

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

**DENISE FITZHENRY,**

Plaintiff,

vs.

CASE NO. 10-CV-14102

**HONIGMAN MILLER SCHWARTZ AND  
COHN, LLP**, a limited liability partnership, and  
**ALAN S. SCHWARTZ**, an individual;  
jointly and severally.

HON. David M. Lawson

Magistrate Judge Virginia Morgan

Defendants.

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**Deborah L. Gordon PLC**  
**Deborah L. Gordon (P27058)**  
**Sarah S. Prescott (P70510)**  
Attorneys for Plaintiff  
33 Bloomfield Hills Parkway, Suite 275  
Bloomfield Hills Michigan 48304  
Telephone 248 258 2500  
[dgordon@deborahgordonlaw.com](mailto:dgordon@deborahgordonlaw.com)  
[sprescott@deborahgordonlaw.com](mailto:sprescott@deborahgordonlaw.com)

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**FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL**

Plaintiff, **DENISE FITZHENRY**, by her attorneys **Deborah L. Gordon PLC** complains against Defendants as follows:

Jurisdiction and Parties

1. This is an action for violations of the Family Medical Leave Act, Section 501 of the Employee Retirement Security Income Act, Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, Retaliation in Violation of the Michigan Worker's Disability Compensation Act, and violations of the Persons with Disabilities Civil Rights Act, and Elliott-Larsen Civil Rights Act.
2. Plaintiff's claims arise out of her employment relationship with Defendant Honigman

Miller Schwartz and Cohn, LLP in its Detroit office.

3. Plaintiff Denise Fitzhenry (hereafter "Plaintiff") is a resident of Michigan and resides within the Eastern District of Michigan.

4. Defendant Honigman Miller Schwartz and Cohn, LLP (hereafter "Defendant Honigman") is a limited liability partnership doing business in the Eastern District of Michigan.

5. Defendant Alan S. Schwartz, (hereafter "Defendant Schwartz") is a partner in Defendant Honigman, was Plaintiff's supervisor, is a resident of the Michigan and resides within the Eastern District of Michigan.

6. Plaintiff made a charge of discrimination with the Equal Employment Opportunity Commission, and received a right to sue letter from the Commission on or about September 29, 2010.

7. The events out of which this controversy arose occurred in the Eastern District of Michigan.

8. This Court has jurisdiction over this matter pursuant to 28 USC § 1331 and §1343, and supplemental jurisdiction over the state law claims pursuant to 28 USC §1367.

#### Background Facts

9. Plaintiff began her employment with Defendant Honigman in or about October 2005 as an executive assistant to Defendant Schwartz.

10. Defendant Schwartz was, at that time, the CEO of Defendant Honigman, a title he held until December 31, 2007.

11. Plaintiff's performance was at all times exemplary.

12. In fact, Plaintiff received accolades from Defendant Schwartz and many others regarding her superior performance.

13. Despite her excellent performance, Defendant Schwartz created a hostile environment for Plaintiff based on her gender.

14. Job classifications are very gender segregated at Defendant Honigman. For example, of more than 200 secretaries at the firm, less than 1% are male, while there are very few women in the highest level positions in the firm.

15. Plaintiff was excluded from participation in certain firm events, when similarly situated male employees were permitted to participate.

16. On or about February 23, 2007, Plaintiff sustained a severe work-related injury to her back.

17. As a result, Plaintiff was on a Family Medical Leave from February 26th through May 21, 2007.

18. Thereafter, Plaintiff was on a non-FMLA approved leave of absence.

19. Defendant Honigman provides health insurance to its employees through its own self-insurance plan.

20. For approximately nine weeks after the injury, Honigman refused to authorize a surgery recommended by Plaintiff's own physicians and Defendant Honigman's worker's compensation insurance carrier, The Hartford Insurance Company.

21. On or about April 23, 2007, after Defendant Honigman finally acquiesced, Plaintiff had the surgery.

22. On or about July 2, 2007, Plaintiff returned to work.

23. Due to the extreme pain from which Plaintiff continued to suffer, Plaintiff requested reasonable accommodation of her disability.

24. Plaintiff's accommodation included the need to work part-time, to limit the length

of her workday, take regular breaks, and avoid lifting heavy objects.

25. Although she did need reasonable accommodation, Plaintiff always performed her job duties in an exemplary fashion.

26. Defendant Schwartz repeatedly refused to honor Plaintiff's request for reasonable accommodation.

27. Defendant Schwartz was extremely hostile to Plaintiff regarding her disability.

28. Defendant Schwartz refused to permit Plaintiff to take regular breaks afforded to staff much less breaks required as part of her reasonable accommodation.

29. Defendant Schwartz forced Plaintiff to cancel doctor and physical therapy appointments.

30. Even when she was permitted to go to such appointments, Defendant Schwartz would harass her by asking if she was "leaving again."

31. Defendant Schwartz became angry with Plaintiff when she sought assistance from other staff with heavy files.

32. In approximately April or May 2008, Plaintiff sought a transfer to an open position in order to get away from the harassment of Defendant Schwartz and his refusal to honor her request for reasonable accommodation.

33. Her request was denied and she was told that the only way she could get away from Defendant Schwartz was to leave the firm.

34. During the summer of 2008, Plaintiff took several weeks of leave pursuant to the Family Medical Leave Act for an additional back surgery.

35. Plaintiff's leave was authorized, she returned to work within the permissible time period, and was returned to her position.

36. Due to chronic pain, Plaintiff requested and was granted a reduced schedule in or about March 2009.

37. In or about August 2009, Plaintiff submitted paperwork from her doctor requesting a leave pursuant to the Family Medical Leave Act because she continued to suffer agonizing and chronic pain due, at least in part, to Defendant Schwartz's refusal to permit her to take breaks during the day to stretch and/or walk around.

38. Prior to her taking the leave, Defendant Schwartz told Plaintiff that if she took the FMLA leave she would not be able to come back to work for him, would be demoted and forced to take a pay reduction, or may not have a job upon her return.

39. Despite these threats Plaintiff took an FMLA leave, with Defendant Honigman's authorization, on August 24, 2009.

40. Plaintiff returned to work within the time required by the FMLA.

41. In violation of the FMLA and in keeping with Defendant Schwartz's threats, Plaintiff was demoted to the document services department (word processing pool).

42. A representative of Defendant Honigman advised Plaintiff she was demoted because Defendant Schwartz could not accept her restrictions, and that document services was the first step before employees are terminated.

43. Plaintiff's demotion to the word processing department further exacerbated her injury causing her to go back on leave on or about November 23, 2009.

44. On or about May 19, 2010, Plaintiff contacted Defendant Honigman and advised that she was cleared by her physician to return to work full-time on May 31, 2010.

45. On May 27, 2010, Plaintiff was advised there was no open position available for her, that they did not expect such a position to open up, and as such her employment would be

terminated.

46. Although Plaintiff was told that she could apply for open positions for which she was qualified until her termination was finalized, her access to the posting of such positions was barred.

47. Although it had been clear for some time that Defendants intended to harass Plaintiff until she was forced to resign, and it was certainly clear by May 27, 2010 that Plaintiff was involuntarily terminated, Defendant Honigman deprived Plaintiff of a substantial subsidy toward her COBRA payments by falsely alleging she was terminated on June 8th.

COUNT ONE  
FAMILY MEDICAL LEAVE ACT

48. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 47 above as if set forth in full herein.

49. Defendants are employers covered by the Family and Medical Leave Act pursuant to 29 USC 2601 et seq.

50. In May 2009, Plaintiff was entitled to leave under the Family and Medical Leave Act, pursuant to 29 CFR 825.114.

51. Defendants engaged in prohibited conduct under the FMLA by interfering with, restraining or denying Plaintiffs' rights provided under the Act.

52. Defendants' action foreclosed Plaintiff's rights under the FMLA, including but not limited to the right to be returned to her position and the right to be free from threats and harassment for exercising her rights under the law.

53. Defendants' actions were intentional, with deliberate disregard for the rights and sensibilities of the Plaintiff.

54. As a direct and proximate result of Defendants' wrongful acts and omissions, Plaintiff

sustained loss of earnings and earning capacity; loss of fringe and pension benefits; suffered mental anguish, physical and emotional distress; humiliation and embarrassment; loss of professional reputation, and loss of the ordinary pleasures of everyday life, including the right to pursue gainful employment of her choice.

COUNT TWO  
VIOLATION OF SECTION 501 OF THE EMPLOYEE RETIREMENT  
INCOME SECURITY ACT (ERISA)

55. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 54 above as if set forth in full herein.

56. Plaintiff was at all times a participant or beneficiary, as that term is defined in ERISA.

57. Defendants were at all times an employer, as that term is defined in ERISA.

58. Under Section 510 of ERISA, 29 U.S.C. § 1140, an employer may not taken an adverse action against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan ... for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.

59. Plaintiff was terminated, at least in part, in order to interfere with her rights under Defendants' employee benefit plan.

60. As a direct and proximate result of Defendants' wrongful acts and omissions, Plaintiff has sustained injuries and damages including but not limited to, loss of earnings and earning capacity; loss of career opportunities; loss of fringe and pension benefits; mental anguish, physical and emotional distress; humiliation and embarrassment; loss of professional reputation; and loss of the ordinary pleasures of everyday life, including the right to pursue the gainful employment of her choice.

COUNT THREE  
VIOLATION OF THE AMERICANS WITH DISABILITY ACT (ADA)

61. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 60 above as if set forth in full herein.

62. At all times material hereto, Plaintiff was an employee and Defendants her employer, covered by and within the meaning of Title I of the Americans with Disabilities Act of 1990 (ADA), 42 USC 12111(5)(a)

63. At all times material hereto, Plaintiff was and is an individual with a disability within the meaning of §3(2) of the ADA, 42 USC 12102(2).

64. Plaintiff is a qualified individual with a disability as that term is defined in the ADA, 42 USC 12111(8).

65. Plaintiff's back injury is a physical impairment that substantially limits one or more major life activities.

66. Plaintiff has a record of a physical impairment that substantially limits one or more major life activities.

67. Defendants were aware of Plaintiff's back injury.

68. Defendants regarded Plaintiff's back injury as a physical impairment that substantially limited one or more major life activities.

69. Plaintiff's disability, and/or record of a disability, and/or perceived disability was a factor that made a difference in Defendants' decision to harass, demote and then terminate her employment.

70. Plaintiff's disability, and/or record of a disability, and/or perceived disability was a factor that made a difference in Defendants' decision not to place her in another position with

Defendants.

71. Defendants were predisposed to discriminate on the basis of disability and/or record of a disability and/or perceived disability and acted in accordance with that predisposition.

72. The actions of Defendants were intentional and willful, in deliberate disregard of and with reckless indifference to the rights and sensibilities of Plaintiff.

73. As a direct and proximate result of Defendants' violation of Plaintiff's rights as alleged, Plaintiff's terms, conditions, and privileges of employment were adversely affected.

74. As a direct and proximate result of Defendants' wrongful acts and omissions, Plaintiff has sustained injuries and damages including but not limited to, loss of earnings and earning capacity; loss of career opportunities; loss of fringe and pension benefits; mental anguish, physical and emotional distress; humiliation and embarrassment; loss of professional reputation; and loss of the ordinary pleasures of everyday life, including the right to pursue the gainful employment of her choice.

COUNT FOUR  
VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

75. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 74 above as if set forth in full herein.

76. At all relevant times, Plaintiff was an employee and Defendants were her employer within the meanings set forth in the Title VII of the Civil Rights Act of 1964, as amended, 42 USC '2000e, et seq.

77. Plaintiff is a member of a protected class; she is female.

78. At all times, Plaintiff performed her job duties in a manner that was satisfactory or better.

79. Defendants' treatment of Plaintiff, as described above, was based, at least in part, on the unlawful consideration of her sex/gender.

80. Defendant Honigman, its agents, representatives and employees, including Defendant Schwartz, were predisposed to discriminate on the basis of sex/gender and acted in accordance with that predisposition.

81. Defendant Honigman, its agents, representatives and employees, including Defendant Schwartz, treated similarly situated male employees more favorably than Plaintiff, in the terms, conditions and/or benefits of employment.

82. Defendant Honigman, its agents, representatives and employees, including Defendant Schwartz, created a hostile and degrading environment towards female employees, based, at least in part, on their gender.

83. The actions of Defendant and its agents were willful, intentional, in deliberate disregard of and with reckless indifference to the rights and sensibilities of Plaintiff.

84. As a direct and proximate result of Defendants' wrongful acts and omissions, Plaintiff has sustained injuries and damages including but not limited to, loss of earnings and earning capacity; loss of career opportunities; loss of fringe and pension benefits; mental anguish, physical and emotional distress; humiliation and embarrassment; loss of professional reputation; and loss of the ordinary pleasures of everyday life, including the right to pursue the gainful employment of her choice.

COUNT FIVE  
RETALIATION IN VIOLATION OF THE WORKER'S DISABILITY  
COMPENSATION ACT (WDCA)

85. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 84 above as if set forth in full herein.

86. Plaintiff filed a claim for Worker's Compensation benefits.

87. Defendants were aware that Plaintiff filed a claim for Worker's Compensation benefits.

88. Defendants retaliated against and terminated Plaintiff because she filed a claim for Worker's Compensation benefits, in violation of M.C.L. § 418.101 et seq.

89. Plaintiff's claim for Worker's Compensation benefits was one of the motivating factors behind Defendants' decision to harass, demote and then terminate Plaintiff.

90. As a further direct and proximate result of Defendants' wrongful acts and omissions, Plaintiff has sustained injuries and damages including but not limited to, loss of earnings and earning capacity; loss of career opportunities; loss of fringe and pension benefits; mental anguish, physical and emotional distress; humiliation and embarrassment; loss of professional reputation; and loss of the ordinary pleasures of everyday life, including the right to pursue gainful employment of her choice.

COUNT SIX  
PERSONS WITH DISABILITIES CIVIL RIGHTS ACT

91. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 90 above as if set forth in full herein.

92. Plaintiff had a severe and disabling back injury, a covered disability under the act, was perceived as having a disability and/or had a record of having a disability.

93. Plaintiff's disability affected her ability to engage in one or more major life activities.

94. Plaintiff was/is qualified for her former position as Executive Assistant.

95. Plaintiff's disability did not affect her ability to perform the essential functions of her job as Executive Assistant.

96. Defendants discriminated against Plaintiff by refusing to reasonably accommodate Plaintiff's disability, by harassing and retaliating against her, by creating a hostile environment, demoting and terminating her because of her disability.

97. As a further direct and proximate result of Defendants' wrongful acts, Plaintiff has sustained injuries and damages including but not limited to: loss of earnings and earning capacity; loss of career opportunities; loss of fringe and pension benefits; mental anguish; physical and emotional distress; humiliation and embarrassment; loss of professional reputation; and loss of the ordinary pleasures of everyday life, including the right to pursue gainful employment of her choice.

COUNT SEVEN  
ELLIOTT LARSEN CIVIL RIGHTS ACT

98. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 97 above as if set forth in full herein.

99. At all times material hereto, Defendant Honigman and Defendant Schwartz were employers and Plaintiff was an employee covered by and within the meaning of the Elliott-Larsen Civil Rights Act MCL§37.2101, et seq.

100. As Plaintiff's employer, Defendants had a duty to refrain from discriminating against Plaintiff on the basis of sex/gender. MCLA §37.2202.

101. Plaintiff is a member of a protected class; she is female.

102. Defendants' harassment, demotion and termination of Plaintiff as described above, were based, at least in part, on the unlawful consideration of her sex/gender.

103. Defendant Honigman, its agents, representatives and employees, including Defendant Schwartz, were predisposed to discriminate on the basis of sex/gender and acted in accordance with that predisposition.

104. Defendants treated similarly situated male employees more favorably than Plaintiff, in the terms, conditions and/or benefits of employment.

105. Defendants created a hostile and degrading environment towards those working in the secretarial/administrative assistant function, based, at least in part, on their gender.

106. The actions of Defendant Honigman, its agents, representatives and employees, including Defendant Schwartz, were intentional, in deliberate disregard of and with reckless indifference to the rights and sensibilities of Plaintiff.

107. As a direct and proximate result of Defendants' wrongful acts and omissions, Plaintiff has sustained injuries and damages including but not limited to, loss of earnings and earning capacity; loss of career opportunities; loss of fringe and pension benefits; mental anguish, physical and emotional distress; humiliation and embarrassment; loss of professional reputation; and loss of the ordinary pleasures of everyday life, including the right to pursue the gainful employment of her choice.

#### Relief Requested

For all of the foregoing reasons, Plaintiff Denise Fitzhenry demands judgment against Defendants as follows:

A. **Legal Relief:**

1. Compensatory damages in whatever amount she is found to be entitled;
2. Exemplary and punitive damages in whatever amount she is found to be entitled;
3. A judgment for lost wages and benefits, past and future, in whatever amount she is found to be entitled; and,
4. An award of interest, costs and reasonable attorney fees.

**B. Equitable Relief:**

1. An order out of this Court reinstating Plaintiff to the position she would have held had there been no wrongdoing by Defendants;
2. An injunction out of this Court prohibiting any further acts of discrimination or retaliation;
3. An award of interest, costs and reasonable attorney fees; and,
4. Whatever other equitable relief appears appropriate at the time of final judgment.

**DEBORAH L. GORDON, PLC**  
/s/Deborah L. Gordon (P27058)  
Sarah S. Prescott (P70510)  
Attorneys for Plaintiff  
33 Bloomfield Hills Parkway, Ste. 275  
Bloomfield Hills, MI 48304  
(248) 258-2500  
[dgordon@deborahgordonlaw.com](mailto:dgordon@deborahgordonlaw.com)  
[sprescott@deborahgordonlaw.com](mailto:sprescott@deborahgordonlaw.com)

DATED: October 14, 2010

**JURY DEMAND**

Plaintiff Denise Fitzhenry by her attorneys Deborah L. Gordon, PLC, demands a trial by jury of all the issues in this case.

**DEBORAH L. GORDON, PLC**  
/s/Deborah L. Gordon (P27058)  
Sarah S. Prescott (P70510)  
Attorneys for Plaintiff  
33 Bloomfield Hills Parkway, Ste. 275  
Bloomfield Hills, MI 48304  
(248) 258-2500  
[dgordon@deborahgordonlaw.com](mailto:dgordon@deborahgordonlaw.com)  
[sprescott@deborahgordonlaw.com](mailto:sprescott@deborahgordonlaw.com)

DATED: October 14, 2010