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EMPLOYMENT · CONSUMER · WHISTLEBLOWER

VIA U.S. MAIL

Joseph F. Puishys
Chief Executive Officer
Viracon, Inc.
4400 W. 78th St., Ste. 520
Minneapolis, MN 55435

September 25, 2017

DEMAND LETTER

Re: Theodore Haugland v. Viracon, Inc., EEOC No. 444-2017-00510

Dear Mr. Puishys:

Theodore Haugland has retained Halunen Law to represent him with respect to his legal claims arising from the termination of his employment with Viracon, Inc. (“Viracon”). Please direct all future correspondence related to this matter to my attention or the attention of Emma Denny, the other attorney in my office working on this matter.

Factual Background

Mr. Haugland was hired by Alliance Staffing Solutions and assigned to start a position as a Stager in the IG staging department at Viracon on October 24, 2016. Mr. Haugland’s position was a temp-to-hire position in which he was to be hired on by Viracon at the end of 90 days, provided he had met certain attendance requirements. During his time at Viracon, Mr. Haugland was supervised by Chris Blouin. Mr. Blouin directed the means and manner by which Mr. Haugland performed his position, controlled his work hours, and supervised and directed his day-to-day work activities.

On or about November 22, 2017, Mr. Blouin informed Mr. Haugland that he had conducted an internet search of Mr. Haugland and found out “more information about [Mr. Haugland] than [Mr. Blouin] wanted to know.” Mr. Haugland asked what information Mr. Blouin had found, and Mr. Blouin responded that he had found a video of Mr. Haugland online that led him to believe that Mr. Haugland was gay. Mr. Blouin, who knew that Mr. Haugland had a daughter, said he was confused about Mr. Haugland’s sexual orientation, and asked “So were you gay and now you’re straight, or were you straight then, and gay now?” Mr. Haugland responded that he is bisexual and said that it is more common for people to be bisexual in Houston, where he is from. Mr. Blouin said “It’s the opposite here. You need to be careful, especially at work.” Mr. Haugland responded that he did not plan on telling anyone at work, and that he planned on keeping

his personal life out of the workplace, and just do his job. He told Mr. Blouin that he was enjoying his job so far and intended to continue working hard and doing a good job. At the conclusion of the conversation, Mr. Blouin said "I've got to go. Just don't forget what I told you." Mr. Haugland left the conversation feeling upset that his boss had done internet sleuthing to determine his sexual orientation, then brought it up to him in a menacing way at work, demanding that he keep it private. While Mr. Haugland did not intend to tell anyone at work about his sexual orientation, feeling it was irrelevant to his job, he still felt uncomfortable that his supervisor was demanding he not disclose this information.

Following this interaction, Mr. Blouin's attitude and conduct towards Mr. Haugland changed dramatically for the worse. On December 3, 2016, Mike P., an employee on Mr. Haugland's shift, ran a forklift into a load of glass, breaking the glass all over the work floor. Mike then hid the evidence of the accident and the broken glass in an attempt to avoid a drug test. During Mr. Haugland's training, he had been told to report workplace accidents and safety incidents such as this to his supervisor. Accordingly, Mr. Haugland reported this incident to Mr. Blouin that shift. Mr. Blouin responded by becoming angry and telling Mr. Haugland "All you've been doing all day is staring at guys and you need to stop." Mr. Blouin was upset that Mr. Haugland had reported this incident to him, and Mr. Haugland responded by stating that reporting safety incidents was what he had been trained to do. Mr. Blouin told Mr. Haugland to get out of his office and that he didn't want to see him for the rest of the night.

Shortly after this incident, Mr. Haugland was walking back into his work area after a break, and was accompanied by several of his other co-workers. Mr. Blouin began yelling at Mr. Haugland for returning late from his break. Mr. Haugland pointed to the group of co-workers walking in with him and asked why Mr. Blouin was yelling at him about being late when all of his co-workers were very obviously returning at the same time as him. Mr. Blouin said "Don't worry about anybody else, worry about yourself" and said that if Mr. Haugland did anything like that again, he would be fired.

On December 5, 2016, at the beginning of Mr. Haugland's shift, he was standing around with a group of employees before their shift had begun, holding a beverage in his hand, as were several of the other employees. Mr. Blouin again singled Mr. Haugland out, and stated "What are you doing with that drink out here? You're not supposed to have that, go throw it away." Mr. Haugland pointed out that several of his co-workers had beverages in their hand just like him at that very moment and asked why he was the only one who had to throw his away. Mr. Blouin responded "Don't worry about everybody else. If you don't go throw that away right now, I'm sending you home for the day." Mr. Haugland complied and threw his drink away. This entire exchange unfolded in front of his co-workers and was extremely humiliating.

On December 13, 2016, Mr. Haugland was finishing up his shift at 5:55am. His co-workers had begun changing out of their uniforms at 5:55 for the end of their shift, which ended at 6:00am. Mr. Haugland began to change out of his uniform as well. Mr.

Blouin came running up and again singled out Mr. Haugland, yelling at him not to get undressed and go home until 6am. Mr. Blouin did not say a word to any of the other employees who had begun changing out of their uniforms. Mr. Haugland complied with Mr. Blouin's instruction, and did not change out of his uniform until 6am.

Again on December 27, 2016, Mr. Blouin singled Mr. Haugland out in a group of employees returning from their break, telling Mr. Haugland that he was late and that Mr. Blouin would terminate him if he saw him returning late again from a break. Once again, Mr. Blouin did not say a word to the other employees who were returning at the exact same time from their break as Mr. Haugland.

On January 2, 2017, Mr. Blouin called Mr. Haugland into his office and told Mr. Haugland that although he didn't want to, he was going to hire Mr. Haugland on as a full-time Viracon employee, because he was required to do so by Viracon policy. Mr. Blouin stated that once he communicated this decision to Human Resources, a date would be set up for Mr. Haugland to officially become a Viracon employee and begin receiving benefits.

On January 7, 2017, Mr. Haugland was informed by his Department Lead, Craig, that Mr. Blouin had changed Mr. Haugland's assignment to a Rack Changing position, which required advanced skills in forklift operation. Mr. Haugland was surprised, as he had just received his forklift license and was still new at it. Mr. Haugland protested that he hadn't been trained for this position and did not think he was qualified for it, but Craig brushed aside his concerns, stating that it was easy and Mr. Haugland would be fine. Mr. Haugland, realizing he had no choice, agreed to perform the Rack Changing position.

On January 9, 2017, Mr. Haugland asked Mr. Blouin if he was performing alright in his new position. Mr. Blouin responded that he had no complaints.

However, on January 10, 2017, Mr. Blouin called Mr. Haugland into his office and stated "I've decided I'm going to rescind your full time employment offer." Mr. Haugland was taken aback and asked why. Mr. Blouin responded that Mr. Haugland was moving too slow and that "a fucking retard" could do Mr. Haugland's job better than him. Mr. Haugland responded that he had had no training on this position, and was trying hard to do his best, but didn't know exactly what he should be doing, because no one had shown him. Mr. Blouin then asked, apropos of nothing, "Who's the Mexican down there that's too stupid to follow safety guidelines? Or the Somali that sits on his ass all day? I can't trust those people." Deciding it was best to ignore these racially discriminatory comments, Mr. Haugland reiterated that he was trying his best, and asked if he could be transferred back to the staging department, where he knew the position and had been performing well. Mr. Blouin then stated the real reason he had decided to rescind Mr. Haugland's offer of employment: "I can't even find an employee down there that will work with you. They are all uncomfortable with your sexuality." Mr. Haugland protested, stating that was not true, and that all of his co-workers were perfectly comfortable working with him. Mr. Blouin wouldn't listen, telling Mr. Haugland that his decision was

final and to get out of his office. As Mr. Haugland was leaving, Mr. Blouin stated that if he had to see Mr. Haugland in his office again, he was going to fire him.

On January 11, 2017, extremely upset about what had transpired the previous day, Mr. Haugland called Phil Sayles in Viracon's Human Resources Department. Mr. Haugland told Mr. Sayles all of Mr. Blouin's statements and conduct towards him, and told Mr. Sayles that he believed Mr. Blouin was discriminating against him on the basis of his sexual orientation. Mr. Haugland asked Mr. Sayles if he could switch shifts to get away from Mr. Blouin. Mr. Sayles said that any shift change had to be approved by his current supervisor, who in this case was Mr. Blouin, and asked if Mr. Haugland thought that Mr. Blouin would approve the shift change. Mr. Haugland responded that Mr. Blouin was trying to get him fired and likely would not approve the shift change. Finally, Mr. Sayles said that if Mr. Haugland got approval from the lead of the other shift, BJ, to approve the shift change, that would be sufficient.

Mr. Haugland asked Rolando, a supervisor on BJ's shift, if there were any open positions on that shift, and Rolando responded that there were, and that they could really use someone like Mr. Haugland on their shift. Rolando said that it was not his decision though, and that Mr. Haugland would have to ask BJ. Mr. Haugland then walked over to BJ's office and asked if he would approve Mr. Haugland switching to his shift. BJ looked uncomfortable and said there weren't any open positions. Mr. Haugland told him that Rolando had said there were open positions and BJ responded that Rolando didn't know what he was talking about.

On January 13, 2017, Mr. Haugland went to Mr. Sayles' office to talk to him about the shift change. Mr. Sayles told him that he couldn't approve the shift change without Mr. Blouin's approval, as it went against company policy. Mr. Haugland asked about some open sales positions he had seen at Viracon and whether Viracon would allow him to work in those positions. Mr. Sayles responded that Mr. Haugland could have one of the sales positions, and told him that if he put in his two weeks for his current position, he could then begin in a sales position at the end of the two weeks. Mr. Haugland told Mr. Sayles he was worried that if he put in his two weeks, Mr. Blouin would manufacture a reason to fire him during the two weeks so that Mr. Haugland couldn't get the sales position. Mr. Sayles assured Mr. Haugland that he would personally guarantee that wouldn't happen.

On January 14, 2017, Mr. Haugland reported to work and found that he had been assigned back to the staging department, to his relief. Mr. Blouin approached him and said "I was surprised that I got an email from HR saying you put in your two week notice. Why did you do that?" Mr. Haugland responded that he didn't want to keep working in the Rack Changing department because he didn't feel safe performing a job he wasn't trained or qualified to do. Mr. Blouin asked if Mr. Haugland knew what he was going to do next, and Mr. Haugland said he had talked to Mr. Sayles about working in a sales position, because his background was in sales. Mr. Blouin said "Well, good luck with that. The email didn't give an exact last day. I need to know for my records what

day is your last.” Mr. Haugland said it was going to be January 28, 2017 and Mr. Blouin said he would put that in the computer.

On January 23, 2017, Mr. Blouin yelled “Theo get over here now!” Mr. Haugland walked over to Mr. Blouin, not sure what to expect. Mr. Blouin asked “Were you the one who touched the confirm button on the ASM portal?” Mr. Haugland responded “No, I didn’t, you made it very clear I’m not allowed to touch the machine, so I didn’t.” Mr. Blouin said “Theo, I’m going to ask you one more time: did you hit the confirm button on the machine?” Mr. Haugland said “No, I assure you I did not touch it.” Mr. Blouin yelled “That’s it, you’re done here for good. Come up to my office so you can sign the termination paperwork.” Mr. Haugland said “Chris, I’m not going to let you get away with this. I’m going to Jerry’s [Mr. Blouin’s supervisor] office to talk to him about this.” As Mr. Haugland walked to Jerry’s office, Mr. Blouin walked beside him yelling that he was going to call the police if Mr. Haugland didn’t leave immediately. Mr. Haugland kept walking until he reached Jerry’s office, and walked in, with Mr. Blouin following him into the office.

Once he entered the office, Mr. Haugland told Jerry: “Chris found out I was bisexual in November and has been discriminating against me ever since. He continually blames me for mistakes and problems of other employees, and it’s rare a shift goes by that he doesn’t harass me. He just fired me for hitting the ASM button, which I didn’t do.” Jerry said “Okay, let’s see what we got here,” and proceeded to load a video of the ASM machine from that shift. The three then watched the video together. As they watched, all three clearly saw an employee named Rick hit the button, not Mr. Haugland. Mr. Haugland said “See? It wasn’t me. Now can I please go back to work?” Mr. Blouin jumped out of his chair and yelled “Absolutely not!” Mr. Haugland said “Chris, you saw it wasn’t me in the video. I’m done on your shift anyways after this week, can’t you just let me have the opportunity to work in a different department?” Mr. Blouin walked out and said as he was leaving, “No, I’m absolutely finished with you.”

Now it was just Mr. Haugland and Jerry in the office, and Mr. Haugland turned to him and said “You saw it wasn’t me. Please don’t let him fire me.” Jerry said “I’ve always gone with my supervisors’ judgment.” Mr. Haugland said “Well, now is a good time to stop.” Jerry responded “Sorry, I can’t do it.” Mr. Haugland then left the office to go pack his things.

The next day, January 24, 2017, Mr. Haugland called Mr. Sayles to tell him what had happened and confirm he could still come work in Viracon’s sales department. Mr. Haugland left a voicemail asking Mr. Sayles to call him back, but his call was never returned.

Legal Analysis

I. Viracon Discriminated Against Mr. Haugland Due to His Sexual Orientation.

The Minnesota Human Rights Act (“MHRA”) prohibits employers from discriminating against employees because of their sexual orientation. Minn. Stat. § 363A.08, subd. 2. An employee may prove a discrimination claim through the use of either direct or indirect evidence. *Friend v. Gopher Co., Inc.*, 771 N.W.2d 33, 37 (Minn. App. 2009). “Direct evidence is evidence showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action.” *Ramlet v. E.F. Johnson Co.*, 507 F.3d 1149, 1152 (8th Cir. 2007). Employees proceeding under the direct evidence method of proof need not proceed under the *McDonnell-Douglas* burden-shifting framework. *Gagnon v. Sprint Corp.*, 284 F.3d 839, 848 (8th Cir. 2002).

It is direct evidence of discrimination when the decision-maker for the adverse employment action in question makes comments revealing hostility towards persons of the protected class in the workplace. *See, e.g., Ross v. Douglas Cnty., Neb.*, 234 F.3d 391, 397 (8th Cir. 2000) (holding Chief warden's statement that former black correctional officer would not be allowed to get his job back because he was a “black radical” who would stir up other black employees” was direct evidence of race discrimination related to employment decision); *Browning v. President Riverboat Casino-Missouri, Inc.*, 139 F.3d 631, 635 (8th Cir. 1998) (finding immediate supervisor's reference to employee as “that white boy” in context of employment was direct evidence of racially discriminatory attitude); *Stacks v. Southwestern Bell Telephone Co.*, 27 F.3d 1316, 1318 (8th Cir. 2000) (finding supervisor's statement that “women in sales were the worst thing that had happened to this company” was direct evidence of gender discrimination); *Denesha v. Farmers Ins. Exchange*, 161 F.3d 491, 498 (8th Cir. 1998) (manager’s statement that “younger employees [are] running circles around older employees” and that the only way to improve things would be to “get rid of the old heads” was direct evidence of age discrimination); *Erickson v. Farmland Indus., Inc.*, 271 F.3d 718, 724 (8th Cir. 2001) (direct evidence is evidence of conduct or statements by persons involved in making the employment decision directly manifesting a discriminatory attitude). Mr. Blouin’s comments that Mr. Haugland shouldn’t tell his co-workers that he was bisexual because they would be uncomfortable with it, and that he would not change him back to his original position because his co-workers refused to work with him because of his sexual orientation, reveals hostility towards bisexual people in the workplace and is therefore direct evidence of discrimination. *Id.*

When there is direct evidence of discrimination, summary judgment is precluded for the employer, and the case proceeds to trial. *See, e.g., Ramlet*, 507 F.3d at 1152; *E.E.O.C. v. City of Independence, Mo.*, 471 F.3d 891, 896 (8th Cir. 2006) (“direct” evidence is sufficient to generate genuine issues of material fact, thus precluding

summary judgment). The court does not engage in a *McDonnell Douglas* analysis to determine whether the employer's reasons for the termination are pretextual. *Id.*; *see also Friend v. Gopher Co., Inc.*, 771 N.W.2d 33, 37 (Minn. App. 2009). Even if the Court were to engage in a pretext analysis, Mr. Haugland would prevail, for the simple reason that Viracon's stated reason for his termination – allegedly pushing the button – is verifiably and blatantly untrue, given the video evidence of the incident. *See, e.g., Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 441 (Minn. 1983) (a plaintiff may sustain his burden of showing pretext “by showing that the employer's proffered explanation is unworthy of credence.”).

Further, should Viracon try to argue that it is not liable for sexual orientation discrimination because it was not Mr. Haugland's employer, it will surely fail. Courts use the Title VII employee/employer standard to determine if an entity is an employer for purposes of liability under the MHRA. *Hanson v. Friends of Minn. Sinfonia*, 181 F.Supp.2d 1003, 1006 (D. Minn. 2002). Under the Title VII standard, courts use a multi-factor approach to determine whether an entity is an employer, under which a “primary consideration” is the “right to control the manner and means by which a task is accomplished.” *Schweiger v. Farm Bureau Ins. Co. of Neb.*, 207 F.3d 480, 483 (8th Cir. 2000). Other factors include:

[T]he source of instrumentalities and tools; the location of the work; whether the hiring party has the right to assign additional projects to the hired party; [and] the extent of the hired party's discretion over when and how long to work.”

Under this analysis, it is clear that Viracon was Mr. Haugland's employer: it controlled the manner and means of his work; provided his work location, instrumentalities and tools; and controlled his work hours and to which projects he was assigned. Even if a Court were to find that Viracon was not Mr. Haugland's employer for purposes of this analysis, Viracon would still be liable for failure to hire Mr. Haugland into a sales position, as Mr. Sayles had promised Mr. Haugland would occur. Further, the MHRA provides that it is illegal “to intentionally refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person's ... sexual orientation.” Minn. Stat. § 363A.17, subd. 3. Under any avenue, Viracon is liable for sexual orientation discrimination under the MHRA.

Damages

The damages available to Mr. Haugland for Viracon's violations of law are substantial. Under the MHRA, Mr. Haugland is entitled to recover his back pay, front pay, damages for emotional distress, punitive damages and attorneys' fees and costs. Minn. Stat. § 363A.29, subd. 4; Minn. Stat. § 363A.33, subd. 7. The court may also treble his back pay and front pay awards if it finds a violation of the MHRA. Minn. Stat. § 363A.29, subd. 4; *Ray v. Miller Meester Advertising, Inc.*, 684 N.W.2d 404, 407 (Minn. 2004).

Because of his illegal termination, Mr. Haugland has and will continue to suffer significant wage loss. At Viracon, Mr. Haugland was earning an average of \$1100/wk., or \$57,200/year. It has been 35 weeks since Mr. Haugland's termination on January 24, 2017, meaning he has lost \$38,500 in back wages he would have earned but for Viracon's illegal termination of his employment. Should the court treble this amount pursuant to the MHRA, Mr. Haugland's total compensatory damage award to date would rise to \$115,500.

It could easily take Mr. Haugland some time to find work comparable to his position at Viracon. It is not uncommon for courts to award front pay for several years to discrimination plaintiffs. *See, e.g., Salitros v. Chrysler Corp.*, 306 F.3d 562, 571 (8th Cir. 2002) (upholding front pay award of \$445,516 representing seven years of front pay in a discrimination case). Under the circumstances, it would not be unreasonable to assume Mr. Haugland could be awarded one year of back pay and three years of front pay, which would come to a total of \$228,800. Combined with his already accumulated back pay, and trebled pursuant to the MHRA, Mr. Haugland's total combined compensatory damages could rise to \$1,032,900.

Mr. Haugland is also entitled to recover damages for his emotional distress. Mr. Haugland has experienced significant emotional distress over the fact that he was terminated due to his sexual orientation. Due to the way society has historically treated non-heterosexual individuals, there is a legacy of emotional pain experienced by LGBT people when they experience discrimination due to their sexual orientation. Mr. Haugland is no different, and now that he has had to experience this discrimination first hand, it has been emotionally devastating to him, and it will be very easy for a jury to understand why once they hear the facts of this case. Given the circumstances, I think it is not unreasonable to assume Mr. Haugland could be awarded as much as \$100,000 in emotional distress damages at trial.

Mr. Haugland is also likely to recover punitive damages given the nature of the conduct as outlined above. Given the blatant and egregious nature of Viracon's conduct in this matter, it is not unreasonable to assume Mr. Haugland would be awarded \$25,000 in punitive damages.

Finally, Mr. Haugland is entitled to recover his attorneys' fees and costs. If this matter goes to trial, I anticipate Mr. Haugland's attorneys' fees and costs will exceed \$250,000. Defendant will also incur fees in a similar amount. In sum, Viracon's exposure in this matter is in excess of \$1.5 million.

Mr. Haugland is currently interested in determining whether Viracon has any interest in amicably resolving this matter prior to litigation. Please let me know by **October 5, 2017** if Viracon wishes to engage in settlement negotiations and/or retain a mutually agreeable mediator to resolve this matter prior to litigation. If I have not heard from you or your legal representative by that time, we will proceed accordingly.

Joseph F. Puishys
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Viracon should regard this letter as notice of potential litigation and immediately take steps to secure and not destroy any documents, records, and electronically stored information concerning Mr. Haugland's employment and termination. Thank you for your attention to this matter.

Best Regards,

HALUNEN LAW

A handwritten signature in black ink, appearing to read 'Kaarin', followed by a long, sweeping horizontal line that extends to the right.

Kaarin Nelson Schaffer