

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

KIMBERLY L. MARTIN,)	Case No. CI16-10432
)	
Plaintiff,)	
)	
vs.)	AMENDED COMPLAINT AND
)	JURY DEMAND
)	
NEBRASKA METHODIST HEALTH)	
SYSTEM, INC, a Nebraska Non-Profit)	
Corporation,)	
)	
Defendant.)	

COMES NOW the Plaintiff, by and through her attorneys, and for her causes of action against the Defendant hereby states the following:

PARTIES-VENUE-JURISDICTION

1. Plaintiff Kimberly L. Martin, f/k/a Kimberly L. Marx, is a resident of Omaha, Douglas County, Nebraska.
2. Defendant Nebraska Methodist Health System, Inc., is a Nebraska non-profit corporation that is authorized to conduct business in Nebraska, and at all times relevant was doing business in Omaha, Douglas County, Nebraska.
3. This Court has original jurisdiction over the claims arising under state law, and supplemental jurisdiction over the claims arising under Federal law.
4. Venue is appropriate in this district under Neb. Rev. Stat. §25-403.02. The acts about which Plaintiff complains occurred during the course of her employment in Omaha, Douglas County, Nebraska.
5. On or about September 20, 2016, less than 90 days prior to the filing of her Complaint, Nebraska Equal Opportunity Commission made a determination with respect to Plaintiff's charges, NEB 2-15/16-3-47250-RS.



6. On or about January 23, 2017, less than 90 days prior to the filing of this Amended Complaint, Plaintiff received a Notice of Right to Sue from the U.S. Equal Employment Opportunity Commission on charge number 32E-2016-00369.

FACTUAL BACKGROUND

7. Plaintiff was employed by Defendant from May 29, 2007 to November 16, 2016, most recently as a mammography technologist.

8. During her employment with Defendant, Plaintiff suffered from one or more physical and/or mental impairments that substantially limit her major life activities of hearing, performing manual tasks, sleeping, learning, thinking, reading and interacting socially. Plaintiff's physical and/or mental impairments also substantially limit her major bodily functions of her neurological systems.

9. During her employment, Defendant knew of Plaintiff's physical and/or mental impairments and regarded her as disabled.

10. In December 2013, one of Plaintiff's co-workers approached her about a concern that one of Defendant's supervisors had directed the co-worker to violate company policy. Plaintiff and her co-worker reported the incident to supervisor Laurie Beaver. Beaver told Plaintiff that the supervisor's instruction was indeed against company policy and that they had done the right thing to report the issue.

11. On January 14, 2014, Plaintiff was disciplined by her immediate supervisor, Sue Collins, for reporting the incident involving her co-worker to Beaver and for "failing to follow the chain of command."

12. In September 2014, Plaintiff received a poor performance review by Collins. Plaintiff disputed Collins' assessment of her performance and tape recorded the performance

review because she felt like Collins was still hostile towards her about the January 2014 incident.

13. In January 2015, Plaintiff requested her annual family medical leave to care for her son who had a serious health condition under the Family Medical Leave Act. Plaintiff's request was approved by Defendant.

14. In April 2015, Plaintiff requested family medical leave for a serious health condition under the Family Medical Leave Act. Plaintiff's request was approved by Defendant.

15. In April 2015, Plaintiff complained to Beaver that Collins was harassing her and retaliating against her for reporting violations of company policy and that Plaintiff was fearful of losing her job. Beaver instructed Plaintiff to address her complaints with Defendant's Human Resources Department.

16. On May 6, 2015, Plaintiff complained to Defendant's HR Director, Paula Pittman that Collins was harassing her and retaliating against her for reporting violations of company policy, for taking FMLA leave and for complaining about wage and hour violations. Plaintiff played Pittman the tape recording of her performance review with Collins from September 2014. Plaintiff requested that the meeting remain confidential for fear of retaliation by Collins.

17. In June 2015, Plaintiff requested that April request for family medical leave be extended. Plaintiff's request was approved by Defendant and Plaintiff was absent from work for approximately three weeks.

18. On July 28, 2015, Collins called Plaintiff into her office for a disciplinary meeting. Before starting the meeting, Collins asked Plaintiff to go place her cell phone in her locker. Plaintiff complied with the request. Collins proceeded to give Plaintiff a disciplinary action for alleged violations of Defendant's cell phone policy and for alleged poor performance. Collins also made negative comments about and harassed Plaintiff about her FMLA leave.

Collins said that she would start requiring Plaintiff to work or be “on-call” on her days off to make-up the days she would use FMLA leave. Collins acknowledged that she knew Plaintiff had been working extra time and was not getting paid for it. Plaintiff pointed out Collins’ deviation from Defendant’s progressive disciplinary policy, that it was a hostile work environment and that she was being singled out. Plaintiff also disagreed with Collins’ assessment of her performance and requested the presence of an HR representative when signing the acknowledgement of receipt. Collins agreed to contact HR about the issue and set up a meeting.

19. On July 30, 2015, Collins approached Plaintiff and told her that she had changed her mind and that HR didn’t need to be involved in the matter. Plaintiff again requested a meeting with Collins and HR.

20. On August 6, 2015, Collins approached Plaintiff to make sure that she understood that the recent disciplinary action would disqualify Plaintiff from receiving her bonus pay. A day later, Collins emailed Plaintiff the same information as a “reminder.”

21. In September 2015, Plaintiff requested family medical leave for a serious health condition under the Family Medical Leave Act. Plaintiff’s request was approved by Defendant.

22. On September 28, 2015, Plaintiff complained to Defendant in writing that Collins was harassing her, creating a hostile work environment due to Plaintiff’s disability, interfering with Plaintiff’s rights under the FMLA and retaliating against Plaintiff for exercising her rights under the FMLA. Plaintiff also complained that Defendant was violating state and federal wage and hour laws.

23. On October 10, 2015, Plaintiff’s family medical leave was extended by her physician through November 14, 2015.

24. On November 5, 2015, Plaintiff requested a reasonable accommodation from

Defendant under the Americans with Disabilities Act (“ADA”) and the Nebraska Fair Employment Practices Act (“NEFEPA”). Plaintiff gave Defendant medical notes from her physician requesting a reasonable accommodation for her disability.

25. On November 6, 2015, Plaintiff again complained to Defendant in writing that Collins was harassing her, creating a hostile work environment due to Plaintiff’s disability, interfering with Plaintiff’s rights under the FMLA and retaliating against Plaintiff for exercising her rights under the FMLA. Plaintiff also complained that Defendant was violating state and federal wage and hour laws.

26. On November 10, 2015, Defendant denied Plaintiff’s request for a reasonable accommodation.

27. On November 11, 2015, Plaintiff requested Defendant to provide her with information concerning any reasonable accommodations that Defendant was willing to make for her disability.

28. On November 13, 2016, Plaintiff again complained to Defendant in writing about wage payment issues, hostile work environment, interfering with Plaintiff’s rights under the FMLA and retaliating against Plaintiff for exercising her rights under the FMLA. Also, Plaintiff again requested in writing a reasonable accommodation and that Defendant provide information concerning any reasonable accommodations that Defendant was willing to make for her disability.

29. On November 16, 2016, Plaintiff was informed by one of her co-workers that Defendant announced by email to the staff that she allegedly resignation her position.

30. Plaintiff considers her employment terminated by Defendant as of November 16, 2016.

31. Prior to termination, Plaintiff's job performance was above satisfactory.

32. At the time of her termination, Plaintiff was earning approximately \$23.92 per hour plus bonuses working 32 hours per week for Defendant. As of the date of this filing, Plaintiff's lost wages resulting from Defendant's wrongful conduct are approximately \$45,160.96 and are continuing. As part of her compensation, Plaintiff also received health, dental, and vision insurance, 401K retirement contributions, pension, life insurance, short-term disability insurance and long-term disability insurance in amount that is currently unknown to Plaintiff and will be subject to further discovery.

33. On March 1, 2016, Plaintiff filed a charge of discrimination against Defendant with the Nebraska Equal Opportunity Commission and U.S. Equal Employment Opportunity Commission.

34. In June 2016, Plaintiff applied for a new position with Defendant and was rejected for the position because she was designated not eligible for re-hire by Defendant.

35. As a result of Defendant's wrongful conduct, Plaintiff suffered lost wages and benefits, compensatory damages, including emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and has also incurred attorney's fees and other costs that are continuing.

COUNT I

DISABILITY DISCRIMINATION

Neb. Rev. Stat. §48-1104 ("NEFEPA")

36. Plaintiff hereby incorporates paragraphs 1 through 35 as if fully set forth herein and states:

37. Defendant is and was at all times material an "employer" within the meaning of under Neb. Rev. Stat. §48-1102.

38. Plaintiff is and was disabled within the meaning of the NEFEPa.

39. Defendant regarded Plaintiff as disabled by an actual or perceived impairment that substantially limits a major life activity.

40. Plaintiff was qualified to perform the essential functions of the job, with or without accommodation.

41. At all times relevant, Plaintiff suffered from an impairment that substantially limited one or more of her major life activities and major bodily functions.

42. Defendant discriminated against Plaintiff because of her disability and altered a term, condition and/or privilege of her employment, including but not limited to, harassing Plaintiff about her disability and termination of her employment.

43. Defendant failed to accommodate Plaintiff's disability in violation of the NEFEPa.

44. Defendant failed to engage in good faith in an interactive process with Plaintiff to assist her in accommodating her disability in violation of the NEFEPa.

45. Plaintiff's disability was a motivating factor in such discrimination, failure to accommodate and failure to engage in the interactive process.

46. The unlawful employment practices complained of above were malicious or recklessly indifferent to Plaintiff's rights as protected by state law, and by its conduct Defendant is subject to punitive damages payable to the Nebraska Common Schools Fund.

47. As a result of Defendant's acts and omissions, Plaintiff has in the past and will in the future suffer injuries and damages, including, but not limited to mental and emotional

distress; humiliation; fear, embarrassment; lost enjoyment of life; lost wages and benefits; front pay and other emoluments of employment.

COUNT II

DISABILITY DISCRIMINATION

42 U.S.C. §§12101 et seq. (“ADA”)

48. Plaintiff hereby incorporates paragraphs 1 through 47 as if fully set forth herein and states:

49. Defendant is and was at all times material an “employer” within the meaning of under 42 U.S.C §12111.

50. Plaintiff is and was disabled within the meaning of the ADA, as amended.

51. Defendant regarded Plaintiff as disabled by an actual or perceived impairment that substantially limits a major life activity.

52. At all times relevant, Plaintiff suffered from an impairment that substantially limited one or more of her major life activities and major bodily functions.

53. At all times relevant, Plaintiff was able to perform the essential functions of her job, with or without reasonable accommodation.

54. Defendant discriminated against Plaintiff because of her disability and altered a term, condition and/or privilege of his employment, including but not limited to, failing to promote Plaintiff, harassing Plaintiff about her disability and discharge of her employment.

55. Defendant failed to accommodate Plaintiff’s disability in violation of the ADA.

56. Defendant failed to engage in good faith in an interactive process with Plaintiff to assist her in accommodating her disability in violation of the ADA.

57. Plaintiff's disability was a motivating factor in such discrimination, failure to accommodate and failure to engage in the interactive process.

58. The unlawful employment practices complained of above were malicious or recklessly indifferent to Plaintiff's rights as protected by Federal law, and by its conduct Defendant is subject to punitive damages.

59. As a result of Defendant's acts and omissions, Plaintiff has in the past and will in the future suffer injuries and damages, including, but not limited to mental and emotional distress; humiliation; fear, embarrassment; lost enjoyment of life; lost wages and benefits; front pay and other emoluments of employment.

COUNTS III AND IV

RETALIATION

42 U.S.C. §12203 and Neb. Rev. Stat. §48-1114

60. Plaintiff hereby incorporates paragraphs 1 through 59 as if fully set forth herein and states:

61. During her employment, Plaintiff engaged in protected activity, including but not limited to exercising her rights under the ADA and NEFEPA, internally complaining of hostile work environment and filing a charge of discrimination against Defendant with the NEOC and EEOC.

62. Defendant took adverse employment action against Plaintiff, including but not limited to subjecting her to harassment, subjecting her job performance to higher scrutiny than others, taking away her job duties, disqualifying her from bonuses, terminating her employment and failing to re-hire her in another position.

63. There is a causal connection between Plaintiff's participation in protected activity and Defendant's adverse action against her.

64. The unlawful employment practices complained of above were malicious or recklessly indifferent to Plaintiff's rights as protected by state law, and by its conduct Defendant is subject to punitive damages payable to the Nebraska Common Schools Fund.

65. The unlawful employment practices complained of above were malicious or recklessly indifferent to Plaintiff's rights as protected by Federal, and by its conduct Defendant is subject to punitive damages.

66. As a result of Defendant's retaliation, Plaintiff has in the past and will in the future suffer injuries and damages, including, but not limited to mental and emotional distress; humiliation; fear, embarrassment; lost enjoyment of life; lost wages and benefits; front pay and other emoluments of employment.

COUNT V

VIOLATIONS OF THE FAMILY MEDICAL LEAVE ACT

29 U.S.C. 2601 et seq.

67. Plaintiff hereby incorporates paragraphs 1 through 66 as if fully set forth herein and states:

68. Defendant is and was at all times material an "employer" within the meaning of the Family Medical Leave Act.

69. Plaintiff is and was at all times material an "eligible employee" within the meaning of the Family Medical Leave Act.

70. During all times of her employment, Plaintiff suffered from one or more "serious health conditions" within the meaning of the Family Medical Leave Act.

71. During all times of her employment, Plaintiff's son suffered from one or more "serious health conditions" within the meaning of the Family Medical Leave Act.

72. Plaintiff was entitled to a leave of absence pursuant to her rights under the Family Medical Leave Act.

73. Plaintiff invoked her right to a leave of absence under the Family Medical Leave Act.

74. Defendant interfered with Plaintiff's right to take leave under the Family Medical Leave Act.

75. Defendant retaliated against Plaintiff and terminated Plaintiff for exercising her rights under the Family Medical Leave Act.

76. As a result of Defendant's acts and omissions, Plaintiff has in the past, and will in the future, suffer damages including, but not limited to, lost wages, benefits, future earnings, liquidated damages and other emoluments of employment.

COUNT VI

WHISTLEBLOWER RETALIATION

Neb. Rev. Stat. § 48-1114

77. Plaintiff hereby incorporates paragraphs 1 through 76 as if fully set forth herein and states:

78. Plaintiff made complaints to Defendant about:
- a) Violations of company policies and procedures;
 - b) Violations of wage and hour laws;
 - c) Harassment and discrimination based on disability;
 - d) Interference and retaliation under FMLA; and,

e) Other ways to be proved at trial.

79. Plaintiff's whistleblowing activity was a motivating factor regarding Plaintiff's termination.

80. As a result of Defendant's retaliation, Plaintiff has in the past and will in the future suffer injuries and damages, including, but not limited to mental and emotional distress; humiliation; fear, embarrassment; lost enjoyment of life; lost wages and benefits; front pay and other emoluments of employment.

COUNT VII

NEBRASKA WAGE PAYMENT AND COLLECTION ACT

Neb. Rev. Stat. § 48-1229 et seq.

81. Plaintiff hereby incorporates paragraphs 1 through 80 as if fully set forth herein and states:

82. Defendant meets the definition of employer set forth in Neb. Rev. Stat. § 48-1229(1), and as an employer, Defendant is subject to, and is required to abide by, the provisions of the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. § 48-1228, et seq. (hereafter "NWPCA").

83. Plaintiff meets the definition of employee set forth in Neb. Rev. Stat. § 48-1229(2), and as an employee, Plaintiff is entitled to the benefits and protection of the NWPCA.

84. Plaintiff performed labor and services for Defendant for which she was not compensated for.

85. Defendant willfully failed to pay Plaintiff her wages in violation of the NWPCA and it has been more than thirty (30) days since the regular payday designated by Defendant.

86. In addition to the wages owed, Plaintiff is entitled to the costs of this suit, plus attorney's fees in an amount not less than 25% of her unpaid wages under the Agreement, pursuant to Neb. Rev. Stat. § 48-1231.

87. Pursuant to Neb. Rev. Stat. § 48-1232(1), an equal amount of the judgment rendered herein should be recovered from Defendant and placed in a fund to be distributed to the common schools of this State. Because Defendant's nonpayment of wages to Plaintiff was willful, an amount equal to two times the amount of unpaid wages should be recovered from Defendant and placed in a fund to be distributed to the common schools of this State, pursuant to Neb. Rev. Stat. § 48-1232(2).

DAMAGES

88. Plaintiff hereby incorporates by reference paragraphs 1 through 87 and states:

89. As a result of Defendant's discrimination and retaliation, Plaintiff has suffered damages and seeks the following relief:

- a. Unpaid wages under the NWPCA;
- b. Damages paid to the Nebraska Common Schools Fund under the NWPCA;
- c. Lost wages and lost benefits to the time of trial;
- d. Front pay including retirement and other benefits;
- e. Compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses;
- f. Punitive damages under Federal law;

- g. Punitive damages payable to the Nebraska Common Schools Fund for Defendant's actual malice or reckless indifference to Plaintiff's state protected rights;
- h. Liquidated damages for FMLA violation as prescribed by 29 U.S.C §2617;
- i. Attorney's fees, expert witness fees and other reasonable costs; and,
- j. Pre-judgment and post judgment interest.

WHEREFORE, Plaintiff demands judgment against Defendant in an amount which will fully and fairly compensate her for her injuries and damages, for all her general, special and punitive damages, for costs, attorney's fees, interest and for such other relief as just and equitable.

Plaintiff demands a trial by jury.

Dated: March 7, 2017.

KIMBERLY L. MARTIN, Plaintiff

BY: /s/ Jennifer Turco Meyer
Jennifer Turco Meyer, #23760
Of Dyer Law, P.C., LLO
10730 Pacific Street, #111
Omaha, Nebraska 68114
(402) 393-7529
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Jennifer@dyerlaw.com
Attorney for Plaintiff

Certificate of Service

I hereby certify that on Tuesday, March 07, 2017 I provided a true and correct copy of the Amended Complaint to the following:

Nebraska Methodist Health System service method: No Service

Signature: /s/ Jennifer Turco Meyer (Bar Number: 23760)