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The U.S. Supreme Court in *Federal Express Corp. v. Holowecki* ruled that employees who claim workplace discrimination can satisfy their statutory obligation to file an EEOC charge by submitting any paperwork that asks the agency to take some kind of action.

A Charge, by Any Other Name, Is Still a Charge: High Court Adopts Broad Definition in Age Cases

By Kerry L. Middleton

The United States Supreme Court has adopted a very broad definition of what constitutes a "charge" for purposes of federal discrimination suits. The ruling is a victory for employees, essentially making it easier for them to sue their employers for discrimination. It is also an example of the judiciary's general reluctance to dismiss a case based on what might be considered a technicality.

In *Federal Express Corp. v. Holowecki*, No. 06-1322 (Feb. 27, 2008), the Court ruled that the completion of an EEOC Intake Questionnaire with a supporting affidavit satisfied the mandatory charge prerequisite under the Age Discrimination in Employment Act (ADEA). One of the plaintiffs in the case filed a formal Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC) but only after she sued the former employer, FedEx, for age discrimination in federal court. The ADEA requires that a charge be filed with the EEOC before a lawsuit can be filed against the employer, and it specifically imposes a 60-day waiting period after the charge is filed before litigation can be commenced. Accordingly, the trial court dismissed the complaint. The Second Circuit Court of Appeals reversed the decision and the Supreme Court affirmed the Second Circuit allowing the suit against FedEx to proceed based on its conclusion that the plaintiff's Intake Questionnaire and affidavit satisfied the statutory charge requirement.

Procedural Background

There were 14 plaintiffs in the case, each alleging age discrimination by FedEx in violation of the ADEA. None of them filed a timely Charge of Discrimination with the EEOC before pursuing their claims in court. One of them did file an EEOC Intake Questionnaire and an affidavit. Other plaintiffs relied upon those filings to satisfy their statutory obligation to first seek redress through the EEOC. The completed questionnaire included, among other things, a general allegation of age discrimination by FedEx. The affidavit included a request that the EEOC "force Federal Express to end their age discrimination plan."

The ADEA provides that "[n]o civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission.[1] That section also provides that, upon receipt of a charge, the EEOC "shall promptly notify" the employer named in the charge and "shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." Notably, the ADEA does not define the term, "charge." In its regulations, however, the EEOC has defined "charge" – sort of.

The EEOC says that "[a] charge shall be in writing and shall name the prospective respondent and shall generally allege the

[1] 29 U.S.C. § 626(d).

discriminatory act(s)."[2] The regulations also state that a charge "should" contain certain specific information including, among other things, the identity of the charging party, identity of the employer, and "a clear and concise statement of the facts" constituting the alleged discrimination.[3] The very same section, however, provides that "a charge is sufficient when the Commission receives ... either a written statement or information reduced to writing by the Commission that conforms to the requirements of Sec. 1626.6."[4] The EEOC has created a specific form entitled "Charge of Discrimination." The agency requires complainants to sign a completed Charge of Discrimination form before taking enforcement action. In the Holowecki case, an Intake Questionnaire and affidavit were submitted to the EEOC in December 2001. In April 2002, the plaintiffs sued FedEx for age discrimination in federal court. Later, a Charge of Discrimination was filed with the EEOC. The EEOC field office that received the Intake Questionnaire and affidavit did not treat those filings as a charge. As a result, the EEOC did not fulfill its statutory obligation to promptly notify FedEx and explore conciliation. The federal lawsuit was FedEx's first notice of the plaintiffs' allegations. The opportunity for pre-suit conciliation, mandated by the ADEA, was lost.

FedEx moved for dismissal of the lawsuit on the grounds that the plaintiffs did not comply with the ADEA's charge requirement. The trial court agreed and dismissed the case. The plaintiffs appealed to the Second Circuit Court of Appeals, and that court revived the suit by reversing the trial court's dismissal.

The Court's Ruling

The Supreme Court was faced with two issues. First, what constitutes a "charge" as that term is used in the ADEA? Second, did the Intake Questionnaire and affidavit meet the charge requirement? In answering those questions, the Court deferred to the EEOC while at the same time admonishing the agency to establish "a clearer, more consistent process."

Apparently, the Court took the case to address confusion among the federal courts of appeal regarding what constitutes a charge. The Second Circuit had previously held that an Intake Questionnaire can be a charge if it indicates an intent to trigger the EEOC's enforcement powers.[5] The Ninth Circuit had held that a completed Intake Questionnaire, standing alone, satisfied the charge requirement.[6] The Sixth Circuit had more strictly construed the definition, requiring a formal charge.[7]

Ruling for the employees in Holowecki, the Supreme Court determined that the questionnaire and affidavit, taken together, constituted a discrimination charge. It concluded that an EEOC filing meets the definition of a "charge" if it contains an allegation of discrimination, names the employer, and can be "reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee." Thus, under the Court's ruling, the analysis comes down to whether papers filed with the EEOC ask the agency to do something.

As amicus curiae, the EEOC argued that the questionnaire and affidavit did meet its definition of a "charge." The agency made that argument despite the fact that it did not treat the questionnaire and affidavit as a charge when they were filed in December 2001. The Court agreed with the EEOC, noting that charging parties often do not have counsel when they contact the agency regarding alleged discrimination. After adopting the EEOC's "request-to-act" test, the Court focused on the affidavit in which the EEOC was asked to "force Federal Express to end their age discrimination plan." The Court concluded that the plaintiffs had requested action by the EEOC. Therefore, the lawsuit against FedEx can continue.

In a rather sharp dissenting opinion, Justice Thomas (joined by Justice Scalia) took issue with the majority's conclusion. Obviously drawing upon his experience as former Chair of the EEOC, Justice Thomas opined that the majority's request-to-act test is "so malleable that it effectively absolves the EEOC of its obligation to administer the ADEA according to discernible standards." He further declared that the Court's ruling in the case "does nothing – absolutely nothing -- to solve the problem that under the EEOC's current processes no one can tell, ex ante, whether a particular filing is or is not a charge" and warned that "the statutorily required notice to the employer and conciliation process will be evaded in the future as it has been in this case."

Implications

Holowecki is notable for the Court's willingness to defer to a federal agency even while scolding it. It also demonstrates the Court's willingness to interpret statutory requirements quite liberally to allow plaintiffs their day in court.

The impact could be far reaching. From a practical standpoint, it may limit in many ADEA cases an employer's procedural defense based on the plaintiff's failure to exhaust administrative remedies. If a plaintiff has almost any written communication with the EEOC before filing suit, it may be much more difficult for an employer to prevail on a failure-to-exhaust defense. Although the Court may have set out to resolve disagreement among the federal circuits, it is questionable whether the Holowecki ruling provides any mean-

[2] 29 C.F.R. § 1626.6.
[3] 29 C.F.R. § 1626.8(a).
[4] 29 C.F.R. § 1626.8(b).
[5] See *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534 (7th Cir. 1988).
[6] See *Casavantes v. California State. Univ., Sacramento*, 732 F.2d 1441 (9th Cir. 1984) (Title VII case).
[7] See *Dorn v. General Motors Corp.*, 131 Fed. Appx. 462 (6th Cir. 2005).

ingful guidance regarding what is and what is not a charge of discrimination under the ADEA.

In addition, the EEOC's definition of "charge" for other types of discrimination (e.g., Title VII) is very similar to its ADEA definition. Therefore, the Holowecki request-to-act test may not be limited to ADEA cases. The Court's broad definition of a "charge" appears to set a low standard that will not be difficult for plaintiffs to meet in employment litigation.

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