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### Supreme Court Defines ADEA Charge Permissively

**By Allen Smith**

An intake questionnaire filed with the Equal Employment Opportunity Commission (EEOC) might constitute a charge under the Age Discrimination in Employment Act (ADEA), the U.S. Supreme Court decided on Feb. 27, 2008. The attention that the case has brought to the issue of what exactly constitutes a charge already has resulted in a spike in the number of charges filed with the EEOC this fiscal year, Don Livingston, an attorney with Akin Gump and a former general counsel with the EEOC, told *SHRM Online*.

After Federal Express Corp. adopted compensation programs tying couriers' compensation and continued employment to performance benchmarks, 14 current and former FedEx couriers over the age of 40 sued, claiming that the programs violated the ADEA. They claimed that the new pay programs were veiled attempts to force older workers out of the company before they became entitled to receive retirement benefits.

FedEx responded that the lawsuit was not timely filed because one of the plaintiffs, Patricia Kennedy, had not first filed a charge with the EEOC, as required in order to exhaust administrative remedies.

The plaintiffs countered that Kennedy's intake questionnaire and accompanying affidavit constituted a charge.

FedEx disagreed. The intake questionnaire was not a charge when the EEOC's Tampa field office did not treat it as a charge and never notified the employer, it argued. Since the EEOC did not treat the filing as a charge, the plaintiffs sued before the agency could initiate a conciliation process with the employer.

The district court determined that no charge was filed and granted FedEx's motion to dismiss, but the 2nd U.S. Circuit Court of Appeals reversed.

### Request-To-Act Requirement

On appeal, the Supreme Court upheld the 2nd Circuit decision.

An intake questionnaire may constitute a charge even if an individual does not subsequently file the EEOC's charge form if in addition to the information required by the EEOC regulations (i.e., an allegation and the name of the charged party), the filing can "reasonably be construed as a *request for the agency to take remedial action* to protect the employee's rights."

The Supreme Court acknowledged that "it is true that under this permissive standard a wide range of documents might be classified as charge." But it said this result was consistent with the purpose of the ADEA, particularly since many individuals represent themselves and do not hire lawyers when seeking assistance at an administrative agency.

The high court rejected FedEx's argument that the definition of a charge should depend on the EEOC's fulfillment of its mandatory duty to notify the charged party and initiate a conciliation process. "It would be illogical and impractical to make the definition of charge dependent upon a condition subsequent over which the parties have no control," the Supreme Court stated.

Applying this test, the high court concluded that Kennedy's intake questionnaire and six-page affidavit contained a request for the agency to act. It noted that on the last page of the questionnaire, Kennedy asked the agency to "please force Federal Express to end" its allegedly discriminatory plan.

The EEOC does not have to treat every completed intake questionnaire as a charge, the Supreme Court noted. But it said

"there might be instances where the indicated discrimination is so clear or pervasive that the agency could infer from the allegations themselves that action is requested and required."

The Supreme Court agreed that the employer's interests in this case "were given short shrift" because FedEx was not notified of Kennedy's complaint until she sued. But this deficiency can be ameliorated by staying proceedings to allow an opportunity for conciliation, the Supreme Court stated, though it added that "once the adversary process has begun a dispute may be in a more rigid cast than if conciliation had been attempted at the outset" (*Federal Express Corp. v. Holowecki*, No. 06-1322).

### **Dissenting Opinion, Disappointed Employers**

In a dissenting opinion joined by Justice Scalia, Justice Thomas criticized the decision as defining an ADEA charge as "whatever the EEOC says it is." Thomas wrote that the court's "failure to apply a clear and sensible rule renders its decision of little use in future cases to complainants, employers or the agency."

However, Livingston said the case already has resulted in the EEOC taking a closer look at whether intake questionnaires should be treated as charges. He said the EEOC has, as a result, docketed 10 percent more charges this fiscal year than a similar period last fiscal year.

Rae Vann, general counsel with the Equal Employment Advisory Council (EEAC), said that the EEAC is "really disappointed" by the decision, adding that "the Justice Thomas dissent was pretty clear about what the ramifications of this will be going forward."

The benefits of administrative procedures—prompt notice of discrimination practices, a chance for the EEOC to investigate and opportunity for a company to quickly eliminate any problems through administrative means—all are undermined by the ruling, she said. Under the ADEA, "litigation should be an avenue of last resort," Vann stated, but she predicted that this decision "will enable complainants and the EEOC to evade this important aim."

As for the suggestion that litigation might be stayed to allow parties to try to conciliate once a lawsuit has been brought, Vann said that is simply too late to conciliate. "By that time years and years may have passed," she said, "The whole point of administrative remedies is to resolve a dispute quickly before it drags on."

Debra Friedman, an attorney with Cozen O'Connor in Philadelphia, said the ruling was "a pro-employee decision that has the potential for increased litigation" but added that "the court made considerable efforts to limit the fallout from its decision."

In a Feb. 27 interview, she noted that the Supreme Court:

- Pointed out that its decision should not be construed to apply to Title VII or the Americans with Disabilities Act.
- Held that not all completed intake questionnaires will constitute charges.
- Ruled that an intake questionnaire with an affidavit will not necessarily suffice to be a charge.

Friedman said that the Supreme Court deferred to the EEOC's interpretation in this litigation of what constituted a charge "but did criticize the EEOC's forms and procedures and suggested that it revisit these."

Arthur Silbergeld, an attorney with Proskauer Rose in Los Angeles, said employers can expect more ADEA claims "as pension benefits don't buy the same amount of gas or support the same lifestyle." He recommended that employers take special note of this trend in the decision-making process.

*Allen Smith, J.D., is SHRM's manager of workplace law content.*

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