

The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Link A. Gibbons

Office Address: 1804 Eastern Avenue, Morristown, Hamblen County, Tennessee 37813
(including county)

Office Phone: 423-839-0990

Facsimile: 423-839-1306

INTRODUCTION

The State of Tennessee Executive Order No. 41 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit original (unbound) completed application (*with ink signature*) and six (6) copies of the form and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with electronic or scanned signature via email to debra.hayes@tncourts.gov, or via another digital storage device such as flash drive or CD.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am currently self-employed and doing business as the Law Office of Link A. Gibbons in Morristown, Tennessee.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

October 31, 2003. BPR # 022799.

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

I have only been licensed in Tennessee.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Montpelier & Young, P.A. in Knoxville, Tennessee	January 2004 – March 2005
Lewis, King, Krieg & Waldrop, P.C. in Knoxville, Tennessee	March 2005 – March 2010
Law Office of Link A. Gibbons in Morristown, Tennessee	March 2010 – Present

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

I graduated law school from the Cumberland School of Law at Samford University in Birmingham, Alabama, in May of 2003. While studying for the bar and for a short time period after passing the bar in October of 2003, I worked construction for a concrete cutting company by the name of True-Line Coring and Cutting in Nashville, Tennessee, until being hired by Montpelier & Young, P.C. in January of 2004.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

My primary areas of practice are employment law (30%), personal injury (20%), general civil litigation (15%), workers' compensation (15%), administrative law (10%), divorce (5%) and probate (5%).

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

I began my legal career with a small firm, Montpelier & Young, P.C., in Knoxville, Tennessee. We handled primarily employment law and general civil litigation matters. I was involved and assisted in all aspects of litigation including the initial client meetings, written discovery, depositions, motion practice, mediation, and trial. I was fortunate to serve as co-counsel in my first federal civil trial in U.S. District Court in Knoxville, Tennessee, approximately nine (9) months after being admitted to the bar. I worked for Montpelier & Young for a little over a year.

In 2005, I was hired by Lewis, King, Krieg & Waldrop, P.C. (now Lewis, Thomason, King, Krieg & Waldrop, P.C.). I continued working on all types of employment law matters including discrimination and retaliation under Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the Family Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA) issues, etc. Additionally, I also began

handling workers' compensation matters and personal injury cases. While at Lewis-King, I was afforded the opportunity to not only assist more senior attorneys, but progress to handling my own caseload. The relationships, knowledge, and experience I gained while working there was invaluable.

In March of 2010, I made the decision to return to my hometown of Morristown, Tennessee, to practice law. While I certainly did not choose the best time to open my own firm from the standpoint of the economy, I was able to develop a foothold here in the legal community. I have continued to work primarily on matters involving employment law, workers' compensation, and personal injury. However, as most small town lawyers can attest, I had to branch out to some new areas of law as well including divorce, child custody, and probate matters.

I have civil jury trial experience in the U.S. District Court for the Eastern District of Tennessee and Tennessee state courts. My most recent jury trial in federal court was in September, 2012, in Greeneville, Tennessee, before the Honorable J. Ronnie Greer. I represented an individual in an Age Discrimination in Employment Act (ADEA) and Family Medical Leave Act (FMLA) retaliation case against a national tree trimming corporation. After three (3) days of a jury trial, the parties reached a confidential settlement. I have served as either lead counsel or counsel of record in forty-nine (49) civil cases in the U.S. District Court for the Eastern District of Tennessee.

My most recent jury trial in state court was in Sevier County Chancery Court before the Honorable Telford E. Forgety. I represented an individual against a used car lot in a Tennessee Consumer Protection Act (TCPA) and fraud case. The parties reached a confidential settlement just before closing arguments. In addition to jury trials, I have had several bench trials involving workers' compensation cases, debtor/creditor matters, landlord/tenant issues, probate matters, and child visitation. I routinely appear in chancery and circuit court throughout east Tennessee. I have had limited experience in criminal law matters. I have represented clients on misdemeanor offenses only in traffic court and General Sessions court.

I have substantial experience in administrative hearings as I have represented both individuals and employers in numerous unemployment hearings before the Tennessee Department of Labor (TDOL). I have also represented both individuals and employers before the Equal Employment Opportunity Commission (EEOC) and the Tennessee Human Rights Commission (THRC). Additionally, I also have previous experience with Tennessee Board of Nursing and am currently handling a matter with the Tennessee Board of Pharmacy.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

In January 2013, I represented a developer before the City Council of Morristown, Tennessee, regarding monetary fines and penalties imposed by the City of Morristown against the developer totaling approximately \$190,000. After a three and a half (3½) day administrative hearing, the Morristown City Council voted 6-1 to waive all fines against the developer. It was stated during the hearing that this was the first time such an administrative hearing had ever taken place before

Morristown City Council.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I have not previously served as a mediator, arbitrator or a judicial officer.

11. Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

I have served as a guardian *ad litem* on two (2) occasions for conservatorship matters. I performed a home visit with the elderly individuals and provided a report to the court with my observations and recommendations.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

None.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

I have not previously submitted an application for judgeship.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

SAMFORD UNIVERSITY CUMBERLAND SCHOOL OF LAW, Birmingham, AL
J.D. Degree, May 2003

- Honors:**
- Dean's List
 - WD and Edwin Rollison Scholarship

- Activities:**
- Cumberland National Trial Team
 - Janie Shores Moot Court Competition
 - Cordell Hull Speaker's Forum
 - Samford University Traffic Court Justice

UNIVERSITY OF TENNESSEE, Knoxville, TN
B.S. Degree, Finance, May 2000

- Honors:**
- First Tennessee Bank Scholar
 - Dean's List

- Activities:**
- Lambda Chi Alpha Fraternity
 - Inter-Fraternity Council Judicial Board
 - Student Alumni Associate

PERSONAL INFORMATION

15. State your age and date of birth.

I am thirty-six (36) years old. My date of birth is May 26, 1978.

16. How long have you lived continuously in the State of Tennessee?

I have lived in Tennessee my entire life with the exception of the three (3) years I attended law school at the Cumberland School of Law at Samford University in Birmingham, Alabama. However, I remained a resident of Tennessee during that time period.

17. How long have you lived continuously in the county where you are now living?

I was born and raised in Hamblen County, Tennessee. I lived in Hamblen County until 1996 when I went to college at the University of Tennessee at Knoxville. I returned back to Hamblen County in 2008. I opened my own law firm here in March 2010.

18. State the county in which you are registered to vote.

I am registered to vote in Hamblen County, Tennessee.

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

I have never served in the military.

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

I have had traffic citations in the past as follows:

3/28/1995 Wrong way on a one-way street in Hamblen County, Tennessee. Paid the fine and court costs.

8/21/1997 Illegal left hand turn in Knox County, Tennessee. Paid the fine and court costs.

11/15/1997 Speeding Ticket in Jefferson County, Tennessee. Attended driving school and paid court costs.

10/29/1999 Failure to obey traffic officer in Knox County, Tennessee. Paid the fine and court costs.

12/14/2001 Speeding Ticket in Loudon County, Tennessee. Paid the fine and court costs.

2/22/2005 Following too closely, no proof of insurance in Knox County, Tennessee. Dismissed upon providing proof of insurance.

12/8/2006 Speeding Ticket in Knox County, Tennessee. Dismissed upon payment of court costs.

11/20/2007 Speeding Ticket in Knox County, Tennessee. Dismissed upon payment of court costs.

4/15/2008 Speeding ticket in Knox County, Tennessee. Paid the fine and court costs.

Sometime in 2008 or 2009. Speeding in Jefferson County, Tennessee. Dismissed upon payment of court costs.

5/11/2014 Violation of the seatbelt law. Paid the \$10 fine.

To the best of my knowledge and recollection, I have listed above all the traffic citations that I

am aware of at this time. I have never been charged, convicted, or pled guilty to violation of any law, regulation, or ordinance other than a misdemeanor traffic citation.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. Please state and provide relevant details regarding any formal complaints filed against you with any supervisory authority including, but not limited to, a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you.

I am not aware of any formal complaints filed against me.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

No.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and

fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

I was previously a member of the Morristown Rotary. I am currently a member of the Morristown Elks Lodge. I am also an alumni member of Lambda Chi Alpha fraternity.

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.
- a. If so, list such organizations and describe the basis of the membership limitation.
 - b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

Lambda Chi Alpha is a men's fraternal organization. I was a member at the University of Tennessee. I am an alumni member of Lambda Chi Alpha and am not currently active with any activities

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

The Knoxville Bar Association 2005 – Present (Co-Chair of Legal Placement Committee 2007)

The Tennessee Bar Association 2005 – Present

The Hamblen County Bar Association 2010 – Present

The Tennessee Association for Justice 2014 – Present

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

I was selected and inducted into Fairview Marguerite Elementary School Wall of Fame in 2012 based on personal and professional accomplishments.

30. List the citations of any legal articles or books you have published.

None.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

1/12/2009 NBI Seminar "Workers' Compensation Case Preparation Techniques" presented in Knoxville, Tennessee.

4/23/2013 NBI Seminar "Administrative Law in Tennessee" presented in Knoxville, Tennessee.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

I have never been a candidate or applicant for any public office.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

I have never been a registered lobbyist.

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

Please see the attached. I was the sole drafter of these briefs.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? (150 words or less)

I left a large firm in Knoxville, Tennessee, to return to my hometown because I believed there was a need in Hamblen County for attorneys at the time. I have enjoyed practicing on my own and helping the people of the surrounding area. Judge Faulk's recent passing has left a void on

the bench, and I believe I have the integrity, experience, and skill set to serve as a competent civil trial judge to the people of the 3rd Judicial District.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. *(150 words or less)*

I have taken many cases over the years in which I have waived a fee if I can help an individual. Just within the last couple of months, I helped a single mother who was homeless get her children back in school. The children were expelled because of zoning issues in violation of the McKinney-Vento Homeless Assistance Act. I was able to quickly get them back in school and their regular extracurricular activities at no charge.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. *(150 words or less)*

The 3rd Judicial District is comprised of Greene, Hamblen, Hancock, and Hawkins Counties. There are three (3) civil circuit court positions and one (1) criminal circuit court position. The Circuit Court hears a wide variety of cases ranging from personal injury to probate matters in both jury trials and bench trials. While there is always a learning curve to any new position, I believe that my previous legal experience and work ethic will allow me to hit the ground running.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? *(250 words or less)*

I have previously coached youth football teams in both Knoxville and Morristown. Additionally, I have also participated in the annual Christmas shopping event sponsored for local children by the Morristown Rotary. I have also assisted in the Morristown Elks "hoop shoot" which is a charitable contest for local youth. Lastly, my law office frequently sponsors youth sports teams in the Hamblen County School System. I believe it is important to give back to your community and I would try to continue to find opportunities to do so if I am appointed to this position.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. *(250 words or less)*

I am a first generation college graduate as well as attorney. I have paid and continue to pay for my own undergraduate and legal education. My parents instilled a belief in me at a young age that anyone can be successful if you are willing to put in the hard work to do so. I believe that

with all that I am. I have not always been the smartest or most gifted person in a situation or setting, but I have rarely met anyone willing to work harder to get the job done. I intend to approach the position of Circuit Court Judge in the same manner if I receive the appointment.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. *(250 words or less)*

Yes. I do not have a specific example of this from my own legal practice regarding a specific law or rule. However, I took the oath as an attorney practicing in the State of Tennessee to support the Constitution of the United States and of the State of Tennessee. As long as the substance of a law is consistent with those documents, I would enforce such law even if I disagreed with it from a personal standpoint.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Deborah C. Stevens—Knox County Circuit Court Judge

B. Danny Thomas—Mayor of Morristown, Tennessee

C. Rodney A. Fields – Attorney and Managing Shareholder of Lewis-Thomason Knoxville Office

D. Steve Southerland—Mortgage Broker and Tennessee State Senator for District 1

E. Marshall Stair—Attorney at Lewis-Thomason and City Council Member for Knoxville, Tennessee

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] Circuit Court of 3rd Judicial District of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: January 24, 2015.


Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.



**THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS**

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

**TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS**

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

Link A. Gibbons
Type or Print Name

[Signature]
Signature

1/28/15
Date

022799
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

MICHAEL W. SHELL,)	
)	
Plaintiff,)	
)	
V.)	No.: 3:05-cv-245
)	Phillips/Guyton
J.J.B. HILLIARD, W.L. LYONS, INC.,)	
and THE PNC FINANCIAL SERVICES)	
GROUP, INC.,)	
)	
Defendants.)	

PLAINTIFF'S RESPONSE TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

I. FACTUAL BACKGROUND

Plaintiff was recruited by Defendants to become a Financial Consultant at the time of his hire in October 2001. Plaintiff enjoyed his work as a Financial Consultant and performed well in his position. However, shortly after beginning his employment with the Defendants, another employee, Stan Shelton, began sending sexually explicit and suggestive emails and documents involving the Plaintiff and the other male employees of Defendants. Stan Shelton was a long time employee of Defendant Hilliard Lyons and a former sales manager. He was the top producer in Defendants' Knoxville offices for a ten year period from 1991 until 2000 and was in the top twenty (20) brokers in Defendant Hilliard Lyons' entire organization. Plaintiff complained to his branch manager, David McDonald, on "four or five" occasions regarding Shelton's conduct prior to December 2002. However, David McDonald and Stan Shelton had been friends for several years and Mr. Shelton was responsible for David McDonald being hired as branch manager for Defendants. David McDonald allegedly talked to Stan Shelton regarding his behavior on one (1) occasion but did not otherwise reprimand Mr. Shelton. Mr. Shelton's conduct continued despite

Plaintiff's numerous complaints. In December 2002 or early January 2003, David McDonald was promoted to regional manager and a new branch manager, Brian Donaldson, was hired. Following Mr. Donaldson's hiring, Shelton's conduct began to escalate. Not only did Shelton send his lewd materials via the company computer and intranet, he often posted sexually related materials in Defendants' kitchen on the refrigerator for all employees and customers to see. Additionally, Shelton's conduct directly toward Plaintiff increased in both frequency and severity. Plaintiff often worked from home so that he would not have to encounter Stan Shelton as frequently. However, he could not shield himself from Shelton's conduct. Plaintiff again went to his direct supervisor, now Brian Donaldson, on multiple occasions to complain about Shelton's conduct. Brian Donaldson also allegedly spoke to Shelton about his conduct in April 2003 but did not otherwise reprimand him. Just as was the case following David McDonald's alleged conversation with Shelton, Shelton continued with his behavior. While Defendants have attempted to argue in their Memorandum of Law several other reasons for Plaintiff's resignation, Plaintiff resigned his employment in August 2003 with the Defendants due to Shelton's continuous harassment and Defendants failure to take prompt and effective corrective action for which they should be held liable.

III. LAW AND ARGUMENT

A. STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that Summary Judgment will be granted by the Court only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The burden is on the moving party to show that no genuine issue of material fact exists. The Court must view the facts and all inferences to be drawn from them in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); White v. Turfway Park Racing Ass'n, Inc., 909

F.2d 941, 943 (6th Cir. 1990); 60 Ivy Street Corp. v. Alexander, 822 F.2d 1432, 1435 (6th Cir. 1987).

B. PLAINTIFF CAN ESTABLISH A *PRIMA FACIE* CASE OF A HOSTILE WORK ENVIRONMENT DUE TO SAME-SEX SEXUAL HARASSMENT UNDER BOTH TITLE VII AND THE THRA.

Defendants have correctly identified the elements required for Plaintiff to meet his burden of establishing a *prima facie* case of a hostile work environment due same-sex sexual harassment under both Title VII and the Tennessee Human Rights Act.¹ These elements require the Plaintiff to show that: (1) he is a member of a protected class; (2) he was subject to unwelcome sexual harassment; (3) the harassment was based on his sex; (4) the harassment created a hostile work environment; and (5) Defendants failed to take reasonable care to prevent and correct any sexually harassing behavior. See Bowman v. Shawnee State Univ., 220 F.3d 456, 462-63 (6th Cir. 2000). For purposes of the Motion for Summary Judgment, Defendants have conceded the first two elements of Plaintiff's *prima facie* case.² Accordingly, Plaintiff will address only the remaining three elements.

1. The Harasser's conduct was due to Plaintiff's sex.

In Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 80-81; 118 S.Ct 998, 1002 (1998), the Supreme Court stated that the critical issue in a hostile work environment claim is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which other members are not exposed." The Court outlined three ways in which a Plaintiff may establish an inference of discrimination in a same-sex sexual harassment case. These three methods of proving discrimination include: (1) showing that the harasser's conduct was motivated by sexual desire; (2) showing that the harasser's conduct was motivated by a general hostility to

¹ Defendants have conceded that THRA claims are analyzed in the same manner as Title VII claims.

² See Footnote 18 of Defendants' Memorandum of Law in Support of the Motion for Summary Judgment.

the presence of men in the workplace; or (3) offering direct comparative evidence about how the harasser treated members of both sexes in a mixed-sex workplace. See id. Although some of Stan Shelton's conduct toward his male co-workers may reasonably be viewed as evidencing a sexual desire for men, Plaintiff does not rely on this theory in proving the third element of his *prima facie* case. Instead, Plaintiff relies on the other two methods outlined in Oncale to meet his evidentiary burden. See id.

a. Stan Shelton's harassing conduct was due to a general hostility toward men in the workplace.

Stan Shelton was the top producer at the Hilliard Lyons' Knoxville offices from 1991 through 2000. See Deposition of Stan Shelton, p. 24. In fact, Stan Shelton very proudly testified that he ranked in the top twenty (20) brokers out of two hundred (200) brokers in Hilliard Lyons' entire organization during this time. See id. At some point in time following 2000, however, Stan Shelton's production levels began to decrease. See id. at 113-114. Additionally, during this same time period, Hilliard Lyons began to expand the number of brokers in its Knoxville locations. See Deposition of Stan Shelton, p. 36-37. Hilliard Lyons' number of brokers went from three (3) brokers when David McDonald was hired as Branch Manager in approximately 1998 to approximately fifteen to twenty (15 to 20) brokers when the Plaintiff, Mike Shell, was hired in 2001. See id. at p. 12, 36-37. Hilliard Lyons later grew to approximately thirty (30) brokers, only one (1) of which was female, Cindy Harless, who had been employed by Hilliard Lyons as a broker since 1987. See Deposition of Cynthia (Cindy) Harless, p. 8, 35. The other brokers hired by Hilliard Lyons were male. See id. at 35. Not coincidentally, it was during this growth period for Hilliard Lyons that Stan Shelton ramped up his harassment and ridiculing of the other male brokers. It appears that much of Stan Shelton's conduct was targeted at the Plaintiff, Mr. David O'Block, and Mr. Jeff Marzolf (all three of whom filed federal lawsuits against Defendants related to the sexual harassment perpetrated by Stan Shelton). See Deposition

of Mike Shell, p. 279-280. Additionally, Shelton's conduct was also directed at several other male brokers including Mr. John Bedner, Mr. Frank Veneable, Mr. Jim Gormley, Mr. Jimmy Johnston, and Mr. Kevin Mays. See Deposition of David McDonald, p. 130; See Deposition of Mike Shell, p. 279-280; See Deposition of Cindy Harless, p. 14. See Deposition of Stan Shelton, p. 66-68.

The Defendants have cited Shelton occasionally engaging in social activities with male co-workers outside the office in an attempt to dismiss the idea of Shelton opposing the presence of men in the workplace. See Defendants' Memorandum of Law at p.16. However, it is irrefutable that Mr. Shelton's ridicule and harassing conduct targeted no less than eight (8) of his male co-workers. Furthermore, it is undisputed that Stan Shelton did not engage in conduct which involved sexual harassment toward the only female broker, Cindy Harless. See Deposition of Cindy Harless, p. 36. Shelton's harassing conduct was directed only at the male brokers and was so widespread toward the other male brokers so as to allow the Court to infer as a reasonable inference that Shelton's conduct was motivated by a general hostility toward men in the workplace. Therefore, considering all evidence in a light most favorable to the Plaintiff, it is Plaintiff's position that he has met the third element of his *prima facie* case as required under Oncale.

- b. Women in the Defendants' workplace were not the target of Stan Shelton's harassing conduct.

Defendants have conceded that one way in which the Plaintiff may meet his burden of establishing that he was discriminated against because of his sex would be to offer direct comparative evidence about how the harasser treated members of both sexes in a mixed-sex workplace.³ Defendants do not contest the fact that Stan Shelton engaged in offensive conduct toward males in the workplace. Instead, Defendants have apparently taken the unenviable position that they allowed Shelton's conduct toward both men and women. See Defendants' Memorandum

³ See Defendants' Memorandum of Law at p. 16-17.

of Law, p. 17. Defendants' state, "the undisputed facts in this case show that women were also exposed to Shelton's conduct and, therefore, Shell will be unable to show, as he must, that he was harassed because of his sex." See id. Defendants attempt to relegate Stan Shelton's conduct to "joking" behavior. However, Stan Shelton's conduct toward the Plaintiff and the other male employees was not mere joking. His harassing conduct toward the male employees included among other things the following:

- Commenting on Plaintiff's "bootie" in a voice and manner meant to demean Plaintiff. See Deposition of Mike Shell, p. 121, 122.
- Sending the Plaintiff a brochure for homosexual cruises and vacations and instructing an assistant, Rebecca Lynch, to leave a note stating that the Plaintiff's manager, Brian Donaldson, had asked that Plaintiff not receive these types of materials at work. See Deposition of Stan Shelton, p. 78. See also Exhibit 9
- Placing Plaintiff's picture on a copy of the homosexual cruise brochure and distributing it at a brokers' luncheon held by the Defendants. See Deposition of Stan Shelton, p. 78; See Deposition of Rebecca Lynch, p. 31-32; See Deposition of Mike Shell, 268-269; See also Exhibit 10.
- Altering the Defendants' "Code of Ethics" to comment on the relationship between Plaintiff and his girlfriend and distributing the document to the other employees of Defendants. See Deposition of Stan Shelton, p. 58; See Deposition of Mike Shell, p. 173; See also Exhibit 11.
- Sending multiple emails containing sexually explicit photographs depicting a severely overweight, unidentified female receiving oral sex from an unidentified male and insinuating that Plaintiff was the male in the picture. See Deposition of Stan Shelton, p. 70-74; See also Exhibit 12 and Exhibit 13;

- Sending an email containing a severely overweight and naked unidentified female sitting on the head of an unidentified male receiving oral sex entitled “How to punish a sex offender” and insinuating that Plaintiff was the unidentified male. See Deposition of Stan Shelton, p. 76-77; See also Exhibit 14.
- Sending an email stating “Shell’s girlfriend trying out his new hot tub!” which contained a picture of a severely overweight and naked female. See Deposition of Stan Shelton, p. 72-73; See also Exhibit 15.
- Sending emails referring to Plaintiff in degrading terms such as “lugnut”. See Deposition of Stan Shelton, p. 68-69; See also Exhibit 16.
- Sending an email stating “A recent photo of Mike Shell lounging at his crib!” which contains a picture of an extremely hairy, overweight male lying face down. See Deposition of Stan Shelton, p. 79-80; See also Exhibit 17.
- Distributing a picture of a “penis putter” referring to a male employee and his genitalia as well as the sexual relationship between the male employee and his wife. See Deposition of Stan Shelton, p. 61; See also Exhibit 18.
- Sending emails to another male broker, David O’Block, repeatedly asking him what a dildo sex toy tastes like. See Deposition of Stan Shelton, p. 88-89; See also Exhibit 19.
- Sending an email to David O’Block insinuating that O’Block’s former girlfriend knew the size of Stan Shelton’s penis. See Deposition of Stan Shelton, p. 43; See also Exhibit 20.
- Sending an email to all Defendants’ Knoxville employees, including Brian Donaldson, entitled “Diet Ads” which referred to another male broker, Jim

Gormley, being overweight. See Deposition of Stan Shelton, p. 87-88; See also Exhibit 21.

- Posting documents on the refrigerator in Defendants' kitchen and break room which was frequently visited by both employees and customers containing a picture of a male broker, Jim Gormley, stating that Gormley was a homosexual and was involved in the pornography business. See Deposition of Stan Shelton, p. 53-55; See also Deposition of Kim Harrell, p. 17-18; See also Exhibit 22.
- Distributing a document entitled "Local Stockbroker Joins Gay Coalition" which stated that another male broker, Jim Gormley, was a homosexual as well as insinuating that Gormley performed oral sex on other men. See Deposition of Stan Shelton, p. 55-56; See also Deposition of Kim Harrell, p. 27-29; See also Exhibit 23.

While Defendants attempted to convey in the affidavits drafted by defense counsel that women employees were also subjected to Stan Shelton's conduct, it quickly became apparent during the depositions of Cindy Harless and Kim Harrell that Defendants' female employees did not have to endure such conduct. In her affidavit, Kim Harrell states that "Shelton joked with everyone in the office, it made no difference whether the person was male or female. I never observed Stan Shelton acting inappropriately" See Affidavit of Kim Harrell at ¶ 5. Additionally, Kim Harrell goes on to state in Paragraph Eight (8) of her affidavit that she had seen a document prepared by Stan Shelton involving the "Little Rascals" during her employment, which was attached to her affidavit as Tab A, involving another male broker, Jim Gormley, which she thought was funny and did not find offensive. See id. at ¶ 8; See Exhibit 22. However, Kim Harrell admitted at her deposition that the document attached to her affidavit as Tab A contained references to Jim Gormley being a homosexual, contained references to Jim Gormley working in

the pornography business, and that such document was inappropriate in the workplace and was in violation of the Defendants' policy on sexual harassment as she understood it. See Deposition of Kim Harrell, p. 17, line 5 – p. 21, line 6. Furthermore, Kim Harrell testified that the document was posted in the Defendants' kitchen and break room which was open to both employees and customers. See id. at p.18, ll. 3-22. She further admitted that the document attached to her affidavit as Tab A could have been viewed as offensive to other employees or customers of the Defendants. See id. at p. 20, ll. 17-20.

Additionally, Kim Harrell states in Paragraph Nine (9) of her affidavit that she had viewed a document during her employment with Defendants that was attached to her affidavit as Tab B and was entitled "Local Stockbroker Joins Gay Coalition Movement." See Affidavit of Kim Harrell at ¶ 9; See also Exhibit 23. She goes on to state in the affidavit that she was "not offended by this joke" and "thought the joke was funny." However, in her deposition testimony, Kim Harrell admits that this document refers to Jim Gormley being homosexual, refers to Jim Gormley performing oral sex on other individuals, contains sexually suggestive language, and that such document would violate Defendants' sexual harassment policy as she understood it. See Deposition of Kim Harrell, p. 27, line 8 – p. 29, line 19. While Kim Harrell stated that she was not offended by viewing this document about Jim Gormley, she readily admitted that she would have been offended and reported Stan Shelton for sexual harassment had he created a document referencing her in the same manner as he did Jim Gormley. Ms. Harrell testified as follows:

See Deposition of Kim Harrell, p.29, line 20 – p. 31, line 1.

Q: Did Stan Shelton ever send you any E-mails or make any documents referring to you?

A: Yes.

Q: What were those?

A: I don't recall any specifics, I mean, it was twelve (12) years ago.

Q: Was it related to you performing sexual acts?

A: No.

Q: Did he ever insinuate that you had performed a sexual act on someone else?

A: No.

Q: Would you have been offended if he had insinuated that about you?

A: Yes.

Q: Would you have considered that to be sexual harassment?

A: Yes.

Q: Would you have reported that incident if it had been about you?

A: Yes.

Q: During Mike Shell's tenure with Hilliard Lyons, do you ever recall any of these documents or posters, whatever you want to call them, do you ever recall any of the documents referring to other – to women in the office performing sexual acts?

A: No.

Q: Were you aware of -- did Stan Shelton ever do any of that, to your knowledge, referring to women?

A: No.

Q: He never did that to Ms. Harless, to your knowledge?

A: No.

At her deposition, Kim Harrell also testified that she had seen another document during her employment referring to a "penis putter" which was created by Stan Shelton regarding another male broker, Jimmy Johnston. See Deposition of Kim Harrell, p.31, line 2 – p. 32, line 19; See Exhibit 18. This document refers specifically to male genitalia and contains a picture of a golf club with the head of the golf club being replaced with a penis. See id. Furthermore, the document contains reference to the sexual relationship between Mr. Johnston and his wife. See id. Ms. Harrell again testified that this document contained sexually explicit and sexually suggestive

material that was inappropriate and was in violation of the Defendants' sexual harassment policy as she understood it.

Additionally, both Kim Harrell and Cindy Harless unequivocally testified in their respective depositions that none of the joking referred to in their affidavits toward women was of a sexual nature or contained sexually explicit materials. See Deposition of Kim Harrell, p. 36, ll. 13-18; See Deposition of Cindy Harless, p. 30, ll. 11-17. This is in stark contrast to the conduct perpetrated by Stan Shelton toward Defendants' male employees. Defendants attempt to establish Stan Shelton as an equal opportunity harasser is simply not supported by the evidence and testimony in this case. Therefore, considering all evidence in a light most favorable to the Plaintiff, it is Plaintiff's position that he has met the third element of his *prima facie* case by offering direct comparative evidence regarding the difference in how Stan Shelton treated members of both sexes in a mixed-sex workplace.

2. **Shelton's harassment of plaintiff and the other male workers was severe and pervasive.**

The Sixth Circuit in EEOC v. Harbert-Yeargin, 266 F.3d 498 (6th Cir. 2001) has stated the following regarding whether conduct should be considered to be severe and pervasive:

In Harris v. Forklift Systems, Inc., 510 U.S. 17, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993), the Supreme Court addressed the elements of a valid claim for a hostile workplace environment under Title VII. It held that all of the circumstances relating to the plaintiff's workplace environment must be taken into account. These circumstances "include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance," as well as its "effect on the employee's psychological well-being." Furthermore, the conduct must both create an "objectively hostile or abusive work environment" and cause the victim to "subjectively perceive the environment to be abusive."

Defendants argue in their Memorandum of Law that although Stan Shelton's conduct may have been offensive, it was not severe and pervasive.⁴ Contrary to the Court's holding in Harris that

⁴ See Defendants' Memorandum of Law, p. 18.

“all of the circumstances relating to [a] plaintiff’s workplace environment” should be taken into account, Defendants have put forth the idea that the Court should only consider Stan Shelton’s harassing conduct over approximately a four (4) month period from December 6, 2002, until April 2, 2002, because Plaintiff allegedly said that Shelton’s conduct “wasn’t that bad” as of December 6, 2002.. See Defendants’ Memorandum of Law, p. 19. Defendants have cited to page 234 of Plaintiff’s deposition testimony for this alleged statement. However, this was not Plaintiff’s testimony regarding Shelton’s earlier conduct at all. At page 233-234, Plaintiff was being questioned by defense counsel regarding Defendants requiring him to sign a promissory note in order to receive the funds from a bonus he had earned under his compensation agreement. Plaintiff testified as follows:

Deposition of Mike Shell, p. 233, line16 – p. 234, line 19.

Q: You signed the agreements and you got the check, correct?

A: Yes.

Q: Okay. And you did it knowing the significance of doing that, correct?

A: Yes.

Q: Okay. So you understood what the agreement said?

A: Yes. As I said, David McDonald knew that I had bought a house and I had bought a car and I had no choice. He knew that was going to be signed no matter what it said.

Q: Well, let’s talk about how you bought your house.

A: And I’ll say this too. At that time – you know, at that time it wasn’t the end of the world either, because at that time I wasn’t -- ***the things with Stan had gotten started, but it wasn’t to the degree that it was later on. It wasn’t near that bad.*** So at that time, I mean, it wasn’t the end of the world, because, I mean, I was actually very happy at Hilliard Lyons.

Q: ***Okay. So whatever was going on with Stan was not so bad that you were –***

A: ***At that time, no.***

Q: -- *considering leaving Hilliard Lyons?*

A: *Not really at that time.* You know, I mean, I wasn't the happiest person, but – I mean, I wasn't as happy as I was, but, also at that point it wasn't the end of the world. So I signed it, thought, you know -- [Emphasis added.]

When viewed in context, it is apparent that Plaintiff's statement was that Shelton's conduct was not "to the degree that it was later on" and that he was not considering leaving Hilliard Lyons at that point in time in December 2002. See *id.* This does not mean that Shelton's conduct prior to December 2002 was not viewed by Plaintiff as being severe or pervasive. To the contrary, it is undisputed that Plaintiff had already complained about Stan Shelton's conduct to his then branch manager, David McDonald, on at least one (1) occasion and likely between two to four (2 to 4) times prior to Brian Donaldson becoming branch manager. See Deposition of David McDonald, p. 134, 147.⁵ It is Plaintiff's testimony that Shelton's conduct escalated at the time Brian Donaldson took over as branch manager in December 2002 to the point that he was later forced to work from home and eventually forced to resign his employment with Defendants due to Defendants' failure to stop Shelton's conduct. See Deposition of Mike Shell, pp. 108, 112, 117, 193-194.

a. Frequency of Shelton's conduct.

Furthermore, it is Plaintiff's testimony that the incidents listed *supra* were only part of Shelton's conduct during his employment with Defendants and were only those documents that he kept during his employment. See Deposition of Mike Shell, p. 94, line 22 – p. 95, line 8. The Plaintiff testified at his deposition that he received sexually suggestive or pornographic material from Stan Shelton "once or twice a week" during his employment. See *id.* at p. 265, line 22 – p. 266, line 2. The Plaintiff further testified that Shelton's conduct continued throughout his employment until he was forced to resign. See Deposition of Mike Shell, p. 275. Defendants'

⁵ In addition to David McDonald's testimony, the Plaintiff testified that he complained to David McDonald about Stan Shelton's conduct on four (4) or five (5) occasions. See Deposition of Mike Shell, p. 107.

have attempted to state that Stan Shelton's conduct toward Mike Shell ceased as of April 2, 2003, when Brian Donaldson allegedly spoke to Shelton about his conduct. However, Stan Shelton admitted in his deposition testimony that he sent at least two (2) additional documents following his alleged conversation with Brian Donaldson. See Deposition of Stan Shelton, p. 83, lines 3-7. The first document was sent on May 29, 2003, and was entitled "recent photo of Mike Shell lounging at his crib." See *id.* at 79-80; See also Exhibit 17. This document was sent to two (2) other male brokers at Hilliard Lyons and contained the photograph of an overweight, naked, and extremely hairy male lying face down. See *id.* Additionally, the second document was sent on July 14, 2003, and was entitled "an oldie but goodie, Shell and his girlfriend relaxing at home." See Deposition of Stan Shelton, p. 81. Shelton admitted that he sent this document to Mike Shell, Jimmy Johnston, David O'Block, and Jim Gormley, and that such picture shows an overweight, naked female receiving oral sex from an unidentified male. See *id.* at p. 81-82. While the Defendants would have the Court believe that Shelton's conduct ceased after his alleged conversation with Brian Donaldson, the perpetrator, himself, admitted that he engaged in the very same type of conduct for which he was allegedly warned as late as July 14, 2003. See *id.* at 79-82. At the very least, the Plaintiff's testimony and Mr. Shelton's testimony about the continuation of the harassing conduct conflict with the Defendants' theory of the case. Therefore, there remains a question of fact for the jury to decide as to whether Shelton's conduct continued beyond his alleged reprimand.

b. Severity of Shelton's conduct.

Regarding the severity of Shelton's actions, Plaintiff testified that Shelton's conduct was "beyond the point of just joking or playing around, far beyond that, to the point of he –you know, of – you know, it was more of an intimidation or humiliation-type situation than it was just horseplay. I mean, it was pushed to the extreme limits." See Deposition of Mike Shell, p. 107.

The Plaintiff further testified regarding the embarrassment he suffered from Shelton's conduct as follows:

Deposition of Mike Shell, p. 275, line 24 – p. 276, line 12

Q: While you were working for Hilliard Lyons, did Stan Shelton's action cause you any embarrassment?

A: Absolutely.

Q: How so?

A: Well, I mean, my picture being on the cover of a gay resort on a vacation magazine, you know, having 20 other advisors laughing at it, just the thought that – you know, I don't even want people to know anything about the situation. You know, I mean, the humiliation of the whole thing and, you know, the weird, twisted, dirty, nasty feeling that you get, you know, when a guy is acting like that toward you. I mean, its—you know, it's just twisted stuff. You know, it's just the weird, twisted stuff that he did. I mean, it's ---

In addition to Plaintiff's testimony regarding the severity of Shelton's conduct and the documents created by Shelton, the Defendants' own witness and regional manager, David McDonald, testified that the documents which are attached hereto as Exhibits were so "nasty" that he refused to review them when asked to do so by the EEOC investigator. Mr. McDonald testified as follows:

Deposition of David McDonald, p. 182, ll. 7-25.

Q: And you would agree that Exhibit 24, though, appears to be, at least on the front cover, the same as Exhibit 8 ---

A: Yeah.

Q: -- absent Mike Shell's picture; is that correct?

A: That's correct. I also want to say that when the young lady was in Knoxville from the EEOC, *I refused to look at all of it*. I just told her that I had seen it all in Marilyn's. I didn't need to see it again. [Emphasis added.]

Q: Okay.

A: So I want to – I'll just tell you that.

- Q: Why did you refuse to look at it?
- A: *I thought it was nasty.* [Emphasis added.]
- Q: Okay. It was inappropriate, wasn't—
- A: Yes —
- Q: --it?
- A: -- it was.

Mr. McDonald further testified in relation to Exhibit 24 (homosexual cruise brochure) the following:

Deposition of David McDonald, p. 184, ll. 9-19.

- Q: Okay. Would you agree that Exhibit 24 contains material that would constitute sexual harassment as we've looked at PNC's code of ethics?
- A: Yes.
- Q: Okay.
- A: *I think it's inappropriate to be printed, quite frankly.* [Emphasis added.]

Defendants do not contest the fact that Mike Shell's presence in the Defendants' office declined. See Defendants' Memorandum of Law, p. 9. Instead, Defendants attempt to argue that Plaintiff cut his time in the office due to the fact that he was searching for alternate employment. See id. The Defendants' account of events clearly contradicts Plaintiff's testimony, who states that he cut his time in the office in an effort to avoid Shelton. See Deposition of Mike Shell, p. 112, 193.

The conduct of Stan Shelton went beyond the bounds of decency any reasonable person would expect to permeate any type of work environment, much less a professional work environment such as a brokerage firm. Plaintiff was not a fragile person with thin skin. He is a former United States Marine and law enforcement officer as Defendants have pointed out. The Plaintiff was a professional and used great restraint in not taking the matter into his own hands. In accordance with Rule 56 of the Federal Rules of Civil Procedure, all reasonable inferences must

be resolved in favor of Plaintiff. Accordingly, based on the Plaintiff's testimony and the totality of the circumstances, Shelton's conduct unreasonably interfered with Plaintiff's work performance and constituted severe and pervasive conduct from both a subjective and objective perspective.

3. **Defendants failed to take reasonable care to prevent and correct any sexually harassing behavior.**

In order for employer liability to result in a case for a hostile work environment, a Plaintiff must show that the employer either knew or should have known of the alleged harassment and failed to implement prompt and effective corrective action. See Rudd v. Shelby County, 199 Fed. Appx. 777, 778 (6th Cir. 2006).

It is undisputed that Defendants' sexual harassment policy states that an employee experiencing sexual harassment may contact his direct supervisor to report sexual harassment.⁶ Furthermore, Defendants cannot reasonably claim that they did not know or should not have known about Shelton's conduct. To the contrary, David McDonald testified that Plaintiff complained of Shelton's conduct to him on at least one occasion and as many as two to four different times while he served as Plaintiff's direct supervisor. See Deposition of David McDonald, p. 134, 147. Despite Plaintiff's complaints to his supervisor, Stan Shelton's conduct continued. A new branch manager, Brian Donaldson, joined Defendants in late 2002 or early 2003 and David McDonald was promoted to regional manager. As a regional manager, David McDonald was Brian Donaldson's supervisor and continued working from the west Knoxville office for a period of time. See id. at 22-26. Stan Shelton's conduct not only continued under Brian Donaldson, it became worse. See Deposition of Mike Shell, p. 45, 107-108. It is undisputed that Plaintiff approached his new supervisor, Brian Donaldson, in April 2003, to complain about several matters including a document entitled "PNC Code of Ethics Revisions" referring to Mike Shell's former girlfriend. See Deposition of Brian Donaldson, p.39-41. Brian

⁶ See Defendants' Memorandum of Law, p. 12.

Donaldson admitted in his deposition that Plaintiff expressed he was upset by Shelton's conduct. See id. Brian Donaldson further testified that during his meeting with Stan Shelton, he became aware of an incident involving Plaintiff in which Shelton placed Plaintiff's picture on a homosexual travel brochure and distributed such document to the other brokers at a luncheon. See id. at 45. It is the Defendants' contention that Brian Donaldson told Stan Shelton to stop his conduct immediately and that there were no additional incidents from April 2, 2003, until the end of Plaintiff's employment. See Defendants' Memorandum of Law, p. 11. However, as stated above, Stan Shelton testified that there were at least two additional incidents where he sent the Plaintiff sexually explicit pictures following his conversation with Brian Donaldson. These incidents occurred on May 29, 2003, and July 14, 2003, respectively. Furthermore, the Plaintiff testified that Shelton's conduct was continuous throughout his employment. See Deposition of Mike Shell, p. 275. Additionally, another male employee, David O'Block, testified that he also complained about Stan Shelton's conduct to his supervisors on multiple occasions. See Deposition of David O'Block, p. 54, 55, 72-74, 84, 86, 98, 104, 118, 124, 162. Furthermore, Stan Shelton testified that he used the Defendants' computers, copiers, and materials in creating most of the documents and emails sent to Plaintiff and the other male employees. See Deposition of Stan Shelton, p. 61. Therefore, it cannot reasonably be said that Defendants did not know or should not have known about Shelton's conduct.

Additionally, David McDonald and Brian Donaldson both admitted that they were responsible for enforcing the Defendants' sexual harassment policy. See Deposition of David McDonald, p. 154; See Deposition of Brian Donaldson, p. 65-66. However, neither of these individuals ever took any action to reprimand Stan Shelton beyond one alleged conversation each had with Shelton. See Deposition of David McDonald, p. 136-137; See Deposition of Brian Donaldson, p. 55-57. Stan Shelton testified he never received any type of written reprimand

related to his conduct toward Plaintiff or the other male brokers. See Deposition of Stan Shelton, p. 105-106. Given Plaintiff's testimony of Shelton's continuing conduct, it cannot reasonably be said that Defendants took prompt and effective corrective action. In fact, David McDonald testified in his deposition that Stan Shelton informed him about the incident in which he placed Mike Shell's picture on the homosexual cruise brochure. See Deposition of David McDonald, p. 172-177. However, David McDonald stated that although he was regional manager, he did not take any action against Shelton because Brian Donaldson was Shelton's immediate supervisor and he did not notify Brian Donaldson. See id. Additionally, Shelton also testified that he was never reprimanded by David McDonald for his conduct. See id. at 105. This indifference by a regional manager charged with enforcing the company's sexual harassment policy cannot reasonably be classified as immediate and prompt corrective action. Furthermore, the alleged verbal reprimands by Donaldson and McDonald were obviously ineffective as Shelton admitted to have continued engaging in his harassing conduct. See *supra*.

4. Defendants failure to take action eventually led to Plaintiff's constructive discharge.

Plaintiff had complained to both his branch manager and regional manager on multiple occasions about Shelton's conduct to no avail. It became apparent to the Plaintiff that the Defendants did not intend to take action against Shelton due to the fact that he was a long time employee and had historically been one of the largest producers in the entire company for approximately ten (10) years prior to 2000. See id. Plaintiff testified that Shelton frequently boasted that he was very well connected with individuals in upper management such as Jim Allen and Jim Stuckert. See id. at 151. Stan Shelton stated at his deposition that he did know most of the people at the home office of Hilliard Lyons in Louisville, Kentucky, including Mr. Jim Allen, the president of Hilliard Lyons. See Deposition of Stan Shelton, p. 20. Additionally, Shelton testified that he personally called Jim Allen in 1998 to recommend David McDonald for the

branch manager job in west Knoxville. See *id.* at 16-20. Given Shelton's close connections and Defendants previous refusal to take action, Plaintiff was forced to resign his employment.

Defendants have attempted to argue that the Plaintiff left his employment to work as an independent broker. Plaintiff testified, however, that he would have continued working for Defendants had Stan Shelton no longer been employed. See Deposition of Mike Shell, p. 278. Not only did Defendants not fire Stan Shelton for his conduct toward the Plaintiff and the other male brokers, Defendants continued to employ Stan Shelton for approximately two (2) more years after Plaintiff left Defendants' employ. Defendants only decided to terminate Shelton's employment after learning that he was planning to leave Defendants to start a new firm. See Deposition of Stan Shelton, p. 113. The undisputed testimony and evidence in this case shows that the Defendants refused to stop Shelton's harassing conduct and that Plaintiff was forced to resign his employment due to the difficult and unpleasant working conditions with the Defendants.

C. DEFENDANTS HAVE WAIVED THEIR AFFIRMATIVE DEFENSE OF STATUTE OF LIMITATIONS ON THE THRA CLAIM.

Defendants have raised a statute of limitations defense to Plaintiff's claims under the Tennessee Human Rights Act. However, Defendants have failed to plead the statute of limitations as an affirmative defense in its Answer as required under Rule 8(c) of the Federal Rules of Civil Procedure. See Court Doc. 6. Rule 8(c) states in relevant part the following:

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

In Horton v. Potter, 369 F.3d 906 (6th Cir. 2004), the Sixth Circuit Court of Appeals stated the following regarding the requirement of pleading an affirmative defense or the resulting waiver for failure to do so:

A response to a pleading must set forth any matter constituting an affirmative defense. Fed. R. Civ. P. 8(c). *Failure to plead an affirmative defense in the first responsive pleading to a complaint generally results in a waiver of that defense.* Haskell v. Washington Twp., 864 F.2d 1266, 1273 (6th Cir. 1988). With respect to the affirmative defense that a plaintiff's claim is barred by the statute of limitations, "it is of no importance that a party and/or his counsel were unaware of a possible statute of limitations defense." Id. [Emphasis added.]

Defendants pled eighteen (18) affirmative defenses in its Answer, but did not include the statute of limitations. Additionally, this case was originally filed on May 12, 2005, and has been ongoing for over two (2) years. The case was previously continued without any amendment of Defendants' Answer and the new Motion to Amend deadline has passed. There is no excuse for Defendants' undue delay in asserting this affirmative defense as required under the Federal Rules of Civil Procedure. Accordingly, Defendants have waived any statute of limitations defense and Plaintiff should be allowed to prosecute his claims under the Tennessee Human Rights Act.

D. DEFENDANTS' SUBSEQUENT REPRESENTATIONS TO PLAINTIFF REGARDING THE CONTINUING OBLIGATIONS UNDER THE PNC CODE OF ETHICS DEMONSTRATE EMPLOYER'S INTENT TO BE BOUND BY SUCH PROVISIONS AND SUPERSEDE ANY DISCLAIMER LANGUAGE.

Defendants state that Plaintiff's claim for breach of implied contract under the PNC Code of Ethics is not supported by Tennessee law. See Defendants' Memorandum of Law, p. 24. Defendants argue that an employee handbook like the PNC Code of Ethics will constitute an employment contract only if it contains specific language demonstrating the employer's intent to be bound by its terms. See Rose v. Tipton County Public Works Dep't, 953 S.W.2d 690, 692 (Tenn. Ct. Ap. 1997). Defendants further argue that the PNC Code of Ethics contains disclaimer language evidencing that Defendants expressly state that the Code of Ethics should not be "construed to imply an employment contract between you and PNC." Plaintiff agrees that if this were the full extent of Defendants' representations to the Plaintiff regarding the PNC Code of Ethics, then an implied contract may not normally exist. However, Plaintiff's claim is based upon the fact that at some point in time subsequent to distributing PNC's Code of Ethics to the Plaintiff

when he began his employment, the Defendants did consider the PNC Code of Ethics to constitute a binding document as evidenced by Defendants' agent's representations to Plaintiff. Defendants state in their correspondence to Plaintiff dated August 25, 2003, in relevant part as follows:

PNC expects that you will fully comply with your duties and obligations under the Code of Ethics and applicable law. If you have retained any documents or electronic media containing proprietary and/or confidential information of PNC, PNC requests that you return any such materials (including copies thereof) immediately. This includes any documents you may have created for your own use while employed by PNC to the extent that those documents or files contain proprietary or confidential information of PNC.

This reminder is provided to facilitate your full compliance with your legal and ethical obligations to PNC. Please be assured that PNC takes these obligations seriously and will vigorously defend its corresponding rights and interests should these be damaged or threatened. Should you have any questions concerning your continuing obligations and duties discussed herein, please do not hesitate to contact me. [Emphasis added.]

See letter dated August 25, 2003, attached hereto as Exhibit 24. It is uncontested that Plaintiff was no longer even employed with Defendants at this time. However, the Defendants legal counsel represents that there are "continuing obligations" extending beyond the termination of Plaintiff's employment relationship with Defendants. Furthermore, Defendants state that it takes the obligations under the Code of Ethics "very seriously" and "will vigorously defend its corresponding rights and interests should these be damaged or threatened." Defendants cannot now contest their own representations that legal rights arise from violation of the Code of Ethics. Furthermore, both Brian Donaldson and David McDonald testified that Stan Shelton's conduct toward the Plaintiff and the other male brokers would be in violation of the PNC's Code of Ethics. Accordingly, it is Plaintiff's position that Defendants' subsequent representations to Plaintiff evidence the employer's intent to be bound by the Code of Ethics and supersede any previous disclaimer by Defendants.

III. CONCLUSION

Defendants have failed to meet their burden of showing that there are no genuine issues as to any material fact and that they are entitled to judgment as a matter of law on any of Plaintiff's claims. As the approximately three hundred and fifty (350) plus pages of evidence filed by Defendants in support of their Motion shows, there are many genuine issues of material fact which must be decided by a jury in this matter. Indeed, given the requirement that all facts be taken in the light most favorable to Plaintiff as the non-moving party, the Defendants are utterly unable to show that they are entitled to summary judgment.

WHEREFORE, based on the foregoing reasons, Defendants Motion for Summary Judgment should be DENIED with costs and attorneys' fees taxed to the Defendants.

Respectfully submitted this 22nd day of June, 2007.

s/ Link A. Gibbons
Link A. Gibbons, Esq. (BPR #022799)

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this the 22nd day of June, 2007, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

s/Link A. Gibbons

Link A. Gibbons, Esq. (BPR #022799)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

DEBORAH L. MCKENNON)	
)	
Plaintiff,)	
)	
V.)	Civil No.: 3:10-cv-246
)	
JAYESH G. PATEL and JYOTIBEN)	Jordan/Shirley
PATEL, individually and d/b/a RIVER)	
BEND INN, and REGENCY INN, INC.,)	
)	
Defendants.)	
)	

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

COMES now the Defendants, by and through the undersigned counsel, and files this Memorandum of Law in support of Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted under the doctrine of *Res judicata*.

I. PROCEDURAL BACKGROUND

On or about November 16, 2009, the Plaintiff, Deborah L. McKennon, along with two (2) other employees as named Plaintiffs, filed a representative action against all off the above named Defendants with the exception of Defendant Jyotiben Patel, alleging violations of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* for failure to properly compensate the Plaintiffs and all other similarly situated individuals. See a copy of the Complaint, Docket No. 3:09-CV-493 attached to the Motion to Dismiss as Exhibit 1; also referenced in the Plaintiff's most recent Complaint at ¶ 48. On or about March 3, 2010,

the Defendants sent an Offer of Judgment to Plaintiff's counsel seeking to allow judgment against them for the alleged amounts of back pay, an equal amount for liquidated damages, costs, and an agreed upon amount of attorneys' fees, without the admission of liability, for the three (3) named Plaintiffs which included Ms. Deborah McKennon. On or about March 5, 2010, counsel for the Plaintiffs filed a Notice of Acceptance of the Offer of Judgment along with a copy of the Offer of Judgment signed by the three (3) named Plaintiffs. A copy of the Notice of Acceptance of the Offer of Judgment and the signed Offer of Judgment are attached the Motion to Dismiss as Exhibit 2 and Exhibit 3, respectively. A Judgment was entered by the Court which states the following:

Pursuant to *Federal Rule of Civil Procedure* 68 and in accordance with the Notice of Acceptance of Offer of Judgment (Doc. 9), judgment is entered against defendants Jayesh G. Patel, individually and d/b/a River Bend Inn, Regency Inn, Inc. and Park Grove Inn, Inc. and in favor of plaintiffs Deborah L. McKennon, Jon Brown and Sandra Sanchez, collectively and as a whole, in the amount of Fifteen Thousand Seven Hundred and Fifty Dollars (\$15,750.00) inclusive of all alleged sanctions, fines, damages, costs, filing fees and attorney's fees for defendants' alleged violations in this lawsuit.

A copy of the Judgment is attached to the Motion to Dismiss as Exhibit 4. The Defendants subsequently paid the Judgment in full and a Satisfaction of Judgment was entered by the Court on April 30, 2010. A copy of the Satisfaction of Judgment is attached to the Motion to Dismiss as Exhibit 5.

On or about June 2, 2010, the Plaintiff Deborah McKennon individually filed the

second action again alleging violation of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* This time for alleged retaliation and/or discrimination under the FLSA. The Plaintiff has also alleged state law claims for retaliatory discharge under the Tennessee Public Protection Act, T.C.A. § 50-1-304, and Tennessee common law.

II. LAW AND ARGUMENT

A. Standard of Review

The court must construe the complaint in the light most favorable to the plaintiff, accept her factual allegations as true, and determine whether she can prove any set of facts in support of her claims that would entitle her to relief. See Turker v. Ohio Dep't of Rehab. & Corr., 157 F.3d 453, 456 (6th Cir. 1998). Although typically courts are limited to the pleadings when faced with a motion under Rule 12(b)(6), a court may take judicial notice of other court proceedings without converting the motion into one for summary judgment. Winget v. JP Morgan Chase Bank, N.A., 537 F.3d 565, 576 (6th Cir. 2008).

B. The Doctrine of Res Judicata

Res judicata is established when four elements are present: 1) a final decision was rendered on the merits in the first action by a court of competent jurisdiction; 2) the second action involved the same parties or their privies as the first; 3) the second action raises issues actually litigated or which should have been litigated in the first action; and 4) an identity of the causes of action exists. Begala v. PNC Bank, Ohio, Nat'l Ass'n, 214 F.3d 776, 779 (6th Cir. 2000), *cert. denied*, 148 L. Ed. 2d 958, 121 S. Ct. 1082 (2001). The Tennessee Supreme Court has also outlined these same elements. See Richardson v. Tennessee Bd. of Dentistry, 913 S.W.2d 446, 459 (Tenn. 1995).

Res judicata requires a plaintiff to bring every claim he or she has that arises out of a common nucleus of fact at the same time, in the same lawsuit. See Black v. Ryder/P.I.E Nationwide, Inc., 15 F.3d 573, 582 (6th Cir. 1994) (“every ground of recovery that might have been presented” “on the same cause between the same parties” should be brought in the first action). The term “same cause of action” encompasses claims that “were previously available to the parties, regardless of whether they were asserted or determined in the first proceeding.” See Brown v. Felsen, 442 U.S. 127, 131 (1979). Issues that “could have and should have been raised by the plaintiff and litigated with the jurisdiction of the ... court are barred by *res judicata*.” Smith v. Dawson-Smith, 111 Fed. Appx. 360, 362 (6th Cir. 2004). Lawsuits that violate these principles are subject to summary dismissal. Id.

C. **The Plaintiff Deborah McKennon’s newest claims for discrimination, retaliation, and/or retaliatory discharge are barred under the doctrine of Res Judicata.**

The Defendants would contend that the Plaintiff’s acceptance of the Offer of Judgment and subsequent entry of the Satisfaction of Judgment satisfies the first element of the doctrine of *res judicata*. The Supreme Court of Tennessee has recognized the *res judicata* effect of agreed judgments, even when the prior judgment involves no findings of fact or law. See Third Nat’l Bank v. Scribner, 370 S.W.2d 482, 486 (Tenn. 1963).

Secondly, there can be no dispute that the newest action before the Court “involves the same parties or their privies.” The only new party is the Defendant Jayesh G. Patel’s wife, Defendant Jyotiben Patel. In fact, the Court has already issued an Order

in this case stating, “The Court finds that these cases arise out of the same transaction or occurrence and involve one or more of the same parties, and are, therefore, related.” See [Court Doc. 3].

Regarding the third element, there is no reason that the Plaintiff’s current claims could not have been part of the original lawsuit. As stated above, the Court has already determined that the two cases “arise out of the same transaction or occurrence.” See Id. In fact, the Plaintiff is seeking to recover under the very same statutes, the Fair Labor Standards Act, 29 U.S.C. 201 et seq., for which she has previously recovered. Plaintiff’s counsel may attempt to argue that the first lawsuit was filed as a representative action for alleged back overtime pay only, and, therefore, it was necessary to file the claims separately in order try to gain collective action status on behalf of other similarly situated employees. The reality of the matter, however, is that the Plaintiff was not needed as a representative plaintiff given the fact that there were two (2) other named plaintiffs in the previous collective action. The advantages and disadvantages of including the Plaintiff, Deborah McKennon, in the representative action were presumably discussed between her and her counsel. Therefore, the informed decision was made by her to proceed as part of the representative action rather than filing a separate lawsuit to include additional claims unique to her.

Lastly, regarding the fourth element set forth above, there can be no dispute that the Plaintiff either new or should have known that the current causes of action existed. The Plaintiff, Deborah McKennon, was employed by Regency Inn as a desk clerk from

June 27, 2009, until on or about June 9, 2009. See Complaint, ¶ 9. All alleged unlawful conduct by the Defendants in the instant action occurred during the course of Plaintiff's employment and ended on before June 9, 2009. See Complaint. The initial lawsuit filed by Ms. McKennon and her two (2) co-workers as a representative action was not filed until November 16, 2009. The Plaintiff was aware or should have been aware of any additional claims she had against the Defendants prior to filing the November 16, 2009, action.

WHEREFORE, the above premises considered, the Defendants respectfully request that the Court dismiss the Plaintiff's most recent claims as they are barred under the doctrine of *res judicata* and, as such, fail to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Respectfully submitted this 12th day of July, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 12th day of July 2010, a copy of the foregoing Memorandum of Law was filed electronically. Notice of this filing will be sent by operation of the court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the court's electronic filing system.

/s/ Link A. Gibbons

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