

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.

ANDREW L. McCARGO,

Plaintiff

v.

**TEXAS ROADHOUSE, Inc.,
a Delaware corporation**

Defendant.

Complaint

COMES NOW Plaintiff Andrew L. McCargo, by and through counsel, Cornish & Dell'Olio, and for his Complaint against the Defendant, Texas Roadhouse, Inc. alleges the following:

Introduction

1. This is an action brought pursuant to 42 U.S.C § 1981 against Texas Roadhouse, Inc. for race discrimination.

Jurisdiction

2. The Court has jurisdiction over the subject matter of this case pursuant to 28 U.S.C. §§ 1331, 1343.

Venue

3. The unlawful employment actions described below were committed in the

State of Colorado. Venue is proper in the United States District Court for the District of Colorado under 28 U.S.C. § 1391(b).

Parties

4. Andrew L. McCargo is an African-American man who was employed by Defendant, Texas Roadhouse, Inc.

5. Defendant Texas Roadhouse, Inc. operates restaurants with a Texas “country” theme throughout the United States and in Colorado where it operates 13 restaurants.

6. Texas Roadhouse, Inc. is a Delaware corporation doing business as Texas Roadhouse and is authorized to do business in Colorado and is in good standing with the Colorado Secretary of State.

General Allegations

7. Mr. McCargo worked for a Texas Roadhouse restaurant located at 3120 North Powers Blvd. in Colorado Springs from mid October, 2009 until the date of filing.

8. Mr. McCargo attended a two year culinary arts program at Atlantic Community College in Atlantic City, New Jersey and has extensive experience in food service.

9. He was hired by Texas Roadhouse as an “expo” cook. An expo cook at the Texas Roadhouse restaurants assembles the cooked food on a tray with appropriate condiments for delivery to the customer. An “expo” cook works at a lower rate of pay than all other positions in the kitchen including positions known as the point

man, the push man, the fry man, the broil cook and the salad man. The expo cook is the lowest paid position in the kitchen at Texas Roadhouse restaurants.

10. Mr. McCargo first submitted a written application for employment to Texas Roadhouse in early October, 2009.

11. Managers of the Texas Roadhouse restaurant let him know they were not interested in his application by declining to act on his application and by declining to provide him with information about the status of his application, in spite of numerous telephone and in person requests for information. Kitchen Manager Kris Brocious and Assistant Kitchen Manager Chad Simpson told him they didn't know if there were openings for employment.

12. Approximately 3 weeks after he applied for employment he had received no information about the status of his application, training or a start date.

13. Mr. McCargo had his wife, who does not sound "African American" telephone the restaurant, purportedly on her own behalf, to find out about openings. She was invited to attend an interview session even though she had not applied for employment.

14. Mr. McCargo who had been unable to secure an interview, showed up for the interview session his wife had been invited to attend and participated in the interview process.

15. In response to his interview no firm offer of employment was made. The restaurant manager, Tom Skipworth, told Mr. McCargo to speak to Kris Brocious, Kitchen Manager, about getting on the schedule. He was told nothing about an

orientation. Mr. McCargo called Kris Brocious to find out whether he could be put on the schedule. Kris Brocious told Mr. McCargo there was an orientation the following week but hung up without telling Mr. McCargo the date of the orientation. Mr. McCargo called back and obtained the date of the orientation. He showed up at the orientation session and attended the orientation session.

16. Following the orientation he was allowed to participate in training. During the training process Mr. McCargo was told by the restaurant manager, Tom Skipworth, that he would begin working as an “expo” cook at \$7.29 per hour. The position was below Mr. McCargo’s skill level. He accepted the position and began working as an “expo” cook.

17. When Mr. McCargo received his paycheck he observed that he was being paid at the rate of \$4.26 per hour.

18. Shortly after Mr. McCargo began working a white man, “Josh” applied for a job as a server. The white man who was less qualified for the job of expo cook than Mr. McCargo was hired as an expo cook on the same day he applied for a position as a server.

19. At the time the white man was hired Mr. McCargo was working very few hours, purportedly because full time work was not available. The restaurant management began scheduling the white man for as many or more hours as Mr. McCargo.

20. The employees of the Texas Roadhouse restaurant where Mr. McCargo was employed were predominately white. Mr. McCargo was the only African-American working on his assigned shift, other than occasionally a busboy and a dishwasher.

21. The work atmosphere at the Texas Roadhouse for Mr. Mc Cargo was very tense and uncomfortable. The white employees were deliberately unhelpful to Mr. McCargo, ignoring his requests for food items and deliberately delaying their assistance to him. The white employees would pretend not to hear Mr. McCargo's requests for food items.

22. White employees would recite rap lyrics which included the work nigger in a manner directed at Mr. McCargo. One of the point men referred to Mr. McCargo as "my nigger." Other employees referred to Mr. McCargo as "boy."

23. Kitchen employees generally ignored Mr. McCargo and would decline to engage in casual conversation with him. Managers declined to return greetings to Mr. McCargo and ignored him.

24. On November 23, 2009 at approximately 7:20 p.m. Kitchen Manager, Chad Simpson, made a comment about lynching to one of the point men. He made the comment loudly enough for Mr. McCargo to hear and for others in the kitchen area to hear. Mr. McCargo could not hear the entire comment. The kitchen staff laughed in reaction to the statement. Mr. McCargo did not react verbally to the statement.

25. At approximately 8:02 p.m. Mr. McCargo felt some heat on his back. Robert Carter, a broil cook, said "Hey, you're on fire." and the kitchen staff including managers laughed. Manager Kris Brocious patted out a fire on Mr. McCargo's back.

Robert Carter had attempted to set Mr. McCargo's clothing on fire with a cigarette lighter. A server had added a tea bag to the paper Mr. Carter had used to start the fire.

26. A tea bag has symbolic significance to Mr. McCargo and other African-Americans as a symbol of lynching.

27. Mr. McCargo experienced extreme humiliation and distress as the result of the assault by Robert Carter and the supportive reaction of the kitchen staff and managers.

28. Mr. McCargo left work in a state of extreme humiliation. He returned to the restaurant approximately 15 minutes later. He met two Colorado Springs police officers at the restaurant who had been summoned by his wife. He reported the assault to the police officers.

29. Mr. McCargo finished his shift that night, determined not to allow the employees of Texas Roadhouse to drive him off the job. The police officer who responded to the scene recommended to the managers that Robert Carter be sent home. The managers of the restaurant took no corrective action the night of the assault and treated the assault as a joke.

30. The following day Mr. McCargo returned to work again determined not to allow the employees of Texas Roadhouse to drive him off the job. Robert Carter was back at work the following day with apparently no disciplinary action taken by Texas Roadhouse.

31. The managers of Texas Roadhouse allowed Robert Carter to work for several days before suspending him and Angela Mills the other employee who participated in the assault on Mr. McCargo.

32. Mr. McCargo reported the incident to the corporate offices of Texas Roadhouse on November 25, 2009 by electronic submission and by certified mail.

33. No corrective action was taken by the Texas Roadhouse management until November 27, 2009 when the restaurant manager told Mr. McCargo that he was suspending Robert Carter and Angela Mills.

34. In the days following the assault Mr. McCargo continued to work enduring insult, humiliation and harassment from coworkers and manager Kris Brocious.

35. Another manager, Steve Miller, required Mr. McCargo to watch a video tape recording of the assault. On the video recording Mr. McCargo could observe that Robert Carter attempted 3 times to set his clothing on fire and did so in full view of coworkers and managers.

36. The conditions of employment at Texas Roadhouse following the assault are so humiliating for Mr. McCargo that no reasonable person could be expected to endure them.

37. Mr. McCargo has suffered damages including humiliation, insult to his dignity and distress as the result of and following the assault.

**First Cause of Action
(For Violations of 42 U.S.C. § 1981)**

38. Plaintiff incorporates paragraphs 1 through 37 herein by reference.

39. Mr. McCargo is an African-American protected from racial discrimination by 42 U.S.C. § 1981.

40. Mr. McCargo received disparate and hostile treatment compared to other similarly situated, non-minority employees before and after the assault.

41. The disparate and hostile treatment received by Mr. McCargo during his employment with Texas Roadhouse came from coworkers and managers.

42. The disparate and hostile treatment from coworkers and managers was allowed, fostered and encouraged by management.

43. The discrimination culminating in a physical assault which was suffered by Mr. McCargo was racial and stemmed from a racial animus.

44. The discrimination suffered by Mr. McCargo was so pervasive and severe as to alter the terms, conditions, or privileges of Mr. McCargo's employment.

45. Texas Roadhouse, Inc.'s response to racial harassment was inadequate to remedy the hostile work environment that Mr. McCargo suffered and in fact contributed to it.

46. Defendant's actions and omissions violated Plaintiff's rights secured by 42 U.S.C. § 1981.

Prayer for Relief

WHEREFORE, Plaintiff prays for the following relief, pursuant to 42 U.S.C. §§ 1981, 1988, and Fed. R. Civ. P. 54:

- a. Front pay in lieu of reinstatement;

- b. Nonpecuniary and compensatory damages, including damages for humiliation, emotional distress and consequential damages;
- c. Punitive damages;
- d. Pre- and post-judgment interest at the highest rate allowed by law;
- e. Costs and reasonable attorneys fees; and
- f. All other legal or equitable relief to which Plaintiff is entitled.

Jury Demand

Plaintiff requests this matter be tried by a jury.

Respectfully submitted on this 10th day of December, 2009.

CORNISH AND DELL'OLIO

/s/ Donna Dell'Olio

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