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10-1-2007

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Publication Information
Paul M. Secunda & McCann LeFeve, Can an EEOC Intake Questionnaire Constitute a Charge of Discrimination Under the Age Discrimination In Employment Act?, 35 Preview U.S. Sup. Ct. Cas. 56 (2007). © 2007 American Bar Association. This information or any portion thereof may not be copied or disseminated in any form or by any means or downloaded or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Repository Citation
Secunda, Paul M. and LeFeve, McCann, "Can an EEOC Intake Questionnaire Constitute a Charge of Discrimination Under the Age Discrimination In Employment Act?" (2007). *Faculty Publications.* Paper 511.
http://scholarship.law.marquette.edu/facpub/511

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Case at a Glance

In order for an employee to bring an age discrimination claim in federal court under the Age Discrimination in Employment Act (ADEA), the employee must first file a "charge of discrimination" 60 days before commencing suit. This case will clarify whether an Equal Employment Opportunity Commission (EEOC) intake questionnaire filled out by an employee-plaintiff constitutes a "charge of discrimination" for purposes of the ADEA.

Can an EEOC Intake Questionnaire Constitute a Charge of Discrimination Under the Age Discrimination in Employment Act?

by *Paul M. Secunda & McCann LeFeve*

PREVIEW of United States Supreme Court Cases, pages 56–59. © 2007 American Bar Association.

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Issue

May an "intake questionnaire" submitted to the EEOC suffice for the charge of discrimination that must be submitted pursuant to the Age Discrimination in Employment Act, even in the absence of evidence that the EEOC treated the form as a charge or the employee submitting the questionnaire reasonably believed it constituted a charge?

Facts

On December 3, 2001, Patricia Kennedy, a courier for Federal Express (FedEx), filed an intake questionnaire and four-page affidavit with the EEOC alleging age discrimination in violation of the ADEA. According to these documents, throughout 1994 and 1995, FedEx implemented the "Best Practices Pays" policy. This policy required a courier and his or her supervisor to agree upon a "reasonable and safe number of stops per hour" that could be achieved on a particular courier's route. If the courier achieved this number, the result was enhanced pay; however, Kennedy's questionnaire and affidavit asserted that over time these goals were treated as the minimum acceptable number of stops older couriers were required to make to ensure job retention. She went on to explain that while she knew of several older employees who were either fired or "constructively terminated" as a result of these policies, she did not know of any younger couriers who were terminated on the same grounds.

Subsequently, a class action ADEA complaint was filed by a number of older FedEx employees, including Kennedy, on April 30, 2002. On May 30, 2002, Kennedy filed a formal charge of discrimination with the EEOC.

Federal Express Corporation v. Holowecki et al.
Docket No. 06-1322

Argument Date:
November 6, 2007
From: The Second Circuit

Institution of an action under the ADEA, as with other federal employment discrimination statues such as Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA), requires individuals to file a charge with the EEOC alleging unlawful discrimination prior to bringing suit in court. Under the ADEA, plaintiffs are required to wait 60 days before bringing a cause of action in court. However, unlike Title VII and the ADA, individuals may bring a suit under the ADEA regardless of whether the EEOC has issued a right-to-sue letter. If the EEOC does issue a right-to-sue letter, the individual has 90 days after receiving the letter to file in federal court.

The district court held that Kennedy's EEOC intake questionnaire did not constitute a charge within the meaning of the ADEA. Specifically, because Kennedy did not file a formal administrative charge until May 30, 2002, one month after the complaint was filed, she failed to meet the ADEA requirement of filing a charge with the EEOC 60 days before commencing suit in federal court and her case was therefore dismissed.

The Second Circuit Court of Appeals reversed the district court and held that Kennedy's intake questionnaire did constitute a charge within the meaning of the ADEA. The court held that Kennedy's questionnaire constituted an EEOC "charge" because (1) its content satisfied the statutory and regulatory requirements for what content must be included in a charge, and (2) the questionnaire communicated Kennedy's intent to her employer to activate the EEOC administrative process.

Case Analysis

The ADEA does not define the term "charge." 29 U.S.C. § 626(d). However, the EEOC has established regulations that specify what information must appear in order for a document to constitute a charge. 29 C.F.R. §§ 1626.3, 1626.6, 1828.8. According to these regulations, a charge is sufficient when the EEOC receives a "writing" from the person alleging discrimination that names the employer and generally describes the discriminatory acts. Additionally, these regulations suggest that charges should contain full contact information for the employer and the person filing the charge, and a "clear and concise" statement of facts, including pertinent dates.

When a charge is filed, the EEOC is obligated to place the employer on notice and begin investigation and conciliation efforts. The EEOC has created a formal charge form, EEOC Form 5. The EEOC also utilizes an intake questionnaire form, EEOC Form 283. In some situations the EEOC has treated intake questionnaires as charges, utilizing them to provide notice to prospective defendant employers and to begin the investigation and conciliation processes. However, the more common practice seems to be for the EEOC to treat these intake questionnaires like informal documents instead of charges.

The circuits who have decided whether an intake questionnaire form is sufficient to constitute a charge have come to significantly divergent conclusions, falling into four separate camps. The first approach, represented by the Sixth Circuit, requires a formal charge. The second approach, represented by the Fifth and Seventh Circuits, allows that an intake questionnaire may serve as a charge when it contains all the information necessary for a charge and the EEOC treats it like a charge by providing notice to the employer and instigating conciliation efforts. The third approach, taken by the Fourth and Ninth Circuits, holds that an intake questionnaire could be a charge, regardless of how it is treated by the EEOC, if it includes all the requisite information necessary for a charge.

Finally, the fourth approach, represented by the Second Circuit in *Holowecki* and adopted by the Third Circuit, involves the "manifest intent" standard, under which an intake questionnaire can constitute a "charge" if its content satisfies the statutory and regulatory requirements for what content must be included in a charge and the questionnaire communicated the employee's intent to her employer to activate the EEOC administrative process.

In arguing against treating the intake questionnaire as a charge, the brief for FedEx emphasizes three main points: (1) Allowing anything other than a formal charge to suffice as a charge will increase litigation, which in turn will place undue burdens on employees, employers, the courts, and the EEOC alike; (2) allowing an intake questionnaire to suffice as a charge will essentially do away with the statutory time restraints that are contingent upon the filing of a charge and result in indefinite liability without notice for employers; and (3) allowing precharge documents to constitute a charge will significantly increase the EEOC's workload.

More specifically, FedEx contends that allowing precharge documents to fulfill the functions of a charge will increase litigation, because individuals will choose to bypass the EEOC's conciliation process. It reasons employees will suffer because individuals will be forced to wait longer for resolution. Employees will be harmed further by incurring the legal expenses necessary for litiga-

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tion. On the other hand, employers forced into litigation will face harmful distractions, undue expense, and deprivation of an opportunity to resolve these disputes without litigation, in addition to potential liability for employees' attorneys' fees.

FedEx also argues that the Second Circuit's manifest intent approach will lead to the possibility of stale claims. It urges that under the ADEA's 60-day requirement, an individual may potentially abrogate all time limits altogether. Under this theory, if the EEOC never issues a right-to-sue letter and the 60 day waiting period has already passed, employees could file suit whenever they wanted to since neither time limitation applies to their circumstances any longer. This will result in indefinite employer liability for events that may have occurred many years ago. The effects of the passage of time could result in diminished ability of parties to reconstruct facts, unavailable witnesses or witnesses with diminished recollection, and loss or destruction of pertinent employment records.

Finally, FedEx asserts that if a document other than a formal charge is found to constitute a charge, individuals will bypass EEOC conciliation and thus deny the EEOC the opportunity to fulfill its statutory functions. The importance of conciliation is evidenced by Congress's recognition of the frailties of a private lawsuit. According to this argument, Congress included the charge requirement to facilitate the prompt resolution of employment discrimination through conciliation. Congress intended for the charge requirement to provide notice to potential defendant employers, both to aid in conciliation and as a matter of fairness to the employer.

The FedEx employees, on the other hand, emphasize three main points: (1) The statute and amendments were meant to help an average employee file a charge and then bring a lawsuit; (2) employees should not be punished for the failings of the EEOC to comprehend that the employee wanted the questionnaire to be treated like a charge; and (3) a rule that finds a charge has been made only when notice has been given to the prospective defendant employers is contrary to Congress's intent and prior Supreme Court holdings.

Beginning with the ADEA's history, the employees assert that Congress's relaxed charge requirements were meant to allow employees to file charges without having to pay for an attorney. According to the employees, this is evidenced by a comparison of the ADEA's charge requirements with Title VII's charge requirements.

Title VII requires verification of a charge and the issuance of a right-to-sue letter before a private action may be filed. In *Edelman v. Lynchburg College,* 535 U.S. 106, 110 (2002), the Supreme Court stated that "a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of." Additionally, the Court held that Title VII is "a remedial scheme in which lay persons, rather than lawyers, are expected to initiate the process... [and as a result], the lay complainant who may not know enough to verify on filing will not risk forfeiting his rights inadvertently."

On the other hand, the ADEA does not specifically define the term "charge" and does not require a verification or the issuance of a right-to-sue letter before suit is brought. Therefore, respondents assert that since the ADEA's charge requirements are based substantially on Title VII's charge requirements, a comparison between the two demonstrates Congress's intention to place less emphasis on formal requirements.

Additionally, the FedEx employees point out that the 1978 amendments to the ADEA removed a provision that required an individual bringing a charge to file a notice of intent to sue. Congress amended this provision to restrict suits under the ADEA only through time limitations. In making these amendments, Congress observed that "[f]ailure to timely file notice [of intent to sue was] the most common basis for dismissal of ADEA lawsuits." S. Rep. No. 493, 95th Cong. 1st Sess. 12 (1977). As a result, one of Congress's stated purposes for amending the charge requirement was "to make it more likely that the courts will reach the merits of the cases of aggrieved individuals." Thus, by refusing to adopt the formal charge requirements of Title VII and later excising the ADEA's stricter notice requirements, Congress made it clear it did not intend to define "charge" based on its success of notifying defendant employers of the complaints brought against them.

The employees also emphasized the penal nature of a rule requiring notice to employers before allowing suit to commence. They assert such a rule would not depend upon the content of the filing, as defined by the EEOC's regulations, but only upon the EEOC's obligation to provide prompt notice. Thus, the rule would punish the employee for the shortcomings of the agency.

This would be especially true where an employer is unable to show that the lack of notice prejudiced its interests. For instance, in *Love v.*

Pullman Co., 404 U.S. 522, 619 (1972), the Court found that when an employer's lack of notice does not prejudice its interests, the requirement of "a second filing by the aggrieved party would serve no purpose other than the creation of another procedural technicality. Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."

Additionally, the ADEA's statutory language only obligates the EEOC to notify the employer's "promptly." Thus, the FedEx employees contend that the lack of a specific time evidences Congress's intent to allow a suit to be filed prior to the distribution of notice and that to hold otherwise would penalize the lay employee for the EEOC's failure to perform its duty to act "promptly."

SIGNIFICANCE

Although in a recent Title VII case, *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 118 (2002), the Court concluded that a "charge" did not have to be "under oath or affirmation" to be considered timely, the Supreme Court has not yet directly addressed the question of whether a written submission to the EEOC that is not on an EEOC charge form may be considered a "charge."

The Supreme Court's decision in *Holowecki* will likely resolve the many inconsistencies among federal circuit courts of appeal on the issue of whether an EEOC intake questionnaire may constitute a charge of discrimination under the ADEA. Depending on the breadth of the holding, the case may also answer this same question for related federal employment discrimination laws, such as Title VII and the ADA.

Should the court adopt FedEx's bright-line, formalistic approach, individuals may lose their day in court on a technicality. This is especially true among individuals who file documents with the EEOC without consulting an attorney. A formalistic approach fails to take into account that laypersons are unlikely to appreciate the legal requirements for initiating a case.

Additionally, this approach could mean an employee will be penalized for the EEOC's mistakes, even when the mistake is completely and totally out of the employee's control. This most often occurs when employees are misled by the EEOC to believe a document constitutes a charge. As a result of the EEOC's mistake, these employees will be denied access to the courts. Practically speaking, an agency that receives roughly 85,000 charges of discrimination under several different statutory schemes is likely to make a mistake every once in a while.

The Court's adoption of FedEx employees' intent-based approach could have a far reaching effect on documents other than intake questionnaires, which contain the requisite amount of information. Under this approach just a letter sent to the EEOC might be sufficient to constitute a charge. While ensuring that individuals will not inadvertently forfeit their access to the courts, this approach may create significant confusion as to when a document fulfills the requirements of the EEOC. Ultimately, courts will be forced to undertake a case-by-case analysis. In addition to the possible creation of more inconsistencies among the circuits, an ad hoc analysis may delay an employee's much needed relief even more and consume precious administrative resources of both the EEOC and the courts.

Additionally, if the use of other types of documents means that employers are not provided sufficient notice of the claims brought against them, employers may be less likely to voluntarily correct discriminatory practices. Furthermore, it may be more difficult for the EEOC to carry out its statutory, gate-keeping function of exposing frivolous claims and helping to conciliate meritorious ones.

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