CHAPTER 5

EMPLOYEE RIGHTS AND PROTECTIONS

5.1 FEDERAL CIVIL RIGHTS STATUTES

5.101 In General. The federal statutes prohibiting discrimination in employment are enforced by the Equal Employment Opportunity Commission (EEOC), which also issues regulations based on the statutes and provides assistance to employers and employees who have questions about discrimination in employment. The EEOC's website address is www.eeoc.gov. The website contains information for employers about the laws enforced by the EEOC and on avoiding discriminatory employment practices. The EEOC also has publications dealing with employment discrimination. Publications may be ordered by telephoning the EEOC publications department at 800-669-3362. The EEOC may also be contacted directly by telephoning 800-669-4000 for assistance.

The scope of a plaintiff's right to file a federal lawsuit is determined by the contents of the charges that are filed with the EEOC or the corresponding state deferral agency during the process of exhaustion of administrative remedies.[1] In other words, only those discrimination claims stated in the initial charge, those reasonably related to the original complaint, and those that are developed by reasonable investigation of the original complaint may be maintained in a subsequent lawsuit.[2]

If the charge by the employee triggers the EEOC's authority to investigate under title VII, the agency may access any evidence that related to the unlawful employment practices covered by the statute that is relevant to the investigation. The EEOC also may require the attendance and testimony of witnesses and has subpoena power, all of which can be enforced by the federal district courts.

Virginia is a deferral state, which means that the plaintiff must first file a complaint with a designated deferral agency to begin the process before the EEOC is involved. The Office of Civil Rights (OCR) in the Office of the

[1] *Enoch v. Becton, Dickinson & Co.*, No. 11-3551, 2012 U.S. Dist. LEXIS 86797, at *27 (D. Md. June 22, 2012).

[2] *Id.*

Attorney General is a qualified deferral agency.[3] The filing period begins to run when the alleged unlawful employment practice occurs.[4]

In states with no deferral agencies, the employee must file the discrimination charge with the EEOC within 180 calendar days of the date that the discrimination took place. The 180-day filing deadline is extended to 300 calendar days in states like Virginia that have a deferral agency in place to accept the initial filing. These time limits will not be extended while the employee and employer attempt to resolve the dispute through other methods such as grievance procedures, arbitration, or mediation. If more than one discriminatory act occurred, the deadline generally applies to each separate event. With the exception of work situations that involve ongoing harassment, this means that more recent events that fall within the limitations period would be actionable, but others that are more remote in time would not.

Although the EEOC only files lawsuits against employers in select cases, the EEOC provides each employee with a right-to-sue letter at the end of its investigation, giving the employee permission to file a private lawsuit. If the employee decides to pursue the claim, the court action must be filed within 90 days of the letter. The right-to-sue letter, or at least entitlement to one, is a prerequisite to federal court jurisdiction.[5]

5.102 42 U.S.C. § 1981. The Civil Rights Act of 1866 (section 1981),[6] prohibits discrimination in the making or enforcement of contracts, including unwritten employment contracts, on the basis of race, color, or ethnicity. Section 1981 prohibits racial discrimination throughout the employment relationship.

Section 1981 applies only to discrimination based on race, color, or ethnicity to protect identifiable classes of persons who are subject to discrimination solely on account of their ancestry or racial characteristics.[7] Racial bias under section 1981 applies as much to white employees as it does to other "ethnic" groups such as Jews and Arabs.[8]

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[3] Certain Virginia localities have agencies that also qualify as deferral agencies.

[4] *Hamilton v. 1st Source Bank*, 928 F.2d 86 (4th Cir. 1990).

[5] *See Davis v. North Carolina Dep't of Corr.*, 48 F.3d 134, 140 (4th Cir. 1995).

[6] 42 U.S.C. § 1981.

[7] *Runyon v. McCrary*, 427 U.S. 160 (1976).

[8] *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976).

The statute applies only to intentional discrimination (disparate treatment). Disparate impact claims are not allowed.[9] The burden remains on the plaintiff to prove discriminatory intent. The cause of action does not have to be premised on "state action."[10]

Because no federal statute of limitations directly applies, courts had previously used the most closely related statute of limitations of the state in which the cause of action arose. However, the Supreme Court concluded that the catch-all four-year statute of limitations found in federal law[11] applies to actions based on federal statutes enacted after December 1, 1990.[12] In Virginia, this had the effect of doubling the statute of limitations for section 1981 claims.

5.103 Title VII of the Civil Rights Act of 1964. Title VII of the Civil Rights Act of 1964 (title VII),[13] prohibits workplace discrimination on the basis of race, color, religion, sex, or national origin. This statute has far-reaching implications that impact virtually every aspect of the employment relationship.

Title VII applies to employers that have fifteen or more employees for each working day in each of 20 weeks in the current or preceding calendar year.[14] An "employee" is defined broadly in title VII as "an individual employed by an employer."[15]

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[9] *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982).

[10] *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *see also Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) (stating that section 1981 affords a federal remedy against discrimination in private employment).

[11] 28 U.S.C. § 1658.

[12] *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004).

[13] 42 U.S.C. § 2000e *et seq.* (as amended).

[14] 42 U.S.C. § 2000e(b); *Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997) ("the 'payroll method' represents the fair reading of the statutory language" for determining the number of employees). Whether an employer has the requisite number of employees is not a matter of subject matter jurisdiction, but whether the defendant is an "employer" under 42 U.S.C. § 2000e(b) must be raised as a motion to dismiss under Rule 12 of the Federal Rules of Civil Procedure, or this defense is waived. *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006).

[15] 42 U.S.C. § 2000e(f). In *Farlow v. Wachovia Bank*, 259 F.3d 309 (4th Cir. 2001), the Fourth Circuit held that, even though the plaintiff worked on-site at Wachovia and had a written contract to perform legal services for the bank, she was not an employee for purposes of title VII. The plaintiff asserted that she was required to comply with the bank's administrative practices, attend staff meetings, and perform other employee-related functions, but the bank countered that because she had a prior criminal conviction she could not become an employee without FDIC approval, and that approval was never sought. In *Hicks v. Powell Staffing Solutions, Inc.*, No. 3:12CV439, 2012 U.S. Dist. LEXIS 152775, at *6 (E.D. Va. Oct. 17, 2012), the district court found that the plaintiff alleged sufficient facts in her complaint to raise a question of fact

Under title VII, unlawful discrimination may be shown if employees are treated differently because of their protected status, resulting in a claim of "disparate treatment." The key to any disparate treatment case is identifying different treatment given to similarly situated employees. The worker must show that all relevant aspects of his or her employment situation are nearly identical to those of a comparative employee whom the worker alleges was treated differently.[16]

In a disparate treatment case, an affected employee must show:

1. Membership in a protected class;

2. Qualification for the position and satisfactory job performance;

3. Discharge or demotion in spite of qualifications; and

4. Replacement by a person who is outside the protected class and has comparable qualifications.[17]

An employee can establish that he or she was performing satisfactorily, either by using documentation such as evaluations or the testimony of supervisors, but not of coworkers.[18] An employee whose job performance is not satisfactory cannot prevail on a title VII claim.[19] Many recent decisions have found that misconduct such as insubordination will satisfy or can be a factor in satisfying the employer's burden.[20]

An employment practice that does not appear to be discriminatory but has a discriminatory effect may result in a claim of "disparate impact" if it disproportionately disqualifies members of a protected class from employment or promotion and the practice is not justified by business necessity.

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whether the defendant employers exercised sufficient control over the plaintiff to establish an employment relationship, thereby precluding a Rule 12(b)(6) motion to dismiss on that basis.

[16] *Smith v. Monsanto Chem. Co.*, 770 F.2d 719, 723 (8th Cir. 1985), *cert. denied*, 475 U.S. 1050 (1986).

[17] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

[18] *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397 (4th Cir. 2005).

[19] *Karpel v. Inova Health Sys. Servs.*,134 F.3d 1222 (4th Cir. 1998).

[20] *Pulley v. KPMG Consulting, Inc.*, 183 Fed. Appx. 387 (4th Cir. 2006); *Williams v. Harvey*, Civ. Action No. 4:05cv161, 2006 U.S. Dist. LEXIS 62249 (E.D. Va. Aug. 21, 2006).

Another situation where discrimination can arise involves the employer who may have a mixed motive for making an employment decision. In mixed motive cases, the evidence shows that the responsible management employee had both legitimate and discriminatory reasons for the action taken. For example, a decisionmaker promotes a male employee because of the candidate's outstanding qualifications and because the decisionmaker believes that women should not be in a position that requires so much travel. The issues are (i) whether this is a mixed motive decision, without other evidence establishing discrimination; (ii) whether a violation occurred only if the discrimination was the deciding factor; (iii) which party has the burden of proof; and (iv) the available remedies.

Section 107 of the Civil Rights Act of 1991 deals with mixed motive cases involving race, color, religion, sex, national origin, or disability. It added section 703(m) to the Civil Rights Act of 1964,[21] which provides that an unlawful employment practice occurs when the complaining party demonstrates that race, color, religion, sex, or national origin was a "motivating factor" in the employment practice even though other factors also influenced the decision.[22] Section 107 limits the damages available to the plaintiff in mixed motive cases under 42 U.S.C. § 2000e-5(g)(2)(B). If the employer can demonstrate that it would have reached the same decision absent the impermissible motivating factor, the court can grant the plaintiff declaratory or injunctive relief and attorney fees and costs but may not award punitive and compensatory damages or force the employer to reinstate, promote, or hire the plaintiff.

Employers should also be aware of the potential for an employee to claim retaliation if adverse employment actions follow complaints under title VII. Although retaliation is not included in the list of bases subject to disparate impact analysis in the Civil Rights Act of 1991, a series of decisions concerning retaliation claims highlights the difficulty that these cases present for both plaintiffs and employers. An employee alleging unlawful retaliation in violation of title VII must demonstrate that the employer's retaliatory motive was the "but-for" cause of the adverse employment action, a higher standard of

[21] 42 U.S.C. § 2000e-2(m). Subsection (m) reads: "Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

[22] *See Burrage v. United States*, 571 U.S. 204 (2014).

proof than is required for a discrimination claim.[23] Use of this standard means that the employee has to prove that he or she would have avoided the adverse employment action but for the employer's retaliatory intention.

Title VII is the law under which claims of employee harassment or "hostile environment" are brought. The Guidelines on Discrimination cover "conduct [which] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment."[24] This concept of "hostile environment" came from a line of hostile environment cases based on race in which, for example, blacks were hired but subjected to racial epithets or jokes as a condition of employment.[25]

A single isolated incident is *usually* in itself not severe enough to create a hostile environment.[26] The Fourth Circuit reiterated this position in *Jordan v. Alternative Resources Corp.*,[27] in which it held that one isolated racial comment cannot establish a hostile environment.[28] Rather, establishing a hostile work environment generally requires an accumulation of individual acts.[29] The plaintiff's dissatisfaction with legitimate job duties will also not establish a hostile environment.[30] In the context of retaliation by an employer against a worker who has made such complaints, the United States Supreme Court has said that "the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination."[31] Denial of a deserved pay increase, having office equipment taken away or limited, being excluded from meetings, and being given unattainable goals could also constitute adverse actions.[32]

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[23] *University of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013).

[24] 29 C.F.R. § 1604.11.

[25] *See Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) ("one can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers").

[26] *Tatum v. Hyatt Corp.*, 918 F. Supp. 5 (D.D.C. 1994); *Strickland v. Sears, Roebuck & Co.*, 693 F. Supp. 403 (E.D. Va. 1988).

[27] 458 F.3d 332 (4th Cir. 2006).

[28] *But see Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264 (4th Cir. 2015) (en banc) (two uses of the term "porch monkey" within 24 hours coupled with threats to terminate the employee were sufficiently severe).

[29] *See National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002); *see also Okoli v. City of Baltimore*, 648 F.3d 216 (4th Cir. 2011); *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306 (4th Cir. 2006).

[30] *Gordon v. Gutierrez*, No. 1:06cv861, 2007 U.S. Dist. LEXIS 253 (E.D. Va. Jan. 4, 2007).

[31] *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 57 (2006).

[32] *Williams v. Prince William Cnty.*, No. 15-1711, 2016 U.S. App. LEXIS 6786 (4th Cir. Apr. 14, 2016).