2015 IL App (1st) 14-0799



FOURTH DIVISION
May 14, 2015

No. 1-14-0799

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| GINA PLANELL, | ) | |
| | ) | Appeal from the Circuit Court |
| Plaintiff-Appellant, | ) | of Cook County, Illinois, |
| | ) | County Department, Law Division. |
| v. | ) | |
| | ) | No. 12 L 4903 |
| WHITEHALL NORTH, L.L.C., d/b/a WHITEHALL | ) | |
| OF DEERFIELD HEALTHCARE CENTER, | ) | The Honorable |
| | ) | Joan E. Powell, |
| Defendant-Appellee. | ) | Judge Presiding. |

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Howse and Cobbs concurred in the judgment.

**ORDER**

¶ 1 *Held*: The circuit court erred in granting summary judgment in favor of the defendant, employer. The record establishes that there remained genuine issues of material fact as to: (1) whether the plaintiff employee was perceived to be disabled at the time of her termination so as to be able to proceed with her disability discrimination claim under the Illinois Human Rights Act (775 ILCS 5/1-101 *et seq*. (West 2010)); and (2) whether the employee was terminated as a result of inquiring into the possibility of workers' compensation benefits, so as to proceed with her retaliatory discharge claim under the Illinois Workers' Compensation Act (820 ILCS 305/1 *et seq*. (West 2010)).

¶ 2 This is an appeal from the circuit court's order granting summary judgment in favor of the

defendant, Whitehall North, L.L.C., d/b/a Whitehall of Deerfield Healthcare Center (hereinafter Whitehall or the employer) and against the plaintiff, Gina Planell, a former employee. The plaintiff asserts that the circuit court erred in granting summary judgment in favor of the defendant because there remained genuine issues of material fact as to whether: (1) the defendant wrongfully terminated the plaintiff's employment after it perceived her plantar fasciitis as a permanent medical condition, which constituted a disability, and would have prevented her from working as a rehabilitation aide without accommodation in violation of the Illinois Human Rights Act (Human Rights Act) (775 ILCS 5/1-101 *et seq*. (West 2010)); and (2) the defendant unlawfully terminated her employment in retaliation for her attempt to initiate a claim under the Illinois Workers' Compensation Act (Workers' Compensation Act) (820 ILCS 305/1 *et seq*. (West 2010)). For the reasons that follow, we reverse the judgment of the circuit court and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 The record reveals the following undisputed facts and procedural history. The plaintiff's employer, Whitehall, is a nursing home engaged in the business of providing short term and long term, skilled and unskilled care to a primarily geriatric population in Deerfield, Illinois. The plaintiff was employed as a full-time rehabilitation therapy aide (hereinafter rehabilitation aide or therapy aide) by Whitehall between approximately December 23, 2009, and August 27, 2010.

¶ 5 After she was terminated from her employment with Whitehall, the plaintiff first filed a two-count discrimination charge against her employer with the Illinois Department of Human Rights (hereinafter the Department), alleging that she had been terminated because of her: (1) perceived physical disability, plantar fasciitis, and (2) her actual physical disability, plantar fasciitis. On February 3, 2012, the Department dismissed the plaintiff's discrimination charge for

lack of substantial evidence, permitting the plaintiff to pursue the instant civil action in circuit court.

¶ 6 On May 7, 2012, the plaintiff filed her instant two-count complaint in the circuit court, asserting: (1) that in violation of the Human Rights Act (775 ILCS 5/1-101 *et seq*. (West 2010)), she was terminated from her employment because her employer perceived her plantar fasciitis as a permanent condition which would constitute a disability preventing her from working as an aide without accommodation; and (2) that she was unlawfully terminated in retaliation for taking the necessary steps in anticipation of receiving benefits pursuant to the Workers' Compensation Act (820 ILCS 305/1 *et seq*. (West 2010)). In support, the plaintiff alleged that as a full-time employee for Whitehall she consistently met all of her employer's expectations. In fact, in April 2010, her employer described her as "kind and compassionate" and "an asset to the company." The plaintiff further alleged that beginning in May 2010 she started to experience foot pain because of a condition called plantar fasciitis. As a result, the plaintiff missed several days of work in May and June, each time providing her employer with a doctor's note explaining her absences. The plaintiff asserted that in June 2010, she received an injection for her condition and missed two days of work, again providing a doctor's note, this time indicating that she could return to work as of June 20, 2010. The plaintiff additionally alleged that even though she continued to experience foot pain and receive treatment for her condition, she never asked her employer for an accommodation prior to her termination.

¶ 7 The plaintiff further alleged that in August 2010, she told Mary Hansen (hereinafter Hansen), a Whitehall employee, that she was considering filing a workers' compensation claim. The plaintiff told Hansen that her foot had been hurting for months and wanted to know if there was a possibility to be seen by Whitehall's physicians. The plaintiff explained that she asked this

question because she had not yet qualified for insurance and had been paying the medical costs herself. Hansen told the plaintiff that since the plaintiff had already seen her own physician, the plaintiff did not qualify for workers' compensation benefits, but advised the plaintiff that she would investigate further.

¶ 8 The plaintiff also asserted that on or about August 6, 2010, she saw a posting for a position in Whitehall's Alzheimer's unit for a therapy aide, and obtained a job description from that division.

¶ 9 In her complaint, the plaintiff further asserted that in August 2010, she had a conversation with her supervisor and Whitehall's assistant administrator, Cindy Cohen (hereinafter Cohen). During that conversation, the plaintiff provided Cohen with a document, which was required for her enrollment in the company's insurance program. When Cohen questioned the plaintiff about her plantar fasciitis, the plaintiff responded that the condition began while she was working at Whitehall and that she thought it might be related to her job, because the pain often occurred while she was at work.

¶ 10 The plaintiff further alleged in her complaint that subsequently, on or about August 23, 2010, she met her other supervisor, and Whitehall's director of rehabilitation services, Beth Wilcox (hereinafter Wilcox). At that meeting, Wilcox expressed her displeasure with the plaintiff's inquiry about another position and the possibility of workers' compensation benefits. In support, the plaintiff attached a portion of Wilcox report, from Whitehall's personnel files, regarding that meeting dated August 23, 2010, stating:

> "I was disappointed to hear that she [the plaintiff] had been asking other departments about job opportunities that are less physically demanding and how to get covered under workman's compensation for her plantar fasciitis (*sic*). I told her that I knew she had even interviewed in another department. I told her that as her supervisor I should be made aware

of her desire to look at other job opportunities within the facility because she was having difficulty meeting the demands of her job requirements due to her foot pain. I also told her that there needed to be some action plan made regarding treatment of her condition so that she can resume her regular duties without further aggravating her condition. I told her that there are currently no other light duty positions available, but that I would allow her to continue in her current position until the end of the week so long as she met with her doctor to determine a more permanent solution to her condition. I told her that I felt that this problem was being dragged out with no solution and that it was not fair to the Rehab department to have her continue as a the Rehab Aide if she could not guarantee us the 40 hours she was hired for or perform the tasks she was hired for. I also said that I felt she should have been more proactive with her treatment if she truly was in that much pain. I told her that I understood she needed the income, but that I can't have her continue to work in our department if she claims that the work is causing her situation to get worse. I told her that we would meet again on Friday and decide what her next course of action would be."

¶ 11 Later that same afternoon, Wilcox and Cohen again met with the plaintiff to express their displeasure with her workers' compensation inquiry. In support, the plaintiff attached a report authored by Wilcox and dated August 23, 2010, stating:

"***Cohen and I met with Gina [the plaintiff] again this afternoon to offer her another option in the event that she could not continue in the Rehab Department. She was offered a position in either the kitchen or laundry department at off hours. We explained to [the plaintiff] that we were very uncomfortable with her statements that her job as a Rehab Aide was what caused her condition in the first place. Additionally, we were unconformable with [her] statement that we aggravated her condition by forcing her to work the 40 hours per week that

> she had originally committed to. We reiterated to [the plaintiff] that for a short term 2-4 weeks we had no problem accommodating her decreased hours and lighter workload, but that this could not continue indefinitely. This condition has been an issue for at least 5-8 weeks. It is not fair to her coworkers to have a Rehab Adie that is not able to fulfill the job commitments. [The plaintiff] was remanded that she has until Friday to get an appointment with her doctor to review other treatment options or get an all clear to work 40 hours per week and do all of her duties as a Rehab Aide. [The plaintiff] was also reminded that she does not qualify for workman's compensation since there is no proof that her condition was acquired by doing her work at Whitehall. There was no particular event or injury that caused this condition. [The plaintiff] responded by saying that she was sorry we felt that [she was] not being forthcoming with information regarding her condition and her plan of action to deal with her condition. We all agreed that [the plaintiff] and I will meet Friday to make plans for the future."

¶ 12 Based upon the aforementioned allegations, the plaintiff asserted that she was unlawfully terminated because of her disability and in retaliation for pursuing workers' compensation benefits. As a result she sought damages in excess of $50,000 for each count.

¶ 13 On June 8, 2012, the employer filed its answer to the plaintiff's complaint, admitting that Wilcox had authored the aforementioned reports, but denying the remaining allegations in the plaintiff's complaint. In addition, the employer filed its affirmative defense alleging that a legitimate nondiscriminatory reason for terminating the plaintiff. Specifically, the defendant alleged that on or before August 27, 2010, the plaintiff informed Whitehall that she could not physically perform her duties as a full time rehabilitation aide because of her plantar fasciitis. The employer asserted that because of this alleged physical limitation, Whitehall offered the

plaintiff an opportunity to work in Whitehall's kitchen or laundry departments, which were less physically demanding jobs, at the same wage paid to the plaintiff as a rehabilitation aide. According to the employer, the plaintiff rejected this offer, and failed to provide it with any information concerning the alleged plantar fasciitis and her anticipated treatment for this condition so as to be able to perform her duties as a rehabilitation aide.

¶ 14 The parties proceeded with discovery. Relevant to this appeal, in its answer to the plaintiff's interrogatories, the employer indicated that the plaintiff had four meetings with her supervisors prior to her termination. Specifically, on July 23, 2010, the plaintiff met Wilcox to discuss her excessive absenteeism. On August 23, 2010, she met with Wilcox again, at the end of which she was told that she would be allowed to continue in her current position until the end of the week "as long as she met with her physician to determine a solution to her condition." That same day, she had a second meeting with both Wilcox and Cohen at which it was reiterated to her that she needed to get an appointment with her physician by Friday to review treatment options or "get an all clear to work." Finally, the plaintiff had a meeting with Wilcox on August 27, 2010. At that meeting, the plaintiff admitted to Wilcox that she had not seen her physician as requested, explaining that he had been on vacation. Wilcox then informed the plaintiff that she would have to move to the laundry department, working the 3 p.m. to 11 p.m. shift at the same salary, until she brought a physician's note stating that she could resume working a full 8 hour shift as a rehabilitation aide. The plaintiff refused the offered laundry position. After checking and confirming with both Cohen and Jeremy Kanter (the employer's administrator) that there were no other light duty positions other than the 3 p.m. to 11 p.m. laundry shift, Wilcox returned to the plaintiff and informed her that she was being terminated. The reasons stated were that the plaintiff: (1) was unable to meet the requirements of the rehabilitation aide position; (2) had

failed to provide the employer with a letter from her physician stating that she could safely perform her position; (3) did not actively seek medical attention; and (4) had declined to accept a light duty position at the same salary.

¶ 15 During discovery, several parties were deposed, including the plaintiff and Wilcox. In her deposition, taken on August 20, 2013, the plaintiff averred, *inter alia*, that in 2010, she was a married, mother of a 15-year-old, and was employed by Whitehall. Prior to working for Whitehall, the plaintiff had been employed as an administrative assistant in her and her husband's home-based business, Rinkell Carpentry & Renovations, Inc. (hereinafter Rinkell). Prior to that for 12 years she was employed by FedEx. The plaintiff admitted that while at FedEx she suffered a right knee injury on the job. She testified, however, that she could not recall whether she filed a workers' compensation claim in that case. On cross-examination, however, she was presented with evidence of filing such a claim, and then testified that she "must have done so."

¶ 16 The plaintiff next testified that she began working as a rehabilitation therapy aide for Whitehall in December 2009. The plaintiff explained that while employed at Whitehall she directly reported to Jean Bossinette (hereinafter Bossinette), who reported to Wilcox, who ultimately reported to Candace Serka (hereinafter Serka), the manger of the physical therapy department. The plaintiff admitted that she did not report to Cohen, but that Cohen worked at the administration office and was the person with whom employees were to discuss insurance matters. The plaintiff stated that on occasion she would socially chat with Cohen. The plaintiff admitted that prior to her termination she had a conversation with Cohen regarding her insurance, namely that Cohen had wanted a signature on a document that the plaintiff had forgotten to provide. The plaintiff further recalled that some time prior to her termination (possibly May or June) she had a casual conversation with Cohen in which she told Cohen that

she had a feeling that her illness (plantar fasciitis) had come about because of her job. The plaintiff explained that her physician had told her that her condition may have been caused by her repetitive and near-constant walking and the weight that she had to bear by lifting patients. The plaintiff, however, admitted that after she had this conversation with Cohen no immediate actions were taken against her.

¶ 17 The plaintiff further testified that she never told her immediate supervisor Bossinette that she believed that the job had caused her plantar fasciitis; nor did she ever discuss her injury with him. She also never asked Bossinette about a workers' compensation claim nor told him that she was thinking about filing one. The plaintiff, however, believed that Bossinette was aware of her injury because she limped when she walked as a result of the pain. In addition, she believed that Bossinette was present on an occasion when during lunchtime one of the employees from the occupational therapy area was showing her how to wrap her foot, and apply ice to it.

¶ 18 The plaintiff next acknowledged that she spoke to Hansen regarding workers' compensation benefits, even though Hansen was not her immediate or indirect supervisor. She explained that on that occasion, she saw Hansen passing in the hallway and asked her about workers' compensation benefits. The plaintiff averred that she "understood that doctors on workers' compensation will keep you on the job and treat you as you're going." Accordingly, she asked Hansen if she knew anything about this, and Hansen responded that she would "have to get back to her."

¶ 19 The plaintiff next averred that her employment was involuntarily terminated by Wilcox. She acknowledged that Wilcox informed her that she was being terminated because she "was not being forthcoming wither [her] medical condition." The plaintiff admitted that around August 23, 2010, she was instructed to make a follow-up doctor's appointment, but testified that she did

not know why she was being asked to do so. She explained that in August she had had no absences, and her foot felt fine. She had come to a point where she "could do [her] job without any problems." In fact, the plaintiff testified that on the date she was terminated she had no physical disability.

¶ 20 The plaintiff also testified that she believed that Cohen participated in the decision to terminate her employment. She explained that on August 23 or 24, 2010, she was approached by Cohen and asked whether she "wanted to be fired." The plaintiff did not know what Cohen was talking about, so she responded "Absolutely not." Cohen then told her that she "needed to come up with a game plan of medical treatment regarding [her] foot." The respondent told Cohen that she would and that she would do whatever Cohen wanted her to do in order to keep her job.

¶ 21 The plaintiff testified that because her physician was on vacation, she could not make an appointment until September 2, 2010, and that she told Wilcox as much at the August 27, 2010 meeting. The plaintiff averred that during this appointment her doctor advised her that because "flare-ups" were possible, she should take muscle relaxants to alleviate the paint and do stretching and other exercises to keep the condition in check. The plaintiff, stated, however, that because she was terminated before September 2, 2010, she never told anyone at Whitehall about what her physician had subsequently recommended.

¶ 22 The plaintiff next acknowledged that June 2010 she sought a job as activities director for Whitehall's Alzheimer's unit. She testified that she was interested in the job because she had experience working with geriatric patients, like her father, and "had an affinity towards older people." She stated that her decision to inquire about the job had nothing to do with her plantar fasciitis. The plaintiff also testified that she walked up to the Alzheimer's unit to inquire about the job because Cohen had told her that the position was available and that they were

interviewing for it. According to the plaintiff, after she interviewed for the job she was told that she had made a mistake by inquiring for the position and that instead she should have followed proper procedure and spoke to her supervisor, Wilcox, first. The plaintiff averred that the position was filled by another candidate and believed that the only reason she was not hired was that she had not followed proper procedure.

¶ 23 The plaintiff next admitted that she told people at Whitehall that her foot hurt and that she took time off because of that pain. She also testified that she provided a doctor's note to her employer so as to be able to take that time off. In addition, the plaintiff admitted that she continued to work in her own home business while taking absences from Whitehall, but explained that the position at home did not require a lot of movement or standing.

¶ 24 The plaintiff further admitted that on August 23, 2010, Cohen and Wilcox offered that she start working in the laundry or the cafeteria instead of as a rehabilitation aide, explaining to her that her foot pain was effecting her position. She testified that both offered positions were for the 3 p.m. to 11 p.m. shift. The plaintiff explained that prior to this conversation, she had never been demoted or warned about her absenteeism or placed on "light (nonphysical) duty." She then testified that she refused the offered positions because her son is a special needs child who needed her at home in the evenings for dinner for guided learning. While the plaintiff admitted that her husband worked from their home office, she testified that he could not be there to take care of their son because he was often "out on jobs."

¶ 25 The plaintiff testified she was terminated because she inquired about the possibility of receiving workers' compensation benefits. She explained that before her inquiry about such benefits no one had questioned her performance or work ability. Rather, "everything started getting very strange" only after she spoke to Hansen about such benefits. The plaintiff admitted

that she never filed a workers' compensation claim, but explained that Wilcox told her she did not qualify for such benefits since the injury did not occur on the job.

¶ 26 The plaintiff next testified regarding absences she took from work beginning in May 2010. She first admitted that May 2010 she took five days off work to take care of her sick son, providing Whitehall with a note explaining this absence. The plaintiff next testified that on June 30, 2010, after having been away from work for three consecutive days, she gave Serka a doctor's note from her physician, Dr. Mark Collins (hereinafter Dr. Collins), explaining her absence. That note indicated that the plaintiff "continu[ed] to be under [his] care, but may return to work on Thursday, June 30th." In addition, the note stated that the plaintiff "may at times have to limit her work," but is "capable of letting you know when the limitations are needed." The plaintiff explained to Serka that this note meant that "she may have to sit down and work sitting form time to time."

¶ 27 The plaintiff further testified that July 20, 2010, she received four injections in her heel to alleviate the pain from her plantar fasciitis. In addition, she was given a fitted boot to wear at night, as well as a note written by Dr. Phillip Forni (hereinafter Forni), stating: "Gina Planell [the plaintiff] is under our care and has been advised not to work 7-21-10 and 7-22-10. She may return to work on 7-23-10." The plaintiff testified that she could not recall the exact dates, but believed that when she returned to work on July 23, 2010, she gave that doctor's note to Wilcox.

¶ 28 During discovery, on March 18, 2013, the parties also deposed Wilcox. In her deposition, Wilcox testified that she is a former employee of Whitehall and that she has not worked for Whitehall for over two years. Wilcox admitted that she herself was terminated by Whitehall because she could no longer meet the demands of the job—specifically, she could not work in

the office 40 hours, five days a week. Wilcox explained that she had wanted to work 40 hours in four days, but could not be accommodated.

¶ 29 Wilcox next testified that in 2010, while she was still employed with Whitehall, she supervised the plaintiff on a daily basis. According to Wilcox, the plaintiff was a full-time rehabilitation aide in the orthopedic gym, and her responsibilities included: cleaning the gym, helping transport patients to and from therapy in the upstairs and the downstairs gyms, as well as aiding the therapists with patient activities. Wilcox next identified a copy of the therapy aide job description. That document, *inter alia*, listed the following as a therapy aide's duties: (1) filling the water pitchers each morning; (2) sanitizing all treatment mats in the morning and afternoon; (3) wiping down all surfaces, machines and walkers; (4) assisting therapists with exercises, activities and transfer of patients; (5) picking up equipment and folding walkers; (6) copying notes; (7) retrieving charts; (8) taking patients back and forth from their rooms to the therapy room. In addition, the document stated that "refusal to do, or repetitive non-compliance, will be subject to disciplinary action at the discretion of the director of rehabilitation or building administrator." The document explained that on the first offense, the employee would be "written up," that on the second offense, she would receive a two-day suspension without pay, and that on the third offense, she would be terminated.

¶ 30 Wilcox next averred that she first became aware that the plaintiff was working less than her mandatory 40 hours per week in June 2010. At that time, the plaintiff presented Wilcox with a doctor's note that explained that she was suffering from plantar fasciitis and that there may be times during the day when she would need to take a break. Wilcox testified that after reading that note she believed that the plaintiff "would let her know if her feet were bothering her and she could no [longer] stand and do her work." According to Wilcox, subsequently, the plaintiff

began asking to leave work early as a result of foot pain. Wilcox, however, could not recall exactly how many times or on what dates this actually occurred.

¶ 31 Wilcox next acknowledged that the plaintiff was never given a written warning or disciplined as a result of missing work. Wilcox explained that the plaintiff followed Whitehall's policy and provided the appropriate doctor's notes excusing all of her absences. Wilcox also admitted that no other rehabilitation aides were required to work overtime as a result of the plaintiff's absences and that in fact Whitehall's policy prohibited overtime without permission. She therefore acknowledged that it was not until August 2010 that she told the plaintiff for the first time that she may have to switch positions because she was "leaving work a lot and unable to do her job."

¶ 32 Wilcox next admitted that on August 23, 2010, she had two meetings with the plaintiff, the first one alone and the second one with Cohen. She admitted to authoring a note in the plaintiff's personnel file dated August 23, 2010, describing that first meeting. Wilcox then acknowledged that during that first meeting she told the plaintiff that she was disappointed to hear that the plaintiff had been seeking out job opportunities in other departments. During her deposition, Wilcox explained that she was not upset that the plaintiff wanted another job, but would have wanted the plaintiff to have approached or notified her first.

¶ 33 During that first meeting, Wilcox also told the plaintiff that she had not been to see her physician since June 2010, and that she needed to obtain a doctor's note for a more permanent solution to her condition. When asked why she gave the plaintiff only until the end of that week to speak to her physician, Wilcox explained that she was just trying to "obtain some time frame" as to when the plaintiff would be able to perform a 40 hour work schedule. Wilcox stated that her expectation was to receive a note from the plaintiff's doctor indicating for example that in

four weeks time the plaintiff could return to regular hours or that she would be given new medication to offer her relief or immediate improvement.

¶ 34 Wilcox next testified that she could not recall what transpired at the second meeting she had with the plaintiff and Cohen. In addition, she refused to authenticate the second note in the plaintiff's personnel file that described that second meeting, and which was signed by her. In fact, she testified that she believed that words were inserted into that note that she never wrote. Specifically, she could not recall ever writing or making these three comments contained in the second note dated August 23, 2010: (1) that the plaintiff "was also reminded that she does not qualify for workman's compensation since there is no proof that her condition was acquired by doing her work at Whitehall"; (2) that "we were uncomfortable with [the plaintiff's] statement that we aggravated her condition by forcing her to work the 40 hours per week that she had originally committed to"; and (3) that there was no particular event or injury that caused this condition." Wilcox explained that anyone at Whitehall could have gone back into the computer and edited these notes so long as they had a password.

¶ 35 Wilcox further averred that she could not recall ever being told by any employee of Whitehall that the plaintiff had inquired about whether she qualified for workers' compensation benefits. She testified, however, that she is familiar with Hansen, and that in August 2010, Hansen was in charge of billing and accounts receivable for Whitehall. She further admitted that it is possible that at that time Hansen was helping to cover a position of an employee on maternity leave, so that she may have been responsible for workers' compensation claims as well.

¶ 36 Wilcox next testified that she last met the plaintiff on August 27, 2010. During that meeting,

the plaintiff informed Wilcox that she had not seen her doctor, as requested, but explained that she did not do so because he was on vacation. Wilcox then told the plaintiff that she would have to move to the 3 p.m. to 11 p.m. shift in the laundry room. The plaintiff refused, but according to Wilcox, only stated that she could not "accept a demotion," never mentioning any child care issues. Wilcox admitted that the plaintiff was terminated that day.

¶ 37 Wilcox was next asked to identify Whitehall's attendance sheet for the months of July and August 2010. After identifying the document, she admitted that the document revealed that for the entire month of August 2010, the plaintiff neither missed a day of work nor took any early leaves.

¶ 38 Based on the aforementioned deposition testimony, on November 20, 2013, the defendant employer filed a motion for summary judgment arguing that it was entitled to summary judgment as a matter of law on both of the plaintiff's counts. As to the plaintiff's disability discrimination claim brought pursuant to the Human Rights Act (775 ILCS 5/1-101 *et seq*. (West 2010)), the employer argued that by testifying in her own deposition that she had no physical disabilities, that her planter fasciitis was not impairing her ability to work and, in fact, did not affect her ability to work for her own home business, where she continued to work during the time she was taking absences from Whitehall, the plaintiff failed to establish a *prima facie* case of a disability. As to her retaliatory discharge claim brought pursuant to the Workers' Compensation Act (820 ILCS 305/1 *et seq*. (West 2010)), the defendant asserted that it was entitled to judgment as a matter of law because the plaintiff admitted in her deposition that she never filed a workers' compensation claim, and, in any event, there was no evidence in the record that she would have had a basis for filing such a claim, so as to assert that she was terminated in retaliation for attempting to obtain such benefits. In support of its motion for summary judgment, the employer

attached a copy of: (1) the Department's administrative decision dismissing the plaintiff's charge; and (2) the plaintiff's deposition.

¶ 39 In its response to the motion for summary judgment, the plaintiff argued that there remained genuine issues of material fact as to both counts so as to permit her cause to proceed to a trial. In support of this position, the plaintiff pointed, *inter alia*, to the discrepancies in Wilcox's and the plaintiff's depositions, and particularly to Wilcox assertion that the plaintiff's employment personnel file may have been "doctored" after Wilcox left Whitehall. In support of her assertions, she attached copies of, *inter alia*: (1) her discrimination charge filed with the Department; (2) her complaint; (3) her own deposition; (4) Wilcox's deposition (including exhibits); and (5) the defendants' answers to her interrogatories.

¶ 40 On February 19, 2014, the circuit court granted the defendant's motion for summary judgment. The plaintiff now appeals.

¶ 41 II. ANALYSIS

¶ 42 " 'Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt.' " *O'Gorman v. F.H. Paschen, S.N. Neilsen, Inc.*, 2015 IL App (1st) 133472, ¶ 82 (quoting *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992)). Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005 (West 2010); see also *Carlson v. Chicago Transit Authority*, 2014 IL App (1st) 122463, ¶ 21; *Fidelity National Title Insurance Company of New York v. West Haven Properties Partnership*, 386 Ill. App. 3d 201, 212 (2007) (citing *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004)); *Virginia Surety Co. v. Northern Insurance Co. of*

*New York*, 224 Ill. 2d 550, 556 (2007). In determining whether the moving party is entitled to summary judgment, the court must construe the pleadings and evidentiary material in the record in the light most favorable to the nonmoving party and strictly against the moving party. *Happel v. Wal-Mart Stores, Inc.*, 199 Ill. 2d 179, 186 (2002); see also *Pearson v. DaimlerChrysler Corp.*, 349 Ill. App. 3d 688, 697 (2004). A genuine issue of material fact exists where the facts are in dispute or where reasonable minds could draw different inferences from the undisputed facts. *Morrissey v. Arlington Park Racecourse, LLC*, 404 Ill. App. 3d 711, 724 (2010); see also *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 114 (1995); but see, *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999) ("Mere speculation, conjecture, or guess is insufficient to withstand summary judgment."). We review a trial court's entry of summary judgment *de novo*. *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 349 (1998).

¶ 43 A. Human Rights Act

¶ 44 On appeal, the plaintiff first asserts that the trial court erred in granting summary judgment on her disability discrimination count (775 ILCS 5/1-101 *et seq*. (West 2010)). The Illinois Human Rights Act prohibits discrimination in employment against the physically and mentally disabled. 775 ILCS 5/1-102 (West 2010); *Van Campen v. International Business Machines Corp.*, 326 Ill. App. 3d 963, 970 (2001); *Raintree Health Care Center v. Illinois Human Rights Comm'n*, 173 Ill. 2d 469, 479 (1996).[1] In analyzing employment discrimination claims under the

[1] We note that prior to 2007, the Human Rights Act referred to "handicap" discrimination instead of "disability" discrimination. However by Public Act 95-668 (P.A. 95-668, § 5, eff. Oct. 10, 2007) the legislature replaced the term "handicap" throughout the statute with "disabled" or "disability." The definition of "handicap" (now "disability") was not changed. Accordingly,

Human Rights Act, Illinois courts apply the three-part test set out by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973). *Van Campen*, 326 Ill. App. 3d at 970-71 (citing *Zaderaka v. Illinois Human Rights Comm'n*, 131 Ill. 2d 172, 178-79 (1989)). First, the plaintiff must establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. *Van Campen*, 326 Ill. App. 3d at 971; see also *Raintree*, 173 Ill. 2d at 481. Second, to rebut the presumption of unlawful discrimination, the employer must articulate a legitimate, nondiscriminatory reason for its employment decision. Finally, if the employer establishes a legitimate reason, the plaintiff must prove that the reason was merely a pretext for unlawful discrimination. *Van Campen*, 326 Ill. App. 3d at 971; see also *Raintree*, 173 Ill. 2d at 48.

¶ 45 To establish a *prima facie* case of disability discrimination under the Human Rights Act, the plaintiff must prove that: (1) she was disabled within the definition of the Act; (2) her disability was unrelated to her ability to perform the functions of the job she was hired to perform; and (3) an adverse job action was taken against her related to her disability. *Van Campen*, 326 Ill. App. 3d at 971.

¶ 46 In the present case, the defendant initially contends that summary judgment was proper because the plaintiff failed to establish a *prima facie* case of disability discrimination by repeatedly admitting in her deposition that at the time she was terminated, she suffered from no physical disability and could perform her job without any accommodation. We disagree.

¶ 47 The Human Rights Act defines "disability" in employment as:

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while much of the case law relied on by the parties refers to "handicap" discrimination, in our analysis we will treat it as interchangeable with "disability" discrimination.

> "a determinable physical or mental characteristic of a person,*** or the perception of such characteristic by the person complained against, *** and which characteristic *** is unrelated to the person's ability to perform the duties of a particular job or position." 775 ILCS 5/1–103(I)(1) (West 2010).

Our courts have repeatedly held that in establishing a *prima facie* case, a plaintiff alleging that her employer perceived a condition to be a disability is afforded the same protection as a disabled person. See 775 ILCS 5/1–103(I)(1) (West 2010); see also 56 Ill. Adm. Code 2500.30(3) (2009); see also *Illinois Telephone Co. v. Human Rights Commission*, 190 Ill. App. 3d 1036, 1049 (1997); see also *Lake Point Tower, Ltd. v. Illinois Human Rights Commission*, 291 Ill. App. 3d 897, 906 (1997) ("If the employer perceives the employee as handicapped, rightly or wrongly, then acts against the employee based on that perception, the [Human Rights] Act has been violated."); see also 56 Ill. Adm. Code 2500.30(3) (2009).

¶ 48 For example, in *Kenall Manufacturing Co. v. Illinois Human Rights Comm'n*, 152 Ill. App. 3d 695, 702 (1987) an employee was terminated after returning to work following a heart attack. The defendant employer argued that the plaintiff was not handicapped because he was fully recovered from his heart attack. *Kenall Manufacturing Co.*, 152 Ill. App. 3d at 702. The appellate court rejected this argument holding that the Human Rights Act defines "handicap" as having a history of such handicapped characteristics or being perceived by the employer as having a handicap. *Kenall Manufacturing Co.*, 152 Ill. App. 3d at 703.

¶ 49 In the present case, despite the fact that the plaintiff testified that at the time of her termination she had no physical disability and her medical condition was not impairing her work, the plaintiff's deposition, her personnel file and Wilcox deposition testimony all establish facts from which a reasonable jury could conclude that Whitehall had a perception that the plaintiff

was disabled and terminated her because of that perception. Specifically, in her deposition the plaintiff testified that she told numerous people at Whitehall, including Cohen that her foot hurt, that she had to take time off because of the pain. She testified that she often limped at work and that employees from the occupational therapy area showed her how to wrap her foot in ice to alleviate the pain. The plaintiff also testified that she specifically told Cohen that she believed that her plantar fasciitis was caused by her job, namely repetitive walking and the weight that she had to bear by lifting patients. In addition, in her deposition, the plaintiff's supervisor, Wilcox admitted that in June 2010, the plaintiff presented her with a doctor's note explaining that she was suffering from plantar fasciitis and that there may be times during the day when she would need to take a break. Wilcox next testified that after receiving this note from the plaintiff, she noticed that the plaintiff began to leave work early as a result of the pain in her feet. Wilcox' notes in the plaintiff's personnel file also indicate that Wilcox told the plaintiff that she would have to take a position in the laundry room or kitchen where she would not have to stand because she was "leaving work a lot and unable to do her job" as a result of her foot pain. Under this record, namely Wilcox's admissions regarding Whitehall's perception of the plaintiff's absenteeism being related to her disability, we cannot state as a matter of law that the plaintiff failed to establish that Whitehall did not perceive her to be disabled, so as to be able to proceed under the Human Rights Act.

¶ 50 The defendant alternatively asserts that the plaintiff failed to establish that her disability (*i.e.*, her plantar fasciitis), even if only perceived, was not unrelated to her ability to perform her job so as to constitute a disability under the Human Rights Act because she was unable but required to stand or walk all day. In support of this position, the defendant points out to: (1) the plaintiff's frequent absences from work as a result of the pain in her feet; (2) the plaintiff's physicians' notes

and requirements to that effect; (3) the plaintiff's search for an alternative position that did not require as much standing; and (4) the plaintiff's request in August 2010 regarding workers' compensation benefits, particularly whether she could be seen by a physician in Whitehall. For the reasons that follow, we disagree.

¶ 51 We acknowledge that our courts have repeatedly held that a plaintiff who cannot, by reason of a physical condition, perform the duties of the job in question even with accommodation is not disabled under the Human Rights Act. See *Harton v. City of Chicago Dept. of Public Works*, 301 Ill. App. 3d 378, 385-86 (1998). The Joint Committee on Administrative Rules has explained the meaning of "unrelated to the person's ability to perform the duties of a particular job" in the following manner:

> "(1) Under this language, the real or suspected implications of a person's physical or mental condition are irrelevant, and therefore cannot justify discrimination against the person, if those implications do not affect the person's ability to acceptably perform the particular job in question. Irrelevant implications include the preferences of co-workers, clients and customers; the expense of providing fringe benefits such as group insurance; and potential workers' compensation liability. Moreover, a condition is 'unrelated to a person's ability to perform the duties of a particular job or position' if it merely affects the person's ability to perform tasks or engage in activities that are apart from or only incidental to the job in question.
>
> (2) On the other hand, a person's condition is related to his/her ability if it would make employment of the person in the particular position demonstrably hazardous to the health or safety of the person or others, or if it is manifested or results in behavior (e.g., absenteeism, poor quality or quantity of production or disruptiveness) that fails to meet acceptable

standards. Reasonable accommodation of a person's physical or mental limitations must be explored, in accordance with Section 2500.40, to determine whether the condition prevents acceptable or safe performance of the activities necessary to the job." 56 Ill. Adm. Code § 2500.20(d) (2009).

¶ 52 In the present case, after reviewing the record before us, we find that there remains a genuine issue of material fact as to whether the plaintiff could have performed her job with accommodation, so as to make her disability unrelated to her work and permit her to proceed under the Human Rights Act. The defendant employer's assertion that the plaintiff's condition was directly related to her ability to perform her job duties because it required her to be on her feet most of the day, is unpersuasive in light of the fact that the employer's own attendance sheet unequivocally establishes that for the entire month of August, immediately preceding her termination, the plaintiff worked an uninterrupted full-day 40-hour schedule and never requested nor required any accommodation. In addition, aside from the complaints about the plaintiff's absences in July, all of which the employer conceded were excused by a physician's note, the record contains no testimony or evidence by the employer that the plaintiff was in any way unable to perform the duties outlined in her job description as a result of her foot pain. In fact, Wilcox herself admitted that the plaintiff was never given a written warning about her work absences or disciplined as a result of missing work prior to the August 23, 2010, meeting, when she was told she would have to take another job in the laundry or kitchen.

¶ 53 In addition, the physician's notes provided by the plaintiff, while indicating that she may have some limitations, also expressly stated that the plaintiff could "return to work." The notes contained no physical or time restrictions on the plaintiff's employer, nor provided any future hazard to the plaintiff as a result of her return to work.

¶ 54 In this respect, we find unpersuasive, the defendant's reliance on the plaintiff's application for a job in the Alzheimer's unit and her inquiry regarding workers' compensation benefits as proof that the plaintiff was unable to perform her job as a result of her disability. There is no evidence in the record whatsoever that the position in the Alzheimer's unit was any less physically demanding than the plaintiff's already held rehabilitation aide position. In fact, in her deposition testimony, the plaintiff explained that she sought out this position, not because she believed it to be less demanding but because she liked working with older patients, like her father. As to the plaintiffs August 2010 worker's compensation benefits inquiry, we reiterate that the Joint Committee on Administrative Rules has explicitly provided that "potential workers' compensation liability" and the expense of similar fringe benefits may not be considered in determining whether an employee's condition is not unrelated to her ability to perform her job. See 56 Ill. Adm. Code § 2500.20(d)(1) (2009).

¶ 55 Therefore, under this record we are compelled to conclude that there remains a genuine issue of material fact as to whether the plaintiff's perceived disability was unrelated to her ability to perform the duties of her job, so as to permit her to proceed under the Human Rights Act. See 775 ILCS 5/1–103(I) (1) (West 2010). Accordingly, we find that the trial court erred in granting summary judgment on count I of the plaintiff's complaint and reverse and remand for further proceedings as to that issue.

¶ 56 B. Retaliatory Discharge

¶ 57 Turning to the plaintiff's retaliatory discharge claim brought pursuant to the Workers' Compensation Act (820 ILCS 305/1 *et seq*. (West 2010)), we begin by noting that "[i]t is undisputed that Illinois recognizes a cause of action for the retaliatory discharge of an

employee who asserts his or her rights to workers' compensation." *Reinneck v. Taco Bell Corp.*, 297 Ill. App. 3d 211, 214 (1998) (citing *Kelsay v. Motorola*, 74 Ill. 2d 172 (1978)). Section 4(h) of that Act provides that it is unlawful for:

> "any employer, individually or through any insurance company or service or adjustment company, to discharge or threaten to discharge *** an employee because of the exercise of his or her rights or remedies granted to him or her by [the Workers' Compensation] Act." 820 ILCS 305/4(h) (West 2002).

In *Kelsay*, 74 Ill. 2d at 180-81, our supreme court carved out an exception to the general rule that an employer may fire an at-will employee for any reason or for no reason at all, and created a cause of action for retaliatory discharge for employees who were terminated in retaliation for filing worker's compensation claims. In that case, the court noted that the public policy underlying the Workers' Compensation Act would be seriously undermined if employers were allowed "to discharge, or threaten to discharge," employees who sought relief under the Act. *Kelsay*, 74 Ill. 2d at 182. The *Kelsay* court reasoned that the sound public policy underlying the Workers' Compensation Act dictated the recognition of an employee's cause of action for retaliatory discharge, so as to prevent an employer from presenting an employee with a choice between his job and his legal entitlement to compensation. See *Kelsay*, 74 Ill. 2d at 182.

¶ 58 Since *Kelsay*, our courts have repeatedly held that in order to sustain a cause of action for retaliatory discharge based upon the filing of a workers' compensation claim, the employee must prove: (1) that he was an employee before the injury; (2) that he exercised a right granted by the Worker's Compensation Act; and (3) that he was discharged and that the discharge was causally related to his filing a claim under the Act. *Siekierka v. United Steel Deck, Inc*., 373 Ill. App. 3d 214, 221 (2007) (citing *Clemons v. Mechanical Devices Co.*, 184 Ill. 2d 328, 335-36 (1998)).

¶ 59 In the present case, the plaintiff asserted in her deposition that she believed that her job at Whitehall had caused her plantar fasciitis. She explained that her physician had told her that her condition may have been caused by her repetitive and near-constant walking and the weight that she had to bear by lifting patients. Since the defendant offered no evidence to rebut this allegation, there can be no doubt that the plaintiff has met the first prong of the aforementioned retaliatory discharge analysis. See *Siekierka* 373 Ill. App. 3d 214, 221

¶ 60 Turning to the second prong of that analysis, the defendant contends that summary judgment was proper because the plaintiff never filed a workers' compensation claim. Contrary to the defendant's assertion, however, it is well-established that "[t]he fact that a plaintiff has not filed a [workers' compensation] claim in Illinois prior to her discharge does not preclude her from bringing a retaliatory discharge cause of action." *Reinneck*, 297 Ill. App. 3d at 214; see also *Burgess v. Chicago Sun-Times*, 132 Ill. App. 3d 181, 185 (1985) ("there exists no requirement in Illinois that in order to state a viable cause of action for retaliatory discharge, a plaintiff must plead that he was discharged in retaliation for filing a Workers' Compensation claim"). *Fuentes v. Lear Siegler*, 174 Ill. App. 3d 864, 866 (1988) **("**it should be noted that Illinois does not require a plaintiff to plead that he was discharged for filing a worker's compensation claim."). Rather "it is sufficient that the plaintiff establish that [s]he was discharged in *anticipation* of [her] filing a workers' compensation claim." (Emphasis added.) *Fuentes*, 174 Ill. App. 3d at 866.

¶ 61 In the present case the record affirmatively establishes that the plaintiff was terminated after having inquired as to whether she was eligible for workers' compensation benefits, and specifically after having asked whether she could avail herself of the services of a Whitehall physician. The plaintiff testified in her deposition that she inquired about such benefits from Hansen, a Whitehall employee who Wilcox conceded was potentially responsible for workers'

compensation benefits, as a result of another employee being on maternity leave. Although Wilcox could not recall whether she ever spoke to Hansen, or whether she ever found out about the plaintiff's inquiry, the defendant's personnel files about the plaintiff corroborate the plaintiff's assertion that she made such inquiries prior to her termination and that Whitehall was aware of and did not look kindly upon them. Accordingly, under such a record, "the fact that no claim had been filed prior to the plaintiff's termination has no bearing on this case." *Fuentes,* 174 Ill. App. 3d at 866; see *e.g.*, *Hinthorn v. Roland's of Bloomington, Inc.*, 119 Ill. 2d 526 (1998*)* (holding that employee could proceed with her retaliatory discharge claim against her employer where she was discharged in retaliation for meeting with the vice president and advising him in person that she was injured and required medical attention, without ever having indicated that she intended to file a workers' compensation claim, and without actually filing one; the court found that the employer's behavior violated the public policy set forth in the Workers' Compensation Act, namely "the overriding purpose *** to protect injured employees by ensuring the availability of medical treatment, by shifting the financial burden of such treatment to the employer"); see also *Bray v. Stan's Rental, Inc*., 196 Ill. App. 3d 384, 387, (1990) (holding that in order to proceed with a retaliatory discharge claim, "it is not necessary *** that the employee actually file a claim for workers' compensation prior to h[er] discharge, but only that [s]he seek medical attention for the injuries.").

¶ 62 Finally, the defendant asserts that the summary judgment was proper because the plaintiff failed to establish that her discharge was casually related to filing a claim under the Act. Specifically, the defendant argues that Whitehall had a legitimate nonretaliatory reason for discharging the plaintiff, namely that: (1) she was taking too much time off work; (2) had refused to follow its directive in providing a timely physician's note explaining how she intended to

proceed with her treatment; and (3) had rejected two alternative positions that would have accommodated her condition. We disagree.

¶ 63 It is well-settled that the causation element of any retaliatory discharge claim centers around "the employer's motive in discharging the employee." *Siekierka*, 373 Ill. App. 3d at 221-22 (citing *Clemons*, 184 Ill. 2d at 336). This element is not met if the employer has "a valid basis, which is not pretextual, for discharging the employee." *Siekierka*, 373 Ill. App. 3d at 222 (citing *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 160 (1992)). The mere existence of a valid or sufficient reason, however, does not defeat a retaliatory discharge claim. *Siekierka*, 373 Ill. App. 3d at 222. Rather, only " 'if an employer chooses to come forward with a valid, nonpretextual basis for discharging its employees and *the trier of fact believes it*, the causation element required to be proven is not met. [Citation.]" *Siekierka*, 373 Ill. App. 3d at 222. Accordingly, because "motive is a question of fact, not law," our courts have repeatedly held that "summary judgment is generally inappropriate in retaliatory discharge cases" relating to an employee's pursuit of workers' compensation benefits. *Paz v. Commonwealth Edison*, 314 Ill. App. 3d 591, 594 (2000); see also *Austin v. St. Joseph Hospital*, 187 Ill. App. 3d 891, 897 (1989) ("Because it is the employer's motive in firing an employee which is ultimately at issue in cases for retaliatory discharge, and because motive presents a question of fact, Illinois courts recognize that such cases should not be readily subject to disposition pursuant to motions for summary judgment."); *Fuentes*, 174 Ill. App. 3d at 866-67 ("In cases of retaliatory discharge, the issue of an employer's motive in discharging an employee should not readily be the subject of summary judgment."); see also *Hugo v. Tomaszewski*,155 Ill. App. 3d 906, 909-10 (1987); see *Palmateer v. International Harvester Co.*, 140 Ill. App. 3d 857, 860 (1986).

¶ 64 In the present case, after a review of the record we find that there remains a genuine issue of

material fact, as to what motive Whitehall had in terminating the plaintiff's employment. While we acknowledge the defendant's nonpretextual reason for the termination, namely, the plaintiff's "not being forthcoming about [her] medical condition," the record is full of contradictions regarding this issue. For one, although the defendant asserted that the plaintiff 's termination was triggered by excessive absenteeism, as already noted above, its own attendance sheet revealed that for the entire month of August, prior to her termination, the plaintiff missed no days of work, nor took any early leaves. Second, although the defendant asserted that it offered the plaintiff an accommodation, by offering her a less demanding position in the laundry room, the shift for that position from 3 p.m. to 11 p.m. was markedly different from the plaintiff's regular daily rehabilitation aide shift. In addition, the plaintiff testified that she could not take this shift because of a special needs child. Finally, although the defendant alleged that the plaintiff was given an opportunity to provide a physician's note providing it with a treatment plan, the record reveals that the plaintiff was given a week to obtain such a note, without any prior warning about her work performance or absenteeism. In addition, the plaintiff testified that she could not provide such a note within the requisite time because her physician was on vacation. Wilcox admitted that the plaintiff had told her as much.

¶ 65 Most importantly, we are troubled by the contradictions in the defendant's own record regarding its knowledge of the plaintiff's inquiry about workers' compensation benefits, and its response to such an inquiry. While the defendant's personnel files indicate that it was well-aware of the plaintiff's inquiry and "disappointed" both by the plaintiff's statements that she may have been injured at work, and that she was trying to obtain workers' compensation benefits, Wilcox testified in her deposition that the notations in those files attributed to her were in fact never made by her, and that someone may have tampered with the file. Under such a record, we are

faced with a myriad of inconsistent facts, and credibility determinations that are the sole province of a trier of fact. See e.g., *Paz*, 314 Ill. App. 3d at 594; *Austin*, 187 Ill. App. 3d at 897 (1989); *Fuentes*, 174 Ill. App. 3d at 866-67; see also *Hugo*, 155 Ill. App. 3d at 909-10; *Palmateer*, 140 Ill. App. 3d at 860.

¶ 66 III. CONCLUSION

¶ 67 Accordingly, for all of the aforementioned reasons we reverse the judgment of the circuit court and remand for further proceedings.

¶ 68 Reversed and remanded.