

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

ASIA MYERS,

Plaintiff,

v.

Hon. Sean F. Cox

HOPE HEALTHCARE CENTER,
a Michigan Corporation,

SAVA SENIORCARE,
a Texas Corporation,

First Amended Complaint and Jury Demand

Defendants.

Case No. 2:13-cv-14459-SFC-MKM

FIRST AMENDED COMPLAINT

INTRODUCTORY STATEMENT

1. Plaintiff Asia Myers is a Certified Nursing Assistant (“CNA”) who works for Defendant Hope Healthcare Center (“Hope”), a longterm care facility located in Westland, Michigan. Hope is an affiliate of Defendant Sava Seniorcare (“Sava”).

2. In June 2013, shortly after learning of her pregnancy, Ms. Myers suffered complications which, if not treated, could have led to a miscarriage. Her doctor ordered her on bed rest for a week and then cleared her to return to work if she did not engage in lifting or pushing. Accordingly, she requested a reasonable accommodation from her employer.

3. Upon information and belief, Defendant Sava issues company policies which Defendant Hope is required to follow.

4. Defendant Hope, operating pursuant to a company policy for which Defendant Sava is responsible, refused to allow Ms. Myers to return to work and refused to grant her a reasonable accommodation, and instead forced Ms. Myers onto unpaid leave, despite the fact that Hope routinely accommodates other workers who have temporary lifting restrictions.

5. In refusing to grant Ms. Myers a reasonable accommodation and requiring her to take unpaid leave, Defendants violated Ms. Myers's rights under federal law protecting workers from discrimination on the basis of pregnancy and disability. Defendants further violated Ms. Myers's rights under Michigan's Elliott-Larsen Civil Rights Act, which explicitly forbids employers from treating pregnant workers differently from other employees with temporary restrictions, regardless of the source of those restrictions.

6. Ms. Myers respectfully asks this Court to find that Defendants' treatment of her violated Title VII of the Civil Rights Act of 1964, as amended, the Pregnancy Discrimination Act, the Americans with Disabilities Act, as amended, and Michigan's Elliott-Larsen Civil Rights Act, as amended, and to award her the relief requested below.

7. Defendants are jointly and severally liable for violating Ms. Myers's rights under federal and Michigan law.

JURISDICTION AND VENUE

8. This Court has federal question jurisdiction over this controversy under 28 U.S.C. §§ 1331 and 1337, to enforce the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e(k), 2000e-2, and the Americans with Disabilities Act, as amended ("ADA"), 42 U.S.C. §§ 12101 *et seq.*

9. This Court has supplemental jurisdiction under 28 U.S.C. § 1367 to address the claims brought under Michigan's Elliott-Larsen Civil Rights Act, M.C.L. §§ 37.2201-37.2202,

because they are so related to the federal law claims that they form part of the same case or controversy.

10. This Court has diversity jurisdiction over Defendant Sava based on 28 U.S.C. § 1332(a)(1), because the case involves citizens of different states and the matter in controversy exceeds \$75,000.

11. A substantial part of the events giving rise to this suit arose on the premises of Defendant Hope Healthcare, which is located in the Eastern District of Michigan. Accordingly, under 29 U.S.C. §1391(b)(2), venue lies in this judicial district.

12. Prior to filing this lawsuit, Ms. Myers filed a timely written charge with the Equal Employment Opportunity Commission (“EEOC”) alleging gender and pregnancy discrimination under Title VII of the Civil Rights Act of 1964 against Defendant Hope. This charge placed Defendant Hope on notice of her claim under the Americans with Disabilities Act, because the charge explained that Ms. Myers’s doctor placed her on restrictions for pregnancy-related reasons and that Hope had refused to allow her to return to work with those restrictions..

13. On July 24, 2013, the EEOC issued a notice of right-to-sue letter. Ms. Myers filed this action within 90 days of her receipt of the right-to-sue letter.

14. In an abundance of caution, Ms. Myers also filed a timely written charge with the EEOC expressly alleging discrimination on the basis of disability, in addition to discrimination on the basis of sex and pregnancy, and adding Hope’s parent company Sava as a defendant. Ms. Myers has requested expedited treatment of this related charge of discrimination.

15. Accordingly, Ms. Myers has exhausted all administrative remedies pursuant to 42 U.S.C. § 2000e-5 and this Complaint is properly filed.

PARTIES

Plaintiff

16. Plaintiff Asia Myers is a Certified Nursing Assistant (“CNA”) who has been employed with Defendant Hope Healthcare Center as a CNA since 2010. She resides in the Eastern District of Michigan.

Defendants

17. Defendant Hope Healthcare Center (“Hope”) is a long-term care facility located in Westland, Michigan. On information and belief, Hope employs at least one hundred people and houses approximately 117 residents.

18. Hope is an affiliate of Defendant Sava SeniorCare (“Sava”), which is located in Houston, Texas. Sava describes itself as “affiliated entities” that provide short- and long-term care. Sava’s web site states that it is one of the largest providers of short- and long-term care in the United States.

STATEMENT OF FACTS

19. Asia Myers is a CNA who lives in Detroit. She began working for Hope as a CNA on or around March 23, 2010.

20. As a CNA, Ms. Myers’s duties include providing personal care and services to residents, such as helping them with bathing and grooming, feeding, mobility, and assisting them with toileting.

21. On or around May 18, 2013, Ms. Myers learned that she was pregnant.

22. On or around May 20, 2013, Ms. Myers informed her Human Resources manager, Erica Long, that she was pregnant. Ms. Myers continued to work during her pregnancy as scheduled.

23. On June 3, 2013, while at home, Ms. Myers experienced bleeding and cramping related to her pregnancy. She immediately went to see her doctor, who advised her to go on bed rest until June 10.

24. Cramping and bleeding in early pregnancy is a pregnancy-related impairment and complication known as “threatened miscarriage.”

25. Ms. Myers’s doctor wrote a note dated June 3 indicating that Ms. Myers was under his care for pregnancy and that she was unable to work from June 4 through June 10 due to complications.

26. Ms. Myers told her employer on June 3 about the restriction imposed by her doctor and submitted this note to her employer, via another employee, on June 4.

27. Between June 4 and June 10, Ms. Myers was on a medical leave of absence.

28. On June 10, Ms. Myers’s doctor wrote a note indicating that she was under his care for pregnancy complications, and releasing her to return to full-time work on June 11 with work restrictions of no lifting or pushing.

29. On June 10, Ms. Myers informed Ms. Long by telephone that her doctor had released her to return to work on June 11 with work restrictions of no lifting or pushing.

30. Ms. Long told Ms. Myers that she would not be able to return to work with those restrictions.

31. Ms. Long told Ms. Myers that she would have to use leave under the Family and Medical Leave Act (“FMLA”) until her doctor released her to return to work without restrictions.

32. On June 10, Ms. Long and the Director of Nursing, Kathleen Tolbert, told Ms. Myers that, pursuant to company policy, she could not return to work with any restrictions. On or around June 11, Ms. Myers went to Hope to pick up the FMLA paperwork and met with Ms.

Long. Ms. Myers told Ms. Long that if she was forced to take FMLA at that time, she would not have any remaining leave when her child was born. Ms. Myers also informed Ms. Long that she did not have sufficient funds to take unpaid leave at that time.

33. Ms. Long indicated to Ms. Myers that she had no discretion under company policy to permit her to return to work as long as she had work restrictions.

34. On June 13, Ms. Myers reported to work and began to perform work duties, including passing trays, making beds, and other regular duties.

35. Partway through the morning, Ms. Myers spoke with the Director of Nursing, Kathleen Tolbert. Ms. Tolbert said that she was aware that there were many tasks that Ms. Myers could perform without violating her doctor's restrictions. However, she told Ms. Myers that any decision about whether to allow her to remain at work was not her "call." Ms. Tolbert directed Ms. Myers to talk with Donald Mass, the Administrator of the building.

36. On the same day, Ms. Myers spoke with Mr. Mass and again asked to be able to work with restrictions in accordance with her doctor's instructions.

37. Mr. Mass and Ms. Long asked Ms. Myers to punch out and leave work.

38. The same day, Ms. Long left Ms. Myers a voice message and when Ms. Myers called her back, she informed Ms. Long that she had filed a discrimination charge with the EEOC. Ms. Long then asked her to come in to discuss accommodations.

39. The following day, Ms. Myers went in to work on her scheduled day off to fill out a Reasonable Accommodation Acknowledgment form. This form was signed by Ms. Myers and Ms. Long and dated June 14.

40. On or about Friday, June 21, Ms. Long called Ms. Myers and told her that her request to work with accommodations had been denied and that she would have to remain on leave, even though she was still being listed on the work schedule.

41. As a result of Defendant Hope's refusal to permit Ms. Myers to return to work with her doctor's restrictions and as a result of Defendant Hope's refusal to grant Ms. Myers a reasonable accommodation, Ms. Myers remained on unpaid leave until July 11.

42. Defendant Hope routinely provides reasonable accommodations to CNAs who have medical conditions or injuries unrelated to pregnancy. When a CNA is given a reasonable accommodation, that person is permitted to work, and may be given tasks including hair and nail care for residents, shaving residents, paperwork, feeding residents, and performing showering tasks that do not require lifting.

43. Upon information and belief, Defendant Sava is jointly and severally responsible for Hope's discriminatory corporate policy that accommodates non-pregnant employees with lifting and pushing restrictions and denies the same accommodations to pregnant employees with similar restrictions.

44. On information and belief, work that comprised part of Ms. Myers's regular job duties and that Ms. Myers could perform with her restrictions was available during the time Ms. Myers was on unpaid leave.

45. During the time Ms. Myers was on unpaid leave, she lost her health benefits and suffered economic hardship because she was not being paid. She had difficulty paying bills and had to borrow money from family members. She also suffered emotional distress related to stress caused by Defendant's unlawful refusal to permit her to return to work during a time when she was in great need of health benefits and wages.

46. On July 10, Ms. Myers's doctor released her to return to work on July 11 without restrictions.

47. Ms. Myers returned to work on July 11.

48. In summary, Ms. Myers was out of work on a medical leave of absence from June 3 – June 10. Ms. Myers was disabled and was otherwise qualified to perform her job with or without a reasonable accommodation from June 11 – July 10. During the period from June 11 – July 10, Defendants refused to permit Ms. Myers to work.

49. Ms. Myers resumed working a full schedule on July 11; however, she experiences much stress and anxiety due to her concern that, if she needs a reasonable accommodation related to pregnancy again in the future as her pregnancy progresses, she will again be forced onto a discriminatory unpaid leave of absence.

CAUSES OF ACTION

COUNT I

VIOLATION OF TITLE VII, AS AMENDED, AND THE PREGNANCY DISCRIMINATION ACT, 42 U.S.C. §§ 2000e(k), 2000e-2(a)(1), (k)

50. Ms. Myers re-alleges and incorporates by reference the allegations contained in the previous paragraphs as if fully set forth herein.

51. Title VII of the Civil Rights Act of 1964, as amended (“Title VII”) prohibits discrimination on the basis of sex, including on the basis of pregnancy and related medical conditions. 42 U.S.C. §§ 2000e(k), 2000e-2(a)(1).

52. At all times relevant hereto, Ms. Myers was an employee and Defendants were employers within the meaning of Title VII.

53. Under the Pregnancy Discrimination Act of 1978, which amended Title VII, employers are required to afford pregnant workers the same treatment and benefits in

employment as “other persons not so affected but similar in their ability or inability to work.” 42 U.S.C. § 2000e(k).

54. Prior to her pregnancy, Ms. Myers was qualified for her position and was meeting her employer’s legitimate expectations. She had been employed by Defendants for more than three years as a CNA.

55. Defendants violated Title VII and the Pregnancy Discrimination Act when they took adverse employment actions against Ms. Myers by refusing to grant her reasonable accommodation request and forcing her to take unpaid leave, even though they routinely grant accommodations to other, non-pregnant, CNAs who are similar to Ms. Myers in their ability to work.

56. Defendants’ practice of denying accommodation requests by pregnant workers while granting them to other CNAs has a disparate impact on pregnant women and is not justified by business necessity.

57. Defendants are jointly and severally liable.

COUNT II

VIOLATION OF THE AMERICANS WITH DISABILITIES ACT 42 U.S.C. §§ 12101 *et seq.*

58. Ms. Myers re-alleges and incorporates by reference the allegations contained in the previous paragraphs as if fully set forth herein.

59. The Americans with Disabilities Act, as amended, 42 U.S.C. §§ 12101 *et seq.*, prohibits employers from discriminating against people with disabilities in employment, including failing to make reasonable accommodations to known physical limitations of otherwise qualified individuals with disabilities, unless the employer can demonstrate that the accommodation would impose an undue hardship.

60. In 2008, Congress enacted the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. This set of amendments broadened the list of major life activities of which a substantial limitation amounts to a disability to include lifting and bending, as well as the operation of reproductive functions.

61. The United States Equal Opportunity Commission (“EEOC”), in interpreting the amendments, explained that impairments related to pregnancy, such as gestational diabetes, pregnancy-induced hypertension, and asthma, are temporary disabilities covered by the ADA as amended.

62. Threatened miscarriage, with the attendant bleeding and cramping that Ms. Myers experienced, is an impairment related to pregnancy for purposes of the ADA. While Ms. Myers was subject to the doctor’s restrictions, she was substantially limited in the major life activities of lifting, bending, and cooking and cleaning for herself, and was therefore entitled to a reasonable accommodation under the ADA, absent a showing of undue hardship.

63. Defendants knew or had reason to know of Ms. Myers’s disability.

64. Ms. Myers was able to perform the essential functions of her job with or without a reasonable accommodation for the few weeks during which she was subject to the lifting restriction. After her pregnancy-related impairment subsided, she was also able to perform the essential functions of her job without any accommodation.

65. Ms. Myers is a qualified individual who had a disability during the period in question. The reasonable accommodation that Ms. Myers requested would not have imposed an undue hardship on Defendants. Hope routinely grants such accommodations to other employees with temporary lifting restrictions at its large facility.

66. By denying Ms. Myers a reasonable accommodation and forcing her to take unpaid leave, Defendants violated her rights under the Americans with Disabilities Act.

67. Defendants further violated her rights under the ADA because they regarded Ms. Myers as having an impairment. Defendants told Ms. Myers that she could not work with restrictions and required her to fill out a “Reasonable Accommodation” form. After Ms. Myers filled out this form Defendants took an adverse employment action against her by requiring her to take unpaid leave, even though she was otherwise qualified to continue working in her position.

68. Defendants forced Ms. Myers to take unpaid leave based on her impairment or perceived impairment.

69. Defendants are jointly and severally liable.

COUNT III

VIOLATION OF THE MICHIGAN ELLIOTT-LARSEN CIVIL RIGHTS ACT M.C.L. §§ 37.2201-37.2202.

70. Ms. Myers re-alleges and incorporates by reference the allegations contained in the previous paragraphs as if fully set forth herein.

71. Michigan’s Elliott-Larsen Civil Rights Act (“ELCRA”) prohibits discrimination on the basis of sex, including discrimination in employment on the basis of pregnancy and medical conditions related to pregnancy. M.C.L. §§ 37.2102, 37.2201, 37.2202.

72. In 2009, the Michigan legislature amended the ELCRA to provide:

“An employer shall not ... [t]reat an individual affected by pregnancy, childbirth, or a related condition differently for any employment-related purpose from another individual who is not so affected but similar in ability or inability to work, without regard to the source of any condition affecting the other individual’s ability or inability to work.”
M.C.L. § 2202(d).

73. Defendants violated this provision by refusing to grant Ms. Myers the accommodation of being allowed to work with her doctor's restrictions of no lifting or pushing, while routinely granting the same accommodation to other, non-pregnant CNAs who were similar in their ability to work.

74. Defendants also violated this provision by forcing Ms. Myers to take unpaid leave while she was subject to her doctor's restrictions, while not forcing other employees with similar injuries and restrictions to take unpaid leave.

75. Defendants are jointly and severally liable.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff Asia Myers respectfully requests the following relief:

1. An order declaring that Defendants violated Ms. Myers's rights to be free from discrimination on the basis of pregnancy under Title VII of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act of 1978;
2. An order declaring that Defendants violated Ms. Myers's rights to be treated the same as other workers similar in their ability or inability to work, without regard to the source of any condition affecting the other workers' ability or inability to work, in violation of Michigan's Elliott-Larsen Civil Rights Act.
3. An order enjoining Defendants from denying a reasonable accommodation, including light duty work, to Ms. Myers in the future while granting similar accommodations to other workers with lifting restrictions;
4. An order declaring that Defendants violated Ms. Myers's right to a reasonable accommodation under the Americans with Disabilities Act, as amended;
5. An order awarding Ms. Myers economic, punitive, and emotional damages, past and future, against Defendants for their unlawful conduct, in an amount she is found to be entitled to;
6. An order awarding Ms. Myers interest, costs, attorneys' fees and litigation expenses as provided for under Title VII, the Americans with Disabilities Act and the Elliot-Larsen Civil Rights Act; and
7. Any other relief the Court deems appropriate.

JURY DEMAND

Plaintiff respectfully requests a jury trial on all issues triable to a jury.

Respectfully submitted,

/s/ Brooke Tucker

Brooke Tucker
Michael J. Steinberg (P43085)
Kary L. Moss (P49759)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6823
btucker@aclumich.org
msteinberg@aclumich.org
kmoss@aclumich.org

/s/ Cary McGehee (P42318)

Cary S. McGehee (P42318)
Pitt McGehee Palmer Rivers & Golden
Cooperating Attorneys, American Civil
Liberties Union Fund of Michigan
117 W. Fourth Street, Suite 200
Royal Oak, Michigan 48067
(248) 398-9800
cmcgehee@pittlawpc.com

Attorneys for Plaintiff

/s/ Ariela Migdal

Ariela Migdal
Lenora M. Lapidus
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
(212) 549-2651
amigdal@aclu.org
llapidus@aclu.org

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