

NA 06-0013-C h/h Spellman v. Seymor Tubing  
Judge David F. Hamilton

Signed on 04/12/07

**NOT INTENDED FOR PUBLICATION IN PRINT**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
NEW ALBANY DIVISION

JOSIE SPELLMAN, )  
)  
Plaintiff, )  
vs. ) NO. 4:06-cv-00013-DFH-WGH  
)  
SEYMOUR TUBING, INC., )  
)  
Defendant. )

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
NEW ALBANY DIVISION

JOSIE SPELLMAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 4:06-cv-0013-DFH-WGH
	)	
SEYMOUR TUBING, INC.,	)	
	)	
Defendant.	)	

ENTRY ON PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

Plaintiff Josie Spellman has moved pursuant to Rule 15(a) of the Federal Rules of Civil Procedure for leave to amend her complaint to include a claim for retaliation. Spellman filed an EEOC charge in May 2005 alleging that defendant Seymour Tubing, Inc. subjected her to sexual harassment and a hostile work environment while she was an employee. The EEOC issued Spellman a Notice of Right to Sue in October 2005. She filed her original complaint in January 2006. Seven months after Spellman filed suit in court, Seymour Tubing terminated her employment. Plaintiff claims this termination was unlawful retaliation for having filed her earlier EEOC charge and this lawsuit. Seymour Tubing opposes plaintiff's motion for leave to amend, arguing that her proposed retaliation claim falls outside the scope of her EEOC filing and therefore should not be considered by this court. The motion does not challenge the merits of plaintiff's claim of retaliation, so the court assumes for present purposes that the termination was

an unlawful act of retaliation. The court grants plaintiff's motion for leave to amend complaint.

Before a Title VII claimant can bring suit in federal court, he or she must first exhaust the available administrative remedies by filing a charge with the appropriate federal or state agency. See 42 U.S.C. § 2000e-5; *Volovsek v. Wis. Dept. of Agriculture, Trade & Consumer Protection*, 344 F.3d 680, 686-87 (7th Cir. 2003). Although the exhaustion requirement is not jurisdictional, it is a condition precedent with which Title VII plaintiffs must comply. *Cheek v. Western & Southern Life Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994), citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392 (1982); *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 864 (7th Cir. 1985). A Title VII plaintiff may bring “only those claims that were included in her EEOC charge, or that are like or reasonably related to the allegations of the charge and growing out of such allegations.” *Haugerud v. Amery School Dist.*, 259 F.3d 678, 689 (7th Cir. 2001), quoting *McKenzie v. Illinois Dept. of Transportation*, 92 F.3d 473, 481 (7th Cir. 1996); see also *Cheek*, 31 F.3d at 500 (“As a general rule, a Title VII plaintiff cannot bring claims in a lawsuit that were not included in her EEOC charge”).

This exhaustion requirement has its limits, however. The Seventh Circuit has long held “that the judicial complaint in a Title VII case can embrace not only the allegations in the administrative charge but also discrimination like or reasonably related to the allegations of the charge and growing out of such

allegations, specifically including retaliation for the filing of the charge.” *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1312 (7th Cir. 1989) (internal quotations omitted), superseded on other grounds by statute as noted in *Rush v. McDonald’s Corp.*, 966 F.2d 1104, 1119-20 (7th Cir. 1992). Therefore, “[o]f course, an employee is not required to file a separate EEOC charge alleging retaliation when the retaliation occurs in response to the filing of the original EEOC charge.” *Gawley v. Indiana University*, 276 F.3d 301, 314 n.8 (7th Cir. 2001); see also *McKenzie*, 92 F.3d at 482-83 (7th Cir. 1996). This is a pragmatic rule, one that avoids requiring plaintiffs to file multiple charges and/or multiple lawsuits with overlapping evidence and issues. See *Malhotra*, 885 F.2d at 1312; *Steffen v. Meridian Life Insurance Co.*, 859 F.2d 534, 545 at n.2 (7th Cir. 1988) (requiring “double filing . . . would serve no purpose except to create additional procedural technicalities when a single filing would comply with the intent of Title VII”).

In this case, Spellman filed her EEOC charge in May 2005 alleging sexual harassment and a hostile work environment. The EEOC issued its Notice of Right to Sue in October 2005, and Spellman filed her complaint with the court in January 2006. Seven months later, in August 2006, Seymour Tubing terminated her employment. She alleges her employer was retaliating against her for having filed the EEOC charge and this lawsuit. This is precisely the sort of “reasonably related” claim envisioned by *Malhotra* and *Gawley*. Under this well established line of Seventh Circuit cases, Spellman was not required to pursue new

administrative remedies for this new claim because she had already exhausted the underlying harassment and hostile work environment claims.

Seymour Tubing argues that the Supreme Court's decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 (2002), requires a different result. The plaintiff in *Morgan* alleged that his employer discriminated and retaliated against him throughout his nearly 15-year career. He filed the requisite administrative complaint, and the EEOC issued its Notice of Right to Sue. After Morgan filed a lawsuit in federal court, the employer moved for summary judgment on all alleged discriminatory and retaliatory incidents that occurred before the 300-day administrative filing period. The Ninth Circuit had determined that Morgan should be allowed to sue on these prior incidents because they were "sufficiently related" to claims falling within the statutory filing period. The Supreme Court reversed. The Supreme Court ruled instead that all discrete discriminatory acts that occurred prior to the 300-day statutory period were not actionable because Morgan had failed to seek a timely administrative remedy for such acts:

Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable "unlawful employment practice."

*Id.* at 114. In reaching its decision, the Court considered only discriminatory and retaliatory acts that occurred more than 300 days *before* the plaintiff filed an

EEOC charge. In that way, *Morgan* differs significantly from the case at hand, where Spellman seeks to litigate a retaliatory act that occurred *after* she filed her EEOC complaint. Seymour Tubing nevertheless insists that the reasoning in *Morgan* applies equally to retaliatory acts like that at issue here, citing the Tenth Circuit's decision in *Martinez v. Potter*, 347 F.3d 1208, 1210 (10th Cir. 2003); see also *Romero-Ostolaza v. Ridge*, 370 F. Supp. 2d 139, 148-49 (D.D.C. 2005); *Velikonja v. Mueller*, 315 F. Supp. 2d 66, 74 (D.D.C. 2004).

If the court were bound to apply the Tenth Circuit's holding in *Martinez*, Spellman's retaliation claim would no doubt fail. Like Spellman, the plaintiff in *Martinez* sued under Title VII for retaliatory acts that occurred after he filed his original EEOC charge and complaint in district court, and he had not filed a new EEOC charge claiming retaliation. The Tenth Circuit upheld summary judgment for the employer on these subsequent retaliatory acts, relying on the Supreme Court's holding in *Morgan*:

[The *Morgan* rule] applied to bar a plaintiff from suing on claims for which no administrative remedy had been sought, when those incidents occurred more than 300 days *prior* to the filing of plaintiff's EEO complaint. The rule is equally applicable, however, to discrete claims based on incidents occurring *after* the filing of Plaintiff's EEO complaint.

*Id.* at 1210-11.

The Eighth Circuit has rejected the Tenth Circuit's expansive interpretation of *Morgan*. See *Wedow v. City of Kansas City*, 442 F.3d 661, 673 (8th Cir. 2006)

(“we have not wholly abandoned the theory that reasonably related subsequent acts may be considered exhausted”).<sup>1</sup> Likewise, Title VII plaintiffs in this circuit have continued to litigate unexhausted retaliation claims that arose after the original EEOC claim was filed. See, e.g., *Horton v. Jackson County Bd. Of County Commissioners*, 343 F.3d 897, 898 (7th Cir. 2003) (“retaliation for complaining to the EEOC need not be charged separately from the discrimination that gave rise to the complaint”); *Kind v. Gonzales*, 2006 WL 1519579, at \*8 n.8 (N.D. Ill. May 30, 2006) (“Defendant rightly recognizes the Seventh Circuit’s teaching that retaliation claims are within the scope of an EEO charge when the retaliation arose after, and in response to, the initial EEO filing and was reasonably related to that filing, obviating the need for a second EEO charge”) (internal quotations omitted); *Hopper v. Legacy Property Mgmt. Services, L.L.C.*, 2006 WL 1388832, at \*8 (E.D. Wis. May 16, 2006) (“Hopper’s failure to file a new EEOC complaint or to amend her complaint to include new allegations of retaliation and constructive discharge is not fatal to her judicial complaint”); *Schwartz v. Bay Industries, Inc.*, 274 F. Supp. 2d 1041, 1046 (E.D. Wis. 2003) (denying defendant’s motion to dismiss a retaliatory discharge claim that was omitted from the EEOC charge).

The Supreme Court’s holding in *Morgan* is consistent with the Seventh Circuit’s approach to the exhaustion requirement for Title VII claims. In *Steffen v.*

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<sup>1</sup>In an unpublished decision, a divided panel of the Sixth Circuit also held that *Morgan* did not require a fresh EEOC charge for a later act of retaliation. *Delisle v. Brimfield Township Police Dep’t*, 94 Fed. Appx. 247, 252-54 (6th Cir. 2004).

*Meridian Life Insurance Co.*, the Seventh Circuit expressly distinguished between retaliation claims that arose *after* a charge of discrimination was filed (as here) from those that arose prior (as in *Morgan*):

Steffen cites to a number of cases that have allowed a retaliatory discharge claim to proceed even though the underlying charge did not mention retaliation. These cases, however, all involved situations where the alleged retaliation arose *after* the charge of discrimination had been filed or the employer was given clear notice from the EEOC that retaliation was at issue; thus, a double filing . . . would serve no purpose except to create additional procedural technicalities when a single filing would comply with the intent of Title VII. These cases are distinguishable from the present case where the alleged retaliatory acts occurred *before* Steffen's December 1, 1983 charge of discrimination was filed and Meridian was not given clear notice that retaliation was at issue.

*Steffen v. Meridian Life Insurance Co.*, 859 F.2d 534, 545 at n.2 (7th Cir. 1988) (internal citations omitted); see also *McKenzie*, 92 F.3d at 482-83. This reasoning stands in contrast to the Tenth Circuit's approach to the exhaustion requirement in *Martinez*, which did not distinguish between retaliation claims that arose before and after a discrimination charge was filed. 347 F.3d at 1210-11.

The policy goals of Title VII and its exhaustion requirement would not be served by requiring plaintiffs to exhaust administrative remedies before bringing a claim for retaliation arising after the plaintiff filed the first charge of discrimination. The exhaustion requirement "serves the dual purpose of affording the EEOC and the employer an opportunity to settle the dispute through conference, conciliation, and persuasion, and of giving the employee some warning of the conduct about which the employee is aggrieved." *Cheek*, 31 F.3d at 500

(7th Cir. 1994) (internal citations omitted). In words that could describe Spellman's case:

Even without requiring the complainant to file a charge of retaliation, it is evident the defendant has notice of the act in which it engaged as a direct result of the filing . . . . As a result, the defendant's ability to defend the claim and initiate voluntary settlement or conciliation attempts with the EEOC prior to the start of litigation is in no way prohibited or impeded by the absence of a second filing. Even if the EEOC does not investigate, the defendant has notice and can initiate discussions directly with the plaintiff.

*Schwartz*, 274 F. Supp. 2d at 1048, quoting Kelly Koenig Levi, *Post Charge Title VII Claims: A Proposal Allowing Courts to Take "Charge" When Evaluating Whether to Proceed or to Require a Second Filing*, 18 Ga. St. U. L. Rev. 749, 770-71 (2002); see also *Malhotra*, 885 F.2d at 1312 ("there is a practical reason for treating retaliation in this way: having once been retaliated against for filing an administrative charge, the plaintiff will naturally be gun shy about inviting further retaliation by filing a second charge complaining about the first retaliation").

Accordingly, Spellman's retaliation claim is not barred, and her motion for leave to amend her complaint (Docket No. 20) is hereby granted. The tendered complaint shall be deemed filed this date.

So ordered.

Date: April 12, 2007

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DAVID F. HAMILTON, JUDGE  
United States District Court  
Southern District of Indiana

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