IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 5:25-cv-00338

JOYLEN DIAZ,

Plaintiff,

v.

THE DRISCOLL FIRM, P.C.,

Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6)

Defendant The Driscoll Law Firm, P.C. ("Defendant" or "Driscoll Firm"), by and through undersigned counsel, pursuant to Local Rule 7.1(e), submits this memorandum in support of Defendant's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) ("Motion to Dismiss").

INTRODUCTION

In this action, Plaintiff Joylen Diaz ("Plaintiff") alleges that her former employer, the Driscoll Firm, discriminated and retaliated against her in violation the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"); interfered with her rights under the Family Medical Leave Act, 29 U.S.C. § 2601 *et seq.* ("FMLA"); and failed to pay her overtime compensation in violation of the North Carolina Wage and Hour Act, N.C. Gen. Stat. § 95-25.1 *et seq.* ("NCWHA"). Plaintiff's Complaint fails to state any claim upon which relief can be granted, and therefore, the Court should dismiss this action in its entirety pursuant to Fed. R. Civ. P. 12(b)(6).

Plaintiff's ADA discrimination claim for wrongful termination fails because Plaintiff fails to allege facts sufficient to plead that she was: (1) disabled or regarded as disabled; (2) a qualified individual; or (3) meeting the Driscoll Firm's legitimate expectations at the time of termination. She also fails to allege facts sufficient to plead that the Driscoll Firm terminated her employment

because of discriminatory animus based on disability. Plaintiff's ADA retaliation claim fails because Plaintiff failed to exhaust administrative remedies as to that claim and the Complaint fails to allege that Plaintiff engaged in any protected activity. Plaintiff's FMLA interference claim fails because: (1) Plaintiff fails to allege that the Driscoll Firm is a covered employer under the FMLA; (2) Plaintiff expressly admits that she was not an eligible employee under the FMLA; and (3) Plaintiff fails to allege that she provided adequate notice to the Driscoll Firm of her intent to take FMLA leave. Finally, Plaintiff's NCWHA claim fails because she fails to allege sufficient facts to plead a plausible claim for unpaid overtime wages.

Accordingly, this Court should dismiss the Complaint and this action in its entirety.

STATEMENT OF FACTS

Plaintiff was employed by the Driscoll Firm as a paralegal from approximately July 2023 until March 14, 2024, when the Driscoll Firm terminated her employment.[1] (Compl. ¶¶ 16, 31 [ECF No. 1]) Plaintiff alleges that she "qualifie[s] as disabled under the ADA due to her ongoing battle with ovarian cancer which significantly affect[s] her major life functions" and that "[i]n particular, [she] has difficulty completing activities of daily living such as dressing and walking" and that she "also has difficulty sitting for more than two hours and typing for long periods of time which affect her ability to work." (*Id.* ¶¶ 17-18) Plaintiff alleges that on February 9, 2024, she "was diagnosed with a recurrence of ovarian cancer." (*Id.* ¶ 19)

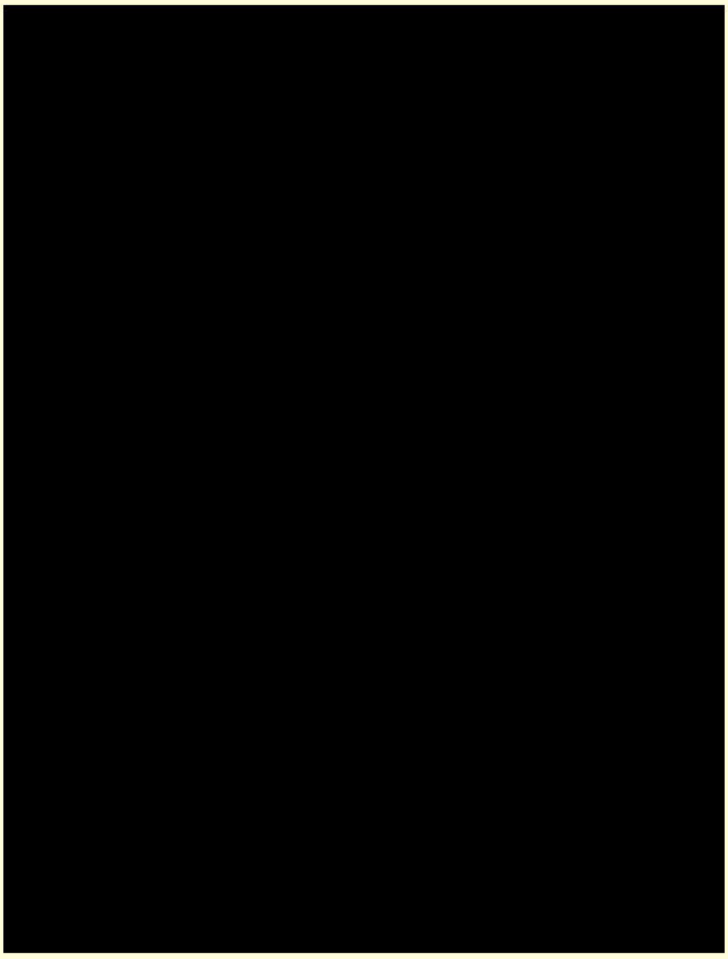
On March 13, 2024, Plaintiff sent an email to the Driscoll Firm's founder and President, John Driscoll ("Driscoll"); and Chief Financial Officer, Cullen Milsap ("Millsap"), which stated,

[1] The following are the relevant factual allegations (as opposed to statements of bare legal conclusions, unwarranted deductions of fact, or unreasonable inferences) made by Plaintiff in the Complaint, which the court must accept as true at this stage of the proceedings. *E.g.*, *Cobb v. The Select Grp. LLC*, 2021 U.S. Dist. LEXIS 116005, *1 (E.D.N.C. June 22, 2021) (cleaned up). The Driscoll Firm treats these allegations as true only for purposes of the Motion to Dismiss.

in its entirety, as follows:

> My ovarian cancer has metastasized to my liver, and I have become symptomatic. I would like to continue my employment as long as possible. I have blood work today and will keep you posted on prognosis.

(Compl. ¶¶ 20-21; Ex. A, Email from J. Diaz to C. Millsap & J. Driscoll (Mar. 13, 2024, 07:41 EST))[2] The Complaint fails to allege that Plaintiff had provided any notice to the Driscoll Firm regarding her history or diagnosis of ovarian cancer prior to this email. Attached to Plaintiff's email was a screenshot of what appeared to be a notation from a healthcare provider through UNC My Chart dated February 9, 2024. The attachment is reproduced in its entirety below:



[2] Because the emails dated March 13, 2024, are integral to and explicitly relied on in the Complaint, (Compl. ¶¶ 20-22), this Court properly may consider them under Rule 12(b)(6). *See Am. Chiropractic v. Trigon Healthcare*, 367 F.3d 212, 234 (4th Cir. 2004).

(Ex. A, Email from J. Diaz to C. Millsap & J. Driscoll (Mar. 13, 2024, 07:41 EST))

After seeing the healthcare provider's statement in the above notation that [redacted] Millsap sent Plaintiff the following email, with the subject heading "Next Steps Before Returning to Work," later the same day, March 13, 2024:

> Good Morning Joy,
>
> Let me start by saying how awful this news about [redacted] We will keep you in our thoughts during this time.
>
> In the email you sent to me and John this morning, [redacted]
>
> Take care of yourself.
>
> Thanks,
> Cullen

(Compl. ¶ 22; Ex. B, Email from C. Millsap to J. Diaz (Mar. 13, 2024, 12:12 EST)) During a telephone communication between Plaintiff and Millsap later that same day, Millsap informed Plaintiff that she would be allowed to the return to the office and resume her duties as a paralegal the following day, March 14, 2024. (Ex. B, Email from C. Millsap to J. Diaz (Mar. 13, 2024, 17:54 EST)) The Complaint expressly acknowledges that Plaintiff "did not request any accommodations for her disability" in her communications on March 13, 2024. (Compl. ¶ 25)

The Complaint alleges that on the following day, March 14, 2024, the Driscoll Firm terminated Plaintiff's employment. (*Id.* ¶ 31)

STANDARD OF REVIEW

"When considering a Rule 12(b)(6) motion to dismiss, the court must accept as true all of the well-pleaded factual allegations contained within the complaint and must draw all reasonable inferences in the plaintiff's favor, but any legal conclusions proffered by the plaintiff need not be accepted as true." *Cobb v. The Select Grp. LLC*, 2021 U.S. Dist. LEXIS 116005, * 3-4 (E.D.N.C. June 22, 2021) (cleaned up). "The *Iqbal* Court made clear that 'Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.'" *Id.* at *4 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009)).

"To survive a Rule 12(b)(6) motion, the plaintiff's well-pleaded factual allegations, accepted as true, must state a claim to relief that is plausible on its face." *Id.* at *4 (cleaned up). "*Twombly*'s plausibility standard requires that a plaintiff's well-pleaded factual allegations 'be enough to raise a right to relief above the speculative level,' *i.e.*, allege 'enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct].'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007)). "A speculative claim resting upon conclusory allegations without sufficient factual enhancement cannot survive a Rule 12(b)(6) challenge. *Id.* at *4-5 (cleaned up).

Under Rule 12(b)(6), this Court also properly considers the facts established through any documents "that are integral to and explicitly relied on in" the Complaint. *Am. Chiropractic v. Trigon Healthcare*, 367 F.3d 212, 234 (4th Cir. 2004) ("[W]hen a defendant attaches a document to its motion to dismiss, a court may consider it in determining whether to dismiss the complaint

if it was integral to and explicitly relied on in the complaint and if the plaintiffs do not challenge its authenticity.") (cleaned up). Further, "in the event of a conflict between the bare allegations of [the] [C]omplaint and any exhibit attached, the exhibit prevails." *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166-67 (4th Cir 2016).

ARGUMENTS AND AUTHORITIES

I. Plaintiff's Claims for Discrimination and Retaliation in Violation of the ADA Fail

A. Plaintiff's ADA Discrimination Claim for Wrongful Termination Fails

"To state a claim for wrongful discharge [under the ADA], the plaintiff must allege that (1) [s]he was a qualified individual with a disability; (2) [s]he was discharged; (3) [s]he was fulfilling [her] employer's legitimate expectations at the time of discharge; and (4) the circumstances of [her] discharge raise a reasonable inference of unlawful discrimination." *Kelly v. Town of Abingdon*, 90 F.4th 158, 169 (4th Cir. 2024) (quotations and citation omitted). "To raise a reasonable inference of disability discrimination in a wrongful discharge case, an employee must allege that his disability was a 'but-for' cause of [her] termination." *Id.*

1. Plaintiff Fails to Allege She Was within the ADA's Protected Class

Plaintiff fails to allege that she was within the ADA's protected class because she fails to allege that she was a qualified individual who had an actual disability or was regarded as disabled at the time of her termination. *See* 42 U.S.C.S. §§ 12102(1)(A), 12112(a).

a. Plaintiff Fails to Allege That She Had an Actual Disability or That the Firm Regarded Her as Disabled

First, Plaintiff fails to allege sufficient facts to plead that she had an actual disability at the time of termination. The ADA defines a "disability," in part, as "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). Having a physical or mental impairment is not sufficient on its own to establish a disability under the ADA,

nor is showing that the impairment merely affects one or more major life activities. Instead, an individual must also show that she is *substantially limited* as a result of the impairment. The implementing regulations state that "substantially limits" "shall be construed broadly in favor of expansive coverage" and need not "prevent, or significantly or severely restrict, the individual from performing a major life activity." 29 C.F.R. § 1630.2(j). Nevertheless, "not every impairment will constitute a disability," and an individual must be limited "as compared to most people in the general population." *Id.*

Although cancer certainly can and often will be a disability under the ADA, like any other impairment, it is a disability only to the extent that it substantially limits the employee in her performance of major life activities. *See Iwebo v. Sheppard Pratt Health Sys.*, 2020 U.S. Dist. LEXIS 147445, *26 (D. Md. Aug 14, 2020) ("Although cancer may qualify as a disability under the ADA, by plaintiff's own allegations she was only disabled due to cancer until June 2017."); *see also Kitchens v. Boeing Co.*, 2018 U.S. Dist. LEXIS 159978, *13 (D.S.C. Sept. 19, 2018) ("[E]ven a life-threatening or terminal illness [cancer] does not qualify as a disability under the ADA unless it substantially limits a major life activity.") Accordingly, a plaintiff claiming disability based on a cancer diagnosis must allege additional facts establishing that it constitutes a substantial limitation on major life activities. *See Jeffries v. Wal-Mart Stores East, LP*, 2016 U.S. Dist. LEXIS 13418, *8 (D. Md. Feb. 3, 2016) ("Although Plaintiff alleges in the Complaint that she suffers from breast cancer, the Complaint goes no further in satisfying the definition of a disability under the ADA . . . Cancer certainly may qualify as a disability under the ADA, but Plaintiff has failed to allege any facts with respect to how it substantially limited one or more of her major life activities.") (cleaned up); *Signore v. Bank of Am., N.A.*, 2013 U.S. Dist. LEXIS 145649, *20-22 (E.D. Va. Oct. 8, 2013).

The Complaint alleges that as a result of her ovarian cancer, Plaintiff "has difficulty completing activities of daily living such as dressing and walking" and "also has difficulty sitting for more than two hours and typing for long periods of time which affect[s] her ability to work." (Compl. ¶ 18) However, a mere allegation that the employee "suffered 'difficulties'" in performing certain functions "falls well short of alleging" substantial limitation under the ADA. *Miller v. Maryland Dep't of Natural Resources*, 813 F. App'x 869, 876 (4th Cir. 2020). Further, Plaintiff's remaining allegations regarding disability or substantial limitation are "conclusory allegation[s] devoid of any reference to actual events that will not survive a motion to dismiss." *Id.*; *see also Okyere v. John Bean Techs. Corp.*, 2020 U.S. Dist. LEXIS 240191, *17 (E.D.N.C. Dec. 22, 2020) ("[A]lthough plaintiff has properly pled facts indicating a physical impairment, he has failed to allege facts or details for the court to infer his physical impairment limited a major life activity and did so in a substantial way.") (cleaned up); *Egler v. Am. Airlines, Inc.*, 2018 U.S. Dist. LEXIS 28210, *5-6 (E.D.N.C. Feb. 22, 2018) ("[I]n describing plaintiff's condition, the complaint parrots the language of the statute . . . Merely reciting the language of the statute is insufficient to meet the pleading requirement.").

Additionally, in her email to Driscoll and Millsap on March 13, 2024, Plaintiff did not indicate that the return of her cancer substantially limited her in any major life activity or prevented her from performing the essential functions of her job. (Compl. ¶¶ 20-21; Ex. A, Email from J. Diaz to C. Millsap & J. Driscoll (Mar. 13, 2024, 07:41 EST)) While she made passing reference to being "symptomatic," she did not indicate what those symptoms were or that they were interfering with any major life activity, including her ability to perform her job functions. (*Id.*) Further, she expressly stated that she wanted "to continue [her] employment as long as possible," indicating that she felt she was able to perform her job duties. (*Id.*) The notation from Plaintiff's

healthcare provider attached to her email [redacted] (*Id.*)

Further, Plaintiff fails to allege sufficient facts to plead that the Driscoll Firm "regarded" her as being disabled. *See* 42 U.S.C. §§ 12102(1)(C), 12102(3). At most, Plaintiff alleges that she communicated her cancer diagnosis to the Driscoll Firm. (*See* Compl. ¶¶ 20-21; Ex. A, Email from J. Diaz to C. Millsap & J. Driscoll (Mar. 13, 2024, 07:41 EST)) However, an employer's mere awareness of an employee's alleged impairment, without more, is insufficient to demonstrate that the employer regarded the employee as disabled for ADA purposes. *Haulbrook v. Michelin N. Am., Inc.*, 252 F.3d 696, 702 (4th Cir. 2001) ("The fact that an employer is aware of an employee's impairment, without more, is insufficient to demonstrate either that the employer regarded the employee as disabled or that perception caused the adverse employment action.") (quotations and citation omitted); *Okyere* 2020 U.S. Dist. LEXIS 240191 at *21 (same).

Nothing in Plaintiff's email communicated to the Driscoll Firm anything regarding her ability to engage in major life activities or information that would lead to the inference that the Driscoll Firm perceived her as disabled. *See Okyere* 2020 U.S. Dist. LEXIS 240191 at *21-23. The email did not indicate that her cancer diagnosis incapacitated or substantially limited her, and in fact, stated Plaintiff's desire to continue to work, and Plaintiff returned to work the following day, (*see* Compl. ¶¶ 20-21; Ex. A, Email from J. Diaz to C. Millsap & J. Driscoll (Mar. 13, 2024, 07:41 EST); Ex. B, Email from C. Millsap to J. Diaz (Mar. 13, 2024, 17:54 EST)). *See Iwebo*, 2020 U.S. Dist. LEXIS 147445 at *28-29 ("These facts [regarding plaintiff's cancer diagnosis] are not sufficient to show 'regarded as' disability because, as discussed above, plaintiff clearly states that she was incapacitated or substantially limited only until June 2017 and she does not allege any other facts to support her allegation that defendant perceived her to be disabled after June 2017.").

b. Plaintiff Fails to Allege She Was a Qualified Individual

Plaintiff also fails to allege that she was a "qualified individual" under the ADA. *See Chisholm v. Mountaire Farms of N.C. Corp.*, 629 F. Supp. 3d 368, 375 (M.D.N.C. 2022) ("The ADA only permits qualified individuals for the job to state a discrimination claim."). The ADA defines a "qualified individual" as "an individual who, with or without reasonable accommodation, can perform essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The Complaint contains no allegations regarding the essential functions of Plaintiff's job as a paralegal and no allegations demonstrating that she could perform the essential functions of her position with or without reasonable accommodation. *See Chisholm*, 629 F. Supp. 3d at 375. Accordingly, Plaintiff has not plausibly alleged that she was a "qualified individual" under the ADA. *See id.*; *Iwebo*, 2020 U.S. Dist. LEXIS 147445 at *29, 31 ("In her Complaint, plaintiff pleads no factual content as to the requirements of her job or her qualifications. . . . [P]laintiff's Complaint fails to adequately plead that she is a qualified individual who could perform the essential functions of the job.").

2. Plaintiff Fails to Allege She Was Meeting Legitimate Expectations

Plaintiff also fails to allege that she was meeting the Driscoll Firm's legitimate expectations at the time of termination. *See Girardeau v. North Carolina Agricultural & Technical State University*, 2025 U.S. Dist. LEXIS 69375, *11 (E.D.N.C. Apr. 11, 2025) ("[Plaintiff] has not plausibly alleged that she was fulfilling the University's legitimate expectations at the time of her discharge, a necessary requirement for asserting an ADA disability discrimination claim, and thus her claim must fail."); *Futrell v. Blanton's Air, Plumbing, & Electric, LLC*, 2024 U.S. Dist. LEXIS 147014, *10 (E.D.N.C. Aug. 15, 2024) ("[P]laintiff has failed to allege that plaintiff was satisfying his defendant's legitimate expectations when defendant terminated him.").

3. Plaintiff Fails to Allege Discriminatory Motive

Plaintiff also fails to allege facts sufficient to plead that the Driscoll Firm terminated her employment because of discriminatory animus based on disability. "The mere fact that a certain action is potentially consistent with discrimination does not alone support a reasonable inference that the action was motivated by bias." *Kelly*, 90 F.4th at 169. "If [the court] would have to speculate to fill in the gaps regarding the defendant's motive, the circumstances do not warrant a reasonable inference of discrimination." *Id.* (cleaned up). Because "employers remain free to take adverse employment actions when the action and the disability are truly unrelated," in order to plead discriminatory motive, "the plaintiff must allege facts suggesting a reasonable inference of unlawful discrimination, rather than the mere coincidence of action against an employee who happens to be disabled." *Calloway v. Durham County Public School Board of Education*, 2016 U.S. Dist. LEXIS 18894, *34-35 (M.D.N.C. Feb. 17, 2016).

Plaintiff relies on allegations of temporal proximity between her email on March 13, 2024, and the termination of her employment on the following day to support an inference of discriminatory animus. (*See* Compl. ¶¶ 31-32) "To determine whether unlawful discrimination may be present in ADA wrongful discharge claims, courts may look at the temporal proximity between when an employer learns of an employee's disability and when the employee is fired." *Hines v. Blue Cross & Blue Shield of N.C.*, 2020 U.S. Dist. LEXIS 111084, *16 (M.D.N.C. June 24, 2020). However, Plaintiff's email on March 13, 2024, failed to place the Driscoll Firm on notice of her alleged disability. (*See* Compl. ¶¶ 20-21; Ex. A, Email from J. Diaz to C. Millsap & J. Driscoll (Mar. 13, 2024, 07:41 EST)) Plaintiff's email vaguely stated that Plaintiff had "become symptomatic" and wanted "to continue [her] employment as long as possible." (*Id.*) It said nothing about whether her condition substantially limited her in any major life activity or prevented her

from performing the essential functions of her job. (*Id.*) Accordingly, the temporal proximity between her email and termination gives rise to no plausible inference of discrimination based on her alleged disability. *See Hines*, 2020 U.S. Dist. LEXIS 111084 at *16-18.

Further, mere temporal proximity between an employee's complaint or communication and some alleged adverse action does not necessarily support a claim for discrimination based on disability. *Kelly*, 90 F.4th at 170. "To present an inference of discrimination, the plaintiff must allege that the employer was motivated by [her] disability, not simply [her] [alleged] protected action." *Id.* Here, the Complaint expressly alleges that on March 13, 2024, sometime after she sent her email notifying Millsap and Driscoll of her cancer diagnosis, she sent another email to Driscoll "outlining several complaints, including staff concerns, job security, lack of resources, and insufficient response and feedback on projects." (Compl. ¶¶ 23-24) Accepting these allegations as true, it is just as likely that the Driscoll Firm terminated Plaintiff based on this unprotected complaint as it is that the Driscoll Firm terminated her based on her cancer diagnosis. *See Kelly*, 90 F.4th at 170.

Accordingly, Plaintiff fails to state an ADA discrimination claim for wrongful termination.

B. To the Extent Plaintiff Asserts an ADA Discrimination Claim for Failure to Accommodate, the Claim Fails

It is unclear from the Complaint whether or not Plaintiff asserts an ADA claim for failure to accommodate in addition to her wrongful termination claim. While most of her allegations appear directed toward wrongful termination, Paragraph 38 alleges: "Defendant failed to reasonably accommodate [Plaintiff] despite being aware of her cancer recurrence." (Compl. ¶ 38) To the extent that Plaintiff intends to assert a failure to accommodate claim, that claim fails.

"Before an employer is required to accommodate a disabled employee, the employee must make an adequate request, thereby putting the employer on notice." *Kelly*, 90 F.4th at 166. "To

trigger an employer's duty to accommodate, a disabled employee need only communicate his disability and desire for an accommodation." *Id.* (cleaned up). The Complaint fails to allege that Plaintiff ever communicated to the Driscoll Firm any request for an accommodation. To the contrary, the Complaint expressly states that Plaintiff "did not request any accommodations for her disability" in her communications on March 13, 2024, (Compl. ¶ 25), and it fails to allege that she requested any accommodation at any other point thereafter prior to the termination of her employment, (*see id.* ¶¶ 20-25, 31). Plaintiff's email on March 13, 2024, plainly did not request any accommodation, but instead, communicated her desire "to continue [her] employment as long as possible." (*Id.* ¶¶ 20-21; Ex. A, Email from J. Diaz to C. Millsap & J. Driscoll (Mar. 13, 2024, 07:41 EST)) Absent allegations that Plaintiff requested an accommodation, any claim for failure to accommodate must fail. *See Kelly*, 90 F.4th at 165-68.

C. Plaintiff's ADA Retaliation Claim Fails

1. Plaintiff Failed to Exhaust Administrative Remedies as to Her ADA Retaliation Claim

Plaintiff's ADA retaliation claim fails because she failed to exhaust her administrative remedies with respect to that claim by including it in her Charge of Discrimination ("Charge") filed with the Equal Employment Opportunity Commission ("EEOC"). (Compl., Ex. A, Charge, [ECF No. 1-2]) "The scope of an EEOC charge limits the scope of any subsequent litigation, with any claims that exceed the scope of the EEOC charge being procedurally barred." *Satterwhite v. Wal-Mart Stores East, L.P.*, 2012 U.S. Dist. LEXIS 9584, *5-6 (E.D.N.C. Jan. 26, 2012). "Where alleged retaliation occurred before the charging party filed an EEOC charge, and the charging party could have alleged retaliation in the EEOC charge, the party cannot raise the claim in as subsequent suit without exhaustion." *Boone v. Buncombe County Board of Education*, 2023 U.S. Dist. LEXIS 80328, *5 (E.D.N.C. May 8, 2023).

The initial portion of Plaintiff's Charge identifies as its basis only discrimination based on "Disability." (Compl., Ex. A, Charge at pg. 1) Further, the narrative portion of Plaintiff's Charge contains no mention of "retaliation" and concludes with the summary statement: "I believe that I was discriminated against because of my disability[] in violation of [the ADA]." (*Id.* at pg. 2) Accordingly, Plaintiff failed to allege retaliation in her Charge, and therefore, her ADA retaliation claim is barred for failure to exhaust. *See Hoyle v. Cumberland Cnty. Hosp. Sys., Inc.*, 2025 U.S. Dist. LEXIS 41095, *9 (E.D.N.C. Mar. 7, 2025) ("In her EEOC charge, Hoyle did not allege retaliation under Title VII or the ADA."); *Boone*, 2023 U.S. Dist. LEXIS 80328 at *5-6 ("Here, Plaintiff failed to allege retaliation in her EEOC charge. That is, Plaintiff failed to check the 'Retaliation' box on the first page of the Charge of Discrimination, and she failed to raise any specific allegation of retaliation in the EEOC Charge itself. . . . Furthermore, Plaintiff's EEOC Charge concludes: 'I believe I have been discriminated against on the basis of my disability . . .', without mentioning any alleged retaliation."); *Thiessen v. Stewart-Haas Racing, LLC*, 311 F. Supp. 3d 739, 744 (M.D.N.C. 2018) ("The charge makes no mention whatsoever of . . . any form of a claim of retaliation for having engaged in a protected activity. Further, . . . there is a box labeled 'Retaliation'—which Thiessen chose to leave blank.").

2. Plaintiff Fails to Allege That She Engaged in Protected Activity

Even if Plaintiff had exhausted administrative remedies with respect to her ADA retaliation claim, that claim still would fail because Plaintiff fails to allege that she engaged in any protected activity. *See Clements v. Town of Sharpsburg*, 2019 U.S. Dist. LEXIS 175926, *10-11 (E.D.N.C. Oct. 10, 2019) (quoting *Strothers v. City of Laurel, Maryland*, 895 F.3d 317, 335-36 (4th Cir. 2018)) (employee may establish *prima facie* retaliation "by showing that (1) the employer either understood or should have understood the employee to be engaged in protected activity and (2)

the employer took adverse action against the employee soon after becoming aware of such activity'"); *see also Ramirez-Rodriguez v. Wal-Mart Stores East, LP*, 2014 U.S. Dist. LEXIS 46821, *8-9 (E.D.N.C. Apr. 4, 2014). "[The] ADA's retaliation provision only prohibits retaliation against a person because the person engaged in conduct protected by the ADA." *Woodruff v. Red Classic Transit, LLC*, 2019 U.S. Dist. LEXIS 163123, *7 (W.D.N.C. Sept. 24, 2019). "The enumerated examples of protected conduct under the ADA include opposing an act or practice made unlawful by the ADA and making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding or hearing under the ADA," and "[a] plaintiff clearly engage[s] in protected activity by submitting a request for accommodation." *Okyere*, 2020 U.S. Dist. LEXIS 240191 at *24-25.

The Complaint fails to allege that Plaintiff engaged in any protected oppositional activity under the ADA. Further, the Complaint admits that Plaintiff "did not request any accommodations for her disability" in her email communications on March 13, 2024. (Compl. ¶ 25) Instead, it alleges that "it was reasonably foreseeable to [the Driscoll Firm] that [Plaintiff] would imminently request formal accommodations for her disability." (*Id.* ¶ 26) It further asserts that Plaintiff "engaged in protected activity within the meaning of the ADA by disclosing the recurrence of her medical condition." (*Id.* ¶ 60) However, an employee's mere disclosure of an impairment or a medical condition, absent a reasonable request for accommodation, is not protected activity under the ADA. *See Atlanta Family Law Group LLC*, 2024 U.S. Dist. LEXIS 158613, *26-27 (N.D. Ga. Sept. 4, 2024) ("It is well-settled law, however, that an employee who merely discloses to his employer that he has a disability has not engaged in a protected activity for the purpose of a retaliation claim under the ADA.") (collecting cases); *Thornock v. JES Foundation Repair*, 2024 U.S. Dist. LEXIS 73687, *25 (W.D. Va. Apr. 23, 2024) ("This mere disclosure by Thornock of his

mental health problems is not 'protected activity' for purposes of an ADA retaliation claim."); *Granda v. Old Dominion Freight Line*, 2021 U.S. Dist. LEXIS 189829, *34 (D.S.C. July 14, 2021) ("Plaintiff has cited no case law for the proposition that merely advising an employer that time was being taken off of work for diagnostic testing is protected activity. Because Plaintiff has not demonstrated that he participated in activity protected by the ADA he cannot establish a prima facie case of retaliation."); *Woodruff*, 2019 U.S. Dist. LEXIS 163123 at *8-9 ("[M]ere communication to Defendant that Plaintiff had a knee condition is not a request for an accommodation. Because Plaintiff has pled no facts showing that he was engaged in a protected activity under the ADA, Plaintiff's second claim (for ADA retaliation) is dismissed.") (citations omitted). Absent allegations of protected activity, Plaintiff's ADA retaliation claim fails.

Accordingly, Plaintiff fails to state a claim for ADA retaliation.

II. Plaintiff's FMLA Interference Claim Fails

"To state an interference claim under the FMLA, Plaintiff must allege: (1) that [s]he was an 'eligible employee' under the FMLA; (2) that his employer was covered under the FMLA; (3) that [s]he was entitled to FMLA leave; (4) that [s]he gave [her] employer adequate notice of [her] intention to take leave; and (5) that [her] employer denied him benefits to which he was entitled." *Littell v. Diversified Clinical Services, Inc.*, 2013 U.S. Dist. LEXIS 66856, *7 (M.D.N.C. May 10, 2013). Plaintiff's claim fails on multiple grounds.

A. Plaintiff Fails to Allege That the Driscoll Firm Is Covered by the FMLA

First, Plaintiff fails to allege that the Driscoll Firm is a covered employer for purposes of the FMLA. "For Plaintiff to plead a plausible claim against Defendant for FMLA violations, then, Plaintiff must sufficiently allege that Defendant is a covered employer under the FMLA's standards." *See Whitt v. High Voltage, Inc.*, 2017 U.S. Dist. LEXIS 194115, *3 (S.D. W. Va. Nov.

27, 2017); *see also* 29 U.S.C. § 29 USC § 2611(4)(A) (defining covered "employer"), § 2615(a) (making it "unlawful for any employer" to interfere with exercise of FMLA rights); *Chapman v. City of Newton*, 2023 U.S. Dist. LEXIS 220106, *16 (W.D.N.C. Nov. 22, 2023) ("Whether his FMLA claim is presented as an interference or retaliation claim, Plaintiff must plead that he is an 'eligible employee' of a 'covered employer' under the FMLA."). The FMLA defines a covered "employer" as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." 29 U.S.C. § 2611(4)(A).

The Complaint fails to allege that the Driscoll Firm meets the FMLA's definition of a covered "employer" for purposes of coverage. *See Chapman*, 2023 U.S. Dist. LEXIS 220106 at *17 ("While Plaintiff generally alleged 'Defendants' were his employer in a separate section of the Complaint, Plaintiff still has made no allegation that the City of Newton 'employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.'").

B. Plaintiff Fails to Allege That She Was an Eligible Employee under the FMLA

Further, the Complaint fails to allege that Plaintiff was an "eligible employee" under the FMLA, and in fact, demonstrates that she was not an eligible employee. Under the FMLA, an "eligible employee" must have been employed "for at least 12 months by the employer with respect to whom leave is requested" and "for at least 1,250 hours of service with such employer during the previous 12-month period." 29 U.S.C. § 2611(2)(A). The Complaint expressly alleges that Plaintiff was employed with the Driscoll Firm from July 2023 until her termination on March 14, 2024, which is a total of eight (8) months. (Compl. ¶¶ 16, 21) Accordingly, Plaintiff was not an eligible employee, and her claim for FMLA interference fails. *See Littell*, 2013 U.S. Dist. LEXIS

66856 at *7-8, *14-15; *see also Chisholm*, 629 F. Supp. 3d at 376 ("[Plaintiff], by his own admission, was only employed at [employer] for approximately six months . . . [Plaintiff's] period of employment falls short of the required twelve months needed for FMLA eligibility.").

C. Plaintiff Fails to Allege That She Provided Defendant Adequate Notice of Her Intent to Take FMLA Leave

Lastly, Plaintiff fails to allege that she provided the Driscoll Firm with adequate notice of her intent to take FMLA leave. "To establish unlawful interference with an entitlement to FMLA benefits, the plaintiff must prove, among other things, that she gave her employer adequate notice of her intention to take FMLA leave and that she was denied FMLA benefits to which she was entitled." *Watson v. Shenandoah University*, 2015 U.S. Dist. LEXIS 68776, *30-31 (W.D. Va. May 28, 2015) (citation omitted). "The notice must contain 'sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request.'" *Hayes v. Maryland Transit Administration*, 2018 U.S. Dist. LEXIS 189755, *23 (D. Md. Nov. 6, 2018) (quoting 29 C.F.R. § 825.303(b)).

Plaintiff's email on March 13, 2025, shows that Plaintiff failed to provide the Driscoll Firm adequate notice of her intention to take FMLA leave. Indeed, Plaintiff's email did not communicate any intention to take FMLA leave. (*See* Compl. ¶¶ 20-21; Ex. A, Email from J. Diaz to C. Millsap & J. Driscoll (Mar. 13, 2024, 07:41 EST)) Instead, it vaguely stated that Plaintiff had "become symptomatic" and wanted "to continue [her] employment as long as possible." (*Id.*) Courts have found similarly vague communications regarding illnesses or injuries insufficient to satisfy the adequate notice element under Rule 12(b)(6). *See Caldwell v. United Parcel Service, Inc.*, 2015 U.S. Dist. LEXIS 142141, *12-13 (W.D. Va. Oct, 20, 2025) ("[Plaintiff] alleges only that he notified his supervisor that he was going to miss work, that '[t]he[y] were mad' that he 'got hurt during [the] busy season and was going to be out for [a] few days up to [a] week,' and that he

'had [a] knee injury that was a factor.'"); *Hayes*, 2018 U.S. Dist. LEXIS 189755 at *24 ("Hayes failed to meet the FMLA's requirement that she provide her employer with sufficient notice and information concerning her requested FMLA leave."); *Watson*, 2015 U.S. Dist. LEXIS 68776 at *30-31 ("[Plaintiff's] allegation that she made her superior aware by email of her automobile accident in June 2009 is patently inadequate notice of her intention to take FMLA leave, and it is equally inadequate to suggest a denial of FMLA benefits to which she was entitled.").

Accordingly, Plaintiff fails to state acclaim for FMLA interference.

III. Plaintiff's NCWHA Claim for Unpaid Overtime Fails

To state a plausible claim for unpaid overtime compensation, "a plaintiff must provide sufficient factual allegations to support a reasonable inference that he or she worked more than forty hours in at least one workweek and that his or her employer failed to pay the requisite overtime premium for those overtime hours." *Hall v. DIRECTV, LLC*, 846 F.3d 757, 777 (4th Cir. 2017). "Under this standard, plaintiffs seeking to overcome a motion to dismiss must do more than merely allege that they regularly worked in excess of forty hours per week without receiving overtime pay." *Id.*; *see also Simmons v. United Mortgage & Loan Investment, LLC*, 634 F.3d 754, 768 (4th Cir. 2011) (conclusory allegations that plaintiff routinely worked in excess of 40 hours per week during employment and that defendant failed to pay overtime compensation insufficient to state a claim under NCWHA). While a plaintiff is not required "to identify a *particular* week in which they worked uncompensated overtime hours," she "must provide sufficient detail about the length and frequency of their unpaid work to support a reasonable inference that they worked more than forty hours in a given week." *Hall*, 846 F.3d at 777 (quotations and citation omitted).

The Complaint alleges only that during her employment, Plaintiff "was assigned a substantial workload with strict deadlines, which required her to work overtime, including holidays

and weekends," that the Driscoll Firm "was aware of the number of hours . . . [Plaintiff] was working overtime," and that Plaintiff "has not been paid for her overtime work." (Compl. ¶¶ 27-30) These allegations fail to satisfy the standard set forth above because they "merely allege that [Plaintiff] regularly worked in excess of forty hours per week without receiving overtime pay." *See Hall*, 846 F.3d at 777; *see also Simmons*, 634 F.3d at 768; *Haq v. Adora Manufacturing, Inc.*, 2024 U.S. Dist. LEXIS 164903, *16-20 (M.D.N.C. Sept. 13, 2024); *Acosta v. Ararat Import & Export Co., LLC*, 378 F. Supp. 3d 443, 449-50 (E.D.N.C. 2019).

Accordingly, Plaintiff's NCWHA claim for unpaid overtime fails to state a claim.

CONCLUSION

For the reasons stated above, this Court should grant Defendant's Motion to Dismiss and dismiss the Complaint and this action in its entirety.

Respectfully submitted, this the 11th day of August, 2025.

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CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH LOCAL RULE 7.2(f)

The undersigned hereby certifies that the foregoing Memorandum in Support of Defendant's Motion to Dismiss Pursuant to Rule 12(b)(6) consists of 6,117 words, exclusive of the case caption, the signature block, any required certificates, any table of contents, any table of authorities, and any attachments, exhibits, affidavits, and other addenda, and complies with Local Rule 7.3(f).

This the 11th day of August, 2025.

MORNINGSTAR LAW GROUP

/s/ Harrison M. Gates
Harrison M. Gates

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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of filing to all counsel of record in this matter.

This the 11th day of August, 2025.

MORNINGSTAR LAW GROUP

/s/ Harrison M. Gates
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