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Split 3rd Circ. Panel Throws Out Retaliation Case for Failure to Exhaust Administrative Remedy

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By **Jeffrey Campolongo** | April 22, 2021



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One of the single biggest issues that we employment lawyers must confront is ensuring that our clients have properly administratively exhausted his or her claims. The path to a successful employment claim is riddled with obstacles and roadblocks, none more significant than being able to file a civil lawsuit in the first place. Experience has shown that if there is even so much as the slightest slip-up when filing an administrative charge, savvy employers will pounce like a famished lion on a hapless gazelle. Look no

further than a recent decision from the U.S. Court of Appeals for the Third Circuit where a majority panel threw out a retaliation suit because the claim was not included within the four corners of the original Equal Employment Opportunity Commission (EEOC) charge.

In *Simko v. United States Steel*, No. 20-1091 (3d Cir. Mar. 29, 2021) (U.S. Steel), a split panel of the Third Circuit upheld the dismissal of Simko's retaliation suit under the ADA. Michael Simko alleged that he was discharged in August 2014 in retaliation for filing an EEOC charge approximately 15 months earlier. The original charge, filed in a timely manner, alleged that U.S. Steel disqualified him for another position on the basis of his hearing disability. Simko was subsequently terminated by U.S. Steel. The retaliation charge, which was filed with the EEOC 521 days after the termination of his employment, was beyond the agency's 300-day jurisdictional threshold. The district court determined that the later claim of retaliation was not encompassed within the earlier charge, thus resulting in Simko's failure to file a timely retaliation charge.

Background

According to the decision, Simko, who is hearing impaired, was a Larryman in defendant U.S. Steel's blast furnace department. All employees had trouble hearing radio calls and signals in the noisy work environment, but Simko's hearing impairment compounded this problem. In August 2012, Simko successfully bid to become a Spellman in the transportation department. While training for that position, he requested a newer two-way radio as an accommodation for his disability. U.S. Steel did not provide the radio or offer any other reasonable accommodation. In November 2012, Simko's trainer determined that Simko could not work in the transportation area "because he cannot hear," and Simko returned to his former position as a Larryman.

As a result, Simko filed an EEOC charge alleging that U.S. Steel had discriminated against him because of his disability. On May 24, 2013, Simko signed an EEOC charge alleging violations of the ADA against U.S. Steel. The only box checked on the original charge was for "discrimination based on ... disability." Eventually, U.S. Steel fired Simko in August 2014 for an alleged safety violation.

On Nov. 14, 2014, approximately three months after Simko's final discharge from U.S. Steel, Simko, who was pro se, wrote to the EEOC to say "since I have filed charges with the EEOC I have been terminated twice and placed on a last chance agreement with no just cause by the company ... I believe anyone who familiarizes themselves with the details of the case will clearly see it as retaliation for filing charges with the EEOC." Simko did not execute a new or amended EEOC charge at that time.

After a full year of inactivity at the EEOC, the agency sent a letter to Simko on Nov. 23, 2015, stating, "based upon what I have read, it appears as though you have been terminated by the respondent on two separate occasions during 2014 and that you believe that the terminations were retaliatory against you." After the EEOC contacted Simko, he retained counsel to represent him in his EEOC proceedings. By letter dated Dec. 18, 2015, the EEOC investigator communicated to Simko's counsel that the EEOC had notified U.S. Steel "that an amended charge was going to follow."

On Jan. 22, 2016, Simko, through counsel, filed an amended EEOC charge which addressed Simko's failure to secure the Spellman position and his subsequent discharge from U.S. Steel. This time the boxes for disability discrimination and retaliation were both checked. Following an extensive investigation, on Feb. 19, 2019, four and a half years after his termination, the EEOC found reasonable cause to believe that U.S. Steel had retaliated against Simko. Eventually, the matter made its way to federal court with a single count complaint alleging retaliation. Simko's lawsuit was dismissed by the district court, which

determined that he did not exhaust his administrative remedies because his claim of retaliation was untimely. The district court also held that Simko was not entitled to equitable tolling of the ADA's 300-day filing deadline because he was neither misled by the EEOC, nor prevented from filing a timely amended charge.

Split Decision

The majority of the Third Circuit panel agreed with the district court. On appeal, Simko advanced three alternative arguments. First, Simko contended that his handwritten November 2014 correspondence to the EEOC itself constituted a timely administrative charge. Second, in an amicus brief, the EEOC argued that Simko was entitled to equitable tolling of the statutory filing period because the agency failed to promptly act on the November 2014 correspondence. Third, Simko argued that he did not have to file an additional EEOC charge because his original, still-pending disability discrimination charge encompassed his subsequent claim of retaliation.

Interestingly, the panel rejected the first argument deeming it to be "forfeited" because it was not argued in the district court. The panel concluded that the equitable tolling argument had been fully argued to the lower court but was not raised as an issue on appeal until it was briefed by the EEOC in its amicus brief. Therein, the EEOC admitted that it "made a mistake" by failing to assist Simko with converting his November 2014 letter into a timely filed charge. Nevertheless, equitable tolling was rejected as there were no extraordinary circumstances that warranted tolling.

Simko's final argument that his retaliation claim was encompassed within his original charge of disability discrimination was also rejected. The Third Circuit panel concluded that the claim did not fall "fairly within ... the investigation arising from the initial charge" and could not "reasonably be expected to grow out of" the original charge because the allegations of retaliation were too remote in time. The court also noted the substantive difference between a disability discrimination claim and a retaliation claim. Unlike other Third Circuit cases where the retaliation was a natural extension of the underlying charge, here, there was no such claim. Simko's original failure to accommodate claim made no mention of retaliation, nor did it have any connection to his discharge.

The Dissent

In a well-reasoned and passionate dissent, appellate judge Theodore McKee, argued against the harsh result of dismissal, particularly in light of Simko's November 2014 handwritten correspondence alleging retaliation. McKee wrote that "claims of retaliation are intrinsically tethered to claims of discrimination; they rarely arise in a vacuum or in an environment devoid of claims of discrimination. Indeed, this is precisely why the EEOC's policy of allowing investigations into substantive discrimination to include allegations of retaliation is so eminently reasonable. In fact, a contrary policy that would preclude or discourage inquiries into whether an employee alleging discrimination had suffered retaliation would be unreasonable."

McKee also pointed to the EEOC's own compliance manual for investigations wherein EEOC investigators are specifically instructed to be alert to retaliation claims. Here, Simko attempted to amend his claim to include retaliation; he put the EEOC on notice that he suspected retaliation was the reason for his firing; and, the EEOC actually investigated the retaliation claim, issued a right to sue letter, and attempted to conciliate the claim. These facts all support the reasonableness of allowing an unexhausted claim to proceed, Judge McKee wrote.

In the end, Simko was without a remedy as the majority concluded that he needed to file an amended charge advancing his retaliation claim within the ADA's 300-day filing period. Failure to do so was a fatal flaw. There is no question this decision worked a hardship on Simko and other similarly situated litigants alleging retaliation following an original charge. The lesson to be learned from this situation is to be sure to file a new or amended charge whenever an additional act of retaliation occurs, particularly when it results in discharge.

Jeffrey Campolongo *is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters.*

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