UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-5729
Summary Calendar

CHARLES W. HUNT, ET AL.,

Plaintiffs,

CHARLES W. HUNT,

Plaintiff-Appellant,

versus

INTERNATIONAL BUSINESS MACHINES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(SA-90-CV-1103)

(August 9, 1993)

Before POLITZ, Chief Judge, HIGGINBOTHAM and DeMOSS, Circuit Judges.

PER CURIAM:*

Denied leave to add a Title VII claim to his complaint after receipt of a notice of right to sue, Charles W. Hunt appeals. We reverse.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Hunt sued International Business Machines, Inc., contesting his termination as an account marketing representative. Purporting to join the U.S. Secretary of Labor and the Chairman of the Equal Employment Opportunity Commission as involuntary plaintiffs, Hunt claimed violations of the Age Discrimination in Employment Act,[1] the Employee Retirement Income Security Act,[2] affirmative action requirements for federal contractors promulgated pursuant to Executive Order 11246, 42 U.S.C. § 1981, federal common law, the Texas Commission on Human Rights Act,[3] and state common law. Because the limitations period on certain of his claims was about to expire, Hunt filed suit before receiving a notice of right to sue on his pending EEOC charge. His original complaint, however, advised that he would seek leave to assert a race discrimination claim under Title VII of the Civil Rights Act of 1964[4] upon receipt of a right-to-sue letter. Simultaneously, Hunt persuaded the district court to stay the proceedings pending issuance of the notice of right to sue.

During the stay, the Secretary of Labor and the Chairman of the EEOC moved for dismissal. IBM moved for dismissal of certain

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[1] 29 U.S.C. § 621 *et seq*.

[2] 29 U.S.C. § 1001 *et seq*.

[3] Tex.Rev.Civ.Stat.Ann. art. 5221k.

[4] 42 U.S.C. § 2000e *et seq*.

claims. While these motions were pending Hunt received his notice of right to sue and within 90 days moved for leave to file his first amended complaint. The district court dismissed the involuntary plaintiffs, the federal contract debarment claim, and the 42 U.S.C. § 1981 claim, simultaneously denying Hunt's motion for leave to amend his complaint. The court invited Hunt to "urge a new motion to amend in light of the instant order," but gave no reasons for its rulings.

Maintaining that he did not receive a copy of this order, Hunt did not reurge a motion to amend until the eve of trial, nine months later. The district court denied the motion as untimely and granted summary judgment for IBM on Hunt's remaining claims. Unable to obtain reconsideration of the denial of leave to add the Title VII claim, Hunt timely appealed.

Analysis

On appeal Hunt seeks only to assert his Title VII claim. We are persuaded that the district court exceeded the bounds of its discretion[5] in denying Hunt's first motion for leave to amend.

The Federal Rules of Civil Procedure adopt a liberal policy in regard to amendment of pleadings.[6] Fed.R.Civ.P. 15(a) directs that leave to amend "be freely given when justice so requires." Absent

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[5] **Whitaker v. City of Houston, Tex.**, 963 F.2d 831 (5th Cir. 1992) (denial of leave to amend pleadings is reviewed for abuse of discretion).

[6] **Jamieson v. Shaw**, 772 F.2d 1205 (5th Cir. 1985).

special circumstances, it is well settled that a plaintiff challenging an adverse employment action is entitled to amend his complaint to add a Title VII claim based on the same action within 90 days of receipt of a notice of right to sue.[7] In the normal course of events, Hunt should have been allowed to amend.

IBM, however, argues that the particular amended complaint that Hunt wished to file was properly rejected because it retained parties and claims that the district court simultaneously dismissed. In IBM's view, the district court could not dismiss those parties and claims while allowing the filing of an amended complaint that retained them. We disagree; IBM has artificially elevated form over substance.

At the time that he filed his motion for leave to amend, appropriately accompanied by his proposed first amended complaint, Hunt did not know whether the pending motions to dismiss would be granted. Unless prepared to concede those motions, he had to retain the disputed parties and claims in the new complaint. Hunt added, as relevant herein, no new material other than that pertaining to his race discrimination claim.[8] Therefore, the

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[7] See, e.g., **Doss v. South Central Bell Telephone Co.**, 834 F.2d 421 (5th Cir. 1987); **Langston v. Insurance Co. of North America**, 827 F.2d 1044 (5th Cir. 1987).

[8] The only other new material did not relate to the disputed parties and claims. It consisted of the substitution of a state law claim for tortious interference in place of a wrongful discharge claim and the specification of an additional item of damages. The proposed first amended complaint dropped the federal common law claims and the Texas Human Rights Act claim.

proposed first amended complaint did only what Hunt legally was required to do in order to assert his Title VII claim.

There was no reason to deny Hunt leave to add his Title VII claim, notwithstanding the pending motions to dismiss. The district court could have allowed the amended complaint and then dismissed those parties and claims subject to dismissal.[9] Alternatively, it could have granted leave to amend to add the Title VII claim and directed Hunt to file an amended complaint that excluded the dismissed parties and claims. Either of these options would have solved the technical anomaly, to which IBM points, without interfering with Hunt's substantive right to file his Title VII claim. Congress did not intend the statutory prerequisites to advancing a Title VII claim to become a procedural minefield.

REVERSED and REMANDED for further proceedings consistent herewith.

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[9] See **John v. State of Louisiana (Board of Trustees for State Colleges and Universities)**, 757 F.2d 698 (5th Cir. 1985) (plaintiff amended his complaint to reinstate his Title VII claim after receipt of a notice of right to sue while part of a motion to dismiss other portions of the complaint was pending).