

LABOR AND EMPLOYMENT

ALERT

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Supreme Court: Employers Must Timely Raise Affirmative Defenses Involving Administrative Exhaustion Under Title VII

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On June 3, 2019, the U.S. Supreme Court ruled that the charge filing requirement under Title VII of the Civil Rights Act of 1964 is not a “jurisdictional” bar to litigation, but instead is a claim-processing rule subject to waiver if the defendant-employer fails to raise an affirmative defense. The Court’s decision means employer’s counsel should be diligent in assessing whether the plaintiff has followed the Title VII requirement to identify the basis of the alleged discrimination in a charge of discrimination filed with the Equal Employment Opportunity Commission (“EEOC”). Otherwise, employers risk waiving this important procedural defense in litigation.

Background

Title VII prohibits workplace discrimination because of a person’s race, color, religion, sex, or national origin. The federal statute requires individuals to first file a “charge” with the Equal Employment Opportunity Commission (“EEOC”) or with the state-agency equivalent before filing a lawsuit in federal court. Plaintiffs are permitted to file a Title VII discrimination lawsuit in federal court after the EEOC dismisses the administrative charge and issues a “right-to-sue” notice.

The case before the Supreme Court, *Fort Bend County v. Davis*, No. 18-525, involved Ms. Davis’ claim of religious discrimination alleged in her federal court lawsuit but not asserted in her underlying EEOC charge. Her EEOC charge alleged sexual harassment and retaliation but not religious discrimination. After years of litigation, only the religious discrimination claim remained in the lawsuit. The defendant-employer then moved to dismiss the claim, arguing for

the first time that the Court did not have jurisdiction to adjudicate Ms. Davis’ religious discrimination claim because she had failed to assert that claim in her EEOC charge. A jurisdictional defense – as asserted here by the employer – which challenges a court’s authority to adjudicate a case, may be raised at any point in a proceeding and, therefore, cannot be waived by a defendant.

The District Court agreed with the employer and granted summary judgment. The U.S. Court of Appeals for the Fifth Circuit reversed, concluding that the EEOC charge-filing requirement was merely a procedural prerequisite to suit and not a jurisdictional defense. The Fifth Circuit found that the employer had forfeited the right to assert an affirmative defense that the plaintiff had failed to exhaust her administrative remedies because the employer did not raise the defense earlier in the litigation.

In a 9-0 decision written by Justice Ginsburg, the Supreme Court agreed with the Fifth Circuit and resolved a conflict among the 12 federal appellate courts. A minority of federal appellate courts had held that a plaintiff’s failure to assert a claim in an EEOC charge was a jurisdictional bar to a court adjudicating the claim.

Takeaways

Employers should analyze and compare a plaintiff’s original claims in the EEOC to the claims made in a subsequent lawsuit in federal court. Employment defense counsel must be vigilant in determining whether a plaintiff has failed to exhaust administrative

remedies and assert an affirmative defense if warranted. Otherwise, employer-defendants may end up waiving the procedural defense. Although the Supreme Court's recent decision addressed exhaustion under Title VII, the Americans with Disabilities Act and the Age Discrimination in Employment Act likewise contain charge-filing requirements similar to those in Title VII. Thus, prudence counsels employers to timely raise an affirmative defense in claims under all three statutes as appropriate. ♦

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