RACE DISCRIMINATION AND RACIALLY DISCRIMINATORY HARASSMENT IN THE WORKPLACE

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I. INTRODUCTION

Issues of race discrimination and racially discriminatory harassment in the workplace continue to be fiercely litigated, generating volumes of case law each year. Although Title VII and Section 1981, the two primary sources of discrimination law in the employment context, have been in existence for quite some time, broadly worded statutes and the fact-specific nature of discrimination cases result in continuing and heated debate over the proper interpretations of these laws. Even in areas where the Supreme Court has decided key cases and enunciated standards, the circuit courts have interpreted and applied these standards differently to various factual scenarios, resulting in a broad spectrum of results. The goal of this paper is to provide an overview of race discrimination and harassment law and to highlight recent cases which are relevant, interesting, and instructive.

A. Relevant Statutory Provisions

1. Title VII

Title VII of the Civil Rights Act of 1964 (“Title VII”), as amended by the Civil Rights Act of 1991, provides that it is an unlawful employment practice for an employer “to fail or refuse to hire or discharge an individual, or otherwise to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s race, color, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). Title VII race discrimination claims may be based on theories alleging disparate treatment, disparate impact, and hostile work environment.

Title VII race discrimination suits may be brought by individuals of any race, color or ethnicity who believe they have been victims of discrimination. L.N. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 (1976) (holding that Title VII prohibits discrimination in private employment against white persons as well as non-whites). Title VII protects workers who are employees or former employees, however, independent contractors are not covered by this statute. Wilde v. County of Kandiyohi, 15 F.3d 103, 104 (8th Cir. 1994) (holding that business owner who rented executive office space and provided secretarial services was independent contractor rather than an employee of the county and therefore could not bring a Title VII claim against the county).

In addition to protecting those who are subject to discrimination based on their own race, Title VII protects those who encounter discrimination based on association with individuals of a
different race. See Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 590 (5th Cir. 1998), vacated by, 169 F.3d 215 (1999), reinstated in pertinent part by, 182 F.3d 333 (1999) (holding that termination of white department store employee, accompanied by supervisor’s remark that employee “would never move up with the company being associated with a black man” was a violation of Title VII); Johnson v. Univ. of Cincinnati, 215 F.3d 561, 573 (6th Cir. 2000) (holding that plaintiff, a terminated university vice president who advocated on behalf of minorities and women, did not need to be a member of a protected class to state a claim under Title VII but only needed to allege that he was discriminated against on the basis of his association with a protected class).

Title VII suits may be brought against “employers”, defined by Title VII as a person employing fifteen or more employees for each working day in each of twenty or more calendar weeks per year in the current or preceding calendar year. 42 U.S.C. § 2000e(b). An individual supervisor or employee who does not otherwise qualify as an “employer” is not liable under Title VII. Weberg v. Franks, 229 F.3d 514, 522 (6th Cir. 2000). This principle is illustrated in Boise v. Boufford, 127 F. Supp. 2d 467 (S.D.N.Y. 2001), in which a white New York University (“NYU”) professor brought race, sex, age and disability claims against the President of NYU and Dean of the NYU Robert F. Wagner Graduate School of Public Service for reducing his workload and assigning him to work under the direction of a less-experienced African-American professor. The court granted defendants’ motion to dismiss, holding that the university officials were not proper defendants under Title VII, the Civil Rights Act of 1991, the Age Discrimination in Employment Act, or the Americans with Disabilities Act because liability could attach only to the employer entity, not the individual supervisors. Id. at 472. The court cited the Second Circuit’s decision in Tomka v. Seiler Corp., 66 F.3d 1295, 1313-17 (2d Cir. 1995), which held that Title VII’s definition of “employers” as including “employers’ agents” means that employer entities may be held liable for discriminatory acts of their agents, not that supervisors or agents are subject to individual liability. Boise, 127 F. Supp. 2d at 472.

A discrimination charge under Title VII must be filed with the Equal Employment Opportunity Commission within 180 days after the alleged unlawful practice, or 300 days in deferral states, which are states with a state or local administrative mechanism to address complaints of employment discrimination. Adams v. Cal-Ark Int’l, Inc., 159 F.Supp. 2d 402 (E.D. Tex 2001). The EEOC will then investigate to determine whether there is “reasonable cause” to believe discrimination exists and whether it can eliminate the alleged unlawful practice through conciliation. 42 U.S.C. § 2000e-5(b). If there is no reasonable cause found or no conciliation, then the employee may sue in federal court. Once the EEOC issues a “right to sue” letter, the employee has 90 days to file in federal court. 42 U.S.C. § 2000e-5(f) Individuals may bring suits individually or as members of a class. The Equal Employment Opportunity Commission may also bring suit on behalf of a class or individuals.

The relief available under Title VII includes back pay, prospective wages and benefits, injunctive relief, compensatory damages, punitive damages, and attorneys’ fees. Compensatory and punitive damages under Title VII are capped depending on the size of the employer, with the maximum amount ranging from $50,000 for employers with 15 to 100 employees to $300,000 for employers with 501 or more employees. 42 U.S.C. § 1981a(b)(3). However, in a decision with significant implications, the Supreme Court held in Pollard v. E.I. du Pont Nemours & Co., 121 S.
Ct. 1946, 1949 (2001), that front pay, money awarded for lost compensation during the period between judgment and reinstatement, or in lieu of reinstatement, is not an element of compensatory damages within the meaning of the Civil Rights Act of 1991 and is therefore not subject to the Act’s statutory cap. In Pollard, the district court, which found that the plaintiff had been subject to hostile work environment sexual harassment, awarded plaintiff $300,000 in compensatory damages, observing that the award was insufficient to compensate Pollard, but that it was bound by an earlier Sixth Circuit decision holding that front pay was subject to the damages cap of 42 U.S.C. § 1981a(b)(3). The Supreme Court reversed, holding that front pay is not an element of compensatory damages subject to the statutory cap. The Court reasoned that the language of 42 U.S.C. § 1981a demonstrated that the remedy of compensatory damages was intended to be in addition to the remedies already provided by § 706(g) of the Civil Rights Act of 1964, which include front pay, and that the cap therefore did not apply. Pollard, 121 S. Ct. at 1947. Although Pollard arose in the context of a claim of sex discrimination, the principle enunciated applies to race discrimination claims as well.

Imposition of punitive damages is limited to cases where employee can show egregious conduct or willfulness, malice or reckless indifference on the part of the employer. Moore v. Kuka Welding Sys., 171 F.3d 1073 (6th Cir. 1999). In Moore, an African-American who was formerly employed as a welder brought suit for hostile work environment, retaliation and constructive discharge, alleging repeated racial slurs and threats. The court affirmed a punitive damages award of $70,000, holding that “defendant’s apparent indifference to plaintiff’s plight” whereby a supervisor witnessed and condoned offensive conduct over two and one half year period and even participated himself to some extent, was sufficient to justify the award. Id. at 1083.

Additionally, an employer may have an affirmative defense to punitive damages where it can demonstrate that it made good-faith efforts to comply with anti-discrimination laws by establishing and following anti-discrimination policies and procedures. Kolstad v. Amer. Dental Assoc., 527 U.S. 526 (1999).

2. Section 1981


Unlike a Title VII claim, administrative remedies need not be exhausted prior to bringing a Section 1981 claim. However, a plaintiff who elects to bring a Section 1981 claim without waiting for Title VII administrative remedies to be exhausted, and subsequently attempts to bring a Title VII
claim based on the identical cause of action risks having the Title VII claim collaterally estopped if the ruling in the earlier Section 1981 suit is unfavorable. *Lartius v. Iowa Dep’t of Transp.*, 705 F.2d 1018, 1020 (8th Cir. 1983).

To prevail in a Section 1981 action, plaintiff must show intentional and purposeful discrimination through either a direct or inferential demonstration of discriminatory intent. *Gen. Bldg. Contractors Ass’n, Inc. v. Pennsylvania United Eng’rs & Constr.*, 458 U.S. 375, 383 (1982) (holding that absent a finding of discriminatory intent on the part of contractors and their trade association, vicarious Section 1981 liability could not be imposed for the discriminatory conduct of the union or the joint apprenticeship training committee, which included members from both union and contractors). It is not necessary to show racial animus, rather merely that the employer made decisions based on race. *Ferrill v. The Parker Group, Inc.*, 168 F.3d 468 (11th Cir. 1999). In *Ferrill*, the court reversed the lower court’s ruling and held that defendant telemarketing firm, which made work assignments based on employees’ race, could be held liable under Section 1981, even though there was no evidence of racial animus. *Id.* at 472. Proof that an employer’s facially neutral policies have a disparate impact on minority employees is not sufficient to impose liability absent intentional discrimination. *Id.* at 472; *Mozee v. American Commercial Marine Svc. Co.*, 940 F.2d 1036, 1051 (7th Cir. 1991), *cert. denied*, 506 U.S. 872 (1992). However, it is possible to bring an action for hostile work environment under Section 1981. *Whidbee v. Gararelli Food Specialties, Inc.*, 223 F.3d 62, 69 (2d Cir. 2000).

Unlike Title VII, there may be individual liability under Section 1981. However, an individual liability claim under Section 1981 requires that the plaintiff demonstrate some affirmative link to causally connect the actor with the discriminatory action. *Whidbee v. Gararelli Food Specialties, Inc.*, 223 F.3d at 75. In *Whidbee*, the court affirmed the lower court’s granting of summary judgment on the issue of individual liability, holding that although the restaurant owner was negligent in maintaining the restaurant’s anti-discrimination policy, this did not constitute sufficient personal involvement to support a claim of individual liability under Section 1981. *Id.*

Punitive damages may only be awarded in a Section 1981 case “when the defendant’s conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.” *Ferrill*, 168 F.3d at 476.


II. TYPES OF RACE DISCRIMINATION CLAIMS

Generally, there are three types of race discrimination claims that may arise: disparate treatment and hostile work environment claims under Title VII and Section 1981, and disparate impact claims under Title VII.