

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MARK HORTON,)	
)	
Plaintiff,)	
)	
v.)	Case No. 4:17-CV-2324
)	
MIDWEST GERIATRIC)	
MANAGEMENT, LLC,)	
)	
Defendant.)	

DEFENDANT MGM’S MOTION TO DISMISS PLAINTIFF’S COMPLAINT

COMES NOW Defendant Midwest Geriatric Management, LLC (“MGM” or “Defendant”), by and through its counsel, and pursuant to Federal Rule of Civil Procedure 12(b)(6), hereby moves this Court to dismiss Plaintiff Mark Horton’s (“Plaintiff”) Complaint for failure to state a claim upon which relief may be granted. In support of its Motion, Defendant states as follows:

1. In his Complaint, Plaintiff attempts to assert three claims based upon the alleged withdraw of an offer of at-will employment: (1) Count I, a violation of Title VII based upon Plaintiff’s sexual orientation, which Plaintiff contends equates to “sex” under Title VII in as much as Plaintiff was in a relationship with another male (Complaint, ¶¶ 46-61); (2) Count II, another violation of Title VII based upon Plaintiff’s sexual orientation, which Plaintiff contends equates to “religious discrimination” under Title VII because he held religious beliefs that permitted him to be in a homosexual marriage and relationship (*id.*, ¶¶ 62-76); and (3) Count III, a state law claim of fraudulent inducement based upon MGM’s alleged failure to object to Plaintiff’s proposed four-to-six week timeline for obtaining his educational records in completing a background check upon which his employment was conditioned (*id.*, ¶ 77-90).

2. Counts I and II fail to state a claim as a matter of law because under controlling Eighth Circuit precedent, sexual orientation is not protected by Title VII. *See Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam); *see also Johnson v. Shinseki*, No. 1:12-CV-00187SNLJ, 2013 WL 1987352, at *1-2 (E.D. Mo. May 13, 2013); *Logan v. Chertoff*, No. 4:07-CV-1948 CAS, 2009 WL 3064882, at *1 n.3 (E.D. Mo. Sept. 22, 2009); *Bland v. Burwell*, No. 14-0226-CV-W-ODS, 2016 WL 110597, at *1 (W.D. Mo. Jan. 8, 2016); *Pambianchi v. Arkansas Tech Univ.*, No. 4:13-CV-00046-KGB, 2014 WL 11498236, at *4 (E.D. Ark. Mar. 14, 2014); *Robertson v. Siouland Cmty. Health Ctr.*, 938 F. Supp. 2d 831, 841 (N.D. Iowa 2013); *Harmon v. Dep't of Veterans Affairs*, No. 4:06CV1674SWW, 2008 WL 495876, at *2 (E.D. Ark. Feb. 20, 2008), *aff'd*, 301 F. App'x 569 (8th Cir. 2008); *Klein v. McGowan*, 36 F. Supp. 2d 885, 889 (D. Minn.), *aff'd*, 198 F.3d 705 (8th Cir. 1999); *Kelley v. Vaughn*, 760 F. Supp. 161, 163 (W.D. Mo. 1991).

3. This is true regardless of whether Plaintiff pleads these allegations as sounding in “sex” discrimination, *see, e.g., Robertson*, 938 F. Supp. 2d at 841; *Harmon*, 2008 WL 495876, at *2-3; *Klein*, 36 F. Supp. 2d at 890; *Kelley*, 760 F. Supp. at 163, or “religious discrimination,” *see Williamson*, 876 F.2d at 70; *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 293 (3d Cir. 2009); *Burrows v. Coll. of Cent. Florida*, No. 5:14-CV-197-OC-30PRL, 2014 WL 7224533, at *4 (M.D. Fla. Dec. 17, 2014).

4. Count III fails to state a claim as a matter of law because, among other reasons, the job offer was for employment at-will, which necessarily precludes any reasonable reliance by Plaintiff. (*See Complaint*, Ex. 3); *Deschler v. Brown & Williamson Tobacco Co.*, 797 F.2d 695, 696 (8th Cir. 1986); *Franklin v. Pinnacle Entm't, Inc.*, 1 F. Supp. 3d 979, 988-90 (E.D. Mo. 2014); *Faust v. Ryder Commercial Leasing & Servs.*, 954 S.W.2d 383, 394 (Mo. Ct. App. W.D.

1997), *abrogated on other grounds by Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81 (Mo. banc 2010); *Alfano v. AAIM Mgmt. Ass'n*, 770 S.W.2d 743, 745 (Mo. Ct. App. 1989); *Guido v. Orange Reg'l Med. Ctr.*, 958 N.Y.S.2d 195, 199 (N.Y. App. 2013).

5. As such, Plaintiff's Complaint should be dismissed in its entirety, with prejudice, for failure to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6).

6. Defendant files herewith its Memorandum in Support of this Motion to Dismiss, which is incorporated herein by reference.

WHEREFORE, Defendant Midwest Geriatric Management, LLC respectfully moves this Court to dismiss Plaintiff's Complaint, with prejudice, and for such other and further relief as the Court deems just and proper.

Dated: September 26, 2017

Respectfully submitted,

/s/ Philip J. Mackey
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CERTIFICATE OF SERVICE

I hereby certify that, on September 26, 2017, a true and correct copy of the foregoing was served via the Court's electronic filing system upon all counsel of record, pursuant to the Court's Local Rules.

/s/ Philip J. Mackey