

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

**CHARLENE BOST,**

**Plaintiff,**

**vs.**

**SAM’S EAST, INC. and WAL-MART  
ASSOCIATES, INC.,**

**Defendants.**

Civil Action No. 1:17-CV-1148

**BRIEF IN SUPPORT OF  
DEFENDANTS’ PARTIAL MOTION  
TO DISMISS**

Defendants Sam’s East, Inc. (“Sam’s”) and Wal-Mart Associates, Inc.<sup>1</sup> (collectively “Defendants”) hereby submit this Brief in Support of their Partial Motion to Dismiss Counts Five, Six, Seven, Eight, and part of Count Nine of Plaintiff Charlene Bost’s (“Plaintiff”) Complaint. In support of their Motion, Defendants state as follows:

**I. NATURE OF THE MATTER**

Plaintiff, a former Sam’s associate who is a transgender female,<sup>2</sup> alleges that Defendants subjected her to a hostile work environment and ultimately terminated her because (1) she is a transgender woman; (2) her co-workers and manager(s) regarded her as having gender dysphoria; and (3) she complained about being discriminated against. She alleges that, in doing so, Sam’s violated Title VII of the Civil Rights Act of 1964 (“Title VII”), the Americans with Disabilities Act (“ADA”), and North Carolina’s prohibition against sex and disability discrimination as set forth in the North Carolina Equal Employment Practices Act (“NCEEPA”),

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<sup>1</sup> Plaintiff incorrectly names Wal-Mart Associates, Inc. as a co-defendant in this action. Sam’s East, Inc. (Plaintiff’s employer for purposes of this action and the only properly-named entity) is a wholly-owned subsidiary of Walmart Inc., as is Wal-Mart Associates, Inc. (*See* Compl. ¶ 12.) Wal-Mart Associates, Inc. is not a parent company of Sam’s East, Inc. Nonetheless, in order to preserve its defenses, Wal-Mart Associates, Inc. joins in this Motion as well.

<sup>2</sup> Sam’s calls its employees “associates.”

N.C. Gen. Stat. § 143-422.2. (Compl. ¶¶ 2-5.) Plaintiff’s claims for disability discrimination under the ADA and North Carolina law and for ADA retaliation should be dismissed.

First, Plaintiff’s “regarded as” disability discrimination claims under state and federal law should be dismissed because Plaintiff pleads no factual allegations to support that anyone plausibly regarded her as disabled. Allowing Plaintiff’s bare-bones “regarded as” disability discrimination claims to proceed in litigation would create a protected class for all transgender individuals under the ADA just because they are transgender—something the ADA expressly seeks to avoid.<sup>3</sup> The ADA specifically excludes coverage of “transsexualism” and “gender identity disorders not resulting from physical impairments.” 42 U.S.C. § 12211(b)(1). Instead, and as Plaintiff acknowledges, *some* transgender individuals have a medical condition known as “gender dysphoria”: “the **formal diagnosis** used by physicians and psychologists to describe people who experience **significant distress** with the sex they were assigned at birth.” (Compl. ¶ 47 (emphasis added).) It is individuals with that condition—perceived or otherwise—who may be protected under the ADA and the NCEEPA, not **all** transgender individuals.

Thus, in order to seek protection under the ADA and the NCEEPA, Plaintiff’s allegations must do more than state she is transgender—her allegations must make it plausible that Defendants regarded her as having the medical condition of gender dysphoria. They do not. Although Plaintiff’s Complaint spans more than 310 paragraphs and more than 80 pages, the only allegations she provides to support her claim that she was regarded as having gender dysphoria are merely infrequent reiterations of the same boilerplate, conclusory language: “Ms.

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<sup>3</sup> As stated more thoroughly below, a claim for wrongful discharge based on an alleged violation of the NCEEPA’s prohibition against disability discrimination is generally subjected to the same standards as those under ADA.

Best was regarded by Defendant, at all relevant times, as having gender dysphoria.”<sup>4</sup> (*See* Compl. ¶¶ 5, 64, 239, 255, 262.) Plaintiff does not allege facts that would show other associates regarded her as suffering from significant distress arising from her birth gender, let alone gender dysphoria, or as having received a formal diagnosis of a medical condition, disabling or otherwise. She does not describe who regarded her as having gender dysphoria, how they communicated that perception, or when. Given the unique circumstances of the ADA’s explicit exclusion of “transsexualism” and “gender identity disorders not resulting from physical impairments” as disabilities, Plaintiff’s lack of any allegation that Defendants believed she suffered from a medical impairment is fatal to her disability discrimination claims under the ADA.

Additionally, the standard for claims for “regarded as” disability discrimination under the NCEPA (via the North Carolina Persons With Disabilities Protection Act, N.C. Gen. Stat. §§ 168A-1, et. seq. (“NCPDPA”)) is more stringent than under the ADA. Specifically, under North Carolina law, plaintiffs who seek protection under a “regarded as” theory of disability must still establish that they are regarded as having a physical or mental impairment which substantially limits one or more major life activities. N.C. Gen. Stat. §§ 168A-3(7a). As stated above, Plaintiff has not alleged that Defendants regarded her as having gender dysphoria, let alone that anyone perceived her as being substantially limited in a major life activity. Thus, Plaintiff’s North Carolina wrongful termination claim premised on disability discrimination must also fail.

Similarly, as with her “regarded as” claim, Plaintiff’s ADA retaliation claim is only supported by conclusory allegations that she complained about “sex-based and/or disability-based harassment and discrimination she suffered.” (*See* Compl. ¶¶ 6, 82, 266, 290.) Plaintiff

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<sup>4</sup> Though Plaintiff brought this lawsuit against two defendants, her allegations pertain only to a singular “Defendant” throughout the Complaint. When quoting Plaintiff’s allegations, Defendants have kept her use of the singular “Defendant.”

provides no factual allegations to support her claim that she complained about disability discrimination before her termination. She fails to plead how, when or to whom she complained about disability discrimination specifically, as required by well-established precedent. The absence of any disability-related claims in her numerous pre-termination EEOC charges and the charge she filed the day after her termination underscore what is obvious: she has not alleged facts regarding protected activity under the ADA because there are none. Dismissal of her retaliation claim is warranted.

For the foregoing reasons, and as discussed in greater detail below, each of Plaintiff's fifth through eighth claims, and part of her ninth claim (i.e., her claims for disability discrimination under the ADA and North Carolina law, and her ADA retaliation claim) fail as a matter of law and should be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6).

## **II. RELEVANT FACTS ALLEGED IN THE COMPLAINT<sup>5</sup>**

### **A. Plaintiff Does Not Allege Facts Showing That Other Sam's Associates Perceived Her as Having Gender Dysphoria.**

Sam's employed Plaintiff, a transgender woman, from March 2004 to March 2015. (Compl. ¶ 37.) In or about May 2008, Sam's promoted Plaintiff to a Checkout Supervisor position. (Compl. ¶ 57.) Around that same time, Plaintiff began "gradually to express her female gender identity at work more openly by wearing makeup, a feminine hairstyle, and more feminine clothing." (Compl. ¶¶ 59-60.) At various times after 2008, Plaintiff "informed various Sam's Club co-workers; as well as managers, supervisors, and other Sam's Club associates, that she was transgender and/or a transgender woman"—not that she suffered from "significant

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<sup>5</sup> Plaintiff's allegations are taken as true for purposes of this Motion only.

distress” related to that or any medical condition, disabling or otherwise, that could create a perception of her having gender dysphoria. (Compl. ¶ 61.)

Although Plaintiff pleads numerous details about her transition from living as a male to a female and about other Sam’s associates’ awareness of her transgender identity starting in 2008, (Compl. ¶¶ 59-63, 65-68), her *only* allegations regarding perceived disability, however, are cursory and conclusory, (see Compl. ¶ 64 (“Upon information and belief, Ms. Bost was regarded by Defendant, at all relevant times, as having gender dysphoria.”)). She does not plead any factual allegations to suggest that other associates knew of or perceived her as having gender dysphoria or any of the distinguishing symptoms of that disability, nor any other impairment that transformed her non-disabled transgender status into the realm of a disability. Nor does she plead facts about which associates regarded her as having gender dysphoria, how those associates came to that conclusion, or when. In fact, she specifically contends there was “evident prejudice against persons who were transgender and/or gender non-conforming,” but does not mention gender dysphoria prejudice at all. (Compl. ¶ 68.)

Instead, Plaintiff alleges only that other associates insisted on referring to her by male terminology and made derogatory comments about her transgender identity—nothing related to any disability, let alone gender dysphoria. (*See, e.g.*, Compl. ¶¶ 72, 75-79.)

**B. Plaintiff Does Not File a Disability Discrimination Charge until after Her Termination, and She Does Not Allege Any Earlier Disability Discrimination Complaints.**

Plaintiff was terminated on March 17, 2015 after Sam’s received complaints from Plaintiff’s co-workers about her conduct. (Compl. ¶¶ 11, 164.) While still employed by Sam’s, Plaintiff had previously filed **at least three** sex discrimination and retaliation charges with the EEOC, **under Title VII only**—the last one filed **less than one month before her termination**. (Compl. ¶¶ 17-19.) She also filed a **Title VII-only** sex discrimination and retaliation charge on

March 18, 2015, **the day after she was terminated**. (Compl. ¶ 20.) Not until July 12, 2015—nearly four months after her termination—did Plaintiff file her **first disability** discrimination and retaliation charge under the ADA. (Compl. ¶¶ 21, 166.)

Plaintiff now claims she was retaliated against for complaining about disability discrimination, but she again alleges no *facts* that would show she actually engaged in any protected conduct. (See Compl. ¶ 82.) She vaguely claims only that she “made numerous reports and complaints to Defendant (in writing, orally, and by voicemail) concerning the severe and pervasive...disability-based harassment and discrimination she suffered.” (Compl. ¶82.) She states that between August and November 2014, she “made at least eight complaints to Defendant concerning the continuing harassment and retaliation” (Compl. ¶ 138), but nowhere does she state that those complaints included complaints about *disability* discrimination. Nor should the Court make an unwarranted inference that those complaints included a disability-related complaint, particularly since none of the EEOC charges she filed during and immediately after her employment referred to the ADA.

Defendants now move to dismiss Counts Five through Eight, and part of Count Nine, of Plaintiff’s Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

### **III. STATEMENT OF QUESTION PRESENTED**

1. Does Plaintiff sufficiently allege that Defendants regarded her as disabled under state and federal law because of her transgender status, alone, with no allegations supporting that anyone believed she suffered from and was disabled by gender dysphoria—a distinct medical condition?
2. Does Plaintiff’s lack of details regarding her alleged protected activity under the ADA mandate dismissal of her ADA retaliation claim under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)?

#### **IV. LAW AND ARGUMENT**

##### **A. Standard of Review**

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal for failure to state a claim upon which relief can be granted. The purpose of a Rule 12(b)(6) motion is to eliminate claims that are factually or legally insufficient. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To survive a motion to dismiss, a pleading must contain “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). In making this determination, “a court accepts all well-pled facts as true and construes these facts in the light most favorable” to the plaintiff, but does not consider “legal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement.” *Nemet Chevrolet Ltd. v. Consumeraffairs.com*, 591 F.3d 250, 255 (4th Cir. 2009). Nor must the court accept “unwarranted inferences, unreasonable conclusions, or arguments.” *Id.* While a plaintiff alleging employment discrimination need not “plead facts that constitute a *prima facie* case in order to survive a motion to dismiss, *see Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510-15 (2002), ‘[f]actual allegations must be enough to raise a right to relief above the speculative level.’” *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010) (quoting *Twombly*, 550 U.S. at 555). A motion to dismiss should be granted if the complaint fails to allege the elements for a cause of action or facts sufficient to support such elements. *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003).

##### **B. Plaintiff’s Disability Discrimination Claims Under the ADA and North Carolina Law Should Be Dismissed.**

Plaintiff purports to state a cause of action against Defendants under the ADA and North Carolina’s wrongful discharge in violation of public policy doctrine for disability discrimination,

relying on a “regarded as” disabled theory.<sup>6</sup> Specifically, she alleges that Defendants “perceived” her as disabled—gender dysphoric—and treated her unlawfully based upon that perception.<sup>7</sup> (Compl. ¶ 5.) However, Plaintiff has alleged no factual allegations to make it plausible that anyone perceived her as suffering from gender dysphoria—a medical condition distinct from transgender status, alone.

**1. Legal Standard for a “Regarded As” Disability Claim and the ADA’s Position on Transgender Individuals as Disabled.**

To state a claim for disability discrimination under the ADA and North Carolina law, a plaintiff must allege that she has a disability. 42 U.S.C. §12102. “Disability” is defined by the ADA as (1) having an actual disability; (2) having a record of a disability; or (3) being regarded as having a disability. 42 U.S.C. §12102(1). To state a claim for disability discrimination under a “regarded as” disabled theory, a plaintiff must allege that the defendant regarded her as having

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<sup>6</sup> Nowhere in her Complaint does Plaintiff state that she actually has a disability or that she has a record of a disability; instead, she only alleges that Defendants regarded her as having a disability. (Compl. ¶¶ 5, 64, 71, 79(h), 81(g).)

<sup>7</sup> A claim for wrongful discharge based on an alleged violation of the NCEEPA’s prohibition against disability discrimination is generally subjected to the same standards as those under ADA; thus, throughout this Brief, Defendants typically refer exclusively to the ADA standards since North Carolina law follows the ADA. *See, e.g., Jefferson v. Biogen Idec Inc.*, No. 5:11-CV-237-F, 2012 WL 3629219, at \*7 (E.D.N.C. Aug. 22, 2012) (“[W]hen faced with state law wrongful discharge on the basis of handicap/disability claims, courts utilize the evidentiary framework used in evaluating disability discrimination claims under the ADA.”); *Morris v. BellSouth Telecomms.*, 302 F. Supp. 2d 515, 524–25 (M.D.N.C. 2004) (“[S]tate law claims for wrongful termination for discharge due to handicap are analyzed with the same burden shifting test as claims brought under the ADA.”). Accordingly, for the same reasons that Plaintiff’s ADA discrimination claim fails, so, too, does her state common law wrongful discharge claim. To the extent Plaintiff’s wrongful discharge claim relies on her claiming that she actually is gender dysphoric (“Ms. Bost, who was a member of protected categories by reason of her sex and disability as alleged herein” (Compl. ¶ 306)), this, too fails because there are no allegations in the Complaint that Plaintiff actually suffers from gender dysphoria or any symptoms that would support such a finding. As with her ADA claim, merely claiming she is transgender is not enough to confer protected status as a disabled individual. *See Arledge v. Peoples Servs., Inc.*, No. 02 CVS 1569, 2002 WL 1591690, at \*3 (N.C. Super. Apr. 18, 2002) (granting Rule 12 motion to dismiss the transsexual plaintiff’s claim for wrongful discharge in violation of North Carolina public policy based on disability discrimination, following the ADA’s exclusion of transsexuals as disabled individuals, without more, holding “that neither [the NCEEPA], nor any other express public policy of North Carolina, establishes Plaintiff’s transsexualism as a disability that would permit the Plaintiff to state an exception to the at-will employment doctrine”).

a physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. 42 U.S.C. §12102(3)(A).

North Carolina law defines disability discrimination under a “regarded as” theory more narrowly still. The NCEPA, which Plaintiff cites in her Complaint, prohibits discrimination against gender and disability (characterized as “handicap”). (Compl. ¶¶ 301-302 (citing N.C. Gen. Stat. § 143-422.1).) The standards for what constitutes disability discrimination under state law are set forth in the NCPDPA, however—and the NCPDPA expressly declines to mirror current ADA standards when it comes to “regarded as” disability discrimination (though it mirrors it in most other regards). While the NCPDPA was revised after the ADA was amended in 2008, the NCPDPA revisions did not broaden the definition of a “person with a disability” to include temporary conditions, or add a mandate for broad coverage, as the ADA amendments did. *See* Pub. L. No. 110-325, 122 Stat. 3553 (ADA Amendments Act of 2008 (“ADAAA”)); 42 U.S.C. § 12102(4)(A) (2012); 2011 N.C. Sess. Law 94(i). Unlike the ADA, North Carolina law still requires an employee seeking protection under a “regarded as” theory to allege an employer perceives her as having an impairment that substantially limits a major life activity. N.C. Gen. Stat. § 168A-3(7a)(d).

Importantly, the ADA expressly states that “transsexualism” and “gender identity disorders not resulting from physical impairments” are not disabilities under the ADA, and North Carolina courts have adopted this as well. 42 U.S.C. § 12211(b)(1); *see Arledge*, 2002 WL 1591690, at \*3. That is, transgender status, alone, is not a disability under the ADA and North Carolina law, nor is being transgender sufficient to create a “regarded as” disabled status. Against this backdrop, courts have rejected gender dysphoria-based disability discrimination claims in the employment context where, like Plaintiff here, plaintiffs essentially try to have

courts confer disabled status onto all transgender individuals. *See, e.g., Michaels v. Akal Sec., Inc.*, No. 09-CV-01300-ZLW-CBS, 2010 WL 2573988, at \*6 (D. Colo. June 24, 2010) (granting Rule 12 motion to dismiss claim of perceived disability (gender dysphoria) and finding that “gender dysphoria, as a gender identity disorder, is specifically exempted as a disability by the Rehabilitation Act,” citing language identical to ADA’s language excluding gender identity orders); *see also Kasti v. Maricopa Cty. Cmty. Coll. Dist.*, No. CIV.02-1531PHX-SRB, 2004 WL 2008954, at \*4, n.9 (D. Ariz. June 3, 2004) (granting Rule 12 motion to dismiss ADA claim, citing § 12211(b)(1) and finding that even if plaintiff fell within exception of gender identity disorders resulting from physical impairments, she did not demonstrate that alleged disability limited any major life activities; **“Contrary to Plaintiff’s assertion, the leap from recognizing an individual as a transsexual to believing that individual to be disabled is by no means automatic.”**) (emphasis added); *see also Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 1001 (N.D. Ohio 2003), *aff’d*, 98 F. App’x 461 (6th Cir. 2004) (granting Rule 12 motion to dismiss and finding that plaintiff, who allegedly suffered from gender identity disorder, was not disabled under ADA, both because of language in § 12211(b)(1) and because plaintiff failed to show that alleged disability substantially limited any major life activities).<sup>8</sup> Though the ADAAA relaxed the “regarded as” standard for plaintiffs, it still does not allow parties to transform non-disabilities into disabilities with nothing to support the transformation, and North Carolina law still requires more from plaintiffs who seek protection from disability discrimination.

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<sup>8</sup> Though *Kasti* and *Johnson* are pre-ADAAA cases, they are still appropriately analogous here, where Plaintiff argues that, by virtue of her being transgender, alone, Defendants perceived her as disabled. Here, Plaintiff must do more than just issue a conclusory statement.

**2. Plaintiff's Complaint Does Not Allege Any Facts Showing Other Associates Regarded Her as Having the Disability of Gender Dysphoria.**

Throughout her Complaint, Plaintiff presumes in conclusory fashion that Defendants' associates conflated her being transgender with having gender dysphoria. Being transgender is not a medical condition or disability under the ADA or North Carolina law, but having gender dysphoria *may* be a medical condition or disability under the ADA or North Carolina law, and only some transgender individuals have gender dysphoria. Thus, in order to make it plausible that people regarded Plaintiff as suffering from gender dysphoria, she must do more than reiterate that she is transgender. In fact, under North Carolina law, Plaintiff must go further and allege that she was perceived as having gender dysphoria and that people perceived her as being substantially limited in a major life activity as a result. She meets neither the ADA nor NCPDPA standards, and her "regarded as" claims fail under both the ADA and North Carolina law.

Here, taking Plaintiff's allegations as true for purposes of this Motion, nothing can be inferred from the facts alleged in the Complaint that Defendants regarded Plaintiff as having gender dysphoria or any of its distinguishing symptoms, let alone being "disabled" by it. To the contrary, Plaintiff pleads that the distress she allegedly suffered arose from how Sam's associates' treated her—not her own condition. (*See* Compl. ¶¶ 192, 226, 237, 253, 263, 287, 297, 308.) Plaintiff does not allege that anyone knew, believed, or commented about her suffering from gender dysphoria or any of its distinguishing symptoms, or that anyone at Sam's knew or believed that she suffered from a disabling medical condition at all. Nothing suggests that anyone at Sam's even knows what gender dysphoria is. The entirety of Plaintiff's conclusory allegations supporting her "regarded as" disabled claims centers on her being transgender with nothing more. Moreover, Plaintiff's disability discrimination claim falls far

short of the exacting standard set by North Carolina law. Plaintiff pleads no facts to suggest any Sam's employee considered Plaintiff substantially limited in her ability to work, nor any other major life activity. See N.C. Gen. Stat. § 168A-3(7a)(b) (defining functions constituting "major life activities," including "sleeping, lifting, bending, ... and working"). Plaintiff's allegations are insufficient as a matter of law, and dismissal is appropriate, even under the more relaxed ADA standard. See *Reardon v. Int'l Paper Co.*, No. 2:13-CV-02708-CWH, 2014 WL 2612496, at \*4 (D.S.C. June 9, 2014) (dismissing Rule 12 motion to dismiss "regarded as" claim where the plaintiff "failed to provide any factual allegation demonstrating that the defendant regarded her as disabled. . . . [relying] on conclusory statements that are not tied to any factual allegations, which are the precise type of '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements' that *Iqbal* deems fatal to a claim's plausibility."); *Bess v. Cty. of Cumberland*, N.C., No. 5:11-CV-388-BR, 2011 WL 4809879, at \*6 (E.D.N.C. Oct. 11, 2011) (granting Rule 12 motion to dismiss "regarded as" disability claim, even where the plaintiff alleged that the defendant once "wrote about [the plaintiff's] disability," because "there are simply no facts in the complaint which show that any of the relevant decision makers in this case regarded plaintiff as having an actual or perceived impairment"); *Gray v. Walmart Stores, Inc.*, No. 7:10-CV-171-BR, 2011 WL 1831780, at \*10 (E.D.N.C. May 12, 2011) (granting Rule 12 motion to dismiss "regarded as" disability claim because plaintiff only made "conclusory statement[s] . . . which state[] that plaintiff was 'discriminated against, based on being regarded as having a disability'" and alleged no facts to show that anyone at the defendant regarded her as having an actual or perceived impairment).

Plaintiff's use of boilerplate, conclusory language makes clear that she is only speculating that Defendants regarded her as suffering from gender dysphoria. "Scenarios that are

the products of speculation—not factual allegations—do not make what is possible plausible.” *Scraggs v. NGK Spark Plugs (U.S.A.), Inc.*, No. 2:15-CV-11357, 2015 WL 8485248, at \*2 (S.D. W. Va. Sept. 1, 2015) (granting Rule 12 motion to dismiss “regarded as” disability claim where the plaintiff did not “present any facts in support of her claim that the defendant treated her as if she had an impairment.”). Plaintiff’s “regarded as” disabled claims under the ADA and North Carolina law should both be dismissed as a matter of law.

**C. Plaintiff Fails to State an ADA Retaliation Claim Because She Does Not Allege Any Facts Showing She Engaged in Protected Conduct.**

Plaintiff’s ADA retaliation claim should also be dismissed under the *Iqbal/Twombly* pleading standard because there is nothing to support she engaged in protected activity under the ADA before her termination, aside from her own “formulaic recitation of the elements” to that effect. *Twombly*, 550 U.S. at 555. Instead, she wants the Court to make an improper, unwarranted inference—one that is belied by actual factual allegations in her Complaint.

To prevail on an ADA retaliation claim, a plaintiff must set forth: (1) she engaged in a protected activity, (2) defendant took an adverse action against her, and (3) there is a causal connection between the two. *Buchhagen v. ICF Int’l, Inc.*, 650 F. App’x 824, 829 (4th Cir. 2016). It is axiomatic that, in order to meet the “protected activity” requirement, a plaintiff must demonstrate that she opposed something made unlawful by, or otherwise engaged in conduct protected by, the statute underlying the retaliation claim. 42 U.S.C. § 12203(a) (“no person shall discriminate against any individual because such individual has opposed any act or practice **made unlawful by [the ADA]** . . .”) (emphasis added); *see also Siraj v. Hermitage in N. Va.*, 51 F. App’x 102, 113-114 (4th Cir. 2002) (dismissing plaintiff’s retaliation claim where, although the plaintiff had complained about disparate pay, there was no evidence she complained that she believed the disparate pay resulted from unlawful discrimination); *Winchester v. Galveston Yacht*

*Basin*, 943 F. Supp. 776, 781-82 (S.D. Tex. 1996) (no protected activity where plaintiff complained about earning less than other male managers, since there was no evidence that her complaint was related to her gender), *aff'd*, 119 F.3d 1 (5th Cir. 1997) (unpublished) (no discussion).

Plaintiff's Complaint allegations regarding her protected activity under the ADA are nothing more than "labels and conclusions." She merely states that she "made numerous reports and complaints to Defendant (in writing, orally, and by voicemail) concerning the severe and pervasive...disability-based harassment and discrimination she suffered." (Compl. ¶ 82.) Plaintiff fails to assert any particulars as to whom she notified, when she notified the person(s), what specific "concerns" she relayed, what the person(s)' response was, and the like. Where she claims to have "made at least eight complaints to Defendant concerning the continuing harassment and retaliation" between August and November 2014, she does not identify those complaints as disability-related. (Compl. ¶ 138.) Indeed, she identifies an EEOC charge she filed during that same time frame premised on Title VII—**not the ADA**. (Compl. ¶ 139.)

Furthermore, Plaintiff did not file her first EEOC charge alleging disability discrimination until July 2015, four months *after* her termination and even *after* she filed a charge **the day after her termination alleging only a violation of Title VII**. (See Compl. ¶¶ 17-21.) Had Plaintiff engaged in protected activity under the ADA before her termination—or ever had reason to believe that anyone regarded her as disabled—she would have so claimed in one of her numerous EEOC charges. That she did not, coupled with the lack of any factual allegations in her voluminous Complaint, supports that Plaintiff's disability retaliation claim is not plausible and, therefore, should be dismissed. *Iqbal*, 129 S. Ct. at 1952 (quoting *Twombly*, 550 U.S. at 570).

## V. CONCLUSION

Because Plaintiff failed to state a claim on which relief can be granted with respect to any of her Fifth through Eighth Counts or to part of her Ninth Count (i.e., her claims for disability discrimination under the ADA and North Carolina law, and her ADA retaliation claim), her Complaint against Defendants should be dismissed as to those claims, with prejudice, pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendants respectfully request this Court grant their Partial Motion to Dismiss.

### **CERTIFICATE OF WORD LIMITATION**

I, Molly M. Shah, certify that this motion complies with the word limitation, as prescribed by Local Rule 7.3(d). This brief does not exceed 6,250 words, exclusive of the case caption, signature lines, and certificate of service.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 15, 2018

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 15, 2018, I electronically filed the foregoing **BRIEF IN SUPPORT OF DEFENDANTS' PARTIAL MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system, which will automatically send notification of such filing to the following counsel of record:

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