

## Split Among Federal Circuits Deepens Regarding Administrative Exhaustion Of Post-Charge Retaliation Claims

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Year after year, retaliation is at or near the top of the list of the most common charges filed with the EEOC. After receiving a right to sue notice, many plaintiffs, however, add a retaliation claim to their federal court complaints based on alleged employer conduct occurring after the EEOC charges have been filed. Traditionally, these claims have been allowed to proceed – despite not having been raised in the EEOC charge – under the theory that such claims grow out of or are sufficiently related to the actual charges brought.

This past week, however, the Eighth Circuit Court of Appeals dismissed a plaintiff's retaliation claim, which was based on her employer's post-EEOC charge conduct, because the plaintiff failed to exhaust her administrative remedies. The case is styled [Richter v. Advance Auto Parts, Inc.](#)

In *Richter*, the plaintiff originally brought only race and sex discrimination charges in her EEOC complaint. Later discharged, she brought suit in federal court under the theory of retaliation under Title VII, claiming she was terminated for filing her charges with the EEOC. The Eighth Circuit, relying on the Supreme Court case of *National Railroad Passenger Corp. v. Morgan*, which focused on the discrete nature of employment acts and the timeliness of bringing charges related to each act, held that plaintiff's retaliation claim involved a separate, discrete act by her employer and would first need to be investigated by the EEOC. The court therefore dismissed the claim.

While the majority opinion cited Tenth Circuit case law to support its decision, the dissent, which would have allowed the retaliation claim to proceed under the traditional theory ( *i.e.*, an administrative exhaustion exception for "like or reasonably related" charges), cited supporting decisions from the Fourth, Fifth, Sixth, and Ninth Circuits. Obviously, the circuits are in conflict on this point of law, but this recent Eighth Circuit opinion may signal the recent trend among federal jurisdictions. Regardless, employers (and their attorneys) should be mindful of the administrative exhaustion defense and the possibility of using this new arrow to shoot down post-charge, newly-raised retaliation claims.

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