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Title VII employment claim carried more punch than standard bias charge

Under federal law, an employer is prohibited from retaliating against an individual because that individual either opposed any practice made unlawful by applicable the equal employment opportunity law or participated in the investigation of any practice made unlawful by applicable equal employment law.

Before filing suit to prosecute federal equal employment claims, an individual must first exhaust his or her administrative remedies by filing a charge of discrimination with the Equal Employment Opportunity Commission.

In that charge, the individual is required to check the appropriate basis for each equal employment claim. There is an exception to this requirement: the EEOC charge contains a description section that the individual can use to (a) describe the conduct being challenged and/or (b) identify the laws that the individual contends have been violated.

The threshold issue in *McWhorter v. Nucor Steel Birmingham Inc.*, No. 2:17-cv-01007 (N.D. Ala., Jan. 11, 2018), was whether claims under the Americans with Disabilities Act and Age Discrimination in Employment Act in a lawsuit were within the scope of an EEOC charge alleging that (a) Nucor Corp.'s hiring practices might be in violation of laws enforced by the EEOC and (b) that plaintiff Jason McWhorter had been discharged in retaliation for protesting acts made unlawful by Title VII. As to the Title VII retaliation alleged in the complaint, the issue centered on whether McWhorter had sufficiently pleaded his claim.

In a cautionary decision that should prompt employers to re-examine their hiring and performance discharge practices, and which should place attorneys who counsel individuals during administrative investigation on notice, Judge R. David Proctor held that the ADA and ADEA claims were ripe for dismissal, but the Title VII retaliation claim survived the motion to dismiss.

Consistent with applicable rules, the court assumed all of the allegations in the complaint were true and drew all reasonable inferences in the plaintiff's favor in considering Nucor Corp.'s motion to dismiss. In line with that process, the discussion below will also assume that the allegations in the complaint are true.

On July 11, 2015, McWhorter complained to two members of Nucor upper management that he believed the company's pre-employment psychological evaluations were being used to circumvent laws prohibiting certain information from disclosure during the hiring process.

Specifically, through "psychological evaluations," a psychologist questioned applicants about their age, marital status, children, parents and family life. Thereafter, the psychologist would share this information with employees involved in the hiring process.

Two days after submitting his internal complaint, McWhorter contacted the EEOC. He also placed the company on notice that he had contacted the EEOC.

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Even though the coaching paperwork gave McWhorter until August to improve his performance, he was fired 16 days later, on July 31.

McWhorter had an attorney when he filed his EEOC charge. However, he did not check the box identifying age or disability as individual bases for his administrative charge filing. He also failed to identify either (a) disability-related or age-based conduct or (b) the ADEA or ADA as laws that Nucor Corp. had violated in the description section of his EEOC charge.

Rather, McWhorter checked only the "retaliation" box, and he used the description section of his EEOC charge to state that he had been discharged in retaliation for protesting acts made unlawful by Title VII.

The court agreed with Nucor Corp. in finding that McWhorter had failed to exhaust his administrative remedies in connection with his ADEA and ADA claims before filing suit. The court also ruled that McWhorter was not entitled to a liberal construction of his EEOC charge because he was represented by counsel at the time he filed his charge.

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Four days later, McWhorter was placed on a coaching plan that gave him until the end of August to improve his job performance. Prior to receiving this coaching document, McWhorter had never been provided with any formal negative feedback and had only received "exceed[s] expectations" in his performance evaluations.

The court, however, rejected Nucor's argument that the Title VII retaliation claim was not supported by facts establishing a plausible claim. To survive a Rule 12(b)(6) motion directed at his Title VII retaliation claim, McWhorter was required to allege facts showing that (a) he engaged in protected activity, (b) he suffered an adverse employment action that imposed a materially adverse effect on him and (c) there was a causal link between the adverse employment action and his protected activities.

As detailed below, the court concluded that McWhorter had sufficiently pleaded each of the elements of his claim.

First, the court found that McWhorter had sufficiently alleged protected activity through his internal complaint to management and the external EEOC charge filing.

Second, the court had little difficulty in concluding that the termination of McWhorter's employment imposed a materially adverse effect upon him. Thus, the termination of his employment constituted an action which, if linked to his protected activity, would tend to dissuade a reasonable worker from engaging in the protected activities at issue.

Third, in alleging a plausible causal connection between his discharge and protected activity, McWhorter was required to plead facts establishing that his protected activity and his discharge were not completely unrelated. Against that backdrop, McWhorter's allegations that (a) on July 13, 2015, he contacted the EEOC regarding his concerns about the company's hiring practices and notified his employer that he had done so; (b) two days after he contacted the EEOC, he received a negative performance review, which indicated his performance would be reassessed in August; but (c) he was abruptly terminated at the end of the month, were sufficient to allege a plausible Title VII retaliation claim — given the close timing between his internal and external voicing of concerns and the expedited nature of his discharge.