1/25/19

No. 18-971

In The
Supreme Court of the United States

FAYE RENNELL HOBSON,
Petitioner,

v.

RETIRED GENERAL JAMES MATTIS,
UNITED STATES OF AMERICA,
Secretary, Department of Defense,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Petitioner, Pro Se *Dated: January 25, 2019*

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QUESTIONS PRESENTED

1. Should the doctrine of equitable tolling be expanded to include a situation in which a pro se party in federal sector employment discrimination litigation (against the U.S. Department of Defense under Title VII) believed that their complaint could be presented to the Department of Labor prior to filing in U.S. District Court even though their complaint, timely filed at the Department of Labor, would consequently be untimely filed in U.S. District Court after the expiration of the ninety day filing period?

2. Should a pro se litigant be penalized when the actions of one governmental agency effectively caused a delay in the process such that the employee unknowingly missed a filing deadline with another agency? The situation contemplated also includes the pro se party having informed both the Department of Defense and the Department of Labor of her belief, and neither agency informs the pro se party that she has filed with the incorrect agency.

3. Should a pro se litigant be penalized when the Department of Labor expends a protracted period of time determining whether it has enforcement authority and the ninety days under Title VII's right to sue expires while the Department of Labor is making its determination as to its enforcement authority?

4. Is an ADA/The Rehabilitation Act claim like or related to, and/or can it reasonably be expected to grow out of a charge that the denial of an employee's

request for FMLA leave is discriminatory and retaliatory such that the failure to specifically mention the ADA/The Rehabilitation Act claim during the administrative process is excusable and a court errs in dismissing the ADA/The Rehabilitation Act claim based on a failure to exhaust administrative remedies?

5. A related question is whether the EEOC's own interpretation of the ADA/The Rehabilitation Act (which supports the position that these claims are "like or related") is entitled to deference by reviewing courts under the *Chevron* Deference.

LIST OF PARTIES

The parties are listed in the caption. There are no additional parties joined in this action.

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The U.S. District Court dismissed the Petitioner's Title VII and ADA/The Rehabilitation Act claims on May 2, 2017. On November 8, 2018, the Court of Appeals affirmed the rulings of U.S. District Court Judge Trauger. The Petitioner's Title VII claim was dismissed on the basis of a failure to file the complaint within ninety days of the Respondent's receipt of the Final Agency Decision. The Petitioner took the position below that the doctrine of equitable tolling should have been applied and her Title VII claim should have proceeded. The Petitioner's ADA/The Rehabilitation Act claim was dismissed on the basis of what the U.S. District Court found to be a failure to exhaust administrative remedies. The Petitioner took the position below that her ADA/The Rehabilitation Act claim is like or related to, and reasonably expected to arise out of her claim that her FMLA benefits were denied on the basis of discrimination and retaliation such that the failure to specifically mention the ADA/The Rehabilitation Act in the administrative process should not prevent her claim under the ADA/The Rehabilitation Act from proceeding in U.S. District Court.

STATEMENT OF JURISDICTION

On November 8, 2018, the Court of Appeals affirmed the rulings of the U.S. District Court in regard to the dismissal of the Petitioner's Title VII claim and her ADA/The Rehabilitation Act claim. The Court of Appeals did not accept the Petitioner's argument that the doctrine of equitable tolling applied to allow her Title VII case to proceed despite

having not been filed within ninety days of the receipt of the Final Agency Decision. Likewise, the Court of Appeals did not accept the Petitioner's argument that her ADA/Rehabilitation Act claim was like or related to, and reasonably expected to grow out of her claim of discrimination involving denial of benefits under the FMLA. Therefore, the failure to specifically mention the ADA/The Rehabilitation Act in the administrative process was deemed to be a failure to exhaust administrative remedies. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-16(c)

29 C.F.R. § 1614.407

Reproduced in Appendix at pp. 39a-42a.

STATEMENT OF THE CASE

This Petition arises from the Order of the United States Court of Appeals for the Sixth Circuit (hereinafter "the Court of Appeals"), No. 18-5306, filed on November 8, 2018, and not recommended for full text publication. For purposes of her Petition for Writ of Certiorari, the Petitioner's appeal was based on the following issues: The first issue is whether the U.S. District Court erred in dismissing the Petitioner's Title VII claim for failure to exhaust her administrative remedies. Specifically, the first issue involves the question of whether the doctrine of equitable tolling applies so as to toll the limitations

period allowing the claim to proceed despite the civil case not being filed prior to the expiration of ninety days following the Petitioner's receipt of the Final Agency Decision. The second issue is whether U.S. District Court erred in dismissing the Petitioner's ADA/The Rehabilitation Act claim. (The Appellant also takes the position that, even if she phrased her disability claim in terms of the ADA instead of The Rehabilitation Act, it should have still been allowed to proceed.) This issue involves the question of whether the U.S. District Court erred in dismissing the Petitioner's ADA/The Rehabilitation Act claim on the rationale that it was not specifically raised during the administrative proceedings. The Petitioner takes the position that her ADA/The Rehabilitation Act claim was "like or related to" her claims that the denial of her FMLA leave requests was discriminatory and in retaliation for prior EEOC activity/complaints. Likewise, the Petitioner took the position that the ADA/The Rehabilitation Act claims "can reasonably be expected to grow out of the charge of discrimination" based on the denial of FMLA leave and that, consequently, her claim based on the ADA/The Rehabilitation Act should have been allowed to proceed.

I. THE COURT OF APPEALS ERRED IN UPHOLDING THE U.S. DISTRICT COURT'S DISMISSAL OF THE PETITIONER'S TITLE VII CLAIM AS UNTIMELY. THE DOCTRINE OF EQUITABLE TOLLING SHOULD HAVE BEEN APPLIED TO ALLOW THE CLAIM TO PROCEED BASED ON PRECENDENT ESTABLISHED BY THE UNITED STATES

SUPREME COURT AND THE SIXTH CIRCUIT'S OWN PRECENDENT.

As recited in the decision of the Court of Appeals, the Petitioner filed an EEOC discrimination complaint in December, 2014. Upon the completion of the administrative processing of the complaint, the Petitioner requested and received the Respondent's Final Agency Decision (FAD) on August 18, 2015, after which she drafted a letter to the agency office that issued the FAD. (The FAD provided information concerning the time limits within which the Petitioner was to file, if she intended to do so, a case in U.S. District Court, i.e. within ninety days of receipt of the FAD.) This letter was drafted and forwarded on the same day she received the FAD, i.e. August 18, 2015. The Petitioner takes the position that she was certainly acting diligently, although, as it turns out, mistakenly. In the course of that letter, the Petitioner clearly disclosed her intentions in terms of her future actions to the Respondent:

> This letter is to further inform you, that I WILL NOT be filing an appeal with the U.S. Equal Employment Opportunity Commission (EEOC) in reference to the attached (FAD). *I WILL NOT at this time be filing a Civil Suit in this matter, but I reserve the right to file suit, if this matter is not properly handled, by the appropriate agency. A Complaint or Civil Suit must be filed within 2 years of the date of the last action in which the FMLA was violated.* (Emphasis added)

It would be obvious to anyone reading the Petitioner's letter that she was under the misapprehension that, because her complaint was based on what she believed to be discriminatory/retaliatory treatment in her application for FMLA benefits, the ordinary ninety day statute of limitations did not apply.[1] The Petitioner then diligently pursued the issue with what she believed was the "appropriate agency" believing that she could "reserve the right to file suit, if this matter is not properly handled" by the appropriate agency tasked with enforcing the FMLA, i.e. the Department of Labor.

She drafted and forwarded a letter, also dated August 18, 2015, to the United States Department of Labor (DOL), the agency that she believed was responsible for enforcing the provisions of the FMLA. She raised the issue of what she believed were violations of the FMLA and she attached a number of documents, to include but not limited to the FAD. She concluded the letter by pointing out that she had attached a number of documents for DOL's review, asked that they please take the time to review all of the documents and she reiterated her belief that she had two years to file a civil suit should DOL not resolve the issue.[2]

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[1] It would also have been clear that she was proceeding as a pro se litigant. She received no response from the agency addressing her misunderstanding of my rights.

[2] Again, no agency representative contacted me in regard to the Petitioner's belief that she had two years to file a civil suit based on an allegation of a discriminatory/retaliatory failure to property apply the provisions of the FMLA to her requests for leave. There were a number of telephone conversations with DOL employees and the Petitioner submitted a number of

The Petitioner then received a response from the Department of Labor but only after the expiration of approximately 116 days, i.e. on December 14, 2015. This letter informed the Petitioner that she should have presented her complaint to the Office of Personnel Management (OPM).[3] The Petitioner responded to this letter approximately a week later, i.e. on December 21, 2015, and pointed out that she had actually contacted OPM prior to contacting DOL: "I contacted OPM before contacting your office and now your office is redirecting me back to OPM after holding onto my documents for a total of 116 days." DOL responded by letter, dated January 12, 2016, that it had confirmed by additional research that it had no enforcement authority in regard to the Petitioner's complaint.

Given the fact that it was apparent that the Petitioner was not going to obtain any meaningful response from either DOL or OPM, she began to assemble all the necessary documents, and to draft her pro se complaint which was ultimately filed with the U.S. District Court on April 22, 2016. As the ninety days (following the Petitioner's receipt of the FAD) had elapsed while DOL was addressing the Petitioner's complaint and determining whether or not it had any enforcement authority in her case, the U.S. District court dismissed her Title VII case for failure to comply with the statute of limitations.

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documents upon request during the approximately 116 days she was waiting for DOL to take action.

[3] The statute of limitations (i.e. 90 days following my receipt of the FAD) expired in the interim between the Petitioner's letter to DOL and their response.

The Petitioner argued in her appeal that she believed that the U.S. District Court erred in dismissing her Title VII claim. The court dismissed this claim due to the fact that it was not filed within ninety (90) days of her receipt of the FAD. This statute of limitations is subject to equitable tolling. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). The factors that are to be considered by a court in deciding whether to equitably toll the statute of limitations have been variously described in the caselaw as set out below:[4]

A plaintiff is "entitled to equitable tolling only if [s]he shows (1) that [s]he has been pursuing her rights diligently, and some extraordinary circumstance stood in [her] way and prevented timely filing". Holland v. Florida, 560 U.S. 631, 130 S. Ct. 2549, 177 L. Ed.2d 130 (2010). Significantly for the Petitioner's case, there are also cases in which courts have held that equitable tolling is appropriate in situations where a plaintiff has "received inaccurate or ineffective notice from a government agency required to provide notice of the limitations period". Bowden v. United States, 106 F.3d 433, at 438 (D.C. Circuit, 1997).

Another similar case which is significant for deciding the Petitioner's case is Granger v. Aaron's, Incorporated, 636 F.3d 708 (5th Cir. 2011)[5], in which

[4] In addition, the Petitioner cites to additional caselaw in the "Reasons for Allowance of the Writ" section herein.

[5] Although this case addressed the requirement to file an administrative complaint within 300 days of the discriminatory act, the principles are the same in terms of applying the concept of equitable tolling.

the plaintiffs obtained legal counsel and filed their complaints of discrimination with the Office of Federal Contract Compliance Programs (OFCCP), which was not, however, the correct agency to receive the complaints as the plaintiffs were not federal contractors. The attorney's staff mistakenly believed that they were dealing with the Equal Employment Opportunity Commission (EEOC) which was the correct agency for filing the complaints. OFCCP personnel never informed the attorney's staff that it was the incorrect agency, OFCCP personnel assured the attorney's staff that the complaint was being evaluated and there were a number of phone calls which took place between agency personnel and attorney's staff. When the 300th day passed, which was the deadline for timely filing the complaints with the EEOC, they were still pending at OFCCP.

OFCCP subsequently closed the files and transferred them to the EEOC, after which right to sue letters were issued. The district court agreed with the plaintiffs that the statute of limitations for filing with the EEOC should be equitably tolled, and the appellate court agreed. The district court observed that although the situation did not fit squarely under any of the ordinarily cited factors for deciding the issue, equitable estoppel was still appropriate. The appellate court reached this finding even though there were no affirmative misrepresentations by OFCCP. The court found that the situation was similar to those cases in which the plaintiff actively pursued judicial remedies even though the pleadings were defective because, overall, the efforts of the plaintiff reflected due diligence.

The appellate court concluded that the district court did not abuse its discretion in reaching the conclusion that the facts warranted equitable tolling: "Their attorney's staff made repeated contact with the OFCCP, which never communicated the filing error and maintained the complaints were under investigation." The facts of the Petitioner's situation are similar to those presented in the Bowden and Granger line of cases, and it is, consequently, the U.S. District Court should have found that it was appropriate to equitably toll the statute of limitations so that the Petitioner's Title VII case could have proceeded.

The caselaw is clear that it is not appropriate to apply the standard (as set out in cases like Zipes) in a formulaic and/or rigid fashion. As the Granger case makes clear, the concept underlying the standard is broad enough and flexible enough to encompass a situation where the plaintiff, particularly a pro se litigant, is acting diligently but under a misunderstanding of the filing requirements in such a way that the governmental agency is on notice of the misunderstanding and bears, in a sense, some if not all of the blame for perpetuating the misunderstanding for such a long period of time that the plaintiff's rights are lost because of the expiration of filing deadlines.

The Petitioner respectfully submits that the U.S. District Court's failure to apply the standard in a broad and/or flexible manner in accordance with the applicable cited caselaw was an abuse of discretion and should be reversed. Here, because the application of equitable tolling was a fact-specific,

discretionary matter, the appropriate standard of review is abuse of discretion. See Fisher v. Johnson, 174 F.3d 710 (5th Cir.1999).

II. THE COURT OF APPEALS ERRED IN UPHOLDING THE U.S. DISTRICT COURT'S DISMISSAL OF THE PETITIONER'S ADA/THE REHABILITATION ACT CLAIM BASED ON HER ALLEGED FAILURE TO EXHAUST ADMINSTRATIVE REMEDIES. THE PETITIONER'S ADA/THE REHABILITATION ACT CLAIM IS LIKE OR RELATED TO HER CLAIM THAT THE DENIAL OF HER FMLA LEAVE WAS DISCRIMINATORY AND RETALIATORY AND COULD HAVE REASONABLY BEEN EXPECTED TO GROW OUT OF THE FMLA RELATED CLAIM. THE EEOC'S OWN INTERPRETATION OF THE ADA/THE REHABILITATION ACT IS SUCH THAT A FMLA RELATED CLAIM NECESSARILY REQUIRES AN ANALYSIS OF WHETHER A "DISABILITY" UNDER THE ADA/THE REHABILITATION ACT HAS BEEN LIKEWISE ALLEGED. THE COURT OF APPEALS IGNORED THIS INTERPRETATION WHICH NOT ONLY MEANS ITS SUBSTANTIVE FINDING IS IN ERROR BUT THIS ALSO MEANS THAT IT HAS IGNORED THE UNITED STATES SUPREME COURT'S GUIDANCE

IN THIS AREA BY IGNORING THE CHEVRON DEFERENCE DOCTRINE[6].

The law is clear that a case may include allegations "like or related to allegation[s] contained in the [EEOC] charge and growing out of such allegations during the pendency of the case before the Commission". McClain v. Lufkin Indus, Inc., 519 F.3d 264, 273 (5th Cir. 2008). If an allegation "can reasonably be expected to grow out of the charge of discrimination", said determination being based on a "fact intensive" analysis, the court should include the allegation in the lawsuit. Id.

The EEOC's own guidance is relevant to deciding the issue of whether the Petitioner's ADA claim is "like or related to" the Petitioner's claim that she was subjected to retaliation/discrimination when she applied for FMLA benefits. The EEOC's Office of Legal Counsel prepared a fact sheet, entitled "The Family Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964". This fact sheet basically compares and contrasts the FMLA and the ADA, and provides guidance on when (in terms of investigations) terms used with the context of the FMLA implicate terms pertaining to the ADA.

For example, the guidance makes clear that a "serious health condition" is not necessarily an ADA "disability". However, the guidance also makes clear that "(s)ome FMLA 'serious health conditions' may be

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[66] The failure of the Court of Appeals to consider the Chevron Deference doctrine is addressed in the "Reasons for Allowance of the Writ" herein.

ADA 'disabilities'....". The guidance also directs investigators to look at all pertinent evidence "including any information about whether the individual has or had a 'serious health condition' in addressing the issue of whether the individual has an ADA disability".

The guidance also makes clear that, under the ADA, intermittent or occasional leave may be characterized as a reasonable accommodation if there is no undue hardship created for the employer. Also, there are remarks in the guidance that (for purposes of analyzing a situation in which an employee has requested FMLA leave) this should trigger an evaluation of whether the request is also one for a reasonable accommodation under the ADA;

> If an employee requests time off for a reason related or possibly related to a disability (e.g., "I need six weeks off to get treatment for a back problem"). *The employer should consider this a request for ADA reasonable accommodation as well as FMLA leave.* (Emphasis added)

In terms of requesting leave "for a reason related or possibly related to a disability" (and related to major life activities, for that matter), the Petitioner's declaration to the investigator was replete with reasons "related or possibly related to a disability". The Petitioner, in her declaration, made reference to a statement completed by one of her physicians: "Her medical conditions has mentally impaired her to perform her duties". The Petitioner's physician went on to say (and the physician's

comments are referenced in the Petitioner's declaration) that "(d)ue to her multiple medical issues and the nature of her job her in Korea, she is having difficulty addressing her medical concerns and in turn causing her mental anguish that is affecting her as an educator". The Petitioner also referenced in her declaration that she suffers from "chronic kidney disease" and "severe anemia".

The EEOC's own guidance, prepared by its Office of Legal Counsel, makes clear that, when the Petitioner requested leave, it was for a reason related or possibly related to a disability and, because of this, her request should have been considered a request for reasonable accommodation under the ADA/The Rehabilitation Act (as well as a request pursuant to the FMLA). The Petitioner proffers that it is difficult to imagine a more clear example of a claim arising out of, or being related to another claim. As described above, the EEOC guidance makes clear that the Respondent, as well as the investigator, should have been analyzing the Petitioner's request for leave not only as a request pursuant to the FMLA (and in terms of whether she was discriminated against when she made the request), but also as a request for a reasonable accommodation under the ADA/The Rehabilitation Act.

Consequently, based on the foregoing, the district court's dismissal of the Petitioner's ADA/The Rehabilitation Act claim based on the theory that she failed to exhaust administrative remedies is in error and should be reversed. The ADA/The Rehabilitation Act claim is like and/or related to the

retaliation/discrimination (FMLA) claim within the meaning of the applicable caselaw as described above.

REASONS FOR ALLOWANCE OF THE WRIT

REVIEW IS WARRANTED BECAUSE THERE IS A BASIS FOR AND OPPORTUNITY FOR THE UNITED STATES SUPREME COURT TO EXPAND ON ITS EARLIER DECISIONS WHICH ESTABLISH THAT THE DOCTRINE OF EQUITABLE TOLLING IS TO BE APPLIED LIBERALLY IN REGARD TO PRO SE LITIGANTS AND PARTICULARLY SO IN TITLE VII EMPLOYMENT DISCRIMINATION CASES. THIS WOULD PROVIDE GUIDANCE FOR THE CIRCUITS ON THIS ISSUE, PARTICULARLY IN THE 6TH CIRCUIT, WHICH HAS RECOGNIZED THE BASIC CONCEPT BUT IS RELUCTANT TO FOLLOW THE TREND ESTABLISHED BY THE UNITED STATES SUPREME COURT AND EVEN ITS OWN PRECENDENT (AS IS DEMONSTRATED BY ITS DECISION IN THIS CASE) TO APPLY THE CONCEPT BROADLY ENOUGH TO COVER THE PETITIONER'S SITUATION. IN ADDITION, THIS CASE PROVIDES AN OPPORTUNITY FOR THE UNITED STATES SUPREME COURT TO ADDRESS AND ENFORCE THE APPLICATION OF THE "CHEVRON DEFERENCE" WITHIN THE SPECIFIC CONTEXT OF TITLE VII LITIGATION.

In Brown v. Crowe, 963 F. 2d 895 (6th Cir. 1992), the Sixth Circuit addressed the issue of the application of the doctrine of equitable tolling in the context of a Title VII employment discrimination case. Specifically, the case dealt with a situation in which the actions of one governmental agency effectively caused a delay in the process such that the employee missed a filing deadline with another agency. The particulars of this case warrant reciting to some degree to facilitate an explanation of why it is applicable and relevant to the Petitioner's case.

Namely, the Brown v. Crowe case dealt with the interplay between an employee filing with a state agency on the one hand, i.e. the Tennessee Human Rights Commission (THRC) and with a federal agency, i.e. the EEOC, on the other. In that case, the employee contacted the EEOC regional office by mail on the 179th day following his allegedly discriminatory transfer and demotion. Two months later, he actually submitted a charge to the THRC, which had entered into a work-sharing agreement with the EEOC.

Under the work-sharing agreement, the EEOC was to initially process the employee's charges as they involved ongoing discrimination and retaliation. Furthermore, the THRC had also agreed under the work-sharing agreement to defer immediately to the EEOC any charges that were determined to be untimely under Tennessee law. The charges had not been brought to the attention of the THRC within 180 days so were, therefore, untimely under Tennessee law. Consequently, the charges received by the THRC were transferred to the EEOC.

After a brief investigation, the EEOC determined that it would not pursue further processing of the charges and informed the THRC of this decision. The THRC began an investigation and inexplicably (insofar as the employee's initial contact with the THRC was untimely) took over a year to issue a notice that it was administratively closing the case. By this point, a great deal more than 300 days had elapsed between the alleged discriminatory act and THRC's closing of the case so that the employee could not file a timely charge with the EEOC.

Under Title VII, the general rule is that charges are to be filed with the EEOC within 180 days of the discriminatory act. The statutory provisions addressing filings with state agencies however, provide that where charges have been filed first with a state agency, the charges must be filed with the EEOC (in order to be timely) within 300 days of the discriminatory act or within 30 days of the closing of the state proceeding, whichever occurs first. However, the applicable statutes also provide that when a charge arises in a state which prohibits the alleged discriminatory act, no charge may be commenced with the EEOC prior to the expiration of 60 days after proceedings are commenced with the state agency unless the state proceedings are terminated earlier than 60 days.

Read together, the statutes provide that if an employee does not file a charge with the EEOC within 180 days, the employee must file with the appropriate state agency within 240 days of the alleged discrimination so that the charge can be filed with the EEOC within 300 days, or, in the alternative,

if the employee files after 240 days with the state agency and that agency terminates its proceedings prior to the expiration of 300 days, the employee can still file a timely charge with the EEOC.

The District Court granted summary judgment against the employee as he had clearly not filed his charge with the EEOC within the expiration of 300 days after the occurrence of the alleged discriminatory employment act. The Court of Appeals applied, however, the doctrine of equitable tolling (even though it had not been argued at the trial court level) and reversed the District Court. The Court of Appeals cited the U.S. Supreme Court holding in Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed2d 234 (1982) for the proposition that "compliance with the filing period [is] not a jurisdictional prerequisite to filing a Title VII suit, but [is] a requirement subject to waiver as well as tolling when equity so requires....". The Court of Appeals noted the reasoning of Zipes v. Trans World Airlines, Inc. insofar as the application of the doctrine of equitable tolling is concerned: "[W]e honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer."

In Brown v. Crowe, the Court of Appeals not only cited to the U.S. Supreme Court's clear indication that equitable tolling is to be applied liberally particularly within the context of Title VII employment discrimination cases, but to its own case law. In particular, the Court of Appeals cited to Morgan v. Washington Manufacturing Co., 660 F.2d. 710 (6th Cir. 1981), which includes language that

makes clear that the Title VII statutory remedial framework was constructed with the pro se litigant in mind (and in order to encourage employees to pursue remedies without legal representation) and that, consequently, the doctrine of equitable tolling should be liberally applied. This case also contains language that the required diligence on the part of the employee (to justify the application of the doctrine of equitable tolling) can be demonstrated by the employee's filing with some (even if the incorrect agency) federal agency and even if the employee, in pursuing this "incorrect" remedy, fails to submit a claim to the "correct" agency within the time allotted for such a claim.

The Morgan v. Washington Manufacturing Co. court observed the following in regard to the required showing of diligence and in regard to the types of situations that warrant the application of the doctrine of equitable tolling to the "reasonable efforts of the lay plaintiff": "We conclude, therefore, that in the absence of prejudice to the defendant or a showing of bad faith or lack of diligence by a claimant, equitable considerations should toll the 180 day period for filing a complaint under Title VII when the claimant makes a timely filing with a federal agency, like the Labor Department, which has jurisdiction in some fields of employment discrimination and when that complaint is forwarded to the EEOC shortly after the time period has expired."

As is made clear in the "Statement of the Case" herein, this is exactly what the Petitioner did, i.e. filed a complaint with the Department of Labor which has jurisdiction over an area of employment law which is

inextricably intertwined with the Petitioner's Title VII case under the mistaken belief that this was a viable alternative route to relief on her claim and that she could subsequently file a lawsuit if her claim wasn't satisfactorily resolved by the Department of Labor. The Morgan v. Washington Manufacturing Co. case should be adequate case law support in the Sixth Circuit for a finding that equitable tolling should be applied to the Petitioner's case. In addition, the fact that she informed the Respondent of her belief that she could seek relief from the Department of Labor and somehow reserve her right to file a lawsuit later without regard for the expiration of the time ordinarily allowed for filing a lawsuit, and the fact that the Department of Labor took and inordinate amount of time to determine that it could not pursue her claim, places the Petitioner's case squarely within precedent established by the Brown v. Crowe case.

Despite the Brown v. Crowe and the Morgan v. Washington Manufacturing Co. cases, however, and despite the clear trend and guidance provided by the United States Supreme Court in Zipes v. Trans World Airlines, Inc., the Court of Appeals in this case refused to follow the clear trend and precedent which has been previously established, even in its own precedent. This is an area which begs for a clear directive from the United States Supreme Court that the circuits, in particular, the Sixth Circuit, are to continue to follow this trend, i.e. the liberal application of the doctrine of equitable tolling in Title VII litigation, particularly when pro se litigants are involved. This type of directive would serve to direct the circuits to expand rather than contract the application of the doctrine of equitable tolling within

the very specific and unique context of Title VII litigation which is based on a statutory framework designed for pro se litigants. Consequently, the Petitioner's case also presents an opportunity for the United States Supreme Court to ensure that the trend in this area continues in terms of expanding, rather than contracting, the application of the doctrine of equitable tolling in regard to pro se litigants and this will ensure as well that the remedies intended by Title VII will not be denied to future pro se litigants.

In addition, as addressed in the "Statement of the Case" herein, the Petitioner has pointed out that the law is clear that a case may include allegations "like or related to allegation[s] contained in the [EEOC] charge and growing out of such allegations during the pendency of the case before the Commission". McClain v. Lufkin Indus, Inc., 519 F.3d 264, 273 (5th Cir. 2008). The Petitioner also pointed out that the EEOC's own guidance is relevant to deciding the issue of whether her ADA claim is "like or related to" her claim that she was subjected to retaliation/discrimination when she applied for, but was denied, FMLA benefits.

Namely, the Petitioner pointed out that the EEOC's Office of Legal Counsel prepared a fact sheet entitled "The Family Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964". As pointed out by the Petitioner, this fact sheet basically compares and contrasts the FMLA and the ADA, and provides guidance on when (in terms of investigations) terms used within the context of the FMLA implicate terms pertaining to the ADA.

For example, the guidance makes clear that, although a "serious health condition" is not necessarily an ADA "disability", it is clear that "(s)ome FMLA 'serious health conditions' may be ADA 'disabilities'....". The guidance also directs investigators to analyze whether the individual has or had a "serious health condition" in order to fully address the issue of whether the individual has an ADA "disability". The Petitioner also pointed out that there are remarks in the guidance that (for purposes of analyzing a situation in which an employee has requested FMLA leave) this should trigger an evaluation of whether the request is also one for a reasonable accommodation under the ADA.

Consequently, it is clear that the agency charged with administering the law in question (i.e. the ADA, and, in terms of the Petitioner's case, The Rehabilitation Act) has made an official determination and/or interpretation such that allegations involving the FMLA should be interpreted to implicate a claim pursuant to the ADA/The Rehabilitation Act. In other words, the agency has arrived at an interpretation of a statute which it administers and it is clear that, insofar as the agency is concerned, a charge involving the FMLA necessarily involves an analysis of whether a disability under the ADA/The Rehabilitation Act has been alleged.

The Petitioner clearly pointed this out to the Court of Appeals in her case and not only did the decision rendered by the Court of Appeals give short shrift to this issue, i.e. the agency's own interpretation of the statute it administers, there is

no mention of this issue. In Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed2d 694 (1984), the United States Supreme Court held that in a review of an agency's construction of a statute that it administers, two questions are involved. First, the question is whether Congress has spoken to the precise issue involved. Second, if Congress has not addressed the specific issue, the question for the reviewing court is whether the agency's interpretation is based on a permissible construction of the statute. The reviewing court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

In this case, the Petitioner is aware of no indication from Congress on the interplay between allegations of discrimination involving the FMLA and the extent to which this necessitates an analysis of whether a disability under the ADA/The Rehabilitation Act has been alleged (and the guidance authored by the EEOC's Office of Legal Counsel mentions no Congressional directive. Consequently, the question should have been asked by the Court of Appeals in this case should have been whether the EEOC's interpretation of the ADA/The Rehabilitation Act is a based on a permissible construction of those statutes.

In a sense, the decision by the Court of Appeals in this case is worse than it would be if the Court of Appeals had simply addressed the interpretation of the ADA/The Rehabilitation Act by the Equal Employment Opportunity Commission and

substituted its own interpretation. This would have been the case had the Court of Appeals determined that allegations premised on the FMLA do not (as opposed to the position taken by the EEOC) necessarily implicate the issue of whether a "disability" under the ADA/The Rehabilitation Act has been alleged and, therefore, a claim implicating the FMLA is not "like or related to" a claim premised on the ADA/The Rehabilitation Act.

The decision actually rendered by the Court of Appeals in this case is worse insofar as it simply ignores clearly applicable United States Supreme Court precedent, i.e. the "Chevron Deference" despite the fact that the Petitioner clearly placed this issue before the Court of Appeals by referencing the EEOC's own interpretation of the ADA/The Rehabilitation Act. This is situation into which the United States Supreme Court should enter in order to make clear to the circuits, and the 6th Circuit in particular, that the "Chevron Deference" should be rigorously applied particularly within the context of a statutory scheme such as the ADA/The Rehabilitation Act which is focused on righting the wrong of workplace discrimination.

CONCLUSION

Thus, certiorari is warranted to further define the nature of the expanded scope of the doctrine of equitable tolling specifically within the context of cases involving pro se parties in Title VII litigation who exercise diligence but under a mistaken belief as to the procedures and timeframes, and in which federal agencies fail to correct the mistaken belief and

contribute to the delay which results in an untimely filing. Further, certiorari is warranted to determine extent to which ADA/The Rehabilitation Act claims arise out of claims of discrimination related to a denial of benefits under the FMLA, and to what extent the Chevron Deference doctrine is controlling in this regard.

RESPECTFULLY SUBMITTED this 25th day of January, 2019.

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