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LEGAL ALERT



## Legal Alert: Supreme Court Decides that EEOC Intake Questionnaire May Be a Charge of Discrimination

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Is an intake questionnaire filed with the EEOC sufficient to be considered a discrimination charge? It depends. On February 27, the Supreme Court held by a 7-2 vote in *Federal Express Corp. v. Holowecki* that a former employee who filed an intake questionnaire supported by a detailed affidavit had filed a charge that entitled her to file an ADEA suit. The Supreme Court decided that a document filed with the EEOC that requests action to protect the employee's rights or to settle a dispute with the employer constitutes a discrimination charge under the ADEA.

Instead of filing a formal charge of discrimination, the former employee filed an EEOC form known as an "Intake Questionnaire" along with an affidavit to support her claim that her employer discriminated against her and older workers in violation of the ADEA. The EEOC did not notify the employer that the intake questionnaire had been filed, thus depriving it of the opportunity to resolve the case at an early stage. The former employee later filed suit under the ADEA. The trial court found that the intake questionnaire and affidavit were not a charge and dismissed the lawsuit. The Second Circuit reversed, holding that the intake questionnaire and supporting affidavit constituted a valid charge. The Supreme Court affirmed the Second Circuit's decision.

Writing for the majority, Justice Kennedy noted that under the ADEA, no civil action may be commenced until 60 days after a charge has been filed with the EEOC. The ADEA also requires that the EEOC promptly notify all persons named in the charge and promptly seek to eliminate any alleged discrimination by informal methods of conciliation, conference, and persuasion. The ADEA, however, does not define "charge" and the implementing regulations are unclear. The EEOC argued in a friend of the court brief that the proper test for determining whether a filing is a charge is whether the filing, taken as a whole, should be construed as a request by the employee to vindicate her rights. Justice Kennedy concluded that, in addition to containing an allegation of discrimination and the name of the charged party, if a filing is to be deemed a charge it must be reasonably construed as a request to the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee. In this case, the intake questionnaire and the affidavit were enough to be deemed a "charge" of discrimination. The majority opinion noted that employers and their counsel must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.

In a strongly-worded dissent, Justice Thomas wrote that the majority's standard was "so malleable that it effectively absolves the EEOC of its obligation to administer the ADEA according to discernible standards." He noted that the intake questionnaire and the attached affidavit did not objectively demonstrate that the employee intended to initiate the EEOC's enforcement process. In support of his reasoning, Justice Thomas cited the fact that the EEOC never assigned the intake questionnaire a charge number and failed to serve the document on the employer. Justice Thomas was a former chairman of the EEOC.

### **Employers' Bottom Line**

This case is more likely to create confusion rather than furnish employers and their counsel a roadmap to follow. If an employer receives a charge of discrimination that appears to be untimely, the employer should assert the defense that the charging party failed to follow the procedural steps that are required to invoke the EEOC's jurisdiction. The employer should not assume that an intake questionnaire, by itself, will necessarily be deemed a valid charge of discrimination.

If you have any questions regarding this decision or labor or employment related issues in general, please contact the Ford & Harrison attorney with whom you usually work or the author of this Alert, Bennet Alsher, a partner in our Atlanta office, at [balsher@fordharrison.com](mailto:balsher@fordharrison.com) or 404-888-3852.