

### **Careful! Don't Fall Asleep at the Wheel: Supreme Court Holds Title VII Exhaustion Requirement Is Waivable by Employers**

On June 3, 2019, the Supreme Court ruled that Title VII's administrative exhaustion requirement is not a jurisdictional predicate for litigation and that an employer who fails to raise this defense has waived it.

In a Title VII case, employees alleging discrimination are required to administratively exhaust their claim, or in other words, file an EEOC charge prior to initiating a lawsuit. The employee must typically wait until after the EEOC, or state agency, has reviewed the complaint and issued a right to sue letter before filing suit. The timeframe for filing suit is 300 days after the EEOC issues a right to sue letter or 30 days after the state's determination, whichever is earlier.

In *Fort Bend County v. Davis*, No. 18-525 (June 3, 2019), Lois Davis, a municipal worker for Fort Bend County, had complained about sexual harassment by a male colleague. After he resigned, she claimed that her supervisor retaliated against her for reporting the harassment and filed a charge with the EEOC. The tension between Davis and her supervisor continued to mount, until one day he threatened to fire her if she did not work on a Sunday even after she claimed to have a religious commitment on that day. (Slip. Op. at 4.) After the supervisor terminated Davis for failing to show up to work, she handwrote "religion" on an EEOC intake questionnaire but never followed up with a formal EEOC charge document. (*Id.*)

After the EEOC issued a right to sue letter, Davis filed suit against her former employer. The case unfolded in discovery and motion practice for several years, during which Davis lost her retaliation claim. Her religious discrimination claim survived summary judgment, however, and would have gone to trial. (*Id.* at 5.) Five years into the litigation, the defendant, Fort Bend County, argued for the first time that Davis had failed to exhaust the administrative requirement because she did not file a formal charge of religious discrimination with the EEOC. Her charge only mentioned "reasonable accommodation" and "discharge." (*Id.* at 4-5.)

The district court granted Fort Bend's motion, concluding that the charge requirement was "jurisdictional" and precluded the court from considering the claim. The Fifth Circuit Court of Appeals reversed, concluding that Fort Bend had waived the administrative exhaustion requirement. (*Id.* at 5.)

In an opinion penned by Justice Ruth Bader Ginsburg, the Supreme Court unanimously affirmed, holding that the exhaustion requirement is a "claim processing" requirement and is not "jurisdictional." (*Id.* at 7.) This means that unless a defendant employer argues *early* in the litigation that the employee failed to file a charge with the EEOC (or is attempting to litigate claims that were not covered by a charge filed with the EEOC), that argument may be deemed waived. Still, as Justice Ginsburg explained, the exhaustion requirement should not be ignored: a Title VII complainant would be "foolhardy" not to follow the administrative procedure prior to initiating a case and the defense is still valid so long as it is timely raised. (*Id.* at 11.)

**Key Takeaways:** Based on the *Fort Bend* ruling, employers should carefully scrutinize the underlying EEOC file, including the charge form, anytime they are sued, in order to have a complete understanding of the basis of the EEOC charge. If some or all of the employee's claims were not raised in an EEOC charge, a defendant employer should raise the

exhaustion defense in litigation as soon as possible, likely on a motion to dismiss. Employers should also pay close attention to any amended complaints, and determine whether subsequent amendments raise claims or allegations that were not previously exhausted.

**This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.**

**Lisa E. Cleary**

**212.336.2159**

**lecleary@pbwt.com**

**Catherine A. Williams**

**212.336.2207**

**cawilliams@pbwt.com**

**Gabriela Bersuder**

**212.336.2151**

**gbersuder@pbwt.com**

To subscribe to any of our publications, call us at 212.336.2813, email [info@pbwt.com](mailto:info@pbwt.com) or sign up on our website, <https://www.pbwt.com/subscribe/>.

This publication may constitute attorney advertising in some jurisdictions. © 2019 Patterson Belknap Webb & Tyler LLP