UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CLAUDINE MCNAMARA, Plaintiff, v. HAWTHORN RETIREMENT GROUP, LLC & BANGOR ASSISTED LIVING, LLC d/b/a WINTERBERRY HEIGHTS ASSISTED LIVING & MEMORY CARE Defendants.	Civil Action No.

COMPLAINT
JURY TRIAL REQUESTED
INJUNCTIVE RELIEF REQUESTED

NOW COMES the Plaintiff, Claudine McNamara ("Plaintiff" or "McNamara"), by and through undersigned counsel, and complains against the Defendants, Hawthorn Retirement Group, LLC and Bangor Assisted Living, LLC ("Defendants") as follows:

INTRODUCTION

1. Defendants terminated Plaintiff because of her use of protected medical leave and because of Plaintiff's association with her daughter, a person with a disability.

2. This action arises under the Family Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601 *et seq.*; the Family Medical Leave Requirements ("FMLR"), 26 M.R.S. §§ 844 *et seq.*; the Maine Human Rights Act ("MHRA"), 5 M.R.S. §§ 4551 *et seq*., the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, and the Rehabilitation Act ("Rehab Act"), 29 U.S.C. § 794 *et seq.*

PARTIES

3. McNamara is a United States citizen residing in China, Maine.

4. Defendant Hawthorn Retirement Group, LLC is a Washington corporation with headquarters in Vancouver, Washington.

5. Defendant Bangor Assisted Living, LLC is a Washington corporation with operations in Bangor, Maine.

6. At all times material to this Complaint, the Defendants have operated Winterberry Heights Assisted Living and Memory Care facility in Bangor, Maine.

7. At all times material to this Complaint, the Defendants have done business as Winterberry Heights Assisted Living and Memory Care.

8. McNamara was formally employed by Bangor Assisted Living, LLC.

9. At all material times, Defendants were an integrated enterprise. Namely, Defendants had an interrelation of operations, common management, centralized control of labor relations, and common ownership.

10. With regard to common management and centralized control of labor relations, at all material times Defendant Hawthorn Retirement Group, LLC has provided management services to the Winterberry Heights Assisted Living facility including complete accounting services such as issuing payroll checks to employees; coordination of all food services for the facility; coordination of most human resources functions for the facility including employee benefits, workers' compensation claims, formal employee complaints, employee recruitment, and employment counselling; coordination of all maintenance services for the facility; management of marketing services; assignment of a regional manager to work with the facility manager; provision of regulatory compliance services; and coordination of all risk management services.[1]

[1] http://www.seniorlivinginstyle.com/senior_housing_management_services_hrg

11. The integrated nature of the Defendants is highlighted by the fact that the decision to terminate McNamara was made by Cari Koford, a Hawthorn Retirement Group, LLC employee.

JURISDICTION

1. Defendant Bangor Assisted Living, LLC had approximately 77 employees working at the Winterberry Heights facility as of the time of Defendants' February 5, 2016 response to the Maine Human Rights Commission.

2. Defendant Hawthorn Retirement Group, LLC maintains and manages over sixty facilities which are spread over eighteen states and two Canadian provinces.

3. Fifty or more employees were employed at the Winterberry Heights facility for each working day in each of 20 or more calendar weeks in 2014 and 2015.

4. At all times material to this Complaint, Defendants have operated a "program or activity receiving federal financial assistance" within the meaning of the Rehab Act.

5. This Court has subject matter jurisdiction over McNamara's federal and state claims pursuant to 28 U.S.C. §§ 1331, 1332, and 1367.

6. On or about November 5, 2015, McNamara filed a timely Complaint / Charge of Discrimination alleging unlawful disability discrimination and retaliation with the Maine Human Rights Commission ("MHRC") and Equal Employment Opportunity Commission ("EEOC").

7. On or about June 1, 2016, the MHRC issued a Notice of Right to Sue with respect to McNamara's MHRA claims.

8. On or about July 1, 2016, the EEOC issued a Notice of Right to Sue with respect to McNamara's ADA claims.

9. McNamara has exhausted her administrative remedies with respect to all claims set forth in this Complaint.

FACTUAL ALLEGATIONS

10. McNamara was employed as the Administrator of the Winterberry Heights facility from June 30, 2014 until she was wrongfully terminated on August 4, 2015.

11. McNamara's annual salary was $70,000.

12. Her job performance was satisfactory.

13. McNamara's 23-year-old daughter (hereinafter "Daughter") has severe bipolar disorder with manic features and is sometimes suicidal.

14. McNamara became aware of Defendants' bias against people with mental illness midway through her employment.

15. In March 2015, at a company conference in Bismarck, North Dakota, McNamara heard the owner, Bart Colson, make "jokes" about mental illness.

16. Mr. Colson made a "joke" about schizophrenia and about putting "bipolar" on their applications.

17. The "jokes" really bothered McNamara at the time. The corporate culture, starting at the very top of leadership, seemed disrespectful and discriminatory to her.

18. On Monday, June 8, 2015, McNamara worked from 9 AM until 6:10 PM. She stayed late to work in the dining room, pouring coffee.

19. Her evening receptionist was also working that evening. McNamara talked to the receptionist about concerns she had about her daughter. McNamara told the receptionist that she was worried because her daughter did not return any of her calls all day.

20. McNamara asked the receptionist to finish pouring coffee and then left to go home.

21. At home, McNamara could see that things were not right. Her daughter was missing.

22. McNamara called the State Police and tracked her credit card purchases to find her daughter. McNamara got in the car to look for her daughter and get her to the hospital for help.

23. McNamara called her director, Cari Koford, knowing that she would need some time off.

24. McNamara told Koford that her daughter was having a bipolar manic episode.

25. McNamara told Koford that she did not want to lose her job.

26. Koford told McNamara that she was not going to lose her job and that it was fine for her to go take care of her daughter.

27. McNamara took two and a half weeks off from work from June 9 through June 25, 2015.

28. Hawthorn paid McNamara during that leave of absence. McNamara did not question it at the time. She thought they were being generous.

29. On about Monday, June 15, 2015, Koford texted McNamara to see how things were going.

30. McNamara texted back that things were so bad that she did not know when she would be back.

31. A week later, McNamara texted Koford and told her she would be back on June 24, 2015.

32. However, June 24th turned out to be a bad day for McNamara's daughter.

33. McNamara texted Koford again and let her know she would not be back until the following day, June 25th.

34. On July 1, 2015, McNamara requested that Defendants send her an application for intermittent FMLA leave because her daughter was getting increasingly worse.

35. As of July 1, 2015, McNamara had worked for Defendant Bangor Assisted Living, LLC for twelve months.

36. As of July 1, 2015, McNamara had worked more than 1,250 hours in the previous twelve months.

37. As of July 1, 2015 McNamara was eligible for protected leave under the FMLA and FMLR.

38. McNamara's daughter's bipolar disorder was a serious medical condition as defined by the FMLA and FMLR.

39. McNamara's daughter required constant supervision and care during the time from June 2015 through August 10, 2015 and there was medical necessity that McNamara's daughter receive this care.

40. McNamara provided this care for her daughter.

41. McNamara was entitled to protected leave under the FMLA and FMLR during the period from July 1, 2015 through August 10, 2015 to care for her daughter.

42. McNamara's daughter was also a person with a disability as defined by the MHRA, ADA, and Rehab Act.

43. In particular, bipolar disorder is a per se disability as defined by the MHRA and McNamara's daughter was substantially limited in major life activities, particularly when viewed in the absence of mitigating measures, including the ability to care for herself and work. McNamara's daughter's bipolar disorder also significantly impaired her health.

44. In addition, Defendants regarded McNamara's daughter as a person with a disability.

45. On Tuesday, July 7, 2015, Lori Johnson from the Hawthorn Retirement Group Benefits Department called to ask McNamara about the time she was paid for in June when she was on leave of absence.

46. Johnson told McNamara that she was not eligible to be paid when she was not working.

47. McNamara stated that Defendants could take the money she owed incrementally out of future paychecks and Johnson agreed to this plan.

48. McNamara also talked to Johnson about her work schedule when she returned to work.

49. McNamara mistakenly told Johnson that she returned to work on June 24, 2015, which was the day she planned to return, forgetting that she had to take that day off to care for her daughter and that she actually returned on June 25, 2015.

50. During that phone call, McNamara reminded Johnson that she had sent in a request for an application for intermittent FMLA and had not received one yet.

51. McNamara received an FMLA application by fax later that day.

52. On July 10, 2015, at about 4:00 PM, McNamara attended a doctor's appointment with her daughter.

53. The doctor completed the Certification of Health Care Provider form.

54. McNamara submitted the completed FMLA paperwork to Hawthorne Retirement Group by fax on July 13, 2015.

55. On July 14, 2015, McNamara emailed Koford to let her know that she would not be able to attend a conference in Nashville that week.

56. McNamara told Koford that although her daughter was better, McNamara did not feel comfortable leaving her alone.

57. Koford indicated that she was not happy and that she would be speaking to her after the conference.

58. On July 15, 2015, Johnson notified McNamara that her request for intermittent FMLA had been approved.

59. Defendants do not dispute that McNamara was entitled to protected FMLA/FMLR leave for the period in question.

60. In a July 15, 2015 letter to McNamara, Johnson confirmed the agreement that Defendants would deduct 16.5 hours per pay period in repayment of overpayment of salary.

61. On Sunday, July 19, 2015, McNamara's daughter took a significant turn for the worse.

62. McNamara worked on Monday, July 20, 2015 because a relative was available to look after her daughter.

63. McNamara took Tuesday off July 21, 2015 to care for her daughter.

64. On Wednesday, July 22, 2015, McNamara attended a training session in Portland, Maine.

65. McNamara approached Koford because Koford had indicated that she wanted to speak to McNamara after the Nashville conference, but Koford did not bring up any issues with McNamara that day.

66. Also on July 22, 2015, McNamara's sister in law (who was visiting) texted McNamara to get home immediately.

67. McNamara's daughter was in a kayak and would not come to shore. McNamara's daughter kept saying it was her time to go. When McNamara got home, her daughter was completely irrational and screaming at her.

68. On Thursday, July 23 2015, McNamara texted Koford to let her know she was taking the day off.

69. Koford texted back and asked which days McNamara had taken off. McNamara was preoccupied with concerns about her daughter and responded by text that it was just Wednesday and Thursday.

70. Koford texted back and asked about Tuesday.

71. McNamara quickly remembered that she did take that day off and immediately responded by text that Koford was correct. McNamara apologized and stated that she was having trouble keeping track of her days and that she was going to keep a calendar.

72. McNamara asked if Koford wanted her to send a text every time she took time off.

73. Ms. Koford did not respond.

74. On Friday, July 24, 2015, McNamara texted Koford that she was taking that day off.

75. McNamara reiterated to Koford that she had also taken days off on the 21st and 23rd. McNamara apologized again for the mix up and explained that she was concerned about her daughter and wanted this nightmare to end.

76. Ms. Koford did not respond.

77. On Monday, July 27, 2015, McNamara texted Koford to let her know that McNamara was taking the day off and that she would be applying for full FMLA that day because her daughter's condition was so bad.

78. McNamara had an appointment that day with her daughter's doctor to change her FMLA from intermittent to continuous from July 27 to August 10, 2015.

79. A couple hours after she texted Koford, McNamara received a reply text telling her to call Johnson and Linda Caba in the Hawthorn Retirement Group Benefits Department.

80. McNamara called Johnson and Caba shortly before her appointment with her daughter's doctor.

81. Johnson and Caba were rude during the call.

82. They badgered McNamara about the exact times she was absent from work.

83. They kept saying that McNamara needed the doctor's permission to take full FMLA.

84. McNamara told them she was going to do so when the phone call ended.

85. They brought up July 8, 2015 and stated that McNamara left two hours early and did not report it.

86. McNamara did not remember what happened on that date.

87. McNamara was with her daughter during the phone call and did not feel comfortable talking about those topics in front of her.

88. McNamara was trying to get off the phone but they just kept questioning and talking to her.

89. McNamara had to end the phone call abruptly so that she did not miss the doctor's appointment.

90. Defendants violated the FMLA and FMLR on July 27, 2015 by requiring McNamara to participate in a telephonic work meeting while she was on protected intermittent leave to care for her daughter.

91. At the end of the appointment, the doctor faxed an updated medical certificate to the Benefits Department stating that McNamara needed a leave of absence from July 27 to about August 10, 2015.

92. The doctor wrote that McNamara's daughter needed constant supervision due to mania and increased risk of suicidal behavior.

93. McNamara did not receive a response to her request for continuous FMLA from Johnson, Caba or Koford.

94. Instead, on August 4, 2015, McNamara received a memorandum via email from Koford terminating her employment.

95. Koford made assertions of fact that are untrue and reached conclusions about McNamara's ethics without seeking her input.

96. McNamara responded to Koford by email letting Koford know that she disagreed with some of the facts and that any reporting errors she made were because she was in the middle of a crisis with her daughter.

97. During unemployment hearings after she was terminated, Koford admitted that McNamara worked on some of the dates which Koford claimed McNamara was absent. For example, Koford asserted in her August 4, 2015 memo that McNamara was "off of work from June 3rd through June 8th but failed to disclose this information to [Koford or the Benefits Department]…I was [] upset that you would have already missed five (5) complete work days when you finally contacted me on the evening of June 9, 2015 to request time off without telling

me that you had already been off work since the 3rd of June…Your failure to ever disclose the specific dates missed work time in writing, is inexcusable." In fact, McNamara worked the days between June 3rd and June 8th.

98. Koford's August 4, 2015 memo also indicated that McNamara was terminated, in part, for her failure to attend a service plan meeting with a resident's family on June 24, 2015 and July 10, 2014. McNamara was out on protected leave caring for her daughter on June 24, 2015 and July 10, 2014[2]. Koford's statements in her memo act as admissions that McNamara was terminated, in part, for using protected leave rather than working on the days in question.

99. Later in the evening on August 4, 2015, McNamara emailed Koford, pointed out a number of errors in her August 4, 2015 memo, reiterated that McNamara had not misled anyone intentionally and explained again that the allegation that she was lying was unfounded.

100. McNamara was entitled to take full FMLA beginning on July 1, 2015 and be out of work, completely, for twelve weeks if necessary.

101. McNamara attempted to continue working as much as possible and care for her daughter during this time frame in order to assist Defendants with the administration of the Winterberry Heights facility as much as possible.

102. At about 8:30 PM on August 5, 2015, McNamara received a telephone call from Koford and Cynthia Stutsman from the Hawthorne Retirement Group home office.

103. Koford and Stutsman said that they wanted to "wipe the slate clean" with the "money McNamara owed them" and about helping her financially until she found a job instead of collecting unemployment.

[2] McNamara tried to take July 10th off to care for her daughter but ended up doing some work from home by phone and text.

104. Defendants then sent a severance agreement to McNamara that waived her rights to hold Defendants accountable for violations of her state and federal rights and in exchange offered to pay McNamara money that was already owed to her. McNamara did not sign the agreement.

105. McNamara was not dishonest in her dealings with Defendants.

106. McNamara was dealing with an intense crisis at home. McNamara and her daughter were going through an extremely difficult time together on almost a daily basis due to her daughter's suicidal ideations and delusions.

107. McNamara was slapped, her glasses were ripped off her face and broken, and she was called every name in the book.

108. McNamara could not go to the bathroom or take a shower at times because she did not know what was going to happen if she left her daughter alone.

109. McNamara did her best to keep Koford informed about her time off.

110. McNamara made clear to Koford that the information she gave Koford was not intentionally inaccurate.

111. McNamara repeatedly apologized and explained her situation including details regarding the crisis and explained that this context was the reason for the occasions when McNamara provided incorrect dates for her absences.

112. McNamara also made clear to Defendants that she was willing to reimburse Defendants for any wages that were paid to her in error and proposed that Defendants recoup overpaid wages gradually from McNamara's pay checks and Defendants agreed to this plan.

113. Koford and those employees who were involved in McNamara's request for leave and termination were notified and understood that to the extent that McNamara provided

incorrect information regarding the dates and times of her absences to care for her daughter that these were mistakes caused by McNamara's crisis and the fact that Defendants' agents repeatedly contacted McNamara to demand information from her while McNamara was out on protected leave caring for her daughter.

114. The claim by Koford and Defendants that McNamara was intentionally dishonest with regard to the time she was absent from work is false and they know it to be false.

115. Defendants' claim that McNamara was terminated for lying and dishonesty is false and a pretext for an unlawful termination.

116. Daughter's disability was known to Defendants when they terminated McNamara's employment.

117. Defendants failed to provide McNamara with protected medical leave to which she was entitled and rather terminated her in the midst of her leave rather than reinstating her to her position at the conclusion of her leave.

118. Defendants unlawfully considered McNamara's medical leave as a negative factor when making the decision to terminate her employment.

119. Defendants retaliated against McNamara and treated her worse because of her request for and use of protected leave including making unfounded allegations that McNamara was lying and being dishonest and terminating McNamara's employment.

120. Defendants assumed, incorrectly, that McNamara was and would continue to be distracted from her job duties because of her association with her disabled daughter.

121. Defendants assumed, incorrectly, that McNamara would continue to need leave from work to care for her daughter into the future.

122. Defendants terminated McNamara because of her association with her disabled daughter and because of unfounded beliefs and stereotypes relating to her daughter including that her daughter would distract McNamara from her work and require McNamara to take leave from work into the future in order to care for her daughter.

123. The fact that Defendants provided false and pretextual reasons for McNamara's termination evidences a causal connection between her use of leave, her daughter's disability and her termination.

124. The probative timing of McNamara's disclosure of her daughter's disability, request for leave, use of leave, and termination evidences a causal connection between her use of leave, her daughter's disability and her termination.

125. The fact that Defendants treated McNamara different and worse because of her need for protected leave and because of her association with her disabled daughter evidences a causal connection between her use of leave, her daughter's disability and her termination.

126. There is direct evidence that Defendants terminated McNamara's employment because of her use of protected leave. In particular, Koford concedes in her August 4, 2015 memo that McNamara's use of protected leave on certain days rather than working was a factor in her termination.

127. As a result of the Defendants' unlawful discrimination against McNamara, she has suffered lost wages, lost benefits, loss of enjoyment of life, loss of self-esteem, injury to reputation, injury to career, humiliation, and other pecuniary and non-pecuniary losses.

128. McNamara has no plain, adequate, or complete remedy at law to fully redress the wrongs alleged, and she will continue to suffer irreparable injury from her treatment by Defendants unless and until it is enjoined by this court.

COUNT I: FMLA

129. Paragraphs 1-128 are incorporated by reference.

130. Defendants have violated Plaintiff's prescriptive and proscriptive rights under the FMLA.

COUNT II: FMLR

131. Paragraphs 1-130 are incorporated by reference.

132. Defendants have violated Plaintiff's prescriptive and proscriptive rights under the FMLR.

COUNT III: MHRA – Associational Disability Discrimination

133. Paragraphs 1-132 are incorporated by reference.

134. Defendants terminated Plaintiff on the basis of her association with a person with a disability in violation of the MHRA.

COUNT IV: ADA – Associational Disability Discrimination

135. Paragraphs 1-134 are incorporated by reference.

136. Defendants terminated Plaintiff on the basis of her association with a person with a disability in violation of the ADA

COUNT V: Rehab Act – Associational Disability Discrimination

137. Paragraphs 1-136 are incorporated by reference.

138. Defendants terminated Plaintiff on the basis of her association with a person with a disability in violation of the Rehab Act.

PRAYER FOR RELIEF

Plaintiff respectfully requests that the Court grant the following relief:

A. Declare the conduct engaged in by Defendants to be in violation of Plaintiff's rights;

B. Enjoin Defendants, their agents, successors, employees, and those acting in concert with them from continuing to violate her rights;

C. Order Defendants to reinstate Plaintiff or award front pay to Plaintiff;

D. Award lost future earnings to compensate Plaintiff for the diminution in expected earnings caused by Defendants' retaliation and discrimination;

E. Award equitable-relief for back pay, benefits and prejudgment interest;

F. Award compensatory damages in an amount to be determined at trial;

G. Award punitive damages in an amount to be determined at trial;

H. Award liquidated damages in an amount to be determined at trial;

I. Award nominal damages;

J. Award attorney's fees, including legal expenses, and costs;

K. Award prejudgment interest;

L. Permanently enjoin Defendants from engaging in any employment practices which retaliate against employees for use of protected medical leave or discriminate on the basis of disability;

M. Require Defendants to mail a letter to all employees notifying them of the verdict against them and stating that Defendants will not tolerate discrimination in the future;

N. Require that Defendants post a notice in all of its workplaces of the verdict and a copy of the Court's order for injunctive relief;

O. Require that Defendants train all management level employees on the protections afforded by the FMLA, FMLR, MHRA, ADA, and Rehab Act;

P. Require that Defendants place a document in Plaintiff's personnel file which explains that Defendants unlawfully terminated her because of her use of protected medical leave and association with a person with a disability; and

Q. Grant to Plaintiff such other and further relief as may be just and proper.

Dated: July 1, 2016

/s/ Chad T. Hansen
chansen@maineemployeerights.com

/s/ Peter Thompson
pthompson@maineemployeerights.com

Attorneys for the Plaintiff

MAINE EMPLOYEE RIGHTS GROUP
92 Exchange Street 2nd floor
Portland, Maine 04101
Tel. (207) 874-0905
Fax (207) 874-0343