No. _____

In The Supreme Court of the United States

DEBRA SIMMONS-MYERS,

Petitioner,

v.

CAESARS ENTERTAINMENT CORPORATION,
d/b/a/ Harrah's Casino and
BL DEVELOPMENT CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964 forbids employment discrimination on the basis of race, gender, national origin, and religion, and prohibits retaliation against an employee because he or she filed a charge with the Equal Employment Opportunity Commission or otherwise opposed a practice made unlawful by the statute. Section 706(e) requires that a prospective plaintiff, prior to commencing suit under Title VII, first file a charge with the EEOC.

The question presented is:

> If an employee files a charge with the EEOC, and the employer subsequently again violates Title VII, must the employee file a second charge with the EEOC before filing suit to challenge the post-charge violation?

PARTIES

The parties to this action are set out in the caption.

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Petitioner Debra Simmons-Myers respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on February 26, 2013.

OPINIONS BELOW

The February 26, 2013 opinion of the Court of Appeals, which is unofficially reported at 2013 WL 697226 (5th Cir. Feb. 26, 2013), is set out at pp. 1-12 of the Appendix. The July 13, 2012 decision of the United States District for the Northern District of Mississippi, which is unofficially at 2012 WL 2885366 (N.D. Miss. July 13, 2012), is set out at pp. 13-34 of the Appendix.

JURISDICTION

The decision of the Court of Appeals was entered on February 26, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 703(a)(1)of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), provides in pertinent part:

> Employment practices. It shall be an unlawful employment practice for an employer –

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....

Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e) provides in pertinent part:

> (1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred....

STATEMENT OF THE CASE

Under section 706(e) of Title VII of the Civil Rights Act of 1964, an employee may not file suit regarding a violation of that statute unless he or she has first filed a charge with the EEOC. It frequently occurs that, after an employee has filed such a

charge, the employer engages in additional unlawful actions. The lower courts are divided regarding whether in such a case the employee must file a second charge in order to be able to challenge in court the post-charge violation. This question arises most often when an employer retaliates against an employee because he or she filed a charge with EEOC. This case presents that recurring legal issue.

In 2009, Debra Simmons-Myers was hired as a sales manager for Caesars Entertainment, responsible for soliciting business groups from a particular region to visit the Harrah's Casino in Tunica County, Mississippi. App. 2. In March 2010, Simmons-Myers complained to a company human resources official that male sales managers were being given discriminatory favorable treatment.[1] The next month, Simmons-Myers' supervisor gave her a written writeup asserting that her work performance was deficient. Simmons-Myers in response filed a Title VII charge with EEOC,[2] alleging that she was the victim of both sex discrimination and retaliation, and stating that the discrimination and retaliation were "continuing." App. 35.

Three months after Simmons-Myers filed her charge with EEOC, and while that charge was still pending, the company issued her a "final" warning

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[1] R:593-94.

[2] A copy of the EEOC charge is reproduced in the Petition at Appendix 35.

asserting that her work performance was inadequate.[3] Simmons-Myers responded to this warning by asserting to company officials "that I am being treated harsher than other market sales managers due to the fact that I complained to both HR and the EEOC."[4] She also wrote to the company president, explaining that she felt that she "had no [ ] choice but to go to the EEOC for help."[5] Two months later, Simmons-Myers was fired.[6] Several other company employees were dismissed at the same time. App. 4-5. Throughout this period, Simmons-Myers' original Title VII charge was pending at the EEOC.

The EEOC subsequently issued Simmons-Myers a right to sue letter regarding her April 2010 charge of discrimination and retaliation. Without filing a second EEOC charge, Simmons-Myers commenced this action in federal district court in December 2010. The plaintiff's complaint alleged that she had been fired in retaliation for her original EEOC charge and because of her gender.[7] Caesars moved to dismiss that

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[3] R:841.

[4] R:841.

[5] R:846.

[6] R:862.

[7] The complaint also alleged that Caesars had retaliated and discriminated against Simmons-Myers while she was still working for the company, the issues specifically raised in her pre-termination EEOC charge. The district court concluded that this alleged discrimination and retaliation were not sufficiently serious to be actionable. App. 31-33. The plaintiff also asserted that she had been dismissed because of her race, a claim arising

(Continued on following page)

claim on the ground that Simmons-Myers had not filed a second EEOC charge regarding her post-charge termination. The district court dismissed both of these claims.

The district court concluded that plaintiff was barred from pursuing her claim that her post-charge dismissal was the result of sex discrimination. Relying on this Court's decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the district court held that an EEOC charge alleging discrimination can only encompass acts of discrimination that occurred *before* the filing of that charge. Any *post*-charge discrimination claim, it reasoned, must be raised in a second or other succeeding EEOC charge or it will be barred.

> [T]here is no question that ... *Morgan* ... require[s] a plaintiff to exhaust her administrative remedy for a discrete allegation of *discrimination* occurring *after* the filing of her EEOC charge..... Because Simmons-Myers did not exhaust her gender discrimination claim in connection with the termination of her employment, there is no question that Title VII bars her from bringing her gender *discrimination* claim....

App. 22-23 (Emphasis in original).

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under 42 U.S.C. § 1981. The district court concluded that Simmons-Myers lacked sufficient evidence of racial discrimination to survive a motion for summary judgment. App. 28-30. Those claims are no longer at issue.

Regarding the plaintiff's claim of retaliatory discharge, the district court noted that the Fifth Circuit had at one time held that a worker who was retaliated against for filing an EEOC charge is not required to file a second EEOC charge as a prerequisite to suit. App. 24-25. In *Gupta v. East Texas State University*, 654 F.2d 411, 414 (5th Cir. 1981), the Fifth Circuit ruled that an employee retaliated against for filing an EEOC charge need not file a second such charge before commencing litigation.[8] The district judge noted that Simmons-Myers' "retaliatory discharge claim grows directly out of her earlier EEOC charge and thus falls squarely within ... *Gupta*." App. 24-25. The district court concluded, however, that the decision in *Gupta* "is not viable" in light of this Court's decision in *Morgan*. In the district court's view, *Morgan* holds that a worker dismissed for filing an EEOC charge must always file a second EEOC charge, even though the retaliation claim "grows directly out of her earlier EEOC charge." App. 25-27. It, therefore, dismissed Simmons-Myers' post-charge retaliation claim on the grounds that, because she had not filed a second EEOC charge, she had failed to exhaust that claim as required by section 706(e) of Title VII.

The court of appeals affirmed. With regard to Simmons-Myers' post-charge discrimination claim,

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[8] Prior to 2002 ten other circuits had agreed with *Gupta*. *See* p. 9, *infra*.

the Fifth Circuit held that a Title VII charge can encompass and exhaust only discriminatory acts that occurred prior to the filing of that charge. Any post-charge discrimination must be raised in a second (or succeeding) charge, or by formally amending the original charge. "Although Simmons-Myers made allegations of gender discrimination for acts prior to her termination in her EEOC charge, discrete discriminatory acts are not entitled to the shelter of the continuing violation doctrine.... Her termination was a separate employment event for which Simmons-Myers was required to file a supplemental claim, or at the very least, amend her original EEOC charge. *Nat'l R.R. Passenger Corp. v. Morgan*." App. 8.

With regard to the plaintiff's retaliation claim, the Fifth Circuit held that a worker retaliated against for having filed an EEOC charge must at least sometimes file a second EEOC charge prior to commencing civil litigation. Applying an earlier 2011 Fifth Circuit opinion,[9] the court of appeals held that a worker retaliated against for filing an EEOC charge cannot file suit, absent a second EEOC charge about the retaliation, if the worker's federal court complaint *also* contains any separate claim which the court concludes was not properly exhausted. In the instant case, the Fifth Circuit held that under *Morgan* the plaintiff had not exhausted her claim of post-charge gender discrimination. Thus, because Simmons-Myers

[9] *Sapp v. Potter*, 413 Fed.Appx. 750 (5th Cir. 2011).

had included in her complaint that unexhausted claim, she was barred from pursuing her claim of post-charge retaliation in the absence of a second EEOC charge. App. 8-10.

REASONS FOR GRANTING THE WRIT

I. Introduction

Title VII, like several federal employment statutes, contains an exhaustion requirement. The statute forbids various forms of discrimination, and prohibits an employer from retaliating against an employee who filed a charge with the EEOC. Before commencing litigation, however, an employee must first file a charge with the EEOC. This case presents a recurring dispute about whether such a charge can encompass, and thus exhaust, an unlawful employment practice that occurs *after* the filing of the charge itself.

The lower courts are in agreement that a Title VII charge regarding pre-filing discrimination or retaliation is ordinarily broadly read. On the forms used by the EEOC, the charging party is asked to check one or more boxes indicating the type of unlawful action alleged (e.g., retaliation), and to include a short discursive description of the problem. The circuits agree, with regard to pre-filing events, that a charge encompasses discriminatory or retaliatory acts

that are like or related to the particular incidents set out in the discursive summary.

Prior to 2002, the lower courts applied the same standard to post-filing events. Thus, if an employee filed a charge with EEOC and was then retaliated against for having done so, the retaliation was uniformly regarded as relevant to the charge that it grew out of. Eleven circuits agreed that in that situation the discrimination victim did not have to file a second charge – alleging that she had been retaliated for having filed the first charge – before commencing litigation. *See Clockedile v. N.H. Dep't of Corrections*, 245 F.3d 1, 4 and n.3 (1st Cir. 2001) (citing cases).

That consensus regarding post-filing violations was disrupted by this Court's decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). *Morgan* involved a dispute about the timeliness of claims that had arisen *before* the plaintiff filed an EEOC charge. Title VII establishes a statute of limitations for EEOC charges, requiring that a charge be filed within 180 or 300 days after a violation. The plaintiff in *Morgan* contended that he could file a charge more than 300 days after an asserted violation if that older violation were part of a practice of discrimination that had continued into the 300-day limitations period. This Court rejected that "continuing violation" theory. 536 U.S. at 110-115. Unlawful conduct that occurred prior to 300 days before the charge filed in *Morgan* was held to be "untimely filed and no longer actionable." 536 U.S. at 115.

The circuit courts are divided as to whether *Morgan* means that a Title VII charge may not encompass and exhaust *post*-filing violations, and regarding whether the victim of post-filing illegal action must, therefore, file a second (or successive) charge. That same issue arises as well regarding the exhaustion requirements of the Age Discrimination in Employment Act and the Americans With Disabilities Act.

II. The Circuit Courts Are Divided Regarding Whether A Title VII Charge Can Encompass and Exhaust Post-Charge Violations

In the decade since this Court's decision in *Morgan,* the circuit courts have reached sharply conflicting conclusions regarding whether a Title VII charge can encompass, and exhaust, violations that occur after the filing of that charge. Five circuits adhere to the pre-*Morgan* rule that a charge can encompass and exhaust post-filing violations so long as they are like or related to the violations complained of in the charge itself. One other circuit, while not reaching that broader issue, holds that an employee who is retaliated against for filing a Title VII charge is not required to file a second such charge. On the other hand, two circuits hold that a charge can never encompass and exhaust any post-charge violations; in those circuits an employee must file a second charge in order to preserve his or her claims regarding any post-charge discrimination or retaliation. In the

instant case, the Fifth Circuit holds that any post-charge discrimination requires a second charge, and that a second charge is also required in at least some cases in which an employee was retaliated against for having filed an earlier charge.

(1) The Fourth Circuit in *Jones v. Calvert Group Ltd.*, 551 F.3d 297 (4th Cir. 2009), expressly reaffirmed its pre-*Morgan* rule that a charge can encompass related post-filing violations. That rule, the Fourth Circuit explained, "is the inevitable corollary of our generally accepted principle that the scope of a Title VII lawsuit may extend to any kind of discrimination like or related to allegations contained in the charge...." 551 F.3d at 302 (quoting *Nealon v. Stone*, 958 F.2d 584, 590 (4th Cir. 1992)). "[A] claim of 'retaliation for the filing of an EEOC charge [of] discrimination' is indeed 'like or reasonably related to and growing out of such [earlier] allegations.'" 551 F.3d at 302 (quoting *Nealon*, 958 F.3d at 590). The court of appeals insisted that this Court's decision in *Morgan* did not affect this rule regarding post-filing violations.

> Although [defendant] asserts that *Morgan* required Jones to file a new EEOC charge alleging that she was terminated in retaliation for her first charge, we do not read *Morgan* that broadly. *Morgan* addresses only the issue of when the limitations clock for filing an EEOC charge *begins* ticking with regard to discrete unlawful employment practices.... *Morgan*.... does not purport to address the extent to which an EEOC charge satisfies

> exhaustion requirements for claims of related, *post*-charge events.

551 F.3d at 303 (emphasis added).

The Sixth Circuit in *Delisle v. Brimfield Tp. Police Dep't*, 94 Fed.Appx. 247 (6th Cir. 2004), also held that a single EEOC charge is sufficient to exhaust any post-charge violations that are "reasonably related" to the claims in that charge. 94 Fed.Appx at 252, 254. In that situation "a second filing [is] unnecessary." *Id.* at 254. Retaliation against a worker for having filed a Title VII charge, the court of appeals held, fits within that general rule, because such retaliation "grow[s] out of" the original charge. *Id.* at 252, 253. The Sixth Circuit rejected the argument that this rule is inconsistent with *Morgan*. "*Morgan* ... makes clear what discrete acts of discrimination or retaliation will not be heard if they occurred *prior* to the 300 day period leading up to an administrative filing." *Id.* at 253 (emphasis added). "Plaintiff before us is not looking to raise the issue of retaliatory acts that may have occurred *prior* to his filing of his EEOC claim.... [T]here is no precedent precluding this Court from the review of ... *subsequent* adverse actions." *Id.* (emphasis added). Although *Delisle* is not officially reported, it has repeatedly been applied by district courts in the Sixth Circuit.[10]

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[10] *Moore v. Third Judicial Circuit of Michigan*, 867 F.Supp.2d 872, 878 (E.D. Mich. 2011); *Troxler v. Mapco Express, Inc.*, 2012 WL 4484939 at *9 (M.D. Tenn. Sept. 27, 2012).

In *Francheschi v. United States Dep't of Veterans Affairs*, 514 F.3d 81 (1st Cir. 2008), the First Circuit reiterated its pre-*Morgan* rule that an employee retaliated against for having filed a charge with EEOC need not file a second charge.

> A claim of retaliation for filing an administrative charge with EEOC ... may ordinarily be bootstrapped onto the other Title VII claim or claims arising out of the administrative charge and considered by the district court.... This is so because such a claim of retaliation is "reasonably related to and grows out of the discrimination complained of to the [EEOC]."

514 F.3d at 86 (quoting *Clockedile v. N.H. Dep't of Corr.,* 245 F.3d 1, 6 (1st Cir. 2001)). As in the Fourth and Sixth Circuits, this decision regarding post-charge retaliation is an application of a more general rule that post-charge violations are encompassed and exhausted by an earlier charge to which they are reasonably related.

The Second Circuit in *Alfano v. Costello*, 294 F.3d 365 (2d Cir. 2002), held that a court may consider Title VII claims that "are based on conduct subsequent to the EEOC charge which is 'reasonably related' to that alleged in the EEOC charge." 294 F.3d at 381 (quoting *Alfano v. Costello*, 940 F.Supp. 459, 467 (N.D.N.Y. 1996)).

> Subsequent conduct is reasonably related to conduct in an EEOC charge if [1] the claim would fall within the reasonably expected

> scope of an EEOC investigation of the charges of discrimination; [2] it alleges retaliation for filing the EEOC charge; or [3] the plaintiff "alleges further incidents of discrimination carried out in precisely the same manner alleged in the EEOC charge."

294 F.3d at 381 (quoting *Butts v. City of N.Y. Dep't of Hous. Preservation and Dev.,* 990 F.2d 1397, 1402-03 (2d Cir. 1993)). *Williams v. New York City Housing Authority*, 458 F.3d 67, 70 n.1 (2d Cir. 2006), reiterated the rule that an employee retaliated against for having filed a Title VII charge need not file a second charge. The Second Circuit applied this rule in *Terry v. Ashcroft*, 336 F.3d 128 (2d Cir. 2003). "Terry's EEO complaints prior to the [allegedly unlawful] transfer were sufficient to exhaust his administrative remedies." 336 F.3d at 151. The court of appeals explained that if employees were required to file successor Title VII charges when subject to post-charge unlawful practices, "[t]he more effective an employer was at using retaliatory means to scare an employee into not filing future EEO complaints, the less likely the employee would be able to hold the employer liable for that retaliation because the less likely the employee would risk filing an EEO complaint as to the [later] retaliation." *Id.*

In *Lyons v. England*, 307 F.3d 1092 (9th Cir. 2002), the Ninth Circuit applied this majority rule to a post-charge claim. The plaintiffs in that case had filed an EEOC charge in 1996 which "did not include allegations of discrimination relating to ... 1997 ...

promotions, nor could they possibly have done so." 307 F.3d at 1104. The Ninth Circuit held that the plaintiffs had "exhausted their administrative remedies with regard to challenged conduct occurring after the filing of their EEOC charge." *Id.* at 1103. Under the Ninth Circuit standard, a plaintiff's post-filing claims are actionable if "reasonably related to allegations in the [earlier] charge." *Id.* at 1004. The Ninth Circuit discussed at length this Court's decision in *Morgan*, 307 F.3d at 1106-08, but concluded that *Morgan* had not overruled prior Ninth Circuit precedent that "forcing an employee to begin the administrative process anew after additional occurrences of discrimination in order to have them considered by ... the courts would erect a needless procedural barrier." *Id.* at 1104 (quoting *Anderson v. Reno*, 190 F.3d 930, 938 (9th Cir. 1999)).

In *Thomas v. Miami Dade Public Health Trust,* 369 Fed.Appx. 19 (11th Cir. 2010), the Eleventh Circuit applied the pre-*Morgan* rule that an employee need not file a second Title VII charge if retaliated against for having filed an earlier charge. "[I]t is unnecessary for a plaintiff to exhaust administrative remedies prior to urging a retaliation claim growing out of an earlier charge; the district court has ancillary jurisdiction to hear such a claim when it grows out of an administrative charge that is properly before the court." 369 Fed.Appx. at 23 (quoting *Gupta v. East Texas State Univ.*, 654 F.2d 411, 414 (5th Cir. 1981)). Unlike the decisions in the First, Second, Fourth, Sixth and Ninth Circuits, the Eleventh

Circuit decision addressed only the issue of post-charge retaliation, and did not announce a general rule regarding other types of post-charge claims like or related to the earlier charge.

(2) The Eighth and Tenth Circuits, on the other hand, interpret *Morgan* to mean that an EEOC charge can never encompass, or exhaust, claims of post-charge unlawful employment practices. In those circuits, any violations that occur after the filing of a charge itself, including retaliation for the filing of that charge, must be raised in a second charge. In the instant case, the Fifth Circuit largely agrees with that rule.

The Tenth Circuit decision in *Martinez v. Potter*, 347 F.3d 1208 (10th Cir. 2003), is the leading case requiring the filing of multiple Title VII charges. The plaintiff in *Martinez* claimed that, after he filed an administrative EEO complaint, he was suspended and then fired in retaliation for that protected activity. The Tenth Circuit held that those retaliation claims were not viable because Martinez had not filed additional administrative complaints.[11]

[11] Because Martinez was a federal employee, he was required by the applicable regulations to initiate an administrative claim within 45 days of an unlawful act. Since the post-charge retaliatory acts alleged by Martinez occurred seven months apart, he would have been required under the Tenth Circuit decision to file separate charges for each of the two retaliatory acts.

> *Morgan* ... bar[red] a plaintiff from suing on claims for which no administrative remedy had been sought, when those incidents occurred more than 300 days *prior* to the filing of plaintiff's EEO complaint. The rule is equally applicable, however, to discrete claims based on incidents occurring *after* the filing of Plaintiff's EEO complaint.... Application of this rule to incidents occurring after the filing of an EEO complaint is consistent with the policy goals of the statute.

347 F.3d at 1210-11 (emphasis in original). The court of appeals concluded that *Morgan* "has effected fundamental changes" to the rules governing exhaustion, and was inconsistent with prior Tenth Circuit case law – on which Martinez relied – that permitted a plaintiff without filing an additional charge to litigate "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." 347 F.3d at 1210 (quoting *Ingels v. Thiokol Corp*., 42 F.3d 616, 625 (10th Cir. 1994)). The earlier Tenth Circuit "like or reasonably related" standard repudiated by *Martinez* is the very standard still applied by the First, Second, Fourth, Sixth and Ninth Circuits. The Tenth Circuit's interpretation of *Morgan* applies to all post-charge violations.[12]

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[12] *See Duncan v. Manager, Dep't of Safety, City and Cnty. of Denver,* 397 F.3d 1300, 1314 (10th Cir. 2005) (dismissing claim that plaintiff was retaliated against for filing an EEOC charge because she "did not file an additional EEOC charge alleging the

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In *Richter v. Advance Auto Parts, Inc.,* 686 F.3d 847, 851 (8th Cir. 2012), the Eighth Circuit disavowed its earlier precedents permitting a plaintiff to pursue, without filing an additional charge, claims of post-charge violations that were reasonably related to the charge.

> We reject Richter's contention that retaliation claims arising from a charge filed with the EEOC are excepted from the statutory exhaustion requirement. Title VII requires that a complainant must file a charge with the EEOC within 180 days "after *the* alleged unlawful practice occurred,".... The use of the definite article shows that the complainant must file a charge with respect to each alleged unlawful employment practice. In her EEOC charge, Richter alleged discrimination based on race and sex that occurred on August 14, 2009. In the district court, she alleged discrimination for making a charge (*i.e.,* retaliation) that occurred on August 25, 2009. These are two discrete acts of alleged discrimination – one in violation of 42 U.S.C. § 2000e-2(a), one in violation of § 2000e-3(a). Each discrete act is a different unlawful employment practice for which a separate charge is required.

686 F.3d at 851 (emphasis in original).

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retaliatory act"); *Morris v. Cabela's Wholesale, Inc.,* 2012 WL 1925542 at *1, *3 (10th Cir. May 29, 2012) (dismissing claim that plaintiff was retaliated against for filing EEOC charge because plaintiff never filed a separate retaliation charge with EEOC).

> We recognize that *Morgan* concerned discrete acts of an employer that occurred *prior* to the filing of an EEOC charge, rather than discrete acts of an employer that occurred thereafter, but the meaning of the phrase "unlawful employment practice" does not vary based on the timing of the alleged unlawful acts.

Id. at 852 (emphasis in original). The Tenth Circuit concluded that its earlier decisions, holding that a charge encompasses subsequent violations that are "like or reasonably related to" the allegations of the charge itself, were no longer good law. "After *Morgan* ... this court disavowed ... the 'like or reasonably related' analysis." 686 F.3d at 852. The Eighth Circuit decision in *Richter*, like the Tenth Circuit decision in *Martinez*, applies to all post-charge unlawful employment practices.

In the instant case, the Fifth Circuit analyzed separately Simmons-Myers' claims of post-charge discrimination and post-charge retaliation. The court below held that under *Morgan* any discrimination that occurs following the filing of an EEOC charge must be the subject of a second charge, or (perhaps) a formal amendment to the original charge. App. 8.

The Fifth Circuit concluded that the plaintiff's post-charge retaliation was also barred. The court of appeals held that a post-charge retaliation claim must have been the subject of a separate EEOC charge in any case in which the plaintiff's subsequent federal court complaint included any other

claim which a court concluded had not been properly exhausted. App. 8-10. Because Simmons-Myers' lawsuit alleged that her post-charge dismissal was the result of gender bias as well as retaliation, and the court of appeals concluded that the gender bias claim had not been exhausted, it held that the post-charge retaliation claim was barred because Simmons-Myers had not filed a second EEOC charge. Although the Fifth Circuit's decision in this case was not officially reported, it relied on and quoted an earlier unreported Fifth Circuit decision that established this rule. App. 9 (quoting *Sapp v. Potter*, 413 Fed.Appx. 750, 752-53 (5th Cir. 2011). The district court in this case had also relied heavily on *Sapp* (App. 22), and in its appellate brief, Caesars repeatedly cited and quoted the decision in *Sapp*.[13] As a practical matter, the Fifth Circuit decisions in this case and *Sapp* have precedential significance in that circuit.

(3) The courts of appeals are divided as to whether, as a general rule, a post-charge claim can be encompassed and exhausted by an earlier charge if the original charge and the post-charge claim are like or related. The First, Second, Fourth, Sixth and Ninth Circuits continue to apply this "like or related" doctrine, which predates this Court's decision in

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[13] Brief of Appellees, pp. 15 ("*Sapp* ... conclusively forecloses Appellant's argument"), 18 (quoting *Sapp*), 19 ("*Sapp's* holding"; quoting *Sapp*), 20 ("*Sapp* ... preclude[s] application of the *Gupta* exception"; quoting *Sapp*), 23 (plaintiff's action barred "under the Court's reasoning in *Sapp*"; quoting *Sapp*), 28 n.17.

Morgan. The Eighth and Tenth Circuits have expressly repudiated that rule. The Fifth Circuit, in the instant case, held that *Morgan* bars any post-charge discrimination claim, regardless of whether it is like or related to a claim in the original charge, unless the plaintiff has filed a second charge.

More specifically, the courts of appeals are divided regarding the particular issue of whether an employee retaliated against for having filed an EEOC charge is required to file a second EEOC charge. Most disputes about post-charge violations concern this type of retaliation. In the First, Second, Fourth, Sixth, Ninth and Eleventh Circuits such a second EEOC charge is never needed, because this type of retaliation by definition grows out of and is related to the earlier charge. The Eighth and Tenth Circuits hold that a second charge is always required for post-charge retaliation. The Fifth Circuit holds (in this case and in *Sapp*) that, at the least, a second EEOC charge is required in any case in which the plaintiff contends that the post-charge adverse action was also the result of discrimination. That Fifth Circuit rule conflicts with the decisions in the six circuits that hold that a second charge is never required because the retaliatory act is by its very nature related to the original charge.

This conflict is well recognized. The Eighth Circuit in *Richter* criticized the Fourth Circuit decision in *Jones* for having failed to "analyze the exhaustion question anew," and for having "held only that *Morgan* had not 'overruled' binding circuit precedent."

686 F.3d at 853 n.2. The Eighth Circuit also objected to the Ninth Circuit decision in *Lyons* on the ground that the Ninth Circuit allegedly had "simply continued to apply pre-*Morgan* circuit precedent on a 'like or reasonably related to' rule without addressing the impact of *Morgan*." *Id.* The dissenting opinion in *Richter*, contrasting the Tenth Circuit decision in *Martinez* with the decisions in the Fourth and Sixth Circuits, noted that "[s]ome courts ... interpreting *Morgan's* holding broadly, ... concluded a Title VII plaintiff must file a separate EEOC charge for each discrete act of retaliation, even when the retaliation occurs after a timely charge has been filed.... Other courts, however, construed *Morgan* more narrowly and continued to adhere to the position [that] post-filing acts of retaliation ... can be pursued without [additional] administrative exhaustion because they are like or reasonably related to the allegations in the charge." 686 F.3d at 858.

The Eleventh Circuit noted in *Bennett v. Chatham County Sheriff Dep't*, 315 Fed.Appx. 152, 162 n.7 (11th Cir. 2008), that the "[c]ircuits disagree on whether, after ... *Morgan* ... , discrete acts of retaliation must be exhausted." In *Wedow v. City of Kansas City, Mo.,* 442 F.3d 661, 673 (8th Cir. 2006), the Eighth Circuit noted the conflict between the Tenth Circuit holding in *Martinez* that "*Morgan* ... applies with equal force to discrete acts of discrimination that occur subsequent to a timely filed EEOC charge" and the Sixth Circuit opinion in *Delisle* "distinguishing *Morgan* as involving a limitation on recovering for

discriminatory actions that are time-barred and allowing a claim for retaliation that 'can be reasonably expected to grow out of the EEOC charge.'"

Seven district court decisions have recognized the existence of this circuit conflict.[14] "Circuit Courts ... are split on how broadly to construe the *Morgan* holding." *Hernandez v. Gutierrez*, 656 F.Supp.2d 101,

[14] In addition to the cases cited in the text, *see Carroll v. Sanderson Farms, Inc.,* 2012 WL 3866886 at *22 n.34 (S.D. Tex. Sept. 5, 2012) ("There is a division of opinion whether retaliation occurring ... after the filing of a discrimination EEOC charge must be exhausted by being included in a [second] timely EEOC charge.... [Some] courts, in the wake of ... *Morgan,* ... have concluded that plaintiffs must file an amended or new charge for discrete acts of retaliation occurring after their initial charge has been filed. *Martinez v. Potter* ... Other courts narrowly construe *Morgan.*"); *Fentress v. Potter*, 2012 WL 1577504 at *2 (E.D. Ill. May 4, 2012) ("The circuits have split over whether *Morgan* abrogated the exception to the exhaustion requirement for claims that a plaintiff suffered retaliation for filing an administrative complaint. *Compare Jones ... with Martinez*.... [There is a] three-to-one circuit split against abrogation...."); *Finch v. City of Indianapolis,* 996 F.Supp.2d 945, 964 (S.D. Ind. 2012) ("Although the Tenth Circuit views [*Morgan*] as requiring a[ ] [new] EEOC ... charge of retaliation for having gone to the EEOC in the first place, ... other circuits have held ... that [*Morgan*] does not abrogate that [pre-*Morgan* cases recognizing an] 'exception' to administrative exhaustion [in such cases]."); *Reyes v. Pharma Chemie, Inc.*, 890 F.Supp.2d 1147, 1166 (D. Neb. 2012) ("Some courts hold that when an employee claims he or she was retaliated against for filing a charge with the EEOC, the retaliation claim is 'reasonably related to' the underlying charge and is exempted from the exhaustion process. *See, e.g., Francheschi ... Williams*.... But in *Richter* the Eighth Circuit rejected this view.").

104 (D.D.C. 2009) (footnote omitted). "*Delisle* ... reach[ed] the opposite conclusion [from] the Tenth Circuit ... in *Martinez*, thus creating a circuit split." *Romero-Ostolaza v. Ridge,* 370 F.Supp.2d 139, 149 (D.D.C. 2005). "Circuit courts ... have ... reached differing conclusions on whether *Morgan* requires a plaintiff to separately exhaust her administrative remedies for retaliation claims arising after the filing of the administrative complaint." *Smith-Thompson v. District of Columbia*, 657 F.Supp.2d 123, 136-37 (D.D.C. 2009).

The EEOC has pointed out this circuit split regarding post-charge retaliation.

> The majority's decision [in *Richter*] ... conflicts with decisions from most circuit courts.... [E]ven after *Morgan*, the Commission and most other circuits that have addressed the issue continue to adhere to the rule that plaintiffs need not file a new or amended charge to challenge retaliation arising from the filing of an earlier charge.... While the majority [in *Richter*] cited to *Martinez* ... , that is clearly the minority view.

Brief of the Equal Employment Opportunity Commission in Support of Plaintiff-Appellant's Petition for Rehearing En Banc, at *0 and *12, available at 2012 WL 4061602.

III. The EEOC and Department of Justice Have Taken Conflicting Positions Regarding The Question Presented

The Equal Employment Opportunity Commission, which is responsible for enforcing Title VII as well as several other federal statutes affected by this issue, has consistently maintained that an EEOC charge can encompass post-charge violations, and that an employee who is retaliated against for filing such a charge need not file a second charge before commencing litigation. On the other hand, Justice Department attorneys, who defend federal agencies sued for violating those statutes, have repeatedly taken precisely the opposite position. Several of the leading appellate opinions requiring workers to file additional charges to preserve claims of post-charge claims adopted the interpretation of Title VII advocated in those cases by government defense attorneys.

The EEOC's Compliance Manual, in a provision issued after *Morgan*, emphatically states that "[a] timely charge also may challenge related incidents that occur *after* the charge is filed." EEOC Compliance Manual, section 2-IV(C)(1)(a) (emphasis in original) (footnote omitted), available at 2009 WL 2966756. An accompanying passage directly addressed the significance of *Morgan*:

> This is consistent with the position taken by courts before the decision in *Morgan*.... It is the Commission's view that *Morgan* does not affect these decisions.... Nothing in *Morgan*

> suggests that a new charge must be filed when a charge challenging related acts already exists. Thus, *Morgan* does not affect existing case law that permits subsequent related acts to be addressed in an ongoing proceeding.

Id. at n.185.

In *Richter* the EEOC filed a brief supporting rehearing en banc, arguing that *Morgan* did not affect the well-established rule that an employee retaliated against for having filed a charge with EEOC need not file a second charge or amend that earlier charge.

> [A] judicial complaint may include claims that are "like or reasonably related to" the allegations in the original charge.... [A]n allegation that the defendant retaliated against the plaintiff for filing an EEOC charge may be included in a Title VII lawsuit even if the plaintiff did not first file a new or amended charge with the Commission complaining of retaliation ... because [such a retaliation] claim [is] "like or reasonably related to" that charge.... Because such retaliatory acts occur after and flow directly from the filing of the original charge, they are ... "necessarily reasonably related to the underlying allegations in the charge."

Brief of the Equal Employment Opportunity Commission in Support of Plaintiff-Appellant's Petition for Rehearing En Banc, 6-7 (quoting *Richter*, 686 F.3d at 861 (Bye, J., dissenting)), available at 2012 WL 4061602. The Commission insisted that this Court's

decision in *Morgan* had no bearing on this issue. "*Morgan* does not address, either directly or indirectly, the question presented here. Rather, the issue in *Morgan* was timeliness.... *Morgan* does not suggest that the Court was upending settled law on the exhaustion of *post-charge* retaliation claims." *Id.* at 9.

Conversely, attorneys at the Department of Justice have been the leading advocates for the rule that post-charge violations must always be the subject of a second charge. That rule in *Martinez* was adopted at the urging of the federal defendant in that case.

> Martinez urges that the [post-charge] reprimand and removal [claims] relate to issues raised in his previous administrative complaint. Even if that ... were true, it makes no difference. The Supreme Court taught in *Morgan* that for each discrete, allegedly retaliatory act, a claimant must initiate administrative proceedings.... Martinez ... relies on this Circuit's line of cases creating an exception to the requirement for administrative exhaustion. In *Ingels v. Thiokol Corp.*, 42 F.3d 616, 624-25 (10th Cir. 1994), the Court held that a plaintiff did not need to file a separate administrative charge for retaliation claims that occurred during related pending administrative charges. In light of *Morgan*, that exception no longer is viable.

Brief of Appellee, *Martinez v. Potter*, No. 02-2252 (10th Cir.), 15 (emphasis and footnote omitted), available at 2003 WL 23356219; *see Martinez,* 347

F.3d at 1210 ("[w]e agree with the government".). In contrast to the EEOC, which urged the Eighth Circuit in *Richter* to reject the Tenth Circuit rule in *Martinez*, the Department of Justice has urged the Eleventh[15] Circuit to follow *Martinez*, and has repeatedly asked the district courts to do so as well.[16] The Fifth Circuit rule in *Sapp*, which the court below applied in the instant case, was adopted in that case at the behest of Justice Department attorneys.[17]

In one instance the government suggested that a District Court in the Fourth Circuit disregard that Circuit's controlling decision in *Jones* on the ground that *Jones* was wrongly decided. Referring to *Jones* and the Fourth Circuit's similar pre-*Morgan* decision in *Nealon v. Stone,* 958 F.2d 584 (4th Cir. 1992), the Department in a brief filed four months after *Jones* "noted that the Fourth Circuit has recently cited *Nealon* as good law in a post *Morgan* case. *See Jones*

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[15] Brief for the Appellee John Ashcroft, *Gonzalez v. Ashcroft*, No. 03-12711-DD (11th Cir.) 17, available at 2004 WL 1878052.

[16] E.g., Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, *Stienmier v. Donley*, No. 1:09-cv-01260-KMT-BNB (D. Colo.) 3, available at 2010 WL 2393323; Defendant's Motion for Summary Judgment, *Pruitt v. Brownlee*, Case No. 3:04-cv-00086-RRB (D. Alaska) 13-14, available at 2006 WL 1882658.

[17] Brief of Defendant-Appellee John E. Potter, *Sapp v. Potter,* No. 10-40364 (5th Cir.) 38-39, available at 2010 WL 4619604.

v. Calvert Group, Ltd."[18] The government argued that "*Jones* cannot be controlling here ... because *Morgan* is Supreme Court precedent[;] *Jones* and *Nealon* cannot be controlling ... because both of these latter opinions are at odds with *Morgan*, and this Court is bound to follow the Supreme Court precedent above all."[19]

It is understandable that the EEOC might take a different view of this issue than Justice Department attorneys or federal agencies named as defendants in Title VII cases. The EEOC is responsible for enforcing Title VII, the Age Discrimination in Employment Act and the Americans With Disabilities Act, and has a particular interest in safeguarding charging parties from retaliation for having complained to the Commission. Justice Department attorneys, on the other hand, represent agencies alleged to have violated those laws, and unsurprisingly advance many of the same arguments as private defense counsel. The Solicitor General permits the various agencies to develop their positions in the lower courts, without insisting on imposing uniformity as to all issues. Nonetheless, this difference in the position advanced by the EEOC and by Justice Department lawyers compounds the problems that already exist in light of the circuit conflict on this issue.

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[18] Memorandum of Law in Support of Defendant's Motion to Dismiss, *Villaras v. Geithner*, No. JFM-08-2859 (D. Md.) n.7, available at 2009 WL 2416614.

[19] *Id.*

IV. The Decision of The Fifth Circuit Is Incorrect

The Fifth Circuit decision in this case, like the Eighth Circuit decision in *Richter* and Tenth Circuit decision in *Martinez*, is clearly incorrect.

(1) The requirement in section 706(e) that an employee file a charge within 180 days (or in some situations 300 days) of the occurrence of a violation is in the nature of a statute of limitations. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-95 (1982). The purpose of section 706(e), like that of other statutes of limitations, is to prevent the litigation of stale claims at a point in time when memories may have faded or relevant evidence can no longer be located. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 630 (2007). But those concerns have no application to claims arising *after* a charge has been filed; those claims will by definition be even closer in time to any investigation or hearing than the pre-charge events. Statutes of limitations traditionally operate only to bar claims that arose too long in the past prior to the initiation of a lawsuit; they have never been understood to bar consideration of claims that may arise in the future. There is no reason to think that Congress intended that the statute of limitations in section 706(e) would function differently than an ordinary statute of limitations.

Construing section 706(e) to require an additional charge for any post-charge claims would have strange consequences. Suppose, for example, an employer

retaliated against an employee by lowering his or her salary, or by assigning the employee unpleasant tasks. *See Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 58, 71 (2006). The victim's initial charge of retaliation could only encompass financial or other injuries that had occurred prior to the submission of that charge to EEOC. In order to preserve claims for all the ongoing injuries, the employee would have to file a new charge every 180 days until the dispute was finally resolved. A federal employee would face an even more onerous burden. Because federal regulations require a federal worker to initiate the government's EEO process within 45 days of a violation, a federal employee who is the victim of such an ongoing retaliatory practice would have to file a new claim every 45 days.

Moreover, if a Title VII charge could not encompass and thus exhaust post-filing violations, a court could never provide adequate relief for an ongoing violation. Under section 706(f) an employee ordinarily cannot file suit with regard to any given charge until at least 180 days after he or she has filed the charge with the EEOC. Thus, at whatever point in time a plaintiff's case came to trial, the charge or charges regarding the immediately past six months of violations would necessarily still be pending before the Commission.

(2) A charge filed with the EEOC exhausts those claims that are fairly encompassed by the terms of the charge. The lower courts have for decades agreed, as the EEOC maintains, that a charge

encompasses those claims that are like or reasonably related to the particulars set out in that charge. Whatever the precise contours of the like-or-related standard, it applies in the same manner to events occurring subsequent to the charge-filing date as it does to claims arising prior to that date.

This Court's decision in *Morgan* holds that, except for harassment, each individual violation of Title VII is a discrete act which must be the subject of a timely charge. But an employee is free to include multiple claims in a charge. Nothing in *Morgan* limits the scope of what an employee can include in a charge or precludes certain types of charges as premature. If an employee filed a charge alleging a systemic and ongoing retaliatory wage reduction, the charge itself would fairly encompass future as well as past violations. Although under *Morgan* each paycheck would be a discrete violation, a charging party can include any number of separate discrete violations in a single charge. While claims regarding wages paid more than 180 days before the filing of such a charge would be barred, that would be because they would be untimely, not because they were outside the scope of the charge itself. Nothing in *Morgan* precludes an employee from filing a complaint that encompasses post-filing violations or bars a court from adjudicating such claims.

(3) The Fifth Circuit's justification for rejecting Simmons-Myers' retaliation claim is particularly implausible. It reasoned that if that claim were not dismissed, "Simmons-Myers would be required to

return to the EEOC and exhaust her administrative remedies with respect to her discrimination claim, while proceeding with litigation on her retaliation claim. Permitting simultaneous proceedings such as these for the same inciting event would 'thwart the administrative process and peremptorily substitute litigation for conciliation.'" App. 9 (quoting *McClain v. Lufkin Indus., Inc.,* 519 F.3d 264, 273 (5th Cir. 2008)). But the Fifth Circuit did not "require [plaintiff] to return to the EEOC and exhaust her administrative remedies with respect to her discrimination claim"; rather, the court of appeals dismissed that claim. Because the discrimination claim concerns Simmons-Myers' October 2010 termination, and the Fifth Circuit dismissed that claim in February 2013, the plaintiff obviously cannot "return to the EEOC"; a charge filed in 2013 regarding a 2010 termination would be untimely. If plaintiff were permitted to pursue her retaliation claim in court, there obviously would be no "simultaneous proceeding[ ]" at the EEOC regarding her discrimination claim.

(4) The EEOC has correctly warned that requiring employees to file additional successor charges to address any post-charge violations "would undermine enforcement of federal anti-discrimination law."[20] The Commission has expressed particular concern about

[20] Brief of the Equal Employment Opportunity Commission in Support of Plaintiff-Appellant's Petition for Rehearing En Banc, *Richter v. Advance Auto Parts, Inc.*, at 5.

the impact of requiring retaliation victims to file such a second charge.

> [Title VII] "depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses." [*Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006).] However, "a plaintiff that has already been retaliated against one time for filing an EEOC charge will naturally be reluctant to file a separate charge, possibly bringing about further retaliation." *Jones*, 551 F.3d at 302. Rather than do so, she might well choose not to pursue her claim, thereby undermining enforcement of the statute.[21]

"[H]aving 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." *Schwartz v. Bay Indus.,* 274 F.Supp.2d 1041, 1047 (E.D. Wis. 2003).

This Court should grant certiorari to remove the serious barrier that now exists in the Fifth, Eighth and Tenth Circuits to enforcement of Title VII and other federal employment statutes.

[21] *Id.* at 11-12.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Slip Copy, 2013 WL 697226 (C.A.5 (Miss.))

United States Court of Appeals,
Fifth Circuit.
Debra SIMMONS-MYERS, Plaintiff-Appellant
v.
CAESARS ENTERTAINMENT CORPORATION, doing business as Harrah's Casino; BL Development Corporation, Defendants-Appellees.

No. 12-60592
Summary Calendar.
Feb. 26, 2013.

Jim D. Waide, III, Esq. Ronnie Lee Woodruff, Esq., Waide & Associates, P.A., Tupelo, MS, for Plaintiff-Appellant.

Robert Catron Stevens, Erin Mcphail Wetty, Esq., Attorney, Seyfarth Shaw, L.L.P., Atlanta, GA, for Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Mississippi, USDC No: 2:10-CV-216.

Before KING, CLEMENT, and HIGGINSON, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Debra Simmons-Myers appeals the district court's grant of summary judgment in favor of Caesars Entertainment Corporation and BL Development Corporation (hereinafter "Harrah's"), arguing that she was fired from her job on account of her race and gender in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. For the following reasons, we AFFIRM.

FACTS AND PROCEEDINGS

Simmons-Myers (white female) was hired by Harrah's on April 27, 2009 as a Remote Sales Manager for the Arkansas and Texas markets, which were part of its Mid-South division. According to Harrah's, the function of the Remote Sales Manager was to work off-site (from home), selling meetings, conventions, and social events to associations and groups. Simmons-Myers had previously worked for Harrah's as an on-site Senior Sales Manager, but she resigned from that position in 2006. In the intervening time, Simmons-Myers worked for various hotels and resorts in the Arkansas and Texas markets.

Shortly after re-hiring Simmons-Myers, Harrah's hired three additional Remote Sales Managers – Michael Wilson (black male), Darrell Russell (black male), and Janice Jefferson (black female). As a condition of employment, Harrah's required its Remote Sales Managers to achieve a certain amount of sales during each quarter (other than the first quarter of employment). Any Sales Manager who failed to

achieve a minimum of 80% of their sales goals in a single quarter was subject to a written warning, and if that Manager failed to achieve 80% of their goals in two quarters, they were subject to discharge. Simmons-Myers signed an agreement stating that she understood these terms the day that she was hired.

Simmons-Myers failed to meet 80% of her goals during the third and fourth quarters of 2009, which were the first quarters she was eligible for review. Although Harrah's chose not to terminate her, Simmons-Myers received a rating of "Development Opportunity" on her 2009 performance evaluation. Simmons-Myers was also contacted by her supervisor, Valerie Morris, who warned her that she was not meeting her goals, and offered assistance if needed. After receiving the warning and performance evaluation, Simmons-Myers complained to Tammy Young that Valerie Morris (her direct supervisor) had sent her badgering emails and that Morris treated Darrell Wilson [sic] and Michael Wilson more favorably than Simmons-Myers. Director of Employee Relations Joy Antolini later conducted an investigation into Simmons-Myers's allegations, but concluded that there was no evidence to support them.

Simmons-Myers again failed to meet her sales goals for the first quarter of 2010. Although Harrah's again chose not to terminate her, the Director of Sales (Kim Thomas) administered a written document "coaching" Simmons-Myers that she had failed to meet her sales goals for three consecutive quarters.

Simmons-Myers proceeded to file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging that Harrah's discriminated against her based on her sex because her supervisors had shown preferential treatment toward Michael Wilson and Darrell Wilson [sic] in a variety of ways, including taking them to dinner and imposing a different set of sales goals. Simmons-Myers again failed to meet her sales goals for the second quarter of 2010, and Thomas administered her a final written warning and gave her the lowest possible performance rating on her mid-term evaluation.

In mid-2010, the Mid-South division received a directive from Harrah's Corporate Finance Team to cut $10 million in expenses from its properties. As a result, the division decided to implement a reduction-in-force ("RIF") of over one hundred individuals across fifty different positions, including the Remote Sales Manager position. Harrah's asserts that the selected positions were determined by considering the profitability of each business unit, planned increases in productivity, ratios of employees to departmental metrics, and the potential impact on guests. Harrah's further asserts that the Remote Sales Manager position was included in the RIF because the position, as a whole, was not profitable for the company. In doing so, Harrah's did not consider the performance, profitability, or other circumstances of individual employees with respect to the Remote Sales Manager position. None of Simmons-Myers's direct bosses was involved in the decision. Simmons-Myers, along with

Michael Wilson, Darrell Russel, and Janice Jefferson, were all terminated on October 20, 2010.

Prior to learning that Harrah's was going to eliminate the Remote Sales Manager position, Simmons-Myers requested a notice of right to sue, which the EEOC granted on October 25, 2010. Simmons-Myers never informed the EEOC that she had been terminated as part of the RIF in the intervening time, and did not file a second charge of discrimination relating to her termination, prior to commencing the present action. On December 7, 2010, Simmons-Myers filed a complaint in the United States District Court for the Northern District of Mississippi, alleging: (i) discrimination based on race in violation of Title VII of the Civil Rights Act of 1964; (ii) discrimination based on gender in violation of Title VII; (iii) retaliation in violation of Title VII; and (iv) discrimination based on race in violation of 42 U.S.C. § 1981. After discovery, the district court granted summary judgment in favor of Harrah's. Simmons-Myers appeals.

STANDARD OF REVIEW

"This court reviews the district court's grant of summary judgment *de novo*, applying the same standards as the district court." *Greater Hous. Small Taxicab Co. Owners Ass'n v. City of Hous., Tex.*, 660 F.3d 235, 238 (5th Cir.2011) (citation omitted). "Summary judgment is warranted if the pleadings, the discovery and disclosure materials on file, and any affidavits show there is no genuine [dispute] as to any

material fact and that the movant is entitled to judgment as a matter of law." *Id.* (citation omitted and alteration in original). This court reviews questions about the exhaustion of administrative remedies *de novo*. *Pacheco v. Mineta*, 448 F.3d 783, 788 (5th Cir.2006).

DISCUSSION

A. Exhaustion

The first question on appeal is whether Simmons-Myers has exhausted her administrative remedies, permitting her to proceed with her Title VII claims. "[C]ourts have no jurisdiction to consider Title VII claims as to which the aggrieved party has not exhausted administrative remedies." *Nat'l Ass'n of Gov't Emps. v. City Pub. Serv. Bd. of San Antonio, Tex.*, 40 F.3d 698, 711 (5th Cir.1994); *see* 42 U.S.C. § 2000e-5(f)(1). A Title VII suit may "extend as far as, but not further than, the scope of the EEOC investigation which could reasonably grow out of the administrative charge." *Fine v. GAF Chem. Corp.*, 995 F.2d 576, 578 (5th Cir.1993) (quoting *Terrell v. U.S. Pipe & Foundry Co.*, 644 F.2d 1112, 1123 (5th Cir. Unit B 1981)). However, "a charging party's rights should [not] be cut off merely because he fails to articulate correctly the legal conclusion emanating from his factual allegations." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462 (5th Cir.1970). Instead, the proper question is whether the charge has stated sufficient facts to trigger an EEOC investigation, *id.*,

and to put an employer on notice of the existence and nature of the charges against him. *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 878 (5th Cir.2003).

a. Racial Discrimination claims

We agree with the district court that Simmons-Myers did not properly exhaust her racial discrimination claims under Title VII. Although "a new theory of recovery [ ] can relate back to the date of the original charge when the facts supporting both the amendment and the original charge are essentially the same," *id.* at 879, that is not what happened here. The only discriminatory facts Simmons-Myers alleged prior to her dismissal were those in which she claimed to have been treated differently from other men in her department. Simmons-Myers did not refer to the race of any employee in her charge, nor did she allege that she was treated differently from the third Remote Sales Manager, Janice Jefferson, a black female. The district court was correct to conclude that no reasonable reading of Simmons-Myers's EEOC charge would put either the EEOC investigators or Harrah's on notice that her termination or any other adverse employment action was or could have been caused by discrimination based on race. Accordingly, Simmons-Myers's Title VII racial discrimination claims are dismissed without prejudice.

b. Gender and Retaliation claims

Simmons-Myers's Title VII gender discrimination and retaliation claims that arise out of her termination are also dismissed without prejudice. Although Simmons-Myers made allegations of gender discrimination for acts prior to her termination in her EEOC charge, discrete discriminatory acts are not entitled to the shelter of the continuing violation doctrine. *See Frank v. Xerox Corp.*, 347 F.3d 130, 136 (5th Cir.2003). Her termination was a separate employment event for which Simmons-Myers was required to file a supplemental claim, or at the very least, amend her original EEOC charge. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002).

Simmons-Myers asks us to hold that she is entitled to an exception to exhaustion under *Gupta v. East Texas State University*, which does not require exhaustion for a retaliation claim growing out of an earlier EEOC charge. 654 F.2d 411, 414 (5th Cir.1981).[1] But this court has not applied the *Gupta*

[1] We note that *Gupta* may no longer be applicable after the Supreme Court's decision in *Morgan*, 536 U.S. 101. Our sister circuits appear to be split on this issue. *See*, *e.g.*, *Martinez v. Potter*, 347 F.3d 1208, 1211 (10th Cir.2003) (abolishing a *Gupta*-like exception). *But see Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 303 (4th Cir.2009) (holding that *Morgan* did not abolish a *Gupta*-like exception); *Wedow v. City of Kan. City, Mo.* 442 F.3d 661, 672-76 (8th Cir.2006) (holding that a narrow exhaustion requirement remains); *Delisle v. Brimfield Twp. Police Dep't.*, 94 F. App'x 247, 252 (6th Cir.2004) (same); *Fentress v. Potter*, No. 09 C 2231, 2012 WL 1577504, at *2 (N.D.Ill. May 4, 2012) ("Given these post-*Morgan* tea leaves from the Seventh Circuit, as well

(Continued on following page)

exception to claims in which both retaliation and discrimination are alleged. *See Gupta*, 654 F.2d at 414 (creating exception for a claim involving only retaliation "growing out of an earlier charge," not a retaliation and discrimination claim simultaneously alleged); *see also Scott v. Univ. of Miss.*, 148 F.3d 493, 514 (5th Cir.1998) (holding that *Gupta* "is limited to retaliation claims due to the special nature of such claims"), *abrogated on other grounds by Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Sapp v. Potter*, 413 F. App'x 750, 752-53 (5th Cir.2011) ("Because the *Gupta* exception is premised on avoiding procedural technicalities, it has only been applied to retaliation claims alone [and not] claims in which both retaliation and discrimination are alleged."). Otherwise, Simmons-Myers would be required to return to the EEOC and exhaust her administrative remedies with respect to her discrimination claim, while proceeding with litigation on her retaliation claim. Permitting simultaneous proceedings such as these for the same inciting event would "thwart the administrative process and peremptorily substitute litigation for conciliation." *McClain v. Lufkin Indus., Inc.*, 519 F.3d

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as the three-to-one circuit split against abrogation, the court concludes that the exception remains valid."); *Gordon v. Bay Area Air Quality Mgmt. Dist.*, No. C08-3630 BZ, 2010 WL 367781, at *1 (N.D.Cal. Jan. 27, 2010) ("The Ninth Circuit authority that has interpreted [a *Gupta*-like exception] in light of *Morgan* has [found it to still be applicable]."). *See also Weber v. Battista*, 494 F.3d 179, 182-84 (D.C.Cir.2007) (discussing other circuits' treatment of the issue). We need not answer this question today.

264, 273 (5th Cir.2008); *see also Sapp*, 413 F. App'x at 753.

B. Summary Judgment

We must now consider whether Simmons-Myers is entitled to relief on her racial discrimination claim under 42 U.S.C. § 1981, or her claim for gender discrimination and retaliation under Title VII, as evidenced by actions occurring prior to her termination. We affirm the district court's holding that Harrah's is entitled to summary judgment on each of these claims.

i. Racial Discrimination under 42 U.S.C. § 1981

To make out a prima facie case of racial discrimination, Simmons-Myers must show that: (1) she is a member of a protected class; (2) she is qualified; (3) she experienced an adverse employment action; and (4) she was replaced by someone outside the protected class, or, in the case of disparate treatment, that others similarly situated were treated more favorably than she. *Wesley v. Gen. Drivers, Warehousemen & Helpers Local 745*, 660 F.3d 211, 213 (5th Cir.2011) (recognizing that "the burden-shifting framework developed in the context of Title VII in *McDonnell Douglas Corp. v.. Green*, 411 U.S. 792 [ ] (1973), also applies to claims of racial discrimination under § 1981." (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989))). However, Simmons-Myers

was not replaced because her position was eliminated, and she has offered no evidence that others similarly situated were treated more favorably than she. The only disparate treatment Simmons-Myers alleged was her termination. This cannot serve as a basis for a disparate treatment claim because the Remote Sales Manager position was eliminated in its entirety and all employees were fired, regardless of their race. Furthermore, as the district court explained, there is no evidence to substantiate Simmons-Myers's theory that firing the Remote Sales Managers (all of whom, other than Simmons-Myers, were black) was either a pretext for, or a way to cover up, any aspect of race discrimination. Therefore, there is no "evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 41 (5th Cir.1996). Accordingly, Simmons-Myers' claim for racial discrimination under 42 U.S.C. § 1981 is dismissed with prejudice.

ii. Gender Discrimination and Retaliation claims under Title VII

Simmons-Myers has abandoned her non-termination gender and retaliation claims by failing to properly raise these issues on appeal. *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir.1994) ("An appellant abandons all issues not raised and argued in its *initial* brief on appeal."). Even if we were to consider these issues, Simmons-Myers could not make

out a prima facie case of discrimination or retaliation because she did not experience an adverse employment action prior to termination. *See McDonnell Douglas*, 411 U.S. at 802; *Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 331 (5th Cir.2009) (requiring an adverse employment action in retaliation cases). Under Title VII, an adverse employment action must be an "ultimate employment decision," such as "hiring, granting leave, discharging, promoting, or compensating." *McCoy v. City of Shreveport*, 492 F.3d 551, 559 (5th Cir.2007) (quoting *Green v. Adm'rs of Tulane Educ. Fund*, 284 F.3d 642, 657 (5th Cir.2002)). Title VII does not cover "every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." *Banks v. E. Baton Rouge Parish Sch. Bd.*, 320 F.3d 570, 575 (5th Cir.2003) (quoting *Burger v. Cent. Apartment Mgmt., Inc.*, 168 F.3d 875, 878 (5th Cir.1999)). The written warnings administered by Thomas do not constitute materially adverse actions under this standard, nor would they have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006) (citation omitted). Simmons-Myers' claims for gender discrimination and retaliation prior to her termination are dismissed with prejudice.

AFFIRMED.

2012 WL 2885366 (N.D.Miss.)

United States District Court,
N.D. Mississippi,
Delta Division.
Debra **SIMMONS-MYERS**, Plaintiff
v.
CAESARS ENTERTAINMENT CORPORATION, d/b/a Harrah's Casino, and BL Development Corp., Defendants.

Civil Action No. 2:10cv216-WAP-JMV.
July 13, 2012.

Jim D. Waide, III, Ronnie Lee Woodruff, Waide & Associates, PA, Tupelo, MS, for Plaintiff.

Robert Catron Stevens, Erin McPhail Wetty, Seyfarth Shaw LLP, Atlanta, GA, for Defendants.

MEMORANDUM OPINION AND ORDER

DAVID BRAMLETTE, District Judge.

This cause is before the Court on Defendants' Motion for Summary Judgement [**docket entry no. 47**]. Having carefully considered the Motion, Plaintiff's opposition thereto, applicable statutory and case law, and being otherwise fully advised in the premises, the Court finds and orders as follows:

I. Facts

Plaintiff Debra Simmons-Myers is a former employee of Defendant Harrah's Casino.[1] She claims Harrah's fired her in violation of 42 U.S.C. § 1981, which prohibits discrimination or retaliation on the basis of race, and Title VII of the Civil Rights Act of 1964, 29 U.S.C. §§ 2000e *et seq.,* which prohibits discrimination or retaliation on the basis of race or gender. Specifically, Simmons-Meyers [sic], who is a white female, complains that other similarly-situated black male employees were treated more favorably than her while she was employed by Harrah's and further argues that she was terminated by Harrah's because she filed an EEOC charge complaining of the unfavorable treatment. Harrah's responds that there is no evidence of unfavorable treatment and that it terminated Simmons-Myers as a part of a larger reduction in force.

II. Standard of Review for Summary Judgment Motions

Summary judgment is apposite "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(a). "A fact is

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[1] Defendant BL Development Corp. was technically the Plaintiff's employer, but the Court will refer to it as Harrah's – as did the Defendants in their summary judgment brief – in the interest of simplicity.

'material' if its resolution in favor of one party might affect the outcome of the lawsuit under governing law. An issue is 'genuine' if the evidence is sufficient for a reasonable jury to return a verdict for the non-moving party." *Ginsberg 1985 Real Estate P'ship v. Cadle Co.,* 39 F.3d 528, 531 (5th Cir.1994) (citations omitted). The party moving for summary judgment bears the initial responsibility of apprising the district court of the basis for its motion and the parts of the record which indicate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

"Once the moving party presents the district court with a properly supported summary judgment motion, the burden shifts to the non-moving party to show that summary judgment is inappropriate." *Morris v. Covan World Wide Moving, Inc.,* 144 F.3d 377, 380 (5th Cir.1998). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986). But the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). Moreover, "[t]he mere existence of a scintilla of evidence is insufficient to defeat a properly supported motion for summary judgment." *Anderson,* 477 U.S. at 252. Summary judgment must be rendered when the nonmovant "fails to make a showing sufficient to establish the existence of an element essential to that party's case,

and on which that party will bear the burden of proof at trial ." *Celotex Corp.,* 477 U.S. at 322.

The Court is ever mindful that summary judgment should be exercised cautiously in discrimination cases which often require courts to delve into motive and intent. *Hayden v. First Nat. Bank of Mt. Pleasant, Tex.,* 595 F.2d 994, 997 (5th Cir.1979). Accordingly, with regard to employment discrimination claims, a district court should be hesitant to grant summary judgment based on "potentially inadequate factual presentation." *Id.* (citations omitted). Nevertheless, summary judgment in favor of the defendant is hardly uncommon in discrimination cases and is appropriate if the plaintiff's claim has no basis in fact. *Wallace v. SMC Pneumatics, Inc.,* 103 F.3d 1394, 1396 (7th Cir.1997).

III. Analysis

1. Whether Plaintiff Failed to Exhaust Her Administrative Remedies

Simmons-Myers filed an EEOC charge alleging gender discrimination related to perceived unfair treatment of similarly-situated employees before her employment with Harrah's was terminated. Exactly one day before her employment was terminated, Simmons-Myers requested her notice of right to sue, and she received this notice from the EEOC shortly after her termination. There is no evidence that she informed the EEOC of her intervening termination. Harrah's argues that Simmons-Myers's claims in

connection with the termination of her employment are barred because the allegations contained in the EEOC charge pertain to facts occurring before her termination. Furthermore, Harrah's argues, in a footnote, that Simmons-Myers never alleged race discrimination in her EEOC charge, and therefore, her race discrimination claim under Title VII is barred because it is beyond the scope of her EEOC charge. Simmons-Myers disputes Harrah's argument that the claims associated with the termination of her employment are barred, citing only one case, *Gupta v. East Texas State University,* but ignores Harrah's argument that her race discrimination claim should be dismissed.

"Courts have no jurisdiction to consider title VII claims as to which the aggrieved party has not exhausted administrative remedies." *Clayton v. Rumsfeld,* 106 F. App'x 268, 271 (5th Cir.2004) (citations omitted). The purpose for requiring exhaustion is to allow the administrative agency the opportunity to investigate and resolve any claims of discrimination. *Id.* Thus, a Title VII suit "'may extend as far as, but not further than, the scope of the EEOC investigation which could reasonably grow out of the administrative charge.'" *Id.* (quoting *Fine v. GAP Chem. Corp.,* 995 F.2d 576, 578 (5th Cir.1993)). To determine whether a reasonable EEOC investigation could grow out of an administrative charge, a district court focuses on the factual statements contained in the charge. *Id.* (citing *Sanchez v. Standard Brands, Inc.,* 431 F.2d 455, 462 (5th Cir.1970)). A district court

views factual statements in the broadest reasonable sense, considering whether the employer is put on notice of the existence of the nature of the charges. *Id.* (citing *Manning v. Chevron Chem. Co.,* 332 F.3d 874, 878-89 (5th Cir.2003)).

A. Race Discrimination Claims Are Barred As a Matter of Law

In light of the foregoing law, the Court agrees with Harrah's that, to the extent that Simmons-Myers alleges a race discrimination claim under Title VII,[2] such a claim is barred as a matter of law for failure to exhaust administrative remedies. In her EEOC charge, Simmons-Myers clearly alleges she was treated differently than two other Harrah's employees because she is a female, but nowhere in her charge does she suggest race discrimination. The entire factual basis of her EEOC charge is as follows:

> On March 10, 2010, I reported Valerie Morris, Vice President of Sales to Tammy Young, Human Resources Manager, about harassing e-mails. Tammy Young told me that she did mention my complaint to Valarie Morris. After the complaint, I am being written up. Kim Thomas, Director of Sales, told

[2] The Amended Complaint states that the Plaintiff's race discrimination claim arises under 42 U.S.C. § 1981. However, Paragraph 11 of the Amended Complaint states that the Defendants are liable "under the race, sex and retaliation prohibitions of Title VII of the Civil Rights Act of 1964."

> me that Valarie Morris strongly advised her to write me up.
>
> On April 21, 2010, I received a written Performance Documentation for first quarters 2010. However, they also mentioned third and fourth quarter for 2009. After questioning Kim Thomas about the male's quarterly achievement which was lower, she informed me that Michael Wilson and Darrell Russell are new employees. I reminded her that in third and fourth quarter I was also new. I began my employment with the company on April 27, 2009.
>
> I am required to have a higher goal than my male remote Sales Manager. I was told by Kim Thomas, that I am required to have a higher goal because of the client's contacts when I came on board. If I have higher goals than the males, why are we all being paid the same salary? My goals expectations need to be the same as the males or an increase in salary.

Morever [sic], not only do the facts fail to suggest discrimination based on race, the Discrimination Statement states:

> I believe I have been discriminated against because of my Sex, female, and Retaliation, in that after the reporting of Valarie Morris to Tammy Young, I was given a written warning reference my performance and higher goals than the my male employees, in

> Violation of Title VI of the Civil Rights Act of 1964, as amended.

EEOC charge, docket entry 55-17 (typos in the original). Because no reasonable reading of the charge would put either the EEOC investigators or Harrah's on notice that Simmons-Myers attributed the alleged adverse employment action – the written warning – to her race, the Court will dismiss Simmons-Myers's race discrimination claim arising under Title VII because it is beyond the scope of the EEOC charge.[3] 42 U.S.C. § 1981 does not provide administrative remedies or require exhaustion thereof, and therefore, following further discussion of whether Simmons-Myers exhausted her remaining claims, the Court will address Simmons-Myers's race discrimination claim under that statute.

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[3] Simmons-Myers did not argue in response to the Defendants summary judgment motion that the failure to allege race discrimination in her EEOC charge was a mere procedural oversight. *See Sanchez v. Standard Brands, Inc.,* 431 F.2d 455 (5th Cir.1970). Even if she had, the Court finds no merit to this argument, as neither Simmons-Myers's race or the race of other employees was identified in the EEOC charge. It is clear from the facts contained in the charge that the Plaintiff believed her gender was the cause of the alleged discrimination and retaliation.

B. Simmons-Myers May Not Proceed With Her Gender Discrimination Claim in Connection with the Termination of Her Employment

Likewise, the Court agrees with Harrah's that Simmons-Myers's Title VII gender discrimination claim in connection with the termination of her employment is barred.[4] Simmons-Myers cites *Gupta v. East Texas State University* for the proposition that the Court may consider an unexhausted claim arising after the EEOC charge was filed if that claim grows out of the EEOC charge. In *Gupta,* the Fifth Circuit stated:

> [I]t is unnecessary for a plaintiff to exhaust administrative remedies prior to urging *a retaliation claim growing out of an earlier charge;* the district court has ancillary jurisdiction to hear such a claim when it grows out of an administrative charge that is properly before the court.

654 F.2d 411, 414 (5th Cir.1981) (emphasis added). But, more recently, the Supreme Court held in *National Railroad Passenger Corporation v. Morgan* that a Title VII plaintiff has the obligation to file an

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[4] For the record, the Court notes that the Plaintiff's gender discrimination claims and related retaliation claims in this case arise exclusively under Title VII, as 42 U.S.C. § 1981 does not provide a basis for a gender discrimination claim. *See, e.g., Stewart v. NCI Group, Inc.,* 2011 WL 310255, at *1 n. 1 (S.D.Miss. Jan. 28, 2011).

administrative claim as to each discrete discriminatory act. 536 U.S. 101, 110-14 (2002); *see also Martinez v. Potter,* 347 F.3d 1208, 1210-11 (10th Cir.2003) (finding that *Morgan's* holding applies to claims arising both before and after a claim is filed). In a recent unpublished opinion, the Fifth Circuit, citing *Morgan,* declined to extend *Gupta's* exception to any circumstances other [sic] a "retaliation claim growing out of an earlier charge," and for this reason, it affirmed the district court's determination that a distinct *discrimination* claim not included in the EEOC charge was barred for failure to exhaust administrative remedies, even though the claim arose after the plaintiff had filed an EEOC charge. *Sapp v. Potter,* 413 F. App'x 750, 753 (5th Cir. Feb. 22, 2011). The court of appeals also appeared to express its doubt, citing holdings from other circuits, as to whether *Gupta's* narrow procedural exception for retaliation claims remained viable after *Morgan,* but it declined to address the issue. *Sapp,* 413 F. App'x at 753 n. 2.

As explained by *Sapp,* there is no question that Supreme Court's holding in *Morgan* interprets Title VII to require a plaintiff to exhaust her administrative remedy for a discrete allegation of *discrimination* occurring *after* the filing of her EEOC charge. *See also, Martinez,* 347 F.3d at 1210-11 (10th Cir.2003); *Adams v. Mineta,* 2006 WL 367895, at *4 (D.D.C. Feb. 16, 2006). There are limited situations, such as hostile work environment claims, when a discrete

discriminatory act may involve repeated conduct drawn out over a period of time, but in this case, Simmons-Myers's termination is a discrete event requiring exhaustion. *Morgan,* 536 U.S. 101 at 114 ("Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify."). Because Simmons-Myers did not exhaust her gender discrimination claim in connection with the termination of her employment, there is no question that Title VII bars her from bringing her gender *discrimination* claim before this Court.[5]

C. Simmons-Myers May Not Proceed With Her Retaliation Claim Under the *Gupta* Exception

The question remains, however, whether the *Gupta* exception is applicable to Simmons-Myers's *retaliation* claim arising out of her earlier EEOC charge, and if so, whether *Gupta's* narrow exception survives *Morgan.* The circumstances in this case

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[5] The fact that EEOC issued the notice of a right to sue some days after the Plaintiff was terminated is of no consequence as there is no evidence before this Court to suggest that the EEOC was either made aware of or considered the Plaintiff's termination. As a practical matter, therefore, an EEOC investigation into the Plaintiff's termination could not "reasonably be expected to grow out of the charge of discrimination." *Clayton,* 106 F. App'x at 271. As the Fifth Circuit has put it, "a person cannot reasonably expect a concluded investigation to include an event that has not yet occurred." *Sapp,* 413 F. App'x at 752.

differ slightly from those in *Gupta.* In *Gupta,* the plaintiff's retaliation claim arose as he was litigating an earlier discrimination charge, which was properly exhausted; *Gupta,* 654 F.2d at 413, whereas in the present case Simmons-Myers was terminated on October 20, 2010, over a month before she filed suit in this Court, and thus had the opportunity to notify the EEOC of her termination prior to filing suit. *See* Complaint, docket entry no. 1. This fact alone lends itself to the conclusion that Simmons-Myers should have complied with Title VII's express requirements by either filing a new claim or amending her earlier EEOC charge.[6] *See* 29 C.F.R. § 1601.12. Doing so would have given the EEOC the opportunity to investigate the circumstances surrounding the termination of employment prior to this Court's consideration of her claim. *Fine,* 995 F.2d at 578.

Nevertheless, *Gupta's* holding, taken literally, applies to this case. The Plaintiff's initial EEOC charge of gender discrimination and retaliation were filed before her discharge, and the present retaliatory

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[6] The Court cannot say whether the EEOC had the authority to reopen her first EEOC charge after the notice of the right to sue was issued. *See* 29 C.F.R. § 1601.28(a)(3); *Eidenbock v. Charles Schwab & Co., Inc.,* 283 F. App'x 549 (9th Cir.2008) (quoting half of the applicable regulation to determine that the aggrieved cannot amend). Regardless, Simmons-Myers could have filed a new retaliation charge, wherein she could have alleged the same acts of discrimination alleged in her first EEOC charge in support of her retaliation claim. *See Morgan,* 536 U.S. at 113.

discharge claim grows directly out of her earlier EEOC charge and thus falls squarely within the exception articulated in *Gupta. See* Amended Complaint ¶ 9, docket entry 34. As a result, the Court has no choice but to address whether *Morgan,* which is of course binding on this Court, forecloses application of *Gupta's* otherwise applicable exception. After carefully considering the issue, the Court concludes, that pursuant to Supreme Court's instruction to follow the plain language of the statute, the *Gupta* exception is not viable in the present case.

There is one notable distinction that the Court can make between *Morgan* and *Gupta,* but that distinction is more superficial than substantive. In *Morgan,* the Supreme Court addressed cognizable claims based on events that occurred *before* the plaintiff filed the lawsuit in district court, whereas *Gupta* addressed claims based on events that occurred *after* the lawsuit was being litigated in district court. The *Gupta* Court's determination that it had ancillary jurisdiction over the plaintiff's newly arisen retaliation claim seems reasonable given the alternative of foreclosing the retaliation claim and requiring him to restart the administrative process based upon facts similar to those it was already adjudicating. *See generally Gupta,* 654 F.3d 411. Imposing such requirement does indeed seem inefficient.

But, regardless of the reasonableness of this holding, it no longer has any force. The Supreme Court in *Morgan* repudiated the Ninth Circuit's "continuing violations" theory, which, not unlike the

policy exception created in *Gupta,* is predicated on a secondary event being "related to" or having "grow[n] out of" the first. *Morgan,* 536 U.S. at 107. In reaching this conclusion, the Supreme Court focused narrowly on the statutory text, which states in mandatory language: "a charge . . . *shall be filed* within one hundred and eighty days after the alleged unlawful employment practice occurred." *Morgan,* 536 U.S. at 109 (emphasis in original) (quoting 42 U.S.C. § 2000e-5(e)(1)). It explained that the event "occurred" on the "day that it happened," and further, most times, the occurrence is a discrete event, requiring exhaustion. *Id.* at 110. This interpretation holds true regardless of whether the event, "occurred" before or after filing the EEOC charge. The statute is clear that a charge must be filed "after the alleged *unlawful employment practice* occurred." 42 U.S.C. § 2000e-5(e)(1) (emphasis added).

Morever [sic], the policy justifications offered by the *Gupta* Court in the creation of its procedural exception are fundamentally at odds with the policy espoused in *Morgan.* The *Gupta* Court's exception to Title VII's procedural requirement-and its consequent ancillary jurisdiction determination-was premised on two "strong practical reasons and policy justifications": (1) there was no need to create the additional procedural difficulty of a what would amount to a burdensome double-filing, and (2) "[e]liminating this needless procedural barrier [would] deter employers from attempting to discourage employees from exercising their rights under Title VII." *Gupta,* 654 F.2d

at 414. In stark contrast, the *Morgan* Court viewed "strict adherence to the procedural requirements specified by the legislature [to be] the best guarantee of evenhanded administration of the law." *Morgan,* 536 U.S. at 109 (citation omitted); *see also Adams,* 2006 WL 367895, at *3.

Here, Simmons-Myers alleges that Harrah's terminated her employment in retaliation for filing an EEOC charge; however, she did not file a retaliation charge or amend her earlier EEOC charge after her termination occurred. As noted above, termination is a discrete discriminatory event requiring exhaustion, unlike a hostile work environment claim, where a discriminatory event can "occur" over a period of time. Simmons-Myers should have filed an EEOC charge as to this discrete event. In failing to do so, she did not comply with Title VII's mandatory requirement that "a charge . . . shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). Considering that *Morgan* prescribes strict adherence to Title VII's legislated procedural requirements, particularly in light of the fact that Simmons-Myers could have easily exhausted her administrative remedies with respect to her retaliatory discharge claim prior to filing suit, the Court finds that her claims [sic] is barred for failure to exhaust the administrative remedies available to her for this claim.

2. Whether There is a Genuine Issue of Fact to Support the Plaintiff's Race Discrimination Claim Arising Under 42 U.S.C. § 1981

As explained above, Simmons-Myers race discrimination claim against Harrah's is viable under 42 U.S.C. § 1981; however, the Court finds no evidence of race discrimination in this case. The only allegations of race discrimination in the Amended Complaint are limited to the circumstances surrounding her dismissal; therefore, the Court's analysis is focused on that event. Amended Complaint ¶ 8. Race discrimination claims, whether arising under Title VII or 42 U.S.C. § 1981, are evaluated under the familiar *McDonnell Douglas* framework. *Wesley v. Gen. Drivers, Warehousemen and Helpers Local 745,* 660 F.3d 211, 213 (5th Cir.2011). To make out a prima facie case of race discrimination, Simmons-Myers must show: (1) she is a member of a protected class; (2) she is qualified; (3) she experienced an adverse employment action; and (4) she was replaced by someone outside the protected class, or, in the case of disparate treatment, that others similarly situated were treated more favorably.[7] *Harrison v. Corrections Corp. of Am.,* 2012 WL 1623575, at *2 (5th Cir. May 09, 2012).

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[7] Harrah's, however, maintains that it laid off Simmons-Myers as a part of large scale reduction in force (RIF). In an RIF case, Simmons-Myers must demonstrate: (1) she is within a protected group; (2) she has been adversely affected by her employer's decision; (3) she was qualified to assume another

(Continued on following page)

After reviewing the evidence in this case, the Court concludes that Simmons-Myers cannot make even the "very minimal showing" necessary to establish her prima facie case because she has not produced evidence that other employees were treated differently because of their race. *Nichols,* 81 F.3d at 41 (5th Cir.1996). As an initial matter, Simmons-Myers was the *only* white employee on the sales team who lost her job. The other three employees that were laid off were black. Also, Simmons-Myers has not and cannot produce evidence to suggest that she was replaced by a non-white employee. The record is undisputed that the position of remote sales manager was discontinued. Simmons-Myers attempts to show race discrimination by arguing that Harrah's fired her to avoid being sued by the other black sales managers. According to her theory, Harrah's had to fire the three underperforming black sales managers and therefore also decided to lay her off in order avoid

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position at the time of the discharge; and (4) evidence, circumstantial or direct, from which a fact-finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue. *Nichols v. Loral Vought Systems Corp.,* 81 F.3d 38, 41 (5th Cir.1996). The Court is not certain that the present case qualifies as an RIF case because it is unclear how many people were laid off at Harrah's and the time period during which the layoffs occurred. As far as the Court can tell, the remote sales team employees were the only Harrah's employees laid off at the time. Regardless, under the alternative RIF prima facie test, Simmons-Myers race discrimination fails for similar reasons: there is absolutely no evidence, circumstantial or direct, that Harrah's decision to terminate Simmons-Myers was based on her race.

the inference of race discrimination. As implausible as this theory might sound, it is not unreasonable. The problem with this theory, however, is that it is just a theory.

The only piece of evidence Simmons-Myers offers to support this argument is an e-mail from Valerie Morris wherein she indicates that she included some written documentation in a few of the sales managers' files "just to be consistent." *See* Aug. 9, 2010 E-mail, docket entry no. 55-28. Simmons-Myers reads the e-mail as an admission that Morris's final warning to her was completely baseless, and Morris simply added the criticism of the others just to avoid the charges from Simmons-Myers that she was being treated unfairly. As an initial matter, the e-mail does not support this reading, as Morris's criticism of Michael, a black employee, is mostly indistinguishable from her criticism of Simmons-Meyers [sic], suggesting that race did not motivate Morris's attempt at "consistency." Moreover, the rest of the record does not corroborate the theory that Morris might have taken action against Simmons-Myers because of her race. For instance, there is some evidence in the record that Harrah's showed favoritism to its male employees, or could have perhaps acted in response to Simmons-Myers's gender-based complaints, but nothing in this case supports a race discrimination claim. Accordingly, Harrah's motion for summary judgment with respect to Simmons-Myers's race discrimination claim pursuant to § 1981 is granted. This claim will be dismissed with prejudice.

3. Whether There is Genuine Issue of Material Fact as to the Gender Discrimination Claim and Retaliation Claim Contained in the EEOC Charge

Finally, the Court will briefly consider the merits of the gender discrimination and retaliation claim that are properly before it, although it recognizes that the basis for recovery in the Amended Complaint and the arguments contained in the Plaintiff's summary judgment brief are inextricably linked to her discharge. The specific allegations levied in the EEOC charge, restated succinctly, are: (1) Simmons-Myers had higher sales goals than her male counterparts; (2) she received negative performance documentation regarding her first sales quarter whereas other males' first quarter sales numbers were excused; (3) the negative performance documentation was issued in retaliation for her complaints about Valerie Morris's favoritism of other male employees. EEOC charge, docket entry 55-17. The Plaintiff's gender discrimination and retaliation claims are also evaluated under the *McDonnell Douglas* burden-shifting test. *See Tex. Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 252-54 (1981). As with her race discrimination claim, Simmons-Myers must establish her prima facie case of gender discrimination by demonstrating: (1) she is a member of a protected class; (2) she is qualified; (3) she experienced an adverse employment action; and (4) she was treated less favorably than someone outside the protected class. *Bouvier v. Northrup Grumman Ship Systems, Inc.,* 350 F. App'x 917, 921

(5th Cir.2008). To recover for her retaliation claim, she must first show that "(1) she participated in a Title VII protected activity, (2) she suffered an adverse employment action by her employer, and (3) there is a causal connection between the protected activity and the adverse action." *Stewart v. Miss. Transp. Com'n,* 586 F.3d 321, 331 (5th Cir.2009).

Considering only the events as they are described in the EEOC charge, Simmons-Myers cannot make out a prima facie case of discrimination or retaliation because she did not experience an adverse employment action before the termination of her employment. The only potentially materially adverse employment action alleged in the EEOC charge is the written warning administered by Young, but, under the reasonable-worker standard articulated by the Supreme Court, the written warning does not constitute a materially adverse action in this context. *Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 68-70 (2006); *see also DeHart v. Baker Hughes Oilfield Operations, Inc.,* 214 F. App'x 437, 442 (5th Cir.2007). There is no evidence that Simmons-Myers was denied any promotion, salary increase, or any other material benefit as a consequence of the written warning. Further, the adverse action, the written warning, did not deter her, nor would it deter a reasonable worker, from filing an EEOC charge of retaliation in an attempt to be made whole. *See DeHart,* 214 F. App'x at 442. *But see Turrentine v. United Parcel Service, Inc.,* 645 F.Supp.2d 976, 989 (D.Kan.2006) (questioning the logic of Dehart). In

short, Simmons-Myers has failed to show discrimination or retaliation that produced "an injury or harm." *Burlington N. & Santa Fe Ry. Co.,* 548 U.S. at 67. Without having suffered a materially adverse employment action, Simmons-Myers cannot recover for those gender discrimination and retaliation claims that were included in her EEOC charge. Accordingly, these claims must be dismissed with prejudice.

IV. Conclusion

Accordingly, **IT IS HEREBY ORDERED THAT** Defendants' Motion for Summary Judgement [**docket entry no. 47**] is **GRANTED**. To the extent that Plaintiff alleges a race discrimination claim pursuant to Title VII, that claim is **DISMISSED WITHOUT PREJUDICE**. Plaintiff's Title VII gender discrimination and retaliation claims that arise out of the termination of her employment are also **DISMISSED WITHOUT PREJUDICE**. Plaintiff's § 1981 claim that is based on the termination of her employment is **DISMISSED WITH PREJUDICE**. Plaintiff's Title VII gender discrimination and retaliation claim regarding the allegations contained in the EEOC charge are **DISMISSED WITH PREJUDICE**. To be clear, the Court's holding forecloses the possibility of recovery for the Defendants' alleged pre-termination retaliation and discrimination pursuant to Title VII or for race discrimination in regard to Plaintiff's termination pursuant to § 1981. The Court reaches no conclusion as to how its decision affects any future

Title VII race and gender retaliation or discrimination claims with respect to the termination of her employment.

SO ORDERED.

CHARGE OF DISCRIMINATION This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.	Charge Presented To: Agency(ies) Charge No(s): ☐ FEPA ☒ EEOC **450-2010-02477**

Texas Workforce Commission Civil Rights Division and EEOC
State or local Agency, if any

Name *(Indicate Mr., Ms., Mrs.)*	Home Phone *(Incl. Area Code)*	Date of Birth
Ms. Debra Simmons	[Omitted]	[Omitted]

Street Address City, State and ZIP Code
[Omitted]**, Mckinney, TX 75070**

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. *(If more than two, list under PARTICULARS below.)*

Name	No. Employees, Members	Phone No. *(Include Area Code)*
HARRAH'S ENTERTAINMENT	**500 or More**	**(800) 946-4946**
Street Address City, State and ZIP Code **13615 Old Hwy 61 N., Robinsonville, MS 38664**		
Name	No. Employees, Members	Phone No. *(Include Area Code)*
Street Address City, State and ZIP Code		

DISCRIMINATION BASED ON *(Check appropriate box(es).)* ☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NATIONAL ORIGIN ☒ RETALIATION ☐ AGE ☐ DISABILITY ☐ GENETIC INFORMATION ☐ OTHER *(Specify)*	DATE(S) DISCRIMINATION TOOK PLACE **Earliest** **Latest** **03-10-2010** **04-21-2010** ☒ CONTINUING ACTION

THE PARTICULARS ARE *(If additional paper is needed, attach extra sheet(s)):*

PERSONAL HARM:

On March 10, 2010, I reported Valerie Morris, Vice President of Sales to Tammy Young, Human Resources Manager, about harassing e-mails. Tammy Young told me that she did mention my complaint to Valarie Morris. After the complaint, I am being written up. Kim Thomas, Director of Sales, told me that Valarie Morris strongly advised her to write me up.

On April 21, 2010, I received a written Performance Documentation for first quarters 2010. However, they also mentioned third and fourth quarter for 2009. After questioning Kim Thomas about the male's quarterly achievement which was lower, she informed me that Michael Wilson and Darrell Russell are new employees. I reminded her that in third and fourth quarter I was also new. I began my employment with the company on April 27, 2009.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.	NOTARY – *When necessary for State and Local Agency Requirements*
I declare under penalty of perjury that the above is true and correct. **Apr 27, 2010** /s/ Debra Simmons *Date* *Charging Party Signature*	I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief. SIGNATURE OF COMPLAINANT /s/ Debra Simmons SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (*month, day, year*) /s/ Denise Brown