UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

ROGER ISAACS, Plaintiff, v. FELDER SERVICES, LLC, Defendant.

CIVIL ACTION NO. 2:13cv693-MHT

October 29, 2015, Filed October 29, 2015, Decided

For Roger Isaacs, Plaintiff: Benjamin Howard Cooper, LEAD ATTORNEY, Cooper Law Group, LLC, Birmingham, AL.

For Felder Services, LLC, Defendant: Andrew J. Rutens, Thomas O. Gaillard, III, LEAD ATTORNEYS, Galloway, Wettermark, Everest, Rutens & Gaillard, LLP, Mobile, AL.

Myron H. Thompson, UNITED STATES DISTRICT JUDGE.

Myron H. Thompson

(WO)

OPINION

This is an employment-discrimination case. Plaintiff Roger Isaacs alleges that defendant Felder Services, LLC, his former employer, (1) discriminated against him (by firing him) on the basis of his sex, gender non-conformity, and sexual orientation; (2) subjected him to sexual harassment which created a hostile-work environment; and (3) retaliated against him for complaining about that harassment, all in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.

This lawsuit is now before the court on the recommendation of the United States Magistrate Judge that summary judgment should be granted in favor of Felder Services on all three claims. See Report and Recommendation (doc. no. 41) (hereafter "R&R"). There are no objections to the recommendation. After an independent and de novo review of the record, the court concludes that the magistrate judge's recommendation should be adopted, albeit for somewhat different reasons. See Fed. R. Civ. P. 50(b)(3) . These reasons are set out below.

1. Facts

Because the facts are set out in detail in the R&R, they are summarized only briefly here.

Isaacs is a gay man. For about six months, he was an employee of Felder Services, which provides services to healthcare facilities (Isaacs worked as a dietician). Felder Services had a contract with Arbor Springs Health and

Rehabilitation Center in Opelika, Alabama, and Isaacs was assigned to work there.

Isaacs worked with employees of both Felder Services and Arbor Springs, but had no on-site supervisor. Instead, his boss was Debbie McGarvey, a regional supervisor for Felder Services. There is no evidence to suggest that Felder Services exercised authority over Arbor Springs employees at the facility or that anyone at Arbor Springs exercised authority over Isaacs. This court has previously dismissed Isaacs's claims against Arbor Springs, ruling that it was not Isaacs's employer or co-employer. See Isaacs v. Felder Servs., LLC, No. 2:13-CV-693-MEF, *2014 U.S. Dist. LEXIS 83978* , [2014 BL 172467], 2014 WL 2806128 (M.D. Ala. 2014)(Fuller, J.).

McGarvey asked Isaacs to work at another facility in Florala, Alabama, once every three weeks. Because Isaacs had been injured in a car accident, he asked for, and was given, permission for a man he identified as his brother but who was actually his husband to drive him to Florala, and for the two to stay overnight there. (There is a dispute as to whether McGarvey authorized Isaacs to seek reimbursement for expenses incurred by his husband.) Isaacs began staying in Florala, with his husband, the nights before and after he was to work in the facility there; he submitted the expenses they both incurred **[*2]** for reimbursement by Felder Services.

In addition, Isaacs brought his mother along on some of his trips to Florala, and he submitted multiple reimbursement requests for meals and lodging for her. Isaacs offers no evidence--even in the form of his own deposition testimony--to suggest that these expenses were authorized. Finally, Isaacs submitted a visitor pass from an air force base, on which he had handwritten "$50." Although he gave no explanation for the request when it was submitted (visitor passes are free), he later testified that he had taken his husband and mother there; because they received no receipt for their meal, he estimated that it had cost $50 and wrote that amount on the visitor pass.

On July 23, 2012, Juli Bleicher, an administrative assistant at Felder Services, began an investigation into Isaacs's reimbursement requests after noticing that he had submitted requests for three people and finding the visitor pass suspicious. The next day, July 24, McGarvey sent Isaacs an e-mail instructing him to send her copies of future expenses for approval; McGarvey also spoke with Bleicher, and informed her that Isaacs was not due reimbursement for meals and lodging for his mother or husband. On July 26, at 2:00 p.m., Bleicher sent Isaacs an e-mail asking him to call her to discuss his expense reports.

At exactly the same time on July 26 as Bleicher e-mailed Isaacs, Isaacs attended a staff meeting at Arbor Springs, the events of which apparently form the sole basis for his allegations of discrimination. Isaacs was the only Felder Services employee present, and the meeting was run by the associate director of nursing, Cheri Place. According to Isaacs (and as disputed by both Place and the other attendees), after he and Place began to disagree about whether staff members were correctly completing a form, Place asked someone to put tape over Isaacs's mouth, approached Isaacs and made an allegedly masturbatory hand gesture, and acknowledged that Isaacs's reading of the form was correct by saying, "Cupcake was right." After the meeting concluded, Isaacs submitted a letter describing what had occurred to the associate director of Arbor Springs.

At some point between July 26 and 31, Bleicher first brought the issue of Isaacs's questionable expenses to the attention of David Perez, the director of human resources at Felder Services. Isaacs called Bleicher back on July 30, and they discussed the disputed expenses.

On July 31, Isaacs forwarded his complaint letter to McGarvey; the same day, she forwarded the letter to Perez, and to K. C. Komer, another supervisor. Komer contacted Isaacs that day: he thanked Isaacs for letting him know about the incident and told him that, if he felt uncomfortable at Arbor Springs, he was free to leave with pay until the issue was resolved. Isaacs left Arbor Springs and never returned.

When Perez received the letter, he contacted Mark Traylor, the owner-administrator of Arbor Springs, and asked him to interview the Arbor Springs employees who were present at the meeting with Place. These interviews were concluded **[*3]** on August 1. Before Perez received the results of Traylor's investigation, Bleicher reported to him that Isaacs had submitted false charges and sought reimbursement for unauthorized expenses. Then, Traylor reported to

Felder Services (directly to its president, Kevin Muscat) his finding that Isaacs's allegations were baseless.

On August 7, Perez and Muscat decided to terminate Isaacs's employment based on the improper reimbursement requests.

2. Discrimination

Isaacs claims that Felder Services terminated him because he is male. The recommendation concludes that the court "need not engage in a discussion regarding whether or not Plaintiff has provided evidence of comparators for the purposes of the prima-facie-case analysis because Plaintiff has offered no evidence of gender-discrimination by Defendant Felder," given that his claim revolves around the harassment he allegedly suffered at the hands of Place, and Place was not an employee, or otherwise under the control or authority, of Felder Services. R&R at 20. The court takes issue with this reasoning. Had Isaacs identified a relevant female comparator, the fact that she was not terminated would have constituted just the sort of circumstantial evidence of discrimination by his employer that his claim now lacks. Hence, the court cannot reject this claim without considering whether Isaacs has offered comparator evidence.

However, the court agrees with the recommendation of summary judgment on this claim because Isaacs has indeed failed to identify a relevant female comparator. The individual he identifies, Place herself, was not an employee of--and therefore not subject to discipline by--Felder Services. Moreover, her alleged misconduct (sexual harassment) was entirely different from the misconduct that Felder Services asserts formed the basis of its decision to fire Isaacs (seeking reimbursement for unauthorized expenses). See Holifeld v. Reno, 115 F.3d 1555 , 1562 (11th Cir. 1997) ("In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways.").

With respect to Isaacs's claim that Felder Services discriminated against him on the basis of his gender non-conformity, the record does not support the recommendation's finding that Isaacs "does not allege" that anyone over whom Felder Services had authority or control discriminated against him based on the tone of his voice. Compare R&R at 23-24 with Complaint (doc. no. 1) at 5 ("The Defendant's [sic] further intentionally discriminated against Isaacs on the basis that he is effeminate in action [and] tone of voice."). However, the court adopts the recommendation's reasoning to the extent it concludes that "Plaintiff has identified no direct or circumstantial evidence suggesting that one of Defendant Felder's employees ever acted with discriminatory intent towards him, such that a reasonable factfinder could conclude that his **[*4]** termination was based on his non-conformity to gender stereotypes." R&R at 24 (emphasis added).

Finally, Isaacs claims that he was discriminated against based on his sexual orientation. The court rejects the magistrate judge's conclusion that "[s]exual orientation discrimination is neither included in nor contemplated by Title VII." R&R at 24. In the Eleventh Circuit, the question is an open one. See Evans v. Ga. Reg'l Hosp., No. CV415-103, *2015 U.S. Dist. LEXIS 120618* , [2015 BL 292628], 2015 WL 5316694 , at *2 (S.D. Ga. Sept. 10, 2015) (Smith, J.) ("[T]he Eleventh Circuit has not addressed this issue...."); see also Muhammad v. Caterpillar Inc., 767 F.3d 694 (7th Cir. 2014) (amending a previously issued opinion to omit language stating that discrimination on the basis of sexual orientation is not actionable under Title VII).

This court agrees instead with the view of the Equal Employment Opportunity Commission that claims of sexual orientation-based discrimination are cognizable under Title VII. In EEOC Appeal No. 0120133080, *2015 EEOPUB LEXIS 1905* , *2015 WL 4397641* , at *4-*10 (July 16, 2015), the Commission explains persuasively why "an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." *2015 EEOPUB LEXIS 1905* , [WL] at *5. Particularly compelling is its reliance on Eleventh Circuit precedent, *2015 EEOPUB LEXIS 1905* , [WL] at *7:

> "Title VII ... prohibits employers from treating an employee or applicant differently than other employees or applicants based on the fact that such individuals are in a same-sex marriage or because the employee

> has [or is interested in having] a personal association with someone of a particular sex. Adverse action on that basis is, 'by definition,' discrimination because of the employee or applicant's sex. Cf. Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888 , 892 (11th Cir. 1986) ('Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race [in violation of Title VII].')."

See also Andrew Koppelman, "Why Discrimination Against Lesbians and Gay Men is Sex Discrimination," 69 N.Y.U. L. Rev. 197, 208 (1994) ("If a business fires Ricky ... because of his sexual activities with Fred, while th[is] action[] would not have been taken against Lucy if she did exactly the same things with Fred, then Ricky is being discriminated against because of his sex.").

To the extent that sexual orientation discrimination occurs not because of the targeted individual's romantic or sexual attraction to or involvement with people of the same sex, but rather based on her or his perceived deviations from "heterosexually defined gender norms," this, too, is sex discrimination, of the gender-stereotyping variety. EEOC Appeal No. 0120133080, *2015 EEOPUB LEXIS 1905* , *2015 WL 4397641* , at *7-*8 (citation omitted); see also Latta v. Otter, 771 F.3d 456 , 486 (9th Cir. 2014) (Berzon, J., concurring) ("The notion underlying the Supreme Court's anti-stereotyping doctrine in both Fourteenth Amendment and Title VII cases is simple, but compelling: '[n]obody should be forced into a predetermined role on account of sex,' or punished for failing to conform to prescriptive expectations of what behavior is appropriate for one's gender. See Ruth Bader Ginsburg, '**[*5]** Gender and the Constitution,' 44 U. Cin. L. Rev. 1, 1 (1975). In other words, laws [and employment practices] that give effect to 'pervasive sex-role stereotype[s]' about the behavior appropriate for men and women are damaging because they restrict individual choices by punishing those men and women who do not fit the stereotyped mold. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 , 738 , 123 S. Ct. 1972 , 155 L. Ed. 2d 953 (2003).").

However, this claim fails for the same reason Isaacs's other discrimination claims fail: He has offered no direct or circumstantial evidence to suggest that the decision of Felder Services to fire him was based on his sexual orientation.

3. Hostile-Work Environment

The court agrees with the magistrate judge's reasoning with respect to this claim.

4. Retaliation

The magistrate judge's reasoning with respect to this claim is adopted except to the extent that it suggests that "[s]ummary judgment is also due to be granted on the basis that Plaintiff has failed to demonstrate that retaliation was the but-for cause of his termination" because he has also taken the "position that he was terminated because he is male, because [] his voice does not conform to gender stereotypes, and because he is gay, in addition to his retaliation claim." R&R at 37 (emphasis added). There may be multiple wrongful, actionable but-for causes of a termination. See Zann Kwan v. Andalex Group LLC, 737 F.3d 834 , 846 n.5 (2d Cir. 2013) (explaining, in an employment-discrimination case, that "a plaintiff's injury can have multiple 'but-for' causes, each one of which may be sufficient to support liability"). Moreover, even if the multiple but-for causes that Isaacs alleged were in fact inconsistent--again, they are not--"[l]itigants in federal court may pursue alternative theories of recovery, regardless of their consistency," and without the articulation of one theory prejudicing the litigant's entitlement to relief on another. Allstate Ins. Co. v. James, 779 F.2d 1536 , 1540 (11th Cir. 1986); see also Fed. R. Civ. P. 8(d)(3) ("A party may state as many separate claims or defenses as it has, regardless of consistency.").

An appropriate judgment will be entered.

DONE, this the 29th day of October, 2015.

/s/ Myron H. Thompson

UNITED STATES DISTRICT JUDGE

(WO)

JUDGMENT

In accordance with the memorandum opinion entered today, it is the ORDER, JUDGMENT, and DECREE of the court as follows:

(1) The United States Magistrate Judge's recommendation (doc. no. 41) is adopted for the reasons set out in the opinion.

(2) Defendant Felder Services, LLC's motion for summary judgment (doc. no. 27) is granted.

(3) Judgment is entered in favor of defendant Felder Services, LLC and against plaintiff Roger Isaacs, with plaintiff Isaacs taking nothing by his complaint.

It is further ORDERED that costs are taxed against plaintiff Isaacs, for which execution may issue.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure .

This case is closed.

DONE, this the 29th day of October, 2015.

/s/ Myron H. Thompson

UNITED STATES DISTRICT JUDGE

A copy of this checklist is available at the website for the USCA, 11th Circuit at www.ca11.uscourts.gov Effective on December 1, 2013, the new fee to file an appeal **[*6]** will increase from $455.00 to $505.00.

CIVIL APPEALS JURISDICTION CHECKLIST

1. Appealable Orders : Courts of Appeals have jurisdiction conferred and strictly limited by statute:

(a) **Appeals from final orders pursuant to 28 U.S.C. § 1291** : Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C.§ 158 , generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365 , 1368 (11th Cir. 1983). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. § 636(c) .

(b) **In cases involving multiple parties or multiple claims**, a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b) . Williams v. Bishop, 732 F.2d 885 , 885-86 (11th Cir. 1984). A judg ment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S.196, 201 , 108 S. Ct. 1717 , 1721-22 , 100 L. Ed. 2d 178 (1988); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832 , 837 (11th Cir. 1998).

(c) **Appeals pursuant to 28 U.S.C. § 1292(a)** : Appeals are permitted from orders "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions . . ." and from

"[i]nterlocutory decrees . . . determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." Interlocutory appeals from orders denying temporary restraining orders are not permitted.

(d) **Appeals pursuant to 28 U.S.C. § 1292(b) and Fed.R.App.P. 5** : The certification specified in 28 U.S.C. § 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

(e) **Appeals pursuant to judicially created exceptions to the finality rule**: Limited exceptions are discussed in cases including, but not limited to: Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 , 546 , 69 S. Ct. 1221 , 1225-26 , 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F.2d 371 , 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148 , 157 , 85 S.Ct. 308 , 312 , 13 L.Ed.2d 199 (1964).

2. Time for Filing : The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276 , 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P. 4(a) and (c) set the following time limits:

(a) **Fed.R.App.P. 4(a)(1)** : A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD — no additional days are provided for mailing**. Special filing provisions for inmates are discussed below.

(b) **Fed.R.App.P. 4(a)(3)** : "If one party timely files a notice of appeal, any other party may file a notice of appeal within **[*7]** 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

(c) **Fed.R.App.P. 4(a)(4)** : If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

(d) **Fed.R.App.P. 4(a)(5) and 4(a)(6)**: Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.

(e) **Fed.R.App.P. 4(c)** : If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. Format of the notice of appeal : Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. See also Fed.R.App.P. 3(c) . A pro se notice of appeal must be signed by the appellant.

4. Effect of a notice of appeal : A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4) .