No. 11-1917

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Tara V. Luevano,
Plaintiff-Appellant,
v.

Wal-Mart Stores, Inc.,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Case No. 1:10-cv-03999
The Honorable Virginia M. Kendall

REPLY BRIEF OF PLAINTIFF-APPELLANT TARA V. LUEVANO

Bluhm Legal Clinic
Northwestern University School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Sarah O'Rourke Schrup
Attorney
Sarah J. Newman
Senior Law Student
Marjorie M. Filice
Senior Law Student

Counsel for Plaintiff-Appellant,
Tara V. Luevano

ORAL ARGUMENT REQUESTED

Table of Contents

Table of Authorities

Cases

Statutes

Rules

Argument

Appellant Tara V. Luevano did everything she could to properly preserve her claims in the district court. She filed two timely EEOC charges that explicitly alleged sex discrimination and retaliation. She then filed her First Complaint within Title VII's ninety-day statute of limitations. Finally, when the district court dismissed her First Complaint and told her she could file an amended complaint, Luevano promptly did just that.

Yet Wal-Mart suggests that Luevano, at the time a *pro se* plaintiff, acted unreasonably. In Wal-Mart's view, a *pro se* plaintiff in Luevano's shoes should have first decided that the ninety-day deadline provided by her right-to-sue letter was not the real deadline and that she needed to subtract some undefined number of days in order to diligently pursue her claims. She next should have decided that the form complaint the district court provided to her was inadequate. Then she should have ignored the district court's explicit instruction to file an amended complaint and, instead, immediately initiated an appeal. Wal-Mart relies on a string of sound bites from the case law and invokes inapplicable procedural doctrines to avoid acknowledging what has been plain from the first day of this lawsuit: Luevano has alleged valid claims that should have been heard in the district court. To now claim prejudice—and indeed to request that Luevano pay its costs—from these self-imposed delays demonstrates the true unreasonableness in this case. This Court should reverse.

I. The district court erroneously dismissed Luevano's First Complaint.

A. This Court has jurisdiction to review Luevano's First Complaint.

All of Luevano's claims are properly before this Court. This Court unequivocally recognizes that "a notice of appeal from a final judgment . . . is adequate to bring up everything that preceded it." *Weiss v. Cooley*, 230 F.3d 1027, 1031 (7th Cir. 2000). Furthermore, appellate courts leniently construe Federal Rules of Appellate Procedure 3 and 4.[1] *See Smith v. Barry*, 502 U.S. 244, 248 (1992); *see also Kunik v. Racine Cnty., Wis.*, 106 F.3d 168, 172 (7th Cir. 1997) (noting that Rule 3(c) does *not* require that "*every* individual order in a case that preceded final judgment . . . be separately designated in order to be part of the appeal" (emphasis added)). Luevano fully complied with both rules by promptly filing her adequate notice of appeal and docketing statement after the district court entered final judgment against her on March 24, 2011. (*See* A.18); (*see also* R.55) (Luevano designating in her docketing statement that she was the party appealing to this Court from the district court's final judgment). Thus, Wal-Mart's unsupported waiver theory in this Court is merely a reprise of its arguments in the

[1] Federal Rule of Appellate Procedure 3(c)(1) explains that "[t]he notice of appeal must: (A) specify the party . . . taking the appeal . . . ; (B) designate the judgment, order, or part thereof being appealed; and (C) name the court to which the appeal is taken." The rule also warns that "[a]n appeal must not be dismissed for informality of form." Fed. R. App. P. 3(c)(4). In addition to meeting the content requirements of Rule 3, Luevano also complied with the timing requirements of Rule 4. *See* Fed. R. App. P. 4(a)(1)(A) ("[T]he notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from."). As discussed below, *see infra* at 3–5, the district court's July 9, 2011 Order was not a final judgment because it dismissed Luevano's complaint without prejudice, so it did not trigger the thirty-day time period for filing a notice of appeal. (*See also* Appellant Br. 16–17.)

district court, claiming that Luevano's facially adequate filings should be discarded on an inapplicable technicality.

Once these flimsy waiver arguments are set aside, the true question facing this Court is whether the district court's July 9, 2011 dismissal without prejudice was a final order subject to immediate appeal. As discussed in Luevano's opening brief, the default rule is that dismissals without prejudice are not final, appealable judgments, subject only to a narrow exception when, in the wake of a dismissal, the plaintiff has no other options available to her in the district court. (Appellant Br. 16–17.) Conversely, when a plaintiff retains options in the district court, either because the plaintiff still has time to refile or has additional arguments to raise before the court, the dismissal without prejudice remains non-final and non-appealable. *Cf. Taylor-Holmes v. Office of Cook Cnty. Pub. Guardian*, 503 F.3d 607, 610 (7th Cir. 2007) (recognizing that an order of dismissal is "nonfinal and unappealable" if "it is clear that the judge doesn't think she's through with the case"). What this means as a practical matter and for purposes of this case is that in the narrow universe of § 1915 screening, which explicitly tolls the statute of limitations during the motion's pendency, *see Williams-Guice v. Bd. of Educ.*, 45 F.3d 161, 164–65 (7th Cir. 1995), a district court's dismissal without prejudice will never be a final appealable order because there will always be time on the clock to do something more in the district court.

Wal-Mart's hindsight rule, making the district court's order appealable on July 14, is impracticable. (*See* Appellee Br. 1, 11–12.) Not only does a rule focusing

on the date of dismissal allow a litigant to more easily determine what the proper next step is in her lawsuit, but it also saves parties from regularly facing complicated jurisdictional issues to which there is no clear answer. *Cf. Shah v. Inter-Continental Hotel Chi. Operating Corp.*, 314 F.3d 278, 281 (7th Cir. 2002) (cautioning district courts that "'springing' judgments . . . should be avoided because they are a potent source of confusion concerning the timeliness of appeals"). Thus, this bright-line rule that looks to the plaintiff's options *at the time of the dismissal* is not only supported by the few cases in this Court to reach the question, as discussed below, but also is the only clear way for courts to ascertain their jurisdiction and for plaintiffs to be able to ascertain their duties.

The cases Wal-Mart cites—*Lee v. Cook Cnty.*, 635 F.3d 969 (7th Cir. 2011) and *Elmore v. Henderson*, 227 F.3d 1009 (7th Cir. 2000)—actually support Luevano's point. In both cases, no rule served to toll the statute of limitations, so when the district court dismissed those cases without prejudice, the plaintiffs' time had long expired. *See Lee*, 635 F.3d at 972 (noting that on the date the district court dismissed the original suit "it was *already* too late" for the plaintiffs to refile); *Elmore*, 227 F.3d at 1012 (noting that the plaintiff was dismissed from the suit "long after the 90-day period within which he had to sue had elapsed"). Therefore, there was nothing left for those plaintiffs to do in the district court and they should have immediately appealed.

Unlike *Lee* and *Elmore*, Luevano's clock was tolled during her § 1915 proceeding. So there was still time remaining on the limitations clock on July 9

when the district court dismissed her First Complaint, and Luevano still had additional viable arguments to raise before the district court. Therefore, the district court's July 9 Order was never final and is properly carried up on appeal from the district court's ultimate final judgment, giving this Court jurisdiction to review the district court's dismissal of Luevano's First Complaint.

B. Luevano pled facially adequate hostile work environment and retaliation claims in her First Complaint.

Anyone who took a close look at Luevano's First Complaint would have seen that Luevano had facially adequate hostile work environment and retaliation claims, especially because in the § 1915 context the court was required to accept all of Luevano's factual allegations as true and to review the complaint in the light most favorable to Luevano.[2] *See Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011). And regardless of the contours of the lenient pleading standard that the district court was required to apply, the district court's July 9 Order demonstrates that it merely glossed over Luevano's facially adequate pleadings. That is, Luevano satisfies even the plausibility standard from *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), which is "not an exacting standard," *Jaros v. Ill. Dep't of Corr.*, 684 F.3d 667, 672

[2] Because this is the applicable standard for a motion to dismiss, Wal-Mart's reliance on summary judgment case law to attribute a lack of reasonableness to Luevano's allegations is misplaced. (*See* Appellee Br. 21) (citing *O'Leary v. Accretive Health, Inc.*, 657 F.3d 625 (7th Cir. 2011) (affirming a motion for summary judgment)). This Court should similarly disregard Wal-Mart's speculation that the EEOC found no merit in Luevano's claims, an argument that finds no support in this record on appeal. (*See* Appellee Br. 15 n.4) (citing the EEOC's Priority Charge Handling Procedures and arguing, with absolutely no support from the record, that the EEOC's dismissals were "a signal that [Luevano's charges] were not meritorious").

(7th Cir. 2012), and she certainly satisfies any iteration of *Iqbal* that accounts at all for Luevano's *pro se* status.

Wal-Mart assumes without citation that *Iqbal*'s plausibility standard applies unchanged when a district court screens a *pro se* complaint *sua sponte* under § 1915(e)(2). (*See* Appellee Br. 16–17.) And although Wal-Mart concedes as it must that "lenient pleading standards apply to *pro se* complaints," (Appellee Br. 16), its approval of the district court's superficial analysis of Luevano's First Complaint lays bare the fact that it treats this principle as mere boilerplate. This Court has cautioned against imposing *Iqbal* on *pro se* plaintiffs without some sort of lenient construction. *See Arnett*, 658 F.3d at 751 (emphasizing post-*Iqbal* that courts must liberally construe *pro se* complaints and hold them to a lower standard than those drafted by lawyers); *see also Mehta v. Beaconridge Improvement Ass'n*, 432 F. App'x 614, 616 (7th Cir. 2011) (explaining post-*Iqbal* that "the district court too quickly characterized [the plaintiff's] claims . . . as conclusory, especially given its duty to interpret his pro se complaint liberally"). While this Court has not clarified the precise contours of the *pro se* leniency requirement, it undoubtedly applies in this circuit and Luevano has amply met it.

The same language in the complaint that shows Luevano pled facially adequate claims also undercuts Wal-Mart's disingenuous assertion that Luevano's allegations were insufficient. First, though Wal-Mart asserts that Luevano did not plead any facts giving rise to claims for sex discrimination or retaliation, its very next sentence concedes that Luevano "checked the boxes marked sex discrimination

and retaliation," (*see* Appellee Br. 18), which has been deemed a sufficient mode of pleading, even under the new plausibility standard. *Cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007) (citing with approval the model form for pleading negligence, Civil Form 9 [now Form 11], as satisfying the Court's pleading standard); (*see also* Appellant Br. 19 n.6). Moreover, Luevano did more than just fill out the district court's form complaint—she attached several other documents that provided additional factual detail.

Wal-Mart's next salvo is equally unavailing: that Luevano raised only a coworker harassment claim. In her own words[3]:

> After asking my male manager once again what was being done about my complaints, he told me he understood my harasser *because he's a male* and that he wanted to help him and related situation to his brother and himself both males.
>
> I then escalated my complaint to the District H.R. Mgr. who began an investigation. My manager called me in the office to coach me for taking his advise [sic]; gathering information and gave him names of wittness [sic] and going up the Corp. Ladder against my harasser. I was then subjected to intimidation *by my manager*, being watched on my breaks and ultimately they cut my hours. As a result of the harassment I have suffered serious medical issues and expenses.

[3] The only complaint at issue here is the First Complaint, so Wal-Mart should not have cherry-picked tidbits from Luevano's Third and Fourth Complaints as evidence that Luevano did not intend to raise a supervisor-based harassment claim. (*See* Appellee Br. 19 n.7.) Regardless, those complaints—read in their entirety—also establish that "[her supervisor] made lewd gestures at Luevano, threw furniture to intimidate Luevano and threatened Luevano," (A.52 ¶ 25; A.66 ¶ 28), and that after her reports to upper management, both "[the supervisor] and the male associate continued to intimidate, taunt and threaten Luevano," (A.53 ¶ 28; A.66 ¶ 31). If it were not already clear that Luevano intended to raise a supervisor-based harassment claim, she emphasized in both amended complaints that her sex discrimination claim was based on both "the male associate and [the supervisor's] harassment and discrimination against her." (A. 54 ¶ 36; A.67 ¶ 39); (*see also* A.53 ¶ 29; A.66 ¶ 32) ("As a result of defendant's conduct and the harassment of [her supervisor] and its male associate, Luevano suffered substantial health problems and financial damages.").

(A.26) (emphasis added); (*see also* A.33) (copy of FMLA certification requesting medical leave for "severe anxiety" and "GI incontinence" caused by Luevano's abusive work environment). What is clear from this paragraph is that the coworker's abuse was relevant only as the trigger that prompted Luevano to seek help from her supervisor, who then engaged in discriminatory misconduct by expressly favoring her male coworker over her *because* he was a male, by harassing and intimidating her, and finally by cutting her hours after she went over his head to complain about him.

Wal-Mart wholly ignores the most critical allegation in Luevano's complaint: she "escalated [her] complaint to the District H.R. Mgr." immediately after her manager told her he would not respond to her complaint "because [her coworker]'s a male," and then her hours were cut. (A. 26); (*see also* Appellee Br. 20–21) (focusing only on whether Luevano had a good faith belief that her coworker's conduct was in violation of Title VII). These allegations were more than sufficient to survive a motion to dismiss with respect to Luevano's sex discrimination and retaliation claims.

II. Because the district court's equitable tolling analysis was flawed, it erroneously dismissed Luevano's amended complaints on timeliness grounds.

Equitable tolling applies because Luevano acted diligently and extraordinary circumstances prevented her from complying with the statute of limitations. What is more, Wal-Mart is not prejudiced by allowing Luevano to pursue the facially valid

claims that she has consistently pressed—and of which Wal-Mart had notice—since 2010.[4]

A. Luevano diligently pursued her claims against Wal-Mart.

First and foremost, during much of this litigation below, Luevano was *pro se* and inexperienced, a fact that this Court factors into any diligence inquiry. *Compare Donald v. Cook Cnty. Sheriff's Dep't*, 95 F.3d 548, 554 (7th Cir. 1996) (taking into account a litigant's "incarcerated, *pro se* status and his lack of legal sophistication" when concluding that the litigant "pursued his case diligently"), *with Bensman v. U.S. Forest Serv.*, 408 F.3d 945, 964 (7th Cir. 2005) (finding it was not clear error for the district court to conclude that the plaintiff did not exercise due diligence when he filed his appeal a day late in part because "[h]e was experienced with the agency's appeals process").

Furthermore, during her time as a *pro se* plaintiff, Luevano tried again and again to have her claims heard. (*See, e.g.*, A.21, 34, 47, 60.) Luevano timely filed her EEOC charges and First Complaint. 42 U.S.C. § 2000e-5 (2006); (*see* A.22, 28, 72). Then, after the first dismissal, she filed an amended complaint within just a few weeks. (*See* A.3, 35) (filing her Second Complaint on August 4, less than a month after the court entered its dismissal on July 12). Luevano subsequently continued to meet every court-imposed deadline through the remainder of her case

[4] Luevano also diligently argued equitable tolling in the district court, so Wal-Mart's waiver argument is flatly without merit. (*See* Appellee Br. 25.) In her brief in opposition to Wal-Mart's second motion to dismiss, Luevano argued that "the statute of limitations ha[d] been equitably tolled," (R.48 at 4), citing both diligence, (R.48 at 5), and reliance on the court's misleading order, (R.48 at 5–6), to justify her argument.

in the district court. (*See* R.13; A.48; R.28; A.61.) Had the district court reviewed the record, Luevano's diligence would have been plain.

Wal-Mart's efforts to undermine this clear diligence are unavailing. As proof that Luevano was not diligent, Wal-Mart first recites the unremarkable proposition that even *pro se* litigants are expected to know the statute of limitations. (*See* Appellee Br. 26.) Notably, Luevano met the applicable statute of limitations by filing her First Complaint within the ninety-day filing period. And Wal-Mart cannot seriously contend that Luevano should have anticipated the jurisdictional nuances that her counsel flagged for this Court on appeal, issues that are far from transparent and concrete. (*See, e.g.*, Appellant Br. 1–2, 16–17); (Appellee Br. 1–2, 10–15); *see also supra* 3–5.

Second, Wal-Mart hints that Luevano was not diligent because she waited until day eighty-eight to file her First Complaint. If this were truly the test for diligence, then virtually every lawyer could be accused of resting on her laurels, for a brief filed on the due date can be stricken and a deadline missed for any number of reasons. (*See, e.g.*, App. Dkt. 17) (Wal-Mart filing brief on its due date in this Court); (App. Dkt. 20) (striking Wal-Mart's brief as deficient but permitting refiling). Furthermore, while this Court has allowed this sort of eleventh-hour argument in the context of represented parties, it has implicitly rejected it in the context of *pro se* filings. *Compare Farzana K. v. Ind. Dep't of Educ.*, 473 F.3d 703, 705 (7th Cir. 2007) ("Waiting until the last hours is not diligent; the errors that often accompany hurried action do not enable the bungling lawyer to grant himself

extra time."), *and Wilson v. Battles*, 302 F.3d 745, 748 (7th Cir. 2002) ("Moreover, if Wilson and his attorney were unclear about the deadline, he should have filed by the earliest possible deadline, not the latest." (citation and internal quotation marks omitted)), *with Williams-Guice v. Bd. of Educ.*, 45 F.3d 161, 165 (7th Cir. 1995) (suggesting that a more appropriate rule for *pro se* plaintiffs would be to rely on local rules to provide a reasonable period of time for a *pro se* plaintiff to refile after her complaint was dismissed under § 1915).

Finally, Wal-Mart overstates any delay between the district court's § 1915 dismissal and Luevano's filing of her Second Complaint. (*See* Appellee Br. 23.) Though the district court dismissed Luevano's First Complaint on July 9, 2010, the court did not enter the order on the docket until July 12, 2010. (A.3.) Because this order also dismissed Luevano's IFP petition, this Court has suggested that she then had "the greater of the time remaining in the period of limitations, or the 15 days provided by [Northern District of Illinois] Local Rule [3.3(e)]" to pay the filing fee and refile. *Williams-Guice*, 45 F.3d at 165. Therefore, measuring from July 12, 2010, and taking into account the fifteen-day period under Local Rule 3.3(e) and the three-day grace period for mail service under Federal Rule of Civil Procedure 6(d), Luevano would have had until July 30, 2010, to refile her complaint had equitable tolling not extended the limitations period. Properly calculated, Luevano filed her Second Complaint within a mere five days of this deadline. (*Cf.* cases cited in Appellant Br. 26) (demonstrating that courts only refuse to find diligence when a plaintiff delays the litigation for months or years).

B. Extraordinary circumstances warrant equitable tolling in this case because the district court advised Luevano that she could file an amended complaint while neglecting to warn her of the statute-of-limitations consequences stemming from its § 1915 dismissal.

The district court was not required to give Luevano legal advice, but when it did, it could not mislead her. The district court could have simply dismissed Luevano's complaint without prejudice and without further instructions. Instead, the district court chose to give advice and instruction to Luevano, so it was required to do so completely and accurately. (*See* cases cited in Appellant Br. 27.) Contrary to Wal-Mart's repeated suggestion, (*see* Appellee Br. 13, 23, 27), Luevano does not seek to impose additional, onerous obligations on district courts, for even Wal-Mart acknowledges that courts must screen *pro se* complaints under § 1915, (*see, e.g.* Appellee Br. 16). The problem in this case arose not by the threshold calculations, but by the district court's seeming misapprehension of the impact of its § 1915 dismissal on the running of the statute-of-limitations clock. (*See* A.9) (district court order reinstating Luevano's case and appointing counsel, acknowledging that she "appears to have timely claims under Title VII").

Thus, when a district court affirmatively tells a *pro se* plaintiff that she may file an amended complaint, no reasonable plaintiff would question that ruling or presume that the judge would instruct that she do something she was not legally entitled to do. Any rational person would simply accept the district court's advice. That's what Luevano did; she followed instructions that the district court itself later acknowledged giving. (*See* A.14) (district court recognizing that it "told Luevano that she could file an amended complaint").

This Court has affirmed that misleading comments and inadequate notice can warrant equitable tolling. *See, e.g.*, *Prince v. Stewart*, 580 F.3d 571, 575 (7th Cir. 2009) ("Equitable tolling is properly invoked in any case in which 'the court has led the plaintiff to believe that she had done everything required of her,' . . . or has 'misled a party regarding the steps that the party needs to take to preserve a claim.'" (quoting *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984) (per curiam)); *cf. Baldwin Cnty. Welcome Ctr.*, 466 U.S. at 151 (rejecting equitable tolling because both the district court and the magistrate judge warned the plaintiff of the statute of limitations, and therefore the plaintiff could not argue that she had "inadequate notice"). And those notice principles apply even more forcefully when a *pro se* plaintiff is involved. *See, e.g.*, *Tucker v. Randall*, 948 F.2d 388, 390 (7th Cir. 1991) (recognizing that the district court should have notified a *pro se* plaintiff of the consequences of failing to comply with the briefing schedule before dismissing the complaint (citing *Palmer v. City of Decatur, Ill.*, 814 F.2d 426, 429 (7th Cir. 1987)); *Schilling v. Walworth Cnty. Park & Planning Comm'n*, 805 F.2d 272, 277 (7th Cir. 1986) (noting that the district court "should at least warn a *pro se* litigant of the possible consequences of any neglect, if the court intends to sanction with dismissal in the first instance"); *Averhart v. Arrendondo*, 773 F.2d 919, 920 (7th Cir. 1985) (instructing district court judges to advise *pro se* plaintiffs of the requirement to file a new notice of appeal after denying plaintiffs' Rule 59(e) motions). These warnings are implicit in the "the well-established duty of the trial court to ensure that the claims of a *pro se* litigant are given a fair and meaningful

consideration." *Pruitt v. Mote*, 503 F.3d 647, 666 (7th Cir. 2007) (citation and internal quotation marks omitted).

In short, under these narrow circumstances where a *pro se* plaintiff is led astray by information the district court volunteered, equitable tolling is warranted.

C. Wal-Mart will not be prejudiced if equitable tolling applies.

When both the diligence and extraordinary circumstances prongs are met, as they are here, equitable tolling applies in cases where the defendant is not prejudiced. *See Savory v. Lyons*, 469 F.3d 667, 673–74 (7th Cir. 2006). Statutes of limitations are important because they protect a defendant's right to timely notification. *See Elmore v. Henderson*, 227 F.3d 1009, 1013 (7th Cir. 2000). Here, Wal-Mart would not be prejudiced by the application of equitable tolling because it received timely notification, first learning of the lawsuit by summons on October 1, 2010, more than two years ago. (R.16.)

Wal-Mart concedes that it faced no prejudice in the district court because it received timely notice of Luevano's claims. (*See* Appellee Br. 28) (admitting that there would have been no prejudice "had the district court decided to apply equitable tolling in 2010 or early 2011"). And to the extent delay on appeal is relevant—which it is not because Wal-Mart has known all along about the litigation—Wal-Mart too bears responsibility for delay during this appeal by, for example, repeatedly moving to strike Luevano's briefs rather than simply addressing them on the merits. (*See, e.g.*, App. Dkt. 16, 29.) By employing these tools that delay, Wal-Mart cannot credibly claim prejudice here.

Luevano acted with reasonable diligence despite the district court's own misleading order, and this Court should reverse on equitable tolling grounds.

III. Relation-back principles preserve the retaliation claim that Luevano raised in her second EEOC charge.

At a minimum, Luevano has a timely retaliation claim arising out of her second EEOC charge. Wal-Mart once again invokes a misplaced waiver argument, (*see* Appellee Br. 31), to fend off this valid claim. First, Luevano explicitly argued in the district court that relation back salvaged her Fourth Complaint. (*See* R.48 at 7 n.4) (explaining that Luevano "filed her second Charge of Discrimination and was affected by the retaliation even before she filed her original Complaint on June 28, 2010, not to mention her subsequent complaints, and she alleged conduct covered by the second Charge of Discrimination and second Notice of Right to Sue in each of her complaints"). Therefore, there was no waiver here.

Second, Wal-Mart commits the same analytic missteps as the district court when it argues that Luevano's retaliation claim fails because she did not mention her second EEOC charge until her Fourth Complaint. (*See* Appellee Br. 29.) The question of timeliness necessarily precedes the substantive question of whether relation back is appropriate. *See* Fed. R. Civ. P. 15(c)(1)(B); *Henderson v. Bolanda*, 253 F.3d 928, 931 (7th Cir. 2001) (noting that relation back applies when: (1) the *original complaint* was timely filed and (2) the amended complaint asserts claims that arose out of the same conduct that was set out—or attempted to be set out—in the original complaint). Wal-Mart, like the district court, ignored the fact that Luevano satisfied the timeliness requirement by filing her "original" Second

Complaint within the ninety-day statutory period running from her second EEOC charge. (*See* Appellant Br. 32); (*see also* Appellee Br. 31). Rather, Wal-Mart analyzed only the timeliness of the Fourth Complaint—the "amended complaint"—which was wrong. (*See* Appellee Br. 29, 32) (noting that the Fourth Complaint was filed after the ninety-day period running from the second EEOC charge). So long as the original complaint—here, the Second Complaint—was timely filed (which it was), the timing of the amended complaint that relates back—here, the Fourth Complaint—is irrelevant.

Only after confirming that Luevano's Second Complaint was timely with respect to the second EEOC charge should the district court have turned to the substantive prong of the relation-back test. Had it done so, the only reasonable conclusion would have been that the claims asserted in the Fourth Complaint arose out of the same conduct that Luevano set out in her Second Complaint. All the facts that Luevano alleged in this lawsuit relating to retaliation occurred *before* Luevano filed her Second Complaint on August 4, 2010 (and indeed even before she filed her First Complaint on June 28, 2010):

- March 16, 2010: Luevano filed her first EEOC charge, which explicitly mentioned retaliation. (A.28.)
- April 8, 2010: Luevano alleged that her supervisor reduced her hours on this date (the crux of her retaliation claim). (A.40.)
- June 7, 2010: Luevano filed her second EEOC charge, which explicitly referenced her first EEOC charge. (A.72.)

What this shows is that the retaliation claim that Luevano alleged in her second charge and attached to her Fourth Complaint was premised on the same

factual allegations that Luevano raised in her timely Second Complaint—a complaint that alleged facts consistent with a claim of retaliation for her filing the first EEOC charge. (*See* A.39) (alleging in her handwritten statement accompanying her Second Complaint that she was "retaliated against . . . for engaging in protected activity" and instructing the court to see the copy of Wal-Mart's HR-19 Discrimination and Harassment Prevention Policy, which she also attached to her Second Complaint); (*see also* A.43) (copy of Wal-Mart's HR-19 Policy on which Luevano underlined and placed an asterisk next to the policy's prohibition on taking negative action against an employee for "[f]iling a complaint of discrimination or harassment *with a government agency or court*" (emphasis added)).

What is more, both Wal-Mart and the district court erred in characterizing Luevano's allegations as two separate retaliation claims, presumably for the purpose of claiming that the latter one was untimely. All of Luevano's protected activity—whether it was her oppositional conduct in reporting to management or her participation conduct in filing her first EEOC charge—led to the same adverse action that was in retaliation for both reports: her reduction in hours on April 8, 2010. (A.40.) Because all of the retaliatory conduct was tethered to the same protected activity (complaining to others about her supervisor's behavior) and the same period of time (March through June 2010), any attempt to distinguish them, for purposes of timeliness or otherwise, is unavailing.

In any event, even if this Court finds that Luevano raised two independent retaliation claims, this Court may still consider the retaliation claim she raised in her second EEOC charge because this claim is reasonably related to her earlier retaliation claim for reporting to management. This Court has recognized that an EEOC charge may encompass new claims in a complaint "if there is a reasonable relationship between the allegations in the charge and those in the complaint, and the claim in the complaint could reasonably be expected to be discovered in the course of the EEOC's investigation." *Teal v. Potter*, 559 F.3d 687, 692 (7th Cir. 2009) (citing *Cheek v. W. & S. Life Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994)). To be reasonably related, "the EEOC charge and the complaint must, at a minimum, describe the *same conduct* and implicate the *same individuals*." *Cheek*, 31 F.3d at 501. As required by *Teal* and *Cheek*, both of Luevano's retaliation claims described the same conduct—reduction in her hours—and implicated the same individual—Luevano's supervisor. (A.40, 68.) Under the reasonably related doctrine, both of Luevano's retaliation claims are therefore encompassed in her second EEOC charge.

In conclusion, Luevano satisfied the substantive prong of the relation-back doctrine by demonstrating that her retaliation allegations in her Fourth Complaint arose from the same conduct set out in her Second Complaint. Relation back is therefore proper and provides an additional ground for this Court to vacate the district court's judgment against Luevano.

CONCLUSION

For the foregoing reasons, Appellant Tara V. Luevano respectfully requests that this Court reverse the district court's dismissal and remand for further proceedings.

Respectfully Submitted,

Tara V. Luevano
Plaintiff-Appellant

By: /s/ SARAH O'ROURKE SCHRUP
Attorney

SARAH J. NEWMAN
Senior Law Student

MARJORIE M. FILICE
Senior Law Student

Bluhm Legal Clinic
Northwestern University School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Counsel for Plaintiff-Appellant,
TARA V. LUEVANO

Certificate of Service

I, the undersigned, counsel for the Plaintiff-Appellant, Tara V. Luevano, hereby certify that I electronically filed this brief with the clerk of the Seventh Circuit Court of Appeals on January 14, 2013, which will send the filing to the persons listed below.

Norma W. Zeitler
Barnes & Thornburg
One North Wacker Drive, Suite 4400
Chicago, IL 60606

/s/ Sarah O'Rourke Schrup
Attorney
Bluhm Legal Clinic
Northwestern University School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Dated: January 14, 2013

No. 11-1917

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

TARA V. LUEVANO, Plaintiff-Appellant, v. WAL-MART STORES, INC., Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division Case No. 1:10-cv-03999 The Honorable Virginia M. Kendall

---

Certificate of Compliance with Federal Rule of Appellate Procedure 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,183 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 12-point Century Schoolbook font with footnotes in 11-point Century Schoolbook font.

/s/ Sarah O'Rourke Schrup
Attorney
Bluhm Legal Clinic
Northwestern University School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Dated: January 14, 2013