

Circuit Court for Baltimore City
Case No. 24-C-16-006923

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 648

September Term, 2019

KATHERINE PACKETT

v.

UNIVERSITY OF MARYLAND
MEDICAL CENTER

Fader, C.J.,
Kehoe,
Berger,

JJ.

Opinion by Kehoe, J.

Filed: July 23, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. *See* Md. Rule 1-104.

Katherine Packett appeals from a judgment of the Circuit Court for Baltimore City that resolved all her claims against her former employer, the University of Maryland Medical Center (“UMMC”), in its favor. On appeal, she presents two issues, which we have reordered and reworded:

1. Did the circuit court err in granting UMMC’s motion for summary judgment?
2. Did the circuit court abuse its discretion when it denied Ms. Packett’s motion for reconsideration?¹

We will affirm the judgment of the circuit court.

BACKGROUND

Ms. Packett’s Employment at UMMC

Ms. Packett began working at UMMC in July 2013 as a clinical nurse. In October 2014, she was promoted to Senior Clinical Nurse I (“SCN I”) and transferred to UMMC’s Pediatric Cardiac Catheterization Laboratory (the “Pediatric Cath Lab”). She tendered her

¹ Ms. Packett articulates the issues as:

1. Did the Circuit Court abuse its discretion by failing to reconsider and vacate the order granting summary judgment against Ms. Packett and in favor of UMMC after Ms. Packett filed a timely motion for reconsideration pointing out that the Circuit Court applied the wrong legal standard?
2. Did the Circuit Court abuse its discretion in granting UMMC’s motion for summary judgment by adopting wholesale and relying exclusively on the facts and arguments proffered by UMMC, failing to account for the countervailing facts and arguments presented by Ms. Packett, viewing the facts in the light most favorable to UMMC and drawing all inferences in UMMC’s favor, and analyzing the material facts in isolation instead of their totality?

resignation on December 21, 2015 and was thereafter placed on administrative leave. At all relevant times, Ms. Packett was supervised by Eveena Felder, R.N., a nurse manager, and Michael Slack, M. D., the medical director of the Pediatric Cath Lab.

During her time at UMMC, Ms. Packett received accolades for her outstanding work, including awards, a positive performance evaluation, and a recommendation for a merit-based pay increase. As a result of her good work, Ms. Felder recommended that Ms. Packett apply for SCN II, the highest-ranking clinical nurse on the unit. In June 2015, Ms. Packett received the promotion from SCN I to SCN II.

Between January and September 2015, Ms. Packett filed seven “incident reports” regarding what she perceived as violations of UMMC policies that occurred in the Pediatric Cath Lab. While some of these reports were not directed at specific individuals,² others clearly were and equally clearly addressed matters relating to patient safety.³ Ms. Felder was the initial recipient of incident reports. At some point (exactly when is unclear but it was before September 22, 2015), Ms. Packett began to share her concerns about patient safety directly with Dr. Slack. Ms. Packett was not alone in filing incident reports—in its motion for summary judgment, UMMC acknowledged that all employees of the Pediatric

² For example, one incident report concerned a difficulty in finding a bed for a cardiac catheterization and biopsy patient.

³ For example, in one report, Ms. Packett wrote that a nurse had loaded an injector with the wrong medication. In another, she asserted that the same nurse failed to obtain a patient’s full medical history prior to a cardiac catheterization procedure.

Cath Lab filed one or more incident reports during Ms. Packett’s time of employment and that UMMC encourages employees to file such reports.

The FMLA request

On September 30, 2015, Ms. Packett submitted a Family Medical Leave Act (FMLA) request for work accommodations, specifically intermittent leave, to accommodate her migraines and hypertension. The request included a doctor’s note that Ms. Packett should avoid working more than forty (40) hours per week. On October 7, 2015, UMMC’s Leave Management Department approved her request. The approval was copied to Ms. Felder.

The corrective action forms

Central to Ms. Packett’s theories of her case as to her Whistleblower Protection Act and wrongful discharge claims are a series of corrective action forms issued by Ms. Felder in 2015. From what we can tell from the record, the first step in UMMC’s progressive disciplinary program is a verbal warning from a supervisor. For more serious or repeated offenses, UMMC supervisors issue written corrective action forms to employees. It appears that the issuance of a corrective action form can, but doesn’t always, trigger a process that may result in significant disciplinary consequences, *e.g.* termination of employment. Depending upon the nature of the incident, the supervisor may impose a performance improvement plan (“PIP”) to address the problematic behavior. In this case, the corrective

action reports were followed up by meetings between Ms. Felder and Ms. Packett. Sometimes, but not always, Ms. Felder issued a PIP. But there were no other disciplinary ramifications arising out of the corrective action forms.

In chronological order, the corrective action forms at issue were:

On September 23, 2015, Ms. Felder issued a corrective action form to Ms. Packett because the latter had left work early on that day without requesting or obtaining permission to do so. Ms. Packett asserted that issuing a corrective action notice was unwarranted because it was only one incident and “it was common practice for employees in the [Pediatric Cath Lab] to leave early without notifying Ms. Felder or seeking her permission.”

On September 25, 2015, Ms. Felder issued a corrective action form to Ms. Packett arising out of an incident that had occurred earlier that day. Another nurse in the Pediatric Cath Lab asserted that Ms. Packett had been rude and disrespectful to her in a discussion recording patient records. Ms. Felder scheduled a meeting with Ms. Packett on October 5th to discuss the matter. The meeting was rescheduled three times before it finally took place on December 21, 2015. The PIP that resulted from the meeting stated that Ms. Packett should “develop effective working relationships and maintain[] good communication with other team members.” E. 372

Finally, on December 28, 2015, Ms. Felder issued a corrective action form to Ms. Patchett regarding an incident that allegedly occurred on December 8, 2015. What actually happened on that day is contested by the parties and we will discuss their respective positions later. At this point, it’s sufficient to say that Ms. Felder concluded that Ms. Packett

did not accompany one or more of her post-operative patients to the Pediatric Intensive Care Unit (the “PICU”) in violation of UMMC standards for the transfer of patients from one department to another.

Ms. Packett’s email to Dr. Slack

On September 22, 2015, Ms. Packett sent an email to Dr. Slack. She wrote:

I wanted [sic] to apologize for the uproar that may have been caused by the issues I brought up for the agenda for our upcoming staff meeting and the issues that I have started to cc you on. I do feel as though there have already been repercussions for my actions but I do not regret informing you. I feel very strongly about patient safety and staff accountability and feel as though some issues have gone unaddressed for too long and you should be aware.

With this said, I am actively pursuing other employment and although I’m not a quitter, I do not appreciate feeling harassed day in and day out because I’m advocating for our patients and trying to protect our licenses as healthcare professionals.

I just wanted to give you a heads up and apologize. I would like to fly under the radar from this point forward and I will do my job as I am expected; with patient care and safety as my top priority, as always. I will be present at the staff meeting but would prefer not to say much.

Ms. Packett contends that the corrective actions issued by Ms. Felder were in retaliation for her “escalating” her concerns about patient safety in the Pediatric Cath Lab to Dr. Slack.

Ms. Packett resigns

Following her December 21st corrective action meeting, Ms. Packett sent an email to Ms. Felder notifying her that she would resign. The email stated:

Please accept this as formal notification that I am resigning from my position[.] My last day will be Monday, January 11, 2015.

Thank you for the opportunity to work in this position, I've appreciated the opportunities I've had working with this team.

During my last three weeks, I'll do everything possible to wrap up my duties. . . . I wish the company continued success.

On December 28, 2015, UMMC placed Ms. Packett on paid administrative leave. In an affidavit filed in support of UMMC's motion for summary judgment, Ms. Felder averred that the reason for the administrative leave was that, in the week following Ms. Packett's email regarding her intent to resign, "there was increased disruption and tension among the Pediatric Cath Lab employees, which was spreading to the related departments, all of which could have interfered with patient safety."

On January 8, 2016, Ms. Packett submitted a statement to UMMC's corporate compliance department about her experiences at UMMC, including detailed allegations of what she asserted were multiple instances of retaliation by Ms. Felder⁴ that followed her "good faith report[s] of suspected violations of UMMC's policies and legal/regulatory obligations."

The claim for unemployment benefits

In early 2016, Ms. Packett filed for unemployment benefits. In response, UMMC asserted that it was not obligated to pay benefits because she had left her employment

⁴ Ms. Packett mentioned other employees as well but these individuals did not play a role in the events at issue in this litigation.

voluntarily. The claims specialist agreed with UMMC. Ms. Packett appealed. After a hearing, the hearing examiner reversed the earlier decision and held that Ms. Packett was eligible for unemployment benefits. In pertinent part, the hearing examiner found:

The claimant's uncontroverted testimony established that the claimant was subjected to disciplinary action in apparent bad faith. The employer's actions, in turn, led her to make reasonable assumptions regarding the status of her continued employment, and to maintain a legitimate concern for her professional reputation. The employer was not able to offer any evidence in rebuttal. Accordingly, it must be determined that claimant's resignation was for good cause[.]

Ms. Packett's complaint

On December 19, 2016, Ms. Packett filed the present action against UMMC. In her complaint, she alleged that (1) she was constructively discharged in retaliation for filing incident reports relating to the conduct of other members of the Pediatric Cath Lab staff, and (ii) UMMC failed to provide accommodations for her health conditions. The complaint set out claims pursuant to the Health Care Workers Whistleblower Protection Act (the "Whistleblower Act"), Md. Code, Health Occ. § 1-501-06; failure to accommodate her disabilities in violation of the Fair Employment Practices Act ("FEPA"), Md. Code, State Gov't § 20-601-11; and common law wrongful discharge.

UMMC's Motion for Summary Judgment

After the close of discovery, UMMC filed a Motion for Summary Judgment on all of Ms. Packett's claims.

First, UMMC asserted that Ms. Packett's Whistleblower Act claim failed because (1) the statute of limitations barred her claim, (2) there was no causal link between Ms.

Packett’s alleged protected activity and adverse actions, and (3) UMMC had a legitimate, non-retaliatory basis for its actions against Ms. Packett.

Second, UMMC argued that Ms. Packett’s FEPA claim could not succeed for three reasons: First, UMMC asserted that she had not established that she had a disability as defined under FEPA and related statutes. Second, UMMC asserted that it did not take a retaliatory action against her because there was a legitimate, non-retaliatory basis for issuing its corrective action arising out of her absence from work, Third, her request for accommodations pursuant to the Family Medical Leave Act (“FMLA”) did not “sufficiently convey[] to Ms. Felder or UMMC that she had a disability under the FEPA or constituted [sic] protected activity under the FEPA.

Finally, UMMC asserted that Ms. Packett’s wrongful discharge claim failed because she did not present evidence of constructive discharge or identify a violation by UMMC of a clear public policy mandate.

In her response to UMMC’s motion, Ms. Packett argued that while some of the personnel actions fell outside the relevant limitations periods, others did not and were therefore actionable. Additionally, she asserted that all of these were retaliatory because they were issued by Ms. Felder after Ms. Packett began to pass on her concerns about patient safety to Dr. Slack. She pointed to the temporal proximity between her reporting her concerns to Dr. Slack and the issuance of the corrective action forms. Finally, Ms. Packett argued that UMMC’s justifications for its actions were pretextual.

As to the FEPA claim, Ms. Packett asserted that her medical condition qualified as a disability and that she presented evidence that she said indicated that UMMC failed to provide reasonable accommodation by requiring her to work more than forty hours a week. Lastly, Ms. Packett supported her claim of wrongful discharge by referring to the unemployment benefits decision which found that Ms. Packett had established good cause that UMMC acted in bad faith and gave her legitimate concern regarding her employment.

The circuit court grants the motion for summary judgment

On October 15, 2018, the court granted UMMC's motion for summary judgment. As to all three claims, the summary judgment court concluded that there were no disputes of material fact and that UMMC was entitled to judgment as a matter of law. The court reached the following conclusions:

Ms. Packett's claim under the Health Care Workers Whistleblower Protection Act failed for several reasons. First, she did not provide sufficient evidence to prove a *prima facie* case of retaliation because her September 22, 2015 email to Dr. Slack did not identify any activity, policy, or practice that posed a substantial and specific danger to public health and safety, the email was not covered by the statute. Accordingly, reasoned the summary judgment court, sending the email did not constitute a protected activity under the purview of the Act.

Moreover, the court explained that, assuming that the September 22, 2015 email qualified as protected activity, Ms. Packett's claim failed because she did not establish a causal

connection between the email to Dr. Slack and the adverse actions taken against her. Specifically, the summary judgment court noted that, during the time that Ms. Packett was filing the incident reports, she “promoted and received awards[.]” According to the court, this “negat[ed] any causal link” between her incident reports and the personnel actions taken against her.

The court concluded that UMMC had a legitimate, non-retaliatory basis for issuing its corrective actions against Ms. Packett because it was undisputed that, in each incident, she had not complied with the relevant Pediatric Cath Lab and UMMC policies. Similarly, the court concluded that UMMC’s reason for putting Ms. Packett on paid administrative leave was not retaliatory but was to limit disruption after Ms. Packett voluntarily submitted her resignation on December 21, 2015. Finally, the summary judgment court concluded that the record did not support Ms. Packett’s claim that UMMC retaliated against her by submitting false information in response to her request for unemployment benefits. As to this issue, the court stated:

Finally, Ms. Packett claims that UMMC retaliated against her for reporting safety concerns by providing false information in response to her request for unemployment benefits in early 2016 after she had left employment with UMMC. This claim is not supported by the record. The record establishes that she voluntarily left her employment with UMMC without comment. She submitted a resignation letter that failed to mention anything about resigning because she believed that she was about to be terminated, or because she believed that she was being retaliated against for reporting safety concerns.

She further admitted that she never mentioned anything to her supervisors prior to submitting her resignation.

(References to the record omitted.)

Turning to Ms. Packett’s claim under FEPA, the court found that Ms. Packett provided sufficient evidence that her hypertension limited her ability to work, thus meeting the definition of disability. However, regarding UMMC’s failure to provide reasonable accommodation, the court concluded that the undisputed evidence showed that Ms. Packett never communicated to Ms. Felder that she could not safely work more than 40 hours a week and that “Ms. Felder was not even aware of Ms. Packett’s alleged disability.”

In its analysis, the court differentiated between a request for FMLA leave (which UMMC granted) and a request for a reasonable accommodation for her disability. The court concluded that the undisputed evidence showed that Ms. Packett never submitted a request for reasonable accommodation to Ms. Felder. Finally, as to Ms. Packett’s claim for denial of FMLA leave, the summary judgment court found that the record showed Ms. Felder approved Ms. Packett’s requests for leave on multiple occasions between October and December 2015. For these reasons, the court concluded that Ms. Packett’s FEPA claim failed.

In addressing Ms. Packett’s wrongful discharge claim, the court concluded that Ms. Packett did not provide evidence demonstrating that the conditions at UMMC were so intolerable that she was forced to resign. The court placed weight on the fact that Ms. Packett never mentioned the intolerable conditions in her resignation letter or to her supervisors prior to resigning. The court concluded that the “undisputed record” revealed that UMMC never considered terminating her. Last of all, and citing *Yuan v. Johns Hopkins University*,

452 Md. 436, 448–49 (2017), the court concluded that Ms. Packett failed to show that she had been constructively discharged in violation of a clear mandate of public policy.

The Motion to Revise the Judgment

The circuit court’s order granting summary judgment was docketed on October 16, 2018. Thirty days later, Ms. Packett filed a “Motion for Reconsideration and to Alter and Judgment.” This motion focused almost entirely on the court’s disposition of her Whistleblower Protection Act claim.

Ms. Packett argued that the summary judgment court erred by adopting what she termed UMMC’s “false narrative” that the email did not contain any “specific disclosures protected by the HCWWPA.” She claimed that the September 22 email corroborated the personal log she sent to Dr. Slack which lists the patient safety concerns she had previously reported.

Ms. Packett spent the bulk of her argument on the summary judgment court’s conclusion that the evidence did not demonstrate that there was a cause and effect relationship between Ms. Packett’s filing the incident reports and the alleged retaliatory actions taken by UMMC. She asserted that the summary judgment court’s finding that her positive performance reviews from January to September 2015 negated UMMC’s retaliatory intent ignored her testimony that Ms. Felder’s behavior towards her changed sometime after Ms. Packett began reporting the safety concerns to Dr. Slack. She posited that the concerns she had previously raised to Dr. Slack between January and September were not the same as the “unresolved and recurring issues” that were the subject of her emails to Dr. Slack in

September 2015 and thereafter. Additionally, Ms. Packett asserted that the temporal proximity between her reports of patient safety issues to Dr. Slack and the issuing of the corrective action forms supported an inference of retaliatory intent on Ms. Felder's part.

Ms. Packett also contested the court's conclusion that UMMC had a "legitimate, non-retaliatory basis" for Ms. Felder's corrective action forms. Specifically, she argued that another nurse had more serious issues and UMMC never issued a corrective action or a PIP against that nurse, and that Ms. Felder ignored Ms. Packett's legitimate reason for not accompanying the patients to the PICU, namely, that Ms. Packett was the only available nurse to accompany the patients' families to the PICU as requested by Dr. Slack. Finally, she addressed the summary judgment court's finding that the record did not establish that UMMC retaliated against Ms. Packett by providing false statements by pointing to the Defendant's "shifting and contradictory assertions."

In her motion, Ms. Packett devoted one sentence to her FEPA and wrongful discharge claims: "Furthermore, the same overarching analysis applies to Ms. Packett's FEPA and wrongful discharge claims."

The circuit court denied the motion for reconsideration. The court did not issue an explanation of its reasoning. Ms. Packett filed a timely notice of appeal.

STANDARD OF REVIEW AND PRESERVATION

A motion to alter or amend a judgment must be filed within ten days of the entry of the judgment. Md. Rule 2-534. Thus, the title of her motion notwithstanding, Ms. Packett's

motion was actually a motion to revise the judgment pursuant to Md. Rule 2-535(a). Because it was not filed within ten days of the entry of judgment, Ms. Packett's motion did not extend the period for filing an appeal. *See, e.g., Pickett v. Noba*, 114 Md. App. 552, 556 (1997). Therefore, the only court order that is properly before us for purposes of review is the court's denial of the post-judgment revisory motion. This raises two problems. The first pertains to the appropriate standard of review. The second is whether Ms. Packett has waived any of her appellate contentions by failing to present them adequately in her post-judgment motion. We will discuss these matters in order.

1.

We review a circuit court's decision to grant or deny a post-judgment revisory motion for abuse of discretion. *Dixon v. Ford Motor Co*, 433 Md. 137, 157 (2013). In many cases, an appellate court's review of a discretionary decision by a trial court is extremely deferential. *See, e.g., Bartlett v. Portfolio Recovery Associates*, 438 Md. 255, 273 (2014). The present case is a bit different, however.

The issue before the court on the motion to revise was whether the circuit court erred as a matter of law in granting summary judgment. If the court erred in denying the motion to revise, its error was one of law. As the Court of Appeals has explained:

A circuit court's decision on a motion to alter or amend under Rule 2-534 may depend, in some cases, on that court's assessment of the facts or it may depend entirely on the court's assessment of the legal principles that apply to the particular case. If the court's ruling is rooted in its role as a factfinder, an appellate court typically would accord its decision substantial deference. If the circuit court's decision is based on an application of legal principles, an appellate court does not accord the circuit court any special deference.

Morton v. Schlotzhauer, 449 Md. 217, 232 (2016) (cleaned up).

In deciding whether to grant a motion for summary judgment, the court does not engage with the evidence as a fact-finder; instead, it assesses the evidence in the light most favorable to the non-moving party to determine whether there is a dispute of material fact. In every case where there are disputes of fact, whether the disputed facts are material is a legal issue. In this context, “the lower court’s interpretations of law ‘enjoy no presumption of correctness on review: the appellate court must apply the law as it understands it to be.’”

Cunningham v. Feinberg, 441 Md. 310, 322 (2015) (quoting *Rohrbaugh v. Estate of Stern*, 305 Md. 443, 447 n. 2 (1986)). We turn once again to *Morton v. Schlotzhauer*:

[A]n error in applying the law can constitute an abuse of discretion, even in the context of a motion for reconsideration made pursuant to Maryland Rule 2–534.⁵ A court that fails to rectify a judgment based on a misunderstanding of the law applicable to the case or the procedural posture of the case, especially when that error is brought to its attention in a timely manner, abuses its discretion.

449 Md. at 232.

For these reasons, in deciding whether the circuit court erred when it denied Ms. Packett’s post-judgment revisory motion, we will undertake essentially the same task that the circuit court undertook before it ruled on the motion to revise. We will review the record

⁵ Ms. Packett’s post-judgment motion was filed more than ten days but less than thirty days after the circuit court granted the motion for summary judgment. In such circumstances, subsection (a) of Rule 2-535 permits the court to “take any action that could have been taken under Rule 2-534” as long as the case was not tried before a jury. The principles articulated in *Morton v. Schlotzhauer* apply with equal force to the case before us.

considered in the light most favorable to the non-moving party to decide whether there are disputed issues of material fact. *Wells Fargo Home Mortgage, Inc. v. Neal*, 398 Md. 705, 714, 922 A.2d 538 (2007). In determining whether there are such disputes, we construe reasonable inferences arising from the facts in favor of the non-moving party. *Educational Testing Service v. Hildebrant*, 399 Md. 128, 140 (2007).

To avoid summary judgment, the non-moving party must establish the existence of a genuine dispute of material fact. *Beatty v. Trailmaster Products, Inc.*, 330 Md. 726, 737, (1993). To be “genuine” in this context, the dispute must be more than hypothetical or conjectural: “the mere existence of a scintilla of evidence in support of the [non-moving party’s] claim is insufficient to preclude the grant of summary judgment; there must be evidence upon which the jury could reasonably find for the plaintiff.” *Id.* at 738. Put another way, “when a movant has carried its burden, the party opposing summary judgment ‘must do more than simply show there is some metaphysical doubt as to the material facts.’” *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

2.

It is UMMC’s position that Ms. Packett failed to preserve her contentions regarding her FEPA and wrongful discharge for appellate review. UMMC characterizes her treatment of these issues in her post-judgment motion as “hasty,” and says that, as a result, her motion for reconsideration “was insufficient to put the Circuit Court on notice of any reason warranting it [to] vacate the summary judgment decision.” We do not agree.

In her motion, Ms. Packett argued that the validity of the summary judgment court’s analysis was undercut because the court accepted factual assertions made by UMMC as undisputed when, in fact, there was evidence before the court that raised disputes as to material facts. Although her motion was focused almost entirely on her Whistleblower Protection Act claim, she clearly, albeit only in passing, asked the court to undertake the same analysis as to her other claims. This is sufficient to preserve her contentions for appellate review. *See* Md. Rule 8-131(a).⁶

ANALYSIS

We will begin by clarifying the issues before us. In her brief, Ms. Packett asserts that the summary judgment court’s analysis was irredeemably flawed because the court impermissibly adopted UMMC’s “false narrative” as to the events leading up to her resignation and did not take into account evidence in the record that showed that there were genuine disputes as to material facts as to each of her causes of action. Although we do not agree with her terminology, we will accept for purposes of analysis that there may have been flaws in the way that the summary judgment court dealt with some aspects of the parties’ contentions and counter-contentions. However, in its memorandum opinion, the summary judgment court articulated multiple grounds for its disposition as to each count. And, as to

⁶ Md. Rule 8-131(a) states in pertinent part that, other than contentions pertaining to certain jurisdictional issues, an “appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]”

each count, we agree with the court’s reasoning as to at least one ground. We will focus our analysis accordingly.

A. THE WHISTLEBLOWER PROTECTION ACT CLAIM

The Whistleblower Protection Act prohibits an employer from taking or refusing to take “any personnel action as reprisal against an employee” because the employee makes a good faith report to a supervisor of an activity by fellow employees that “poses a substantial and specific danger to the public health or safety[.]” Health Occ. §§ 1-502 and 1-503. The Whistleblower Protection Act provides that an employee who is subject to an action of commission or omission prohibited by § 1-502 has the right to file a civil action against the employer. Health Occ. § 1-504(a). However, the action must be filed “within 1 year after the alleged violation of § 1-502 . . . occurred or within 1 year after the employee first became aware of the alleged violation[.]” Health Occ. § 1-504(b). Finally, “it is a defense that the [allegedly retributive] personnel action was based on grounds other than the employee’s exercise of any rights protected under this subtitle.” Health Occ. § 1-506.

To establish a retaliation claim, the employee-plaintiff must show that: (1) the employee was engaged in a protected activity, (2) the employee suffered adverse action by the defendant-employer, and (3) there is a casual connection between the protected activity and the personnel action. *Foster v. University of Maryland-Eastern Shore*, 787 F.3d 243, 250 (4th Cir. 2015).

To satisfy the causation requirement, an employee must show “by a preponderance of the evidence that the protected disclosure was a ‘contributing factor’ in the decision to take

the personnel action.” *Department of Natural Resources v. Heller*, 391 Md. 148, 510 (2006). Temporal proximity, alone, can be sufficient to establish causation, but “the temporal proximity must be very close.” *Lewis v. Baltimore City Board of School Commissioners*, 187 F. Supp. 3d 588, 597 (D. Md. 2016). Compare *Foster v. University of Maryland-Eastern Shore*, 787 F.3d 243, 253 (4th Cir. 2015) (A one-month gap between the complaint about retaliation and her termination was sufficient to establish causation); with *Hooven-Lewis v. Caldera*, 249 F.3d 259 (4th Cir. 2001) (finding that “a six-month lag is sufficient to negate any inference of causation.”).

In the present case, there is no direct evidence that establishes that any of the personnel actions taken by UMMC were in retaliation for Ms. Packett’s reporting her concerns about workplace practices to Ms. Felder’s or Dr. Slack’s attention. In the absence of direct evidence, courts apply the *McDonnell Douglas*⁷ burden-shifting framework in retaliation cases. *Foster*, 787 F.3d at 250. To prevail, a plaintiff must first establish a prima facie retaliation case. *Id.* If the plaintiff satisfies her burden, then “the burden shifts to the [defendant] to show that its purportedly retaliatory action was in fact the result of a legitimate non-retaliatory reason.” *Id.*⁸

⁷ *McDonnell Douglas v. Green*, 411 U.S. 792, 802–07 (1973).

⁸ See Health Occ. § 1-506 (“In any action brought under this subtitle, it is a defense that the personnel action was based on grounds other than the employee’s exercise of any rights protected under this statute.”).

If the defendant establishes a legitimate, non-retaliatory reason, then “the burden shifts back to the plaintiff to rebut the employer’s evidence by demonstrating the employer’s purported nonretaliatory reasons were not its true reasons, but were a pretext for discrimination.” *Foster*, 787 at 250 (cleaned up). A plaintiff:

typically makes a showing of pretext in one of three ways: (1) with evidence that the defendant’s stated reason for the adverse employment action was false; (2) with evidence that the defendant acted contrary to a written company policy prescribing the action to be taken by the defendant under the circumstances; or (3) with evidence that the defendant acted contrary to an unwritten policy or contrary to company practice when making the adverse employment decision affecting the plaintiff.

Igwe v. Saint Anthony’s Hospital, 804 F. Supp. 2d 1183, 1190 (W. D. Oklahoma 2011), *aff’d*, 464 F. App’x 685 (10th Cir. 2012) (citing *Kendrick v. Penske Transportation Services*, 220 F.3d 1220, 1230 (10th Cir, 2000) (other citations omitted)).

At the summary judgment proceeding and in this Court, it has been Ms. Packett’s position that she was engaged in protected activities when she filed the incident reports and when she expressed her concerns directly to Dr. Slack. She contends that the corrective actions forms and UMMC’s opposition to her application for unemployment benefits were adverse employment actions and that they were pretextual. In other words, Ms. Packett asserts that she has satisfied the first step of the *McDonnell Douglas* burden-shifting analysis. With some minor exceptions, UMMC does not agree.⁹ Additionally, UMMC contends

⁹ UMMC doesn’t dispute that Ms. Packett was engaged in protected activity when she filed the incident reports. It does argue that Ms. Packett’s September 22, 2015 email to Dr. Slack was not a protected activity because it did not articulate any specific concerns but

that there were legitimate, good-faith reasons for both the corrective action forms and UMMC's opposition to the application for unemployment benefits. Ms. Packett disagrees. In its memorandum opinion, the circuit court addressed these contentions and counter-contentions and resolved all of them in UMMC's favor.

For purposes of our analysis, we will assume that Ms. Packett satisfied the initial step of the *McDonnell Douglas* test. Nonetheless we agree with the circuit court that UMMC established that it had good-faith basis for its relevant actions and that the record before the court did not show that there was a genuine dispute as to the material facts relevant to this issue.

An action under the Whistleblower Protection Act must be filed within one year of the date on which alleged violation(s) of the Act, Health Occ. § 1-504(b) occurred or when the employee became aware of the violations. Ms. Packett filed her complaint on December 19, 2016. The only arguably retaliatory actions taken by UMMC in this matter that occurred within one-year limitations period were:

(1) the corrective action form issued by Ms. Felder on December 28, 2015 that pertained to Ms. Packett's failure to personally escort one or more patients from the Pediatric Cath Lab to the Pediatric Intensive Care Unit on December 8, 2015;

only alluded to the fact that Ms. Packett had previously shared her concerns directly with Dr. Slack. Ms. Packett appears to concede the point but asserts that the email is significant because it is evidence that supports her deposition testimony that she was in direct communication with Dr. Slack about patient safety.

(2) UMMC’s filing of an opposition to her application for unemployment insurance benefits, which occurred in January 2016.¹⁰

We will start with the corrective action form.

UMMC has a written protocol for transferring patients from surgical centers, including the Pediatric Cath Lab, to other departments. The protocol is explicit that at least one registered nurse must accompany patients from surgical centers, including the Pediatric Cath Lab, to the Pediatric Intensive Care Unit (the “PICU”). The Pediatric Cath Lab and the PICU are located in separate buildings within the UMMC campus.

On December 8, 2015, two patients from the Pediatric Cath Lab were transported to the PICU unaccompanied by a registered nurse. On the day in question, Ms. Packett was the only nurse on duty in the Pediatric Cath Lab. Other members of the Pediatric Cath Lab staff who were on duty at the time expressed concerns to Ms. Felder regarding the incidents. After meeting with Ms. Packett, Ms. Felder issued a PIP that stated in pertinent part:

You must show immediate and sustained improvement. Failure to improve may result in further corrective action including termination of your employment with [UMMC]. . . . [Ms. Packett] will ensure RN presence for monitoring all patients post procedure.

In her written response to the corrective action, and after stating that she had discussed the two patients with two physicians, Ms. Packett stated in pertinent part:

I feel as though a stable, non-monitored patient transported to a unit post cardiac cath procedure is safely transported with an anesthesiologist and a

¹⁰ Ms. Packett does not assert that UMMC’s decision to place her on administrative leave after she tendered her notice of resignation is a basis for liability.

PALS^[11] certified tech if each member of the team feels that this is appropriate. From my clinical judgment and discussion with each member of the team, we all agreed that this would be appropriate so that I could check on consents for the next cath patient and then bring the prior patient’s family to the PICU after [the patients] are settled in their PICU room. Dr. Slack requested only an RN transport the cath patient’s family to the PICU after he speaks with them.

* * *

I have never been informed that it is expected, within this unit, for an RN to transport the patient post-cath despite their clinical status and who is traveling with them.

Ms. Felder addressed these assertions in a note to her file. She wrote that she “was concerned that [Ms. Packett] stated that all of the patients were transported to the PICU without a monitor,” that the PICU was “three buildings away” from the Pediatric Cath Lab, that all members of the team did not agree with Ms. Packett’s decision “as members of the team” approached her about the matter, and that “a [radiation] tech is never a replacement for an RN when transferring an ICU level patient.” She concluded that the incident was “an example of poor clinical judgment and against our standards.”

¹¹ “PALS” (an acronym for “Pediatric Advanced Life Support”) is a “classroom, video-based, Instructor-led course that uses a series of simulated pediatric emergencies to reinforce the important concepts of a systematic approach to pediatric assessment, basic life support, PALS treatment algorithms, effective resuscitation and team dynamics.” [https://www.hopkinsmedicine.org › training › hope › PALS](https://www.hopkinsmedicine.org/training/hope/PALS) (last visited July 15, 2021).

In assessing whether a decision is pretextual, courts:

look at the facts as they appear to the person making the decision . . . , not the aggrieved employee. A mistaken belief can be a legitimate reason for an employment decision and is not necessarily pretextual.

Green v. New Mexico, 420 F.3d 1189, 1191 n.2 (10th Cir. 2005) (cleaned up).

This Court has explained that, in the context of a wrongful discharge claim, pretext on an employer's part:

might be established by showing such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.

Edgewood Management Corp. v. Jackson, 212 Md. App. 177, 199–200 (2013) (cleaned up).

The UMMC protocol for transferring post-surgery pediatric patients to the PICU contains no exceptions and there is nothing in it that suggests that nurses can opt out of compliance with its requirements. There was no emergency. Ms. Packett conceded that she did not accompany the patients to PICU so that she could check on the paperwork for other patients and accompany patients' families to the PICU. Although it was Ms. Packett's position that all of the physicians and staff agreed that there was no reason for her to accompany the patients, some of the staff members gave a different version of events to Ms. Felder. She did not act unreasonably in crediting the actual statements from witnesses. In conclusion, Ms. Packett did not present evidence to the summary judgment court that

there were “weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions” could be the basis for a fact-finder to conclude that Ms. Felder’s action was pretextual.

Ms. Packett also contends that the summary judgment court erred when it concluded that there was not a dispute of material fact as to whether UMMC retaliated against her “by filing false information against her in response to her request for unemployment benefits.” The “false information” was a statement that Ms. Packett had resigned work voluntarily. In reaching its decision, the court relied on the fact that, in her email informing Ms. Felder that she was resigning, Ms. Packett made no mention of anything that might constitute a constructive discharge or anything else that suggested that her resignation was not voluntary.¹² In her brief, Ms. Packett presents two arguments as to why the court erred.

The first is that the summary judge court “failed to account for the corporate compliance complaint Ms. Packett made immediately following her resignation, which explained at length that she believed Ms. Felder was setting her up for termination and felt she had

¹² The email stated:

Please accept this as formal notification that I am resigning from my position[.] My last day will be Monday, January 11, 2015.

Thank you for the opportunity to work in this position, I’ve appreciated the opportunities I’ve had working with this team.

During my last three weeks, I’ll do everything possible to wrap up my duties. . . . I wish the company continued success.

no choice but to resign to protect her professional reputation.” This argument is not convincing.

It is Ms. Packett’s theory of her case that the UMMC employee who harbored ill-feelings towards her was Ms. Felder.¹³ But Ms. Packett does not present a plausible hypothesis, much less point to facts, to show that Ms. Felder had anything to do with UMMC’s decision to oppose benefits.

UMMC used a service, Equifax, to respond to requests for unemployment compensation by former employees. To the extent that the materials in the record extract shed light on the matter, it appears that the individual who was responsible for providing the information to Equifax was Rebecca Hielke, whose job title was “Employee and Labor Relations Advisor.” Ms. Packett points to nothing in the extract that suggests that Ms. Hielke had any contact with UMMC’s corporate compliance department before providing information to Equifax. She directs us to nothing in the record extract that shows that it was Ms. Hielke’s practice to consult with UMMC corporate compliance department before responding to requests from Equifax in cases in which the employee’s resignation letter contained no references to a supervisor’s animus against her. Similarly, Miss Packett references nothing in the extract that could give rise to an inference that Ms. Hielke was in

¹³ In her deposition, Ms. Felder denied that this was the case but a fact-finder would have been free not to believe her.

contact with Ms. Felder regarding Ms. Packett or indeed, that they were even aware of one another's existence.

If we assume for purposes of analysis that there is a dispute of material fact as to whether Ms. Felder wished to retaliate against Ms. Packett, there is no evidence in the record that supports the notion that her suppositional animosity could be attributed to UMMC itself, Equifax, or Ms. Hielke. Ms. Packett's contention to the contrary is an exercise in the "hypothetical or conjectural" that at best suggests that "there is some metaphysical doubt as to the material facts." *Beatty v. Trailmaster Products*, 330 Md. at 737. More is required to defeat a motion for summary judgment.

Ms. Packett's second argument is based on the fact that at the hearing on the motion for summary judgment, UMMC's counsel incorrectly asserted her client had forwarded Ms. Packett's corporate compliance email to Equifax. This was wrong,¹⁴ and when Ms. Packett's counsel pointed this out, UMMC's counsel conceded the error. That UMMC's lawyers made a misstatement of fact during a hearing it is not a basis to conclude that UMMC itself was retaliating against Ms. Packett when it responded to the claim for unemployment benefits.

¹⁴ There is an affidavit in the extract from Ms. Hielke that lists what she provided to Equifax and that list does not include Ms. Packett's corporate compliance email.

B. THE FAIR EMPLOYMENT PRACTICES ACT CLAIM

As to her claim under FEPA, Ms. Packett argues that UMMC had notice of her disability and failed to accommodate her. She supports her argument by citing to the fact that UMMC’s Leave Management personnel approved her FMLA request for intermittent leave, and she notified her supervisor that she had submitted FMLA paperwork relating to her hypertension. Thereby, she reasons, she put UMMC on notice of her disability and UMMC was required to provide accommodations. Its failure to do so violated the FEPA.

The summary judgment court concluded otherwise. The court held that Ms. Packett’s FMLA request did not qualify as a request for reasonable accommodation. The court additionally concluded that Ms. Packett did not communicate to UMMC her desire for accommodation, and she “knowingly” worked more than forty-hour weeks without informing her supervisor of the need for accommodation.

To establish a prima facie case for a failure to accommodate claim, the employee must show: (1) that he or she was an individual with a disability; (2) that the employer had notice of his or her disability; (3) that with reasonable accommodation, he or she could perform the essential functions of the position; and (4) that the employer failed to make such accommodations. *Adkins v. Peninsula Regional Medical Center*, 224 Md. App. 115, 139 (2015), *affirmed*, 448 Md. 197 (2016). The employee bears the burden to “communicate . . . to his employer his disability and his desire for an accommodation for that disability.” *Adkins*, 224 Md. App. 115 at 140. Additionally, the court noted that a request for “FMLA leave does not, alone, constitute an adequate request for an accommodation.” *Id.* at 142.

The record does not support Ms. Packett’s assertion that she had notified UMMC of her need for workplace accommodation for her hypertension and migraines. Ms. Packett’s FMLA leave request does not suffice as a request for reasonable accommodation. While the request included her doctor’s recommendation of accommodation (i.e., no more than forty hours per week), the request was not for accommodation but for leave. We recognize that Ms. Packett need not submit a formal request, but she needed to inform her supervisor, *i.e.* Ms. Felder, that working more than forty hours per week threatened her health. Notice to Ms. Felder that her request for FMLA *leave* had been approved does not satisfy her burden. Nor do we accept the fact that Ms. Packett’s work beyond forty hours a week establishes UMMC’s liability. Ms. Packett worked those additional hours without comment or complaint. UMMC cannot be faulted for Ms. Packett’s failure to ask for accommodation.

C. THE WRONGFUL DISCHARGE CLAIM

To succeed in Maryland on a claim for wrongful discharge, “the employee must be discharged, the basis for the employee’s discharge must violate some clear mandate of public policy, and there must be a nexus between the employee’s conduct and the employer’s decision to fire the employee.” *Yuan v. Johns Hopkins University*, 452 Md. 436, 452 (2017 (quoting *Wholey v. Sears Roebuck*, 370 Md. 38, 50-51 (2002)). The summary judgment court concluded that the record established that Ms. Packett failed to present evidence to satisfy any of these criteria.

When an employee intentionally resigns, he or she will normally not have a claim for wrongful termination. *See Williams v. Maryland Glass Corp.*, 134 Md. 320, 330–31 (1919). Ms. Packett argues that she was constructively discharged. Constructive discharge occurs “when an employer deliberately causes or allows the employee’s working conditions to become so intolerable that the employee is forced into an involuntary resignation.” *Williams v. Maryland Dep’t of Human Resources*, 136 Md. App. 153, 178 (2000) (quoting *Beye v. Bureau of National Affairs*, 59 Md. App. 642, 650 (1984)). The summary judgment court concluded that Ms. Packett pointed to no evidence that supported an inference that she had been constructively discharged. In arguing otherwise, Ms. Packett points to her deposition testimony in which she stated: “From September-mid-September [2015] on is when I felt as though I was being mistreated and retaliated upon.” But the standard for constructive discharge is not subjective but objective. Additionally, Ms. Packett points to the corrective actions and the information contained in her email to UMMC’s corporate compliance department. The only matter that is raised in that email that we haven’t already discussed was the fact that, although she was informed of her promotion to SCN II in mid-June, it was not until September that her salary was increased. But in the email, Ms. Packett also stated that, after she contacted UMMC’s human relations department for assistance, she was advised what steps to take to resolve the issue and that, if she did not feel comfortable in taking them, an HR representative would handle the matter for her. She told HR that she preferred to handle the matter herself and that her salary increase was processed in mid-September.

None of this in our view comes close to establishing a factual dispute as to whether UMMC made working conditions for Ms. Packett “so intolerable” that she had no choice but to resign. The summary judgment court was correct when it concluded that there were no disputes as to material fact as to this issue and that UMMC was entitled to a judgment in its favor. Because Ms. Packett failed to show that she had been constructively discharged, there is no reason for us to address the other elements in her wrongful discharge claim.

**THE JUDGMENT OF THE CIRCUIT
COURT FOR BALTIMORE CITY IS
AFFIRMED. APPELLANT TO PAY
COSTS.**