

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Delores V. Wigger,)	Civil Action No. 2:15-CV-01122-DCN-MGB
)	
Plaintiff,)	
)	
v.)	AMENDED COMPLAINT
)	(Jury Trial Requested)
CVS Pharmacy; CVS Caremark,)	
)	
Defendants.)	

The Plaintiff complaining of the Defendants would show unto this Honorable Court as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff, Delores Wigger, is a citizen and resident of Dorchester County, South Carolina. She is 58 years old and a pharmacist licensed by the State of South Carolina and subject to laws and regulations governing the practice of pharmacy, including those contained in the South Carolina Pharmacy Practice Act, S.C. Code Ann. §§ 40-43-10 et seq.

2. Defendant, CVS Caremark Corporation (Caremark), is a foreign corporation organized in the State of Delaware, and doing business through individual stores in South Carolina.

3. Defendant, CVS Pharmacy, Inc. (CVS), is a foreign corporation organized in the State of Rhode Island, and doing business through individual stores in South Carolina. CVS is subsidiary of Caremark.

4. Defendant CVS Rx Services, Inc. (Rx), is a foreign corporation organized in the State of New York, and doing business through individual stores in South Carolina.

5. On September 25, 2013, Plaintiff filed a verified charge of discrimination with the Equal Employment Opportunity Commission (EEOC), alleging that Defendants had discriminated against Plaintiff on the basis of age and disability

6. On or about December 24, 2014, Plaintiff received a Notice of Right to Sue from the EEOC.

7. This action is brought pursuant to Section 107 (a) of the Americans with Disabilities Act (42 U.S.C. Sec 12117) (“ADA”), which incorporates by reference Sec. 706 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e-5; the US Age Discrimination in Employment Act of 1967 (“ADEA”) and the Family Medical Leave Act of 1993 (42 U.S.C. Sec. 2601, et. seq.) (“FMLA”).

8. Defendants are “persons” within the meaning of §701 Title VII (“Title VII”) of the Civil Rights Act of 1964, 42 U.S.C. §2000e.

9. Defendants do business in an industry that affects commerce within the meaning Title VII.

10. Defendants employ fifteen (15) or more employees and are an "employer" within the meaning of Title VII.

11. Defendants employ twenty (20) or more employees and are an “employer” within the meaning of the ADEA.

12. Defendants are “persons” within the meaning of the FMLA.

13. Defendants employ fifty (50) or more employees and are an “employer” within the meaning of the FMLA.

14. This court has jurisdiction to hear and determine this matter pursuant to 28 U.S.C. §1331.

15. Venue is properly brought in the District of South Carolina, Charleston Division, pursuant to 28 U.S.C.A. § 1391(b), because the unlawful acts giving rise to Plaintiff's claims were committed in this judicial division.

FACTUAL ALLEGATIONS

Plaintiff's Work History

16. In or about August of 1997, Plaintiff began working as a staff pharmacist at the CVS store located on Old Orangeburg Road, Summerville, South Carolina, which was owned and operated by Defendants. She was subsequently promoted to Pharmacist in Charge (PIC).

17. Sometime in the early 2000s, Defendants closed that store and transferred Plaintiff to a new location at 10599 Dorchester Road, Summerville, South Carolina. She worked there as a staff pharmacist, but was promoted to PIC in 2010.

18. In or about 2008, Defendants began a new program call the Metrics system, which rated CVS stores based solely on productivity. Over the years, new Metrics requirements were added which placed significant and unrealistic time pressures on CVS pharmacists. Even under these pressures, Plaintiff remained capable of performing, and did perform, her duties competently.

19. In late summer or early fall of 2012, Darlene Mollet (Mollet) was hired as the Pharmacy Supervisor for the CVS location where Plaintiff was working. Although Plaintiff had always enjoyed positive relationships with her Pharmacy Supervisor and the District Manager and had always received high ratings on her performance evaluations from them, Mollet started out highly critical and hostile toward Plaintiff.

20. In late 2012, as a result of the extreme pressures created by the Metrics system and Mollet's mistreatment of her, Plaintiff sought treatment from a psychiatrist, who diagnosed her with Post Traumatic Stress Disorder with severe depression.

21. On the order of her psychiatrist, Plaintiff took a leave of absence from December 27, 2012, through the beginning of March, 2013.

22. Upon Plaintiff's return to work in or about March 2013, Defendants relocated Plaintiff to its store at 1515 Old Trolley Road and demoted her from the PIC to a staff pharmacist. She remained under the supervision of Mollet and Kevin Elliott (Elliott), the District Manager. The PIC at Old Trolley Road was Millie (last name unknown). Defendants filled Plaintiff's position at the Dorchester Road location with a younger, less experienced pharmacist.

23. On August 27, 2013, Defendants terminated Plaintiff's employment. Defendants filled her position with a younger pharmacist. Defendants also made Millie a floater and filled the PIC position with a younger, less experienced pharmacist.

Defendants' Business Model and the Metrics System

24. Beginning in approximately 2008, Defendants restructured their business practices. As part of this program, Defendants created a new policy called the Metrics system. Under the Metrics system, Defendants' stores are rated based on the timing and volume of pharmacy services. For example, Metrics measure how many and how quickly prescriptions are filled daily based on store volume. At the Old Trolley Road location, pharmacists were expected to fill one prescription every three minutes. The program also measures how many telephone calls are made to customers to refill and/or pick up prescriptions; how many flu shots are given; as well as other pharmacy tasks. All measurements focus on productivity with the end goal of maximizing Defendants' profits. There is no measurement for pharmacy accuracy or customer safety. Because the metrics are measured by store, the PIC is held responsible for the productivity levels of his or her pharmacy.

25. At the same time that Defendants increased demands for productivity, they cut the hours for pharmacy technicians, leaving PICs and staff pharmacists severely understaffed and unable to provide all services required by the Metrics system.

26. Under the Metrics system, pharmacists are expected to meet unobtainable goals. To satisfy the increased productivity demands with decreased staffing would require Plaintiff, and other pharmacists employed by Defendants, to violate the law regarding their professional responsibilities and governing practice rules, including those contained in the South Carolina Pharmacy Practice Act, S.C. Code Ann. §§ 40-43-10 et seq.

27. The “high volume” and “increased profits” business model of Defendants created stressful working environments for Defendants’ pharmacists, including Plaintiff.

28. The “high volume” and “increased profits” business model of Defendants has also led to a greater number of errors in dispensing prescriptions, which can result in significant harm to pharmacy customers. In fact, in one instance a two-year old child in an Ohio hospital died from a mis-fill created by the pharmacist having to rush to meet time constraints, and the pharmacist in question was convicted of a crime and incarcerated. In another case, CVS pharmacists in New Jersey dispensed the incorrect medicine to children in as many as 50 families over approximately a three month period.

29. Defendants instituted, or at least have relied on, the Metrics system as a tool to eliminate older pharmacists. Although the demands of the business model are nearly impossible for any pharmacist to meet, the consequences for failure to comply with the Metrics System are disparately and discriminatorily applied. Older pharmacists who do not meet the Metrics are terminated, while younger pharmacists who fail to meet them remain employed. Moreover, the older pharmacists who are terminated are replaced with younger, less experienced pharmacists.

Wrongful conduct against Plaintiff

30. From the time Mollet was hired as Plaintiff's supervisor in late summer or early fall of 2012, she began to target Plaintiff and criticized her often. Mollet frequently commented on Plaintiff's failure to meet the Metrics requirements. This hostile and antagonistic behavior occurred each and every time Mollet visited the store, which was almost weekly.

31. In late 2012, Mollet wrote up Plaintiff because her store was the lowest in the district for new prescription pickups. The disciplinary action was accompanied with a threat by Mollet that she could terminate Plaintiff. However, the following week, Plaintiff pointed out to Mollet that Plaintiff's store was the highest in the District, Mollet was indifferent. Mollet was clearly using the new prescription pick up numbers as a sword against Plaintiff.

32. As a result of extreme pressure of the unattainable production obligations, the decrease in tech support, and the constant harassment by Mollet, Plaintiff began to experience overwhelming anxiety and depression. She sought treatment for symptoms and was diagnosed with Post Traumatic Stress Disorder (PTSD), a serious medical condition as defined by the FMLA.

33. On the order of her psychiatrist, Plaintiff took a leave of absence from December 27, 2012, through the beginning of March, 2013. Plaintiff informed her supervisor of her need to take leave and requested FMLA for a period of six to eight weeks to begin December 27, 2013. Defendants approved this request.

34. Although this leave qualified for FMLA time off, Defendants failed to inform Plaintiff of her FMLA benefits as required by federal law.

35. Upon Plaintiff's return to work in March 2013, Defendants relocated Plaintiff to the severely understaffed and its lowest performing pharmacy in the area located at 1515 Old Trolley Road and demoted her from the PIC to a staff pharmacist. Defendants made this

decision in spite of the fact that there were several other stores in the area with available positions for a permanent full-time pharmacist.

36. The severe lack of technician support created even greater pressure on Plaintiff than she had had at her store. In addition, Plaintiff suffered constant abuse and harassment by the store's PIC, Millie. Although Millie was over the age of forty (40), she had not been diagnosed with, nor was she regarded as having, a disability.

37. Millie yelled at Plaintiff any time she was in the store for no reason and in front of customers and staff. On one occasion, Millie also screamed at Plaintiff in earshot of nearby customers that Plaintiff was impossible to work with and insinuated that Plaintiff had a bad reputation as a pharmacist.

38. Millie's mistreatment of Plaintiff was both pervasive and severe. Plaintiff repeatedly reported Millie's hostile behavior to both Mollet and Elliot. Mollet simply told Plaintiff that she needed to try harder and that Millie was in charge. Mollet and Elliott dismissed Millie's misconduct as "just being Millie." Although Mollet and Elliott were aware of the hostile and discriminatory work environment, they did nothing to investigate or remedy it.

39. In fact, Mollet condoned and participated in the hostile work environment. On information and belief, on at least on one occasion, Mollet went into the manager's office and secretly observed Plaintiff working. Because Plaintiff was aware of this observation but Mollet did not meet with her to discuss her observations, good or bad, Plaintiff became suspicious of Mollet's motives and believed that she was engaging in a course of conduct to terminate Plaintiff.

40. On another morning, Mollet came into the store as it was opening. The younger pharmacist who had closed the prior night was responsible for complying with the CVS metrics. She had left ten pages of prescriptions to be filled and had not made any of the required

telephone calls for doctor authorizations for refills or to customers asking them to refill prescriptions. When Plaintiff pointed out the extra work that she would have to do because of the younger pharmacist's failure to complete her tasks and that she did not have sufficient technician support, Mollet was unconcerned. This younger pharmacist often failed to complete her metrics, but is still employed by Defendants.

41. One week later, Mollet called Plaintiff in to meet with her and Elliott and accused Plaintiff of being disoriented and confused when, in fact, Plaintiff was merely disclosing to Mollet the amount of work that had been left undone by the younger pharmacist the night before.

42. At that meeting, Elliott suggested that Plaintiff leave her position and take permanent disability. Plaintiff explained to Elliott and Mollet that she was capable of competently performing the functions of her job so long as she was removed from the hostile environment she was in and moved to another store. At Elliot's request, Plaintiff wrote down four stores which she believed would be a reasonable accommodation for her disability. However, neither Elliot nor Mollet ever discussed those options with Plaintiff as promised.

43. Plaintiff also requested, as a reasonable accommodation, that if she remained at the same store she not be subjected to a hostile work environment, and that she be allowed to carry out her professional responsibilities in a reasonable manner.

44. On or around the beginning of April, 2013, Plaintiff received a telephone call at her home from Mollet. Mollet said that she had received numerous complaints that Plaintiff was physically assaulting technicians. The following week, Plaintiff followed up with Mollet regarding the accusations and Mollet told her that she "could not find any supporting evidence" and not to worry about it. Plaintiff asked the identity of her alleged accusers, but Mollet would not tell her. Upon information and belief, the allegations were fabricated to elicit Plaintiff's PTSD symptoms and force her to quit working.

45. On or around May 13, 2013, Plaintiff met with Mollet and Elliott. Mollet said that Plaintiff had not received a good yearly performance review and had scored “needs improvement” in all categories. Plaintiff’s previous reviews were all “meets expectations” and “exceeds expectations.”

46. Mollet put Plaintiff on an Individual Development Plan (IDP) and stated she and Elliott would reevaluate the Plaintiff in three months. Other, younger, less experienced employees without a disability, who received the same type of performance evaluations, were not placed on such a plan.

47. The IDP is intended to be a tool designed to provide the pharmacist with ongoing training and development in the areas which are purported to need improvement. However, during the three months Plaintiff was under the IDP, Mollet did not provide any training or support. Instead, Mollet met with Plaintiff monthly to point out what metrics were not being met and to remind Plaintiff that she could be terminated for failing to meet them. Even though Plaintiff was not the PIC, she was held responsible for the store’s underperformance on the metrics.

48. On or around the end of May, 2013, Millie accused Plaintiff of harming a technician, Nita, and making her quit when, in fact, Plaintiff had done nothing to Nita, and Nita had not quit. These false allegations against Plaintiff were part of an ongoing campaign to harass Plaintiff and force her out of her job. This wrongful conduct caused Plaintiff to suffer from overwhelming anxiety, fear, stress, and depression.

49. On or around the beginning of June, 2013, Plaintiff’s PTSD symptoms were again triggered due to the hostile work environment, and she was forced to go to Palmetto Behavioral Health for treatment. Plaintiff’s doctor instructed her not to go to work for two weeks. Upon her return, Defendants informed Plaintiff that she did not have enough sick leave to cover the time

she was out and would have to use vacation leave. Immediately upon Plaintiff's return from leave, Mollet again accused Plaintiff of being disoriented and disorganized, which Plaintiff denied.

50. On or around July 23, 2013, Plaintiff corrected three mis-fills originally dispensed by Millie. Plaintiff informed Millie about these mis-fills and that they had been corrected without any harm to the patient. In retaliation, Millie accused Plaintiff of wrongly filling a prescription, but the handwriting on the bottle was not Plaintiff's. Nonetheless, Millie persisted in her hostile treatment of Plaintiff.

51. On or around July 26, 2013, Plaintiff met with Mollet to go over her IDP. Mollet told Plaintiff that she had received a complaint from a customer that Plaintiff had treated the customer rudely. Mollet refused to identify the alleged customer. On August 13, 2013, Mollet further informed the Plaintiff that she could terminate the Plaintiff.

52. In or about mid-August, 2013, Plaintiff told Mollet that Millie was not adhering to the skeleton schedule for technicians, and that Millie was adequately scheduling technicians for her own shifts, but not for Plaintiff's. In fact, Millie had provided false schedules to Mollet. Again, this misconduct was part of a larger plan to harass Plaintiff and set her up for failure. Although Mollet told Plaintiff she would adjust the schedule, she never did.

53. In August of 2013, Plaintiff corrected the technicians' schedule according to adhere to the store guidelines. Charlie, a younger technician in charge of the schedule, became very upset and left the store. Upon his return, Plaintiff was told that she needed to go meet with Mollet, who then reprimanded Plaintiff for her failure to meet the metrics.

54. Because neither Mollet nor Elliot took any action to remedy Defendants' misconduct, Plaintiff reported the discrimination and inappropriate behavior to other employees or agents of Defendants, including George Cunningham in Human Resources. Defendants began

treating Plaintiff harshly in retaliation for reporting the discrimination, preferential treatment and inappropriate behavior.

55. During this time period, Defendants terminated a number of pharmacists who were all older individuals as defined by the ADEA. Substantially all of the terminated pharmacists were replaced with younger pharmacists.

56. On August 27, 2013, Defendants through Mollet terminated Plaintiff. Defendants' alleged reasons for termination were that she failed to comply with the Metrics requirements and that she had one complaint from an identified customer. However, as the PIC, Millie, not Plaintiff, should have been held accountable for the store's productivity levels under the Metrics system. Younger PICs were not terminated even though their stores did not meet Metrics requirements. On information and belief, the store where Plaintiff was working had received numerous complaints, most directed at Millie. The reasons given for Plaintiff's termination were a pretext for the illegal employment actions taken by Defendants.

57. As a result of Defendants' wrongful termination, Plaintiff has suffered, and continues to suffer, from debilitating symptoms of PTSD and depression. She has been unable to secure other employment.

FOR A FIRST CAUSE OF ACTION
VIOLATION OF AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

58. Plaintiff reiterates each and every allegation above as if fully repeated herein.

59. Plaintiff is a member of a protected group on the basis of her age.

60. Plaintiff was an employee in a position for which she was qualified and was an individual over forty (40) years old.

61. Defendants retaliated against Plaintiff for complaining of age discrimination and inappropriate behaviors.

62. Defendants used the Metrics system to discriminate against older pharmacists, including Plaintiff, based on their age.

63. Plaintiff was discharged from her position due to her age in violation of the ADEA.

64. Plaintiff's age was a determining factor in the retaliation, discriminatory treatment and discharge of the Plaintiff. But for the Plaintiff's age, she would not have been terminated.

65. Defendants violated the ADEA by allowing the discrimination to exist in the workplace.

66. Defendants violated the ADEA by allowing a hostile work environment to exist regarding age discrimination in the workplace.

67. As a direct and proximate result of the acts and practices of Defendant in the discrimination, retaliation, disparate treatment and wrongful discharge of Plaintiff from employment, the Plaintiff has suffered and continues to suffer from lost wages, front and back pay, lost past and future benefits, and attorney fees and costs.

68. Defendants' actions were done willfully, maliciously, wantonly and were done in an intentional action of retaliation and discrimination against Plaintiff because of her age.

69. Accordingly, Plaintiff is informed and believes that she is entitled to compensatory damages in the nature of the value of her lost wages and benefits, front pay, together with interest thereon, as well as liquidated damages, punitive damages and her reasonable attorney's fees and costs for the bringing of this action.

FOR A SECOND CAUSE OF ACTION
VIOLATION OF AMERICANS WITH DISABILITIES ACT (ADA)

70. Plaintiff reiterates and realleges the allegations contained in the above paragraphs as if fully set forth herein.

71. Plaintiff's diagnosis of PTSD makes her a disabled individual within the meaning of the ADA as she has a record of a disability, of which Defendants had knowledge.

72. Plaintiff is guaranteed the opportunity to maintain employment without discrimination because of her disability pursuant to the ADA.

73. Defendants have discriminated against Plaintiff, a handicapped person, without reasonable justification as prohibited the ADA.

74. Despite being a person with a disability, Plaintiff can perform the essential functions of her job as a pharmacist.

75. Defendants have failed to undertake any good faith efforts, in consultation with Plaintiff, to identify and make reasonable accommodations for employment.

76. Because of Plaintiff's disability, Defendants terminated her employment, in violation of the ADA.

77. In terminating Plaintiff, Defendant unlawfully discriminated against Plaintiff on the basis of her disability and violated the ADA.

78. The Defendants' termination of Plaintiff was in bad faith and its discrimination against Plaintiff was intentional.

79. Plaintiff is entitled to damages for back pay, front pay, emotional distress, humiliation and embarrassment, attorneys' fees and costs, pre-judgment interest, post-judgment interest, and punitive damages.

FOR A THIRD CAUSE OF ACTION
WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

80. Plaintiff repeats and reiterates the foregoing allegations as though repeated herein verbatim.

81. Plaintiff is subject to laws and regulations governing the practice of pharmacy, including those contained in the South Carolina Pharmacy Practice Act, S.C. Code Ann. §§ 40-43-10 et seq.

82. S.C. Code Ann. §40-43-86 sets forth the legal requirements to be followed by a pharmacist employed by Defendants in South Carolina.

83. Defendants' business practices, including their Metrics, require pharmacists, including Plaintiff, to violate the laws and regulations governing the practice of pharmacy in South Carolina.

84. Defendants' business practices are in clear violation of the public policy of South Carolina as they, *inter alia*, require pharmacists, including Plaintiff, to disregard the legal requirements with regard to patient care and safety in favor of productivity and financial profit.

85. Plaintiff's termination was in retaliation for her complaints of, and refusal to comply with, Defendants' improper and illegal business practices of the Defendants.

86. Defendants' discharge of Plaintiff is a violation of the clear mandate of public policy of the State of South Carolina.

87. As a direct and proximate result of the aforesaid conduct of the Defendants, their agents and servants, Plaintiff has been damaged as aforesaid, both actual and punitive damages, in such amount as a judge and jury may award.

WHEREFORE, Plaintiff prays that the following relief be granted:

1. Full back pay from the date of termination of employment, taking into account all raises to which Plaintiff would have been entitled but for her unlawful termination, and all fringe and pension benefits of employment, with prejudgment interest;

2. Front pay to compensate Plaintiff for lost future wages, benefits, and pension for a reasonable time up to and including Plaintiff's expected retirement date that takes into consideration the state of the economy, the impact of her termination on her ability to secure comparable employment, and other conditions affecting the employer-employee relationship;
3. Compensatory damages;
4. Punitive damages;
5. Pre-judgment and post-judgment interest;
6. Attorneys' fees and costs; and
7. Such other and further relief that this Court deems appropriate.

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