IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JAMES E. HARRELL, JR.,

Plaintiff,

vs.

FEDERAL EXPRESS CORPORATION,

Defendant.

No. 04-2246 Ma/P

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

Before the Court is Plaintiff James Harrell's Motion for Leave to Amend Complaint, filed on September 20, 2004 (dkt #17). Defendant Federal Express Corporation ("Fed Ex") filed its response on October 18, 2004. For the reasons below, the motion is GRANTED in part and DENIED in part.

I. BACKGROUND

On April 8, 2004, Harrell filed this lawsuit, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, the Tennessee Human Rights Act ("THRA"), T.C.A. § 4-21-401 et seq., and 42 U.S.C. § 1981. The claims in the complaint stem from Harrell's termination on March 25, 2002 from his employment with Fed Ex, and his subsequent reinstatement to a demoted position on May 8, 2002.

23

On June 4, 2004, Fed Ex filed a motion to dismiss the state law THRA claim based on the THRA's one-year of statute of limitations. On August 25, 2004, the Court granted the motion and dismissed the THRA claim. In its order, the Court noted that

> Plaintiff's response to the motion to dismiss attempts to demonstrate a continuing violation by referring to a series of events not alleged as facts in the complaint. Motions to dismiss test the sufficiency of the complaint, not the sufficiency of briefs filed with the court. Although Plaintiff argues that the court may consider documents that "simply fill in the contours and details of the plaintiff's complaint and add nothing new" in deciding a motion to dismiss, . . . Plaintiff's additional factual allegations go beyond filling in the details of the existing allegations in the complaint. The last discriminatory event alleged in the complaint is Plaintiff's demotion on May 8, 2002. This was more than one year before the complaint was filed on April 8, 2004. The THRA claim, therefore, is time barred.

(Order Granting Mot. to Dismiss at 4-5) (internal citation and footnote omitted). Harrell now seeks to amend his complaint to reintroduce the THRA claim by alleging a continuing violation under the THRA. He also seeks to increase the amount of damages in his prayer for relief.

II. ANALYSIS

Federal Rule of Civil Procedure 15(a) provides that, after a responsive pleading has been filed, a party may file an amended complaint "only by leave of the court or by written consent of the adverse party," but such "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The rule "reinforce[s] the principle that cases 'should be tried on their merits rather than

the technicalities of pleadings.'" Moore v. City of Paducah, 790 F.2d 557, 559 (6th Cir. 1986)(quoting Tefft v. Seward, 689 F.2d 637, 639 (6th Cir. 1982)).

Nevertheless, a court may deny a motion for leave to amend the complaint if the amendment would be futile. Yuhasz v. Brush Wellman, Inc., 341 F.3d 559, 569 (6th Cir. 2003) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)). "A proposed amendment is futile if the amendment could not withstand a Rule 12(b)(6) motion to dismiss." Rose v. Hartford Underwriters Ins. Co., 203 F.3d 417, 420 (6th Cir. 2000). When a court is faced with a Rule 12(b)(6) motion to dismiss, "all of the allegations contained in the plaintiff's complaint are accepted as true, and the complaint is construed liberally in favor of the party opposing the motion." Miller v. Currie, 50 F.3d 373, 377 (6th Cir. 1995). In assessing whether an amended complaint could withstand a Rule 12(b)(6) motion to dismiss, the following principles govern the court's analysis:

> In appraising the sufficiency of the complaint [the court should follow] the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Cameron v. Seitz, 38 F.3d 264, 270 (6th Cir. 1994) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

A. THRA Claims and the Continuing Violation Doctrine

The continuing violation doctrine is an equitable principle in discrimination cases, which "relieves the plaintiff from the burden

of proving that the entire violation occurred within the limitations period." Spicer v. Beaman Bottling Co., 937 S.W.2d 884, 889 (Tenn. 1996). The Sixth Circuit recognizes two categories of continuing violations: (1) the "serial" violation, which involves repeated discriminatory acts, such as where an employer continues to impose disparate work assignment between similarly situated employees; and (2) the "long-standing and demonstrable policy" violation, which involves intentional discrimination against a protected class, such as an established and repeated pattern of paying men more than women. See Foster v. Overnite Transportation Co., No. 01-2854, 2003 WL 297544, at *4 (W.D. Tenn. Jan. 16, 2003); Spicer, 937 S.W.2d at 889. "[T]he categories are distinguishable, because a 'serial' violation affects only one person, while a 'policy' violation reveals disparate treatment of the protected class as a whole." Foster, 2003 WL 297544, at *4. Harrell does not allege a policy of discrimination against all African-Americans; rather, he asserts that he is a victim of discriminatory actions by Fed Ex based on his race. Therefore, only the continuing "serial" violation is at issue in this case.

To determine whether a violation is a continuing violation, the inquiry is "whether the earlier acts were 'related closely enough to constitute a continuing violation' or were 'merely discrete, isolated, and completed acts which must be regarded as individual violations.'" Spicer, 955 S.W.2d at 637-38 (quoting

Berry v. Board of Supervisors of L.S.U., 715 F.2d 971, 981 (5th Cir. 1983)). To make this distinction, courts consider three factors: (1) whether the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation; (2) whether the alleged acts are recurring or more in the nature of individual incidents; and (3) whether the alleged acts have the degree of permanence that should trigger an employee's awareness of and duty to assert his or her rights, or that should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate. Spicer, 937 S.W.2d at 890 (quoting Berry, 715 F.2d at 981); see also Frazier v. Heritage Federal Bank for Savings, 955 S.W.2d 633, 638 (Ct. App. Tenn. 1997). Applying these factors to the proposed amended complaint, and treating all well-pleaded allegations as true, the Court concludes that, with the exception of Harrell's retaliation claim, the proposed amendments would be futile because the THRA claims would not survive a Rule 12(b)(6) motion to dismiss.

As an initial matter, the last discriminatory act alleged in the original complaint was Harrell's demotion on May 8, 2002, which the court has already ruled is time barred because the federal complaint was filed on April 8, 2004 - more than one year after that discriminatory act. Almost all of the new allegations of discrimination contained in the proposed amended complaint also

occurred more than one year before the complaint was filed, and are likewise untimely. These include Harrell's claims that: he did not timely receive proper training in his new position; he had to move packages manually instead of with a forklift; management falsely accused him of talking on his cell phone; he was denied use of his cell phone even though other employees were allowed to use their cell phones; he did not timely receive his back pay; he was not timely reissued his employment badge; he was threatened with disciplinary action for using the internet while other employees who used the internet were not threatened; and he was denied access to the e-mail group to which other employees had access.[1]

As for the remainder of the new allegations which do fall within the one year limitations period, these discriminatory acts are discrete, unconnected acts that do not constitute a serial violation for purposes of the statute of limitations. Specifically, Harrell alleges that in August 2003, he was denied an interview for two positions for which he was qualified and for which he applied. However, "[d]iscrete acts such as termination,

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[1]It is not clear from these new allegations what class these "other employees" are members of, and furthermore, whether any of these discriminatory acts affect the terms and conditions of Harrell's employment. 42 U.S.C. §§ 2000e-2(a)(1); Mehr v. Starwood Hotels & Resorts Worldwide, Inc., 72 Fed. Appx. 276, 281 (6th Cir. 2003) ("Claims under the THRA are analyzed in the same manner as Title VII claims."). However, even if the Court were to give Harrell the full benefit of the doubt on these issues, he nevertheless fails to state a continuing violation under the THRA.

failure to promote, denial of transfer, or refusal to hire are easy to identify . . . [and each] constitutes a separate actionable 'unlawful employment practice.'"[2] See, e.g., National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 120 (2002). Likewise, Harrell's claim that he was given an unwarranted warning letter one week after his Right to Sue letter was issued in January 2004, is also a discrete and unconnected discriminatory act.[3]

Harrell also contends that in November 2003 and January 2004, he "complained" about being assigned more work than "other employees" in his work area. In addition to being overly vague, this allegation fails to meet the "frequency" factor set forth in Spicer. These acts, as well as the other acts of discrimination

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[2]The court notes that Harrell's failure to hire claim (based on events that allegedly occurred in August 2003) appears to fall beyond the one year statute of limitations period. Neither party addressed this issue in their briefs. The court need not resolve this issue, however, because Harrell does not allege that an applicant outside of his protected class was hired instead of him and, thus, he fails to state a claim for failure to hire. Betkerur v. Aultman Hosp. Ass'n, 78 F.3d 1079, 1095 (6th Cir. 1996).

[3]However, the court concludes that Harrell does sufficiently state a claim for retaliation under the THRA, and will allow Harrell to amend his complaint to add his retaliation claim. See Thaddeus-X v. Blatter, 175 F.3d 378, 394 (6th Cir. 1999) (setting forth elements of retaliation claim); Gill v. Rinker Materials Corp., No. 3:02-CV-13, 2003 WL 749911, at *2-3 (E.D. Tenn. Feb. 24, 2003) (same); see also Moore v. Nashville Elec. Power Board, 72 S.W.3d 643, 649 (Ct. App. Tenn. 2001) (under the THRA, an individual may pursue either an administrative path or file a direct action in circuit or chancery court); Hoge v. Roy H. Park Broadcasting of Tennessee, Inc., 673 S.W.2d 157, 160 (Ct. App. Tenn. 1984) (same).

contained in the proposed amended complaint, are "more in the nature of an isolated work assignment or employment decision," as opposed to being recurring acts of discrimination (e.g. a bi-weekly paycheck).[4] Berry, 715 F.2d at 981.

For these reasons, Harrell's motion for leave to amend his complaint is GRANTED in part, to add only the THRA claim for retaliation. The motion is DENIED with respect to all other THRA claims.

B. Increased Damages

In his proposed amended complaint, Harrell also seeks to add a prayer for up to $200,000 for front pay, back pay, any benefits, and injunctive relief to which he is entitled, and he seeks to increase his prayer for punitive damages from $300,000 to $50,000,000. In response, Fed Ex argues these increases are prejudicial.

"The general rule is that a proposed amendment which amplifies or increases the amount of damages or varies the prayer for filing is permitted and relates back even after a statute of limitations has run." Jahr v. Great West Cas. Co., No. 3:00-619, 2002 WL 32050122, at *2 (E.D. Tenn July 24, 2002)(citing United States v. Templeton, 199 F.Supp. 179, 183 (E.D. Tenn. 1961)). This rule

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[4]This new allegation, standing alone, would not survive a Rule 12(b)(6) motion to dismiss, as it is not apparent from the wording of the amended complaint exactly what Harrell claims is the discriminatory act.

follows Rule 15's liberal standard. Moreover, the Court concludes that the prejudice to Fed Ex, if this amendment is allowed, would be minimal. Accordingly, the Court will grant Harrell leave to amend his complaint to increase his prayer for damages.

III. CONCLUSION

For the reasons above, Harrell's Motion for Leave of Court to Amend Complaint is GRANTED in part and DENIED in part.

Harrell is directed to file with the Clerk of Court an amended complaint to (1) add his THRA retaliation claim and (2) increase the amount of damages.

IT IS SO ORDERED.

TU M. PHAM
United States Magistrate Judge

2/7/05
Date