IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

ARIQ CABBLER,	)	
	)	
Plaintiff,	)	
	)	No.: 08 L 5820
v.	)	
	)	Hon. Barbara A. McDonald
WORKING FOR TOGETHERNESS,	)	
CLIFFORD ARMSTEAD	)	
	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AS TO COUNTS I AND II

NOW COMES Plaintiff, ARIQ CABBLER, by and through his attorney, John C. Kunes of The Law Office of John C. Kunes, P.C., and submits the following Memorandum of Law in Opposition to Defendants' Motion for Judgment on the Pleadings as to Counts I and II of Plaintiff's Complaint.

I. INTRODUCTION

Plaintiff, Ariq Cabbler (hereinafter "Plaintiff") filed his Amended Complaint, *pro se*, on April 20, 2009. Plaintiff's Amended Complaint includes claims (Counts I and II) to redress sexual orientation discrimination and sex discrimination pursuant to the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.* (hereinafter the "Act"). On June 12, 2009, Defendants Working For Togetherness and Clifford Armstead filed their Motion for Judgment on the Pleadings as to Counts I and II, submitting that, because Plaintiff has allegedly failed to establish *prima facie* claims of sexual orientation and sex discrimination, these claims should be dismissed. See Def.'s Memo at 2. However, because Plaintiff can establish intentional discrimination by virtue of the direct method of proof, the *prima facie* elements of the indirect method are immaterial and, accordingly, Defendants' motion should be denied.

II. ARGUMENT

The well-pleaded facts of Plaintiff's Complaint raise a host of genuine issues of material fact that preclude any conception that Defendants are entitled to judgment as a matter of law. Thus, Plaintiff respectfully requests that this Court deny Defendants' Motion for Judgment on the Pleadings as to Counts I and II of Plaintiff's Complaint.

A. Standard

Judgment on the pleadings is proper only where the pleadings disclose that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Employers Ins. of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 138 (1999). The Court must take all of Plaintiff's well-pleaded facts as true and all reasonable inferences that can be drawn from those facts must be drawn in Plaintiff's favor. *Id.*

B. Discrimination Based on Plaintiffs Sexual Orientation

The Act provides that it is a civil rights violation for an employer to act with respect discharge and the privileges or conditions of employment on the basis of unlawful discrimination. 775 ILCS 5/2-102. "Unlawful discrimination" means discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, disability, military status, sexual orientation, or unfavorable discharge from military service as those terms are defined in this Section. 775 ILCS 5/1-103. Count I of Plaintiff's Complaint[1] is for relief for sexual orientation discrimination in violation of the Act.

The Illinois Supreme Court has adopted the analytical framework set forth in United States Supreme Court decisions addressing claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* in analyzing discrimination cases under the Act. *Zaderaka v. Illinois Human Rights Com'n*., 131 Ill.2d 172, 178 (1989). Accordingly, Plaintiff may prove

[1] Attached as Exhibit A.

discrimination under the either direct method of proof, by establishing that the employer had a discriminatory motivation, or by the indirect method of proof as set forth in *McDonnell Douglas Corp. v. Green*. *Board of Educ. of City of Chicago v. Cady*, 369 Ill. App. 3d 486, 495 (1st Dist. 2006) (*citing Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989) (*modified by statute,* 42 U.S.C. § 2000e-2(m), § 2000e-5(g)(2)(B)(i)); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, (1981)).

Under the direct method of proof, Plaintiff may present either direct or circumstantial evidence that Defendants' decision to terminate Plaintiff's employment was motivated by his sexual orientation. *Rudin v. Lincoln Land Community College,* 420 F.3d 712, 720 (7th Cir. 2005). Direct evidence of discrimination is evidence that would prove discrimination without reliance on inference or presumption. *Id.* at 720. Defendants cite *Rhodes v. Illinois Department of Transportation,* 359 F. 3d 498, 504 (7th Cir. 2004), seemingly to support their argument that Plaintiff must proceed under the *McDonnell Douglas* burden-shifting paradigm. See Def.'s Memo. at 6. However, *Rhodes* additionally demonstrates that Plaintiff "can also prevail under the direct method of proof by constructing a 'convincing mosaic' of circumstantial evidence that 'allows a jury to infer intentional discrimination by the decisionmaker.'" *Rhodes*, 359 F. 3d at 504 (*quoting Troupe v. May Dept. Stores Co.,* 20 F. 3d 734, 737 (7th Cir.1994)).

Three types of circumstantial evidence of intentional discrimination, each sufficient by itself or together with the others, can be used to construct a convincing mosaic of circumstantial evidence. *Troupe*, 20 F. 3d at 736. Plaintiff may raise an inference of discrimination by demonstrating: (1) Suspicious timing, ambiguous oral or written statements, or behavior toward or comments directed at other employees in the protected group; (2) Evidence, whether or not rigorously statistical, that similarly situated employees outside the protected class received

systematically better treatment; and (3) Evidence that the employee was qualified for the job in question but was replaced by a person outside the protected class and the Defendant's reason is pretext for discrimination. *Sun v. Board of Trustees of University of IL*, 473 F.3d 799, 812 (7th Cir. 2007). Plaintiff's well-pleaded facts fall neatly into two of these three categories of circumstantial evidence.

Mr. Armstead's frequent oral statements, although not always ambiguous, as well as his behavior and comments directed at other homosexual employees and candidates for employment, raise issues of material fact that preclude judgment on the pleadings. Shockingly, Plaintiff overheard Mr. Armstead state that he was using Plaintiff to get the "fags" off his back. Ex. A at ¶ 21. Use of the term "fags" can be regarded as nothing less than discrimination based on sexual orientation. *See Bailey v. Binyon*, 583 F.Supp. 923, 927 (N.D.Ill. 1984) ("When a racial epithet is used to refer to a [black] person, ... an adverse distinction is implied between that person and other persons not of his race." Use of such a racial epithet is discrimination *per se.*).

Mr. Armstead's verbal displays of animosity toward homosexuals did not end there, however. In or around August 2007, Mr. Armstead asked Plaintiff why homosexual men don't "act like men" and "why do homosexuals let everyone know they are gay." Ex. A at ¶ 30. Mr. Armstead reiterated these sentiments on other occasions. *Id.* at ¶ 33. In or around January 2008, after complaining of poor treatment of gay males, Mr. Armstead stated to Plaintiff, "wow, I didn't realize you were one of them." *Id.* at ¶ 24.

Mr. Armstead's behavior and actions toward other employees and candidates further supports an inference that Plaintiff's termination was motivated by intentional sexual orientation discrimination. In or around January 2008, Mr. Armstead discharged two employees and stated to Plaintiff that they were fired because they were effeminate, acted like sissies, weren't

masculine enough, and couldn't handle rowdy, masculine gay clients. Ex. A at ¶ 32. Also in or around January 2008, Mr. Armstead stated that he refused to hire an openly gay man because he was too feminine. *Id.* at ¶ 34. Mr. Armstead stated that he wanted to hire masculine employees that were not gay and "vengeful." *Id.* These statements alone demonstrate that sexual orientation was a factor upon which Mr. Armstead based employment decisions. Mr. Armstead also stated that instead of hiring gay males, he would hire pretty women. *Id.* Apparently, Mr. Armstead made good on this promise as a woman replaced Plaintiff in the position from which he was discharged. See Pl.'s Charge of Discrimination at p. 3 (attached to Ex. B[2]).

The fact that an individual outside of his protected class replaced Plaintiff falls squarely in the third category of evidence. This is clear in that Mr. Armstead explicitly stated that he would hire women instead of homosexual men. Also falling within that third category of circumstantial evidence, Plaintiff's Complaint raises genuine issues of material fact regarding whether Defendants' proffered reason for Plaintiff's discharge is pretext.

1. Plaintiff Committed No Criminal Act

Defendants allege that Plaintiff did not adequately perform his duties as a program manager because he committed a criminal act against Working For Togetherness. See Def.'s Memo at 9. Specifically, Defendants allege that Plaintiff violated Section 17-1 of the Illinois Criminal Code. *Id.* at 7. However, Defendants' attempt to characterize Plaintiff's pleading as an admission of a crime is baseless. Defendants' quote Section 17-1 with respect to possession of stolen or fraudulently obtained checks, but omit language that is highly relevant. *Id.* at 8. Section 17-1 provides in *relevant* part:

(2) Possession of Stolen or Fraudulently Obtained Checks.

[2] Copies of written instruments attached to a pleading as an exhibit are considered a part of the pleading. *Employers Ins. of Wausau*, 186 Ill.2d at 139.

> Any person who possesses, *with the intent to obtain access to funds of another person* held in a real or fictitious deposit account at a financial institution, makes a false statement or a misrepresentation to the financial institution, or possesses, transfers, negotiates, or presents for payment a check, draft, or other item purported to direct the financial institution to withdraw or pay funds out of the account holder's deposit account *with knowledge that such possession, transfer, negotiation, or presentment is not authorized by the account holder or the issuing financial institution* is guilty of a Class A misdemeanor. *A person shall be deemed to have been authorized to possess, transfer, negotiate, or present for payment such item if the person was otherwise entitled by law to withdraw or recover funds from the account in question and followed the requisite procedures under the law*.

720 ILCS 5/17-1(C)(2) (*emphasis added*).

The first flaw in Defendants' argument is that Plaintiff was never in possession of stolen or fraudulently obtained checks. Plaintiff never attempted to cash checks that were not issued to him as payroll checks, or issued to him by Mr. Armstead personally. Ex. A ¶¶ 57, 61 – 67. The second flaw is that the plain text of the statute requires "*intent to obtain access to funds of another person*." Plaintiff only ever intended to access his own funds – the salary due him from Working For Togetherness. *Id.* at ¶¶ 72, 72a. The third flaw in Defendants' attempt to cast Plaintiff as a criminal also arises from the plain text of the statute, which requires "*knowledge that such possession, transfer, negotiation, or presentment is not authorized by the account holder*." Plaintiff was instructed to return two unsigned checks (his payroll checks) to the office manager after he had been notified by his bank that they had not cleared. *Id.* at ¶¶ 57 – 59. Plaintiff did resubmit to his own bank an additional payroll check that did not initially clear due to insufficient funds, but not the unsigned payroll checks. *Id.* at ¶¶ 63 – 67.

Clearly Plaintiff was authorized to cash his own paycheck made payable to him and signed by an agent of the account holder. In fact, the sentence that Defendants omitted from their quotation exonerates Plaintiff from Defendants' accusation– *"A person shall be deemed to have been authorized to possess, transfer, negotiate, or present for payment such item if the*

person was otherwise entitled by law to withdraw or recover funds from the account in question and followed the requisite procedures under the law."

Furthermore, Plaintiff pleads that any issues regarding the checks were cleared up prior to his termination. To ensure nothing unethical had taken place, Northern Trust Bank, the issuing financial institution, was called and a manager confirmed that the bank had made a mistake and the check Plaintiff attempted to cash there was indeed his payroll check. *Id.* at ¶¶ 73 – 76. In fact, after the misunderstanding had been cleared up, it was believed that Working For Togetherness still *owed* Plaintiff money. *Id*. at ¶ 77. These facts create a reasonable inference, one that must be drawn in Plaintiff's favor, that Defendants' reason for Plaintiff's termination is pretext.

Plaintiff's array of circumstantial evidence raises an inference of intentional discrimination and, thus, satisfies his burden under the direct method. *Paz v. Wauconda Healthcare & Rehab. Ctr., LLC*, 464 F.3d 659, 665 (7th Cir. 2006) (holding that a range of direct method evidence precludes the grant of summary judgment). Plaintiff's circumstantial evidence must not be viewed in small pieces that are mutually exclusive of each other, but rather, the key consideration is the totality of these bits and pieces from which an inference of discriminatory intent might be drawn. *Id.* at 666. Plaintiff's well-pleaded facts, taken as true, clearly compose the "convincing mosaic" required to raise the inference of discriminatory intent. Accordingly, defendant's motion as to Count I must be denied.

C. Discrimination Based on Plaintiff's Sex

Defendants assert that, "Plaintiff's Complaint is completely devoid of any conduct that pleads a cause of action for sexual discrimination." Def.'s Memo at 12. This assertion could not be further from the truth. Count II of Plaintiff's Complaint is for relief for sexual discrimination

in violation of the Act. The Act provides that it is a civil rights violation for an employer to act with respect discharge and the privileges or conditions of employment on the basis of unlawful discrimination. 775 ILCS 5/2-102. "Unlawful discrimination" includes discrimination against a person because of his sex. 775 ILCS 5/1-103. "Sex" means the status of being male or female. *Id.*

"Sexual harassment," on the other hand, means "any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." 775 ILCS 5/2-101.

Plaintiff, in Count II of his Complaint, specifically alleges that, "Defendant Working For Togetherness and Defendant Clifford Armstead terminated Plaintiff on the basis of his sex." Ex. A at ¶ 111. Although Plaintiff submits that Mr. Armstead's derogatory and harassing statements to Plaintiff on the basis of sex were acts with respect to terms and conditions of employment on the basis of unlawful discrimination, Plaintiff does not allege that he was subject to unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature. Inasmuch as Plaintiff's claim is discrimination because of his sex and not sexual harassment, Defendants' recitation of the *prima facie* case of sexual harassment and argument that Plaintiff's Complaint does not establish such is rendered meaningless.

However, Plaintiff's Complaint does support his Count II claim of sex discrimination much as it supports his Count I claim of sexual orientation discrimination. Again, working under

the analytical framework set forth in United States Supreme Court decisions addressing claims under Title VII, *Zaderaka*, 131 Ill.2d at 178, and proceeding with circumstantial evidence as set forth in *Troupe*, 20 F. 3d at 736, the facts alleged in Plaintiff's Complaint, when taken as true and with all reasonable inferences drawn his favor, succeeds in composing the "convincing mosaic" required to raise the inference of discriminatory intent.

Defendants acknowledge that Plaintiff alleges comments by Mr. Armstead that show his bias toward effeminate men, including:

- Why don't homosexual males act like men?
- Why do homosexuals let everyone know that they are gay?
- Gay males flaunt their lifestyle.
- Why do gays have to be so obvious that they're gay.
- Why can't you just be a man?

Def.'s Memo at 10. Plaintiff's Complaint also alleges that Mr. Armstead has stated:

- That he terminated employees because they were effeminate gays, acted like sissies, and weren't masculine enough. Ex. A at ¶ 32.
- That he wanted more masculine employees that weren't gay. *Id.* at ¶ 34
- That he preferred to hire pretty women. *Id.*

These are all comments that raise a reasonable inference of sex discrimination based upon gender stereotype.

Gender stereotyping claims have been recognized in Title VII cases. *See Doe v. City of Belleville,* 119 F.3d 563, 580-81 (7th Cir.1997) (harassment because plaintiff did not conform to stereotypical expectations of masculinity was actionable discrimination because of sex; vacated and remanded on other grounds); *Hamm v. Weyauwega Milk Products, Inc.,* 332 F.3d 1058, 1064 (7th Cir. 2003) (recognizing sex stereotyping claim under Title VII but holding that evidence did not support claim). It is a reasonable inference the Mr. Armstead discriminated against Plaintiff because his behavior did not conform to his stereotypical ideas of gender and masculinity. Such

can amount to actionable discrimination "based on sex." *Howell v. North Central College,* 320 F.Supp.2d 717, 722 (N.D.Ill. 2004).

Again, Plaintiff's circumstantial evidence must be viewed in the perspective of the total mosaic that the bits and pieces compose, from which an inference of discriminatory intent might be drawn. Accordingly, defendant's motion as to Count II must be denied.

III. CONCLUSION

WHEREFORE, Plaintiff, Ariq Cabbler respectfully request that this Court find in his favor and deny Defendants' Motion for Judgment on the Pleadings as to Counts I and II of Plaintiff's Complaint.

Respectfully submitted,

ARIQ CABBLER

By:_____

His Attorney

John C. Kunes
The Law Office of John C. Kunes, P.C.
3843 North Broadway Street
Chicago, Illinois 60613
(773) 701-4050 (*telephone and facsimile*)
Attorney Number: 46396