

JUDGE SWAIN

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JULIAN PEREYRA,

Plaintiff,

-against-

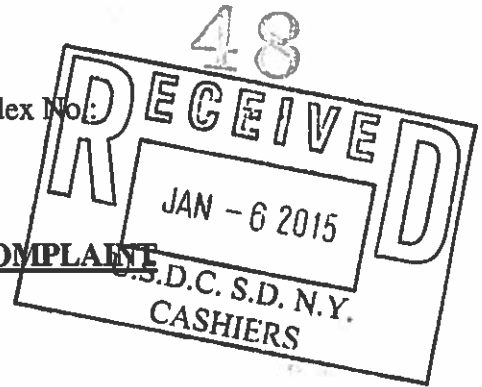
TOYS "R" US PROPERTY COMPANY II, LLC,
individually and d/b/a TOYS "R" US, JAIRO
BETANCOURT, individually, and MICHAEL
BETANCOURT, individually,

Defendants.
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Index No:

COMPLAINT

Plaintiff Demands a Trial by Jury



Plaintiff by his attorneys, ARCE LAW GROUP, P.C., hereby complains of the Defendants, upon information and belief, as follows:

NATURE OF THE CASE

1. Plaintiff complains pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et Seq. ("Title VII"), and to remedy violations of the laws of the State of New York and the Administrative Code of the City of New York based upon the supplemental jurisdiction of this Court pursuant to Gibb, 38 U.S. 715 (1966) and 28 U.S.C. §1367, seeking damages to redress the injuries Plaintiff has suffered as a result of being discriminated against by his employer, on the basis of his sex/gender, sexual orientation, national origin, disability and/or perceived disability, along with retaliation and constructive discharge.

JURISDICTION AND VENUE

2. The Court has jurisdiction pursuant to 42 U.S.C. §12101 et. Seq.; 29 U.S.C. §2617; 28 U.S.C. §1331; §1343 and supplemental jurisdiction thereto.
3. This action involves a Question of Federal Law.
4. Venue is proper in this district based upon the fact that a substantial part of the events or omissions giving rise to the claim occurred within the Southern District of the State of New York. 28 U.S.C. §1391(b).
5. On or about June 3, 2014, Plaintiff filed a charge with the New York State Division of Human Rights, which was dual filed with the Equal Employment Opportunities Commission (“EEOC.”)
6. On or about November 26, 2014, Plaintiff received a Notice of Right to Sue letter from the EEOC.
7. This action is being brought within 90 days of said Notice of Right to Sue letter.

PARTIES

8. Plaintiff is a homosexual male resident of the City of New York, County of Bronx.
9. Plaintiff was born in the Dominican Republic.
10. At all times material, Defendant TOYS “R” US PROPERTY COMPANY II, LLC, individually and d/b/a TOYS “R” US (herein also referred to as TOYS “R” US) was and is a foreign limited liability company duly incorporated under the laws of the State of Delaware.
11. At all times material, Defendant TOYS “R” US was and is a foreign business corporation authorized to conduct business in the State of New York.

12. At all times material, Defendant TOYS “R” US was and is a foreign business corporation which does conduct business in the State of New York
13. At all times material, Defendant JAIRO BETANCOURT (hereinafter also referred to as “JAIRO”) was and is an employee of Defendant TOYS “R” US.
14. At all times material, Defendant JAIRO was Plaintiff’s supervisor and/or had supervisory authority over Plaintiff.
15. At all times material, Defendant MICHAEL BETANCOURT (hereinafter also referred to as “MICHAEL”) was and is an employee of Defendant TOYS “R” US.
16. At all times material, Defendant MICHAEL was Plaintiff’s supervisor and/or had supervisory authority over Plaintiff.
17. Defendants TOYS “R” US, JAIRO, and MICHAEL are all collectively referred to as “Defendants.”
18. At all times material Plaintiff was an employee of Defendant TOYS “R” US at its 1514 Broadway, 44th Street, New York, NY 11596.

MATERIAL FACTS

19. In or around September 2008, Plaintiff began working for Defendants as an “Inventory Control Specialist.”
20. Almost instantly, Defendant MICHAEL began making inappropriate sexual comments to Plaintiff such as “What kind of chicks do you like?” “When are you gonna have kids?”
21. On more than one occasion, Defendant JAIRO called Plaintiff a “fag” in the presence of other TOYS “R” US employees, with the intention to harass Plaintiff.

22. In or around September 2011, on several occasions Defendant JAIRO asked Plaintiff **“Are you fucking Osmond?” “Were you hired because you’re fucking Osmond?”** and **“You’re blowing all the guys in the back room.”**
23. Defendant MICHAEL’s discriminatory remarks were intended to sexually harass Plaintiff and discriminate against him on the basis of his sex/gender and/or because Plaintiff did not comport with certain gender stereotypes.
24. Although the comments were related to Plaintiff’s sexual orientation, Plaintiff considered the comments sexually harassing in and of themselves.
25. On more than one occasion, Defendant JAIRO, who is of Colombian descent, would make derogatory remarks about his own Dominican wife in the presence of Plaintiff, who was also from the Dominican Republic. Defendant JAIRO would say **“I don’t know how I ended up with a Dominican wife,” “All Dominicans are filthy and nasty,”** and **“Los primos se primen,” (Dominicans are incestuous).**
26. On more than one occasion, Defendant JAIRO made further derogatory remarks about Plaintiff’s national origin by saying **“I’m from Colombia, I’m better than you”** and **“I’m not like you, I can speak Spanish. I’m better than you.”**
27. Although Plaintiff became increasingly offended, intimidated and stressed by Defendant JAIRO’s behavior, he endured the harassment because he feared losing his job.
28. The comments were made to Plaintiff repeatedly throughout his time working with Defendants.
29. In or around October 2011 through December 2011, Plaintiff complained three to five times to Geraldine (last name currently unknown) of Defendant TOYS “R” US’ Human Resources Department about the inappropriate and harassing conduct.

30. Defendants failed to take any remedial action and Plaintiff continued to endure a hostile work environment.
31. As a result of Defendants' discriminatory conduct, Plaintiff felt emotionally overwhelmed, depressed and anxious.
32. On or about November 29, 2012, due to Defendants' harassment, Plaintiff **attempted suicide** by jumping in front of an MTA subway train. Plaintiff felt that he could no longer suffer the discrimination and abuse from Defendants.
33. On or about November 29, 2012, Plaintiff was admitted for Emergency Care and received emergency spinal fusion surgery as a result of a severe and life-threatening spinal injury. Post-emergency admittance, Plaintiff received weekly medical assistance and care in the form of psychiatric therapy for suicide-prevention, physical therapy for regaining physical movement, and medication for his severe depression and chronic back pain.
34. As a result of his extreme attempt to escape Defendants' abuse, Plaintiff sustained injuries to his body which have left him permanently disabled.
35. In or around December 2012, Tametria Bennett and Yesenia Figueroa, two Human Resources employees for Defendant TOYS "R" US, visited Plaintiff in the hospital and assured him that he could return to his position as "Inventory Control Specialist." Plaintiff requested disability accommodations; specifically, Plaintiff asked for an assistant to help him with tasks in the Inventory and Control Department, as well as a permanent separation from Defendants JAIRO and MICHAEL. Tametria Bennett and Yesenia Figueroa assured Plaintiff that they would accommodate his request.
36. On or about April 2, 2013 Plaintiff returned to TOYS "R" US.

37. Despite Bennett's and Figueroa's assurances, Defendant TOYS "R" US failed to accommodate Plaintiff, and placed him back under the supervision of Defendants JAIRO and MICHAEL in the Video Games department. Plaintiff was forced to work under the supervision of the same individuals whose daily hostility and racial and sexual harassment drove him to attempt suicide.
38. In or around April 2013, while still working under the supervision of Defendants MICHAEL and JAIRO, Plaintiff requested a reasonable accommodation in the form of additional assistance with picking up and carrying heavy products from storage. Defendants refused to accommodate Plaintiff's request and refused to provide any assistance.
39. In or around April 2013, Plaintiff again contacted Human Resources and requested a transfer from the Video Games department because the position involved physical work in the warehouse and it interfered with Plaintiff's disability. Defendants again failed to reasonably accommodate Plaintiff or engage in the interactive process.
40. In or around April 2013, Plaintiff also contacted the Inventory Control Supervising Manager and requested a disability accommodation; a transfer from the Video Games Department. That manager also failed to accommodate Plaintiff and brushed off his request as "meritless."
41. Despite Plaintiff's multiple requests for a transfer and reasonable accommodation, Plaintiff remained under Defendants JAIRO and MICHAEL's supervision.
42. On or about July 15, 2013, in retaliation for his complaints and requests for a reasonable accommodation, Defendants drafted a pretextual "Corrective Action" against Plaintiff for his tardiness on four occasions in June. However, it is pretextual because Plaintiff provided

doctors' notes and informed Defendants that he needed additional time to prepare for his job, which he performed at a slower pace (but in an efficient manner) due to his disability.

43. On or about August 12, 2013, Defendants drafted a second pretextual "Corrective Action" against Plaintiff for his tardiness on four occasions in July and August. However, Plaintiff was again able to provide Defendants with doctors' notes that excused his tardiness.
44. As a result of Defendants' actions, Plaintiff felt physically and emotionally unable to continue working in the environment created and enabled by Defendants. Plaintiff felt a return of suicidal thoughts after Defendants' continuous retaliation and failure to accommodate his disability.
45. Defendants' actions were also intended to create a pretextual reason to terminate Plaintiff and/or constructively discharge Plaintiff.
46. Defendants' actions did constructively discharge Plaintiff.
47. In or around September 2013, Plaintiff resigned from his position with Defendants.
48. Defendants created a working environment that no reasonable person could endure.
49. As a result of Defendants' actions, Plaintiff felt extremely humiliated, degraded, victimized, embarrassed, and emotionally distressed.
50. Defendants' actions were deliberate and they were intended to harm Plaintiff.
51. As a result of the Defendants' discriminatory and intolerable treatment, Plaintiff suffered severe emotional distress and physical ailments.
52. As a result of the acts and conduct complained of herein, Plaintiff has suffered future pecuniary losses, emotional pain, suffering, inconvenience, loss of enjoyment of life, and other non-pecuniary losses. Plaintiff has further experienced severe emotional and physical distress.

53. As a result of the above, Plaintiff has been damaged in an amount which exceeds the jurisdiction limits of all lower Courts.
54. As Defendants' conduct has been malicious, willful, outrageous, and conducted with full knowledge of the law. Plaintiff demands Punitive Damages as against all the Defendants, jointly and severally.

**AS A FIRST CAUSE OF ACTION
UNDER FEDERAL LAW
DISCRIMINATION**

55. Plaintiff repeats and realleges each and every allegation made in the above paragraphs of this complaint.
56. This claim is authorized and instituted pursuant to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section(s) 2000e et seq., as amended and 42 U.S.C. Section 1981, for relief based upon the unlawful employment practices of the above-named Defendants. Plaintiff complains of Defendants' violation of Title VII's prohibition against discrimination in employment based, in whole or in part, upon an employee's sex/gender, sexual orientation, national origin, disability and/or perceived disability.
57. Defendants engaged in unlawful employment practices prohibited by 42 U.S.C. §2000e et. seq., by terminating and otherwise discriminating against Plaintiff because of his sex/gender, sexual orientation, national origin, disability and/or perceived disability, failure to reasonably accommodate Plaintiff, and failure to engage in the interactive process.

**AS A SECOND CAUSE OF ACTION
UNDER FEDERAL LAW
RETALIATION**

58. Plaintiff repeats and realleges each and every allegation made in the above paragraphs of this complaint.

59. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-3(a) provides that it shall be unlawful employment practice for an employer:

“(1) to... discriminate against any of his employees... because [s]he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”

60. Defendants engaged in unlawful employment practice by 42 U.S.C. §2000e et. seq. by discriminating against Plaintiff with respect to the terms, conditions or privileges of employment because of his opposition to the unlawful employment practices of Defendants and because he requested a reasonable accommodation.

**AS A THIRD CAUSE OF ACTION
UNDER STATE LAW
DISCRIMINATION**

61. Plaintiff repeats and realleges each and every allegation made in the above paragraphs of this complaint.

62. Executive Law § 296 provides that “1. It shall be an unlawful discriminatory practice: "(a) For an employer or licensing agency, because of an individual's age, race, creed, color, national origin, sex, or disability, marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.”

63. Defendants engaged in an unlawful discriminatory practice by discriminating against the Plaintiff on the basis of his sex/gender, sexual orientation, national origin, disability and/or perceived disability, failure to reasonably accommodate, and failure to engage in the interactive process.
64. Plaintiff hereby makes a claim against Defendants under all of the applicable paragraphs of Executive Law Section 296.

**AS A FOURTH CAUSE OF ACTION
UNDER STATE LAW
RETALIATION**

65. Plaintiff repeats and realleges each and every allegation made in the above paragraphs of this complaint.
66. New York State Executive Law §296(7) provides that it shall be an unlawful discriminatory practice:
- “For any person engaged in any activity to which this section applies to retaliate or discriminate against any person because [s]he has opposed any practices forbidden under this article.”
67. Defendants engaged in an unlawful discriminatory practice by discharging, retaliating, and otherwise discriminating against the Plaintiff because of Plaintiff's opposition to his employer's unlawful employment practices, and because he requested a reasonable accommodation.

**AS A FIFTH CAUSE OF ACTION
UNDER STATE LAW
AIDING AND ABETTING**

68. Plaintiff repeats and realleges each and every allegation made in the above paragraphs of this complaint.
69. New York State Executive Law §296(6) provides that it shall be an unlawful discriminatory practice:
- “For any person to aid, abet, incite compel or coerce the doing of any acts forbidden under this article, or attempt to do so.”
70. Defendants engaged in an unlawful discriminatory practice in violation of New York State Executive Law §296(6) by aiding, abetting, inciting, compelling and coercing the discriminatory conduct.

**AS A SIXTH CAUSE OF ACTION
UNDER THE NEW YORK CITY ADMINISTRATIVE CODE
DISCRIMINATION**

71. Plaintiff repeats, reiterates and realleges each and every allegation made in the above paragraphs of this Complaint as if more fully set forth herein at length.
72. The Administrative Code of City of NY § 8-107 [1] provides that “It shall be an unlawful discriminatory practice: “(a) For an employer or an employee or agent thereof, because of the actual or perceived gender . . . of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment.”
73. Defendants engaged in an unlawful discriminatory practice in violation of New York City Administrative Code Title 8, § 8-107(1)(a) by creating and maintaining discriminatory working

conditions, and otherwise discriminating against the Plaintiff because of his sex/gender, sexual orientation, national origin, and disability and/or perceived disability, failing to reasonably accommodate, and failure to engage in the interactive process.

**AS A SEVENTH CAUSE OF ACTION
UNDER THE NEW YORK CITY ADMINISTRATIVE CODE
RETALIATION**

74. Plaintiff repeats, reiterates and realleges each and every allegation made in the above paragraphs of this Complaint as if more fully set forth herein at length.

75. New York City Administrative Code Title 8-107(7) provides that:

“It shall be unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to retaliate or discriminate in any manner against any person because such person has (i) opposed any practice forbidden under this chapter, (ii) filed a complaint, testified or assisted in any proceeding under this chapter, (iii) commenced a civil action alleging the commission of an act which would be an unlawful discriminatory practice under this chapter...”

76. Defendants engaged in an unlawful and retaliatory discriminatory practice by retaliating, and otherwise discriminating against the Plaintiff, including, but not limited to constructive discharge of Plaintiff’s employment and failing to reasonably accommodate him.

**AS AN EIGHTH CAUSE OF ACTION
UNDER THE NEW YORK CITY ADMINISTRATIVE CODE
SUPERVISOR LIABILITY**

77. Plaintiff repeats, reiterates and realleges each and every allegation made in the above paragraphs of this Complaint as if more fully set forth herein at length.

78. New York City Administrative Code Title 8-107(13) Employer liability for discriminatory conduct by employee, agent or independent contractor.

- a. An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of any provision of this section other than subdivisions one and two of this section.
- b. An employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subdivision one or two of this section only where:
 - (1) the employee or agent exercised managerial or supervisory responsibility; or
 - (2) the employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or
 - (3) the employer should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.

79. Defendants violated the section cited herein as set forth.

AS A NINTH CAUSE OF ACTION
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

80. Plaintiff repeats, reiterates and realleges each and every allegation made in the above paragraphs of this Complaint as if more fully set forth herein at length.

81. Defendants engaged in extreme and outrageous conduct.

82. Defendants intended to cause, or disregarded a substantial probability of causing, severe emotional distress to Plaintiff.

83. There exists a causal connection between the above conduct and said injury.
84. As a result of said conduct Plaintiff suffered and suffers from severe emotional distress.
85. As a result of the above Plaintiff has been damaged in an amount which exceeds the Jurisdictional limits of all Lower Courts.
86. As Defendants' conduct has been willful, reckless, outrageous, intentional and/or malicious, Plaintiff also demands Punitive Damages in an amount which exceeds the Jurisdictional limits of all Lower Courts.

WHEREFORE, Plaintiff respectfully requests a judgment against the Defendants:

- A. Declaring that the Defendants engaged in unlawful employment practice prohibited by Title VII, The New York City Administrative Code Title 8, §8-107 et. seq., the New York Executive Law, and New York Common Law; and that the Defendants harassed and discriminated against Plaintiff on the basis of his sex/gender, sexual orientation, national origin, disability and/or perceived disability, retaliation and constructive discharge, failing to reasonably accommodate and failing to engage in the interactive process.
- B. Awarding damages to the Plaintiff for any lost wages and benefits, past and future, back pay and front pay, resulting from Defendants' unlawful employment practice;
- C. Awarding Plaintiff compensatory damages for mental, emotional and physical injury, distress, pain and suffering and injury to reputation in an amount in excess of the jurisdiction of all lower Courts;
- D. Awarding Plaintiff Punitive Damages;
- E. Awarding Plaintiff attorneys' fees, costs, and expenses incurred in the prosecution of the action;
- F. Awarding Plaintiff such other and further relief as the Court may deem equitable, just and proper to remedy the Defendants' unlawful employment practices.

JURY DEMAND

Plaintiff requests a jury trial on all issues to be tried.

WHEREFORE, Plaintiff demands judgment against Defendants, jointly and severally, in an amount to be determined at the time of trial plus interest, Punitive Damages, attorneys' fees, costs, and disbursements of action; and for such other relief as the Court deems just and proper.

Dated: New York, New York
January 6, 2015

ARCÉ LAW GROUP, P.C.
Attorneys for Plaintiff

By: 

Christopher Van De Water, Esq.
30 Broad Street, 35th Floor
New York, New York 10004
(212) 248-0120