No. 21-____

IN THE

Supreme Court of the United States

MICHAEL SIMKO,

Petitioner,

v.

UNITED STATES STEEL CORP.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, or under what circumstances, a claim that an employer unlawfully retaliated against an employee for filing a charge of discrimination with the EEOC under the remedial structure of Title VII may be addressed in an ensuing civil action, if the employee did not file a second formal administrative charge specifically alleging the retaliation.

RELATED PROCEEDINGS

Simko v. U.S. Steel Corp., No. 20-1091 (3d Cir. Mar. 29, 2021).

Simko v. U.S. Steel Corp., No. 2:19-cv-00765 (W.D. Pa. Dec. 13, 2019).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Simko respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a-62a) is published at 992 F.3d 198. The district court's memorandum opinion and order (Pet. App. 63a-84a) is unpublished, but may be found at 2019 WL 6828421.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 2021. Pet. App. 1a. A timely petition for rehearing was denied on May 11, 2021. Pet. App. 85a-86a. On March 19, 2020, this Court entered a standing order that extended the time to file a petition for a writ of certiorari in this case to October 8, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant portions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, are reprinted at Pet. App. 87a-92a.

Relevant portions of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12112, 12117, and 12203, are reprinted at Pet. App. 93a-94a.

STATEMENT OF THE CASE

A. Legal Background

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, sex, religion, or other impermissible grounds. *See* 42 U.S.C. § 2000e-2(a). The Act includes remedial provisions that apply not only under Title VII itself but also to claims arising under other statutes, such as the Americans with Disabilities Act of 1990. *See, e.g.*, 42 U.S.C. §§ 12117 and 12203(c), incorporating 42 U.S.C. §§ 2000e-4 *et seq.* The ADA prohibits both discrimination on the basis of disability, 42 U.S.C. § 12112(a), and retaliation for seeking to assert or protect rights under the Act, *id.* § 12203.

Under the Title VII structure, an aggrieved employee first files a "charge" with the Equal Employment Opportunity Commission. *See* 42 U.S.C. § 2000e-5(b). In general terms, the EEOC notifies the employer, investigates the charge, and may seek to conciliate the dispute. *See id.* After the Commission has an opportunity to investigate, and if any attempt at conciliation fails, either the government or the charging party may file "a civil action." *Id.* § 2000e-5(f)(1); *see generally, e.g.*, *Ft. Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1846-1847 (2019) (describing process).

Title VII imposes no textual limit on the claims that may be made in such a civil action. But in implementing its provisions, courts have generally reasoned that the permissible scope of such an action must be limited to some extent by the original charge filed with the EEOC and later related developments. *See generally, e.g.*, 2 Barbara T. Lindemann *et al.*,

Employment Discrimination Law ch. 29.IV (6th ed. 2020); *Clockedile v. N.H. Dep't of Corrections*, 245 F.3d 1, 4 (1st Cir. 2001) (Boudin, J.). One early case, for example, held that a suit in court "may encompass any kind of discrimination like or related to allegations contained in the charge and growing out of such allegations during the pendency of the case before the Commission." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970) (citation omitted). Another held that a suit "may encompass any discrimination like or reasonably related to the allegations of the EEOC charge, including new acts occurring during the pendency of the charge before the EEOC." *Oubichon v. N. Am. Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973). A claim not satisfying these standards may be dismissed.

Courts often refer to these inferred limitations on the scope of actions as "exhaustion requirement[s]." *E.g.*, *Clockedile*, 245 F.3d at 3-4. As the United States has explained, however, Title VII's charge-filing requirement "does not resemble" structures "in which Congress has channeled review of certain claims to agencies and restricted judicial review accordingly." U.S. Br. 27, *Ft. Bend Cnty. v. Davis*, *supra* (No. 18-525; filed Apr. 3, 2019). "Instead, individuals alleging discrimination merely must give the EEOC a right of first refusal before bringing their own suits." *Id. See also Woodford v. Ngo*, 548 U.S. 81, 98 (2006) (observing that 42 U.S.C. § 2000e-5(e) is not "in any sense an exhaustion provision"). Accordingly, while this petition quotes from court decisions that use "exhaustion" language, elsewhere we generally refer to the statutory provisions involved as charge-filing or claim-processing requirements.

In practice, construing Title VII's charge-filing requirement to limit the scope of claims in later litigation has given rise to a variety of questions. *See, e.g.*, *Clockedile*, 245 F.3d at 4. This case involves one such question, on which the courts of appeals have reached conflicting results: May a claim that an employer retaliated against an employee for filing a charge with the EEOC be addressed in the ensuing civil action, if the employee did not also file a further charge specifically alleging the retaliation?

B. Facts and procedural history

1. a. Petitioner Michael Simko began working for respondent U.S. Steel in 2005. Pet. App. 2a.[1] In 2012 he successfully bid for an opportunity to transfer from his job as a larryman in the blast furnace department to become a spellman in the transportation department. *Id.* 2a-3a.[2] During training for the spellman position, Simko requested that the company provide a new two-way radio to accommodate his partial hearing loss. *Id.* 3a. The company provided no accommodation; and although Simko completed the required training, his trainer

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[1] Because the district court granted U.S. Steel's motion to dismiss, the facts recited are drawn from the allegations in the complaint and from documents attached to the briefing on the motion to dismiss. *See* Pet. App. 2a n.1. There is no dispute over the procedural history relevant to the question presented.

[2] A "larryman" generally operates "larry cars," which are used to transport raw materials to the blast furnace where iron is produced for steelmaking. *See* C.A. App. 101. A "spellman" provides relief for locomotive operators and must be qualified to operate locomotives. *Id.* 102.

refused to certify him to perform the spellman duties because he could not hear. *Id.* 3a, 64a, 95a-97a. Simko returned to a larryman position in November 2012. *Id.* 64a.

In May 2013, Simko filed a timely charge with the EEOC, alleging that U.S. Steel discriminated against him on the basis of disability when it refused him a hearing accommodation and denied him the spellman position. Pet. App. 3a. The EEOC notified U.S. Steel of the charge, and in August 2013 the company denied the allegations of discrimination. *Id.* The Commission then took no action for an extended period. *See id.* 3a-4a.

In December 2013, U.S. Steel discharged Simko after an incident in which a larry car lost power. Pet. App. 4a. Simko challenged the discharge through his union, and in June 2014 he returned to work under a "last chance" agreement. *Id.* In August 2014 he was discharged again, this time after an alleged safety violation. *Id.*

b. In November 2014, Simko sent the EEOC a handwritten letter and additional documents to supplement his still-pending discrimination charge. Pet. App. 4a. Among other things, he explained that since filing his initial charge he had been "terminated twice and placed on [a] last chance agreement with no just cause by the company." *Id.* 5a (quoting C.A. App. 80-81). He added: "I believe anyone who familiarizes themself with the details of the case will clearly see it as retaliation for filing charges with the EEOC." *Id.* (court's emphasis and addition omitted).

The EEOC remained silent for another year. In late November 2015, however, an EEOC investigator wrote to Simko to seek more information. Pet. App.

5a. The investigator noted that "it appears as though you have been terminated by [U.S. Steel] on two separate occasions during 2014 and that you believe that the terminations were retaliatory against you." *Id.* (quoting C.A. App. 84; alteration in court's opinion). At this point, Simko retained counsel. *Id.* 6a. After further discussions with the investigator, counsel filed a formal amended charge, including the retaliation claim, on January 22, 2016. *Id.*

After receiving supplemental responses from U.S. Steel and conducting its own investigation, the EEOC determined that there was reasonable cause to believe the company had retaliated against Simko for seeking to assert his rights under the ADA—in particular, by disciplining him more severely than a non-disabled employee for similar alleged work-rule violations. Pet. App. 6a. The Commission's effort to conciliate the dispute failed, and in April 2019 it notified Simko of his right to sue. *Id.* Simko then filed this suit, alleging a single claim of retaliation in violation of the ADA. *Id.*; *see id.* 95a-100a.

2. The district court granted U.S. Steel's motion to dismiss. Pet. App. 63a-84a. That motion pointed out that Simko's charge amendment formally alleging retaliation was filed outside the statutory period for making that charge on a stand-alone basis. *See id.* 8a, 68a-69a, 82a-83a. Simko responded that for these purposes a claim of retaliation for the filing of an EEOC charge is properly treated as "within the

scope" of that initial charge. *Id.* 71a. But the district court rejected that argument.[3]

The court explained that the Third Circuit had expressly rejected the Fifth Circuit's "per se rule that all claims of retaliation are 'ancillary' to the original administrative complaint," opting instead for "a case-by-case approach." Pet. App. 74a. Under that approach, the district court concluded that Simko's retaliation claim was "not fairly within the scope of his original EEOC charge or the resulting [EEOC] investigation." *Id.* 79a; *see id.* 74a-81a. The court acknowledged that in this case the EEOC "did actually address retaliation[.]" *Id.* 71a; *see id.* 81a-82a. It nonetheless refused to treat Simko's claim as properly presented for litigation, based on the court's own assessment that the Commission's investigation was "untimely made" and "unreasonably broad." *Id.* 82a.

3. A divided panel of the Third Circuit affirmed. Pet. App. 1a-62a.

a. As relevant here, the court of appeals first rejected Simko's argument—now joined by the EEOC as amicus—that no separate administrative charge was required to litigate his retaliation claim. Pet. App. 13a; *see id.* 13a-27a. The court again expressly rejected "the broad per se rule followed by some courts of appeals that treat post-charge claims of retaliation as exhausted when they arise during the pendency of a prior charge." Pet. App. 16a (citing decisions from Second, Fourth, and Fifth Circuits).

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[3] The court also rejected arguments based on equitable tolling, waiver, or deference to the EEOC. Pet. App. 69a-71a.

Rather, it "adhere[d] to [its] precedent" requiring a "case-by-case" inquiry involving "a careful examination of the nature of the relevant claims." *Id.* 15a-16a (citation omitted).[4]

The court framed the "relevant test" as "a two-pronged inquiry into whether 'the acts alleged in the subsequent . . . suit are fairly within the scope of [1] the prior EEOC complaint, or [2] the investigation arising therefrom." Pet. App. 14a (citation omitted). Here, Simko's claim that U.S. Steel retaliated against him for the filing of his initial EEOC charge could not have been included in that charge itself. *See id.* 17a; *see also id.* 39a-40a & n.18 (dissent). The "central dispute" was thus whether the claim fell "'fairly within . . . the investigation arising' from" that charge. *Id.* 17a (citation omitted).

The court held that Simko's retaliation claim could not satisfy that requirement "simply based on the fact that the EEOC *actually did* investigate" the claim. Pet. App. 17a-18a. "To the contrary," the court explained, its test is "'objective' rather than 'subjective'": a court "must look only at the scope of the EEOC investigation that would *reasonably* grow out of, or arise from, the initial charge filed with the EEOC, 'irrespective of the actual content of the Commission's investigation.'" *Id.* 18a (citations omitted).

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[4] The court declined to consider whether Simko's November 2014 letter to the EEOC should be treated as the equivalent of a formal charge, or whether the Commission's failure to convert it promptly into such a charge should toll the statutory deadline. Pet. App. 9a-13a. The court considered those arguments not properly presented, and they are not at issue here. *See also id.* 36 n.2 (McKee, J., concurring in part and dissenting in part).

The court articulated "several principles," Pet. App. 22a, to guide this simultaneously hypothetical and "fact-specific" inquiry, *id.* 18a. First, a court must "closely examine the original charge's contents" and "determine the reasonable scope of the EEOC investigation that would likely occur." *Id.* 22a. Next, it must "parse the later claim and determine whether its allegations would be covered in that reasonable investigation." *Id.* A court may "look for factual similarities or connections"—but "factual overlap alone" is not sufficient, if the new allegations "do not fall within the 'gravamen' of the initial charge." *Id.* 22a-23a (citation omitted). Conversely, even if there is "no factual nexus," the court "may also consider whether the two sets of allegations advance the same theory of discrimination[.]" *Id.* 23a.

In the court's view, Simko's claim that he was ultimately terminated in retaliation for filing his original EEOC charge was "only tenuously related to the substance of" that charge. Pet. App. 23a-24a. The court acknowledged that a "reasonable investigation" of the initial charge "could also inquire into whether any other adverse actions were taken against him relating to his disability or his having filed a charge." *Id.* 24a. But it concluded that "in this case" such an investigation "would not have included an inquiry into Simko's post-charge firing," which was "too remote in time and substantively distinct from the allegations of disability discrimination[.]" *Id.* 24a; *see also id.* 25a-27a.

The court also rejected arguments based on the EEOC's policies and practices, the presumption of administrative regularity, and the Commission's express position on the facts of this case. Pet. App.

29a-33a. And it disagreed with Simko and the EEOC that an additional formal charge was unnecessary here because, in light of the EEOC's actual investigation, "the purpose of the ADA [and Title VII] statutory scheme was ultimately fulfilled: namely, the facilitation of an informal dispute resolution process between Simko and U.S. Steel." *Id.* 33a. The court pointed instead to "two other fundamental aims of the exhaustion requirement: prompt notice to the employer and swift dispute resolution." *Id.*; *see id.* 33a-34a. Accordingly, while acknowledging that the outcome was "unfortunate," the court held that Simko could not proceed on his retaliation claim. *Id.* 34a-35a.

b. Judge McKee dissented in part. Pet. App. 36a-62a. He accepted the Third Circuit's "prior rejection of a *per se* rule which would [make] all retaliation claims automatically relate back to the earlier claim upon which they [are] based[.]" *Id.* 55a-56a. But he did "not believe that the facts here justif[ied] concluding that the EEOC's investigation was unreasonably broad." *Id.* 40a-41a.

Judge McKee was "not as willing as [his] colleagues to brush aside the EEOC's own conclusion" about the reasonableness of including retaliation in its investigation. Pet. App. 47a-48a. He noted that, as the majority acknowledged, the EEOC's Compliance Manual instructed investigators to look for evidence of retaliation; to inform employers that the scope of inquiry could be expanded based on information received during the investigation; and that if they found indications of retaliation for the filing of a charge, they could investigate the retaliation on the

basis of the original charge. *Id.* 48a-49a, citing *id.* 30a (majority opinion).

The dissent further emphasized that "[h]aving actually investigated and attempted to conciliate the retaliation claim, the EEOC fulfilled the purpose of the exhaustion requirement." Pet. App. 51a. Simko's employer received notice; participated in the agency's investigation, including a site visit; was "invited to conciliate"; and "understood that it was facing a retaliation charge before Simko brought suit[.]" *Id.* Accordingly, there was "nothing to be served by requiring Simko to have filed a second complaint." *Id.* (brackets and citation omitted).

The dissent observed that "[a]n individual who alleges retaliation for the filing of a previous charge is not 'gaming the system[.]'" Pet. App. 61a. That sort of retaliation "must necessarily come after the charge is filed." *Id.* Here, it was "quite reasonable" for the EEOC, "after being alerted by Simko about retaliation for the filing of the initial charge, to also investigate the alleged retaliation." *Id.* 61a-62a. And that conclusion was "reinforced" where the Commission "actually investigated the discrimination, concluded that there was evidence of retaliation, and attempted to conciliate the dispute." *Id.* 62a.

REASONS FOR GRANTING THE PETITION

This case presents a recurrent question on which the courts of appeals are in persistent conflict: When, if ever, may a claim of retaliation for filing a charge of discrimination with the EEOC be addressed in an ensuing civil action, if the employee did not file a further charge specifically alleging the retaliation? Two circuits, including the court below, answer that

question on a case-by-case basis—but disagree over whether a suit may proceed where, as here, the EEOC actually investigated the retaliation claim. Two other circuits would always dismiss a suit in the absence of a second formal charge. And seven circuits would always allow a suit like Simko's to proceed.

This Court should hold that the majority rule is correct. At a minimum, the Court should hold that a retaliation claim is properly presented for litigation if the EEOC actually investigated it, as happened here. And in any event the Court should grant review and resolve the conflict to give claimants, employers, and courts the benefits of a clear and uniform rule.

I. The circuits are divided over how to treat allegations of retaliation for filing an EEOC charge.

A. Two circuits make case-by-case inquiries—but differ on the relevance of the EEOC's actual investigation.

The Third and Ninth Circuits both consider the question here case-by-case. Pet. App. 15a; *see Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 644-646 (9th Cir. 2003). But unlike the Third Circuit, the Ninth would have allowed the claim here to proceed.

The decision below sets out the Third Circuit's position in detail. Pet. App. 13a-23a. The court expressly recognized, but refused to adopt, the "broad per se rule followed by" some other courts, under which Simko would have prevailed. *Id.* 16a; *see* Part I.C, *infra*. Instead, because Simko's claim that U.S. Steel retaliated against him for the filing of his initial EEOC charge did not (of course) appear in that

charge itself, the court asked whether the claim fell "'fairly within . . . the [administrative] investigation arising' from the initial EEOC charge." Pet. App. 17a (quoting *Waiters v. Parsons*, 729 F.2d 233, 237 (3d Cir. 1984)); *see also id.* 14a-15a.

The court explained that its test is "objective": a court must "look only at the scope of the EEOC investigation that *would reasonably* grow out of, or arise from, the initial charge filed with the EEOC," not at the actual scope of the real investigation. Pet. App. 18a (emphasis added); *see id.* 22a-23a. Applying that principle here, *id.* 23a-34a, the court concluded that although "the EEOC actually investigated and attempted to conciliate Simko's retaliation claim," *id.* 27a, the district court "correctly dismissed his complaint for failure to exhaust administrative remedies," *id.* 35a.

The Ninth Circuit, too, considers case-by-case whether retaliation claims are properly presented. *See Vasquez*, 349 F.3d at 644. Unlike the Third Circuit, however, the Ninth considers not only what investigation "could reasonably be expected to grow out of the charge" initially filed, but also "the scope of the EEOC's *actual* investigation." *Id.* at 644 (emphasis added); *see also B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1100 (9th Cir. 2002); *cf. Arizona ex rel. Horne v. Geo Grp., Inc.*, 816 F.3d 1189, 1205 (9th Cir. 2016) (discussing similar issue in EEOC class action). Thus, the Ninth Circuit would have allowed Simko's claim to proceed.

B. Two circuits always require a new charge.

Other circuits that have addressed the question have rejected case-by-case analysis, instead adopting

one of two conflicting per se rules. On one side of that division, the Eighth and Tenth Circuits hold that an employee like Simko must always file a second formal administrative charge. They base that rule on this Court's decision in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

Morgan considered the application of Title VII's time limit for filing charges with the EEOC—in most cases, within 300 days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1); *Morgan*, 536 U.S. at 109. The Court granted review to resolve a conflict and held that a claimant could not recover for any older "discrete retaliatory or discriminatory act," even if it could be viewed as part of an "ongoing violation." *Morgan*, 536 U.S. at 110. The Court reasoned that each older "incident of discrimination" or "retaliatory adverse employment decision" was "a separate actionable 'unlawful employment practice'" subject to the statutory limitations bar. *Id.* at 114 (quoting 42 U.S.C. § 2000e-5(e)(1)).

In *Martinez v. Potter*, 347 F.3d 1208 (10th Cir. 2003), the Tenth Circuit held that *Morgan* required a similar act-by-act approach to the question presented here. The district court in that case had determined that certain retaliation allegations were not "like or reasonably related to" other allegations that had been properly exhausted. *Id.* at 1210. But the Tenth Circuit based its affirmance on *Morgan*, which it thought required holding that a plaintiff must *always* file a separate charge "to exhaust administrative remedies for each individual discriminatory or retaliatory act." *Id.* at 1211. *See also, e.g.*, *Sanderson v. Wyo. Highway Patrol*, 976 F.3d 1164, 1170-1171

(10th Cir. 2020); *Lincoln v. BNSF Ry.*, 900 F.3d 1166, 1181 (10th Cir. 2018).

A divided panel of the Eighth Circuit adopted the same rule in *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847, 850-853 (8th Cir. 2012) (per curiam) (agreeing with *Martinez*), *cert. dismissed*, 568 U.S. 1210 (2013) (No. 12-854). The court dismissed a plaintiff's suit because she had not filed a new EEOC charge, specifically alleging retaliation, when she was fired just days after filing her initial charge. *See also id.* at 857-861 (Bye, J., dissenting on this point).

In these courts Simko's retaliation claim would have been dismissed, as it was below. But the dismissal would have resulted from a categorical rule based on an interpretation of this Court's precedent and the statutory text—not from a case-by-case judicial assessment of the reasonableness of the EEOC's proceedings.

C. Seven circuits do not require a new charge.

Finally, seven circuits would have applied the opposite categorical rule. Those courts would have treated Simko's claim as properly presented because he alleged that U.S. Steel retaliated against him for filing his original charge of discrimination with the EEOC.

The Fifth Circuit, for example, has long held that it is "unnecessary for a plaintiff to exhaust administrative remedies prior to urging a retaliation claim growing out of an earlier charge" that is properly before the court. *Gupta v. E. Tex. State Univ.*, 654 F.2d 411, 414 (5th Cir. Unit A Aug. 1981). In *Gupta*, for example, the plaintiff professor filed an EEOC charge alleging that his university employer

discriminated against him in compensation and other ways. *Id.* at 412. After the Commission issued a right-to-sue letter and Gupta sued, the university declined to renew his employment contract. *Id.* at 413. Gupta argued in court that the nonrenewal "was in retaliation for his filing charges with the EEOC," but he never filed a separate administrative charge to that effect. *Id.* The court held that no such charge was required. *Id.* at 413-414. It reaffirmed that analysis in *Gottlieb v. Tulane Univ.*, 809 F.2d 278, 283-284 (5th Cir. 1987), even where the alleged retaliation did not occur until after trial in the district court on the underlying discrimination claim.[5]

Other courts have adopted similar rules. In *Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989), the plaintiff filed an EEOC charge alleging racial discrimination in the denial of promotions. *Id.* at 1308. The employer later fired the plaintiff—after the EEOC had concluded its review and the plaintiff had filed suit. *Id.* The plaintiff amended his complaint to allege that he was fired in retaliation for filing the initial charge. *Id.* The Seventh Circuit allowed the claim to proceed, "adopting the rule that a separate administrative charge is not prerequisite to a suit complaining about retaliation for filing the first charge." *Id.* at 1312; *see also, e.g.*, *Ford v.*

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[5] The Fifth Circuit phrased its holdings in terms of "ancillary jurisdiction." *Gupta*, 654 F.2d at 414. As this Court has since made clear, the claim-processing rules at issue here do not affect subject-matter jurisdiction. *Ft. Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1851 (2019). The phrasing does not affect the analysis of the proper rule.

Marion Cnty. Sheriff's Off., 942 F.3d 839, 857 n.11 (7th Cir. 2019) ("[W]e have long held that a plaintiff need not file a new charge alleging post-charge retaliation by the employer.").

Similarly, in *Clockedile v. New Hampshire Department of Corrections*, 245 F.3d 1 (1st Cir. 2001), the plaintiff filed an EEOC charge alleging sexual harassment. *Id.* at 2. In the ensuing lawsuit she also alleged retaliation, pointing to acts that occurred after her administrative charge and even after she filed suit. *Id.* at 3, 5. Noting the "recurrent problem" of "whether (or to what extent) a lawsuit following a discrimination complaint can include a claim of retaliation not made to the agency," *id.* at 4, the First Circuit considered the positions adopted by other courts and the EEOC, which filed an amicus brief, *see id.* at 4-5 & n.3. It concluded that "claims of retaliation are homogeneous enough and sufficiently distinct from other problems to justify a general rule," and that "[o]n balance, . . . the cleanest rule is this: retaliation claims are preserved so long as the retaliation is reasonably related to and grows out of the discrimination complained of to the agency—*e.g.*, the retaliation is for filing the agency complaint itself." *Id.* at 6. "Someday," the court remarked, "the Supreme Court will bring order to this subject; until then, this is a practical resolution of a narrow but recurring problem." *Id.*

The Second, Fourth, Sixth, and Eleventh Circuits have likewise held that a second EEOC charge is not required for a court to consider a plaintiff's claim that an employer retaliated for the filing of an initial charge, so long as the suit is otherwise timely. In *Duplan v. City of New York*, 888 F.3d 612 (2d Cir.

2018), for example, the Second Circuit explained that it has "long recognized" that "if a plaintiff has already filed an EEOC charge," the requirements for suit are "also met for a subsequent claim 'alleging retaliation by an employer against an employee for filing an EEOC charge.'" *Id.* at 624 (quoting *Terry v. Ashcroft*, 336 F.3d 128, 151 (2d Cir. 2003)); *see id.* at 622-625.

In *Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 301-304 (4th Cir. 2009), the Fourth Circuit reaffirmed its adherence to a similar rule: "a claim of 'retaliation for the filing of an EEOC charge'" is actionable without a separate administrative charge because it "is indeed 'like or reasonably related to and grow[s] out of such allegations.'" *Id.* at 302 (quoting *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992)).[6] *See also Spengler v. Worthington Cylinders*, 615 F.3d 481, 489 n.3 (6th Cir. 2010) ("Retaliation claims are typically excepted from the filing requirement because they usually arise after the EEOC charge is filed."); *Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167, 169 (11th Cir. 1988) (following *Gupta*).

In any of these circuits, the courts would have addressed the merits of Simko's retaliation claim.

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[6] *Jones* spoke in terms of subject-matter jurisdiction. *See* 551 F.3d at 301. In that respect it was abrogated by this Court's decision in *Fort Bend County v. Davis*, 139 S. Ct. at 1851. As with the Fifth Circuit's decision in *Gupta*, however, recognizing that Title VII's claim-processing rules are not jurisdictional in that sense does not affect the analysis of how they apply in particular situations.

D. The conflict is ripe for resolution now.

There is no prospect that further percolation will resolve the present conflict among the lower courts or aid in this Court's consideration of the issue. Most courts of appeals settled on their positions long ago. And while this Court's decision in *Morgan* caused the Eighth and Tenth Circuits to adopt a new rule, in the twenty years since that decision other courts have adhered to their prior decisions.

The Fourth Circuit has expressly rejected any change to its retaliation rule based on *Morgan*. *See Jones v. Calvert Group Ltd.*, 551 F.3d at 303 ("we do not read *Morgan* that broadly"). Other courts have continued to apply their existing rules, despite being well aware of *Morgan*. *See, e.g.*, *Duplan*, 888 F.3d at 622-625 & n.10 (discussing and applying existing doctrine on retaliation claims while citing *Morgan* for other reasons); *Ford*, 942 F.3d at 857 n.11; *Spengler*, 615 F.3d at 489 n.3; *Franceschi v. U.S. Dep't of Veterans Affs.*, 514 F.3d 81, 86 (1st Cir. 2008).[7]

To be clear, even these latter decisions were not mere rote applications of existing rules that were not challenged in particular cases. The Second Circuit's

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[7] Some decisions have noted the post-*Morgan* conflict without taking a definitive position. *See, e.g.*, *Williams v. Bd. of Ed. of Chi.*, 982 F.3d 495, 503 n.13 (7th Cir. 2020); *Haynes v. D.C. Water and Sewer Auth.*, 924 F.3d 519, 526-527 & n.1 (D.C. Cir. 2019); *Ariz. ex rel. Horne*, 816 F.3d at 1205-1206 & n.11; *see also Payne v. Salazar*, 619 F.3d 56, 65 (D.C. Cir. 2010) (Garland, J.) (noting issue); *cf. Duble v. FedEx Ground Package Sys., Inc.*, 572 F. App'x 889, 893 (11th Cir. 2014) (citing *Morgan* but distinguishing existing circuit precedent on facts of case), *cert denied*, 575 U.S. 1037 (2015) (No. 14-1028).

recent *Duplan* decision, for example, thoughtfully discusses the reasons for and limits of its rule. *See* 888 F.3d at 622-625. So, for all its flaws, does the Third Circuit's decision in this case. *See* Pet. App. 14a-23a (reviewing precedents and reasoning in detail); *id.* 15a, 23a-34a (conducting case-specific exhaustion inquiry); *cf. id.* 14a, 33a-34a (citing *Morgan* several times). Older cases, too, have discussed the reasons for treating retaliation claims like Simko's as properly presented. *See, e.g.*, *Clockedile*, 245 F.3d at 4-6; *Gupta*, 654 F.2d at 414; *infra* Part III. On the other side of the conflict, the Eighth and Tenth Circuits have fully aired their reasons for concluding that *Morgan* requires a different result. *See, e.g.*, *Richter*, 686 F.3d at 850-853; *id.* at 857-861 (Bye, J., dissenting on this point).

Under these circumstances, there is no reason to defer review. On the contrary, only this Court can assess the conflicting positions and, as Judge Boudin forecast, "bring order to this subject." *Clockedile*, 245 F.3d at 6.

II. This case is a good vehicle for review of this important question.

1. This case is a good vehicle for conducting that assessment. As it comes to this Court, the case presents a core factual scenario for consideration of the question presented.

Petitioner Simko filed a charge of disability discrimination with the EEOC. He alleges that, while that charge was pending before the Commission, his employer retaliated against him for making the initial filing. *See Duplan*, 888 F.3d at 622 (calling this "the paradigmatic case for which the 'reasonably

related' doctrine was adopted"). He did not file a timely second charge alleging the retaliation; but in its investigation of the initial charge the EEOC became aware of and actually investigated the issue.

In the process, the EEOC gave express notice to Simko's employer and sought its response. Indeed, the Commission ultimately found reasonable cause to believe retaliation had occurred, and sought to conciliate the parties' dispute over that precise unlawful practice. When conciliation failed, the Commission notified Simko of his right to sue. Simko then brought a timely civil action, alleging only the retaliation.

This clean factual presentation is important. Analysis in this area can be complicated by a variety of factors, many of which have produced their own decisional fissures. Some courts, for example, treat alleged retaliation of other sorts (such as for making an internal complaint to a supervisor) differently where it occurs before an initial EEOC charge has been filed, rather than in retaliation for (and thus necessarily after) that first filing.[8] Some courts will not treat a claim of retaliation for filing a charge as properly presented without a further charge if the alleged retaliation occurred after the conclusion of the EEOC's investigation of the first charge.[9] Some

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[8] *See, e.g.*, *Swearnigen-El v. Cook Cnty. Sheriff's Dep't*, 602 F.3d 852, 864-865, 864 n.9 (7th Cir. 2010); *McKenzie v. Ill. Dep't of Transp.*, 92 F.3d 473, 482-483 (7th Cir. 1996) (noting conflict on this issue).

[9] *Compare Payne v. Salazar*, 619 F.3d at 65, *with, e.g.*, *Clockedile*, 245 F.3d at 5-6. An unpublished Eleventh Circuit decision suggests, conversely, that where the alleged retaliation

will not entertain a claim of retaliation for the filing of a particular charge if the plaintiff's ultimate civil action was not filed within the requisite time period after the receipt of a right-to-sue letter based on that specific charge.[10]

Here, none of these special situations would impede the Court from considering the core question presented. Moreover, in this case the EEOC, despite the absence of any formal second charge, actually became aware of the retaliation issue, specifically investigated it, found reasonable cause, and sought to conciliate it. The facts thus present the question of what amounts to adequate administrative claim-processing in the sharpest possible relief. *Compare, e.g.*, Pet. App. 27a-34a (majority opinion) *with id.* 36a, 40a-41a, 46a-62a (McKee, J., dissenting in part).

2. That issue also warrants this Court's review. The question presented here is a "recurrent problem" under the remedial provisions of Title VII. *Clockedile*, 245 F.3d at 4. It arises frequently, and has generated confusion and divergence in results. *See, e.g.*, *Redding v. Mattis*, 327 F. Supp. 3d 136, 139-140 (D.D.C. 2018) (discussing post-*Morgan* debate in district court opinions). Commentators have likewise discussed the issue, focusing on the sharp conflict between the Eighth and Tenth Circuits and others

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occurred while an initial charge was still pending before the EEOC, the plaintiff could not include a retaliation claim in later litigation where he "chose not to amend or file a new charge" with the Commission. *Duble*, 572 F. App'x at 893.

[10] *See, e.g.*, *Duplan*, 888 F.3d at 623-624; *but see Hentosh v. Old Dominion Univ.*, 767 F.3d 413, 416-418 (4th Cir. 2014).

after *Morgan*. *See* Lawrence Rosenthal, *To File (Again) or Not to File (Again): The Post*-Morgan *Circuit Split Over the Duty to File an Amended or Second EEOC Charge for Claims of Post-charge Employer Retaliation*, 66 Baylor L. Rev. 531 (2014); Brandon Wheeler, Note, *Amending Title VII to Safeguard the Viability of Retaliation Claims*, 98 Minn. L. Rev. 775 (2013).

The EEOC, too, has recognized the importance of the question. Its Compliance Manual instructs that retaliatory acts may be challenged without a second formal charge, expressly rejecting the reasoning of contrary decisions. EEOC Compliance Manual, Section 2: Threshold Issues, § 2-IV(C)(1)(a) & n.185 (2009), https://perma.cc/CQ67-WTJC. And the Commission has filed briefs advancing that position in several cases, including this one. *See* Pet. App. 8a-9a, 28a-33a; EEOC C.A. Br. 26-32; *id.* at 30-31 (arguing that the Eighth and Tenth Circuits have misread *Morgan*). With the lower courts locked in disagreement, the view of the expert federal administrative agency clear, and the question continuing to arise, this Court should grant review to settle the matter.

III. The decision below is wrong.

Finally, the decision below is wrong.

1. The text and structure of Title VII's remedial provisions require that enforcement begin with the filing of a "charge" with the EEOC. *See* 42 U.S.C. §§ 2000e-5(b), (e)(1). The EEOC "shall serve a notice of the charge" on the employer "within ten days, and shall make an investigation thereof." *Id.* § 2000e-5(b). If the Commission determines there is "reasonable cause to believe that the charge is true," it must

"endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Id.* If conciliation fails, the Commission "may bring a civil action" against the employer (or, for certain government employers, refer the matter to the Attorney General). *Id.* § 2000e-5(f)(1).

More commonly, the Commission notifies "the person aggrieved" that there will be no government suit. 42 U.S.C. § 2000e-5(f)(1). Within 90 days of that notice, "a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved." *Id.* Similarly, if the Commission determines after investigation that there is not reasonable cause to believe a charge is true, it nonetheless provides the charging party with notice of the right to file an individual "civil action." *Id.* §§ 2000e-5(b), (f)(1). Moreover, if the charging party simply wishes to proceed directly, the Commission will provide a similar right-to-sue letter on request at any time once 180 days have passed from the filing of the charge, and in many cases even during the first 180 days. 29 C.F.R. § 1601.28(a).

The phrase "civil action" is different from, and normally broader than, the term "charge." And as the First Circuit has observed, "Title VII does not say explicitly that the court suit must be limited to just what was alleged in the agency complaint," or supply any precise rule for determining what connection is required between the two. *Clockedile*, 245 F.3d at 4. As noted above (*see supra* at 2-3), in construing the statute courts have generally "assum[ed] that some kind of a relationship must exist[.]" *Id.*; *see generally, e.g.*, 2 Barbara T. Lindemann *et al.*, *Employment*

Discrimination Law ch. 29.IV (6th ed. 2020). But in defining the metes and bounds of such a judicially inferred procedural limitation, courts may not impose technical rules that are inconsistent with Title VII's structure and objectives.

2. Title VII is designed to enable effective enforcement for employees (who are often proceeding, at least initially, without counsel), to provide employers with timely notice, and to give both parties an opportunity for resolution through administrative investigation and informal conciliation. *See, e.g.*, Pet. App. 13a-14a; *id.* 51a (McKee, J., dissenting in part); Lindemann, *Employment Discrimination Law* ch. 29.IV.A. Once an employee has filed an initial charge of discrimination, it does not serve those goals to require the employee to file second or successive formal charges in order to preserve the ability to challenge new acts of retaliation. And that is especially true where, as here, the EEOC learns of and investigates such acts even without any new charge.

As the Fifth Circuit explained in its influential *Gupta* decision, "[i]t is the nature of retaliation claims" of the sort at issue here "that they arise after the filing of the [initial] EEOC charge." 654 F.2d at 414. Requiring a "double filing" with the Commission in such cases serves "no purpose except to create additional procedural technicalities[.]" *Id.* That sort of "needless procedural barrier," *id.*, is especially problematic where, as is common, an employee is unrepresented during part or all of the time a charge is pending before the Commission. *See Edelman v. Lynchburg Coll.*, 535 U.S. 106, 115 (2002) ("Title VII [is] 'a remedial scheme in which laypersons, rather

than lawyers, are expected to initiate the process.'" (citation omitted)). Eliminating such a trap for the unwary or unrepresented can also help "deter employers from attempting to discourage employees from exercising their rights under Title VII" or the ADA. *Gupta*, 654 F.2d at 414; *see also, e.g.*, *Duplan*, 888 F.3d at 622-623; *Malhotra*, 885 F.2d at 1312 ("having once been retaliated against for filing an administrative charge, the plaintiff will naturally be gun shy about inviting further retaliation by filing a second charge complaining about the first retaliation"); *Jones v. Calvert Grp., Ltd.*, 551 F.3d at 302.

The Second Circuit has further explained that where, as here, alleged retaliation occurs while a charge is pending before the Commission, "the ongoing EEOC investigation on the first charge would be expected to uncover and address any related retaliation," without any need for a second formal charge. *Duplan*, 888 F.3d at 622. The EEOC itself has made the same point, including in its amicus brief below in this case. *See* EEOC C.A. Br. 27-29; *id.* at 29 (new-charge requirement "would create a procedural hurdle with no practical effect"); *see also Clockedile*, 245 F.3d at 4-5 (discussing and relying on EEOC amicus brief in that case). Certainly there is no practical significance to a second formal charge where, as here, the Commission *in fact* investigated the retaliation question—and, indeed, found reasonable cause and sought to conciliate the matter.

Moreover, in cases involving alleged retaliation while an initial charge remains pending, the employer has always been put on notice by that charge that there is a perceived problem, and can if it wishes seek some mutually agreeable pre-litigation

resolution. Thus, in terms of the purposes of the Title VII claim-processing structure, there is nothing further to be gained from "[f]orcing the parties into two concurrent agency proceedings." *See Duplan*, 888 F.3d at 622.

3. This Court's decision in *Morgan* does not counsel a different result. *Morgan* disapproved the use of a "continuing violation" theory that allowed new EEOC charges to reach back and include, for liability purposes, some older adverse actions that were otherwise expressly barred by the statutory period for filing charges. *See* 536 U.S. at 105, 107. The Court focused on text specifying that "[a] charge under this section shall be filed within" a specified period "after the alleged unlawful employment practice occurred." *Id.* at 109 (quoting 42 U.S.C. § 2000e-5(e)(1); brackets added, emphasis omitted). And it reasoned in part that the term "practice" generally applies "to a discrete act or single 'occurrence,' even when it has a connection to other acts." *Id.* at 111.

Nothing in *Morgan*'s analysis of the time-bar provision at issue there speaks to how principles not specified in the statutory text should limit the scope of a "civil action" brought under 42 U.S.C. § 2000e-5(f)(1). As the Fourth Circuit and others have pointed out, *Morgan* "does not purport to address the extent to which an EEOC charge," once timely made, "satisfies exhaustion requirements for claims of related, *post*-charge events." *Jones v. Calvert Grp., Ltd.*, 551 F.2d at 303 (emphasis added); *see also Ariz. ex rel. Horne*, 816 F.3d at 1205-1206; *Richter*, 686 F.3d at 858-861 (Bye, J., dissenting in part); EEOC C.A. Br. 31-32. In particular, a claim that an

employer retaliated against the charging party for filing an EEOC charge can, by definition, arise only *after* the charge was filed. Allowing litigation of that retaliation claim in court raises no concern about using the EEOC charge to "pull in" allegations based on otherwise time-barred pre-charge acts. *Compare Morgan*, 536 U.S. at 113.

4. In any event, even if *Morgan* suggested the need for some different analysis in this case, that would only be another reason for review. Unlike the Eighth and Tenth Circuits' decisions in *Richter* and *Martinez*, the decision below does not purport to rely on *Morgan*. Although it cited *Morgan* on other points, *e.g.* Pet. App. 14a, 33a-34a, the Third Circuit did not focus on statutory text, and it did not craft or apply any bright-line rule requiring a new formal charge to challenge any alleged act of retaliation. On the contrary, it adhered to its "case-by-case" approach to assessing the permissible scope of litigation claims, *id.* 15a, applying judicially crafted rules based on the court's view of some of the purposes served by the Title VII claim-processing structure, *e.g.*, *id.* 13a-15a, 22a-23a. And the court would have allowed Simko's retaliation claim to proceed if it thought that claim was "fairly within the scope of . . . the [EEOC] investigation arising" from his original charge. *Id.* 14a.

Yet, after extensive analysis, the court concluded that a retaliation claim the Commission *in fact* investigated and *in fact* sought to conciliate with the employer was nonetheless barred from court—because the investigation actually undertaken by the EEOC was, in the court's view, unreasonably broad. Pet. App. 28a-29a. *See also id.* 41a (McKee, J., dissenting in part); *id.* 82a-83a (district court). As

discussed above, that analysis conflicts even with the approach of the only other court that uses a case-by-case approach to the question. *See Vasquez*, 349 F.3d at 644 (allowing litigation of all claims "that fall within the scope of the EEOC's actual investigation"). And frankly, it is difficult to understand. At a bare minimum, a plaintiff's claim of retaliation for the filing of an EEOC charge should be recognized as properly presented for litigation if the retaliation issue was actually investigated by the Commission during its processing of the related charge.

* * *

Eight years after he filed his first EEOC charge, petitioner Simko has not had his day in court. The EEOC found reasonable cause to believe that U.S. Steel retaliated against him for filing that first charge, and tried but failed to conciliate the dispute. Simko then brought this civil action to obtain adjudication of his retaliation claim, just as contemplated by Title VII's remedial structure. And yet, the courts below dismissed his suit—because as a pro se claimant he did not file a separate formal administrative charge, and because reviewing judges decided that the EEOC's actual investigation of his first charge was unreasonably broad.

That outcome to this case is not compelled by—or even based on—anything in the text of Title VII. It is different from the outcome that would have resulted if Simko's case had arisen in any of eight other circuits. It perpetuates a deep and entrenched circuit conflict, involving a recurrent issue in an area of frequent litigation and great importance. It is contrary to the known position of the EEOC, as expressed in its brief below in this case. And by

creating traps for unwary and often unrepresented claimants while at best only complicating proceedings before the Commission and the courts, it manages to be not only unfair but also inefficient. This Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 6, 2021

APPENDIX

APPENDIX A

PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1091

MICHAEL SIMKO,

Appellant

v.

UNITED STATES STEEL CORP

On Appeal from the United States District Court
for the Western District of Pennsylvania
(District Court No.: 2:19-cv-0075)
District Judge: Honorable Joy Flowers Conti

Argued September 24, 2020

(Filed March 29, 2021)

Before McKEE, JORDAN and RENDELL, Circuit Judges.

* * * *

OPINION

RENDELL, *Circuit Judge*.

In this employment discrimination case, Michael Simko asserts one claim of retaliation against his former employer, United States Steel Corp., under

the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*. Simko alleges that in August 2014 he was discharged in retaliation for filing an administrative charge of disability discrimination with the Equal Employment Opportunity Commission ("EEOC") approximately fifteen months earlier. Simko's original charge—which alleged that U.S. Steel disqualified him for another position on the basis of his hearing disability—was timely filed. But he never filed a timely charge of retaliation that formed the basis for his complaint before the District Court. The District Court held that the later claim of retaliation was not encompassed within the earlier charge, and, therefore, that his failure to file a timely retaliation charge was fatal. Accordingly, the District Court dismissed his complaint for failure to exhaust administrative remedies. We will affirm.

I. BACKGROUND[1]

A. Simko's Original Charge and Initial Discharge

Simko, who suffers from hearing loss, began working for U.S. Steel in August 2005. In August 2012, while he was employed as a Larryman in the

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[1] The facts are drawn from Simko's complaint and exhibits to the parties' briefs in support of, and opposition to, U.S. Steel's motion to dismiss. In reviewing a dismissal under Federal Rule of Civil Procedure 12(b)(6), we "must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents." *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010); *see also Levins v. Healthcare Revenue Recovery Grp. LLC*, 902 F.3d 274, 279 (3d Cir. 2018). The parties have not disputed the authenticity of any documents in the record.

Blast Furnace Department of the U.S. Steel plant in Braddock, Pennsylvania, he successfully bid on an open position as Spellman in the Transportation Department. During training for the position, Simko requested a new two-way radio from a Transportation Department supervisor to accommodate his hearing impairment, but U.S. Steel did not provide the new radio or any other accommodation. Although Simko completed the Spellman training, he alleges that his trainer refused to approve his completion of the training and "sign off" that he was able to perform the Spellman duties because of his disability. App 33. Having failed to secure the Spellman position, Simko resumed working as a Larryman in the Blast Furnace Department.

On May 24, 2013, Simko signed an EEOC charge alleging violations of the ADA against U.S. Steel. The only box checked on the original charge was for "[d]iscrimination based on . . . disability." App. 33. Specifically, Simko asserted that U.S. Steel discriminated against him by denying him the Spellman position and denying his request for an accommodation. Simko also alleged in the charge that he was later "subjected to negative comments from other employees regarding my impairment," including one instance in which the "Walking Boss" told him that "[i]f I couldn't hear, I must be disabled and should not work anywhere in the plant." App. 34. The EEOC received the charge on May 28, 2013. By letter dated August 7, 2013 to the EEOC, a U.S. Steel Labor Relations official denied Simko's allegations of discrimination. The EEOC did not take any action to

investigate the charge or U.S Steel's August 7, 2013 letter.

On December 30, 2013—while Simko's charge was still pending—U.S. Steel discharged Simko after an incident in which a car he was operating lost power. Approximately five months later, on May 27, 2014, Simko entered into a "last chance agreement" with U.S. Steel and his union providing for his reinstatement. Simko returned to work under the last chance agreement on June 1, 2014, but he was discharged again on August 19, 2014[2]—this time, based on a safety violation. Although Simko grieved the discharge through his union, the union later withdrew the grievance.

B. The November 2014 Correspondence

On November 14, 2014,[3] approximately three months after Simko's final discharge from U.S. Steel, the EEOC received an undated handwritten letter and set of documents from Simko ("November 2014 correspondence"). The November 2014 correspondence comprised 14 pages, including what appears to be Simko's handwritten notes regarding a union hearing on the violation of his last chance agreement, a copy of his last chance agreement, copies of safety incident reports, and, in the final

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[2] Simko initially received a five-day suspension, which was ultimately converted to a discharge.

[3] Simko and the EEOC allege that the EEOC received the November 2014 correspondence on November 14, 2014. Because U.S. Steel does not contest this allegation, we will, as the District Court did, assume its truth. The November 2014 correspondence was attached to Simko's response to U.S. Steel's motion to dismiss, but it was not referenced in his civil complaint.

three pages, a handwritten note that urged that he was discharged in retaliation for his filing of the original discrimination charge with the EEOC. In relevant part, the letter provided:

> Since I have filled [sic] the charges with the EEOC I have been terminated twice and placed on [a] last chance agreement with no just cause by the company. The union only calls me at [the] last minute with information, they are not in contact with me otherwise . . . . *I believe anyone who familiarizes themself [sic] with the details of the case will clearly see it as retaliation for filing charges with the EEOC.*

App. 80–81 (emphasis added).

The EEOC did not take any action in response to Simko's November 2014 correspondence until approximately one year later. By letter dated November 23, 2015, an EEOC investigator notified Simko that he had been assigned to Simko's case. The investigator further wrote that, based upon the November 2014 correspondence, "it appears as though you have been terminated by [U.S. Steel] on two separate occasions during 2014 and that you believe that the terminations were retaliatory against you." App. 84. Simko's EEOC file also contains a handwritten note by the investigator, dated November 23, 2015, indicating that the EEOC contacted the U.S. Steel Labor Relations Department and confirmed that Simko had been discharged.[4] In

[4] The EEOC investigator's November 23, 2015 letter and handwritten note were not attached to the complaint but were attached to Simko's response to U.S. Steel's motion to dismiss.

addition, the note stated, "Amended charge is to follow including retaliatory discharge." App. 83.

C. The EEOC Investigation, Amended Charge, and Simko's Federal Lawsuit

After the EEOC contacted Simko, he retained counsel to represent him in his EEOC proceedings. By letter dated December 18, 2015, the EEOC investigator communicated to Simko's counsel that the EEOC had notified U.S. Steel "that an amended charge was going to follow." App. 87. On January 22, 2016, Simko's counsel filed an amended EEOC charge. The amended charge addressed Simko's failure to secure the Spellman position and his subsequent discharges from U.S. Steel. The boxes for disability discrimination and retaliation were both checked.

After investigating the allegations set forth in the amended charge, the EEOC on February 19, 2019 issued a determination of reasonable cause that U.S. Steel retaliated against Simko. Specifically, the EEOC investigator found that U.S. Steel disciplined Simko more harshly for his violation of work rules and regulations than a non-disabled comparator. The EEOC attempted conciliation of the dispute, but after those efforts failed, it issued a right-to-sue letter on April 1, 2019. On June 28, 2019, Simko filed this lawsuit, asserting only a single count of retaliation in connection with his final discharge from U.S. Steel. It did not allege either disability discrimination or failure to accommodate.

The District Court determined that Simko failed to file a timely EEOC charge asserting his retaliation claim because his amended charge claiming

retaliation was filed 521 days after the termination of his employment. The District Court also held that Simko was not entitled to equitable tolling of the ADA's filing deadline because he was not misled by the EEOC or prevented from filing the amended charge, and he offered no reason why he could not file a timely claim. Thus, the District Court concluded that since Simko never filed a timely charge of retaliation with the EEOC, he failed to exhaust his administrative remedies as required by the ADA, and it dismissed his complaint. Simko timely appealed.

II. JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction under 28 U.S.C. § 1331. We exercise appellate jurisdiction pursuant to 28 U.S.C § 1291. We review de novo a district court's decision granting a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Schmidt v. Skolas*, 770 F.3d 241, 248 (3d Cir. 2014). In reviewing a dismissal under Rule 12(b)(6), we accept all well-pled factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Connelly v. Lane Const. Corp.*, 809 F.3d 780, 787 (3d Cir. 2016).

III. DISCUSSION

Plaintiffs must exhaust their administrative remedies before filing an ADA claim in federal court. *See Churchill v. Star Enters.*, 183 F.3d 184, 190 (3d Cir. 1999) (noting that claims asserted under the ADA must be filed in adherence with the administrative procedures set forth in Title VII); 42

U.S.C. §§ 12117(a), 2000e-5.[5] In Pennsylvania, an aggrieved party must initiate this pre-suit procedure by filing a charge with the EEOC within 300 days of the challenged employment action. *Watson v. Eastman Kodak Co.,* 235 F.3d 851, 854 (3d Cir. 2000); 42 U.S.C. § 2000e-5(e)(1).

It is undisputed that Simko filed his amended EEOC charge of retaliation 521 days after the latest adverse employment action at issue in the civil complaint—his final discharge. Before the District Court and on appeal, U.S. Steel urges that Simko's civil complaint should therefore be dismissed because he failed to file the retaliation charge within the ADA's 300-day filing period.

Despite his failure to meet the 300-day deadline, Simko argues that he nonetheless satisfied the ADA's pre-suit requirements. The EEOC filed an amicus brief in which it also urges that, contrary to the District Court's conclusion, Simko satisfied the ADA's pre-suit filing requirements.[6] Three arguments are

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[5] While failure to file a timely charge may be a ground for dismissal, that pre-suit requirement does not implicate a district court's subject matter jurisdiction. Rather, "like a statute of limitations, [the filing deadline is] subject to waiver, estoppel, and equitable tolling." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *see also Fort Bend Cty., Texas v. Davis*, 139 S. Ct. 1843, 1851 (2019) (holding that the "charge-filing requirement is a processing rule, albeit a mandatory one, not a jurisdictional prescription delineating the adjudicatory authority of courts").

[6] We noted at oral argument that it was unusual for the EEOC to file an amicus brief in support of an appellant in Simko's position. Counsel for the EEOC stated that the agency "made a mistake" by failing to help Simko convert his November 2014 correspondence into a charge in a timely manner. We

advanced in the alternative. First, both Simko and the EEOC contend that his handwritten November 2014 correspondence to the EEOC itself constituted a timely administrative charge. Second, the EEOC alone argues that Simko was entitled to equitable tolling of the statutory filing period because the agency failed to promptly act on the November 2014 correspondence. Third, both Simko and the EEOC urge that he did not have to file an additional EEOC charge because his original, still-pending disability discrimination charge encompassed his subsequent claim of retaliation.

We reject these arguments. The first argument was never asserted in the District Court and has not been properly preserved for our review. The second argument was raised only by the EEOC on appeal and, for reasons we explain below, will not be considered. With respect to the final argument, we conclude that Simko's retaliation claim is distinct from his underlying EEOC charge and therefore needed to be raised first in a timely filed charge. His failure to file a timely retaliation claim with the EEOC therefore dooms his case.

A. We Will Not Reach the Unpreserved Issue of Whether the November 2014 Correspondence Constituted a Charge

Simko and the EEOC both contend that the District Court should have concluded that the November 2014 correspondence—which was sent within 300 days of Simko's final discharge—itself constituted a timely EEOC charge that may serve as

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appreciate the EEOC's candor, but its acceptance of some degree of fault does not alter our analysis.

the basis for his federal lawsuit. They urge that, despite its informal appearance, Simko's handwritten correspondence included all of the required contents of an administrative charge. But as U.S. Steel points out, Simko never raised this issue before the District Court. In its opinion, the District Court *sua sponte* commented on the handwritten letter, stating that it "d[id] not constitute a 'charge' and Simko d[id] not contend otherwise." *Simko v. United States Steel Corp.*, No. CV 19-765, 2019 WL 6828421, at *3 (W.D. Pa. Dec. 13, 2019). Simko and the EEOC now, for the first time, contend otherwise.

It is well-established that arguments raised for the first time on appeal are not properly preserved for appellate review. *See Del. Nation v. Pennsylvania*, 446 F.3d 410, 416 (3d Cir. 2006); *see also Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 249 (3d Cir. 2013) ("We generally refuse to consider issues that the parties have not raised below."). The general rule requiring preservation "serves several important judicial interests," such as protecting the parties from unfair surprise, "preventing district courts from being reversed on grounds that were never urged or argued before [them]," and promoting finality and the conservation of judicial resources. *Tri-M Grp., LLC v. Sharp*, 638 F.3d 406, 416 (3d Cir. 2011) (alteration in original) (quoting *Webb v. City of Phila.*, 562 F.3d 256, 263 (3d Cir. 2009)).

As a preliminary matter, the District Court's cursory statement that Simko's handwritten correspondence did not constitute a charge is, alone, insufficient to preserve that issue for our review. U.S. Steel contends that, by failing to raise that issue

before the District Court, Simko waived any argument to the contrary. Although we agree with U.S. Steel that Simko did not preserve his argument on appeal, we think that, under our most recent precedent, Simko's failure is better characterized as "forfeiture," not "waiver." *See Barna v. Bd. of Sch. Directors of Panther Valley Sch. Dist.,* 877 F.3d 136, 146–47 (3d Cir. 2017). In *Barna*, we distinguished the two terms, noting that "[t]he effect of failing to preserve an argument will depend upon whether the argument has been forfeited or waived." *Id.* at 146. Waiver is the intentional abandonment of an argument. *Id.* at 147. In contrast, forfeiture "'is the failure to make the timely assertion of a right,' an example of which is an inadvertent failure to raise an argument." *Id.* at 147 (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). Because Simko's failure to argue before the District Court that the November 2014 correspondence qualified as a charge appears inadvertent, we treat that argument as forfeited. *See PDX N., Inc. v. Comm'r N.J. Dep't of Labor & Workforce Dev.*, 978 F.3d 871, 886 (3d Cir. 2020).

While a court may not entertain waived arguments on appeal, it may review forfeited arguments, but under only "truly 'exceptional circumstances.'" *Barna*, 877 F.3d at 147 (quoting *Brown v. Philip Morris Inc.*, 250 F.3d 789, 799 (3d Cir. 2001)). These circumstances are "very 'limited,'" *id.* (quoting *Webb*, 562 F.3d at 263), and may include cases where "the public interest requires that the issue[s] be heard or when a manifest injustice would result from the failure to consider the new issue[s]," *United States v. Anthony Dell'Aquilla, Enters. &*

Subsidiaries, 150 F.3d 329, 335 (3d Cir. 1998) (alterations in original) (quoting *Altman v. Altman*, 653 F.2d 755, 758 (3d Cir. 1981)). Here, Simko offers no reasons for his failure to urge before the District Court that his handwritten correspondence and accompanying documents qualified as a charge. Moreover, there is no public interest implicated or manifest injustice, particularly because Simko knew how to file a formal EEOC charge, as he had done in May 2013. In short, there are no exceptional circumstances justifying departure from our rule requiring preservation. Accordingly, we will not address this issue.

B. Nor Will We Address the District Court's Ruling on Equitable Tolling

In its amicus brief, the EEOC alone urges that the District Court erred by concluding that Simko was not entitled to equitable tolling of the 300-day statutory filing period. Specifically, the EEOC contends that, if the November 2014 correspondence did not qualify as an administrative charge, the EEOC's failure to promptly convert it to a charge should warrant equitable tolling of the statutory deadline for Simko. Although Simko litigated the equitable tolling issue before the District Court, he did not present it to us as an issue on appeal. We have held that the role of an amicus brief is to "elaborate[] issues properly presented by the parties," not "inject[] new issues into an appeal." *N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 382 n.2 (3d Cir. 2012) (quoting *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 445 (2d Cir. 2001)). Thus, "[a]n amicus normally 'cannot expand the scope of an appeal with issues not presented by the parties

on appeal,' at least not 'in cases where the parties are competently represented by counsel.'" *Hartig Drug Co. Inc. v. Senju Pharm. Co.*, 836 F.3d 261, 267 (3d Cir. 2016) (citation omitted) (quoting *Nuveen Mun. Tr. ex rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C.*, 692 F.3d 283, 300 n.10 (3d Cir. 2012)). By raising the equitable tolling issue, the EEOC attempts to resurrect an issue that Simko abandoned on appeal. Accordingly, we will not reconsider the District Court's conclusion that equitable tolling was not warranted.

C. Simko's Original EEOC Charge Did Not Encompass His Subsequent Retaliatory Discharge Claim

Simko's main argument on appeal is that he was not required to file a timely retaliation charge because his retaliation claim was encompassed within his still-pending original charge of disability discrimination. U.S. Steel responds, as it did before the District Court, that Simko's retaliation claim cannot be bootstrapped to the original charge because the two sets of allegations are sufficiently distinct, and under the analysis required by our precedent, Simko should have filed a separate charge for the retaliation claim. We agree with U.S. Steel on this issue.

As noted above, the ADA requires that a plaintiff administratively exhaust all claims before seeking relief in federal court. *Burgh v. Borough Council of Borough of Montrose*, 251 F.3d 465, 469 (3d Cir. 2001); 42 U.S.C. §§ 12117(a), 2000e-5(b). These pre-suit requirements, which include the step of filing a charge and receiving a right-to-sue letter from the EEOC, are "essential parts of the statutory plan,

designed to correct discrimination through administrative conciliation and persuasion if possible, rather than by formal court action." *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 398 (3d Cir. 1976); *see also Anjelino v. New York Times Co.*, 200 F.3d 73, 94 (3d Cir. 1999) ("[T]he purpose of the filing requirement is to enable the EEOC to investigate and, if cause is found, to attempt to use informal means to reach a settlement of the dispute."). The Supreme Court has also emphasized that a fundamental aim of the pre-suit requirements is to "give prompt notice to the employer" and "encourage the prompt processing of all charges of employment discrimination." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109, 121 (2002) (internal quotation marks omitted). The exhaustion requirement thus advances the remedial purposes of the ADA.

The "relevant test" for determining whether a later claim needs to be exhausted despite the filing of a previous charge is a two-pronged inquiry into whether "the acts alleged in the subsequent . . . suit are fairly within the scope of [1] the prior EEOC complaint, or [2] the investigation arising therefrom."[7] *Waiters v. Parsons*, 729 F.2d 233, 237

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[7] The *Waiters* inquiry is a disjunctive test—that is, a plaintiff need not file an additional EEOC charge if the allegations of the civil complaint are fairly within the scope of (1) the pending EEOC charge *or* (2) the investigation arising from the charge.

As Simko notes, however, on at least two occasions, we have treated the inquiry as being conjunctive. For example, in *Hicks v. ABT Associates, Inc.*, we determined that a

(3d Cir. 1984); *see also Robinson v. Dalton*, 107 F.3d 1018, 1025 (3d Cir. 1997) (identifying the "two circumstances in which events subsequent to a filed [EEOC] complaint may be considered as fairly encompassed within that complaint").

The exhaustion inquiry is highly fact specific. Under our precedent, the Court must "examine carefully the prior pending EEOC complaint and the unexhausted claim on a case-by-case basis before determining that a second complaint need not have

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> finding that the EEOC would have discovered a claim for sex discrimination in the course of a reasonable investigation does not itself meet the standard of *Ostapowicz* [and satisfy the exhaustion requirement]. This evidence merely rebuts the presumption that the scope of the actual investigation is "what can reasonably be expected to grow out of the charge of discrimination." 541 F.2d at 398–99. *The district court must further find* that the sex discrimination claims which would have been uncovered were reasonably within the scope of the charge filed with the EEOC.

572 F.2d 960, 967 (3d Cir. 1978) (emphasis added). In *Howze v. Jones & Laughlin Steel Corp.*, which was decided less than a year after *Waiters*, we summarized *Hicks* as holding that a "district court may assume jurisdiction over additional charges if they are reasonably within the scope of the complainant's original charges *and* if a reasonable investigation by the EEOC would have encompassed the new claims." 750 F.2d 1208, 1212 (3d Cir. 1984) (emphasis added). The *Howze* court notably failed to mention *Waiters*.

Notwithstanding this minor conflict of authority, since *Howze* we have consistently applied the disjunctive formulation of the exhaustion test set forth in *Waiters*. *See Antol v. Perry*, 82 F.3d 1291, 1295 (3d Cir. 1996); *Robinson v. Dalton*, 107 F.3d 1018, 1025 (3d Cir. 1997); *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 163 (3d Cir. 2013). Accordingly, the disjunctive test governs our analysis in this case.

been filed." *Robinson*, 107 F.3d at 1024. Simko and the EEOC urge that we should adopt the broad per se rule followed by some courts of appeals that treat post-charge claims of retaliation as exhausted when they arise during the pendency of a prior charge. *See, e.g.*, *Duplan v. City of New York*, 888 F.3d 612, 622 (2d Cir. 2018); *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992); *Gupta v. E. Texas State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981). We have said, however, that such a per se rule, "whether express or applied in practice, would eviscerate the remedial purposes of the exhaustion requirement." *Robinson*, 107 F.3d at 1024. We have already rejected this per se argument and will adhere to our precedent that requires a careful examination of the nature of the relevant claims. *See Waiters*, 729 F.2d at 237 n.10 (declining to adopt what the Court characterized as the Fifth Circuit's rule that "all claims of 'retaliation' against a discrimination victim based on the filing of an EEOC complaint are 'ancillary' to the original complaint"); *Robinson*, 107 F.3d at 1024 (also rejecting a per se rule that post-charge retaliation claims "necessarily fall[] within the scope of . . . [previously filed, still-pending EEOC] complaints").[8]

Even interpreting Simko's charge liberally under our fact-specific approach, the retaliation claim based

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[8] Similarly, Simko urges that his retaliation claim is sufficiently related to his original charge of disability discrimination under our case-by-case approach because, by definition, retaliation requires a "predicate action protected by the ADA," and his original charge "was a prerequisite to the existence of the retaliation claim." Appellant's Br. 62. Because such an argument merely restyles the same per se rule that we have previously rejected, we also reject it here.

on his August 2014 termination does not fall fairly within the scope of either (1) his original charge of disability discrimination based on his being denied the Spellman position in August 2012, or (2) the EEOC investigation arising therefrom. *See Waiters*, 729 F.2d at 235; *see also Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 163 (3d Cir. 2013); *Robinson*, 107 F.3d at 1025; *Antol v. Perry*, 82 F.3d 1291, 1295 (3d Cir. 1996). We address both prongs of the analysis in turn.

Simko concedes that his retaliation claim fails the first prong of the exhaustion analysis. Simply put, no allegations of retaliation appeared on the face of his original EEOC charge. Simko failed to check the box indicating a claim of retaliation and his narrative contained no reference to conduct that could be construed as retaliatory. As U.S. Steel argues, "the legal theories in the original charge and amended charge are not the same, the incidents are not the same, the individuals involved are not the same, the work locations are not the same, and the time-periods are not the same." Appellee's Br. 20–21. Accordingly, Simko's retaliatory discharge claim does not fall fairly within the scope of his EEOC charge.

The central dispute in this case, however, concerns the second prong of the analysis—whether Simko's claim of retaliation falls "fairly within . . . the investigation arising" from the initial EEOC charge. *Waiters*, 729 F.2d at 237. At this step of the analysis, we consider "the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Ostapowicz*, 541 F.2d at 398–99. Simko and the EEOC primarily argue that this prong may be satisfied simply based on the fact

that the EEOC *actually did* investigate Simko's retaliatory discharge claim, albeit more than two years after he filed his initial charge.[9] To the contrary, our precedent emphasizes that the Court must look only at the scope of the EEOC investigation that would reasonably grow out of, or arise from, the initial charge filed with the EEOC, "irrespective of the actual content of the Commission's investigation." *Hicks v. ABT Assocs., Inc.*, 572 F.2d 960, 966 (3d Cir. 1978); *see also Howze v. Jones & Laughlin Steel Corp.*, 750 F.2d 1208, 1212 (3d Cir. 1984) (holding that "[w]hether the actual EEOC investigation uncovered any evidence of retaliation is of no consequence" in determining whether a new claim of retaliation is encompassed in the original EEOC charge). As such, we agree with the District Court's characterization of our exhaustion analysis as "objective" rather than "subjective." *Simko*, 2019 WL 6828421, at *7.

Given the fact-specific nature of the exhaustion inquiry, our precedent in this area—*Hicks*, *Waiters*, *Antol*, and *Robinson*—provides useful guidance. As these cases demonstrate, when determining whether a claim fairly or reasonably falls within the investigation arising from a charge, courts consider

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[9] Simko pushes this argument one step further: He urges that our case-by-case analysis and precedent are not even applicable in this case because the EEOC ultimately investigated his retaliation claim and issued a right-to-sue letter based on that claim. He contends that our fact-specific exhaustion inquiry instead applies only in cases where either (1) the claim at issue was not presented to the EEOC or (2) the EEOC failed to investigate the claim. We disagree. No authority from our Court supports such a strict limitation on the exhaustion analysis.

(1) whether the claim arises from the same set of facts that support the original charge and (2) whether the claim advances the same theory of discrimination as the original charge.

In *Hicks*, the plaintiff filed an EEOC charge alleging only race discrimination, but later sued asserting, *inter alia*, claims of both race discrimination and sex discrimination. 572 F.2d at 962–63. The EEOC investigated the race discrimination claim but failed to investigate sex discrimination. *Id.* Nevertheless, we held that the actual EEOC investigation did not necessarily set the "outer limit" of the scope of the civil complaint. *Id.* at 966. Such a limitation would unfairly penalize a plaintiff for an "unreasonably narrow or improperly conducted" investigation by the EEOC. *Id.* Thus, the issue was whether a reasonable investigation would include a sex discrimination claim.

We noted that certain instances of sex discrimination alleged in Hicks's civil complaint arose from the same conduct that supported his race discrimination claims and that there was evidence that the EEOC improperly failed to contact Hicks to discuss his charge after it was filed. *Id.* On those grounds, we remanded to the district court to determine "whether the . . . investigation reasonably would have included examination of the sex discrimination claims," such that those claims did not need to have been exhausted by filing a separate charge. *Id.* at 966, 970.

Waiters involved an investigation of retaliatory conduct that went beyond the four corners of the EEOC charge. Waiters filed a charge with the EEOC asserting a claim of sex discrimination under Title

VII against her employer, and over a year later she filed a second charge alleging that the employer retaliated against her for having submitted the earlier complaint. *Waiters*, 729 F.2d at 235. After she filed the second charge, Waiters was discharged. *Id.* at 236. Waiters did not file a new charge based on her termination. *Id.* She then brought suit in federal court alleging that she was discharged in retaliation for exercising her rights under Title VII. *Id.*

The district court concluded that Waiters should have filed another charge with the EEOC after she was discharged and dismissed Waiters's complaint for failure to exhaust administrative remedies. *Id.* We reversed. While Waiters's second EEOC charge was limited to a specific instance of retaliation, the EEOC investigation extended beyond that individual allegation and uncovered a subsequent pattern of retaliatory harassment by different officials. *Id.* at 235 n.2, 238. Although the post-charge retaliatory conduct involved different officials and episodes of misconduct that occurred over thirty months later, we held that "the core grievance—retaliation—is the same and, at all events, it is clear that the allegations of the appellant's complaint fall within the scope of the [EEOC's] investigation of the charges contained in the . . . [second EEOC] complaint." *Id.* at 238. Thus, Waiters did not need to file a separate charge regarding her new retaliatory discharge claim. *Id.*

We reached a different conclusion, on different facts, in *Antol v. Perry*. In that case, Antol filed a federal lawsuit alleging both disability discrimination under the Rehabilitation Act, 29 U.S.C. § 791 *et seq.*, and gender discrimination under Title VII for failure to hire. *Antol*, 82 F.3d at 1293. Although Antol

exhausted his remedies with respect to his claim of disability discrimination, he never raised allegations of gender discrimination at any point in the administrative proceedings and the EEOC did not investigate gender discrimination. *Id.* at 1295. We concluded that "[t]he specifics of [Antol's] disability discrimination charge d[id] not fairly encompass a claim for gender discrimination merely because investigation would reveal that Antol is a man and the two employees who received the positions [were] women." *Id.* at 1296. In addition, we determined that the EEOC investigation properly focused on "the gravamen of Antol's complaint—disability discrimination" and that neither the EEOC nor the employer had been put on notice of the new gender discrimination claim. *Id.* Accordingly, Antol's failure to exhaust administrative remedies for his gender discrimination claim barred that claim. *Id.*

Robinson is our most recent precedential opinion addressing the exhaustion of claims arising from post-charge events. There, we applied our fact-specific exhaustion inquiry to a post-charge claim of retaliatory discharge. *Robinson*, 107 F.3d at 1024. Robinson filed three EEOC charges alleging racial discrimination and retaliation against his employer, the Navy, for denying him sick leave, placing him on unauthorized leave status, and issuing him an "indebtedness letter" for taking unapproved sick leave and creating an asbestos hazard. *Id.* at 1019, 1025. After Robinson filed these charges, the Navy terminated his employment, pointing to his excessive unauthorized absences and the asbestos hazard—the subject matter of his prior charges—as the basis for his discharge. *Id.* at 1019–20. Robinson then brought

suit in federal court claiming that he was discharged in retaliation for filing his three charges. *Id.* at 1020. He did not file an additional charge alleging retaliatory discharge and the EEOC did not investigate his termination. *Id.* at 1025. The district court dismissed Robinson's complaint for failure to exhaust administrative remedies. *Id.* at 1020. On appeal, we noted that the district court had failed to examine the scope of the EEOC's investigation, and—as in *Hicks*—we remanded to determine whether a reasonable investigation of Robinson's charges would have included his retaliatory discharge allegation. *Id.* at 1026.

We draw several principles from these precedents. Most importantly, the original charge is the touchstone of our exhaustion analysis. *See, e.g.*, *Antol*, 82 F.3d at 1296 (focusing on the "specifics of . . . [the] charge" in determining whether a new claim is encompassed by the charge). First, we closely examine the original charge's contents to determine the reasonable scope of the EEOC investigation that would likely occur. *See Robinson*, 107 F.3d at 1024. Second, we parse the later claim and determine whether its allegations would be covered in that reasonable investigation. *See Hicks*, 572 F.2d at 966. At bottom, we must compare the two sets of allegations and evaluate whether they are sufficiently related such that a reasonable investigation of the original charge would address the subsequent, unexhausted claims. In comparing the two sets of allegations, we look for factual similarities or connections between the events described in the claims, the actors involved, and the nature of the employer conduct at issue. *See id.* at 965 (noting that

some instances of sex discrimination alleged in the civil complaint "arise from the same acts which support claims for race discrimination" described in the underlying charge). Such factual overlap alone, however, does not guarantee that the new allegations are encompassed by the original charge if they do not fall within the "gravamen" of the initial charge. *See Antol*, 82 F.3d at 1296 (rejecting the male plaintiff's attempt to recharacterize his disability discrimination claim for failure-to-promote as a gender discrimination claim merely on the ground that two women secured positions over him). But even if we find no factual nexus, we may also consider whether the two sets of allegations advance the same theory of discrimination, as in *Waiters*. *See* 729 F.2d at 238.

With these principles in mind, we turn to the fact pattern presented here. Unlike in *Waiters*, the additional allegations that the EEOC investigated after it received the November 2014 correspondence were only tenuously related to the substance of the original charge. Simko's original EEOC charge was based on the Transportation Department's failure to accommodate his hearing disability and its alleged discrimination against him by its refusal to approve him for the Spellman position in August 2012.[10] By

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[10] As the District Court noted, the fact that Simko's original charge of disability discrimination also alleged that his "Walking Boss" made a discriminatory comment in November 2012 about his hearing impairment does not sufficiently expand the effective scope of the original charge to include his later retaliation claim. That specific allegation of disability discrimination is still too tenuously related in time and substance to Simko's retaliatory discharge claim.

contrast, the retaliation claim that Simko later filed in the District Court alleges that his discharge from the Blast Furnace Department in August 2014 was in retaliation for his filing of the original discrimination charge.

The original EEOC charge and Simko's civil complaint thus address discrete adverse employment actions that occurred approximately two years apart and involved different supervisors in different departments. Under these facts, the scope of a reasonable investigation arising out of Simko's initial charge would certainly include an inquiry into whether Simko was qualified for the Spellman position, U.S. Steel's reasons for passing him over, and identification of the person who secured the position and why he or she was chosen. While such an investigation could also inquire into whether any other adverse actions were taken against him relating to his disability or his having filed a charge, a reasonable investigation in this case would not have included an inquiry into Simko's post-charge firing. Simko's allegations of retaliation are too remote in time and substantively distinct from the allegations of disability discrimination for a reasonable EEOC investigation based on the original charge to encompass the later events.[11] And,

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[11] Our dissenting colleague says that retaliation charges are intrinsically related to previous charges of discrimination. We do not disagree with this as a general proposition, but the allegation that an adverse employment action occurred in retaliation for the filing of an initial EEOC charge does not necessarily mean that "a close nexus" of supporting facts, *Hicks*, 572 F.2d at 967, or a common "core grievance," *Waiters*, 729 F.2d at 238, exist. We have only held that unexhausted claims of retaliatory discharge fall within the scope of the investigation

importantly, the original charge and complaint allege different types of discrimination—in one, disability discrimination and failure to accommodate and in the other, retaliation. Absent "a close nexus" of supporting facts, *Hicks*, 572 F.2d at 967, or a common "core grievance," *Waiters*, 729 F.2d at 238, we conclude that a reasonable investigation of Simko's original charge of disability discrimination would not unearth facts about his allegations of retaliation nearly two years later.

Our dissenting colleague cites the appropriate test repeatedly: If discriminatory acts occur after a plaintiff files his EEOC charge, he need not file an additional charge if the new allegations are "fairly [or reasonably] within the scope of . . . the investigation arising" out of the initial charge. *Waiters*, 729 F.2d at 237. As the dissent recognizes, in conducting this inquiry, we ask whether the new claim should "reasonably [have] be[en] expected to grow out of the [initial] charge." *Ostapowicz*, 541 F.2d at 399. However, the dissent fails to consider the facts in light of the test. As we have done in the other cases applying our exhaustion analysis, we must look at the facts as they are alleged in the charge and the civil complaint. And the facts here are unique.

What was the initial charge? Here, Simko claimed that U.S. Steel denied him a reasonable

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reasonably arising out of the original claim when the original claim included "the same retaliatory intent inherent in the [subsequent] retaliatory discharge claim." *Robinson*, 107 F.3d at 1026; *see also Waiters*, 729 F.2d at 238 ("[T]he core grievance—retaliation—is the same."). We will not expand that exception to the exhaustion requirement to cover such tenuously related conduct as in this case.

accommodation for his hearing disability and passed him over for a job because of that same disability. The initial charge included no additional instances of unlawful discriminatory treatment, other than an allegation that some other employees made "negative comments" about Simko's hearing impairment. App. 34. Unlike the plaintiff in *Hicks*, Simko did not later allege a different theory of discrimination based on some of the same underlying acts that supported his initial theory of discrimination. And unlike in *Waiters*, Simko's initial charge of discrimination was not followed by subsequent instances of the same type of unlawful treatment. As previously discussed, our exhaustion analysis is tied to the substance of Simko's only timely-filed claim in this case: that he did not receive a reasonable accommodation and was denied the Spellman job due to his disability.

The only other operative fact, namely Simko's discharge, came to light over seventeen months after he submitted the initial charge, when he alerted the EEOC that he was fired in retaliation for filing the charge. But, would the allegedly retaliatory firing have been included in an investigation that could "reasonably be . . . expected to grow" out of the facts surrounding his original charge of disability discrimination, approximately two years prior? *Ostapowicz*, 541 F.2d at 399. There is no basis in fact or law for an answer in the affirmative. As we noted above, the scope of a reasonable investigation into Simko's being passed over for a job based on his disability would have involved a limited inquiry. If we were to say that his later claim of retaliation was encompassed by his—however distantly related—initial charge of disability discrimination, we would

be establishing a de facto per se rule, contrary to our holdings in *Waiters*, 729 F.2d at 237 n.10, and *Robinson*, 107 F.3d at 1024.

The dissent urges that we should conclude Simko's post-charge retaliation claim was encompassed in his original charge because his retaliation claim is strongly "tethered" to his initial charge of disability discrimination and failure to accommodate. Dissent Op. 15. We reject this conclusory assertion. As relevant here, a "tether" actually exists only when the allegations in the later charge would fall within the reasonable scope of the investigation into the *allegations of the original charge*. Simko's situation fails that test. The dissent glosses over the differences between the two very different types of allegations in the initial charge and the civil complaint and instead focuses on the fact that the EEOC actually investigated and attempted to conciliate Simko's retaliation claim. Those ex-post facts do not determine the reasonable scope of an EEOC investigation.

Even if our exhaustion inquiry turned on the actual—rather than reasonable—scope of investigation arising from a charge, Simko's retaliation claim should still be dismissed. That is because the investigation in this case did not actually "aris[e]" from, *Waiters*, 729 F.2d at 237, or "grow out of," *Hicks*, 572 F.2d at 967, the underlying discrimination charge. Critically, the EEOC failed to investigate Simko's original charge, and during the approximately thirty-month delay between the filing of his original charge and the EEOC investigator's response to his November 2014 correspondence, he experienced a change in circumstances that formed

the basis of a new, distinct claim. It was due only to that extended delay and Simko's handwritten November 2014 correspondence that the EEOC learned of, and was able to investigate, Simko's new allegations while his original charge was still pending.

Thus, the EEOC investigation did not actually grow out of the original charge. Instead, the investigation arose from Simko's handwritten correspondence. After apparently taking no investigative action for over two years following its receipt of the original 2013 charge, the EEOC commenced its investigation only after an investigator read Simko's correspondence and sent Simko a letter inquiring about his case. Significantly, that letter—dated November 23, 2015, over a year after Simko's November 2014 correspondence—referenced only Simko's retaliation allegations, further demonstrating that the EEOC acted on the basis of the November 2014 correspondence, not his original charge. As we noted above, the EEOC file included a comment that an amended charge was to follow, "including retaliatory discharge." App. 83. That amended charge, however, was not timely filed.

Simko and the EEOC nevertheless urge that because the EEOC ultimately did investigate the retaliatory discharge claim, such an investigation must have been "reasonable," rendering it unnecessary to file an additional timely charge. We disagree.

As the District Court observed, this case does not involve an EEOC investigation that was unduly narrow, but rather, one that extended beyond the face of the operative EEOC charge. Contrary to

Simko and the EEOC's arguments, however, we analyze claims *excluded* from an EEOC investigation in the same way that we analyze claims *included* in the investigation. Our focus remains on the investigation that can "reasonably be expected to grow out of the charge." *Ostapowicz*, 541 F.2d at 399. This principle applies equally in cases where the EEOC failed to investigate a claim, *see, e.g.*, *Robinson*, 107 F.3d at 1025; *Hicks*, 572 F.2d at 966, and cases where the EEOC broadened its investigation to cover claims not included in the charge, *see Waiters*, 729 F.2d at 238. Holding otherwise—that is, treating all investigated claims as exhausted—would create a one-way ratchet. The EEOC's *choice to investigate* certain employer conduct would set the bare minimum scope of a civil complaint while its *failure to investigate* other conduct would not restrict the "outer limit" of the complaint, *Hicks*, 572 F.2d at 966. Such a rule would undermine the remedial aims of the pre-suit filing requirements by permitting a charging party to "greatly expand an investigation simply by alleging new and different facts when he was contacted by the [EEOC] following his charge." *Id.* at 967. Simko's November 2014 correspondence did just that—it introduced new allegations of retaliation based on facts distinct from those alleged in his original charge.

Simko and the EEOC's other arguments that his retaliatory discharge claim fell within the scope of a reasonable EEOC investigation are unpersuasive. They both contend that EEOC investigations are entitled to a presumption of regularity and that, in essence, we should "assume that the EEOC would not

expend time or resources investigating matters unrelated to a pending charge." EEOC's Br. 24; *see also Hicks*, 572 F.2d at 966. In support of this position, they point to EEOC internal policies, reflected in the EEOC's Compliance Manual, which govern the scope of investigations and the circumstances in which the EEOC may broaden an investigation. For example, these policies direct investigators to remain alert to evidence of retaliation during their investigations, inform their supervisors in case such evidence surfaces, and notify the employer that "the scope may be expanded or limited based on information received during the investigation." EEOC Compl. Man. § 22.3, Scope of Investigation, 2006 WL 4673367; *see also* EEOC Compl. Man. § 2.8, Charges Warranting Priority Handling, 2006 WL 4672924; EEOC Compl. Man. § 13.1, Litigation for Temporary or Preliminary Relief: Introduction, 2006 WL 4673012.

In light of these practices and the presumption of investigative regularity, Simko and the EEOC urge that it was reasonable for the EEOC to broaden the investigation beyond the four corners of the original charge and that Simko's retaliation claim therefore satisfies the second prong of the exhaustion inquiry. We reject this argument on two grounds. First, a rebuttable presumption of regularity does not foreclose judicial review of the scope of EEOC investigations, as Simko argues. *See, e.g.*, *Robinson,* 107 F.3d at 1026 (remanding to the district court to "evaluate the reasonableness of the decision not to investigate"); *Antol*, 82 F.3d at 1296 (holding that the investigation "quite properly" focused on Antol's disability discrimination claim). Here, the EEOC's

inaction for over two years on Simko's original charge is sufficient to rebut the presumption that its subsequent investigation of Simko's charge was regular or reasonable.[12]

Second, the EEOC Compliance Manual does not persuade us that a reasonable investigation of the original charge in this case would have included the post-charge retaliation allegations. We do not question the EEOC's policy that officials prioritize retaliation claims or inquire about possible retaliation while investigating a discrimination charge. Nor do we question that the EEOC often changes the scope of investigations based on the

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[12] We recognize that limited resources and the significant volume of charges filed with the EEOC each year make some amount of administrative delay inevitable. For example, in Fiscal Year 2019 alone, the EEOC received 72,675 charges of workplace discrimination. *See* Press Release, U.S. Equal Employment Opportunity Commission*, EEOC Releases Fiscal Year 2019 Enforcement and Litigation Data* (Jan. 24, 2020), https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2019-enforcement-and-litigation-data (last visited Mar. 26, 2021).

Nevertheless, two points of reference underscore that the EEOC's delay in this case was out of the ordinary. First, under the ADA, a charging party must permit the EEOC a minimum of 180 days to investigate and attempt to resolve his dispute, only after which he may demand a right-to-sue letter and proceed to federal court. *See Occidental Life Ins. Co. of California v. EEOC*, 432 U.S. 355, 360–61 (1977); 42 U.S.C. § 2000e-5(f)(1). Second, according to the EEOC, the average length of an investigation is approximately ten months. *See* U.S. Equal Employment Opportunity Commission, *What You Can Expect After You File a Charge*, https://www.eeoc.gov/what-you-can-expect-after-you-file-charge (last visited Mar. 26, 2021).

In this case, the agency's delay in initiating its investigation alone far exceeded both of these time periods.

information it gathers during the investigative process. Nevertheless, the significant differences between Simko's original charge of disability discrimination and his later claim of retaliatory discharge foreclose the possibility that a reasonable investigation would have reached his post-charge claim, even in light of the EEOC's own practices.[13]

Relatedly, we do not give more weight to these arguments about exhaustion merely because the EEOC itself has taken the position that a reasonable investigation would have encompassed Simko's retaliation claim. Courts refuse to defer to the EEOC's litigation position when, as here, it is "not embodied in any formal issuance from the agency, such as a regulation, guideline, policy statement or administrative adjudication." *Gregory v. Ashcroft*, 501 U.S. 452, 485 n.3 (1991) (White, J., concurring); *see also Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's . . . litigating position would be entirely inappropriate."). Specifically, when a district court considers whether a plaintiff has exhausted his administrative remedies, "[n]o deference may be accorded the EEOC or the complaint investigator's finding with respect to the plaintiff's compliance." *McBride v. CITGO Petroleum Corp.*, 281 F.3d 1099, 1105–06 (10th Cir. 2002).

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[13] The dissent characterizes what occurred after the EEOC received the November 14 correspondence as the agency "expanding" its investigation into Simko's initial charge. Dissent Op. 12. The EEOC did no such thing. There never was a disability discrimination investigation in the first place. Instead, the EEOC embarked on a discrete investigation into retaliation based on the handwritten letter.

Accordingly, we do not defer to the EEOC on the question of administrative exhaustion.

Simko and the EEOC further assert that filing an additional EEOC charge was not necessary in this case because the purpose of the ADA statutory scheme was ultimately fulfilled: namely, the facilitation of an informal dispute resolution process between Simko and U.S. Steel. This argument, however, ignores two other fundamental aims of the exhaustion requirement: prompt notice to the employer and swift dispute resolution. *See, e.g.*, *Morgan*, 536 U.S. at 109 ("[B]y choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination." (internal quotation marks omitted)); 42 U.S.C. § 2000e-5(b), (e)(1) (requiring that the EEOC serve notice on the employer against whom the charge is made within 10 days of the filing of the charge). In addition to advancing those goals, the Supreme Court has emphasized that "strict adherence" to the ADA's procedural requirements "is the best guarantee of evenhanded administration of the law." *Morgan*, 536 U.S. at 108 (quoting *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980)).

While the EEOC did ultimately investigate and attempt pre-complaint conciliation between Simko and U.S. Steel, this process was significantly delayed. Critically, U.S. Steel did not receive any notice of Simko's retaliation claim until well after the end of the 300-day filing period. The parties agree that U.S. Steel was informally notified of Simko's retaliation allegations no earlier than November 23, 2015—the day of the EEOC investigator's note to Simko's file—

and no later than December 18, 2015—the day of the investigator's letter to Simko's counsel stating that he had informed U.S. Steel about the amended charge to be filed. This means that U.S. Steel did not receive even informal notice of the retaliatory discharge claim until some point between 161 days and 186 days after the filing period expired. Moreover, U.S. Steel was not formally put on notice of the retaliatory discharge claim until after Simko's counsel filed his amended EEOC charge on January 22, 2016, 221 days after the end of the filing period. Given this timeline, excusing the exhaustion requirement for Simko's retaliation claim would undercut the Supreme Court's emphasis on "strict adherence" to the pre-suit requirements and the statutory scheme's aims of notice and prompt dispute adjudication. *See Morgan*, 536 U.S. at 108–09.

We thus conclude that Simko's subsequent retaliation claim would not have fallen within the reasonable scope of an EEOC investigation into his original discrimination charge. Accordingly, his retaliation claim fails the second prong of the exhaustion inquiry.

While it is unfortunate that Simko did not timely amend his initial charge on his own and that the EEOC did not promptly react to his November 2014 correspondence, we cannot hold that the later claim is encompassed within the initial charge because Simko's retaliatory discharge claim does not fairly, or reasonably, fall within the scope of his original charge or an EEOC investigation that would arise therefrom. Thus, he needed to file an amended charge advancing that claim within the ADA's 300-day filing period. Because he failed to do so, the

District Court correctly dismissed his complaint for failure to exhaust administrative remedies.

IV. CONCLUSION

For the foregoing reasons, we will affirm the District Court's dismissal of Simko's complaint.

McKEE, Circuit Judge, concurring in part and dissenting in part.

A petitioner need not file a new formal charge with the Equal Employment Opportunity Commission if that charge is "within the scope of a prior EEOC complaint or the investigation which arose out of it."[1] I must respectfully dissent from the Majority opinion because the EEOC investigation of Simko's retaliation claim was reasonably within the scope of the investigation arising out of Simko's initial disability discrimination claim. Thus, Simko's retaliation claim related back to his earlier timely disability discrimination claim and the District Court erred in dismissing Simko's retaliation claim for failure to exhaust his administrative remedies.[2]

I.

In Pennsylvania, "a complainant has 300 days from the date of the adverse employment decision to

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[1] *Waiters v. Parsons*, 729 F.2d 233, 235 (3d Cir. 1984).

[2] I agree with my colleagues' decision to dismiss the first two claims raised by Simko and the EEOC. Simko's strongest argument would have been that his November 2014 letter to the EEOC should have been construed as a formal EEOC charge of retaliation. However, that argument has been forfeited because Simko did not raise it before the District Court. *See* Maj. Op. at 8–10. I agree with my colleagues that the District Court's cursory, *sua sponte* consideration of the issue—which simply noted that the letter did not constitute a charge and that Simko did not argue otherwise—is insufficient to preserve the issue. *Id.* at 9–10. We also cannot reach the EEOC's claim that the court should have equitably tolled the charge-filing period during the time after Simko sent his November 2014 letter to the EEOC because the claim was not included in Simko's notice of appeal. *See id.* at 10.

file a claim with the [EEOC]."[3] "The purpose of [the filing requirement] . . . is to afford the EEOC the opportunity to settle disputes through conference, conciliation, and persuasion, avoiding unnecessary action in court."[4]

If, after a petitioner files a claim, subsequent discriminatory acts occur, the petitioner does not need to file a new formal charge with the EEOC so long as the new allegations "fall[ ] within the scope of a prior EEOC complaint *or the investigation which arose out of it*."[5] This "includ[es] new acts which occurred during the pendency of proceedings before the Commission."[6] This is quite reasonable because "additional charges filed during the pendency of the administrative proceedings may fairly be considered explanations of the original charge and growing out of it."[7]

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[3] *Watson v. Eastman Kodak Co.*, 235 F.3d 851, 852 (3d Cir. 2000).

[4] *Antol v. Perry*, 82 F.3d 1291, 1296 (3d Cir. 1996).

[5] *Waiters*, 729 F.2d at 235 (emphasis added); *see also id.* ("Since we conclude that appellant's current claim falls within the scope of the prior investigation, and that appellant would be entitled to sue on the complaint that led to that investigation, appellant was free to bring this suit without further exhausting her administrative remedies.").

[6] *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 398–99 (3d Cir. 1976). *See also Robinson v. Dalton*, 107 F.3d 1018, 1025 (3d Cir. 1997) (describing that even where an investigation was "broadened by the EEOC" and included "events that occurred after the filing of the informal complaint," we concluded "there was nothing to be served by requiring [claimant] to file a second complaint").

[7] *Ostapowicz*, 541 F.2d at 399.

Moreover, we liberally construe the scope of an EEOC complaint when considering whether a subsequent claim falls within the ambit of an earlier claim: "In determining the content of the original complaint for purposes of applying [relation back], we keep in mind that charges are most often drafted by one who is not well versed in the art of legal description. Accordingly, the scope of the original charge should be liberally construed."[8] Indeed, that is precisely the situation here. The letter that led to the EEOC's eventual investigation was handwritten by Simko, a lay plaintiff with no legal training or experience. We have also previously concluded that where the petitioner "*attempted* to amend his [EEOC] charge,"[9] but failed to do so, he could still bring a civil action based on the charge that he attempted to include. Even a failed attempt to amend a charge "create[d] an excuse for the failure to file a[n amended] charge."[10]

We have established two factors to determine if a claim of discrimination relates back to a prior claim. We look to see whether the subsequent claim "(1) falls within the scope of a prior EEOC complaint, or (2) falls within the scope of the EEOC 'investigation which arose out of it.'"[11] The first inquiry is determined by the face of the complaint itself. To resolve the second inquiry, we look at the content and

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[8] *Hicks v. ABT Assocs., Inc.*, 572 F.2d 960, 965 (3d Cir. 1978).

[9] *Id.* at 964.

[10] *Id.*

[11] *Robinson*, 107 F.3d at 1025 (citing *Waiters*, 729 F.2d at 235).

results of the EEOC investigation to determine if the new claim should "reasonably [have] be[en] expected to grow out of the [initial] charge."[12]

Here, Simko timely filed a disability discrimination claim against U.S. Steel.[13] While that claim was pending before the EEOC, he was fired.[14] He subsequently wrote to the EEOC detailing his belief that he was fired in retaliation for filing his initial discrimination claim. He wrote, "I believe anyone who familiarizes themself [sic] with the details of the case will clearly see it as retaliation for filing charges with the EEOC."[15] The EEOC then expanded the disability discrimination investigation to include retaliation.[16] The EEOC notified U.S. Steel, investigated the claim, found evidence of retaliation, and attempted to conciliate the claim.[17]

Simko concedes that his initial complaint alleged only disability discrimination and did not include a

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[12] *Ostapowicz*, 541 F.2d at 399. Some claims that were not presented to the EEOC at all may still proceed in District Court because we have held that the actual EEOC investigation does not necessarily "set[] the outer limit to the scope of the civil complaint." *Hicks*, 572 F.2d at 966. We have allowed some of these unexhausted claims to proceed so as not to punish the claimant for a failure of the EEOC. We have concluded that "[i]f the EEOC's investigation is unreasonably narrow or improperly conducted, the plaintiff should not be barred from his statutory right to a civil action." *Id.*

[13] App. 33.

[14] App. 25.

[15] App. 80–81.

[16] App. 84.

[17] App. 106; App. 112–17.

charge of retaliation.[18] Accordingly, we must determine whether the retaliation claim could "reasonably [have] be[en] expected to grow out of the [initial disability discrimination] charge."[19] As I explain below, a number of factors govern that reasonableness inquiry. These include the normal course of EEOC investigations, whether the petitioner attempted to amend the claim to include the additional charge, and whether the claim was actually investigated.

My colleagues' analysis of the reasonableness of the scope of the EEOC's investigation is guided by four cases: *Hicks*, *Waiters*, *Antol*, and *Robinson*.[20] In each of these cases, we considered whether claims that petitioners brought for the first time before the District Court (and that had not been filed with the EEOC) could relate back to earlier discrimination claims that each petitioner had properly filed with the EEOC. Each petitioner in those cases claimed that the new charge s/he filed related back to the earlier-filed charge. Below, I discuss some the principles that we can take from these cases. While these cases are instructive, I realize that none of them addressed the issue before us now—whether an EEOC investigation was *too broad* and thus unreasonable such that an actually investigated claim should be prevented from proceeding in District Court. I do not believe that the facts here justify

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[18] This, however, of course is true with any charge alleging retaliation for filing a substantive discrimination charge because the discrimination charge must predate the retaliation.

[19] *Ostapowicz*, 541 F.2d at 399.

[20] See Maj. Op. at 15–18.

concluding that the EEOC's investigation was unreasonably broad.

Indeed, we have cautioned that, in conducting an inquiry into reasonableness, "[t]he individual employee should not be penalized by the improper conduct of the Commission."[21] We have also reaffirmed the "sound and established policy that procedural technicalities should not be used to prevent Title VII claims from being decided on the merits."[22] In short, errors by the EEOC should not affect a claimant's ability to pursue his or her claim.

II.

The petitioner in *Hicks* brought a claim before the District Court alleging race and sex discrimination even though he had only filed a race discrimination charge with the EEOC. The District Court concluded that it did not have "jurisdiction over Hicks's claims of sex discrimination because a charge of such discrimination had not been filed with the EEOC."[23] We reversed. We held that Hicks' failure to formally file a sex discrimination charge with the EEOC did not "preclude[] jurisdiction over the sex discrimination claims."[24] That holding was based upon two considerations. First, there was evidence that Hicks "reasonably attempted to amend his charge to include sex discrimination" but the

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[21] *Hicks*, 572 F.2d at 964–65.

[22] *Seredinski v. Clifton Precision Prods. Co.*, 776 F.2d 56, 65 (3d Cir. 1985) (quoting *Gooding v. Warner-Lambert Co.*, 744 F.2d 354, 358–59 (3d Cir. 1984)).

[23] *Hicks*, 572 F.2d at 963.

[24] *Id.* at 964.

EEOC erred in failing to amend the claim.[25] This, we found, "create[d] an excuse for the failure to file a sex discrimination charge"[26] regardless of whether Hicks attempted to amend the charge within the statutory filing period.[27]

Second, we concluded that there was a genuine issue of material fact as to whether a properly conducted EEOC investigation would have included an inquiry into sex discrimination. Hicks alleged that he was not contacted by the investigator until the conclusion of the investigation.[28] There was "sufficient evidence to raise a fair inference that Hicks would have told the EEOC investigator that he believed that sex discrimination was a cause of the disparate treatment alleged in his charge" had he been contacted earlier.[29]

We concluded that if, on remand, the District Court found either that (1) "the EEOC improperly failed to accept an amendment to Hicks's charge which would have incorporated sex discrimination" or (2) "a reasonable investigation of the charge as filed would have encompassed the sex discrimination

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[25] *Id.*

[26] *Id.*

[27] *Id.* ("The record does not indicate whether the attempt to incorporate sex discrimination in the EEOC charge was made within the required 180-day statutory period. Our resolution of the amendment issue in this case does not depend on whether the amendment would have been filed within that time period.").

[28] *Id.* at 966.

[29] *Id.*

claims" we would have jurisdiction over the sex discrimination claim.[30]

As part of the inquiry into whether "the sex discrimination claims [] would have been uncovered" we noted that "there [wa]s a close nexus between the facts supporting the claims of race and sex discrimination,"[31] which increased the likelihood that they would have been uncovered. We also noted that "evidence of the investigatory practices of the agency" would help us "conclude whether a reasonable inquiry would have reached Hicks's allegations."[32]

The petitioner in *Waiters* filed a sex discrimination claim with the EEOC alleging that she had been passed over for a position in favor of a male applicant.[33] One year later, she filed a second claim with the EEOC alleging that her employer had retaliated against her for filing that claim a year earlier.[34] The EEOC investigated the claim and found that there was support for Waiters' allegations, but then the investigation was dropped: "no further action was taken by the EEOC, [the] claim was never finally adjudicated by the agency, and no right to sue letter ever issued."[35] Waiters continued to work at the

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[30] *Id.* at 967.

[31] *Id.*

[32] *Id.* In *Hicks* we noted that we did not have such evidence before us, so we could not consider whether the EEOC's investigatory practices supported an assertion of jurisdiction over the unexhausted claim. *Id.* Fortunately, as my colleagues note, we have the benefit of the EEOC's guidance here.

[33] *Waiters*, 729 F.2d at 235.

[34] *Id.*

[35] *Id.*

same employer, but in a different department on a different program. Approximately two years later, while working on the new program, she was fired.[36] Her employer alleged misconduct unrelated to the conduct that her prior retaliation claim was based upon.[37] Rather than filing another retaliation claim with the EEOC, she sued in District Court alleging that she had been fired in retaliation for filing her discrimination claims with the EEOC.[38]

The District Court dismissed her action based on her failure to file a second retaliation charge with the EEOC specifically related to her discharge. We again reversed. We held that she need not have filed another retaliation claim even though years had passed since her prior claim and "the allegedly discriminatory officials and acts [in her prior claim we]re different" than the officials and acts that were the subject of her retaliation claim filed in the District Court.[39] We held that even though the actors, acts, and departments were different, "[w]here discriminatory actions continue[d] after the filing of an EEOC complaint . . . the purposes of the statutory scheme [we]re not furthered by requiring the victim to file additional EEOC complaints."[40] Our reasoning rested upon two considerations. The "core grievance—retaliation—[wa]s the same" between Waiters' new and prior charges. And "it [wa]s clear that the allegations of the appellant's complaint f[e]ll

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[36] *Id.* at 236.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 238.

[40] *Id.* at 237.

within the scope of the [EEOC's] investigation of the charges."[41] In other words, we found it relevant that the EEOC had already actually investigated retaliation against Waiters.

The Majority focuses on two aspects of our decisions in *Hicks* and *Waiters*—the "close factual nexus" in *Hicks*, and the similarity of the substantive discrimination charges in *Waiters*—and concludes that one or both of these factors must be present in order for a subsequently filed claim to relate back.[42] But, as I discuss below, neither opinion made either factor a prerequisite, and in so concluding, the Majority ignores other considerations that we found relevant to the relation back analysis in those decisions.

Several principles, in addition to those discussed by the Majority, emerge from *Hicks* and *Waiters*. First, there are multiple ways in which a petitioner can demonstrate that an unexhausted claim is reasonably within the scope of an earlier-filed claim. As my colleagues recognize, a subsequent claim of discrimination or retaliation may reasonably relate back to an earlier-filed charge of discrimination if the filed and unfiled claims share a close factual nexus. But *Hicks* also establishes that "evidence of the investigatory practices of the agency" are relevant to our reasonableness determination.[43] Stated another way, evidence from the agency itself, such as EEOC guidance showing that a properly conducted EEOC investigation would or should have reached the

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[41] *Id.* at 238.

[42] *See* Maj. Op. at 20.

[43] *Hicks*, 572 F.2d at 967.

unexhausted claim, can help a petitioner establish that the unexhausted claim relates back to a properly filed claim.

In addition, as my colleagues note, we consider whether a prior and subsequent claim of discrimination share the same core grievance in determining if a subsequent claim relates back to the prior claim. But we also look to see whether the EEOC actually investigated the unexhausted claim. The fact that the EEOC's investigation of the charges include the substance of the unexhausted claim helps to establish that the claim reasonably fell within the scope of the prior complaint.[44] Finally, if a petitioner attempts to amend a charge and the EEOC erroneously fails to recognize the amendment, a petitioner may be excused from filing a new charge with the EEOC before bringing his or her claim before the District Court.[45]

Our holding today is inconsistent with our approach in *Hicks* and *Waiters.* Moreover, my colleagues overlook that we have not previously held that a claim that was actually investigated by the EEOC was not reasonably within the scope of the initial charge that gave rise to the investigation. Although I agree that we can review the reasonableness of a completed EEOC investigation, I do not think my colleagues give sufficient weight to

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[44] *Waiters*, 729 F.2d at 238 (concluding that the unexhausted claim was within the scope of the previous complaint in part because "it [wa]s clear that the allegations of the [District Court] complaint f[e]ll within the scope of the [EEOC's] investigation of the charges").

[45] *Hicks*, 572 F.2d at 967.

the fact that the EEOC actually investigated and attempted to conciliate Simko's retaliation claim in determining the reasonableness of that investigation. Given our analysis in *Hicks* and *Waiters*, I am persuaded that the investigation here was reasonable and the investigation's scope should not be viewed as unreasonable merely because of the delay that occurred.[46]

III.

Because "the EEOC has considerable expertise in the area of employment discrimination,"[47] I am not as

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[46] In other cases, we have emphasized the importance of the EEOC actually having investigated the claim at issue. For example, in *Ostapowicsz*, we found vital that "conciliation discussions and proposals . . . between the Commission and the employer" included the new charge that was at issue there. 541 F.2d at 399. We noted that had the new charge at issue not been included in the investigation and conciliation efforts, "there would be some force to the defendant's contention that Ostapowicz could not bring herself within the scope of the EEOC charge." *Id.* But because the new charge was included in the conciliation efforts, we allowed it to proceed. Similarly, in *Waiters*, we found it persuasive that "the allegations of the [] complaint f[e]ll within the scope of the [EEOC's] investigation of the charges." 729 F.2d at 238.

[47] *Chacko v. Patuxent Inst.*, 429 F.3d 505, 510 (4th Cir. 2005); *see also, e.g.*, *Butler v. West*, 164 F.3d 634, 642 (D.C. Cir. 1999) (The EEOC has "a measure of expertise and familiarity with employment discrimination disputes that federal judges cannot readily match."); *Muller Optical Co. v. EEOC,* 743 F.2d 380, 395 (6th Cir. 1984) ("[T]he EEOC has developed considerable expertise in the field of employment discrimination since Congress created it by the Civil Rights Act of 1964."); *Maskin v. Chromalloy Am. Corp.*, 1986 WL 4481, at *13 (E.D. Pa. Apr. 14, 1986) ("The EEOC has special expertise in investigating charges of discrimination, and its expertise should not be ignored.").

willing as my colleagues to brush aside the EEOC's own conclusion that it was reasonable to include the subsequent acts of retaliation in its investigation.

This is particularly true when we consider that we liberally construe claims for the purpose of relation back.[48] In addition, "[c]ourts have generally determined that the parameters of the civil action in the District Court are defined by the scope of the EEOC investigation . . . including new acts which occurred during the pendency of proceedings before the Commission."[49] It is also important to recall that we "presume the regularity of the EEOC's investigation."[50] We should not lightly conclude that the EEOC's commitment of resources and time to an investigation into discrimination was unreasonable.

Accordingly, since the EEOC actually investigated Simko's retaliation claim, we must begin with the presumption that the investigation was reasonable. And because "evidence of the investigatory practices of the agency" are relevant to determining "whether a reasonable inquiry would have reached [any additional] allegations,"[51] we must also consider the EEOC's general practices. These practices offer further support for the reasonableness of the investigation here.

As the Majority recognizes, EEOC investigators are told to look for "evidence of retaliation during their investigations, inform their supervisors in case

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[48] *Hicks*, 572 F.2d at 965.

[49] *Ostapowicz*, 541 F.2d at 399–400.

[50] *Hicks*, 572 F.2d at 966.

[51] *Id.* at 967.

such evidence surfaces, and notify the employer that 'the scope may be expanded or limited based on information received during the investigation.'"[52] Indeed, the EEOC Manual states that "if it is found during the investigation that the charging party has been discriminated against because s/he filed the charge, [the] EEOC may investigate the retaliation issue *based on the original charge*."[53] Yet, my colleagues dismiss the importance of this statement in the Manual by focusing on the differences in the initial allegations of discrimination and the subsequent allegations of retaliation.[54]

I submit, however, that the EEOC's policy is eminently reasonable because even a minimally well-informed employer in today's marketplace knows better than to admit that an employee was terminated in retaliation for filing a claim of discrimination. As we explained in *Aman v. Cort Furniture Rental Corp.*,[55] "[d]efendants of even minimal sophistication will neither admit discriminatory animus or [sic] leave a paper trail demonstrating it."[56] All we need do is substitute "retaliatory animus" for "discriminatory animus" to appreciate the reasonableness of the EEOC's policy and the scope of its investigation.

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[52] Maj. Op. at 23 (citing EEOC Compl. Man. § 22.3, Scope of Investigation).

[53] *See* EEOCCM, § 2.8 Charges Warranting Priority Handling, 2006 WL 4672924 (emphasis added).

[54] *See* Maj. Op. at 24–25.

[55] 85 F.3d 1074 (3d Cir. 1996).

[56] *Id.* at 1082 (quoting *Riordan v Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987)) (internal quotation marks omitted).

Neither party disputes that Simko's initial disability discrimination charge in May 2013 was timely. While it was still pending before the EEOC, U.S. Steel fired Simko allegedly for unrelated reasons.[57] In November 2014, a few months after being fired, while the disability discrimination charge was still pending before the EEOC, Simko wrote to the EEOC stating his belief that he was fired "as retaliation for filing charges with the EEOC."[58] Simko's timely filed initial disability discrimination claim, therefore, is the alleged basis of the retaliation claim. It is difficult to see how the retaliation claim cannot be said to have, at least in part, grown out of the original charge. Absent the initial charge of discrimination, there would be no basis for the retaliation.

As is regular practice at the EEOC, and as is explicitly contemplated by the EEOC guidance, an EEOC investigator wrote back to Simko and contacted U.S. Steel in November 2015 to inform U.S. Steel that it was expanding its investigation into retaliation and that a formal retaliation charge was forthcoming.[59] The EEOC investigated the retaliation

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[57] The mere fact that U.S. Steel claimed Simko was fired for job performance is of little import for the reasons articulated in *Cort Furniture, supra*.

[58] App. 80–81. As noted above, I agree with my colleagues that Simko's argument that the November 2014 correspondence should have been construed as a charge was forfeited because counsel failed to raise it below. *See* Maj. Op. at 8–10. But, the procedural default aside, as the EEOC itself recognizes, the agency very likely erred in failing to construe the correspondence as a formal charge.

[59] App. 83.

claim on-site at U.S. Steel in September 2018.[60] And in February 2019, the EEOC determined that there was reasonable cause to believe U.S. Steel had retaliated against Simko.[61]

Having actually investigated and attempted to conciliate the retaliation claim, the EEOC fulfilled the purpose of the exhaustion requirement. We have previously stated that the "purpose of the filing requirement is to enable the EEOC to investigate and, if cause is found, to attempt to use informal means to reach a settlement of the dispute."[62] That happened here. U.S. Steel was a part of the EEOC's investigation of the retaliation claim, including when the EEOC made a site visit.[63] U.S. Steel therefore was on notice of the investigation, invited to conciliate, and understood that it was facing a retaliation charge before Simko brought suit in District Court.

All of these factors demonstrate the reasonableness of the investigation here and would do so even absent the presumption of reasonableness which attaches that investigation.[64] Accordingly, "there [is] nothing to be served by requiring [Simko] to [have] file[d] a second complaint"[65] other than allowing U.S. Steel to escape any liability for conduct

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[60] App. 106.

[61] A112–14.

[62] Maj. Op. at 11 (citing *Anjelino v. New York Times Co.*, 200 F.3d 73, 93 (3d Cir. 1999)).

[63] App. 106.

[64] *Hicks*, 572 F.2d at 966 ("[C]ourts should presume the regularity of the EEOC's investigation.").

[65] *Robinson*, 107 F.3d at 1024–25.

that Simko may be able to prove is illegal. Doing so undermines the statutory purpose and regulatory scheme of the EEOC. Because Simko's "current claim falls within the scope of the prior investigation, and [he] would be entitled to sue on the complaint that led to that investigation, [Simko] was free to bring this suit without further exhausting h[is] administrative remedies."[66]

IV.

The Majority concludes that despite the fact that the EEOC actually investigated and attempted to conciliate the claim, it does not relate back to the initial disability charge because it referenced events that were discrete and remote from the events referenced in the initial charge.[67] But we have previously rejected similar arguments and concluded that claims may relate back even where they are based on discrete events, occurring years apart.

In *Waiters*, 30 months elapsed between the initial charge and the adverse employment action, but we concluded that the claims related back. Just as U.S. Steel and the Majority argue here, the defendant there argued that the original charge and the retaliation claim were very different—"different officials are alleged to be responsible for the allegedly discriminatory acts, more than thirty months passed between the formal complaint and the discharge, and the alleged retaliatory acts are of a different nature."[68] The defendant therefore argued that this

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[66] *Waiters*, 729 F.2d at 235.

[67] *See* Maj. Op. at 18–20.

[68] *Waiters*, 729 F.2d at 238.

"preclude[d] us from holding that the claim based on the discharge is within the scope of the investigation that arose from the formal complaint."[69] We disagreed. We allowed the claim to proceed because "it [wa]s clear that the allegations of the appellant's complaint fall within the scope of the district director's *investigation of the charges*."[70] This was true even where "[t]he investigation clearly went beyond the specific problem alleged in the formal complaint."[71] So too here. Through no fault of Simko, the EEOC delayed investigating his claims—and, to its substantial credit, the EEOC concedes its error in delaying the investigation of Simko's claim. Nevertheless, the retaliation claim was eventually part of the agency's investigation and U.S. Steel participated in the investigation and conciliation process.

The Majority also argues that the claims cannot relate back because disability discrimination is substantively different from retaliation. But we have previously concluded that claims that differ in kind may also relate back so long as they reasonably would have been included in the investigation of the initial charge. As described above, in *Hicks* we concluded that a charge of sex discrimination could relate back to a charge of race discrimination because, had the EEOC properly investigated the

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[69] *Id.*

[70] *Id.* (emphasis added).

[71] *Id. See also Ostapowicz*, 541 F.2d at 399 ("The additional charges filed during the pendency of the administrative proceedings may fairly be considered explanations of the original charge and growing out of it.").

claim, the petitioner would have put the EEOC on notice of sex discrimination as well.[72] Simko's claims are connected with a much stronger tether than those in *Hicks*. Simko did communicate with the EEOC and put the agency on notice of the retaliation claim—a claim that was actually investigated. And although the court in *Hicks* noted that part of the reason it concluded the claims could relate back was because both the sex and race discrimination claims arose out of the same set of facts, here there is more to support the reasonableness of the investigation than was present in *Hicks*. Simko's retaliation claim was actually investigated by the EEOC; moreover, the EEOC guidance instructs that investigations into retaliation arising out of discrimination claims are a normal part of the process and relate back to the initial charge of discrimination; and finally, the contemplated administrative process was fulfilled when Simko and U.S. Steel were involved in the investigation and conciliation process. As noted, "[t]he purpose of the filing requirement is to initiate the statutory scheme for remedying discrimination. . . . Thus, the effect of the filing requirement is essentially to permit the EEOC to use informal, non-judicial means of reconciling the differences between the charging party and an employer."[73]

Additionally, as I have argued above, we must not lose sight of the fact that claims of retaliation are intrinsically tethered to claims of discrimination; they rarely arise in a vacuum or in an environment devoid of claims of discrimination. Indeed, this is

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[72] *Hicks*, 572 F.2d at 962.

[73] *Id.* at 963 (citing *Ostapowicz*, 541 F.2d at 398.)

precisely why the EEOC's policy of allowing investigations into substantive discrimination to include allegations of retaliation is so eminently reasonable. In fact, a contrary policy that would preclude or discourage inquiries into whether an employee alleging discrimination had suffered retaliation would be unreasonable.

The Majority argues that considering the facts of Simko's disability discrimination claim in light of the appropriate test demonstrates that any tether it has to the retaliation claim is "conclusory" and does not "actually exist[]."[74] But in so arguing, my colleagues appear to ignore the clear connection between the two claims. Simko's allegation that he was fired in retaliation for filing a disability discrimination claim means that his disability discrimination claim is both a factual and legal basis for his retaliation claim. Stated differently, his claim alleges that but for his filing of a disability discrimination claim, he would not have faced the allegedly retaliatory discharge. Such a connection between the claims is hardly "conclusory."[75] As I explain below, I agree with the

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[74] Maj. Op. at 21.

[75] Curiously, on the one hand, the Majority agrees with the "general proposition" that "retaliation charges are intrinsically related to previous charges of discrimination," Maj. Op. at 19 n.11, and it notes that a reasonable "investigation could [] inquire into whether any other adverse actions were taken against [Simko] relating to his disability *or his having filed a charge*," *id.* at 19 (emphasis added), but, in the same sentence, concludes that "a reasonable investigation in this case would not have included an inquiry into Simko's post-charge firing." *Id.* But if a reasonable inquiry could inquire into "[Simko] having filed a charge," and Simko alleges that his having filed a charge is what caused his firing, then a reasonable inquiry would

Majority that, due to our prior rejection of a *per se* rule which would have made all retaliation claims automatically relate back to the earlier claim upon which they were based,[76] a petitioner must show more than the simple fact that he or she filed a subsequent retaliation claim in order to be excused from having to file a second formal charge with the EEOC. But Simko has shown much more than that here.

Concluding that Simko's retaliation claim relates back here would not run afoul of our prior rejection of such a *per se* rule. It is not true that all such cases will evidence the apparent nexus between a prior discriminatory act and a subsequent discharge that appears here. Here it is not simply the fact that Simko alleged retaliation before the District Court that causes his claim to relate back. He attempted to amend his claim to include retaliation; he put the EEOC on notice that he suspected retaliation was the reason for his firing; and, of course, the EEOC actually investigated the retaliation claim, issued a right to sue letter, and attempted to conciliate the claim. All of these are factors which we have previously concluded support the reasonableness of

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necessarily include "an inquiry into his post-charge firing." That is what our precedent says. *See*, *e.g.*, *Ostapowicz*, 541 F.2d at 398-99 (Reasonable investigations may "includ[e] new acts which occurred during the pendency of proceedings before the Commission."). And that is what the EEOC concluded when it investigated the post-charge firing and found that Simko was likely retaliated against.

[76] *See* Maj. Op. at 13, 21 (citing *Robinson*, 107 F.3d at 1024, and *Waiters*, 729 F.2d at 237 n.10).

allowing an unexhausted claim to proceed.[77] The fact that Simko is alleging a retaliation claim (as opposed

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[77] Indeed, as the following two examples demonstrate, there are other reasons why allowing Simko's claim to relate back here would not create a *per se* rule. For example, consider the situation of a petitioner who files a timely race discrimination claim with the EEOC, but later brings a retaliation claim before the District Court that was not brought before the EEOC. If, prior to filing in District Court, the petitioner (i) made no attempt to amend her claim to include retaliation; (ii) did not notify the EEOC that she suspected she was retaliated against for filing the race discrimination claim; and (iii) the EEOC did not actually investigate retaliation; the only tie to the prior race discrimination claim would be the fact that the new claim before the District Court was a retaliation claim. Although, as described above, there is some inherent connection between a retaliation claim and the substantive discrimination claim on which it is based, consonant with our rejection of a *per se* rule, this, on its own, would not be sufficient to show that the claim was "within the scope of a prior EEOC complaint or the investigation which arose out of it," *Waiters*, 729 F.2d at 235, and therefore, petitioner's claim would fail.

Additionally, consider the situation in which an employee alleges that she was retaliated against for supporting her colleague's disability discrimination claim. This retaliation claim would not relate back to, for example, a prior sex discrimination claim that the employee herself filed. It would not relate back because the retaliation claim would not have "grown out of the subject matter" of her earlier sex discrimination claim. That retaliation claim would not depend at all on the employee having first filed her sex discrimination claim. Rather, the basis from which this retaliation claim flowed would have been her support of her colleague's disability discrimination claim. By contrast, here, because the retaliation is based on Simko's own filing of a disability discrimination claim in his case, it does arise, at least in part, out of the subject matter of the initial charge. This, coupled with Simko's case specific circumstances outlined above, is enough to show that

to another type of discrimination claim) before the District Court only provides one added benefit—because EEOC investigators are specifically instructed to be alert to retaliation claims, the fact that he alleges retaliation makes it more reasonable to conclude that the investigation the agency conducted into the retaliation was proper. But, of course, not every litigant claiming retaliation will be able to point to all of these additional factors in support.[78]

Nevertheless, my colleagues press even further in rejecting the argument raised by Simko and joined by the EEOC that the retaliation claims relate back. My colleagues conclude that "[e]ven if our exhaustion inquiry turned on the actual—rather than reasonable—scope of investigation arising from a charge, Simko's retaliation claim should still be dismissed[.]"[79] They argue that result must follow because the investigation did not actually arise from the disability discrimination charge. Rather, my colleagues conclude that the investigation arose from Simko's November 2014 letter to the EEOC.[80] However, based on our precedent and the actual workings of EEOC investigations, that is a

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the retaliation claim is properly within the scope of the investigation of Simko's initial charge.

[78] Nor, however, are all of these additional factors necessarily required. As we held in rejecting the per se rule in *Robinson*, we must "examine carefully the prior pending EEOC complaint and the unexhausted claim on a case-by-case basis" to determine whether the unexhausted claim is reasonably within the scope of the prior complaint. 107 F.3d at 1024.

[79] Maj. Op. at 21.

[80] *Id.*

distinction without difference. I have already explained that EEOC investigators are instructed to look for retaliation in their investigations of substantive discrimination claims and also explained why that is so very reasonable. Communication with the petitioner during the course of the investigation is a routine and necessary part of such investigations. In fact, we held that the EEOC erred when it failed to communicate with the petitioner during the investigation in *Hicks*.[81] We concluded that had the investigation been reasonable and proper, the EEOC would have communicated with Hicks, and that it was likely that communication would have put the EEOC on notice of his additional claim of sex discrimination.[82] That is exactly what occurred here.

During the course of the EEOC's investigation of the discrimination claim, Simko put the EEOC on notice of an additional claim of retaliation that arose after he filed, and as a result of, his initial claim. Such communication is not only contemplated by our caselaw; it is encouraged by it and it *is required* by the EEOC's guidance. Thus, I fail to see how it was unreasonable for the EEOC to inquire into any acts of retaliation. Indeed, the EEOC would have been derelict if it had not done so. The very fact that the investigation arose from Simko's November 2014 letter is actually evidence of its reasonableness. I do not think we can so easily dismiss the EEOC's assessment of what is a reasonable investigation in such cases.

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[81] *Hicks*, 572 F.2d at 966.

[82] *Id.*

The Majority next takes issue with the length of time that the investigation took. And while the EEOC has commendably and forthrightly admitted that the prolonged delay was a mistake, that should not defeat Simko's claim; he did not cause the delay. I do not dispute my colleagues' claim that the length of time that the investigation took is out of the ordinary.[83] However, there is nothing in the statute or precedent that allows us to find that unreasonably delaying an investigation is sufficient to overturn our presumption that the investigation that was conducted was reasonable. In fact, if anything, our caselaw points to the opposite conclusion. We have consistently maintained that where the EEOC errs, we do not to allow the errors to adversely impact a claim. For example, in *Hicks* we noted, "[t]he failure of the EEOC to accept [an] amendment is . . . [a] failure of the agency to follow the statute and its own regulations," but we concluded that "[t]he individual employee should not be penalized by the improper conduct of the Commission."[84] I cannot understand why we now penalize Simko for the agency's laxity.

And we have concluded that much more egregious failures by the EEOC than simple delay do not preclude a petitioner's suit. For example, "failure of the EEOC to give notice of a charge to the employer involved or its failure to attempt reconciliation, both of which are *required* by section 706(b) of Title VII, 42 U.S.C. [§] 2000e-5(b), does not

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[83] *See* Maj. Op. at 24 n.12.

[84] *Hicks*, 572 F.2d at 964–65. *See also id.* at 966 ("We reject such a limitation . . . [that would] ask[] the court to penalize a plaintiff for the possible misconduct of the EEOC.").

bar a civil suit by the charging party."[85] This is because an "individual's right to bring a civil action . . . should not be defeated by the EEOC's failure to comply with its statutory obligations."[86] Our holding today is to the contrary.[87]

Finally, the Majority is concerned that failing to dismiss Simko's claim could encourage gamesmanship in the claim filing process by allowing a claimant to "greatly expand an investigation simply by alleging new and different facts when he was contacted by the [EEOC] following his charge."[88] But that alleged risk is not at issue here. An individual who alleges retaliation for the filing of a previous charge is not "gaming the system," because s/he is not complaining of discriminatory conduct that arose *before* the initial claim of discrimination. The retaliation must necessarily come after the charge is filed. Here, in the face of new alleged acts of discrimination, Simko appropriately "includ[ed] [in his charge] new acts which occurred during the pendency of proceedings before the Commission."[89]

V.

In sum, I believe that our precedent requires the conclusion that it was quite reasonable for the EEOC,

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[85] *Id.* at 964 (emphasis added).

[86] *Id.*

[87] The Majority recognizes that it is "unfortunate" that "the EEOC did not promptly react to his November 2014 correspondence," Maj. Op. at 36, but then proceeds to do what our caselaw warns against and punishes Simko for the EEOC's failure.

[88] Maj. Op. at 23 (quoting *Hicks*, 572 F.2d at 967.).

[89] *Ostapowicz*, 541 F.2d at 399.

during the course of its investigation of Simko's claim of disability discrimination, after being alerted by Simko about retaliation for the filing of the initial charge, to also investigate the alleged retaliation. That conclusion is reinforced here where the EEOC guidance tells us that such retaliation investigations are routine, and where the EEOC actually investigated the discrimination, concluded that there was evidence of retaliation, and attempted to conciliate the dispute. Accordingly, I must respectfully dissent from my colleagues' analysis.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MICHAEL SIMKO, Plaintiff, v. UNITED STATES STEEL CORP., Defendant.	CIVIL ACTION NO. 19-765 JUDGE JOY FLOWERS CONTI [Filed 12/13/2019]

OPINION

Pending before the court is a motion to dismiss this case in its entirety (ECF No. 6) filed by defendant United States Steel Corporation ("USSteel"), with a brief in support. Plaintiff Michael Simko ("Simko") filed a response and brief in opposition to the motion (ECF Nos. 11, 12), USSteel filed a reply brief (ECF No. 16). On October 17, 2019, the court held oral argument on the motion and requested further briefing. The supplemental briefing was completed on December 2, 2019 (ECF Nos. 18, 19) and the motion is ripe for decision. The court appreciates the thorough and professional memoranda of law submitted by counsel for both parties.

Factual and Procedural Background

The facts are taken from the complaint (ECF No. 1) and are accepted as true for the purpose of

resolving the motion to dismiss. Simko began working for USSteel on August 22, 2005. In August 2012, Simko was a larryman in the blast furnace department at the Edgar Thompson plant in Braddock, Pennsylvania, when he successfully bid for a position as a spellman in the transportation department.

During his spellman training, Simko sought an accommodation for his hearing loss by requesting a newer two-way radio. No accommodation was provided. Simko's trainer refused to approve the completion of Simko's spellman training because Simko could not hear. Simko returned to his work as a larryman in November 2012. (ECF No. 12-1).

Simko filed a charge with the EEOC alleging violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq. The charge of discrimination was signed on May 24, 2013, and received by the EEOC on May 28, 2013. On December 30, 2013, Simko was discharged (for the first time) for a car having lost power. (ECF No. 12-9 at 2). On May 27, 2014, Simko entered into a Last Chance Agreement and returned to work on June 1, 2014.

On August 19, 2014, Simko was discharged again. USSteel stated the discharge was based on a safety violation that occurred on August 15, 2014. The initial discipline for the incident was a five-day suspension, but it was converted into a discharge. Complaint ¶¶ 19-20. Simko grieved the discharge. The union withdrew the grievance.

Included in the documents submitted by Simko in response to the motion to dismiss[1] is an undated[2] handwritten letter to the EEOC stating, in relevant part, that Simko believed his discharge was in retaliation for filing charges with the EEOC. (ECF No. 12-2 at 12-14). This letter is not referenced in the complaint. There was no apparent action taken by the EEOC for the next year.

The first reference by the EEOC to a retaliation claim occurred in a letter from an investigator dated November 23, 2015. (ECF No. 12-4). Counsel entered an appearance with the EEOC on Simko's behalf on November 30, 2015, and on January 21, 2016, submitted an amended charge to the EEOC, alleging retaliation.[3] (ECF No. 12-9). In the amended charge, Simko stated that the latest date that discrimination took place was "08-19-2014." *Id.* The EEOC investigated the retaliatory discharge claim. On February 19, 2019, the EEOC issued a Determination that USSteel retaliated because it disciplined Simko more severely than a non-disabled comparator. (ECF No. 12-14). The Determination did not clearly state whether the retaliatory motivation was based on Simko's disability or his prior EEOC charge. *Id.*

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[1] EEOC documents may be considered in deciding a motion to dismiss without converting the motion into one for summary judgment. *Branum v. United Parcel Serv., Inc.*, 232 F.R.D. 505, 507 n.1 (W.D. Pa. 2005).

[2] Simko states in his brief that EEOC received this letter on November 14, 2014. (ECF No. 12 at 8). The court will assume the truth of this allegation.

[3] USSteel argues that by filing this amended charge, Simko concedes that his retaliatory discharge claim was not within the scope of his original charge.

Standard of Review

As set forth in *Connelly v. Lane Construction Corp.*, 809 F.3d 780, 786-87 (3d Cir. 2016):

> A complaint may be dismissed under Rule 12(b)(6) for "failure to state a claim upon which relief can be granted." But detailed pleading is not generally required. The Rules demand "only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson,* 355 U.S. 41, 47 (1957)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*; *see also Sheridan v. NGK Metals Corp.,* 609 F.3d 239, 262 n. 27 (3d Cir. 2010). Although the plausibility standard "does not impose a probability requirement," *Twombly,* 550 U.S. at 556, it does require a pleading to show "more than a sheer possibility that a defendant has acted unlawfully," *Iqbal,* 556 U.S. at 678. A complaint that pleads facts "merely consistent with a defendant's liability ... stops short of the line between possibility

> and plausibility of entitlement to relief." *Id.* (citation and internal quotation marks omitted). The plausibility determination is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679.
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> Under the pleading regime established by *Twombly* and *Iqbal,* a court reviewing the sufficiency of a complaint must take three steps. First, it must "tak[e] note of the elements [the] plaintiff must plead to state a claim." *Iqbal,* 556 U.S. at 675. Second, it should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679; *see also Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 224 (3d Cir. 2011) ("Mere restatements of the elements of a claim are not entitled to the assumption of truth." (citation and editorial marks omitted)). Finally, "[w]hen there are well-pleaded factual allegations, [the] court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal,* 556 U.S. at 679.

At the final step, the court is to assume all well-pled allegations to be true, construe those allegations in the light most favorable to the plaintiff, draw all reasonable inferences from them in favor of the plaintiff, and ask whether they "raise a reasonable expectation that discovery will reveal evidence" to support the legal claim being asserted. *Id.* at *7.

Legal Analysis

In the complaint, Simko asserts a single claim for retaliation under the ADA in connection with his second discharge in August 2014. USSteel contends that the retaliation claim is time barred and must be dismissed with prejudice.

Before a claimant may bring suit in federal court, he must exhaust his administrative remedies. *Robinson v. Dalton,* 107 F.3d 1018, 1020–21 (3d Cir. 1997). In Pennsylvania, a verified charge must be filed with the EEOC within 300 days of the alleged unlawful employment practice. *Urban v. Bayer Corp. Pharm. Div.*, 245 F. App'x 211, 212 (3d Cir. 2007) (citing *Watson v. Eastman Kodak Co.,* 235 F.3d 851, 854 (3d Cir. 2000)). The United States Supreme Court recently explained that a "charge-filing requirement is a processing rule, albeit a mandatory one, not a jurisdictional prescription delineating the adjudicatory authority of courts." *Fort Bend Cty., Texas v. Davis*, 139 S. Ct. 1843, 1851 (2019). The Third Circuit Court of Appeals similarly instructs that a nonjurisdictional claim-processing rule "still has teeth." *Guerra v. Consol. Rail Corp.*, 936 F.3d 124, 135–36 (3d Cir. 2019).

To determine whether a charge alleging unlawful termination was timely filed, the limitations period is measured from the date on which the employee was advised of his termination. *Urban*, 245 F. App'x at 213 (citing *Delaware State College v. Ricks,* 449 U.S. 250, 258 (1980); and *Watson,* 235 F.3d at 855). In this case, 521 calendar days elapsed from the date Simko was discharged until he filed an EEOC charge

alleging a retaliatory termination. Simko acknowledges that the 300-day filing period elapsed.

Simko contends however, that his amended charge should be regarded as timely because: (1) the limitations period should be equitably tolled when he sent a handwritten letter to the EEOC complaining about retaliation within three months of his discharge (ECF No. 12-2), but the EEOC failed to take action for over a year; (2) USSteel waived this defense by not raising it sooner; and (3) the EEOC rejected USSteel's untimeliness defense. Simko also argues that his retaliation claim relates back to his original EEOC charge in 2013. Each of these arguments will be addressed.

A. Equitable tolling

The handwritten letter[4] (ECF No. 12-2) does not constitute a "charge" and Simko does not contend otherwise. The document is not verified, as required, and did not cause the EEOC to initiate an investigation. *Urban*, 245 F. App'x at 213 (citing *Buck v. Hampton Twp. Sch. Dist.,* 452 F.3d 256, 265 (3d Cir. 2006). Although Simko was pro se at the time, he knew how to file a proper EEOC charge because he had done so in May 2013.[5]

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[4] The documents were produced by Simko's counsel in the format they were received from EEOC. The letter appears to be part of a larger document because page one starts: "In closing ...." (ECF No. 12-2 at 12.) Simko is primarily complaining in the letter about his first discharge in December 2013, the lack of support from his union, and being brought back on a Last Chance Agreement. *Id.* at 13.

[5] Simko concedes that the May 2013 charge did not allege retaliation. (ECF No. 12 at 8).

The EEOC's mere failure to act on the handwritten letter does not justify equitable tolling of the 300-day filing period. The court of appeals has recognized three circumstances in which equitable tolling would be appropriate: "(1) [W]here the defendant has actively misled the plaintiff respecting the plaintiff's cause of action, and that deception causes non-compliance with an applicable limitations provision; (2) where the plaintiff in some extraordinary way has been prevented from asserting his rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum." *Pizio v. HTMT Glob. Sols.*, 555 F. App'x 169, 176 (3d Cir. 2014) (citations omitted). None of these circumstances apply in this case. Simko does not allege that USSteel actively misled him. Simko was not prevented in any way (let alone an extraordinary way) from exercising his rights. Simko did not explain why he could not have simply filed a timely amended charge with the EEOC to assert a retaliatory discharge. Finally, Simko did not timely assert his rights in the wrong forum. In sum, under the standard established by the court of appeals there is no basis to equitably toll the limitations period.

B. EEOC finding of timeliness/ waiver

It is well-settled that courts are not bound by the EEOC's view of whether a claim is timely filed. *Urban*, 245 F. App'x at 213 ("our case law is clear that 'the EEOC's belief as to the timeliness of a charge is not determinative.'") (quoting *Kocian v. Getty Ref. & Mktg. Co.,* 707 F.2d 748, 754 n. 9 (3d Cir. 1983), *overruled on other grounds by Colgan v.*

Fisher Sci. Co., 935 F.2d 1407, 1414 (3d Cir. 1991) (en banc)).

It is equally clear that USSteel would not waive this defense by failing to raise it with the EEOC. As this court explained, "the non-adversarial, non-binding nature of EEOC proceedings means that an employer's failure to raise the timeliness issue before the EEOC cannot have the binding effect of a waiver." *Byrnes v. Herion, Inc.*,757 F.Supp. 648, 653 (W.D. Pa. 1990) ("[W]e are unable to find any authority for the proposition that a waiver under these circumstances would be appropriate."). In any event, USSteel did, in fact, argue to the EEOC that Simko's retaliatory discharge claim was untimely filed. (ECF No. 12-13).

In sum, the amended charge filed in January 2016 does not satisfy Simko's administrative prerequisites. USSteel's defense that the amended claim is untimely is cognizable and meritorious.

C. Whether the retaliation claim is within the scope of Simko's original charge

Simko argues that his retaliatory discharge claim is within the scope of his original charge. Simko also contends that his claim is cognizable because the EEOC investigation in this case did actually address retaliation, albeit not until two and a half years later. These are the issues on which the court requested supplemental briefing.

1. Third Circuit Court of Appeals precedent

The court notes, as an initial matter, that if court of appeals precedential decisions are in conflict, it is the older opinion that controls. *Kossler v. Crisanti*,

564 F.3d 181, 194 (3d Cir. 2009) ("[t]his Circuit has long held that if its cases conflict, the earlier is the controlling authority and the latter is ineffective as precedents.") (quoting *Pardini v. Allegheny Intermediate Unit*, 524 F.3d 419, 426 (3d Cir. 2008)).

An aggrieved employee is required to file a charge to initiate the statutory scheme for remedying discrimination. *Hicks v. ABT Associates, Inc.*, 572 F.2d 960, 963 (3d Cir. 1978). Once the EEOC receives a charge, it gives notice to the employer and investigates whether there is reasonable cause to believe that the charge is true. *Id.* If cause is found, the EEOC must attempt to settle the dispute on an informal basis. *Id.* If no reasonable cause is found, or if reconciliation attempts prove futile, the charging party is issued a right to sue letter. *Id.* In *Waiters v. Parsons,* 729 F.2d 233 (3d Cir. 1984), the court explained the underlying rationale for not requiring that a new formal charge be filed if the new allegations of discrimination are related to the original charge: "Once the EEOC has tried to achieve a consensual resolution of the complaint, and the discrimination continues, there is minimal likelihood that further conciliation will succeed." *Id.* at 237. Under these circumstances, the policy of promoting conciliation would not be furthered by allowing the defendants to delay having to answer in court for additional discriminatory actions taken against an employee for asserting her rights. *Id.* at 238.

As Simko recognizes, the oldest case to address whether a new claim of discrimination relates back to an earlier charge is *Hicks*. In *Hicks*, the court adopted an objective test: "Once a charge of some sort is filed with the EEOC, [ ] the scope of a resulting

private civil action in the district court is defined by the scope of the EEOC investigation which can **reasonably** be expected to grow out of the charge of discrimination." 572 F.2d at 966 (emphasis added, citations omitted). The court further explained that a discrimination claim is within the scope of the charge if, presuming a reasonable investigation had occurred, the EEOC would have been informed of that discrimination claim. *Id.* at 967.

The court cautioned that a mere finding that the EEOC would have discovered a claim for discrimination in the course of a reasonable investigation "does not itself meet the standard." *Id.* A district court must further find that the claims which would have been uncovered were reasonably within the scope of the charge filed with the EEOC. "Otherwise, the charging party could greatly expand an investigation simply by alleging new and different facts when he was contacted by the Commission following his charge." *Id.*

In *Hicks*, the employee's original charge alleged only race discrimination. The court held that there was a genuine issue of fact about whether the employee reasonably attempted to amend his charge to include sex discrimination, which the EEOC improperly refused to accept. *Id.* at 964. The court noted that the amendment could relate back to the original filing date even if the amendment was filed beyond the 180-day deadline. *Id.* at 965. The court emphasized that the alleged sex discrimination arose "from the same acts which support claims for race discrimination." *Id.* The claim of sex discrimination "Hicks says he tried to have incorporated in his charge would have been 'directly related to' the facts

in the original charge and thus would have related back to the original filing date." *Id.* In reasonably investigating the charge of race discrimination, there was a "fair inference that Hicks would have told the EEOC investigator that he believed that sex discrimination was a cause of the disparate treatment." *Id.* at 966.

The next relevant precedential decision of the court of appeals was *Waiters*. In *Waiters*, the court rejected the Fifth Circuit Court of Appeals' per se rule that all claims of retaliation are "ancillary" to the original administrative complaint and therefore no further EEOC complaint need be filed. 729 F.2d at 237 n. 10 (quoting *Gupta v. East Texas State University*, 654 F.2d 411 (5th Cir. 1981)). Instead, the court adopted a case-by-case approach under which district courts must examine carefully the initial charge and the additional claim to determine whether a second charge should have been filed. *See Crawford v. Verizon Pa., Inc.*, 103 F. Supp.3d 597, 610 (E.D. Pa. 2015).

In *Waiters*, the initial complaint charged a specific instance of retaliation for the filing of her informal complaint a year earlier. The EEOC investigation went beyond the specific problem alleged in the formal complaint and found evidence of retaliatory intent in a pattern of actions by the employer. 729 F.2d at 238. The employee alleged that her discharge (for which she did not file a new charge) was the product of this same retaliatory intent. The employer argued that the discharge claim was not within the scope of the investigation because different officials committed the allegedly discriminatory acts, more than thirty months passed

between the formal complaint and the discharge, and the alleged retaliatory acts were of a different nature. The court rejected this argument, and explained: "While it is true that the allegedly discriminatory officials and acts are different, **the core grievance-retaliation-is the same** and, at all events, it is clear that the allegations of the appellant's complaint fall within the scope of the district director's investigation of the charges contained in the 1979 formal complaint." *Id.* (emphasis added).

In *Antol v. Perry*, 82 F.3d 1291, 1295 (3d Cir. 1996), the court held that a charge of disability discrimination did not encompass a new claim for gender discrimination. The court explained that the "specifics of his disability discrimination charge do not fairly encompass a claim for gender discrimination merely because investigation would reveal that Antol is a man and the two employees who received the positions are women." *Id.* at 1296. Because the EEOC investigation properly focused on disability discrimination, neither the EEOC nor the employer were put on notice of a gender discrimination claim. *Id.* at 1296. The court explained that the employee failed to exhaust administrative remedies for his gender discrimination claim because the EEOC was not afforded "the opportunity to settle [the gender discrimination] disputes through conference, conciliation, and persuasion, avoiding unnecessary action in court." *Id. Antol* distinguished *Waiters* "because [in *Waiters*] the core grievances in the suit filed and the earlier EEOC complaint were the same—retaliation." *Id.* at 1295.

In *Robinson v. Dalton*, 107 F.3d 1018, 1024 (3d Cir. 1997), the court of appeals provided additional

guidance on how to determine whether a new claim falls within the scope of the original charge. *Robinson* described the *Waiters* decision as follows:

> in *Waiters* we identified two circumstances in which events subsequent to a filed complaint may be considered as fairly encompassed within that complaint, either where the incident (1) falls within the scope of a prior EEOC complaint, or (2) falls within the scope of the EEOC "investigation which arose out of it." *Id.* at 235.[6] We decided that the EEOC investigation, which apparently had been broadened by the EEOC, encompassed the underlying conduct leading to the ultimate discharge, and that there was nothing to be served by requiring Waiters to file a second complaint. *Id.*

Id. at 1025.

In *Robinson*, the EEOC expressly declined to include the employee's retaliatory discharge claim in its investigation, even though the subject of his prior complaints was used as a basis for the employer's decision to discharge him. *Id.* at 1025-26. The court reiterated that the Third Circuit Court of Appeals rejected the "per se" rule that all retaliation claims fall within the scope of a prior charge, but courts must examine carefully the prior pending EEOC complaint and the unexhausted claim on a case-by-

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[6] In *Waiters*, the court added the proviso "provided that the victim can still bring suit on the earlier complaint." 729 F.2d at 235. If a claim is bootstrapped to a prior EEOC charge that is untimely, neither claim is properly before the court. *Fenton v. Port Auth. of NY & NJ*, 777 F. App'x 45, 49 (3d Cir. 2019).

case basis. *Id.* at 1024. The case was remanded for further consideration. The *Robinson* decision identified several factors:

> Factors the district court may consider in making this determination include 1) whether the previous three complaints alleged the same retaliatory intent inherent in the retaliatory discharge claim, *Waiters*, 729 F.2d at 238, 2) whether the subject of these previous complaints were used as a basis for the Navy's decision to terminate Robinson; and 3) whether the EEOC should have been put on notice of Robinson's claim of retaliatory discharge and therefore investigated that claim, *Hicks*, 572 F.2d at 966. In light of our precedent, the court may also want to reexamine whether there is enough overlapping in Robinson's subsequent allegations with the earlier complaints that this discharge complaint fairly falls within the scope of the earlier complaints.

Id. at 1026.[7]

This court asked the parties to consider whether the Third Circuit Court of Appeals' test is objective or subjective. In *Hicks*, the court held that the parameters of the civil action are defined by the scope

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[7] In *Robinson v. Consol Pennsylvania Coal Co. LLC*, No. 2:18-CV-00555-NR, 2019 WL 6338464, at *7 (W.D. Pa. Nov. 27, 2019), the court recently explained that the test "turns on whether there is a close nexus between the facts supporting each claim or whether additional charges made in the judicial complaint may fairly be considered explanations of the original charge or growing out of it."

of the EEOC investigation which can "reasonably" be expected to grow out of the charge. 572 F.2d at 966. In *Antol*, the court similarly explained that the claim must fall "fairly" within the scope of the prior EEOC complaint. 82 F.3d at 1295. These decisions adopt an objective test, that is not dependent upon the actual scope of the EEOC investigation.

Waiters contains inconsistent language. It purported to adopt the "fairly within the scope of the prior EEOC complaint" test, citing *Hicks*. 729 F.2d at 237. The court also stated, however, that an employee is not required to exhaust administrative remedies if the incident "falls within the scope of a prior EEOC complaint or the investigation which arose out of it." *Id.* at 235 (omitting a reference to "reasonably" or "fairly"). *Waiters* recognized that the EEOC's actual investigation of retaliation was broader than the original charge. *Id.* at 238. The decision in *Robinson,* in describing *Waiters*, entirely omitted any reference to charges "reasonably" and "fairly" arising from the investigation. 107 F.3d at 1025. *Robinson* appears to endorse a subjective test in which exhaustion is not required when the charge was actually within the scope of the EEOC's investigation. The court of appeals continues, however, to apply the objective test. *See Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 164 (3d Cir. 2013) (adopting "fairly within scope" test and holding that original charge of sexual harassment did not encompass claim of retaliation).

The court believes that these precedents can be harmonized. The lesson of *Waiters* is that the EEOC investigation of an original claim of retaliation will necessarily encompass additional allegations of retaliation, because it is the same "core grievance"

(*i.e.*, same kind of discrimination). The lesson of *Hicks* and *Robinson* is that an EEOC investigation could reasonably encompass different types of discrimination if they are based on the same set of underlying facts. The lesson of *Antol* is that a new claim is not fairly within the scope of an EEOC investigation if it is based on different facts and a different kind of discrimination. As noted above, to the extent that the decisions cannot be reconciled, the older, objective standard set forth in *Hicks* and *Antol* is controlling.

2. Application to this case

With this background, the court concludes, after a careful analysis, that the conduct alleged by Simko in the complaint in this case (*i.e.*, retaliation in connection with Simko's second termination in August 2014) is not fairly within the scope of his original EEOC charge or the resulting investigation. It is *Antol*, not *Waiters*, that is most analogous to this case.

Simko's complaint is based on a different kind of discrimination than his original charge. Unlike *Waiters*, the "core grievance" in Simko's initial charge did not involve retaliation – there was no reference to retaliation in Simko's original charge at all. Simko's original EEOC charge, as in *Antol*, alleged disability discrimination in the transportation department for failing to accommodate Simko's hearing loss for a position as a spellman. (ECF No. 12-1).

Simko's retaliatory discharge claim is also based on different facts than his original charge. Simko's disability discrimination claim was relatively narrow

and discrete. The two individuals identified in the original charge were a trainer, Kevin Puckey, and a supervisor, Brian Spiller, in the transportation department. The alleged conduct was a failure to accommodate his hearing loss by providing a newer two-way radio. A timely investigation of the incident involving the transportation department would not have encompassed the alleged retaliatory discharge alleged in the complaint in this case, which involved different supervisors, a different department, and a different, discrete safety violation incident. Simko's second discharge did not even occur until almost two years later, in August 2014.[8]

The subject of the original EEOC charge (Simko's efforts to seek accommodation for his hearing loss) was not cited by USSteel as the basis for either of his discharges. As set forth in Simko's amended EEOC charge, he was discharged on December 30, 2013, for a car having lost power. (ECF No. 12-9). He was discharged a second time in August 2014 (the only claim set forth in the complaint) for violating a last chance agreement by failing to sign-out in two areas. *Id.* In sum, as in *Antol*, the complaint in this case alleges a different kind of discrimination and is based on entirely different facts from the original charge. There is no reason that the EEOC or USSteel would have reasonably or fairly been put on notice and

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[8] The last sentence of ¶ 3 of the initial charge arguably expands the scope of the hearing loss inquiry to include November 2012, when "Gary Evans, Walking Boss, told [Simko] that if [he] couldn't hear, [he] must be disabled and should not work anywhere in the plant." (ECF No. 12-1 at 2). This fact does not change the court's analysis because it does not implicate retaliation.

investigated an alleged August 2014 retaliatory discharge as part of its investigation of the 2012 alleged failure to accommodate Simko's hearing loss.

Several courts have reached similar conclusions, holding that nothing in the original charge could have put the EEOC on notice of the employee's later retaliation claim. *See Crawford*, 103 F. Supp. 3d at 610; *Thomas v. St. Mary Med. Ctr.*, 22 F. Supp. 3d 459, 471 (E.D. Pa. 2014) (employee failed to exhaust retaliation claim because she failed to check the "retaliation" box and presented no facts in support of a retaliation claim in her initial charge); *McGinnis v. Donahoe*, No. 12-1880, 2015 WL 507043 *12 (W.D. Pa. Feb. 6, 2015) (retaliation and hostile work environment claims not fairly within the scope of original charge). In sum, the complaint must be dismissed because Simko failed to exhaust his administrative remedies regarding his retaliatory discharge claim under applicable Third Circuit precedent.

The court will briefly address Simko's alternative argument that exhaustion is excused because the EEOC actually investigated his retaliation claim. In this case, the EEOC did not conduct an unfairly narrow investigation of Simko's original charge in May 2013 – instead, it apparently conducted no investigation at all, for several years. In May 2015, the EEOC began a belated investigation, Simko filed an amended charge in January 2016 alleging retaliation, and the EEOC eventually found the discharge was retaliatory. The court in *Hicks* rejected a standard that would penalize a plaintiff if the "EEOC's investigation is unreasonably narrow or improperly conducted." 572 F.2d at 966. This case

presents the opposite situation – whether the employer should be penalized if the EEOC's investigation is unreasonably broad (by addressing a retaliation theory that was not reasonably within the scope of Simko's initial charge). The parties did not cite any authorities addressing this particular situation.

There are two fatal flaws with Simko's argument. First, the court of appeals in *Hicks* cautioned, in adopting an objective test, that exhaustion of remedies is not dependent on the actual scope of the EEOC's investigation. As the court explained: "Otherwise, the charging party could greatly expand an investigation simply by alleging new and different facts when he was contacted by the Commission following his charge." *Hicks*, 572 F.2d at 967. Second, under the circumstances of this case, the investigation of Simko's claim for retaliatory discharge was untimely made. As the court recently explained in *Fenton*, a new claim might relate back if the employee can still sue on the original charge but if a claim is bootstrapped to a prior EEOC charge that is untimely, neither claim is properly before the court. 777 F. App'x at 49. In this case, Simko has no timely claim to which to bootstrap his retaliatory discharge claim.

Conclusion

Simko's complaint in this case seeks redress for an alleged retaliatory discharge in August 2014. Simko recognizes that he failed to file a charge of retaliation with the EEOC within 300 days of that discharge. For the reasons explained above, based upon the undisputed record Simko's amended charge

is untimely and his retaliation claim is not within the scope and does not relate back to his original EEOC charge, which concerned a failure to accommodate his hearing loss in August 2012.

Because Simko failed to exhaust his administrative remedies, any effort to amend the complaint would be futile and inequitable. In accordance with the foregoing, the motion to dismiss (ECF No. 6) will be GRANTED and the complaint will be dismissed with prejudice and without leave to amend. The case will be marked closed.

An appropriate order follows.

December 13, 2019

BY THE COURT:

/s/ Joy Flowers Conti
Joy Flowers Conti
Senior United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MICHAEL SIMKO, Plaintiff, v. UNITED STATES STEEL CORP., Defendant.	CIVIL ACTION NO. 19-765 JUDGE JOY FLOWERS CONTI [Filed 12/13/2019]

ORDER

AND NOW this 13th day of December, 2019, in accordance with the memorandum opinion, it is hereby ordered that the motion to dismiss (ECF No. 6) is GRANTED. The complaint is DISMISSED with prejudice and without leave to file an amended complaint. The case will be marked closed.

BY THE COURT:

/s/ Joy Flowers Conti
Joy Flowers Conti
Senior United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1091

MICHAEL SIMKO,

Appellant

v.

UNITED STATES STEEL CORP

On Appeal from the United States District Court
for the Western District of Pennsylvania
(District Court No.: 2:19-cv-0075)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS and RENDELL,[1] Circuit Judges

The petition for rehearing filed by **appellant** in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the

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[1] Judge Rendell's vote is limited to panel rehearing only.

circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Theodore A. McKee
Circuit Judge

Dated: May 11, 2021
SLC/cc: Counsel of Record

APPENDIX E

RELEVANT STATUTORY PROVISIONS

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, provides in part as follows:

* * *

§ 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The [Equal Employment Opportunity] Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-

management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, 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 such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") 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. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public

information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

* * *

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after

receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

* * *

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United

States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil

action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

* * *

The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.*, provides in part as follows:

Subchapter I – Employment

* * *

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

* * *

§ 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

* * *

Subchapter IV – Miscellaneous Provisions

* * *

§ 12203. Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures

The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b), with respect to subchapter I, subchapter II and subchapter III, respectively.

* * *

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA
PITTSBURGH DIVISION

MICHAEL SIMKO,

Plaintiff, Civil Action No.

v. 2:19-cv-765

UNITED STATES STEEL CORPORATION,

Defendant.

COMPLAINT

AND NOW comes Michael Simko by and through his attorneys, JULIAN LAW FIRM and JOHN E. EGERS, JR., ESQUIRE and hereby alleges and states as follows:

PRELIMINARY STATEMENT

1. The Plaintiff, Michael Simko ("Simko") brings this action against United States Steel Corporation ("USS") for violations of the Americans with Disabilities Act of 1990 ("ADA") as amended by the ADA Amendments Act of 2008 ("ADAAA"), 42 U.S.C.§§12101 to 12213 (collectively the "ADA").

2. USS retaliated against Simko in violation of the ADA by terminating him in response to his requests for reasonable accommodation and his complaint(s) regarding violation of the ADA. As a

result, Simko has suffered significant emotional and monetary damages.

PARTIES

3. Simko is an adult male individual with a residence address of P.O. Box 13, 1296 Bentleyville Road Van Voorhis, PA 15366.

4. USS is a Delaware Corporation with a corporate headquarters located in Pittsburgh, Pennsylvania.

5. USS is an employer as defined by the ADA.

6. USS does business in multiple locations including its Edgar Thompson Plant at 13th Street and Braddock Avenue, Braddock, Pennsylvania 15104.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, in that this is a civil action arising under the ADA.

8. Venue is proper under 28 U.S.C. § 1391(b)(1) and (b)(2).

FACTS

9. USS began employing Simko on August 22, 2005.

10. In August of 2012, Simko held the larryman position in the blast furnace department at USS's Edgar Thompson Plant.

11. That same month of August 2012, Simko successfully bid on the position of spellman in the transportation department.

12. During his spellman training, Simko requested an accommodation for his hearing loss by requesting a newer two-way radio from Brian Spiller, but this

accommodation was never granted and no other accommodations were offered or considered by USS or its personnel.

13. Simko completed all parts of the required training for the spellman position.

14. Simko's trainer, Kevin Puckey refused to approve the completion of Simko's spellman training because of his disability or because he was regarded as being disabled because Simko could not hear.

15. Simko had filed a charge with the Equal Employment Opportunity Commission alleging violations of the ADA on the basis that he was denied employment as a spellman, denied reasonable accommodation and returned to his former job as a larryman because he was disabled or regarded as being disabled because he could not hear.

16. Simko's charge of discrimination was signed on May 24, 2013 and received by the EEOC on May 28, 2013 (and subsequently amended on January 22, 2016).

17. Thereafter, Simko was returned back to his assignment as a larryman by USS until he was discharged effective December 30, 2013.

18. On May 27, 2014, Simko entered into a Last Chance Agreement with USS and his union and returned to work on June 1, 2014.

19. Simko continued to work until August 19, 2014 when he was discharged a second time for what USS said was a safety violation that occurred on August 15, 2014.

20. Simko's initial discipline for this safety violation of August 15, 2014 was initially a five-day suspension, but was later converted to a discharge.

21. Simko grieved the discharge, but his union withdrew the grievance.

22. On February 19, 2019, the Equal Employment Opportunity Commission (EEOC) issued a Determination finding reasonable cause to believe that unlawful employment practices occurred under the ADA, specifically that USS retaliated against Simko.

23. Although the EEOC invited the parties to engage in conciliation, conciliation did not occur and a Notice of Conciliation of Failure was issued by the EEOC on March 13, 2019.

24. On April 1, 2019, the EEOC issued a Notice of the Right to Sue to Simko.

25. This Complaint has been filed within ninety (90) days of receipt of that Notice.

COUNT I – RETALIATION

26. Simko was an employee of USS as defined by the ADA.

27. Simko was qualified for his position with USS when he was fired on August 19, 2014.

28. Simko engaged in protective activity under the ADA by requesting an accommodation and subsequently filing a charge of discrimination with the EEOC.

29. USS subjected Simko to a materially adverse action by converting a five-day suspension of Simko for violation of safety rules to a permanent discharge of his employment.

30. Simko's discharge was an act of retaliation by USS caused by Simko's engagement in protected activity.

31. USS's reason for terminating Simko was pretextual and baseless as USS discharged Simko based on the fact that he requested accommodation for his disability and filed a charge of discrimination.

32. USS treated a comparator of Simko's, Kenneth Moses, differently in that it did not accelerate Mr. Moses's eventual termination for safety rules as it did for Simko.

33. Simko has suffered damages as a result of USS's unlawful retaliatory actions including emotional distress, past and future lost wages and benefits, and the cost of bringing this action.

34. USS intentionally violated Simko's rights under the ADA with malice or reckless indifference and as a result they are liable for punitive damages.

PRAYER FOR RELIEF

WHEREFORE, Simko respectfully requests judgment as follows:

A. An acceptance of jurisdiction over this matter by this Honorable Court;

B. Award Simko his past and future losses of wages and all other benefits plus interest;

C. Award Simko compensatory and punitive damages;

D. To order USS to reinstate Simko to a position comparable to his former position without loss of seniority or in lieu of his reinstatement, award him front pay;

E. Award Simko all costs and reasonable attorney's fees incurred in connection with this action;

F. Grant Simko such additional and alternative relief as this Honorable Court deems just and proper.

DEMAND FOR JURY TRIAL

Simko demands a trial by jury on all claims properly triable by a jury.

Respectfully submitted,

JULIAN LAW FIRM

Date: June 28, 2019

/s/ John E. Egers, Jr., Esquire
JOHN E. EGERS, JR., ESQUIRE
Attorney for Plaintiff,
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