

BENCHMEMO: SILAS JONES v. RICHMOND, FREDICKSBURG & POTOMAC RAILROAD COMPANY, 87-0581; motion to dismiss for lack of subject matter jurisdiction; Nov. 13 at 3:00

ATTORNEYS: Plaintiff: Alan Rosenblum (Rosenblum & Rosenblum)
Defendant: James Meath & Douglas Nabhan (Williams, Mullen)

Judge, this Title VII claim is before you on defendant's motion to strike paragraph 14 of the complaint for lack of subject matter jurisdiction. Paragraph 14 reads: "The Defendant, RF&P, failed to timely promote the Plaintiff to the position of Road Conductor." RF&P asserts that because the plaintiff failed to make this allegation in his previous two EEOC complaints, the Court does not have subject matter jurisdiction. If the Court liberally construes the charges made in the EEOC complaints, however, the charge of discriminatory promotion practices would arise in the course of a reasonable EEOC investigation. Therefore, the defendant's motion to dismiss should be denied.

Failed to promote in earlier EEOC complaints to promote

Facts

On August 6, 1986 Jones, a black man, was charged with failure to properly yard his train. He was suspended for seven days. After his suspension, Jones learned that a white engineer admitted that he too had failed to properly yard his train; yet the white engineer was not punished. On August 26, 1986 Jones filed a Charge of Racial Discrimination against RF&P with the EEOC alleging that he was a victim of racial discrimination.

1st EEOC 8/26/86 Failure to yard his train

On August 25 1986 Jones was charged with insubordination for failing to report to work on August 16, 1986 and was suspended without pay for 90 days. Jones claims he had requested leave for that day to be with his sick son and that he had been granted leave. He filed another EEOC claim on September 18, 1986 alleging retaliation. In his charge he noted that of the six other men marked off as sick on August 16 he was the only one required to provide a doctor's statement (which he produced); that he was the only employee ever charged with insubordination for not reporting to work because of a family illness; and that he was given an excessive punishment--90 days whereas most other employees charged with offenses relating to leave are given a written reprimand or are suspended for two days. (Both EEOC complaints are attached.)

*2d EEOC
Sept 18/19 86
filing lawsuit
on 8/26/86*

The EEOC issued a right to sue letter without determining the validity of the discrimination allegations. On the eve of filing his complaint in this present action, Jones was promoted to Road Conductor.

Discussion

Jones did not specifically allege in his EEOC charges that RF&P had failed to promote him because on his race. He alleged that he was being punished differently than his white co-workers. He cites two specific incidences in support of his claims. The issue for the Court to resolve is whether a charge of failure to promote is encompassed in his EEOC allegations. The Fourth Circuit's test provides few guidelines, and the Fourths have not addressed this issue often.

A civil suit subsequent to an EEOC charge "may encompass only the 'discrimination stated in the charge itself or developed in the course of a reasonable investigation of that charge.'" King v. Seaboard Coast Line Railroad Co., 538 F.2d 581, 583 (4th Cir. 1976), quoting, EEOC v. General Electric Co., 532 F.2d 359, 366 (4th Cir. 1976). (The factual patterns in these cases are not helpful in resolving the issue in this case.) Determining the scope of a reasonable investigation is difficult. Would a reasonable EEOC investigation into the charge that when Jones performed poorly he was treated more harshly than his white counterparts also examine whether Jones was treated less favorably when he performed well?

I believe that a reasonable investigation would make such an inquiry. Punishment and promotion are opposite sides of the same coin. They both relate to job performance. Logically, if one was interested in discovering if a company is punishing black workers more harshly than white workers, one would look to see if black employees are being promoted with the same frequency as white employees. The two issues are "reasonably related"--the standard adopted by the Fifth Circuit in Sanchez v. Standard Brands, Inc., 431 F.2d. 455 (5th Cir. 1970) and in dicta by the Fourth Circuit in EEOC v. General Electric Company, 532 F.2d 359 (4th Cir. 1976).

Allowing Jones to pursue his claim of promotion discrimination also comports with the policy of Title VII and EEOC procedure. Complaints are brought to the EEOC first to allow for the EEOC, the employer and employee to amicably work

out a solution. RF&P was on notice that Jones felt he was being treated differently from his white counterparts. If Jones had raised the issue of discriminatory promotion practices at the time of his complaints, I don't believe it would have changed the tenor of the discussions. RF&P would have still denied racial discrimination.

Fifth Circuit cases that have directly addressed this issue are also helpful in deciding this matter. The scope of an EEOC charge is to be liberally construed. Danner v Philipps Petroleum Co., 447 F.2d. 159 (5th Cir. 1971). In Falcon v. General Telephone Co. of the Southwest, 626 F.2d. 369 (5th Cir. 1980), the court explained the rationale for this rule:

This Court's traditional application of a liberal standard in this area is a reflection of our understanding about the realities of Title VII litigation. Often the complainants are poor and uneducated. They are unfamiliar with legal concepts and often do not comprehend the specific elements of their complaint. But they understand the basic premise of the Act. They feel that they have been discriminated against on the basis of race or some other impermissible factor. To hold these individuals to a high standard of knowledge about the bases of their charge would ill-serve the remedial purpose of Title VII.

Id. at 377. In Falcon, the Court held that the district court had jurisdiction over the claim of hiring discrimination even though the EEOC charge referred only to discrimination with respect to promotion. Under this analysis, the Court has jurisdiction to hear Jones' claim of discriminatory promotion practices.

The defendant relies on Pickney v. American District Telegraph Company of Arkansas, 586 F. Supp. 687 (E.D. Ark. 1983). In that case, the plaintiff alleged in her EEOC charge that she had been fired based upon sex and race discrimination. She alleged other white males had engaged in similar behavior and not been fired. In her civil suit, she also alleged that her employer had not given her the promised training she needed to be promoted because of her gender. After reviewing the policy underlying Title VII, the Court struck Count II. It reasoned that the plaintiff had alleged a specific grievance and cited specific facts and that her discriminatory promotion claim was not "sufficiently related" to her termination claim: "The [promotion] claims address the terms of the plaintiff's employment. The [other] claim simply involves a single decision of the employer to terminate the employee." 568 F. Supp. at 692.

Although I think the Pickney court's distinction is artificial, under this analysis both the discriminatory promotion and discipline charges address the "terms" of employment. What the Pickney court is really concerned about is preventing the plaintiff from circumventing the EEOC's administrative function. As noted earlier, allowing Jones' claim to proceed will not circumvent the EEOC's function.

In summary, the Court should exercise jurisdiction over charges of discrimination developed in the reasonable investigation of an EEOC charge. Given the plaintiff's background, the plaintiff's charge should be liberally construed.

But it should not be so liberally construed as to frustrate the EEOC's administrative function. Exercising jurisdiction over Jones' allegation of discriminatory promotion practices is in keeping with prior decisions and does not frustrate the EEOC's function. Therefore, the defendant's motion to strike paragraph 14 of the complaint for lack of subject matter jurisdiction should be denied.

JLW

CHARGE OF DISCRIMINATION

ENTER CHARGE NUMBER

FEPA

EEOC

122-86-0818

This form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse side of this form.

(State or local Agency, if any)

and EEOC

NAME (Indicate Mr., Ms., or Mrs.)

Mr. Silas W. Jones

HOME TELEPHONE NO. (Include Area Code)

(703) 967-0494

STREET ADDRESS

Route 2, Box 104

CITY, STATE AND ZIP CODE

Louisa, VA 23093

COUNTY

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.)

Richmond Fredericksburg & Potomac Railroad

NO. OF EMPLOYEES/MEMBERS

15 Plus

TELEPHONE NUMBER (Include Area Code)

(804) 257-3252

STREET ADDRESS

Post Office Box 11281

CITY, STATE AND ZIP CODE

Richmond, VA 23230

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)

08-08-86

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

1. I began working for the above named Respondent on April 27, 1977 as a Laborer. I was promoted after six months to the position of Trainman. I was suspended from this position on August 8, 1986 for seven days. This employer has more than fifteen employees.
2. On or about August 8, 1986, I received a letter from J.O. Williams, Transportation Manager, stating that I would be suspended from August 11, 1986 - August 17, 1986 for failing to yard my train properly.
3. I believe that I have been discriminated against in violation of Title VII of the Civil Rights Act of 1964, as amended, because:
 - A. A White engineer admitted that he had failed to yard his train properly on the previous night and was not disciplined.
 - B. The Yard Master was aware that the white engineer did not yard his train properly.

RECEIVED
 88 AUG 27
 A10

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.

SIGNATURE OF COMPLAINANT

Date 8/26/86
 Charging Party (Signature) *Silas W. Jones*

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

CHARGE OF DISCRIMINATION

Form is affected by the Privacy Act of 1974; see Privacy Act Statement on reverse side completing this form.

EMPLOYER CHARGE NUMBER

EPA

EEOC

122-86-0899

(State or local Agency, if any) _____ and EEOC

NAME (Indicate Mr., Ms., or Mrs.) Mr. Silas W. Jones HOME TELEPHONE NO. (Include Area Code)
 STREET ADDRESS Route 2, Box 104 CITY, STATE AND ZIP CODE Louisa, Va. 23093 COUNTY 703-967-0494

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	NO. OF EMPLOYEES/MEMBERS	TELEPHONE NUMBER (Include Area Code)
<u>Richmond, Fredericksburg, & Potomac Railroad</u>	<u>15+</u>	<u>804-257-3252</u>

STREET ADDRESS P. O. Box 11281 CITY, STATE AND ZIP CODE Richmond, Va. 23230

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) 08-28-86

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

1. I filed charges alleging illegal employment on the part of this employer. On August 18, 1986 I was charged with insubordination and an informal hearing was held on August 25, 1986. Subsequently, on August 28, 1986 I was suspended for a period of ninety days. I believe that these actions are in retaliation for my filing the previous charge. This company employs more than the required number of persons.
2. During the investigation the Transportation Manager, Mr. Jo Williams, stated "He did not do what he was instructed to do. There is no doubt in his mind what his instructions were. He did not do that. That is insubordination any way you turn it".
3. I believe that these actions are retaliatory in violation of Section 704a of Title VII of the Civil Rights Act of 1964, as amended, in that:
 - a. I requested leave due to the illness of my son. It was granted, however, I was required to submit a doctor's statement upon my return to work.
 - b. There were six others marked off on that day due to sickness. Leave due to personal sickness and that of a relative is usually approved in the same manner. However, I was the only one required to provide a doctor's statement.
 - c. I am the only employee to ever be charged with insubordination for an incident involving "marking off" (taking off) duty for sickness.

I also want this charge filed with the EEOC. CONTINUED
 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.

SIGNATURE OF COMPLAINANT

S. W. Jones
 Charging Party (Signature)

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

Date 9-18-86

CHARGE OF DISCRIMINATION

FILE NUMBER CHARGE NUMBER

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EEOC 122-86-0899

PAGE TWO, CONTINUED

JONES VS. RICHMOND, FREDERICKSBURG & POTOMAC RAILROAD

- d. In addition, most employees charged with offenses relating to leave are given a written reprimand or suspended for two days. My period of suspension is grossly multiplied in comparison with the usual discipline.
- e. I provided the required doctor's statement showing that my son was under his care from August 11th through August 20th. When I returned to work I had already been charged.

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AUG 18 10:03
OFFICE

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.

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

Date 9-18-86 Charging Party (Signature) L. W. Jones

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.

SIGNATURE OF COMPLAINANT

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