

## ADA Charge Verified By Counsel Is Insufficient; Plaintiff Failed To Exhaust Administrative Remedies

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In *Davenport v Asbury, Inc.*, the plaintiff, Lori Davenport, brought several claims against her former employer, including an alleged violation of the Americans with Disabilities Act, as amended (ADA). The U.S. District Court, Eastern District of Tennessee dismissed Ms. Davenport's ADA claim, holding that she failed to exhaust her administrative remedies.

The dismissal occurred as a result of a technicality wherein Ms. Davenport personally failed to verify the allegations set forth in her EEOC Charge of Discrimination, which must be filed prior to litigating any claims under the ADA. Instead, Ms. Davenport's counsel, on her behalf, verified the veracity of the allegations set forth in her Charge of Discrimination. Ms. Davenport verified and signed other related documents in connection with her Charge of Discrimination; however, she failed to verify and sign the actual Charge (also referred to as Form 5).

Although the regulations permit a Charge to be filed by a third party, the regulations require that the Charge be verified by someone with personal knowledge of the allegations. In this instance, Ms. Davenport's counsel had no personal knowledge of the facts that supported the allegations in the

Charge nor did her attorney personally swear to such facts. Although the district court acknowledged that it was a “close call” as to whether the Intake Questionnaire constituted a Charge, the court focused on the EEOC’s own actions. Because the EEOC instructed Ms. Davenport to return the “signed charge to the EEOC,” the agency distinguished the Intake Questionnaire “from the Form 5, referring to it in the letter as the charge.” The district court further noted that Ms. Davenport’s Intake Questionnaire had not been verified. As a result of all of these facts, the district court determined no valid Charge had been filed.

The district court also rejected Ms. Davenport’s amended Form 5, which was filed after the employer filed its motion to dismiss. The court stated the amended Form 5 did not relate back to either the Intake Questionnaire or the original Form 5. According to the district court, since “the purpose of the verification requirement is to protect the defendant from responding to frivolous charges and ‘demands an oath . . . by the time the employer is obliged to respond to the charge,’” Ms. Davenport, by filing her verified amended Form 5 after the EEOC closed its case and her lawsuit was initiated and removed to the district court, acted too late. Based on this, the court found Ms. Davenport failed to exhaust her administrative remedies and dismissed her ADA claim.