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BLOGS

Archives;Discrimination

Employer Must Timely Assert a Title VII Failure to Exhaust Administrative Remedies Defense or Waives the Defense

On Monday, the U.S. Supreme Court unanimously held that Title VII's requirement that claimants exhaust administrative remedies by filing a charge with the Equal Employment Opportunity Commission (EEOC) before suing is not jurisdictional. The decision, issued in *Fort Bend County v. Davis*, means that an employer that fails to timely assert a failure to exhaust affirmative defense to a lawsuit waives the ability to later seek dismissal of the suit on this ground. As a result of the Court's ruling, employers need to be vigilant in timely asserting any failure to exhaust defense at the outset of litigation to preserve the defense.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination by covered employers on the basis of race, color, national origin, religion, and sex. The plain language of Title VII sets forth an administrative process that a claimant must follow before filing suit. This process requires that a claimant begin by filing a Title VII charge of discrimination with the EEOC. Once a charge is filed, the claimant may leave the charge pending with the EEOC through the conclusion of the EEOC's process or, after 180 days, seek a right to sue notice to proceed to court. Under Title VII, a plaintiff's failure to appropriately complete the EEOC charge process is grounds to dismiss their case.

In *Davis*, plaintiff Lois Davis filed an EEOC charge alleging sexual harassment and retaliation by her former employer, Fort Bend County. Davis's EEOC charge did not assert religious discrimination. Davis later brought a lawsuit in federal court that included a claim of religious discrimination, as well as the claims asserted in her earlier EEOC charge. Fort Bend moved to dismiss Davis's claims, which the lower court did. The Fifth Circuit Court of Appeals reversed the lower court's dismissal of Davis's religious discrimination claim, remanding this claim back to the lower court. At that point, for the first time in the litigation, Fort Bend asserted that the district court lacked jurisdiction to consider the religious discrimination claim based on Davis having failed to exhaust her obligation to file a charge on that claim with the EEOC. The District Court agreed, dismissing the claim. On appeal, the Fifth Circuit held that Fort Bend had waived the failure to exhaust defense by not timely asserting it earlier in the case.

The Supreme Court accepted review. Before the Court, Fort Bend argued that Title VII's exhaustion requirement is jurisdictional; that is, a failure to exhaust defense cannot be waived and federal courts lack the authority to hear unexhausted Title VII claims without exception. The Supreme Court rejected this argument, ruling that Title VII does not state that the exhaustion requirement is jurisdictional and, as such, courts must treat it as non-jurisdictional. The Supreme Court also stated, though, that the exhaustion requirement cannot be ignored, and an employee risks having a lawsuit claim dismissed for a failure to exhaust if an employer timely asserts a failure to exhaust affirmative defense.

As noted above, the Court's ruling means that employers with a failure to exhaust defense must timely assert that defense or risk losing it.