

68064-SUL/WAL

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF ILLINOIS
 EASTERN DIVISION

BRANDI DOREEN KELLY,)	
Plaintiff,)	
)	
v.)	No. 04 C 6688
)	Judge Leinenweber
THE MORTGAGE EXCHANGE and)	
JOSEPH ALDEGUER,)	
Defendants.)	

DEFENDANT'S MOTION IN LIMINE NO. 15
Regarding Adverse Job Action

Defendants THE MORTGAGE EXCHANGE and JOSEPH ALDEGUER, by their attorneys, April R. Walkup and Querrey & Harrow, Ltd., move this Court to enter an order in limine, prohibiting all parties hereto and their counsel from mentioning, referring to, interrogating, or attempting to convey in any manner, either directly or indirectly, whether in voir dire, argument or during the taking of evidence, regarding the receptionist position, rudeness, and “bad attitude” from other co-workers which she claims constitutes adverse employment actions.

The Defendants further requests that this Court enter an order instructing counsel for the parties to advise their witnesses in this case as to the existence and mandates of said order and the requirements and limitations established by it prior to the testimony of any such witness.

In support of this motion, the Defendants state as follows:

1. Plaintiff alleges Title VII claims of sexual harassment and retaliation against THE MORTGAGE EXCHANGE. She is also seeking recovery as against JOSEPH ALDEGUER under state law claims of assault and battery.

Events Prior to July 20, 2004

2. The Plaintiff filed a Charge of Discrimination with the Illinois Department of Human Rights on or about July 20, 2004, claiming she had been sexually harassed by Joseph Aldeguer. Prior to this date, the Plaintiff had not filed any internal complaints of harassment with anyone at The Mortgage Exchange. She had never complained to anyone in management at The Mortgage Exchange that she was being sexually harassed. However, the Plaintiff now seeks to introduce evidence and testimony that her “demotion” to receptionist on May 29, 2004 constitutes an adverse job action to establish a claim of retaliation under Title VII.

3. There is absolutely no dispute in this case that during her employment the Plaintiff did not make a formal complaint of sexual harassment to anyone at The Mortgage Exchange. See, Plaintiff’s Sept. 1, 2005 dep., p. 84, attached as Exhibit A. The Plaintiff did not utilize the internal complaint procedures available to her as an employee of The Mortgage Exchange. That she felt those internal channels would be useless does not alleviate her requirement to utilize them. See, Durkin v. City of Chicago, 341 F.3d 606, 614-15 (7th Cir. 2003).

4. The Defendants’ first notice that the Plaintiff had filed a claim of sexual harassment came in the form of a Notice of Attorney’s Lien received by them on July 16, 2004. A copy of this Lien is attached as Exhibit B. Therefore, there can be no argument that the Plaintiff was retaliated against, in violation of Title VII, before she

lodged any complaint of harassment or sought recovery for such claims. It is axiomatic that an employer cannot retaliate where there is nothing for an employer to retaliate against. *Id.* at 615.

5. The Plaintiff now seeks to present evidence to the jury that being made the receptionist on May 29, 2004 constitutes retaliation as that term is contemplated by Title VII. The Plaintiff admits that when she returned to being the receptionist she maintained the same pay rate, received the same benefits and worked the same, if not more, hours per work day. See, Exhibit A, pp.87 to 88. The change of job to receptionist on May 29, 2004 preceded her Charge of Discrimination and cannot form the basis of an adverse job action. To allow such testimony before the jury would be unfairly prejudicial to the Defendants and could result in the jury deciding this issue on evidence not properly before it.

Activities between July 15 and August 23, 2004

6. The Plaintiff also seeks to introduce evidence of certain acts and conduct after July 15, 2004 that she believes constitute an adverse job action for purposes of her claim of retaliation. On July 15, 2004, the Plaintiff's attorney sent, via facsimile, a Notice of Attorney's Lien, to The Mortgage Exchange and Joseph Aldeguer, evidencing that he had been retained to represent the Plaintiff in her suit of sexual assault and harassment as against the Defendants. See, Exhibit B. The Plaintiff claims that after she filed her Charge of Discrimination with the Illinois Department of Human Rights, she was retaliated against when co-workers were "rude" to her, her job was threatened for speaking about the lawsuit, she was written up for poor job performance, and her co-

workers gave her “looks.” Exhibit A, pp. 94 to 100. These actions do not constitute an adverse job action as that term is defined by Title VII and applicable case law.

7. Even if this Court finds that the activities of May 29, 2004 and July 15 to August 23, 2004 are sufficient to give rise to a *prima facie* case of retaliation under Title VII, the Plaintiff should be barred from arguing that the activities outlined above were adverse job actions as that term is defined by Title VII and as interpreted in the case law. The Seventh Circuit broadly defines an adverse job action, but not every action that makes an employee unhappy is actionable. Smart v. Ball State Univ., 89 F.3d 437, 441 (7th Cir. 1996); Cullom v. Brown, 209 F.3d 1035, 1041 (7th Cir. 2000). An action must be materially adverse; it must be more than a mere inconvenience or an alteration of job responsibilities. Ribando v. United Airlines, Inc., 200 F.3d 507, 510-511 (7th Cir. 1999). Examples of materially adverse actions include termination, a demotion evidenced by a decrease in pay, a less distinguished title, a material loss of benefits or significantly diminished material responsibilities. Bottoms v. Ill. Dept. Human Services, 174 F. Supp. 2d 758 (N.D. Ill. 2001). The terms and conditions of the Plaintiff’s employment have never been so altered. She admitted at her deposition that she maintained the same rate of pay, the same benefits and the same working hours.

8. Accordingly, this Court should bar all evidence relating to any adverse job action before August 24, 2004 the Plaintiff attempts to raise in this matter as they are irrelevant to the claims she raises in this lawsuit. See, Fed.R.Evid. 401 and 402. To allow otherwise would be highly prejudicial to the Defendants and may result in prompting the jury to decide the case on testimony not properly before it, thereby defeating the ends of justice, even though this Court might sustain an objection to such

evidence and instruct the jury to disregard any reference to it in their deliberations. See, Fed.R.Evid. 403.

WHEREFORE, THE MORTGAGE EXCHANGE and JOSEPH ALDEGUER, respectfully request this Court to order that the parties and their witnesses and counsel not mention, refer to, interrogate concerning, or attempt to convey to the jury in any manner, either directly or indirectly, whether in voir dire, argument or during the taking of evidence, any purported claims of adverse job action and retaliation raised by the Plaintiff for any date before August 24, 2004. The Defendants further move that this Court order that all parties' counsel caution each and every one of the witnesses, prior to the testimony of any such witness, as to the requirements and limitations of this Court's order. Finally, the Defendants request that this Court prohibit the parties hereto and their counsel from referring to this motion before the jury at any time during the trial of this cause and further counsel all such witnesses to the mandates of this order.

Respectfully submitted,

THE MORTGAGE EXCHANGE and
JOSEPH ALDEGUER,

By: /s/April R. Walkup

April R. Walkup
One of Their Attorneys

Attorneys for the Defendants

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Document #: 1060805

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

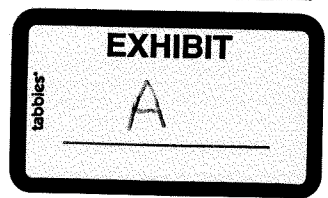
BRANDI DOREEN KELLY,)
)
Plaintiff,)
)
vs.)
)
THE MORTGAGE EXCHANGE and)
JOSEPH ALDEGUER,)
)
Defendants.)

No. 04 C 6688

ORIGINAL

PART II

The deposition of **BRANDI D. KELLY**, taken in the above-entitled cause before Laurie A. Gustafson, C.S.R., R.P.R., and a notary public within and for the County of Cook and State of Illinois, taken pursuant to the Federal Rules of Civil Procedure for the United States District Courts, at 175 West Jackson Boulevard, Suite 1600, Chicago, Illinois, on the **1st day of September, 2005**, at 1:00 p.m.



1 Q. Were you ever told that the reason you
2 were asked to be the receptionist is because there
3 was dissatisfaction with your job performance as an
4 opener?

5 A. I was told something along the lines of
6 they were waiting until we moved to train somebody
7 on the new system.

8 Q. May 28, 2004 you had not retained an
9 attorney, correct?

10 A. Correct.

11 Q. May 28, 2004 you had made no claim of
12 sexual harassment to anyone at The Mortgage
13 Exchange, correct?

14 A. Officially. I complained.

15 Q. You made no complaint of sexual
16 harassment to anyone in management at The Mortgage
17 Exchange, correct?

18 A. No.

19 Q. You had certainly talked to several of
20 your co-workers, but whether an official complaint
21 had been made, certainly not from you, correct?

22 A. Correct.

23 Q. Did you ever decline to accept the
24 position as receptionist?

1 A. No.

2 Q. You also received an e-mail from Jill
3 Moore about being the receptionist and you spoke
4 with her and told her no problem, correct?

5 A. When I was under the assumption that it
6 would be temporary, yes, ma'am.

7 Q. During that conversation with Ms. Moore,
8 you certainly never expressed your distaste at being
9 the receptionist, true?

10 A. I don't recall.

11 Q. Did you ever object to Misty, Jill,
12 Maureen, Joe, anyone else in management that you
13 felt you were being retaliated against when you were
14 made the receptionist?

15 A. I would not have put it in those words
16 with anybody, no, ma'am.

17 Q. Your salary remained the same, correct?

18 A. Correct.

19 Q. You had the same number of vacation days
20 available to you after May 28, 2004 as you had
21 before May 28, 2004, true?

22 A. It appears that that is true.

23 Q. Although medical benefits were made
24 available to you as an employee of The Mortgage

1 Exchange, you chose not to enroll in the medical
2 benefits, true?

3 A. Correct.

4 Q. Did your hours of employment remain the
5 same?

6 A. No, they did not.

7 Q. What was the change?

8 A. Well, essentially I was supposed to have
9 been there slightly earlier than I was able, at
10 which point it was made clear to me that Carolyn
11 could and would be up at the front desk until such
12 time I was able to arrive in the morning.

13 Q. So your hours certainly weren't
14 shortened, in fact, I think you're telling me you
15 were required to be there more hours?

16 A. Approximately the same. Maybe about 20,
17 30 minutes earlier.

18 Q. You had to be there at 8:30?

19 A. Correct.

20 Q. And you left at 5:00?

21 A. Yes, ma'am.

22 Q. Once you became the receptionist
23 following May 28, 2004, did you still attend the
24 call rally meetings?

LAW OFFICES
ERNEST T. ROSSIELLO & ASSOCIATES, P.C.

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*ALSO ADMITTED TO
PRACTICE IN NEW YORK

ERNEST T. ROSSIELLO*

BRANDI DOREEN KELLY)
)
 v.)
)
THE MORTGAGE EXCHANGE) VIA TELEFAX AND MAIL
)

July 15, 2004

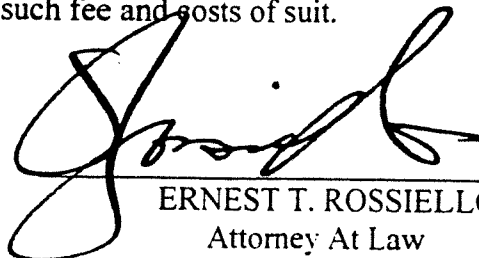
NOTICE OF ATTORNEY'S LIEN

TO: THE MORTGAGE EXCHANGE
c/o Daniel G. Coman, Registered Agent
1979 North Mill Street, Suite 211
Naperville, IL 60563

TO: JOSEPH ALDEGUER
THE MORTGAGE EXCHANGE
1 TransAm Plaza Dr.
Oak Brook Terrace, IL 60181

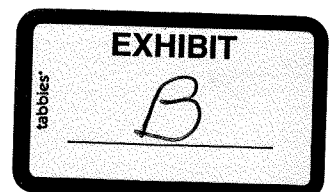
YOU ARE HEREBY NOTIFIED THAT the above claimant, BRANDI DOREEN KELLY, has placed in our hands for suit or collection, a claim, demand, or cause of action against you for sexual harassment arising out of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a) and 3 sustained by BRANDI DOREEN KELLY on or about the 31ST day of May, 2004 at or near Oak Brook Terrace, Illinois.

The said claimant has agreed to pay us for our services an amount of money equal to \$10,000.00, assignment of rights to statutory fees plus 33 1/3% of whatever amount is recovered there from by suit, settlement or otherwise. A lien is hereby claimed upon the said claim, demand or cause of action for such fee and costs of suit.



ERNEST T. ROSSIELLO
Attorney At Law

CERTIFIED MAIL
RETURN RECEIPT REQUESTED



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FACSIMILE TRANSMITTAL SHEET

TO:	Mr. Joseph Aldeguer	FROM:	Ernest T. Rossiello
COMPANY:	The Mortgage Exchange	DATE:	7/15/2004
FAX NUMBER:	(630) 792-7777	TOTAL NO. OF PAGES INCLUDING COVER:	2
PHONE NUMBER:		SENDER'S REFERENCE NUMBER:	
RE:	Brandi Doreen Kelly v. The Mortgage Exchange	YOUR REFERENCE NUMBER:	

URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY PLEASE RECYCLE

NOTES/COMMENTS:

HARD COPY TO FOLLOW:
