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Please Let Employers Know the Charge

After *Holowecki,* the EEOC should appreciate the need to give early and full notice.

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On Feb. 27, the Supreme Court issued its opinion in *Federal Express Corp. v. Holowecki*, in which it decided that an employer, not the worker, should bear the burden of the Equal Employment Opportunity Commission's failure to fulfill its obligation to process discrimination claims.

In so doing, the Court showed compassion toward employees in disputes with their employers, a trait that many plaintiffs attorneys would argue they rarely see. The Court was not so kind to the EEOC, the agency arguably at the center of the dispute (and which participated as amicus curiae). The Court called upon it to establish a clearer, more consistent charge-filing process.

As the EEOC responds to the Court's decision, greater clarity in the charge filing process would be welcome, both for employment counsel and especially for employers that need fair notice about the allegations against them.

A 'CHARGE'

A federal employment discrimination lawsuit typically begins with the filing of a "charge" of discrimination with the EEOC or a local Fair Employment Practice Agency, such as the D.C. Office of Human Rights. The charge shapes future proceedings and litigation because an employee may pursue only claims within the scope of the charge. For example, an employee may not sue for age discrimination if the charge alleges only gender discrimination.

An employee may go to court only after the administrative agency has had time to investigate the charge. The EEOC has 180 days to investigate a Title VII charge before an employee may request a right-to-sue letter. Under the Age Discrimination in Employment Act, the statute at issue in *Holowecki*, a plaintiff is required to wait 60 days. In addition, an employee must file a charge within 180 or 300 days (depending on the jurisdiction) from the date of the alleged discriminatory act. A charge is also the focus of the all-important notice and early resolution process that Title VII and the ADEA contemplate will occur before litigation.

With so much riding on the charge, one would think it would have to be presented as a well-defined document. That is not the case, however. A charge may take many forms, in large part because neither Title VII nor the ADEA define the term "charge." EEOC regulations specify what information must appear for a document to be considered a charge. A charge is sufficient if it is in writing, names the employer, and generally alleges the discriminatory acts. Not surprisingly, Justice Anthony Kennedy characterized these regulations as falling short of "a comprehensive definition."

The EEOC accepts charges in many forms. Signed letters, affidavits, and other informal communications are permitted, as is Form 283, an intake questionnaire that the employee completes and signs. Its purpose is to facilitate "pre-charge counseling" and to help the agency determine if it has jurisdiction over the "potential charge." The EEOC treats Form 283 as an informal and internal document, which the employer frequently does not see until after litigation commences and only then if the employer makes a Freedom of Information Act request. This lack of employer access to Form 283 during

the early stages of litigation is a key point wholly ignored by the Court.

The employer's initial notice now comes when it receives a Form 5, the formal charge form labeled "Charge of Discrimination," which is a summary version of Form 283, usually prepared by the EEOC intake officer and signed by the employee.

It is the disconnect between the informal "charge" first filed by the employee—whether on Form 283 or in some other form—and the formal "charge" presented to the employer on Form 5 that can create collateral litigation as in *Holowecki*. Unfortunately, *Holowecki* did little to clear up the matter.

In *Holowecki*, the plaintiff, a former FedEx courier, on Dec. 3, 2001, filed an EEOC Form 283 Intake Questionnaire and an affidavit, but did not complete or sign Form 5. The EEOC did not assign a charge number to her submission, did not notify FedEx that it received her Form 283, and made no attempt at informal conciliation. FedEx had no knowledge that a claim had been lodged until the plaintiff and others filed a class action on April 30, 2002.

The question for the Supreme Court was what may constitute a "charge" of discrimination that a potential plaintiff must submit to the EEOC before bringing suit. FedEx took the position that the Supreme Court must condition the definition upon the EEOC's fulfilling its duty to notify the employer and initiate the conciliation process. The Court rejected FedEx's position because the existence of a charge would then depend on a condition over which the parties had no control, the agency's action.

Instead, the Court held that a document, whether on Form 283 or on any other form submitted, is a "charge" if it identifies the employer, alleges discrimination, and may "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." It noted that such a standard is consistent with the purpose of equal opportunities laws that a charge can be a form that is easy to complete or an informal document that's easy to draft.

Wasted Time

The Court's decision, viewed in the context of whether a charge is timely or filed at all, may make some sense. However, it does little to relieve the tension caused by the current charge-filing process or to alleviate the collateral litigation that frequently ensues.

Because the employer does not see Form 283 or other information provided to the EEOC before litigation begins, it does not know the full extent of the employee's claims. Instead, the employer responds to the scope of the charge found in the Form 5 received during agency proceedings and often forms initial litigation strategy and defenses around those allegations.

It may not be until well into the litigation, after filing a motion to dismiss based on failure to exhaust administrative remedies or the statute of limitations, that the employer discovers that the scope of allegations in the Intake Questionnaire is broader than that in Form 5 or that the employee sought out the agency long before signing Form 5. The result is that both the employee and employer waste time and resources fighting over the "charge."

Back to the EEOC

The Court recognized that it failed to address two important elements of the Title VII and ADEA schemes. It acknowledged that the employer was not given notice of the charges against it while the administrative proceedings were pending and that both sides lost the opportunity for informal dispute resolution at the agency. The Court quite bluntly called upon the EEOC to correct the problem.

The EEOC is currently trying to decide what, if any, changes need to be made. It is a complicated question, as shown by the fact that the EEOC receives more than 175,000 inquiries a year, but only 85,000 charges are actually filed annually.

The EEOC needs to give crystal-clear guidance to employees so that they may knowingly request remedial action. It needs to decide when and under what circumstances an Intake Questionnaire can be a charge and when and how that document will be served on the employer. Even if the Court has held that the question of whether a "charge" has been filed cannot depend on agency action, the agency can and should have room to make decisions about the legitimacy of a charge, its scope, and, what, if anything, will be disclosed to the employer about the charge and any investigation.

Many employees want to bring discriminatory practices to the EEOC, but do not want their inquiry disclosed to their employers. Other employees know there is a problem, but without the assistance of EEOC personnel, they do not describe their complaints in ways the EEOC can act on them. Other employees bring workplace disputes to the EEOC that fall outside its jurisdiction.

From the employer's standpoint, nothing is more important than getting early notice so that employers can resolve any problems before a charge turns into expensive and unnecessary litigation.

As the EEOC responds to *Holowecki*, it needs to be mindful of the issues the Court ignored. The filing of a "charge" is not merely the trigger for the statute of limitations. It is also the document against which the appropriateness of subsequent litigation is evaluated, given that plaintiffs must exhaust their administrative remedies at the EEOC.

The EEOC needs to find a way to ensure that the scope of the charge—whether by its actual language or by the scope of a reasonable investigation flowing from its language—cannot be broader than the information disclosed to the employer. If the agency fails to do so, the requirements of notice and opportunity for early resolution will be lost, fundamentally violating the statutory scheme Congress contemplated for remedying workplace discrimination.

Fortunately, the EEOC seems open to a dialogue with both employees and employers. Let's hope this exchange will result in clarification of the meaning of a "charge" and an administrative process that serves all constituents.

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