

# THE EEOC PROCESS:

## Lessons Learned from *Fort Bend County v. Davis*

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The U.S. Supreme Court recently resolved a split among the circuit courts of appeal regarding an important question of employment discrimination law. In a unanimous decision, the court held in *Fort Bend County v. Davis*, 139 S.Ct. 1843 (2019), that the charge-filing requirement of Title VII of the Civil Rights Act of 1964 (Title VII) is a prudential prerequisite to filing a lawsuit. It is not jurisdictional. As such, an employer may waive the charge-filing requirement if it does not timely raise an objection.

*Fort Bend* reveals two of the many pitfalls that await claimants and employers in filing and responding to charges of discrimination: failure to exhaust one's administrative remedies, and failure to timely object to the same. With the #MeToo movement and the increased focus on workplace harassment and discrimination, it is important that legal practitioners understand the administrative process by which discrimination claims are investigated so that these pitfalls can be avoided. This article will discuss *Fort Bend* and provide an overview of, and helpful hints regarding, this process.



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### *Fort Bend County v. Davis*

Title VII creates a process that an employment-discrimination claimant must follow before filing suit. A claimant's failure to complete this process (i.e., failure to exhaust her administrative remedies) is generally a basis for dismissing the case.

In *Fort Bend*, the plaintiff, Lori Davis, filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), alleging sexual harassment and retaliation against her employer, Fort Bend County. While the charge was pending, Davis' employment was terminated due to alleged religious-based discrimination. Following

her termination, Davis attempted to supplement her EEOC charge to include a claim for religious discrimination. On her EEOC intake questionnaire, Davis wrote "religion" next to the checklist of "Employment Harms or Actions," and she checked the boxes for "discharge" and "reasonable accommodation." However, she never amended her formal charge.

Eventually, Davis received a right-to-sue letter, and she filed suit in the U.S. District Court for the Southern District of Texas for religious-based discrimination and retaliation for reporting sexual harassment. Years into the litigation and after a

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round of appeals, Fort Bend sought for the first time to dismiss Davis' religious discrimination claim on the grounds that she had failed to exhaust her administrative remedies by not amending her formal charge. The district court granted Fort Bend's motion to dismiss. Davis appealed, and the Fifth Circuit reversed, holding that the administrative exhaustion requirement is not jurisdictional but, rather, a prudential prerequisite to suit that Fort Bend forfeited by not raising it in a timely manner.

Fort Bend appealed to the U.S. Supreme Court, which affirmed. The court stated that Title VII's charge-filing requirement is a non-jurisdictional claim processing rule. Therefore, unlike jurisdictional requirements, the charge-filing requirement is subject to forfeiture if tardily asserted. Accordingly, the court held that Fort Bend forfeited its objection to Davis' religious discrimination claim based on her failure to comply with the charge-filing requirement because it did not raise the objection in a timely manner.

## Filing a Charge

The EEOC administrative process begins by a claimant filing a charge of discrimination with the EEOC or an analogous state agency — in Nevada, the Nevada Equal Rights Commission (NERC). Federal anti-discrimination laws provide a limited amount of time in which to file a charge. In states where no state or local agency enforces a law that prohibits employment discrimination on the same basis, a charge of discrimination must be filed within 180 days after the alleged discrimination occurred. However, in states like Nevada that have such agencies, the charge must be filed within 300 days of the alleged discriminatory conduct.

Before filing a charge, a claimant should determine whether the employer is subject to the federal anti-discrimination laws. Other than the Age Discrimination in Employment Act, which only applies to employers with 20 or more employees, federal anti-discrimination laws apply to employers with 15 or more employees.

A claimant should also determine whether the alleged wrongful conduct falls within the defined categories of unlawful discrimination. These include race, color, religion, sex, national origin, age, disability and genetic information.

After determining eligibility, a claimant should contact the EEOC, accurately and completely fill out an intake questionnaire, and submit to an interview with an EEOC staff member. The staff member will prepare the charge based on information provided by the employee, so the employee should carefully review the charge before signing it to ensure its accuracy and completeness. As demonstrated in *Fort Bend*, it is important that the charge be accurate and includes all bases for the claimant's claims of discrimination, because failure to include a basis could result in dismissal of the claim in a subsequent lawsuit. Indeed, as the court stated in *Fort Bend*, "Defendants, after all, have good reason promptly to raise an objection that may rid them of the lawsuit filed against them. A Title VII complainant would be foolhardy consciously to take the risk that the employer would forgo a potentially dispositive defense."

“Even if the claims forming the basis of a charge are determined to be baseless, an employer can be held liable for retaliating against an employee who files a charge of discrimination in good faith.”

## Responding to a Charge

After a charge of discrimination is filed, the EEOC generally requests that the employer submit a position statement and supporting documentation. No matter how frivolous the employer may consider the charge, this request should not be ignored. Nor should the employer engage in any retaliatory conduct in response to the charge. Even if the claims forming the basis of a charge are determined to be baseless, an employer can be held liable for retaliating against an employee who files a charge of discrimination in good faith.

An employer generally has only 30 days in which to submit a position statement. As such, the employer should promptly review the charge and, if it has not already done so, conduct a thorough investigation of the allegations giving rise to the claims of discrimination. The employer should gather and preserve all relevant documents and interview all relevant witnesses. The employer may ask interviewees not to

discuss the charge or the investigation with others in order to maintain the integrity of the investigation. But employers should not prohibit employees from discussing the investigation under threat of disciplinary action, because the EEOC scrutinizes this practice due to the chilling effect it may have on an employee rights.

After completing its investigation, the employer should prepare a well-drafted position statement, complete with supporting evidence. It is often helpful to describe the nature of the employer's business, so that the EEOC understands the employer's business practices and has context for any actions taken by the employer. It is also advisable to set forth the company's relevant anti-discrimination policies to

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demonstrate its commitment to providing a workplace free of harassment and discrimination.

Next, the employer should explain the claimants' employment history and identify all facts relevant to the employer's defense of the charge. The employer should then address each allegation of discrimination made by the claimant, set forth its position regarding the same and explain the reasons for any action taken by the company. The employer should keep in mind that the position statement will be seen by the claimant and her attorney, so it should not contain any admissions or statements that could later be used by the claimant as evidence that the company's actions were a pretext for unlawful discrimination.

## Charge Outcomes

The purpose of the EEOC's investigation is to determine whether

reasonable cause exists to believe that unlawful discrimination occurred. If the EEOC determines that reasonable cause exists, it will issue a determination letter, setting forth the basis for the EEOC's decision and inviting the parties to seek a resolution through an informal process known as conciliation. Conciliation is a nonbinding process similar to mediation and is likely the last chance the parties have to reach a resolution before litigation. If conciliation is unsuccessful, the EEOC may file a lawsuit of its own in federal court, or it may issue the claimant a right-to-sue letter, enabling the claimant to file her own lawsuit within 90 days.

Alternatively, if the EEOC is unable to conclude that reasonable cause exists that unlawful discrimination occurred, it will dismiss the charge and the claimant will nevertheless be able to file a lawsuit.

*Fort Bend* highlights the importance of understanding the EEOC

administrative process and the nuances involved in filing and responding to charges of discrimination. It illustrates that failure to abide by the filing requirements can subject an otherwise viable claim to dismissal, and failure to timely assert objections can result in forfeiture of an otherwise viable defense. Given these and the many other pitfalls that exist, legal practitioners navigating claimants and employers through this process would be well advised to stay abreast of developments in this area of the law.

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