

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

BRIAN PAIVA, :  
Plaintiff, :  
 :  
v. : CA 11-339 L  
 :  
TRADE SECRET BEAUTY STORES, INC., :  
alias, REGIS CORPORATION, alias, :  
TRADE SECRET SALON, alias, :  
DOE CORPORATIONS, alias :  
JANE DOE, alias, and :  
JOHN DOE, alias, :  
Defendants. :

**REPORT AND RECOMMENDATION**

David L. Martin, United States Magistrate Judge

Before the Court is Defendant Regis Corporation's Motion for Summary Judgment (Docket ("Dkt.") #7) ("Motion for Summary Judgment" or "Motion"). The Motion has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B). The Court has determined that no hearing is required because the Motion is unopposed. For the reasons stated below, I recommend that it be granted.

**I. Facts<sup>1</sup> and Travel**

Plaintiff Brian Paiva ("Plaintiff" or "Paiva") was hired by

---

<sup>1</sup> The facts are taken from the Complaint and from Defendant Regis Corporation's Statement of Undisputed Facts in Support of Its Motion for Summary Judgment (Docket ("Dkt.") #8) ("SUF").

Trade Secret Inc. ("TSI")<sup>2</sup> as a hair stylist in or about June 2008. See Defendant Regis Corporation's Statement of Undisputed Facts in Support of Its Motion for Summary Judgment (Dkt. #8) ("SUF") ¶ 1.<sup>3</sup> At the time Paiva was hired, TSI was a wholly owned subsidiary of Defendant Regis Corporation ("Regis"). SUF ¶ 2. In February 2009, Regis sold its entire interest in TSI to Premier Beauty Salons ("Premier"). SUF ¶ 3. Pursuant to Regis's agreement with Premier, Paiva's employment with Regis terminated on February 15, 2009. SUF ¶ 4. Thereafter, Paiva was an employee of Premier, not an employee of Regis. Id.

Paiva alleges that in or about the last week of August 2009 he was offered the managerial position by the District Manager, Maureen Arliss,<sup>4</sup> and Paiva agreed. Complaint ¶ 8. On or about September 4, 2009, Paiva received a letter and a state license form to complete and return for the managerial position. Id. ¶ 9. In

---

<sup>2</sup> Neither the Complaint nor the SUF explains TSI's relationship to Trade Secret Beauty Stores, Inc., and Trade Secret Salon. Regis's Answer (Dkt. #2) refers to its having "divested its interest in any and all Trade Secret entities in or about February 2009 ...." Answer ¶ 8.

<sup>3</sup> See District of Rhode Island Local Rule ("DRI LR") Cv 56(a)(3) ("For purposes of a motion for summary judgment, any fact alleged in the movant's Statement of Undisputed Facts shall be deemed admitted unless expressly denied or otherwise controverted by a party objecting to the motion."); see also Borges v. Serrano Isern, 605 F.3d 1, 6 (1<sup>st</sup> Cir. 2010) ("failure to present a statement of disputed facts, embroidered with specific citations to the record, justifies the court's deeming the facts presented in the movant's statement of undisputed facts admitted").

<sup>4</sup> The Complaint does not identify the entity (or entities) for whom Ms. Arliss was the "District Manager," Complaint ¶ 8, and there is no other information about her in the present record.

or about September 2009, Paiva was notified that another individual had been hired for the position which had been offered to him. Id. ¶ 10.

Paiva then contacted "the Vice President of Operation, Shelby Michaelis for Trade Secret Beauty, Trade Secret Salon, Regis Corporation to inquire about the managerial position being filled by another individual and not Mr. Paiva." Complaint ¶ 11. According to Paiva, Michaelis was not available when he called, and Paiva left a message with the secretary asking that Michaelis return the call. Id. Within the message was a question "as to whether or not Mr. Paiva was denied the position due to his sexual preference." Id. The call was never returned. Id.

Thereafter, Paiva was treated differently than other employees. Id. ¶ 12. He alleges that he was "degraded, screamed at, embarrassed, and falsely written up," id., and that as a result of the stress from this harassment he experienced extreme depression and anxiety, id. ¶ 13. On or about October 12, 2009, after being falsely accused,<sup>5</sup> Paiva was terminated from his employment without any prior notice or suspensions. Id. ¶ 14. Paiva alleges that as a male homosexual he is part of a protected class and that he was treated differently from other employees due to his sexual preference. See id. ¶¶ 15-16.

---

<sup>5</sup> The Complaint does not disclose the nature of the "false accusations," Complaint ¶ 14, which preceded Paiva's firing, see id.

The Rhode Island Commission for Human Rights issued a right-to-sue letter regarding this matter on April 12, 2011. Id. ¶ 17. On or about June 28, 2011, Paiva filed a complaint in the Providence County Superior Court, see Notice of Removal, Attachment ("Att.") 5 (Summons), alleging violations of the Rhode Island Fair Employment Practices Act (Count I) and the Rhode Island Civil Rights Act (Count II), intentional infliction of emotional distress (Count III), and retaliation (Count IV).

Regis removed the action to this Court on August 1, 2011, see Notice of Removal (Dkt. #1), and filed its Answer (Dkt. #2) on August 8<sup>th</sup>. Paiva neither served discovery nor responded to the discovery (deposition notice, document requests, and requests for admissions) that was served by Regis during the course of the litigation. SUF ¶ 5. Regis filed the instant Motion on January 13, 2012. As previously stated, Paiva has not filed an objection.

## **II. Summary Judgment Standard**

"Summary judgment is appropriate if 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Commercial Union Ins. Co. v. Pesante, 459 F.3d 34, 37 (1<sup>st</sup> Cir. 2006) (quoting Fed. R. Civ. P. 56(c)); accord Kearney v. Town of Wareham, 316 F.3d 18, 21 (1<sup>st</sup> Cir. 2002). "A dispute is genuine if the evidence about the fact is

such that a reasonable jury could resolve the point in the favor of the non-moving party. A fact is material if it carries with it the potential to affect the outcome of the suit under the applicable law.” Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1<sup>st</sup> Cir. 2000) (quoting Sánchez v. Alvarado, 101 F.3d 223, 227 (1<sup>st</sup> Cir. 1996)).

In ruling on a motion for summary judgment, the court must examine the record evidence “in the light most favorable to, and drawing all reasonable inferences in favor of, the nonmoving party.” Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1<sup>st</sup> Cir. 2000) (citing Mulero-Rodriguez v. Ponte, Inc., 98 F.3d 670, 672 (1<sup>st</sup> Cir. 1996)). The non-moving party may not rest merely upon the allegations or denials in its pleading, but must set forth specific facts showing that a genuine issue of material fact exists as to each issue upon which it would bear the ultimate burden of proof at trial. See Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d at 53 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S.Ct. 2505 (1986)). “[T]o defeat a properly supported motion for summary judgment, the nonmoving party must establish a trial-worthy issue by presenting enough competent evidence to enable a finding favorable to the nonmoving party.” ATC Realty, LLC v. Town of Kingston, 303 F.3d 91, 94 (1<sup>st</sup> Cir. 2002) (alteration in original) (internal quotation marks omitted) (quoting LeBlanc v. Great Am. Ins. Co., 6 F.3d 836,

842 (1<sup>st</sup> Cir. 1993)).

"[W]hen the facts support plausible but conflicting inferences on a pivotal issue in the case, the judge may not choose between those inferences at the summary judgment stage." Coyne v. Taber Partners I, 53 F.3d 454, 460 (1<sup>st</sup> Cir. 1995). Furthermore, "[s]ummary judgment is not appropriate merely because the facts offered by the moving party seem more plausible, or because the opponent is unlikely to prevail at trial. If the evidence presented is subject to conflicting interpretations, or reasonable men might differ as to its significance, summary judgment is improper." Gannon v. Narragansett Elec. Co., 777 F. Supp. 167, 169 (D.R.I. 1991) (citation and internal quotation marks omitted).

### **III. Discussion**

Regis seeks summary judgment on the basis that it cannot be liable to Paiva for the employment discrimination related claims set forth in the Complaint because Regis did not have any relationship with Paiva and was not his employer at the time the alleged discrimination occurred. See Motion at 1. Therefore, Regis contends that it is not a proper defendant in this lawsuit and that it is entitled to judgment as matter of law. See id. In addition, Regis argues that even if it were a proper defendant, it is still entitled to summary judgment because the record does not contain any evidence to support Paiva's discrimination based claims. See id.

Given the undisputed facts, Regis's arguments are well founded. Regis ceased to have an employment relationship with Paiva six months before any of the acts on which he bases his claims occurred. Accordingly, Regis cannot be liable to Paiva. See Anderson v. Pacific Mar. Ass'n, 336 F.3d 924, 930 (9<sup>th</sup> Cir. 2003) (stating that in order for applicable employment discrimination statute to apply "there must be some connection with an employment relationship"); Allen v. Educ. Cmty. Credit Union, No. C06-16MJP, 2006 U.S. Dist. LEXIS 34191, at \*14 (W.D. Wash. May 24, 2006) (finding that plaintiff's sexual harassment claim against defendant fails because plaintiff was not an employee of defendant); Rector v. State Farm Mut. Ins. Co., 392 F.Supp.2d 1069, 1073-74 (W.D. Mo. 2005) (dismissing plaintiff's employment discrimination claims where "[t]he undisputed facts ... indicate that State Farm was never plaintiff's employer").

Moreover, Paiva's discrimination claim fails as a matter of law because he cites no evidence that he was treated differently or improperly because of his sexual orientation. First, as Regis points out, the record does not contain evidence of how heterosexual individuals were treated by the defendants. See Defendant Regis Corporations' Memorandum of Law in Support of Its Motion for Summary Judgment ("Regis's Mem.") at 4. Second, the record does not contain a shred of evidence that connects the unfair treatment to which Paiva was allegedly subjected, including

his failure to receive a promotion, to his sexual orientation. Id. at 5. Therefore, even if the record contained evidence consistent with the allegations in the Complaint, Paiva's claims would still fail because he does not allege any facts that tie the alleged discriminatory conduct to his sexual orientation. Id.

Regis notes that it served Paiva with discovery asking him to produce material connecting his ostensibly unfair treatment to his sexual orientation and that Paiva did not respond. Id. As Regis correctly observes, the Complaint consists of nothing more than conclusory allegations about why Paiva did not receive a promotion, why he was treated improperly, and why he was terminated. Id. Paiva's Complaint does not address when or how the defendants first learned of his sexual orientation, which is necessary to reconcile the alleged discrimination with the harmonious employment relationship that existed for more than a year before the alleged discrimination took place. Id. The only "fact" that is alleged as evidence of a discriminatory animus is that the vice-president did not return Paiva's phone call after he left a message asking whether he was not promoted because he is gay. Id. The mere failure to return a phone call is not sufficient to support a claim for discrimination. Id.

In sum, because it is undisputed that Regis was not Paiva's employer at the time of the alleged discrimination and the record contains no evidence to support Paiva's claims, Regis is entitled

to judgment as a matter of law. Accordingly, its Motion for Summary Judgment should be granted. See Morón-Barradas v. Dep't of Educ. of Commonwealth of Puerto Rico, 488 F.3d 472, 481 (1<sup>st</sup> Cir. 2007) (holding that "in the absence of evidence of discrimination, summary judgment was properly granted"). I so recommend.

#### **IV. Conclusion**

For the reasons stated above, I recommend that Regis's Motion for Summary Judgment be granted. Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within fourteen (14) days of its receipt. See Fed. R. Civ. P. 72(b); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1<sup>st</sup> Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1<sup>st</sup> Cir. 1980).

/s/ David L. Martin  
DAVID L. MARTIN  
United States Magistrate Judge  
June 15, 2012