UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CIVIL ACTION NO. 5:25-cv-00338-BO-BM

JOYLEN DIAZ,

Plaintiff,

v.

THE DRISCOLL FIRM, P.C.,

Defendants.

DEFENDANT'S REPLY TO PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Defendant The Driscoll Firm, P.C. ("Defendant"), by and through the undersigned counsel and pursuant to E.D.N.C. Local Rule 7.1(g), submits this Reply to Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss (ECF No. 24 (the "Response")).

I. INTRODUCTION

In response to Defendant's Motion to Dismiss (ECF No. 7), Plaintiff voluntarily dismissed all but her first cause of action for disability discrimination under the Americans with Disabilities Act ("ADA") and her second cause of action for alleged unpaid overtime under the North Carolina Wage and Hour Act ("NCWHA"). (*See* ECF No. 23; *see also* ECF No. 24, at p. 8.) However, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (the "Rules"), Plaintiff's Complaint fails to state a claim under the ADA or NCWHA upon which relief can be granted, necessitating the dismissal of both remaining claims.

Regarding her ADA cause of action, that claim fails because the Complaint does not contain sufficient factual allegations to plausibly allege Plaintiff had a qualifying disability or that Defendant perceived her as disabled, that she was meeting Defendant's legitimate work expectations, or circumstances to raise a reasonable inference that a disability was the "but-for"

cause of her termination in order to state a claim for disability discrimination under the ADA. Plaintiff's NCWHA claim likewise fails because the Complaint does not allege facts that plausibly show Plaintiff worked more than forty hours in a workweek without receiving the requisite overtime premium for her overtime hours. Plaintiff attempts to remedy this critical defect by adding new allegations in her Response brief to support her NCWHA claim. (ECF No. 24, at pp. 8-9, n.1.) Plaintiff cannot amend her Complaint through her Response brief, and her NCWHA claim should therefore also be dismissed for failure to state a claim upon which relief can be granted.

II. ARGUMENT

A. Plaintiff fails to state a claim for disability discrimination under the ADA.

"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).

1. Plaintiff fails to allege sufficient facts to show that she had an impairment that substantially limited a major life activity.

The Complaint fails to sufficiently allege the first element of an ADA discrimination claim because it contains no allegations that Plaintiff was a qualified individual who had an actual disability. *See* 42 U.S.C.S. §§ 12102(1)(A), 12112(a). In her Response, Plaintiff cites *Murphy v. County of New Hanover*, No. 7:17-cv-229-FL, 2019 WL 3244112 (E.D.N.C. July 18, 2019) and *Bordonaro v. Johnston County Bd. of Education*, 938 F. Supp. 2d 573 (E.D.N.C. 2013) to argue that her Complaint contains sufficient factual allegations of an impairment that qualifies as a disability under the ADA. Specifically, Plaintiff contends that the *Murphy* and *Bordonaro* courts

held that a medical condition that merely "limited [the plaintiff's] ability" to perform major life activities constitutes a disability under the ADA. (*See* ECF No. 24, at p. 4.) *Murphy* and *Bordonaro* stand for no such proposition. In *Murphy*, the Court determined the plaintiff sufficiently alleged that he had a qualifying disability under the ADA because he "allege[d] that his ADHD *substantially limits* major life activities, including concentrating, thinking, interacting with others, working, and sleeping." *Murphy*, 2019 WL 3244112, at *3 (emphasis added). Similarly, in *Bordonaro*, the Court noted that the plaintiff sufficiently alleged her medical condition, glaucoma, qualified as a disability under the ADA because "[she] states that her loss of peripheral vision *substantially limits* her ability to see . . . ." *Bordonaro*, 938 F. Supp. 2d at 578–79 (emphasis added).

Unlike the plaintiffs in *Murphy* and *Bordonaro* who both alleged their medical condition *substantially limited* a major life activity, here, Plaintiff only alleges that she "has difficulty completing activities of daily living such as dressing and walking due to her medical condition." (ECF No. 1, at ¶ 18.) Plaintiff also alleges that she "has difficulty sitting for more than two hours and typing for long periods of time which affect her ability to work." (*Id.*) Plaintiff's bare allegations that her medical condition caused "difficulty completing activities" fall short of the "substantially limits a major life activity" standard that is required for a condition to qualify as a disability under the ADA. *Kitchens v. Boeing Co.*, 2018 WL 4476124, at *4 (D.S.C. Sept. 19, 2018) ("[E]ven a life-threatening or terminal illness [such as cancer] does not qualify as a disability under the ADA unless it substantially limits a major life activity . . . ."); *see also Miller v. Maryland Dep't of Nat. Res.*, 813 F. App'x 869, 876 (4th Cir. 2020) ("Though a substantial limitation need not be severe, Appellant's claim that he suffered 'difficulties' lifting and sleeping falls well short of alleging he was limited 'as compared to most people in the general population.'"

(citing 29 C.F.R. § 1630.2(j)(1)(ii))). Accordingly, Plaintiff's Complaint fails to plausibly allege she had a qualifying disability at the time of her separation to state a claim for relief under the ADA.

2. Plaintiff fails to allege sufficient facts to state a plausible claim for relief that Defendant regarded her as disabled.

Plaintiff argues she has pleaded sufficient allegations that Defendant regarded her as disabled based on her Complaint's allegations that she informed Defendant that she was diagnosed with a recurrence of ovarian cancer and that she was symptomatic, and in response, Defendant noted "concerns about [Plaintiff's] reactions to the medication she might be taking to treat the ovarian cancer." (ECF No. 24, at p. 5 (quoting ECF No. 1, at ¶¶ 21-22).) Significantly, Plaintiff concedes that after requesting information to clarify the concerns Plaintiff's doctor reported regarding Plaintiff's medication, Defendant put Plaintiff directly to work without any restrictions, and Plaintiff needed no accommodation to perform any part of her job. (ECF No. 9-2, at p. 1; *see also* ECF No. 24, at p. 2 (agreeing that Plaintiff worked without ever needing or requesting any form of accommodation).) The United States Court of Appeals for the Fourth Circuit has held that an employer's request for further information regarding the nature of an employee's impairment does not establish the employer perceived the employee as having a disability. *Haulbrook v. Michelin N. Am.,* 252 F.3d 696, 703 (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.'"); *see also Irvin v. Versatrim, LLC*, 737 F. Supp. 3d 297, 305 (E.D.N.C. 2024) (holding knowledge of disability not enough to establish employer regarded employee as disabled). Plaintiff cites no law to rebut this authority. (ECF No. 24, at pp. 5-6.) Applying *Haulbrook* and *Irvin*, Plaintiff's Complaint fails to state a claim for relief that Defendant regarded her as disabled.

3. Plaintiff fails to plead sufficient factual allegations that she was meeting Defendant's legitimate expectations at the time of her discharge.

Plaintiff fails to allege that she was meeting Defendant's legitimate expectations at the time of termination to state a claim for disability discrimination under the ADA. Plaintiff contends that her allegations that she worked for Defendant as a paralegal for nearly eight months and had been promoted and assigned a "substantial workload" involving "overtime" are sufficient to show she was meeting Defendant's legitimate expectations at the time of her discharge. (ECF No. 24, at p. 7; *see also* ECF No. 1, at ¶¶ 16, 28.) Courts in this Circuit have recognized that such bare allegations are insufficient to plausibly allege the employee was meeting her employer's legitimate expectations at the time of her termination to state a claim for disability discrimination under the ADA. *See Futrell v. Blanton's Air, Plumbing, & Electric, LLC*, 2024 WL 3852132, at *4 (E.D.N.C. Aug. 16, 2024) ("[P]laintiff has failed to allege that plaintiff was satisfying his [employer's] legitimate expectations when defendant terminated him."); *see also id.* at *3 (citing *Kikwebati v. Strayer Univ. Corp.*, No. 2:14-CV-203, 2014 WL 7692396. at *8 (E.D. Va. Oct. 21, 2014) which noted that an employee's "record of success" and "superior performance" would have, on its own, been insufficient to prove satisfactory job performance). Under this authority, the Complaint fails to plausibly allege Plaintiff was meeting Defendant's legitimate work expectations at the time of her separation.

4. Plaintiff fails to plead sufficient factual allegations to show that the circumstances of her discharge raise a reasonable inference of unlawful discrimination.

Plaintiff further fails to plausibly plead sufficient factual allegations of circumstances that raise a reasonable inference that her discharge constitutes unlawful disability discrimination. "To raise a reasonable inference of disability discrimination in a wrongful discharge case, an employee must allege that [her] disability was a 'but-for' cause of [her] termination." *Kelly*, 90 F.4th at 169.

Here, Plaintiff argues the temporal proximity between her March 13, 2024, email to Defendant disclosing "the recurrence of her cancer" and her separation the following day is sufficient to raise a reasonable inference of unlawful discrimination. (ECF No. 24, at pp. 7-8.) However, as detailed in Defendant's opening brief, Plaintiff's March 13, 2024 email failed to place Defendant on notice of an alleged disability. (ECF No. 9, at pp. 11-12.) Plaintiff's email vaguely stated that Plaintiff had "become symptomatic" and wanted "to continue [her] employment as long as possible." (*Id.* at p. 11 (quoting ECF No. 9-1, at p. 1).) Because the email failed to inform Defendant that her diagnosis substantially limited a major life activity or interfered with her ability to perform the essential functions of her job, the temporal proximity between her email and separation does not give rise to a plausible inference of disability discrimination.

Plaintiff contends that this Court's holding in *Bordonaro* supports her position that close temporal proximity between disclosure of a medical condition and termination is alone enough to raise a reasonable inference that the discharge was due to her alleged disability. Plaintiff's argument is misplaced. In *Bordonaro*, this Court held that the plaintiff's complaint raised a reasonable inference of discrimination when it alleged that "[the plaintiff] requested reasonable accommodation in the form of exemption from bus driving duties and plaintiff was terminated within weeks of speaking publically about the discriminatory effect of Policy Code 5420 and her requests for accommodation." *Bordonaro*, 938 F. Supp. 2d at 580. Unlike the Plaintiff in *Bordonaro* who requested an accommodation for her alleged disability, here, Plaintiff concedes she never requested or needed an accommodation during her employment with Defendant. (ECF No. 24, at p. 7 (requesting the Court to find Plaintiff "was able to perform the essential functions of her employment without accommodation"); *id.* at p. 2 (stating Plaintiff never requested an accommodation).) Mere notice of Plaintiff's medical condition, without any accompanying request

for accommodation, is not enough to plausibly show that Plaintiff's alleged medication was the "but-for" cause of her termination.

Because Plaintiff's Complaint does not contain sufficient factual allegations to plausibly allege she had an actual or perceived disability under the ADA, that she was meeting her employer's legitimate expectations at the time of her termination, or that circumstances of her discharge raise a reasonable inference of unlawful discrimination, her disability discrimination claim should be dismissed under Rule 12(b)(6) for failure to state a claim for relief.

B. Plaintiff's Complaint fails to state a claim under the NCWHA for which relief can be granted.

The Complaint fails to state a plausible claim for unpaid overtime under the NCWHA because it only vaguely alleges Plaintiff was required to work uncompensated "overtime" during her employment without providing sufficient factual detail about the length and frequency of the alleged unpaid work. (ECF No. 1, at ¶¶ 27-30); *see also Hall v. DIRECTV, LLC*, 846 F.3d 757, 777 (4th Cir. 2017). Recognizing the pleading's defect, Plaintiff attempts to salvage her NCWHA claim by including additional factual allegations in her Response – cutting and pasting an extraneous, post-separation March 29, 2024 email into her brief. (ECF No. 24, at pp. 8-9, n.1.) Plaintiff argues the March 29, 2024 email is appropriately considered in her Response because it "is integral and explicitly relied on in [paragraph 27 of] the Complaint." (*Id.* at n.1 (citing ECF No. 1, at ¶ 27).) That is incorrect. Paragraph 27 of the Complaint states, in its entirety: "Since December 2023, Ms. Diaz had been requesting approval for her overtime work via email exchanges." (ECF No. 1, ¶ at 27.) These allegations do not reference or incorporate the March 29th post-separation email, and they cannot be used to supplement the Complaint to state a plausible claim for unpaid overtime under the NCWHA. "Under Rule 15(a), a plaintiff must request leave of court to amend the complaint and *cannot simply include additional factual allegations in a*

responsive pleading." *Williams v. Pitt Cnty. Bd. of Educ.,* No. 4:18-CV-32-BR, 2018 WL 6981219, at *5 (E.D.N.C. Dec. 5, 2018) (emphasis added), *report and recommendation adopted,* No. 4:18-CV-32-BR, 2019 WL 137583 (E.D.N.C. Jan. 8, 2019), *appeal dismissed and remanded,* 773 Fed. Appx. 699 (4th Cir. 2019); *see also McNulty v. Commc'ns Workers of Am.,* No. 3:12CV-22-MOC-DSC, 2012 WL 1569601, at *3 (W.D.N.C. Mar. 16, 2012) ("Additional factual allegations contained in a response brief are not considered on a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6)."), *report and recommendation adopted,* No. 3:12CV-22-MOC-DSC, 2012 WL 1569591 (E.D.N.C. May 3, 2012). Pursuant to this authority, Plaintiff's attempt to add allegations through her Response should be disregarded, and her NCWHA should be dismissed for failure to state a claim under Rule 12(b)(6).

III. CONCLUSION

For all of these reasons, Defendant respectfully requests the Court dismiss Plaintiff's remaining ADA discrimination and NCWHA claims under Rule 12(b)(6) for failure to state a claim upon which relief may be granted.

This the 6th day of October 2025.

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CERTIFICATION 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) consist of 2,339 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 6th day of October 2025.

/s/ Brett A. Carpenter
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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing document was electronically filed with the clerk of the court using the CM/ECF system, which sends notifications of such filing to the following counsel of record:

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