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LEGAL UPDATES

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## Supreme Court Rules on Employers' Waiver of Administrative Exhaustion Defense

On June 3, 2019, the Supreme Court of the United States issued its opinion in *Fort Bend County, Texas v. Davis*, deciding whether the filing of a discrimination charge (a precondition commonly referred to as “administrative exhaustion of claims”) is a jurisdictional requirement that can be raised *at any stage* of the proceeding or a “procedural prescription” which may be intentionally or unintentionally waived by a defendant.

The Supreme Court held that failure to file a Charge of Discrimination is *not* a jurisdictional requirement, meaning that a defendant must raise the failure to exhaust affirmative defense in their answer or early motion to dismiss in order to avoid waiving the defense.

However, the Supreme Court did not alleviate claimants of the requirement of filing a Charge of Discrimination, nor suggest that filing a charge is an unimportant requirement. Justice Ginsburg, writing for a unanimous court, closed her opinion by admonishing Title VII plaintiffs to comply with these requirements noting that they “would be foolhardy consciously to take the risk that an employer would forego a potentially dispositive defense” and implicitly scolding the County for its failure to raise the defense timely.

The case arose when Lois Davis filed a Charge of Discrimination alleging sexual harassment and retaliation against her employer, Fort Bend County, Texas. During the pendency of her EEOC Charge, the County terminated her employment for allegedly attending a church event instead of work. Ms. Davis then attempted to supplement her charge by writing the word “religion” on an EEOC form called an “intake questionnaire.” She did not formally amend her Charge of Discrimination to include a claim of religious discrimination.

The matter ultimately proceeded to court, and, after several years, only the purported religious discrimination claim remained. The County then asserted (for the first time) that it was entitled to dismissal as a jurisdictional matter due to Davis's failure to file a charge asserting religious discrimination. The trial court agreed with the County's position, but the Fifth Circuit reversed that ruling. The County sought review by the Supreme Court of the United States.

In upholding the Fifth Circuit's decision, the Supreme Court noted that use of the term "jurisdictional" is overused. Congress has the ability to clearly describe a requirement as jurisdictional but did not do so with respect to filing a charge. The Supreme Court contrasted this with, for example, the amount-in-controversy required to invoke federal diversity of citizenship jurisdiction. The Court also rejected the County's position that Congress intended to incentivize charge filing because this would render virtually any Congressional mandate to be a jurisdictional prerequisite to filing. Accordingly, the Court upheld the lower court's ruling that reinstated Davis's religious discrimination claim.

### **What this means to you**

Employers should closely monitor whether the claims in a newly-filed or amended complaint were properly exhausted. Further, while there may be circumstances in which an exhaustion defense is inadvisable for case-specific reasons, an employer should expect to waive such a defense if not pleaded in its answer or responsive pleading.

### **Contact us**

If you have questions about this update or how it might affect your business, contact Tim Hilton, Sonni Nolan or your Husch Blackwell attorney.