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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JAMES BURHANS on behalf of himself and all others similarly situated,

Plaintiff,

v.

FARMERS INSURANCE EXCHANGE and DOES 1-50, inclusive,

Defendant.

Case No.:

COMPLAINT

1) Disability Discrimination in Violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*;

2) Disability Discrimination in Violation of NRS § 613.330; and

3) Interference with Family Medical Leave Act Rights in Violation of 29 U.S.C § 2601 *et seq.*

JURY TRIAL DEMANDED

COMES NOW Plaintiff JAMES BURHANS ("Plaintiff") on behalf of himself and all others similarly situated and alleges the following:

All allegations in this Complaint are based upon information and belief except for those allegations that pertain to the Plaintiff named herein and his counsel. Each allegation in this Complaint either has evidentiary support or is likely to have evidentiary support after a reasonable opportunity for further investigation and discovery.

INTRODUCTION

1. Plaintiff James Burhans is an individual with a recognized physical disability who was employed by Defendant Farmers Insurance Exchange as an insurance adjuster for more than

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twenty-six years. Plaintiff received positive performance reviews throughout his employment until the onset of his disability in the final years of his employment. In mid-2015, Plaintiff suffered a series of injuries and conditions that required medical treatment and affected his ability to perform his job duties without accommodation. In particular, Plaintiff was diagnosed with carpal tunnel syndrome in both wrists, and his treating physician placed him on a medical restriction limiting his work to five hours per day. Plaintiff notified Defendant of his disability and need for accommodation, and Defendant agreed to partially limit the work assigned to Plaintiff. However, Defendant refused to limit Plaintiff's work to only five hours per day, as recommended by Plaintiff's treating physician, and instead continued to assign Plaintiff a volume of work that took six to seven hours per day to complete. Defendant then disciplined Plaintiff for not completing the assigned six to seven hours of work per day and ultimately terminated Plaintiff based on his inability to work more than 5 hours per day due to his disability. Defendant terminated Plaintiff immediately after Plaintiff underwent surgery to alleviate the effects of his disability and following by a period of FMLA-covered leave. Plaintiff brings this action under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, NRS § 613.330, NRS § 613.420, and the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.*, seeking redress for Defendant's failure to provide him with reasonable accommodations, terminating his employment on the basis of his disability, and interfering with his right to leave under the FMLA.

JURISDICTION AND VENUE

2. This Court has original jurisdiction over the federal claims alleged herein. *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); *see also* 29 U.S.C. §794a(2), 29 U.S.C. § 2617(a)(2), and 42 U.S.C. § 2000e-5(f)(3).

3. This Court has supplemental jurisdiction over the state law claims alleged herein as arising from the same transaction or occurrence—i.e., disability discrimination against Plaintiff in his employment with Defendant.

4. Because Plaintiff's claims under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA") and Family Medical Leave Act Rights in Violation of 29 U.S.C § 2601 *et*

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seq. ("FMLA") arise under federal law, this Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331. In addition, this Court has supplemental jurisdiction under 28 U.S.C. § 1367 over Plaintiff's Nevada state law claims because those claims derive from a common nucleus of operative fact regarding Defendants' unlawful treatment of Plaintiff in connection with his disability, and form part of the same case and controversy.

5. Federal and state law provide bases for attorney fees and costs in actions under the ADA, FMLA, and NRS § 613.330. *See* 29 U.S.C. § 2617(a)(2) ("The court in such an action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action to be paid by the defendant."); *see also* 29 U.S.C. §794(b); NRS § 613.420.

6. Venue is proper in this Court because many of the acts complained of herein occurred in this district, because Plaintiff was employed by Defendant to work in this district, and because Defendant actively conducts business in this district.

7. On April 22, 2016 and June 9, 2016, Plaintiff filed Charges of Discrimination on the basis of disability against Defendant with the Nevada Equal Rights Commission ("NERC"). A true and correct copy of Plaintiff's June 9, 2016 Charge is attached as Exhibit A.

8. On November 13, 2018, DETR dismissed Plaintiff's Charge and provided him with a notice of his right to seek administrative review of the dismissal or to file a civil action.

9. On March 28, 2019, the Equal Employment Opportunity Commission ("EEOC") adopted DETR's findings regarding Plaintiff's Charge and issued Plaintiff a Dismissal and Notice of his right to sue in federal or state court within ninety days of Plaintiff's receipt of the Notice. A true and correct copy of the Notice is attached as Exhibit B.

10. Plaintiff exhausted his administrative remedies under the ADA and NRS § 613.330 against Defendant.

11. Plaintiff files this Complaint under the ADA against Defendant within ninety days of his receipt of the EEOC Notice.

12. There is no administrative exhaustion requirement for Plaintiff's FMLA claims against Defendant. *Id*. § 2617(a)(2).

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PARTIES

13. Plaintiff JAMES BURHANS is a natural person who is and was a resident of the State of Nevada at all relevant times herein and was employed by Defendant as an insurance adjuster in Reno, Nevada from on or about August 16, 1990 to on or about October 17, 2016.

14. Defendant FARMERS INSURANCE EXCHANGE (hereinafter "Defendant" or "Farmers") is a reciprocal insurer organized under California Insurance Code Section 1300 *et. seq*., with a principal place of business at 6301 Owensmouth Ave., Woodland Hills, CA 91367. Farmers, together with its subsidiaries and affiliates, provides automobile, homeowners, personal umbrella, and business owners insurance throughout Nevada and the United States. During the relevant period, Farmers was an "employer" of Plaintiff under the relevant provisions of state and federal law.

15. The identity of DOES 1-50 is unknown at this time and this Complaint will be amended at such time when the identities are known to Plaintiff. Plaintiff is informed and believes that each Defendant sued herein as DOE is responsible in some manner for the acts, omissions, or representations alleged herein and any reference to "Defendant," "Defendants," or "Farmers" herein shall mean "Defendants and each of them."

FACTUAL ALLEGATIONS

16. Plaintiff was employed by Defendant as an Insurance Adjuster in Reno, Nevada from on or about August 16, 1990 to on or about October 17, 2016.

17. Defendant promoted Plaintiff multiple times during his career. Specifically, Defendant promoted Plaintiff to Claims Representative in 1991, to Senior Claims Representative in 1993, and to Special Claims Representative Liability in 1996—the position held by Plaintiff until his termination in 2016.

18. Plaintiff received positive performance reviews throughout his employment until the onset of his disability.

19. In mid-2015, Plaintiff suffered a series of injuries and conditions that required medical treatment and affected his ability to perform his job duties without accommodation.

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20. In particular, Plaintiff began experiencing increasing work and life disruption from several recognized disabilities, including ongoing effects from a meniscal tear in Plaintiff's right knee, neural foraminal narrowing, and carpal tunnel syndrome in both wrists, which Plaintiff's treating physician diagnosed as qualifying disabilities under the ADA.

21. Plaintiff took several periods of qualifying and approved FMLA leave in connection with these disabilities.

22. Plaintiff's disabilities—in particular, his carpal tunnel syndrome, interfered with his ability to type, click, and work on his computer for extended periods of time.

23. Because Plaintiff's work routinely required Plaintiff to type, click, and work on his computer for extended periods of time, Plaintiff began to fall behind on tasks that he could not complete due to the limitations imposed by his disability.

24. Defendant disciplined Plaintiff on several occasions for falling behind on his work, even though Plaintiff's disability and the lack of a reasonable accommodation were the only reasons why Plaintiff was behind in his work.

25. Plaintiff continued to seek medical treatment for his disability, and in early 2016, Plaintiff's treating physician recommended that Plaintiff's work be limited to a set number of hours per day to accommodate his disability.

26. After briefly imposing 4 and 6-hour restrictions, Plaintiff's treating physician ultimately determined that Plaintiff's work should be limited to no more than 5 hours per day to accommodate his disability.

27. Plaintiff notified Defendant of his 5 hour per day work limitation and requested that Defendant provide a reasonable accommodation in line with this limitation.

28. While Defendant agreed to reduce Plaintiff's hours, Defendant nonetheless refused to limit Plaintiff's hours to 5 per day.

29. Instead, Defendant simply cut Plaintiff's work assignments to 62% (5/8) of his normal workload.

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30. Defendant's decision to cut work assignments to 62% of Plaintiff's normal workload appears to rest on the unsupported and factually incorrect premise that Defendant's insurance adjusters only worked 8 hours a day for a total of no more than 40 hours per week.

31. In reality, insurance adjusters were required to work and did work significantly more than 8 hours in a day and 40 hours in a week.

32. Plaintiff's normal workload required him to work between 9 to 12 hours per day, and Plaintiff often performed additional work on weekends, holidays, and vacation days.

33. In addition, Defendant assigned work through an automated work assignment program that did not reduce the volume of work assignments to account for vacation or holidays.

34. Because Plaintiff normally worked 9 to 12 hours per day, Defendant's decision to cut Plaintiff's work assignments to 62% of his normal workload meant that Defendant was still assigning Plaintiff approximately 6 to 7 hours of work per day.

35. Plaintiff repeatedly explained to Defendant that his restriction was for 5 hours of work per day, not 62% time.

36. For example, Plaintiff explained this distinction in a May 18, 2016 email to Defendant, and also explained the impact that Defendant's ineffective accommodation was having on his ability to complete required work. In this email, Plaintiff reiterated his request for a reasonable accommodation that actually reflected the 5-hour work limitation imposed by his treating physician.

37. In responding to Plaintiff's email, Defendant refused to limit Plaintiff's hours to a true 5-hour per day commitment and explained only that: "The company is accommodating your work restriction by limiting the amount of new claims you get in accordance with the five out of eight work restriction. We reviewed your new assignments as compared to your peers and are comfortable that the implemented work reduction plan is commensurate with your restriction. With that in mind, we are not going to further reduce your new assignments. Your daily claim handling activities need to be in accordance with our claim handling strategies." A true and correct copy of this email exchange is attached as Exhibit C.

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38. At no point since the onset of Plaintiff's disability has Defendant explained or indicated why it would not limit Plaintiff's work to 5 hours per day other than its vague reference to business concerns regarding its "claims handling strategies."

39. At no point since the onset of Plaintiff's disability has Defendant indicated that it could not limit Plaintiff's work to 5 hours per day or that such a limitation would impose an undue hardship on the operation of the business.

40. Following the email exchange summarized above, Plaintiff continued to plead for a reasonable accommodation in the form of a 5-hour limitation on his workday.

41. Without further explanation, Defendant continued to deny Plaintiff's requests.

42. For example, in an August 24, 2016 email, Defendant recognized that a full time work load required Plaintiff and other claims adjusters to work more than 8 hours in a day, but nonetheless reiterated that Defendant would only reduce Plaintiff's schedule to 62% of his normal workload, as opposed to an actual 5-hour per day limitation on work: "With respect to the workplace challenges you cited, that are causing you to work in excess of 5 hours per day, those are challenges facing all claims representatives on a daily basis (ie. computer issues). It has never been our practice to adjust work load, schedules, or job responsibilities' as a result of such challenges."

43. As Plaintiff appropriately responded to the above email, Defendant's representation that "'It has never been our practice to adjust work load, schedules, or job responsibilities' as a result of such challenges' does not apply to [Plaintiff's] situation. 5 hrs. is 5 hrs. Giving me much more than 5 hrs. and saying it should be done in 5 hrs. is not honoring the accommodation."

44. Defendant's past business "practice" and "claims handling strategies" do not justify its refusal to accommodate Plaintiff with a 5-hour workday.

45. Because Plaintiff adhered to his medically imposed 5-hour work restriction, he continued to fall further behind as Defendant continued to assign him 6 to 7 hours of work per day.

46. Defendant continued to discipline and ultimately terminated Plaintiff on this basis.

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47. On September 7, 2016, Plaintiff took a leave of absence to undergo surgery for his carpal tunnel syndrome.

48. Plaintiff's surgery required a recovery period of medical leave, which kept Plaintiff out of work until October 17, 2016, at which point Defendant terminated Plaintiff's employment.

FIRST CAUSE OF ACTION

Disability Discrimination in Violation of the ADA, 42 U.S.C. § 12101 *et seq*.

49. Plaintiff realleges and incorporates by this reference all the paragraphs above in this Complaint as though fully set forth herein.

50. Under the Americans with Disabilities Act ("ADA"), it is unlawful for covered employers to "discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a); 29 C.F.R. § 1630.4.

51. Under the ADA, prohibited discrimination includes:

> b. "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5).

52. The "reasonable accommodation" element of the [ADA] imposes a duty upon employers to engage in a flexible, interactive process with the employee needing accommodation so that, together, they might identify the employee's precise limitations and discuss accommodations which might enable the employee to continue working." *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 693 (7th Cir. 1998); *see also* 29 C.F.R. § 1630.2(o)(3).

53. Plaintiff was and is an individual with a disability within the meaning of the ADA at all times relevant to this lawsuit.

54. Plaintiff was and is substantially limited in the major life activities of typing, clicking, and working on a computer, amongst other limitations.

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55. Plaintiff has a record of a disability within the meaning of the ADA.

56. Defendant regarded Plaintiff as disabled within the meaning of the ADA.

57. Plaintiff was a qualified individual under the ADA because he could perform his essential job functions with or without reasonable accommodation. 42 U.S.C. § 12111(8).

58. Defendant was a covered employer under the ADA, as it employed more than fifteen employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. *Id*. § 12111(5).

59. Defendant discriminated against Plaintiff on the basis of his disability by terminating his employment on the basis of his disability.

60. Defendant discriminated against Plaintiff on the basis of his disability by failing to provide reasonable accommodations to Plaintiff.

61. Defendant discriminated against Plaintiff on the basis of his disability by failing to engage in an interactive process to meaningfully consider possible reasonable accommodations for Plaintiff to perform his essential job functions.

62. Defendant's actions were intentional, willful, and in reckless disregard of Plaintiff's rights under the ADA.

63. Plaintiff has suffered damages as a result of Defendant's unlawful actions.

SECOND CAUSE OF ACTION

Disability Discrimination in Violation of NRS § 613.330

64. Plaintiff realleges and incorporates by this reference all the paragraphs above in this Complaint as though fully set forth herein.

65. It is unlawful under Nevada's equal employment opportunity laws, NRS 613.310-613.345 ("EEO Laws"), for an employer to discriminate against an employee based on an employee's disability. Specifically, "it is an unlawful employment practice for an employer: (a) To fail or refuse to hire or to discharge any person, or otherwise to discriminate against any person with respect to the person's compensation, terms, conditions or privileges of employment, because of his or her . . . disability . . .; or (b) To limit, segregate or classify an employee in a way which would deprive or tend to deprive the employee of employment opportunities or otherwise

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adversely affect his or her status as an employee, because of his or her . . . disability . . . ." NRS 613.330.

66. Plaintiff was an employee of Defendant.

67. Plaintiff had a disability—carpal tunnel syndrome in both wrists, that qualifies as a physical impairment and that substantially limited one or more major life activities (i.e., typing, clicking, and using a computer).

68. Plaintiff notified Defendant of his impairment and complied with Defendant's request to provide a doctor's note explaining his limitations.

69. Plaintiff repeatedly requested and explained the reasonable accommodation necessary to allow him to continue performing his job.

70. Plaintiff was qualified and capable of performing the essential functions of his job with the accommodation of a shortened (5-hour) workday.

71. Defendant refused to provide Plaintiff with a reasonable accommodation and discriminated against Plaintiff on the basis of his disability.

72. Defendant had a duty to engage Plaintiff in the interactive process and make a reasonable accommodation.

73. Defendant refused to engage in any sort of meaningful interactive process concerning the hours actually worked by Plaintiff and other claims adjusters and the need to limit Plaintiff's work to 5 hours per day.

74. Defendant's failure to accommodate Plaintiff's disability directly led to Plaintiff falling behind in his work, which Defendant used as the basis for disciplining and ultimately terminating Plaintiff.

75. Plaintiff is informed and believes and, on that basis, alleges that Defendant's reason for terminating Plaintiff was motivated by his disability.

76. Defendant intentionally, and with malice and oppression, discriminated against Plaintiff because of his disability.

77. Plaintiff has suffered damages as a result of Defendant's unlawful actions.

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THIRD CAUSE OF ACTION

Interference with FMLA Rights in Violation of 29 U.S.C § 2601 *et seq*.

78. Plaintiff realleges and incorporates by this reference all the paragraphs above in this Complaint as though fully set forth herein.

79. At all times relevant to this Complaint, Defendant was a covered employer under the Family and Medical Leave Act ("FMLA"), as it was engaged in an industry affecting commerce and it employed fifty or more employees for each working day during each of twenty or more calendar workweeks in the current or preceding calendar year. 29 U.S.C. § 2611(4).

80. Plaintiff was covered under the FMLA as an eligible employee employed by Defendant for at least twelve months who had performed at least 1,250 hours of service during the previous twelve-month period. Id. § 2611(2).

81. Under the FMLA, "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." Id. § 2615(a).

82. The FMLA's "prohibition against interference" prohibits an employer from discriminating or retaliating against an employee . . . for having exercised or attempted to exercise FMLA rights. . . ." 29 C.F.R. § 825.220(c).

83. "[E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions." Id.

84. Employers who violate the FMLA "may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered." Id. § 825.220(b); 29 U.S.C. § 2617.

85. The statute of limitations for willful violations of the FMLA is "3 years of the date of the last event constituting the alleged violation for which such action is brought." 29 U.S.C. § 2617(c)(2).

86. Defendants discriminated against Plaintiff in violation of the FMLA by failing to provide Plaintiff with required information regarding his rights under the FMLA; by failing to

provide Plaintiff with FMLA-protected leave for a serious health condition that, at times, made Plaintiff employee unable to perform his job; and by terminating Plaintiff for taking such leave.

87. Defendants' actions were intentional, willful, and in reckless disregard of Plaintiff's rights under the FMLA.

88. Plaintiff has suffered damages as a result of Defendants' unlawful actions.

PRAYER FOR RELIEF

Wherefore Plaintiff prays for relief as follows:

1. A declaratory judgment that Defendant discriminated against Plaintiff in violation of Title I of the ADA;
2. A declaratory judgment that Defendant intentionally discriminated against Plaintiff in violation of the FMLA;
3. A declaratory judgment that Defendant intentionally discriminated against Plaintiff in violation of Nevada's EEO Laws.
4. An injunction ordering Defendant to reinstate Plaintiff to his prior position of employment with Defendant, with such retroactive promotions and benefits as Plaintiff would have received had he not been terminated;
5. An injunction ordering Defendant to provide Plaintiff reasonable accommodations necessary for Plaintiff to perform his essential job functions;
6. An order requiring Defendant to undergo periodic ADA and FMLA training;
7. For lost wages resulting from Defendants' violations;
8. For liquidated damages;
9. Compensatory and punitive damages;
10. For interest as provided by law at the maximum legal rate;
11. For reasonable attorneys' fees authorized by statute;
12. For costs of suit incurred herein;

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13. For pre-judgment and post-judgment interest, as provided by law, and

14. For such other and further relief as the Court may deem just and proper.

DATED: June 26, 2019

/s/ Joshua R. Hendrickson
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Index of Exhibits

A. Plaintiff's June 9, 2016 Charge

B. Dismissal and Notice of Rights

C. Email Exchange