No. 06-1322

IN THE

Supreme Court of the United States

FEDERAL EXPRESS CORPORATION,
Petitioner,

v.

PAUL HOLOWECKI, *et al*.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONER

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August 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council, the National Federation of Independent Business Legal Foundation (NFIB Legal Foundation), and the Society for Human Resource Management (SHRM) respectfully submit this brief as *amici curiae*.[1] Letters of consent from both parties have been filed

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

with the Clerk of the Court. The brief supports Petitioner Federal Express Corporation in favor of reversal.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business Legal Foundation (NFIB Legal Foundation), a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small-business advocacy association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill this role as the voice for small business, the NFIB Legal Foundation frequently files *amicus* briefs in cases that will impact small businesses nationwide.

The Society for Human Resource Management (SHRM) is the world's largest professional association devoted to human resource management. The Society's mission is to serve the needs of HR professionals by providing the most current and comprehensive resources, and to advance the profession by promoting HR's essential, strategic role. Founded in 1948,

SHRM represents more than 225,000 individual members in over 125 countries, and has a network of more than 575 affiliated chapters in the United States, as well as offices in China and India.

Amici's members are employers or representatives of employers that are subject to the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, as well as other equal employment laws and regulations. As employers and representatives of employers that are subject to the ADEA, *amici* have a significant interest in the issue presented in this case – whether the mere act of submitting a pre-charge intake questionnaire to the Equal Employment Opportunity Commission satisfies the ADEA's charging filing requirement when the agency does not process the form as a charge or provide notice to the employer.

Amici seek to assist the Court by highlighting the impact its decision in this case will have beyond the immediate concerns of the parties to the case. Because of their experience in these matters, *amici* are well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Patricia Kennedy worked as a courier for Federal Express Corporation (FedEx). Pet. App. 4a. In December of 2001, Kennedy filled out a pre-charge intake questionnaire and submitted it to the U.S. Equal Employment Opportunity Commission (EEOC) along with a four-page, signed affidavit, alleging that FedEx's new performance standards discriminated on the basis of age. Pet. App. 8a.

The EEOC took no action in response to Kennedy's intake questionnaire. Pet. App. 39a. It did not notify FedEx that a charge had been filed and did not assign a charge number. *Id.* Nor did the agency investigate Kennedy's allegations. *Id.*

Several weeks later, Kennedy filed an ADEA class action lawsuit along with a group of other FedEx employees – including Paul Holowecki, the lead plaintiff in the case. *Id.* at 18a, 38a. Only after initiating suit did Kennedy file a formal charge of discrimination with the EEOC. *Id.* at 33a.

Holowecki and the other plaintiffs argued that Kennedy's intake questionnaire constituted a valid charge upon which they could "piggyback" their claims.[2] *Id.* at 12a. A federal trial court dismissed the lawsuit, however, ruling that Kennedy's intake questionnaire was not "the equivalent of a charge" and that the plaintiffs' formal charge was untimely because it was filed one month after suit had been filed. *Id.* at 39a.

On plaintiffs' appeal, the Second Circuit reversed, concluding that Kennedy's intake questionnaire constituted a valid EEOC charge, even though the EEOC never treated it as one and Kennedy later returned to the agency to file a charge. *Id.* at 20a. While the ADEA requires an individual to file a timely charge with the EEOC before bringing suit, the Second Circuit ruled that the regulatory requirements are "minimal" and, therefore, any minimally sufficient intake questionnaire would suffice as a charge so long as it "manifest[s] an individual's intent to have the agency initiate its investigatory and conciliatory process." *Id.* at 14a-15a. Because Kennedy's questionnaire contained full contact information for the employer and provided information about alleged violations of the ADEA, the court concluded that it satisfied the statutory and regulatory requirements for the content of an ADEA charge, even though FedEx never received notice of the charge. *Id.* at 18a. Moreover, the "forceful tone" of the questionnaire and affidavit communicated Kennedy's "intent

[2] None of the eleven piggybackers had ever filed a charge. Pet. App. 11a.

to activate the [EEOC's] administrative process," the court said. *Id*. at 19a.

FedEx petitioned this Court for a writ of certiorari, which was granted on June 4, 2007.

SUMMARY OF ARGUMENT

Congress expressly provided that individuals claiming a violation of the ADEA are required to exhaust administrative remedies by filing a charge of discrimination with the EEOC prior to initiating suit in federal court. 29 U.S.C. § 626(d). The important purpose behind this statutory requirement is to give prompt notice to the employer and provide the EEOC "with an opportunity 'to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance . . . .'" Pet. App. 15a.

The dispute in this case centers on whether an age discrimination plaintiff satisfies this charge filing requirement simply by completing an EEOC "intake questionnaire" – a form used by the agency to facilitate pre-charge interviews with prospective claimants. In most cases, as the case was here, the EEOC does not notify the employer when an intake questionnaire is received or otherwise treats the form as a charge. No investigation is conducted and conciliation is not attempted.

The Second Circuit's ruling below, that even an unprocessed, unserved intake questionnaire is a charge "filed" with the agency as long as its content purports to "communicate[ ] [the employee's] intent to activate the EEOC administrative process," runs directly counter to the ADEA's requirement that a plaintiff first exhaust his or her administrative remedies. Pet. App. 18a. Moreover, granting *de facto* charge status to intake questionnaires only serves to foster unnecessary confusion about when (or whether) an individual's claim has been properly "filed" with the agency. Indeed, some plaintiffs will

be permitted to litigate in federal court without any notice to the employer before the filing of a civil complaint, as the case was here, thus effectively eliminating the statute's exhaustion requirement and undermining employer efforts to resolve employment discrimination disputes without resort to litigation.

An employer's first notice of a claim should never come in the form of a lawsuit. Accordingly, *amici* urge the Court to make clear that the submission of an intake questionnaire is not tantamount to "filing" a charge, except in the rare instance when the questionnaire both satisfies EEOC regulations concerning the sufficiency of charges and is actually treated as a charge by the agency, with prompt notice provided to the employer.

ARGUMENT

I. THE MERE ACT OF SUBMITTING TO THE EEOC A PRE-CHARGE INTAKE QUESTIONNAIRE WILL NOT SATISFY THE ADEA'S CHARGE FILING REQUIREMENT WHEN THE AGENCY DOES NOT TREAT THE FORM AS A CHARGE

As one of the chief federal civil rights enforcement agencies, the EEOC's mission is to prevent and correct unlawful employment practices through investigation, voluntary settlement and conciliation and, in extraordinary instances, litigation in the public interest. Where an individual suspects unlawful age discrimination has occurred, he or she is required to first exhaust administrative remedies by filing a charge of discrimination with the EEOC. 29 U.S.C. § 626(d).

The dispute in this case centers on whether an age discrimination plaintiff can satisfy the ADEA's charge filing requirement simply by completing an EEOC "intake questionnaire" – a form used by the agency to facilitate interviews with potential charge filers. Many thousands of prospective

claimants complete intake questionnaires each year, although many ultimately decide not to file a charge. For this reason, the EEOC usually will not notify the employer or conduct an investigation when an intake questionnaire is received, as it does when a charge is filed.

A. Under EEOC Procedural Rules, "Intake Questionnaires" Usually Are Not Processed As Charges

While the manner in which the intake function is performed can vary from office to office, all offices generally follow certain basic procedures. When a potential charge filer first approaches the agency, he or she typically will be asked to fill out an "intake questionnaire" or a "Form 283." EEOC Compl. Man. § 1.7, Office Visitor Requests (June 2001). The intake questionnaire serves as a "preliminary device" designed to help an EEOC investigator, or other agency staff who perform charge intake functions, conduct an intake interview – the next step in the intake process. *Id.* During the interview, EEOC staff will determine whether the person's complaint falls within the agency's jurisdiction, and possibly prepare a charge on an EEOC "Form 5" charge form. EEOC Compl. Man. § 2.5, Drafting the Charge/ Complaint (Oct. 2002). Once an individual signs the charge form, the agency will assign a charge number and serve "prompt" notice to the employer (or notice within ten days if the charge alleges violations of Title VII or the ADA). EEOC Comp. Man. § 2.7, Docketing and Disposition of Charges/ Complaints (Aug. 2002); EEOC Comp. Man. § 3.1, Introduction (June 2001).

When an intake interview reveals that the agency has no jurisdiction over a complaint, however, EEOC intake staff will counsel the individual or make a referral. EEOC Comp. Man. § 1.7, Office Visitor Requests (June 2001); EEOC Comp. Man. § 2.4, Pre-Charge Counseling (Aug. 2002). An indi-

vidual also might choose not to pursue a claim over which the agency does have jurisdiction. EEOC Comp. Man. § 1.7, Office Visitor Requests (June 2001). In situations where the prospective charge filer ultimately decides not to pursue a claim, the agency will place the intake questionnaire in a "suspense file" where it remains until it is eventually discarded. *Id*.; EEOC Comp. Man. § 2.7, Docketing and Disposition of Charges/Complaints (Aug. 2002). No notice is given to the employer, and no investigation is conducted.

Accordingly, under the EEOC's procedural rules, intake questionnaires generally are not treated as charges, and the agency does not routinely investigate them.

B. The ADEA Requires "Prompt" Notice Of The Filing Of A Charge, An Agency Investigation, And Conciliation

Congress expressly provided that individuals claiming a violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq*., are required to exhaust administrative remedies by filing a charge of discrimination with the EEOC prior to initiating suit in federal court. 29 U.S.C. § 626(d). The important purpose behind this statutory requirement is to give notice of the claim to the employer and to provide the EEOC with an opportunity to eliminate the discriminatory practice or practices alleged and effect voluntary compliance. *Id.* ("Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal means of conciliation, conference and persuasion").

The legislative history of the ADEA confirms that Congress deliberately selected administrative resolution as the preferred means for resolving claims brought under the Act:

> A condition precedent to the bringing of an action by an individual is that he must give the Secretary 60 days

> notice of his intention to do so. This is to allow time for the Secretary to mediate the grievance. It is intended that the responsibility for enforcement vested in the Secretary by Section 7 be initially directed through informal methods of conciliation and that the formal methods be applied only if voluntary compliance cannot be achieved.

Dean v. American Sec. Ins. Co., 559 F.2d 1036, 1038 (5th Cir. 1977) (quoting 113 Cong. Rec. 31250 (Nov. 6, 1967)); *see also Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834, 841 (3d Cir. 1977) ("The thrust of the ADEA's enforcement provisions is that private lawsuits are secondary to administrative remedies and suits brought by the Secretary of Labor").[3]

Congress made the same choice with respect to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Whenever a charge of discrimination is filed under Title VII, the EEOC statutorily is required to provide the employer-respondent with notice of the charge and to investigate the allegations. 42 U.S.C. § 2000e-5(b). The purpose of this administrative scheme is to allow the EEOC "to settle disputes through conference, conciliation, and persuasion before the aggrieved party is permitted to file a lawsuit." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), this Court considered the question of whether an ADEA plaintiff forfeits his ability to pursue an action in federal court where he fails first to submit his claim to a state agency for administrative resolution. Noting the similarities between Title VII and the ADEA's enforcement schemes, the Court stated a clear preference for administrative resolution of discrimination claims, particularly those arising under the ADEA, ob-

[3] Administrative enforcement of the ADEA was transferred from the Secretary of Labor to the EEOC in 1972. Exec. Order No. 12,144, 44 Fed. Reg. 37,193 (June 26, 1979).

serving that Congress "intended to screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state [administrative] proceedings." *Id.* at 756 (citations and internal quotations omitted).

Generally speaking, the EEOC's procedures for filing a charge are straightforward, and prospective claimants should be required to follow them. Under those procedures, "an intake questionnaire is not intended to function as a charge," because the purpose of a charge (unlike the intake questionnaire) is to: 1) notify the employer that a discrimination charge has been filed with the EEOC; and 2) initiate the EEOC investigation of the complaint. *Pijnenburg v. West Ga. Health Sys., Inc.*, 255 F.3d 1304, 1305-06 (11th Cir. 2001). Accordingly, "[t]o randomly treat [the] questionnaire as a charge would thwart these two objectives." *Id.* at 1306. As the Seventh Circuit has observed, to recognize intake questionnaires "willy-nilly as charges would be to dispense with the requirement of notification of the prospective defendant, since that is a requirement only of the charge and not of the questionnaire." *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 80 (7th Cir. 1992).

Arguably, an individual can accomplish a charge filing if the intake questionnaire both satisfies EEOC regulations concerning the sufficiency of charges and is actually *processed by the agency as a charge*. *See Clark v. Coats & Clark, Inc.*, 865 F.2d 1237 (11th Cir. 1989) (plaintiff's intake questionnaire could serve as a charge of discrimination where the questionnaire contained the information needed to support a charge and the EEOC treated it as such by serving notice on the employer); *Philbin v. General Elec. Capital Auto Lease, Inc.*, 929 F.2d 321 (7th Cir. 1991) (EEOC intake questionnaire would suffice as a charge where the agency assigned it a charge number and promptly notified the employer that a charge had been filed); *Price v. Southwestern Bell Tel. Co.*, 687 F.2d 74 (5th Cir. 1982) (the fact that the EEOC initiated

the enforcement process in response to its receipt of plaintiff's completed charge intake questionnaire is "relevant" to the question of whether a charge had been filed with the agency). In such cases, the intake questionnaire may constitute a charge "filed" with the agency if it contains the requisite information and fulfills the statutorily-required functions of providing notice to the employer and initiating an investigation and conciliation.

In the instant case, however, the EEOC did not process Kennedy's intake questionnaire as a charge and the company received no notice that a charge had been filed. Indeed, the company only became aware of Kennedy's claim after suit was filed in federal court. In order to give Kennedy's intake questionnaire *de facto* charge status, the Second Circuit below adopted a sweeping standard that would render virtually every unprocessed, unserved intake questionnaire a filed charge. Under this standard, any intake questionnaire submitted to the agency would be considered a charge "filed" with the agency if it purports to "communicate[] [the employee's] intent to activate the EEOC administrative process." Pet. App. 18a. In the Second Circuit's view, the fact that the EEOC never processed the form as a charge, provided notice to the employer, or conducted an investigation was immaterial. *Id.* at 16a. It concluded an individual can accomplish filing simply by submitting a questionnaire that contains "forceful tone and content," sufficient that he or she intends the form to be a charge. *Id.* at 19a.

C. Treating An Intake Questionnaire As A Filed Charge Without Notice To The Employer Undermines The ADEA's Goal Of Resolving Discrimination Claims Through Voluntary Means

This standard articulated by the Court below puts the EEOC in the position of having to guess a person's intentions, and if it guesses incorrectly, the employer's first notice

of a claim may not come until after a lawsuit has been filed, as the case was here. An employer's first notice of a discrimination claim should never come in the form of a private lawsuit. The EEOC is not merely a short stop to have one's ticket punched on the way to federal court. Rather, the EEOC's statutorily required efforts at "conciliation, conference and persuasion" form the cornerstone of enforcement of federal anti-discrimination laws. Where a plaintiff submits a completed intake questionnaire, but then files a lawsuit without first having taken care to ensure a proper administrative charge filing has been accomplished, the exhaustion requirement is not satisfied, which deprives the parties of the opportunity to resolve the dispute informally without resorting to protracted litigation.

An employer managing an EEOC charge investigation has a strong interest in resolving the dispute early, not only to conserve resources but also to preserve the relationship between the company and the charging party, particularly if the individual is a current employee. Meaningful efforts to conciliate a discrimination charge by the EEOC, which is an "outsider" to the dispute, helps to avoid unnecessary escalation of the matter. Early resolution with the EEOC's assistance also may help to repair an employer-employee relationship that now may be merely strained, but may be destroyed irretrievably by the acrimony and scorched earth tactics of litigation.

II. GRANTING *DE FACTO* CHARGE STATUS TO INTAKE QUESTIONNAIRES UNDER THE SECOND CIRCUIT'S STANDARD WILL INCREASE CHARGE FILINGS, GENERATE UNNECESSARY CONFUSION AND PREJUDICE EMPLOYERS WHO MUST DEFEND AGAINST STALE CLAIMS

Granting automatic charge status to intake questionnaires under the Second Circuit's standard would increase exponen-

tially – at tremendous additional cost to employers – the numbers of complaints that now must be investigated by the agency. Employers already expend an extraordinary amount of time and resources each year defending against discrimination charges and lawsuits, most of which lack merit and ultimately fail. The EEOC received more than 75,000 discrimination charges in 2006, for example, with the agency finding "reasonable cause" to believe discrimination occurred in only 5% of the cases investigated that year. Equal Employment Opportunity Comm'n, *Enforcement Statistics and Litigation, All Statutes FY 1992 – FY 2006* (Jan. 31, 2007)[4]. As the agency's own charge statistics suggest, discrimination very often is *not* the underlying cause of the problems related in intake questionnaires. It is only through charge counseling performed by skilled EEOC staff, *which the intake questionnaire is designed to facilitate*, that the true reasons behind any discord might become apparent.

Because the EEOC does not routinely process intake questionnaires as charges, whether or not a particular questionnaire is considered a charge "filed" with the agency should not hinge on what a person says on the form, but rather on what the agency does with it. If an intake questionnaire contains the requisite information and is processed as a charge, with prompt notice given to the employer, only then may it be considered a "charge."

While most federal appeals courts will not "willy-nilly" recognize intake questionnaires as charges, some have occasionally recognized unserved, unprocessed intake questionnaires as filed charges to avoid penalizing a plaintiff for the EEOC's failure to accomplish a timely filing when the agency promised to do so. In *Steffan v. Meridian Life Ins. Co.*, 859 F.2d 534, 544 (7th Cir. 1988), for example, the Seventh Circuit concluded that an unprocessed intake ques-

[4] *Available at* http://www.eeoc.gov/stats/all.html.

tionnaire constituted a charge because an EEOC intake official mistakenly told plaintiff that filing the questionnaire would preserve the plaintiff's private suit rights. Likewise, in *Diez v. Minnesota Mining & Manufacturing Co*., 88 F.3d 672, 677 (8th Cir. 1996), the Eighth Circuit ruled that an intake questionnaire might serve as a charge of discrimination if the plaintiff intended the questionnaire to be one and the agency led him to believe that it would be.

Kennedy does not claim that she was misled by the EEOC as to the status of her intake questionnaire. Furthermore, it is unnecessary for courts to waive the statutory exhaustion requirement in situations like these. Courts have long applied equitable principles to toll the limitations period when an untimely filing is directly attributable to misinformation provided by the EEOC. *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75 (7th Cir. 1992); *Schlueter v. Anheuser-Busch, Inc*., 132 F.3d 455 (8th Cir. 1998). Applying the doctrine of equitable tolling in appropriate cases – rather than indiscriminately "deeming" an unprocessed, unserved intake questionnaire to be a charge – avoids unnecessary confusion over the status of an intake questionnaire and ensures that claimants, in most instances, are held to their administrative exhaustion obligation.

Moreover, the doctrine of equitable tolling (unlike the rule adopted by the Second Circuit below), places an affirmative duty on the plaintiff to accomplish a charge-filing "as early as he realistically could given that misinformation," thereby helping to ensure that even in the exceptional cases where tolling might apply, the employer still receives notice of the charge at the earliest possible opportunity. *Early*, 959 F.2d at 81 (citation omitted). Absent a clear requirement that claimants diligently pursue their discrimination claims by filing an administrative charge with the EEOC, employers will be placed in the untenable position of having to defend stale claims, which is precisely what Congress sought to avoid by

establishing a limitations period in the first place. *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2170 (2007) ("The EEOC filing deadline 'protects employers from the burden of defending claims arising from employment decisions that are long past.'") (quoting *Delaware State College v. Ricks*, 449 U.S. 250, 256-57 (1980)). Indeed, the limitations period is "designed to assure fairness to defendants," and to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1965) (citation and internal quotation omitted).

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request this Court reverse the decision below.

Respectfully submitted,

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