IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

BRENDA BLOOMFIELD,	:	
Plaintiff,	:	Case No. 3:12-cv-00870-JJH
vs.	:	JUDGE HELMICK
WHIRLPOOL CORPORATION,	:	MAGISTRATE ARMSTRONG
Defendant.	:	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Respectfully Submitted,

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INTRODUCTION

Plaintiff worked for Defendant for 9 years, beginning in 2001. In July 2010, she was attempting to return to work after taking medical leave due to depression and anxiety. Although her treating psychiatrist released her to work, Defendant refused to allow her to return until she agreed to submit to an additional psychiatric examination.[1] Defendant claims it terminated Plaintiff for allegedly refusing to cooperate with this exam.

Accordingly, the main issue in this case is whether Defendant's medical inquiry was lawful in the first place. Defendant attempts to justify the exam on a "direct threat" basis. Accordingly, Defendant assumes an affirmative "burden of going forward" (at a minimum) by invoking the direct threat defense.[2] It is actually Plaintiff who is entitled to summary judgment because she can demonstrate (1) Defendant took adverse actions against her based on a perceived disability, (2) she was qualified for her job, and (3) Defendant cannot offer sufficient evidence of "direct threat" to justify a medical inquiry or prove she wasn't qualified for her job.

Plaintiff's Complaint states five claims for relief - some based on multiple legal theories. Defendant moves for summary judgment on Plaintiff's Complaint in its entirety. Plaintiff will address each of Defendant's arguments in the order they appear in Defendant's brief.

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[1] Defendant and its witnesses have referred to this medical inquiry as an "IME."

[2] See *Wells v. Cincinnati Children's Hosp. Med.*, 2012 U.S. Dist. LEXIS 19227, *28 (S.D. Ohio, February 14, 2012)("Although not articulated as such by CCHMC, the principal issue with respect to Plaintiff's disability discrimination claim is to what extent her medical condition and/or use of prescription medicine presented a direct threat to the health and safety of the patients. As indicated above, the burden to show that the individual presents a direct threat to the health and safety of others is on the employer.") The Sixth Circuit has yet to rule on the issue of who maintains the burden of proof as opposed to merely a burden of going forward. See *Wurzel v. Whirlpool Corp.*, 2012 Fed. App. 0446N, fn. 14, (6th Cir. 2012). Many Circuit courts, however, citing to recent Supreme Court cases, have placed that burden on the Defendant. See *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 571-72 (8th Cir. 2007); *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 219 (2nd Cir. 2001)("The legislative history of the ADA also supports the premise that 'the plaintiff is not required to prove that he or she poses no risk.' H.R. Rep. No. 101-485, pt. 3, at 46 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 469."); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, (9th Cir. 1999). It is clear, however, that a defendant justifying an adverse job action on the basis of safety concerns related to a medical condition has an affirmative burden to produce evidence meeting the standards set forth by the Courts.

BACKGROUND FACTS

Plaintiff provided her version of the background facts in her Partial Motion for Summary Judgment, which is incorporated herein by reference. Although Defendant's background facts section is titled "Statement of *Undisputed* Material Facts," Plaintiff does dispute Defendant's version - finding it constitutes as much argument as fact.

Defendant loads its fact section with allegations regarding Plaintiff's purported bad behavior to support its decision to force a medical inquiry upon Plaintiff. But as the Court will see, Human Resources Specialist Suzanne Dye made that decision alone, relying only on documents and notes she claims she reviewed in Plaintiff's personnel file. In other words, Dye wasn't aware of many of the facts and details Defendant relies on to justify its forced medical inquiry. Indeed, Dye admits she never even spoke with Plaintiff prior to the exam. [Dye, 35-36] But the lawfulness of Dye's decision depends on what she knew at the time she made the decision. Although Dye's boss, HR Director Jennifer Hanna, supported Dye's decision, she confirmed the decision was Dye's and Dye's alone. [Hanna, 18, 21]

Defendant's self-styled "Statement of *Undisputed* Material Facts" is nothing of the sort. Defendant mischaracterizes deposition testimony to support its "direct threat" theory. For example, Defendant claimed "*Dye was also aware of the threat that Bloomfield had made to Osting*." [Def. Mot. p. 8] But here is what Dye testified:

> *Q. I just want to clear it up. So at a certain point in time in 2010, you did arrange for Brenda to have an independent medical exam; is that correct?*
> **A. That's correct.**
>
> *Q. Can you tell me why you did that?*
> **A. We had gotten a -- Matrix had sent a notice saying that she was going to be returning back to work, and the timing was at 26 weeks. Her short-term had just -- was ending, and she was running out of pay. And Brenda had spoken to our MOA, our medical office assistant, and told her that she didn't feel that she was ready to**

return. And I also knew at that time that there had been the situation with Cindy Osting.

Q. Tell me about that. What did you know about that?
A. I just know there was a conversation – I don't know if it was really a conversation, but there was an incident that had happened.

Dye never testified she was aware of a threat – a conversation maybe, an incident perhaps – but she never mentioned threat.[3] Even in her letter to Dr. Burke, Dye never characterized Plaintiff's incident with Osting as a threat – even though Dye had no problem adding her own characterization of other events she described in the letter.[4] Importantly, even Osting had trouble articulating how Plaintiff had "threatened" her. Osting's explanation is contained in her deposition testimony that spans several pages. [Osting, 58-63] Importantly, Osting admitted that her belief Plaintiff had threatened her was based on her "personal feelings." [Osting, 58] When asked to explain these personal feelings, Osting referred to the fact that Plaintiff quoted scripture to her when Osting was issuing disciplinary action to Plaintiff. [Osting, 58-59] Again, however, Dye didn't know any of this. She merely reviewed Osting's note in Plaintiff's file, which never made any mention of Osting's personal feelings regarding feeling threatened. [Osting, 58] Plaintiff is not merely trying to mince words here – it is Defendant's burden to justify its decision to order the IME on a "direct threat" basis. So, Defendant's unjustified use of the word "threat" is a serious matter.

[3] Plaintiff and Osting passed each other at an Olive Garden restaurant while off duty. Osting claimed Plaintiff said to her, "Your's is coming, Cindy." Plaintiff testified she said "It's coming, Cindy." Plaintiff explained that her comment was intended to let Osting know she had just reported Whirlpool and Osting to the EEOC. Importantly, this happened months before Dye ordered Plaintiff to attend the IME. And Osting admitted she didn't even write up a note about the incident until "months" after the incident. [Osting, 57]

[4] Dye's letter clearly presents a one-sided view of events to Dr. Burke. For instance, Dye claims Plaintiff confronted a co-worker at Wal-Mart. But Plaintiff testified that the co-worker, Dawn Bower, confronted her and her daughter at Wal-Mart. [Pl. Dep., 178-184] This is consistent with what Plaintiff told her therapist, Ms. Shiple. [Shiple, 33-34]. And, of course, no mention is made to Dr. Burke that Bower has had a history of conflict with co-workers. [Osting 27-31]

Defendant again mischaracterizes the testimony and evidence by claiming as fact that Dr. Burke, the "IME" doctor, was unable to "complete" his evaluation because he learned "during" the session that Plaintiff was recording. [Def. Mot. p. 1, 10] But Dr. Burke's testimony at pages 70 to 72 of his deposition proves he did "complete" a full examination of Plaintiff and only learned about the tape-recording at "the end" of the exam. The fact is Dr. Burke had enough information to determine whether Plaintiff was dangerous and his subsequent failure to report any concerns regarding danger provides further proof Plaintiff did not pose a "direct threat."

Plaintiff would exhaust her page limitations if she tried to point out every instance where Defendant has twisted the testimony, or used only select portions thereof, to justify its IME on a "direct threat" basis. Instead, Plaintiff has incorporated the background facts section from her cross-motion for partial summary judgment as if re-written herein and filed complete deposition transcripts (instead of select excerpts) for the Court's review. When viewed in its full context, the testimony and evidence does not support Defendant's decision to withhold Plaintiff's job or terminate her for any reason related to a "direct threat" basis.

LEGAL STANDARD

Summary judgment is properly granted where the parties' dispute presents no genuine issue of material fact. Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the court must view all facts and inferences in the light most favorable to the nonmoving party. *S.E.C. v. Blavin* (6th Cir. 1985), 760 F.2d 706, 710. The moving party has the burden of showing the absence of genuine disputes over facts which, under the substantive law governing the issue, might affect the outcome of the action. *Anderson v. Liberty Lobby, Inc*. (1986), 477 U.S. 242. "The disputed issue does not have to be resolved conclusively in favor of the nonmoving party, but that party is required to present some significant probative evidence which makes it

necessary to resolve the parties' differing versions of the dispute at trial." *60 Ivy Street Corp. v. Alexander* (6th Cir. 1987), 822 F.2d 1432, 1435.

ARGUMENT

A. It is actually Plaintiff who is entitled to summary judgment on her disability discrimination claims because Defendant cannot meet its respective burdens under a direct or indirect evidence analysis.

Defendant claims it fired Plaintiff for failing to cooperate with its IME. Plaintiff was trying to return to work from a medical leave. Dye claims she ordered the IME out of a concern Plaintiff's mental health condition might impact her ability to work. Defendant withheld Plaintiff's job unless and until she submitted to the IME. Accordingly, this case should be analyzed using a direct evidence analysis. The fact Defendant claims it fired Plaintiff for insubordination should not change the analysis. Plaintiff's alleged refusal to cooperate with the IME is directly related to her impairment (perceived or otherwise). No impairment – no IME. No IME – no alleged insubordination. No alleged insubordination – no termination.

In *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1180 (6th Cir. 1996), the Sixth Circuit instructed that the direct evidence analysis proceeds as follows:[5]

1. Plaintiff bears the burden of establishing she is disabled (perceived or otherwise).

2. Plaintiff bears the burden of establishing she is "otherwise qualified" for the position despite her disability: a) without accommodation from the employer; b) with an alleged "essential" job requirement eliminated; or c) with a proposed reasonable accommodation.

[5] Defendant cites to *Murphy v. University of Cincinnati*, 72 F. App'x 288, 294 (6th Cir., July 29, 2003) apparently to suggest that the instant case is not a direct evidence case. But *Murphy's* facts are far different than what exists here. In *Murphy*, the court examined certain ambiguous statements and refused to hold that those statements constituted direct evidence that the plaintiff was fired because she was a woman. This case, however, is much more like *Monette*. In *Monette*, the defendant-employer refused to reinstate the plaintiff, who was trying to return to work from a medical leave – just like in the instant case. *Monette*, at 1187. The court held that when viewed properly, the defendant-employer's explanation for the decision was related to *Monette's* handicap. Id.

3. Defendant bears the burden of proving that a challenged job criterion is essential, and therefore a business necessity, or that a proposed accommodation will impose an undue hardship upon the employer.

From the discussion that follows, the Court will understand why no genuine issue of fact exists that Defendant (1) regarded Plaintiff as disabled and (2) Plaintiff was otherwise qualified for her job. The Court will also see that no genuine issue of fact exists that Defendant's challenged criterion, submission to an IME, was neither essential nor a business necessity. Even if an indirect evidence analysis is used, however, Plaintiff is entitled to summary judgment because Defendant cannot articulate a legitimate non-discriminatory reason for Plaintiff's termination on the basis of an unlawful IME.

1. Defendant regarded Plaintiff as disabled.

To prove a "regarded as" claim, Plaintiff must show she was "subjected to an action prohibited under [the ADAAA] because of an actual or perceived physical or mental impairment. 42 U.S.C. § 12102(3)(A) (2009).[6] Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment. 29 C.F.R. § 1630.3(l)(1). The regarded-as-disabled prong of the ADA "protects employees who are perfectly able to perform a job, but are rejected . . . because of the myths, fears and stereotypes associated with disabilities." *Gruener v. Ohio Cas. Ins. Co.*, 510 F.3d 661, 664 (6th Cir. 2008); See also *Ross v. Campbell Soup Co.*, 237 F.3d 701, 706 (6th Cir. 2001) (Thus, an individual may fall into the definition of one regarded as having a disability if an employer ascribes to that individual an inability to perform the functions of a job because of a medical condition when, in fact, the individual is perfectly able to meet the job's duties.)

[6] Defendant doesn't argue in its motion that Plaintiff was neither disabled nor perceived as disabled.

Plaintiff challenges the following employment actions: (1) Defendant's refusal to return Plaintiff to work when released by her treating physician; (2) Defendant's forced medical inquiry; and, (3) Defendant's termination of Plaintiff's employment. Dye made the decision to withhold Plaintiff's job pending a medical inquiry. Dye was aware of Plaintiff's medical history and claimed she was concerned Plaintiff's mental health condition might affect her work.

Q. What did you know about her diagnosis at the time you requested the IME?
A. I can't say for sure as of today. I knew she was treating with Dr. Bundy, I knew what type of things he treated for. So it seemed appropriate to have a psychiatrist versus an orthopedic or a neurologist see her.

Q. That would have been my question. Okay. So am I correct that you sought an IME for a psychiatrist because of your awareness of her prior mental health condition?
A. I had her see a psychiatrist based on her treating physician.

Q. And her treating physician was a –
A. Psychiatrist.

Q. Okay. Am I correct that you believed that if she had an issue with return to work, that it was related to a medical -- or a mental health condition; is that correct?
A. That's an assumption I had.

Q. You had that assumption?
A. Yes.

[Dye, p. 54-55]

Dye's boss, HR Director Jenni Hanna, agreed with the decision to withhold Plaintiff's job until she submitted to the IME. [Hanna, p. 21-22] And, Hanna eventually decided to terminate Plaintiff for allegedly failing to complete the IME.[7]

Q. So were you involved in the decision to terminate Brenda at any point in time?
A. Yes.

Q. Okay. Can you tell me what that involvement was? How were you involved?

[7] Hanna claimed she didn't know if Plaintiff's treating psychiatrist had released Plaintiff back to work. [Hanna, 20-21]

A. When she did not complete the IME, basically I reviewed all the facts of the situation and made a decision to terminate her.

Q. So did you make the ultimate decision to terminate her?
A. Yes.
[Hanna, 17]

Hanna's decision was directly related to Plaintiff's medical condition. But for Plaintiff's medical condition, she would not have been ordered to submit to an IME. It follows Plaintiff would not have been terminated for allegedly refusing to cooperate with the IME. Although Plaintiff no longer has to prove Defendant regarded her as having a disability *that substantially limited her in a major life activity* under the post-amendment ADA (ADAAA), Defendant's refusal to return Plaintiff to work *in any job* unless and until she was cleared by an IME demonstrates Defendant regarded Plaintiff as disabled. See *Henderson v. Ardco*, Inc. 247 F.3d 645, 653 (6th Cir. 2001)("Where the 100% rule is applied to mildly impaired persons to exclude them from a broad class of jobs, it may be treating them as disabled even if they are not, thereby qualifying them for protection under the ADA and parallel statutes, and activating the individual assessment rule.") If Plaintiff proves a prohibited action was taken because of her impairment, she has made out a "regarded as" claim. The evidence is clear Defendant took its challenged actions because of Plaintiff's impairment.

2. <u>Plaintiff was otherwise qualified for her position with an alleged essential job requirement eliminated.</u>

Dye imposed a job requirement on Plaintiff to attend an IME. But Dye had no concerns regarding Plaintiff's physical ability to perform her job. Nor did Dye believe Plaintiff suffered from cognitive deficiencies.

Q. So you had no concerns about her ability to work that required a functional capacity exam?
A. Correct.

Q. Other than the safety issue that we talked about -- the safety issue, the timing of her returning to work, her exchange with Ms. Osting –
A. Uh-huh.

Q. -- and her expression that she may not be ready to return to work -- I lost my train of thought -- did you have any other concerns about her ability to do her job?
A. No, I did not.

Q. Okay. So nothing physically that you were worried about, correct?
A. That is correct.

Q. And from the standpoint of her mental abilities, did you have any reason to believe that she had some sort of cognitive deficiency that would have prevented her from working?
A. I did not.

Q. Okay. So you had no reason to believe that she wasn't mentally capable of performing her job?
A. I don't have the medical expertise to determine that.

[Dye, 104-105]

Defendant claims it had a "safety" concern. And Defendant amended its Answer to raise the "direct threat" affirmative defense. The ADA allows employers to require that a disabled individual does not pose a "direct threat to the health or safety of other individuals in the workplace." 42 U.S.C.A. 12113(b). The Code of Federal Regulation further provides:

Direct Threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;
(2) The nature and severity of the potential harm;
(3) The likelihood that the potential harm will occur; and
(4) The imminence of the potential harm.

[29 C.F.R. § 1630.2(r). (emphasis added)]

Dye gave several reasons for conditioning Plaintiff's return to work upon her submission to an IME: (1) Plaintiff allegedly shared with an administrative assistant at the health clinic that she didn't feel quite ready to come back;[8] (2) there had been some sort of exchange with HR employee Cindy Osting; and, (3) the timing of Plaintiff's return made Dye suspect Plaintiff just wanted to come back because "she was running out of pay."[9] [Dye, 33, 40] Reviewing Dye's deposition, it is clear these reasons do not rise to the type of continuing, likely and imminent threat of severe harm required by 29 C.F.R. § 1630.2(r). See also, *Wurzel v. Whirlpool Corp.*, 482 Fed. Appx. 1, 11 (6th Cir. 2012) (citing 29 C.F.R. § 1630.2(r); and, *Estate of Mauro v. Borgess Medical Center*, 137 F.3d 398, 402 (6th Cir. 2000). But Defendant bears the burden of showing (a) a medical inquiry was justified on a direct threat basis and/or (b) Plaintiff was "unqualified" on a direct threat basis. The evidence does not show Plaintiff posed a "direct threat." Indeed, the objective medical evidence points to the contrary. Dr. Bundy cleared Plaintiff to return to work "without restrictions." Moreover, Dr. Bundy testified he never considered Plaintiff to pose a risk of harm to herself or others. [Bundy, 149-151]

Defendant's assertion "Dr. Bundy did not independently investigate whether it would be safe for Bloomfield to work" mischaracterizes his testimony.[10] [Def. Mot. p.7] Not surprisingly, Dr. Bundy testified it was "standard procedure" for him to inquire whether a person presented a

[8] Dye was apparently referring to an e-mail she received from Jenna Powell, a medical assistant in Defendant's health clinic. First, Powell's e-mail about Plaintiff's purported statement is unsupported hearsay. Plaintiff denies she said any such thing. [Pl. Dep., 247] Furthermore, Powell's e-mail is dated several days before Plaintiff met with Dr. Leslie, who admits Plaintiff told him she was ready to come back to work. Last, Powell's e-mail statement merely claims Plaintiff said she "…wasn't ready with everything that's going on." Without any other context, there is simply no way this statement justifies an IME on a "direct threat" basis.

[9] This rationale does not directly support a safety concern.

[10] Defendant cites to Dr. Bundy's deposition at 130:1-131:3 to support this assertion. But his testimony there doesn't support Defendant's assertion. Read in its entirety, Dr. Bundy's deposition demonstrates that determining whether Plaintiff was a threat to herself or others is one of the most important goals of his evaluation and treatment of Plaintiff.

risk of harm. [Bundy, 122] Indeed, he testified whether a person presents a risk of harm is one of the most important things he tries to determine in his sessions with a patient.

Q. Doctor, I introduced myself earlier. I'm Danny Caudill, Brenda Bloomfield's attorney in this case. If I understood your earlier testimony, it sounds like it's very important when you sit down with a patient at some point in time to determine whether or not they present a risk of harm to themselves or others; is that correct?
A. Correct.

Q. And would you say that's one of the most important things you try to determine in a particular session?
A. Yeah.

[Bundy, 146]

Dr. Bundy also testified he was obligated to make a report if he thought a patient presented an imminent risk of harm. He testified that is both a legal and an ethical obligation.

Q. And where do you believe that this obligation to do that arises? Does it arise from law or from your physician's code of ethics? Where does it come from?
A. There are laws that say we have a duty to warn.

Q. Do you know what particular law you're referring to, by any chance?
A. The Tarasoff Law[11] that I believe pertains to Ohio. But also, ethically, you have that duty, too. But it gets complicated. Because as you probably well know, people get upset with other people. We all have fantasy thoughts. We sometimes voice those in a time of agitation. Would we really act out on it or not is the question. You also temper whether you warn somebody or not, what damage that might do to the relationship you have with someone else or with the patient. But if there is imminent risk, I would warn, and I would urge the patient to get help.

[Bundy, 150] [12]

Dr. Bundy never made such a report because he didn't consider Plaintiff to pose a risk of harm.

Q. Did you ever make any such warnings about Brenda Bloomfield?
A. No.

[11] Dr. Bundy may have been referring to *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr 14 (Cal. 1976)(discussed in *United States v. Hayes*, 227 F.3d 578 (6th Cir. 2000).

[12] Dr. Bundy discussed his concern regarding the need to spot threats at other times in his deposition, as well. [Bundy, 54-56, 59, 64-65]

Q. Why didn't you make any such warnings?
A. I never had any information that indicated there was a risk.

[Bundy, 151]

It is important to understand Dr. Bundy treated Plaintiff over a six-month period. During that time, he discussed many issues with her to diagnose and treat her mental health conditions. Those included issues related to her work [Bundy, 50], her family relationships [Bundy, 56-57, 73], her dating relationships [Bundy, 49, 57], her family's medical history [Bundy, 73], her finances [Bundy, 57], significant events that she had experienced in her life (such as motor vehicle accidents) [Bundy, 49, 69] and her spiritual beliefs [Bundy, 75-76]. Defendant tries to undermine Dr. Bundy's return to work certification by suggesting he might have come to a different conclusion had he been aware of Defendants' allegations regarding Plaintiff's interactions with her co-workers. But Defendant's contract physician, Dr. Leslie, shared those allegations with Dr. Bundy before Dr. Bundy released Plaintiff to work. [Bundy, 107-109; Leslie, 24-28][13] Informed of those allegations, Dr. Bundy still cleared Plaintiff to work.

Dr. Burke didn't want to admit it at his deposition but it is clear he came to the same conclusion. Dr. Burke agreed he had an obligation to make a report if he determined Plaintiff

[13] Dr. Leslie's testimony is interesting. Dr. Leslie essentially rejected Dr. Bundy's return to work certification. So, Plaintiff's counsel asked him if he thought Dr. Bundy's certification was invalid in some respect. [Leslie, 22] Dr. Leslie wouldn't go so far as to say the certification was invalid. Instead, he lamely offered he "was concerned that [Dr. Bundy] did not have all of the information regarding the other issues in order to influence his decision on her return to work status." [Id.] At Defense Counsel's prodding, Dr. Leslie expanded on this: "I was concerned that he may not have had full knowledge regarding the interpersonal issues that she was having with some of the Whirlpool employees; and because of that, I felt it was necessary for an independent party that would have not only his information but the other information regarding those issues, having that at hand and being able to make an objective opinion and a guide as to what to do." But Dr. Leslie's lame justification is undercut by the fact he had already shared this information with Dr. Bundy prior to Dr. Bundy issuing the return to work certification. [Leslie, 24-28] Furthermore, when asked "if you had reason to believe that Brenda Bloomfield posed a lethality risk or she presented a threat, would you have told Dr. Bundy that?" Dr. Leslie answered, "I don't know." [Leslie, 27] Dr. Leslie never spoke with the IME psychiatrist, Dr. Burke [Burke, 25-26], nor did he help Dye write the letter she sent to Dr. Burke. [Leslie, 32; Dye, 34] It is clear Dr. Leslie merely rubberstamped Dye's request for an IME and is now attempting to justify that decision. It is telling that even though Dr. Leslie is a non-party witness, Whirlpool's counsel represented him at his deposition. Indeed, prior to the deposition, Whirlpool's counsel instructed Plaintiff's counsel he could only contact Dr. Leslie through them.

posed a danger to herself or others. [Burke, 72] He also agreed he never made such a report despite having evaluated Plaintiff. [Dr. Burke Dep. p. 73] Although Dr. Burke claimed he didn't "complete" his evaluation, this is simply not true. At the ***end*** of the session, Dr. Burke learned Plaintiff tape-recorded the exam. This angered Dr. Burke leading him to claim that Plaintiff "lied" during the session and that he was unable to "complete" his evaluation. But the Court should review pages 70-72 of Dr. Burke's deposition. There, the Court will see Dr. Burke did complete a full evaluation. This evaluation gave him enough information to determine if Plaintiff posed a "direct threat" and it's clear he determined she did not.

Last, Anne Shiple was Plaintiff's treating psycho-therapist for five years. [Shiple, 173] Like Dr. Bundy and Dr. Burke, Ms. Shiple also believed she had a duty to make a report if she thought Plaintiff posed a threat of harm. [Shiple, 169-175] And again, like Dr. Bundy and Dr. Burke, Ms. Shiple testified she never made such a report because she never determined Plaintiff posed such a threat. [Shiple, 174-175]

To sum up, Dye admitted she had no concerns regarding Plaintiff's ability to perform her job from a physical or cognitive standpoint. As for "direct threat," not one of the three mental health practitioners who examined Plaintiff determined she posed a threat of harm. Indeed, her treating psychiatrist confirmed she could return to work – not once, but twice. The evidence is simply overwhelming that Plaintiff was qualified to do her job.[14]

3. <u>Defendant cannot meet its burden of proving that the requirement of an employer-ordered, psychiatric examination was essential, and therefore a business necessity.</u>

Defendant relies on *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804 (6th Cir. 1999) to support its decision to terminate Plaintiff for allegedly refusing to submit to a medical exam. But

[14] Again, keeping in mind that it is Defendant's burden to demonstrate Plaintiff was unqualified if it attempts to use a "direct threat" basis.

Sullivan and this case are different for a number of important reasons. First, Plaintiff in this case had already been examined and treated by not one, but two, mental health professionals, Dr. Bundy and Therapist Anne Shiple. Neither found any reason to believe Plaintiff posed a "direct threat" and Dr. Bundy even certified that Plaintiff could return to work - not once but twice. By contrast, there is no indication the plaintiff in *Sullivan* had already been examined and cleared by a competent and highly regarded psychiatrist after six months of treatment. In other words, unlike *Sullivan*, the objective medical evidence in this case did not support a medical inquiry.

Second, the plaintiff in *Sullivan* wholly refused to submit to any examination. That is not the case here. Plaintiff sought mental health treatment from Anne Shiple and Dr. Bundy. And she attended the IME with Dr. Burke despite her belief the IME was unnecessary and retaliatory. Dr. Burke's testimony confirms Plaintiff provided medical records and answered all of his questions. Dr. Burke's sessions typically last an hour and that is how much time he spent with Plaintiff. [Burke, 55] Indeed, Dr. Burke admitted Plaintiff's responses were consistent with the medical records from her prior treatment. [Burke, 77] And, Dr. Burke admitted that, because he didn't know Plaintiff was recording, the fact of the recording had no bearing on how he asked his questions. [Burke, 75-76]

Defendant is merely *claiming* Plaintiff did not cooperate because it was learned at the end of the examination that she had recorded the conversation. Plaintiff wasn't asked at her deposition why she tape-recorded the session but it is clear she believed the IME was a retaliatory act for having filed a complaint with the EEOC. [Dye, 70-71; Leslie, 17-18; Pl. Dep., 250-253] In any event, there is nothing inherently insubordinate or uncooperative about tape-recording an exam session. And, both Dr. Burke and Dye admitted they never told Plaintiff she

couldn't record prior to the IME session.[15] [Burke, 74-75; Dye, 87]. Moreover, Dye couldn't even confirm she told Plaintiff in advance that failure to cooperate with an IME would result in termination.[16] [Dye, 87] In short, Plaintiff in this case did not refuse to submit to an employer-ordered exam like the plaintiff in *Sullivan*.

To sum up, the *Sullivan* court reasoned that the employer could order a medical inquiry because it didn't have any other medical information regarding the plaintiff's fitness for duty. In this case, however, Defendant had not one but two return to work certifications from a "highly"[17] regarded psychiatrist, Dr. Bundy, who had treated Plaintiff for months. And, any suggestion Dr. Bundy wasn't aware of Plaintiff's interactions with her co-workers simply isn't true. Defendant gave Dr. Bundy the same information it gave to the IME psychiatrist.[18] If Defendant didn't give the exact same information to Dr. Bundy, then Defendant should be required to explain why not. The fact is Defendant has never been able to provide a plausible explanation for why Dr. Bundy's return to work certification wasn't sufficient. And, Defendant's witnesses admit that they never reached out to Dr. Bundy to seek clarification after requiring him to send a second certification indicating that his release of Plaintiff was "without restrictions."

This is not to say, however, that *Sullivan* has nothing to offer this case. The *Sullivan* court cautioned against forced examinations that are not related to an employee's job or are otherwise too broad in scope. *Sullivan*, 197 F.3d at 812. In this case, Dye didn't simply ask Dr. Burke to determine whether Plaintiff could safely do her job, she also asked Dr. Burke to provide

[15] Dr. Burke's dismay at having discovered that Plaintiff had taped the session is unexplainable and could not be justified by any implied breach of patient-doctor trust or other confidentiality reasons. Dr. Burke made a point of explaining to Plaintiff at the beginning of the session that this was "not the same as meeting with a doctor under normal circumstances." [Burke, 32] Indeed, Dr. Burke told Plaintiff that their discussion "would not be held to a normal level of psychiatric confidentiality." [Id.] And, he further told her that in order to perform the IME he could not "have ever been her doctor prior" and "was not allowed to be her treating physician following this examination." [Id.]

[16] For these reasons, Defendant could not have had an "honest belief" that Plaintiff was "uncooperative."

[17] [Leslie, 36]

[18] [Leslie, 24-28]

a diagnosis and recommended treatment plan. [Dye, 77-78] When pressed, Dye couldn't remember why she believed she needed to know Plaintiff's diagnosis. [Dye, 78] And her answer to why she needed to know a recommended treatment plan was equivocating and unclear at best. [Id.] Dr. Burke did as requested and claims he performed a diagnostic analysis of Plaintiff. [Burke, 23]

Dye's request for a diagnosis and recommended treatment plan exceeded the scope permissible under the ADA. Employers are "restricted to determining whether an employee can perform 'the essential functions of the job.'" *James v. James Marine, Inc*., 805 F. Supp. 2d 340, 348 (W.D. Ky., August 4, 2011). Furthermore, "a fitness for duty examination permitted under 42 U.S.C. § 12112(d)(4)(A) is not an excuse for every wide-ranging assessment of mental or physical debilitation that could conceivably affect the quality of an employee's job performance." *Id.*, at 349. In *James*, the court held that the employer violated the ADA by failing to limit the scope of the medical examination. [Id.] The court held that the employer's demand for the plaintiff's past medical history was a general inquiry into the plaintiff's health, which the court found improper. [Id.] Like in *James*, Defendant's forced exam here, if justified at all, clearly exceeded the scope necessary to determine whether Plaintiff could perform the essential functions of her job. It is telling Dye never provided Dr. Burke with Plaintiff's job description or any other information about Plaintiff's job, so that he could first understand the essential functions of her job before determining whether she could perform them. Importantly, Dye testified that she has never written the kind of letter she wrote to Dr. Burke for any other IME. [Dye, 65] And, she testified that there was no written policy requiring her to write such a letter. [Id.] Simply put, the very fact Dye chose to write a letter to the IME doctor containing unconfirmed allegations regarding Plaintiff is discriminatory.

On the other hand, it is easy to see how Dye could misunderstand the limits on an employer's ability to order medical inquiries. Dye was placed in charge of the company health clinic and given the authority to order Defendant's employees to submit to medical inquiries. [Dye, 19-22; Hanna, 21, 24-25] But Dye's deposition testimony demonstrates she had little training in the ADA. [Dye, 17-19] Furthermore, she has never had any medical training. [Dye, 47] And, although she had ordered IME's for physical conditions, she had never ordered an employee to be examined by a psychiatrist before. [Dye, 46-47] Indeed, Dye admitted she had a limited understanding of what psychiatrists did. [Dye, 48] Most troubling, HR Director Hanna's testimony makes it clear there is little oversight when it comes to forcing employees to submit to medical inquiries:[19]

> *Q. Did you have any discussions with any of the medical personnel in the Health Center about Brenda Bloomfield?*
> **A. No.**
>
> *Q. At some point, did you authorize or approve this decision to send Brenda to an IME?*
> **A. I don't -- there's no formal approval process, but I supported Sue in making the decision.**
>
> [Hanna, 21]

Medical inquiries aren't the only issue where Defendant's human resources and health clinic personnel seemingly misunderstand the requirements of the ADA. Dye testified that while her job required her to transfer employee medical records to people outside the company, she didn't know whether she needed a release to do so. [Dye, 82] Dye admitted she never had any training on the issue. [Dye, 82] Dr. Leslie testified it was Defendant's policy that employees could not be returned to work unless they were certified to return "without restrictions." [Leslie,

[19] HR Director Hanna testified she had only recently assumed her role in human resources one month before Dye ordered the IME. [Hanna, 15] Prior to that, Hanna, who has an engineering background, spent the vast majority of her career in operations and also had little training in the ADA. [Hanna, 10-15]

14, 16-17, 21] But "100% percent healed" policies have been found to be per se violations of the ADA. See *Henderson*, at 655; See also, *McGregor v. National R.R. Passenger Corp.*, 187 F.3d 1113 (9th Cir. 1999). Last, Dye testified she would not allow a person to return to work from FMLA leave unless and until they brought a revised certification from their treating physician that met Defendant's standards. [Dye, 95-96] This policy violates the FMLA, which prohibits employers seeking clarification of a return to work certification from withholding the employee's job until the clarification is received. See *Brumbalough v. Camelot Care Centers, Inc.*, 427 F.3d 996, 1004 (6th Cir. 2005)("once an employee submits a statement from her health care provider which indicates that she may return to work, the employer's duty to reinstate her has been triggered under the FMLA.").[20]

B. Plaintiff can establish a claim of religious discrimination against Defendant.[21]

1. <u>Defendant based adverse employment decisions taken against Plaintiff on her religious beliefs.</u>

Plaintiff testified she was raised in a very strict Pentecostal household. [Pl. Dep., 43] Although she hasn't held as strictly to the Church's teachings as her parents did now that she is older, she still considers herself to belong to the Pentecostal denomination. [Pl. Dep. 43-45] Plaintiff explained people often have misconceptions about her faith. For instance, Plaintiff testified people think all Pentecostal believers handle snakes. [Pl. Dep., 44] Plaintiff explained they don't. [Id.]

Plaintiff did quote a Bible verse during one of her meetings with Osting but denied she ever used a Bible verse to communicate a threat. [Pl. Dep., 157-158]. Plaintiff made the Biblical

[20] Indeed, Plaintiff was attempting to return from FMLA and Short Term Disability leave, which Dye testified "ran concurrently." [Dye, 89, 91]

[21] After having the opportunity to conduct discovery related to her claims, Plaintiff will not oppose Defendant's summary judgment motion as it relates to her claim for sex discrimination.

reference to express the idea that she wouldn't seek revenge against her co-worker, Dawn Bower, because she believed it was God's job to judge people. [Pl. Dep., 157] In this same meeting, however, Plaintiff also told Osting she would pray for Osting and her unborn child. [Pl. Dep., 159] Although Plaintiff denied any threatening intent, Osting instructed Plaintiff to stop using religious references. [Pl. Dep. 161] Further, Osting suggested Plaintiff could be disciplined if she continued making religious references. [Pl. Dep. 161-162].

It is clear Osting was uncomfortable with Plaintiff's use of religious references during their conversations. But Osting admitted she didn't see anything menacing or threatening about the Biblical references Plaintiff made with regard to her dispute with Bower. [Osting, 69, 77] And yet, Dye used Plaintiff's Biblical references to support withholding Plaintiff's job and justifying the IME. [Dye Dep. Ex. 1 attached to Def. Mot.] Clearly, a dispute of fact exists as to whether Plaintiff's religious beliefs were a factor in the adverse employment actions taken against her.

C. Plaintiff is entitled to summary judgment on her Retaliation claim.

Defendant moves for summary judgment on Plaintiff's retaliation claim on two bases: (1) Plaintiff cannot establish a causal connection; and, (2) Plaintiff cannot establish pretext. Defendant claims it fired Plaintiff for failing to cooperate with its employer-ordered medical inquiry. Plaintiff alleges in her Complaint (a) she was harassed after she filed a charge of discrimination with the EEOC on March 21, 2010 and (b) she was terminated for allegedly failing to cooperate with an inappropriate medical inquiry. Compl. ¶ 28, 29 (sic)[22].

1. <u>Defendant retaliated against Plaintiff for filing a charge with the EEOC.</u>

[22] Paragraph 29 is mislabeled "20."

Plaintiff believed the forced IME was retaliatory and she told Dr. Leslie this. [Pl. Dep. 251; Leslie, 18] And, she expressed her skepticism regarding the need for the IME to Dr. Burke when he examined her. [Burke, 78] Furthermore, Dye's letter to Dr. Burke uses the fact that Plaintiff had filed an EEOC charge against Defendant as one of the reasons it requested the IME. [Dye, 64; Dye Dep. Ex. 1] Last, Defendant's termination letter to Plaintiff suggests Plaintiff's "…repeated threats of legal action against Division personnel…" was a factor in its decision to terminate Plaintiff. [Traxler Dep. Ex. 1] Accordingly, a dispute of fact exists as whether Plaintiff's EEOC charge caused Defendant to harass her or factored into Defendant's decision to terminate her.

2. Defendant retaliated against Plaintiff for allegedly refusing to cooperate with an unlawful IME.

An employee's right to be free from unwarranted medical inquiries is an important substantive protection offered by the ADA. In this case, it is clear Plaintiff believed Defendant's forced IME was improper and unnecessary. Nevertheless, Plaintiff did attend and cooperate with the IME. In any event, Defendant could not lawfully terminate Plaintiff for refusing to cooperate with an unlawful medical inquiry. See 42 U.S.C.S. §12203; see also, *Jackson v. Lake County*, 2003 U.S. Dist. LEXIS 16244 (N.D. Ill., September 16, 2003).

CONCLUSION

Defendant spends a lot of time in its motion detailing Plaintiff's alleged bad behavior. But this case isn't about bad behavior. This case is about whether Defendant complied with the ADA. Defendant didn't like Dr. Bundy's professional medical opinion, so Defendant simply made up its own rules, coerced Plaintiff into submitting to an unlawful medical inquiry, and then fired her for allegedly refusing to cooperate. That violates the ADA. And that is what this case is about.

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CERTIFICATE OF COMPLIANCE PURSUANT TO LR 7.1(F)

I, Attorney Danny L. Caudill, hereby certify that the instant lawsuit has been assigned to the Standard Track designation, and the foregoing ***Plaintiff's Memorandum in Support of Partial Motion for Summary Judgment*** is in full compliance with Local Rule 7.1(f) of the Northern District of Ohio, and does not exceed twenty (20) pages in length.

/s/ *Danny L. Caudill*
Danny L. Caudill (0078859)

CERTIFICATE OF SERVICE

The undersigned attorney caused the foregoing to be served on all counsel for all parties via the Clerk of Court's CM/ECF system on May 7, 2013.

/s/ *Danny L. Caudill*
Danny L. Caudill (0078859)