

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KIMBERLEE McCARDEL,

Case No.

Plaintiff,

HON.

v

NORTHERN STAR BROADCASTING, LLC,
A MICHIGAN COMPANY, and
MARY REYNOLDS, an individual,

Defendant.

VERIFIED COMPLAINT

Plaintiff states:

Jurisdiction and Parties

1. This suit is brought pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et. seq.*, which incorporates the enforcement provisions of § 706 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5. 42 U.S.C. § 12117. A pendent state court claim is being bought pursuant to Michigan's Sales Representative Act, MCL §600.2961. A pendent state court claim is being bought pursuant to Michigan's Persons with Disabilities Civil Rights Act (PDCRA), MCL §§ 37.1201 *et seq.*

2. This Court has jurisdiction over Plaintiff's ADA claims pursuant to 28 U.S.C. §1331 and 42 U.S.C. § 2000e-5(f)(3) and supplemental jurisdiction over Plaintiff's pendent PDCRA and Michigan Sales Representative Act claims pursuant to 28 U.S.C. § 1367.

3. Plaintiff submitted an Intake Questionnaire and filed a charge of employment discrimination on the basis of disability with the Equal Employment Opportunity Commission

(EEOC) within 300 days of the commission of the unlawful employment practices alleged in this complaint. Exhibit 1.

4. The EEOC investigated the claim and issued a Determination that found Plaintiff was denied a reasonable accommodation and discharged, based on a disability, and that Defendant violated the ADA. Exhibit 2.

5. The EEOC issued Plaintiff a Notice of Right to Sue dated February 23, 2016. Exhibit 3.

6. Plaintiff filed this complaint with 90 days of receiving the EEOC's Notice of the Right to Sue.

7. Plaintiff is a citizen of the United States and the State of Michigan, and resides in the City of Traverse City, County of Grand Traverse, Michigan.

8. All the discriminatory employment practices alleged in this complaint occurred within the State of Michigan.

9. Defendant Northern Star Broadcasting, LLC, (hereinafter "NSB") is a Michigan Limited Liability Company with its main office and principal place of business located at 514 Munson Ave, Traverse City, MI 49686.

10. Defendant Mary Reynolds (hereinafter "Ms. Reynolds") is a citizen of the United States and the State of Michigan and resides in the City of Traverse City, County of Grand Traverse, Michigan.

11. Ms. Reynolds was the General Manager and Vice President of defendant Northern Star Broadcasting, LLC, acted as an agent of NSB, and in her own individual interest as she was one of the parties involved in the ownership transfer of NSB in 2013.

Statement of Facts

12. Plaintiff was hired by NSB on or about April 6, 1998, as an Integrated Marketing Consultant engaged in sales for NSB at NSB's office located at 3250 Racquet Club Drive, Traverse City, MI 49684.

13. At all times relevant to this Complaint, Plaintiff could and did perform the essential functions of her job with or without accommodation.

14. On October 14, 2011, Plaintiff was involved in a motor vehicle accident.

15. As a result of this accident, Plaintiff received injuries including and a traumatic brain injury, with symptoms including, but not limited to, neck pain, back pain, headaches, and sensitivity to light and noise. See Exhibit 4.

16. While recovering from the accident, Plaintiff was allowed to work from home as a reasonable accommodation and was able to perform the essential functions of her job.

17. A large portion of Plaintiff's sales job was performed outside the office calling on clients and potential clients.

18. As a result of these injuries and ongoing symptoms, Plaintiff is impaired in the major life functions of multitasking, being able to concentrate when interruptions to her tasks occur often, limitations in lifting and some physical activities, and tolerating fluorescent lighting. Fluorescent lighting causes Plaintiff severe headaches. See Exhibit 5.

19. Over the following two years, Plaintiff continued to perform the essential functions of her job.

20. Plaintiff received paperwork dated October 22, 2013 from her physician, Dr. David Oakley, for a medical leave of absence beginning on October 23, 2013 and lasting 2 weeks with a return to work date of November 6, 2013. See Exhibit 6.

21. Plaintiff submitted the medical leave request on October 23, 2013 to NSB and Ms. Reynolds.

22. NSB, through Ms. Reynolds, responded by requiring Plaintiff to turn in her laptop and took away her access to her emails and work product prior to taking her leave of absence.

23. On November 6, 2013, NSB did not allow Plaintiff to return to work, did not give back her laptop and refused to grant her access to her emails and work product.

24. Despite Plaintiff's requests to meet, Ms. Reynolds for a full week refused to meet with Plaintiff regarding her situation, stating she was too busy.

25. On or about November 13, 2013, Plaintiff met with Ms. Reynolds and Dave Simmons, President of defendant Northern Star Broadcasting, LLC. to discuss her return to work and request for accommodation.

26. At the November 13, 2013 meeting, NSB requested additional information from Plaintiff's medical providers regarding her disability and request for accommodation.

27. On November 18, 2013, Plaintiff's Occupational Therapist submitted the requested information to Ms. Reynolds and recommended accommodations for Plaintiff including working from home, no fluorescent lighting, and a quiet environment without interruptions, as well as specifics on working in the office when necessary for meeting with clients, sales meetings, business meetings, manager meetings, getting her mail, etc. See Exhibit 5.

28. On November 22, 2013, Plaintiff sent an email to Ms. Reynolds including the accommodation request from Plaintiff's Occupational Therapist.

29. On November 25, 2013, Plaintiff sent a letter to Ms. Reynolds requesting accommodation. See Exhibit 7.

30. On November 25, 2013, Ms. Reynolds sent an email to Plaintiff forbidding Plaintiff from talking to any client, or contacting any client in any way, until Ms. Reynolds and Plaintiff had a chance to meet sometime in early December. See Exhibit 8.

31. Plaintiff received a letter dated November 27, 2013, from Ms. Reynolds stating in part:

- a. “I received your prior email and letters from your physician and occupational therapist.”
- b. “Apparently you are somehow relating this request to an automobile accident that happened over two years ago. You have continuously worked in the NSB office since until your recent absence.”
- c. “You know that your request comes at the most inopportune time in our business with the holidays and yearend sandwiched on top of the pending merger and acquisition.”
- d. “You are welcome to close your door to cut down on the usual office chatter and shut your lights.”

See Exhibit 9.

32. In the November 27, 2013 letter, NSB requested additional documentation from Plaintiff’s medical providers asking for details of Plaintiff’s status which had already been included in the November 18, 2013 letter from her Occupational Therapist.

33. Instead of providing the reasonable accommodation and engaging in the reasonable accommodation process and allowing her to work, NSB told Plaintiff to “utilize any accrued vacation, sick or personal leave if you and/or your physician decide you cannot return to work under the prior existing conditions of your employment” effectively denying her request for reasonable accommodation. See Exhibit 9.

34. Plaintiff responded by a letter dated December 3, 2013, in which she explained that she had over the prior two years attempted to work with her door closed and lights turned off, but it had not been effective in solving the problem. This led to plaintiff consulting her physicians to develop solutions and suggest alternatives for job accommodation strategies.

35. In this December 3, 2013, letter to Ms. Reynolds, Plaintiff stated,

I feel the company is discriminating against me based on my disability, in violation of the ADA and the Michigan Persons with Disability Civil Rights Act.

Also you have failed to accommodate my disability. I feel you are retaliating against me for requesting job accommodations and taking disability leave.

I feel that these failures to grant the reasonable and necessary accommodations are effecting my ability to work, and do my job duties effectively and successfully as I have in the past. I further feel that you not honoring my request for accommodations is impairing my ability to earn a livelihood given my commission based compensation.

I am expecting a meeting to be set, and you to address my request for the job accommodations this week.

See Exhibit 10.

36. In addition, Plaintiff submitted to NSB a letter from Dr. David Oakley dated December 5, 2013, which again states Plaintiff's disability and physical symptoms and recommends the reasonable accommodations suggested in Carol Holland's letter dated November 18, 2013. See Exhibit 4.

37. In a letter to plaintiff from Ms. Reynolds dated December 6, 2013, Ms. Reynolds acknowledged receipt of Plaintiff's letter dated December 3, 2013 described above and her email dated December 5, 2013, with further medical documentation from Dr. Oakley, both of which requested accommodation based on Plaintiff's disability.

38. In her December 6, 2013 letter, Ms. Reynolds refused to schedule a meeting with Plaintiff. She states, "I am requesting that you not return to work until further notice." See Exhibit 11.

39. On December 10, 2013, Plaintiff was officially terminated.

40. In a December 11, 2013 meeting with Del Reynolds, Vice President of Programming and Operations and Chief Engineer of defendant Northern Star Broadcasting, LLC, and Ms. Reynolds, then executives of NSB and now also the principal owners of the entity that purchased NSB, Plaintiff was told her position had been eliminated.

41. Directly after this meeting, Del Reynolds assured Plaintiff in person that as the company received payments from their clients for work done by Plaintiff, she would continue to receive her commissions.

42. Plaintiff has not received her commissions earned for these collected payments.

43. Plaintiff reapplied for a position with the new entity but was the only non-executive not rehired.

Discrimination Claims

Count 1

ADA Disability Discrimination

44. Plaintiff incorporates by reference paragraphs 1-43 above as if fully set forth herein.

45. Plaintiff is a person within the meaning of §101(7) of the ADA, 42 U.S.C. § 12111(7), and §701 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

46. NSB meets all of the requirements for *employer* status under the ADA. 42 U.S.C. § 12111(5)(A).

47. At all times relevant to this complaint, Plaintiff was an *employee* within the meaning of 42 U.S.C. § 12111(4).

48. At all relevant times, Plaintiff was an individual with a *disability* within the meaning of the ADA, 42 U.S.C. § 12102(1). Specifically, Plaintiff had a physical impairment that substantially limits one or more of her major life activities, had a record of the impairment, and was regarded by NSB as having the impairment.

49. Plaintiff is a *qualified individual with a disability* as that term is defined in the ADA. 42 U.S.C. §12111(8). Plaintiff is an individual who with reasonable accommodation could perform the essential functions of her job.

50. NSB discriminated against Plaintiff in respect to the terms, conditions, or privileges of employment in violation of 42 U.S.C. § 12112 by:

- a. Failing to make reasonable accommodation for Plaintiff's known physical limitations;
- b. Denying her the right to return to work for one week or return her laptop and access to her clientele;
- c. Forcing her to use leave;
- d. Discharging Plaintiff by reason of her disabilities;
- e. Withholding payment of her earned commissions; and/or
- f. Eliminating her position.

51. NSB has failed to undertake any good-faith efforts, in consultation with Plaintiff, to identify and make a reasonable accommodation for Plaintiff.

52. NSB conducted itself with malice or with reckless indifference to Plaintiff's federally protected rights.

53. As a direct proximate result of NSB's discrimination, plaintiff has suffered lost wages and commission, benefits, and the loss of employment. In addition, NSB's unlawful discrimination has caused plaintiff to suffer substantial pecuniary losses, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.

Count 2
ADA Retaliation

54. Plaintiff incorporates by reference paragraphs 1-53 above as if fully set forth herein.

55. Plaintiff engaged in protected activity within the meaning of 42 U.S.C. § 12203 by requesting the accommodation of working from her home to avoid the excess noise and visual distractions affecting her condition to the point of reducing her effectiveness at work.

56. Plaintiff was retaliated against in violation of 42 U.S.C. § 12203 when she was forced to use leave, discharged from employment by NSB because she requested the reasonable accommodation of working from home, her earned commissions were withheld, and her position was eliminated.

57. NSB's statement that Plaintiff's position was eliminated was pretext for its retaliatory actions against Plaintiff.

58. NSB conducted itself with malice or with reckless indifference to Plaintiff's federally protected rights.

59. As a direct proximate result of Defendants' discrimination, Plaintiff has suffered lost wages, benefits, and the loss of employment. In addition, NSB's unlawful discrimination has caused Plaintiff to suffer substantial pecuniary losses, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.

Count 3
PDCRA Disability Discrimination

60. Plaintiff incorporates by reference paragraphs 1-59 above as if fully set forth herein.

61. At all relevant times, Plaintiff was an individual with a *disability* within the meaning of §103(d) of the PDCRA, MCL 37.1103(d) or was regarded as such.

62. At all relevant times, Plaintiff was a *person with a disability* within the meaning of §103(h) of the PDCRA, MCL 37.1103(h) or was regarded as such.

63. At all relevant times, Defendant Northern Star Broadcasting, LLC, was an *employer* within the meaning of Article II of PDCRA, MCL 37.1201(b).

64. At all relevant times, Defendant Mary Reynolds was a *person* within the meaning of Article 2 of the PDCRA, MCL 37.1103(g) and 37.1201.

65. At all relevant times, Plaintiff was an *employee* within the meaning of Article 2 of the PDCRA, MCL 37.1103(d)(i)(A) and 37.1201.

66. Plaintiff could, with or without reasonable accommodation, perform the essential functions of her job with NSB.

67. On November 25th, 2013, Plaintiff requested in writing accommodation for her disability in a letter to Ms. Reynolds, Vice President for NSB.

68. Ms. Reynolds acknowledged receipt of Plaintiff's request for accommodation and supporting documents from medical providers in a letter to Plaintiff from Ms. Reynolds dated November 27, 2013 and again in a letter from Ms. Reynolds to Plaintiff dated December 5, 2013.

69. Defendants discriminated against Plaintiff in violation of MCL 37.1202 by:

- a. Failing to make reasonable accommodation for Plaintiff's known physical limitations;
- b. Denying her the right to return to work or return her laptop and access to her clientele;
- c. Forcing Plaintiff to use leave if she would not work under the same conditions;
- d. Discharging Plaintiff by reason of her disabilities;
- e. Withholding payment of her earned commissions; and/or
- f. Eliminating her position.

70. Defendants failed to undertake any good-faith efforts, in consultation with Plaintiff, to identify and make a reasonable accommodation for Plaintiff.

71. Defendants conducted themselves with malice or with reckless indifference to Plaintiff's state protected rights.

72. The actions of NSB and its agents, representatives, and employees were intentional in their disregard for the rights and sensibilities of Plaintiff.

73. As a direct proximate result of Defendants' discrimination, Plaintiff has suffered lost wages, benefits, and the loss of employment. In addition, Defendants' unlawful discrimination has caused Plaintiff to suffer substantial pecuniary losses, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.

**Count 4
PDCRA Retaliation**

74. Plaintiff incorporates by reference paragraphs 1-73 above as if fully set forth herein.

75. Plaintiff engaged in protected activity within the meaning of MCL 37.1602 by requesting the accommodation of working from her home to avoid the excess noise and visual distractions affecting her condition to the point of reducing her effectiveness at work.

76. Plaintiff engaged in protected activity within the meaning of MCL 37.1602 by submitting in writing her letter to Mary Reynolds dated December 3, 2013 that she felt discriminated and retaliated against and requesting a meeting to discuss her request for accommodation.

77. Plaintiff was retaliated against in violation of MCL 37.1602 when she was forced to use leave, discharged from employment by NSB because she requested the reasonable accommodation of working from home, her earned commissions were withheld, her position was eliminated, and she was not rehired.

78. NSB's statement that Plaintiff's position was eliminated was pretext for its retaliatory actions against Plaintiff.

79. NSB conducted itself with malice or with reckless indifference to Plaintiff's state protected rights.

80. The actions of NSB and its agents, representatives, and employees, including, but not limited to Ms. Reynolds, were intentional in their disregard for the rights and sensibilities of Plaintiff.

81. As a direct proximate result of Defendants' discrimination, Plaintiff has suffered lost wages, benefits, and the loss of employment opportunities. In addition, NSB's unlawful discrimination has caused Plaintiff to suffer substantial pecuniary losses, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.

Discrimination Claims Prayer for Relief

PLAINTIFF REQUESTS relief from this court against Defendant as follows:

- a) An order of this court reinstating Plaintiff to her former position with NSB at a rate of pay commensurate with all intervening raises to which plaintiff would have received, or in the alternative, an award of front-pay until plaintiff turns the age of 67;
- b) An order of this court awarding Plaintiff compensatory damages in an amount to be determined at trial in this matter;
- c) An order of this court granting Plaintiff all pecuniary damages, including back pay and loss of benefits and interest;
- d) An order of this court awarding Plaintiff punitive damages in an amount to be determined at the trial of this matter;
- e) An award to Plaintiff of attorney fees, costs of litigation, and interest; and,
- f) An order of this court granting Plaintiff further relief that it deems just and equitable.

Withheld Sales Commission Claim

**Count 5
Michigan Sales Representative Act**

82. Plaintiff incorporates by reference paragraphs 1-81 above as if fully set forth herein.

83. Plaintiff is a *person* within the meaning of MCL 600.2961(1)(b).

84. NSB meets all of the requirements for *principal* status under MCL 600.2961(1)(d).

85. At all times relevant to this complaint, Plaintiff was an *Sales Representative* within the meaning of MCL 600.2961(1)(e).

86. Throughout her employment with NSB, Plaintiff was paid on a *Commission* basis as defined under MCL 600.2961(1)(a).

87. NSB agreed to pay Plaintiff a commission on all sales.

88. Plaintiff fully performed.

89. Plaintiff was the procuring cause for the sales.

90. Plaintiff was terminated by NSB on December 10, 2013.

91. Plaintiff had commissions pending as of the date of her termination.

92. Forty-five (45) days have passed since Plaintiff was terminated and NSB has failed to pay Plaintiff the commissions she was owed.

93. Payment for sales resulting from Plaintiff's efforts were received by NSB after Plaintiff's termination.

94. Commissions earned on these post-termination sales payments received were not paid by NSB within 45 days of the sales receipt as required by MCL 600.2961(4).

95. NSB purposefully and intentionally failed to pay the commissions.

96. NSB's breaches have caused damages to Plaintiff, including unpaid commissions, and other incidental and consequential damages.

97. Plaintiff is entitled to an additional award of double the amount of unpaid commissions up to \$100,000.00 plus reasonable attorneys' fees and court costs pursuant to MCL 600.2961.

PLAINTIFF REQUESTS that this court

- a) Award damages against NSB in whatever amount Plaintiff is found to be entitled, including an additional award of two times the amount of unpaid commissions up to \$100,000.00,
- b) An award of reasonable attorneys' fees, costs and interest, and
- c) An order of this court granting Plaintiff further legal and equitable relief that it deems just and equitable.

JURY DEMAND

Plaintiff requests a trial by jury.

Respectfully Submitted,

WHEELER UPHAM, P.C.

/s/ Kevin M. Keenan

By:

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Dated: May 20, 2016

VERIFICATION

I, Kimberlee McCardel, being first duly sworn, hereby verify that I am the Plaintiff and that the material allegations contained in the above Verified Complaint are true and correct to my personal knowledge.


Kimberlee McCardel, Plaintiff