

Employers Can Lose Failure-to-Exhaust Defense if Not Timely Raised, Supreme Court Rules

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On June 3, 2019, the United States Supreme Court ruled unanimously in *Fort Bend County, Texas vs. Davis* that Title VII cases can proceed in federal court even if employees fail to first bring their claims before the U.S. Equal Employment Opportunity Commission (EEOC) or an equivalent state agency (e.g., Massachusetts Commission Against Discrimination). The Court's ruling, however, made clear that employers can continue to protect themselves against new claims, so long as they raise the failure-to-exhaust defense early in litigation. The Court did not say how early. But best practice is to raise this defense in a first responsive pleading – ideally in a motion to dismiss, or at least, in the answer, in order to preserve the defense for later.

Title VII includes a requirement that employees file their discrimination claims with the EEOC or an equivalent state agency before filing litigation in federal court. The requirement to file at the administrative agency first is called exhaustion. Under Title VII, the EEOC has first right to investigate the matter and potentially prosecute it. If, after 180 days, the EEOC chooses not to sue (or has not acted on the claim), complainants receive a “right to sue” notice entitling them to pursue their claims in court. Typically plaintiffs allege in court the same or similar claims brought before the EEOC. Sometimes, however, plaintiffs bring new causes of action not previously before the EEOC for the first time in federal court. Prior to *Fort Bend*, circuit courts were split as to whether the requirement to file at the EEOC first, before suing, was jurisdictional or simply procedural. If jurisdictional, employers could seek dismissal throughout litigation, whereas if procedural, the employer needed to raise the issue early on or risk waiving the defense.

In *Fort Bend*, the plaintiff, an employee of Fort Bend County, Texas, filed a charge of discrimination with the EEOC alleging sexual harassment and retaliation for reporting sexual harassment. While her claim was pending, Fort Bend terminated the plaintiff after she did not report to work on a Sunday, although she had told her employer she missed the day for religious reasons. Thereafter, the plaintiff attempted to amend her charge, handwriting “religion” on an EEOC intake form, but she never formally amended her charge. The plaintiff later filed her case in federal district court alleging religious discrimination and retaliation for filing a sexual harassment claim. Fort Bend County did not immediately seek to dismiss the religious discrimination claim due to the plaintiff's failure to exhaust her administrative remedies as to that claim, but did so later, after years of litigation had passed.

The Court, in a decision written by Justice Ginsburg, found that the plaintiff's duty to raise her religious discrimination claim was a “claim-processing,” rather than “jurisdictional,” requirement. Thus, given Fort Bend County's failure to raise the issue in a timely manner, the federal court could retain jurisdiction of her case, even if she failed to meet the requirement. Jurisdictional requirements, the Court explained, mean “the classes of cases a court may entertain (subject matter jurisdiction) and the persons over whom the court may exercise adjudicatory authority (personal jurisdiction).” By contrast, claim-processing requirements “seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.” Had Congress wanted to make the exhaustion requirement – filing at the EEOC first – jurisdictional, it needed to say so. Since Congress did not, the Court held that this requirement was akin to a procedural rule, like other EEOC requirements. As such, an employer can lose the right to its failure-to-exhaust defense if not timely raised. If Title VII litigation arises, it is now critical to investigate this exhaustion issue early on, when responding to a complaint.

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