

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

BESIME D. BRIERTON,

Plaintiff,

v.

KAISER FOUNDATION HEALTH PLAN OF
THE MID-ATLANTIC STATES, INC., D/B/A
KAISER PERMANENTE

Serve: Corporation Service Company
100 Shockoe Slip
2nd Floor
Richmond, Virginia 23219

Defendant.

Civil Action No. _____

COMPLAINT

COMES NOW the plaintiff, Besime D. Brierton (“Plaintiff” or “Ms. Brierton”), by and through her undersigned counsel, John C. Cook, Esq., Broderick C. Dunn, Esq., Philip C. Krone, Esq, and the law firm of Cook Craig & Francuzenko, PLLC, and for her Complaint against the defendant, Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc., d/b/a Kaiser Permanente (“Defendant” or “Kaiser”), states as follows:

NATURE OF THE CASE

1. This is an action brought under the Family Medical Leave Act of 1993, 29 U.S.C. §§ 2601, *et seq.* (“FMLA”) and the Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et seq.* (the “ADA”) for Defendant’s termination of Plaintiff in retaliation for taking FMLA leave and because of her disability.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over Plaintiff's FMLA and ADA claims under 28 U.S.C. § 1331.

3. This Court has personal jurisdiction over Defendant because it performed the acts complained of within this district.

4. Venue is proper in this district and in this division by virtue of 28 U.S.C. § 1391 (b) because, among other reasons, a substantial part of the events or omissions giving rise to the claims occurred in Burke, Virginia.

THE PARTIES

5. Plaintiff is an adult female resident of Fairfax County in the Commonwealth of Virginia.

6. Kaiser is an American integrated managed care consortium headquartered in Oakland, California. Plaintiff most recently worked for Kaiser at its Burke, Virginia location.

FACTS

7. Plaintiff began her employment with Kaiser in March of 1997 when she was hired as a Home Infusion Staff Pharmacist.

8. Plaintiff was diagnosed with anxiety in 2003 following the death of Plaintiff's father. Plaintiff's anxiety substantially impairs a major life activity because it makes it difficult for Plaintiff to sleep, work, concentrate, think and regulate her emotions. Defendant was aware of Plaintiff's disability.

9. Plaintiff's anxiety was initially mild and Plaintiff's physician prescribed low dose alprazolam on an as needed basis.

10. Plaintiff worked under the supervision of Cheryl Hamlin Freeman (“Ms. Freeman”), eventually becoming lead pharmacist under Ms. Freeman, until Ms. Freeman’s retirement in 2005.

11. Kun Kim (“Mr. Kim”) was one of Plaintiff’s co-workers and peers during her time working under Ms. Freeman.

12. When Ms. Freeman retired, both Plaintiff and Mr. Kim interviewed for the position of Pharmacy Supervisor. Kaiser chose Plaintiff over Mr. Kim for the position.

13. After Kaiser moved its pharmacy operations to a new facility in Burke in 2008, Mr. Kim became Manager of Infusion Pharmacy Services. Thus, Mr. Kim effectively became Plaintiff’s boss.

14. From 2009 through 2012, Plaintiff enjoyed extra responsibilities such as being involved in the building of several new infusion pharmacies and working closely with the compliance pharmacist on Business Practice Assessments. Plaintiff was also President of Virginia Society of Health System Pharmacists.

15. Plaintiff was diagnosed with breast cancer in 2012. Plaintiff’s breast cancer substantially limits her major life activities of normal cell growth and causes her to experience fatigue and cognitive issues. Defendant was aware of Plaintiff’s cancer diagnosis.

16. From 2012 through 2014, Plaintiff underwent multiple surgeries and chemotherapy related to her breast cancer. During this time, Plaintiff occasionally reduced her hours at work per her physician’s orders. However, Mr. Kim expressed frustration that Plaintiff did not work sixty-five hour weeks during her treatment and he continued to give Plaintiff new projects.

17. Despite Plaintiff's disabilities, between 1997 and 2017, Plaintiff effectively managed her department and helped her staff as evidenced by Plaintiff's long tenure at Kaiser as well as her excellent performance evaluations.

18. In August of 2016, Mr. Kim informed Plaintiff and other infusion managers that Kaiser was implementing a new staffing directive in its pharmacy department wherein there would be no overtime for non-exempt employees and no coverage for vacation in direct contravention of the employees' union contract.

19. Several employees in Kaiser's Burke and Tysons Corner Infusion Pharmacies filed a grievance with their union. Plaintiff was informed by Deborah Leahy in Kaiser's human resources department that Mr. Kim believed that Plaintiff was behind the grievance.

20. Mr. Kim became increasingly critical of Plaintiff was seemingly impossible to please. For example, Mr. Kim told Plaintiff that, even though Plaintiff was a manager, he still expected her to be in staffing eighty (80) percent of the time. When Plaintiff would staff as a pharmacist, however, Mr. Kim would berate her for being in staffing too much.

21. As a result of Mr. Kim's increased scrutiny and harassment of Plaintiff, Plaintiff's anxiety symptoms grew worse. Additionally, Plaintiff began experiencing worsening lymphedema which occurred secondary to Plaintiff's cancer surgery.

22. On May 30, 2017, Mr. Kim asked to meet with Plaintiff without scheduling a meeting. Despite the fact that Plaintiff had already eaten lunch, Mr. Kim insisted on meeting over lunch so that he could eat.

23. Mr. Kim accused Plaintiff of delegating her administrative work to another employee and staffing instead.

24. On May 31, 2017, faced with increasing anxiety and stress-related cancer complications, Plaintiff sought medical and psychiatric help.

25. Plaintiff's counselor wanted to enroll Plaintiff in an intensive, two-week program but Plaintiff was afraid to take more time off on FMLA because of how Mr. Kim would react.

26. On June 5, 2017, Plaintiff met with Mr. Kim and told him that she needed to go on medical leave for the next two weeks. Plaintiff told him that she felt bullied by him and undermined with her staff.

27. Plaintiff ended up taking nine days FMLA leave in June of 2017 but did not complete the full program recommended by her counselor because she feared how Mr. Kim would react if she were to take more time off.

28. On August 3, 2017, Mr. Kim and a representative from Defendant's human resources department, Erric Beasley ("Mr. Beasley"), met with Plaintiff to conduct Plaintiff's mid-year evaluation.

29. While Plaintiff received an uncharacteristic "performance needs improvement" rating, Mr. Beasley stated that he believed that Plaintiff should have received a "successful" rating. Plaintiff's rating was based on Mr. Kim's overwhelmingly negative comments.

30. On August 22, 2017, Mr. Kim put Plaintiff on a ninety-day performance improvement plan (the "PIP").

31. The PIP was not based on Plaintiff's performance. To the contrary, the PIP was based on Mr. Kim's belief that Plaintiff was taking too much time off to address her mental and physical health concerns.

32. In September of 2017, Mr. Kim told Mr. Beasley that he wanted to terminate Plaintiff because she "uses too much FMLA" and because Plaintiff "cries." Mr. Kim also criticized

Plaintiff's cognitive skills, a byproduct of Plaintiff's cancer, by stating that he "had to think for [Ms. Brierton]."

33. Mr. Beasley told Plaintiff that he believed that the PIP was Mr. Kim's way of trying to force Plaintiff out.

34. Defendant terminated Plaintiff on February 28, 2018 after twenty years of service.

35. Plaintiff's termination was motivated by Mr. Kim's belief that she was using too much FMLA and because of her anxiety and cognition issues.

COUNT I

(Termination of Plaintiff's Employment Under the ADA)

36. Plaintiff restates the allegations contained in paragraphs 1 through 35 of Plaintiff's Complaint as if fully set forth herein.

37. Plaintiff was disabled and within the ADA's protected class on the basis of her anxiety and breast cancer.

38. Defendant terminated Plaintiff on February 28, 2018.

39. Plaintiff was performing her job at a level that met Defendant's legitimate expectations, as evidenced by her lengthy tenure and most recent performance reviews, at the time of her discharge.

40. Plaintiff's discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination as evidenced by Mr. Kim's comments to Mr. Beasley and Mr. Kim's animus towards Plaintiff.

41. Plaintiff has suffered wage loss and emotional distress as a result of Defendant's actions.

COUNT II

(FMLA Retaliation)

42. Plaintiff restates the allegations contained in paragraphs 1 through 35 of the Complaint as if fully set forth herein.

43. Plaintiff engaged in protected activity when she took FMLA leave.

44. Defendant took an adverse action against Plaintiff when it terminated her based on her decision to take FMLA and the chance that she might take more FMLA leave.

45. Plaintiff's termination was causally connected to her use of FMLA leave as evidenced by Mr. Kim's comments to Mr. Beasley.

46. As a result of Defendant's conduct, Plaintiff has suffered lost back pay, lost front pay and liquidated damages.

WHEREFORE the plaintiff, Besime D. Brierton, demands judgment against the defendant, Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc. d/b/a Kaiser Permanente, as follows:

- (a) Lost wages in the amount of \$300,000;
- (b) Punitive damages in the amount of \$300,000;
- (c) \$1,000,000, or such an amount as may be proven at trial, for emotional pain and suffering, inconvenience and mental anguish;
- (d) Plaintiff's attorneys' fees and court costs as provided by statute; and
- (e) All other further relief that this Court deems just and proper.

JURY DEMAND

Plaintiff demands a jury on all issues so triable.

Respectfully submitted,



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