Fabricated EEO Charges—What's A Business To Do? Burdens of Proof in Title VII Retaliation Claims

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In a recent case out in the Tenth Circuit, two employees sued their former employer for retaliation after they were terminated for making allegations of harassment which the employer concluded were intentionally false. *Renner-Wallace v. Cessna Aircraft Co.*, 2003 U.S. Dist. LEXIS 4134 (D. Kan.), *aff'd* 95 Fed. Appx. 967 (10th Cir. 2004). The district court granted the employer's motion for summary judgment holding that the employees had failed to present any evidence that the proffered reason for the employees' termination was a pretext for discrimination. This decision highlights the dilemma faced by employers who seek to respond to fabricated EEO claims in the face of an almost certain retaliation charge.

The Fourth Circuit has not had an occasion to address the exact situation presented in *Renner-Wallace v. Cessna*. This article considers how the Fourth Circuit is likely treat a retaliation claim based on a fabricated complaint of race, sex, religion, or national origin discrimination, focusing on the burden the court is likely to impose on employers defending such claims. This article also discusses the possible impact of the United States Supreme Court's recent decision in *Desert Palace v. Costa*, 539 U.S. 90, 123 S. Ct. 2148 (2003), on the treatment of such claims.

I. The Existing Framework for Title VII Retaliation Claims

Title VII's anti-retaliation provision, known interchangeably as § 704 and § 2000e-3(a), provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C. § 2000e-3(a) (Lexis 2003).

Cases brought under § 704, like the one contemplated here, are often resolved on summary judgment. A court faced with such a motion must first ask whether the plaintiff has made out a *prima facie* case of unlawful retaliation. To meet this burden, the plaintiff-employee must show (1) that the employee "engaged in protected activity" (opposed or made a charge of unlawful activity under Title VII); (2) that the employer took adverse employment action against the employee; and (3) that a sufficient causal connection existed between the protected activity and the adverse employment action. *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir. 1996) (citing *McNairn v. Sullivan*, 929 F.2d 974, 980 (4th Cir. 1991)); *see also DeWitt v. Mecklenburg County*, 73 F. Supp. 2d 589, 602 (W.D.N.C. 1999).

If the plaintiff succeeds in making out his prima facie case, courts in the Fourth Circuit go on to apply one of two burden-shifting tests, depending upon the strength of the plaintiff's initial showing. The first test, a three-step scheme established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), is applied to what are known as "pretext cases."

In pretext cases, the plaintiff has proffered only circumstantial, as opposed to direct, evidence of an impermissible motive. A presumption of unlawful retaliation then arises, and the burden of production shifts to the defendant, who may rebut the presumption by offering a legitimate, nondiscriminatory reason for the adverse employment action. Under McDonnell Douglas, if the defendant-employer meets this burden, "the presumption raised by the prima facie case is rebutted and 'drops from the case,' and [the plaintiff] bears the ultimate burden of proving that she has been the victim of retaliation." *Dowe v. Total Action* against Poverty, 145 F.3d 653, 656 (4th Cir. 1998) (internal citations omitted); *see also DeWitt*, 73 F. Supp. 2d at 597. Ultimately, the plaintiff must show that the adverse action would not have occurred "but for" the employer's consideration of the protected activity. DeWitt, 73 F. Supp. 2d at 602 (citing *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365–66 (4th Cir. 1985)).

The *McDonnell Douglas* proof scheme places the ultimate burden of persuasion on the plaintiff, distinguishing it from the "mixed motive" method of proof established in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The "mixed motive" scheme applies when both legitimate and illegitimate considerations motivated an adverse employment action. If the plaintiff's prima facie case entitles him to a "mixed motive"

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1 The author gratefully acknowledges the usual outstanding and invaluable assistance of our associate, Gregory R. Hunt, as well as assistance and work of Meghan Cloud, a former law student at the University of Virginia, and Richard Farley, a student at Marshall Wythe School of Law, at the College of William and Mary.

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instruction, the burden of persuasion then shifts to the employer to establish a "same decision" defense—that is, the company must show that it would have made the same decision even absent the impermissible consideration. A defendant who successfully proves the "same decision" defense in a Title VII retaliation action can still avoid a finding of liability altogether. *Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 552 n.7 (4th Cir. 1999).[2] *See Matima v Celli*, 228 F.3d 68, 81(2nd Cir. 2000); *Norbeck v Basin Elec. Power Coop.*, 215 F.3d 848 (8th Cir. 2000); *McNutt v. Board of Trustees*, 141 F.3d 706 (7th Cir. 1998); *Woodson v. Scott Paper Co.*, 109 F.3d 913 (3rd Cir.) cert. denied 522 U.S. 914 (1992).

Because it places the ultimate burden on the defendant employer to prove that the adverse employment action would have been taken even in the absence of the impermissible consideration, the "mixed motive" scheme is significantly friendlier to plaintiffs than is *McDonnell Douglas*.

In the Fourth Circuit the question of which test to apply has turned on the strength of the plaintiff's initial showing; a plaintiff presenting "direct evidence" of discriminatory motive is entitled to application of a "mixed motive" instruction, while a plaintiff relying solely on "circumstantial evidence" must meet the more rigorous *McDonnell Douglas* standard. See *Williams v. City of Fayetteville*, 2002 U.S. Dist. Lexis 26221, *52–54 (E.D.N.C. May 13, 2002) (differentiating between the two types of evidentiary showings). The distinction is not a model of clarity; one particularly circumspect in light of a more recent Fourth Circuit decision which has defined "direct evidence" as "evidence, be it direct or indirect, that is of sufficient strength to warrant use of the mixed-motive framework." *Hill v. Lockheed Martin Logistics Mgmt.*, 314 F.3d 657, 665 (4th Cir. 2004).

This ambiguity is unfortunate. Whether a court chooses to apply *McDonnell Douglas* or "mixed motive" standard has significant implications for any employer contending that a plaintiff fabricated the complaints giving rise to the retaliation claim, and the fact-dependent nature of that inquiry makes its outcome difficult to predict. The uncertainty is exacerbated by the fact that the Fourth Circuit apparently has yet to face a Title VII retaliation case in which the defendant-employer discharged the plaintiff because he reasonably believed that the plaintiff had fabricated the underlying complaint.[3]

The Fourth Circuit has shown a strong preference for the *McDonnell Douglas* test in the context of retaliation claims under § 704. See, e.g., *Lauer v Schewel Furniture Co.*, 84 Fed. Appx. 323, 329-330, 2004 U.S. App. LEXIS 53 (4th Cir. 2004); *Tinsley v. First Union Nat'l Bank*, 155 F.3d 435 (4th Cir. 1998) (the "'series of proofs and burdens outlined in *McDonnell Douglas* apply to retaliation claims'"); *Dowe*, 145 F.3d at 656; *Causey v. Balog*, 162 F.3d 795, 803 (4th Cir. 1998); *DeWitt*, 73 F. Supp. 2d at 602; *Williams v. City of Fayetteville*, 2002 U.S. Dist. Lexis 26221, *49 n.20. Kubicko, did expressly note that the mixed motive proof scheme is available to Title VII plaintiffs claiming retaliation who "can establish the necessary evidentiary threshold." 181 F.3d at 553 n.8; *see Myers v Paxar Corp.*, 1999 U.S. Dist. LEXIS 21400, *16 n. 4 (W.D. N.C. 1999) (court sua sponte raises issue and concludes that "mixed motive" theory does not apply because no "direct evidence" of a retaliatory attitude); *see also, Medlock v. Ortho BioTech*, 164 F.3d 545 (10th Cir. 1999); *Cosgrove v. Sears Roebuck & Co.*, 9 F3d 1033 (2d Cir. 1993).

In *Kubicko v. Ogden Logistics*, the plaintiff alleged retaliation because he supported a colleague who made a sexual harassment complaint. The lower court granted summary judgment to the employer, but the Fourth Circuit found that the facts justified the use of mixed-motive proof scheme because the former employee offered testimony of statements made by the decision maker within two days of the termination which suggested a direct connection between his protected activities and his termination. 181 F.3d at 553 (citing *Fuller v Phillips*, 67 F.3d 1137, 1142 (4th Cir. 1995). The court of appeals went on to hold that summary judgment was inappropriate because, "when the evidence is viewed in the light most favorable to Kubicko, the record supports a finding that [the employer] did not legitimately believe that Kubicko fabricated without foundation the allegations of sexual harassment." *Id.* at 554–55.

A more recent case from North Carolina, *Williams v. City of Fayetteville*, 2002 U.S. Dist. Lexis 26221 (E.D.N.C. 2002), involved alleged fabrication of discrimination claims. The plaintiffs in Williams were African-American police officers who had voiced their concerns about workplace racism in internal interviews. Under pressure from white supervisors, they went on to name fellow officers who they believed felt similarly. The supervisors later discharged the interviewees for lying, in part because the officers they had named denied sharing their sentiments. The plaintiffs filed suit under various theories, including a retaliation claim under Title VII and an allegation that their constitutional rights to equal protection had been violated.

Applying *McDonnell Douglas*, the district court denied the defense's motion for

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2 These decisions are based on a determination that §107 (a) of the Civil Rights Act of 1991 (which overruled *Price Waterhouse v. Hopkins* and provides that this "same result defense" does not exonerate an employer from liability; it only limits the damages that can be recovered) does not apply to a "retaliation claim" under Title VII.

3 *See Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 554–55 (4th Cir. 1999) ("We have not yet had an occasion to consider whether an employer is liable under § 704's opposition clause for retaliation if the employer took an adverse employment action against an employee in actual belief that the employee fabricated without foundation the content of his opposition activity, and the present appeal does not provide us with such an occasion.").

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summary judgment with respect to the plaintiffs' retaliation claims. In the course of so finding, however, the court noted that the city's proffered reason for the termination—plaintiffs' alleged untruthfulness—"satisfied [the defendant's] burden of producing a 'legitimate, nonretaliatory reason'" for the adverse employment actions. *Id.* at *62. It further noted that the city's decision was entitled to a degree of deference stemming from the business judgment rule. Id. at *63. Nonetheless, the court held that the plaintiffs had "offered sufficient evidence to raise a genuine issue of material fact as to the pretextual nature of the City's stated reasons for its conduct and to support the inference that the City's suspension of Williams was motivated by retaliatory animus." *Id.* at *69. The court noted that because activity protected by § 704 includes allegations of discrimination that do not turn out to be true, a termination based on lying about Title VII claims presents an unusually delicate situation. *Id.* at *62 n.23.

In a footnote, the *Williams* court noted that the plaintiffs might in fact be entitled to the less onerous "mixed motive" standard. *Id.* (citing *Kubicko*, 181 F.3d at 553). It declined, however, to choose between the two tests because the plaintiffs had met the more stringent *McDonnell Douglas* standard, and denied summary judgment on the Title VII claim. *Id.* The police chief appealed the denial of summary judgment on the equal protection constitutional claim under 42 U.S.C. § 1983, arguing that he was entitled to "qualified immunity". The Fourth Circuit, without addressing the Title VII claim, disagreed with the district court and held the police chief was entitled to qualified immunity and remanded for the entry of summary judgment on that issue, and a trial on the Title VII claim. *Williams v. Hansen*, 326 F.3d 569 (4th Cir. 2003).

II. Application of Current Fourth Circuit Law to the Fabrication Hypothetical

A plaintiff who fabricates the complaint of discrimination which underlies his claim of unlawful retaliation will have little difficulty making out a *prima facie* case. The first part of the three-part standard[4] is easily met; by definition, either an internal complaint of discrimination will have been made to the company or a formal charge lodged with the Equal Employment Opportunity Commission or some other civil rights organization. To sustain a claim for retaliation the plaintiff does not need to prove that the underlying claim of discrimination is true or even meritorious. *Balazs v. Liebenthal*, 32 F.3d 151, 158 (4th Cir. 1994); *Ross*, 759 F.2d at 357 n.1. Instead, the plaintiff must merely establish that s/he "believe[d] in the validity of the claim, and that belief [was] reasonable." *Childress v. City of Richmond*, 907 F. Supp. 934, 940 (E.D. Va. 1995), *aff'd* 134 F.3d 1205 (4th Cir. 1998) (en banc).[5] At the preliminary stage of determining the existence of prima facie case, a district court is not normally willing to go into such complex factual issues as whether the plaintiff actually fabricated the underlying allegations. *See, e.g., Renner-Wallace v. Cessna*, 2003 U.S. Dist. LEXIS 4134 (D. Kan. Mar. 17, 2003) (whether the plaintiffs in fact fabricated the charges is a jury question).

The two remaining prongs of the prima facie showing are likewise easily satisfied; dismissal is unquestionably an adverse employment action, and causation is usually sufficient to established simply by demonstrating temporal proximity between the complaint and the adverse employment action. *See, e.g., Karpel v. INOVA Health Sys. Servs.*, 134 F.3d 1222, 1229 (4th Cir. 1998); *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989).

Once the plaintiff meets his initial burden, the question of which proof test applies will affect the defendant's evidentiary obligation significantly. If *McDonnell Douglas* is invoked, the employer in our hypothetical will be well positioned to win on summary judgment. The prima facie showing creates a presumption of unlawful retaliation that can be rebutted relatively easily. Any legitimate, nondiscriminatory reason for the discharge will be enough to shift the burden back to the plaintiff. *See, e.g., Causey v. Balog*, 162 F.3d at 803 (affirming dismissal of baseless claims and noting that, even if the plaintiff had made out a prima facie claim, the defendant had proffered legitimate, non-discriminatory reasons for its actions that rebutted plaintiff's allegations of retaliation); *DeWitt*, 73 F. Supp. 2d at 599 ("Even were the record to support a *prima facie* case of disparate treatment, defendants have articulated legitimate, nondiscriminatory reasons for each of the challenged employment actions."). Thus, an employer who genuinely believes that the plaintiff fabricated the underlying allegations of discrimination need only cite dishonesty or breach of trust as the reason for termination in order to shift the ultimate burden of persuasion to the plaintiff, which is just what the defendant in *Renner-Wallace* did.

Under *McDonnell Douglas*, after the presumption of discrimination "drops out," a plaintiff must present enough evidence to show that a genuine issue of material fact exists regarding whether the employer's proffered rational is a "pretext." If they do not, as in *Renner-Wallace*, the case can be decided as a matter of law; if they do, the question of whether the employer's legitimate rationale—falsified accusations—is a "pretext" will proceed to a jury, with the burden on the plaintiff to prove the

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4 *See* supra p 2.

5 Cases in the Fourth Circuit applying this reasonableness standard do not involve fabricated complaints; rather, they address complaints that either fall wholly outside the purview of Title VII or are clearly baseless. Such claims do not survive the summary judgment stage because the plaintiffs fail to make the prima facie showing. *See, e.g., Mayo v. Kiwest Corp.*, 898 F. Supp. 335 (E.D. Va. 1995) (because same-sex sex discrimination clearly is not actionable under Title VII, the plaintiff's action for retaliatory discharge was not founded on a reasonable belief that the employer had acted unlawfully); Childress, 907 F. Supp. at 940 (dismissing white male officers' retaliation claims because their complaints of racist and sexist remarks could not reasonably be expected to state a claim under Title VII).

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pretextual nature of the rationale by a preponderance of the evidence. *See Lauer*, 84 Fed. Appx. at 329-330 (contradictions between employer's proffered explanation for the adverse action and the employer's contemporaneous statements to the employee are "convincing evidence" of pretext, and reinstated the plaintiff's retaliation claim).

In a case where an employer does in fact conclude in good faith that claims of discrimination were made for improper reasons or untruths were involved, a plaintiff should find this ultimate burden very hard to meet. Indeed, where the complaints underlying a Title VII retaliation claim are baseless or fabricated, and/or there is evidence that the claims were made out of spite, plaintiffs may find it hard to put on any evidence at all. *See Renner-Wallace* at *18–19; *Causey*, 162 F.3d at 803 (plaintiff presented "no competent evidence suggesting [that the proffered] rationale was pretextual"); *DeWitt*, 73 F. Supp. 2d at 599 ("[p]laintiff has provided no evidence to disprove Defendants' explanations, much less to establish that gender was the true motivating factor for each of the decisions").

Staving off liability will be more challenging if the court applies the "mixed motive" analysis. The defendant-employer will be required to make a much stronger showing during the second stage of the proceeding, because it has the burden of persuasion, and dismissal as a matter of law will be much less likely. *See, e.g., Kubicko*, 81 F.3d at 554–55. Should the case go to trial, the evidence needed by the defense will necessarily vary with the facts of the case and the strength of the plaintiff's own showing. Ultimately, the outcome may be the same. Taking into account the Fourth Circuit's regard for the "business judgment rule," an employer who discharges an employee in good faith and with the reasonable belief that the employee fabricated his underlying Title VII claim has a good chance of avoiding liability altogether.

III. The Potential Impact of Changing Federal Law

Over the years, two developments have served to make methods of proof under Title VII increasingly plaintiff-friendly. The first of these was the Civil Rights Act of 1991, which overturned the holding of *Price Waterhouse* (that if a defendant in a mixed motive case could establish that the "same decision" would have been made regardless there is no Title VII liability) and held the "same decision" defense only serves to limit a plaintiff's right of recovery. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B). The second came in June 2003, when the U.S. Supreme Court blurred the already indistinct line between pretext and mixed-motive cases in *Desert Palace v. Costa*, 539 U.S. 90, 123 S. Ct. 2148 (2003). In *Desert Palace*, the Court held that a plaintiff seeking a mixed-motive instruction need present only circumstantial, as opposed to "direct evidence" of an impermissible motive. Because prior to *Desert Palace* the distinction between cases calling for application of the "mixed motive" and those calling for *McDonnell Douglas* rested on the strength of the plaintiff's showing, Desert Palace might thus be read as obviating *McDonnell Douglas* altogether.

Nonetheless, there is a distinct possibility that the Fourth Circuit will decline to apply the rule of *Desert Palace* to Title VII retaliation claims. For example, in *Lauer* which was decided on January 5, 2004, the Court ruled that the plaintiff had to meet the *McDonnell Douglas* scheme in retaliation claims. 84 Fed. Appx. at 329. Nowhere in the decision does the court cite *Desert Palace* or *Kubicko*; instead it relied on an earlier decision, *Karpel v Inova Health Sys. Servs.*, 134 F.3d 1222, 1228 (4th Cir. 1998). The Supreme Court in *Desert Palace* was construing § 2000e-2(m). As previously noted, the Fourth Circuit in 1999 made clear its position, shared at the time by several other circuits, that this provision applies only to charges of disparate treatment discrimination, not to claims of unlawful retaliation under § 704. *Kubicko*, 181 F.3d at 552 n.7. Thus, just as the liability-limiting facet of the 1991 amendments does not apply to claims of retaliation, it is possible that in the Fourth Circuit the lowering of the evidentiary bar for plaintiffs permitted by *Desert Palace* may not apply at least in the Fourth Circuit to those alleging a retaliation claim. Alternatively, it could simply be that the facts of *Lauer* where such that the mixed motive issue was not presented. Certainly, the *Kubicko* court noted that there was no absolute ban against the use of a mixed motive approach to a Title VII claim, and it is hard to see how the elimination of a requirement of "direct evidence" to get a mixed motive charge will not be applied to these troublesome claims.

Assuming that the Fourth Circuit does retain the distinction between circumstantial and direct evidence in Title VII retaliation claims, employers who have fired employees in good faith for fabrication will continue to enjoy the comparatively low hurdle that is *McDonnell Douglas*; where the employer's decision was made in good faith, plaintiffs will have a difficult time finding direct evidence of an impermissible motive. The Fourth Circuit's invocation of the business judgment rule in Title VII retaliation cases should only help. *See, e.g., DeWitt*, 73 F. Supp. 2d at 599 ("'When an employer articulates a reason for discharging the plaintiff not forbidden by law, it is not our province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for plaintiff's termination.'") (citing *DeJarnette v. Corning, Inc.*, 133 F.3d 293, 298–99 (4th Cir. 1998)). The ultimate burden of persuasion will thus be on the plaintiff to show that the proffered reason for termination—dishonesty—is pretextual. This was the framework applied in *Renner-Wallace*, decided almost three months before *Desert Palace* was handed down, but the Tenth Circuit had no trouble affirming the district court's rationale in April 2004, and the *Lauer* court did not hesitate in applying the requirement that the plaintiff prove "pretext" on her retaliation claim. ■