

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:21-cv-31

Mary Caldwell,

Plaintiff,

v.

Liberty Commons of Kernersville, LLC,

Defendant(s).

**COMPLAINT
AND JURY DEMAND**

Plaintiff Mary Caldwell (“Ms. Caldwell” or “Plaintiff”), through her counsel, the law firm of Williams & Ray, PLLC, for her Complaint against Liberty Commons of Kernersville, LLC (“Liberty” or “Defendant”) alleges the following:

I. INTRODUCTION

1. Ms. Caldwell, an accomplished Speech-Language Pathologist (also referred to as a “Speech Language Therapist”) and a former Liberty employee, was subjected to series of targeted acts of discrimination against her by Liberty based on her age in an effort to push her out of her job. Ms. Caldwell took leave pursuant to the Family Medical Leave Act as a consequence to the accompanying stress which exacerbated her disability. Upon her return, Liberty promptly terminated her for a singular pretextual reason.

II. PARTIES

2. Ms. Caldwell is a resident of the town of Lewisville, Forsyth County, North Carolina. Ms. Caldwell was employed by Liberty as a Senior Speech-Language Pathologist at the time of her termination on August 4, 2020.

3. Liberty is a limited liability company organized under North Carolina law, formed on September 30, 2013 with a registered address and principal office located at 2334 South 41st Street, Wilmington, NC 28403-5502, and with a local address at 485 Veterans Way, Kernersville, NC 27284.

III. JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject matter of this action pursuant to 29 U.S.C. § 2601, *et seq.*, 29 U.S.C. § 623, *et seq.*, and 42 U.S.C. § 12101, *et. seq.* Jurisdiction over the state law claim is made pursuant to 28 U.S.C. § 1367.

5. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b)(1) because Defendant is a limited liability company with its principal office located within the Southern Division of the Eastern District of North Carolina.

6. Ms. Caldwell has complied with all administrative, jurisdictional and legal prerequisites for the filing of this action. Specifically, Ms. Caldwell filed a Charge of Discrimination and Retaliation with the Equal Employment Opportunity Commission (“EEOC”) alleging, *inter alia*, discrimination based on her age and disability. On November 30, 2020, the EEOC provided Ms. Caldwell with a notice granting her the right to sue Liberty.

IV. FACTUAL ALLEGATIONS

A. Background

7. Ms. Caldwell is a 61-year-old woman who has a master’s degree in Education with a Certification of Clinical Competence as a Speech Language Pathologist and 35 years of experience in the field.

8. Ms. Caldwell suffers from diagnosed diabetes and complications arising therefrom including reactive hypoglycemia.

9. Liberty is a skilled nursing and rehabilitation company providing enhanced-therapy services to its patients. Ms. Caldwell worked within the rehabilitation unit.

10. The rehabilitation unit comprises three departments: The Physical Therapy Department, the Occupational Therapy Department, and the Speech Therapy Department. In total, the rehabilitation unit contained approximately 12 employees:

- a. Four employees in the Occupational Therapy Department (all of whom are in their 30s).
- b. Four employees in Physical Therapy Department (three of whom are in their 30s, and one of whom is in her 40s).
- c. Two employees in the Speech Therapy Department (one, in her 50s, and Ms. Caldwell, who is 61 — the oldest employee in the rehabilitation unit).
- d. One Rehabilitation Technician (in her 20s).
- e. One manager overseeing all three departments (in her 30s).

11. Ms. Caldwell worked within the Speech Therapy Department under the direct supervision of Kristen Carpenter, the Rehabilitation Manager. Ms. Carpenter managed all three Departments within the rehabilitation unit. The therapists across the Departments worked in close proximity and comingled with their patients within the same rehabilitation gym.

12. Ms. Caldwell began her career with Liberty in approximately October 2011 as a Senior Speech-Language Pathologist/Therapist in Liberty's Speech Therapy Department.

13. At all relevant times, as a Senior Speech-Language Pathologist, Ms. Caldwell would assess, diagnose, and treat patients, and help prevent or improve communication and swallowing disorders. Ms. Caldwell's role required her to *inter alia*:

- a. Evaluate patients' abilities of speech, language, and swallowing;

- b. Identify treatment options for patients;
- c. Create and carry out individualized treatment plans to address patient-specific needs;
- d. Teach patients how to make sounds, improve their voices, and maintain fluency;
- e. Help patients improve their vocabulary and sentence structure;
- f. Cognitive retraining for patients with dementia and other cognitive impairments; and
- g. Counsel patients on how to cope with communication and swallowing disorders.

14. At the time she was hired, Ms. Caldwell was the only therapist in the Speech Therapy Department, and each of the Physical Therapy and Occupational Therapy Departments comprised two therapists and two assistants each. The Speech Therapy Department has since doubled in size.

15. Ms. Caldwell excelled in her role. During her tenure at Liberty, Ms. Caldwell neither received any formal discipline nor any negative feedback from patients, patients' family, or staff.

16. Ms. Caldwell received uniformly positive performance appraisals.

17. Liberty rewarded Ms. Caldwell with merit raises through at least 2017.

18. During her 2017 performance appraisal, Liberty's then-Rehabilitation Manager, Chad Hall,¹ informed Ms. Caldwell that she had reached the salary cap and would no longer receive raises. However, in a more recent performance evaluation conducted in approximately January 2020, Ms. Caldwell was given an additional \$0.50 per hour raise by Ms. Carpenter.

19. Liberty's Employee Handbook states that its employees may accumulate an unlimited amount of PTO and that PTO will be paid out to the employee upon their departure.

B. Liberty Discriminates Against Ms. Caldwell

20. In April 2020, Ms. Carpenter announced to the two Speech Language Therapists (Ms. Caldwell and Ms. Wilder) that Liberty would be placing one of them on a temporary furlough due to COVID-19.

21. At the time, the Speech Therapy Department — containing two employees total — was staffed at an ideal level; both employees had a full workload and were meeting their productivity expectation standards; and the announcement was neither preceded by nor succeeded by a reduction in patient demand.

22. It made no business sense for Liberty to place a fully productive therapist within a fully booked department on furlough — traditionally meaning a “leave of absence” from reduced demand. Instead, and in a display of backward logic, Ms. Carpenter announced that, effective immediately, Liberty would be affirmatively restricting certain Speech Therapy services, such to justify the furlough. Throughout the same timeframe, Liberty reduced no services and cut no hours within the other rehabilitation unit departments. In contrast to the affirmative stifling of Ms.

¹ Liberty terminated Mr. Chad Hall in approximately August of 2017 and replaced him with Ms. Kristen Carpenter.

Caldwell's productivity, Liberty operated rationally with regard to the other departments and encouraged maximal productivity amongst the other departments' employees.

23. Liberty's new policy restricted Ms. Caldwell from performing "provision to voice" treatment, "dysphagia" treatment, and later, "cognitive" treatment.

24. Restricting of Speech Language Therapists from performing treatment deemed necessary according to the therapist's professional judgment would violate standards imposed by the profession's licensing body, the American Speech Language and Hearing Association ("ASHA").

25. Ms. Caldwell reported the illegality of the restrictions to ASHA, and Liberty rescinded the policy. On information and belief, these new policies served no legitimate interest and existed solely as a pretext to reduce Ms. Caldwell's work hours.

26. On April 29, 2020, Liberty put into effect its furlough of Ms. Caldwell. Ms. Carpenter handed to Ms. Caldwell a letter stating that Ms. Caldwell's hours would be immediately reduced from full-time to an amount to be determined on an as-needed, week-to-week basis.

27. In addition, Ms. Carpenter announced that Ms. Caldwell's caseload would be transferred to Ms. Wilder and that Ms. Caldwell would be responsible for all non-billable responsibilities for the Department.

28. Liberty's policy for assignment of non-billable responsibilities is an important policy to the employees. Liberty requires its Speech Therapists to bill a minimum of 75% of their time, leaving 25% for the non-billable responsibilities, such as conducting patient screenings, performing

evaluations, and preparing discharge reports.² Liberty's traditional custom, practice, and policy *de facto* was to delegate non-billable responsibilities evenly across its employees.

29. Ms. Caldwell's circumstance was a double whammy. Liberty doubled her non-billable responsibilities, reduced her scheduled hours, while keeping her billable-hour quota constant.

30. The combination of adverse policies effectuated a squeeze on Ms. Caldwell that caused extreme stress and hardship and served no legitimate interest. Furthermore, Liberty's irrational reasoning for furloughing a fully productive employee, Liberty's illegal service restrictions, and Liberty's substantive favoring of an entry-level employee (Ms. Wilder) over a senior level employee (Ms. Caldwell), demonstrate Liberty's animus toward Ms. Caldwell — the oldest therapist in the business unit.

C. Liberty's Targeted Discrimination Caused Ms. Caldwell's Disability to Severely Exacerbate

31. Ms. Caldwell has suffered from hypoglycemia as a complication arising from diabetes since 2016. Hypoglycemia occurs when the body's blood-sugar level drops dangerously low and can result in, *inter alia*, coma, stroke, or death.

32. As a consequence, an individual who suffers from diabetes with hypoglycemia is subject to substantial limitations of their life activities. In Ms. Caldwell's case, among other limitations, her speech becomes impaired, she becomes confused, loses vision, she must inform and

² Liberty states on its employee performance appraisals whether the employee meets the threshold billable hour requirement. The failure by the employee to meet the threshold requirement can result in discipline and/or a reduction in pay.

train co-workers of emergency intervention protocols, and must take special precautions when driving.

33. Diabetes with reactive hypoglycemia constitutes a disability under the ADA.

34. Elevated stress is a well-known exacerbator of this disability.

35. The stress and embarrassment caused by Liberty's treatment toward her exacerbated Ms. Caldwell's hypoglycemia and caused her blood-sugar level to drop dangerously low on multiple occasions.

36. At all relevant times, Ms. Carpenter was aware of Ms. Caldwell's diabetes and reactive hypoglycemia and that Liberty's treatment was exacerbating it. On various occasions (increasing in frequency over time) other Liberty employees including Ms. Carpenter and Ms. Wilder had to intervene pursuant to Ms. Caldwell's emergency intervention protocol.

37. On or around June 5, 2020, while driving home from work, Ms. Caldwell began experiencing the symptoms of an episode of aggravated hypoglycemia and nearly caused a catastrophic car accident.

38. On June 8, 2020, the following Monday, Ms. Caldwell contacted the Human Resources department to apply for unpaid leave pursuant to the Family Medical Leave Act ("FMLA") as an accommodation for her disability. Liberty approved the leave immediately.

39. Between June 9, 2020 and July 20, 2020, Ms. Caldwell was on unpaid leave and used her accrued Paid Time Off ("PTO") to furnish her salary.

40. Prior to taking FMLA leave, Ms. Caldwell had accrued approximately 450 hours of PTO. By the time Ms. Caldwell returned to work, she had at least 186 PTO hours remaining.

D. Liberty Falsely Accuses Ms. Caldwell of Medicare Fraud

41. On July 30, 2020, ten days after returning from leave, the new Rehabilitation Manager and Liberty's Administrator (Ann Mahieu and Howard Staples, respectively) accused Ms. Caldwell of a categorically untrue theory of billing fraud, and suspended her immediately.

42. Ms. Caldwell had at all times been an employee of the utmost character, and across her 35 years of logging and billing her time, she had never once been accused of any form of impropriety to speak of.

43. On August 4, 2020, the Head of Rehabilitation, Tammy McPhearson, called Ms. Caldwell. Ms. McPhearson revealed the basis of Liberty's defamatory claim. Liberty alleged that Ms. Caldwell committed billing fraud and that the fraud was evidenced by security camera footage showing Ms. Caldwell visiting a certain patient for five minutes whereas her corresponding billing entry stated a visit of 30 minutes.

44. In fact, the footage actually reflected that Ms. Caldwell had made multiple visits with said patient on that day, the aggregation of which amounted to 30 minutes.

45. On the August 4 phone call with Ms. McPhearson, Ms. Caldwell explained herself. Ms. McPhearson admitted that the remaining footage in fact revealed Ms. Caldwell's repeated visits to the patient's room. Nevertheless, at the conclusion of the phone call, Ms. McPhearson terminated Ms. Caldwell.

46. The aggregation of multiple visits with a single patient in a single day for time-keeping purposes is a customary practice within and without Liberty.

47. In addition, the aggregation of time was particularly pertinent under the circumstances of COVID-19. Pre-COVID-19, therapists at Liberty, including Ms. Caldwell,

would bring handheld computers with them to the patient rooms and would document their treatment notes face-to-face.

48. Liberty had an affirmative policy that only “point of service” (i.e., face-to-face with the patient) documentation would count toward the employees 75% productivity standard. Approximately one third of any given therapist’s time spent to meet their productivity standard would be spent conducting note documentation.

49. In fact, Liberty had an affirmative policy requiring its employees to (a) bill for the time spent documenting their notes, and (b) to do so at the “point of service.”

50. But in response to COVID-19, Liberty created a new policy. The new policy prohibited the transport of the handheld documenting computers into patient rooms, thereby preventing the documentation from occurring at the “point of service”; however, all the while, Liberty’s productivity standards remained constant. The result was that therapists would scurry between the “point of service” and their offices to document their treatment notes and to log their time.

51. Ultimately, Liberty’s policies entrapped its therapists into violating the policy of logging time for documentation, violating the policy against transporting the handheld computers into patient rooms, or failing to meet their productivity standards.

52. Liberty offered no information, training, or clarification to Ms. Caldwell in regard to revised billing practices or billing coding differences under the new COVID-19 policies.

53. Neither Ms. Caldwell nor any other Speech Language Pathologist at Liberty was tasked within their job description of deeming the bill-worthiness or the legality of any form of billing practice. It was at all times a part of Ms. Caldwell’s job to simply log her time.

54. Liberty's false accusation of Medicare fraud was just another targeted act of discrimination and retaliation. On information and belief, no other therapist had their time entries similarly scrutinized.

55. Upon information and belief, after her termination, all of Ms. Caldwell's job responsibilities were reassigned to an individual or individuals who were at least nine years younger than her, did not suffer from a disability, did not seek a reasonable accommodation for any disability, or did not take FMLA leave.

56. Following the illegal termination, Liberty refused to pay Ms. Caldwell for her remaining PTO.

57. Following the illegal termination, Liberty withheld and refused to return Ms. Caldwell's personal property including but not limited to: assessment materials, extensive treatment materials, and several assistive and alternative communication devices.

58. On information and belief, Liberty has previously terminated numerous employees on the same "Medicare fraud" pretext, including Chad Hall, Anne Hutchins, and Jessica McCollum, and Tani Savage. On information and belief, Liberty employs this pretext as a tool for manufacturing "cause" for termination and as is its *modus operandi* for discrimination and avoiding significant PTO-payout obligations.

V. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Discrimination in Violation of the Age Discrimination in Employment Act ("ADEA")

59. Plaintiff hereby incorporates all foregoing paragraphs as though fully alleged herein.

60. Plaintiff was 60 years old at the time of her termination and is a member of the protected class defined by the ADEA.

61. Defendant has knowingly and intentionally engaged in an ongoing pattern and practice of discrimination against Plaintiff based on her age.

62. The intentional discriminatory practice to which Plaintiff was subjected include, but are not limited to, terminating her employment.

63. As a proximate result of the above discriminatory actions, Plaintiff has sustained damages, including lost wages and benefits, liquidated damages, and has incurred attorney's fees and costs.

SECOND CLAIM FOR RELIEF
Discrimination and Retaliation in Violation of the
Americans with Disabilities Act ("ADA")

64. Plaintiff hereby incorporates all foregoing paragraphs as though fully alleged herein.

65. At all relevant times, Plaintiff was diagnosed with reactive hypoglycemia and diabetes.

66. Plaintiff's diagnosed conditions constitute physical conditions that substantially limits her major life activities, including concentrating, thinking, communicating, and working, among other things, and therefore constitute disabilities under the ADA.

67. Defendant knew of Plaintiff's diagnoses and regarded Plaintiff as disabled.

68. Plaintiff was qualified for and capable of performing all of the essential functions of her position as s Senior Speech-Language Pathologist working for Defendant with a reasonable accommodation.

69. Plaintiff's disabilities are ones that can be successfully managed by intermittent leaves of absence as needed.

70. Plaintiff engaged in protected activity in the form of seeking an unpaid leave of absence pursuant to the FMLA as a reasonable accommodation for her disabilities.

71. Defendant discriminated and retaliated against Plaintiff on the basis of her disabilities and in retaliation for her seeking a reasonable accommodation by virtue of their targeted acts of discrimination against her, including *inter alia* Defendant's act of terminating her employment, and for unjust purposes including *inter alia* to avoid future obligations to reasonable accommodations.

72. As a proximate result of the above-described targeted acts of discrimination, Plaintiff sustained damages including lost wages and benefits, compensatory damages including emotional distress, and has incurred attorney's fees and costs.

THIRD CLAIM FOR RELIEF
Unlawful Retaliation in Violation of the
Family Medical Leave Act ("FMLA")

73. Plaintiff hereby incorporates all foregoing paragraphs as though fully alleged herein.

74. Plaintiff engaged in protected activity in that she sought and was granted FMLA leave.

75. Defendant terminated Plaintiff 15 days after she returned to work from her FMLA leave.

76. Defendant retaliated against Plaintiff because of her request for and ultimately availing herself to FMLA leave by virtue of Defendant terminating Plaintiff's employment and including *inter alia* to avoid future obligations under the FMLA.

77. As a proximate result of the above discriminatory actions, Plaintiff has sustained damages, including lost wages and benefits, liquidated damages, and has incurred attorney's fees and costs.

FOURTH CLAIM FOR RELIEF
Breach of Contract

78. Plaintiff hereby incorporates all foregoing paragraphs as though fully alleged herein.

79. Defendant's Employee Handbook constitutes an enforceable contract between Plaintiff and Defendant.

80. Defendant's Employee Handbook obligates it to pay out accrued PTO to its employees all situations except when the employee has been terminated 'for cause.'

81. Plaintiff had at least 186 accrued PTO hours at the time of her termination.

82. Consequential to Defendant's illegal and targeted acts of discrimination, Plaintiff unjustly incurred and expended over 200 hours of her accrued PTO.

83. Plaintiff was not terminated for cause.

84. Defendant did not pay Plaintiff the PTO she had accrued at the time of her termination.

85. Defendant is unjustly enriched by Plaintiff's consumption of her accrued hours of PTO consequential to Defendant's illegal acts.

FIFTH CLAIM FOR RELIEF
Violation of North Carolina's
Wage and Hour Act 95-25.1

86. Plaintiff hereby incorporates all foregoing paragraphs as though fully alleged herein.

87. Defendant's Employee Handbook obligates it to pay out accrued PTO to its employees in all situations except when the employee has been terminated 'for cause.'

88. Plaintiff was not terminated for cause.

89. Plaintiff's PTO is therefore a wage under North Carolina's Wage and Hour Act.

90. Plaintiff was not paid out for her PTO on or before the next regular payday following her termination.

JURY TRIAL DEMAND

Plaintiff hereby requests a trial by jury on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter a judgment in her favor and against the Defendant(s) and award the following:

- (a) Injunctive, declaratory, and prospective relief as allowed by law;
- (b) Compensatory damages in such amount as shall be proven at trial for lost back pay and damages including lost benefits, wages, promotions, tenure, seniority, and other employment opportunities, and unpaid and unjustly expended PTO;
- (c) An order to reinstate Plaintiff, or in the alternative, front pay and benefits in an appropriate amount;
- (d) Punitive and liquidated damages as allowed by law;
- (e) An order to return Plaintiff's personal property;
- (f) Attorney's fees and costs as provided for by law;
- (g) Pre- and post-judgment interest as provided for by law; and
- (h) Such other relief as the Court deems just on proper.

Respectfully submitted on this 26th day of February 2021.

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