

OCT 11 2007*Cooper v. Pasadena Unified School District*, no. 04-56497**CATHY A. CATTERSON, CLERK**
U.S. COURT OF APPEALS

WALLACE, Circuit Judge, concurring in part and dissenting in part.

I would affirm the district court's summary judgment in favor of Pasadena SD on Cooper's 1997 discrimination and retaliation claim and his 1999 retaliation claim. I would also affirm its dismissal of Cooper's termination claim under the ADA and the Rehabilitation Act because Cooper has not exhausted the required administrative remedies.

While it is true that we construe the language of EEOC charges liberally and will adjudicate claims that are reasonably related to the EEOC charges, "there is a limit to such judicial tolerance when principles of notice and fair play are involved." *Freeman v. Oakland Unified Sch. Dist.*, 291 F.3d 632, 635 (9th Cir. 2002). "The crucial element of a charge of discrimination is the factual statement contained therein." *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1100 (9th Cir. 2002). Neither of Cooper's EEOC charges so much as mentions termination proceedings. The 1999 charge all but excludes the dates of Cooper's termination proceedings: the charge lists harassment beginning June 30, 1998, overlapping only one month with the termination proceedings occurring between October 1997 and July 1998. While his 1999 charge lists "harassment" from the personnel office, it is in the specific context of his complaint about the office's failure to provide him with an evaluation form. *See Freeman*, 291 F.3d at 637. A

reasonable EEOC investigation would not have focused on anything but the district's failure to complete Cooper's requested evaluation form based on the factual allegations in Cooper's complaint.

I would not consider Cooper's argument, raised for the first time on appeal, that the Rehabilitation Act does not require exhaustion. While we have the discretion to consider new arguments on appeal where the issue, like this one, is purely legal, *see United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990), here the factual record upon which a determination of whether exhaustion was necessary has not been developed. *Cf. United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978) (holding that consideration of a new issue on appeal is appropriate where the consideration does not depend on the record or the record has been fully developed). Cooper's failure to raise this argument below prevented the district court from making the appropriate inquiry into the factors that would favor or militate against requiring exhaustion. *See Montgomery v. Rumsfeld*, 572 F.2d 250, 253-54 (9th Cir. 1978). I would not allow him to correct that mistake on appeal.