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EMPLOYERS, BEWARE: SCOTUS RULING CREATES TITLE VII LITIGATION TRAP

Insights
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The U.S. Supreme Court unanimously ruled today that Title VII's administrative exhaustion requirement—whereby an aggrieved employee first must file a claim with the Equal Employment Opportunity Commission ("EEOC") or a state agency before filing a lawsuit—is merely a claim-processing rule, rather than jurisdictional. As a result, an employer who does not assert "failure to exhaust" as an affirmative defense to a lawsuit might waive the ability to seek dismissal on that basis. In light of today's decision, employers must ensure they identify an employee's failure to exhaust at the outset of any Title VII litigation to preserve their ability to dismiss the claims on that ground (*Fort Bend County v. Davis*).

JURISDICTIONAL OR PROCEDURAL? CIRCUIT COURT SPLIT PROMPTS SCOTUS REVIEW

As noted above, Title VII of the Civil Rights Act of 1964 (the federal antidiscrimination statute) requires employees to file discrimination and retaliation claims with the EEOC or a similar state agency before filing a lawsuit against their employers, and to do so within 180 days of any alleged unlawful employment practice (extended to 300 days if a state or local agency enforces a law that prohibits employment discrimination on the same basis). Before today's ruling, federal circuit courts were split as to whether this was a "jurisdictional" requirement, meaning courts are deprived of jurisdiction over the lawsuit until a charge is filed with the EEOC, or a "claim-processing rule," viewing the EEOC charge as merely procedural—an element of the

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employee's discrimination claim that can be waived if not challenged at the outset of litigation by the employer.

Three circuit courts ruled the language was jurisdictional. Meanwhile, eight other circuit courts ruled the language was a claim-processing rule (i.e., procedural). The Supreme Court decided to weigh in after the 5th Circuit recently hardened its position that the language was a claim-processing rule.

The case started when Lois Davis filed an internal complaint alleging Fort Bend County's IT Director subjected her to sexual harassment. Fort Bend investigated her complaint, and the IT Director later resigned as a result. Nonetheless, Davis filed a charge against Fort Bend with the Texas Workforce Commission (Texas' EEOC equivalent) claiming sexual harassment and retaliation. In so doing, she completed an intake questionnaire (a series of EEOC questions to determine coverage under Title VII) outlining the contours of her sexual harassment and retaliation claims.

The IT Director's resignation, however, did not resolve Davis' workplace complaints. She claimed her supervisor (who was allegedly the IT Director's close friend) retaliated against her and eventually terminated her employment after she failed to report to work one Sunday due to a religious observation. After her termination, Davis amended her intake questionnaire—but not her charge—to include "religion" as another basis of discrimination. Shortly after, she filed a lawsuit in federal district court, alleging sexual harassment, retaliation, and religious discrimination under Title VII. Ford Bend asked the lower court to dismiss all of Davis's claims, which it did. Davis appealed the decision to the 5th Circuit Court of Appeals, which reversed the lower court's ruling on Davis' religious discrimination claim and sent the case back for further proceedings.

On remand, Fort Bend argued to the lower court—*for the first time, five years into the lawsuit*—that Davis failed to exhaust her administrative remedies on the religious discrimination claim (i.e., she never included "religion" as a basis for discrimination in her charge with the EEOC). The lower court agreed with Fort Bend, holding that filing an administrative charge is a jurisdictional prerequisite in Title VII cases, and once again tossed Davis' lawsuit.

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On appeal, however, the 5th Circuit sided with Davis, holding an administrative charge is simply an element of a workplace discrimination claim (which can be waived by the employer). Ultimately, this meant Davis could pursue her religious discrimination claim in federal court because Fort Bend did not timely allege a "failure to exhaust" defense after Davis filed her lawsuit. Fort Bend asked the Supreme Court to weigh in and provide definitive guidance for federal courts to follow.

SCOTUS: ADMINISTRATIVE EXHAUSTION REQUIREMENT IS PROCEDURAL

Today, the Supreme Court ruled Title VII's administrative exhaustion requirement is merely a claim-processing rule, and not a jurisdictional bar to filing a lawsuit. Therefore, a federal court may retain jurisdiction over a discrimination claim even if an employee fails to allege the basis for such claim in their administrative charge. The Court found that Congress did not clearly state that Title VII's administrative requirement is jurisdictional, and therefore courts must treat it as non-jurisdictional in nature.

The Supreme Court clarified, however, that Title VII's administrative exhaustion requirement cannot simply be ignored just because it is not jurisdictional in nature. An employee still risks having a claim tossed if they do not first file a charge with the EEOC or relevant state agency. Likewise, an employer risks defending against a claim—that was never filed with the EEOC—if it does not assert failure to exhaust as an affirmative defense and move to dismiss on that ground.

EMPLOYERS, YOU'RE ON NOTICE

What does this decision mean for employers? Upon receipt of any complaint asserting a Title VII claim, employers (and their lawyers) must immediately and carefully review and assess the administrative history, asking themselves these pertinent questions: Did the employee file a charge with the EEOC or the state equivalent? If so, did the employee assert the same claim(s) (or those within the scope of the agency's investigation) in that proceeding as in the lawsuit?

If not, the employer either should move to dismiss on that ground or, at the very least, include this as an affirmative defense in its response to the complaint—and ultimately pursue it. An unwary employer that fails to do so may waive

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the right to assert the defense in the future and, ultimately, the ability to obtain dismissal on that basis.

If you have questions about how best to effectively defend against discrimination or retaliation claims, regardless of whether in an administrative or judicial setting, please contact your Fisher Phillips attorney.

This Legal Alert provides an overview of a specific Supreme Court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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