STATE OF MICHIGAN
IN THE SUPREME COURT

CHRISTINA ZINK

Plaintiff-Appellant

V

MSC #167913
COA #367682
LCN # 21-116109-CD

GENESEE INTERMEDIATE SCHOOL DISTRICT and JAN COX

Defendants-Appellees.
_____/

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DEFENDANTS-APPELLEES, GENESEE INTERMEDIATE SCHOOL DISTRICT and JAN COX ANSWER TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

**** ORAL ARGUMENT REQUESTED****

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INTRODUCTION

This is an employment case. Plaintiff has sued her former employer, Genesee Intermediate School District, and Principal Jan Cox, under the Whistleblower Protection Act ("WPA"), claiming she was constructively discharged. In other words, Plaintiff claims that Defendants' alleged actions caused Plaintiff to resign her position. Plaintiff's lawsuit is untimely and her appeal fails as a matter of law.

This case presents a straightforward legal issue already conclusively decided by this Court multiple times: When does the statute of limitations begin to accrue for a constructive discharge claim under the WPA? Is it based on the Defendant *employer's* action? Or is it the Plaintiff *employee's* decision to resign her employment?

The plain and unambiguous language of the Whistleblower Protection Act prohibits acts by an employer, and the statute of limitations expressly begins to accrue when the employer violates the WPA. See MCL 15.362; 15.363(1). Interpreting this statute, this Court has made clear that it is the *employer's* actions that trigger the accrual period, not the *employee's* resignation:

> in the context of a constructive discharge it is the employer's wrongful act that starts the period of limitations by causing the employee to feel compelled to resign, not the employee's response.

Joliet v Pitoniak, 475 Mich. 30, 41, 715 NW2d 60, 68 (2006). Plaintiff's argument that the statute of limitations begins to accrue when an employee decides to resign is unworkable, as it effectively nullifies the statute limitations. Based on Plaintiff's argument, a plaintiff may be able to bring suit 20 years or more after an employer's last alleged act. That is absurd. Such an interpretation of the statute of limitations is contrary to well established statutory interpretation rules that prohibit courts from interpreting statutes in a manner that renders the statute nugatory. *Hanay v. Dep't of Transp.*, 497 Mich 45, 57; 860 NW2d 67 (2014).

This case arises from Plaintiff's ongoing harassment of a severely disabled student. In January and February of 2020, Plaintiff repeatedly harassed a disabled student and publicly disseminated that student's private information in violation of federal law. Plaintiff claims that her harassment of the student was somehow a protected act under the WPA, and that Defendants retaliated against her in response. Plaintiff asserts that Defendants' alleged retaliation led to Plaintiff resigning her employment in June 2022. It is undisputed, however, that the last alleged act Plaintiff claims that Defendants committed occurred on May 21, 2021, when Defendants gave Plaintiff a *positive* performance evaluation. Ninety-seven days later, on August 26, 2021, Plaintiff filed suit under the WPA, claiming she was constructively discharged.

Plaintiff's lawsuit is time barred. The WPA has a 90-day statute of limitations. Because Plaintiff has not identified any alleged discriminatory conduct committed *by Defendants* after May 21, 2021, the period of limitations on Plaintiff's claims expired, at the latest, 90 days from that date, or August 19, 2021. Since Plaintiff filed suit on August 26, 2021, Plaintiff's lawsuit was filed *after* the expiration of the statute limitations and her lawsuit should be dismissed.

Even if Plaintiff were able to identify an act by her employer within the 90-day statute of limitations, the "continuing violations doctrine" is not recognized in Michigan. Therefore, every act occurring before May 28, 2021, should be dismissed as a matter of law.

Defendants request that this Court deny Plaintiff's application for leave and affirm the dismissal of Plaintiff's lawsuit on the basis that it was filed after the statute of limitations had expired.

COUNTER STATEMENT OF JURISDICTION

On November 8, 2024, the Court of Appeals issued its Opinion affirming the trial court's grant of summary disposition on the basis that Plaintiff's constructive discharge claim was barred by the statute of limitations. This case does not present a matter of significant legal importance as defined my MCR 7.305. Statute of limitation issues are straightforward and relatively easy rules to apply. The particular facts and issue in this case does not compel judicial review. This case involves the application of a statute limitations in the context of a constructive discharge case. Plaintiff is asking this Court to interpret statute limitations to start the statute limitations on the date the employee decides to resign.

This Court has already decided this issue multiple times. This Court has repeatedly found that the statute limitations for constructive discharge claims begins to run based on the employer's alleged actions, not the date that an employee decides to resign. *Joliet v Pitoniak*, 475 Mich. 30, 715 NW2d 60 (2006); *Magee v DaimlerChrysler Corp*., 472 Mich 108, 693 NW2d 166 (2005).

Plaintiff's argument would lead to a legal absurdity and render all statute of limitations statutory schemes nugatory. It would allow for plaintiffs to file suit conceivably 20 years or more after the employer's last alleged actions that the plaintiff claims caused him or her to resign their employment.

COUNTER QUESTIONS STATED FOR REVIEW

Issue 1: Does the statute of limitations for a constructive discharge claim filed under the Whistleblower Protection Act begin to accrue only based on the employer's alleged act, and not the employee's decision to resign her employment?

Yes.

Issue 2: Is a constructive discharge claim a viable cause of action under the Whistleblower Protection Act?

No.

MOST CONTROLLING AUTHORITY

Joliet v Pitoniak, 475 Mich 30, 41, 715 NW2d 60, 68 (2006), for the following propositions:

- **"[A] constructive discharge is not a cause of action."**
- **Constructive discharge is not itself a violation of the WPA: "**Where the resignation is not itself an unlawful act perpetrated by the employer, it simply is not a 'violation' of the WPA under the plain language of MCL 15.362, which prohibits discharge, threats, or other discrimination by the employer."
- **Accrual of the statute of limitations for a constructive discharge claim begins with the employer's act, not the employee's decision to resign:** "in the context of a constructive discharge it is the employer's wrongful act that starts the period of limitations by causing the employee to feel compelled to resign, not the employee's response."

Magee v DaimlerChrysler Corp., 472 Mich 108, 693 NW2d 166 (2005), for the following proposition:

- holding that a claim of discrimination accrues when the adverse discriminatory acts occur, not when the employee decides to resign.

COUNTER STATEMENT OF FACTS

Plaintiff's Appeal attempts to distract this Court from the real issue on Appeal by delving into factual inaccuracies. To be clear, this Appeal does not address whether the District's response to Plaintiff's harassment of a disabled child, and her public dissemination of that student's private information in violation of federal law, somehow violated the WPA. Instead, this Appeal only addresses whether Plaintiff's lawsuit is barred by the statute of limitations. Therefore, Defendant will rely on those facts relevant to the statute of limitations argument.

1. The Parties

The Genesee Intermediate School District ("GISD") is a center-based school district that provides special education support and services to Genesee's court CLU all knowledge it was the sole one action is as is part County school districts. In addition to providing programs for general education and career technical education, GISD provides special education services for the 21 public school districts and 15 public school academies in Genesee County, as well as Lapeer, Shiawassee, and surrounding counties. Ms. Jan Cox is a Principal at GISD.

During the 2019-20 and 2020-21 school years, Plaintiff was a middle school special education teacher at GISD's self-contained Middle School Day Treatment ("MSDT") program. The purpose of the program is to teach profoundly disabled students as required by a federal law, the Individuals with Disabilities Education Act ("IDEA"), 20 USC § 1401, *et seq*. The disabilities of the students in the program range from students with spastic quadriplegia, to students who are nonverbal with cerebral palsy.

The students in Plaintiff's classroom qualified for special education services under emotional impairment ("EI") classification pursuant to the Michigan Administrative Rules for

Special Education ("MARSE").[1] EI students exhibit behavioral problems, which can include violent outbursts, depression, and an inability to maintain relationships with peers as a result of their disabilities. Def Appx 0011B, p. 9:8-17. These students, including those in Plaintiff's classroom, typically have other diagnoses, such as Oppositional Defiant Disorder, ADHD, and bipolar disorder, and her students struggled with making positive choices in the school environment. Id., p. 9:18-25; Def Appx 0012B, 10:1-8. EI students often engage in behaviors that are manifestations of their disabilities, such as shutting down, putting their head down, withdrawing, outward aggression, throwing objects, eloping from class or the school building, making verbal threats, and physically assaulting others. Def Appx 0019B-20B, p. 17:25; 18:1-22.

During the 2019-20 school year, Student A was one of the students attending the MSDT program in Plaintiff's class. Like the other students in the class, Student A had a diagnosis of an EI, along with other disabilities.

2. January 2020 Incident and Plaintiff's Claims of Harassment and Retaliation

Plaintiff claims that in January 2020, she complained about Student A's behaviors in the classroom. The particular behavior was a manifestation of Student A's disability. After the complaints, the District conducted a manifestation determination review as required by federal law, and determined the behavior was the result of Student A's disability (as expected of his particular impairment), rather than an actual safety issue. Plaintiff claims that Ms. Cox and GISD began harassing and retaliating against her in February 2020 after Plaintiff complained about

[1] The education of special education students is governed by IDEA, 20 USC § 1400, *et. seq.* The IDEA is a comprehensive and complicated statutory scheme dedicated to the education of disabled students. The core purpose of the IDEA is to provide a "free appropriate public education" ("FAPE") that addresses the needs of every student. Michigan complies with the IDEA through the Michigan Mandatory Special Education Act ("MMSEA") and the Michigan Administrative Rules of Special Education ("MARSE"), MCL 380.1701 *et. seq.* The MARSE provide the requirements for qualifying for services under EI.

Student A to Ms. Cox. Def Appx, 0212B, ¶ 12.

In late February 2020, Plaintiff shared confidential student information related to Student A. Plaintiff's actions violated a Federal privacy law called the Family Educational Rights and Privacy Act ("FERPA"), 20 USC § 1232g *et. seq*. This breach of Federal law jeopardized GISD's receipt of federal funding. Plaintiff claims that after she violated this Federal law, GISD held a Pre-Corrective Action meeting in March 2020. Plaintiff further claims that she was told she would be transferred to a different teaching position in June 2020, as allowed by the collective bargaining agreement. Def Appx 0219B-0220B, ¶ 69, 76. The proposed transfer was due to staffing shortages caused by Covid. Plaintiff, however, was never actually transferred.

During the following 2020-2021 school year, Plaintiff also claims that she entered into a Mediation Agreement with Ms. Cox and GISD in September 2020. Def Appx 0221B, ¶ 90. Plaintiff alleges, however, that Ms. Cox and GISD violated the agreement and continued violating the agreement during the 2020-2021 school year. Def Appx 0221B-0222B, ¶ 92-98. She also claims that she was harassed and retaliated against from February 2020 through May 2021.

3. The Employer's Last Alleged Act Occurred on May 21, 2021.

Plaintiff tries hard in her Application to ignore the most important date in the lawsuit: the last date Plaintiff alleges the employer took any alleged action against her. In fact, Plaintiff never makes mention of this date in her Application.

Plaintiff applied for and was granted FMLA leave on May 7, 2021. Def Appx 0222B, ¶ 97-99. It is undisputed that Plaintiff never returned to work after May 7, 2021.

It is undisputed that Defendants' last interaction occurred with Plaintiff was on May 21, 2021, when Plaintiff claims she had her final evaluation with the ISD. Def Appx 0221B, ¶ 98; Plaintiff's Exhibit 25. Plaintiff testified that on that date the ISD rated her as a "highly effective"

teacher at her evaluation. **This May 21, 2021, interaction was the last date on which Plaintiff contends Defendants took any action.** Def Appx 0331B.

Plaintiff now claims that an act occurred on May 26, 2021, when she received a text message from a friend gossiping about the disabled student that Plaintiff had harassed. See Plaintiff Exhibit 25. This was not an act committed by Defendants directed at Plaintiff, however. This was a text message between Plaintiff's friends gossiping about a disabled child. Id.

Plaintiff did not identify a single alleged act taken against her after May 21, 2021, which caused her to resign; not in answers to interrogatories, her deposition, or in her response to Defendants' motion for summary disposition. In her appeal, Plaintiff also has not identified a single act committed by Defendant employer after May 21, 2021.

Ultimately, Plaintiff voluntarily resigned on June 7, 2021, to take a position at another school district. Def Appx 0225B.

4. Procedural Background

Ninety-seven days after the May 21, 2021, evaluation, on August 26, 2021, Plaintiff filed this one-count lawsuit against GISD and Defendant Cox alleging a violation of the WPA. Def Appx 0210B. The WPA has a 90-day statute of limitations.

On June 2, 2023, Defendants filed their motion for summary disposition on the sole basis that Plaintiff's lawsuit was filed after the statute of limitations expired on her WPA claim, and therefore was untimely.

During oral argument, Plaintiff admitted that the last act that she could identify at all occurred on May 26, 2021, when Plaintiff received a text message from her friend gossiping about the disabled student plaintiff had been harassing. Def Appx 0288B ("And then contrary to what Mr. Chapie said and what has been identified in the motion, you know, there is an act that occurs

and it's Exhibit 25. This is on May 26th…"). Plaintiff was referring to a text message between Plaintiff and her friends gossiping about the disabled student that Plaintiff has attached as Exhibit 25 to her Appeal Brief. Plaintiff did not identify a single event that occurred after that date, with the exception of Plaintiff's decision to resign to take a different job. However, that May 26, 2021, event was not an act by any Defendant. Even if it was an act by the employer, that event did not occur within 90 days of the date Plaintiff filed suit on August 26, 2021—the lawsuit was still filed two days after the statute of limitations expired.

Ultimately, the trial court agreed with Defendants' argument and dismissed Plaintiff's lawsuit without prejudice to allow Plaintiff to file suit under a different legal theory. Exhibit 8. In doing so, the court relied on the Supreme Court's decision in *Joliet v Pitoniak*, 475 Mich 30, 41, 715 NW2d 60, 68 (2006), which found that "in the context of a constructive discharge it is the employer's wrongful act that starts the period of limitations by causing the employee to feel compelled to resign, not the employee's response." Since Plaintiff could not identify any act by the employer within the statute of limitations, the court properly found that Plaintiff's claim was time-barred.

Instead of filing suit under another cause of action, Plaintiff followed with an appeal. On November 8, 2024, the Court of Appeals issued its opinion affirming the trial court's dismissal of Plaintiff's lawsuit on the basis that the claims are barred by the statute of limitations. The Court found that a claim alleging violation of the WPA accrues when the retaliatory or discriminatory acts occur, not when the employee decides to resign as a result of intolerable working conditions. The Court observed that its finding is consistent with the general rule regarding statutes of limitation that a claim accrues at "the time the wrong upon which the claim is based is done regardless of the time when damage results." Since the last act by the employer fell outside of the

90 day statute limitations, the Court affirmed the dismissal of the Plaintiff's lawsuit.

This Application For Leave followed.

STANDARD OF REVIEW

Questions of statutory interpretation are reviewed de novo. *Nastal v. Henderson & Assoc. Investigations, Inc.*, 471 Mich. 712, 720; 691 N.W.2d 1 (2005).

ARGUMENT

I. PLAINTIFF'S WPA CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS.

1. Rules Of Statutory Interpretation.

This Court has previously explained that when interpreting statutes the fundamental obligation is "to ascertain the legislative intent that may reasonably be inferred from the words of the expressed statute." *Reed v. Yackell*, 473 Mich. 520, 528-529; 703 N.W.2d 1 (2005)(citing *Koontz v. Ameritech Services*, Inc., 466 Mich. 304, 312 ; 645 N.W.2d 34 (2002)); *Nawrocki v Macomb County Road Com'n*, 463 Mich 143, 159; 615 NW2d 702 (2000)(citing *Murphy v Michigan Bell Telephone Co.*, 447 Mich 93, 98; 523 NW2d 310 (1994)). And since the best indicator of the Legislature's intent is the words used by the Legislature in the statute, a statutory interpretation analysis should "begin by examining the plain language of the statute". *Id.* (citations omitted); *Jesperson v Auto Club Ins Ass'n*, 499 Mich 29, 34; 878 NW2d 799 (2016)(citing *Johnson v Pastoriza*, 491 Mich 417, 436; 818 NW2d 279 (2012)); *see Robinson v City of Detroit*, 462 Mich. 439, 459; 613 NW2d 307 (2000)("the Legislature is presumed to understand the meaning of the language it enacts into law, statutory analysis must begin with the wording of the statute itself.").

This is "because the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute." *Reed*, 473 Mich. at

528-529. Thus, the first step of a statutory interpretation analysis is to determine whether the text of the statute is ambiguous. "A statute is ambiguous if two provisions irreconcilably conflict or if the text is equally susceptible to more than one meaning." *People v. Hall*, 499 Mich. 446, 454; 884 N.W.2d 561 (2016).

This Court has explained that: "[i]t is a fundamental principal of statutory construction that the words used by the Legislature shall be given their common and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain the Legislature's intent." *Nawrocki*, 463 Mich at 159(emphasis added)(citing *Turner v. Auto Club Ins Ass'n*, 448 Mich. 22, 27; 528 NW2d 681(1995)); *Driver v. Naini*, 490 Mich. 239, 246-247; 802 NW2d 311 (2011). This is because the Legislature is presumed to have included each word in a statute for a purpose. *Robinson*, 462 Mich. at 459. So "[t]he Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another." *Id.*

Also, courts are to interpret a statute as a whole and "must give effect to every word, phrase, and clause in a statute to avoid an interpretation that renders nugatory or surplusage any part of a statute." *Hanay v. Dep't of Transp.*, 497 Mich 45, 57; 860 NW2d 67 (2014)(emphasis added).

And if a statutory language is clear and unambiguous the court should interpret it as written and refrain from judicial construction. *Id.; Reed*, 473 Mich. at 528 (stating that if a statute is unambiguous then judicial construction is not required or permitted "[b]ecause the proper role of the judiciary is to interpret and not write the law, courts simply lack the authority to venture beyond the unambiguous text of a statute.").

2. The Language Of The WPA Is Plain And Unambiguous.

The Whistleblower Protection Act prohibits employers from retaliating against employees who report violations of the law to a public body. Importantly, the statute describes the *exact* type

of conduct that is prohibited under the statute. The WPA provides in pertinent part:

> ***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 public body, or a court action. "***An employer*** shall not discharge, threaten, or otherwise discriminate against an employee" who reports a violation of law.

MCL 15.362 (emphasis added). So, by its plain language, the WPA is violated **only** when the *employer* takes action, not when the *employee* acts.

The WPA further provides a statute of limitations for claims brought under the act. In relevant part, the statute states: "[a] person who alleges a violation of this act may bring a civil action for . . . actual damages . . . within 90 days after the occurrence of the alleged violation of this act." MCL 15.363(1). *See also Anzaldua v Neogen Corp*, 292 Mich App 626, 631; 808 NW2d 804 (2011). Thus, the statute of limitations begins to accrue when the WPA is violated. Again, the WPA is only violated by the ***employer's act***. MCL 15.362 By its plain language, the statute is not violated by the employee's actions.

Therefore, the language of the WPA is unambiguous and clear. It prohibits acts taken by an employer, not an employee. There can be no confusion based on the plain language of the statute whose retaliatory acts the WPA seeks to prohibit. By its plain language, the WPA is not violated when an employee feels the pain of an injury.

The unambiguous language of the statute states that the statute of limitations begins to accrue when ***an employer*** takes an act that violates the WPA. By its plain language, the statute limitations does not accrue when the employee decides to resign. In fact, constructive discharge,

or circumstances related to constructive discharge, are not contained in the statute.

The salient question before the Court is when does the statute of limitations begin to accrue for a constructive discharge[2] claim, where ***the employee*** decides to resign her employment due to her alleged employer's acts? The crux of Plaintiff's appeal is that the statute of limitations for a constructive discharge claim under the WPA begins at the time *the employee* decides to resign. Plaintiff is wrong, and this Court has outright rejected this argument in *Joliet v Pitoniak*, 475 Mich 30, 41; 715 NW2d 60 (2006). In *Joliet*, this Court found that based on the plain language of the WPA, it is the employer's act that triggers the accrual of the statute of limitations, not the employee's decision to resign.

3. For Constructive Discharge Claims, The Statute Of Limitations Begins To Accrue On The Date Of The Employer's Last Act, Not The Date The Employee Decides To Resigns.

In *Joliet*, this Court already addressed the issue of when the statute limitations begins to accrue for constructive discharge claims brought under the WPA. This Court held that the statute of limitations for a constructive discharge claim begins to accrue on the date of the last alleged discriminatory act **by the e*mployer*** that purportedly causes the resignation. *Id.* at 32-33. It does **not** begin to accrue on the date of **the *employee's*** resignation. *Id.* The Court held: "the relevant date for the period of limitations is **not** plaintiff's last day of work, but the date of the last

[2] Constructive discharge claims are similar to hostile environment claims. They are established where "an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation or, stated differently, when working conditions become so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign." *Vagts v Perry Drug Stores, Inc*., 204 Mich App 481, 487, 516 NW2d 102, 105 (1994); *Hensley v Romeo Cmty Sch*, No. 308621, 2014 WL 265511, at *7 (Mich Ct App Jan. 23, 2014). The "constructive discharge" standard has been described as "essentially present[ing] a 'worst case' harassment scenario, harassment ratcheted up to the breaking point." *Penn State Police v Suders*, 542 US 129, 146-147 (2004).

discriminatory incident or misrepresentation." *Id*. (emphasis added). The Court continued more directly:

> **in the context of a constructive discharge it is the employer's wrongful act that starts the period of limitations by causing the employee to feel compelled to resign, not the employee's response**. Accordingly, we overrule the accrual analysis of *Jacobson* because it is inconsistent with our opinion in *Magee* and with the plain language of the statute of limitations under the WPA and the CRA.

Id. at 41.

In *Joliet*, the plaintiff filed a complaint alleging quid pro quo sex discrimination, hostile work environment sex discrimination, and age discrimination, among other claims. *Id* at 33. All of the employer's alleged harassing or discriminatory acts occurred **before** November 30, 1998. *Id.* at 32. The plaintiff resigned on November 30, 1998, to be effective December 1, 1998. *Id*. at 33. The plaintiff filed suit three years to the day after her decision to resign, on November 30, 2001, alleging constructive discharge. But importantly, the plaintiff filed suit three years and one day after the last act committed by the employer. The defendants filed a (C)(7) motion, arguing that plaintiff's suit was barred by the statute of limitations. *Id*. at 34. The plaintiff countered that the statute of limitations began to accrue the day she decided to resign—just as Plaintiff argues in this case. The Michigan Supreme Court rejected the plaintiff's argument and found that the statute of limitations began to accrue on the last day of the *employer's* alleged discriminatory actions, not the day the employee decided to resign. *Id*. at 41. (internal citations omitted). The Court then found that discriminatory acts that occurred outside of the statute of limitations cannot be used to support a constructive discharge claim. *Id.* Since there were no acts of harassment occurring within the statute of limitations, the Court then dismissed the constructive discharge claim. *Id*. at 45.

Thus, for constructive discharge claims, the statute of limitations begins to accrue on the last date the employer committed an alleged act of harassment, **not** the date the plaintiff decided

to resign. In this case, that would be May 21, 2021. And any employer acts occurring outside of the statute of limitations cannot be considered.

This Court's Decision in *Joilet* finds support by how this Court has interpreted the accrual of the statute limitations period for constructive discharge claims brought under the general statute limitations statute, MCL 600.5805.

In *Magee v DaimlerChrysler Corp*., 472 Mich 108, 693 NW2d 166 (2005), this Court found that the statute of limitations begins to accrue on the last date of the employer's alleged discriminatory act, not the employee's decision to resign due to the alleged working conditions. Similar to this case, in *Magee*, the plaintiff sued her former employer claiming that she had been subjected to ongoing harassment, retaliation, and discrimination that continued to regularly occur until her last day of work on September 12, 1998, when she went on medical leave. The plaintiff decided to resign February 2, 1999, due to her working conditions. The plaintiff then filed suit on February 1, 2002, three years after her resignation, but nearly three years and five months after the last discriminatory acts committed by her employer. *Id.* at 110.

The issue in *Magee*, as in this case, was when the statute of limitations began to accrue. The Supreme Court found that the statute of limitations began to accrue on the last day of the *employer's* alleged discriminatory acts, September 12, 1998. It did not begin to accrue on the date she decided to resign her employment on February 2, 1999. The Court found, "[b]ecause Magee alleged no discriminatory conduct occurring after September 12, 1998, the period of limitations on Magee's claims expired, at the latest, three years from that date, or by September 12, 2001. Accordingly, as the trial court held, Magee's February 1, 2002, complaint was not timely filed." *Id.* at 113.

Thus, it is the defendant employer's alleged act that triggers the start of the statute of

limitations, not the plaintiff's decision to resign. Plaintiff here claims that the last alleged act committed by her employer occurred on May 21, 2021. Based on the above, the date Plaintiff chose to resign does not factor into the analysis. Therefore, for purposes of the statute of limitations, Plaintiff was required to file her lawsuit by August 19, 2021. Plaintiff did not. Plaintiff admits that she did not file her Complaint until August 26, 2021, **97 days later**. The statute of limitations for a Whistleblower Protection Act claim is 90 days. Therefore, Plaintiff's lawsuit is barred by the statute of limitations.

4. *Joliet* Was Properly Decided.

Joliet was properly decided based on the plain language of the statute. The WPA expressly and unambiguously focuses on ***employer acts*** only, not employee acts. This Court in *Joliet* interpreted the accrual of the statute limitations based on ***employer acts*** consistent, with the plain and unambiguous language of the statute. *Joliet*, 475 Mich at 39-40.

The Court clarified that there is an important distinction "between a violation of the WPA and its lingering effects." *Joliet*, 475 Mich at 39. "[T]he WPA limitations period runs on the " 'occurrence of the alleged violation of this act,'…" the plaintiff's resignation was a ***response*** to an alleged WPA violation, not an alleged violation itself." *Id.* at 40 (emphasis in original).[3]

Thus, this Court determined that according to the plain language of the WPA, only an *employer's* act can violate the WPA. *Id.* at 39-40. An *employee's* decision to resign does **not** constitute a violation of the WPA. *Id.* Therefore, the Court in *Joliet* found that a constructive discharge is **not** itself a violation of the WPA:

> However, notwithstanding the conclusion that a constructive discharge is not a cause of action, *Jacobson* erroneously treated an employee's resignation as a

[3] (adopting the dissent in *Jacobson v Parda Fed. Credit Union*, 457 Mich 318, 577 NW2d 881 (1998), overruled by *Joliet v Pitoniak*, 475 Mich 30, 715 NW2d 60 (2006)); *Id.* at 41 ("We agree with the *Jacobson* dissent").

> violation of the WPA. **Where the resignation is not itself an unlawful act <u>perpetrated by the employer</u>**, it simply is not a "violation" of the WPA under the plain language of MCL 15.362, which prohibits discharge, threats, or other discrimination **by the employer**.

Id. at 41 (emphasis added). Since a constructive discharge does not violate the WPA, the date that the employee resigns to establish the constructive discharge **cannot** start the accrual of the statute limitations under the WPA. Only an employer's act can.

a. By The Statute's Plain Language, Constructive Discharge Is NOT A Violation Of The WPA And Is NOT An Independent Cause Of Action.

Plaintiff argues that constructive discharge is an adverse employment action, similar to moving an employee's office can be. But it is undisputed that constructive discharge is **not** a cause of action. This Court in *Joliet* found that, based on the statute's plain language, a constructive discharge is **not** a cause of action, much less a violation of the WPA:

> We agree with the *Jacobson* majority that a **constructive discharge is not a cause of action**, but simply the culmination of alleged wrongful actions that would cause a reasonable person to quit employment. Constructive discharge is a defense that a plaintiff interposes to preclude the defendant from claiming that the plaintiff voluntarily left employment. *Jacobson*, supra at 321 n 9, 577 NW2d 881. **The resignation itself does not constitute a separate cause of action.** *Id.*

Id. While Plaintiff hinges her appeal on arguing that a cause of action must exist before she could file suit, the Supreme Court in *Joliet v Pitoniak* eviscerated her argument.

Indeed, it is well established that "constructive discharge is not in itself a cause of action" but "a defense against the argument that no suit should lie in a specific case because the plaintiff left the job voluntarily." *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994). "Thus, an underlying cause of action is needed where it is asserted that a plaintiff did not voluntarily resign but was instead constructively discharged." *Id.* In the present case, Plaintiff's underlying cause of action appears to be based on an alleged retaliatory hostile environment based on purported conduct occurring long before May 21, 2021. See Complaint ¶¶ 99 ("toxic work

environment"), 105 ("harassment and retaliation"), 113.

Contrary to Plaintiff's assertion, Plaintiff was not constrained to only file suit until after she resigned. The opposite is true. Plaintiff could have filed suit well before she decided to resign. After all, constructive discharge claims are in essence hostile environment claims, "essentially present[ing] a 'worst case' harassment scenario, harassment ratcheted up to the breaking point." *Penn State Police v Suders*, 542 US 129, 146-147 (2004).

If the working conditions were really as intolerable since February 2020 as Plaintiff claims, then Plaintiff could have filed suit for a hostile environment within 90 days of that alleged harassment; 18 months before she filed suit on August 26, 2021. Similarly, if Plaintiff identified an act by the employer that could constitute a discrete adverse employment action, such as an involuntary transfer to a less desirable position with a decrease in pay, she could have filed suit under the WPA within 90 days of that event. For example, if Plaintiff claims that the alleged decision in June 2020, to transfer Plaintiff to a different position (which never occurred) was an act of discrimination, Plaintiff could have filed suit within 90 days of that event, by September 2020—nearly a year before she filed suit. Yet, Plaintiff chose not to file suit after any of these events but waited until August 26, 2021.

Plaintiff has taken the absurd legal position that constructive discharge claims are always a question of fact to be determined by a jury. This is a false legal claim that is contradicted by the fact that dozens of constructive discharge cases have been decided as a matter of law by both Michigan courts and courts in the Sixth Circuit.[4] See e.g., *Collette v Stein-Mart, Inc*, 126 Fed.

[4] "In the Sixth Circuit, the standard applied to a claim of constructive discharge under federal law is the same as a claim of constructive discharge under the MCRA [Michigan's Civil Rights Act]." *Lemond v American Freight of MI*, 2011 US Dist LEXIS 123853, at *26, n. 5, citing *Agnew v BASF Corp*, 286 F3d 307, 309 (6th Cir 2002).

Appx. 678 (6th Cir 2006)(applying Michigan law); *Selph v Gottlieb's Fin Servs, Inc*, 35 F Supp 2d 564 (WD Mich 1999); *Hartleip v McNeilab, Inc*, 83 F3d 767, 775-76 (6th Cir 1996)(applying Michigan law); *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 474, 652 NW2d 503 (2002). Plaintiff's claim is further belied by the fact that these same Courts have routinely decided cases as a matter of law based on the lower hostile environment standard. See e.g., *Langlois v McDonald's Rests of Michigan, Inc*, 149 Mich App 309, 311, 385 NW2d 778 (1986); *Clark v UPS*, 400 F3d 341 (6th Cir 2005); *Stacey v Shoney's Inc*, 142 F3d 436 (6th Cir 1998); *Black v Zaring Homes*, 104 F3d 822 (6th Cir 1997).

In short, constructive discharge claims are not itself a cause of action or a violation of the WPA. So, the statute of limitations for a WPA constructive discharge claim begins to accrue on the date of the employer's last discriminatory act; it does not begin to accrue on the date Plaintiff resigns. As a result, Plaintiff was required to file suit under the WPA within 90 days of May 21, 2021—at the latest—but she did not. Therefore, Plaintiff's lawsuit is barred by the statute of limitations.

5. Plaintiff Improperly Conflates Constructive Discharge and Termination Claims

Plaintiff's claim that *allegations* of constructive discharge and *allegations* of termination are the same for purposes of establishing the accrual date of statute of limitations also fails as a matter of law.[5] The Supreme Court found that, for purposes of determining when the statute of limitations begins to accrue under the WPA, there is an important distinction between constructive discharge and termination claims. *Joliet*, 475 Mich at 37. The Supreme Court held:

[5] Plaintiff relies on *Champion v Nationwide Security, Inc*, 450 Mich 702 (1996), to suggest that constructive discharge and termination are the same. But *Champio*n only finds that they are treated the same once an individual *actually established* a constructive discharge, not just *alleges* constructive discharge. Any other reading of *Champion* runs counter to *Joliet*, *Magee*, and *Millar*, which all distinguish discriminatory terminations from constructive discharges.

> Following our decision in *Magee v DaimlerChrysler Corp*., 472 Mich 108, 693 NW2d 166 (2005), we hold that a claim of discrimination accrues when the adverse discriminatory acts occur. Thus, if a plaintiff's complaint does not make out a claim of *discriminatory discharge*, a claim of constructive discharge for a separation from employment occurring after the alleged discriminatory acts cannot serve to extend the period of limitations for discriminatory acts committed before the termination.

Id. at 32 (emphasis in original). Thus, the Supreme Court found that an *employer's* act to discharge an employee is analyzed differently than an *employee's* decision to resign due to alleged working conditions for purposes of determining when the statute of limitations begins to accrue.

Plaintiff relies heavily on *Collins v Comerica Bank*, 468 Mich 628; 664 NW2d 713 (2003), in support of her claim that the statute of limitations did not begin to run until the effective date of her resignation. But *Collins* addresses the accrual of the statute of limitations when an employee is terminated by the employer, not a constructive discharge. Plaintiff here was not terminated; she voluntarily resigned and undertook employment with another School District. The Supreme Court found in *Joliet* that relying on *Collins* in a constructive discharge case is "erroneous" and "misplaced." *Joliet*, 475 Mich at 37, 38. More specifically, in *Joliet*, the Court found: "The lower courts' reliance on *Collins* was erroneous. First, as we noted in *Magee*, supra, *Collins* involved a claim of discriminatory discharge motivated by race and gender animus, not a constructive discharge based on earlier discriminatory acts, as is the claim here." *Id.* at 37. In *Magee v DaimlerChrysler Corp*., 472 Mich 108, 112, 693 NW2d 166, 168 (2005), the Court also found that "reliance on *Collins* to reinstate Magee's claims of sexual harassment, sex and age discrimination, and retaliation is misplaced" because it was a termination case, not harassment. The Court simply stated, "*Collins*, a discriminatory termination case, simply does not apply in this situation." *Id.*

Plaintiff's reliance on *Millar v Construction Code Authority*, 501 Mich 233 (2018) is misplaced for the same reason. *Millar* involved the termination of a contract, not a constructive discharge. *Millar* even distinguishes itself from *Joliet* on that basis. *Id.* at 239-240 (finding that

Millar "is more analogous to *Collins* than to … *Joliet*"). In *Millar*, the Court acknowledged the important distinction between a termination and constructive discharge: "Critical to our rulings in both cases [*Joliet* and *Magee*] was the fact that neither plaintiff asserted a claim of discriminatory discharge." *Id.* at 239. Instead, in *Joliet*, 475 Mich at 31, the plaintiff asserted a constructive discharge claim, and in *Magee*, 472 Mich 108, the plaintiff asserted a hostile environment claim. *Miller* actually supports Defendant's position. The *Millar* Court emphasized that it was the ***employer's actions*** that triggered the start of the statute of limitations. 501 Mich at 240-241.This Court did not find that the employee's reaction to an employer's act initiated the accrual.

6. Plaintiff's Argument Is Contrary To The Language And Purpose Of The Statute Of Limitations.

If Plaintiff's argument is accepted, then the statute of limitations contained in MCL 600.5805 and MCL 15.363 would be rendered nugatory, and employees could unilaterally choose when claims begin to accrue. For example, a plaintiff could claim that a 2024 resignation was a constructive discharge for an employer's retaliatory actions from 2004. All of the operative facts would have occurred two decades earlier. That would be contrary to the well-established rules of statutory interpretation. *See Apsey v Mem'l Hosp*, 477 Mich 120, 131, 730 NW2d 695, 701 (2007)("Of course, a reviewing court should not interpret a statute in such a manner as to render it nugatory."). This very concern was raised by the Supreme Court in *Magee*, 472 Mich at 113, when confronting a similar argument Plaintiff here makes:

> in Justice CAVANAGH'S view [the dissent], a plaintiff subjected to a hostile work environment on December 31, 2005, may file a timely complaint in December 2030 if the employer has failed to remedy the sexual harassment in the ensuing twenty-five years. This theory renders nugatory the period of limitations established by the Legislature in MCL 600.5805(10). It is therefore a theory we must reject.

Id. at 113 (*citing Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60, 631 NW2d 686 (2001)). Plaintiff's argument would effectively eliminate the statute of limitations in the WPA, which is

intended to encourage the prompt reporting of illegal conduct. *See Hanay*, 497 Mich at 57 (courts are "to avoid an interpretation that renders nugatory or surplusage any part of a statute."

Plaintiff's argument would also lead to the "absurd result" that Plaintiff decries, as that would destroy the very reason for the statute of limitations. The statute of limitation seeks to: (1) provide plaintiffs with a reasonable opportunity to bring suit, (2) compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend, (3) relieve the court system from dealing with stale claims, (4) protect potential defendants from protracted fear of litigation, and (5) prevent fraudulent claims. *Hatcher v State Farm Mut Auto Ins Co*, 269 Mich App 596, 603–604; 712 NW2d 744 (2006). These goals could not be achieved if Plaintiff could unilaterally establish that the statute of limitations would begin to run a decade or more after all of the operative facts occurred.

Plaintiff's position also would allow her to rely on facts to establish her claim that occurred outside of the statute of limitations. That stands contrary to the Supreme Court's admonishment that the continuing violations doctrine does not apply, as discussed below.

II. THE CONTINUING VIOLATIONS DOCTRINE DOES NOT APPLY TO CLAIMS UNDER THE WPA.

Even if Plaintiff somehow conjured up some new incident that occurred *after* May 28, 2021, (90 days prior to Plaintiff initiating this lawsuit on August 26, 2021) to attempt to survive dismissal, any alleged harassment occurring *before* May 28, 2021, cannot be considered and should be dismissed. *Joliet v Pitoniak*, 475 Mich 30, 715 NW2d 60 (2006). Plaintiff admits that the "'continuing violations doctrine' cannot be used to extend the statute of limitations in Civil Rights cases," and "Plaintiff does not dispute this." *See Plaintiff's Response, p. 15*. This is consistent with the Supreme Court's decision in *Joliet*, which excluded any incidents of alleged harassment that occurred outside of the statute of limitations to support the constructive discharge claim. 475 Mich

at 31 ("a claim of constructive discharge for a separation from employment occurring after the alleged discriminatory acts cannot serve to extend the period of limitations for discriminatory acts committed before the termination.").

In *Garg v Macomb County Community Mental Health Services*, the Michigan Supreme Court found that the "continuing violations doctrine" does not apply to a hostile environment claim. *Garg v Macomb County Community Mental Health Services*, 472 Mich 263; 696 NW2d 646 (2005)(the continuing violations doctrine "bears little relationship to the actual language of the relevant statute of limitations, MCL 600.5805 and MCL 600.5827."). This means that a plaintiff cannot rely on claims of harassment that occurred outside of the statute of limitations to support her claim.

The *Garg* Court identified that "[n]othing in these provisions permits a plaintiff to recover for injuries outside the limitations period when they are susceptible to being characterized as 'continuing violations,'" finding that **"[t]o allow recovery for such claims is simply to extend the limitations period beyond that which was expressly established by the Legislature."** *Id*. at 282. (emphasis added). The Court also recognized that "there is no corresponding provision in Michigan law that even implicitly endorses the 'continuing violations' doctrine." *Id*. at 283. Accordingly, the Michigan Supreme Court overruled *Sumner v Goodyear Tire & Rubber Co.,* 427 Mich 505, 398 NW2d 368 (1986), holding that the **continuing violations doctrine "is contrary to the language of § 5805 and . . . has no continued place in the jurisprudence of this state**." *Id*. at 290. (emphasis added).

This Court has repeatedly applied *Garg* to bar claims outside of the statute of limitations in WPA claims. Consider again *Janetsky v Cnty. of Saginaw*, No. 346542, 2023 WL 6322639, (Mich Ct App Sept. 28, 2023), where this Court recently affirmed that the statute of limitations for

constructive discharge claims brought under the WPA accrue on the date of the last employer act, not the employee's decision to resign. Although the Court there found that the plaintiff had identified some employer act within the statute of limitations, plaintiff could not seek damages for any action occurring outside of the statute of limitations:

> to the extent that the trial court stated or implied that plaintiff could seek damages for conduct that occurred more than 90 days before the date she filed suit, it erred by doing so; as we stated in our initial opinion, "to the extent the trial court based its decision regarding the limitations period on the 'continuing wrongs' doctrine, this doctrine has been disavowed in Michigan." *Janetsky*, unpub. op. at 9 n 7, citing *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 290; 696 NW2d 646 (2005), amended on other grounds 473 Mich 1205 (2005). and *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 280; 769 NW2d 234 (2009). **Plaintiff's claim for damages under the WPA is therefore limited to that flowing from conduct that took place within the limitations period.**

Id, at *5

In *Moyer v Comprehensive Rehabilitation Center, Inc*, No. 292061, 2010 WL 3604680 (Mich Ct App Sept 16, 2010), the plaintiff appealed the lower court's order granting summary disposition to defendant on plaintiff's WPA claim. *Id*. at *1. The lower court found that the plaintiff failed to file a claim within 90 days as required by the WPA. *Id*. at *3. The plaintiff maintained that her claims were based on defendant's actions prior to the 90 days before she filed her complaint were not barred from recovery, because they were a part of a continuing violation of the WPA. *Id*. The plaintiff argued that *Garg* analyzed the Michigan Civil Rights Act, not the WPA; thus, the continuing violations doctrine should apply to preserve her claims. Applying the reasoning of *Garg*, the Court of Appeals found that "to allow recovery for a claim that was not within 90 days of the occurrence of the WPA violation 'is simply to extend the limitations period beyond that which was expressly established by our Legislature.'" *Id*.

Accordingly, the Court of Appeals concluded that the continuing violations doctrine is not

applicable to WPA claims. *Id*. *See also Wajer v Outdoor Adventures, Inc*., No. 294985, 2011 WL 240697 (Mich Ct App, Jan 25, 2011) (finding that the trial court did not err in granting defendants' motion for summary disposition based on its finding that the continuing violations doctrine was inapplicable to plaintiff's WPA claim). *See also Parakh v Harrison Tp*, No. 306053, 2013 WL 6670846, *4-5 (Mich Ct App, Dec 17, 2013)(affirming the trial court's finding that plaintiff's claim under the WPA is barred by the statute of limitations and, pursuant to *Garg*, the continuing violations doctrine does not apply to preserve claims outside of the 90-day limitations period).

Therefore, under *Garg* and the above Court of Appeals decisions, Plaintiff cannot rely on any alleged incidents of harassment that occurred outside of the statute of limitations. The statute of limitations under the WPA is 90 days and Plaintiff filed suit on August 26, 2021. Therefore, any claims occurring before May 28, 2021, are barred by the statute limitations and cannot be considered. Since Plaintiff has not made any allegations of alleged harassment or adverse employment actions occurring after May 28, 2021, Plaintiff's lawsuit should be dismissed.

III. SUMMARY DISPOSITION WAS PROPERLY GRANTED

On appeal, Plaintiff asserted that Defendants' alleged retaliation led to Plaintiff resigning her employment in June 2021. Plaintiff now claims that she did not actually resign until early August 2021. It is undisputed, however, that the last alleged act Plaintiff claims that Defendants committed occurred on May 21, 2021, when Defendants gave Plaintiff a *positive* performance evaluation. Ninety-seven days later, on August 26, 2021, Plaintiff filed suit under the WPA, claiming she was constructively discharged.

The Court properly found that Plaintiff's lawsuit is time-barred. The WPA has a 90-day statute of limitations. Because Plaintiff has not identified any alleged discriminatory conduct committed *by Defendants* after May 21, 2021, the period of limitations on Plaintiff's claims

expired, at the latest, 90 days from that date, or August 19, 2021. Since Plaintiff filed suit on August 26, 2021, Plaintiff's lawsuit was filed *after* the expiration of the statute limitations and her lawsuit should be dismissed

STATEMENT OF RELIEF SOUGHT

Plaintiff's argument, that the statute of limitations for constructive discharge claims under the WPA begins to accrue when the employee decides to resign, is wrong.

This Court is clear that based on the plain language of the WPA a constructive discharge is not a cause of action, nor is it a violation of the WPA. *Joliet*, 475 Mich at 40-41. As a result, the statute of limitations begins to accrue on the last date of an *employer* act, not the date the *employee* decides to resign: "**in the context of a constructive discharge it is the employer's wrongful act that starts the period of limitations by causing the employee to feel compelled to resign, not the employee's response**." *Id.* at 41.

In this case, the last date Plaintiff alleges Defendants took any action was May 21, 2021. The WPA has a 90-day statute of limitations. Therefore, Plaintiff was required to file suit by August 19, 2021. Plaintiff, however, waited to file suit until August 26, 2021, 7 days after the expiration of the statute of limitations. Plaintiffs' lawsuit is time-barred and should be dismissed.

For all the reasons stated above, this Court should deny Plaintiff's Application for Leave to Appeal.

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DATED: January 17, 2025

CERTIFICATE OF COMPLIANCE

Pursuant to Admin. Order No. 2019-6, the undersigned counsel certifies that this Motion complies with the type-volume limitations of same. The Answer was prepared in Microsoft Word 2010, using a Times New Roman 12 pt. font. Microsoft Word 2010 has a function that calculates the number of words in a document. According to that function, there are 8,412 words in this Answer.

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