2016 IL App (4th) 150425-U

NO. 4-15-0425

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
April 20, 2016
Carla Bender
4th District Appellate
Court, IL

CATHERINE VOS,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Sangamon County
THE DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES,	)	No. 10MR141
	)	
Defendant-Appellee.	)	Honorable
	)	John P. Schmidt,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Harris concurred in the judgment.
Justice Turner dissented.

ORDER

¶ 1 *Held:* In this action for retaliatory discharge under article 15 of the State Officials and Employees Ethics Act (5 ILCS 430/15-5 to 15-40 (West 2008)), genuine issues of material fact preclude summary judgment in defendant's favor, namely, (1) whether plaintiff voluntarily resigned as opposed to resigning at defendant's direction and (2) if defendant directed plaintiff to resign, thereby discharging her, whether a protected activity by plaintiff was a contributing factor in the discharge and whether defendant would have discharged her in the absence of the protected activity.

¶ 2 Pursuant to article 15 of the State Officials and Employees Ethics Act (Ethics Act) (5 ILCS 430/15-5 to 15-40 (West 2008)), plaintiff, Catherine Vos, sued defendant, the Illinois Department of Healthcare and Family Services, for retaliatory discharge. The circuit court granted defendant's motion for summary judgment. Plaintiff appeals.

¶ 3 In our *de novo* review (see *Pielet v. Pielet*, 2012 IL 112064, ¶ 30), we find genuine issues of material fact precluding summary judgment in defendant's favor, namely, (1)

whether plaintiff voluntarily resigned as opposed to resigning at defendant's direction and (2) if defendant directed plaintiff to resign, thereby discharging her, whether a protected activity by plaintiff was a contributing factor in the discharge and whether defendant would have discharged her in the absence of the protected activity (see 5 ILCS 430/15-20 (West 2008)). Therefore, we reverse the circuit court's judgment, and we remand this case for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 In support of its motion for summary judgment, defendant submitted various unsworn documents as well as two discovery depositions: the deposition of plaintiff, taken on July 1, 2011, and the deposition of Terri Shawgo, taken on October 18, 2011. We will concentrate on the depositions, summarizing the parts that seem relevant to arguments the parties make in their briefs.

¶ 6 A. Plaintiff's Deposition

¶ 7 1. *Her Job and What It Entailed*

¶ 8 From February 2004 to September 2008, defendant employed plaintiff as a health facility surveillance nurse. Through its health facility surveillance nurses, defendant provided an auditing service for the federal government, to make sure it was not being defrauded in Medicaid and Medicare billings. Plaintiff's job was to go to long-term care facilities in Illinois and review their records, to see if the services for which the facility had billed the federal government "met [the client's] diagnosis and acuity needs."

¶ 9 These audits followed rather than preceded payment. The facility, the nursing home, electronically transmitted to the federal government a reimbursement claim, which listed services the facility had rendered to the resident over the preceding three months; and by plaintiff's understanding, payment by the federal government was instantaneous. Three to six

months after payment, plaintiff went to the facility to check the records and retroactively approve or deny the payment—or more precisely, to recommend approval or denial, because defendant's bureau chief of long-term care, Kelly Cunningham, made the final decision as to whether a claim was approved or denied. In performing an audit, plaintiff referred to a federal publication, the Minimum Data Set (MDS) Manual, which, in chapter three, described the documentation a facility had to present in support of its claim for reimbursement.

¶ 10 The audits that defendant performed were otherwise known as "MDS surveys," and plaintiff described an MDS survey as follows:

> "The team arrives that is assigned to the facility by region. We are told which records to review. The records are distributed among the team of nurses. Records are requested and presented by the long-term care facility. Nurses review the records. They use a score sheet to determine whether or not the documentation presented meets the definition of the MDS policy manual. Then they can either A, approve, or B, deny the claim for payment."

¶ 11 The pecuniary consequence of denial could be rather severe. Assume, for example, that a facility billed the federal government for pressure ulcer prevention that the facility claimed it had provided to a resident. This would be an extra service, for which the federal government would pay extra, over and above the base rate. Afterward, in an audit, the facility would have to provide the health facility surveillance nurse sufficient documentation to justify its bill for pressure ulcer prevention. If the documentation failed to satisfy chapter three of the MDS manual, defendant was supposed to deny the claim. And in the event of a denial, the repercussions would go beyond the extra charge for that particular resident. Plaintiff testified:

> "They would be denied the charge and they would not only be denied for the charge for that section for that client, they would be denied the charge for all residents in that home who are under pressure ulcer prevention for the entire billing period which is three months.
>
> So for instance let's just say pressure ulcer prevention paid $20 a day and you have a hundred clients living in the facility. You take the $20 times a hundred and multiply that out for the 3 month period."

¶ 12 Although, by the time of the denial, the federal government already would have paid the facility for pressure ulcer prevention, the federal government could calculate the amount of the overpayment and "take that out of their next payment cycle." Plaintiff explained:

> "I believe if we denied claims, however, we did not when I was there employed, they would go to Springfield who would do a process review and if they agreed with the denial of the nurse on the ground then it would go to the federal government who would then through some sort of actuary purposes [*sic*] figure out how much money was owed back to the government."

¶ 13 2. *Alleged Routine Fudging*

¶ 14 During the four years plaintiff worked for defendant as a health facility surveillance nurse, she never once saw a claim denied. She testified:

> "A. You can deny a claim in theory.
>
> Q. What do you mean [']in theory[']?

A. We never denied anyone."

¶ 15 According to plaintiff's testimony, another indication that the audits were rigged was that a surveillance nurse could ask a facility "for specific documentation up to three times." Defendant's attorney asked her:

"Q. Is there a problem with asking for documentation three different times?

A. Yes.

Q. What is that problem?

A. They would have an opportunity potentially to fabricate documentation. On the third ask often we were told they would call their consultants who would discuss over the phone what documentation needed to be presented so they can be approved for claim payment."

¶ 16 3. *Insufficient Documentation of Pressure Ulcer Prevention in an Audit in Rockford*

¶ 17 In August 2008, plaintiff did an MDS survey at a nursing home in Rockford, and in the case of one resident, the only documentation the facility provided in support of its charge for pressure ulcer prevention was a shower sheet signed by a certified nurse's aide. A "shower sheet," as the name suggested, was simply a sheet of paper memorializing the fact that the client had been given a shower. The shower sheet was insufficient documentation of pressure ulcer prevention; it did not satisfy the MDS manual. Although plaintiff was able to determine that the client was at risk of developing pressure ulcers, the facility provided no plan of care. She explained: "They have to provide documentation that proves that they did a professional assessment of the client, they came up with a plan of care for the client, they implemented the

plan of care, and they evaluated whether it was successful or unsuccessful." The documented treatments had to include "a turning schedule," "nutritional and hydration intervention," and the application of dressings, ointments, and medication.

¶ 18 In the absence of any documentation that such treatments had been given to the client, plaintiff commented, in the audit form, that (1) the documentation of pressure ulcer prevention was insufficient and (2) she was writing this comment in defiance of her supervisor's order. Plaintiff testified:

> "I believe the comment I put on the comment section of the form was that I was told to receive the information as services rendered, but all I received was a shower sheet which in my opinion did not meet the standards for medical care professionals or preventions by the MDS standards but I was informed by my interim PSA [(Public Service Administrator)] Lori Wojciechowski to accept the form on that date at that time.
>
> * * *
>
> Q. Are you ever overruled by your supervisors regarding whether something meets the standards of the MDS?
>
> A. We were continuously.
>
> * * *
>
> Q. And your supervisor told you that it met the standards.
>
> A. She told me to accept the documentation.
>
> Q. Did you understand that to mean that she was telling you that it met the standards?

A. She told me to accept the documentation.

Q. But you weren't sure whether her telling you to accept the documentation was illegal or not.

A. She had made a call to Springfield when I refused the documentation and she came back and told me to accept the documentation.

Q. You didn't answer my question. Did you feel that it was illegal for her to overrule you and tell you to accept the documentation?

A. In my impression, yes.

Q. And what rule or regulation or law was the Department or your supervisor violating at that point?

A. They were making me sign a documentation [*sic*] that the charges leveed [*sic*] for this client were accurate and complete. I did not agree with that. On my signature I was telling the federal government, yes, I agree, all the documentation is here, your payment is secure, the documentation meets the standards.

Q. What is the rule or law or regulation that they violated?

A. The premise of the MDS in my opinion is to gauge the level of care, quality of care and cost of care as well as access to care. *** My problem was cost. They were being charged for services that in the documentation presented to me never were delivered. Therefore, they were charging for services knowingly

knowing [*sic*] they had not provided the services. It would be like me taking my car in for repair and being charged for repair that was never provided. In my opinion that would be fraudulent.

Q. But you told me you couldn't be sure whether or not they actually provided this service that they may have been charging for.

A. Because all the documentation they gave me was a shower sheet. I had asked three times for specific documentation for pressure ulcer prevention. It was never produced. There's a premise in nursing. If it's not documented, it's not done.

* * *

Q. You believe that being forced to take the shower sheet constituted a violation of a rule or a law or regulation?

A. Yes.

Q. And that rule or law or regulation is?

A. Medicaid fraud.

Q. So by, [defendant] by accepting this sheet committed Medicaid fraud. Is that what I understand?

A. I believe they're complicit in Medicaid fraud.

Q. Well, I didn't ask if they were complicit. I asked if they committed Medicaid fraud.

A. Yes.

Q. Okay. Is there any other reason, anything else about this MDS live audit that was illegal on behalf of [defendant] other than accepting this sheet?

A. No, but they didn't like my comments.

Q. They didn't like your comments. Was that illegal not to like your comments?

A. No, but they told nurses they're not allowed to write comments any more.

Q. Was it illegal to tell nurses they weren't allowed to write comments any more?

A. No, but the section for comments was still there."

¶ 19 Apropos this question of illegality, plaintiff remembered that, as a graduate student, she heard a presentation by an assistant Attorney General, who warned the class that dishonesty in audits could be criminal misconduct. Plaintiff testified:

"We had assistant [A]ttorney [G]enerals come to the facility where I was doing education, University of Illinois [at] Chicago and they said auditors are expected when they certify documentation to be accurate and complete and if they sign those forms and they're not accurate and complete they too can be complicit in Medicaid and Medicare fraud.

Q. And what form were they talking about when they—

A. They were talking about a generalization of forms for auditing.

Q. Okay. So who at the Attorney General's Office told you this?

A. Oh. That was back in 1998, 1999. It was a female from the Assistant Attorney General's Office out of Chicago. Tall woman, gray hair. Cannot remember her name."

¶ 20 4. *Plaintiff Gets in Trouble With Defendant for Allowing the Correction of a Medical Chart, and While Defendant Ponders What Discipline To Impose, She Makes Inquiries About Resigning*

¶ 21 In February 2008, plaintiff was assisting with an MDS survey at a nursing home in Algonquin, and when auditing a resident's records, she noticed that the resident was being treated for fibromyalgia. She requested to interview the resident because she was concerned that the resident's pain was not being adequately managed. During the interview, plaintiff noticed the resident was being treated with a pain patch, which had been cut in half, although pain patches were not supposed to be cut into smaller pieces. The medication chart indicated that a pain drug, Lyrica, had been administered to the resident in doses of 15 milligrams and that after only 10 days the drug had been discontinued because of adverse side effects. Plaintiff knew that Lyrica came only in capsules of 25 milligrams and that, generally, the dosage was 75 milligrams (and indeed, as it turned out, the prescribed dosage for that resident was 75 milligrams). Looking at the medication chart, she assumed that the 1 in the 15 was a hastily drawn 7. She told a nurse employed by the facility, Joyce Manzullo, that she should consider correcting the error, and Manzullo did so. At the beginning of the survey, plaintiff's boss had told the survey team to "just tag the transcriptions errors and have them correct them, have Joyce correct them."

¶ 22 Plaintiff admitted, however, that, under the standards of the nursing profession, any correction of a transcription error should be done by drawing a line through the error and

writing a note above the correction. Muzillo did not make the correction that way: she just drew a stem, changing the 1 to a 7. And plaintiff did not check the alteration to see whether it was properly done, nor did she report the alteration to defendant.

¶ 23 Immediately afterward, another nurse employed by the facility, Donna M. Kinsey, who had witnessed the changing of the medication chart, complained to the executive director of the facility, Kathryn Woods, who in turn reported the incident to defendant (we are getting this information from a report of investigation by defendant's inspector general, dated August 8, 2008; the report is attached to plaintiff's deposition as exhibit No. 7). According to Kinsey, plaintiff had told her that if she corrected the error in the medication chart, she (plaintiff) would "look the other way"—that is, the error would not be documented in the survey—whereupon Muzzillo corrected the error in the chart and said "it was no longer a problem." Muzzillo corroborated that plaintiff had indeed said she would "look the other way," but in Muzzillo's opinion, correcting the dosage amount was not a big deal because the resident no longer was taking Lyrica. In her deposition, plaintiff denied saying she would "look the other way," and she drew a distinction between a mere "transcription error," which this was, and a "medication error," which would have had to be reported.

¶ 24 The inspector general seemed to agree that the error was only in what was written down, not in the dosage actually given to the client. The inspector general's report says: "The dosage amount had been erroneously transcribed when it was written on the Resident Medication Profile from the prescription." Because the alteration of the medical chart made the chart more accurate, it was impossible to point to a specifically applicable policy that had been violated. As Kelly Cunningham, the long-term care bureau chief, said on April 24, 2008, in response to a question from the inspector general: " '[G]iven the type of medication error this was (not

actually an error in administration, but rather an error in documentation), the fact that no hospitalization was required (our standard for mandatory reporting by the facility to us) and the fact that the drug had been discontinued prior to the review, you would not find anything in the packet which specifically addresses the incorrect documentation specifically [*sic*].' " Plaintiff "admitted she exercised bad judgment when she failed to document the error in her write-up and when she failed to inform the lead surveyor Public Service Administrator Lori Wojciechowski of her omission." But plaintiff "also added that there is no specific policy to follow in this situation and she used her own judgment."

¶ 25 Nevertheless, the inspector general's report concluded:

> "Notwithstanding the fact that the resident was not injured and the medication had been discontinued would not in and of itself excuse [plaintiff's] action. As [a registered nurse, plaintiff] knew or should have known that her instructions to the [Eastgate Manor registered nurses] to change a resident's medical chart were an unacceptable practice. [Plaintiff's] behavior during and immediately after the change was indicative that she knew that her instructions were inappropriate. The correction of the wrong dosage should have been addressed by following [defendant's] policy and procedures.
>
> [Plaintiff's] aggregate behavior constitutes a violation of the Governor's Executive Order #4 (1970), *Conduct Unbecoming a State Employee*. [Plaintiff] holds a position of trust, and is expected to conduct herself in a responsible manner, refraining

from conduct that could adversely affect the confidence of the public." (Emphasis in original.)

¶ 26 Defendant's inspector general also concluded that plaintiff had violated "Healthcare and Family Service Employee Handbook (EH-605.1) #3 *Inappropriate behavior or discourteous treatment* and #5 *Unsatisfactory work performance or neglect in the performance of duties*." (Emphases in original.) (The record does not appear to contain a copy of either the executive order or the cited provisions of the employee handbook.)

¶ 27 On September 15, 2008, plaintiff received a notice of a pre-disciplinary conference, scheduled for September 18, 2008. According to the notice, defendant was charging her with violating two provisions of the employee handbook: (1) "Section 605.1A (#4), Failing or refusing to follow Department policy or supervisory instructions"; and (2) "Section 605.1A (#5), Unsatisfactory work performance or neglect in the performance of duties." Specifically, defendant accused plaintiff of violating those provisions by doing the following: "[O]n February 26, 2008, [plaintiff], while conducting an annual survey at the Eastgate Manor (EM) Supportive Living Facility (SLF), allowed a nurse at the facility to change a resident's medical chart in order to cover up a documentation error. [Plaintiff] also failed to inform the lead surveyor of the error as well as her omission of [the] error on her write-up."

¶ 28 On September 16, 2008, at 9:33 a.m., Wojciechowski e-mailed plaintiff as follows:

"Per our discussion that you are resigning effective today:

Please fax me a signed copy of your resignation with the effective date to my fax. Please put the original in the mail marked

confidential. Please mail your ID and any keys (filing cabinet) you may have to the regional office."

¶ 29 At 9:56 a.m., plaintiff replied to Wojciechowski by e-mail, stating as follows:

"I guess my comment was premature. I spoke with my Union Rep and Union Lawyer and I have been advised to attend the hearing previously scheduled in Rockford on Thursday the 18th at 1:00 PM. I will be attending with Union Representation."

¶ 30 Plaintiff attended the pre-disciplinary conference on September 18, 2008. Remzi Jaos, her representative from the Illinois Nurses Association, attended by telephone. Wojciechowski and a note-taker, Shirley Witcup, also were in attendance. According to a "Pre-Disciplinary Meeting Report," signed by Wojciechowski on the line labeled "Employee's Supervisor/Convenor's signature, the charges were read to plaintiff, and plaintiff requested a copy of the Governor's executive order No. 4, which was "mentioned in the write up." Wojciechowski told plaintiff she "would ask about that information." It was agreed that, by September 25, 2008, at 5 p.m., plaintiff would provide a written rebuttal to the charges.

¶ 31 Under the heading "Recommendations and Final Decision," the "Pre-Disciplinary Meeting Report" gives the following preprinted instructions:

"After conducting the pre-disciplinary meeting, the employee's supervisor or convener must recommend what disciplinary action is warranted, if any. The employee's supervisor or convener should take into account the degree to which the charges are proven based upon the evidence, any extenuating or mitigating circumstances, and the employee's work record. While

> discipline is to be imposed progressively, the severity should be based upon the severity of the infraction. For purposes of consistency, the employee's supervisor or convener must also consider the level of discipline that has been imposed on other employees in similar situations. NOTE: The proposed level of discipline is not to be discussed with the employee and/or representative during the pre-disciplinary hearing."

Then, next to the preprinted sentence "Briefly describe below (attach copies if possible) any previous discipline which has been imposed on this employee," the word "None" is written.

¶ 32 After the predisciplinary conference, plaintiff did two things. First, she started packing up some of her personal things in her office and taking them home, because (to quote from her deposition) she "could tell by the meeting that they were not going to let this fall" and that they "would probably put [her] on a suspension." At that time, Jaos "suggested [to her] they might do a suspension while they investigated, but he said it was not a terminable offense."

¶ 33 Second, plaintiff wrote a rebuttal, in which she explained the difference between a transcription error, which did not have to be reported, and a medication error, which had to be reported. (The written rebuttal is not in the record, and ultimately, as we will discuss, plaintiff never submitted the rebuttal to defendant. In her deposition, however, she recounted what she had written in the rebuttal.) The error in the medication chart, she argued, was merely a transcription error; it was not a medication error. The resident actually had received the prescribed dosage of Lyrica, 75 milligrams; a nurse merely had used bad penmanship when writing the number down. The resident no longer was taking Lyrica at the time the transcription error was corrected, and the resident never had to be hospitalized, and never suffered any harm,

as a result of taking Lyrica for those 10 days in the past. Hence, under nursing standards, it was unnecessary to report the alteration of the medication chart, by plaintiff's understanding.

¶ 34 At 9 a.m. on September 22, 2008, Jaos telephoned plaintiff and told her he had not had a chance yet to read her rebuttal, but he advised her to resign immediately. Defendant's attorney asked plaintiff:

> "Q. What did [Jaos] tell you?
>
> A. [']Cathy, this is Remzi.['] [']Oh. Remzi, did you get my rebuttal?['] [']No, didn't have time to read it. Had my kids this weekend. Listen, we got a problem.['] [']What's that?['] [']They're look[ing] at doing a 30 day suspension with termination to follow based on this medication error.['] I interrupted him. [']Remzi, it's a transcription error. That's a totally different thing than a medication error. If you had read my rebuttal you would know there is no such policy and transcription errors are handled differently in nursing. You are not a nurse. Let me explain it to you.['] [']Don't have time for that,['] he said. [']I need you to resign. I've talked to my good friend, Terry [*sic*] Shawgo, *** over at [the Department of Central Management Services]. Listen, Cathy, you're in trouble. They're coming after you and they're coming after you hard. They're telling me they're going to have your nursing license revoked unless you resign today.['] I interrupted Remzi[:] [']Remzi, you need to read the rebuttal. I can resubmit it to you.['] [']No, you don't understand. They're coming

after you and they're coming after you hard. I will put the attorney for [the Illinois Nurses Association], Alice Johnson, on the phone. I will make sure they do not come after your license. You need to terminate your employment.['] [']Remzi,['] I said, [']this is not a reportable offense to the Illinois Department of Professional Regulation. It's a transcription error. You need to talk to a nurse.['] [']Don't have time for that,['] he said. [']You're sick. If we grieve this, this could take years. I'm not sure we can win it and I'm not sure your health can stand it. You're in best [*sic*] to severance [*sic*] your employment with the State of Illinois.['] I said, [']Remzi [—'], he hung up."

¶ 35 Defendant's attorney asked plaintiff:

"Q. You were aware that you could file a grievance if they tried to terminate you. Isn't that right?

A. Yes

Q. And you signed the resignation knowing that.

A. Remzi Jaos would not call me back and when I asked him about the grievance he said (sigh) a grievance would take a long time and with your health I don't think you could survive it. You're a sick person. If you don't leave today, they're going after your nursing license. If not for this, then something else. You don't understand. They'll make things up to get your nursing license."

¶ 36 On September 22, 2008, at 10:20 a.m., Terri Shawgo, the bureau chief of defendant's office of labor relations, e-mailed Jaos a resignation form. This e-mail from Shawgo is in the record. It says only: "Per our conversation, please see attached. Thank you." The attached fill-in-the-blank form, entitled "Resignation," reads as follows:

> "I, _____, voluntarily resign my position of _____ with the Illinois Department of Healthcare and Family Services effective immediately. I waive all reinstatement rights, and further agree not to seek or accept employment with the Illinois Department of Healthcare and Family Services at any time in the future."

Then the form has a line for "Employee Signature" and a date, followed by lines for witnesses' signatures.

¶ 37 At 11:29 a.m. on September 22, 2008, plaintiff e-mailed Shawgo, asking her: "To Whom, Where (Please supply FAX Number), and at What time do I FAX this [resignation form]. Also who is to act my Witness [*sic*]? Please advise."

¶ 38 At 11:48 a.m., Shawgo replied: "You can fax your resignation to me anytime today, at the fax number shown at the bottom of my email. Since you have emailed me your intention to sign and fax the document, you should not need a witness. If you choose to have a witness, you can ask anyone you choose." Then Shawgo gave instructions about "turn[ing] in all state equipment prior to your departure today."

¶ 39 At 12:01 p.m., plaintiff e-mailed Shawgo again, asking how she could collect her vacation time, personal time, travel vouchers, and a fee she had paid to take an upcoming class.

Plaintiff testified: "I needed to know what was going to happen to me, what could I expect. I was trying to make a determination."

¶ 40 At 12:15 p.m., Shawgo e-mailed answers to those questions.

¶ 41 5. *Plaintiff Signs the Resignation Form*

¶ 42 Plaintiff went to lunch on September 22, 2008. She had not yet signed the resignation form. She was still waiting for the Illinois Nurses Association to call her back. Jaos was not returning her calls, and the executive director of the association was away, in Washington, D.C. When plaintiff returned from lunch, she found her immediate supervisor, Wojciechowski, in her cubicle. Although Wojciechowski did not at that time threaten plaintiff with discipline, she told plaintiff that she, plaintiff, was going to resign that day, and she insisted that plaintiff sign the resignation form, which was on plaintiff's desk. Plaintiff did so.

¶ 43 Defendant's attorney asked plaintiff:

> "Q. So getting back to my question, why did you sign the resignation?
>
> A. My boss, immediate boss, PSA Lori Wojciechowski, had arrived at my desk when I was at lunch. She was sitting in the visitor chair in my cubicle. She was going through my things on my desk and in my cabinet and in my bookcase. She told me that I was resigning that day and that she needed my keys to make sure I did not take any state policies, procedures or equipment.
>
> Q. What exactly did she say when she told you you were resigning today?

A. She said[:] ['Y]ou are leaving the State of Illinois today. You are resigning today.[']

Q. All right. And did she threaten you with discipline?

A. She started to carry my files to her car. *** She made numerous trips to her car with my files and binders.

Q. Did she threaten you with discipline?

A. She came back to my desk. I had the resignation form sitting in the corner. She looked at it and she said[:] ['Y]ou haven't signed the resignation form.['] I said I did not. And she said[:] [']You need to sign that form.[']

Q. Did she threaten you with discipline on September 22nd of 2008?

A. No. Her statements were ['Y]ou're resigning today,['] repeatedly.

Q. Did she threaten you with termination on September 22nd, 2008?

A. No. She said[:] ['Y]ou're resigning today[,'] and then she started to break down and said[:] ['I] can't do this any more.[']

* * *

Q. Lori carried some boxes to the car. Isn't that what you told me?

A. No. She carried her own, my personal records, policies, and binders to her car. Not to my car, to her car.

Q. Okay.

A. That was prior to signing the resignation.

* * *

Q. Okay. Do you believe that you were forced to resign?

A. Yes.

Q. Why do you believe that?

A. I was threatened. I was coerced. I was harassed, and I was told to sign the resignation form four times by my boss, Lori Wojciechowski."

¶ 44 At 3 p.m. on September 22, 2008, at Wojciechowski's urging, plaintiff signed the resignation form. It was the resignation form Shawgo had provided Jaos.

¶ 45 The next day, September 23, 2008, plaintiff telephoned the Illinois Nurses Association. She testified:

"Remzi Jaos put the lawyer and the other representatives on the phone. I told them that I thought I had been harassed, coerced and intimidated into signing a resignation form and I wanted this fixed, it was wrong, and he said[:] ['N]obody threatened you[,'] and I said[:] ['R]emzi, you are fully aware that you told me that Terry [*sic*] Shawgo threatened me[,'] and he said no such thing happened and he told the unemployment officers the same thing."

¶ 46 Eventually, the executive director of the Illinois Nurses Association, Susan Swart, returned plaintiff's call. According to plaintiff, Swart told her: " 'I'm so sorry, we will get your job back, please don't sue us.' "

¶ 47 B. Terri Shawgo's Deposition

¶ 48 Terri Shawgo was defendant's chief of labor relations, and one of her duties was to consult with managers and supervisors regarding any labor-related question, including discipline.

¶ 49 Shawgo was not well-acquainted with plaintiff, having seen her only once or, at the most, twice. But Cunningham sent Shawgo some information about plaintiff, and Shawgo forwarded the information to defendant's office of internal investigations, which eventually issued a report of its investigation. After reading the report, Shawgo discussed disciplinary charges with Cunningham.

¶ 50 Because defendant did not have many nurses in its employment, disciplinary problems among them were infrequent. Consequently, there was no precedent that Shawgo could use in formulating a recommendation as to the fitting level of discipline for plaintiff. There just were no comparable cases. Also, Shawgo was hesitant to make a determination before plaintiff submitted her rebuttal.

¶ 51 One day, when Shawgo was in Chicago, attending a negotiation for a collective bargaining agreement with the nurses, Jaos asked her what action defendant intended to take against plaintiff. This was sometime between the date when defendant issued its notice of the predisciplinary conference and the date when plaintiff resigned. Shawgo replied to Jaos that because she had not researched the matter yet, she really could not give him a level of discipline. He asked her, then, to give him "a broad range." Shawgo testified: "And I said, you know, suspension and up to discharge I said because I really don't know, I don't want to tell you something that later on its more than what I say. So I left it open-ended. He asked me if it

would be—there would be any referral [to the Department of Professional and Financial Regulation] and I said I believe that we had to."

¶ 52 Plaintiff's attorney asked Shawgo:

"Q. Did [defendant] ever refer the matter to the [D]epartment of [P]rofessional [R]egulation?

A. No. Because she resigned.

Q. How does that go into play? Why is the resignation significant to not turning the matter over to the [D]epartment of [P]rofessional [R]egulation?

A. We would have referred it to [P]rofessional [R]eg if she was continuing on our employment, because we had an obligation to report. That's my understanding. When she leaves, it's no longer our issue. She's not employed with us anymore.

* * *

Q. And did you ever tell [Remzi Jaos] that if she resigned the matter wouldn't be referred to [the] [D]epartment of [P]rofessional [R]egulation?

A. Yes. He asked me would we continue with the disciplinary action and referral process, and I told him that I believed that if she resigned, then, no, we wouldn't have a reason to. I did say that.

Q. All right. Now do you know whose responsibility it would be to refer something to the [D]epartment of [P]rofessional

[R]egulation? And I understand you say you don't have cases like this, but would that have been your responsibility, or would that have been somebody who was one of her supervisor's responsibility?

A. I'm not sure. I hadn't gotten that far. I'm not sure.

Q. I understand.

Were you glad that she resigned, personally?

A. No. I didn't have any personal feelings about it.

* * *

Q. How did you correspond with [Jaos]?

A. E-mail. He wanted a draft resignation if we had anything we could provide him and I gave him a copy of one of those that we had on file. And then she asked me questions after that. ***

* * *

Q. Do you believe that your office put any pressure on [plaintiff] to resign?

A. Absolutely not.

Q. And so if I understand your testimony correctly, and please correct me if I'm wrong, because I understand what you're telling me is your view of things is it was [plaintiff's] decision to resign and it was purely voluntary on her part?

A. Yes."

¶ 53 C. The Summary Judgment

¶ 54 In its order of April 20, 2015, which granted defendant's motion for summary judgment, the circuit court stated:

> "2. The uncontested evidence establishes that Plaintiff voluntarily resigned her position on September 22, 2008.
>
> 3. Accordingly, Plaintiff has not set forth facts that would permit a reasonable trier of fact to conclude that Defendant took a retaliatory action against Plaintiff within the meaning of Section 15-10 of the *** Ethics Act [(5 ILCS 430/15-10 (West 2008))]."

¶ 55 II. ANALYSIS

¶ 56 A. A Reasonable Belief That the Law Has Been Violated

¶ 57 1. *Defendant's Claim of Procedural Forfeiture*

¶ 58 Section 15-10(1) of the Ethics Act (5 ILCS 430/15-10(1) (West 2014)) forbids a state agency to "take any retaliatory action" against a state employee for "disclos[ing] or threaten[ing] to disclose to a supervisor or to a public body an activity, policy, or practice of any officer, member, State agency, or other State employee that the State employee reasonably believes is in violation of a law, rule, or regulation."

¶ 59 Defendant notes that, in plaintiff's initial brief, she "has failed to present any argument or support that she met the first element of a claim under section 15-10 of the Ethics Act, *i.e.*, that she had an objectively reasonable belief that defendant violated a law, rule, or regulation." See 5 ILCS 430/15-10(1) (West 2014). Instead, plaintiff waits until her reply brief to argue her objectively reasonable belief. Because plaintiff's initial brief lacks any discussion of this first element and instead discusses only the element the trial court found to be lacking,

namely, a "retaliatory action" (5 ILCS 430/15-5 (West 2014)), defendant claims that, under Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013), plaintiff "has waived the matter for review"—by which we understand defendant to mean she has *forfeited* any argument that she had the reasonable belief described by section 15-10 (see *People v. Hauschild*, 226 Ill. 2d 63, 72-73 n.1 (2007)).

¶ 60 Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) provides as follows: "Points not argued are waived" (that is to say, forfeited) "and shall not be *raised* in the reply brief, in oral argument, or on petition for rehearing." (Emphasis added.) To "raise" a point means "to bring [it] up for consideration or debate." Merriam-Webster's Collegiate Dictionary 963 (10th ed. 2000). Plaintiff brings up no points in her reply brief; instead, she only replies to points that defendant brought up in its preceding brief. For example, defendant asserts, in its brief, that the record lacks evidence that plaintiff had the reasonable belief described by section 15-10(1), and plaintiff responds, in her reply brief, that the record does indeed contain such evidence. This is exactly what a reply brief is supposed to do: reply to arguments in the appellee's brief. "The reply brief, if any, shall be confined strictly to replying to arguments presented in the brief of the appellee and need contain only Argument." Ill. S. Ct. R. 341(j) (eff. Feb. 6, 2013)).

¶ 61 Therefore, we reject defendant's claim of procedural forfeiture. *People v. Whitfield*, 228 Ill. 2d 502, 514 (2007) ("It would be unfair for us to require an appellant, when writing his or her opening brief, to anticipate every argument that may be raised by an appellee."); *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 378-79 (2003) (denying the defendants' motion to strike an argument raised for the first time in the plaintiffs' reply brief, because the argument was a reply to arguments made by the defendants).

¶ 62 2. *Defrauding the Federal Government*

¶ 63 a. Plaintiff's Inability, in Her Deposition, To Cite Any Particular Law, Rule, or Regulation That Was Violated

¶ 64 According to defendant, plaintiff "repeatedly testified [in her deposition] that she did not know of any law, rule, or regulation that was violated," and all she could do was claim, "generally," that "[defendant's] action was wrong."

¶ 65 Plaintiff responds, in her reply brief, that nothing in section 15-10(1) of the Ethics Act (5 ILCS 430/15-10(1) (West 2008)) requires her to "point to a specific rule that was actually violated." Instead, as she understands the statute, she "must show that she believed that there was a violation of a rule or policy." She identifies a single instance when she believed a law was being violated: in August 2008, her supervisor, Wojciechowski, ordered her to accept a shower sheet as documentation of pressure ulcer prevention, but plaintiff refused to accept the shower sheet as sufficient documentation because, as she explained to Wojciechowski at the time, it failed to substantiate that the resident had received all the services that pressure ulcer prevention entailed. Looking at the evidence in the light most favorable to plaintiff (see *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008)), we infer that plaintiff's objection challenged a practice, a *modus operandi*, by which defendant routinely gave facilities a pass during audits. Plaintiff testified that although "[y]ou can deny a claim in theory," "[w]e never denied anyone." This time, however, the documentation was so flimsy that plaintiff was unwilling to go along.

¶ 66 The import of plaintiff's objection to Wojciechowski was that if she, as an auditor, certified that the documentation was sufficient, as Wojciechowski (and, ultimately, someone higher up, in Springfield) had ordered her to do, she would fraudulently induce the federal government to make a payment, or to refrain from recouping a payment, which was unsupported

by the documentation that the federal government, in its written policies, required. In the audit report to the federal government, which was a "public body" (5 ILCS 430/15-5(2) (West 2008)), plaintiff wrote a dissenting comment about pressure ulcer prevention, stating that, although defendant represented in the report that there was sufficient documentation of pressure ulcer prevention, that representation was untrue. The gist of her dissenting comment was that the federal government was being deceived into paying more than it should, because under the MDS Manual, the provider was entitled to payment for a service only if the service was sufficiently documented—even if the provider actually had rendered the service. This was the understanding under which the federal government, providers, and auditors operated. As everyone understood, requiring documentation to substantiate charges was the only way to protect the integrity of the system.

¶ 67 Now, it is true that, in her deposition, plaintiff was unable to cite title 42, section 1320a-7b(a)(2), of the United States Code (42 U.S.C. § 1320a-7b(a)(2) (2012)), which criminalized "knowingly and willfully mak[ing] or caus[ing] to be made any false statement or representation of a material fact for use in determining rights to [any benefit or payment under a Federal health care program]," and it is true that she was unable to cite cases, such as *People ex rel. Hartigan v. E & E Hauling, Inc.*, 153 Ill. 2d 473, 490 (1992), which set forth the elements of fraud. But section 15-10(1) of the Ethics Act (5 ILCS 430/15-10(1) (West 2008)) does not require the state employee to be a legal encyclopedia. Section 15-10(1), by its terms, does not require the employee to be able to cite any particular law, rule, or regulation, as plaintiff correctly points out. Rather, all section 15-10(1) requires is reasonable belief on the employee's part that some law has been or will be violated. To be precise, the statute requires that, at the time the employee "[d]isclose[d] or threaten[ed] to disclose" the "activity, policy, or practice," he

or she "reasonably believe[d]" that the "activity, policy, or practice" was "in violation of a law, rule, or regulation." *Id*.

¶ 68 Most people not only reasonably believe but positively know that duping someone, by a false representation, to pay out money is illegal, although they would be incapable of citing a specific statute or case that says so. Even if, merely by living, plaintiff had managed not to pick up the knowledge that deceiving the federal government into paying money was against the law, that knowledge was imparted to her in graduate school. An assistant Attorney General told her and her classmates at the University of Illinois, in 1998 or 1999: "[A]uditors are expected when they certify documentation to be accurate and complete and if they sign those forms and they're not accurate and complete they too can be complicit in Medicaid and Medicare fraud."

¶ 69 We are unconvinced that all reasonable persons would expect plaintiff to disbelieve this warning by the assistant Attorney General. "[I]f reasonable persons could draw different conclusions or inferences from undisputed evidence, summary judgment must be denied." *Kleinwort Benson North America, Inc. v. Quantum Financial Services, Inc*., 285 Ill. App. 3d 201, 209 (1996).

¶ 70 b. The Final Authority of the Bureau Chief as to the Sufficiency of Documentation

¶ 71 Defendant argues: "[Plaintiff] claimed at various times that [defendant] was committing fraud by accepting documentation or overruling her determination that the facility did not meet survey standards, *but* she readily admitted that [defendant's] bureau chief ultimately decides what documents meet those standards." (Emphasis added.) The "but" makes no sense. If defendant could "overrul[e] her determination that the facility did not meet survey standards,"

it necessarily would follow that someone superior to plaintiff made the final decision as to whether the facility met survey standards.

¶ 72 B. The "Retaliatory Action" of Discharge, Disguised as Resignation

¶ 73 Again, section 15-10(1) of the Ethics Act (5 ILCS 430/15-10 (West 2008)) forbids "[a]n officer, a member, a State employee, or a State agency" to "take any *retaliatory action* against a State employee" for engaging in any of the protected activities listed in that section. (Emphasis added.)

¶ 74 Section 15-5 (5 ILCS 430/15-5 (West 2008)) in turn defines "retaliatory action" as follows: " 'Retaliatory action' means the reprimand, discharge, suspension, demotion, denial of promotion or transfer, or change in the terms or conditions of employment of any State employee, that is taken in retaliation for a State employee's involvement in protected activity, as set forth in Section 15-10."

¶ 75 The circuit court found a lack of evidence that defendant actually had discharged plaintiff—the only kind of "retaliatory action" plaintiff alleged in her complaint. Rather, according to the court, "[t]he uncontested evidence establishe[d] that Plaintiff voluntarily resigned her position on September 22, 2008."

¶ 76 Plaintiff contends, however, that a reasonable trier of fact would not necessarily regard her resignation as voluntary, given the following evidence:

> "[Plaintiff] was under the impression that if she did not resign her employment would be terminated. Even worse, if she didn't resign [defendant] was going to seek to have her stripped of her nursing license. [Plaintiff's] understanding of where she stood with [defendant] came from two different sources. First, her union

> representative specifically had told her that they were going to terminate her. Second, her immediate supervisor repeatedly advised her that she was going to resign. Mr. [*sic*] Wojciechowski's statements were not made in the form of a question but rather as a declaration. Ms. Wojcichowski, prior to [plaintiff's] ever signing the resignation form, removed items from her cubicle and bookshelves and secured them."

¶ 77 Plaintiff compares herself to the plaintiff in *Hinthorn v. Roland's of Bloomington, Inc.*, 119 Ill. 2d 526 (1988), who signed a resignation form at the direction of a vice-president. The plaintiff in *Hinthorn* had suffered two previous injuries at work, and the third time she complained of a work-related injury, the vice-president told her she had been getting injured too often and had been costing the company too much money (in worker's compensation, presumably). *Id.* at 528-29. He "direct[ed] her to sign a 'Voluntary Resignation' form," explaining to her that, by signing the form, she "would be able to leave her employment with [the company] under her own free will." *Id.* The plaintiff signed the form, "[understanding] that she would lose her job if she did not sign it." *Id*. at 529.

¶ 78 When the plaintiff sued the company for retaliatory discharge (it was illegal to fire someone for claiming worker's compensation (*Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 181 (1978)), the company denied it had even discharged her; instead, according to the company, she had voluntarily resigned, as anyone could see by her signature on the resignation form. *Hinthorn*, 118 Ill. 2d at 529.

¶ 79 The supreme court was unconvinced. It said:

> "There are no magic words required to discharge an employee: an employer cannot escape responsibility for an improper discharge simply because he never uttered the words 'you're fired.' So long as the employer's message that the employee has been involuntarily terminated is clearly and unequivocally communicated to the employee, there has been an actual discharge, regardless of the form such discharge takes.
>
> That [the] defendant directed [the] plaintiff to sign a 'Voluntary Resignation' form also does not alter the allegation that [the] plaintiff was involuntarily discharged. That [the defendant] required the official termination to be by the stroke of the employee's own pen does not shield it from liability for the act of discharge. At most, [the defendant] was offering [the] plaintiff a way to save face, to keep her resume clear of a discharge. But from the alleged circumstances it is clear [the] plaintiff was not being given an actual opportunity to continue her employment [with the defendant]: had she refused to sign the form, she would have been fired in any event." *Id.* at 531.

¶ 80 Arguing that *Hinthorn* is distinguishable, defendant compares plaintiff to the employee in *Addis v. Exelon Generation Co.*, 378 Ill. App. 3d 781, 785 (2007), who, without ever being asked to do so, resigned after receiving negative comments about her job performance. A few days after handing in her letter of resignation, the plaintiff in *Addis* followed up with a letter rescinding her resignation. *Id.* Then, a few days later, a human

resources representative informed her she was being fired for refusing to perform some of her job duties. *Id.* at 786. Thus, there was a resignation, followed by a rescission of the resignation, followed by a discharge.

¶ 81 The plaintiff sued her former employer for retaliatory discharge, on the theory that her former employer had discharged her for reporting safety concerns. *Id.* at 789. She lost in a jury trial. *Id.* at 784.

¶ 82 On appeal, the plaintiff compared herself to the plaintiff in *Hinthorn* (*id.* at 788), but the comparison did not strike the appellate court as apt. The appellate court said:

> "We are not persuaded by [the] plaintiff's reliance on *Hinthorn*. Here, there is no evidence or even any hint of evidence that [the] plaintiff was forced to resign as in *Hinthorn*. In fact, [the] plaintiff was the first to mention resigning when she told [her boss] after their meeting that she would hand in her resignation the next day. [The] [p]laintiff did so by submitting a letter that she composed and typed herself, which stated that she was resigning. *Hinthorn* does not support [the] plaintiff's position." *Id.* at 788-89.

The appellate court found sufficient evidence to support a finding that the letter of resignation was a voluntary resignation rather than a disguised discharge (*id.* at 788) and that the subsequent, actual discharge was for inferior work rather than for reporting safety concerns (*id.* at 798).

¶ 83 Defendant argues that plaintiff is comparable to the plaintiff in *Addis* for the following reasons:

> "[Plaintiff] sought resignation, twice, on her own, and explicitly denied that she did so under any threat of discipline from

> [defendant]. [Citations.] [Plaintiff] admits that Wojciechowski simply told her to sign the resignation form on September 22, 2008, after [plaintiff] twice sought resignation, and did not threaten or force her to sign the resignation form. [Citation.] Only Jaos allegedly informed her that this might occur [citation] and both he and Schawgo dispute there ever was a threat of termination [citations]. There is no evidence that anyone at the Department threatened [plaintiff] with discipline or termination."

¶ 84 Actually, the only point of resemblance between this case and *Addis* is that "plaintiff was the first to mention resigning." *Addis*, 378 Ill. App. 3d at 789. But unlike the employer in *Addis*, defendant drafted the resignation form. And unlike the supervisor in *Addis*, the supervisor in this case, Wojciechowski, ordered plaintiff to sign the resignation form—in fact, Wojciechowski repeatedly ordered plaintiff to sign the resignation form as she confiscated plaintiff's work materials, carrying them out to the car (according to plaintiff's deposition).

¶ 85 Granted, ever since September 15, 2008, when she received the notice of the predisciplinary conference, plaintiff appeared to be on the verge of resigning. She went back and forth. Judging by e-mail correspondence between Wojciechowski and plaintiff on September 16, 2008, plaintiff had told her she was "resigning effective today," to quote Wojciechowski's e-mail. Wojciechowski asked plaintiff to "fax [her] a signed copy of [her] resignation with the effective date" and to mail her the "original," along with her identification card and any keys. But plaintiff responded by e-mail a few minutes later: "I guess my comment was premature"; she wrote that she now intended to attend the pre-disciplinary conference, which was scheduled for September 18, 2008.

¶ 86 Apparently, it was understood that plaintiff would not be considered to have resigned until she signed a resignation form: the "unequivocal act of relinquishment" would be her signing of the form (*Piecuch v. Cook County Sheriff's Merit Board*, 312 Ill. App. 3d 78, 86 (2000)). On September 22, 2008, Shawgo e-mailed plaintiff a blank resignation form "per our conversation." Plaintiff e-mailed her back, asking to whom and to what fax number she should send the resignation form, at what time she should fax it, and who should witness her signature. Shawgo responded, *inter alia*: "You can fax your resignation to me anytime today, at the fax number shown at bottom of my email. Since you have emailed me your intention to sign and fax the document, you should not need a witness." Then—not having signed the resignation form as of yet—plaintiff e-mailed Shawgo back, asking her about vacation time, personal time, travel vouchers, deferred compensation, and a fee she had paid to take an upcoming class. Plaintiff testified she wanted to hear back from the Illinois Nurses Association before signing away her job.

¶ 87 The record does not appear to contain an e-mail from plaintiff in which she herself said she was resigning (as opposed to Wojciechowski and Shawgo remarking, in e-mails to plaintiff, that she had told them she was going to resign). Nevertheless, in her e-mailed replies to Wojciechowski and Shawgo, plaintiff acquiesced to their remarks that she had told them she was going to resign. "Where there is an express acquiescence in a written statement, evidence of such statement and acquiescence is admissible as an admission." 32 C.J.S. *Evidence* § 541 (2008); see also McCormick on Evidence § 262 (3rd ed. 1984) ("[I]f a party receives a letter containing several statements, which he or she would naturally deny if untrue, and states a position as to some of the statements but fails to comment on the others, this failure will usually be received as evidence of an admission to those omitted."). One would expect that if plaintiff

had *not* told Wojciechowski and Shawgo she was going to resign, she would have said so in her e-mailed replies to them. Instead, she asked them how to go about resigning and what would be some of the collateral consequences of resigning.

¶ 88 Consider, then, the following hypothetical, which assumes a retaliatory motive on the part of the employer. See *Hoffelt v. Illinois Department of Human Rights*, 367 Ill. App. 3d 628, 638 (2006) (a *prima facie* case of retaliatory discharge can be established by showing a short time span between the protected activity and the adverse personnel action). An employee has expressed to the employer an intention to resign. It is understood between the employee and the employer that the resignation will occur through the employee's execution of a resignation form drafted by the employer. The employer gives the employee the blank resignation form, but the employee delays or vacillates, and just does not get around to signing it yet. As the resignation form lies, unsigned, on the employee's desk, the boss unexpectedly shows up and, in retaliation for a protected activity in which the employee engaged a month ago, unilaterally begins clearing out the employee's work area and, while doing so, repeatedly orders the employee to sign the resignation form. The employee signs the form, as ordered. Could this employee possibly be entitled to a remedy, under the Ethics Act, for retaliatory discharge?

¶ 89 To arrive at the answer to that question, we begin with an important principle of statutory construction: a court may not "read into the statute exceptions, limitations, or conditions which the legislature did not express." *Hines v. Department of Public Aid*, 221 Ill. 2d 222, 230 (2006). Section 15-10 of the Ethics Act (5 ILCS 430/15-10 (West 2008)) forbids a state agency to take "any retaliatory action" against an employee for engaging in a protected activity, and section 15-5 (5 ILCS 430/15-5 (West 2008)) defines "retaliatory action" as including discharge. When forbidding a state agency to discharge an employee for engaging in a

protected activity, section 15-10 does not use language to the effect of "except if the employee intends to resign anyway." And we decline to read that exception into the statute. See *Hines*, 221 Ill. 2d at 230. If plaintiff intended to resign sometime anyway, that fact *might* be relevant to the issue of damages (although it would seem a matter of speculation when, if ever, she would have signed the resignation form), but it would not prevent her from being reinstated. See 5 ILCS 430/15-25 (West 2008) (remedies).

¶ 90 In sum, notwithstanding the evidence that plaintiff was seriously considering resigning and maybe was even strongly inclined to do so—notwithstanding the evidence that she was lingering at the threshold, so to speak—the record also contains some evidence that, in the manner of *Hinthorn*, defendant "required the official termination to be by the stroke of the employee's own pen." *Hinthorn*, 119 Ill. 2d at 531. Or, to continue with our metaphor, there is some evidence that defendant, through Wojciechowski, overcame plaintiff's hesitation by shoving her out the door. If the boss shows up unexpectedly and begins emptying the employee's office, all the while ordering the employee, four times, to sign a resignation form and asserting, "You are resigning," the employee could perceive a "clear[] and unequivocal[]" "message" that she "was not being given an actual opportunity to continue her employment," and she could feel compelled to put the best face on it by signing the resignation form, as the boss was ordering her to do. *Id.*

¶ 91 It is true that, when asked if she was glad plaintiff had resigned, Shawgo answered: "No. I didn't have any personal feelings about it." And yet, arguably, a preference is apparent in the resignation form she sent for plaintiff's signature, in which plaintiff was to "waive reinstatement" and to "agree not to seek or accept employment with [defendant] at any time in the future." Wanting plaintiff to refrain from seeking employment with defendant ever again fits

in with wanting her to leave defendant's employment. Also, arguably, a preference is apparent in Shawgo's offer to refrain from reporting plaintiff to the Department of Professional and Financial Regulation if plaintiff resigned. In any event, regardless of whether Shawgo herself had a preference, Wojciechowski appeared to have one if plaintiff's account were believed. We conclude, then, that defendant has failed to show the lack of a factual issue when it comes to discharge versus voluntary resignation.

¶ 92 C. "Would Have Taken the Same Unfavorable Personnel Action in the Absence of [the Protected] Conduct"

¶ 93 In the final section of its argument, defendant invokes section 15-20 of the Ethics Act (5 ILCS 430/15-20 (West 2008)), which provides as follows:

> "A violation of this Article may be established only upon a finding that (i) the State employee engaged in conduct described in Section 15-10 and (ii) that conduct was a contributing factor in the retaliatory action alleged by the State employee. It is not a violation, however, if it is demonstrated by clear and convincing evidence that the officer, member, other State employee, or State agency would have taken the same unfavorable personnel action in the absence of that conduct."

¶ 94 Defendant insists, on the one hand, that it "would have taken the same actions even if [plaintiff] could establish that she undertook activity protected by the Ethics Act." Simultaneously, defendant argues, on the other hand: "There also is no evidence that anyone in the Department threatened discipline or forced [plaintiff] to retire [*sic*]."

¶ 95 The only "unfavorable personnel action" that plaintiff alleges in her complaint is the termination of her employment on September 22, 2008. (Her complaint also mentions the

"pre-disciplinary conference," but that conference was not, in itself, an "unfavorable personnel action.") Defendant cannot both deny that it took this "unfavorable personnel action" against plaintiff (that is to say, terminated her employment) and at the same time claim it "would have taken the same unfavorable personnel action in the absence of [the protected] conduct." 5 ILCS 430/15-20 (West 2008). Such an argument is logically incoherent and self-contradictory.

¶ 96 III. CONCLUSION

¶ 97 For the reasons stated, we reverse the circuit court's judgment, and we remand this case for further proceedings.

¶ 98 Reversed and remanded.

¶ 99 JUSTICE TURNER, dissenting.

¶ 100 I respectfully dissent. As defendant points out, plaintiff was given the opportunity to submit a rebuttal to the charges read to her at the predisciplinary conference, but she had not done so at the time she signed the resignation form. Thus, plaintiff resigned in writing before any determination had been made on what, if any, discipline would be imposed. Given these circumstances, plaintiff cannot demonstrate defendant would have discharged her in the absence of a protected activity. I would, therefore, affirm the trial court's award of summary judgment in favor of defendant.