

Circuit Court of Appeals Upholds Dismissal of ADA Lawsuit for Failure to Exhaust Administrative Remedies

In a 2-1 decision, a panel of the Third Circuit Court of Appeals upheld the dismissal of a retaliation suit under the ADA, where the claim was not included in, and did not relate to, the plaintiff's original administrative charge filed with the EEOC, and a subsequent attempt to amend the charge to include the retaliation claim was untimely. The case is *Simko v. U.S. Steel Corp.*

Underlying the majority's decision is a unique set of facts. Specifically, in August 2012, during his employment as a larryman in the blast furnace at the United States Steel Corp. (U.S. Steel) mill in Braddock, Pa., plaintiff Michael Simko successfully bid on an open spellman position in the transportation department. While training for the position, Simko requested a two-way radio to accommodate his hearing impairment, which U.S. Steel failed to provide. Although he completed the training for the spellman position, Simko's trainer did not "sign off" that he was able to perform the duties of the position. Simko was therefore returned to his prior position in the blast furnace department.

Nine months later, in May 2013, Simko filed a charge of discrimination with the EEOC against U.S. Steel alleging a violation of the ADA. Simko checked only the "disability" discrimination box on his charge, and asserted that his employer discriminated against him on the basis of his disability by denying him the transfer to the spellman position, as well as his requested accommodation. U.S. Steel filed a position statement in August of that year, denying the allegation of discrimination. No further action was taken with regard to the charge and, on December 30, 2013, U.S. Steel terminated Simko for conduct unrelated to the failed promotion. Approximately five months later, in May 2014, Simko was returned to work in exchange for a "Last Chance Agreement," but he was terminated again, for the final time, on August 19, 2014, for a safety violation.

On November 14, 2014, approximately three months after his final discharge, Simko submitted a letter to the EEOC in which he alleged that his discharge was the result of retaliation for his filing of the original discrimination charge. However, the EEOC took no action with respect to Simko's original charge or his November 2014 letter for a year — until November 2015 — when it notified Simko that an investigator had been assigned to his case. Simko then retained counsel who, on January 22, 2016, filed an amended charge alleging both disability discrimination related to Simko's failure to secure the spellman position and retaliation related to his discharges.

On February 19, 2019, four and one-half years after his termination, the EEOC issued a determination of reasonable cause that U.S. Steel retaliated against Simko, and on June 28, 2019, Simko filed suit in federal court, asserting one count of retaliation under the ADA in connection with his final discharge. His suit did not allege either disability discrimination or failure to accommodate.

Simko's complaint was dismissed by the district court, which determined that he did not exhaust his administrative remedies — a prerequisite to filing suit in federal court — because his claim of retaliation was untimely filed 521 days after the termination of his employment. In making this determination, the district court held that Simko was not entitled to equitable tolling of the ADA's 300-day filing deadline because he was not misled by the EEOC nor prevented from filing an amended charge.

The majority of the Third Circuit panel agreed with the district court. Interestingly, the EEOC filed an *amicus* brief in the appeal, admitting that it "made a mistake" by failing to assist Simko with converting his November 2014 letter into a timely filed charge; an admission of fault that the majority noted but did not affect its decision.

Simko was left essentially to argue that his retaliation claim was encompassed within his original



Joseph Quinn

Of Counsel

jfquinn@cozen.com
Phone: (412) 620-6514
Fax: (412) 275-2390

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charge of disability discrimination. The Third Circuit panel, however, 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, namely two years apart, and substantively different from the allegations of disability discrimination, particularly as they involve different types of discrimination. It could not be concluded that a reasonable EEOC investigation based on the original charge would encompass the later events of a retaliatory discharge.

As a result, the court held that Simko needed to file an amended charge advancing his retaliation claim within the ADA’s 300-day filing period, and because he failed to do so, the district court correctly dismissed his complaint for failure to exhaust administrative remedies.

This decision is a lesson for employers and counsel both to check an EEOC Charge of Discrimination for compliance with all prerequisites to filing suit in federal court under anti-discrimination and retaliation statutes. It should not be assumed that equitable tolling will “fix” any errors.
