

4. In light of the Supreme Court's decision in *Bostock*, on July 6, 2020, the Eight Circuit entered a Per Curiam Order reversing the judgment of the district court and remanding this case for further proceedings in light of *Bostock*.

5. Plaintiff now seeks to amend his Complaint to allege a single cause of action for sex discrimination consistent with the Supreme Court's decision in *Bostock*.

6. Federal Rule of Civil Procedure 15(a)(2) provides that a party may amend its pleading before trial with leave of court.

7. Federal Rule of Civil Procedure 15(a)(2) further provides that "[t]he court should freely give leave when justice so requires."

8. No discovery has been conducted by the parties to date and, therefore, the Defendant will not be unduly prejudiced by this amendment.

9. Simultaneously submitted for the Court's review is Plaintiff's proposed First Amended Complaint and a proposed order permitting Plaintiff to file the same.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court GRANT Plaintiff's Motion for Leave to File First Amended Complaint, and such other and further relief as the Court deems just and proper.

Respectfully Submitted,

MATHIS, MARIFIAN & RICHTER, LTD.

By: /s/Mark S. Schuver

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CERTIFICATE OF SERVICE

I hereby certify that, on August 26, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Eastern District of Missouri by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/Mark S. Schuver

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI**

MARK HORTON,)	
)	
Plaintiff,)	
)	Case No. 14:17-CV-2324-JCH
v.)	
)	
MIDWEST GERIATRIC MANAGEMENT, LLC,)	JURY TRIAL DEMANDED
)	
Defendant.)	

FIRST AMENDED COMPLAINT

COMES NOW Plaintiff, Mark Horton, by and through his attorneys, Mathis, Marifian & Richter, Ltd., and for his First Amended Complaint against the Defendant, Midwest Geriatric Management, LLC, states as follows:

NATURE OF ACTION

This is an action under Title VII of the Civil Rights Act of 1964 to correct unlawful discrimination based on sex and sexual orientation. Plaintiff, who had accepted the Defendant’s offer of employment in writing, alleges that the Defendant discriminated against him on the basis of his sex and sexual orientation. Thereafter, despite Plaintiff’s acceptance, the Defendant “withdrew” its employment after discovering that the Plaintiff was a homosexual and in a committed marital relationship with another male.

JURISDICTION AND VENUE

1. Plaintiff brings this action to remedy violations under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, as amended by the Civil Rights Act of 1991, 42 U.S.C. §1981a.

2. The employment practices and alleged unlawful acts were committed within the jurisdiction of the United States District Court for the Eastern District of Missouri, and Defendant is located in the Eastern District of Missouri.

3. Plaintiff has complied with all administrative prerequisites by filing timely a Charge of Discrimination based on racial discrimination with the Equal Employment Opportunity Commission (“EEOC”) more than 60 days before the filing of this lawsuit. A true and accurate copy of that Charge is attached hereto as Exhibit 1.

4. The EEOC has issued a right-to-sue letter to Plaintiff. A true and accurate copy of Plaintiff’s right-to-sue letter is attached hereto as Exhibit 2.

PARTIES

5. Plaintiff, Mark Horton, is male and was and is, at all times relevant herein, a resident of Madison County, Illinois, when Defendant’s discriminatory and wrongful conduct occurred.

6. At all times relevant herein, Defendant, Midwest Geriatric Management, LLC (“MGM”), was and is a Missouri Limited Liability Company doing business in the State of Missouri, and having at least 15 employees.

7. At all times relevant herein, MGM was engaged in an industry affecting commerce and was an employer within the meaning of 42 U.S.C. §2000e(b), (g) and (h).

GENERAL ALLEGATIONS

8. Plaintiff is a homosexual male who has been legally married to his male partner since November 14, 2014.

9. Prior to accepting employment with the Defendant, MGM, Plaintiff was employed as Vice President of Sales & Marketing with one of MGM’s competitors, Celtic Healthcare (“Celtic”).

10. Plaintiff's status as a homosexual male in a lawful married relationship with another male did not negatively affect his job performance with Celtic in any way.

11. In February of 2016, while still employed by Celtic, Plaintiff received an unsolicited e-mail from Defendant MGM's authorized agent, an executive search firm called "Jobplex," who represented that they had been "exclusively retained to identify a Vice President of Sales and Marketing" for Defendant, MGM.

12. Plaintiff had never considered leaving his position with Celtic, but Defendant MGM's agent, Jobplex, affirmatively represented to Plaintiff: "I can promise you that it will NOT be a waste of your time."

13. Based on the representations of MGM's agent, Jobplex, Plaintiff agreed to undergo the application process, including one or more interviews with Defendant MGM's President and C.E.O., Judah Bienstock, and his wife, Faigie "Faye" Bienstock.

14. On April 22, 2016, after successfully completing a detailed assessment and interview process, Judah and Faye Bienstock sent Plaintiff a written job offer on behalf of MGM.

15. The job offer was contingent upon a background check, but the written offer contained no time limit for the completion of the background check.

16. After Plaintiff received the job offer, he was informed that a company called "HireRight" had been retained on behalf of Defendant MGM to perform the background check.

17. On or about April 21, 2016, Plaintiff was informed that Defendant MGM's agent, HireRight, was having a hard time verifying Plaintiff's education with two colleges.

18. After investigated the issue, Plaintiff determined that one of the colleges that he had attended had been sold to another university and, as a result, the name had changed and the request for verification needed to be sent to the new entity.

19. Plaintiff further determined that the other college did not have computerized records and, therefore, needed additional time to locate and copy the records.

20. Plaintiff conveyed this information to Jobplex, HireRight and Defendant MGM, including the fact that it could take four to six weeks to obtain the requested information.

21. Neither Jobplex, HireRight nor MGM voiced any concern to Plaintiff over the potential delay.

22. On May 4, 2016, Plaintiff signed the written job offer accepting the position of Vice President of Sales and Marketing with Defendant MGM and transmitted the signed document via e-mail to Faye Bienstock and Jobplex. A copy of the signed written job offer is attached hereto as "Exhibit 3."

23. On May 4, 2016, with full knowledge that the background check had not yet been completed, Faye Beinstock sent an e-mail on behalf of Defendant MGM responding to Plaintiff's transmission of the signed written job offer accepting the position by stating: "*Wonderful! Congratulations! We are so excited! When will be your anticipated start date? Faye.*"

24. In reliance upon the written job offer that he had signed and accepted, and the confirmation by Faye Beinstock on behalf of Defendant MGM, Plaintiff gave notice to Celtic that he was resigning his employment.

25. On May 10, 2016, Plaintiff sent an e-mail to Faye Bienstock advising her that Celtic had agreed to release him from his employment early so that he could "*begin his new adventure*" with Defendant MGM.

26. On that same date, Faye Bienstock responded to Plaintiff on behalf of Defendant MGM, stating, "*We are ready for you whenever works for you!*"

27. On Thursday, May 12, 2016, Faye Bienstock sent Mr. Horton another e-mail, stating, “*Let’s just meet Monday [May 16, 2016 at] 9:00 am to get everything started!*”

28. In reliance upon the written job offer that he had signed and accepted, and the confirmation by Faye Beinstock on behalf of Defendant MGM, Plaintiff began working with Faye Bienstock to identify and recruit candidates for Defendant MGM’s Vice President of Human Resources and Regional Sales Manager positions.

29. On Friday, May 13, 2016, Faye Bienstock sent Plaintiff an e-mail informing him that he needed to complete the documentation regarding his education and complete a pre-hire assessment before attending orientation the following week. Faye Bienstock stated after completion of those two items “*[w]e can pick a new start date.*”

30. Plaintiff responded via e-mail that same date by stating that he had been working closely with Defendant MGM’s agent the past few weeks, and had visited one of the colleges that day to request a copy of his transcript for verification.

31. At no time did Faye Bienstock or anyone on behalf of Defendant MGM voice any concern or objection to any delay in obtaining Plaintiff’s educational records.

32. Plaintiff successfully completed the pre-hire assessment.

33. On Tuesday, May 17, 2016, Plaintiff sent an e-mail to Faye Bienstock in which he updated her on the status of obtaining his educational records, stating that he had reached out to all of his colleges and requested transcripts and diplomas. In passing, Plaintiff disclosed to Faye Bienstock his homosexual relationship by stating: “*My partner has been on me about [my MBA] since he completed his PHD a while back.*”

34. After disclosing his homosexual relationship, Plaintiff personally experienced acts of discrimination by Defendant MGM on the basis of sex and sexual orientation.

35. The acts of discrimination were disclosed to Plaintiff in communications from Faye Bienstock, acting within the course and scope of her position and agency with Defendant MGM.

36. After disclosing his homosexual relationship to Faye Bienstock, the next response Plaintiff received was on May 20, 2016, from Faye Beinstock in which she stated in an e-mail: *“Are you able to come this afternoon? We would like to discuss the status of your employment.”*

37. Plaintiff replied on that same date, stating that he was out of town at the time and unable to come in that afternoon, but would be available on a different date.

38. At the time, only one week had passed since Faye Bienstock had informed Plaintiff on behalf of Defendant MGM that they could *“pick a new start date”* once Defendant MGM received his records.

39. On Sunday, May 22, 2016, Faye Beinstock sent Plaintiff an e-mail on behalf of Defendant MGM stating: *“Mark – I regret to inform you that due to the incompleteness of the background check of supportive documentation- we have to withdraw our offer letter for employment at MGM. We wish you much luck in your future endeavors. Judah and Faye.”*

40. At the time Faye Beinstock transmitted the May 22, 2016 e-mail, there were still nine days left prior to the date that Plaintiff had originally informed Defendant MGM that he could begin work.

41. After Plaintiff received the May 22, 2016 e-mail, he successfully obtained the requested college records himself without any issues.

42. On June 21, 2016, upon learning that the Vice President of Sales and Marketing position with Defendant MGM was still open, Plaintiff sent an e-mail to Judah and Faye

Bienstock stating, in relevant part, “*I would like to meet this week to discuss moving forward with the VP of Sales role with MGM.*”

43. Although the position was still open, Faye Bienstock responded on behalf of Defendant MGM on June 23, 2016, by stating: “*Thank you Mark for your communication. At this time –we are considering other candidates. We appreciate your continued interest in MGM- and will contact you if we wish to pursue a relationship.*”

COUNT I
Title VII Sex Discrimination

44. Plaintiff incorporates Paragraphs 1 through 43 of this Complaint as if fully set forth herein.

45. Plaintiff proved himself to be qualified for the position of Vice President of Sales and Marketing, and was in fact chosen for that position before MGM learned that he was a homosexual male.

46. Since at least May 17, 2016, Defendant MGM engaged in the unlawful employment practice of sex discrimination by “*withdrawing*” its offer of employment, which Plaintiff had already accepted, after learning of Plaintiff’s homosexual relationship, and refusing to reconsider Plaintiff for the position, in that:

- a. MGM treated Plaintiff less favorably because of his sexual orientation, which is necessarily discrimination based on sex;
- b. MGM treated Plaintiff less favorably because Plaintiff, who is male, was associated with a male partner; and
- c. MGM treated Plaintiff less favorably on the basis of his nonconformity with sex stereotypes and MGM’s preconceived definition of how males should behave.

47. “An employer who fires an individual merely for being gay . . . defies the law.” *Bostock v. Clayton County, Georgia*, 590 U.S. ___, 2020 WL 3146686, at *18 (U.S. June 15, 2020).

48. The aforementioned unlawful conduct was directed at Plaintiff because of his male sex.

49. Plaintiff’s association with his male partner motivated MGM to “*withdraw*” or terminated its already-accepted offer of employment to Plaintiff.

50. Plaintiff’s sexual orientation is not consistent with MGM’s and Faye and Judah Bienstock’s perception of acceptable gender roles.

51. Neither sex, nor association with members of a particular sex, nor compliance with perceived sexual stereotypes is an occupational qualification for the position of Vice President of Sales and Marketing.

52. The effect of the aforementioned conduct of MGM has been to deprive Plaintiff of equal employment opportunities and otherwise adversely affect his status as an employee because of his male sex.

53. MGM knew, or should have known, of the unlawful employment practices being carried out by its officers and/or employees against Plaintiff.

54. MGM failed and/or refused to exercise reasonable care to prevent and promptly correct the unlawful employment practices.

55. MGM’s failure and/or refusal to exercise reasonable care to prevent and promptly correct the unlawful employment practices amounted to condonation, ratification, approval, and/or perpetuation of said unlawful conduct.

56. MGM was responsible for the acts, omissions and unlawful conduct of its officers and/or employees who exhibited unlawful conduct toward Plaintiff including, but not limited to Faye Bienstock and Judah Bienstock, and, as such, acted as the alter ego of its officers and/or employees exhibiting unlawful conduct.

57. As a direct and proximate result of MGM's unlawful conduct, Plaintiff was subjected to sex discrimination.

58. As a direct and proximate result of MGM's unlawful conduct, Plaintiff has suffered the unlawful termination of his employment, including the loss of salary, wages, bonuses, benefits and other compensation that his employment with MGM was to entail.

59. As a direct and proximate result of MGM's unlawful conduct, Plaintiff has suffered, and will continue to suffer, severe humiliation, embarrassment, degradation, mental anguish, loss of reputation and standing in the community, and emotional and physical distress.

60. MGM's unlawful conduct was done with malice or reckless indifference to Plaintiff's rights under Title VII, and was so outrageous, extreme, and in disregard of the interests of Plaintiff so as to entitle Plaintiff to an award of punitive damages.

WHEREFORE, Plaintiff, Mark Horton, respectfully requests that this Court enter judgment in favor of Plaintiff and against Defendant Midwest Geriatric Management, LLC, as follows:

(a) That a judgment be entered finding that Midwest Geriatric Management, LLC, intentionally discriminated against Plaintiff Mark Horton with malice or reckless indifference to Plaintiff's federally protected rights in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-3, as amended by the Civil Rights Act of 1991;

(b) That Plaintiff Mark Horton be awarded all wages, benefits and compensation lost due to Midwest Geriatric Management, LLC's unlawful conduct, including back-pay and front pay, loss of benefits and other compensation, with prejudgment interest, and such other equitable relief as will make Plaintiff whole and as may be necessary to eradicate the effects of the unlawful employment practices;

(c) That Plaintiff Mark Horton be made whole by providing compensation for past and future nonpecuniary losses resulting from the unlawful employment practices, including pain and suffering, loss of enjoyment of life, damage to reputation and standing in the community, and humiliation, in amounts to be determined at trial;

(d) That Plaintiff Mark Horton be awarded all other compensatory and lawful damages permitted by law;

(e) That Plaintiff Mark Horton be awarded substantial punitive damages;

(f) That Plaintiff Mark Horton be awarded reasonable attorneys' fees and costs; and

(g) That Plaintiff Mark Horton be awarded such other and further relief as this Court deems just and proper.

Respectfully Submitted,

MATHIS, MARIFIAN & RICHTER, LTD.

By /s/Mark S. Schuver

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