

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

JENNIFER JOHNSTON,

Plaintiff,

v.

WHOLE FOODS MARKET ROCKY MOUNTAIN/SOUTHWEST, L.P.,
a Texas limited partnership,

Defendants.

COMPLAINT AND JURY DEMAND

Plaintiff, Jennifer Johnston, by and through her attorneys, HKM Employment Attorneys LLP, for her Complaint against Whole Foods Market Rocky Mountain/Southwest, L.P., (“WFM” or “Defendant”) states and alleges as follows:

PRELIMINARY STATEMENT

1. This is an employment discrimination suit brought by a former employee of WFM who was harassed on the basis of her gender and sexual orientation. In retaliation for reporting the same, Defendants adversely altered the terms and conditions of Plaintiff’s employment and subjected Plaintiff to a hostile work environment which forced Plaintiff’s constructive discharge in violation of state and federal law. Plaintiff accordingly brings claims against Defendants pursuant to the Colorado Anti-Discrimination Act, as amended, Colo. Rev. Stat. § 24-34-402, *et seq.* (“CADA”) and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* (“Title VII”).

PARTIES

2. Plaintiff is and at all times relevant to the Complaint was a resident of Colorado.

3. Upon information and belief, Defendant Tawny Duckworth is and at all times relevant to the Complaint was a resident of Colorado.

4. Defendant WFM is a Texas limited partnership with a principal office located in Austin, Texas.

5. Defendant WFM operates grocery stores throughout Colorado, including its flagship location, also its largest store in the Rocky Mountain Region, located at 2905 Pearl Street, Boulder, Colorado 80301 (the “Pearl Street store”). Plaintiff was employed at WFM’s Pearl Street store from December 5, 2014 through July 22, 2015.

JURISDICTION AND VENUE

6. Plaintiff incorporates by reference the above paragraphs as though set forth separately herein.

7. Plaintiff brings this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, and the Colorado Anti-Discrimination Act, as amended, Colo. Rev. Stat. § 24-34-402, *et seq.* (“CADA”). Plaintiff additionally raises other employment-related claims under state common law.

8. This Court has original jurisdiction over Plaintiff’s federal claims pursuant to 28 U.S.C. §§ 1331 and 1343(3), (4). The Court also has supplemental jurisdiction over Plaintiff’s state law claims under 28 U.S.C. § 1367, as such claims arise out of the same case or controversy as Plaintiff’s Title VII claims.

9. Jurisdiction is also proper under 28 U.S.C. §§ 1332(a)(1), in that the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different states.

10. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because the employment practices and other conduct alleged to be unlawful occurred in the District of Colorado.

FACTUAL ALLEGATIONS

11. Plaintiff incorporates by reference the above paragraphs as though set forth separately herein.

12. WFM operates natural and organic grocery stores.

13. Plaintiff is a graphic artist who began working for WFM at a Pennsylvania location in March 27, 2012. She transferred to the Pearl Street store on December 5, 2014, and worked there as a graphic artist on WFM's marketing team through July 22, 2015. The events from which Plaintiff's claims arise occurred while she was working at the Pearl Street store.

14. At all relevant times during her employment, Plaintiff performed her job duties satisfactorily or better.

15. Plaintiff is a married homosexual woman, and her chain of command at WFM was aware of the same.

16. The marketing team which Plaintiff worked for and with consisted of two female coworkers, Monika Kunz and Angie Nordstrum, and a female team leader, Defendant Tawny Duckworth.

17. Beginning on or about February 2015, Plaintiff was subjected to unwelcome and offensive comments on a weekly, and often daily, basis from her direct supervisor, Ms. Duckworth.

18. Among other things, Ms. Duckworth:

a. Told Plaintiff that her Croc shoes were "unf*ckaable" in front of her two coworkers, adding that "only gay people wear Crocs". Thereafter, on an almost daily basis, Ms. Duckworth referred to Plaintiff's shoes as "U's" or "UF's", meant to stand for the term "unf*ckable";

b. Dressed up as Plaintiff as part of what was called "team member appreciation week", which involved Ms. Duckworth dressing like each of the three marketing team members. On the day Ms. Duckworth dressed up like Plaintiff, she wore clothes aimed at negative lesbian stereotypes and biases—a sweatshirt, baggy jeans, old tennis shoes and a backwards hat. This is not

how Plaintiff dressed. Ms. Duckworth then asked Plaintiff and her coworkers if she looked gay and “dykey” enough, and told Plaintiff and others she was dressed as Plaintiff;

c. Scrutinized Plaintiff’s personal appearance and asked questions based on “butch” lesbian stereotypes, such as whether Plaintiff plucked her eyebrows and whether she had ever washed her hair;

d. Asked intrusive questions about Plaintiff’s personal life with her wife, including who wore the pants in her relationship, and if she and her wife had “hotel sex” on vacation, like a heterosexual couple;

e. Asked Plaintiff routinely whether she thought certain people were gay, adding “well you are gay, can’t you point out who else is gay?”.

19. Plaintiff did not find any of her supervisor’s above comments or questions funny.

20. Plaintiff repeatedly asked Ms. Duckworth to stop making such comments targeting both her gender and her sexual orientation.

21. Ms. Duckworth did not stop or attempt to comply with Plaintiff’s repeated requests.

22. During team appreciation week when Ms. Duckworth was dressing up as each of the three team members, she actually attempted to dress up to resemble the other two team members, rather than dressing up to resemble a negative stereotype, as she did for Plaintiff. The other two team members, Ms. Kunz and Ms. Nordstrum, are heterosexual.

23. On or about July 2, 2015, Plaintiff registered complaints about discrimination with WFM. Specifically, Plaintiff met with general manager, Omar Ruiz, to tell him about Ms. Duckworth’s harassment and disparate treatment of Plaintiff. Mr. Ruiz was initially sympathetic, apologized to Plaintiff that she had been working under those conditions, and offered to allow Plaintiff to change her schedule to avoid working with Ms. Duckworth. Mr. Ruiz also informed Plaintiff that he would conduct a two-week investigation of the events Plaintiff reported.

24. During Mr. Ruiz’s investigation of Plaintiff’s complaint, he interviewed Plaintiff’s team members, including Ms. Nordstrum.

25. Ms. Nordstrum was a friend of Ms. Duckworth's and learned from Mr. Ruiz that Plaintiff had reported Ms. Duckworth's harassment. Immediately after Ms. Nordstrum's interview with Mr. Ruiz, Ms. Nordstrum stormed over to Plaintiff's work station and yelled at Plaintiff that she hated her and that Plaintiff was the most disgusting person she had ever known.

26. From that point forward, Ms. Nordstrum refused to speak with Plaintiff, even ignoring her when Plaintiff would ask questions about work projects.

27. Plaintiff reported Ms. Nordstrum's behavior to Mr. Ruiz on or about July 14, 2015.

28. Other than her initial meeting to report the harassment she was being subjected to, Mr. Ruiz never interviewed Plaintiff for purposes of his investigation. *See* Unemployment Hearing Transcript, attached as **Exhibit A**, 77:19-21.

29. Yet, on or about July 16, 2015, Mr. Ruiz called Plaintiff into his office to discuss the results of his investigation. WFM's human resources employee, Rebecca Kelso, was also present at the meeting. Ms. Kelso testified in Plaintiff's unemployment hearing that the purpose of the meeting was to tell Plaintiff "the results of the investigation *and hold Ms. Johnson accountable for her position.*" Ex. A, 36:18-19.

30. Mr. Ruiz did not tell Plaintiff at the July 16, 2015 meeting or anytime thereafter whether the investigation of Plaintiff's complaint had determined that harassment had occurred, or whether Ms. Duckworth was disciplined for her conduct.

31. At the July 16, 2015 meeting, Mr. Ruiz told Plaintiff that she was going to be written-up, meaning she was going to be issued a formal written warning, for allegedly playing music that sometimes had inappropriate language and for purportedly playing an unspecified inappropriate music video on an unknown date and time. Ex. A, 70:4-71:19.

32. At the July 16, 2015 meeting, Mr. Ruiz then told Plaintiff that, despite his initial offer to the contrary, she would not be allowed to change her schedule to limit her hours worked with Ms. Duckworth because, Mr. Ruiz reasoned, Plaintiff had indicated she was available for a 40-hour work

week when she was hired. Mr. Ruiz did not offer Plaintiff any alternative accommodations, nor did he instruct Plaintiff how to handle any further instances of harassment. Ex. A, 76:4-22.

33. Plaintiff never played an inappropriate music video at work.

34. Plaintiff was further never once instructed, warned or otherwise given notice that she was not allowed to play music at work, or, for that matter, the type of music she was allowed to play.

35. WFM had in effect a four-step progressive disciplinary policy. The first step was a Counseling Statement, or a verbal warning. The second step was a written warning. The third step was a final written warning, and the fourth step was termination.

36. Plaintiff had never received any discipline prior to the outcome of Mr. Ruiz's investigation of her complaint of harassment.

37. Mr. Ruiz determined that Plaintiff's conduct in allegedly playing inappropriate music and/or a music video warranted skipping the first step of discipline and instead imposing a written warning on Plaintiff in retaliation for her reporting Ms. Duckworth and/or Ms. Nordstrum's conduct. *See* Email from Mr. Ruiz dated July 14, 2015, attached hereto as **Exhibit B** (discussing Plaintiff's "claim that Angie was ignoring her" and stating: "I feel this is another attempt to be manipulative and deceiving on [Plaintiff]'s part. I feel her corrective action should be accelerated to an UWW instead of a counseling statement.").

38. Plaintiff was disciplined by WFM management in retaliation for attempting to report harassment based on her sexual orientation and failure to conform to gender stereotypes.

39. As a result of the above retaliatory conduct, and in conjunction with the fact that Mr. Ruiz told Plaintiff she was not allowed to change her schedule and would have to continue working with Ms. Duckworth, the conditions under which Plaintiff was required to work became so intolerable that she was compelled to resign the next day, on or about July 17, 2015. Said resignation constituted an involuntary termination.

40. During the course of Plaintiff's attempt to exhaust administrative remedies regarding this matter, she has discovered that Mr. Ruiz issued discipline to Ms. Duckworth based on his investigation that found, among other things, that Ms. Duckworth had admitted to:

a. Making the comments about Plaintiff's Crocs being "unf*ckable," that "only gay people wear Crocs" and commonly referring to the Crocs as "U's" and "UF's", meaning "unf*ckable";

b. Dressing up as a lesbian stereotype rather than as Plaintiff for team member appreciation week, as well as asking Plaintiff and others "whether she looked lesbian or dykey enough" and telling Plaintiff and others that she was dressed up as Plaintiff.

41. Ms. Kelso and Mr. Ruiz also confirmed in Plaintiff's unemployment benefits hearing that Ms. Duckworth admitted to making the offensive comments about Plaintiff's shoes being "unf*ckables". Ex. A, 52:14-53:2, 75:25-76:3.

42. Ms. Kelso also testified that, during the course of Defendant's investigation of Plaintiff's reports of harassment, Ms. Duckworth had admitted to dressing up as Plaintiff and making statements about whether she looked lesbian or dykey enough. Ex. A, 52:21-23 ("And also when [Duckworth] dressed up as the claimant, the statement she made around that, she did admit to.").

43. Mr. Ruiz's investigation did not ask Ms. Duckworth whether she had made other offensive statements to Plaintiff based on her sexual orientation. Thus, Ms. Duckworth's comments about Plaintiff's personal appearance, her home life with her wife, and her insistence that Plaintiff should have "gaydar" and be able to tell if other people were homosexual all went completely unaddressed as a result of WFM's half-hearted investigation. Ex. A, 52:14-53:2; 56:9-25.

44. Mr. Ruiz's piecemeal investigation resulted in the following discipline, in addition to Plaintiff's written reprimand: Ms. Duckworth was issued a final written warning for the two instances of harassment investigated by Mr. Ruiz; Ms. Kunz was issued a final written warning for separate instances of using inappropriate language; and Ms. Nordstrum was issued a Counseling Statement for verbally attacking Plaintiff during the course of Mr. Ruiz's investigation.

45. Plaintiff also discovered, at her hearing for unemployment benefits and during the course of exhausting administrative remedies in this matter, that the allegation that she had played an inappropriate music video and music was made by Ms. Duckworth and Ms. Nordstrum, the individuals about whom she had complained to Mr. Ruiz. WFM did nothing to corroborate these allegations prior to determining discipline was warranted. Ex. A, 50:20-51:9, 60:11-61:25.

46. Plaintiff later learned at her unemployment benefits hearing that the music video she had allegedly played was “Turn Down for What” by DJ Snake and Lil Jon.

47. Mr. Ruiz testified under oath at Plaintiff’s unemployment benefits hearing that he never even asked Plaintiff whether she had played the “Turn Down for What” music video prior to issuing her written reprimand for doing so. Ex. A, 71:17-19.

48. Plaintiff did not play the music video for “Turn Down for What” by DJ Snake and Lil Jon at work. Plaintiff did, however, play the song itself on at least one instance. The lyrics of the song do not contain any inappropriate language, as alleged by Ms. Duckworth, Ms. Nordstrum and Mr. Ruiz. See Lyrics of “Turn Down for What,” attached hereto as **Exhibit C**.

49. Plaintiff filed her Charge of Discrimination Number E20160306 concurrently with the Colorado Civil Rights Division and the Equal Employment Opportunity Commission on October 1, 2015. Plaintiff was issued a Notice of Right to Sue from those agencies.

FIRST CLAIM FOR RELIEF

(Discrimination and Harassment Based on Gender in Violation of Title VII, 42 U.S.C. § 2000e, *et seq.* Against Defendant WFM)

50. Plaintiff incorporates by reference the above paragraphs as though set forth separately herein.

51. Plaintiff is an “employee” as that term is defined at 42 U.S.C. § 2000e(f).

52. Defendant is an “employer” as that term is defined at 42 U.S.C. § 2000e(b).

53. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* (“Title VII”) prohibits discrimination based on sex in employment.

54. Based on the above-described acts, practices and omissions, Defendant engaged in unlawful discrimination under Title VII based on Plaintiff's sex (female).

55. Furthermore, Defendants' illegal actions against Plaintiff, including Ms. Duckworth's harassment of Plaintiff, were of a sexual nature and were aimed at Plaintiff because of her sex, resulting in adverse impacts to the terms and conditions of Plaintiff's employment and further subjecting Plaintiff to harassment and a hostile work environment.

56. Defendant's conduct was sufficiently severe or pervasive that a reasonable person in Plaintiff's position would find Plaintiff's work environment to be hostile or abusive.

57. At the time the above-described conduct occurred, including Ms. Duckworth's harassment of Plaintiff, and as a result of such conduct, Plaintiff believed her work environment to be hostile or abusive.

58. Defendant WFM knew or should have known of Ms. Duckworth's conduct and failed to take prompt, remedial action to stop her conduct.

59. As such, Defendant violated 42 U.S.C. § 2000e-2(a) and discriminated against Plaintiff by not only subjecting her to sufficiently severe or pervasive harassment based on female gender stereotypes so as to alter the conditions and terms of Plaintiff's employment, but also: failing to act and condoning or tolerating such harassment, subjecting Plaintiff to less favorable terms and conditions of employment by imposing heightened and/or disproportionate discipline on Plaintiff, and ultimately constructively terminating Plaintiff's employment.

60. The reasons that Defendant submits for changing the terms and conditions of Plaintiff's employment and constructively terminating her are false and pretext for unlawful discrimination.

61. In unlawfully discriminating and retaliating against Plaintiff, Defendant acted willfully, wantonly and/or with malice or with conscious and/or reckless indifference to Plaintiff's equal rights under law, thereby necessitating the imposition of exemplary damages.

62. As a result of Defendant's above-described conduct, Plaintiff has suffered loss of income, emotional pain and suffering, embarrassment, and inconvenience and she is entitled to general and special damages, and economic damages including front and back pay. Plaintiff is also entitled to and seeks her attorneys' fees and costs pursuant to 42 U.S.C. §2000e-5(k).

SECOND CLAIM FOR RELIEF

(Retaliation in Violation of Title VII, 42 U.S.C. § 2000e, *et seq.* as to Defendant WFM)

63. Plaintiff incorporates by reference the above paragraphs as though set forth separately herein.

64. Title VII, 42 U.S.C. § 2000e-3(a), states in relevant part that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual, . . . because [s]he has opposed any practice made an unlawful employment practice by this subchapter, or because [s]he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter."

65. Plaintiff engaged in activity protected by Title VII on multiple occasions. Specifically, she opposed Defendant's unlawful and discriminatory practices under Title VII by submitting verbal and written complaints to WFM's general manager multiple times about Ms. Duckworth's harassment and Ms. Nordstrum's conduct toward her for reporting the same.

66. Plaintiff's opposition and complaints regarding Defendant's illegal practices were protected activities within the meaning of 42 U.S.C. § 2000e, *et seq.*

67. Defendant unlawfully retaliated against Plaintiff in the terms and conditions of her employment and subjected Plaintiff to further harassment because she engaged in the above-described statutorily-protected activities. For example, Defendant, among other things, failed to follow its own policies regarding discipline and subjected Plaintiff to altered terms of conditions of employment when Defendant's investigation of Plaintiff's repeated complaints resulted in Defendant concluding that Plaintiff should be subject to heightened and/or disproportionate

discipline for manufactured conduct. Defendant further failed and refused to take corrective action that would prevent Plaintiff from being subjected to further harassment.

68. A casual connection exists between Plaintiff's protected activities and Defendant's unlawful retaliation.

69. Due to Defendant's retaliatory conduct and refusal to take any corrective action to prevent Plaintiff from being subjected to further harassment, Defendant constructively terminated Plaintiff because she engaged in the aforementioned protected activities.

70. In unlawfully discriminating and retaliating against Plaintiff, Defendant acted willfully, wantonly, and/or with malice or with conscious and/or reckless indifference to Plaintiff's equal rights under law, thereby necessitating the imposition of exemplary damages.

71. As a result of Defendant's retaliatory conduct, Plaintiff has suffered loss of income, emotional pain and suffering, embarrassment, and inconvenience and she is entitled to general and special damages, and economic damages including front and back pay. Plaintiff is also entitled to and seeks her attorneys' fees and costs pursuant to 42 U.S.C. §2000e-5(k).

THIRD CLAIM FOR RELIEF

(Discrimination Based on Gender and Sexual Orientation in Violation of the Colorado Anti-Discrimination Act, C.R.S. § 24-34-301, *et seq.* as to Defendant WFM)

72. Plaintiff incorporates by reference the above paragraphs as though set forth separately herein.

73. Defendant subjected Plaintiff to less favorable terms and conditions of employment based on her sexual orientation and WFM's perception of Plaintiff's sexual orientation, including, but not limited to, by: subjecting her to sufficiently severe or pervasive harassment based on her gender and sexual orientation so as to alter the conditions and terms of her employment; condoning or tolerating such harassment and failing to act to protect Plaintiff after she reported the same; retaliating against Plaintiff and subjecting her to less favorable terms and conditions of

employment by imposing heightened and/or disproportionate discipline; and constructively terminating Plaintiff.

74. Plaintiff registered a complaint regarding the gender and sexual orientation harassment with the appropriate authority at her workplace, general manager Omar Ruiz, and Mr. Ruiz failed to conduct a reasonable investigation of the complaint and then failed and refused to take prompt remedial action to protect Plaintiff from further harassment and retaliation.

75. Defendant's above-described conduct constituted discrimination based on Plaintiff's gender (female) and her sexual orientation (homosexual) in violation of CADA.

76. In unlawfully discriminating and retaliating against Plaintiff, Defendant acted willfully, wantonly, and/or with malice or with conscious and/or reckless indifference to Plaintiff's equal rights under law, thereby necessitating the imposition of exemplary damages.

77. As a direct and proximate result of WFM's actions, Plaintiff has suffered damages, including lost wages and benefits, emotional pain and suffering, embarrassment, and inconvenience and she is entitled to such general and special damages, economic damages, punitive damages and attorneys' fees and costs as permitted by law.

FOURTH CLAIM FOR RELIEF
(Retaliation in violation of the Colorado Anti-Discrimination Act, C.R.S. § 24-34-301, et seq. as to Defendant WFM)

78. Plaintiff incorporates by reference the above paragraphs as though set forth separately herein.

79. Plaintiff participated in statutorily protected activity by opposing unlawful practices under CADA, including discrimination and harassment based on Plaintiff's sexual orientation, sex, and her failure to conform to stereotypical gender roles.

80. As a result of Plaintiff's protected opposition to discrimination and harassment, WFM retaliated against her by subjecting her to less favorable terms and conditions of employment

as described in this Complaint, including imposing heightened discipline against Plaintiff, condoning or tolerating harassment, and constructive termination.

81. In unlawfully discriminating and retaliating against Plaintiff, Defendant acted willfully, wantonly, and/or with malice or with conscious and/or reckless indifference to Plaintiff's equal rights under law, thereby necessitating the imposition of exemplary damages.

82. As a direct and proximate result of WFM's above-described conduct, Plaintiff has suffered damages, including lost wages and benefits, emotional pain and suffering, embarrassment, and inconvenience, and she is entitled to such general and special damages, economic damages, punitive damages and attorneys' fees and costs as permitted by law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in her favor against Defendant and order the following relief as allowed by law:

- A. Compensatory damages, including but not limited to those for emotional distress, inconvenience, mental anguish, and loss of enjoyment of life;
- B. Back pay and benefits;
- C. Front pay and benefits;
- D. Punitive damages;
- E. Attorneys' fees and costs of this action as permitted by law;
- F. Pre-judgment and post-judgment interest at the highest lawful rate; and
- G. Such further relief as this Court deems just and proper.

JURY TRIAL DEMAND

Plaintiff requests a trial by jury on all issues so triable.

Respectfully submitted this 21st day of September, 2016.

HKM EMPLOYMENT ATTORNEYS LLP

By: *s/ Shelby Woods* _____

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