

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Kevin Dunbar,)
)
Plaintiff,)
)
vs.)
)
Foot Locker Retail, Inc,)
)
Defendant.)
_____)

Civil Action No. _____

COMPLAINT
(Jury trial demanded)

(Breach of Contract, internal Infliction
Of Emotional Distress, Breach of Contract
Accompanied by Fraudulent Act)

Plaintiff Kevin Dunbar (“Dunbar”) sues Defendant Foot Locker Retail, Inc. (“Foot Locker”), a New York for-profit corporation with extensive operations in South Carolina, and states as follows:

NATURE OF THE ACTION

1. This is an action for breach of contract and torts stemming from Foot Locker’s employment of Dunbar. Dunbar seeks reinstatement, damages, and other appropriate relief based on Foot Locker’s breach of its express, written contractual obligations to provide a workplace free of harassment and discrimination as well as for violation of its common law duties to Dunbar.

2. Dunbar was the victim of repeated acts of harassment, abuse, threats, and discrimination by his fellow employees, including supervisors. Despite Dunbar’s repeated complaints to his supervisors, and other’s complaints on his behalf, to Dunbar’s knowledge, there was never any action taken against any of the employees who harassed, abused, threatened, or discriminated against him. Dunbar ultimately was wrongfully terminated by Foot Locker after he complained about an incident of sexual harassment.

VENUE AND JURISDICTION

3. Dunbar was employed by Foot Locker from May to August of 2002.

4. Dunbar is currently, and was during the relevant period, a citizen and resident of South Carolina in Richland County.

5. In violation of Foot Locker's contractual obligations, Dunbar, who is a gay man, suffered discrimination and harassment at Foot Locker based on his sexual orientation and on his sex, including because Foot Locker supervisors and employees perceived him as failing to conform to gender stereotypes they held about men.

6. Defendant Foot Locker Retail, Inc. is a corporation organized under the laws of the State of New York. It does business worldwide as Foot Locker. Foot Locker is registered to do business in the State of South Carolina and it has extensive operations in our state. Foot Locker describes itself as the world's leading retailer of athletic footwear and apparel. It operates approximately 3,600 athletic retail stores in 16 countries in North America, Europe, and Australia.

7. Foot Locker Retail, Inc. was previously known as the Venator Group Retail, Inc. On January 30, 2002, the Venator Group Retail, Inc. changed its name to Foot Locker Retail, Inc. The companies are, however, one and the same.

8. Venue is proper pursuant to S.C. Code § 15-7-30, as Foot Locker has operations in Richland County, and the actions set forth herein occurred in Richland County.

FACTUAL ALLEGATIONS

9. Dunbar was hired by Foot Locker in May 2002. Dunbar's job included sales to customers and stocking the sales floor with merchandise.

10. After Dunbar was hired, Foot Locker issued its employee handbook to Dunbar. The handbook that Foot Locker provided still referred to the company as Venator Group. Foot Locker and the Venator Group are the same company for all purposes of this action.

11. The handbook contained certain unequivocal terms of employment, set forth in mandatory terms. Among these mandatory terms was that Foot Locker would not tolerate harassment of its employees based on sex or sexual orientation:

Non-Harassment Work Environment

. . . “Verbal or physical conduct by Associates or others which harasses, disrupts or interferes with work performance or creates an intimidating, offensive or hostile environment will not be tolerated. This includes harassment based on race, color, age, disability, national origin, sex, sexual orientation or religion.”

12. Another term set forth in the handbook was that Foot Locker would not discriminate against its employees based on sex or sexual orientation:

Fair Employment Practice Policy

. . . It is the policy of Venator Group to seek and employ the best qualified people in all of its facilities and all its locations, to provide equal opportunities for the advancement of Associates, including promotion and training, and to administer these activities in a manner which will not discriminate against any person because of . . . sex . . . or sexual orientation. Venator Group is an Equal Opportunity Employer.

13. The handbook also set forth an Open Door Policy encouraging employees to bring problems in the workplace to the attention of their manager. The Open Door Policy included the promise that Foot Locker would resolve problems in a confidential manner, preserving the employee’s privacy:

Open Door Policy

The management of Venator Group strongly advocates an Open Door Policy. Therefore, the normal channel for resolving problems in the workplace would be to speak first with your Manager. . . . Your discussion will be kept confidential within the necessary boundaries of the fact-finding process.

14. These promises constituted a binding contract between Dunbar and Foot Locker, altering an at-will employment relationship.

15. Dunbar complied with the conditions and covenants of his contract with Foot Locker.

16. Foot Locker breached its contractual obligations to Dunbar.

17. In July 2002, Dunbar was working at the Foot Locker store at the Columbiana Mall, in Columbia. Dunbar was waiting on a group of customers when his Assistant Manager began mocking Dunbar and told some of the customers that Dunbar is gay. The group of customers then started laughing and left the store without buying anything. Foot Locker lost the sales, and Dunbar lost the commission. In response to Dunbar's complaint about the Assistant Manager's conduct, the Store Manager told Dunbar to prepare a written complaint. Following Foot Locker's Open Door policy, Dunbar prepared a complaint. The Store Manager then read Dunbar's complaint aloud over the telephone to the District Manager in the presence of Dunbar and other co-workers and customers who were able to hear what should have been a confidential communication. On information and belief, no disciplinary action was taken by Foot Locker against either the Assistant Manager or the Store Manager for their actions.

18. In July 2002, Dunbar began working at another Foot Locker store, this one in the Columbia Mall. The Store Manager there greeted Dunbar by refusing to shake his hand and saying, "I heard about your shit, I don't want your faggot ass in my store." When Dunbar complained about this to the District Manager, the District Manager laughed and dismissed Dunbar's concern about the comments and their significance. The Store Manager subsequently called Dunbar a "sissy" and said that he was not used to being around sissies. On information and belief, no disciplinary action was taken by Foot Locker against the Store Manager for his statements or against the District Manager who ignored Dunbar's complaint.

19. On or about August 3, 2002, a coworker called Dunbar a "punk ass" and a "faggot" in front of Dunbar and the customer Dunbar was serving. The customer complained about this behavior to the Store Manager, but the Store Manager ignored the customer's complaint. On information and belief, no disciplinary action was taken by Foot Locker against the coworker who

made the statements or against the Store Manager who ignored the customer's complaints. A true and correct copy of the affidavit of Elizabeth Johnson attesting to the facts set forth in this paragraph is attached hereto as **Exhibit A**.

20. On or about August 7, 2002, another customer heard the same coworker saying to Dunbar, "I ain't no fag ass motherfucker" and "fuck you." After Dunbar asked him not to speak that way before others, the coworker threatened Dunbar. The coworker stated, "I will beat yo punk ass" and made other derogatory comments to Dunbar. When the customer complained to the Assistant Manager, the Assistant Manager did not reprimand the coworker but instead told both Dunbar and the coworker to go in the back, to which the coworker responded, "I ain't going no damn where, fuck that punk ass nigga, I'll beat his punk ass!" in reference to Dunbar. The customer, concerned for Dunbar's well-being, complained about the incident to the Store Manager. On information and belief, the Store Manager took no action to protect Dunbar or to discipline the coworker. On information and belief, no disciplinary action was taken by Foot Locker against the coworker who verbally harassed and physically threatened Dunbar, or against the Assistant Manager or Store Manager who failed to address the situation properly. A true and correct copy of the affidavit of Miyoshi L. Brennan attesting to the facts set forth in this paragraph is attached hereto as **Exhibit B**.

21. On or about August 11, 2002, the same coworker called Dunbar a "faggot" in front of another customer. When Dunbar said that he was offended, the coworker repeated the slur and again threatened Dunbar, saying, "I don't give a damn faggot" and "Your punk ass can meet me outside, come outside and I'll whip your ass." The customer who witnessed this incident overheard another customer complain to the supervisor about the supervisor's failure to take any action to stop the threats and harassment. The customer walked up to Dunbar and gave him her name and number "because as a Christian woman [she] felt this was wrong and the Lord told [her] to help and

heal because the pain and embarrassment [she] saw in Mr. Dunbar's face was intense." On information and belief, no disciplinary action was taken by Foot Locker against the coworker who verbally harassed and physically threatened Dunbar or against the supervisor who ignored the customer's complaint and the harassment of Dunbar. A true and correct copy of the affidavit of Maria L. Williams attesting to the facts set forth in this paragraph is attached hereto as **Exhibit C**.

22. Dunbar complained repeatedly that he did not want to be called a "faggot." On information and belief, Dunbar was written up for complaining about harassment, while the customer who harassed him was not.

23. On August 21, 2002, a customer sexually harassed Dunbar by fondling Dunbar's buttocks while Dunbar was working on a ladder. Dunbar's Assistant Manager subsequently approached the ladder, at which point Dunbar complained about the sexual harassment. Later in the day, the Assistant Manager talked to the Store Manager about the incident in a conversation that Dunbar heard. During this conversation, the Store Manager said in reference to Dunbar, "We need to get his punk ass out of here," "Faggots don't belong here," and "I can't stand that faggot, make sure you write him up." The assistant manager agreed with the store manager's statements and responded that she would write up Dunbar.

24. The next day that Dunbar reported for work, he was told that he was fired for complaining about the harassment.

25. Dunbar has suffered certain consequential damages as a result of Foot Locker's breach of its obligations to him.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract – Non-Harassment Policy)

26. Dunbar repeats and realleges paragraphs one (1) through twenty-five (25) of this Complaint as if fully set forth herein.

27. Foot Locker made an express contractual promise to its employees, including Dunbar, to provide a “Non-Harassment Work Environment.” Foot Locker made an express contractual promise to its employees, including Dunbar, that it would not tolerate harassment based on sex or sexual orientation by its employees. Foot Locker’s management personnel repeatedly heard firsthand verbal harassment of and physical threats to Dunbar based on his sexual orientation and his perceived failure to conform to gender stereotypes. Foot Locker’s management personnel repeatedly heard complaints by Dunbar and customers about verbal and physical harassment of and physical threats to Dunbar based on his sexual orientation and his perceived failure to conform to gender stereotypes. Foot Locker’s management personnel repeatedly harassed Dunbar based on his sexual orientation and his perceived failure to conform to gender stereotypes. The harassment Dunbar was subjected to was severe and pervasive. Foot Locker created, contributed to, and consistently tolerated an intimidating, offensive, and hostile work environment for Dunbar.

28. As a direct and proximate result of Foot Locker’s breach of its contractual promise to provide a harassment-free workplace, Dunbar suffered and continues to suffer lost advancement opportunities, humiliation, embarrassment, and emotional distress.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract – Fair Employment Practice Policy)

29. Dunbar repeats and realleges paragraphs one (1) through twenty-five (25) of this Complaint as if fully set forth herein.

30. Foot Locker made an express contractual promise to its employees, including Dunbar, in Foot Locker’s “Fair Employment Practice Policy” not to discriminate against employees based on sexual orientation or sex. Dunbar’s supervisors discriminated against Dunbar based on his sexual orientation and sex (including his perceived failure to conform to gender stereotypes) by tolerating verbal and physical harassment toward him and by failing to enforce its policies to protect

him from harassment and discrimination. Foot Locker further discriminated against Dunbar on the basis of his sexual orientation and sex (including his perceived failure to conform to gender stereotypes) in its termination of him.

31. As a direct and proximate result of Foot Locker's breach of its contractual promise not to discriminate, Dunbar has suffered and continues to suffer lost wages and benefits, lost advancement opportunities, expenses in securing new employment, humiliation, embarrassment, and emotional distress.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract – Open Door Policy)

32. Dunbar repeats and realleges paragraphs one (1) through twenty-five (25) of this Complaint as if fully set forth herein.

33. Foot Locker made an express contractual promise to Foot Locker's employees, including Dunbar, in Foot Locker's "Open Door Policy" that any employee's discussion of problems in the workplace "will be kept confidential within the necessary boundaries of the fact-finding process."

34. When Dunbar complained about harassment in July 2002, Dunbar's Store Manager read his complaint aloud in the presence of numerous co-employees. On information and belief, none of these employees present had any role in the fact-finding process for resolving Dunbar's complaint.

35. As a result of Foot Locker's breach of its contractual promise not to disseminate the substance of Dunbar's complaint to unnecessary people, Dunbar suffered humiliation, embarrassment, and emotional distress.

FOR A FOURTH CAUSE OF ACTION
(Breach of Contract Accompanied by Fraudulent Act)

36. Dunbar repeats and realleges paragraphs one (1) through twenty-five (25) of this

Complaint as if fully set forth herein.

37. Foot Locker breached the contract with fraudulent intent accompanied by fraudulent acts.

38. Foot Locker knowingly allowed its supervisors and managers to deal with Dunbar in a manner that directly conflicts and completely contravenes Foot Locker's employee handbook. Said dealings have been dishonest in fact, unfair, and/or have involved unlawful appropriation of Dunbar's property. Dunbar was induced to notify management of any harassment. Instead of following promised procedures, Foot Locker humiliated Dunbar and wrongfully disciplined him for valid complaints. Foot Locker fabricated pretextual reasons for disciplining and terminating Dunbar.

39. Dunbar has suffered damages as a result.

40. Dunbar seeks actual and punitive damages to redress his damages.

FOR A FIFTH CAUSE OF ACTION
(Intentional Infliction of Emotional Distress)

41. Dunbar repeats and realleges paragraphs one (1) through twenty-five (25) of this Complaint as if fully set forth herein.

42. Foot Locker or its agents intentionally or recklessly subjected Dunbar to harassing conduct because of his sexual orientation and/or his sex (including perceived failure to conform to gender stereotypes).

43. Foot Locker's actions were so extreme and outrageous as to exceed all possible bounds of decency.

44. The emotional distress that Dunbar suffered because of Foot Locker's conduct was so severe that no reasonable person could be expected to endure it.

45. As a result of Foot Locker's conduct, Dunbar suffered emotional distress, humiliation, and embarrassment.

46. Plaintiff seeks actual and punitive damages to redress his damages.

WHEREFORE, having fully set forth his Complaint, Dunbar prays the jury award him all available relief including but not limited to the following:

- A. Order Foot Locker to reinstate Dunbar;
- B. Award Dunbar appropriate compensatory, consequential, and punitive damages against Foot Locker to compensate Dunbar for his monetary loss, lost wages, humiliation, embarrassment and emotional distress, and loss of equal employment rights and litigation costs, caused by Foot Locker's breaches of its duties to Dunbar; and,
- C. Award Dunbar such other and further relief as the Court deems just and proper.

Ernest W. Cromartie, III
CROMARTIE LAW FIRM LLP
1607 Harden Street
Columbia, SC 29204
(803) 256-3462

Nekki Shutt
CALLISON TIGHE & ROBINSON, LLC
Post Office Box 1390
1812 Lincoln Street, Suite 100
Columbia, SC 29202-1390
(803) 256-2371

Gregory R. Nevins (admitted in Georgia, pro hac vice
application will be filed)
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
1447 Peachtree Street, NE,
Suite 1004
Atlanta, GA 30309-3027
(404) 897-1880

ATTORNEYS FOR PLAINTIFF KEVIN DUNBAR

Columbia, South Carolina

June _____, 2004

4309.001\Complaint (WordPerfect version)