

DIST.	OFF.	DOCKET		FILING DATE			J	N/S	O	D		R 23	\$ DEMAND	JUDGE/ MAG. NO.	COUNTY	JURY DEM.	DOCKET	
		YR.	NUMBER	MO	DAY	YEAR				PTF	DEF						YR.	NUMBER
422	3	87	0461	07	02	87	3	442	1				Nearest \$1,000 100	J 2214 M	51075	P	87	0461

PLAINTIFFS

DEFENDANTS

LEABOUGH, Larry J.

Commonwealth of Virginia

JURY

CAUSE

42 USC 2000e-5(f)
42 USC 1983

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE
IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

discrimination on the basis of race in employment

Thomas H. Oxenham, III, Esquire
OXENHAM, DAVIS & RHODE, P.C.
P. O. Box 29368
Richmond, Va. 23229
(804) 747-9545

ATTORNEYS

Robert H. Herring, Jr., Esq.
Assistant Attorney General
Criminal Law Enforcement Division
Office of the Attorney General
Supreme Court Bldg.
101 N. 8th St.
Richmond, VA 23219
804/786-2071

JURY

CASE SET:
ON MOTION: 12-16-87 9:30 A.M.
IFTC: 11-12-87 9:00 A.M.
STATUS: _____
MOTION: _____
FPTC: _____

7/11/87
7/11/87
7/11/87
7/11/87

CHECK
HERE
IF CASE WAS
FILED IN
FORMA
PAUPERIS

FILING FEES PAID			C.D. NUMBER	STATISTICAL CARDS	
DATE	RECEIPT NUMBER			CARD	DATE MAILED
				JS-5	08-01-87
				JS-6	

BENCHMEMO: LARRY J. LEABOUGH v. COMMONWEALTH OF VIRGINIA,

87-0461, defendant's motion for sum. jud.;

Dec. 11 at 10:00

ATTORNEYS: Plaintiff: Thomas X. Oxenham (Oxenham, Davis)

Defendant: Robert Herring (Asst. A.G.)

Judge this race discrimination matter is before you on defendant's motions to dismiss under Fed. R. Civ. P. 12(b)(6) and for summary judgment pursuant to Fed. R. Civ. P. 56(b). The complaint contains a Title VII claim and a 42 U.S.C. §1983 claim. The defendant seeks dismissal of the part of the Title VII claim which alleges retaliation because the plaintiff failed to file such a claim with the EEOC, and it seeks summary judgment on the remainder of the claim. The state seeks dismissal of the §1983 claim on grounds of sovereign immunity.

I believe you should grant defendant's motion to dismiss the retaliation and §1983 claims and deny defendant's motion for summary judgment.

Facts

Larry Leabough, a black male, is presently a Corporal prison guard at the Virginia Correctional Center for Women (VCCW). Although he had previously worked at the state's Deep Meadows prison facility, he had been at VCCW for two years when a Corrections Sergeant position became available. Leabough applied, was found to be "qualified" by the personnel screening board, and was interviewed by a panel consisting of Ann Downes,

VCCW's warden, and Fred Jordon, Regional Administrator of the Virginia Department of Corrections.

Leabough was competing with, among others, David Coles, a white male who was also a corporal prison guard. Coles was 36, Leabough 25. Coles had been at VCCW 6 years, Leabough 2 years. Coles had completed 90 hours of college credits. Leabough completed high school. Leabough scored higher on the personnel screening board's test.

Coles was selected over Leabough. Leabough filed a grievance pursuant to §2.1-114.5:1, Code of Virginia (1950) alleging age and seniority discrimination. Before he exhausted his remedies provided by state law, Leabough terminated that action and filed complaints with both the United States EEOC and the Office of Equal Employment Services of the Commonwealth of Virginia (EEOS). He claimed he was victim of racial discrimination. The EEOS determined there was insufficient evidence to sustain the charge, and the EEOC made no determination but did issue a "right to sue" letter.

In his complaint at paragraph 17, Leabough also now alleges that in retaliation for his EEOC complaint, his employer has deliberately lowered his periodic evaluation scores, issued a written reprimand for a trivial violation, and told him he would never be promoted at VCCW and should consider transferring.

Title VII claim

Leabough's Title VII claim alleges two violations: (1) he was not promoted because he is black, and (2) he has been retaliated against because he filed a complaint.

Leabough's EEOC complaint contains no allegations of retaliation. (see attached) The filing of an EEOC complaint is a jurisdictional prerequisite to litigating that allegation in the United States District Court. Hence, you should dismiss this portion of Leabough's complaint because the Court lacks subject matter jurisdiction.

The plaintiff relies on four cases in an attempt to escape this jurisdictional deficiency. All four cases are distinguishable. First he argues that the claims of failure to promote and retaliation are "reasonably related" under the standard enunciated in Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970). The Sanchez standard is not that broad, and the claims are not reasonably related. Second, he argues that where, as here, the EEOC's investigation was overly narrow, the Court can consider other claims that would arise from a "reasonably expected investigation." Hicks v. ABT Associates, 572 F.2d 960 (3rd Cir. 1978). I don't believe a usual EEOC investigation exploring charges of discriminatory promotion would also look for retaliation. Third, he asserts that under the holding in Ramirez v. National Distillers, 586 F.2d 1315 (9th Cir. 1978) a trial court has jurisdiction to hear the substantive charge made in the EEOC complaint and any allegations of harassment and retaliation after the filing of the complaint. As I read Ramirez, however, the court held that it could consider events subsequent to the filing of the complaint that related to the initial complaint. In Ramirez, the plaintiff was hired, laid-off, re-hired, and laid-off again. In his initial EEOC

complaint alleging a pattern of racial discrimination, he referred only to the first lay-off, but the court allowed evidence relating to the second lay-off as well. Here, the two alleged acts differ completely. Retaliation is not a repetition of the originally alleged race discrimination. Finally, the plaintiff argues that the court could assert ancillary jurisdiction over the retaliation claim as the 5th Cir. did in Gupta v. East Texas State University, 654 F.2d 411 (5th Cir. 1981). In Gupta, however, the plaintiff had asserted a retaliation claim in an earlier EEOC complaint and claimed retaliation on retaliation before the district court. It made sense to exercise ancillary jurisdiction to stop the pyramiding of retaliation claims.

The defendant also challenges Leabough on the sufficiency of his substantive race discrimination claim. I believe Leabough has made out a prima facie case of race discrimination under Holmes v. Bevilacqua, 794 F.2d 142 (4th Cir. 1986). He has shown that (1) he belonged to a protected class, (2) he was found to be qualified for the newly open position, (3) he was considered and denied the position, and (4) a white male was promoted over him under circumstances creating an inference that but for the plaintiff's race, he would have been promoted.

Once a prima facie case is demonstrated, the defendant must articulate legitimate, non-discriminatory reasons for promoting someone over the plaintiff. Burdine v. Texas Department of Community Affairs, 450 U.S. 248, 255-56 (1981) The statements in the affidavit of Ann Downes, the warden, satisfy this requirement.

She stresses that VCCW is unusual because unlike most prisons, there is neither a perimeter wall nor are there gun towers. Additionally, because it is the only women's correctional institute in the state, the prison houses a wide range of felons. She argues that it is important for the guards to establish a rapport characterized by dignity and respect with the prisoners. Because Coles had been at VCCW longer, was older, and had taken college courses, Downes felt he was more mature and better suited for the job. Additionally, inmates had complained about Leabough, and he was moved from the maximum security building to the yard.

Once the defendant has carried its burden of proof, the burden of proof switches to the plaintiff to show that the defendant's offered, legitimate reasons are a pretext for discrimination. Burdine, 450 U.S. a 255-56 (1981). The plaintiff argues that Downes improperly allowed subjective impressions to enter into her promotion decision. He asserts that qualities like "maturity" and "rapport" are a pretext for Downes real motivation for selecting Coles. He argues that on the objective facts before Downes and Jordon he was the better applicant. On the facts that relate soley to security and supervision, the plaintiff was better qualified. He points to his periodic evaluations as proof. He also claims that he had higher scores than Coles on the initial promotion board's tests. Finally, he argues that Coles did not warrant being rated 10 points higher than him by Downes. If she had rated Coles any less Leabough claims he would have been promoted.

Judge, the evidence Leabough refers to is not yet part of the record. According to his exhibits list, he plans to introduce his periodic evaluations and the results of the initial promotion board's tests. He has not yet received a copy of the tests but the defendant plans to produce them. If indeed he can produce this evidence tomorrow, then I think summary judgment is inappropriate.

The Fourth Circuit has been reluctant to approve of summary judgment in Title VII cases: "Care is required in deciding whether the evidence presents a genuine issue of motive, for 'summary judgment is seldom appropriate in cases wherein particular states of mind are decisive as elements of [a] claim or defense.'" Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985) quoting Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979). The Fourth Circuit noted that this is the case because resolution of questions of intent often turn upon the credibility of the witness. Credibility can best be determined by observing the demeanor of the witness during direct and cross-examination. Given this warning, I believe you should deny the defendant's motion for summary judgment.

42 U.S.C. §1983

Leabough contends that because he has been discriminated against, his rights, privileges and immunities guaranteed by the Constitution have been trampled upon by those acting under color of state action. In his claim, he fails, however, to jump the hurdle posed by the Eleventh Amendment.

The Eleventh Amendment provides that any monetary claim brought against the State (i.e. through 42 U.S.C. §1983) in a federal court is barred unless the state either consents to the suit or waives its sovereign immunity. Quern v. Jordon, 440 U.S. 332 (1979); Edleman v. Jordon, 415 U.S. 651 (1974). The Commonwealth has not consented to suits of this type nor has it waived its sovereign immunity. See Medicenters of America, Inc. v. Commonwealth of Virginia, 373 F. Supp. 305 (E.D. Va. 1974). The state of Virginia is the only defendant in this case. Therefore, you should grant the defendant's motion to dismiss the second count of the complaint. The parties have raised other issues such as whether Virginia is a person under 42 U.S.C. §1983, but you need not decide them given the Eleventh Amendment argument.

If you dismiss the §1983 claim, you need not make any adjustment to the injunctive and compensatory relief sought by the plaintiff; however, a jury will no longer be needed.

Summary

I believe you should:

- (1) grant the defendant's motion to dismiss the retaliation claim in ¶17 of the complaint;
- (2) deny the defendant's motion for summary judgment for the remainder of the Title VII count; and
- (3) grant the defendant's motion to dismiss the §1983 claim.

CHARGE OF CRIMINATION

FEPA
 EEOC

122-86-0613

This form is effected by the Privacy Act of 1974; see Privacy Act Statement on reverse before completing this form.

(State or local Agency, if any) and EEOC

NAME (Indicate Mr., Ms., or Mrs.) **Mr. Larry Leabough** HOME TELEPHONE NO. (Include Area Code) **804-457-4907**

STREET ADDRESS **2611 Chapel Hill Road** CITY, STATE AND ZIP CODE **Goochland, Va. 23063** COUNTY **Age 54**

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME **Commonwealth of Virginia** NO. OF EMPLOYEES/MEMBERS **15 Plus** TELEPHONE NUMBER (Include Area Code) **804-556-3321**

STREET ADDRESS **Box 1** CITY, STATE AND ZIP CODE **Goochland, Va. 23063**

NAME _____ TELEPHONE NUMBER (Include Area Code) _____

STREET ADDRESS _____ CITY, STATE AND ZIP CODE _____

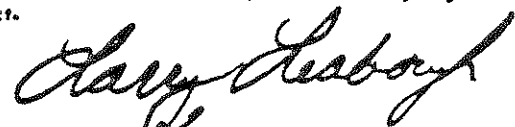
CAUSE OF DISCRIMINATION BASED ON (Check appropriate box(es))
 RACE COLOR SEX RELIGION NATIONAL ORIGIN
 AGE RETALIATION OTHER (Specify) _____
 DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (Month, day, year) **03-24-86**

THE PARTICULARS ARE (If additional space is needed, attached extra sheet(s)):

1. I am currently a Correctional Officer assigned to the above named facility since May 20, 1984. On March 24, 1986 I was advised that I had not been selected for promotion to the position of Correctional Sergeant.
2. Anne Downes (Caucasian), Warden, said I was not selected because I was younger and had less service time at the facility than the selected.
3. I believe I have been discriminated against because of my race (Black) in violation of Title VII of the Civil Rights Act of 1964, as amended, because,
 - a. David Cole (Caucasian) was selected.
 - b. I believe I am better qualified than Mr. Cole because of my past criminal training and three years supervisory experience of a 72 inmate dorm, approximately one (1) year as an Acting Sergeant and two (2) years as a Corporal in maximum security. Mr. Cole has spent the last five (5) years in the correctional facility's post office, with limited inmate contact.
 - c. The use of age and seniority in making promotion selections is in violation of state regulations.

I also want this charge filed with the EEOC. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

NOTARY - (When necessary to meet State and Local Requirements)
 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct.

 Date **6-17-86** Charging Party (Signature)

SIGNATURE OF COMPLAINANT
 SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Day, month, and year)

ATTACH