No. _____

In The Supreme Court of the United States

TERRANCE J. LAVIGNE,

Petitioner,

v.

CAJUN DEEP FOUNDATIONS, L.L.C.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) To establish a prima facie case of discriminatory termination, is a plaintiff required to show that he was replaced by someone outside his or her protected group?*

(2) Under Title VII of the Civil Rights Act of 1964, a plaintiff prior to bringing a civil action must first file a charge with the EEOC, usually within 300 days of the action complained of. The Question Presented is:

> Where a claimant files a timely Title VII charge asserting that employer conduct was the result of a particular unlawful motive, may the claimant after the end of the charge-filing period amend that charge, or bring a civil action, asserting that the conduct was also the result of a second unlawful motive?

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* The petition in *Riley v. Elkhart Community Schools*, No. 16-___, presents the related question of whether to establish a prima facie case of discrimination in hiring or promotion, a plaintiff is required to show that the position at issue was filled by someone outside his or her protected group.

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The parties to this proceeding are set forth in the caption.

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Petitioner Terrence Lavigne respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on July 6, 2016.

OPINIONS BELOW

The July 6, 2016, opinion of the court of appeals, which is unofficially reported at 2016 WL 3626719, is set out at pp. 1a-25a of the Appendix. The July 10, 2014 opinion of the district court, which is reported at 32 F.Supp.3d 718 (M.D.La. 2014), is set out at pp. 26a-65a of the Appendix.[1]

JURISDICTION

The decision of the court of appeals was entered on July 6, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(a).

[1] The petition concerns the rejection of Lavigne's claims of unlawful termination. The district court rejected those claims in its 2014 opinion. The district court subsequently tried, and ultimately rejected, claims of discrimination in pay and in the imposition of discipline. The district court decisions regarding the non-termination claims are reported at 2016 WL 3626719 (M.D.La. July 20, 2015), and 86 F.Supp.3d 524 (M.D.La. 2015).

STATUTES AND REGULATIONS INVOLVED

The statues and regulations involved are set out at pp. 73a-75a of the Appendix.

STATEMENT

Factual Background

For a number of years prior to 2011 petitioner Terrance Lavigne, who is African-American, worked as a foreman for Cajun Deep Foundations. Foreman is the lowest level supervisor position in the firm; the higher level managers hold the position of superintendent and general superintendent. There has never been a black superintendent or general superintendent.[2]

Lavigne was told by two white superintendents that he would never be promoted to the rank of superintendent because he was black. App. 62a. In December 2010 Lavigne complained to the general superintendent that he and his brother had been referred to as "boys" by one of the white superintendents. *Id.* The general superintendent took no action to address the use of that racial epithet.[3] Lavigne also complained to the company that he was not being paid the same wages as the white superintendents when he was carrying out superintendent duties.[4]

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[2] Record on Appeal ("ROA") 873, 1901-02, 2086, 2181, 2224.

[3] ROA 609, 611-21, 986-87.

[4] ROA 628, 806.

In February 2011, several months after Lavigne's complaint about the "boy" epithet, he was involved in a minor mishap in which a construction vehicle he was operating struck a girder. The company suspended Lavigne for three days and placed him on probation. App. 3a. Lavigne contended that the company only imposed that discipline because of his race and earlier complaint.

In March 2011 Cajun Deep fired Lavigne. The ostensible reason for the dismissal was that Lavigne had allegedly violated company policy by failing to report several moving violations for which he had been ticketed, and that this violation came to light when Lavigne was on probation. Lavigne insisted the company knew that he had not violated that policy. Lavigne testified that in compliance with company policy he had earlier reported one moving violation to the general superintendent (the official who later fired him),[5] and had previously reported the other moving violation to a supervisor (the one who later used the "boy" epithet and told Lavigne he could not be a superintendent because he was black).[6] See App. 60a n.13.[7]

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[5] The general superintendent was Gene Landry. ROA 673-74, 676-77.

[6] The white superintendent in question was Seth Gillen. ROA 609, 611, 676-77, 786-87.

[7] The company also invoked a third infraction, but Lavigne pointed out that the state record on which the defendant relied made clear this was not a moving violation, and thus was not covered by the company's reporting requirement. App. 60a n.13.

A week after Lavigne was dismissed, he visited the New Orleans EEOC office and filled out an "Intake Questionnaire" regarding his treatment by Cajun Deep. Based on the information in that Questionnaire, an EEOC official prepared a formal EEOC charge; under normal agency practice an EEOC official, not the charging party, actually prepares such a charge. In August 2011 the EEOC sent the charge to Lavigne, who signed and returned it to the agency. App. 34a. The charge alleged that Cajun Deep had discriminated against Lavigne on the basis of race. The body of the charge contained two general allegations of racial discrimination, and one paragraph that referred more specifically to Lavigne's claim that he had been punished for the accident because of his race, and that he had been paid less because of his race. App. 22a-23a, 36a.

The EEOC office in New Orleans took no steps to investigate Lavigne's charge. After seven months of inaction, the New Orleans office transferred the charge to the Houston EEOC office, explaining that it was doing so because the Houston office would be able to handle the matter without further delay.[8] Within a few days after receiving Lavigne's charge file, an investigator in the Houston EEOC office contacted Lavigne and suggested that the charge be amended. The EEOC then drafted the proposed amendment and sent it to

[8] ROA 984.

Lavigne, who signed the amendment and returned it to the Houston office.[9]

The EEOC-drafted amendment supplemented the original charge in two ways. It elaborated the earlier general allegations of racial discrimination by adding another specific instance of racial discrimination, asserting that Lavigne's dismissal was racially motivated. The amendment also alleged that the dismissal was the result of an additional unlawful motive, an intent to retaliate against Lavigne because of his earlier discrimination complaint to the company. App. 23a, 36a-37a. The EEOC thoroughly investigated Lavigne's specific allegation that his dismissal was unlawful, including both his claim of racial discrimination and his claim of illegal retaliation. App. 24a.

Proceedings Below

Lavigne commenced this action in federal district court, alleging that he had been fired because of his race and in retaliation for his earlier complaint to the company about racial discrimination.[10]

The district court granted summary judgment rejecting the claim of discriminatory dismissal, on the ground that following Lavigne's termination his former position had been filled by an African-American.

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[9] ROA 985, 1152.

[10] The complaint also alleged that Lavigne had been paid less because of his race, and that he had been disciplined for the same reason. Those claims were tried to the court, which ultimately rejected both on the merits. See n.1, *supra*.

"[T]he district court held that Plaintiff had failed to state a prima facie case of discrimination because he had not shown ... that he had been replaced by someone outside of his protected group." App. 15a.[11] Because the district court concluded that Lavigne had not established a prima facie case, it did not address the conflicting evidence regarding whether the company's key proffered justification for firing Lavigne – his asserted failure to report moving violations – was a fabrication concocted to cover up an unlawful discriminatory motive. See App. 60a n.13.

The district court dismissed Lavigne's retaliation claim on a different ground. Title VII requires that, prior to commencing a civil action, an aggrieved individual must file a charge with the EEOC. Lavigne's original charge had alleged only racial discrimination, and the amendment (which asserted the existence of a retaliatory motive) had been filed by Lavigne (and drafted by the EEOC) after the expiration of the 300 day charge-filing period established by Title VII. Although the EEOC regulations provide that certain amendments relate back to the date of the original charge, Fifth Circuit precedent generally bars relation-back where an amendment asserts a new type of unlawful motive (here retaliation, in addition to the original claim of racial discrimination). App. 35a. Because the amended charge added such a new asserted

[11] Lavigne first contacted the EEOC on March 28, 2011. App. 19a. The company hired a new black foreman on April 13, 2011. App. 61a. The parties disagreed about whether that new foreman was given Lavigne's duties. App. 16a, 61a.

unlawful motive, the district court held that the amendment could not relate back. App. 38a-41a.[12]

The court of appeals affirmed the dismissal of both termination claims,[13] again on distinct grounds. With regard to the claim of racial discrimination, the court of appeals applied the longstanding Fifth Circuit rule that in a discriminatory dismissal case a plaintiff cannot establish a prima facie case unless he can show that he was replaced by a person outside the protected class at issue. The Fifth Circuit concluded that Lavigne could not establish a prima facie case because, it believed, he had been replaced by another African-American. App. 15a.

The court of appeals, like the district court, rejected Lavigne's retaliation claim on the ground that he had failed to file a timely retaliation claim with the EEOC. The court of appeals applied a well-established Fifth Circuit rule that an amendment to an EEOC charge generally does not relate back if it asserts a new, additional type of discriminatory motive. App. 16a-18a. One member of the court of appeals dissented, arguing that the amendment should relate back. App. 23a-25a.

[12] The district court concluded that Lavigne's claim of racial discrimination regarding his dismissal was within the scope of the original racial discrimination charge. App. 33a-38a.

[13] The court of appeals also affirmed the district court's rejection of Lavigne's pay and discipline claims. App. 10a-15a.

REASONS FOR GRANTING THE WRIT

I. THERE IS AN IMPORTANT CIRCUIT CONFLICT REGARDING WHETHER A PLAINTIFF CLAIMING DISCRIMINATORY TERMINATION MUST PROVE THAT HE OR SHE WAS REPLACED BY A PERSON OUTSIDE HIS OR HER PROTECTED GROUP

This case presents a recurring important issue regarding discriminatory terminations: whether a plaintiff alleging that he or she was fired on the basis of race or some other protected characteristic is required, in order to establish a prima facie case, to show that he or she was replaced by someone who was not a member of that protected group (the "replacement requirement").[14] In the instant case the court of appeals, applying a long series of Fifth Circuit precedents, rejected the claim of the black plaintiff because it believed the employer had hired a black replacement to fill the plaintiff's position. Several other circuits apply a similar requirement, and have rejected discrimination claims because of the race, gender or national origin of a plaintiff's replacement. "This [C]ourt has not directly addressed the question of whether the personal characteristics of someone chosen to replace a Title VII plaintiff are material...." *St. Mary's Honor*

[14] The petition in *Riley v. Elkhart Community Schools*, No. 16-___, presents the related question of whether a plaintiff alleging that he or she was denied a job or promotion based on a protected characteristic is required to show, in order to establish a prima facie case, that the position was filled by someone who was not a member of his or her protected group.

Center v. Hicks, 509 U.S. 502, 527 n.1 (1993) (Souter, J., dissenting).

A. There Is A Deeply Entrenched and Well Recognized Circuit Conflict About This Issue

Five circuits, including in this instance the Fifth Circuit, apply some variant of the replacement requirement. Seven circuits have rejected this interpretation of Title VII and other federal prohibitions against intentional discrimination. The conflict is widely recognized by courts and commentators.

(1) The court of appeals decision in this case applied a long line of Fifth Circuit precedents requiring the plaintiff in a case alleging discriminatory termination, in order to establish a prima facie case, to show that he "was replaced by a person outside of his protected class." App. 15a (quoting *Wills v. Cleco Corp.*, 749 F.3d 314, 320 (5th Cir. 2014)). That requirement had previously been spelled out in at least 14 reported and 20 unofficially reported Fifth Circuit decisions. App. 66a-72a. E.g., *Finley v. Florida Parish Juvenile Detention Ctr.*, 574 Fed.Appx. 402, 404 (5th Cir. 2014) ("In order to show a prima facie case of discriminatory discharge, a plaintiff must first establish that [he] ... was replaced by someone outside of the protected class") (quoting *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 345 (5th Cir. 2007)).

In the instant case the court of appeals dismissed Lavigne's racial discrimination because it concluded that Lavigne's position had been given to another African-American. App. 15a-16a. In *Moore v. Duncanville Ind. School Dist.*, 358 Fed.Appx. 515 (5th Cir. 2009), the Fifth Circuit rejected the discrimination claim of the terminated Hispanic plaintiff because "his replacement was, like him, of Hispanic national origin and was therefore not 'outside of the protected class.'" 358 Fed.Appx. at 517 (quoting *Turner*, 476 F.3d at 345). In *Singh v. Shoney's, Inc.*, 64 F.3d 217 (5th Cir. 1995), the court of appeals dismissed the discrimination claim of the terminated white plaintiff on the ground that she "failed to make out a prima facie case of racial discrimination ... , because she was replaced by a white female." 64 F.3d at 219.

The Fourth Circuit also requires proof of replacement by someone outside the protected class as an element of a prima facie case. That circuit has repeatedly dismissed claims of discriminatory termination because of the race, gender or national origin of the plaintiff's replacement. E.g., *McCaskey v. Henry*, 461 Fed.Appx. 268, 270 (4th Cir. 2012) (race discrimination claim of black plaintiff dismissed because "a black man was promoted to fill her positon after her termination"); *Spease v. Public Works Comm'n of City of Fayetteville*, 369 Fed.Appx. 455, 456 (4th Cir. 2010) (race discrimination claim of black plaintiff dismissed because he "was replaced by another African-American male"); *Pickworth v. Entrepreneurs' Organization*, 261

Fed.Appx. 491, 493 (4th Cir. 2008) (pregnancy discrimination claim dismissed because "the record shows that [plaintiff's] replacement was pregnant at the time she was promoted to [the plaintiff's] former position."); *Garrow v. Economos Properties, Inc.*, 242 Fed.Appx. 68, 72 (4th Cir. 2007) (dismissing gender discrimination claim of female plaintiff because position filled by another woman); *Brown v. McLean*, 159 F.2d 898, 905 (1998) (gender discrimination claim of male plaintiff dismissed "because [the plaintiff] was replaced by a male").

The Sixth Circuit also holds that a plaintiff asserting a discriminatory dismissal must show that he or she was replaced by a person outside the protected class in order to establish a prima facie case. *Shazor v. Professional Transit Management, Ltd.*, 744 F.2d 948, 957 (6th Cir. 2014) ("replaced by someone outside of the protected class"); *Griffin v. Finkbeiner*, 689 F.3d 584, 592 (6th Cir. 2012) (same). In *Fuelling v. New Vision Medical Laboratories LLC*, 284 Fed.Appx. 247, 253-54 (6th Cir. 2008), the court of appeals held that the discrimination claim of the white plaintiff "clearly fails because she was replaced by a white female." In *Abeita v. TransAmerica Mailings, Inc.*, 159 F.3d 246, 253 (6th Cir. 1998), the gender discrimination claim of the dismissed female plaintiff was rejected because "her responsibilities were split between a number of female ... employees."

The Eleventh Circuit requires plaintiffs in discriminatory dismissal cases to show they were replaced by a person outside the protected class. *Ezell v.*

Wynn, 802 F.3d 1217, 1226 (11th Cir. 2015) ("to establish a prima facie case a plaintiff must show that she ... was replaced by someone outside the protected class"); *Hinson v. Clinch County, Georgia Bd. of Educ.*, 231 F.3d 821, 828 (11th Cir. 2000) ("[t]o establish a prima facie case, [plaintiff] has to show ... that she was replaced by someone outside the protected class").

In the Ninth Circuit as well an essential element of a "prima facie case of discriminatory discharge [is] replacement of the plaintiff by a person outside the protected class." *Srinivasan v. Devry Institute of Technology*, 1995 WL 242307 at *3 (9th Cir. April 25, 1995); see *Stonum v. CCH Computax, Inc.*, 1994 WL 424352 at *1 (9th Cir. Aug. 12, 1994) (same). In *Burks v. Dept. of Arizona Economic Security*, 12 Fed.Appx. 454, 458 (9th Cir. 2001), the court of appeals held that "[the female plaintiff] failed to establish a prima facie case of sex discrimination [because she] was replaced by another woman, and, therefore, she cannot meet the test established by this court...."

In all of these circuits a prudent attorney today would not file an action alleging a discriminatory termination if the employer had replaced the fired worker with someone of the same protected group. Lavigne brought the instant lawsuit only because he had a substantial – although ultimately unsuccessful – factual argument that he had actually been replaced by a white worker.

(2) Seven circuits have emphatically rejected this requirement that a plaintiff show that he or she

was replaced by a person who is not a member of the protected group in question. Those circuits have repeatedly reversed district court decisions that applied that requirement.

In *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990) (opinion joined by Breyer, J.), the First Circuit insisted that

> we have never held that the fourth element of a prima facie discharge case can be fulfilled only if the complainant shows that she was replaced by someone outside the protected group. Indeed, we have said precisely the opposite.... [T]oday we set any uncertainty to rest and rule that, in a case where an employee claims to have been discharged in violation of Title VII, she can make out [a] prima facie case without proving that her job was filled by a person possessing the protected attribute.

902 F.2d at 155; see *Sanchez v. Puerto Rico Oil Co.*, 37 F.3d 712, 719 n.20 (1st Cir. 1994).

The Second Circuit expressly rejects the replacement requirement applied in other circuits.

> Although certain courts ... have required an employee, in making out a *prima facie* case, to demonstrate that she was replaced by a person outside the protected class, ... , we believe such a standard is inappropriate and at odds with the policies underlying Title VII.

Mieri v. Dacon, 759 F.2d 989, 966 (2d Cir. 1985).

> Were we to adopt a mechanical approach, we would be required to exempt from Title VII coverage an employer that, in furtherance of a broad-based policy of employment discrimination, discharged one hundred minority employees, retained nine hundred non-minority employees, and, by making additional overtime available to the nine hundred retained employees, found it unnecessary to replace any of the discharged employees.

759 F.3d at 996 n.9; see *Leibowitz v. Cornell University*, 584 F.3d 487, 502 n.2 (2d Cir. 2009).

The Third Circuit rejected a jury instruction that would have required a female plaintiff in a gender discrimination case to prove "that she was replaced by a man." *Pivrotto v. Innovative Systems, Inc.*, 191 F.3d 344, 351 (3d Cir. 1999). "It is inconsistent with Title VII to require a plaintiff to prove that she was replaced by someone outside her class in order to make out a prima facie case. We hold that it is error to require a plaintiff to do so...." 191 F.3d at 355.

In *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157 (7th Cir. 1996), the Seventh Circuit also rejected such a requirement.

> The district court remarked that [the white plaintiff's] replacement by a white employee prevented her from establishing a prima facie case of discrimination. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), shows that this understanding of a prima facie case is erroneous.... That one's

> replacement is of another race, sex, or age may help raise an inference of discrimination, but it is neither a sufficient nor a necessary condition.

82 F.3d at 158; see *Bates v. City of Chicago*, 726 F.3d 951, 954 n.4 (7th Cir. 2013).

The Eighth Circuit has repeatedly rejected district court opinions imposing a replacement requirement. In *Walker v. St. Anthony's Medical Center*, 881 F.2d 554, 557-58 (8th Cir. 1989), the court of appeals held that "[a]lthough ... the district court[ ] belie[ved] that [the plaintiff] was required to show that she was replaced by an individual from outside the protected class in question, no such per se requirement has traditionally been imposed in cases brought under Title VII." 881 F.3d at 558; see *Davenport v. Riverview Gardens Sch. Dist*., 30 F.3d 940, 944-45 (8th Cir. 1994); *Williams v. Ford Motor Co.*, 14 F.3d 1305, 1308 (8th Cir. 1994).

The Tenth Circuit also holds that a plaintiff can establish a prima facie case of a discriminatory termination even though he or she was replaced by a person in the same protected group.

> A non-white employee who claims to have been discharged as a result of racial discrimination can establish ... [a] prima facie case without proving that her job was filled by a person who does not possess her protected attribute.... [T]he district court erred as a matter of law when it held that [the Hispanic plaintiff] failed to make out her prima facie

> case ... because she was replaced by an Hispanic woman.

Perry v. Woodward, 199 F.3d 1126, 1138-40 (10th Cir. 1999); see *Nguyen v. Gambro BCT, Inc.*, 242 Fed.Appx. 483, 488 (10th Cir. 2007).

The District of Columbia Circuit's rejection of the replacement requirement dates from its decision in *Stella v. Mineta*, 284 F.3d 135, 146 (D.C. Cir. 2002). "[W]e hold ... that a plaintiff in a discrimination case need not demonstrate that she was replaced by a person outside her protected class in order to carry her burden of establishing a prima facie case...." See *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 494 n.2 (D.C. Cir. 2008); *Mastro v. Potomac Elec. Power Co.*, 447 F.2d 843, 851 (D.C. Cir. 2006).

(3) The disagreement among the courts of appeals is widely recognized. "Federal courts construing Title VII have ... struggled with ... whether replacement by an individual outside the protected class is a necessary element [of a prima facie case]. Those courts have reached varying results...." *Williams v. Pemberton Township Public Schools*, 323 N.J.Super. 490, 501 (App.Div. 1999). The Third Circuit decision in *Pivritto* pointed out that the Fourth Circuit standard conflicted with the majority rule. 191 F.3d at 354 n.6; *see Stith v. Chadbourne & Parke, LLP*, 160 F.Supp.2d 1, 11 and n.4 (D.D.C. 2001) (describing conflict).

In *Brown v. Parker-Hannifin Corp.*, 746 F.2d 1407, 1410 n.3 (10th Cir. 1984), the Tenth Circuit rejected the "stricter" Fifth Circuit standard. In *Clayton v. Meijer,*

Inc., 281 F.3d 605, 610 (6th Cir. 2002), the Sixth Circuit rejected the First Circuit standard. In *Mieri* the Second Circuit rejected the Fifth Circuit decision in *Lee v. Russell County Bd. of Ed.*, 684 F.2d 769, 773 (11th Cir. 1982). 759 F.3d at 995-96. Commentators have repeatedly described the conflict.[15]

The conflict has been aggravated to some degree by the fact that federal agencies have taken inconsistent positions. In *O'Connor v. Consolidated Coin Caterers Corp.* 517 U.S. 308 (1996), the United States advised this Court that a prima facie case of discriminatory discharge under Title VII does not require proof that the plaintiff was replaced by a person outside the protected class.[16] But *O'Connor* did not resolve that

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[15] Note, Dubious Protected Class Distinctions: Eliminating the Role of Replacement Identity in a Discharged Title VII Plaintiff's Case, 44 B.C.L.Rev. 1295, 1296-1306 (2003); C.R. Senn, Minimal Relevance: Non-Disabled Replacement Evidence in ADA Discrimination Cases, 66 Baylor L.Rev. 65, 78 (2014) ("the federal circuits are split on whether ... replacement evidence is (and should be) a legally necessary element of [a] ... plaintiff's prima facie case"); Note, The Replacement Dilemma: An Argument for Eliminating A Non-Class Replacement Requirement in the Prima Facie Stage of Title VII Individual Disparate Treatment Discrimination Claims, 101 Mich.L.Rev. 1338, 1340-43 and nn.18-25 (2003) ("Lower courts are inconsistent in deciding whether an employee must show that her job replacement is someone outside her protected class to sustain her prima facie burden under Title VII"); Note, A Matter of Class: The Impact of Brown v. McLean on Employee Discharge Cases, 46 Vill.L.Rev. 421, 429-30 and nn.41-47 (2001).

[16] Brief for the United States and Equal Employment Opportunity Commission as Amici Curiae Supporting Petitioner, available at 1995 WL 793447 at *16-*17.

issue under Title VII, and subsequent to 1995 the Department of Justice in defending Title VII claims against federal agencies has endorsed such a requirement,[17] while the EEOC has advanced the opposite interpretation of Title VII.[18] A grant of certiorari would prompt the Solicitor General to frame a single, consistent Executive Branch position on this issue.

B. The Replacement Requirement Is Clearly Inconsistent With Title VII

The replacement requirement effectively defines what discrimination is, and is not, unlawful under Title VII. Under prevailing practice in the lower courts, a Title VII claim will almost invariably be dismissed if the plaintiff cannot establish a prima facie case. Any legal standard establishing a requirement for a prima facie case thus effectively excludes from the protections of Title VII cases in which that requirement would not be met. In a circuit that imposes a replacement requirement, an employer which engages in intentional discrimination can avoid liability by

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[17] Brief for Appellee, *Fuentes v. Postmaster General*, No. 07-10426 (5th Cir.), available at 2007 WL 5129524 at *19, *22; Brief of Defendant-Appellee United States, *Greene v. Potter*, No. 06-30953 (5th Cir.), available at 2007 WL 3389323 at *19; Brief of Appellee, *Lopez v. Martinez*, No. 05-11300 (5th Cir.), available at 2007 WL 3000609.

[18] Enforcement Guidance on *O'Connor v. Consolidated Coin Caterers Corp.*, available at 1996 WL 33161340 at *3 and n.4; Brief of the EEOC as Amicus Curiae, *Miles v. Dell, Inc.*, No. 04-2500 (4th Cir.), available at 2005 WL 2038371 at *19.

replacing a terminated worker with another person from the same protected group.

The United States correctly advised this Court in *O'Connor* that intentional discrimination could indeed occur even though a terminated worker was replaced by a person from the same protected group.

> There are some situations in which an employer might discriminate on the basis of (for example) race by refusing to hire a black person, even if another black person is ultimately hired for the same or similar position. An employer engaging in racial discrimination might ... reassign a few minority employees to conceal discrimination.... Such actions would constitute prohibited discrimination, even if the persons eventually chosen to fill the positions were black.

Brief for the United States and the Equal Employment Opportunity Commission As Amici Curiae Supporting Petitioner, *O'Connor v. Consolidated Coin Caterers Corp.*, No. 95-354, available at 1995 WL 793447 at *17. The lower courts have recognized that there are a wide variety of circumstances in which, despite such same-group replacement, intentional discrimination would indeed occur. *Carson v. Bethlehem Steel Corp.*, 82 F.3d at 158; *Pivritto v. Innovative Systems, Inc.*, 191 F.3d at 353; *Perry v. Woodward*, 199 F.3d at 1137.

An employer "cannot purge [unlawful racial discrimination against one worker] by hiring another person of the same race later." *Carson*, 82 F.3d at 158.

"Title VII does not permit the victim of a ... discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were [treated more favorably.]" C*onnecticut v. Teal*, 457 U.S. 440, 455 (1982). "Irrespective of the form taken by the discriminatory practice, an employer's treatment of other members of the plaintiffs' group can be 'of little comfort to the victims of ... discrimination.'" *Id*. at 455 (quoting *Teamsters v. United States*, 431 U.S. 324, 432 (1977)). "Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he treats favorably other members of the employees' group." *Id.* at 455. "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 579 (1978) (emphasis in original).

II. THERE IS AN IMPORTANT CIRCUIT CONFLICT REGARDING WHETHER A TITLE VII CHARGE MUST IDENTIFY ALL OF AN EMPLOYER'S UNLAWFUL MOTIVES

This case also presents an issue central to the administration of Title VII and other federal anti-discrimination statutes. Prior to commencing a suit under Title VII, a claimant must file a charge with EEOC. It is common for a claimant, after filing a charge asserting that the employer acted with one

particular unlawful motive, to later assert that the employer action in question was also the result of another unlawful motive.[19] Title VII forbids conduct based on any of six different unlawful motives.[20]

The courts of appeals are sharply divided regarding whether a claimant can later assert the existence of such an additional unlawful motive. The question arises in two different contexts. In some cases the claimant seeks to amend his or her original EEOC charge to assert the existence of an additional motive for employer conduct, but does so after the expiration of the 300 day charge-filing period. In other cases the claimant does not amend his or her charge, but simply includes in a subsequent civil action a claim that the employer conduct that was the subject of the EEOC charge was also the result of an additional unlawful motive.

A. There Is A Deeply Entrenched and Well Recognized Circuit Conflict About This Issue

(1) Three circuits hold that a Title VII suit is limited to the particular unlawful motive asserted in the

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[19] This problem also arises in cases in which the initial and later-asserted motives are forbidden by different statutes, such as the Age Discrimination in Employment Act or the Americans With Disabilities Act.

[20] Title VII generally forbids actions taken for the purpose of discriminating on the basis of race, color, national origin, religion or gender, or for the purpose of retaliating against an individual because he or she engaged in certain protected activity.

original EEOC charge, and that an amendment to such a charge asserting an additional motive for the employer conduct at issue does not relate back to the date the original charge was filed. These decisions refer to such a claim of an additional unlawful motive as raising a "new theory" or "new legal theory," and hold that an amendment with such a new theory generally does not relate back and that the additional unlawful motive thus cannot be included in a Title VII action.

The decision below applies the longstanding Fifth Circuit rule[21] that generally "amendments that raise a new legal theory do not 'relate back' to an original charge of discrimination." App. 17a (quoting *Manning v. Chevron Chemical Co.*, 332 F.3d 874, 878-79 (5th Cir. 2003)). "[D]iscriminat[ory] and retaliat[ory] [motives] are distinct, and the allegation of one in an EEO charge does not exhaust a plaintiff's remedies as to the other." App. 17a (quoting *Bouvier v. Northrup Grumman Ship Sys. Inc.,* 350 Fed.Appx. 917, 921 (5th Cir. 2009)). In the Fifth Circuit a charging party is ordinarily limited to the unlawful motive that was identified by checking the relevant box on the EEOC charge form.[22] The Fifth Circuit recognizes a "narrow exception" to this requirement, limited to instances in which

[21] The Fifth Circuit has applied this stringent rule on numerous occasions. *Thibodeaux v. Texas*, 2016 WL 4547230 at *2 (5th Cir. Aug. 31, 2016); *Carter v. Target Corp.*, 541 Fed.Appx. 413, 419 (5th Cir. 2013); *Bouvier v. Northrup Grumman Ship Systems, Inc.*, 350 Fed.Appx. 917, 921 (5th Cir. 2009); *Teffera v. North Texas Tollway Authority,* 121 Fed.Appx. 18 (5th Cir. 2004).

[22] The EEOC actually prepares these forms, based on an Intake Questionnaire filled out by the charging party.

the discursive portion of a charge sets out facts stating a claim that some additional unlawful motive was present. *Manning*, 332 F.3d at 879. The court below explained that in this case this meant that Lavigne would have had to allege in the body of his original charge each of the factual elements of a retaliation claim. App. 17a (quoting *Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 331 (5th Cir. 2009)). Lavigne's retaliation claim was barred because the "original Charge of Discrimination does not allege these facts" (App. 18a), and because the "Retaliation" box on the EEOC charge form had not been checked. *Id*.

The court of appeals acknowledged that the EEOC regulations expressly permit relation back of certain amendments to a Title VII charge. App. 17a. In the instant case it was the EEOC itself which proposed that Lavigne's charge be amended, and which drafted the amendment. The EEOC then accepted the amendment which Lavigne had signed, and proceeded to investigate the retaliation claim. In the Fifth Circuit's view, the EEOC should never have done any of those things, and ought instead have rejected any such amendment if proposed by Lavigne himself. The Fifth Circuit holds that the investigative authority of the EEOC is limited to the claims of discrimination that are within the scope of a timely EEOC charge. *EEOC v. Mississippi College*, 626 F.2d 477, 481-84 (5th Cir. 1980).

The Tenth Circuit also holds that a claimant cannot amend his original claim after the 300 day charge-filing period to assert the existence of an additional unlawful purpose, or bring a Title VII suit asserting

such an unlawful purpose. *Simms v. Oklahoma*, 165 F.3d 1321 (10th Cir. 1999). In *Simms* the plaintiff's original charge alleged he had been denied a promotion because of his race; the amended charge asserted that the promotion denial was also the result of a retaliatory motive. The EEOC accepted the amendment, investigated the charge and found reasonable cause to believe the allegation was true. 165 F.3d at 1325. The Tenth Circuit dismissed the retaliation claim.

> [A]n amendment will not relate back when it advances a new theory of recovery, regardless of the facts included in the original complaint.... Prohibiting amendments that include entirely new theories of recovery furthers the goals of the statutory filing period – giving the employer notice and providing opportunity for administrative investigation and conciliation.

165 F.3d at 1327.

The Seventh Circuit imposed the same restriction in *Fairchild v. Forma Scientific, Inc.*, 147 F.3d 567 (7th Cir. 1998). The plaintiff in that case had filed a timely EEOC charge alleging that he had been fired because of his age; after the deadline for filing a new charge had expired, the plaintiff attempted to amend his original charge to assert that the dismissal was also the result of discrimination on the basis of disability. 147 F.3d at 574. The Seventh Circuit held that such an amendment was impermissible because it asserted "an additional basis of legal liability" for the dismissal. "[A]n untimely amendment that alleges an entirely

new theory of recovery does not relate back to a timely filed original charge," 147 F.3d at 575.

(2) Four circuits reject the restrictive rule applied in the Fifth, Seventh and Tenth Circuits. The leading case to the contrary is the Eighth Circuit decision in *Washington v. The Kroger Company*, 671 F.2d 1072 (8th Cir. 1982). The original charge in that case asserted that the plaintiff had been denied certain desirable duties because of her gender; several years later she filed a new charge (in what the courts treated as an amendment) that she had also been denied those duties because of her race. The Eighth Circuit held the amendment related back under the governing EEOC regulation. 29 C.F.R. § 1601.12(b).

> It is true that the nature of the discrimination alleged in Washington's first charge and the basis for it differ somewhat from the discrimination and motive alleged in the second charge. But ... [t]he fact that the second complaint filed with the EEOC alleges a basis for discrimination different from that alleged in the first EEOC charge is not dispositive here, where the aggrieved person is a non-lawyer who may be unaware of the true basis for the alleged discriminatory acts until an investigation has been made ... [P]rocedural requirements should not be applied with an unrealistic or technical stringency to proceedings initiated by uncounseled complainants.

671 F.2d at 1075-76.

The First Circuit permits Title VII actions asserting the existence of additional unlawful motive even in the absence of an amended charge. In that circuit a charge is sufficient to exhaust not only a claim regarding the motive specified in the charge, but also a claim about any other unlawful motive that might have been unearthed if the EEOC investigated the employer conduct. "The scope of the civil complaint is ... limited by the charge filed with the EEOC *and* the investigation which can reasonably be expected to grow out of that charge." *Powers v. Grinnell Corp.*, 915 F.2d 34, 38 (1st Cir. 1990) (emphasis added) (opinion joined by Breyer, J.) (quoting *Less v. Nestle Co.*, 705 F.Supp. 110, 112 (W.D.N.Y. 1988)). "[T]he scope of investigation rule permits a district court to look beyond the four corners of the underlying administrative charge to consider ... alternative bases or acts that would have been uncovered in a reasonable investigation." *Thornton v. United Parcel Service*, 587 F.3d 27, 32 (1st Cir. 2009).

In *Hicks v. ABT Associates*, 572 F.2d 960 (3d Cir. 1978), the Third Circuit held that an amendment to an EEOC charge relates back when it asserts a new unlawful motive for the employer conduct that was the subject of the original charge.

> [I]nstances of sex discrimination [asserted in the amendment] ... arise from the same acts which support claims for race discrimination [in the original charge].... If relation back were not permitted in these circumstances, a charging party might be faced with the often difficult burden of analyzing without the

> benefits of any discovery his employer's motivation for an action immediately after that action occurred.

572 F.3d at 965. In *Howze v. Jones & Laughlin Steel Corp.*, 750 F.2d 1208 (3d Cir. 1984), the Third Circuit applied that principle to a case in which the original charge had not been amended, and the allegation of an additional unlawful motive first appeared in the complaint. "Howze's new retaliation claim 'may fairly be considered [an] explanation[ ] of the original charge....'" 750 F.2d at 1212 (quoting *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 399 (3d Cir. 1976). *Howze* treated the plaintiff's "[original] discrimination and [subsequent] retaliation claims [as] alternative allegations regarding the employer's failure to promote the plaintiff." *Barzanty v. Verizon Pennsylvania, Inc.*, 361 Fed.Appx. 41, 414 (3d Cir. 2010.). District courts in the Third Circuit have repeatedly interpreted *Howze* to mean that where a Title VII charge asserts that an adverse action was taken for a discriminatory motive, it is sufficient to encompass a subsequent claim that that particular action was also the result of a retaliatory motive.[23] In addition, in the Third Circuit a claim regarding an additional motive is sufficiently exhausted

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[23] *Mondero v. Lewes Surgical & Medical Associates, P.A.*, 2014 WL 6968847 at *6-*7 (D.Del. Dec. 9, 2014); *Walker-Robinson v. J.P. Morgan Chase Bank*, 2012 WL 3079179 at *7-*8 (D.N.J. July 27, 2012); *Pina v. Henkel Corp.*, 2008 WL 819901 at *5-*6 (E.D.Pa. March 26, 2008); *Rouse v. II-VI, Inc.*, 2007 WL 1007925 at *9 (W.D.Pa. March 30, 2007); *Foust v. FMC Corp.*, 962 F.Supp. 650, 654 (E.D.Pa. 1997).

whenever the charge *in fact* resulted in an EEOC investigation of that possible unlawful motive. *Antol v. Perry*, 82 F.3d 1291, 1295 (3d Cir. 1996) (opinion joined by Alito, J.).

In the Eleventh Circuit a charge asserting one form of discrimination is sufficient to exhaust other additional discrimination or retaliation claims that are "inextricably intertwined" with the particular allegations of the charge itself. *Harrison v. International Business Machines*, 378 Fed.Appx. 950, 953 (11th Cir. 2010); *Green v. Elixir Industries, Inc.*, 407 F.3d 1163, 1169 (11th Cir. 2005); *Gregory v. Georgia Dept. of Human Resources*, 355 F.3d 1277, 1280 (11th Cir. 2004). Two claims are "inextricably intertwined" when they assert alternative unlawful motives for the same employer conduct. *Harrison*, 378 Fed.Appx. at 953. That circuit recognizes that a reasonable EEOC investigation of employer conduct could encompass any unlawful purpose that led to the disputed action. "An EEOC investigation of [the motive asserted in the original charge] ... would have reasonably uncovered any evidence of [another unlawful motive]." *Gregory*, 355 F.3d at 1280.

(3) The Fourth Circuit at one time held that an amendment to an EEOC charge that adds a new theory of recovery – i.e., alleges an additional unlawful motive – does not relate back to the original charge. *Evans v. Technologies Applications & Services Co.*, 80 F.3d 954 (4th Cir. 1996). That decision necessarily involved an interpretation of the applicable EEOC relation-back regulation. 29 C.F.R. § 1601.12(b). In 2012

the Fourth Circuit abandoned its earlier interpretation of § 1601.12(b), after the EEOC filed a brief setting forth the agency's construction of that regulation. *EEOC v. Randstad*, 685 F.3d 433 (4th Cir. 2012).

Section 1601.12(b) provides that an amendment "to clarify and amplify allegations [in the original charge]" will relate back to the date on which the original charge was filed. The Fourth Circuit recognized that the

> EEOC interprets the phrase "clarif[ies] and amplif[ies] allegations" as encompassing amended charges in which ... the charging party makes no new factual allegations, but rather solely revises his or her charge to allege that the same facts constitute a violation of a different statute ... Interpreting § 1601.12(b) as applying to amended charges that alter solely the statutory basis or legal theory of recovery is entirely consistent with th[e] purposes [of the time limit].... [W]e defer to the EEOC's promulgation of § 1601.12(b) and its interpretation thereof.

Randstad, 685 F.3d at 444. In addition, the Fourth Circuit has long held that a charge is sufficient to exhaust a claim regarding a motive not set out in the charge, even if that charge was never amended, if the EEOC's investigation of the charge in fact considered that additional possible unlawful motive. *Hentosh v. Old Dominion University*, 767 F.3d 413, 416 (4th Cir. 2014); *Webster v. Rumsfeld*, 156 Fed.Appx. 571, 580 n.3 (4th

Cir. 2005); *King v. Seaboard Coast Line Railroad. Co.*, 538 F.2d 581, 583 (4th Cir. 1976).

(4) The Ninth Circuit applies a general rule limiting an employment discrimination action to the motive asserted in the original charge, and declining to permit relation back of an amended charge that asserts the existence of an additional motive. *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667 (9th Cir. 1988). But in the Ninth Circuit – unlike the Fifth, Seventh and Tenth – a plaintiff can pursue a claim involving a type of discriminatory motive not asserted in the original charge (whether amended or not) if the EEOC's investigation actually looked into whether that additional unlawful motive was present.

> The ... scope of a Title VII claimant's court action depends upon the scope of both the EEOC charge and the EEOC investigation.... We therefore must examine proceedings before the EEOC to determine the scope of ... [the plaintiff's] case.... We conduct this inquiry into allegations occurring not only before, but also after the filling of [the] EEOC charge.

Sosa v. Hiraoka, 920 F.2d 1451, 1457 (9th Cir. 1990); see *EEOC v. Farmer Brothers Co.*, 31 F.3d 891, 899 (9th Cir. 1994) (additional claim exhausted if it "fell within the scope of EEOC's *actual* investigation") (emphasis in original; quoting *Sosa*); *Stephenson v. United Airlines, Inc.*, 9 Fed.Appx. 760, 761 (9th Cir. 2001) ("The district court must examine both the EEOC charge and the EEOC investigation to determine if claims are exhausted.... Exhausted claims include those actually

investigated"). In the instant case, as the defendant conceded, the EEOC did indeed investigate Lavigne's retaliation claim. App. 24a.

(5) This circuit conflict is well recognized. The First Circuit has noted that

> the courts ... have sometimes allowed court claims that go beyond the claim or claims made to the agency, and sometimes not. The outcomes and rationales vary markedly where the claimant offers ... an entirely new theory.... [T]he courts are far more divided, and the law more confused, on how to handle situations in which a plaintiff advances in court claims based on ... alternative theories that were never presented to the agency.

Clockedile v. New Hampshire Dept. of Corrections, 245 F.3d 1, 4 (1st Cir. 2001) (contrasting decision in the Third Circuit with decision in the Seventh Circuit). The Tenth Circuit recognizes that

> [s]ome courts have held that [the] language [of § 1601.12(b)] encompasses claims based on different legal theories that derive from the same set of operative facts that included in the original charge.... Other courts have concluded that an amendment will not relate back when it advances a new theory of recovery, regardless of the facts included in the original complaint.

Simms v. Oklahoma, 165 F.3d at 1326-27 (contrasting decision in the Eighth Circuit with decisions in the Fourth and Ninth Circuits). In *Fairchild* the Seventh

Circuit acknowledged that relation back of an amendment that asserts a new motive "has some support in decisions from other circuits," but rejected the Eighth Circuit rule in *Washington v. Kroger Co.*, 147 F.3d at 574-75. A series of district court decisions have described this conflict as well.[24]

B. The Pleading Requirement Imposed by The Fifth, Seventh and Tenth Circuits Undermines The Title VII Administrative Scheme and Is Inconsistent With Title VII and The Applicable EEOC Regulations

This issue is of great practical importance both to charging parties and to the EEOC itself. The EEOC receives about 90,000 charges a year. Most of these

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[24] *Ramos v. Vizcarrondo*, 120 F.Supp.3d 93, 104 (D.P.R. 2015) ("[the] circuits have addressed [the issue] and have arrived at differing results ... [about amendments] with additional legal theories"); *Adames v. Mitsubishi Bank Ltd.*, 751 F.Supp. 1565, 1573 (E.D.N.Y. 1990) ("While some courts have not permitted plaintiffs such broad latitude in adding separate bases for the alleged discrimination, ... the majority of courts have allowed plaintiffs considerable latitude in fleshing out the factual circumstances surrounding their initial complaint"); *Dumas v. Kroger Ltd. Partnership I*, 2012 WL 3528972 at *2 (E.D.Ark. Aug. 14, 2012) ("though some Courts of Appeals have taken the view that an amendment will not relate back if it advances a new theory of recovery, that is not the Eighth Circuit's view"); *EEOC v. Schwan's Home Service*, 692 F.Supp.2d 1070, 1081 n.9 (D.Minn. 2010) ("[C]ourts around the country have reached different results as to whether claims premised on different legal theories that stem from the same set of operative facts stated in the original charge relate back to the original charge").

claims involve covert unlawful motives. An unlawfully motivated employer typically misrepresents its reasons for the adverse action in question, and the victimized employee must file his or her administrative charge at a point when he or she has only limited evidence, and no formal discovery, regarding what the covert unlawful purpose may have been. In Fifth, Seventh and Tenth Circuits, where the scope of a charge is limited to the particular unlawful motive identified in the original charge, and an amendment asserting an additional motive will not relate back, an employer's ingenuity in hiding its illegal motive can effectively immunize its violations of federal law.

As the EEOC has repeatedly explained in the lower courts, the Commission's practice is to investigate any potentially unlawful motive that may be behind the particular employment action covered by a charge.[25] A rule barring relation back of an amendment asserting the existence of additional unlawful motives, the EEOC has warned,

> undermines the EEOC's ability to perform the enforcement role that Congress has assigned to it, because it will hamper the Commission's ability to inquire thoroughly into the circumstances surrounding an allegation

[25] Brief of EEOC as Appellant, *EEOC v. Southern Farm Bureau Casualty Ins. Co*., No. 00-31482 (5th Cir.), available at 2001 WL 34105288 at *18-*22; Reply Brief of EEOC as Appellant, *EEOC v. Southern Farm Bureau Casualty Ins. Co*., No. 00-31482 (5th Cir.), available at 2001 WL 34105287 at *5, *11-*13.

> of discrimination the EEOC had already begun to investigate.

Opening Brief of Appellant EEOC, *EEOC v. Randstad*, No. 11-179 (4th Cir.), available at 2011 WL 4369366 at *27-*28. The EEOC interprets its relation-back regulation to provide that an amendment which asserts an additional motive will relate back. "[T]he relation-back regulation permits a charging party ... to amend his charge to 'clarify' and 'amplify' his original allegations by adding an additional potential explanation for the discrimination he experienced." Reply Brief of Appellant EEOC, *EEOC v. Randstad*, No. 11-179 (4th Cir.), available at 2011 WL 5838294 at *14 (quoting 29 C.F.R. § 1601.12(b)).

Nothing in the Title VII or the relevant regulations limits a charging party's claims to the particular unlawful motive that might have been asserted in the original charge. Section 706(b) of Title VII provides in general terms that a claimant must first file with the EEOC a "charge ... alleging that an employer ... has engaged in an unlawful employment practice." 42 U.S.C. § 2000e-5(b). The applicable EEOC regulation requires only that a charge "describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b). Section 706(b) directs the EEOC, upon receipt of a charge, to notify the employer of the "date, place and circumstances of the alleged unlawful employment practice." None of these provisions requires the charging party to specify which unlawful motive was behind the underlying adverse action. As the EEOC has explained,

"an amendment [asserting an additional unlawful motive] does not assert a 'stale' claim [if] it does not allege any new discriminatory incidents. It merely clarifies that there is another possible explanation for the employment action referenced in the original charge...." Opening Brief of Appellant EEOC, *EEOC v. Randstad*, 2011 WL 4369366 at *26.

Correctly identifying the unlawful motive behind an adverse action will often be beyond the ability of the injured worker. Title VII establishes the EEOC charge processing system precisely so that the Commission can bring to bear its experience and investigative abilities, which charging parties will lack. The very purpose of that administrative process would often be thwarted if an amendment could not encompass, the EEOC could not permissibly investigate, and a subsequent lawsuit could not include, motives which the charging party himself was initially unable to detect.

Correct categorization of an unlawful motive at times requires significant legal expertise; in the instant case, for example, the district court held that reprisals taken because an individual complained about racial discrimination constitute a form of racial discrimination under Title VI, but are classified as retaliation under Title VII. App. 40a. The Fifth Circuit below characterized Lavigne's retaliation claim as a "new legal theory" (App. 17a), and faulted him for not having raised that new legal theory at an earlier stage. "Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love v. Pullman Co.*, 404

U.S. 522, 527 (1972). "Whatever [the plaintiff's] level of education, there is no question that he should not be held to the level of understanding the distinctive legal nuances" that may separate the different types of Title VII violations. *Green v. Elixir Industries, Inc.*, 407 F.3d 1163, 1168 (11th Cir. 2005).

This Court has emphasized that "a charge is not the equivalent of a complaint initiating a lawsuit." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68 (1984). But if the charge filing process were governed by the standards applicable to a civil action, Lavigne's amended charge would indeed have related back. Rule 15 of the Federal Rules of Civil Procedure provides that an amendment to a complaint relates back if it "asserts a claim ... that arose out of the conduct ... or occurrence set out ... in the original pleading." Fed. R. Civ. Proc. 15(c)(1)(B). A charge amendment which asserts an additional unlawful motive for employer conduct covered by the original charge is a classic example of a claim that arises out of the conduct or occurrence in the original pleading. The Fifth, Seventh and Tenth Circuits impose on uncounseled laymen seeking assistance from the EEOC a pleading burden that is utterly inconsistent with the intent of Congress to create an informal and readily accessible administrative process.

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED

This case presents an excellent vehicle for resolving both questions presented. The court of appeals rejected Lavigne's racial discrimination in dismissal claim solely on the ground that Lavigne could not prove that his replacement was white. The court of appeals rejected Lavigne's retaliation claim only on the ground that the asserted retaliatory motive was a different "legal theory" than the motive asserted in plaintiff's original Title VII charge. Because Lavigne attempted to amend his original charge to include a claim that the dismissal was retaliatory, this case presents a vehicle for deciding both whether such an amendment relates back to the date of the original charge, and also whether the original charge itself was sufficient to exhaust Lavigne's claims even if no amendment had been filed.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial decisions
issued on or after Jan. 1, 2007. *See also*
U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5.
United States Court of Appeals,
Fifth Circuit.

Terrance J. Lavigne, Plaintiff-Appellant,
v.
Cajun Deep Foundations, L.L.C.,
Defendant-Appellee.

No. 15-30727
|
Date Filed: 07/06/2016

Appeal from the United States District Court
for the Middle District of Louisiana,
USDC No. 3:12-CV-441

Attorneys and Law Firms

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Before HIGGINBOTHAM, PRADO, and GRAVES, Circuit Judges.

Opinion

PER CURIAM:*

Plaintiff-Appellant Terrance J. Lavigne brought suit against Defendant-Appellee Cajun Deep Foundations, L.L.C. alleging retaliation and discrimination related to his compensation, discipline, and termination under Title VII of the Civil Rights Act of 1964 and Louisiana law. The district court dismissed several of these claims at summary judgment and then found for Defendant on Plaintiff's remaining claims following a bench trial. We affirm.

I. FACTUAL BACKGROUND

Plaintiff began working for Cajun Deep Foundations, L.L.C., a construction company, in 2007 and continued working there until he was fired in March 2011. During this time, Plaintiff rose to the position of Drill Shaft Foreman. As a Drill Shaft Foreman, Plaintiff was paid $20.00 per hour. According to Plaintiff, however, he actually performed the duties of a Superintendent but was not paid the higher wage for employees in that position.

During Plaintiff's employment, he was reprimanded several times for violating company policies. In January 2009, Plaintiff was suspended for three

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

days without pay for failing to wear proper safety equipment. On February 7, 2011, Plaintiff failed to comply with proper safety procedures and, as a result, struck a bridge with a piece of machinery. Following this incident, Plaintiff was required to take a drug test, suspended for three days, and placed on probation for one year. In March 2011, while still on probation, it was discovered that Plaintiff had violated Defendant's Motor Vehicle Policy by failing to disclose motor vehicle violations. According to Defendant, Plaintiff's violation of the Motor Vehicle Policy disqualified him from driving or operating equipment as part of his job. Defendant terminated Plaintiff on March 22, 2011.

On March 28, 2011, six days after he was fired, Plaintiff completed an Intake Questionnaire with the Equal Employment Opportunity Commission ("EEOC"). However, the EEOC did not receive Plaintiff's formal signed Charge of Discrimination until August 22, 2011. In the Charge of Discrimination, Plaintiff alleged that he was employed by Defendant as a "Crew Supervisor" and that he had been "subjected to unfair terms and conditions of employment because of my race (Black)." Specifically, Plaintiff asserted that in February 2011, he was suspended and forced to take a drug test after accidently striking a bridge with a piece of machinery and that white employees who had been involved in similar accidents had not been suspended or subjected to drug testing. Plaintiff also alleged that he had not received a "Supervisor's pay even though I have [a] supervising job" and that "[o]ther Supervisors of a different race have received pay increases because of their

Supervisory tasks." In March 2012 – nearly one year after he was terminated – Plaintiff amended his Charge of Discrimination to add the claim that he was terminated in retaliation for challenging Defendant's discriminatory employment practices.

In July 2012, Plaintiff filed a pro se complaint in the District Court for the Middle District of Louisiana alleging that Defendant had violated Title VII and Louisiana law. Plaintiff alleged that he was "treated less favorably than white male employees who violated the same or similar [company] policies"; that he had been "discriminatorily overlooked and/or denied promotion to and the pay rate of superintendent"; and that he had been "retaliated against for seeking the promotion to superintendent and accompanying pay rate."

Defendant moved for summary judgment, and in May 2014, the district court granted Defendant's motion in part and dismissed several of Plaintiff's claims. Relevant to this appeal, the district court dismissed as time-barred several of Plaintiff's Title VII disparate compensation claims that were based on events that occurred before October 26, 2010, which was 300 days prior to the filing of his August 2011 Charge of Discrimination. The district court similarly dismissed Plaintiff's claim of retaliatory discharge, which Plaintiff added to his EEOC charge in March 2012, because the court held that it did not relate back to his original Charge of Discrimination and was thus time-barred. The district court also dismissed Plaintiff's disparate treatment claim related to his termination because he failed to state a prima facie case.

Plaintiff proceeded to trial on his disparate treatment claim based on his 2011 suspension and his disparate compensation claims based on events that occurred after October 26, 2010. After a two-day bench trial, the district court found that Plaintiff had established that he was paid less than similarly situated white employees but had failed to show that Defendant discriminated against him when it suspended him for three days following his February 2011 accident.

Following the court's order, both parties moved for reconsideration. In July 2015, the district court granted Defendant's motion for reconsideration and denied Plaintiff's. The court stated that upon further review of the evidence adduced at trial, Plaintiff had not shown that he was paid less than other similarly situated employees or that Defendant had acted with discriminatory intent. The district court accordingly entered judgment for Defendant. Plaintiff timely appealed.

II. DISCUSSION

Plaintiff challenges the district court's dismissal of several of his claims at summary judgment and its findings against him following a bench trial.

"We review a district court's grant of summary judgment *de novo*." *Morris v. Equifax Info. Servs., LLC*, 457 F.3d 460, 464 (5th Cir. 2006). A court should grant summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is

material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). On a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

"In the appeal of a bench trial, we review findings of fact for clear error and conclusions of law and mixed questions of law and fact *de novo*." *Dickerson v. Lexington Ins. Co.*, 556 F.3d 290, 294 (5th Cir. 2009) (footnote omitted). "A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court based on all the evidence is left with the definitive and firm conviction that a mistake has been committed." *Flint Hills Res. LP v. Jag Energy Inc.*, 559 F.3d 373, 375 (5th Cir. 2009) (quoting *Hous. Expl. Co. v. Halliburton Energy Servs., Inc.*, 359 F.3d 777, 779 (5th Cir. 2004)).

A. Plaintiff's disparate compensation claims

1. Claims based on events before October 26, 2010

"This Circuit has long required plaintiffs to exhaust their administrative remedies before bringing suit under Title VII." *Price v. Choctaw Glove & Safety Co.*, 459 F.3d 595, 598 (5th Cir. 2006). To effectively exhaust administrative remedies, "[a] Title VII plaintiff must file a charge of discrimination with the EEOC no more than 180 days – 300 days in a deferral state such as Louisiana – after the alleged discriminatory

employment action occurred." *Carter v. Target Corp.*, 541 Fed.Appx. 413, 419 (5th Cir. 2013) (per curiam).

In its order at summary judgment, the district court dismissed Plaintiff's Title VII claims that were based on events that occurred before October 26, 2010. Plaintiff argues that this was in error because the district court should have used the date that he completed the EEOC Intake Questionnaire rather than the date of the Charge of Discrimination. Plaintiff makes this argument for the first time on appeal.

"[A]n argument is waived if the party fails to make the argument in response to summary judgment." *Gilley v. Protective Life Ins. Co.*, 17 F.3d 775, 781 n.13 (5th Cir. 1994). To avoid waiving an argument, the party must present it "to such a degree that the district court has an opportunity to rule on it." *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 340 (5th Cir. 2005) (quoting *N.Y. Life Ins. Co. v. Brown*, 84 F.3d 137, 141 n.4 (5th Cir. 1996)). That is, a party "must press and not merely intimate the argument during the proceedings before the district court." *Id*. (quoting *N.Y. Life Ins. Co.*, 84 F.3d at 141 n.4).

Plaintiff's opposition to Defendant's motion for summary judgment does not mention the EEOC Intake Questionnaire. Despite the fact that Defendant had moved for summary judgment on the ground that several of Plaintiff's claims were time-barred, Plaintiff's opposition focuses exclusively on his original Charge of Discrimination and Amended Charge of Discrimination. The dissent argues that Plaintiff raised

the issue of the Intake Questionnaire before the district court because his opposition at summary judgment stated that he "contacted the EEOC to file a charge of discrimination" shortly after being terminated. Not only does this section of Plaintiff's opposition fail to mention the Intake Questionnaire or allege that he actually filed a charge of discrimination at this time, but this vague passing reference falls short of sufficiently presenting this argument. *See, e.g.*, *In re Packer*, 816 F.3d 87, 91 n.2 (5th Cir. 2016). Accordingly, this argument has been waived.

Plaintiff argues that this Court should overlook this lapse because refusing to consider his argument on appeal would result in a miscarriage of justice. An issue that has been waived below may be considered on appeal where "the party can demonstrate 'extraordinary circumstances.'" *State Indus. Prods. Corp. v. Beta Tech., Inc.*, 575 F.3d 450, 456 (5th Cir. 2009). "Extraordinary circumstances exist when the issue involved is a pure question of law and a miscarriage of justice would result from our failure to consider it." *Id.* (quoting *N. Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 916 (5th Cir. 1996)).

This exception does not apply here. Determining whether Plaintiff's Intake Questionnaire constitutes a charge under the test outlined by the Supreme Court in *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008), would require a fact-intensive inquiry into the

contents of the questionnaire.[1] As such, it is not a pure question of law. Accordingly, we will not consider Plaintiff's waived argument, and the district court's dismissal of his Title VII disparate compensation claims based on events that occurred before October 26, 2010, is affirmed.[2]

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[1] Moreover, even if we were inclined to engage in this inquiry, we would be unable to do so here. Plaintiff has neither entered the Intake Questionnaire into the record nor provided any evidence about its contents.

[2] The dissent contends that the untimeliness of Plaintiff's filing should also be excused under the doctrine of equitable tolling. As an initial matter, Plaintiff has never argued that equitable tolling should apply – not below and not on appeal. *See, e.g.*, *Garcia v. Penske Logistics, L.L.C.*, 631 Fed.Appx. 204, 209 (5th Cir. 2015) (holding that a plaintiff's Title VII claim "cannot be saved by the doctrine of equitable tolling" where the plaintiff "did not raise [the equitable tolling] argument with the district court"). Nevertheless, the dissent says that equitable tolling should apply because Plaintiff has complained that the EEOC was understaffed and slow in producing a formal charge of discrimination for him to sign. This is not sufficient to justify equitably tolling the filing period. As we observed in *Taylor v. General Telephone Company of the Southwest*, 759 F.2d 437 (5th Cir. 1985), it is the plaintiff's burden to show facts justifying equitable tolling. *Id*. at 442. We have recognized three situations in which equitable tolling in a case such as this might be appropriate. *See Wilson v. Sec'y, Dep't of Veterans Affairs on Behalf of Veterans Canteen Servs.*, 65 F.3d 402, 404 (5th Cir. 1995) (per curiam). Those are: "(1) the pendency of a suit between the same parties in the wrong forum; (2) plaintiff's unawareness of the facts giving rise to the claim because of the defendant's intentional concealment of them; and (3) the EEOC's misleading the plaintiff about the nature of her rights." *Id.* Plaintiff has not shown facts to support any of these situations. Plaintiff was clearly aware of the facts upon which his complaint was based and knew about the nature of his legal rights. Further, there is no allegation or indication that Defendant

2. Claims based on events after October 26, 2010

Plaintiff proceeded to trial on his disparate compensation claims based on events that occurred after October 26, 2010. In its ruling following trial, the district court held that while Plaintiff was a Drill Shaft Foreman, he performed the work of a Superintendent on several projects but had not been paid as much as other Superintendents who were white. Accordingly, the district court found that Plaintiff had "proven by a preponderance of the evidence that he was paid less than similarly situated non-African American employees for substantially the same job responsibilities." In response, Defendant moved for reconsideration arguing that the district court committed manifest error in concluding that Plaintiff was similarly situated to employees who were Superintendents and in ruling for Plaintiff despite the fact that there was no finding that Defendant had engaged in intentional discrimination.

In July 2015, the district court granted Defendant's motion for reconsideration. It stated that upon further review of the evidence, the use of Superintendent employees as comparators had been in error since Plaintiff only occasionally performed Superintendent-like duties. Instead, the district court concluded that the appropriate comparator was "other Forem[e]n who, like Lavigne, occasionally performed the duties of Superintendents on drill-only jobs." The district court

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concealed any fact from him or that the EEOC misled him about his rights.

noted that the evidence presented at trial showed that, like Plaintiff, other employees also performed some Superintendent duties on certain jobs but were not paid the higher Superintendent wage. The district court also stated that even if Superintendent employees were a proper comparator, Plaintiff had failed to demonstrate that Defendant engaged in intentional discrimination by paying him "less than similarly situated non-African American employees *because of* his race." Accordingly, the district court reversed its prior ruling and held that Plaintiff had not proven a claim of disparate compensation.

Plaintiff argues that the district court's ruling on reconsideration should be reversed for two reasons. First, he argues that it applied an incorrect legal standard in determining the appropriate comparators because it considered job titles rather than "focus[ing] primarily on the duties/responsibilities performed by the respective employees." Second, Plaintiff argues that the district court's factual findings that he was not paid less than similarly situated employees and that Defendant did not act with discriminatory intent are clearly erroneous.

In determining whether a plaintiff was treated less favorably than other employees, comparators must be "similarly situated" to the plaintiff. *Lee v. Kan. City S. Ry. Co.*, 574 F.3d 253, 259 (5th Cir. 2009). While "[t]here is no precise formula to determine whether an individual is similarly situated to comparators," *Lindquist v. City of Pasadena*, 669 F.3d 225, 233 (5th Cir. 2012) (quoting *McDonald v. Vill. of Winnetka*, 371 F.3d

992, 1002 (7th Cir. 2004)), "an employee who proffers a fellow employee as a comparator [must] demonstrate that the employment actions at issue were taken 'under nearly identical circumstances,'" *Lee*, 574 F.3d at 260 (quoting *Little v. Republic Ref. Co., Ltd.*, 924 F.2d 93, 97 (5th Cir. 1991)).

As we have observed, "[w]hat is relevant in one case might not be relevant in another . . . and 'the degree to which others are viewed as similarly situated' necessarily will depend 'substantially on the facts and context of the case.'" *Lindquist*, 669 F.3d at 234 (quoting *Jennings v. City of Stillwater*, 383 F.3d 1199, 1214 (10th Cir. 2004)). Accordingly, "the inquiry is case-specific and requires us to consider 'the full variety of factors that an objectively reasonable . . . decision-maker would have found relevant in making the challenged decision.'" *Id.* (alteration in original) (quoting *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1203 (11th Cir. 2007)).

The district court neither adopted nor applied a legal standard at odds with our precedent. Contrary to Plaintiff's argument, the district court did not focus on job titles. Rather, it considered a multitude of relevant evidence including the job responsibilities, experience, and qualifications of a number of Defendant's employees. Accordingly, we find that Plaintiff's argument in this regard is without merit.

Plaintiff next challenges the district court's findings of fact. In its order on reconsideration, the district

court concluded that Plaintiff was not similarly situated to the Superintendent employees he had identified, but rather was most closely comparable to Horace Lagrow and Jonathan Sharp who, like Plaintiff, also periodically performed Superintendent-like duties on certain jobs. Because these employees, both of whom are white, were paid similarly to Plaintiff, the district court found that Plaintiff had not shown he was paid less than other similarly situated employees outside his protected class.

On appeal, Plaintiff lists the evidence that he believes shows this finding is clearly erroneous and argues that it demonstrates that he is actually more closely comparable to other Superintendent employees who were paid more than him. This evidence, however, does not show that the district court's findings are clearly erroneous. Rather, it merely shows that there is some evidence to support Plaintiff's view. This is not enough to reverse a district court's findings of fact under the clear error standard. *See In re Acosta*, 406 F.3d 367, 373 (5th Cir. 2005) ("As long as there are two permissible views of the evidence, we will not find the fact-finder's choice between competing views to be clearly erroneous.").

Moreover, this evidence does not show that the district court erred in finding that Plaintiff failed to demonstrate that Defendant acted with discriminatory intent. "A disparate-treatment plaintiff must establish 'that the defendant had a discriminatory intent or motive'. . . ." *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (quoting *Watson v. Fort Worth Bank & Tr.*,

487 U.S. 977, 986 (1988)). This requirement extends to claims alleging discrimination in compensation. *Thibodeaux-Woody v. Hous. Cmty. Coll.*, 593 Fed.Appx. 280, 285 n.4 (5th Cir. 2014). "[D]iscriminatory intent is a finding of fact to be made by the trial court. . . . Thus, a court of appeals may only reverse a district court's finding on discriminatory intent if it concludes that the finding is clearly erroneous. . . ." *Pullman-Standard v. Swint*, 456 U.S. 273, 289-90 (1982).

Plaintiff argues on appeal that he established discriminatory intent because he testified that two of Defendant's employees, Seth Gillen and Jonathan Sharp, told him that he would never be promoted to Superintendent because he was black and that Gillen referred to Plaintiff and his brother "in a derogatory manner, specifically calling them 'boys.'" These allegations, however, do not establish that Defendant acted with discriminatory intent. "[S]tatements by non [-]decision makers, or statements by decision makers unrelated to the decisional process itself [do not] suffice to satisfy the Plaintiff's burden" of showing discriminatory intent. *Rios v. Rossotti*, 252 F.3d 375, 382 (5th Cir. 2001) (third alteration in original) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring)).

Plaintiff has neither argued nor shown that Gillen or Sharp were responsible for setting Plaintiff's pay, approving his promotions, or otherwise involved in decisions related to his employment. To the contrary, the district court found that the relevant evidence showed that Chris Jacobs, Defendant's Drill Shaft Manager,

was the ultimate decision maker. Accordingly, Plaintiff has failed to demonstrate that the district court's finding is clearly erroneous.

B. Plaintiff's wrongful termination claim

"Wrongful termination claims are . . . evaluated under the *McDonnell Douglas* framework." *Willis v. Cleco Corp.*, 749 F.3d 314, 320 (5th Cir. 2014). To state a prima facie case of discrimination on the basis of termination, a plaintiff must show that he "(1) is a member of a protected group; (2) was qualified for the position at issue; (3) was discharged . . . ; and (4) was replaced by someone outside his protected group." *Id.* (quoting *McCoy v. City of Shreveport*, 492 F.3d 551, 556 (5th Cir. 2007)). At summary judgment, the district court held that Plaintiff had failed to state a prima facie case of discrimination related to his termination because he had not shown the existence of a genuine dispute that he had been replaced by someone from outside of his protected group. Instead, the district court pointed to evidence which indicated that Plaintiff had actually been replaced by Charles Nelson, an African-American male.

Plaintiff contends that summary judgment was inappropriate because his brother, Romell Lavigne, stated in a declaration that "Plaintiff was replaced by Charles Vignes, a Caucasian." Romell Lavigne's declaration, however, does not say that Vignes replaced Plaintiff. Rather, it states only that "[a]pproximately one (1) year following the termination of Terrance

Lavigne, Charles Vignes, a non-African-American Drill Shaft Operator with Cajun Deep Foundations Drilling Division, was promoted to the position of Drill Shaft Foreman."

Next, Plaintiff argues the district court erred in concluding that Nelson had replaced him because there is "the possibility that the African-American hired prior to Charles Vignes'[s] promotion did not perform the same duties that the Plaintiff performed." However, "unsupported speculation [is] not sufficient to defeat a motion for summary judgment." *Brown v. City of Hous.*, 337 F.3d 539, 541 (5th Cir. 2003). Plaintiff has offered no evidence to indicate that Nelson did not perform the same job duties. Instead, Plaintiff merely speculates that this might have been the case. Accordingly, Plaintiff has not shown that the district court erred in granting summary judgment as to this claim.

C. Plaintiff's retaliation claim

In March 2012 – nearly a year after he was terminated – Plaintiff amended his charge of discrimination to add the allegation that he was terminated in retaliation for challenging Defendant's discriminatory employment practices. The district court held that Plaintiff's retaliation claim did not relate back to his initial Charge of Discrimination and was therefore time-barred as it relied on an event (the termination of

his employment) that occurred more than 300 days before Plaintiff brought this claim. Plaintiff contends that this holding was in error.

"A charge may be amended to cure technical defects or omissions . . . or to clarify and amplify allegations made therein." 29 C.F.R. § 1601.12(b). "Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received." *Id*. However, "amendments that raise a new legal theory do not 'relate back' to an original charge of discrimination" unless "the facts supporting both the amendment and the original charge are essentially the same." *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 878-79 (5th Cir. 2003).

"[D]iscrimination and retaliation claims are distinct, and the allegation of one in an EEO charge does not exhaust a plaintiff's remedies as to the other." *Bouvier v. Northrup Grumman Ship Sys., Inc.*, 350 Fed.Appx. 917, 921 (5th Cir. 2009) (per curiam). Accordingly, Plaintiff's claim of retaliation will only relate back if the facts supporting this claim "are essentially the same" as those contained in his original charge. *Manning*, 332 F.3d at 879. "To establish a prima facie case of retaliation, a plaintiff must show that (1) [he] participated in a Title VII protected activity, (2) [he] suffered an adverse employment action by [his] employer, and (3) there is a causal connection between the protected activity and the adverse action." *Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 331

(5th Cir. 2009). On appeal, Plaintiff argues that he engaged in a protected activity by complaining to his supervisor about his pay and about racially insensitive remarks that had been made toward him. He also asserts that he suffered an adverse employment action when he was fired and that this was in retaliation for making these complaints.

Plaintiff's original Charge of Discrimination does not allege these facts. Rather, it states only that he was paid less than Superintendents of different races and treated differently following an accident compared to his white counterparts. Moreover, the Charge of Discrimination form also contains boxes indicating the type of discrimination being alleged. Plaintiff checked only the box alleging that he had been discriminated against on the basis of his race. He did not select the box alleging retaliation. Because Plaintiff neither checked the box alleging retaliation nor alleged any facts relevant to a claim of retaliation, his claim of retaliation does not relate back. *See Frazier v. Sabine River Auth. La.*, 509 Fed.Appx. 370, 373-74 (5th Cir. 2013) (per curiam) ("In Frazier's EEOC charge, he did not check the 'retaliation' box, and in the particulars section, he failed to mention any claim of retaliation. . . . Discrimination and retaliation claims are distinct, and the factual statement in Frazier's EEOC charge did not put Sabine on notice that Frazier was asserting a retaliation claim.").[3]

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[3] Because we find that Plaintiff has failed to establish liability against Defendant as to any of his claims, we need not address

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

GRAVES, Circuit Judge, dissenting in part.

I would conclude that Terrance Lavigne's disparate compensation claims before October 26, 2010, were not waived. I would further conclude that Lavigne's retaliation claim related back to his initial charge. Because I would reverse the district court on these issues and remand, I respectfully dissent in part.

On March 28, 2011, just six days after he was fired, Lavigne completed an intake questionnaire and initiated a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) against Cajun Deep Foundations, L.L.C. This is supported by the EEOC Charge Transmittal document dated August 26, 2011, which states that it received the charge of discrimination on March 28, 2011. Under the Code of Federal Regulations, "a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b). *See also* 42 U.S.C. § 2000e-5(b).

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his argument regarding the district court's denial of compensatory damages for emotional distress and mental anguish.

Further, the record in this matter does not support the majority's conclusion that Lavigne waived this issue and only raises it for the first time on appeal. Lavigne argues in his brief that the district court erred in not using the "earlier date that the Plaintiff completed the EEOC Intake Questionnaire *and a charge of discrimination.*" (Emphasis added). In his opposition to Cajun Deep's motion for summary judgment, Lavigne asserted that he immediately "contacted the EEOC to file a charge of discrimination against the Defendant. (Exhibit 9 'Form Indicating EEOC Receipt of the Plaintiff's Complaint')."[1] Exhibit 9 is the transmittal document which clearly states that the charge was received on March 28, 2011. Thus, Lavigne in no way waived this issue and did, in fact, raise it in opposition to summary judgment.[2]

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[1] The majority dismisses this as an insufficient "vague passing reference." I disagree. Regardless of the number of times Lavigne specifically stated the phrase "Intake Questionnaire," his argument centers around the timeliness of his "charge of discrimination" and the two phrases are used interchangeably. The majority further concludes it is unable to engage in the necessary inquiry without the actual "Intake Questionnaire." However, the record contains evidence that the EEOC says Lavigne made a charge of discrimination on March 28, 2011, and the court is not tasked with determining whether the EEOC erred in making that determination. Nevertheless, any need for a fact-intensive inquiry into the contents of the questionnaire would be yet another reason summary judgment was not appropriate.

[2] Notwithstanding that I disagree that Lavigne waived this issue and, thus, there would be no need to determine whether there is an exception, I disagree with the majority's conclusion of whether an exception would otherwise apply.

Accordingly, I would conclude that March 28, 2011, is the date of the charge of discrimination, as opposed to August 22, 2011, which was merely the date the formal signed charge was returned.

Regardless, even if the charge did not relate back to March 28, 2011, there would need to be an analysis of whether the facts justify equitable tolling. *See Taylor v. Gen. Tel. Co. of the Sw.*, 759 F.2d 437, 442 (5th Cir. 1985).[3] As stated above, Lavigne immediately went to the EEOC (within six days of being fired) and filed his charge. He asserts that the EEOC was understaffed and that it took them until August 22, 2011, to get the formal written charging document back to him for a signature and that he returned it the following day. He was required to go through the step of filing a charge with the EEOC before proceeding with an action and he conscientiously did so. He should not then be punished for any administrative delay. Thus, even if the

[3] The majority asserts that equitable tolling could not apply because Lavigne failed to raise it with the district court. However, a party's failure to raise equitable tolling in a Title VII case does not preclude the court from sua sponte considering it. *Alvarado v. Mine Serv., Ltd.*, 626 Fed.Appx. 66 (5th Cir. 2015). Additionally, this court is not precluded from considering arguments not raised in the district court when they involve extraordinary circumstances, i.e., "when the issue involved is a pure question of law and a miscarriage of justice would result from our failure to consider it." *N. Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 916 (5th Cir. 1996). The majority also says that, even if equitable tolling could be considered, this is not one of the situations where it would apply. I disagree. According to the EEOC document, Lavigne made a charge on March 28, 2011. The majority now concludes that is false. Thus, that would indicate that the EEOC misled Lavigne about the nature of his rights.

charge did not relate back to March 28, 2011, which is the date of the charge according to EEOC documents, then Lavigne would be entitled to equitable tolling.

For these reasons, I would conclude that summary judgment was not appropriate on this issue and I would reverse the district court.

With regard to Lavigne's retaliation claim, on the formal charge of discrimination, Lavigne checked the box for discrimination on the basis of race, but did not check the box for retaliation. He also set out the following particulars:

> I. Respondent, Cajun Deep Foundations LLC, hired me on August 18, 2005 as a helper/ laborer. Since 2009, I have been working for the company as a Crew Supervisor. During the period of employment with the company, I have been subjected to unfair terms and conditions of employment because of my race (Black).
>
> II. On February 7, 2011, I [sic] suspended for 3 days for striking an I-310 overpass with an excavator. I was also required to take a drug test. The white counterparts who have been involved in similar accidents have not been suspended or required to take a drug test. I am also not receiving a Supervisor's pay even though I have a supervising job. Other Supervisors of a different race have received pay increases because of their Supervisory tasks.

> III. I believe that I have been discriminated against because of my Race (Black) in violation of Title VII of the Civil Rights Act of 1964, as amended, because my white counterparts are treated favorably better under similar circumstances.

The "amended" charge of discrimination states the same particulars, also does not have the retaliation box checked and has an attached sheet amending the charge to include the following:

> On March 22, 2011, I was wrongfully terminated for violating company policy, including
>
> 1) standing too close to an open excavation; 2) having an accident while operating heavy equipment; 3) my driving record; 4) Also, because I sought to be paid at the same rate as that of a job superintendent for the times I had already worked or would work, in the future, in that capacity.
>
> I believe I have been discriminated against because of my race, Black, and retaliated against for opposing unfair employment practices, in violation of Title VII of the Civil Rights Act of 1964, as amended.

As stated by the majority, the Code of Federal Regulations states that:

> A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which

> constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not be required to be redeferred.

29 C.F.R. § 1601.12(b).

Clearly, the facts supporting Lavigne's retaliation claim are essentially the same facts complained of in the original charge. Specifically, he is claiming retaliation for complaining about the accident, other unfair terms and conditions of employment, the disparate pay, and for being treated less favorably than white counterparts – all claims that were mentioned in the original charge. Further, since neither written charge has the retaliation box checked, any reliance here on the significance of that is wholly misplaced.

Because the facts supporting Lavigne's claim of retaliation "grow[] out of the subject matter of the original charge" and are essentially the same as those contained in his original charge, I would conclude that his retaliation claim "relate[s] back to the date the charge was first received." *See* 29 C.F.R. § 1601.12(b); *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 878-79 (5th Cir. 2003).

Moreover, Cajun Deep concedes in its brief that the "EEOC thoroughly investigated all claims that Plaintiff asserted against Deep Foundations, including those claims first asserted in his Amended Charge."

This defeats any claim of failure to exhaust on this issue.

Accordingly, I would conclude that the district court erred in granting summary judgment on the basis that that this claim was time-barred.

For these reasons, I respectfully dissent in part.

32 F.Supp.3d 718
United States District Court,
M.D. Louisiana.

Terrance J. LAVIGNE
v.
CAJUN DEEP FOUNDATIONS, LLC, et al.

Civil Action No. 12-00441-BAJ-SCR.
|
Signed July 10, 2014.

Attorneys and Law Firms

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RULING AND ORDER

BRIAN A. JACKSON, Chief Judge.

Before the Court is **Defendant Cajun Deep Foundations LLC's Motion for Summary Judgment (Doc. 46)**, filed by Defendant Cajun Deep Foundations, LLC ("Cajun Deep"), seeking an order from this Court dismissing Plaintiff Terrance J. Lavigne's ("Lavigne") claims against it, pursuant to Federal Rule

of Civil Procedure 56.[1] Lavigne opposes the motion.[2] (Docs. 52, 85.) Cajun Deep filed a reply memorandum in response to Lavigne's memoranda in opposition. (Doc. 86.) Oral argument is not necessary. The Court has jurisdiction, pursuant to 28 U.S.C. § 1331.

I. Background

This is an employment discrimination action brought by Lavigne against his former employer, Cajun Deep, pursuant to Title VII of the Civil rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII") and the Louisiana Employment Discrimination Law, La. R.S. § 23:301 *et seq.* Lavigne initially filed this lawsuit pro se.[3] Lavigne's Complaint alleges that Cajun Deep unlawfully discriminated against him on the basis of his race (African American). Specifically, Lavigne alleges

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[1] In support of its Motion for Summary Judgment, Cajun Deep relies upon the pleadings; a Statement of Undisputed Facts; Lavigne's November 11 and December 17, 2013 depositions; Lavigne's Original Charge of Discrimination; Lavigne's Amended Charge of Discrimination; the Equal Employment Opportunity Commission's Notice of Right to Sue; excerpts from the Equal Employment Opportunity Commission's investigative file; Lavigne's discovery responses; and Deep Cajun's records.

[2] In support of his memoranda in opposition, Lavigne relies upon his response to Cajun Deep's Statement of Undisputed Facts; his Complaint; his November 11 and December 17, 2013 depositions; his Original Charge of Discrimination; his Amended Charge of Discrimination; his declaration; his brother's declaration; and Deep Cajun's records.

[3] Lavigne filed his Complaint on July 24, 2012. (Doc. 1.) The Court granted counsel's motion to enroll on behalf of Lavigne on February 22, 2013. (Doc. 11.)

that he was denied promotional opportunities, treated "less favorably than white male employees who violated the same or similar policies," and wrongfully terminated for alleged violations of company policy. (Doc. 1, pp. 2-3.) Lavigne further alleges that Cajun Deep retaliated against him: (1) for requesting a promotion and higher compensation; (2) for opposing "unfair employment practices which violate Title VII"; and (3) due to its "concern that [Lavigne] could alert OSHA . . . regarding incidents reportable to it which were not reported or otherwise 'covered up.'" (Doc. 1. p. 3.) Accordingly, Lavigne seeks "injunctive relief," back pay, damages, attorneys' fees, and costs. (Doc. 1, p. 3.) Cajun Deep denies all liability. (Doc. 6.)

As to the instant motion, Cajun Deep seeks an order from this Court dismissing Lavigne's claims, pursuant to Federal Rule of Civil Procedure 56. In support of its motion, Cajun Deep argues that Lavigne's Amended Charge of Discrimination ("Amended Charge") does not relate back to his Original Charge of Discrimination ("Original Charge"). Specifically, Cajun Deep argues that Lavigne's Amended Charge raises new legal theories, namely wrongful termination and retaliation, that do not relate back to the allegations in his Original Charge. Accordingly, such claims are time-barred and must be dismissed as a matter of law. Cajun Deep further argues that Lavigne failed to exhaust seven of the claims made in his Complaint and/or such claims are time-barred. Accordingly, such claims must be dismissed as a matter of law. Finally, Cajun Deep argues that Lavigne has failed to point to sufficient

evidence in the record to establish a prima facie case of discrimination on the basis of his race. Accordingly, Lavigne's claims must be dismissed as a matter of law.

In opposition, Lavigne argues that the claims in his Amended Charge relate back to the claims in his Original Charge. Lavigne further contends that he properly exhausted each of the claims made in his Complaint and/or such claims are not time-barred. Lavigne also argues that there is sufficient evidence in the record to establish a prima facie case of discrimination on the basis of his race. Specifically, Lavigne argues that there is sufficient evidence in the record to establish a prima facie case of disparate treatment, disparate compensation, failure to promote, wrongful termination, and retaliation. Accordingly, Lavigne requests the Court deny Cajun Deep's motion for summary judgment.

II. Undisputed Facts

According to the undisputed facts[4]:

1. Lavigne was initially hired as a Laborer by non-party Cajun Constructors, Inc. on August 18, 2005, even though he had almost no experience in the field of construction.

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[4] Pursuant to Local Rule 56.1, Cajun Deep submitted a statement of undisputed material facts with its motion for summary judgment. (Doc. 46-1.) Lavigne filed a response, in which he opposes a number of Cajun Deep's material facts. (Doc. 52-1.) Pursuant to Local Rule 56.2, certain material facts are deemed admitted for purposes of this ruling and order.

2. Less than two months later, Lavigne was promoted to Driller Helper and received a pay raise to $12.00 per hour.

3. Plaintiff received two more raises in 2006 until he was earning $16.00 per hour when he was promoted to Leadman on October 26, 2006.

4. In 2007, Plaintiff began working for Cajun Deep Foundations, was promoted to Drill Shaft Operator and his pay was raised that year until he was earning $19.00 per hour.

5. Subsequently, Plaintiff was promoted to Drill Shaft Foreman on June 7, 2009 and received a pay raise to $20.00 per hour.

6. In total, Plaintiff was promoted four (4) times and received six (6) raises in a little less than four (4) years of employment with Cajun Deep.

7. Lavigne's first violation of company policy occurred on or about January 29, 2009.

8. Due to this violation of company policy, Lavigne was given a written notice of violation and discipline and given a three (3) day suspension without pay.

9. The second violation of company policy occurred less than two (2) years later on or about February 7, 2011.

10. On that date, Plaintiff was operating an excavator whose boom struck the girder of the southbound I-310 bridge.

11. In this lawsuit, Lavigne reasserted the allegations that he first made in his Original Charge and Amended Charge.

12. Plaintiff claims that Cajun Deep discriminated against him in violation of Title VII.

13. Plaintiff has made no allegations that he was subjected to a hostile work environment in this case.

III. Standard of Review

Pursuant to the Federal Rules of Civil Procedure, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). In determining whether the movant is entitled to summary judgment, the court views facts in the light most favorable to the non-movant and draws all reasonable inferences in the non-movant's favor. *Coleman v. Houston Independent School District*, 113 F.3d 528, 533 (5th Cir.1997).

After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). If the moving party carries its burden of proof under Federal Rule of Civil Procedure 56, the opposing party must direct the court's attention to specific evidence in the record which demonstrates that the non-moving party can satisfy a

reasonable jury that it is entitled to a verdict in its favor. *Id.* The court may not evaluate the credibility of witnesses, weigh the evidence, or resolve factual disputes. *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1263 (5th Cir.1991), *cert. denied*, 502 U.S. 1059, 112 S.Ct. 936, 117 L.Ed.2d 107 (1992). However, if the evidence in the record is such that a reasonable jury, drawing all inferences in favor of the non-moving party, could arrive at a verdict in that party's favor, the court must deny the motion for summary judgment. *International Shortstop, Inc.*, 939 F.2d at 1263.

On the other hand, the non-movant's burden is not satisfied by some metaphysical doubt as to the material facts, or by conclusory allegations, unsubstantiated assertions, or a scintilla of evidence. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1994). Summary judgment is appropriate if the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In other words, summary judgment will lie only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." *Sherman v. Hallbauer*, 455 F.2d 1236, 1241 (5th Cir.1972).

IV. Analysis

A. Whether Lavigne's Amended Charge of Discrimination Relates Back to His Original Charge of Discrimination

In support of the motion, Cajun Deep argues that Lavigne's Amended Charge does not relate back to his Original Charge. Specifically, Cajun Deep argues that Lavigne's Amended Charge raises new legal theories, namely wrongful termination and retaliation, that do not relate back to the allegations in his Original Charge. Accordingly, such claims are time-barred and must be dismissed as a matter of law.

In opposition, Lavigne argues that his wrongful termination and retaliation claims are not time-barred because such claims relate back to the allegations in his Original Charge. According to Lavigne, his wrongful termination and retaliation claims are based on "the same set of operative facts" contained in his Original Charge. (Doc. 52, p. 9.) Accordingly, Lavigne argues that his wrongful termination and retaliation claims relate-back to the claims in his Original Charge, and thus, must not be dismissed as time-barred.

Before an employment discrimination plaintiff may pursue his claims in federal court, he must exhaust his administrative remedies. *Taylor v. Books A Million*, 296 F.3d 376, 378-79 (5th Cir.2002). In order to exhaust his administrative remedies, a plaintiff must first file a timely charge of discrimination with the Equal Employment Opportunity Commission's (EEOC) and receive notice of right to sue. *Id.*

Under Title VII, a plaintiff must file a claim with the EEOC within 180 days of the alleged discrimination. 42 U.S.C. § 2000e-5(e)(1). However, in a "deferral" state like Louisiana, this filing period is extended to 300 days if the complainant instituted a complaint with a state or local agency with authority to grant or seek relief from such practices. *Celestine v. Petroleos de Venezuella SA*, 266 F.3d 343, 351 (5th Cir.2001) (citing 42 U.S.C. § 2000e-5(e)(1)); *Griffin v. City of Dallas*, 26 F.3d 610, 612 (5th Cir.1994).[5]

Here, it is uncontested that the 300-day limitations period applies to Lavigne. It is also uncontested that the last alleged discriminatory act occurred on March 22, 2011, the date Cajun Deep terminated Lavigne. (Doc. 46-3, p. 21.) Accordingly, the 300-day limitations period expired on January 16, 2012. Lavigne's Original Charge was signed on August 6, 2011 and received by the EEOC on August 22, 2011. (Doc. 46, p. 20.) Thus, it is uncontested that Lavigne's Original Charge fell well within the 300-day limitations period.

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[5] A deferral state is one in which state law prohibits discrimination in employment and a state agency has been established to grant or seek relief for such discriminatory practice. *Clark v. Resistoflex Co.*, 854 F.2d 762, 765 n. 1 (5th Cir.1988). The Louisiana Commission on Human Rights ("LCHR") has been funded and operating since April 1994, making Louisiana a deferral state since that time. *See Lafort v. Fussell*, No. 96-3888, 1998 U.S. Dist. LEXIS 189, at *7, 1998 WL 12241, at *2 n. 2 (E.D.La. January 12, 1998) (citing La.Rev.Stat.Ann. § 51:2233 (West Supp.1997)); see also 29 C.F.R. § 1601.74.

Lavigne's Amended Charge was signed on March 21, 2012 (65 days after the 300-day limitations period expired) and received by the EEOC on March 22, 2012 (66 days after the 300-day limitations period expired). (Doc. 46-3, p. 21.) Thus, it is uncontested that Lavigne's Amended Charge was untimely. Accordingly, Lavigne's wrongful termination and retaliation claims are time barred unless those claims relate back to the allegations in his Original Charge.

The EEOC regulations provide, in relevant part, that an amended charge relates back to "the date the charge was first received" only if the amendment "clarif[ies] and amplif[ies] allegations made therein," or "alleg [es] additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge." 29 C.F.R. § 1601.12(b). Accordingly, the general rule is that amendments that raise a new legal theory do not relate back to an original charge of discrimination. *Manning v. Chevron Chemical Co. LLC*, 332 F.3d 874, 878 (5th Cir.2003) (citations omitted). This rule has an important policy justification: one of the central purposes of the employment discrimination charge is to put employers on notice of "the existence and nature of the charges against them." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77, 80, 104 S.Ct. 1621, 80 L.Ed.2d 41 (1984); *Manning*, 332 F.3d at 879. However, one narrow exception to the general rule provides that an amendment, even one that alleges a new theory of recovery, can relate back to the date of the original charge when the facts supporting both the amendment and the original

charge are essentially the same. *Manning*, 332 F.3d at 879 (citations omitted). "The question is whether the employee *already included* sufficient facts in his original complaint to put the employer on notice that the employee might have additional allegations of discrimination." *Id.* (emphasis in original).

Here, Lavigne's Original Charge alleges:

> Since 2009, I have been working for the company as a Crew Supervisor . . . I have been subjected to unfair terms and conditions of employment because of my race (Black). On February 7, 2001, I [was] suspended for 3 days for striking an I-310 overpass with an excavator. I was also required to take a drug test. The white counterparts who have been involved in similar accidents have not been suspended or required to take a drug test. I am also not receiving a Supervisor's pay even though I ha[ve] a supervising job. Other Supervisors of a different race have received pay increases because of their Supervisory tasks. I believe that I have been discriminated against because of my Race (Black) . . . because my white counterparts are treated favorably better under similar circumstances.

(Doc. 46-3, p. 20.) Lavigne's Amended Charge alleges:

> . . . On March 22, 2011, I was wrongfully terminated for violating company policy, including (1) standing too close to an open excavation; (2) having an accident while operating heavy equipment; (3) my driving record; (4) Also, because I sought to be paid at the same

> rate as that of a job superintendent for the times I had already worked or would work, in the future, in that capacity. I believe I have been discriminated against because of my race, Black, and retaliated against for opposing unfair employment practices . . .

(Doc. 46-3, p. 21.)

1. Lavigne's Wrongful Termination Claim

Lavigne first raised his wrongful termination claim in his Amended Charge, thus making this claim a new legal theory. *See Carter v. Target Corp.*, 541 Fed.Appx. 413, 419 (5th Cir.2013) (alleging a new form of discrimination on an amended charge presents an entirely new legal theory.). However, raising a new legal theory in an amended charge is not always fatal. *Manning*, 332 F.3d at 878. (citing *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462 (5th Cir.1970) ("[t]he crucial element of a charge of discrimination is the factual statement contained therein.")); *see also EEOC v. Mississippi College*, 626 F.2d 477, 483 (5th Cir.1980) ("[c]harges filed with the EEOC must be liberally construed because charging parties usually are unfamiliar with the technicalities of formal pleadings and are not assisted by an attorney."). As noted in *Manning*, the issue not whether the employee adds any facts when he amends the charge, but whether the employee already included sufficient facts to put the employer on notice that the employee might have additional allegations of discrimination. *Id.* at 879.

Here, Lavigne alleged that he was "subjected to unfair terms and conditions of employment because of [his] race" and "suspended for 3 days for striking an I-310 overpass with an excavator." (Doc. 46-3, p. 20.) It is uncontested that Cajun Deep terminated Lavigne approximately five months before he filed his Original Charge, allegedly for committing unsafe acts and violating company policy. (Doc. 46-3, pp. 12-14.) In other words, Lavigne was terminated allegedly because of multiple unsafe acts and/or violations of company policy, including the incident described in his Original Charge. Thus, it cannot be said that Cajun Deep was unaware that Lavigne might have an additional allegation of wrongful termination.

In sum, the Court finds that Lavigne's wrongful termination claim "constitutes an unlawful employment practice[] directly related to or growing out of the subject matter of the original charge." 29 C.F.R. § 1601.12(b). Accordingly, the Court finds that Lavigne's wrongful termination claim relates back to his Original Charge, and thus, is not time-barred. Accordingly, Cajun Deep's request that the Court dismiss Lavigne's wrongful termination claim on this basis is **DENIED.**

2. Lavigne's Retaliation Claim

Lavigne also raised his retaliation claim for the first time in his Amended Charge. Thus, this new theory of recovery is time-barred unless the Court finds that Lavigne included sufficient facts in his Original

Charge to put Cajun Deep on notice that he might have a retaliation claim.

A review of Lavigne's Original Charge reveals that Lavigne failed to check the "retaliation" box in the "[d]iscrimination based on" section of the charge form. (Doc. 46-3, p. 20.) The Fifth Circuit has held that a plaintiffs failure to check a box on an EEOC charge of discrimination is not always a fatal error. *See Sanchez*, 431 F.2d at 462 (finding that the plaintiff's failure to check the national origin box on her charge was a mere "technical defect or omission."). However, Lavigne's failure to mark in the "retaliation box" is an indication that his Original Charge does not contain factual allegations sufficiently related to a retaliation claim. *See Frazier v. Sabine River Authority Louisiana*, 509 Fed.Appx. 370, 374 (5th Cir.2013); *Manning*, 332 F.3d at 876; *Carter*, 541 Fed.Appx. at 419.

In *Carter*, the plaintiff neither mentioned race nor marked the "race" discrimination box on her original charge. *Carter*, 541 Fed.Appx. at 419. Later, the plaintiff submitted an amended charge, in which she alleged racial discrimination. *Id.* The Fifth Circuit held that because the plaintiffs amended charge presented a new legal theory, and because the plaintiff failed to mention race or check the "race" discrimination box in her original charge, her racial discrimination claim did not relate back to her original charge. *Id.*

Similarly, here, Lavigne did not mark the "retaliation" box on his Original Charge; nor did he include facts related to a retaliation claim. While the court's

scope of inquiry is not limited to the boxes checked, it is limited to that "which can reasonably be expected to grow out of the charge." *Young v. City of Houston*, 906 F.2d 177, 179 (5th Cir.1990).

In opposition, Lavigne argues that "discrimination encompasses retaliation." (Doc. 52, p. 10.) In support of this argument, Lavigne cites to *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005). However, *Jackson* is inapplicable to the case at bar.[6] Further, it is well established, that discrimination and retaliation claims are distinct. *Frazier*, 509 Fed.Appx. at 374; *Bouvier v. Northrup Grumman Ship Systems, Inc.*, 350 Fed.Appx. 917, 921 (5th Cir.2009); *Randel v. U.S. Dep't of Navy*, 157 F.3d 392, 395 (5th Cir.1998). For these reasons, Plaintiff's argument that discrimination encompasses relation is unconvincing.

In sum, the Court concludes that Lavigne failed to put Cajun Deep on notice that he might have a retaliation claim when he failed to check the "retaliation" box on his Original Charge *and* when he failed to include any facts related to a retaliation claim. Indeed, Lavigne points to nothing in the record that would account for his failure to raise this new legal theory when

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[6] *Jackson* is inapplicable for two reasons: (1) in *Jackson*, the plaintiff filed suit under 20 U.S.C. § 1681, et seq. ("Title IX"); whereas here, Lavigne seeks recovery under Title VII; and (2) Title IX is a broad prohibition against discrimination that includes retaliation; whereas retaliation under Title VII is a distinct legal theory. *See Jackson*, 544 U.S. at 175, 125 S.Ct. 1497; *Frazier*, 509 Fed.Appx. at 374.

he filed his Original Charge. Accordingly, the Court concludes that Lavigne's retaliation claim does not relate back to his Original Charge, and thus, is time-barred. As such, Cajun Deep's request that the Court dismiss Lavigne's retaliation claim on this basis is **GRANTED.**

B. Whether Lavigne Administratively Exhausted the Claims in His July 24, 2012 Complaint

In support of the motion, Cajun Deep argues that Lavigne failed to exhaust seven of the claims made in his Complaint. Specifically, Cajun Deep contends that Lavigne failed to include seven claims of disparate treatment, disparate compensation, failure to promote, wrongful termination, and retaliation in his Original Charge or Amended Charge. Thus, such claims were not properly exhausted and must be dismissed as a matter of law.

In opposition, Lavigne argues that he properly exhausted each of the claims alleged in his Complaint. According to Lavigne, such claims are sufficiently related to the allegations in his Original Charge and Amended Charge. Thus, such claims were properly exhausted and must not be dismissed on this basis.

In his Complaint, Lavigne alleges that he was: (1) treated less favorably than white male employees who violated the same or similar policies; (2) overlooked and/or denied promotion to superintendent, while similarly situated males were promoted to the position;

(3) overlooked and/or denied the pay rate of Superintendent, while similarly situated males were paid at the pay rate of a Superintendent; (4) cited for a policy violation arising from an incident in which his action prevented Cajun Deep from making a costly mistake; (5) cited for a policy violation arising from a review of his motor vehicle records, while similarly situated males were treated more favorably; (6) retaliated against for seeking a promotion to Superintendent; and (7) retaliated against due to Cajun Deep's concern that he could alert OSHA about reportable violations. (Doc. 1, p. 3.) As concluded above, Lavigne's retaliation claims are time-barred. Thus, the only question is whether Lavigne's remaining five claims are addressed in or reasonably related to Lavigne's Original Charge and Amended Charge.

It is well established that "[t]he 'scope' of a complaint is limited to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Sanchez*, 431 F.2d at 466. However, because the scope of an EEOC complaint is to be construed liberally, the Court must review Title VII claims broadly and not limit its review to the scope of the administrative charge itself, but consider the scope of the EEOC investigation which can "reasonably be expected to grow out of the charge of discrimination." *Pacheco v. Mineta*, 448 F.3d 783, 789 (5th Cir.2006) (quoting *Sanchez*, 431 F.2d at 466); *see also Castro v. Tex. Dep't of Crim. Justice*, 541 Fed.Appx. 374, 379 (5th Cir.Tex.2013) ("[w]e will not condone lawsuits

that exceed the scope of EEOC exhaustion, because doing so would thwart the administrative process and peremptorily substitute litigation for conciliation. Instead, we construe an EEOC complaint broadly but in terms of the administrative EEOC investigation that can reasonably be expected to grow out of the charge of discrimination.") (internal citations and quotations omitted).

Here, the Court concludes that Lavigne's remaining five claims reasonably grow out of his Original Charge and Amended Charge and the EEOC investigation that occurred. Indeed, a review of the record reveals that Cajun addressed each of these allegations in its position statement and subsequent responses to the EEOC investigator. (Doc. 46, pp. 1-3, 10-14.)

In sum, the Court concludes that Lavigne properly exhausting [sic] the remaining five claims made in his Complaint. Accordingly, Cajun Deep's request that the Court dismiss Lavigne's claims on this basis is **DENIED**.

C. Whether the Federal and State Law Claims Alleged by Lavigne in His July 24, 2012 Complaint are Time-Barred

In support of the motion, Cajun Deep argues that any federal claims alleged by Lavigne that are based on events that occurred prior to October 2010 are time-barred, and must be dismissed as a matter of law. Cajun Deep also contends that any state law claims alleged by Lavigne that are based on events that

occurred prior to January 2011 are time-barred, and must be dismissed as a matter of law.

In opposition, Lavigne generally argues that his federal and state law claims are not time-barred. Thus, such claims must not be dismissed on this basis.

1. Lavigne's Title VII Claims

A discrimination charge is considered "filed" for purposes of 42 U.S.C. § 2000e-5 on the date the EEOC receives the charge, not the date the charged is signed or mailed.[7] *See Taylor v. Gen. Telephone Co. of the Southwest*, 759 F.2d 437, 441-42 (5th Cir.1985). The date stamp on Lavigne's Original Charge indicates that it was received by the EEOC on August 22, 2011. (Doc. 46, p. 20.) As noted above, it is uncontested that the 300-day limitations period applies to Lavigne. Thus, Lavigne's federal law claims based on events that occurred 300 days before August 22, 2011, or before October 26, 2010, are time-barred.[8]

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[7] By contrast, 29 C.F.R. § 1601.13 explicitly mandates that where a charge of discrimination is filed which includes an allegation under state law, the state law charges are to be forwarded to the appropriate local agency and these "[s]tate or local proceedings are deemed to have commenced on the date such document is mailed. . . ." 29 C.F.R. § 1601.13(a)(4)(i)(B).

[8] While Lavigne's argument in opposition is not entirely clear, to the extent Lavigne argues that the Court should consider discrete employment actions prior to October 26, 2010 under the "continuing violation" doctrine applicable to hostile work environment claims, the Supreme Court has rejected this argument. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002).

2. Lavigne's Claims Under Louisiana Employment Discrimination Law

Generally, claims brought under the Louisiana Employment Discrimination Law ("LEDL") must be filed within one year of the last discriminatory act. However, the LEDL suspends its one-year prescription period for up to six months during any investigation by the EEOC or the Louisiana Commission on Human Rights. La. R.S. § 23:303(D).

Here, Lavigne filed his complaint on July 24, 2012. (Doc. 1.) Thus, Lavigne's state law claims based on events that occurred eighteen months before July 24, 2012, or before January 24, 2011, are time-barred.

Accordingly, Cajun Deep's request that the Court dismiss the federal and state law claims alleged by Lavigne in his July 24, 2012 Complaint is **GRANTED IN PART** and **DENIED IN PART**. As such, Lavigne's federal law claims based on events that occurred before October 26, 2010, and state law claims based on events that occurred before January 24, 2011 are **DISMISSED**.

D. Whether Lavigne Has Established a Prima Facie Case of Discrimination on the Basis of His Race

In support of the motion, Cajun Deep argues that Lavigne has failed to point to sufficient evidence in the record to establish a prima facie case of discrimination on the basis of his race. Accordingly, Lavigne's claims must be dismissed as a matter of law.

In opposition, Lavigne argues that there is sufficient evidence in the record to establish a prima facie case of discrimination on the basis of his race. Accordingly, his remaining claims must not be dismissed on this basis.

Title VII prohibits discrimination by employers "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Title VII intentional discrimination can be proven by either direct or circumstantial evidence. *Laxton v. Gap, Inc.*, 333 F.3d 572, 578 (5th Cir.2003), *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 222 (5th Cir.2000). In order for evidence to be "direct," it must, if believed, prove the fact in question without inference or presumption. *Fabela v. Socorro Indep. Sch. Dist.*, 329 F.3d 409, 415 (5th Cir.2003) (citations omitted). Here, Lavigne has not presented direct evidence of discrimination. Accordingly, the Court shall employ the familiar burden-shifting framework created by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).[9]

In order to overcome a motion for summary judgment on his remaining discrimination claims, Lavigne

[9] Louisiana state courts routinely look to federal jurisprudence in interpreting Louisiana's antidiscrimination laws; this Court will do the same. *See, e.g.*, *Smith v. Amedisys, Inc.*, 298 F.3d 434, 448 (5th Cir.2002); *King v. Phelps Dunbar, L.L.P.*, 743 So.2d 181, 188 (La.1999).

must first establish, by a preponderance of the evidence, a prima facie case of discrimination. *McDonnell Douglas*, 411 U.S. at 801-803, 93 S.Ct. 1817. A prima facie case is established once the plaintiff has proved that he: (1) is a member of a protected class; (2) was qualified for her position; (3) was subjected to an adverse employment action; and (4) was replaced by someone outside the protected class; or in the case of disparate treatment, show that others similarly situated were treated more favorably. *Id.*; *see also Septimus v. Univ. of Houston*, 399 F.3d 601, 609 (5th Cir.2005). The prima facie case, once established, raises a presumption of discrimination, which the defendant must rebut by articulating a legitimate, nondiscriminatory reason for its actions. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. 1817; *Meinecke v. H & R Block*, 66 F.3d 77, 83 (5th Cir.1995) (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)). If the defendant satisfies this burden by proffering a nondiscriminatory reason for the adverse employment action, the plaintiff must then create a genuine issue of material fact that either: (1) the defendants' reason is not true, but instead is a pretext for discrimination (pretext alternative); or (2) regardless of the nondiscriminatory reason, his race was also a motivating factor (mixed-motives alternative). *Alvarado v. Texas Rangers*, 492 F.3d 605, 611 (5th Cir.2007) (citation omitted); *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 312 (5th Cir.2004). Once a Title VII case reaches the pretext stage, the only question on summary judgment is whether there is a conflict in substantial evidence to

create a question for the fact-finder. *Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 404 (5th Cir.1999) (citing *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir.1996) (noting that once a Title VII case reaches the pretext stage, the sufficiency of the evidence test is applied)). Throughout, the ultimate burden of persuasion remains with the plaintiff. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

As concluded above, Lavigne's retaliation claim is time-barred. Accordingly, the Court's analysis shall be limited to Lavigne's disparate treatment, disparate compensation, failure to promote, and wrongful termination claims.

1. Lavigne's Disparate Treatment Claims

Disparate treatment discrimination addresses employment actions that treat an employee worse than others based on the employee's race, color, religion, sex, or national origin. *See Pacheco*, 448 F.3d at 787 (internal citations omitted). In such disparate treatment cases, proof and finding of discriminatory motive is required. *Id.*

In support of the motion, Cajun Deep concedes that Lavigne has met the first two elements of his prima facie case. Thus, the only remaining issues are whether Lavigne can establish that: (1) he was subjected to an adverse employment action; and (2) others similarly situated were treated more favorably.

i. Lavigne's Three-Day Suspension for Working Near an Open Excavation Without Wearing a Harness

In his Complaint, Lavigne alleges that he was "cited for [a] policy violation arising from an incident wherein my action saved Cajun from making a very costly mistake. Others who were White males were not cited for the same action at the same time for which I was cited. The incident was being too close to an open hole." (Doc. 1, p. 3.) Lavigne's Complaint fails to identify the date that this incident occurred. However, a review of record indicates that the incident occurred on January 29, 2009. (Doc. 46-3, p. 12.) As noted above, however, Lavigne's federal law claims based on events that occurred before October 26, 2010, and state law claims based on events that occurred before January 24, 2011, are time-barred. Thus, Lavigne's disparate treatment claim based on this event is **DISMISSED**.

ii. Lavigne's Three-Day Suspension and Cajun Deep's Requirement that Lavigne Undergo Drug Testing After Lavigne Struck the Girder of the Southbound I-310 Bridge with the Boom of an Excavator

In his Complaint, Lavigne alleges that he was "cited for [a] policy violation arising from an accident involving heavy equipment" and that "[o]ther White males have had the same or similar accidents and were not held in violation of Cajun's policies." (Doc. 1, p. 3.)

Lavigne's Complaint fails to identify the date that this incident occurred. However, a review of record indicates that the incident occurred on February 7, 2011, and that Lavigne's suspension and drug testing occurred on February 15, 2011. (Docs. 46-3, p. 2, 52-3, pp. 167-169, 177, 193, 215, 223.) Thus, Lavigne's disparate treatment claim based on such events is timely.

In support of the motion, Cajun Deep argues that Lavigne has failed to establish the fourth element of his prima facie case. Specifically, Cajun Deep contends that Lavigne has failed to identify similarly situated employees who were treated more favorably.

It is well established that the plaintiff's burden of proof in disparate treatment cases is to identify similarly situated employees whose circumstances, including their misconduct, was "nearly identical" to the plaintiff. *See Perez v. Tex. Dep't of Criminal Justice, Inst. Div.*, 395 F.3d 206, 213 (5th Cir.2004) (citing *Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir.1991); *Smith v. Wal-Mart Stores*, 891 F.2d 1177, 1180 (5th Cir.1990)). Based on the evidence in the record, the Court concludes that Lavigne has sufficiently identified three White male employees who struck an overpass or bridge with heavy equipment, but were not suspended. *See Lee v. Kan. City S. Ry. Co.*, 574 F.3d 253, 260 (5th Cir.2009) (noting that the Fifth Circuit's "nearly identical" standard is not synonymous with "identical."). Accordingly, the burden shifts to Cajun Deep to proffer a non-discriminatory reason for Lavigne's suspension.

In support of its argument, Cajun Deep contends that the employees identified by Lavigne were treated more favorably than Lavigne because they, unlike Lavigne, were not Drill Shaft Foreman and because their infractions, unlike Lavigne's infraction, did not involve operator error.[10] Based on the evidence in the record, the Court concludes that Cajun Deep has offered a sufficient non-discriminatory reason for Lavigne's suspension. Accordingly, Lavigne must create a genuine issue of material fact that either: (1) the defendants' reason is not true, but instead is a pretext for discrimination (pretext alternative); or (2) regardless of the nondiscriminatory reason, his race was also a motivating factor (mixed-motives alternative).

In opposition, Lavigne argues that the infractions committed by similarly situated employees were not caused by mechanical error, but rather, were caused by operator error. In support of his argument, Lavigne points to his November 11, 2013 deposition, in which he testified about the cause of his infraction and other infractions by similarly situated employees. (Doc. 52-3, pp. 171-177.) Lavigne also submitted evidence that the damage caused by his infraction was less severe than the damage caused by a similarly situated employee who struck the same bridge. (Doc. 84-4, pp. 54-72.) Accordingly, the Court finds that Lavigne has pointed to

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[10] Cajun Deep contends, and the incident reports submitted by Cajun Deep purport to reflect, that the other employees' infractions were attributable to mechanical malfunction rather than operator error.

sufficient evidence in the record to create a genuine issue of material fact. Accordingly, Cajun Deep's request that the Court dismiss Lavigne's disparate treatment claims based on this event is **DENIED**.

As it relates to Cajun Deep's requirement that Lavigne undergo drug testing, Cajun Deep argues that drug testing is not an adverse employment action as defined by the United States Supreme Court. The Court agrees.

An "tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *Shackelford*, 190 F.3d at 407 (same). Here, Lavigne has failed to establish that Cajun Deep's requirement that he undergo a drug test on February 15, 2011 amounted to or led to an adverse employment action. Accordingly, Lavigne's disparate treatment claims based on this event are **DISMISSED**.

2. Lavigne's Disparate Compensation Claims

To state a prima facie claim for disparate compensation, a plaintiff must show that he was a member of a protected class and was paid less than a non-member for substantially the same job responsibilities. *Goring v. Bd. of Supervisors of La. State Univ. & Agric. & Mech.*

College, 414 Fed.Appx. 630, 633 (5th Cir.2011) (citing *Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510, 522 (5th Cir.2008)).

In support of its motion, Cajun Deep concedes Lavigne is a member of a protected class. Thus, the only remaining issue is whether Lavigne was paid less than white employees for substantially the same job responsibilities.

i. Cajun Deep's Failure to Compensate Lavigne for Supervisory Work

In his Original Charge, Lavigne alleges that he did not receive "a Supervisor's pay even though [he had] a supervising job" and that "[o]ther Supervisors of a different race [] received pay increases because of their Supervisory tasks." (Doc. 46-3, p. 20.) Lavigne's Original Charge and Complaint fail to identify the dates Cajun Deep allegedly failed to compensate Lavigne for supervisory work. However, a review of record indicates that he received promotions on October 2, 2005, October 26, 2006, May 20, 2007, and June 7, 2009. (Doc. 46-3, p. 14.) It is not clear from the record which of these promotions involved supervisory tasks. However, as previously noted, Lavigne's federal law claims based on events that occurred before October 26, 2010, and state law claims based on events that occurred before January 24, 2011, are time-barred. Thus, Lavigne's federal law and state law disparate compensation claims based on these events are **DISMISSED**.

ii. Cajun Deep's Failure to Compensate Lavigne at the Rate of a Superintendent

In his Complaint, Lavigne alleges that he was "consistently and discriminatorily overlooked and/or denied promotion to and the pay rate of superintendent when [he] had been acting and performing very satisfactorily in that capacity on numerous projects." (Doc. 1, p. 3.) Lavigne's Complaint fails to identify the dates Cajun Deep allegedly failed to compensate him at the rate of a Superintendent; nor does Lavigne identify such dates in his memoranda in opposition. However, a review of record indicates that Lavigne was designated as a Superintendent for the following jobs on the following dates[11]:

[11] Lavigne also contends that he was designated as Superintendent for job numbers 10-529, 11-151, and 11-514. However, Lavigne failed to identify or provide evidence of such jobs or the relevant dates. While it is not clear from Lavigne's memoranda in opposition, it appears Lavigne further contends that Cajun Deep's motion should be denied because it failed to produce such documents to him, as ordered by the United States Magistrate Judge. A review of the record reveals, however, that Lavigne failed to file any motion in response to Cajun Deep's failure to produce. *See* Fed.R.Civ.P. 7(b). Accordingly, any disparate compensation claims based on job numbers 10-529, 11-151, and 11-514 are **DISMISSED**.

Job No.	**Date(s)**
10-534	November 9, 2009
10-543	March 5, 2010
10-575	March 26, 2010
10-582	April 12, 2010
10-609	August 11, 2010
11-500	October 13, 2010 through November 5, 2010
11-527	January 27, 2011

As noted above, Lavigne's federal law claims based on events that occurred before October 26, 2010, and state law claims based on events that occurred before January 24, 2011, are time-barred. Thus, Lavigne's federal law disparate compensation claim based job numbers 10-534, 10-543, 10-575, 10-582, and 10-609 is **DISMISSED**. Further, Lavigne's state law disparate compensation claim based job numbers 10-534, 10-543, 10-575, 10-582, 10-609, and 11-500 is **DISMISSED**.

Accordingly, Lavigne's remaining federal law disparate compensation claim is limited to job numbers 11-500 and 11-527, and Lavigne's remaining state law disparate compensation claim is limited to job number 11-527.

In opposition to the motion, Lavigne argues that, despite performing the duties of a Superintendent, he was paid at the rate of a Drill Shaft Foreman, and not at the rate of a Superintendent. Lavigne further contends that Cajun Deeps's internal documents identify Lavigne as the "Project Superintendent" for job numbers 11-500 and 11-527. Yet, unlike white employees who served at the "Project Superintendent," Lavigne was paid at the rate of a Drill Shaft Foreman, and not at the rate of a Superintendent.

In support of the motion, Cajun Deep argues that Lavigne's disparate pay claim based on the above listed job numbers must be dismissed because he failed to point to evidence to establish that he requested to

be paid as a Superintendent.[12] Cajun Deep further argues that Lavigne's claim must be dismissed because he has failed to point to sufficient evidence to establish that any white Drill Shaft Foreman were paid as Superintendents. However, as noted above, to state a prima facie claim for disparate compensation, a plaintiff must show that he was a member of a protected class and was paid less than a non-member for substantially the same job responsibilities. *Goring*, 414 Fed.Appx. at 633.

In support of his argument, Lavigne submitted copies of Cajun Deep's pre-task plan forms, work tickets, daily inspection forms, and final completion acceptance forms for job numbers 11-500 and 11-527. (Docs. 85-2, pp. 137-150, Doc. 85-3, pp. 1-125, 156-157.) A review of the documents reveals that Lavigne was, in fact, identified as the "Project Superintendent" for job numbers 11-500 and 11-527, and signed many of the forms. Based on the evidence in the record, the Court concludes that Lavigne has pointed to sufficient evidence to create a genuine issue of material fact as to whether he was paid less than white Superintendents, despite being given substantially the same job responsibilities as those employees. Accordingly, Cajun

[12] Cajun Deep failed to cite to any authority to support its argument that a plaintiff must request additional compensation for supervisory work. Rather, it is axiomatic that a person who takes on supervisory job responsibilities will receive additional compensation for taking on those added responsibilities.

Deep's request that the Court dismiss Lavigne's disparate compensation claims based on job numbers 11-500 and 11-527 is **DENIED**.

3. Lavigne's Failure to Promote Claims

In his Complaint, Lavigne alleges that he was "consistently and discriminatorily overlooked and/or denied promotion to and the pay rate of superintendent when [he] had been acting and performing very satisfactorily in that capacity on numerous projects." (Doc. 1, p. 3.) Lavigne's Complaint fails to identify the date(s) Cajun Deep allegedly failed to promote Lavigne to the position of Superintendent.

In support of his memoranda in opposition, Lavigne points to his November 11, 2013 deposition, in which he testified that in "late 2009, early January 2010" his immediate supervisor told him that he would be promoted to the position of Superintendent. (Doc. 52-4, pp. 7-8.) According to Lavigne, he was denied the promotion in January 2010. (Doc. 52-4, pp. 7-8.)

Although it is not entirely clear from Lavigne's memoranda in opposition, it appears Lavigne also argues that Cajun Deep unlawfully denied him promotional opportunities when it hired white males as Superintendents on September 11, 2008, November 16, 2009, and January 21, 2011. (Doc. 85, pp. 4-5, 8.)

As previously noted, Lavigne's federal law claims based on events that occurred before October 26, 2010, and state law claims based on events that occurred

before January 24, 2011, are time-barred. Thus, Lavigne's federal law failure to promote claim based on Cajun Deep's failure to promote Lavigne to the position of Superintendent on September 11, 2008 and November 16, 2009 and in January 2010 is **DISMISSED**. Further, Lavigne's state law failure to promote claim based on Cajun Deep's failure to promote Lavigne to the position of Superintendent on September 11, 2008, November 16, 2009, and January 21, 2011, and in January 2010 is also **DISMISSED**.

Accordingly, Lavigne's remaining federal law failure to promote claim is limited to Cajun Deep's failure to promote Lavigne to the position of Superintendent on January 21, 2011.

A plaintiff asserting racial discrimination for failure to promote establishes a prima facie case by satisfying the following conditions: "(1) the employee is a member of the protected class; (2) he sought and was qualified for the position; (3) he was rejected for the position; (4) the employer continued to seek applicants with the plaintiff's qualifications." *Celestine*, 266 F.3d at 354-55. The plaintiff's failure to apply for the disputed promotion will bar a failure to promote claim absent a showing that such an application would have been a futile gesture. *Shackelford*, 190 F.3d at 406; *see also Grice v. FMC Techs. Inc.*, 216 Fed.Appx. 401, 406 (5th Cir.2007) (finding no prima facie showing of "failure to promote" where employee failed to apply for the promotion at issue).

Here, Lavigne has failed to point to any evidence that he applied for the Superintendent position in January 2011. Further, he has failed to allege that his application for and/or efforts to obtain the promotion would have been a futile gesture. As such, Lavigne's failure to apply is fatal to his failure to promote claim. *Mason v. United Air Lines, Inc.*, 274 F.3d 314, 316 (5th Cir.2001) ("[S]ummary judgment is appropriate if the nonmovant fails to establish facts supporting an essential element of his prima facie claim.") Accordingly, Lavigne's remaining failure to promote claim is **DISMISSED**.

4. Lavigne's Wrongful Termination Claims

In his Complaint, Lavigne alleges that Cajun Deep violated Title VII and the Louisiana Employment Discrimination Law when it terminated his employment on March 22, 2011. Specifically, Lavigne alleges that he was "wrongfully terminated . . . on March 22, 2011, allegedly, for violations of company policies." (Doc. 1, p. 2.) Lavigne further alleges that he was "cited for a policy violation arising from a review of [his] motor vehicle records as kept by the Louisiana Department of Public [S]afety" while "[w]hite males with similar or worse records and/or who otherwise had accidents involving personal and company vehicles were not held in violation of company policy." (Doc. 1, p. 3.)

As noted above, to establish a prima facie case of wrongful termination Lavigne must establish that he:

(1) is a member of a protected class; (2) was qualified for his position; (3) was subjected to an adverse employment action; and (4) was replaced by someone outside the protected class, the other similarly situated employees were treated more favorably, or that he was otherwise terminated because of his race. *Lee v. Kansas City So. Ry. Co.*, 574 F.3d 253 (5th Cir.2009).

In support of its motion, Cajun Deep concedes that Lavigne has met the first three elements of the prima facie case.[13] Accordingly the only remaining issue is whether Lavigne has pointed to sufficient evidence to establish that he was replaced by someone outside the protected class, that other similarly situated employees were treated more favorably, or that he was otherwise terminated because of his race.

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[13] According to Cajun Deep, it disqualified Lavigne from driving company provided vehicles for suppressing three motor vehicle moving violations, in violation of Cajun Deep's Motor Vehicle Policy. Cajun Deep contends that because Lavigne was disqualified from driving company provided vehicles, he could no longer operate equipment. According to Cajun Deep, Lavigne was also disqualified from operating equipment because he violated Cajun Deep's Motor Vehicle Policy while on "operator probation" for striking the girder of the southbound I-310 bridge with the boom of an excavator on February 7, 2011. Cajun Deep contends that because Lavigne was disqualified from operating equipment, he could not perform his job duties, and thus, was terminated. (Doc. 46-3.) Lavigne contends that he did not violate Cajun Deep's Motor Vehicle Policy. According to Lavigne, he properly disclosed the two motor vehicle moving violations to his supervisors. Lavigne further contends that the third purported motor vehicle moving violation was not a moving violation subject to Cajun Deep's Motor Vehicle Policy. (Docs. 52, 85.)

In support of its motion, Cajun Deep submitted what appears to be personnel documents establishing that Lavigne was replaced by Charles Nelson (African American male) on April 13, 2011. (Doc. 86-1, p. 8.) Indeed, Lavigne concedes in the testimonial evidence submitted by him that the white male who he alleges replaced him was not promoted to Drill Shaft Foreman until "[a]pproximately one year following the termination of Terrance Lavigne." (Doc. 52-8, p. 2.) Accordingly, the Court finds that Lavigne has failed to establish that he was replaced by someone outside the protected class.

In further support of its motion, Cajun Deep argues that Lavigne has failed to identify similarly situated employees were treated more favorably.

In opposition, Lavigne identifies two white male employees who, according to Lavigne, "were allowed to continue driving semi-trucks even though their company driver's card had expired, placing them in violation of the company policy." (Doc. 52, p. 24.) However, this assertion alone, without further evidence, is insufficient to establish that Lavigne was treated less favorably than a similarly situated employee outside of his protected class. While the Court notes that the Fifth Circuits' "nearly identical" standard is not synonymous with "identical," Lavigne presents no evidence regarding the comparators' job titles, job responsibilities (i.e., whether their job position required them to operate equipment, work and disciplinary history) (i.e., whether they were also on operator probation when

they allegedly violated Cajun Deep's Motor Vehicle Policy), or other information that would indicate that they were similarly situated.

Nonetheless, Lavigne contends that the evidence in the record establishes that he was terminated because he is African-American. In support of his argument, Lavigne points to his November 11, 2013 deposition, in which he testified that three months prior to his termination, Lavigne reported to his supervisor that a white male employee, who was hired as a Superintendent, referred to Lavigne and his brother, Romell Lavigne, as "boys."[14] (Doc. 52-3, pp. 139-142.) Lavigne also points to his December 17, 2013 deposition, in which he testified that two white male employees, who worked as Superintendents, told him that he would never be promoted to a Superintendent because he is "black." (Doc. 52-4, 32-36.) However, Lavigne failed to submit any evidence that the employees who made the alleged comments, or the employee to whom he reported the alleged comments, were formal decision makers or in a position to influence the decision to terminate Lavigne.

Discriminatory remarks may be taken in account "even where the comment is not in the direct context of the termination and even if uttered by one other

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[14] While it is not clear from Lavigne's memoranda in opposition, it appears Lavigne also argues that his termination was in retaliation for his reporting such conduct to his supervisor. However, as previously noted, Lavigne's retaliation claims are time-barred.

than the formal decision maker, provided that the individual is in a position to influence the decision." *Palasota v. Haggar Clothing Co.*, 342 F.3d 569, 577-78 (5th Cir.2003). However, even assuming *arguendo* that the alleged comments were related to Lavigne's termination, this sole piece of evidence is insufficient to create a genuine issue of material fact. *See Palasota*, 342 F.3d at 577 (stating that a comment is not evidence of discrimination if it is the sole proof of pretext).

Although Lavigne may sincerely believe that his termination was discriminatory, the Fifth Circuit has explained that "a subjective belief of discrimination, however genuine [may not] be the basis of judicial belief." *Lawrence v. Univ. of Texas Med. Branch at Galveston*, 163 F.3d 309, 313 (5th Cir.1999). Here, Lavigne has failed to point the Court to sufficient evidence to raise a genuine issue of material fact as to the final element of his prima facie case. Accordingly, Lavigne's federal law and state law wrongful termination claims are **DISMISSED**.

V. Conclusion

Accordingly,

IT IS ORDERED that **Defendant Cajun Deep Foundations LLC's Motion for Summary Judgment (Doc. 46)** is **GRANTED IN PART** and **DENIED IN PART**.

- Cajun Deep's request that the Court dismiss Lavigne's wrongful termination claims as time-barred is **DENIED**.

- Cajun Deep's request that the Court dismiss Lavigne's retaliation claims as time-barred is **GRANTED**. Accordingly, Lavigne's federal law and state law retaliation claims are **DISMISSED**.

- Cajun Deep's request that the Court dismiss the federal law and state law claims alleged by Lavigne in his Complaint on the basis that Lavigne failed to exhaust his administrative remedies is **DENIED**.

- Cajun Deep's request that the Court dismiss the federal law and state law claims alleged by Lavigne in his Complaint on the basis that such claims are time-barred is **GRANTED IN PART** and **DENIED IN PART**. Accordingly, Lavigne's federal law claims based on events that occurred before October 26, 2010, and state law claims based on events that occurred before January 24, 2011 are **DISMISSED**.

- Cajun Deep's request that the Court dismiss Lavigne's disparate treatment claims is **GRANTED IN PART** and **DENIED IN PART**. Accordingly, Lavigne's disparate treatment claim based on his three-day suspension for working near an open excavation without wearing a harness is **DISMISSED**. Lavigne's disparate treatment claim based on Cajun Deep's requirement that Lavigne undergo drug testing after Lavigne struck the girder of the southbound I-310 bridge with the boom of

an excavator is **DISMISSED**. *All other disparate treatment claims remain issues for trial.*

- Cajun Deep's request that the Court dismiss Lavigne's disparate compensation claims is **GRANTED IN PART** and **DENIED IN PART**. Accordingly, Lavigne's federal law disparate compensation claims based job numbers 10-529, 10-534, 10-543, 10-575, 10-582, 10-609, 11-151, and 11-514, and state law disparate compensation based job numbers 10-529, 10-534, 10-543, 10-575, 10-582, 10-609, 11-500, 11-151, and 11-514 are **DISMISSED**. *All other disparate compensation claims remain issues for trial.*

- Cajun Deep's request that the Court dismiss Lavigne's failure to promote claims is **GRANTED**. Accordingly, Lavigne's federal law and state law failure to promote claims are **DISMISSED**.

- Cajun Deep's request that the Court dismiss Lavigne's wrongful termination claims is **GRANTED**. Accordingly, Lavigne's federal law and state law wrongful termination claims are **DISMISSED**.

Fifth Circuit Decisions
Requiring Replacement by Person
Outside the Protected Class

Bennett v. Consolidated Gravity Drainage Dist. No. 1, 2016 WL 2865351 at *3 (5th Cir. May 16, 2016) (prima facie case requires proof that the plaintiff "was replaced by someone outside of the protected class") (quoting *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 345 (5th Cir. 2007)) (Title VII)

Stewart v. Treasure Bay Casino, 622 Fed.Appx. 337, 341 (5th Cir. 2015) ("[t]o establish a prima facie case, [plaintiff] must show . . . that he was replaced by someone outside of this protected class.") (Title VII)

Jenkins v. City of San Antonio Fire Dept., 784 F.3d 263, 268 (5th Cir. 2015) ("[plaintiff] must first establish a prima face case . . . by showing that ' . . . he was replaced by someone outside the protected class' ") (quoting *Price v. Fed. Express Corp.*, 283 F.3d 715, 720 (5th Cir. 2002)) (Title VII)

Anglin v. Ceres Gulf, Inc., 588 Fed.Appx. 342, 343 (5th Cir. 2014) ("[a] prima facie case . . . requires the plaintiff to produce evidence showing . . . she was replaced by someone outside of the protected class") (Title VII)

Finley v. Florida Parish Juvenile Detention Ctr., 574 Fed.Appx. 402, 404 (5th Cir. 2014) ("In order to show a prima facie case of discriminatory discharge, a plaintiff must first establish that [he] . . . was replaced by someone outside of the protected class") (quoting *Turner v.*

Baylor Richardson Med. Ctr., 476 F.3d 337, 345 (5th Cir. 2007)) (Title VII)

Brown v. Mississippi State Senate, 548 Fed.Appx. 973, 976 (5th Cir. 2013) ("a plaintiff must first establish a prima facie case of discrimination by showing . . . he was replaced by someone outside the protected class") ((quoting *Price v. Fed. Express Corp.*, 283 F.3d 715, 720 (5th Cir. 2002)) (Title VII)

Deanes v. North Mississippi State Hospital, 543 Fed.Appx. 366, 369 (5th Cir. 2013) ("[plaintiff] must first establish a prima facie case of discrimination by establishing that . . . she was replaced by someone outside her protected group")540 Fed.Appx. 322, 325 (5th Cir. 2013) ("Generally, a prima facie case requires the plaintiff to demonstrate that she was . . . replaced by someone outside the class") (Title VII)

Rodriguez v. Wal-Mart Stores, Inc., 540 Fed.Appx. 322, 325 (5th Cir. 2013) ("Genrally, a prima facie case requires the plaintiff to demonstrate that she was . . . replaced by someone outside the class") (applying Title VII standard to state law claim)

Caldwell v. University of Houston System, 520 Fed.Appx. 289, 293 (5th Cir. 2013) ("[t]o prove a *prima facie* case of discrimination . . . , [plaintiff] must prove that . . . she was replaced by a person outside of th[e] protected class") (Title VII)

Pryor v. MD Anderson Cancer Center, 495 Fed.Appx. 544, 546 (5th Cir. 2012) ("To survive a summary judgment motion, a plaintiff must establish a *prima facie*

case showing he . . . was replaced by someone outside the protected class") (Title VII)

Umoren v. Plano Ind. Sch. Dist., 457 Fed.Appx. 422, 425 (5th Cir. 2012) ("[Plaintiff] did not include allegations necessary to establish a prima facie case of discrimination. In particular, he did not allege that he was replaced by a person who was not African-American") (Title VII)

Vaughn v. Woodforest Bank, 565 F.3d 632, 636 (5th Cir. 2011) ("[t]o make a prima facie case [plaintiff] must show that . . . she was replaced by someone outside of her protected class") (Title VII)

Garza v. North East Ind. Sch. Dist., 415 Fed.Appx. 520, 523 (5th Cir. 2011) ("[t]o establish a prima facie case of discrimination [plaintiff] must show she . . . was replaced by someone outside the protected class. . . . Garza cannot prove that she was replaced by someone outside the protected class, namely someone not of Mexican origin") (Title VII)

Moore v. Duncanville Ind.Sch. Dist., 358 Fed.Appx. 515, 517 (5th Cir. 2009) ("[i]n order to show a prima facie case of discriminatory termination, a plaintiff must first establish that he . . . was replaced by someone outside of the protected class. . . . As [plaintiff] admits, he replacement was, like him, of Hispanic national origin and was therefore not 'outside of the protected class'") (Title VII)

McKinney v. Bolivar Medical Center, 341 Fed.Appx. 80, 82 (5th Cir. 2009) ("[t]o establish a *prima facie* case of

discrimination under § 1981, a plaintiff must show . . . that he was replaced by a person outside his protected class")

Comeaux-Bisor v. YMCA of Greater Houston, 290 Fed.Appx. 722, 725 (5th Cir. 2008) ("the initial burden of establishing a prime facie case of race discrimination lies with the plaintiff. To do so, she must show that . . . she was replaced by an individual outside the protected class") (Title VII)

Fuentes v. Postmaster General of the United States Postal Service, 282 Fed.Appx. 296, 300-01 (5th Cir. 2008) ("[to establish a prima facie case] a plaintiff must establish that she . . . was replaced by someone outside her race or national origin. . . . [The United States] argues that [plaintiff] has [not] shown . . . that she was replaced by a person outside her protected class, and thus she fails to establish a prima facie case of race or national origin discrimination") (Title VII)

Decorte v. Jordan, 497 F.3d 433, 437 (5th Cir. 2007) ("[p]laintiffs were required to establish . . . a *prima facie* case of racial discrimination by showing . . . they were replaced by individuals outside the protected class") (Title VII and § 1981)

Greene v. Potter, 240 Fed.Appx. 657, 660 (5th Cir. 2007) ("[t]o establish a prima facie case of race discrimination, a plaintiff must show . . . someone outside his protected group replaced him") (Title VII)

Lopez v. Martinez, 240 Fed.Appx. 648, 649 (5th Cir. 2007) ("A prima facie case is established once the

plaintiff has proved that he . . . was replaced by someone outside the protected class. . . . For his claim of national origin discrimination in wrongful discharge, [plaintiff] has filed to show that he was replaced by someone outside of his protected class") (Title VII)

Ramirez v. Gonzales, 225 Fed.Appx. 203, 206 (5th Cir. 2007) ("to establish a prima facie case of discriminatory discharge, [plaintiff] must prove that . . . she was replaced by a person outside of her protected class") (Title VII)

Turner v. Baylor Richardson Medical Center, 476 F.3d 337, 345 (5th Cir. 2007) ("[i]n order to show a *prima facie* case of discriminatory discharge, a plaintiff must first establish that she . . . was replaced by someone outside of the protected class") (Title VII)

Fields v. Cooper Tire & Rubber Co., 202 Fed.Appx. 764, 764 (5th Cir. 2006) ("[i]n order to show a *prima facie* case of discriminatory discharge, [plaintiff] must first establish that she . . . was replaced by someone outside of the protected class") (Title VII)

Frank v. Xerox Corp., 347 F.3d 130 137 (5th Cir. 2003) ("[t]o establish a prima facie case of discrimination, a plaintiff must show . . . after she was discharged, she was replaced with a person who is not a member of the protected class") (Title VII and § 1981)

Price v. Federal Express Corp., 283 F.3d 715, 720 (5th Cir. 2002) ("a plaintiff must first establish a prima

facie case of discrimination by showing . . . he was replaced by someone outside the protected class") (Title VII)

Shackelford v. Deloitte & Touche, LLP, 190 Fed.Appx. 398, 404 (5th Cir. 1999) ("A prima facie case is established once the plaintiff has proved that she . . . was replaced by someone outside the protected class") (Title VII and § 1981)

Bauer v. Albemarle Corp., 169 F.3d 962, 966 (5th Cir. 1999) ("[t]o establish this *prima facie* case under Title VII, the plaintiff must prove that . . . after her discharge [she] was replaced with a person who is not a member of the protected class")

Faruki v. Parsons S.I.P., Inc., 123 F.3d 315, 318 (5th Cir. 1997) ("[t]o establish discriminatory discharge under Title VII, a plaintiff must first establish a *prima facie* case of discrimination by demonstrating that she . . . was replaced by a member of an unprotected class")

Ward v. Bechtel Corp., 102 F.3d 199, 202 (5th Cir. 1997) ("[black female plaintiff alleged race and gender discrimination is required] to establish, as her *prima facie* case, that . . . [the employer] sought to replace her with a similarly qualified white man") (Title VII)

Meinecke v. H & R Block of Houston, 66 F.3d 77, 83 (5th Cir. 1995) ("[t]o establish a prima facie case of discrimination under Title VII, a plaintiff must prove that . . . after being discharged, her employer replaced her with a person who is not a member of the protected class")

Singh v. Shoney's, Inc., 64 F.3d 217, 219 (5th Cir. 1995) ("[i]n order to make out a prima facie case od discrimination a plaintiff alleging discriminatory discharge must show . . . that after her discharge, the position she held was filled by someone not within her protected class. . . . [White plaintiff] failed to make out a prima facie case of racial discrimination on this record, because she was replaced by a white female") (Title VII)

Vaughn v. Edel, 918 F.2d 517, 521 (5th Cir. 1990) ("[i]n a typical disparate treatment discharge case, the plaintiff must prove a prima facie case of discrimination by showing that . . . after his discharge, his employer filed the position with a person who is not a member of the protected group") (Title VII)

Norris v. Hartmarx Specialty Stores, Inc., 913 F.2d 253, 254 (5th Cir. 1990) ("[i]n a discharge case, the plaintiff must prove a prima facie case of discrimination by showing . . . that after her discharge, her employer filled the position with a person who is not a member of the protected group") (Title VII)

Marks v. Prattoc, Inc., 607 F.2d 1153, 1155 (5th Cir. 1979) ("[to establish a prima facie case plaintiffs] were required to show . . . after they were discharged their employer filled the positions with nonminorities") (Title VII) **seems to be first**

STATUTES AND REGULATIONS INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer –
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

Section 703(m) of the Act, 42 U.S.C. § 2000e-(m), provides:

> Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Section 706(a) of Title VII, 42 U.S.C. § 2000e-5(b), provides in pertinent part:

> Whenever a charge is filed by . . . a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged

> unlawful employment practice) on the employer . . . within ten days and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.

Section 1601.12 of 29 C.F.R. provides in pertinent part:

> (a) Each charge should contain the following:
>
> * * *
>
> (3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices: See § 1601.15(b);
>
> * * *
>
> (b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has

been so amended shall not be required to be redeferred.

Section 1601.15(b) of 29 C.F.R. provides in pertinent part:

> (b) As part of the Commission's investigation, the commission may require the person claiming to be aggrieved to provide a statement which includes:
>
> (1) A statement of each specific harm that the person has suffered and the date on which each harm occurred;
>
> (2) For each harm, a statement specifying the act, policy or practice which is alleged to be unlawful;
>
> (3) For each act, policy, or practice alleged to have harmed the person claiming to be aggrieved, a statement of the facts which lead the person claiming to be aggrieved to believe that the act, policy or practice is discriminatory.
