

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

FILED

FEB 27 2008

WILLIAM B. GUTHRIE Clerk, U.S. District Court By Deputy Clerk

DEBORAH METCALF,

Plaintiff,

v.

WAL-MART STORES EAST, L.P., BLAINE HAJOK, and NORMAN JOHNSON,

Defendants.

Case No. CIV 08 - 074 - JHP

JURY TRIAL DEMANDED

COMPLAINT

COMES NOW the Plaintiff, Deborah F. Metcalf, through her attorneys of record, Donald M. Bingham, Peter W. Brolick, and Vaughn Iskanian of the law firm of Riggs, Abney, Neal, Turpen, Orbison and Lewis, PLLC, and for her cause of action against Defendants, Wal-Mart Stores East, L.P., Norman Johnson, and Blaine Hajok, alleges and states as follows:

Parties

- 1. Plaintiff is an individual residing in Vian, Sequoyah County, Oklahoma.
2. Defendant Wal-Mart East, L.P. ("Wal-Mart"), is and, at all pertinent times, was a corporation organized and existing under the laws of the State of Arkansas. Wal-Mart Store No. 47, the place of Plaintiff's employ at all times pertinent to this cause of action, is located in Sallisaw, Sequoyah County, Oklahoma.
3. Defendant Norman Johnson is an individual residing in Poteau, LeFlore County, Oklahoma, and was, at all times material to this cause of action, employed as the Pharmacy Manager of the Pharmacy Department of Wal-Mart Store #47.

consent form given

4. Blaine Hajok is an individual who resides in Bentonville, Benton County, Arkansas.

Jurisdiction and Venue

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1331. Plaintiff's federal cause of action for retaliatory discharge is authorized by the False Claims Act, 31 U.S.C. §3730(h).

6. This Court has supplemental jurisdiction over this action pursuant to 28 U.S.C. §1367. Plaintiff's state cause of action for wrongful discharge is authorized by *Burk v. K-Mart Corp.*, 770 P.2d 24 (Okla. 1989).

7. Venue in this Court is proper pursuant to 28 U.S.C. § 1391. A substantial part of the events and omissions giving rise to Plaintiff's claims occurred in and around Sallisaw, Sequoyah County, State of Oklahoma, which lies within this judicial district.

Factual Statement

8. Ms. Metcalf began working for Wal-Mart as a regular, full-time employee in June of 2003. From the date on which Ms. Metcalf's employment with Wal-Mart commenced until and including the date on which she was fired, she was an at-will employee of Wal-Mart.

9. Ms. Metcalf initially began working as a store sales clerk but requested and was subsequently granted a transfer to the pharmacy department of Wal-Mart Store No. 47 ("the Pharmacy"), where she worked as a pharmacy technician.

10. During the times pertinent to this cause of action, Mr. Johnson was a pharmacist employed by Wal-Mart, who exercised managerial authority over the

Pharmacy. During the course of Ms. Metcalf's employment at the Pharmacy, Mr. Johnson was her immediate supervisor, as the pharmacy manager.

11. At all times and instances material to this action, Mr. Johnson acted within the scope of his employment authority in exercising control over Pharmacy employees.

12. At all times and instances material to this action, Mr. Hajok acted within the scope of his employment authority in exercising supervisory authority, as the district manager, over Wal-Mart Store No. 47.

13. On or about the year 2001, the Pharmacy became a participant in the Special Supplemental Nutrition Program for Women, Infants, and Children ("WIC"), a program funded by grants from the United States Department of Agriculture, pursuant to 42 U.S.C. § 1786 *et seq.* and 7 C.F.R. § 246.1 *et seq.*, and administered in Oklahoma by the State Department of Health ("OSDH").

14. The WIC program was intended to provide nutritional supplements and education to women, infants, and children who were deemed to be in need of such assistance by the federal government, according to income data and nutritional criteria established by the government.

15. Most of the WIC products sold from the Pharmacy were cans of infant formula, "Enfamil Kindercal Beverage" ("Kindercal").

16. Kindercal could be purchased from the Pharmacy by WIC participants, as well as those who did not participate in WIC.

17. At all pertinent times, an individual who was eligible for benefits under WIC ("the Customer") would receive a pre-printed WIC food instrument ("WIC voucher" or "voucher") from OSDH. Each voucher was authorized for a predetermined

amount of money (“Maximum Retail Value”), printed on its face, and was intended to be used for the purchase of a specified number of cans of infant formula. The number of cans to be purchased with each voucher was pre-determined by OSDH, and that number was also printed on each voucher.

18. When the Customer desired to purchase cans of Kindercal at the Pharmacy supervised by Mr. Johnson, the Customer would go to the check-out area of the Pharmacy, ask to purchase cans of Kindercal, and present a voucher as a method of payment.

19. At all pertinent times, the applicable state and federal WIC laws and regulations, administered at the local level by OSDH, required the retail stores participating in WIC to follow specified procedures and to meet specified requirements in receiving such payment and in submitting to OSDH the voucher used in each transaction. Wal-Mart was obligated, by law and/or contract, to honor and comply with each requirement, policy, and procedure that OSDH imposed as a condition of participation in WIC.

20. The proper WIC procedure required each store receiving a WIC voucher as payment for the purchase of Kindercal to calculate the sum total of the purchase price (“Actual Purchase Price”) of each sale (i.e., multiply the number of cans actually purchased, as provided on the voucher, by the price charged by the retailer to the general public) and write such amount accurately on the voucher. Following such a sale, the store was required to forward to OSDH the voucher received as payment from the Customer (or a copy thereof). In turn, OSDH would reimburse the store the Actual Purchase Price on the voucher, regardless of the Maximum Retail Value of the voucher.

21. In calculating the Maximum Retail Value to be printed on each voucher, OSDH intentionally set its estimate of the current price per can higher than the average market price for a single can, to ensure that the Maximum Retail Value printed on the voucher would be sufficient to purchase the pre-determined number of cans, regardless of fluctuations in the actual retail price per can at the stores of each vendor participating in WIC.

22. From the inception of Wal-Mart's participation in the WIC program, Mr. Johnson directed the employees within the Pharmacy to process WIC vouchers in contravention of the mandated OSDH and federal government WIC procedures.

23. Mr. Johnson and/or other individuals employed by Wal-Mart conceived of a plan to manipulate the Actual Purchase Price of each WIC transaction in a manner that would result in the Actual Purchase Price being artificially increased to be equal to the Maximum Retail Value printed on each voucher ("Scheme").

24. The Scheme consisted of dividing the Maximum Retail Value amount printed on each voucher by the number of cans specified on each voucher. Thus, this Scheme resulted in the Actual Purchase Price of the product equaling the Maximum Retail Value printed on each voucher.

25. Because WIC participants would be charged an amount greater than the Actual Purchase Price of the cans, this Scheme resulted in WIC Customers being charged a greater amount than a customer not participating in the WIC program would have been charged, had they purchased the very same product from the Pharmacy.

26. As a result of such manipulation, the Pharmacy submitted fraudulently manipulated vouchers and cash-register tapes to OSDH for reimbursement under WIC.

27. This Scheme was already under way on May 1, 2004, when Ms. Metcalf was first assigned to work in the Pharmacy, and continued at least until the late spring or early summer of 2006.

28. In manipulating the Pharmacy cash-register in this manner, and in knowingly submitting to OSDH both cash-register tapes and handwritten amounts on the vouchers that were false, Mr. Johnson and Wal-Mart knew that OSDH would rely on the accuracy and integrity of each submission in deciding how much to reimburse Wal-Mart for each WIC transaction involving Kindercal.

29. Through the actions of its employees, Wal-Mart intended to deceive OSDH and, as a result of the execution of this Scheme in such manner, OSDH was deceived.

30. Acting in reliance on these WIC-related documents submitted by Wal-Mart, OSDH unknowingly reimbursed Wal-Mart for claimed sale-amounts that in fact had been deliberately inflated by Wal-Mart, at least with regard to Kindercal, thereby causing OSDH to spend an unnecessary and unjustified amount of federal public money and state resources.

31. The planning and execution of this Scheme violated certain Oklahoma criminal statutes, including without limitation 21 O.S. §§ 21, 28, 42, 44, 171, 172, 173, 175, 358, 359, 421, 424, 425, 1541.1, 1541.2, 1542, 1573, 1589, 1590, 1634, 1635, 1636, 1701, 1704, 1705, 1706.

32. The planning and execution of this fraudulent Scheme also constituted tortious misconduct and breach of Wal-Mart's duty not to deceive public officials and the

State of Oklahoma. Certain Oklahoma civil statutes clearly prohibit deceit, whether committed by an individual or a company, including without limitation 76 O.S. §§ 1-4.

33. By and through its employees, Wal-Mart caused certain Pharmacy staff members to assist in perpetrating this Scheme.

34. Ms. Metcalf became aware of this Scheme while being trained in the procedures of processing WIC vouchers.

35. Ms. Metcalf realized its fraudulent nature by investigating further and discovering the actual process through which WIC vouchers were supposed to be processed by Wal-Mart. Despite the direction of her Wal-Mart supervisor, Ms. Metcalf refused to perpetuate the fraudulent Scheme and violate the relevant federal and state laws and regulations.

36. Ms. Metcalf reasonably and in good faith believed that Wal-Mart was committing fraud against the government.

37. While still employed by Wal-Mart, Ms. Metcalf reported the Scheme to OSDH and to a Wal-Mart ethics hotline.

38. Ms. Metcalf made these reports herself and/or with the assistance of her husband.

39. Later in her employment with Wal-Mart, Ms. Metcalf reported the fraudulent activity to Mr. Johnson's supervisor, Defendant, Blaine Hajok, in person.

40. Mr. Johnson was present while Ms. Metcalf made this report to Mr. Hajok.

41. During this conversation, Ms. Metcalf also informed Mr. Hajok and Mr. Johnson that she had made reports internally and externally about the unlawful Scheme.

42. Pursuant to Ms. Metcalf's report to the Wal-Mart ethics hotline, Wal-Mart conducted an internal investigation regarding the allegations of the Scheme and officially found no improper practice by Wal-Mart and/or its employees in processing WIC vouchers.

43. However, around or shortly after Ms. Metcalf's complaints, the Pharmacy was required to change its formerly fraudulent practice of processing vouchers into the proper steps mandated to be followed by the OSDH and the federal government.

44. This change in procedure was caused, at least in part, by Ms. Metcalf's complaints.

45. Although Wal-Mart had knowledge that the Scheme had wrongfully benefited Wal-Mart and/or that Wal-Mart had wrongfully overcharged the OSDH, as of the date of the filing of this Complaint, Wal-Mart has not voluntarily and/or without an audit conducted by OSDH, repaid all of the overcharges to OSDH, which occurred prior to the change in procedure referenced in ¶ 43, thereby acting in concert with its employees to conceal the Scheme.

46. In retaliation of Ms. Metcalf's complaints, Wal-Mart devised a plan to terminate Ms. Metcalf. Mr. Hajok and/or other employees of Wal-Mart with supervisory authority instructed Wal-Mart Pharmacy employees to create and maintain records of any action which could be seized upon to attempt to justify Ms. Metcalf's termination.

47. As a result, many of the employees created and submitted written reports of various allegations and descriptions of alleged improper conduct by Ms. Metcalf.

48. These complaints and allegations were stored in a file, cabinet, or a similar storage area, designated specifically to store such complaints against Ms. Metcalf.

49. The employees of the Pharmacy, either pursuant to a directive from Mr. Hajok or another employee of Wal-Mart, called this file the “Cover Your Own Butt” or “C.Y.O.B.” file.

50. On July 25, 2006, Wal-Mart discharged Ms. Metcalf because of her reporting and investigating the fraudulent Scheme of processing the WIC vouchers. This discharge was conducted under the faulty guise of Ms. Metcalf allegedly making a racially insensitive remark to a coworker. However, there is no evidence to indicate that prior to the alleged incident, while working at Wal-Mart, Ms. Metcalf had done or said anything which would indicate she was a racist or prejudiced against non-Caucasians. Further, Norman Johnson has admitted that he does not believe Ms. Metcalf is a racist.

51. At all pertinent times, the individuals who caused the termination of Ms. Metcalf’s employment with Wal-Mart were themselves employees of Wal-Mart, and in so doing, each of them acted within the scope of his or her employment with Wal-Mart.

52. Mr. Johnson and/or Mr. Hajok and/or other, yet unknown, representatives of Wal-Mart were significant causative factors in Wal-Mart’s decision to terminate Ms. Metcalf’s employment due to her reporting of the fraudulent Scheme of processing the WIC vouchers.

53. Prior to the date on which she was fired, Wal-Mart had negligently retained Mr. Johnson as its employee and/or had negligently retained him in a position of authority over Ms. Metcalf.

Statement of Claims

Claim I.

False Claims Act Retaliatory Discharge

54. Plaintiff was discharged from her employment, at least in part, because of lawful actions undertaken by her in furtherance of an action under the False Claims Act, 31 U.S.C. §3729, *et seq.*

55. Defendants became aware of Ms. Metcalf's reporting and investigation of the Scheme and retaliated against Ms. Metcalf by discharging her from her employment at Wal-Mart.

56. The discharge of Ms. Metcalf by Wal-Mart was motivated, at least in part, by her lawful actions in furtherance of an action under the False Claims Act and constitutes a retaliation in violation of the False Claims Act, 31 U.S.C. §3730(h).

57. As a result of such wrongful discharge, Ms. Metcalf has suffered and continues to suffer significant harm, including, without limitation, loss of employment, loss of earnings, mental distress, loss of earning capacity, loss of job-related benefits, and other cognizable harm, for which she should be compensated in damages.

Claim II

Oklahoma Common Law Wrongful Discharge

(Count 1)

58. Plaintiff was an at-will employee of Wal-Mart.

59. Plaintiff was discharged from her employment because she complained about and refused to engage in the fraudulent Scheme of processing WIC vouchers.

60. Oklahoma has a clearly-established, well-defined public policy that an employee should refuse to commit a crime requested or required by his or her employer.

Additionally, the WIC program is one funded by public funds, for the benefit of those parents, infants, and children who need such assistance for their daily subsistence. Where the public interest is so closely entwined with the unlawful and fraudulent activity, as is the case with the WIC program, Oklahoma public policy further supports the protection of whistleblowers who make internal and external reports. Society also encourages an employee to report, both internally and externally, the commission of a crime by his or her employer, if the crime is not merely an internal matter affecting only the employer's interests. Oklahoma public policy includes this principle and such reporting is protected under the common law of Oklahoma. Oklahoma statutes and judicial decisions made these public policies clear well prior to July 25, 2006. In considering whether to fire Ms. Metcalf, Wal-Mart knew that her discharge would violate or undermine these public policies.

61. An Oklahoma employer incurs liability for terminating the employment of an individual hired at will, if a significant motivating factor in the decision to terminate was a reason that is contrary to the public policy of Oklahoma.

62. At all pertinent times, Wal-Mart owed Ms. Metcalf a common-law duty not to discharge her because she refused to commit, or to aid in the commission of, a crime and/or because she reported the commission of a crime internally, to upper management within Wal-Mart's own organization, and/or disclosed the same to an appropriate agency of state government.

63. Wal-Mart breached its duties to Ms. Metcalf by discharging her in retaliation for her refusal to participate in the fraud being perpetrated at the Pharmacy and/or because she reported the criminal activity internally and/or externally.

64. A significant motivating factor in Wal-Mart's decision to fire Ms. Metcalf was a desire to punish her for her refusal to perpetuate the Scheme and/or for her internal and/or external reporting of same. In addition, her discharge was intended to deter other employees of Wal-Mart from engaging in conduct similar to that of Ms. Metcalf in upholding the public policy of Oklahoma.

65. Wal-Mart's actions in discharging Ms. Metcalf for refusing to violate WIC laws and regulation and for reporting violations of WIC laws and regulations constitute a wrongful discharge under Oklahoma common law.

66. As the direct result of Wal-Mart's breach of these duties, Ms. Metcalf has suffered and continues to suffer significant harm, including, without limitation, loss of employment, loss of earnings, mental distress, loss of earning capacity, loss of job-related benefits, and other cognizable harm, for which she should be compensated in damages.

(Count 2)

67. Oklahoma has a clearly-established, well-defined public policy that an employee who discloses internally and/or externally a pharmacist's conduct that violates the Oklahoma Pharmacy Act and/or the rules promulgated thereunder should not be discharged for making such disclosures. This public policy is embodied and reflected in the Oklahoma Pharmacy Act, 59 O.S. § 353 *et seq.* ("the Act"), and in regulations enacted by the Oklahoma State Board of Pharmacy ("the Board") under the authority of the Act.

68. During her employment with Wal-Mart, Ms. Metcalf disclosed internally and/or externally that Mr. Johnson had violated or caused violations of Pharmacy customers' privacy rights, the Oklahoma Pharmacy Act, and/or one or more of the

Board's regulations. Ms. Metcalf reasonably believed that the professional misconduct which she reported constituted one or more violations of the privacy rights of Oklahoma citizens, Oklahoma pharmacy laws, and/or the Board's regulations. At least some of the conduct disclosed by her did constitute a violation of the Act and/or the Board's regulations, including without limitation 59 O.S. §§ 353.13(A), 353.13(E), 353.17(A), 353.26(A)(1)(e), 353.26(A)(1)(h), 353.29(A), and/or individual privacy rights recognized by Oklahoma law.

69. Pursuant to 59 O.S. § 353.25(A), the violation of any provision of the Oklahoma Pharmacy Act for which no penalty is specifically provided constitutes a misdemeanor. The disclosures by Ms. Metcalf of Mr. Johnson's professional misconduct, disregard for personal privacy, and violation of Oklahoma pharmacy laws were made in good faith and were reasonable under the circumstances. Accordingly, Ms. Metcalf's reports of same were privileged, and she was entitled not to forfeit her employment because she had made such reports.

70. Under the common law of Oklahoma, Wal-Mart had a duty not to discharge Ms. Metcalf because she disclosed such matters. Wal-Mart breached this duty owed to Ms. Metcalf and in retaliation for her conduct in making the disclosures Wal-Mart fired her. In terminating the employment of Ms. Metcalf, Wal-Mart violated and undermined the Oklahoma public policies that encourage citizens to report not only privacy violations and criminal activity but also conduct that is or may be violative of standards and regulations governing the practice of pharmacy, which has been declared to be a profession. 59 O.S. § 353(C).

71. As the direct result of Wal-Mart's breach of this duty and its decision to discharge Ms. Metcalf, she has suffered and continues to suffer significant harm, including, without limitation, loss of employment, loss of earnings, mental distress, loss of earning capacity, loss of job-related benefits, and other cognizable harm, for which she should be compensated in damages.

Claim III
Common-Law Negligence

72. Wal-Mart owed Ms. Metcalf a duty to exercise reasonable care in both hiring and retaining supervisory personnel who would exercise authority over Wal-Mart's pharmacies, including a duty to exercise reasonable care in its supervision of the individuals who were placed in charge of the Pharmacy.

73. Wal-Mart breached its duties owed to Ms. Metcalf, in that Wal-Mart negligently hired, retained, and/or supervised Mr. Johnson in his position of authority over Ms. Metcalf.

74. As a result of Wal-Mart's breach of these duties, Ms. Metcalf suffered and continues to suffer significant harm, including, without limitation, loss of employment, loss of earnings, mental distress, loss of earning capacity, loss of job-related benefits, and other cognizable harm, for which she should be compensated in damages.

Claim IV
Tortious Interference with Employment and Prospective Economic Advantage

75. Under the common law of Oklahoma, Mr. Johnson and Mr. Hajok, individually, owed Ms. Metcalf the duty to refrain from interfering with her Wal-Mart employment and prospective economic advantage unless each of them was privileged to do so and only if he did so without malice and without using improper means.

76. Mr. Johnson and Mr. Hajok breached this duty on and prior to July 25, 2006, when each of them, acting individually and/or in concert with one or more employees of Wal-Mart, tortuously interfered with Ms. Metcalf's Wal-Mart employment and prospective economic advantage and caused or were a part of causing Ms. Metcalf's discharge from the Pharmacy. In causing such discharge, Mr. Johnson and Mr. Hajok did so with improper motives and intent and accomplished the interference with Ms. Metcalf's employment and prospective economic advantage by using improper means.

77. As a result of Mr. Johnson's breach of this duty, Ms. Metcalf has suffered and continues to suffer significant harm, including, without limitation, loss of employment, loss of earnings, mental distress, loss of earning capacity, loss of job-related benefits, and other cognizable harm, for which she should be compensated in damages.

Claim V
Punitive Damages

78. Wal-Mart's decision to discharge Ms. Metcalf was retaliatory, was contrary to Oklahoma public policy, and was made with malice. Firing Ms. Metcalf was done with intent to discourage other employees of Wal-Mart from reporting or disclosing misconduct on the part of management and corporate criminal activity. Accordingly, Wal-Mart should be assessed exemplary damages, in an amount sufficient to punish Wal-Mart and to deter other Oklahoma employers from engaging in similar oppression.

79. Mr. Johnson and/or Mr. Hajok's interference with Ms. Metcalf's employment was done maliciously and with the intent to punish her for her refusal to assist in the commission of a crime and/or for making internal and external reports disclosing the Scheme. In so doing, Mr. Johnson and Mr. Hajok also wanted to deter

other employee's of Wal-Mart from engaging in conduct similar to that of Ms. Metcalf in upholding the public policy of Oklahoma. Because Mr. Johnson and/or Mr. Hajok acted with malice and with intentional or callous disregard for the rights of Ms. Metcalf, they should each be assessed punitive damages in an amount sufficient to punish them and to deter other Oklahoma managers and supervisors from engaging in similar oppression.

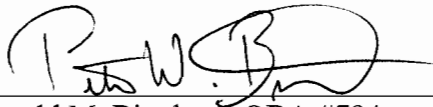
Relief Requested

WHEREFORE, Plaintiff requests the following relief:

- a. An award of two times the amount of lost back pay against Defendants and interest on the back pay pursuant to her claim for wrongful discharge under the False Claims Act; or an award of lost back pay against Defendants pursuant to the tort claims of common law wrongful discharge, tortious interference, negligent hiring and supervision, and compensation for all lost benefits.
- b. An award of compensatory damages against all Defendants for Plaintiff's emotional distress, mental anguish, embarrassment, and loss of enjoyment of life.
- c. An award of punitive damages against all Defendants pursuant to Plaintiff's tort claims for wrongful discharge, negligent hiring and supervision, and tortious interference with Plaintiff's employment and prospective economic advantage.
- d. An award of pre-judgment interest, costs and expenses of this action, and reasonable attorney's fees pursuant to 31 U.S.C. §3730(h) and other applicable provision of law.
- e. An award of such further relief the court deems just and equitable.

Respectfully submitted,

DEBORAH METCALF, Plaintiff

By 

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