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Client Alert

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U.S. Supreme Court Defines Charge Standard Under the ADEA

On February 27, 2008, in a ruling limited to the Age Discrimination in Employment Act ("ADEA"), the United States Supreme Court held that any document filed with the Equal Employment Opportunity Commission ("EEOC" or "Agency") that names the employer, provides identifying and contact information, describes the alleged discrimination, and requests that the Agency take remedial action to vindicate the employee's rights or otherwise settle a dispute with an employer, can reasonably be construed as a discrimination "charge" within the meaning of the Age Discrimination and Employment Act ("ADEA").

Factual Background

In *Federal Express Corp. v. Holowecki*, the U.S. Supreme Court was asked to decide what constitutes "a charge alleging unlawful discrimination" under the ADEA in order to resolve different definitions that the Courts of Appeals had adopted. Incredible as it may be, the statute itself does not define the term "charge", and EEOC's regulations only give some content to the term. The ADEA also requires that "[n]o civil action… be commenced… until 60 days after a charge alleging unlawful discrimination has been filed with the" EEOC. Equally important, unlike Title VII plaintiffs, ADEA plaintiffs need not wait for issuance of a right-to-sue letter before commencing a civil suit. Concomitantly, upon receipt of a charge, the ADEA does require that EEOC engage in conciliation to eliminate any alleged unlawful discriminatory practices.

In this case, the plaintiff, Patricia Kennedy, submitted an Intake Questionnaire with an accompanying six-page affidavit to the EEOC alleging that FedEx had committed age discrimination. The Intake Questionnaire listed factual information such as names and addresses and contained a general allegation that Kennedy and other employees had been the victims of age discrimination because of a performance plan FedEx had implemented. Separately, in her detailed affidavit, Kennedy requested that the Agency "[p]lease force Federal Express to end their age discrimination plan so we can finish out our careers absent the unfairness and hostile work environment created." Kennedy did not, however, complete a formal charge form alleging discrimination and file it with EEOC. The EEOC neither assigned a charge number to Kennedy's submission, nor did it inform FedEx that it had received Kennedy's documentation, nor did it engage in any informal conciliation. Five months later, Kennedy, along with more than one dozen current and former FedEx employees, filed a class-action lawsuit against the Company alleging age discrimination on behalf of themselves and others similarly situated. Many of these plaintiffs sought to "piggyback" their claims on the charges purportedly filed with EEOC (the so-called "single-filing rule").

FedEx moved to dismiss Kennedy's lawsuit citing ADEA's dual requirements that an individual claiming age discrimination cannot bring a civil action against an employer without first filing a charge of discrimination with the EEOC within 180 or 300 days of when the alleged discrimination occurred and that the employee must wait 60 days after filing the charge with the EEOC to bring suit. FedEx also noted that since EEOC never promptly notified it of the charge, the Company was deprived of EEOC's mandated informal dispute resolution procedures, as well. The federal district court granted FedEx's motion to dismiss, ruling Kennedy's suit was untimely because the submission of the Intake Questionnaire and affidavit did not constitute a "charge" under the ADEA. The United States Court of Appeals for the Second Circuit reversed, holding that an Intake Questionnaire was sufficient to constitute a charge when the employee names the employer, sets forth facts describing the alleged discriminatory acts, and the filing reflects the aggrieved employee's intent to activate EEOC's remedial processes.

The Majority's Reasoning

The Supreme Court, in a 7-2 decision (with former EEOC Commissioner, and now Justice, Clarence Thomas, writing the dissent), affirmed the Second Circuit's decision and deferred to the EEOC's regulations and guidance which require that a charge be a written statement that names the employer, generally describes the alleged discriminatory acts, and requests that the Agency take action. 29 C.F.R. §1626 (2007). The Court stated that the EEOC's regulations, although falling short of providing a comprehensive definition, reasonably interpret the statutory term "charge". Therefore, the proper test for what constitutes a charge is whether the filing is objectively construed as a request by the employee for the agency to take action to vindicate his or her rights. The Court concluded that Kennedy's completed Intake Questionnaire form and affidavit, together, qualified as a charge under the Agency's regulations because the submissions identified the employer, described the nature of the alleged discriminatory conduct, and the affidavit asked the agency to force FedEx to end its alleged age discrimination. The Court noted, however, that the Intake Questionnaire (now referred to as the "Charge Questionnaire") alone may not satisfy the "request to act" standard.

Implications for Employers

Notably, the Supreme Court missed an opportunity to address the "single-filing rule". The "single-filing" or "piggyback" rule is a rule utilized in a majority of the circuits that permits individuals who failed to file timely EEOC Charges to join an action where their individual claims arise out of similar discriminatory treatment in the same time frame as those plaintiffs who have filed timely administrative charges. *See Grayson v. K Mart Corp.*, 79 F.3d 1086, 1101 (11th Cir. 1996); *Howlett v. Holiday Inns, Inc.*, 49 F.3d 189, 194 (6th Cir. 1995); *Snell v. Suffolk County*, 782 F.2d 1094, 1100-01 (2d Cir. 1986). The facts of this case presented an opportunity for the Supreme Court to address the use of the single-filing rule because the Second Circuit ruled that Kennedy's EEOC charge was sufficient to permit the eleven named plaintiffs that *never* filed EEOC charges to take advantage of the single filing rule thereby satisfying the ADEA's exhaustion requirements. However, because the Court did not address the issue, the single-filing rule will continue to be the subject of a split amongst the Courts of Appeals.

For most employers, in the usual and customary circumstance, the *Federal Express* decision will have little impact. That said, however, this decision serves to undermine an employer's ability to defeat ADEA claims procedurally, as the high court grounded its holding on the underlying design and purposes of the Age Act. By adopting the reasoning of the Second Circuit, the Supreme Court held that Intake or Charge Questionnaires and potentially other submissions that were not heretofore considered charges may count towards satisfying the 180 or 300 day filing requirement so long as such documents manifest an objective intent to trigger the EEOC's enforcement process over ADEA claims. Further, the Court's ruling indicates that, in the ADEA context, employers need not be notified of a charge filed by an employee for a lawsuit to proceed so long as the district court allows an opportunity for conciliation and settlement discussions to occur. Sensitive to the anticipated criticism that "under this permissive standard a wide range of documents might be classified as charges", the Supreme Court explained that the result here was "consistent with the design and purpose of the ADEA".

In limiting its holding to charges brought under the ADEA, the Supreme Court cautioned employees and their counsel to be careful not to apply rules applicable under one statute to a different statute. Accordingly, it remains an open question as to what submissions constitute a charge under Title VII. As the high court chastised EEOC for lack of clarity in its regulations on this issue, it is anticipated that the Agency will take steps to revise its forms and procedures to make clear what elements must be present in documents filed by individuals to constitute a charge.

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