13 to plaintiff, HR Manager Mr. Frye advised plaintiff that ICMCF had arranged for an Independent Medical Examination (IME) with a neuro-psychiatrist, Dr. Stehouwer, who could analyze plaintiff's condition. ICMCF indicated that the fee for this examination would be paid by ICMCF. (Letter, MSD exhibit V.) ICMCF in this letter reiterated that it was not asking that a physician "guarantee" that plaintiff would not have an episode, but only that plaintiff was medically fit to perform ***23** the essential functions of her job, without being a danger to herself or residents. (Id.) The Facility had no prior relationship with Dr. Stehouwer. (Frye dep, p 26.)

ICMCF staff also followed up via telephone, leaving voice messages for plaintiff regarding the IME on May 13, 15, 17, and 18. (HR note, MSD exhibits W, Schutte Dep, p 7, MSD exhibit X.) Still, there was no communication from plaintiff, until May 20, 2011, when plaintiff's counsel declared that plaintiff had been constructively discharged. (Letter, MSD exhibit Z.)

Plaintiff's argument that multiple demands were made of her that prevented her from returning to work is without merit. To the contrary defendants offered opportunities and alternatives. Plaintiff, however, refused to avail herself of any of these. Plaintiff simply chose to ignore the options repeatedly offered by defendants to try to get her back to work without risking her own safety or that of the residents, and, through her attorney, to unilaterally declare herself constructively discharged. It is plaintiff and her counsel who attempted to fabricate a wrongful discharge lawsuit.

Reasonable persons could not find that plaintiff had been constructively discharged by defendants. Summary disposition should be affirmed on this ground.

2. Alternatively, plaintiff failed to demonstrate the required causal link between her protected activity and the alleged adverse employment action.

As held by the trial court, there was no genuine issue of material fact as to a causal link between plaintiff's resignation and her alleged protected activity. (Tr 5/2/12, p 53.) Plaintiff simply failed to establish any connection between defendants' request that she provide proof of medical fitness for work with the Facility's frail and **elderly** residents after passing out on the job, and plaintiff's protected activity in ***24** participating, along with dozens of other employees, in the investigation of a third party's complaint about CNA Ronda Vermillion.

Plaintiff failed to offer proof of little more than temporal proximity between plaintiff's participation in an investigation of an allegation of **abuse** made by a third party, found to be unsubstantiated, and her employer's decision two and a half weeks later, immediately after she was reported to have passed out at work, that she could not return to work without medical approval. But, timing alone cannot create a fact question regarding causation. *West v General Motors Corp*, 469 Mich 177, 187; 665 NW2d 468 (2003). In *West v General Motors Corp*, the Court held that a mere coincidence in time was insufficient as a matter of law to establish causation:

Something more than a temporal connection between protected conduct and an adverse employment action is required to show causation where discrimination-based retaliation is claimed. *** Plaintiff must show something more than merely a coincidence in time between protected activity and adverse employment action. 12

12. Relying merely on a temporal relationship is a form of engaging in "the logical fallacy of post hoc ergo propter hoc (after this, therefore in consequence of this) reasoning." [*West, supra,* citations omitted.]

This analysis was later applied in *Garg v Macomb County Cmty Mental Health Services,* 472 Mich 263, 287; 696 NW2d 646 (2005), *as amended* 473 Mich 1205 (2005), where the Court held that mere timing or proximity between a complaint and retaliation does not establish causation:

> It appears that both the trial court and the Court of Appeals identified a "causal connection" between the grievance and the promotion denials simply on the basis of timing - that is, because the denials occurred after the grievance, there must be a functional relationship. This is the kind of post hoc, *ergo propter hoc* reasoning rejected in *West.* We reject such reasoning in this case as well. [*Garg,* 287.]

***25** Further negating a causal connection is that there is little to suggest plaintiff's participation was of such a unique nature that she would have been the only staff member, of the 50 involved in the investigation, to be retaliated against. Here, plaintiff did not report the event that triggered the extensive investigation or Ms. Vermillion's suspension pending the investigation. Plaintiff was merely one of many staff members interviewed. While it appears that plaintiff was the only staff member critical of Ms. Vermillion's conduct, the criticisms she revealed only when she was approached and interviewed by her supervisor caused no negative impact to either Ms. Vermillion or the Facility - both were exonerated, first by the Facility's investigation, then by the State investigation. As the trial court reasoned:

> For the Court, the important one was there a causal connection between the protected activity and the first employment action. And the Court can't find any causal connection between that. She simply participated in the investigation. It's undisputed that she had an episode that jeopardized a patient's safety. And I think in a medical care facility, that's a primary concern. [Tr 5/2/12, p 53.]

Staff participation in Facility and State investigations of allegations of potential **abuse** is a common occurrence. There is nothing in the record to suggest that plaintiff's particular participation was so adverse or harmful to the facility that it would have triggered retaliatory response. Further, while plaintiff claimed to Physician Assistant Walker that she previously many times had reported resident **abuse** to her employer who did nothing (so as perhaps to suggest she could have been viewed as a "troublemaker" and susceptible to retaliation), this was shown to be untrue. Plaintif herself acknowledged under oath in this matter that in her 6 years at the Facility, she had never reported resident **abuse** or neglect, although she claimed to have seen multiple instances. (MSD exhibit F, plaintiff's dep, pp 65-93, 136-144.)

***26** Plaintiff's assertion that Mr. Walker's May 5, 2011, note reflects that "Frye revealed that his underlying motive for subjecting Biris to the various demands were her complaints about other employees" (Brief, p 11), is an interpretation of that note that was negated by the record. First, as noted, plaintiff conceded that in truth, despite what she told Mr. Walker, plaintiff had never made a complaint about any employee, and only responded to one inquiry/investigation (regarding Ms. Vermillion) when directed to do so by her supervisor.

Plaintiff's attempt to characterize Mr. Walker's reference in the May 5 note to a "tenuous" work situation, as a statement by Mr. Frye related to plaintiff's participation in the Vermillion investigation (brief, p 11) is negated by the record. Mr. Walker explained: "I prepared a memorandum on or about May 5, 2011 regarding Ms. Biris to memorialize my impression that, among other things, Ms. Biris harbored animosity toward...her employer that I felt could lead to a tenuous work situation from her perspective." There was no reference to a "tenuous work" situation by Mr. Frye, who in the phone discussion "seemed only interested in whether Ms. Biris was safe to work." (Walker affidavit, paras 5, 6.)

Further, there was no indication that Mr. Frye expressed any disapproval of plaintiff's role in the investigation that was triggered by a complaint by a third party, a resident's family member.

Plaintiff's assertion that a retaliatory motive related to her protected activity was evidenced because plaintiff had experienced anxiety attacks previously and had not been required to submit to an IME is meritless. Plaintiff offered no evidence that the decision makers in this matter were aware of plaintiff's previous attacks when ***27** they occurred, but elected to take no action, and only took action after plaintiff participated in the investigation of alleged **abuse** of resident EM. Indeed, Administrator Stevens had only been at the facility for four months, and had never heard of plaintiff before the passing out incident. (Stevens affidavit, MSD exhibit C.)

While plaintiff apparently lost consciousness at work and was taken to the hospital in March 2010, management knew only that she had a medical issue and not that she lost consciousness or would be unsafe at work. (Frye affidavit, MSD exhibit J, incident reports regarding this event, MSD exhibit L, pp 370-371.) Critically, however, plaintiff then did precisely what she would later be asked to do by defendants on May 2011 - she took a medical leave under FMLA and returned to work with physician approval. (MSD exhibit H, at 328.)

There was simply not sufficient evidence from which a reasonable trier of fact could conclude that retaliation for protected activity, rather than concern for resident safety, motivated defendants to prohibit plaintiff from returning to work. Coworkers reported that plaintiff had passed out, and a health care provider examined plaintiff and affirmatively declared her not to be safe to return to work. To have allowed plaintiff to return would have been the height of corporate irresponsibility and would have placed the nursing home residents at risk.

Further negating any such unlawful motivation was the length to which defendants went to assist plaintiff in returning to work or to take FMLA leave to protect her job until she could safely return to her job. If defendants wanted plaintiff off work because of retaliation, there was no reason for defendants to arrange for an ***28** IME after plaintiff had already been determined to be unsafe for work by a licensed health care provider.

Under analogous circumstances, in Lee v Eden Medical Center, 690 FSupp2d 1011 (NDCal 2010), the Court held that causation was severed. There the plaintiff complained of discrimination in a letter (protected activity), and then asserted that she and a staff physician were being “stalked” by a man, “Chen,” who had been stalking plaintiff for years. Plaintiff reported seeing Chen following the physician in traffic, both on motorcycles. Upon investigation, the employer found, among other things, that the physician was on vacation, knew nothing about Mr. Chen, and never rode a motorcycle. The Court held that the employe's reasonable decision to send plaintiff for a mental examination severed a causal connection between the protected activity and the later adverse employment action:

> Plaintiff gave the letter to Ms. Weiss on April 13, 2007. On the same day, Plaintiff informed Ms. Weiss of her claims, including that she and Dr. Silver were being stalked, that he was afraid of the stalker and that she had been stalked by two men for over nine years. This intervening event negates any inference that Plaintiff's complaint caused the subsequent adverse action. Ms. Weiss' request that Plaintiff be evaluated by a mental health professional to determine whether she was fit for duty as a nurse was reasonable given Plaintiff's claims. After a doctor in EMC's Occupational Health Clinic evaluated Plaintiff, concluded she was not fit for duty, and referred her for a psychiatric evaluation, it was reasonable for Ms. Weiss to place her on medical leave and insist that she obtain a psychiatric evaluation before being permitted to return to work. That the doctors that Plaintiff consulted on her own disagreed with the evaluations of Drs. Petersen, Zhalkovksy, Kirz is not evidence that Ms. Weiss' insistence on Plaintiff's clearance for work by a mutually agreed-upon mental health professional was unwarranted. The unrebutted evidence shows that Defendant's termination of Plaintiff's employment was based upon her failure to comply with Ms. Weiss' request. [*Lee v Eden Medical Center,* 690 FSupp2d 101, 1026 (NDCal 2010).]

***29** Here, in contrast, plaintiff never provided proof from any health care provider that she was safe to return to work, thus even more clearly severing any causal connection.

The cases cited by plaintiff in which causation was found to exist have facts so very different from those here that, by comparison, they graphically illustrate why summary disposition was required here. In *Shaw v City of Ecorse*, 283 Mich App 1; 770 NW2d 31 (2009), there was direct evidence of retaliatory animus: immediately after the jury verdict against the employer in a discrimination case in which plaintiff and another employee testified in favor of a former coworker, plaintiff's supervisor told them that they were "in trouble" and that defendant would "go after them" because of their testimonies. No such angry threat was made here.

In *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270; 608 NW2d 525 (2000), just hours after plaintiff revealed herself to be the whistleblower of nursing home **abuse** that had triggered a state investigation, the angry administrator, red in the face, fired plaintiff with an abrupt "you're through." Here plaintiff merely participated in an investigation that she did not trigger. Mr. Frye remained amazingly cordial in dealing with plaintiff's argumentative responses to his attempts to ensure she could safely return to work, as evidenced by the transcripts of plaintiff's surreptitious recordings of her meetings with Mr. Frye. Moreover, Mr. Walker by affidavit declared that in his discussions with Mr. Frye regarding plaintiff, the latter never appeared upset, did not raise his voice, did not change his tone or inflection to indicate anger, and seemed only interested in whether Ms. Biris was safe to work. (Walker affidavit, Defendant's reply exhibit A.)

***30** Likewise, in *Henry v City of Detroit*, 234 Mich App 405, 414; 594 NW2d 107 (1999), the plaintiff police officer claimed that his forced retirement was in retaliation for his deposition testimony in a case that resulted in a million dollar judgment. Plaintiff testified that following his testimony, he was told that the chief of police was upset and believed that plaintiff's testimony was going to cost the city a lot of money. Thus, in *Henry*, there was a direct threat of retaliation, and clear evidence that the decision maker was upset with the whistleblower's actions that had resulted in a damage award against the employer. Here, again, there was no expression of anger, plaintiff's participation in the investigation resulted in no damage to the Facility (as there was a finding of no **abuse** by both the facility and the State), and the decision maker "bent over backwards" to assist plaintiff in returning to work.

Thus, there was no genuine issue of material fact that plaintiff was sent for a fitness-for-duty evaluation because of "retaliation" and no evidence of a WPA violation.

C. Alternatively, Summary Disposition Of the WPA Claim Was Proper As Defendants Established Legitimate Non-Retaliatory Reasons For Taking Plaintiff Off Work And Were Attempting To Return Her To Work When She Voluntarily Quit, Which Plaintiff Failed To Rebut.

Regardless of whether plaintiff succeeded in establishing a prima facie case, the most compelling basis upon which to affirm the grant of summary disposition is defendants' demonstration of a legitimate business reason for requiring plaintiff to establish she could safely return to work before allowing her to do so: concerns for the health and safety of the nursing home residents, as well as plaintiff herself. If a plaintiff is successful in establishing a prima facie case under the WPA, the burden shifts to the defendant to establish a legitimate business reason for the adverse ***31** employment action." *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 280-281; 608 NW2d 525 (2000). "Once the defendant produces such evidence, the plaintiff has the burden to establish that the employer's proffered reasons were a mere pretext for the adverse employment action." *Id.* at 281. As held by the trial court (Tr 5/2/12, p 53), defendants plainly established a non-pretextual legitimate business reason for delaying plaintiff's return to work until a health care provider determined her to be safe to work.

Here, while transporting a nursing home resident in a wheelchair on April 30, 2011, plaintiff appeared to lose consciousness or "pass out," and fell against the wheelchair, according several coworker eye witnesses. (Unusual Occurrence Report, Bates 374-376, MSD exhibit L, Henry dep, pp 14-17, MSD exhibit N, Smith dep, pp 6-7, MSD exhibit O.) Eye witnesses Nurse

Shauna Smith and fellow CNA Tamekia Henry reported, and in discovery here testified, that plaintiff was "passed out," with her eyes rolled back in her head, and was not alert. (Henry dep, pp14-17, MSD exhibit N, Smith dep, pp 6-7, MSD exhibit O.)

While plaintiff later attempted to downplay the seriousness of this incident, and asserted she did not lose consciousness, she herself characterized herself as having become catatonic. In any event, no reasonable person could fault the defendants for taking the precautionary step of requiring plaintiff to obtain physician certification that she could safely return to work, given the descriptions of the event by plaintiff's disinterested coworkers.

This was the first time Fred Frye and the new Administrator, Mark Stevens, knew anything about a medical condition that would cause plaintiff to lose ***32** consciousness or become non-responsive on the job, while caring for nursing home residents. Plaintiff was sent for a fitness-for-duty evaluation to determine if she was safe to work and the professional opinion of the licensed health care provider. The defendants' concern, and that decision, were fully validated when Physician Assistant Walker reported that plaintiff was not safe to work at the time. The evaluation suggested plaintiff meet with her psychiatrist to adjust her medication levels and then have him provide a return-to-work certification.

But, defendants waited for a return-to-work certification that never came. Plaintiff, who previously had always taken FMLA leave after her "anxiety attack" and was physician certified to return to work in the past, refused to do so after the April 30, 2011 incident. Further, after plaintiff refused to submit a physician certification, ICMCF arranged for an IME, at facility expense, that was to cost between $1,600 and $1,800. (MSD exhibit P at 12-13). Dr. Laurence Domino, plaintiff's own psychiatrist, testified that plaintiff should have undergone an IME before returning to work. (MSD exhibit DD at 30-31). Despite letters to her home, and her attorney, and leaving multiple voice messages about the IME, plaintiff refused to cooperate. Thus, defendants unquestionably acted pursuant to legitimate concerns for plaintiff's safety and the safety of defendants' residents.

In fact, taking the above steps for plaintiff is proof of legitimate non-discriminatory reasons as a matter of law. In *Gault v University of Chicago Hospitals,* 1991 US Dist LEXIS 3355, 1991 WL 38757 (NDIII, March 19, 1991)(MSD exhibit EE), the court held that susceptibility to incapacitating epileptic seizures can render a health care provider unqualified for a position, as a matter of law, because an ***33** individual subject to such seizures cannot fulfill his or her duties while unconscious. In *Gault,* a nurse employed in the burn unit suffered from a form of epilepsy that caused her to lose consciousness during seizures. Indeed, on two occasions, the nurse lost consciousness while cutting patients' bandages. *Id.* at 1. The court in *Gault* held that "in these circumstances, Gault cannot contend that she was meeting her position requirements." *Id.*

In this case, defendants were not sure what caused plaintiff to go into a self-described "catatonic state" on April 30, 2011. However, given that plaintiff must shower residents, lift residents, supervise feeding, and be near needles and other dangerous areas of a nursing home, requiring plaintiff to undergo a fitness-for-duty evaluation after she had been determined medically to be unfit was a legitimate non-discriminatory reason as a matter of law.

Another example of defendants' reasonableness in this case, is the case of *Davis v Michigan Agricultural Commodities, Inc,* 2009 US Dist LEXIS 5582 (ED Mich, Northern Division)(MSD exhibit FF). There, the court found that a laborer with a seizure condition who worked in a dangerous job was a direct threat to himself and others under the ADA due to his seizures. There, the seizures were only 80% controlled and the court relied on the dangerous nature of the work as a factor that outweighed the likelihood of a seizure. The IME questionnaire prepared by defendants for Dr. Stehouwer specifically asked for a determination as to how controlled plaintiff's condition was. (See MSD Exhibit Y.)

Given these facts and authorities, plaintiff's assertion that there was a question f fact regarding whether defendants' requests were mere pretext for retaliation is ***34** meritless. Plaintiff passed out at work and a health care provider determined she was unsafe to return to work. All of defendants' efforts after that determination were in an attempt to facilitate plaintiff's return to work and/or to protect her ability to return to her job through a FMLA leave. No reasonable person could find pretext.

Thus, the trial court properly granted summary disposition of the WPA claim.

***35 II PLAINTIFF'S PUBLIC POLICY CLAIM WAS PROPERLY DISMISSED FOR THE ABSENCE OF A GENUINE ISSUE OF MATERIAL FACT, AND/OR AS BARRED AS THE WPA IS THE SOLE EXCLUSIVE REMEDY AND/OR AS BARRED BY GOVERNMENTAL IMMUNITY.**

Plaintiff's claim that she was terminated in violation of Michigan public policy for reporting **abuse** of nursing home residents under MCL 333.21771, properly was dismissed for several alternative and independent reasons.

At the time of the events at issue here, MCL 333.21771(2) required nursing home employees to report **abuse** or mistreatment of a nursing home patient to the facility administrator or director of nursing. [3] MCL 333.21771(6) prohibits retaliation against employees who have made a report under the statute: "A nursing home employee, licensee, or nursing home administrator shall not evict, harass, dismiss, or retaliate against a patient, a patient's representative, or an employee who makes a report under this section."

Summary disposition of this claim was proper, first and foremost, because the statute, MCL 333.21771, has no application to the facts of this case. Plaintiff admitted she did not report **abuse** regarding resident "EM" to the Director of Nursing, Julie Pudvay, or the Facility Administrator, Mark Stevens. (MSD exhibit F, plaintiff's dep, pp 91-96, 151). Thus, factually, there is no basis for this claim and it was properly dismissed for this reason. (While the trial court did not rely upon this ground, as noted above, a trial court's decision granting summary disposition will be affirmed either for the reasons given by the court or for other grounds supported by ***36** the record, even if not addressed by the trial court. *Outdoor Systems, Inc v City of Clawson*, 262 Mich App 726, 720 n 4; 686 NW2d 815 (2004), *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).)

Second, such a public policy claim by plaintiff necessarily must fail for the same lack of evidence of an adverse employment decision and/or causation from which her WPA claim suffered. (See Argument I.)

Third, as held by the trial court, even if the statute applied to the conduct of plaintiff here, it would have been barred by the exclusive remedy of the WPA and was properly dismissed for this reason. The rule regarding public policy wrongful discharge claim is that a "public policy claim is sustainable... only where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue." *Dudewicz v Norris Schmid, Inc*, 443 Mich 68, 70, 78-79; 503 NW2d 645 (1993), overruled in part on other grounds by Brown v Detroit Mayor, 478 Mich 589, 595 n 2 (2007), *Anzaldua v Neogen Corp*, 292 Mich App 626, 631; 808 NW2d 804 (2011). As MCL 333.21771(6) contains a statutory prohibition against discharge in retaliation for the conduct at issue, there can be no public policy claim under Dudewicz. There is no dispute that plaintiff here was engaged in protected activity to which the WPA applies. The existence of the specific prohibition against retaliatory discharge in the WPA is determinative of the viability of a public policy claim." See *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68, 79 (1993).

As plaintiff asserts, if the WPA does not apply, it provides no remedy and there is no preemption. *Anzaldua v Neogen Corp*, 292 Mich App 626, 631; 808 NW2d 804 (2011). Here, however, the WPA did apply to plaintiff's conduct; plaintiff was unable ***37** to prevail on her claim because she could not establish retaliation and/or a causal connection.

Finally, ICMCF and the Board should be immune to this claim through operation of governmental immunity. Courts have specifically found that governmental immunity applies to public policy wrongful discharge claims. *Austin v Wayne State Univ*, unpublished opinion per curiam of the Court of Appeals, issued 6/12/2001 (Docket No 220169). (MSD exhibit HH.) As employing workers and protecting the health and safety of nursing home residents is a governmental function, immunity applies to this claim as well.

Summary disposition of plaintiff's public policy claim should be affirmed.

*38 RELIEF REQUESTED

WHEREFORE Defendants-Appellees Ingham County Medical Care Facility, Ingham County Department Of Human Services Board, and Fred Frye respectfully request that this Honorable Court affirm the trial court's grant of summary disposition.

Footnotes

1 While plaintiff later denied that she fell against the wheelchair or lost consciousness, as reported by all of her coworkers, plaintiff did admit upon later medical examination at the WorkHealth-Occupational Clinic to being in a "catatonic state." (WorkHealth-Occupational Clinic Report, MSD exhibit M, Bates p 377.)

2 Plaintiff's attempt to characterize this reference to a "tenuous work situation", as a statement by Mr. Frye related to plaintiff's participation in the Vermillion investigation (brief, p 11) is negated by the record. Mr. Walker explained: "I prepared a memorandum on or about May 5, 2011 regarding Ms. Biris to memorialize my impression that, among other things, Ms. Biris harbored animosity toward...her employer that I felt could lead to a tenuous work situation from her perspective." There was no reference to a tenuous work situation by Mr. Frye, who in the phone discussion "seemed only interested in whether Ms. Biris was safe to work." (Walker affidavit, paras 5, 6.) This was an internal memo and not provided to defendants prior to this litigation. (Walker affidavit, para 6.)

3 The statute was amended in 2012 to require the employee to also report such **abuse** or neglect to the State. Ironically, plaintiff who now seeks to pursue a claim under this statute never before reported alleged neglect to anyone, although plaintiff claimed in discovery to have observed many instances of **abuse** and neglect of Facility residents.

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