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## Court Refuses to Dismiss Case as Untimely Where No Rational Argument for Dismissal Is Found

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By **Jeffrey Campolongo** | February 22, 2018



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As any practitioner knows, there are going to be times in your career where your opponent thinks they have you dead to rights. A “gotcha” moment, if you will. We have all been there, chest puffing, brooding with confident that no court in the world could see things any other way but your way. It is usually during these overconfident times that lawyers can take a step back and learn

a life lesson, which is exactly what happened in a recent case relating to the statute of limitations under Title VII in *Bivines v. Temple University*, Civ. A. No. 17-2587 (E.D. Pa. Jan. 9 McHugh, J.).

The case at issue was on behalf of a housekeeper by the name of Hassan Bivines who worked for Temple University for almost seven years. After he was fired in March 2016, Bivines filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) for a hostile work environment and wrongful termination. He filed his charge on Dec. 26, 2016. Almost immediately thereafter, the EEOC issued a right to sue letter to Bivines wherein it offered the following explanation for closing his case: "Your charge was not timely filed with the EEOC; in other words you waited too long after the date(s) of the alleged discrimination to file your charge."

As it turns out, Bivines alleged in his charge a series of incidents that gave rise to a Title VII claim and stated that he was terminated in March 2016. Unfortunately, he did not specify the exact date on which the termination occurred. It appears from court documents that Bivines was unrepresented at the time he filed his charge. As is well known, in Pennsylvania a plaintiff has 300 days from the time of an unlawful employment action to file a claim with the EEOC, 42 U.S.C. Section 2000e-5(e). From the face of Bivines' charge, it was not discernible whether he timely filed before the 300th day or not.

After getting the right to sue letter, Bivines filed his federal Title VII action (*pro se*). Confident that the case should be thrown out, Temple University filed a motion to dismiss arguing that the EEOC's dismissal based on timeliness meant that the plaintiff failed to exhaust administrative remedies, requiring dismissal of the lawsuit. The district judge did not agree and found this argument to be wholly without merit. Cue the humiliated emoji for TU's overconfident counsel.

By filing his charge with the EEOC, and receiving a right-to-sue notice, the court wrote, Bivines met the basic requirements for federal jurisdiction. For a federal court to have jurisdiction to hear a Title VII claim, a plaintiff must meet two requirements: a timely charge of discrimination with the EEOC; and a right-to-sue notice from the EEOC. The court further explained that our own U.S. Court of Appeals for the Third Circuit has declared that “the receipt of the right-to-sue letter indicates that a complainant has exhausted administrative remedies, an essential element for bringing a claim in court under Title VII.”

Rather than independently determine or argue the timeliness of the EEOC charge based upon the contents of the charge itself, Temple hitched its argument to the EEOC’s belief that the plaintiff had not filed his charge in time. In fact, Temple conceded that it was “not in a position to know the EEOC’s precise rationale for concluding that the plaintiff’s charge was untimely,” but nonetheless contended that the EEOC’s finding should compel dismissal of the complaint, according to the opinion. To accept this position, the court opined that it would create an additional jurisdictional prerequisite not set forth in Title VII or recognized by any appellate court.

There are a number of reasons why Title VII proceedings in court are deemed de novo. For example, federal courts routinely review Title VII complaints to determine whether the charge may nonetheless be deemed timely while evaluating whether doctrines such as equitable tolling, continuing violation, or relation back might apply. Courts are better equipped to determine the date on which an adverse employment action occurred and whether that “might place the plaintiff within the applicable filing deadline.” The court here further noted that a rule such as this is consistent with Third Circuit precedent that even substantive findings of discrimination by the EEOC are not automatically admissible at trial, see *Coleman v. Home Depot*, 306 F.2d 1333 (3<sup>rd</sup> Cir. 2002).

Here, there was no attempt on the part of the employer to discern whether the plaintiff's termination in March 2016 would make a charge filed in December 2016, timely. Instead, the employer relied, to its detriment, on the EEOC's incorrect belief that the charge was late. In reality, Bivines' termination occurred on March 10, 2016, by Temple's own admission. Thus, a charge filed on Dec. 29, 2016, would fall within 300 days of the termination, and not be time barred. There was nothing on the face of the plaintiff's second amended complaint to suggest that the adverse employment action occurred on a day in March that would render the plaintiff's filing untimely.

In another stunning move, Temple also moved to dismiss the plaintiff's wrongful termination claim, which was premised on the plaintiff's allegation that he was fired for filing a workers' compensation claim related to injuries he suffered during a confrontation with the supervisor who allegedly harassed him. This time, rather than argue the claim was time-barred, or legally flawed in some other way, instead Temple argued in summary fashion that "an institution like Temple University" would never penalize an employee for filing a workers' compensation claim. On that basis alone, the university sought complete dismissal of the claim. Needless to say, arguing that "we are just too good to do bad things" was not successful in convincing a federal judge to throw the case out.

Once again, the lesson from the *Bivines* case is that you should never be overconfident in your legal positions because it's entirely possible that the position you are taking is not only wrong, but it may be downright ridiculous as well. Moreover, courts are loath to elevate form over substance, especially when it could result in an unjust dispensation of justice. Practice tip: for the most part, it helps to use a modicum of common sense when practicing law.

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