

## in this issue:

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Title VII and the ADA expressly require employees to file a charge of discrimination verified under oath with the EEOC. The Third Circuit recently held that contrary to this statutory requirement and, in contradiction to other courts of appeal, this prerequisite may be waived if an employer fails to timely object that the underlying EEOC charge was not verified.

## Third Circuit Holds Employees Need Not File a Verified Charge of Discrimination with the EEOC

By Gregory B. Reilly and Katy Shi-Klepper

The Third Circuit Court of Appeals has found yet another way for the federal courts to retain jurisdiction over discrimination claims even though an employee fails to meet Title VII's and/or the ADA's statutory requirements. In *Buck v. Hampton Township School District*, No. 05-2373 (June 30, 2006) the Third Circuit held that although Title VII and the ADA expressly require plaintiffs to file a verified administrative charge with the EEOC before they can proceed with a lawsuit in federal court, an employer's failure to timely object that the EEOC charge was not verified under oath will waive this statutory requirement.

### Overview

In *Buck*, the plaintiff's attorney timely filed a charge of ADA discrimination and retaliation with the EEOC on behalf of the plaintiff. The EEOC charge, however, was verified by neither the plaintiff nor her attorney. In response, the employer submitted a detailed position statement to the EEOC but did not object to the lack of verification. The EEOC subsequently dismissed the plaintiff's charge. Not deterred, the employee filed a federal lawsuit after she received an EEOC Notice of Right to Sue. Thereafter, the employer filed a motion to dismiss the lawsuit because the plaintiff failed to file her underlying EEOC charge under oath. The district court granted the employer's motion to dismiss.

On appeal, the Third Circuit reversed the

lower court by ruling that the requirement of filing a verified EEOC charge may be waived if the employer failed to timely object to plaintiff's failure to execute her charge under oath. The court held that although the verification requirement is statutorily required, it is not a *jurisdictional* prerequisite for suit. The Third Circuit reasoned that this statutory requirement of Title VII and the ADA should be dispensed with for "equitable considerations" which comport "with the broad remedial purpose of Title VII and the ADA."

### "Cutting Some Slack" for Employees

The Third Circuit's decision is just the most recent example of a federal court finding that its jurisdiction is not affected even though the express statutory requirements of Title VII or the ADA are not met. For example, earlier this year the U.S. Supreme Court held in *Arbaugh v. Y & H Corp.*, No. 04-944 (Feb. 22, 2006) that even though Title VII and the ADA apply only to employers with 15 or more employees, this requirement does not affect a federal court's ability to adjudicate cases where the employer failed to timely object that it had less than 15 employees. Likewise, even though Title VII has express time limits for filing EEOC discrimination charges, in several cases the federal courts have waived or tolled these limitation periods.

From a narrow perspective the *Buck*

case essentially eliminates (at least in the Third Circuit, which covers New Jersey, Pennsylvania, Delaware and the Virgin Islands) the employer's defense that a plaintiff's failure to verify the underlying discrimination charge should result in the dismissal of a Title VII and/or ADA lawsuit. More broadly, the Third Circuit's opinion once again suggests that courts do not strictly enforce the anti-discrimination laws' express statutory requirements if they conflict with these laws' "remedial purposes" of preventing discrimination. In other words, even if an employer is correct that a plaintiff has failed to comply with the anti-discrimination laws' requirements, the courts may not enforce the law for equitable reasons.

## The Key: Employers Must Promptly Raise Any Statutory Defenses

The Third Circuit's ruling was motivated, in part, by its concern that if it ruled otherwise employers would have an incentive to delay raising a plaintiff's failure to verify her EEOC charge. In this way, the employer could secure dismissal of any subsequent federal suit on that basis because the plaintiff did not correct the problem before the EEOC issued its Notice of Right to Sue, since the Notice eliminates the EEOC's jurisdiction to accept amendments to a charge (e.g., verifications). A similar concern existed in *Arbaugh* because the employer claimed it had less than the statutorily required 15 employees only *after* it had lost at trial. These cases strongly suggest the necessity for employers to timely assert all of their possible statutory defenses upon receipt of an EEOC discrimination charge.

## The "Big Picture"

The Third Circuit made clear that its decision applies only to the narrow situation where the employer raises lack of charge verification as a defense *after* the EEOC issues a Notice of Right to Sue. The court acknowledged that "we expect the cases in

which this rule applies to be few and far between." Regardless, the Third Circuit's opinion contradicts earlier decisions of the Fourth and Eleventh Circuits, which raises the possibility that the Supreme Court may review this issue to resolve the lower courts' conflicting decisions.

In the "big picture" the *Buck* decision underlines how important it is that employers raise all statutory defenses promptly at the risk of waiver. The decision also suggests that many federal courts are prepared to "give slack" to plaintiff-employees contrary to the express requirements of the anti-discrimination laws.

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