

# PUBLICATION

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## SCOTUS Jurisdiction Watch: Exhaustion of EEOC Administrative Remedies

May 27, 2015

**On May 28, 2015, the United States Supreme Court is scheduled to meet and decide whether to grant or deny certiorari in *Duble v. FedEx Ground Package System Inc.*, Supreme Court Case No. 14-1028.**

Petitioner, Duble, seeks review of the decision of the 11th Circuit, who, in an [unpublished opinion](#) held that Duble had failed to exhaust his administrative remedies before the EEOC. The exhaustion claim centers around a discrete act of alleged discrimination that occurred after Duble filed his initial charge pertaining to FedEx's alleged failure to accommodate his disability, namely the allegation that Fed Ex terminated his employment in retaliation for his filing of the initial EEOC charge. In so holding, the 11th Circuit distinguished prior precedents which held that it was unnecessary for a plaintiff to exhaust administrative remedies prior to filing a judicial claim of retaliation if that claim grew "out of an earlier charge" because the "district court has ancillary jurisdiction to hear such a claim when it grows out of an administrative charge that is properly before the court." *Duble*, 572 Fed. Appx. 889, 892 (11th Cir. 2014) (unpublished) *citing Baker v. Buckeye Cellulose Corp.* 856 F.2d 167, 169 (11th Cir. 1988) (quoting *Gupta v. E Tex. State Univ.*, 654 F.2d 411, 414 (5th Cir. Unit A Aug. 1981)). The 11th Circuit distinguished prior precedent by pointing out that the discrete act occurred while the EEOC charge was pending. In other words, under the factual circumstances presented in *Duble*, the 11th Circuit concluded that the failure to amend the EEOC charge amounted to a failure to exhaust administrative remedies on Duble's retaliation claim.

The petition for a writ of certiorari in *Duble* presents two questions:

1. When the filing of an EEOC charge of retaliation prompts a new retaliatory act, must a plaintiff file a second EEOC charge in order to judicially pursue the post-charge retaliation?
2. Where the claimant reports post-charge retaliation to the EEOC, the employer defends the post-charge retaliatory act in its position statement to the EEOC, the EEOC investigates and makes an express determination regarding the post-charge retaliation, has the post-charge retaliatory act been administratively exhausted?

The Plaintiff is seeking Supreme Court review because it contends that a circuit split has developed after the Supreme Court's decision in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). In *Morgan*, the Supreme Court held that each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable unlawful employment practice, and that "[a] party . . . must file a charge within either 180 or 300 days of" each discrete retaliatory or discriminatory act "or lose the ability to recover for it." *Id.* at 114, 110. According to the Plaintiff, the majority of circuits have continued to hold that *Morgan* did not overrule prior case law holding that a claimant need not return to the EEOC to file a second administrative charge specifically alleging retaliation for the filing of the earlier EEOC charge, while the 10th Circuit has concluded that *Morgan* established a bright-line rule requiring a second or amend EEOC charge alleging retaliation. See *Martinez v. Potter*, 347 F.3d 1208 (10th Cir. 2003).

Fed Ex, contends that there is not a single published opinion from any Circuit Court of Appeals squarely examining whether a retaliation exception to the exhaustion requirement can still be justified when the retaliation occurs while an EEOC charge is pending and can easily be brought to the agency's attention, thus making certiorari inappropriate.

The Supreme Court will take the case if four justices to vote in favor of the certiorari petition.

While the post-*Morgan* Court of Appeals opinions seem to suggest disagreement over the scope of the *Morgan* decision on claims of retaliation in response to a filed EEOC charge, the specific facts in *Duble* (most notably the length of time during which the EEOC matter was pending) and the lack of reliance or interpretation of *Morgan* in the 11th Circuit's opinion may ultimately foreclose Supreme Court review of this issue, at least for the time being.

**Update: Subsequent to the publication of this article, on June 1, 2015, the Supreme Court denied the petition.**