

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA  
FLORENCE DIVISION

CHRISTOPHER NOWLIN,	)	Civil Action No.: 4:10-1857-JMC-TER
	)	
Plaintiff,	)	
	)	
-vs-	)	
	)	<b>REPORT AND RECOMMENDATION</b>
	)	
LAKE CITY,	)	
	)	
Defendant.	)	
	)	

**I. INTRODUCTION**

In this action, Plaintiff<sup>1</sup> brings claims for race discrimination, hostile working environment and retaliation in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000(e) et seq.<sup>2</sup> Presently before the Court is Defendant's Motion for Summary Judgment (Document # 35). All pretrial proceedings in this case were referred to the undersigned pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(g), DSC. Because this is a dispositive motion, this Report and Recommendation is entered for review by the district judge.

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<sup>1</sup>Plaintiff has filed two previous employment discrimination actions in this court arising out of his employment with different employers. See Nowlin v. Civigenics, C.A. No. 2:04-cv-02495-CWH-GCK; Nowlin v. Pee Dee Mental Health Center et al., C.A. No. 4:07-cv-03676-RBH-TER.

<sup>2</sup>Plaintiff also included a cause of action for violation of the Fair Labor Standards Act in his Amended Complaint. However, Plaintiff abandons this claim in his Response. Plaintiff's Response pp. 26-27.

## II. FACTS

### A. Lake City Municipal Court

Plaintiff's claims arise out of his position as a municipal court judge with Lake City. Thus, an understanding of Lake City, its Municipal Court and the municipal court system in general is necessary. Lake City has a mayor-council form of government. Whittleton Affidavit; S.C. Code Ann. § 5-9-10 et seq. Lake City's Mayor is African American, as are four of its six City Council members. Plaintiff Dep. pp. 54, 61. Lake City's City Council has the authority to appoint one or more municipal court judges. S.C. Code Ann. § 5-7-230. Even though municipal court judges are appointed by municipalities, the municipal court is part of South Carolina's unified court system and answerable to the South Carolina Supreme Court. S.C. Code Ann. § 14-25-5; see Jean H. Toal et al., Appellate Practice in South Carolina 1 (2d ed. 2002) ("South Carolina's unified judicial system encompasses the following courts: ... (7) municipal courts."). The Lake City municipal court has jurisdiction over cases arising under ordinances of the municipality and over all offenses that are subject to a fine not exceeding \$500 or imprisonment not exceeding 30 days, or both. S.C. Code Ann. § 14-25-65. A municipal court judge serves a term of not less than two years but not more than four years, and is subject to removal by the South Carolina Supreme Court. S.C. Code Ann. § 14-25-15, S.C. Const. Art. V, § 17.

In the fall of 2006, both Lake City's full-time municipal court judge, Mamie Harris (African-American), and part-time municipal court judge, DiAnn Hood (white), resigned. Plaintiff Dep. pp. 120-21. The resignation of both municipal court judges left Lake City without any judges. Plaintiff Dep. pp. 121-22. As a result, Lake City asked John Kirven, an attorney and experienced municipal court judge, to assist the city. Kirven Dep. pp. 16-17. Kirven's private practice rate was

\$125 per hour. Plaintiff Dep., D. Ex. 21. As early as September 2006, Kirven began billing Lake City \$100 per hour for his services as a municipal court judge. Plaintiff Dep., D. Ex. 22. Kirven also served as a municipal court judge in the South Carolina towns of Coward, Scranton, Quimby, and Johnsonville. Kirven Dep. pp. 15-16. The rate he charged Lake City was similar to the one he charged other municipalities. Kirven Dep. pp. 15-16. Because he was an independent contractor and not an employee, Kirven did not sign a job description or have a personnel file. Williams Dep. p. 9.

**B. Plaintiff's Employment as Lake City Municipal Judge**

In 2006, Plaintiff sought a position as a municipal court judge with Lake City. Plaintiff Dep. pp. 15-16. The application Plaintiff completed stated the position was a full-time position. Plaintiff Dep., D. Ex. 11. Plaintiff knew he was seeking a full-time position and wanted to replace his previous job at Pee Dee Mental Health. Plaintiff Dep. pp. 43-45. Lake City's City Council appointed Plaintiff to a two-year term as a municipal court judge on September 12, 2006. Plaintiff Dep. pp. 17-20 and D. Ex. 1. However, Plaintiff did not begin serving as a municipal court judge until November 1, 2006. Plaintiff Dep. p. 20. Plaintiff testified in his deposition that the reason for the month and a half "gap of time" between his appointment and his beginning to work was "[b]ecause I was working at Pee Dee Mental Health at the time . . . You have to give notice at the other job and I was still working at Pee Dee Mental Health at the time." Plaintiff Dep. pp. 20-21.

When hired, Plaintiff was required to sign several documents related to his employment including Terms of Employment, Receipt of employee handbook, Disclaimer, Policy Statement, Acknowledgment of City of Lake City's Equal Employment/Anti-Harassment and Anti-Sexual Harassment Policies, Alcohol and Drug Testing Policy, Employee Acknowledgment of Training, Employee Acknowledgment of Drug-Free Workplace Act, Receipt of Company Substance Abuse

Policy, City of Lake City Acknowledgment and Authorization for Alcohol/Drug Testing, Resolution 2008.225, and Employee Statement. Ex. 2 to Plaintiff's Response. Plaintiff was provided with a job description, which stated, in part, "The City of Lake City reserves the right to modify, interpret, or apply this job description in any way." Job Description (attached as Ex. 3 to Plaintiff's Response). The job description set forth the essential functions of the position, including to hold city court, both traffic and criminal, hold bond hearings, sign bench warrants and issue all city and general sessions warrants, supervise all clerical positions of the court, assist officers and citizens with inquiries pertaining to the law and hold preliminary hearings and jury trials. Id.

Plaintiff is not an attorney, and, prior to his service as a Lake City municipal court judge, had no experience as a judge. Plaintiff Dep. pp. 27, 46. As a municipal court judge, Plaintiff issued search warrants and arrest warrants and set bonds. Plaintiff Dep. p. 89. Plaintiff heard criminal cases including petty larceny, larceny, criminal domestic violence, and driving under the influence. Plaintiff Dep. p. 94. Plaintiff sentenced individuals before him and could suspend a sentence when he believed it proper. Plaintiff Dep. pp. 95-96; S. C. Code Ann. § 14-25-75. Plaintiff was also called upon to apply South Carolina common law. Plaintiff Dep. pp. 95-96. These duties required Plaintiff to exercise a great deal of discretion and make independent choices. Plaintiff Dep. p. 98. With regard to his duties, Plaintiff testified: "Everything I do [has] to be thought out . . . ." Plaintiff Dep. p. 92.

When Plaintiff first began his service as a Lake City municipal court judge, the city's liaison with him was the city administrator, Marion Lowder, who is white. Plaintiff Dep. pp. 61-62. Lake City hired John Whittleton, an African American, in August 2007. Plaintiff Dep. p. 70. After Whittleton was hired, he became the city's liaison with Plaintiff, and Plaintiff rarely encountered Lowder. Plaintiff Dep. pp. 65-68. Plaintiff was a salaried employee, receiving the same bi-weekly

salary. Plaintiff Dep. p. 70. Because Lake City treated him as an exempt, salaried employee, he received the same salary regardless of the number of hours he worked. Plaintiff Dep., D. Ex. 14. Plaintiff's starting annual salary, which was set by City Council, was \$33,009. Plaintiff Dep. p. 69, D. Ex. 13. After two raises, his ending salary was \$35,048. Plaintiff Dep. p. 69; D. Ex. 13. Plaintiff kept a record of hours he worked over 40 hours per week for his first nine months of service as a municipal court judge, from November 2006 to August 2007. Plaintiff Dep., D. Ex. 15. During that time – according to Plaintiff's records – he worked roughly two or three hours per week beyond 40 hours. Plaintiff Dep., D. Ex. 15. Following John Whittleton's hiring in August 2007, Plaintiff no longer worked more than 40 hours per week. Plaintiff Dep. pp. 70-74. On January 13, 2009, Lake City City Council appointed Plaintiff to a second two-year term as a municipal court judge. P. Dep., D. Ex. 3.

During an interview with the EEOC, Plaintiff indicated that he was called to the office of Marion Lowder to have a meeting<sup>3</sup> with Lowder, Attorney Jimmy Epps and Chief Billy Brown. EEOC

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<sup>3</sup>Defendant argues that this meeting is outside the scope of his Charge of Discrimination because it occurred more than 300 days prior to the filing of his Charge. To pursue a Title VII claim, a plaintiff must "file a complaint with the EEOC within 180 days of the incident, or within 300 days of the incident if state or local proceedings are initiated." Beall v. Abbott Labs., 130 F.3d 614, 620 (4th Cir.1997); 42 U.S.C. § 2000e-5(e) (1); National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). However, behavior alleged outside of the statutory time period may be considered "for the purposes of assessing liability, so long as an act contributing to the hostile environment takes place within the statutory time period." Morgan, 536 U.S. at 105. Hostile environment claims occur over a series of days or perhaps years; a hostile environment claim is based upon the cumulative effect of individual acts. Id. at 115. "In order for a claim to be timely, the employee need only file a charge within 180 or 300 days of any act that is part of the hostile work environment." Id. at 118. Thus, to the extent Plaintiff alleges other acts of harassment that occurred within 300 days of the filing of his Charge, it is proper to consider this meeting.

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