

H.R. ALERT*

J U L Y 2 0 0 2

Fifth Circuit Applies Presumption of Receipt of EEOC Notice of Right to Sue to Determine Timeliness of Title VII Plaintiff's Complaint

In a case rendered just this month, the United States Fifth Circuit Court of Appeals rendered a decision that addressed a matter of first impression in this Circuit.¹ *Taylor v. Books a Million, Inc.*, 2002 WL 1378576 (5th Cir.) (La.). The Court was faced with the key issue of when the 90-day period for a charging party to sue begins to run after receipt of the EEOC's notice of right to sue. Under federal law, before an employee may pursue a claim in federal court under Title VII, he or she must first exhaust all administrative remedies. Exhaustion occurs when the plaintiff files a timely charge with the EEOC and receives a statutory notice of right to sue. Title VII specifically states that a charging party has 90 days to file a civil action after receipt of such a notice from the EEOC; however, Title VII does not state when that period begins to run. In *Taylor*, the district court granted the employer's summary judgment, finding that Taylor's complaint was untimely.

The facts presented in *Taylor* on appeal presented the Court with the perfect opportunity to address the discreet issue of when the 90-day period begins to run. Plaintiff, Taylor, had submitted two charges of discrimination to the EEOC. The EEOC issued a notice of right to sue letter ("notice") for each charge on the same date, namely, September 29, 2000. Taylor filed his federal court lawsuit on January 5, 2001, 98 days after the mailing of the notice. In his complaint, Taylor averred that the EEOC had issued the notice on September 29, 2000 and that the suit had been filed within 90 days of receipt. The defendant moved to dismiss the lawsuit on the grounds that 98 days had passed

from the date the EEOC issued notice and the date Taylor filed the lawsuit. After noting the requirement that a charging party must file suit within 90 days of receipt of the EEOC notice of right to sue, the Court looked to other federal courts for guidance.

In the course of its opinion, the Fifth Circuit observed that when the date on which notice was actually received is either unknown or disputed, courts have presumed myriad receipt dates that range from three to seven days after the letter was mailed. Because Taylor had failed to specifically allege the date on which he actually received the notice or whether the date the notice was received was unknown, the Court concluded that a presumption of receipt would be appropriate. Giving Taylor the benefit of the doubt, the Court stated that even if it applied the maximum number of days that courts have allowed under the presumption of receipt doctrine (seven days after the EEOC mailed the letter), Taylor's claim would still be considered untimely. In support, the Court noted the following: (1) the EEOC issued notice on September 29th; (2) Taylor did not allege in his complaint that the notice was improperly sent; (3) a presumption, therefore, arose that Taylor received the right to sue letter on or prior to October 6th (seven days later); and, (4) Taylor had until January 4th to file his complaint. Since Taylor did not file his complaint until January 5th, one day beyond the 90-day period after applying the seven-day presumption, the Fifth Circuit determined that the district court had properly dismissed Taylor's claims as untimely.

Fifth Circuit Issues Key Case Interpreting the Required Causal Connection in Retaliation Cases under Title VII

In another recent case, the Fifth Circuit issued a key decision concerning the elements of a retaliation claim under Title VII, specifically focusing on the parameters of the requisite "causal link," which must exist between the protected activity and the adverse action. *Gee v. Principi*, 289 F.3d 342 (5th Cir. 2002). Plaintiff, Sidna B. Gee, filed a retaliation claim under Title VII against the Department of Veterans Affairs Medical Center. Gee alleged that she had been passed over for a new position in

retaliation for having filed a sexual harassment complaint against her supervisor three years earlier. The district court granted summary judgment, dismissing the employee's complaint. The district court held that Gee (the plaintiff) had failed to establish a *prima facie* case of retaliation. The Fifth Circuit reversed, finding that there was a genuine issue of fact as to the reason plaintiff did not get the position she sought.

On appeal, in the course of its opinion, the Fifth Circuit

* H.R. ALERT is intended to provide late-breaking news in the employment arena.

H . R . A L E R T

J U L Y 2 0 0 2

noted that in order to succeed on a Title VII retaliation case, the plaintiff must first make a *prima facie* showing: (1) that she engaged in an activity protected by Title VII; (2) that an adverse action occurred; and, (3) that a causal link existed between the protected activity and the adverse action. *Gee*, 289 F.3d at 345. The Court noted that the plaintiff need not prove that her protected activity was the sole factor motivating the employer's challenged decision in order to satisfy the causal link. The Court also observed that the plaintiff had satisfied the first two elements as she established that she had engaged in a protected activity (filed a sexual harassment complaint) and that she suffered an adverse action (passed over for a promotion). The issue presented was whether there was a genuine issue of fact as to the causal connection between her prior complaint of sexual harassment almost three years ago and her non-selection for the promotion she sought.

In dismissing plaintiff's retaliation case, the district court had placed emphasis on the fact that the harassment complaint had occurred over two years prior to plaintiff's non-selection and, that neither the alleged sexual harasser or the person she had complained to was involved in the decision not to select her. The Fifth Circuit, however, found that the mere lapse in time was not dispositive. More importantly, the Court stated that when the person involved in the decision serves as the so-called "cat's paw" of those who are acting from retaliatory motives, the causal link between the protected activity and the adverse employment action remains intact. 289 F.3d at 345. According to the Fifth Circuit, the ultimate question in this context is whether the employee can establish that others had influence or leverage over the official decision maker. *Id.* The Court also reiterated that the degree to which the final decision maker's decision was predicated on his own independent investigation then becomes a question of fact. *Id.* In reviewing the evidence and drawing all reasonable inferences in favor of plaintiff, the Fifth Circuit concluded that plaintiff had provided sufficient evidence to cast doubt on the reasons proffered by defendant for plaintiff not getting the job. As stated by the Fifth Circuit, summary judgment was inappropriate as it was up to the fact finder to conclude whether defendant's reasons for plaintiff's non-selection were false and were unduly influenced by others based on retaliatory motives.

PHELPS DUNBAR LLP
COUNSELORS AT LAW

Telephone: (504) 566-1311

Facsimile: (504) 568-9130

E-mail: info@phelps.com

NEW ORLEANS
BATON ROUGE
JACKSON
TUPELO
GULFPORT
HOUSTON
TAMPA
LONDON

H.R. ALERT

Inquiries concerning topics addressed in the H.R. ALERT may be directed to Nan Alessandra, Jane Armstrong, or Susan Desmond. Your comments, questions, and suggestions are encouraged.

EDITORS

M. Nan Alessandra**

Jane E. Armstrong

Kim M. Boyle

Susan Fahey Desmond

Susan W. Furr

Thomas H. Kiggins

David M. Korn

***Managing and Contributing Editor*

All rights reserved, PHELPS DUNBAR LLP H.R. ALERT is published as a service to clients and friends of PHELPS DUNBAR LLP, and should not be construed as legal or professional advice or as opinion on specific fact.

¹ The Fifth Circuit covers all federal district courts in Louisiana, Mississippi and Texas.

MARK YOUR CALENDARS

New Orleans Employment Law Seminar
Tuesday, November 7, 2002
Wyndham Canal Place

Please send any suggested topic ideas to:
alessann@phelps.com