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.	:	

MEMORANDUM IN SUPPORT OF PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT

Defendant terminated Plaintiff's employment on August 2, 2010, after nine years of service. Plaintiff suffers from depression and anxiety disorder. At the time of her termination, Plaintiff was attempting to return to work after spending several months on approved medical leave due to her mental health condition. Although Plaintiff was released to return to work by her treating psychiatrist, Defendant refused to let her return unless she first submitted to an examination with another psychiatrist. Defendant refers to this second opinion as an "Independent Medical Exam" or "IME." Defendant claims Plaintiff refused to cooperate with the IME. As a result, Defendant claims it terminated Plaintiff for insubordination.

Defendant is expected to argue the IME was necessary to determine if Plaintiff posed a "direct threat" to herself or others. To do this, Defendant will likely point to certain bad behaviors that Plaintiff is alleged to have engaged in. But bad behavior by itself does not justify ordering medical inquiries. The question has to be – did a reasonable medical judgment or the best objective evidence support that Plaintiff posed a direct threat of harm to herself or others? Defendant could lawfully order Plaintiff to submit to a medical inquiry only if this question can be answered in the affirmative. Furthermore, Defendant bears the burden of proving that the

medical inquiry was lawful. Defendant cannot meet this burden because no evidence exists showing Plaintiff posed a direct threat. Indeed, all of the objective evidence points to the contrary. For this reason, Defendant could not lawfully order Plaintiff to submit to the IME and withhold her job unless she did so.

As the Court will see, a human resources staffer with no medical training, Suzanne Dye, ordered the IME on her own initiative. But she never examined or observed Plaintiff in any meaningful way. Defendant can suggest that the decision to order the IME was based on a wealth of information from a variety of sources. But that wouldn't be true. The simple fact is, Dye merely reviewed Plaintiff's personnel file and spoke with the HR Director. [Dye, 44] The HR Director never examined or observed Plaintiff either. [Hanna, 16] Dye admitted she didn't know whether Plaintiff posed a danger when she ordered the IME. She explained she didn't know because she wasn't a medical expert. She knew, however, that Plaintiff's treating psychiatrist had released her to work "without restrictions." Although a contract physician working in Defendant's health clinic signed off on the staffer's request for the IME, he never performed an individualized assessment to determine whether Plaintiff posed a "direct threat." He also knew Plaintiff's treating psychiatrist had released her to return to work without restrictions. In short, he merely rubberstamped the staffer's IME request.

Reasonable medical judgment and the best objective evidence did not support ordering a medical inquiry on a "direct threat" basis. But the ADA requires this. Accordingly, Defendant violated the ADA by forcing Plaintiff to submit to the IME and withholding her job until she did so. Further, Defendant could not have had a legitimate business interest in terminating Plaintiff for purportedly refusing to submit to the unlawful IME. Last, terminating Plaintiff for refusing to submit to the unlawful IME, if she really refused, constitutes unlawful retaliation. Plaintiff

respectfully moves this Court for summary judgment on the issue of Defendant's liability for ADA discrimination and retaliation, with the issue of damages to be tried to a jury.

BACKGROUND FACTS

Plaintiff worked for Defendant from August 2001 until she was terminated on August 2, 2010. [Pl. Dep. 32; Traxler, 32] In late 2009, Plaintiff became involved in a personal dispute with a co-worker, Dawn Bower. [Osting, 26-27] Both Plaintiff and Bower were disciplined as a result. [Id., 41-43, 45] But Plaintiff received harsher discipline because it was believed she was untruthful during the associated investigation. [Id., 46-47] Plaintiff, however, believed she was disciplined more harshly because she had filed a written complaint against Bower with the human resources department alleging harassment and discrimination. [Osting, 98; attached hereto as Exhibit A]

Plaintiff was treated by a psycho-therapist prior to these events. [Bundy, 45; Dye, 54] On January 19, 2010, Plaintiff began a medical leave of absence due to mental health conditions diagnosed as depression and anxiety. [Bundy, 115] Plaintiff's leave was a combination of FMLA and short term disability leave. [Dye, 89, 91] While she was on medical leave, Plaintiff was treated by a psychiatrist, Dr. Brad Bundy, D.O. [Leslie, 15] On February 5, 2010, Plaintiff filed a complaint with the EEOC alleging sex and religious discrimination and retaliation. [Exhibit A] On July 13, 2010, Dr. Bundy provided Plaintiff with a note stating she could return to work on July 21, 2010. [Leslie, 20; attached hereto as Exhibit B] Plaintiff was required to attend a return to work visit with Dr. Leslie, a physician on contract to the company's health clinic. [Dye, 34] Plaintiff met with Dr. Leslie on July 20, 2010. [Dye, 34] Prior to Plaintiff's meeting with Dr. Leslie, Dye requested that Dr. Leslie order Plaintiff to be examined by a psychiatrist other than Dr. Bundy. [Dye, 35]

Plaintiff met with Dr. Leslie at the company health clinic on July 20, 2010, as ordered. [Leslie, 10-11] Dr. Leslie had never met Plaintiff before. [Leslie, 19] And, Dr. Leslie never reviewed Plaintiff's personnel file either before or after July 20, 2010. [Leslie, 32] By the time of that meeting, however, Dr. Leslie knew that Plaintiff had been treating with Dr. Bundy. [Leslie, 15] In fact, Dr. Leslie had called Dr. Bundy some weeks before and provided him with information about Plaintiff's interactions with her co-workers. [Leslie, 24-28] Dr. Leslie knew Dr. Bundy professionally and claims he held him in high regard. [Leslie, 36] Dr. Leslie also knew that Dr. Bundy had provided Plaintiff with a return to work note. [Leslie, 20-21]

Plaintiff told Dr. Leslie she felt a lot better and was ready to come back to work. [Leslie, 15-16, attached hereto as Exhibit C] But Dr. Leslie rejected the return to work slip from Dr. Bundy dated July 13, 2010 because the slip did not specifically state that Plaintiff could return to work "without restrictions." [Leslie, 16-17, 21] And, Dr. Leslie approved Dye's request to send Plaintiff to an IME with Dr. Charles Burke scheduled for July 27, 2010. [Leslie 19-20] Neither Dr. Leslie nor Ms. Dye knew Dr. Burke. [Leslie, 36; Dye 41] Ms. Dye received Dr. Burke's name from another human resources staffer at a different Whirlpool plant. [Dye, 41]

Prior to the scheduled IME, Dr. Bundy submitted a revised return to work slip specifically stating Plaintiff could "return to work without any restrictions and resume her normal work duties." [Leslie, 21-22; attached hereto as Exhibit D] Dr. Leslie saw this slip prior to the scheduled IME. [Id.] Ms. Dye was also aware the slip was submitted. [Dye, 60-61] But they didn't cancel the IME despite Plaintiff's protests. Dr. Leslie never contacted Dr. Bundy regarding the return to work slips or for any other reason. [Burke, 25-26] Furthermore, neither Dr. Leslie nor Dye ever spoke with Dr. Burke prior to the IME. [Burke, 25-26] Instead, Dye sent a letter to Dr. Burke containing several allegations and "rumors" concerning Plaintiff. [Dye,

33-34, 64-65, 68-74; attached hereto as Exhibit E] Dye's letter also asked Dr. Burke to answer whether Plaintiff posed a safety risk and to give a diagnosis and recommended treatment. [Dye, 75-78]

Plaintiff attended the IME on July 27, 2010, as ordered. [Burke, 27-28] The exam lasted one hour. [Burke, 55] Prior to the exam, Dr. Burke reviewed medical records from Dr. Bundy and from Plaintiff's treating therapist, Anne Shiple. [Burke, 70] At the end of the meeting, Dr. Burke learned that Plaintiff had tape-recorded the meeting. [Exhibit F, attached hereto] Dr. Burke ordered Plaintiff to turn over the tape, so that he could erase it. [Burke, 51-53] Plaintiff refused and left Dr. Burke's office. [Id.] Dr. Burke subsequently sent a letter to Defendant claiming that Plaintiff was uncooperative with the examination. [Exhibit F] Defendant subsequently sent a letter dated August 2, 2010 terminating Plaintiff, effective August 2, 2010. [Traxler, 32; Exhibit G, attached hereto]

STANDARD OF REVIEW

Summary Judgment should be granted only where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Ohio R. Civ. P. 56 (C). In making this determination, the court should view the facts in the light most favorable to the non-moving party and draw all inferences in that party's favor. Reeves v. Sanderson Plumbing, Inc. 530 U.S. 133, 150, (1986). 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., 477 U.S. 242, (1986). "The disputed issue does not have to be resolved conclusively in favor of the non-moving 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, 822 F.2d 1432, 1435 (6th Cir. 1987).

DISCUSSION

Both the ADA (42 U.S.C. § 12112) and Ohio law (R.C. 4112)[1] prohibit covered employers from discriminating against a qualified individual on the basis of disability. "The thesis of the [ADA] is simply this: That people with disabilities ought to be judged on the basis of her abilities; they should not be judged nor discriminated against based on unfounded fear, prejudice, ignorance, or mythologies; people ought to be judged on the relevant medical evidence and the abilities they have." Smith v. Chrysler Corp., 155 F.3d 799, 805 (6th Cir. 1998) (citations omitted)(emphasis added).

This case should be analyzed under a direct evidence analysis. "When an employer admits (or the evidence establishes) that its decision was based upon the employee's disability, direct evidence of discrimination exists." Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1180 (6th Cir. 1996)[2]. Using a direct evidence analysis, Plaintiff must prove she: 1) is disabled under the ADA; 2) is otherwise qualified to perform the requirements of her position, with or without reasonable accommodation; and 3) was discriminated against because of the disability.

A. Defendant perceived Plaintiff as disabled and took actions based on that perception.

[1] Courts are permitted to look to regulations and cases interpreting the ADA when applying the Ohio law. See Knapp v. City of Columbus, 192 F. App'x 323, 328 (6th Cir. 2006); Columbus Civil Serv. Comm'n v. McGlone, 82 Ohio St. 3d 569, 573, 1998 Ohio 410, 697 N.E.2d 204 (1998).

[2] In *Monette*, the defendant's explanation for the decision to replace Plaintiff was that Plaintiff was on medical leave, unable to perform the job under any circumstances, and that because only one customer service representative was employed in the building, the need to replace Plaintiff was urgent. This Court stated, when "[v]iewed properly, all of these reasons are related to Plaintiff's handicap. In other words, the defendant's own explanation for its action established that it relied on [Plaintiff]''s disabled status to replace him." *Monette*, 90 F.3d at 1187.

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). The "regarded as" prong "does not require a showing of an impairment that substantially limits a major life activity." 29 C.F.R. §§ 1630.2(g)(3); 1630.3(l)(1). 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.)

Dye made the decision to withhold Plaintiff's job, until she agreed to submit to a psychiatric examination. 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 purportedly failing to complete the IME.

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?

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 that Plaintiff would not have been terminated for purportedly refusing to cooperate with the IME.

B. <u>Plaintiff was qualified for her job.</u>

Although Dye initiated the IME requirement, she had no concerns regarding Plaintiff's ability to perform her job from a physical standpoint.

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 amended its Answer to raise the "direct threat" affirmative defense.[3] The ADA allows employers to require as a qualification for employment that the disabled individual

[3] 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

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)]

There is simply no evidence that Plaintiff was "unqualified" because she posed a direct threat. Indeed, all of 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] Dr. Burke came to the same conclusion. He agreed at his deposition that he had an obligation to make a report if he determined that Plaintiff 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

---

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 have an affirmative burden to produce evidence meeting the standards set forth by the Courts.

end of the session, Dr. Burke learned that Plaintiff had tape-recorded the exam. This angered Dr. Burke leading him to claim that Plaintiff "lied" during the session. Based on this, Dr. Burke claimed he was not able to "complete" his evaluation. But pages 70-72 of his deposition demonstrate he completed a full evaluation. His evaluation gave him sufficient information to determine if Plaintiff posed a "direct threat" and it's clear he determined she did not.

C. <u>Defendant's stated reasons for the adverse job actions are pretextual.</u>

Hanna made the ultimate decision to terminate Plaintiff's employment. She claimed she terminated Plaintiff for not cooperating with the IME, which she considered insubordination. She confirmed that there were no other reasons. [Hanna, 34-35] But Defendant's reason is pretextual for two reasons: (1) Plaintiff didn't refuse to cooperate with the IME, and (2) Defendant's requirement that Plaintiff submit to the IME was unlawful.

1. Plaintiff cooperated with the IME.

Plaintiff attended the IME and Dr. Burke performed a full one-hour evaluation of her. Although he claimed that Plaintiff "lied" during the evaluation by tape-recording it, Dr. Burke admitted he never told Plaintiff that she couldn't tape-record the session and he never asked her if she was taping during his evaluation. [Burke, 74-75] Likewise, Dye admitted she never told Plaintiff she couldn't tape-record the session either. [Dye, 87] Additionally, Dye couldn't confirm whether she even told Plaintiff that failure to cooperate with the IME would lead to termination. [Dye, 87] Importantly, Plaintiff had provided full medical records for her treatment with her therapist, Anne Shiple, and her treating psychiatrist, Dr. Bundy. [Burke, 70]

2. Defendant's decision to order Plaintiff to submit to a medical examination was not supported by a reasonable medical judgment or the best objective evidence.

The ADA strictly controls when employers may require employees to submit to post-hire medical examinations. Once an employee has been hired, the ADA provides that "[a] covered entity shall not require a medical examination…unless such examination or inquiry is shown to be job related and consistent with business necessity." Denman v. Davey Tree Expert Co., 266 Fed. Appx. 377, 379 (6th Cir. 2007)(citing 42 U.S.C. § 12112(d)(4)(A)). "An employer's request for a medical examination is job-related and consistent with business necessity when: (1) the employee requests an accommodation; (2) the employee's ability to perform the essential functions of the job is impaired; or (3) the employee poses a direct threat to himself or others." Id.

Defendant cannot satisfy any of the three reasons set forth above. First, Plaintiff did not request an accommodation. Second, there is absolutely no evidence that Plaintiff's ability to perform the essential functions of the job was impaired. Third, Defendant cannot justify a medical inquiry on the "direct threat" basis for the same reasons it cannot use the direct threat affirmative defense to attack Plaintiff's status as a qualified individual – all of the relevant, objective evidence points the other way.

Defendant's forced "IME" was a medical examination for purposes of 42 U.S.C. § 12112(d). Prior to the IME, Dye sent a letter to Dr. Burke explaining what information she wanted to receive from the examination. [Dye Dep. Ex. P1] Among other questions, Dye asked Dr. Burke "What diagnosis and treatment would you recommend?" [Dye, 77] "This uncovering of mental-health defects at an employer's direction is the precise harm that § 12112(d)(4)(A) is designed to prevent absent a demonstrated job-related business necessity." Kroll v. White Lake Ambulance Auth., 691 F.3d 809, 819 (6th Cir. 2012).

Defendant will argue that Plaintiff's behavior justified the IME on a "direct threat" basis. "There are four factors to be considered in a direct-threat analysis: (i) the duration of the risk, (ii) the nature and severity of the potential harm, (iii) the likelihood that the potential harm will occur, and (iv) the imminence of the potential harm." 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). "With regard to the risk presented, '[a]n employer . . . is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, i.e. high probability, of substantial harm; a speculative or remote risk is insufficient.'" Wurzel, 482 Fed. Appx. at 11.

Dye offered three reasons for ordering the IME: (1) the fact that Plaintiff knew her short-term disability payments were about to run out; (2) that Plaintiff had purportedly told a medical office assistant that she wasn't ready to return to work; and, (3) that Plaintiff had a "conversation" or "incident" with Cindy Osting. [Dye, 33, 36] But Dye knew Dr. Bundy had released Plaintiff to work "without restrictions." [Dye, 61]

Although Dye questioned the timing of Dr. Bundy's release, she couldn't say it was invalid. [Dye, 93-94] Dye couldn't articulate a "safety" concern regarding a "high probability of substantial harm," of the type articulated in Wurzel. The fact is, Dye's "safety" concerns were purely speculative –likely borne out of stereotypes and preconceptions regarding Plaintiff's mental health condition. [Dye, 75-76] Importantly, Hanna couldn't remember if she knew about Dr. Bundy's return to work slip or if she even asked. [Hanna, 20-21] Furthermore, Hanna never spoke with any physician in the company's health center about Plaintiff. [Hanna, 21] And yet,

she approved holding Plaintiff's job pending her cooperation with the IME and terminated Plaintiff upon receiving second-hand information that Plaintiff did not cooperate with the IME.

Last, both Dye and Dr. Leslie described Defendant's policy of requiring employes to be released to work without restrictions. This is problematic under the ADA as it appears to violate the "100 percent healed rule." See Henderson v. Ardco, Inc., 247 F.3d 645 (6th Cir. 2001).

CONCLUSION

Defendant is expected to smear Plaintiff with every report of bad behavior it can find to justify withholding her job and forcing her to submit to the IME. The Court should see through this. If Defendant had a legitimate concern about bad behavior, it should have taken disciplinary action against Plaintiff. But Defendant shouldn't be permitted to order its employees to submit to intrusive, probing psychiatric examinations just because an employee doesn't say the most reasonable things in the most reasonable way. It is very telling that the employee Plaintiff had a dispute with, Dawn Bower, had a history of conflict with her co-workers but wasn't similarly ordered to submit to a psychiatric IME. [Osting, 27-31; Dye, 106]

In any event, Hanna admitted there were no plans to terminate Plaintiff prior to the IME. [Hanna, 23] Furthermore, neither Hanna nor Osting ever made any reports to Defendant's security staff regarding Plaintiff, undercutting any suggestion they really thought she posed an immediate and significant threat that could support ordering a medical inquiry. [Hanna, 22-23; Osting, 76-77] Indeed, Hanna admitted that any perceived threat had been investigated and was "history." [Hanna, 22] Reviewing Dye's letter to Dr. Burke, the last incident mentioned happened on 4/20/10 – three months prior to the scheduled IME. [Dye Dep. Ex. PX1] Accordingly, it is clear Defendant can't articulate any perceived threat of an immediate or continuing nature.

The content and creation of Dye's letter to Dr. Burke suggest Dye was looking for a way to terminate Plaintiff or had serious pre-conceived notions regarding her condition. The letter is replete with one-sided, unconfirmed allegations and rumor. Furthermore, Dye admitted she had never written such a letter before. [Dye, 65] And, Dye admitted that she obtained all of the information for the letter from Plaintiff's personnel file. [Dye, 72] Dr. Leslie couldn't articulate a logical reason why he rejected the opinion of a treating psychiatrist who had seen Plaintiff for months in favor of some randomly chosen examiner, who would see her for an hour. Even with Dye's letter, however, Dr. Burke admitted he never determined that Plaintiff posed a risk of harm to anyone.

Plaintiff is entitled to summary judgment because the undisputed evidence proves (a) she suffered adverse employment actions that were tied to her impairment and, (b) Defendant cannot articulate legitimate business justifications for the adverse employment actions. Regardless of whether a direct or indirect evidence analysis is used, Defendant should not be permitted to justify Plaintiff's termination on the basis she refused to cooperate with an unlawful medical inquiry. Furthermore, terminating Plaintiff for refusing to cooperate with a medical inquiry that violates the ADA clearly constitutes unlawful retaliation.

/s/ Danny L. Caudill
Danny L. Caudill (0078859)
(*dlcaudill@caudillfirm.com*)
7240 Muirfield Dr., Suite 120
Dublin, Ohio 43017
Telephone: (614) 360-2044
Facsimile: (614) 448-4544

Attorney for Plaintiff

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 fifteen (15) 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 April 16, 2013.

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