## APPENDIX

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## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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TRISHA DORAN, M.D.,
Plaintiff-Appellant
v.
DENIS MCDONOUGH; UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,
Defendant-Appellee

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No. 20-3694

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Decided: November 09, 2021

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Appeal from the United States District Court for the Southern District of Ohio, No. 2:16-cv-665,
Magistrate Elizabeth Deavers

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Opinion Granting Defendant's
Motion for Summary Judgment

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This employment-termination case comes before us for a second time, with appellant, Trisha Doran, M.D., appealing a summary-judgment ruling that upheld her termination by appellees, the Secretary of the United States Department of Veterans Affairs and the United States Department of Veterans Affairs (jointly referred to as the "VA").

Dr. Doran first challenged her termination through the VA's multi-layered administrative process. Her termination was upheld at each step of this process, including reviews by the VA Medical Executive Board ("MEB"), the VA Administrative Investigation Board ("AIB"), the VA Professional Standards Board ("PSB"), and the VA Disciplinary Appeals Board ("DAB"). Dr. Doran then filed suit in federal court under 38 U.S.C. §7462, challenging her termination as arbitrary and capricious (the "APA case"). Her termination was upheld by the district court, *Doran v. McDonald*, No. 2:16-cv-532, 2018 WL 806253, at *21 (S.D. Ohio Feb. 9, 2018), and then by this court in *Doran v. Wilkie*, 768 F. App'x 340 (6th Cir. 2019). Contemporaneously with her APA case, Dr. Doran also filed a complaint for employment discrimination, which gives rise to this appeal. The parties agreed to stay this case pending a ruling in the APA case. After the ruling in *Doran v. Wilkie*, the parties entered a stipulation of facts in our case, and summary judgment was entered in favor of the VA. This appeal followed. Given the voluminous, well-documented record in this matter, we will focus on the facts and findings relevant to the claims raised in this appeal.

## I. Facts and Proceedings Below

Dr. Doran is a board-certified gastroenterologist and licensed physician in the State of Ohio. She was employed by the Chalmers P. Wylie VA Ambulatory Care Center in Columbus, Ohio from 2008 to 2015. For the first five years, Dr. Doran earned high praise from her supervisors and patients, with annual proficiency reports rating her as "outstanding," the highest possible score. That all changed in 2014,

when Dr. Glenn Borchers, who became Chief of Gastroenterology in 2010, took over the annual proficiency review of Dr. Doran's performance, at which time her overall rating dropped to "low satisfactory" to "satisfactory."

The 2013-14 proficiency report covered the period of October 1, 2013, through September 30, 2014. Dr. Borchers reported that Dr. Doran was consistently late or nearly late in completing mandatory training, recredentialing paperwork, and required peer reviews. He noted that her practice style was inefficient, she had higher rates of patient complications than other doctors, she was behind on administrative assignments, and she was frustrated by the amount of work she was required to complete. Dr. Borchers reported her as being distracted or preoccupied.

Dr. Doran claims that this poor review was a result of her complaining about the terms of her employment. Specifically, Dr. Doran alleged that when she was recruited to work for the VA in 2008 by then Chief of Gastroenterology, Dr. Marc Cooperman, that she had been promised participation in the VA's Educational Debt Reduction Program ("EDRP"), a form of student-debt relief. Dr. Doran never received those EDRP benefits, so she sought and obtained Dr. Cooperman's assistance in getting those promised benefits in 2010 and 2013. Dr. Cooperman, who had become Chief of Staff, informed human resources that he had indeed promised EDRP recruitment benefits to Dr. Doran when she was hired, but she still did not receive EDRP benefits. In 2014, a male physician who had transferred recently to Columbus from another VA hospital showed Dr.

Doran a breakdown of his VA benefits, which included EDRP debt-reduction payments. It was also in 2014 that Congress passed the Veteran's Choice Act doubling EDRP benefits from $60,000 to $120,000 for five years of service. And in 2014, Dr. Doran renewed her complaints about not receiving EDRP payments with Dr. Cooperman and the human-resources department. Dr. Doran alleges that it was after this 2014 complaint that Dr. Borchers wrote Dr. Doran's "low satisfactory" proficiency report. Dr. Doran alleges that this is also when Dr. Borchers began to question her competency, treat her differently than male doctors, and exclude her from his inner circle.

On June 2, 2015, Dr. Cooperman issued Dr. Doran a notice of proposed removal and revocation of clinical privileges based on four charges relating to: 1) the treatment of Patients A, B, and C during esophagogastroduodenoscopy ("EGD") and/or colonoscopy procedures on January 26, 2015, January 27, 2015, and October 17, 2014;[1] 2) inappropriately amending patient medical records; 3) lack of candor in attempting to have nurses corroborate her late addition to medical records of Patient A; and 4) performing a procedure (anal tattooing) on Patient D on June 20, 2014, without appropriate privileges. These charges, particularly those relating to the case of Patient A, as detailed in *Doran v. Wilkie*, 768 F. App'x at 347-49, 350-52, led to Dr. Doran's dismissal in August 2015.

[1] For privacy purposes, patients were anonymized throughout the administrative review process and the APA case. The same anonymizers are used in this opinion.

For purposes of this case, the events regarding Patient A are particularly relevant. Patient A, a 53-year-old male, presented on January 26, 2015 for an EGD and a colonoscopy. Despite Patient A' s complex medical history (diabetes, hypertension, coronary artery disease, obesity, sleep apnea, and chronic kidney disease), Dr. Doran considered him at relatively low risk and, instead of seeking assistance from an anesthesiologist, sedated him herself, administrating 100 micrograms of Fentanyl and 2 milligrams of Versed. Patient A became unresponsive, and a code blue was called. Dr. Doran claims that she called for reversal agents, but that nurses did not respond quickly, and the reversal medications were improperly locked away, against VA hospital policy. Before reversal agents could be administered, the code-blue team arrived and intubated Patient A, who was transferred by ambulance to a hospital where he remained for an extended period before being moved into assisted living. Patient A's family sued the VA for three million dollars and the VA settled the claim for $300,000 in damages. Dr. Doran maintains that she treated Patient A properly and did not violate any medical or VA policies.

The parties stipulated to the following facts concerning Dr. Doran's administrative review. A PSB was appointed to review the patient-safety concerns. The PSB reviewed Dr. Doran's care of Patients A, B, C, and D, as well as the nursing staff's concerns about patient safety. The PSB found "a recurring theme of error in decision making and judgment" by Dr. Doran and recommended that she undergo further evaluation to determine her fitness for duty,

as well as receive mentoring, proctoring, and remedial training. Per VA Care Center bylaws, an MEB then convened to review Dr. Doran's care and consider the PSB's recommendations. After reviewing the evidence and testimony from Dr. Doran, the MEB concluded that because alternatives to revoking Dr. Doran's privileges were not feasible for the VA, because Dr. Doran's failure to understand her role and responsibility in the patient care at issue threatened patient safety, and because the patients reviewed had poor outcomes, permanent revocation of her VA privileges was warranted. Dr. Borchers, in answering the MEB's questions regarding the PSB's recommendations, noted that Dr. Doran's demeanor and conduct had changed over the last year, and he was "concerned" by the change. He suggested that Dr. Doran's "escalating poor decisions over the last year" could have a physical cause, such as a brain tumor.

A third review was conducted by the AIB, which examined Dr. Doran's treatment of Patient A, as well as allegations that Dr. Doran made amendments to the medical records of Patients A, B, C, and D and/or had requested staff members to make amendments. The AIB's review included 16 interviews and 30 exhibits. The AIB recommended that "appropriate corrective action be taken" regarding Patient A's care, Dr. Doran's amendment to Patient A's medical record, and her request that staff amend Patient D's medical record. On August 21, 2015, after personally reviewing the charges against Dr. Doran, the Director of the Columbus VA, Keith Sullivan, terminated Dr. Doran for "unacceptable performance and conduct."

Dr. Doran appealed her termination to the VA Under Secretary of Health and the DAB. 38 U.S.C. §§ 7461(b)(1), 7462. The DAB determined that Dr. Doran's treatment of Patient A "was so removed from the standard of care [that] the penalty of discharge is warranted." The DAB emphasized its concerns that the testimony identified errors of judgment and that Dr. Doran "demonstrated a lack of the insight needed to guarantee confidence that her performance would be improved and be consistently safe in the future." The DAB noted that "[o]ther physicians at the facility have received major adverse actions for similar acts of misconduct." The DAB found termination appropriate especially given the seriousness of Patient A's code blue, the erosion of trust and confidence between Dr. Borchers and Dr. Doran, and the need for Dr. Doran, as a licensed independent practitioner, to reflect upon her performance and role in the events under investigation. "Her consistent defense was to argue that her actions were correct and to minimize her role in the events." The DAB voted 2-1 to uphold Dr. Doran's termination. The Principal Deputy Under Secretary for Health executed the DAB's decision to terminate Dr. Doran's employment on May 13, 2016, which was the final agency action regarding Dr. Doran's employment at the VA.

In the APA case, Dr. Doran sought judicial review of her termination, seeking to set aside the findings as arbitrary, capricious, and an abuse of discretion. The district court affirmed the DAB decision, holding that the DAB reached "the reasonable conclusion that discharging Dr. Doran was a warranted and prudent course of action." *Doran*,

2018 WL 806253, at *21. Dr. Doran appealed. This court, conducting de novo review, found that "[w]hile a lesser sanction may also have been appropriate, we cannot say that the DAB's decision to sustain Dr. Doran's termination was arbitrary and capricious." *Doran v. Wilkie*, 768 F. App'x at 352. We reasoned that its decision was "not counter to the evidence before the agency, or so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* at 353 (citation omitted). We affirmed the district court's decision upholding the DAB's findings that Dr. Doran's termination was warranted. *Id.* at 357.

Concurrent with all the above, Dr. Doran initiated employment-discrimination claims by filing a formal complaint with the VA's Office of Resolution Management for discrimination on the basis of sex, perceived disability, and reprisal dating from May 2014 to August 21, 2015. Dr. Doran listed 55 examples of alleged discrimination. In August 2016, the VA's Office of Employment Discrimination Complaint Adjudication dismissed Dr. Doran's complaint because she had filed her APA case in federal court and a regulation required the agency to dismiss a complaint "[t]hat is the basis of a pending civil action in a United States District Court." 29 C.F.R. § 1614.107(a)(3).

Dr. Doran then filed this case in district court, alleging disability discrimination under the Americans with Disabilities Act; sexual harassment, retaliation, and gender-discrimination pursuant to Title VII of the Civil Rights Act of 1964; and fair-pay violations under the Lilly Ledbetter Fair Pay Act of 2009. The parties consented to a magistrate judge

conducting all proceedings. Upon motion by both parties, the magistrate judge stayed proceedings pending the outcome of the APA case. The magistrate judge then granted a further stay pending Dr. Doran's appeal of the APA case to this court. After we ruled in favor of the VA in the APA case, *Doran v. Wilkie*, the magistrate judge held a status conference, at which time counsel for Dr. Doran indicated that she would either move to withdraw as counsel or dismiss this action in light of our decision. On May 21, 2019, since the case remained pending and Dr. Doran's counsel had not moved to withdraw, the magistrate judge vacated the stay, and the VA filed a motion for summary judgment. The magistrate judge held a telephonic status conference on November 5, 2019 and issued an order memorializing the parties' agreement to file stipulations related to the VA's summary-judgment motion and the VA's agreement to withdraw its pending motion for summary judgement. The parties entered into a stipulation of facts and a stipulation that Dr. Doran dismiss with prejudice her sexual-harassment and fair-pay claims. The VA then filed a renewed summary judgment motion on Dr. Doran's remaining claims of gender discrimination, retaliation, and disability discrimination.

On May 29, 2020, the magistrate judge granted the VA's motion for summary judgment, holding that Dr. Doran had abandoned her disability and retaliation claims. Addressing Dr. Doran's gender-discrimination claim, the magistrate judge held that while Dr. Doran was a member of a protected class, had suffered an adverse employment action, and was qualified for the position, she had not established a

prima facie claim for gender discrimination. Further, the magistrate judge held that, even if Dr. Doran had established a prima facie claim of gender discrimination, the VA had presented legitimate non-discriminatory reasons for her termination and that Dr. Doran failed to raise a genuine issue of material fact that those reasons were pretextual. Dr. Doran filed this appeal pro se and is now represented by new counsel on appeal.

## II. Motions to Supplement and Modify the Record

Prior to filing her brief on the merits, Dr. Doran filed a motion to supplement the record on appeal with documents that were not available at the time of summary judgment: the results of the Ohio Medical Board's disciplinary investigation into Dr. Doran. She also filed a motion to modify the record to strike the stipulations on grounds that prior counsel did not obtain her consent to make those stipulations. In the alternative, Dr. Doran moved for a limited remand to allow the district court to consider these motions. A motions panel referred these motions to us, the merits panel.

Since Dr. Doran's termination from the VA involved deviations from standards of care, the VA was required to report her termination and revocation of her clinical privileges to the Ohio Medical Board ("Board"). See 38 C.F.R. § 46.4(c). In February 2018, the Board initiated its own investigation to determine whether to take adverse action with respect to Dr. Doran's medical license. Despite knowing that the Board was conducting its own investigation, Dr. Doran never asked the magistrate

judge to defer a ruling on the pending summary-judgment motion until after the Board finished its investigation. However, shortly after summary judgment was entered against her, Dr. Doran learned that the Board issued an order finding that no further action be taken against her, upholding her license to practice medicine. Dr. Doran immediately moved to supplement this record on appeal with the favorable Board investigation and report.

Motions to supplement the record on appeal are permitted by Federal Rule of Appellate Procedure 10(e) for the purpose of the correction or modification of the record. The purpose of the rule is to permit an appeals court "to correct omissions from or misstatements in the record for appeal, not to introduce new evidence." *United States v. Murdock*, 398 F.3d 491, 500 (6th Cir. 2005); see also *Abu-Joudeh v. Schneider*, 954 F.3d 842, 848 (6th Cir. 2020) (collecting cases). Further, in an appeal from a grant of summary judgment, evidence outside the record may not be considered absent "special circumstances." *Murdock*, 398 F.3d at 499. Dr. Doran did not file her motion to supplement to correct omissions or misstatements in the record below. Rather she seeks to add new information that did not exist at the time summary judgment was entered. Dr. Doran concedes that the Federal Rules of Appellate Procedure do not "specifically authorize" an appellate record to be supplemented under these circumstances.

Thus, Dr. Doran recognizes that the only way that an appellate court can change a record on appeal is through our discretionary authority or "inherent equitable power." *Id.* at 500 (citation

omitted). Factors we consider in deciding whether to exercise any such equitable power include:

1) whether proper resolution of the case was beyond any dispute, 2) whether it would be inefficient to remand to the district court for review of additional facts, 3) whether the opposing party had notice of the existence of the disputed evidence, and 4) whether the case is before the court on a habeas corpus claim, because federal appellate judges have unique powers in that context. *Ibid.* (quotation marks and citation removed). In short, supplementation under our inherent equitable power is generally inappropriate unless the additional evidence "establishes beyond doubt the proper disposition of [the] case." *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1013 (6th Cir. 2003) (citation omitted).

Dr. Doran, while not explicitly addressing the Murdock factors, argues that the magistrate judge should have waited to issue summary judgment pending the final decision of the Board. In particular, she says that the Board is the ultimate arbiter of allegations of medical incompetence and threats to patient safety, and that the Board's ruling would "provide for a historically complete and medically accurate record" on appeal. With no supporting Sixth Circuit case law, Dr. Doran implies that the Board's decision should be considered as part of the administrative record. But the Board's decision was part of a completely different administrative process, in a different forum, using different standards than the VA proceedings.

At the most basic level, the Board's decision regarding Dr. Doran's medical license is not relevant to Dr. Doran's claim of gender discrimination. As

held by the magistrate judge and explained below, the issue is not whether Dr. Doran made a medical error, but whether the VA reasonably and honestly believed that she did. Dr. Doran does not argue that the Board's decision shows discriminatory intent, but rather that it supports her unyielding position that she did nothing wrong in her care for Patient A. Dr. Doran is suggesting that the Board's decision to not take disciplinary action shows discriminatory intent and pretext on the part of the VA. Yet, especially after the extensive administrative and judicial review in this case, the Board's decision in no way suggests that the "proper resolution of the case was beyond any dispute." *Murdock*, 398 F.3d at 500 (citation omitted). In such circumstances, we decline to use our discretionary authority or "inherent equitable power" to supplement the record.

Dr. Doran also seeks to strike all stipulations from the record on grounds that she never authorized her former counsel to enter them. Dr. Doran attached a sworn declaration to her motion to strike stating that she never knew about the stipulations, much less approved them. Dr. Doran attests that if she had seen the stipulations, she would never have agreed to them because relevant details were missing, making them incomplete at best and knowing misrepresentations to the court at worst. Her motion to modify is the first time that Dr. Doran has objected to the stipulations. Both parties agreed to stay this case pending the outcome of Dr. Doran's APA case. After the APA case and its appeal was decided, the parties entered stipulations in our case, which are entirely consistent with the *Doran v. Wilkie* decision. The parties jointly agreed to the stipulations, knowing

that the magistrate judge would be using them to make a summary-judgment ruling. Dr. Doran argues that the stipulations 1) were entered into without her consent; 2) are factually implausible and legally erroneous; and 3) fail to include "several important findings and rulings" entered in Dr. Doran's favor. Dr. Doran did not raise this argument below and it is not properly before us. We rarely exercise discretion to hear issues for the first time on appeal, *Hayward v. Cleveland Clinic Found.*, 759 F.3d 601, 615 (6th Cir. 2014), and we decline to do so here. If Dr. Doran's argument is that her prior counsel committed legal malpractice, the proper remedy for her would be to bring a legal-malpractice claim against her former attorney. *Cf. Cap. Dredge & Dock Corp. v. City of Detroit*, 800 F.2d 525, 530-31 (6th Cir. 1986).

## III. Standard of Review

We review the district court's grant of summary judgment de novo. *Carter v. Univ. of Toledo,* 349 F.3d 269, 272 (6th Cir. 2003). Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We draw reasonable inferences in favor of the non-moving party, but once a moving party identifies record materials showing there is no genuine issue of material fact, the non-moving party must identify material in the record that demonstrates the existence of a genuine dispute of material fact. *Carter*, 349 F.3d at 272; Fed. R. Civ. P.56(c)(1)(A). These materials can include administrative rulings, such as those issued during the VA's

investigations of Dr. Doran. *Abrams v. Johnson*, 534 F.2d 1226, 1228 (6th Cir. 1976).

## IV. Prima Facie Showing of Gender Discrimination

For all the factual and procedural complexity of this case, here we need only to decide on summary judgment if the VA discriminated against Dr. Doran on the basis of gender and whether Dr. Doran abandoned her retaliation claim. A plaintiff may rely on direct or circumstantial evidence to establish a Title VII violation. *Ondricko v. MGM Grand Detroit, LLC*, 689 F.3d 642, 648-49 (6th Cir. 2012). Where, as here, the plaintiff's claim is based solely on circumstantial evidence, it is analyzed under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), burden-shifting framework. See *Davis v. Cintas Corp.*, 717 F.3d 476, 491 (6th Cir. 2013). Dr. Doran can set forth a prima facie case of gender discrimination by showing that: (1) she was a member of a protected class; (2) she suffered an adverse employment action; (3) she was qualified for the position; and (4) she was "replaced by someone outside the protected class or was treated differently than similarly-situated, non-protected employees." *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 707 (6th Cir. 2006) (citation omitted). Only the fourth element is in dispute here. The magistrate judge held that Dr. Doran failed to demonstrate a genuine issue of material fact that she was treated differently than a similarly situated, non-protected employee or that she was replaced by someone outside the protected class.

As to the issue of a similarly situated, non-protected employee, the magistrate judge held that

Dr. Doran failed to identify such a person. To be considered similarly situated, "the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992). On appeal, Dr. Doran argues that Dr. Borchers, who had been involved in a code-blue incident that resulted in patient harm for which he was not disciplined, was similarly situated. The magistrate judge held Dr. Borchers was not similarly situated because he was her supervisor. Whether he was her supervisor or not, Dr. Doran pointed to no evidence in the record or in the briefs that Dr. Borchers was ever involved in a code-blue event in the first instance. In fact, Dr. Borchers testified that he had never been involved in a code-blue event. They are not similarly situated as they did not engage in comparably similar conduct.

Dr. Doran argues that Dr. Borchers, as her "primary accuser," had furnished "many inaccuracies" in his testimony against her in VA administrative hearings and that he had not been punished for those inaccuracies, showing discriminatory treatment by the VA. Unspecified misstatements about Dr. Doran and the code-blue event involving Patient A are not comparable conduct to Dr. Doran providing medical care to a patient that ultimately resulted in a code-blue event.

Dr. Doran also argues that Dr. Scott McKeon, who responded to the code-blue event and intubated

Patient A, was similarly situated. But he was called in to treat Patient A after a code blue had been initiated. Finally, Dr. Doran argues that the VA has never terminated any male physician with "an otherwise unblemished record based on a single non-fatal episode of alleged incompetence." Equating unspecified, non-fatal incompetence with a code-blue event is a false equivalency. A non-life-threatening medical event will not lead to discipline at the same level as a code-blue event, regardless of a doctor's gender.

Regardless of whether there was a similarly-situated male employee who received preferential treatment, Dr. Doran argues that she was discriminated against because she was improperly replaced by someone outside the protected class. Before the magistrate judge, Dr. Doran argued that she was replaced by Dr. William Emlich, Jr., but she only stated that he was hired after her. The VA admits he was hired in 2018, but the magistrate judge held that neither party provided any evidence from which the court could "meaningfully assess whether Dr. Emlich can be considered Dr. Doran's replacement." On appeal, Dr. Doran does not focus on Dr. Emlich. Instead, she argues that "one or two males" were hired at some unidentified time after her termination. She argues that because not one female physician has been hired by the Gastroenterology Department since her departure and the department is all male that "it hardly matters exactly who filled the position." Dr. Doran does not even allege that either of the new male doctors was hired to fill her position. Rather, she just alleges that hiring of any new male doctor shows that the VA was

discriminating against her. Such bare allegations are insufficient to establish a prima facie case of gender discrimination.

**V. Pretext**

The magistrate judge held that even if Dr. Doran had established a prima facie claim of gender discrimination, the VA "easily [met]" the burden of showing that it had a legitimate business reason to terminate Dr. Doran – patient safety – and that Dr. Doran could not meet her burden to prove that patient safety concern was pretextual. A plaintiff can demonstrate pretext by showing that the defendant's "proffered reason (1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct." *Hopson v. Daimler Chrysler Corp.*, 306 F.3d 427, 434 (6th Cir. 2002). The burden as to pretext remains with the employee. *Hall v. Ledex, Inc.*, 669 F.2d 397, 399 (6th Cir. 1982).

Dr. Doran argues that she had done nothing wrong during Patient A's code-blue event.[2] She argues that this factual dispute over the quality of medical care she provided Patient A is sufficient to establish that the VA's patient-safety grounds for firing her were purely pretextual. But, whether Dr. Doran made a medical error is not the question. Under the honest-belief rule, where "an employer reasonably and honestly relies on particularized facts

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[2] Dr. Doran argues that she had submitted evidence from "independent evaluators" which create a factual dispute over the quality of medical care she provided Patient A. However, those independent reviews are not part of the record, because they were filed late and without leave of the magistrate judge.

in making an employment decision, it is entitled to summary judgment on pretext even if its conclusion is later shown to be mistaken, foolish, trivial, or baseless." *Chen v. Dow Chem. Co.*, 580 F.3d 394, 401 (6th Cir. 2009) (citation and quotation omitted). Given Patient A's outcome, the VA had an honest belief that Dr. Doran's medical care was a threat to patient safety and therefore had a legitimate business reason for her termination.

## VI. Retaliation

Dr. Doran argues that the VA retaliated against her after she complained in 2014 to the Chief of Staff and human resources that she was not getting paid the same student-loan-forgiveness benefits as a male counterpart had. To make a prima facie claim of Title VII retaliation, a plaintiff must show that 1) she engaged in a protected activity; 2) her exercise of that activity was known by the defendant; 3) thereafter, the defendant took materially adverse action against the plaintiff; and 4) a causal connection existed between the protected activity and the materially adverse action. *Hubbell v. FedEx SmartPost, Inc.*, 933 F.3d 558, 568 (6th Cir. 2019). Retaliation claims must be proved according to traditional principles of but-for causation, requiring proof that the adverse action would not have occurred in the absence of the alleged wrongful action of the employer. *Laster v. City of Kalamazoo*, 746 F.3d 714, 731 (6th Cir. 2014).

The magistrate judge held that Dr. Doran abandoned her retaliation claim because she only restated the elements of retaliation and did not make any substantive arguments in opposition to the

motion for summary judgment. This is consistent with her complaint, where Dr. Doran claimed retaliation by unspecified "adverse actions" and her ultimate termination. The retaliation claim was not developed below. Now on appeal, she argues that although she had been aware of, and complaining about, not receiving her EDRP benefits since 2010, it was not until 2014 that she realized this was gender discrimination after a male doctor, who had recently transferred to the Columbus VA, showed her that he was receiving EDRP benefits. She argues that there is a causal connection between the protected activity and the adverse employment action because they occurred "in close proximity." But, Dr. Doran provides no specific proximity in time between these events, arguing only that she complained about her EDRP sometime "in 2014" and that "[a]round the same time" Dr. Borchers wrote derogatory comments in her 2014 proficiency report, and that "shortly following these complaints of unfair treatment in 2014" she was suspended on January 26, 2015. While she now addresses retaliation, it is in a cursory way at best. We agree that Dr. Doran's failure to address the substance of her retaliation claim amounted to abandonment of her retaliation claim, so we decline to address it here. See *Thomas M. Cooley L. Sch. v. Kurzon Strauss, LLP,* 759 F.3d 522, 528 (6th Cir. 2014).

## VII. Conclusion

We **AFFIRM** the district court's grant of summary judgment in favor of the VA.

## APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

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TRISHA DORAN, M.D.,
Plaintiff
v.
ROBERT MCDONALD, SECRETARY FOR THE UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, Defendant

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No. 2:16-cv-665

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Decided: May 29, 2020

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OPINION AND ORDER
Granting Defendant's
Motion for Summary Judgment

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Plaintiff, Trisha Doran, M.D. ("Dr. Doran"), brings this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-16 and the Americans with Disabilities Act,[1] asserting claims of

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1 Although Dr. Doran brings her disability discrimination claim under the ADA, the Rehabilitation Act, 29 U.S.C. 791 *et seq.* is the exclusive remedy for a federal employee alleging disability-based discrimination. *Bent-Crumbley v. Brennan*, 799 F. App'x

discrimination and retaliation[2] against Defendant Secretary for the United States Department of Veterans Affairs[3] ("the VA") arising from the termination of her employment. With the consent of the parties (ECF No. 47), pursuant to 28 U.S.C. § 636(c), this matter is before the Court for consideration of Defendant's Renewed Motion for Summary Judgment (ECF No. 57), Plaintiff's Memorandum Contra (ECF No. 65), and Defendants' Reply in Support (ECF No. 69). For the following reasons, Defendant's Renewed Motion for Summary Judgment (ECF No. 65) is **GRANTED**.

## I. BACKGROUND

The factual background of this case has been extensively documented at both the administrative and judicial levels including before the Medical Executive Board ("MEB"), Administrative Investigation Board ("AIB"), the Professional Standards Board ("PSB"), the Disability Appeals Board ("DAB"), this

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342, 344–45 (6th Cir. 2020) (citing *Jones v. Potter*, 488 F.3d 397, 403 (6th Cir. 2007)). As a parallel statute, it specifically incorporates the standards applied under the ADA to determine violations, 29 U.S.C. § 794(d), and courts look to guidance under the ADA to determine if a federal employee has been discriminated against because of a disability. *Id.* (citing *Mahon v. Crowell*, 295 F.3d 585, 588–89 (6th Cir. 2002)).

[2] The parties stipulated to the dismissal of Dr. Doran's hostile work environment claim under Title VII and her claim brought pursuant to the Lilly Ledbetter Fair Pay Act of 2009. (ECF No. 52.)

[3] At the time the Complaint was filed, the Honorable Robert McDonald was serving as the Secretary. He was succeeded by the Honorable Robert Wilkie on July 30, 2018. (ECF No. 57, n.1.)

Court,[4] and the Sixth Circuit Court of Appeals.[5] Accordingly, the parties have stipulated to the facts set forth below.[6] Both parties also have set forth numerous additional factual allegations in their briefing. Given the sheer volume of factual information, however, the Court will address any additional factual matters only to the extent necessary for its discussion.

Beyond the following stipulated facts, the parties also agree, citing to *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 795 (1986), that any prior administrative findings are not preclusive here and that Dr. Doran is "entitled to a trial *de novo* on her claims." Further, they agree that the administrative "decision(s) may be admitted as evidence and accorded such weight as the Court deems appropriate." *Abrams v. Johnson*, 534 F.2d 1226, 1228 (6th Cir. 1976).

## A. STIPULATED FACTS

The Department of Veterans Affairs is an executive department whose primary purpose is to assist the millions of veterans in need of federal benefits. As part of that mission, the VA, through the Veterans Health Administration, operates the United States' largest integrated healthcare system

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[4] *Doran v. McDonald*, Case No. 2:16-cv-532 (Opinion and Order issued February 9, 2018, affirming the decision of the DAB and denying Dr. Doran's motion for summary judgment. (ECF No. 39.)

[5] *Doran v. Wilkie*, Case No. 18-3327 (Opinion issued April 1, 2019, affirming this Court's grant of summary judgment to the Secretary of the U.S. Department of Veterans Affairs and the U.S. Department of Veterans Affairs.

[6] *See* ECF No. 56

comprised of 1,233 facilities serving nearly 9 million veterans annually. The Columbus, Ohio Chalmers P. Wylie VA Ambulatory Care Center is part of the VA Central Ohio Healthcare System, which in turn is part of the VHA's Veterans Integrated Service Network ("VISN 10"), comprised of 11 medical centers as well as 63 Community Based Outpatient Clinics. VISN 10 services more than 685,000 veterans from Michigan, Ohio, Northern Kentucky and Indiana. *Id.* The Columbus VA provides care in dozens of specialties including gastroenterology. The gastroenterology department is made up of a handful of physicians, ranging from 2 to 6 at any given time.

Dr. Doran is a licensed physician, board certified in internal medicine and gastroenterology. She obtained a Bachelor's Degree in microbiology in 1994 and worked as a molecular biologist at the James Cancer Hospital in Columbus, Ohio where she conducted genetic research in immunotherapy. Dr. Doran went on to complete medical school in 2002, an internal medicine residency in 2005, and a gastroenterology fellowship in 2008, all at The Ohio State University. Dr. Doran chose to specialize in gastroenterology because "it is very complicated, so it was interesting because it was complicated. While the other specialties to me seemed kind of simple and small."

Before beginning her employment with the VA in 2008, Dr. Doran worked as a Critical Care Hospitalist at the Adena Medical Center. Other than that experience during her fellowship, the VA was Dr. Doran's first job as a practicing physician. Dr. Doran was initially hired at the Columbus VA on December 21, 2008, under a term, excepted

employment under 38 U.S.C. § 7405(A)(1) and was eventually converted to a fulltime, excepted employee under 38 U.S.C. § 7401. Dr. Doran's starting salary at the VA was <*redacted*> annually. At the outset of Dr. Dr. Doran's employment, she received a one-time payment of <*redacted*> as a recruitment incentive.

At the time that Dr. Doran began her employment with the VA, Dr. Doran's direct supervisor was Dr. Mark Cooperman. Dr. Cooperman held that position until 2010 when he became the Columbus VA Chief of Staff. Although Dr. Cooperman became the Columbus VA Chief of Staff, he continued to conduct Dr. Doran's proficiency reports until 2012. Dr. Doran consistently received favorable evaluations and feed- back for each year of her employment through 2013. Dr. Doran routinely received significant performance pay bonuses. By mid-2013, Dr. Doran's salary had increased to <*redacted*> annually. After Dr. Doran's VA employment ended in 2015, she began working for Gastroenterology Associates of Cleveland, Inc. in Beachwood, Ohio.

On June 2, 2015, Dr. Cooperman issued Dr. Doran a notice of proposed removal and revocation of clinical privileges. The notice described the four charges against her: Charge 1: Failure to provide standard of care. * Specification 1 – Dr. Doran's care of Patient A during his EGD and colonoscopy on January 26, 2015. * Specification 2 – Dr. Doran's care of Patient B during his EGD on January 27, 2015. * Specification 3 – Dr. Doran's care of Patient C during his colonoscopy on October 17, 2014. Charge 2: Lack of Candor. Specification – Dr. Doran's

attempts to have nurses corroborate her late addition to Patient A's Medical records in support of her version of events – despite the nurses' contradictory Recollections regarding Patient A's code blue. Charge 3: Inappropriately documenting in a patient record. Specification - Dr. Doran's late addition (on March 16, 2015) to Patient A's medical records. Charge 4: Performing a procedure without appropriate privileges. Specification – Dr. Doran's performance of annul tattooing with methylene blue on Patient D on June 20, 2014.

The notice informed Dr. Doran she had 14 days to reply to the proposed removal orally, in writing, or both and that any such reply could include affidavits or other documentary evidence. Dr. Doran, through counsel, responded to the notice of proposed removal in writing on July 22, 2015. A PSB reviewed the care of Patients A, B, C, and D, as well as nursing concerns about patient safety. The PSB found "a recurring theme of error in decision making and judgment" in Dr. Doran's care, and recommended that she undergo further evaluation to determine her fitness for duty, as well as receive mentoring, proctoring, and remedial training. Dr. Borchers testified to the PSB but did not vote.

An MEB also reviewed Dr. Doran's care and considered the PSB's recommendations. After reviewing the evidence and testimony from Dr. Doran, the MEB concluded that because alternatives to revoking Dr. Doran's privileges were not feasible for the VA, because Dr. Doran's failure to understand her role and responsibility in the patient care at issue threatened patient safety, and because the patients reviewed had poor outcomes, permanent

revocation of her VA privileges was warranted. Again, Dr. Borchers testified at the MEB but did not vote. Dr. Borchers answered the MEB's questions regarding the PSB's recommendations, noting that Dr. Doran's demeanor and conduct had changed over the last year, and he was "concerned" by the change. He suggested that Dr. Doran's "escalating poor decisions over the last year" could have a physical cause, such as a brain tumor. Dr. Cooperman was the chair and a voting member of the MEB.

An Administrative Investigation Board also reviewed Dr. Doran's treatment of Patient A, as well as allegations that Dr. Doran made amendments to the medical records of Patients A, B, C, and D and/or had requested staff members to make amendments. The AIB's review included 16 interviews and 30 exhibits. The AIB recommended that "appropriate corrective action be taken" regarding Patient A's care, Dr. Doran's amendment to Patient A's medical record, and her request that staff amend Patient D's medical record. Neither Dr. Borchers or Dr. Cooperman testified before the AIB. On August 21, 2015, the Director of the Columbus VA, Keith Sullivan, sustained the charges against Dr. Dr. Doran. On August 21, 2015, Dr. Doran was removed from VA employment for "unacceptable performance and conduct."

## B. PROCEDURAL STIPULATIONS

VA physicians appointed under 38 U.S.C. § 7401, such as Dr. Doran, enjoy certain procedural protections when facing major adverse employment actions. *See* 38 U.S.C. § 7461; see also *Fligiel v. Samson,* 440 F.3d 747,750 (6th Cir. 2006). Under 38

U.S.C § 7461(c)(2), a "major adverse action" includes suspension, transfer, reduction in grade, reduction in basic pay, or discharge from employment. *Fligiel,* 440 F.3d at 750. Because her revocation of clinical privileges and removal from VA employment involved "a question of professional conduct or competence," Dr. Doran had the right to seek administrative review of both decisions by the Disciplinary Appeals Board. 38 U.S.C. §§ 7461(b)(1), 7462. Under the procedures outlined in 38 U.S.C. § 7462, an employee appealing to a DAB is entitled to "[a]t least 30 days advance written notice . . . specifically stating the basis for each charge," the potential adverse actions that the agency may take, and a statement of the "law, regulation, policy, procedure, practice, or other specific instruction that has been violated with respect to each charge." 38 U.S.C. §7462(b)(1)(A). The employee is also entitled to a "reasonable time" to present a response to the deciding official, which may include affidavits or other documentary evidence. 38 U.S.C. § 7462(b)(1)(B). Finally, an appealing employee may elect to be represented by an attorney or other representative at all stages of their appeal. 38 U.S.C. §7462(b)(2).

Dr. Doran elected to invoke these procedural protections after her removal from VA employment in August 2015. On September 15, 2015, through counsel, Dr. Doran sent notice of her appeal of her termination to the VA Under Secretary of Health. Alleging that the VA "did not support the charges by a preponderance of the evidence" and "violated her due process rights" by imposing an "unreasonable" penalty, Dr. Doran sought restoration to her position

and of her privileging; reversal and expungement of all underlying administrative proceedings; rescission of any reporting to any licensing board or the National Practitioner Databank; back pay and restoration of benefits; legal fees; and "correction" of her 2014 Proficiency Report.

Accordingly, in January 2016, the VA convened a Disciplinary Appeals Board to conduct a hearing under 38 U.S.C. § 7462. The DAB ultimately determined that Dr. Doran's treatment of Patient A "was so removed from the standard of care [that] the penalty of discharge is warranted." The DAB also emphasized its concerns that not only did "the testimony identify judgement [sic] errors," but Dr. Doran also "demonstrated a lack of the insight needed to guarantee confidence that her performance would be improved and be consistently safe in the future."

In determining that the penalty of removal was warranted, the DAB also considered the so-called *Douglas* factors, including the seriousness and notoriety of the offense, Dr. Doran's position, her length of service and prior disciplinary record, the erosion of supervisory confidence, consistency in penalties, any potential for Dr. Doran's rehabilitation, and any possible mitigating circumstances. The DAB specifically noted that "[o]ther physicians at the facility have received major adverse actions for similar acts of misconduct." Though the DAB concluded that some of the relevant factors may have weighed in Dr. Doran's favor, it found the penalty to be appropriate especially given the seriousness of Patient A's code blue, the erosion of trust and confidence between Dr. Borchers and Dr. Doran, and the need for Dr. Doran, as a licensed independent

practitioner, to reflect upon her performance and role in the events under investigation. Her consistent defense was to argue that her actions were correct and to minimize her role in the events." The DAB therefore voted 2-1 that the penalty was appropriate and upheld Dr. Doran's termination.

The Principal Deputy Under Secretary for Health executed the DAB's decision to terminate Dr. Doran's employment on May 13, 2016, after considering the evidence, the DAB's analysis, and the DAB's findings. Executing the DAB's decision was the final agency action regarding Dr. Doran's termination. Because Dr. Doran's termination involved identified "deviations from the standard of care," the VA was required to report the revocation of her clinical privileges to the National Practitioner Data Bank and the State Licensing Board in accordance with the Health Care Quality Improvement Act of 1986, Pub. L. No. 99-660,100 Stat. 3743 (1986). *See* 38 C.F.R. § 46.4.

The Ohio Medical Board notified Dr. Doran in February 2018 that it intended "to determine whether or not to limit, revoke, permanently revoke, suspend, refuse to grant or register or renew or reinstate your license or certificate to practice medicine and surgery, or to reprimand you or place you on probation" as a result of the VA's revocation of her privileges. The licensing investigation is ongoing. An employee dis- satisfied with the final agency action involving a major adverse employment action against them may seek judicial review of that decision. 38 U.S.C. § 7462(f)(1). Dr. Doran filed case number 2:16-cv-532 in June 2016, seeking to set aside the DAB's findings as arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law. Following the filing of the administrative record, both parties filed dispositive motions. Concluding that "[t]he DAB gave Dr. Doran a meaningful opportunity to present her case," this Court affirmed the DAB's decision, noting that the DAB reached "the reasonable conclusion that discharging Dr. Doran was a warranted and prudent course of action."

Over a month after the entry of judgment in favor of the VA, Dr. Doran filed a motion for relief from judgment under Federal Rule of Civil Procedure 60. She argued that "newly discovered evidence" in the form of a portion of Patient A's non-VA medical records established "that the Defendant's reasons for suspending Dr. Doran's privileges was [sic] not only unfounded but false" and indicated that the suspension "was done with a malicious and fraudulent intent." The VA filed a response in opposition, and Dr. Dr. Doran replied.

Dr. Doran also filed a timely notice of appeal. Reasoning that the notice of appeal left it without jurisdiction to consider the still-pending motion for relief under Appellate Rule 4, this Court denied the Rule 60 motion. On appeal, Dr. Doran continued to argue that the DAB's decision was not supported by substantial evidence, was arbitrary and capricious, and denied her due process.

The Sixth Circuit conducted a *de novo* review of the VA's administrative action, finding that "[w]hile a lesser sanction may also have been appropriate, we cannot say that the DAB's decision to sustain Dr. Doran's termination was arbitrary and capricious" because its decision was "not counter to

the evidence before the agency, or so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Nor did the Sixth Circuit find any merit to Dr. Doran's due process claims, finding that "the essential requirements of due process . . . were met in this case." Accordingly, the Court of Appeals rejected Dr. Doran's arguments and affirmed the decision upholding the DAB's findings. The mandate issued on May 24, 2019.

Dr. Doran first initiated EEO activity by contacting the VA's Office of Resolution Management ("ORM") on July 14, 2015, approximately six weeks after receiving the proposed removal in early June 2015. She initially brought three complaints. First, she complained that proposed removal letter was discriminatory because the charges against her were unfounded, claiming that "management is not listening to her" since she was "the only female physician in [the] GI specialty." Second, Dr. Doran complained of harassment and hostile work environment on the bases of mental disability and sex. This claim was based on her suspension and administrative leave; she claimed "that the facility is forcing her to transfer." Third, Dr. Doran alleged that she was wrongfully terminated on the bases of mental disability and sex. ORM notified Director Sullivan of Dr. Doran's allegations via letter dated July 29, 2015.

Dr. Doran ultimately elected to file a formal complaint of employment discrimination. She alleged discrimination on the bases of sex, perceived disability, and reprisal dating from May 2014 to August 21, 2015. Dr. Doran listed 55 examples of alleged discrimination.

In January 2016, ORM partially accepted Dr.

Doran's complaints for investigation. ORM accepted for investigation "event 27" — Dr. Doran's removal from federal service and revocation of her clinical privileges—as a discrete occurrence of alleged discrimination. ORM also accepted Dr. Doran's "overall harassment claim" predicated on 27 enumerated instances of alleged discriminatory harassment. ORM also accepted Dr. Doran's claim of "reprisal," although noting that "the term retaliation/reprisal will be interpreted as reprisal based [on] the complainant's allegation that management perceived her as having a disability (EEO protected basis) since a personal tragedy occurring in 2014." Finally, ORM dismissed as untimely a newly added claim that the local VA had "mishandled and improperly denied" Dr. Doran's Education Debt Reduction Program ("EDRP") benefit in 2014.

In August 2016, the VA's Office of Employment Discrimination Complaint Adjudication issued a Final Agency Decision dismissing Dr. Doran's EEO complaint because she had filed a case in federal court[7] seeking review of the VA's administrative actions. The dismissal noted that the pending federal complaint was "based on the same management actions that are the subject of the complainant's administrative complaint of discrimination," and under 29 C.F.R. § 1614.107(a)(3), "an agency shall dismiss a complaint that is the basis of a pending civil action in the a United States District Court. . . ." This lawsuit timely followed.

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[7] Case No. 2:16-cv-532

## II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The burden of proving that no genuine issue of material fact exists falls on the moving party, "and the court must draw all reasonable inferences in the light most favorable to the non-moving party." *Stransberry v. Air Wisconsin Airlines Corp.*, 651 F.3d 482, 486 (6th Cir. 2011) (citing *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 710 (6th Cir. 2001); *cf.* Fed. R. Civ. P. 56(e)(2) (providing that if a party "fails to properly address another party's assertion of fact" then the Court may "consider the fact undisputed for purposes of the motion").

"Once the moving party meets its initial burden, the nonmovant must 'designate specific facts showing that there is a genuine issue for trial.'" *Kimble v. Wasylyshyn*, 439 F. App'x 492, 495 (6th Cir. 2011) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317- 324 (1986)); *see also* Fed. R. Civ. P. 56(c) (requiring a party maintaining that a fact is genuinely disputed to "cit[e] to particular parts of materials in the record"). "The nonmovant must, however 'do more than simply show that there is some metaphysical doubt as to the material facts,'. . . there must be evidence upon which a reasonable jury could return a verdict in favor of the non-moving party to create a 'genuine' dispute." *Lee v. Metro. Gov't of Nashville & Davidson Cty.*, 432 F. App'x 435, 441 (6th Cir. 2011) (citations omitted).

In considering the factual allegations and evidence presented in a motion for summary judgment, the Court "must afford all reasonable inferences, and construe the evidence in the light most favorable to the nonmoving party." *Cox v. Kentucky Dep't of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995). "When a motion for summary judgment is properly made and supported and the nonmoving party fails to respond with a showing sufficient to establish an essential element of its case, summary judgment is appropriate." *Stransberry*, 651 F.3d at 486 (citing *Celotex*, 477 U.S. at 322–23)

## III. ANALYSIS

### A. Disability Discrimination and Retaliation Claims

Dr. Doran has abandoned her perceived disability discrimination and retaliation claims in favor of focusing on her gender discrimination claim. Her shift to focus exclusively on her gender discrimination claim is evident from the opening sentence of her response: "The only reason Trisha Doran's privileges were revoked is because she is a woman." (ECF No. 65, at p.1.) Her choice not to develop her argument on these claims further demonstrates that she has effectively abandoned these claims as further discussed below.

#### *1) Disability Discrimination Claim*

"To prevail on a claim for discrimination under the Rehabilitation Act, a plaintiff must show that he or she: (1) is disabled, (2) is otherwise qualified to

perform the essential functions of the position, with or without reasonable accommodation, and (3) suffered an adverse employment action solely because of his or her disability." *Mitchell v. United States Postal Serv.*, 738 F. App'x 838, 843 (6th Cir. 2018) (citing *Jones v. Potter*, 488 F.3d 396, 403 (6th Cir. 2007)). To satisfy the first element, Dr. Doran need not prove that she is actually disabled if she can show that the VA regarded her as being disabled. *Brady v. Potter*, 273 F. App'x 498, 502 (6th Cir. 2008).

The VA argues that Dr. Doran cannot prevail on this claim because there is no evidence that it regarded her as disabled, that she cannot show that others who the VA regarded as disabled were treated more favorably, or that she was terminated solely by reason of that perception. (ECF No. 57, at pp 48-51.) Moreover, the VA contends, the record is clear that Dr. Doran was terminated solely for reasons other than any alleged disability, namely her care of Patient A that was found to be "so removed from the standard of care" that her discharge was warranted. (*Id.* at Ex. P, AR_00002310.) Dr. Doran did not respond to these arguments. The entirety of her response is limited to a discussion of case law establishing the elements of a *prima facie* case. Dr. Doran's failure to address the substance of this claim amounts to abandonment. *Tonkovich v. Gulfport Energy Corp.*, No. 2:12-CV-38, 2012 WL 6728348, at *2 (S.D. Ohio Dec. 28, 2012). Accordingly, Defendant's renewed motion for summary judgment is **GRANTED** as to Dr. Doran's disability discrimination claim.

***2) Retaliation***

"A prima facie claim of Title VII retaliation requires a plaintiff to prove that '(1) she engaged in a protected activity; (2) her exercise of such protected activity was known by the defendant; (3) thereafter, the defendant took an action that was materially adverse to the plaintiff; and (4) a causal connection existed between the protected activity and the materially adverse action.'" *Ward v. Sevier Cty. Gov't,* No. 3:18-CV-113, 2020 WL 889159, at *9 (E.D. Tenn. Feb. 24, 2020) (quoting *Hubbell v. FedEx SmartPost, Inc.*, 933 F.3d 558, 568 (6th Cir. 2019)). Unlike discrimination claims, "retaliation claims 'must be proved according to traditional principles of but-for causation,' which 'requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employ- er.'" *Id.* at *10 (quoting *Laster v. City of Kalamazoo*, 746 F.3d 714, 731 (6th Cir. 2014)).

The VA contends that Dr. Doran cannot set forth a prima facie case of retaliation. (ECF No. 57, at pp. 51-58.) Specifically, Defendant notes that Dr. Doran has not presented any evidence that her complaints relating to the nonpayment of the EDRP were presented in terms of her belief that the EDRP was being withheld on the basis of her sex. Further, the VA asserts that, at the time Dr. Doran initiated EEO activity by contacting ORM on July 14, 2015, the VA already had proposed her termination over a month before on June 2, 2015. Finally, the VA argues that it was entitled to proceed with the discipline proposed prior to her protected activity such that Dr. Doran has failed to meet the but-for cause requirement.

As with her disability discrimination claim, Dr. Doran did not respond to any of the VA's arguments. The entirety of her discussion is a one paragraph restatement of the elements of a Title VII retaliation claim as set forth in *Canitia v. Yellow Freight Sys., Inc.*, 903 F.2d 1064 (6th Cir. 1990). Dr. Doran's failure to address the substance of her retaliation claim amounts to her abandonment of this claim as well. *Tonkovich,* 2012 WL 6728348, at *2.

Accordingly, Defendant's renewed motion for summary judgment is **GRANTED** as to Dr. Doran's retaliation claim.

**B. Gender Discrimination Claim**

"To establish a Title VII violation, a plaintiff may rely on direct or circumstantial evidence." *Lamanna v. Dayton Police Dep't*, 788 F. App'x 1003, 1007 (6th Cir. 2019) (citing *Chattman v. Toho Tenax Am., Inc.*, 686 F.3d 339, 346 (6th Cir. 2012)). Where a plaintiff does not base her claim on direct evidence, her circumstantial evidence is analyzed under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), burden-shifting framework. *Id.* (citing *Chattman*, at 346-47; *Russell v. Univ. of Toledo*, 537 F.3d 596, 604 (6th Cir. 2008)). "Under that framework: (1) the plaintiff must first establish a prima facie case of discrimination; (2) the burden then shifts to the defendant to offer a legitimate, non-discriminatory basis for its actions; and (3) if the defendant does so, the burden returns to the plaintiff to establish that the employer's proffered reason is a pretext." *Id. (*citing *Upshaw v. Ford Motor Co.*, 576 F.3d 576, 16 584 (6th Cir. 2009). As to pretext, "[a]t

the summary-judgment stage, 'the issue is whether the plaintiff has produced evidence from which a jury could reasonably doubt the employer's explanation.'" *Id.* (quoting *Chen v. Dow Chem. Co.*, 580 F.3d 394, 400 n.4 (6th Cir. 2009)).

Dr. Doran does not base her claim on direct evidence so the burden shifting framework of *McDonnel Douglas* applies here. Dr. Doran can set forth a prima facie case of gender discrimination by showing that: (1) she was a member of a protected class; (2) she suffered an adverse employment action; (3) she was qualified for the position; and (4) she was "replaced by someone outside the protected class or was treated differently than similarly-situated, nonprotected employees." *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 707 (6th Cir. 2006). Only the fourth element is in dispute here and it appears to the Court that Dr. Doran is proceeding under both aspects.

Turning first to the issue of whether Dr. Doran was treated differently, in order to be considered similarly situated, "the individuals with whom the plaintiff seeks to compare his/her treatment must have: (1) dealt with the same supervisor, (2) have been subject to the same standards, and (3) have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992). An employee is not required to demonstrate an exact correlation between herself and others similarly situated. *Jackson v. VHS Detroit Receiving Hosp., Inc.*, 814 F.3d 769, 777 (6th Cir. 2016). Rather, an employee

needs to show only that she and her proposed comparators were similar in all relevant respects, and that she and her proposed comparators engaged in acts of comparable seriousness. *Id.* (citing *Mitchell*, at 583.)

In moving for summary judgment, the VA notes three potential comparators identified by Dr. Doran in her interrogatory responses – Dr. Mayhew, Dr. Maryala, and Dr. Borchers. (ECF No. 57, Ex. K, at p. 3.) The VA contends that Dr. Borchers, as Dr. Doran's supervisor, is not an acceptable comparator because he cannot be considered similarly situated. Further, it contends that Dr. Mayhew had no sedation events and Dr. Maryala had only one. (*Id.*, Ex. LL, at VA_00000779.) According to the VA, there is no evidence that Dr. Maryala's sedation event, or any other GI provider's sedation event, resulted in a code blue or lasting patient harm. (*Id.*, Ex. C, Dr. Borchers Dep., at 65:13-16; Ex. A, Doran Dep., at 159:13-15; *see also* Ex. LL.) In short, the VA contends that no other Columbus VA GI provider can be found to have engaged in conduct of comparable seriousness to Dr. Doran's conduct relating to Patient A. Stated another way, the VA asserts that Dr. Doran was not singled out for severe discipline and, as the DAB noted, "[o]ther physicians at the facility have received adverse actions for similar acts of misconduct." (*Id.*, Ex. P at AR_00002310.)

In her response, Dr. Doran broadly contends without specific identification that her comparators are "every physician who was part of a code blue event is a comparator regardless of status as supervisor as all of the physicians are subject to the same VA rules, same state-wide disciplinary

procedures for medical licensure before the State of Ohio Medical Board and same federal statutory disciplinary procedure." (ECF No. 65, at p. 30.) Further, she asserts without citation to any evidentiary support, that Dr. Borchers, one of her apparent comparators, was involved in a code blue incident that resulted in patient harm for which he received no discipline. Further, again, without evidentiary support, Dr. Doran states that the record from the administrative hearing confirms that other male physicians at the VA who were involved in a code blue event that resulted in patient harm were not disciplined.

Dr. Doran's unsupported arguments on this issue cannot be credited. She has not pointed to any specific evidence that supports her assertions.[8] Dr. Doran has failed to identify comparable employees similarly situated to her in all relevant respects. *Mitchell,* 964 F.2d at 583. First, Dr. Borchers, as her supervisor, cannot be viewed as similarly situated. *See, e.g., Mann v. Navicor Grp., LLC,* 488 F. App'x 994, 999 (6th Cir. 2012) (alleged comparator and plaintiff were not similarly situated in "all of the relevant aspects" where alleged comparator was plaintiff's supervisor). Further, even if Dr. Borchers' status as her supervisor were not preclusive, Dr. Doran has failed to adduce any facts to establish that Dr. Borchers was in any way similarly situated to her. Dr. Borchers testified in his deposition that he had not been involved in a code blue event. (ECF No.

[8] Dr. Doran's failure to rely on evidentiary support in this regard is exemplified by citations broadly to individuals' "depositions" as opposed to a pincite to a deposition transcript. See specific- ally, ECF No. 65, at p. 31, n.9-11.

63, at p. 65.) Dr. Doran has not provided any evidence to the contrary nor any evidence of his having caused harm to a patient comparable to the harm suffered by Patient A. Beyond Dr. Borchers, Dr. Doran has not identified any other comparators. Moreover, she has failed to respond at all to Defendant's discussion as to Drs. Maryala and Mayhew, leading the Court to conclude that she concedes that she cannot demonstrate that they are valid comparators for purposes of her gender discrimination claim.

Dr. Doran also contends that she was replaced by someone outside the protected class, Dr. William H. Emlich, Jr. A person is replaced "'only when another employee is hired or reassigned to perform the plaintiff's duties.'" *Van Winkle v. HM Ins. Grp., Inc.*, 72 F. Supp. 3d 723, 733 (E.D. Ky. 2014) (quoting *Barnes v. GenCorp Inc.*, 896 F.2d 1457, 1465 (6th Cir.1990)). Neither the record nor the parties' arguments are particularly well-developed on this issue. For her part, Dr. Doran seems to assume that Dr. Emlich was her replacement. She, however, does not provide any evidentiary support for this assertion. In her deposition, Dr. Doran characterizes Dr. Emlich only as having been hired after her. (ECF 64, at p. 193.) For its part, the VA acknowledges only that Dr. Emlich was hired in 2018 by Dr. Barry Fagan. (ECF No. 57, at p. 44 n.28.)

To the extent that the parties address Dr. Emlich at all, it appears limited to the context of whether he could be considered a valid comparator for purposes of determining different treatment. On this point, the VA contends that he is not a valid comparator because he was hired more than two

years after Dr. Doran's termination and that his conduct at a different workplace in a different timeframe and under a different supervisor is irrelevant for purposes of Dr. Doran's sex discrimination claim. Dr. Doran does not confirm her intention of utilizing Dr. Emlich as a comparator, but merely states that his hiring demonstrates that the VA was not concerned with patient safety despite its having cited that as the basis for her termination.

"Courts' analyses regarding the issue of replacement have not focused on the titles of the positions occupied by the employees, but rather look to whether the duties associated with the two positions are substantially similar such that it is a de facto replacement." *King v. Ferrous Processing & Trading Co.*, No. 11-CV-10609, 2012 WL 3870517, at *6 (E.D. Mich. Aug. 16, 2012), *report and recommend dation adopted*, No. 11-10609, 2012 WL 3870418 (E.D. Mich. Sept. 6, 2012) (citing *Thompson v. UHHS Richmond Heights Hosp., Inc.*, 372 Fed. Appx. 620, 624 (6th Cir.2010). Here, as noted, neither party has provided any evidence from which the Court could meaningfully assess whether Dr. Emlich can be considered Dr. Doran's replacement. Ultimately, such a showing constitutes a part of Dr. Doran's burden of demonstrating a prima facie case. *See id.* Therefore, even construing these facts in the light most favorable to Dr. Doran, she has not provided anything beyond the bare allegation that Dr. Emlich qualifies as her replacement. Thus, Dr. Doran has failed to set forth a prima facie case of gender discrimination. Accordingly, the VA is entitled to summary judgment on this claim.

The above analysis is dispositive of Dr. Doran's gender discrimination claim. However, even if Dr. Doran had stated a prima facie claim of such discrimination, that would not be enough to defeat the VA's motion for summary judgment. At that point, the burden would shift to the VA to come forward with a legitimate business reason for terminating Dr. Doran's employment. This is a burden the VA easily meets. According to the VA, it terminated Dr. Doran out of significant and substantial patient- safety concerns, including Dr. Doran's failure to take responsibility. Specifically, the VA terminated Dr. Doran as a result of her care of Patient A that resulted in a code blue event followed by the $300,000 settlement of an administrative tort claim. (ECF No. 57, Ex. Y at VA_00003434; Ex. Z at VA_00003440.) Such concerns are undoubtedly a legitimate business reason to terminate a healthcare provider. *See, e.g., Wilson v. Cleveland Clinic Found.*, 579 F. App'x 392, 400 (6th Cir. 2014) (legitimate business reason existed where plaintiff patient transporter violated clinic policy by taking actions detrimental to patient safety when she left unattended a deceased patient); *Qixin Sun v. Dep't of Veterans Affairs*, No. 2:17-CV-1039, 2019 WL 6682158, at *11 (S.D. Ohio Dec. 6, 2019) (incompetence and misconduct were legitimate, nondiscriminatory reasons to discipline physician); *Fletcher v. U.S. Renal Care, Inc.*, 240 F. Supp. 3d 740, 753 (S.D. Ohio), *aff'd sub nom. Fletcher v. U.S. Renal Care*, 709 F. App'x 347 (6th Cir. 2017) (patient charting errors raising patient safety con- cerns was a legitimate reason for the issuance of the disciplinary counseling); *Lisan v. Wilkie*, No.

1:18CV969, 2020 WL 109066, at *16 (N.D. Ohio Jan. 9, 2020), *motion for relief from judgment denied sub nom. Ronald Lisan, M.D. v. Wilkie,* No. 1:18CV969, 2020 WL 2126679 21 (N.D. Ohio May 5, 2020) (disruptive behavior putting patient safety at risk was legitimate business reason for ten-day suspension of anesthesiologist).

Dr. Doran summarily dismisses the VA's legitimate business concern, characterizing Patient A's harm and the settlement payment as "flimsy arguments." (ECF No. 65, at p. 40.) Given the VA's legitimate business reason, it would then be Dr. Doran's burden to prove that this purported patient safety concern was pretextual. This she cannot do. A plaintiff can demonstrate pretext by showing that the defendant's proffered reason "'(1) has no basis in fact, (2) did not actually motivate the defendant's challeng- ed conduct, or (3) was insufficient to warrant the challenged conduct.'" *Hopson v. Daimler Chrysler Corp.*, 306 F.3d 427, 434 (6th Cir. 2002).

Dr. Doran argues that the VA's proffered reason has no basis in fact.[9] She attempts to raise a genuine issue of material fact as to this matter by setting forth nearly twenty pages of "disputed material facts." These "facts" appear to be nothing more than a repackaging of previous arguments and contain only minimal citation to evidentiary support.

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[9] It does not appear that Dr. Doran is invoking the second prong of the pretext analysis. Under that prong, a "'plaintiff admits the factual basis underlying the employer's proffered explanation and further admits that such conduct could motivate dismissal.'" *Russell v. Univ. of Toledo*, 537 F.3d 596, 606 (6th Cir. 2008) (quoting *Manzer v. Diamond Shamrock Chems. Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994)).

For example, she reiterates her belief that Patient A did not experience an over-sedation; continues to assert she provided proper care to Patient B and that others overreacted; and complains about the truthfulness of certain nurse's reports. Primarily, however, she details Dr. Borchers' alleged "vendetta" against her and his actions to insure a "predetermined outcome" of getting her fired. (ECF No. 65, at pp. 8-27.)

To be sure, Dr. Doran continues to adamantly contest the facts underlying her termination. And it is her privilege to do so. But her steadfast disagreement does not create a genuine issue of material fact sufficient to defeat summary judgment. The issue here is not whether Dr. Doran made a medical error. The issue is whether the Columbus VA reasonably and honestly believed that she did.

Under the honest belief rule, "[w]hen an employer reasonably and honestly relies on particularized facts in making an employment decision, it is entitled to summary judgment on pretext even if its conclusion is later shown to be 'mistaken, foolish, trivial, or baseless.'" *Chen*, 580 F.3d at 401 (quoting *Clay v. United Parcel Serv., Inc.*, 501 F.3d 695, 713 (6th Cir. 2007)). "An employer holds an 'honest belief if it 'made a reasonably informed and considered decision' before acting." *Qixin Sun v. Dep't of Veterans Affairs,* No. 2:17-CV-1039, 2019 WL 6682158, at *11 (S.D. Ohio Dec. 6, 2019) (quoting *Smith v. Chrysler Corp.*, 155 F.3d 799, 806–07 (6th Cir. 1998)). "The decisional process need not have been 'optimal,' nor must the employer have 'left no stone unturned.'" *Id.* (quoting *Smith* at 807). An employee can overcome the "honest belief rule" by

pointing to evidence that "the employer failed to make a reasonably informed and considered decision before taking its adverse employment action." *Id.* (quoting *Smith*, 155 F.3d at 807–808); *see also Blizzard v. Marion Tech. Coll.*, 698 F.3d 275, 286 (6th Cir. 2012) (an employee must be permitted to present evidence to the contrary). However, "an employee's bare assertion that the employer's proffered reason has no basis in fact is insufficient to call an employer's honest belief into question and fails to create a genuine dispute of fact." *Babb v. Maryville Anesthesiologists P.C.*, 942 F.3d 308, 322–23 (6th Cir. 2019) (citing *Tingle v. Arbors at Hilliard*, 692 F.3d 523, 531 (6th Cir. 2012)).

There is no question that Dr. Doran's care of Patient A was subject to a thorough investigative and decisional process and multiple levels of review. Significantly, Dr. Doran was found to pose a risk to patient safety by her immediate supervisor, the Columbus VA Chief of Staff, the Columbus VA Director, the MEB, the AIB, the PSB, the DAB, this Court and the Sixth Circuit Court of Appeals. (ECF No. 56, at ¶¶ 21, 25-28, 33, 35, 39, and 43.) The VA contends that these administrative findings are entitled to great weight under *Abrams,* 534 F.2d 1226, because these numerous levels of review present more than an adequate record and afforded Dr. Doran a "more than sufficient" degree of procedural fairness. Dr. Doran does not argue otherwise.[10] The Court agrees that, under these circumstances,

[10] Dr. Doran's Response contains a section heading stating "The Administrative Record is Rife with Contradictions and Cannot be given any weight." (ECF No. 65, at p. 42.) It is not followed by any argument.

these administrative decisions are deserving of great weight. The significant and multiple levels of review, as affirmed by both this Court and the Sixth Circuit, insulate the VA's termination of Dr. Doran from her allegations of pretext. *Qixin Sun,* 2019 WL 6682158, at *12.

Dr. Doran attempts to raise an issue of fact as to whether the VA made a reasonably informed decision before terminating her by demonstrating that she met the standard of care relevant to medical malpractice actions in Ohio.[11] Whether she met that particular standard of care, however, is of no consequence. The VA is free to hold its employees to a higher standard than the threshold for medical malpractice liability under Ohio law. *See Babb,* 942 F.3d at 317 n.6 ("Of course, [the employer's] standard of care for its nurses may be higher than the general standard of care set by state tort law" and "an employer gets to set its own standard for employees to follow"); *Benjamin v. Brachman*, 246 F. A'ppx 905, 912, 916 (2007) (recognizing that plaintiff was aware

[11] Dr. Doran has submitted what she characterizes as "overwhelming expert support for [her] care in this case." (ECF No. 65, at p. 41.) The Court declines to consider these "expert reviews." (ECF No. 68.) First, they were filed nearly one month late and without leave of court. Also, according to the VA, Dr. Doran failed to comply with the requirements of Federal Rule of Civil Procedure 26(a). Moreover, even if the Court were to consider any of these "reviews," contrary to Dr. Doran's position, they are readily distinguishable from the expert testimony at issue in *Babb*, 942 F.3d at 323. That is, they challenge the facts underlying the VA's decision in this case and do not address the "likelihood that a reasonable [practitioner] would have actually relied on those facts to fire an" employee. *Id.* (emphasis in original).

that standard of care at academic hospital was higher than the standard used to evaluate negligence in medical malpractice cases.) Consequently, as the VA points out, the issue here is whether it "held Dr. Doran to its own standards and in doing so relied on the types of facts and inferences that a medical provider would reasonably consider indicative of a breach of that standard." (ECF No. 69, at p. 14.) Dr. Doran has not addressed this issue in any meaningful way.

Finally, Dr. Doran appears to contend that the VA's proffered reason is insufficient to explain the adverse action. "A showing of insufficiency may overlap with the 'similarly situated' prong of the *prima facie* case; pretext may be established by 'evidence that other employees, particularly employees not in the protected class, were not fired even though they engaged in substantially identical conduct to that which the employer contends motivated its discharge of the plaintiff.'" *Fields v. Health*, No. 3:16-cv-100-DJH-CHL, 2017 WL 3910226, at *5 (W.D. Ky. Sept. 6, 2017) (quoting *Madden v. Chattanooga City Wide Serv. Dep't*, 549 F.3d 666, 676 (6th Cir. 2008)). As with her prima facie case, Dr. Doran relies on Drs. Borchers and Emlich as her comparators. For the same reasons Dr. Doran's reliance on these comparators failed to raise a genuine issue of material fact at the prima facie stage, they fail to do so at the pretext stage as well.

Thus, the VA is entitled to summary judgment on Dr. Doran's gender discrimination claim for the additional reason that she has failed to demonstrate pretext. Accordingly, Defendant's renewed motion for summary judgment is **GRANTED** as to this claim.

## IV. CONCLUSION

For the foregoing reasons, Defendant's Renewed Motion for Summary Judgment (ECF No. 57) is **GRANTED**.

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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TRISHA DORAN, MD
*Plaintiff – Appellant*
v.
DENIS RICHARD MCDONOUGH
U.S. DEPARTMENT OF VETERANS AFFAIRS
*Defendant - Appellee*

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No. 20-3694

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Decided: February 15, 2022

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**Appellant's Petition for Panel Rehearing**

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**ORDER**

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Upon consideration of the petition for rehearing filed by John C. Camillus for Appellant Trisha Doran, MD, It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

## APPENDIX D

Excerpts from the Petition for Panel Rehearing submitted to the Sixth Circuit Court of Appeals. Petitioner contested the panel's prior denial for reversal of the district magistrate's summary judgment in favor of the VA on several grounds.

### I. The Panel opinion relied on clearly erroneous material facts

Several of the material facts in the appeal panel's original opinion were clearly erroneous because they were based on the improper stipulations that Petitioner had motioned to strike in the original appeal because she was not made aware of them nor approved of them and because the stipulations omitted material facts to the point they misrepresented the material facts of the case.

### a. Petitioner's evidence did satisfy the *McDonnell- Douglas* Prima Facie stage

1) @ R. 49, Pet. Rehearing at 5 - the Sixth Circuit applied their own precedent regarding Prima Facie "Replaced by" requirement improperly.

"*Vincent v. Brewer Co.*, 514 F.3d 489, 496 (6th Cir. 2007) ("[T]his court has consistently held that a showing that a plaintiff's replacement was not a member of the plaintiff's protected class was sufficient to satisfy the fourth element.")"

2) @ R. 49, Pet. Rehearing at 6 – Petitioner's evidence did satisfy Prima Facie "Replaced by" requirement.

"Dr. Doran met that burden in this case. She was replaced by two male doctors: Dr. Lee and Dr. Weprin. Her supervisor at the VA, Dr. Borchers, testified to this fact:

Q: After she left the VA, Dr. Doran was replaced by one of two males; isn't that right?

A: There was a Dr. Lee, Dr. Weprin.

Q: They're both males; correct?

A: Uh-huh. [Borchers Depo., p. 112, R. 63, PAGEID 1567.] "

**b. The allegations originally made by the GI supervisor to initiate the reviews panels against Petitioner were later admitted under oath to be fabrications and speculation so the "honest belief" rule cannot apply here.**

The adverse actions taken against Petitioner at the VA were all initiated, influenced and encouraged by her supervisor. At the time of Patient A's rigid chest sedation reaction in January 2015, he had been discriminating and retaliating against her for the past few months due to her multiple oppositions to the VA's discriminatory actions taken against her in 2014. This was perfect timing for the supervisor to create a fabricated crisis.

1) @ R. 49, Pet. Rehearing at 13, the DAB agreed that the GI supervisor was untruthful.

"Notably, the VA Disciplinary Appeals Board (DAB) acknowledged that "Dr. Doran complained that Dr. Borchers was inaccurate when he presented his summations before the PSB and the MEB, and that they were without foundation." The Board "found substance to this complaint," and that "his statements were exaggerations or misrepresentations, and were different from his statements under oath." [R. 57-16, D-renewed MSJ, Exh. P, PAGEID#1267.]"

This is evidence of gender based differential treatment. The VA knew Borchers fabricated evidence and did not take disciplinary action against him. Yet the VA charged Petitioner with "Lack of Candor" (Charge 2) and "Inappropriate Documentation" (Charge 3) based only on speculation Petitioner's medical note was not truthful, but it was.

After the DAB hearing, the nurse's sworn testimony supported the fact that Petitioner did order Narcan and multiple times for Patient A and it was the intervening male physician that told room not to give Narcan and it was him that sent the patient to the non-VA hospital. That is gender based differential treatment also because it is undisputed that Narcan was indicated for the patient and is the standard of care. The male physician clearly did not provide the standard of care and prevented it from being provided. The VA did not take any action against him, yet removed Petitioner for alleged "Failure to provide the standard of care" based on only speculation by the GI supervisor that ended up being not true.

**c. Despite the GI supervisor's allegations, no other physician panel at the Columbus, Ohio VA voted to remove Petitioner.**

1) @ R. 49, Pet. Rehearing at 12 – Petitioner informed the Appeal Panel that their assumption that the physician panels at the Columbus VA agreed that Petitioner should be removed – was fundamentally incorrect. None of the review panels at Columbus recommended a removal action.

"The District Court erred in its belief that "the significant and multiple levels of review... insulate the VA's termination of Dr. Doran from her allegations of pretext." [R.70, PAGE ID# 2113.] On the contrary, not one physician review panel at the Columbus VA recommended that Doran should be terminated."

2) @ R. 49, Pet. Rehearing at 12 – The February, 2015 "**Management Reviews**" did not recommend removal or any action against Petitioner is deserved or proper as the district magistrate and circuit appeal panel opinions suggested.

"The Columbus VA chose Dr. Agrawal as the subject matter expert to perform Management Review of the patient safety concerns expressed by Dr. Borchers. Dr. Agrawal recommended no further action needed to be taken against Dr. Doran. [R.57-31, D-Renewed MSJ, Exh. EE, PageID#: 1367-1368.] The suspension and all adverse action against Dr. Doran should have stopped there, but Borchers recommended more [R.57-27, Exh. AA, PAGEID#1349-1350]."

3) @ R. 49, Pet. Rehearing at 12 – The March, 2015 **PSB** was directly and heavily influenced by the GI supervisor yet still did not recommend removal of Petitioner as the district magistrate and circuit appeal panel opinions suggested.

"Next, the Professional Standards Board reviewed Dr. Doran and recommended education and a fitness for duty exam. They did not recommend any other action be taken against her privileges or her termination. [R. 57-3 2, D-Renewed MSJ, Exh. FF, PAGEID 1371.]"

4) @ R. 49, Pet. Rehearing at 12-13 – The **MEB** directly and heavily influenced by the GI supervisor to the point he told them he thought Petitioner must have a "Brain Tumor" and so she was "not safe to practice medicine." Still the MEB did not recommend removal of Petitioner as the district magistrate and circuit appeal panel opinions suggested.

"Following that, the Medical Executive Board recommended to revoke Doran's privileges for a period of time, but even then her privileges could be restored quickly after the Chief of Anesthesia signed off on a limited proctoring session (as was done with another physician). Borchers told the MEB that there were no other alternatives other than revocation of privileges for Doran because he did not have the time to deal with it, but based on his recent experience with sedation events of another provider, he knew that Anesthesia would proctor Dr. Doran-not him. [R.63, Borchers Depo, PAGEID 1488, pg.33]. The MEB did not recommend termination. [R.68, Exh. K, 3-13-2015 MEB Decision.]"

5) @ R. 49, Pet. Rehearing at 13 – The **AIB** report findings and conclusions were directly contrary to the sworn testimony they gathered – highly suggestive of a predetermined outcome. The DAB also agreed their report was "technically inaccurate" because sworn testimony at the DAB also proved that the late addendum was truthful so the charge of "Lack of Candor" was unsupported by any evidence. The AIB report also did not recommend removal of Petitioner as the district magistrate and circuit appeal panel opinions stated.

"Next, an Administrative Investigation Board was commissioned because the VA thought Doran's late addendum was untrue. They did not investigate quality of care issues. After testimony at the DAB, the addendum was proven to be truthful. The AIB also did not recommend Doran's termination, just corrective action. [R. 57-33, D-Renewed MSJ, Exh. GG, PAGEID# 1379.]"

6) @ R. 49, Pet. Rehearing at 13-14 – It was only the Chief of Staff alone, in violation of Due Process, VA policy, procedures and facility bylaws – him alone recommended Petitioner's Removal that the non-physician director admitted he signed off on due to the COS's urging.

"It was not until June 2, 2015, nearly 3 months after the MEB meeting that Cooperman himself, not as part of a committee, decided to send Dr. Doran a notice of proposed removal. [R. 57-34, Exh. HH, PAGEID 1382-1385.] Because no other physician review panel agreed that Dr. Doran should have been terminated, Cooperman's independent and vastly different proposal is sufficient evidence to

support a genuine dispute as to the sufficiency or reasonableness of the VA's alleged nondiscriminatory reason to terminate Doran. This fully supports pretext."

## II. The Sixth Circuit's "Honest Belief" Rule does not apply to Petitioner's case

The Sixth Circuit acted inconsistent with their own circuit's precedent in *Babb v. Maryville Anesthesiologists P.C.* (2019), a very similar discrimination case involving a medical care provider that disputed the employer's nondiscriminatory legitimate reason for terminating the employee – "patient safety concerns." In the *Babb (*6th Cir., *2019)* case below, the sixth circuit stated the "Honest Belief" rule did not apply and reversed the district court below because one expert opinion questioned the "reasonableness" that an employer would terminate nurse Babb for actions that were within the standard of care and that one contrary expert opinion alone was enough evidence that a "reasonable" jury might side with the plaintiff.

Despite the similar circumstances between *Babb (*6th Cir., 2019) and Petitioner both being accused of safety concerns based on "misrepresentations and exaggerations," the sixth circuit treated these two cases very differently. Petitioner has also submitted several expert opinions to the VA from a variety of specialties including five Gastroenterology opinions (including one from the VA's own Subject Matter Expert), Anesthesia and Critical Care expert opinions in addition to the Anesthesia and Critical Care experts from the State Medical Board of Ohio that all agreed Petitioner's

actions were within the Standard of Care. All of the experts agree and fault the VA for not having Narcan "readily available" which is required by The Joint Commission and mandatory per ACLS for any sedation reaction. Considering Petitioner's favorable evidence in addition to the fact the supervisor later admitted his safety concerns were just "speculation" – this should have been ample evidence to make it easy for the district court and sixth circuit to question the validity and reasonableness of the VA's "honest belief" in their alleged nondiscriminatory reason for taking adverse action against the Petitioner. Yet the judiciary gave the agency deference.

**1- @ R. 49, Pet. Rehearing at 7-8**

"*Babb v. Maryville Anesthesiologists P.C.*, 942 F.3d 308 (6th Cir. 2019) (Moore, McKeague, Griffin), establishes that the honest belief rule does not apply here, because at issue is "not so much the facts" underlying the stated reason for termination, but "the likelihood that a reasonable [employer] would have actually relied on those facts to fire an experienced" doctor like Appellant."

**2- @ R. 49, Pet. Rehearing at 10-11**

"the Court stated that "there is a factual dispute as to the reasonableness of Maryville's decision to base Babb's termination" on the two supposed clinical errors. *Id.* at 322. Maryville argued that "Babb's missteps during the 'fracture table' incident and the 'robotic arm' incident were 'critical' mistakes that evinced 'terrible clinical judgment,' and therefore unquestionably justified Babb's

termination." *Id.* Babb, however, submitted evidence "suggesting that she acted reasonably during both incidents, and in accordance with local CRNA standards." *Id.* This Court stated that this dispute was important because "the less serious Babb's clinical mistakes, the more likely they were not the 'real' motivation behind Babb's termination." *Id.*"

**3- @ R. 49, Pet. Rehearing at 11**

"And because in *Babb*, the plaintiff provided expert testimony indicating that her job performance during the alleged clinical errors met the standard of care, this Court found that such evidence created a genuine issue of fact about precisely that - that the employer failed to make a reasonably informed and considered decision before terminating Babb. *Id.* at 323. This Court noted that the expert did "not so much challenge the facts underlying Maryville's stated reasons for firing Babb as she does the likelihood that a reasonable anesthesiology practice would have actually relied on those facts to fire an experienced nurse practitioner like Babb." *Id.*

Here, just as in *Babb*, Appellant is not so much challenging the facts underlying the VA's purported rationale for terminating her as she does the likelihood that a reasonable medical practice would have actually relied on those facts to fire an experienced physician like Doran."

**4- @ R. 49, Pet. Rehearing at 14**

"In *Babb*, this Court recognized that a plaintiff's expert's "key opinion" was that the plaintiff's "behavior during the two critical incidents

accorded with the 'relevant standard of care.'" *Babb*, 942 F.3d at 317. That evidence "matters," said the Court, because "the less serious Babb's clinical mistakes, the more likely they were not the 'real' motivation behind Babb's termination." *Id.* at 322. This called into question whether "a reasonable anesthesiology practice would have actually relied on those facts to fire an experienced nurse practitioner like Babb." *Id.* at 323 (emphasis in original). Here too, then, based on the substantial evidence that multiple layers of physician review panels at the Columbus VA, even when under the influence of Borchers' misrepresentations, still all determined that Dr. Doran should not be terminated. A reasonable jury could also find that a reasonable medical reviewer would not have actually relied on her treatment of Patient A to terminate her employment. Babb therefore compels reversal of the District Court's decision granting summary judgment."

**III. When the Kisor criteria are applied to the Agency action, no deference is due**

Although Petitioner has evidence that would prove the DAB's rationale supporting her removal is contrary to all of the Kisor criteria; the Petition for Rehearing addressed two of the more substantial Kisor criteria.

First, "Official Agency Position" – Petitioner pointed to evidence in the record that proves the DAB's statement that her actions were "egregious" and "so removed from the standard of care" is directly contrary to the Agency's "Official Position."

Second, Petitioner points to evidence in the record that the Chief of Staff knew or should have known on the day of Patient A's rigid chest reaction that he did not suffer any harm and did not have a heart attack or code blue event. Despite this exonerating information, the VA continued their false allegations that Petitioner caused Patient A harm. Petitioner requested these medical records several times, but the Chief of Staff withheld them from her during the VA proceedings. Thus, the actions taken against Petitioner did not reflect the Agency's "Fair and Considered Judgment."

**1- @ R. 49, Pet. Rehearing at 14-16**

"The District Court also failed to follow the Supreme Court's recent admonitions regarding the deference due to agency decisions in the case of *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). In light of *Kisor*, the District Court's deference to agency findings was inappropriate.

**1. Moderate Sedation Policy**

The Disciplinary Appeals Board found that Doran's sedation choices were "removed from the standard of care," [R.57-16, Exh. P, PAGEID#1278], but Dr. Doran's actions are not outside of the Columbus VA's moderate sedation policy that allows for a 100 mcg Fentanyl initial dose [R.57-19, Exh. S, PAGEID#1303]. Dr. Doran's sedation choices are also not outside of the VA's Official Position as explained in the 2018 OIG Report. The VA officially relies on FDA guidance regarding Fentanyl dosing [R.69-2, 2018 VA OIG Report PAGEID#1975].

The VA's Official acceptable dose to initiate sedation with Fentanyl is 100 mcg. [R.69-2, D-Reply, Exh. NN, 2018 VA-OIG Report PAGEID# 1993]. The VA's Official acceptable maximum dose to initiate sedation with Versed is 5 mg. Doran only used 2 mg for Patient A. [*id*, PAGEID#1994]

**2. The VA did not perform a fair and considered investigation of Patient A's harm.**

Dr. Borchers testified that he never reviewed the hospital records of Patient A. [R.64, Borchers depo, p. 122, PAGEID# 1577]. Yet the PSB and MEB committees were told that Patient A had suffered a cardiac arrest/ code blue. Cooperman stated that this information came from the daily UR notes from the hospital that told him Patient A's ongoing condition. The UR note available to him on the day of Patient A's sedation reaction showed that the patient's troponin (cardiac damage level) was normal. [R. 57-22 Exh. V, page 1310.] This means Patient A did not have a cardiac arrest, that is, he did not experience a real code blue. This information was available to Cooperman within hours of the sedation reaction, but he did not "fairly consider" it.

Had the District Court properly applied *Kisor*, it would have given no deference to any determinations made by the VA about any alleged clinical errors made by Dr. Doran." The DAB allegations regarding proper sedation dose were contrary to the VA's official position, thus an "unfair surprise" per *Kisor* and the allegations of patient harm were not supported by and contrary to the objective hospital record evidence – thus not "fair nd considered per *Kisor*.

**IV. If the Sixth Circuit's "honest belief" rule is overruled and the McDonnell-Douglas framework is abrogated for federal-sector Title VII claims, Petitioner will prevail on remand below.**

**1- @ R. 49, Pet. Rehearing at 16**

"This Court originally affirmed the decision granting summary judgment on Dr. Doran's claim for gender discrimination, finding (a) that she did not have evidence in support of the fourth prong of her prima facie case, and (b) that she could not establish pretext because of the honest belief rule. Both findings were in error. Dr. Borchers testified that Dr. Doran was replaced by two males, and the honest belief rule does not apply where, as here a medical professional claims that she did not commit clinical errors sufficient to justify her termination, and provides evidence to support that position. The record evidence makes clear that the multiple genuine disputes of material fact here must be made by a jury. The panel should remand to the Magistrate for further proceedings."

## APPENDIX E – Statutes

**42 U.S.C §2000e(k)**

When Congress uses the terms "because of sex" or "on the basis of sex" they intended for those statutes to mean that women "...shall be treated the same for all employment-related purposes ...as other persons ... similar in their ability ... to work"

**42 U.S.C. §2000e(m)**

The term "demonstrates" means meets the burdens of production and persuasion.

**42 U.S.C. §2000e-14**

Equal Employment Opportunity Coordinating Council;...; Duties;.. "The Equal Employment Opportunity Commission shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. "

**29 U.S. C. §633a**

Nondiscrimination on account of age in Federal Government employment (a) Federal agencies affected. All personnel actions affecting employees or applicants for employment who are at least 40 years

of age ... shall be made free from any discrimination based on age.

**42 U.S.C. §2000e-16(a)**

Discriminatory practices prohibited; employees or applicants for employment subject to coverage. All personnel actions affecting employees ...shall be made free from any discrimination based on race, color, religion, sex, or national origin.

**42 U.S.C. §2000e-16(b)**

Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc... Except as otherwise provided in this subsection, the EEOC "shall have authority to enforce the provisions of subsection (a) through appropriate remedies ... as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section."

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(3) ... The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions...

**42 U.S.C. §2000e-16(c)**

Civil action by employee ...for redress of grievances ... after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission ..... by the failure to take final action on his complaint, may file a civil action as provided in section 2000e–5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

**42 U.S.C. §2000e-16(d)**

The provisions of section 2000e–5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder,...

**42 U.S.C. §2000e-16(e)**

Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity. Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

**42 U.S.C. §2000e-16(f)**

Section 2000e–5(e)(3) of this title shall apply to complaints of discrimination in compensation under this section.

## APPENDIX F –Regulations

29 CFR Part 1614 - FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY

**29 CFR §1614.101**

(a) It is the policy of the Government of the United States to provide equal opportunity in employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, age, disability, or genetic information and to promote the full realization of equal employment opportunity through a continuing affirmative program in each agency.

(b) No person shall be subject to retaliation for opposing any practice made unlawful by Title VII of the Civil Rights Act (title VII) (42 U.S.C. 2000e et seq.), the Age Discrimination in Employment Act (ADEA) (29 U.S.C. 621 et seq.), the Equal Pay Act (29 U.S.C. 206(d)), the Rehabilitation Act (29 U.S.C. 791 et seq.), ... or for participating in any stage of administrative or judicial proceedings under those statutes.

**29 CFR §1614.102**

Agency program. (a) Each agency shall maintain a continuing affirmative program to promote equal opportunity and to identify and eliminate discriminatory practices and policies. In support of this program, the agency shall:

(2) Provide for the prompt, fair and impartial processing of complaints in accordance with this part and the instructions contained in the Commission's Management Directives;

(3) Conduct a continuing campaign to eradicate every form of prejudice or discrimination from the agency's personnel policies, practices and working conditions;

**29 CFR §1614.103**

Complaints of discrimination covered by this part.

(a) "Individual...complaints of employment discrimination and retaliation prohibited by title VII (discrimination on the basis of race, color, religion, sex and national origin)...shall be processed in accordance with this part."

"Complaints alleging retaliation prohibited by these statutes are considered to be complaints of discrimination for purposes of this part."

**29 CFR §1614.501**

Remedies and relief.

(c) Relief for an employee. When an agency, or the Commission, finds that an employee of the agency was discriminated against, the agency shall provide relief, which shall include, but need not be limited to, one or more of the following actions:

(1) Nondiscriminatory placement ...

unless **clear and convincing evidence** contained in the record demonstrates that the personnel action would have been taken even absent the discrimination.

(2) If **clear and convincing evidence** indicates that, although discrimination existed at the time the personnel action was taken, the personnel action would have been taken even absent discrimination, the agency shall nevertheless eliminate any discriminatory practice and ensure it does not recur.

(3) Cancellation of an unwarranted personnel action and restoration of the employee.

(4) Expunction from the agency's records of any adverse materials relating to the discriminatory employment practice.

(5) Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling).

**29 CFR §1630.12**

Retaliation and coercion.

(a) Retaliation. It is unlawful to discriminate against any individual because that individual has opposed any act or practice made unlawful by this part or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing to enforce any provision contained in this part.

(b) Coercion, interference or intimidation. It is unlawful to coerce, intimidate, threaten, harass or interfere with any individual in the exercise or enjoyment of, or because that individual aided or encouraged any other individual in the exercise of, any right granted or protected by this part.

## Appendix G – Excerpt from EEOC Enforcement Guidance on Retaliation, Federal-sector

**Federal Sector** § II.C.1.b.

Found at: https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues

**II. ELEMENTS OF A RETALIATION CLAIM**

C. Causal Connection

**1. Causation Standards**

a. "But-For" Causation Standard for Retaliation Claims Against Private Sector and State and Local Government Employers

b. "**Motivating Factor**" Causation Standard for Title VII and ADEA Retaliation Claims Against **Federal Sector Employers**

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b. "Motivating Factor" Causation Standard for Title VII and ADEA Retaliation Claims Against Federal Sector Employers. By contrast, in federal sector Title VII and ADEA retaliation cases, the Commission has held that the "but-for" standard does not apply because the relevant federal sector statutory provisions do not employ the same language on which the Court based its holding in *Nassar*.[150] The federal sector provisions contain a "broad prohibition of 'discrimination' rather than a list of specific prohibited practices," requiring that employment "be made free from any discrimination," including retaliation. Therefore, in Title VII and ADEA cases against a federal employer, retaliation is prohibited if it was a motivating factor.[151]"

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