

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 MIDWEST GERIATRIC MANAGEMENT, LLC’S COMBINED
OPPOSITION TO PLAINTIFF’S MOTION FOR LEAVE TO FILE SECOND
AMENDED COMPLAINT AND MOTION TO MODIFY SCHEDULING ORDER**

Plaintiff Mark Horton (“Plaintiff”) commenced this action over *four years ago*, on August 28, 2017. (*See* Dkt. 1.) The gist of Plaintiff’s original Complaint and operative First Amended Complaint is that Plaintiff alleges that in May of 2016—*five and a half years ago*—his conditional offer of at-will employment with Defendant Midwest Geriatric Management (“MGM”) was withdrawn because of his sexual orientation. (*See* Dkts. 1, 20, and 40.)

Now, more than a half-decade since his conditional offer of at-will employment was withdrawn (for several, non-discriminatory reasons), now recognizing that his sexual orientation discrimination claim has no basis in fact, Plaintiff seeks to change his theory entirely and assert different claims against MGM and two third parties (Jobplex, Inc. (“Jobplex”) and HireRight, LLC (“HireRight”)) under the new theory that the background check performed on Plaintiff was faulty (or “negligent”) and that it was this poorly performed background check that cost Plaintiff his conditional offer of at-will employment.¹ (*See* Dkts. 20, 57 and 57-1.)

¹ Jobplex was the search firm that identified potential candidates for the Vice President of Sales and Marketing position at MGM. HireRight was the company that worked with Jobplex to perform the required background check. (*See* Dkt. 20, at 1-2.)

Plaintiff's stunning, eleventh-hour change-of-theory should be rejected for several reasons. For one, the deadline to join additional parties or amend pleadings expired *well over a year ago*, on September 2, 2020. (*See* Dkts. 37, 53, 56.) Discovery is set to close in less than one month, and motions for summary judgment are due on or before January 26, 2022. (*See* Dkt. 56.) Moreover, though Plaintiff makes no mention of it in his Motions, the operative Second Amended Case Management Order provides that the current schedule "will be modified only upon a showing of *exceptional circumstances*." (*See id.* (emphasis added).)

Plaintiff comes nowhere close to establishing exceptional circumstances exist that would permit such a significant and belated amendment of the schedule and pleadings. As supposed "good cause" for the untimely amendments requested, Plaintiff contends that he "did not learn of [MGM's] alleged reliance upon representations made by Jobplex and HireRight until [Faye and Judah] Bienstocks' depositions were completed" on October 27, 2021 and November 9, 2021. (Dkt. 57, ¶¶ 9, 23.) This contention is absurd. Plaintiff has known *since the conditional offer of at-will employment was withdrawn on May 22, 2016* that his failure to successfully complete the required background check was one of the non-discriminatory reasons why his conditional offer of at-will employment was withdrawn. Indeed, Plaintiff's Complaint and First Amended Complaint have alleged this. (*See* Dkt. 1, ¶ 41; Dkt. 40, ¶ 39.) Even Plaintiff's Charge of Discrimination, filed with the Equal Employment Opportunity Commission on November 29, 2016, alleged the involvement of Jobplex and HireRight in Plaintiff's unsuccessful background check as a reason why his conditional offer of at-will employment was withdrawn. (*See* Dkt. 40-1.)

Consistent with the foregoing, over five years ago Plaintiff himself even threatened claims against Jobplex relating to his belief that Jobplex (and HireRight) poorly handled his background

check. On June 23, 2016, Plaintiff e-mailed Jobplex asking to “meet in person . . . to discuss the compensation and loss of time spent” in relation to Plaintiff’s belief that Jobplex and HireRight failed to perform an adequate background check and this failure caused him to lose his conditional offer of at-will employment. (See E-mails attached hereto as Exhibit 1, labeled as JP_001856-61.) Notably, Jobplex employees were so concerned with Plaintiff’s behavior prior to and in connection with this e-mail that they sent a picture of Plaintiff to building security and warned that Plaintiff “could show up here uninvited.” (*Id.*) This is but one example of Plaintiff’s longstanding belief that Jobplex and HireRight poorly performed his background check, which caused his conditional offer of at-will employment to be withdrawn by MGM. As another example, upon receiving a copy of a pre-suit demand letter Plaintiff sent to MGM, employees of Jobplex remarked how “insane” Plaintiff’s allegations were, and how “surprised” they were that Jobplex was not being sued. (See E-mails attached hereto as Exhibit 2, labeled as JP_002782-85.)

In short, Plaintiff cannot show any “cause,” much less “good cause” or “exceptional circumstances,” to permit further amendment of the pleadings or modification of the scheduling order. Plaintiff has believed for years that he had claims relating to what he believed was a poorly conducted background check. He never asserted them (for good reason—they would be substantively frivolous, as briefly discussed below). That Plaintiff elected to depose Faye and Judah Bienstock in October and November 2021, and that the Bienstocks testified to what Plaintiff has always known (that the background check was one of several reasons why his conditional offer of at-will employment was withdrawn), changes nothing (and ignores the fact that Plaintiff could have deposed them well over a year earlier). There is no basis to permit Plaintiff to effectively file a new case at this late juncture. *See, e.g., Ellingsworth v. Vermeer Mfg. Co.*, 949 F.3d 1097, 1100 (8th Cir. 2020) (affirming denial of motion for leave to amend complaint to add new claims where,

as here, no new facts had come to light, the litigation was at an advanced stage, discovery would be required to be reopened, and that the plaintiff had realized that the desired new claims were the only way to attempt to hold the defendant liable); *Moses.comSec., Inc. v. Comprehensive Software Sys., Inc.*, 406 F.3d 1052, 1066 (8th Cir. 2005) (affirming denial of motion for leave to file third amended complaint, even though motion was timely made under scheduling order, given the two prior amendments and undue delay and prejudice to the existing and proposed additional defendants, including the additional discovery requirements that would be imposed and delay in concluding the case that would result).

In addition to the foregoing, it bears mention that Plaintiff's proposed amendment would be futile, in that the proposed additional claims would be subject to well-founded motions to dismiss. *See, e.g., U.S. ex rel. Lee v. Fairview Health Sys.*, 413 F.3d 748, 749 (8th Cir. 2005) ("Futility is a valid basis for denying leave to amend."). Plaintiff seeks to add claims of negligence, fraudulent concealment, and tortious interference relating to his failed background check. (*See* Dkt. 57-1.) Each of these claims would be subject to a five-year statute of limitations. *See* Mo. Rev. Stat. § 516.120. As discussed briefly above, Plaintiff has known for well over five years of the facts he believes give rise to these claims.² As such, they would be time-barred. "An amendment is futile if it would be barred by the statute of limitations." *In re: PRE-Filled Propane*

² In his proposed Second Amended Complaint, Plaintiff desires to assert claims of fraudulent concealment against MGM and Jobplex in relation to the background check HireRight was performing. These allegations are difficult to decipher. In any case, Plaintiff alleges that he corresponded with Jobplex regarding each of the schools he represented he attended. (Dkt. 57-1, ¶¶ 29-38.) There necessarily could be no "fraudulent concealment"—particularly by MGM, but also by Jobplex—of the issues HireRight was having confirming Plaintiff's background. Moreover, MGM subpoenaed and provided Plaintiff a full copy of Jobplex's file pertaining to its background check on Plaintiff (including numerous communications relating thereto) on February 11, 2021 - almost a year ago. Plaintiff has had full knowledge of the facts underlying his new purported claims for years.

Tank Antitrust Litig., No. 14-02567-MD-W-GAF, 2015 WL 1111212, at *4 (W.D. Mo. Oct. 2, 2015) (citing *Enervations, Inc. v. Minn. Mining & Mfg. Co.*, 380 F.3d 1066, 1069 (8th Cir. 2004)).

Moreover, Plaintiff's desired negligence, fraudulent concealment, and tortious inference claims would substantively fail. Plaintiff's prospective employment at MGM would have been that of an at-will employee. (See Dkt. 40-3 (“[P]lease understand that MGM Healthcare is an at-will employer. That means that either you or MGM are free to end the employment relationship at any time, with or without notice or cause.”).) “Under Missouri’s employment at will doctrine an employer can discharge—for cause or without cause—an at will employee who does not otherwise fall within the protective reach of a contrary statutory provision and still not be subject to liability for wrongful discharge.” *Franklin v. Pinnacle Ent., Inc.*, 1 F. Supp. 3d 979, 988 (E.D. Mo. 2014) (quoting *Dake v. Tuell*, 687 S.W.2d 191, 193 (Mo. banc 1985)). In other words, in Missouri, “in the absence of a contract for employment for a definite term or a contrary statutory provision, an employer may discharge an employee at any time, without cause of reason, or for any reason and, in such case, no action can be maintained for wrongful discharge.” *Id.* (quoting *Christy v. Petrus*, 295 S.W.2d 122, 124 (Mo. banc 1956)). The employment at-will doctrine bars, among other things, claims of detrimental reliance on promises of future at-will employment. *See id.* (collecting cases). Employees cannot “outflank” the employment at-will doctrine by couching their employment-related claims in negligence or some other common law tort when those claims are contrary to principles of at-will employment. *See id.*

Here, Plaintiff's proposed claims seek to “outflank” the employment at-will doctrine. MGM could withdraw Plaintiff's conditional offer of at-will employment for any reason, so long as that reason was not unlawful. As a result, Plaintiff necessarily cannot maintain common law

claims relating to his loss of prospective at-will employment on an allegedly poorly performed background check (which, is not an unlawful reason).³

Dated: December 3, 2021

Respectfully submitted,

LEWIS RICE, LLC

/s/ Philip J. Mackey

Philip J. Mackey, #48630 (MO)
Michael L. Jente, #62980 (MO)
Sarah L. White, #71102 (MO)
600 Washington Ave., Suite 2500
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*Attorneys for Defendant
Midwest Geriatric Management, LLC*

³ Of course, as noted, in fact, MGM did not “conceal” anything from Plaintiff. The suggestion to the contrary is a transparent and improper attempt to avoid the statutes of limitation which bar Plaintiff’s eleventh-hour and desperate attempt to assert new theories of liability over four years after the filing this lawsuit.

Exhibit 1

To: JoAnna Haston[jhaston@dhrinternational.com]
Cc: Scott Harris[SHarris@dhrinternational.com]; Andy Cornwell[acornwell@dhrinternational.com]
From: Steve Elias
Sent: 2016-06-23T19:17:54Z
Importance: Normal
Subject: FW: duplicate diploma order form
Received: 2016-06-23T19:17:57Z

Hi JoAnna,
Please share this picture with security to let them know this person, Mark Horton, could show up here uninvited. Thanks.



Steve Elias
Partner

Jobplex Inc.
A DHR International company
8000 Maryland Avenue
Suite 1010 | St. Louis, MO | 63105
T: +1 314 269 8922 | F: +1 314 727 2903 | M: +1 314 591 8216 | stelias@jobplex.com

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From: Mark [mailto:mark.horton@almarfarms.net]
Sent: Thursday, June 23, 2016 1:37 PM
To: Steve Elias
Cc: Faye Bienstock; Judah Bienstock
Subject: Fw: duplicate diploma order form

Steve, I would like to meet in person tomorrow to discuss the compensation and loss of time spent on this mishap? As you know I did not doubt I could produce these items you requested and I was very honest the feedback I was getting it could take 4-6 weeks. Not only did Sasha, at Hire Rite, miss the BS at Maryville but also the 100 additional hours at CCHS completing my CRTT and RRT. I supplied transcripts as soon as they arrived 2 weeks ago with the grade point averages and confirmed MGM received these updates. I have never worked with a recruitment agency. The saddest part of this experience was the timing with my mother's death April 26 and the endless emails and calls during her final days requesting I supply Hire Rite the information to do their job. Needless to say by my references, LOR's and resume my integrity speaks for itself. Faye,

Thank you for email. Again I understand your position although nothing has changed from the multiple layers of interviews and calls we had to discuss your desired success moving forward. I wish you and Judah the best in your future. Steve,

I will be awaiting your call today. 6188309571

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

From: Faye Bienstock
Sent: Thursday, June 23, 2016 12:24 PM
To: mark.horton@almarfarms.net; stelias@jobplex.com
Cc: Judah Bienstock
Subject: RE: duplicate diploma order form

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.
Faye

Faye Bienstock, PT, DPT
MGM Healthcare
6 City Place Drive, Ste. 430
St. Louis, MO 63141

Cell: 314-917-9983
Ph. 314-631-3000
Fx. 314-942-6634

From: mark.horton@almarfarms.net [mailto:mark.horton@almarfarms.net]
Sent: Tuesday, June 21, 2016 5:25 PM
To: stelias@jobplex.com
Cc: Faye Bienstock; Judah Bienstock
Subject: Fw: duplicate diploma order form

Good Afternoon Steve,

I hope everyone is having a good week.
Please see emails dating back to May 24th up to today with:

Vicki McFerron
Student Service Center
Maryville University
314 529 9360 office
314 529 9925 fax
"Maryville. Many Connections. One U."

Steve,
Lack of education verification triggered the retraction of the VP role with MGM.

Faye and Judah,

I would like to meet this week to discuss moving forward with the VP of Sales role with MGM.

I still believe, before we were derailed by the inadequate background check from Hire Rite, I can bring value to your organization and commit to the 30,60, and 90 day plan we began to develop.

As I have confirmed my BS from Maryville from 1981 & 100 plus additional College Credits from STLCC & CCHS

to obtain my CRTT & RRT eligibility I have met the requirements. From the email the document will be in hand any day. I will make it available to you and then I will put it in my safe as

I have never been through such an ordeal before. Resigning from a 6 figure position anticipating starting the following week to a month and half of off time was not what any of us planned.

I look forward to hearing from you as I have not worked since the first week of May after I gave Celtic Healthcare my resignation. They did pay out my month as I disclosed to Steve. Great time with the grand kids and horses although I am ready to get to work.

Sincerely and with respect for your decision,
Mark Horton

From: Mark
Sent: Tuesday, June 21, 2016 4:57 PM
To: mark.horton@almarfarms.net
Subject: Fw: duplicate diploma order form

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

From: Mark
Sent: Tuesday, June 21, 2016 4:17 PM
To: Mcferron, Vicki
Subject: Re: duplicate diploma order form

Awesome. Thank you. See you at one of the alumni functions.

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

From: Mcferron, Vicki
Sent: Tuesday, June 21, 2016 4:16 PM
To: Mark
Subject: RE: duplicate diploma order form

So sorry I got you mixed up with someone else that was needing diploma for their daughter. Yes Matt did get your form and he put the new diploma in the mail yesterday when he got back from vacation. You should be getting in the mail any day.

Let me know if there is any problems.
Vicki

From: Mark [<mailto:mark.horton@almarfarms.net>]
Sent: Tuesday, June 21, 2016 4:05 PM
To: Mcferron, Vicki <vmcferron@maryville.edu>
Subject: Re: duplicate diploma order form

Mark Horton. I graduated from the RRT program in 1981 with a BS. Did Matt get the paperwork? Thank You.

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

From: Mcferron, Vicki
Sent: Tuesday, June 21, 2016 4:01 PM
To: Mark
Subject: Re: duplicate diploma order form

Ok just talked with Matt, You did say it was for your daughter could you give me her name again.

So we can double check on it.

Just a FYI my office and I will be out at a staff retreat tomorrow. I will get back with you on thursday.

thanks

Vicki

From: Mark <mark.horton@almarfarms.net>
Sent: Tuesday, June 21, 2016 1:22 PM
To: Mcferron, Vicki
Subject: Re: duplicate diploma order form

Perfect. Thank You.

Sent from my BlackBerry 10 smartphone on the Verizon Wireless 4G LTE network.

From: Mcferron, Vicki
Sent: Tuesday, June 21, 2016 1:19 PM
To: mark.horton@almarfarms.net
Subject: Re: duplicate diploma order form

All is good here, thanks for asking. I will check with Matt who is the one that order the new diploma for you.

He is in a meeting right now, will email you back as soon I found out.

thanks

Vicki

From: mark.horton@almarfarms.net <mark.horton@almarfarms.net>
Sent: Tuesday, June 21, 2016 1:08 PM
To: Mcferron, Vicki
Subject: Re: duplicate diploma order form

Good Afternoon Vicki,

Hope all is well on your end. Writing to confirm my request for a duplicate diploma was received. It have been nearly a month.
We talked by phone. I worked with Denise Evans at Kindred before she came to Maryville.
Thanks for the follow up,
Mark Horton

From: Mcferron, Vicki<<mailto:vmcferron@maryville.edu>>
Sent: Tuesday, May 24, 2016 9:16 AM
To: <mailto:mark.horton@almarfarms.net>%3c<mailto:mark.horton@almarfarms.net>>
Subject: duplicate diploma order form

Once we receive the request back I could take around four weeks for Maryville to be able to mail it back to you.
If you could be sure to give us the address that it needs to be mail to.

Thank you

Vicki McFerron
Student Service Center
Maryville University
314 529 9360 office
314 529 9925 fax
"Maryville. Many Connections. One U."

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Exhibit 2

To: Steve Elias[stelias@jobplex.com]
From: Sasha Fernández
Sent: 2016-09-27T20:30:36Z
Importance: Normal
Subject: RE: Settlement offer Horton v. MGM
Received: 2016-09-27T20:30:37Z

I'm surprised they are not suing us.

From: Steve Elias
Sent: Tuesday, September 27, 2016 3:30 PM
To: Sasha Fernández <sfernandez@jobplex.com>
Subject: RE: Settlement offer Horton v. MGM

Ha I know it's insane.

From: Sasha Fernández
Sent: Tuesday, September 27, 2016 3:27 PM
To: Steve Elias
Subject: RE: Settlement offer Horton v. MGM

I have nothing but shock on my face right now.

Sasha Fernández

Account Manager

Jobplex Inc.
A DHR International company
121 N. Jefferson | Chicago, IL | 60661
T:+1 312 627 9301 | sfernandez@jobplex.com

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From: Steve Elias
Sent: Tuesday, September 27, 2016 3:13 PM
To: Sasha Fernández <sfernandez@jobplex.com>
Subject: FW: Settlement offer Horton v. MGM

Steve Elias

Partner

Jobplex Inc.

A DHR International company
8000 Maryland Avenue
Suite 1010 | St. Louis, MO | 63105
T:+1 314 269 8922 | F:+1 314 727 2903 | M:+1 314 591 8216 | stelias@jobplex.com

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From: Faye Bienstock [<mailto:fbienstock@mgmhealthcare.com>]
Sent: Monday, September 19, 2016 7:16 PM
To: Steve Elias; pharty@starkassociates.com; sandrews@starkassociates.com
Subject: Fwd: Settlement offer Horton v. MGM

Good evening.
Please see attachment from Mark Horton.
We will need to discuss this further with you.
Faye
Sent from my iPhone
Begin forwarded message:

From: "Judah Bienstock" <judah@mgmhealthcare.com>
To: "Faye Bienstock" <fbienstock@mgmhealthcare.com>
Subject: FW: Settlement offer Horton v. MGM

Judah Bienstock
Managing Member
MGM Healthcare
6 City Place Dr., Ste. 430
St. Louis, MO 63141
Ph. 314-631-3000

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-----Original Message-----

From: Lana Schaeffer
Sent: Monday, August 29, 2016 3:13 PM
To: Judah Bienstock <judah@mgmhealthcare.com>
Cc: Michael Winter <mwinter@mgmhealthcare.com>
Subject: Settlement offer Horton v. MGM
Importance: High

Good Afternoon,

I have not saved the attachment to the drive yet as I am not sure where I should put it considering the assumed level of confidentiality. The attached document is a settlement offer from Mathis, Marifian & Richter retained by Mark Horton and requires a response within 10 days.

Please advise.

Sincerely,

Lana Schaeffer
MGM Healthcare
Administrative Operations Manager
6 City Place Dr., Ste. 430
St. Louis, MO 63141
Ph. 314-631-3000
Fx. 314-942-6634

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-----Original Message-----

From: scanners@mgmhealthcare.com [<mailto:scanners@mgmhealthcare.com>] On Behalf
Of scanners@
Sent: Monday, August 29, 2016 2:44 PM
To: Lana Schaeffer
Subject: Scanned image from MX-4140N

Reply to: scanners@mgmhealthcare.com <scanners@mgmhealthcare.com> Device
Name: Not Set Device Model: MX-4140N
Location: Not Set

File Format: PDF (Medium)
Resolution: 200dpi x 200dpi

Attached file is scanned image in PDF format.
Use Acrobat(R)Reader(R) or Adobe(R)Reader(R) of Adobe Systems Incorporated to
view the document.
Adobe(R)Reader(R) can be downloaded from the following URL:
Adobe, the Adobe logo, Acrobat, the Adobe PDF logo, and Reader are registered
trademarks or trademarks of Adobe Systems Incorporated in the United States and
other countries.

<http://www.adobe.com/>

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