

DEFENDING SEXUAL HARASSMENT CHARGE IS TITLE VII PROTECTED ACTIVITY

CAPTION: In *Deravin v. Kerik*, 335 F.3d 195 (2nd Cir. 2003), the Second Circuit Court of Appeals held that “protected activity” for retaliation claims includes an individual’s participation in Title VII proceedings even if those proceedings are initiated against the plaintiff for sexual harassment allegations. The appeals court also reviewed proper exhaustion of administrative remedies prior to bringing suit.

Eric H. Deravin worked for the New York City Department of Corrections (“DOC”) for a period of over twenty years. In October 1989, DOC promoted him to the position of Captain and, in August 1996, it promoted him once again to the position of Assistant Deputy Warden. Seeking a further promotion to Deputy Warden, Deravin applied for that position as soon as he became eligible, in January 1998, but was denied that promotion. From that time through April 2000, Deravin applied for the Deputy Warden position on five separate occasions. Each time, the chief of his department recommended and approved his application; however, Bernard Kerik, former Commissioner of the DOC, blocked his promotion applications and instead promoted less-qualified applicants who possessed only high school diplomas or GEDs while Deravin had a Ph.D. in Criminal Justice Management and a Master’s Degree in Public Administration.

Unsuccessful on his promotion applications, Deravin filed a complaint with the EEOC and then brought suit asserting claims of race discrimination and retaliation under Title VII of the Civil Rights Act of 1964. More specifically, Deravin claimed that Kerik refused to promote him because there was a preferential policy within the DOC to promote white employees, and Kerik did not want to promote an African-American employee to a position of authority and responsibility; and because Deravin had successfully defended himself against false sexual harassment charges brought by Jeanette Pinero, a DOC officer whom Kerik had purportedly dated.

After filing his charge of discrimination with the EEOC, Deravin received his promotion to the position of Deputy Warden on his sixth attempt, in June 2000.

When he filed his EEOC complaint, Deravin just checked the boxes marked “retaliation” and “national origin” as the bases for his discrimination claim. In his written description of the discrimination, Deravin focused on Kerik’s retaliatory actions and preferential treatment given to DOC employees who were members of the Emerald Society due to their “Irish-American Status.” In particular, Deravin stated in his complaint: “If you look at those members who have been given promotions and preferential treatment, you will see the majority are members of the Emerald Society. Both the retaliation I have experienced as well as this ongoing preferential treatment is in violation of the Civil Rights Act of 1964.”

After receiving notice of Deravin’s EEOC charge, the DOC commenced an internal investigation of his claims. As part of that investigation, the DOC analyzed the race of each applicant to the Deputy Warden position from January 1998 to June 2000 and concluded that out of the successful candidates “three (3) were male Hispanics, seven (7) were African-American males, four (4) were African-American females, four (4) were male Italians, eight (8) were male Irish, and one (1) was male Greek. There were a total of twenty-seven promotions. There is no disproportion in promotions of Irish descent as alleged by the complainant. Therefore, the allegations made by the complainant that members of the Emerald Society were given preferential treatment and promotions are unsubstantiated.”

After receiving a right to sue letter from the EEOC, Deravin brought a Title VII action, *pro se*, in federal district court asserting claims of race and retaliation discrimination. Defendants moved to dismiss the complaint. The district court, upon the recommendation of the magistrate, dismissed Deravin’s complaint finding that he had failed to exhaust his administrative remedies with regard to his race discrimination claim because “nothing in the [EEOC] complaint suggests that defendants

discriminated against plaintiff on account of his race.” The court rejected Deravin’s claim that the EEOC counselor failed to specify race as a basis for discrimination on the EEO complaint. Finally, the court concluded that defending oneself against charges of discrimination does not qualify as protected activity under Title VII and therefore rejected his retaliation claim. Deravin subsequently appealed to the Second Circuit Court of Appeals.

The appeals court first looked at the dismissal of Deravin’s claim on the basis that Deravin had failed to exhaust his administrative remedies by not indicating race as a basis of discrimination on his charge of discrimination. Although a plaintiff must first pursue available administrative remedies and file a timely complaint with the EEOC as a precondition to filing a Title VII claim in federal court, claims that were not asserted before the EEOC may be pursued in a subsequent federal court action if they are reasonably related to those that were filed with the agency. If the conduct complained of would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge that was made, a claim is considered reasonably related. This exception to the exhaustion requirement "is essentially an allowance of loose pleading" and is based on the recognition that "EEOC charges frequently are filled out by employees without the benefit of counsel and that their primary purpose is to alert the EEOC to the discrimination that a plaintiff claims [he] is suffering." *Butts v. City of N.Y. Dep't of Hous. Pres. & Dev.*, 990 F.2d 1397, 1402 (2d Cir.1993), *superseded by statute on other grounds as stated in Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684 (2d Cir.1998).

Looking at the factual allegations in the EEOC charge itself revealed to the appeals court that employees of Irish descent were receiving preferential treatment when compared to an African American employee and that this allegation was sufficient to give rise to the possibility of racial discrimination. The EEOC should have recognized this potential and investigated the complaint on that basis too. The appeals court pointed out that the DOC must have made this connection as it analyzed comparable white candidates in terms of ethnicity as well as successful Hispanic and African-American candidates. The court of appeals also spent considerable time pointing out that "the line between discrimination on account of race and discrimination on account of national origin may be so thin as to be indiscernible," *Adames v. Mitsubishi Bank, Ltd.*, 751 F.Supp. 1548, 1559 (E.D.N.Y.1990) (quoting *Enriquez v. Honeywell, Inc.*, 431 F.Supp. 901, 904 (W.D.Okla.1977)), or at least sufficiently blurred so that courts may infer that both types of discrimination would fall within the reasonable scope of the ensuing EEOC investigation for exhaustion purposes.”

The court of appeals also addressed Deravin’s argument that his failure to specify race as a basis for discrimination on his EEOC charge was because of an omission on the part of the EEOC counselor who helped him complete his complaint form. Such evidence of agency error can be presented to demonstrate exhaustion of a Title VII discrimination claim. Deravin had pointed to the EEOC’s failure to list retaliation as an independent basis for his discrimination claim on the EEOC notice of charge despite his allegation of retaliation in his initial administrative complaint. This error makes it more likely that the EEOC also made a mistake on the initial complaint by failing to check “race” as a basis for discrimination. The appeals court ruled that such evidence would overcome a motion to dismiss his race discrimination claim.

Most significantly, the Second Circuit Court of Appeals followed the Eleventh Circuit’s holding in *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1185-89 (11th Cir. 1997) that defending oneself against charges of discrimination - to the extent that such defense involves actual participation in a Title VII proceeding or investigation - is “protected activity” within the scope of §704(a) based on a plain reading of the statutory text. The appeals court thus determined that Deravin could maintain a retaliation claim for the DOC’s refusal to promote him as he had alleged that that refusal was in retaliation for his participation in a Title VII proceeding or investigation, albeit one directed against him based upon allegations of sexual harassment. §704(a) contains both an opposition clause and an independent participation clause. Although Deravin did not take action to protest or oppose illegal discrimination, he still participated in a Title VII proceeding, and §704(a) covers those

employees that “participate in *any* manner.” Such a broad reading of §704(a) may “ensure the overall integrity of the administrative process and encourage truthful testimony.”

The reviewing court was careful to point out that employers may still discipline employees for culpable conduct in spite of this ruling, but they cannot take action in retaliation for participation in a Title VII proceeding.

Ultimately, plaintiffs who allege retaliation for participation in a Title VII proceeding when that proceeding is an investigation of their own sexually harassing behavior will likely fail in proving such a claim. The appeal court’s ruling serves as an example of how broad courts will define “protected activity” in retaliation cases involving other types of participation in Title VII proceedings and investigations.