

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

WENDI J. LEE,

Plaintiff/Counter-Defendant,

v.

Case No.: 8:10-cv-2904-T-23TBM

PMSI, INC.,

Defendant/Counter-Plaintiff.

DEFENDANT'S AMENDED ANSWERS, DEFENSES AND COUNTERCLAIM

Defendant, PMSI, INC., by and through undersigned counsel, hereby files its Answer and Defendants to the Complaint filed by WENDI J. LEE. Defendant responds to each numbered paragraph of the Complaint in correspondingly numbered paragraphs, as follows:

1. Defendant admits that Plaintiff is attempting to bring an action under Title VII of the Civil Rights Act of 1964 as amended ("Title VII") and the Florida Civil Rights Act ("FCRA"). Otherwise, Defendant denies any allegations of wrongdoing, expressed or implied, contained in paragraph 1 of the Complaint.

2. Defendant admits for jurisdictional purposes only. Otherwise, Defendant denies any allegations of wrongdoing, expressed or implied, contained in paragraph 2 of the Complaint.

3. Defendant admits for venue purposes only. Otherwise, Defendant denies any allegations of wrongdoing, expressed or implied, contained in paragraph 3 of the Complaint.

4. Defendant admits that Plaintiff was an employee. Otherwise, Defendant is without knowledge and therefore denies the remaining allegations contained in paragraph 4 of the Complaint.

5. Defendant admits the allegations contained in paragraph 5 of the Complaint.

6. Defendant admits the allegations contained in paragraph 6 of the Complaint.

7. Defendant denies the allegations contained in paragraph 7 of the Complaint.

8. Defendant admits that sometime during the course of her employment, Plaintiff made reference to her pregnancy.

9. Defendant denies the allegations contained in paragraph 9 of the Complaint.

10. Defendant denies the allegations contained in paragraph 10 of the Complaint.

11. Defendant denies the allegations contained in paragraph 11 of the Complaint.

12. Defendant denies the allegations contained in paragraph 12 of the Complaint.

13. Defendant admits Plaintiff filed a charge of Discrimination with the Equal Employment Opportunity Commission. Otherwise, Defendant is without knowledge and therefore denies the remaining allegations contained in paragraph 13 of the Complaint.

14. Defendant is without knowledge and therefore denies the allegations contained in paragraph 14 of the Complaint.

15. Defendant is without knowledge and therefore denies the allegations contained in paragraph 15 of the Complaint.

16. Defendant re-alleges and incorporates by reference herein previously stated answers to paragraphs 1 through 15 as if fully incorporated herein.

17. Defendant admits that sometime during the course of her employment Plaintiff made reference to her pregnancy.

18. Defendant admits the allegations contained in paragraph 18 of the Complaint.

19. Defendant denies the allegations contained in paragraph 19 of the Complaint.

20. Defendant admits the allegations contained in paragraph 20 of the Complaint.

21. Defendant denies the allegations contained in paragraph 21 of the Complaint.

22. Defendant admits that Plaintiff retained counsel in this action. Otherwise, Defendant denies any allegations of wrongdoing, expressed or implied, contained in paragraph 22 of the Complaint.

Defendant denies that Plaintiff is entitled to any of the relief requested in the “wherefore clause” following paragraph 22 of the Complaint.

23. Defendant admits that sometime during the course of her employment Plaintiff made reference to her pregnancy.

24. Defendant admits the allegations contained in paragraph 24 of the Complaint.

25. Defendant denies the allegations contained in paragraph 25 of the Complaint.

26. Defendant admits the allegations contained in paragraph 26 of the Complaint.

27. Defendant denies the allegations contained in paragraph 27 of the Complaint.

28. Defendant denies the allegations contained in paragraph 28 of the Complaint.

DEFENSES

1. To the extent that the Complaint fails to state a cause of action, Plaintiff is not entitled to relief.

2. Because Defendant has legitimate non-discriminatory reasons for terminating Plaintiff, Plaintiff is not entitled to relief.

3. To the extent that Plaintiff has failed to satisfy the administrative prerequisites to bringing this action, Plaintiff is not entitled to relief.

4. To the extent that Plaintiff failed to mitigate her damages, in whole or in part, Plaintiff is not entitled to relief.

5. To the extent that any of the allegations contained in Plaintiff's Amended Complaint occurred more than 300 days prior to the filing of the Charge of Discrimination, those claims are untimely and Defendant is entitled to judgment as a matter of law.

6. To the extent that Plaintiff's claims are barred by the after-acquired evidence doctrine, Plaintiff is precluded from recovering damages against Defendant.

Defendant reserves the right to raise any and all other defenses that may become evident during discovery and any other proceeding in this action.

COUNTERCLAIM

1. This is an action for damages by Defendant/Counter-Plaintiff, PMSI, Inc., against Plaintiff/Counter-Defendant, Wendi Lee, for violation of the Computer Fraud and Abuse Act, as amended by the Computer Abuse Amendments Act of 1994, 18 U.S.C. §§ 1030 and 2707.

2. PMSI, Inc. is a Florida corporation with its principal offices located at Tampa, Florida.

3. Wendi Lee, is a former employee of PMSI. Upon information and belief, Lee is a resident of Hillsborough County, Florida.

4. This Court has jurisdiction of the subject matter of this Counterclaim under 28 U.S.C. §1331 in that this action arises under the laws of the United States, specifically 18 U.S.C. § 2707.

5. On or about May 4, 2009, PMSI hired Lee as a Proposal Developer in its Marketing Department.

6. On or about August 25, 2009, PMSI issued Lee her 90-day performance evaluation. The evaluation revealed that Lee's performance was less than satisfactory in the following areas: communication, dependability, productivity, initiative, knowledge of job and quality of work. This evaluation also contained criticism of Lee for excessive internet usage and making reference to sites visited by Lee.

7. Despite the August 25, 2009 evaluation, Lee failed to respond to the criticism of her excessive internet usage. Indeed, from June 2009 through November 2009, Lee's internet usage substantially exceeded the usage of her coworkers in the Marketing Department.

8. Because Lee's excessive internet usage significantly affected her productivity and dependability, and based on other legitimate non-discriminatory reasons, PMSI terminated her employment on or about November 12, 2009.

9. Under the Computer Fraud and Abuse Act, a civil remedy is available to any person who suffers damages or loss from a violation of the Act. 18 U.S.C. 1030(g). To recover under the Act, a person must prove (1) an intentional access to a computer; (2) lack of authorization or exceeded authorization to the computer; (3) obtained information from the computer; and (4) a loss of at least \$5000.00. 18 U.S.C. 1030(a)(2)(C).

10. During her employment with PMSI, Lee intentionally accessed PMSI's computer system.

11. During her employment with PMSI, Lee exceeded her authorization to use the internet by accessing and spending large amounts of paid work time visiting personal websites such as Facebook and her monitoring and sending personal emails through her Verizon web mail account, while on company paid time and from a company owned computer. These acts were in violation of the Company's Computer Usage Policy.

12. During her employment with PMSI, while spending a large amount of time visiting unauthorized websites, Lee obtained information from these websites while on the Company's computer.

13. The Company suffered a loss from this unproductive time that Lee spent on these unauthorized websites. By way of example, the top ten websites she visited while an employee were, by domain name: i.cdn.turner.com (CNN); netmail.verizon.net (personal webmail); facebook.com (facebook); verizon.net; fbcdn.net (facebook); google.com; verizononline.com (Verizon personal webmail); static.ak.fbcdn.net (facebook); huffingtonpost.com; turner.com. From June 1, 2009 to her last day of employment these 10 websites accounted for 83,254 HTTP Requests.¹ Little, if any, of these Requests were business related.

14. By contrast, the two PMSI employees who worked next to Ms. Lee in the marketing department and had similar responsibilities had 1,152 and 9,912 HTTP Requests during this same time period and visited work related websites such as wcxec.com; workcompcentral.com; salesforce.com; and webmd.com.

15. As a direct and proximate result of the above alleged acts and conduct by Lee, PMSI has suffered financial losses in excess of \$5,000, due to her lack of productivity, as work that should have been performed by her had to be given to others and in wages paid to her.

WHEREFORE, Defendant/Counter-Plaintiff, PMSI, Inc., requests that this Honorable Court enter judgment in its favor against Plaintiff/Counter-Defendant, Wendi Lee, and:

a. award Defendant/Counter-Plaintiff damages pursuant to the CFAA, 18 U.S.C. § 2707.

¹ An Hypertext Transfer Protocol (HTTP) Request occurs when an internet web browser attempts to retrieve a file (a page, a picture, etc.) from a web server. A request happens when the user's computer sends a request for some file (ie "get me this file") and the web server sends back a response ("here is the file.") One webpage can have multiple requests.

b. award Defendant/Counter-Plaintiff attorneys' fees, costs and such further relief as this Court deems just and proper.

Respectfully submitted this 7th day of February, 2011.

s/Richard L. Bradford

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 7th day of February, 2011, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Samuel R. Mandelbaum, Esq.
Scott K. Hewitt, Esq.
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s/Richard L. Bradford

Attorney