

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

JERRY BRACK,)	
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)	
Plaintiff,)	
)	
)	
v.)	Case No.- 01-CV-2997 D/V
)	
SHONEY’S, INC. d/b/a,)	
CAPTAIN D’S # 3126)	
)	
)	
Defendant.)	
)	
)	

**ORDER DENYING DEFENDANT’S MOTION FOR RECONSIDERATION
AND REQUEST FOR ORAL ARGUMENT**

Before the Court is Defendant Shoney’s Inc., d/b/a Captain D’s #3126, (“Captain D’s”)s’ Motion for Reconsideration of this Court’s Order Granting in Part and Denying in Part Defendant’s Motion for Summary Judgment (dkt # 76-1) (“Order”), entered March 13, 2003. For the following reasons, Defendant’s motion for reconsideration and request for oral argument are denied.

Defendant asserts that the Court’s denial of its motion for summary judgment with respect to Plaintiff’s claims for color discrimination based on transfer and hostile work environment/racial harassment should be reconsidered in order to correct manifest errors of law or fact and to prevent manifest injustice. In support of the motion for reconsideration, Defendant argues that Plaintiff did not suffer an adverse employment action based on his transfer. Accordingly, Defendant maintains that Plaintiff failed to establish a prima facie case of color discrimination and that Defendant,

therefore, is entitled to the affirmative defense set forth in Faragher v. City of Boca Raton, 528 U.S. 775, 118 S.Ct. 2275, 141 L. Ed. 2d 662 (1998), with respect to Plaintiff's claim for hostile work environment/racial harassment.

A motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e) may be made for one of three reasons:

- 1) An intervening change of controlling law;
- 2) Evidence not previously available has become available; or
- 3) It is necessary to correct a clear error of law or prevent manifest injustice.

Fed. R. Civ. P. 59(e); Helton v. ACS Group and J&S Cafeterias of Pigeon Forge, Inc., 964 F. Supp 1175 (E.D. Tenn. 1997). Rule 59 is not intended to be used to "relitigate issues previously considered" or to "submit evidence which in the exercise of reasonable diligence, could have been submitted before." Id. at 1182. Thus, there are limited circumstances in which a Court may grant a motion to alter or amend a judgment.

Defendant argued in its motion for summary judgment that Plaintiff did not suffer an adverse employment action. The Court considered the arguments asserted by Plaintiff and Defendant with respect to this issue. While the Court did not explicitly state that it found that Plaintiff established that he was subject to an adverse employment action based on his transfer, the Court did consider the issue and determined that Plaintiff provided sufficient evidence from which the trier of fact could determine that Plaintiff's transfer constituted an adverse employment action. Plaintiff asserted in deposition testimony, that after his transfer to the Third Street store, his duties became primarily that of a cook or cashier. Pl. Resp. To Def.'s Mot. For Summ. J., Ex. 3 pp. 239-40. Although the Sixth

Circuit has not expressly held that a loss of supervisory responsibilities constitutes an adverse employment action, see Handshoe v. Mercy Med. Ctr., 2002 WL 649070, at *5 (6th Cir. 2002) (stating that plaintiff's argument that she suffered an adverse employment action "might be persuasive" if plaintiff had asserted that she was transferred from a supervisory to a non-supervisory position), other Circuits have. See Boone v. Goldin, 178 F.3d 253, 255 (4th Cir. 1999) ("[D]ischarge, demotion, decrease in pay or benefits, loss of job title or supervisory responsibility . . . [are] the typical requirements for a showing of an 'adverse employment action.'" (emphasis added)); Jirau-Bernal v. Agrait, 37 F.3d 1, 4 (1st Cir. 1994) ("[T]he evidence that [Plaintiff] was transferred from a position with supervisory responsibility . . . to a nonsupervisory position carrying a lower salary, surely generated a trial-worthy issue as to whether defendants' actions constituted an actionable demotion.").

Defendant asserts that the Court noted that Plaintiff was transferred with the same pay, title, and duties based on the Court's statement that "Ms. Chevalier transferred Plaintiff on the same day to the Third Street store at the same rate of pay and in the position of Restaurant Manager." Order at p. 4. This statement, however, does not preclude the Court's determination that Plaintiff sufficiently alleged that his duties as Restaurant Manager were diminished after his transfer. The Court finds, therefore, that no manifest injustice exists which would warrant the Court to alter or amend its Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment. Accordingly, Defendant's motion to reconsider and request for oral argument are **DENIED**.

IT IS SO ORDERED this _____ day of _____, 2003

BERNICE BOUIE DONALD
UNITED STATE DISTRICT JUDGE