UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHAREE MILLER,

Plaintiff,

v.

SHAWN BREWER, ROBIN HOWARD, and RENATA PATTON

Defendants.
_____/

Case No. 15-cv-14164
Hon. Sean F. Cox
Magistrate Judge Stephanie Dawkins Davis

PLAINTIFF SHAREE MILLER'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiff Sharee Miller, a prisoner at Women's Huron Valley Correctional Facility ("WHV"), was terminated from her job as a Prisoner Observation Aide ("POA") because she did not stand idly by while witnessing mentally ill inmates housed in segregation undergo multiple instances of abuse, neglect, and inhumane treatment. Instead, in an effort to bring the misconduct to the attention of her superiors, Miller followed the internal WHV procedure for reporting violations, but she was repeatedly ignored by WHV officials while the abuse continued. Indeed, instead of addressing her concerns, WHV fired Miller because she told professional advocates about the abhorrent abuse she witnessed for months.

Defendants seek summary judgment by asserting (1) Miller has not established a retaliation claim under the First Amendment, (2) she cannot seek protection under the Whistleblower's Protection Act ("WPA"), (3) qualified immunity protects them from liability, and (4) injunctive relief would be improper.

Defendants' Motion for Summary Judgment ("Motion") should be denied for multiple reasons. First, Defendants wholly fail to address the authority under which Miller's First Amendment retaliation must be analyzed, relying exclusively on a conclusory and unsupported assertion that their POA confidentiality rule is a "legitimate prison regulation." As applied to Miller in this situation, it clearly is not. Second, the applicable tests used to determine whether an individual is an

employee, when applied to the work Miller performed, demand that this Court find that Miller has presented issues of fact regarding whether she was an employee entitled to protection. Third, qualified immunity does not shield Defendants from liability because Miller's rights were clearly established and unreasonably violated. Finally, Miller seeks injunctive relief, to which qualified immunity does not apply.

II. STATEMENT OF FACTS

A. The Prisoner Observation Aide Program

It is the policy of MDOC to place suicidal or self-injurious prisoners alone in a cell under one-on-one direct and continuous observation. *See generally*, **Exhibit A**, POA Training PowerPoint. Instead of relying solely on corrections staff to observe the at risk prisoners, MDOC employs POAs who are specially selected, specifically trained, and carefully screened prisoners, like Miller. *Id.* p. 3. MDOC has used POAs since approximately 2012, and WHV piloted the POA program for the MDOC in Michigan. *See* **Exhibit B**, R. Patton Dep., 22:3 – 22:6; 23:13. Defendant Patton is the only Corrections Program Coordinator ("CPC") who was responsible for the POA program at WHV. *Id.*, 16:21-23.

Pursuant to their job duties, POAs continuously observe the mentally ill prisoner, log their observations at regular intervals, and contact a corrections officer or other staff if the mentally ill prisoner is in distress, or some other emergency arises. *See* **Exhibit C**, Prisoner Observation Rules and Procedures, at

1. POA rules and procedures require each POA to maintain appropriate confidentiality of her observations. *Id.* at 3. The confidentiality clause provides, in pertinent part:

> Away from the Job
>
> [ ] Confidentiality is very important in prisoner observation. Relevant information should only be shared with staff or the next shift of Prisoner Observers. *Inappropriate* sharing of information about the observed prisoner will be grounds for immediate removal from the job. Prisoner Observers are only to discuss what the assigned prisoner says or does or what is said/done to the prisoner with housing staff on the unit or relief observers (staff or prisoner).

Id. (emphasis added). Thus, the confidentiality provision authorizes removal of any POA who shares information "*inappropriate[ly]*." However, Defendant Patton does not specifically explain the meaning of the confidentiality provision when training POAs. *See* **Exh. B**, at 117:13-25 and 118:1-3.

Miller began working as a POA at WHV in March 2014. *See* **Exhibit D**, S. Miller Dep., 23:1-6. Miller received job training as a POA before assuming her responsibilities. *Id*. at 11:11-13. In exchange for her services as a POA, Miller received wages. *Id*. at 9:4-6.

B. Miller witnessed abuse, neglect, and inhumane conditions suffered by mentally ill inmates

1. The Bielby Incident

During a POA shift in spring 2014, Miller witnessed corrections officers abuse and mistreat a mentally ill inmate, Rochelle Bielby ("Bielby"). *Id*. at 23:14-18. After Bielby became upset and lost her temper, corrections officers stripped Bielby of her clothes and restrained her. *Id*. at 26:16-18; **Exhibit E**, Critical Incident Report. WHV officials cuffed her wrists and ankles, and, using a chain, hog-tied her wrists and ankles together behind her back with her knees bent while leaving her lying on her stomach. **Exh. D**, at 31:8-14. Bielby was naked, tied, and alone in her cell. *Id*. at 34: 1-18. Bielby repeatedly cried out that she was in pain, which caused Miller to be concerned for Bielby's well-being, mainly because, if Bielby had fallen from her bed, she would have no way to catch herself while restrained in the hogtied position. *Id*. at 36:1-5. According to Miller's recollection of the event, officers stated that Bielby had to stay in that position because Bielby had struggled and fought her restraints. *Id*. at 34:19-36:1-5.

Bielby was left naked, hog-tied, and screaming out in pain for four hours and fifty-two minutes. *Id*. at 39:3-25; **Exh. E**, at 001491. Miller observed Bielby sliding off her bed with her extremities bound. **Exh. D**, at 39:3-25. Bielby could have been seriously injured if she hit the cement floor without the ability of her limbs to break her fall. Although she notified a sergeant about this danger, Miller was told dismissively that Bielby would be fine. *Id*. at 42:5-11.

Disturbed by this abuse and mistreatment of a mentally ill inmate, Miller made several attempts to address the incident with authorities at WHV. *Id.* at 41:3-23, 42:16-44:13, 68:14-69:10. None of these attempts proved fruitful. For example, at a POA meeting the next day, Miller complained to Defendant Patton, who supervised the POA program. *Id.* at 42:16-44:13. Patton indicated that the officer's conduct was appropriate and that Miller was mistaken. *Id.* at 43:22-44:2. Based on this apathetic response, Miller sent a kite (or written request) to Defendant Howard, but received no response. *Id.* at 44:3-15. Because WHV would not take her claims seriously, Miller was left with no other avenue to report the abuse within WHV, and was forced to contact advocates outside WHV for aid.

Acting on Miller's behalf, persons and organizations outside WHV reported the abuse to public officials and agencies who initiated investigations. Although Defendant Howard knew Miller had reported the mistreatment of Bielby outside WHV, she met with Miller but did not reprimand her. *Id.* 48:2-15. Instead, Defendant Howard simply encouraged Miller to tell the truth. *Id.*

2. The Martin Incident

In mid-June 2014, Miller again witnessed disturbing abuse and mistreatment of a mentally ill and/or disabled inmate. Compl., Dkt. No. 1, at Page ID # 6. This time, Miller was acting as a POA for inmate Darlene Martin ("Martin"). *Id.* Martin was not eating and could not operate the sink in her cell to drink water due

to her weakened condition. *See* **Exh. D**, at 50:16-52:9. In an effort to drink water, Martin tried to splash water out of the toilet in her cell. *Id.* But, claiming that her actions made a mess, corrections officers turned off all water to Martin's cell. *Id.* at 51:10-12.

Miller informed officers that Martin was begging for water. *Id.* at 52:2-9. Every few hours a tiny paper cup with a very few ounces of water was placed in Martin's cell, but she remained dehydrated. *Id*. at 53:13-18. Over the course of several days as a POA for Martin, Miller sent multiple kites to Defendants Patton and Howard regarding Martin's condition. *Id*. at 56:6-9. Miller reported that Martin was not eating, denied water, and appeared to be in distress. Again, Miller's kites went unanswered. *Id.* at 56:16-18.

Martin's condition grew worse. Miller observed Martin foaming at the mouth, vomiting, naked, and unresponsive to verbal cues. *Id*. at 57:15-19. Equally as concerning, the nurse on duty seemed indifferent about Martin's overall health condition, only stopping in Martin's cell occasionally to administer a shot. *Id.* at 56:19-57:1. The nurse did not take Martin's vital signs, did not attempt to engage Martin in any conversation, and did not appear concerned about Martin's deteriorating condition. Compl., Dkt. No. 1, at Page ID # 7; **Exhibit F**, K.

McDonnell Deposition, 30:14-15 (Q. Did you take vitals at that time? A. No.").[1] While Martin was obviously undernourished, dehydrated, and listless in semi-consciousness, vomiting, and foaming at the mouth, the nurse went about her business as usual with no apparent alarm. Compl., Dkt. No. 1, at Page ID # 8.

Prior to incarceration, Miller worked as a CNA and had a history of working with the mentally ill. **Exh. D**, at 58:1-15. Troubled by the inadequate medical attention Martin was receiving, Miller reported her observations to the nurse. Compl., Dkt. No. 1, at Page ID # 8. The nurse simply stated she knew what she was doing and dismissed Miller's concerns. *Id.*

Approximately one hour after Miller reported her concerns for Martin, Martin went into cardiac arrest and was rushed to the hospital. *Id.*; **Exhibit G**, Martin's Medical Records from St. Joseph Mercy Hospital, at 001266 (noting Martin "was apparently seen by a prison inmate having some breathing difficulties and by the time the patient was found in her cell, she was unresponsive in her bed").[2] Placed on life support, Martin was not expected to live. **Exhibit H**, Martin's Discharge Summary Medical Records from St. Joseph Mercy Hospital, at

[1] Nurse McDonnell testified she does not "take vitals every single time [she] see[s] a patient." **Exh. F**, at 18:3-4.

[2] "The [Martin]'s downtime was unclear; however, patient is showing evidence of intrahepatic failure as well as renal failure, indicating that the patient may have been down for *a significant amount of time*." **Exh. G**, at 001267 (emphasis added).

001327. Although she survived, Martin is in a vegetative state as a result of the incident.[3] *Id.* ("Her mental status did improve but not to her baseline. She improved enough to eat though she has to be fed. She speaks but she does not follow commands.").

Miller feared other mentally ill women at WHV were at risk of similar abuse and mistreatment. Miller was, therefore, compelled to contact professional advocates outside WHV to ask for help. *See* **Exh. D**, at 71:25-72:5.

C. Miller is Terminated From Employment As a POA

On July 16, 2014, Defendant Patton informed Miller that she was being terminated from her position as a POA at the directive of Defendant Howard. Compl., Dkt. No. 1, at Page ID # 9; **Exhibit I**, Email from Howard, 000428; **Exhibit J**, Email from Patton, 000430. Written documentation regarding her termination, signed by Defendant Patton, states:

> Prisoner Miller 326122 began working as a prisoner observation aid on 3/5/2014. On 7/11/2014, classification was notified by Inspector Howard that prisoner Miller has engaged in sharing confidential information regarding prisoners she had observed with persons other than staff or a relieving POA. According to Prisoner Observation Rules and Procedures signed by prisoner Miller on 4/8/2014 Section "Away from the Job" Paragraph 1 it states that "Confidentiality is very important in prisoner observation. Relevant information

[3] Martin's estate has filed suit against WHV and certain WHV officials in connection with the Martin incident. The lawsuit, *Martin v. MDOC, et. al.,* Case No. 2:17-cv-11845, is presently pending in this Judicial District.

> should only be shared with staff of the next shift of prisoner Observers. Inappropriate sharing of information about the observed prisoner will be grounds for immediate removal from the job. Prisoner Observers are only to discuss what the assigned prisoner says/does or what is said/done to the prisoner with housing staff on the unit or relief observes (staff or prisoner)." Based on information received from Inspector Howard's office, it has been determined that prisoner Miller did not comply with the above confidentiality statement, thus she is being removed from the POA position effective immediately.

Exhibit K, Miller Termination Notice.

Miller never shared confidential information "inappropriately." Rather, Miller was terminated in retaliation for reporting the abuse and mistreatment she witnessed to persons outside WHV after she was unable to get help through internal channels. Compl., Dkt. No. 1, at Page ID # 9. First, Miller reported the hogtying of inmate Bielby to WHV officials. *See* **Exh. D**, at 41:3-23, 42:16-44:13, 68:14-69:10. No action was taken except to encourage Miller to report *truthfully* to outside advocacy groups. *Id.* at 42:16-44:13; **Exhibit L**, R. Howard Dep., at 59:17-20 (". . . I always want to encouraged [sic] prisoners to report at the time. I want them to report factually and that was a conversation also; make sure you're making truthful statements."). Second, Miller reported the neglect of inmate Martin, to WHV officials. **Exh. D**, at 68:14-18. No action was taken, and Martin now exists in a vegetative state. Critically, although WHV officials knew Miller reported both incidents outside of WHV, Defendants did not terminate Miller for

external reporting until Miller reported Defendants' mistreatment of Martin. **Exh. I**, at 000428. Defendants conspired to remove Miller from her POA position because Defendants knew that WHV would be exposed to serious legal liability if the public gained knowledge of Defendants' treatment of Martin, and such unwanted exposure would be damning. **Exh. J**, at 000430.

III. ARGUMENT[4]

A. Defendants' Motion on Count I Should be Denied Because Defendants Retaliated Against Miller Based Upon Her Exercise of Her Constitutional Rights

To prevail on a claim under 42 U.S.C. § 1983, a plaintiff must establish a deprivation of "a right secured by the Constitution or laws of the United States" by "a person acting under color of state law." *Redding v. St. Eward*, 241 F.3d 530, 532 (6th Cir. 2001). A First Amendment retaliation claim is established if

> (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by the plaintiff's protected conduct.

Thaddeus–X v. Blatter, 175 F.3d 378, 394 (6th Cir. 1999) (en banc). Retaliation against a prisoner based upon her exercise of a constitutional right

[4] Summary judgment is appropriate where the record show "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

violates the Constitution. *Brown v. Crowley*, 312 F.3d 782, 787 (6th Cir. 2002). Because of the difficulty in obtaining direct evidence of an official's retaliatory conduct, circumstantial evidence, including the temporal proximity of the alleged adverse action and the prisoner's protected conduct, can sustain a First Amendment retaliation claim. *Thaddeux-X*, 175 F.3d at 399; *see Holzemer v. City of Memphis*, 621 F.3d 512, 525-26 (6th Cir. 2010).

1. Miller Engaged in Constitutionally Protected Speech By Reporting the Mistreatment and Neglect of Prisoner Bielby and Prisoner Martin by WHV Officers

Defendants' analysis of Miller's First Amendment retaliation claim begins and ends with the conclusory statement that Miller did not engage in First Amendment protected conduct because she "violated a legitimate prison regulation by disclosing confidential information learned from her POA assignment[.]" (Motion, Page ID # 990) (internal citation omitted). Defendants, however, overlook the basic precept of law that protected conduct is an individual right protected by the Constitution with which the government generally cannot interfere. *Thaddeus-X*, 175 F.3d at 387. The Supreme Court has stressed that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution[]" and that "[w]hen a prison regulation or practice offends *a fundamental constitutional guarantee*, federal courts will discharge their duty to protect constitutional rights." *Turner v. Safley*, 482 U.S. 78, 84 (1987) (emphasis

added). Defendants fired Miller because she spoke out on an issue of public concern, and as applied to Miller in this situation, the POA confidentiality rule cannot, consistent with the First Amendment, justify Defendants' retaliation.

Determining whether Miller's speech was protected by the First Amendment requires application of the tests articulated by the Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Turner v. Safley*, 482 U.S. 78 (1987). As explained below, Miller's claim satisfies both the *Pickering* and *Turner* standards.

a) Miller's Speech is Protected Under the *Pickering* Test

Because Defendants terminated Miller from her job as a POA based on her speech, First Amendment analysis may begin under the *Pickering* test. Although WHV, as an employer of POAs, has an interest in regulating its employees' speech, the Supreme Court declared in *Pickering* that this interest must be balanced against the employee's interest as a citizen in commenting on matters of public concern. *Pickering*, 391 U.S. at 568. So long as an employee is speaking regarding a matter of public interest in her individual capacity, she must face only those speech restrictions that are necessary for her employer to operate efficiently and effectively. *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006) (internal citation omitted). In *Delvin v. Kalm*, 531 Fed. App'x. 697 (6th Cir. 2013), the Sixth Circuit Court of Appeals explained the *Pickering* analysis as follows:

> There are four parts of a successful claim that "a public employer has violated the First Amendment by firing a public employee for engaging in speech." [*Rodgers v. Banks*, 344 F.3d 587, 596 (6th Cir. 2003).] *First*, the plaintiff's speech is only entitled to protection if it "addressed a matter of public concern." *Id*. (citing *Connick v. Myers*, 461 U.S. 138, 143 (1983)). *Second*, the plaintiff must show that the speech was made "outside the duties of employment." *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006). *Third*, "the court must balance the interests of the public employee, 'as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Rodgers*, 344 F.3d at 596 (quoting *Pickering v. Bd. Of Educ*., 391 U.S. 563, 568 (1968)). *Fourth*, the plaintiff must show [that] his "speech was a substantial or motivating factor" in the employer's decision to terminate him.

Id. at 704 (emphasis added). Under *Pickering*, Miller engaged in constitutionally protected speech.

First, Miller was voicing concerns regarding the health and safety of Bielby and Martin, who were being mistreated by WHV officers, as a citizen on a "matter of public concern." Whether speech relates to a matter of public concern under *Pickering* depends on the "content, form, and context" of the communication, and whether it concerns an issue of "political, social, or other concern to the community." *Connick*, 461 U.S. at 146. There is no question that the issue of inmate abuse is a matter of social concern to many citizens and organizations in Michigan—particularly, as in this case, when attempts to report the abuse internally go ignored and unaddressed.

Second, it is undisputed that Miller corresponded about inmate abuse outside of her official employment duties as a POA. Miller did not have a duty as a POA to report abuse to outside authorities; she spoke out because nothing was being done internally to address the abuse she witnessed. *See Fox v. Traverse City Area Pub. Sch. Bd. of Educ.*, 605 F.3d 345, 349 (6th Cir. 2010) (stating that when a police officer "reported his employer's illegal acts to an outside law enforcement agency, rather than solely to his supervisors, . . . those statements were obviously not made pursuant to [his] official duties") (citing *See v. City of Elyria*, 502 F.3d 484, 493 (6th Cir. 2007)).

Third, Miller's interest in speaking out about mistreatment of inmates outweighs WHV's interest in "promoting the efficiency of the public services it performs through its employees." *Leary v. Daeschner*, 228 F3d 729, 737 (6th Cir. 2000) (quoting *Pickering*, 391 U.S. at 568)). The Supreme Court has recognized as pertinent considerations "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

Defendants admit that "the POA confidentiality agreement does not preclude a prisoner from filing complaints to outside agencies about alleged prisoner

mistreatment[,]" but rather *only* "prevent[s] a POA from disclosing confidential information." (Motion, Page ID # 991). Defendants further argue that the confidentiality rule is intended to "keep [inmates'] protected health information confidential[.]" (Motion, Page ID #991).

However, the POA confidentiality rule provides only that "*[i]nappropriate* sharing of information about the observed prisoner will be grounds for immediate removal from the job." (emphasis added). The confidentiality rule does not discuss what "inappropriate" sharing of information means, nor does it draw any distinction between "protected health information" and information that may be publicly disclosed. Further, Defendant Patton did not advise POAs about the meaning of "inappropriate" sharing during POA training. *See* **Exh. B**, at 117:24-118:3 ("I don't really go through it, this point specifically.") Moreover, when pressed to explain what "inappropriate sharing of information about the observed prisoner" meant, Defendant Patton testified it referred to "[t]alking about the prisoner's appearance or maybe referring to the way . . . they don't bathe, maybe the way they smell, or maybe like if they are talking to someone that's not there . . ." *Id.* at 117:3-117:9.

To the extent the purpose of the POA confidentiality agreement is to shield inmates' health information, it is puzzling that Defendant Patton, who was in charge of the POA program at WHV, had absolutely no knowledge of this distinct

purpose. *See Id.* at 15:12-22. Thus, given Defendant Patton's understanding that the POA confidentiality agreement was intended to protect arguably trivial information from disclosure by POAs, Defendants' attempt to characterize the POA confidentiality agreement as "further[ing] the aim of HIPAA" rings hollow. (Motion, at Page ID #991-92).

In addition, Defendants assert that "[a] POA revealing information learned in her role, such as the prisoner's mental or physical limitations, vulnerabilities, or impairments, *could* be used against the prisoner and result in safety and security issues." (Motion, at Page ID # 992) (emphasis added). It is, however, well established that "*speculative concerns* of workplace disharmony are insufficient to overcome [an employee's] interest in speaking as a private citizen on a matter of public concern." *Whitney v. City of Milan*, 677 F.3d 292, 298 (6th Cir. 2012) (emphasis added). Therefore, Defendants' speculative concerns regarding safety and security issues cannot serve as a basis for punishing Miller for her speech on grave matter of public concern like the abuse she witnessed in the case at bar.

On balance, Miller's interest in speaking out about unchecked abuse of mentally infirm inmates like Bielby, and feeble inmates like Martin, at WHV, particularly after efforts to report the abuse internally are ignored, outweighs Defendants' comparably trivial interest in shielding some health-related information from incidental disclosure to the public.

At the very least, where Defendant Patton, who was in charge of training POAs, and WHV appear to have different notions as to purpose of the POA confidentiality policy, and the manner in which it is enforced, there is a genuine issue of material fact as to whether Miller violated a "legitimate prison regulation."

Fourth, whereas the *Pickering* analysis requires that the offending speech be a "substantial or motivating factor" for the adverse action, Defendants readily admit that Miller was terminated as a *direct result* of reporting mistreatment outside of WHV. Defendants state that "Howard instructed Defendant Patton to remove [Miller] from her POA assignment[]" once "Howard became aware of [Miller's] correspondence with Carol Jacobsen and Doug, and after reviewing [Miller's] written and verbal correspondence[.]" (Motion, at Page ID # 987).

Thus, the *Pickering* analysis, which Defendants do not address in their Motion or brief, warrants the conclusion that Miller's speech was protected.

b) Miller's Speech is Protected Under the *Turner* Test

"When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Turner*, 482 U.S. at 84 (citing *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974)). *Turner* assesses the validity of the POA confidentiality policy, as applied to this case, in the wake of its infringement upon established constitutional rights. *Turner* articulates four factors to be used in determining the reasonableness of a

prison regulation: (1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising rights that remain open to inmates; (3) whether accommodating the asserted right will have a significant "ripple effect" on fellow inmates or prison staff; and (4) whether there is a ready alternative regulation that fully accommodates the prisoners' rights at a *de minimis* cost to the valid penological interest. *Id.* at 89-90. Additionally, even when a prison regulation is not wholly invalid on its face, *Turner* analysis may demonstrate that its application in a certain instance is unreasonable and, thus, unconstitutional. *Flagner v. Wilkinson*, 241 F.3d 475, 483 n.5 (6th Cir. 2001).

Miller's case meets the *Turner* criteria. First, there is no valid, rational connection between WHV's interest in protecting an inmate's privacy and preventing POAs from disclosing abuse and neglect of those inmates. The broad (and unclear) confidentiality language, as applied to this case, is an exaggerated response to any *real* prison concern, and Defendants cannot rest on mere speculative concerns. *See Whitney*, 677 F.3d at 298. Second, as implemented, the confidentiality policy leaves POAs with no alternative avenue available for reporting inmate abuse and neglect if it is not addressed by WHV officials. Because Miller's internal reporting to WHV officials was not addressed in any meaningful way, she was left with no other option but to turn to those who would

listen. Third, allowing POAs to report abuse and neglect to outside authorities, especially when attempts at internal reporting are ignored, would not have significant ramifications on the liberty of others or on the use of the WHV's resources for preserving order. WHV could easily ferret out meritless complaints and investigate concerns needing further inspection at minimal cost. Fourth, the existence of an obvious alternative is evidence that the current speech regulation, as applied to Miller, is an exaggerated response to any legitimate prison concerns. WHV could devise procedures for reporting abuse to outside authorities when internal reporting is insufficient, while still prohibiting POAs from *inappropriately* disclosing confidential information, for instance in situations that do not involve abuse or do not involve initial attempts to address problems internally.

2. Miller Suffered an Adverse Employment Action As a Result of Her Protected Conduct

The third element of a retaliation claim is a "causal connection" between the protected conduct and the adverse action. *Brown*, 312 F.3d at 790. This element is satisfied where "the adverse action was motivated *at least in part* by the plaintiff's protected conduct." *Id*. (emphasis added and internal citation omitted). As is clear from the record, Miller was terminated from her POA position once "Howard became aware of [Miller's] correspondence with Carol Jacobsen and Doug, and after reviewing [Miller's] written and verbal correspondence[.]" (Motion, Page ID # 987). Thus, Defendants' Motion on Count I should be dismissed.

B. Defendants' Motion on Count II Should Be Dismissed Because There Are Genuine Issues of Material Fact as to Miller's Claim Under Michigan's Whistleblowers' Protection Act

The Michigan Whistleblowers' Protection Act ("WPA"), M.C.L. § 15.361, prohibits the "discharge, discipline, or other adverse treatment of employees who act in accordance with a statutory right or duty." *Chilingirian v. City of Fraser*, 194 Mich. App. 65, 68 (1992). The WPA provides that,

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that body, or a court action.

M.C.L. § 15.362.

For purposes of the WPA, Miller qualifies as an employee who engaged in protected activity by reporting mistreatment and abuse of inmates, and Miller's termination is causally connected to the protected activity. Defendants claim they terminated Miller's employment because Miller inappropriately shared confidential information. (*See* Motion, Page ID # 987). There is a genuine dispute of material fact as to whether this reason for Miller's termination was a mere pretext for unlawful retaliation, in violation of the WPA.

a) Plaintiff Was an Employee Under the WPA

"Employee" is defined by the WPA as "a person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied." M.C.L. §15.361(a). Michigan uses the economic reality test to determine whether an employer-employee relationship exists. *Chilingirian*, 194 Mich. App. at 69 (citing *Goodchild v. Erickson*, 375 Mich. 289, 293 (1965)). The economic reality test considers the totality of the circumstances surrounding the job and focuses on "(1) the control of a worker's duties; (2) payment of wages; (3) right to hire, fire, and discipline; and (4) performance of the duties as an integral part of the employer's business toward the accomplishment of a common goal." *Id.* Each factor is viewed as a whole; no single one is controlling. *Id.*

Here, Defendants controlled Miller's duties. As a POA, Miller was assigned shifts, told which prisoners to observe, and what information about the observed prisoners to document. Defendants paid Miller wages for her shifts as a POA. Defendants hired Miller, trained her, and ultimately discharged her. Defendants' testimony demonstrates that the POAs, Miller included, play a crucial role in ensuring the safety and security of prisoners on one-on-one observation. *See* **Exh. B**, at 82:10-83:2. *See Richardson v. Genesee Cnty. Cmty. Mental Health Servs.*, 45 F. Supp. 2d 610, 614 (E.D. Mich. 1999) (holding that nurses' after-hours service was an "integral part of defendant's business," entitling nurses to overtime pay for

after-hours work, where crisis clinic provided mental health crisis intervention and referral services to the public and plaintiffs "were employed to perform this particular service"). Given the ratio of mental health providers and nurses to prisoners at WHV, it is clear that the POAs are an "integral part" of WHV's business and accomplishing its mission as defined in its Mission Statement. *See* **Exhibit M,** MDOC Policy Directive 01.01.100 (providing that WHV's mission is to create a "safer Michigan through effective offender management and supervision in our facilities and communities while holding offenders accountable and promoting their rehabilitation."). Ultimately, viewing these factors as a whole, Miller was an employee of WHV.

Defendants cite several statutory schemes in which courts held prisoners are not "employees:" the Worker's Disability Compensation Act ("WDCA"), the Minimum Wage Law (now replaced by the Michigan Workforce Opportunity Wage Act, M.C.L. 408.411 *et seq.*), the Michigan Occupational Safety and Health Act ("MIOSHA"), M.C.L. 408.1001 *et seq.*, and the Public Employment Relations Act ("PERA"), M.C.L. 423.201 *et seq.*. All of these statutes differ from the WPA in a significant way: they confer benefits on the *employee* and were enacted primarily with the *employee's* interests in mind. *See, e.g.*, *Barker Bros. Const. v. Bureau of Safety & Regulation*, 212 Mich. App. 132, 136 (1995) ("the Legislature has declared the general purpose and intent of the MIOSHA: The safety, health,

and general welfare of employees are primary public concerns. The legislature hereby declares that all employees shall be provided safe and healthful work environments free of recognized hazards."); *Local 79, SEIU, AFL-CIO, Hosp. Emp. Div. v. Lapeer Cnty. Gen. Hosp.*, 111 Mich. App. 441, 446 (1981) ("[T]he purpose of the PERA is to protect the organizational rights of public employees[.]"); *Detroit Fire Fighters Ass'n, IAFF Local 344 v. City of Detroit*, 482 Mich. 18, 28–29 (2008) ("One of PERA's primary purposes "is to resolve labor-management strife through collective bargaining."); *Parsad v. Granholm*, No. 1:08-CV-962, 2009 WL 10677876, at *10 (W.D. Mich. Mar. 30, 2009) ("The purpose and intended effects of the FLSA and federal minimum wage laws are to protect employees.").[5]

For example, "[t]he purpose of enacting the [Worker's Disability Compensation Act] 'was to require an employer to compensate a worker for any injury suffered in the course of the worker's employment, regardless of who was at fault.'" *Brown v. Cassens Transp. Co.*, 546 F.3d 347, 360 (6th Cir. 2008). The WPA's purpose, on the other hand, is "to protect *the public* by protecting employees who report violations of laws and regulations." *Dolan v. Continental Airlines*, 454 Mich. 373, 379 (1997) (emphasis added). "Without employees . . . willing to risk adverse employment consequences [for] whistleblowing, the public

[5] Unpublished authorities are attached as **Exhibit N.**

would remain unaware of large-scale and potentially dangerous abuses." *Id.* Thus, to the extent there are good reasons to define "employee" narrowly in the WDCA and the other statutes Defendants cite, these reasons do not apply to the WPA.

Defendants' reliance on *Hoste v. Shanty Creek Management, Inc.*, 459 Mich. 561, 577 (1999), in which the court analyzed the meaning of "contract of hire" under the WDCA, is equally unavailing. The *Hoste* plaintiff was not paid wages but instead received discounted tickets, free lift rides, and free drinks. *Id.* The court in *Hoste* termed these "privileges," "accommodations," and "gratuities," which could not be considered a regular source of income. *Id.* In contrast, Miller received actual money wages for her work as a POA, not perks, and her wages were both her regular and primary source of income. Finally, in *Hoste* the court considered the fact that the privileges were not substantial enough to induce a reasonable person to forfeit his common-law rights against the ski resort. *Id.* at 576. Miller's POA position paid *more* than most other prison jobs. *See* **Exh. B**, at 21:16-20. For all the foregoing reasons, the Court should reject *Hoste*'s analysis and conclude that Plaintiff was an employee for purposes of the WPA.

b) Plaintiff Sets Forth a *Prima Facie* Case of Retaliation.

The elements of a *prima facie* WPA case are "(1) the plaintiff was engaged in protected activity as defined by the [A]ct; (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected

activity and the discharge or adverse employment action." *Foster v. Judnic*, 963 F. Supp. 2d 735, 765 (E.D. Mich. 2013), *aff'd sub nom. Foster v. Mich.*, 573 F. App'x 377 (6th Cir. 2014) (internal citation omitted).

By reporting violations of law, officer misconduct and prisoner mistreatment to a public body, WHV officers, Miller engaged in protected activity as defined by the WPA. WHV terminated Miller's employment as a POA, and expressly stated that it took the adverse employment action because Miller shared confidential information with external advocates after WHV failed to take remedial action. Miller shared this confidential information during the course of reporting WHV's violations of law. Thus, WHV's stated reason for terminating Miller's establishes a causal connection between the termination and Miller's protected activity.

c) There is a Genuine Issue of Material Fact as to Whether Defendants' Reason for Terminating Miller's Employment Was Pretext For Unlawful Retaliation

Because Miller succeeds in establishing a *prima facie* case under the WPA, the burden shifts to Defendants to "articulate some legitimate, nondiscriminatory reason" for terminating Miller. *Deneau v. Manor Care, Inc.*, 219 F. Supp. 2d 855, 860 (E.D. Mich. 2002) (citing *Phinney v. Perlmutter*, 222 Mich. App. 513, 563 (1997)). If Defendants satisfy their burden, Miller has an opportunity to show that Defendants' stated reason was only a pretext for unlawful retaliation. *Id.* "[Miller]

may meet her burden of showing pretext 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" *Id.*

There is evidence that Defendants' stated reason for terminating Miller's employment is pretext for unlawful retaliation. Namely, Defendants were aware of Miller's communications with outside advocacy groups *long before* Defendants terminated Miller's employment. *See* Complaint, Dkt. No. 1, at Page ID #6. Nevertheless, Defendants did not discipline Miller for her external reporting until Miller reported WHV's mistreatment of Martin. That is because public knowledge of Defendants' mistreatment of Martin exposed Defendants to the potential for serious legal liability, and posed significant political risks and damage to Defendants in the court of public opinion, in a much more serious way than the prior incident of WHV's mistreatment of Bielby, which Miller also reported outside of WHV. Indeed, Miller's reporting of the Martin incident resulted in several lawsuits against WHV and its employees, including *Martin v. MDOC, et. al.*, Case No. 2:2017-cv-11845 (E.D. Mich.). The incident involving Martin was different both in substance and in severity from prior officer misconduct which Miller reported, and Defendants could not risk allowing Miller to continue in her position as a POA and observe other similar incidents that may occur in the future. Ultimately, there is a genuine issue of material fact as to whether Defendants'

reason for terminating Miller's employment was pretext for unlawful retaliation. Therefore, Defendants' Motion on Count II must be dismissed.

C. Defendants are Not Entitled to Qualified Immunity Because They Unreasonably Violated Miller's Constitutional Rights that were Clearly Established at the Time of the Violation

Qualified immunity does not shield a government official from liability when the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct. *Bell v. Johnson*, 308 F.3d 594, 601 (6th Cir. 2002) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The court utilizes an "objectively unreasonable" standard in evaluating what the official allegedly did in light of clearly established constitutional rights. *Williams v. Mehra*, 186 F.3d 685, 691 (6th Cir. 1999). As a rule, qualified immunity shields officers from liability when they make good-faith mistakes about the legality of their conduct, but not when they engage in deliberate constitutional deprivations. *See Smith v. City of Troy*, 874 F.3d 938, 944 (6th Cir. 2017). "Although it need not be the case that the very action in question has previously been held unlawful, . . . in the light of pre-existing law, the unlawfulness must be apparent." *Bell*, 308 F.3d at 602 (quotations omitted).

Under the first prong of the analysis, the court "must determine whether the facts alleged, viewed in the light most favorable to the party asserting the injury, show that the official's conduct violated a constitutional right in the context of the

facts presented." *Ebelt*, 231 F. Supp. 2d at 568. Miller reported mistreatment and neglect of prisoners by WHV officials to prisoner rights groups and advocates, and she suffered adverse and retaliatory conduct by WHV as a result, which was a direct violation of her statutory and constitutional rights. *See* Section III(A).

Under the second prong of the analysis, once the plaintiff establishes a violation of a statutory or constitutional right that was clearly in existence at the time of the challenged conduct, qualified immunity does not apply. *Ebelt*, 231 F. Supp. 2d at 568. Although the court must look to the decisions of the Supreme Court and its own precedent to determine whether the violation is clearly established, the court also considers decisions from other courts to determine if the constitutional question is placed beyond debate. *Brown v. Johnson*, No. 2:10-CV-965, 2012 WL 32711, at *4 (S.D. Ohio Jan. 6, 2012), report and recommendation adopted, No. 2:10-CV-965, 2012 WL 3237198 (S.D. Ohio Aug. 7, 2012) ("Thus, while there does not appear to be a case within this circuit dealing with the exact circumstances present here, as the Court of Appeals has recently cautioned, "a wide variety of sources, even those that are not authoritative, can provide defendants with fair warning" of the unconstitutional nature of their actions, and it is not necessary that the " 'very action in question has previously been held unlawful' " in order for the defendants to be on notice as to its unlawfulness."). However, "there need not be a case with the exact same fact pattern, or even

'fundamentally similar' or 'materially similar' facts; rather, the question is whether the defendants had 'fair warning' that their actions were unconstitutional." *Brown v. Chapman*, No. 15-3506, 2016 WL 683260 (6th Cir. Feb. 19, 2016) (quoting *Cummings v. City of Akron*, 418 F.3d 676, 687 (6th Cir. 2005)); *see also Dickerson v. McClellan*, 101 F.3d 1151, 1158 (6th Cir. 1996) ("Although it need not be the case that 'the very action in question has previously been held unlawful, . . . in the light of pre-existing law the unlawfulness must be apparent.'").

It is well established in this Circuit that termination from prison employment in retaliation for engaging in protected conduct violates the First Amendment. *See, e.g.*, *Walker v. Brewer*, No. 1:13-CV-349, 2014 WL 1117835, at *2 (W.D. Mich. Mar. 20, 2014) (concluding that firing from prison job was an adverse action); *Brown v. Johnson*, No. 2:10-cv-965, 2012 WL 32711(S.D. Ohio Jan. 6, 2012) (concluding that the law is clearly established that "taking away an inmate's job assignment in retaliation for the exercise of constitutional rights [is] itself a constitutional violation."); *McGough v. Corrections Corp. of Am.*, No. 1:07-0039, 2007 WL 3088213, 2007 U.S. Dist. LEXIS 78298, * (M.D. Tenn. Oct. 19, 2007); *Pasley v. Conerly*, 345 F. App'x 981, 985 (6th Cir.2009) (concluding that a threat to have the plaintiff "moved out of the unit so that he would lose his job" was "capable of deterring a person of ordinary firmness from exercising protected rights, the standard for adverse action." (internal quotations omitted).

Furthermore, termination for specifically filing grievances violates the First Amendment. *See Brown*, 2012 WL 3237198.

Courts outside this Circuit have also held that "that a corrections officer may not retaliate against a prisoner for exercising his First Amendment right to report staff misconduct." *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009); *Martinez v. Madden*, No. 12CV1298 GPC MDD, 2013 WL 5232271, at *7 (S.D. Cal. Sept. 16, 2013) (stating the plaintiff provided sufficient evidence to show the defendants retaliated against him for reporting staff misconduct); *Lancaster v. Carey*, No. CIV S-08-0051 LKK, 2011 WL 2198313, at *13 (E.D. Cal. June 6, 2011), report and recommendation adopted, No. CIV S-08-0051 LKK, 2011 WL 2960908 (E.D. Cal. July 19, 2011), aff'd, 482 F. App'x 301 (9th Cir. 2012) (holding the defendants were not entitled to qualified immunity for their retaliation against the plaintiff-prisoner who reported staff misconduct).[6] Allowing prisoners to complain about prison staff "provides a crucial check against those who are in a position to abuse them." *Shepard v. Quillen*, 840 F.3d 686, 688 (9th Cir. 2016).

[6] In the employment setting generally, qualified immunity is inapplicable where an employee reports misconduct outside her employment after unsuccessful attempts to correct the conduct internally. *See, e.g., Robinson v. York*, 566 F.3d 817, 826 (9th Cir. 2009) (denying qualified immunity where an employee spoke out against and filed reports about misconduct in his department, and stating that "[a]n employer's written policy requiring speech to occur through specified 'channels' had been held insufficient to justify retaliation motivated by protected speech").

In the instant case, Defendants terminated Miller's employment as a POA because she reported the mistreatment and abuse of Bielby and Martin by WHV officials to external prisoner advocacy organizations after specifically being told by Defendant Howard that she could do so. (Motion, Page ID # 987). Thus, qualified immunity is not proper when a prison is providing a critical check by reporting staff misconduct.

Defendants are not entitled to qualified immunity where they abuse a valid procedure "as a cover or a ruse to silence and punish" an inmate. *Bruce v. Ylst*, 351 F.3d 1283, 1290 (9th Cir. 2003) (denying qualified immunity where the defendants abused a gang validation procedure in order to punish the plaintiff for filing grievances). While the POA confidentiality rule is arguably valid on its face, it only prohibits the "inappropriate" sharing of confidential information, and using it as a cover for punishing Miller's speech about prisoner abuse is clearly an invalid application of the rule, a pretext for unlawful retaliation, or both. *See Flagner*, 241 F.3d at 483 n.5. If the First Amendment is to offer prisoners even the most basic protections, surely a prisoner must be permitted to report the egregious abuse of vulnerable and mentally ill prisoners to outside authorities without fear of punishment regardless of whether prison administrators choose to deem such important information "confidential." Thus, Defendants' use of the confidentiality rule "as a cover of a ruse to silence" Miller from seeking help and speaking out

against inmate abuse and neglect by WHV officials is a clearly established violation of the First Amendment. Given the egregious conduct by prison officials during the Martin and Bielby incidents, Defendants' desire to silence Miller, and allow the abuse to go unchecked, is not protected by qualified immunity.

In order to be entitled to qualified immunity on a First Amendment claim, Defendants must "produce evidence of disruption at the summary judgment stage." *See v. City of Elyria*, 502 F.3d 484, 492–93 (6th Cir. 2007) (rejecting claim of qualified immunity because defendants failed to produce evidence of disruption at the summary judgment stage). In their motion and brief, Defendants do not aver that Miller's comments actually compromised a significant need for confidentiality or threatened to disrupt critical working relationships. *Devlin*, 531 F. App'x at 706–07 (citing *Rankin v. McPherson*, 483 U.S. 378, 389 (1987)). Instead, Defendants make conclusory and broad statements that "revealing information learned in her role [as a POA] . . . could be used against the prisoner and result in safety and security issues." (Motion, at Page ID # 992). Defendants do not allege how revealing information about abuse to prisoner advocates has *actually* manifested safety and security issues at WHV in the four years since Miller reported the mistreatment and neglect of Bielby and Martin. To the contrary, Miller's reporting of mistreatment by WHV officials (along with the other prisoners' reports of mistreatment) has resulted in a significant change in policy at

WHV. *See* **Exhibit O**, Department of Justice Investigations (requiring WHV to change its policy of use of restraints, and treatment of prisoners generally).

Given that retaliatory termination violates clearly established statutory and constitutional rights, it was objectively unreasonable for Defendants to terminate Miller's employment as a POA due to her reporting of mistreatment and neglect of Bielby and Martin. Defendants should have known that prohibiting external reporting of misconduct would have a chilling effect on the exercise of First Amendment rights by inmates. Furthermore, it was unreasonable for Defendants to terminate Miller's employment *after* instructing her that she could report misconduct externally so long as she was telling the truth. Therefore, Defendants are not entitled to qualified immunity.

D. Miller is Entitled to Injunctive Relief

Qualified immunity does not shield state officials from claims for injunctive relief, and in this case Miller seeks such relief against the warden of WHV in his official capacity. Although prison officials are given deference and "accorded latitude in the administration of prison affairs, and [ ] prisoners necessarily are subject to appropriate rules and regulations," the judiciary "sit[s] not to supervise prisons but to enforce the constitutional rights of all 'persons,' including prisoners." *Cruz v. Beto*, 405 U.S. 319, 321 (1972); *see also Phelps v. Dunn*, 965 F.2d 93, 97–98 (6th Cir. 1992) ("Convicted prisoners do not forfeit all

constitutional protections by reason of their conviction and confinement in prison. 'Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.'") (internal citation omitted).

Thus, in certain cases, the court will step in to remedy prisons' constitutional violations. *Cruz*, 405 U.S. at 321 (1972) (reversing a motion to dismiss where the prison refused to allow Buddhists the right to hold religious services when prisoners of other religions were allowed to hold religious services); *Phelps*, 965 F.2d at 97–98 (reversing summary judgment to determine whether a homosexual prisoner's attendance at religious services posed a security risk and whether it was proper to deny the prisoner participation in the services).

Courts have granted injunctive relief for violations of the Constitution. *Glover v. Johnson*, 478 F. Supp. 1075, 1101–03 (E.D. Mich. 1979) (granting injunctive relief regarding rehabilitation opportunities, programming, education, vocational training, adequate facilities and equipment to plaintiff inmates); *Iswed v. Caruso*, No. 1:08-CV-1118, 2012 WL 12865640, at *6–10 (W.D. Mich. Dec. 10, 2012), aff'd, 573 F. App'x 485 (6th Cir. 2014) (granting injunctive relief to the plaintiff inmate and admonishing the defendants' attempt to narrowly tailor the scope of the relief so much that it essentially provided no relief at all). Thus, Miller's request for injunctive relief—which is not limited to reinstatement, but also includes policy reforms to protect against future retaliation against prisoners

for reporting abuse—is legally supportable, and appropriate. *See* Complaint, Dkt. No. 1, at Page ID #12, subparagraphs e & f.

IV. CONCLUSION

For the foregoing reasons, Plaintiff Sharee Miller respectfully requests that this Court deny Defendants' Motion for Summary Judgment.

Respectfully submitted,

DICKINSON WRIGHT PLLC

By: */s/ Emily L. Turbiak*
Daniel D. Quick (P48109)
Alma Sobo (P81177)
Kathleen A. Cieslik (P80024)
2600 W. Big Beaver, Suite 300
Troy, Michigan 48084
(248) 433-7200
dquick@dickinsonwright.com
kcieslik@dickinsonwright.com
asobo@dickinsonwright.com

Emily L. Turbiak (P81178)
Angelina R. Irvine (P81712)
500 Woodward Ave., Ste. 4000
Detroit, MI 48226
(313) 223-3500
eturbiak@dickinsonwright.com
airvine@dickinsonwright.com

Daniel S. Korobkin (P72842)
Michael J. Steinberg (P43085)
American Civil Liberties Union Fund of Michigan

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2018, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to all parties of record.

/s/ Emily L. Turbiak
EMILY L. TURBIAK