

PUBLICATION

Employment Law Update: U.S. Supreme Court Declares EEOC Charge Requirement Non-Jurisdictional

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The U.S. Supreme Court held today, June 3, 2019, that the requirement set forth in Title VII for a complainant to file a charge of discrimination with the EEOC and go through the administrative process prior to suit is non-jurisdictional. *Fort Bend County v. Davis*, No. 18-525, 587 U.S. (U.S. 2019) (slip opinion).

Complainant Davis filed a charge of discrimination against her employer, Fort Bend County, alleging sexual harassment and retaliation. While the charge was pending, the employer discharged Ms. Davis for attending a church event instead of work. Thereafter, she attempted to amend her charge to include religion discrimination by handwriting "religion" on the intake questionnaire; the charge of discrimination was never formally amended. Davis ultimately filed suit, alleging religion discrimination and sexual harassment retaliation. After prolonged litigation, the only remaining claim was religion discrimination. The employer sought dismissal of the complaint because of Ms. Davis's failure to state religion discrimination on the charge, thereby not complying with Title VII's charge-filing requirement with respect to that claim.

Given that years had passed between commencement of the lawsuit and the employer asserting the charge-filing defense, the crux of the decision was whether the requirement to file a charge is jurisdictional (in which case it would not be waivable) or non-jurisdictional (in which case the employer would have waived the defense by not asserting it timely). The district court dismissed the case based on failure to file a charge, but the Fifth Circuit reversed, holding that the charge filing requirement is non-jurisdictional and subject to waiver. The U.S. Supreme Court agreed, holding that the charge filing requirement is not jurisdictional, and therefore only a viable defense if timely asserted. Given that Fort Bend County did not assert the defense until years after Ms. Davis filed the complaint, it waived the charge-filing defense.

TAKEAWAYS: This holding highlights the importance of thorough preparation to defend a case on the front end, as it is now the law in all circuits that failure to file a proper charge is a waivable defense rather than a jurisdictional defect not subject to waiver. The first responsive pleading to any Title VII complaint should assert the defense of failure to file a charge, to the extent supported by the facts of the case. The court provided no guidance as to how long an employer has to assert defenses relating to a complainant's failure to file a proper charge, but ordinary waiver principles should apply.

The sky is not falling. Complainants must still go through the charge process to file a viable Title VII lawsuit unless the employer consents to suit by waiving the defense (which is probably unlikely, since it is still a dispositive defense). As the Supreme Court pointed out, "a rule may be mandatory without being jurisdictional, and Title VII's charge-filing requirement fits that bill."

While there may be limited circumstances in which an employer would consider consenting to suit without requiring that complainants go through the charge process, any such decision of that magnitude would need to be carefully considered based on the facts of the individual case.