# IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No.:

KARA SISSOM

(f/k/a KARA LOVERIDGE)

Plaintiff,

v.

CITY OF THORNTON

Defendant.

# COMPLAINT AND JURY DEMAND

**PARTIES**

1. Ms. Sissom is, and was at all relevant times, a resident of Weld County, State of Colorado.
2. Ms. Sissom was, at all relevant times, an employee of the City of Thornton, Colorado.

# JURISDICTION AND VENUE

1. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1331, this case arising under the laws of the United States. This action arises under the Americans with Disabilities Act, of 1990, and the ADA Amendments Act of 2008, 42 U.S.C. §§ 12101, *et. seq*. and the regulations promulgated thereunder. (“the ADAAA”).
2. Additional claims are brought pursuant to the Family Medical Leave Act, 29 U.S.C. §§ 2601, *et seq*.
3. Venue is proper pursuant to 28 U.S.C. § 1391 (b)(2), as all of the events or omissions giving rise to the claims occurred in the District of Colorado.

# ALLEGATIONS

1. Ms. Sissom was an employee of the City of Thornton beginning on or about April 20, 2009 and continuing until her employment ended through no fault of her own as that term is defined under the Colorado Employment Security Act.
2. Ms. Sissom was promoted from Technical Support Specialist I to Technical Support Specialist II in October 2014 based on her merit.
3. On or about May 31, 2015, Ms. Sissom admitted herself to a facility for treatment of serious health conditions unrelated to work or any workers compensation claim.
4. Ms. Sissom then voluntarily requested leave under the Family Medical Leave Act (“FMLA”) for treatment of these serious health conditions.
5. Defendant granted Ms. Sissom leave from June 1, 2015 through June 12, 2015.
6. Ms. Sissom requested two extensions to her leave, through July 7, 2015.
7. Defendant granted both requests.
8. As part of the process for requesting FMLA, Ms. Sissom’s physician completed a Certification of Health Care Provider for Employee’s Serious Health Condition (“Certification”).
9. The preceding is a confidential document and medical privacy of all FMLA documents is contemplated by regulation.
10. On the Certification, signed by William Arshad, M.D., Ms. Sissom’s potential need for future leave for episodic leave during “flare-ups” was noted as “hopefully not”, with frequency being indicated as “unpredictable.”
11. Dr. Arshad noted “Patient will be unable to interact with others” during such flare-ups.
12. The Designation Notice provided to Ms. Sissom by Defendant on June 4, 2015, stated that she would be required to present a fitness-for-duty certificate to be restored to employment.
13. On or about July 7, 2015, Ms. Sissom was released by her physician to return to work.
14. Despite being released by her own doctor without restrictions, and based solely upon the information contained in the Certification, Defendant required that Ms. Sissom undergo a psychological evaluation to determine whether she was ‘fit for duty.’
15. Such evaluations *by the employee’s health care professional* are permitted under the FMLA. *Emphasis added*
16. Such an evaluation is permissible under the ADAAA when an employer believes that, without periodic alcohol testing, an employee will pose a direct threat to his or her safety, or the safety of others. *ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (ADA), dated July 2, 2000*.
17. The ADAAA was not discussed by Plaintiff or Defendant at the time of the involuntary fitness for duty evaluation.
18. Ms. Sissom complied with this requirement and met with Debra Tasci, Psy.D. (“Dr.

Tasci”), of Nicoletti-Flater Associates, PLLP, on July 9, 2015.

1. Dr. Tasci’s report states that, even though Ms. Sissom was released by her own physician without restrictions, “given the circumstances the City is interested in having her seen for a Fitness for Duty/Dependency Evaluation.”
2. The phrase “given the circumstances…” referred to Ms. Sissom’s self-admission for inpatient treatment.
3. During Ms. Sissom’s absence, there was no inquiry about her welfare or requirement she be examined in order to continue her FMLA leave.
4. There were no events or irregularities in Ms. Sissom’s behavior during her FMLA leave.
5. There was no basis for the harassment related to a perceived disability by Defendant.
6. The Defendant’s perception and treatment of Ms. Sissom was not rational, was not based on any fact or indicator and it harmed her.
7. The website of Nicoletti-Flater Associates advertises their expertise in “threat assessment,” violence prevention and police and public safety.
8. The Defendant, with no evidence relating thereto, regarded and treated Ms. Sissom as a threat to herself and others.
9. Dr. Tasci issued recommendations on July 9, 2015, indicating that Ms. Sissom needed to undergo additional treatment**.**
10. Ms. Sissom was directed to provide documentation of compliance, attendance and progress to Defendant’s Human Resources Director, Tricia Hinton-Potter.
11. Upon information and belief, Ms. Hinton-Potter was not a subject matter expert, credentialed or on with competency in the subjects allegedly of confirm to the Defendant and its doctors.
12. After completing six weeks of treatment conforming to the Defendant’s order, Defendant required that Ms. Sissom submit to a second evaluation.
13. Ms. Sissom complied with this requirement as well.
14. On or about September 17, 2015, Dr. Tasci determined that Ms.Sissom was “fit for duty with considerations”.
15. There were no work-related observations or findings of any irregularities concerning Ms.

Sissom’s conduct or work at any time.

1. Plaintiff’s work products were not compromised or deficient in any respect.
2. In fact, Ms. Sissom was nominated for and received awards for her performance in 2011, 2012, 2013 and 2014.
3. Dr. Tasci’s report issued after the September 17, 2015 assessment states, under the heading REASON FOR REFERRAL, that Hinton-Potter requested the assessment after Ms. Sissom was “admitted for alcohol detoxification, depression and anxiety.”
4. Plaintiff’s mistreatment and disability harassment arose as a result of having requested FMLA leave; that is all she did.
5. Defendant retaliated against Ms. Sissom for having lawfully applied for FMLA leave, by unlawfully using confidential information presented in the Certification as a basis for ordering a fitness for duty assessment and forming a mandatory return-to-work agreement.
6. Being on FMLA leave was a lawful activity.
7. Under Colorado law, § 24-34-402.5, C.R.S., an employer is prohibited from terminating an employee’s employment due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours.
8. No information was obtained from the Defendant by the Colorado Civil Rights Division regarding its motives or criteria which might explain the disability harassment of Plaintiff.
9. Oral interactions between the Defendant and its doctors were not documented in any records.
10. On or about September 30, 2015, Defendant provided Ms. Sissom with a ‘Return to Work Agreement’, which required, *inter alia*, that:
	1. Ms. Sissom be subject to certain types of testing at any time during her working hours, for a period of five (5) years.
	2. If Ms. Sissom was absent on sick leave that was not ‘pre-scheduled’, she must report to a medical facility designated by Defendant within two (2) hours of the beginning of her regular shift. The Return to Work Agreement (“Agreement”) concluded with a paragraph that included the following statement:

THE EMPLOYEE ACKNOLWEDGES THAT EMPLOYEE IS ENTERING INTO THIS AGREEMENT FREELY AND VOLUNTARILY.

1. The Defendant’s conduct was based on suppositions, hypotheses, subjectivity and a form of institutional hysteria.
2. Such an agreement, often referred to as a “last chance agreement” is permitted where an employee could otherwise be terminated for poor performance or misconduct resulting from alcoholism. *The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities*
3. In this case, there was no poor performance or misconduct to support such an agreement.
4. On October 5, 2015, Ms. Sissom and her counsel met with Hinton-Potter and Margaret Braun, Senior Assistant City Attorney for Defendant, to discuss the Return to Work Agreement.
5. This meeting was held at the behest of the Defendant, for the stated purpose of causing Ms. Sissom to sign the Agreement.
6. During the meeting on October 5, 2015, Defendant claimed that submission of the Certification constituted “voluntary disclosure” of alcohol dependence by Ms. Sissom.
7. When Ms. Sissom stated that she disagreed with this characterization of the Certification, Braun also stated that it was now “too late” for Ms. Sissom to bring this argument to Defendant’s attention.
8. Although Ms. Sissom has an alcohol related disability, she has never requested a reasonable accommodation for this disability.
9. Ms. Sissom is also episodically disabled by anxiety and/or depression.
10. Ms. Sissom’s anxiety and depression render her, as a matter of law, a qualified individual with a disability. *EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, Notice No. 915.002, dated March 25, 1997*
11. These conditions were disregarded by Defendant.
12. Ms. Sissom was never accused of any misconduct at work or substandard performance and she was never under the influence of alcohol while at work.
13. At no time during her employment was Ms. Sissom ever tested for alcohol consumption, nor was she ever detained or cited by law enforcement for any alcohol related conduct.
14. Plaintiff was not required to drive to perform her position, nor was her vehicle equipped with alcohol related controls, her job description describes no task which could present a risk to her or to others, she has a clean driving record and no loss prevention, health and safety or risk management professional was ever requested to interact with Plaintiff.
15. What has occurred here is an employer accepting a leave application, afterwards torturing it into evidence of a disability for which it was neither authorized nor intended.
16. The Defendant made a nice tossed salad of statutory provisions it arbitrarily selected from the ADAAA and the FMLA, taking Ms. Sissom to the Defendant’s logical destination, a constructive discharge by forcing her to resign.
17. This case is one of a rogue Employer undertaking the novel stitching of unrelated laws into what amounts to a new legal reality, a hybrid law for which it seeks this court’s imprimatur - bootstrapping a leave law into a disability/leave law.
18. Nothing in the Agreement provided any modification to the work environment, nor any other accommodation for Ms. Sissom’s disabilities.
19. The Agreement did not require any actions by Defendant, only from Ms.

Sissom.

1. Ms. Sissom asked Hinton-Potter and Braun whether she would be fired if she did not sign the Agreement.
2. Ms. Sissom was told that her choices were to sign the agreement or be fired.
3. Ms. Sissom was constructively discharged: rather than have an involuntary termination on her record, Ms. Sissom resigned.
4. Ms. Sissom filed a Charge of Discrimination with the Colorado Civil Rights Division (“CCRD”) on January 21, 2016.
5. The CCRD issued a Determination of Probable Cause on December 26, 2016.
6. On March 22, 2017, the Equal Employment Opportunity Commission (“EEOC”) provided notice that it was asserting jurisdiction and the charge was being transferred from the CCRD to the Denver Field Office, U.S. Equal Employment Opportunity Commission for processing.
7. The EEOC issued a Determination letter, in which the District Director “conclude[d] there is reasonable cause to believe that the Respondent violated the ADA when it conditioned the Charging Party’s return to work from an extended medical leave on her signing an Agreement containing provisions that violate the ADA.”
8. The District Director of the EEOC also concluded that “Charging Party was constructively discharged because of her disability, when she refused to sign the Agreement.”
9. On June 21, 2018, the EEOC issued a Notice of Right to Sue within 90 Days.

# FIRST CLAIM FOR RELIEF

**Willful Violation of the Privacy Provisions of the**

**Family Medical Leave Act (FMLA)**

1. Ms. Sissom re-alleges and incorporates by reference the preceding facts and allegations.
2. The information provided by Ms. Sissom’s physician on the Certification of Health Care Provider should have been used by Defendant solely to determine Ms. Sissom’s eligibility for leave under the FMLA.
3. Defendant used the information obtained in the Certification to make an initial determination that Ms. Sissom must undergo a “fit for duty” exam, even though she had been released to return to work without restrictions by her physician.
4. As a result of this misuse of confidential information, Ms. Sissom was subjected to two return to work assessments.
5. The report issued following those assessments was used to create a Return to Work Agreement that violated Ms. Sissom’s rights under the ADAAA.
6. As a result of Defendant’s actions, as stated in the preceding claim for relief, Ms. Sissom suffered compensable damages.

# SECOND CLAIM FOR RELIEF

**Willful Retaliation for Accessing FMLA Leave**

1. Ms. Sissom re-alleges and incorporates by reference the preceding facts and allegations.
2. Ms. Sissom exercised rights protected by the FMLA.
3. Ms. Sissom was qualified for her position as a Technical Support Specialist II.
4. Defendant used confidential information submitted by her doctor in his Certification for leave under the FMLA as a basis to request “fitness for duty” assessments.
5. Based upon the two assessments, Defendant demanded that Ms. Sissom execute an Agreement that substantially violated her rights under the ADAAA.
6. As a result of declining to sign the Agreement, Ms. Sissom suffered an adverse employment action – constructive discharge.
7. This adverse employment action occurred under circumstances giving rise to inference of retaliatory intent.
8. Were it not for Defendant’s misuse of confidential information provided in the Certification for Leave, Defendant would not have demanded that Ms. Sissom execute a discriminatory Agreement.
9. Through her request for leave under the FMLA, Ms. Sissom initiated efforts to address a non-work-related serious health condition, and was ultimately punished for it.
10. As a result of Defendant’s actions, as stated in the preceding claim for relief, Ms. Sissom suffered compensable damages.

# THIRD CLAIM FOR RELIEF

**Failure to Provide Reasonable Accommodation Under the ADAAA**

1. Ms. Sissom re-alleges and incorporates by reference the preceding facts and allegations.
2. Ms. Sissom is a member of a protected class under the ADAAA.
3. Ms. Sissom is a qualified individual with one or more disabilities.
4. Ms. Sissom was able to perform all the essential functions of her job with or without reasonable accommodation.
5. A reasonable accommodation for a disability “is any change in the work environment or in the way things are customarily done that enables an

application or employee with a disability to enjoy equal employment opportunities.” *The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities*, December 20, 2017. [https://www.eeoc.gov/facts/performance-conduct.](https://www.eeoc.gov/facts/performance-conduct) html#alcohol

1. Nothing in the Agreement provided any modification to the work environment.
2. None of the conditions imposed by the Agreement constitute an accommodation of any type, for Ms. Sissom’s disabilities.
3. Defendant did not engage in an interactive discussion regarding possible accommodations with Ms. Sissom.
4. Defendant failed to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability, in violation of 42 U.S.C.

§ 12112 (b)(5)(A).

1. The Agreement is in conflict with Defendant’s policy 4.2, contained in Administrative Directive 2-26, which reads:

A City Official must have reasonable suspicion, as defined in this Directive, to require an employee to be tested [for alcohol consumption].

1. Reasonable Suspicion is defined in the Directive to mean ”an articulable belief based on specific facts and reasonable inferences drawn therefrom.”
2. The Directive then provides examples of circumstances which constitute a basis for determining that there is a reasonable suspicion that an employee maybe *impaired* by the consumption of alcohol. *Emphasis added*
3. Ms. Sissom was never impaired while at work. Therefore, Defendant had no reasonable suspicion upon which to base testing requirements.
4. Defendant stated that submission of the Certification form constituted voluntary disclosure of alcohol dependence by Ms. Sissom.
5. Defendant maintained that, under the Directive, such voluntary disclosure subjects Ms. Sissom to the same terms and conditions as if she had been impaired at work.
6. ‘Voluntary disclosure’ is a term of art under the American with Disabilities Act as amended, not the FMLA.
7. The Defendant contends it is within its authority to utilize any information it may acquire for any reason and apply said information for any other purposes it sees fit.
8. This is analogous to an employer extracting information from a worker compensation claim that it has denied, then barring the employee from activities related to the denied claim.
9. The FMLA, however, requires that “records and documents relating to certification, recertification or medical histories of employees. . . created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files.” 29 CFR 825.500(g)
10. The Agreement is in conflict with Defendant’s policy 4.9, Return to Duty

Provisions, contained in Administrative Directive 2-26:

* 1. ***An employee who tests positively for drugs and/or alcohol*** will be required to do one of the following prior to returning to work:
		1. Produce written certification from the City’s Substance Abuse Professional (SAP) that the employee has no alcohol dependency problem, or
		2. Enter into a written agreement with the City that the employee will refrain from any alcohol consumption, ***while on duty***, while under the term of the agreement . . . and consent to random drug and/or alcohol tests as described herein. *Emphasis added.*
1. Ms. Sissom was never tested for alcohol consumption while on duty;
2. The Agreement required Ms. Sissom to refrain from alcohol at all times.
3. The ADAAA allows an employer to require that an employee not be under the influence of alcohol **at the workplace**. 42 U.S.C. 12114 (c)(2).
4. Ms. Sissom requested a modification to the Agreement: that she be allowed to take intermittent leave when she was experiencing the symptoms of depression and/or anxiety.
5. Ms. Sissom requested an additional modification to the Agreement that she be allowed to self-report her absence on those occasions.
6. Defendant stated that this would not be allowed, as it would not be in compliance with the requirements of the fitness for duty assessment.
7. Defendant did not suggest that such a modification would cause an undue hardship.
8. The Agreement was not consistent with business necessity.
9. The imposition of the conditions of the Agreement discriminated against Ms.

Sissom on the basis of her disabilities, anxiety and depression, by requiring someone who is unable to leave her home due to the symptoms of these illnesses to do just that.

1. Ms. Sissom was constructively discharged following her refusal to sign the Agreement voluntarily due to her objections to the requirements of the Agreement.
2. As a result of Defendant’s actions, as stated in the preceding claim for relief, Ms. Sissom suffered compensable damages.

# FOURTH CLAIM FOR RELIEF

**Constructive Discharge**

1. Ms. Sissom re-alleges and incorporates by reference the preceding facts and allegations.
2. Ms. Sissom was constructively discharged when Defendant forced her to choose between resignation or termination.
3. The Tenth Circuit Court of Appeals has ruled that an employee who resigns under such circumstances is constructively discharged. *Hall v. U.S. Dept of Labor*, 476 F.3d 847, 860 (110th Cir. 2007).
4. As a result of Defendant’s actions, as stated in the preceding claim for relief, Ms. Sissom suffered compensable damages.

# DAMAGES

1. As a direct and proximate result of Defendant’s violations of Ms. Sissom’s rights, Ms.

Sissom has suffered the loss of income and benefits, as well as incurring other damages. Ms. Sissom is entitled to statutory relief, under 42 U.S.C. Section 12101 *et seq*., as amended, and to other relief as follows:

1. Lost wages including but not limited to all back pay, front pay, benefits, penalties associated with the forfeiture of Ms. Sissom’s accrued pension and all lost tax contributions.
2. All costs, fees and expenses associated with mitigation.
3. All consequential damages resulting from Ms. Sissom’s loss of employment.
4. All costs associated with amended tax returns.
5. All costs, fees and expenses associated with the enforcement of the subject claims.
6. Pre-judgment interest, post-judgment interest and post-judgment interest on pre- judgment interest.
7. All costs of collection of judgment including attorneys’ fees.
8. Liquidated damages.
9. Compensatory damages including but not limited to pain and suffering, emotional distress, mental anguish, loss of enjoyment of life, loss of consortium and inconvenience.
10. All attorneys’ fees, including attorneys’ fees associated with the collection of any judgment.
11. All other relief as authorized by any of the legal theories pled or as the pleadings may be conformed to the evidence.

A jury trial is demanded.

# PRAYER FOR RELIEF

WHEREFORE, Ms. Sissom prays that judgment be rendered herein in her favor and against Defendant and such other relief as the Court deems just and proper.

Respectfully submitted this 18th day of September, 2018.

/s/ *Johanna Brammer-Hoelter*

Johanna Brammer-Hoelter, Esq. Jody Brammer-Hoelter, LLC 357 McCaslin Blvd., Suite 200

Louisville, CO 80027

Tel: (303) 666-6727

Fax: (303) 604-6166

jody@hoelterlaw.com

James Abrams, Esq. 401 Westwood Dr.

Denver, CO 80206

Tel: 303 321-6087

abramsjim@gmail.com

*Counsel for Plaintiff*