

## LABOR RELATIONS

## Expert Analysis

# EEOC in the Spotlight

**T**his past Monday the U.S. Supreme Court unanimously ruled that an employer waited too long after a former employee filed a Title VII discrimination lawsuit to assert the individual failed to properly file a charge with the U.S. Equal Employment Opportunity Commission (EEOC). Therefore, the employer waived its argument that the lawsuit should be dismissed because the employee failed to exhaust administrative remedies. This month we review the court's decision in this important case. We also examine another recent key decision impacting the EEOC. It requires most midsize and large employers to submit expanded Employer Information Reports (EEO-1 Reports)—including employee wage data categorized by gender, ethnicity and race, and by job category, for calendar years 2017 and 2018—to the EEOC by Sept. 30, 2019.

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### EEOC Charges

Title VII of the Civil Rights Act of 1964 (Title VII) requires a potential plaintiff to file a Charge of Discrimination (Charge) with the EEOC (or relevant state or local

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agency) before commencing an action in court. The EEOC then notifies the employer and investigates the claims. If the EEOC determines there is no reasonable cause to believe the Charge is true, the agency issues a right-to-sue letter, after which the plaintiff can file an action in court.

This week the U.S. Supreme Court in *Fort Bend Cty. v. Davis*, No. 18-525 (June 3, 2019), resolved a federal appellate court split, and ruled Title VII's Charge-filing requirement is not a jurisdictional prerequisite to a lawsuit under Title VII. Instead, the court held it is a mandatory claim-processing rule which is subject to waiver. As a result, employers must timely raise a challenge that a plaintiff failed to file a Charge with the EEOC or otherwise forgo that defense.

The dispute in *Davis* began in 2010 when an information technology (IT) supervisor (plaintiff) employed by Fort Bend County (the county) reported to the county's human resources department that the IT Director was sexually harassing her. After an internal investigation, the IT Director resigned, but plaintiff alleged her supervisor retaliated against her for reporting the sexual harassment by reducing her work responsibilities. Plaintiff filed a Charge alleging sexual harassment and retaliation with the Texas Workforce Commission, which automatically relayed the Charge to the EEOC under a worksharing

agreement between the state and federal agencies. While her Charge was pending, the county terminated plaintiff's employment after she failed to report to work on a Sunday, even though she had told her supervisor she had a religious commitment at church that day.

Plaintiff never formally amended her initial Charge alleging sexual harassment and retaliation to add allegations of religious discrimination. However, in January 2012, after receiving notice of her right to sue from the EEOC, plaintiff commenced a civil action in the Southern District of Texas, alleging both religious discrimination and retaliation for reporting sexual harassment. The district court granted the county's motion for summary judgment for both claims. The Fifth Circuit affirmed with respect to the retaliation claim, but reversed as to the religious discrimination claim.

At that point, after years of litigation, the case returned to the district court for adjudication of the religious discrimination claim. The county moved to dismiss the complaint, arguing for the first time, that the district court lacked jurisdiction over the religious discrimination claim because plaintiff did not state this claim in her EEOC charge. The district court agreed and dismissed the suit.

The Fifth Circuit reversed, finding the Charge-filing requirement under Title VII is not a jurisdictional requirement, but rather a prudential prerequisite to bring suit. The Fifth

Circuit determined the county waived this challenge by not raising it until after years of ongoing litigation. The county appealed to the Supreme Court, which granted its petition for certiorari to resolve a circuit court split on whether Title VII's Charge-filing requirement is a jurisdictional requirement, as previously determined by the Fourth, Ninth and Eleventh Circuits, or instead is a waivable claim-processing rule, as decided by the First, Second, Third, Sixth, Seventh, Tenth and Federal Circuits, in addition to the Fifth Circuit in this case.

Justice Ruth Bader Ginsburg wrote the court's unanimous opinion, ruling "Title VII's charge-filing instruction is not jurisdictional, a term generally reserved to describe the classes of cases a court may entertain (subject-matter jurisdiction) or the persons over whom a court may exercise adjudicatory authority (personal jurisdiction)." Instead, the court stated, "Prerequisites to suit like Title VII's charge-filing instruction ... are properly ranked among the array of claim-processing rules that must be timely raised to come into play." The court acknowledged Title VII's Charge-filing requirement is mandatory, but found a challenge based on a party's failure to satisfy the requirement may be forfeited "if the party asserting the rule waits too long to raise the point."

Following this decision, employees wishing to assert Title VII actions should include any claims they may have in a Charge filed with the

EEOC. We expect lower courts will provide guidance on when a defense of failure to satisfy this Charge-filing requirement will be considered forfeited. In the meantime, employers facing Title VII cases should carefully review the complaints and the EEOC charges that precede them to ensure no claims are raised in lawsuits that were not identified to the EEOC. Employers are advised to raise objections as early as possible or otherwise risk waiving a defense that the plaintiff failed to exhaust administrative remedies.

### EEO-1 Reports

In another recent case involving EEOC requirements, on April 25, 2019, the U.S. District Court for the District of Columbia ruled that employers subject to EEO-1 reporting are required to report to the EEOC aggregated wage data and hours worked, categorized by employees' gender, ethnicity and race, and by job category (Wage Data), for calendar year 2018 by Sept. 30, 2019. *Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget*, Civil Action No. 17-cv-2458 (D.D.C. 2019). Pursuant to the court's ruling that the EEOC also collect a second year of Wage Data, the EEOC has instructed EEO-1 filers to submit Wage Data for calendar year 2017, in addition to Wage Data for calendar year 2018, by Sept. 30, 2019.

The intent to revise the EEO-1 Report to add a Wage Data component was first announced by the EEOC in February 2016. The

federally mandated EEO-1 Report already required (1) employers with 100 or more employees and (2) federal government contractors or first-tier subcontractors with 50 or more employees and a federal contract, subcontract or purchase order amount of \$50,000 or more, to collect and annually report their employees' gender, ethnicity and race, by job category. Following a comment period and public hearing, in September 2016, the Office of Management and Budget (OMB) approved the collection and reporting of Wage Data, and the changes were set to become effective in March 2018 with reporting on 2017 data.

However, in August 2017, the OMB changed course and issued a memorandum suspending implementation of the EEO-1's Wage Data collection and reporting requirements. The OMB cited the Paperwork Reduction Act, and stated its general concern that the new requirements "lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues."

Subsequently, the National Women's Law Center and the Labor Council for Latin American Advancement filed suit against the OMB and the EEOC, seeking both a declaration that the OMB exceeded its authority under the Paperwork Reduction Act and reinstatement of the Wage Data collection and reporting requirements. On March 4, 2019, the U.S. District Court found the OMB's

stated reason when issuing the stay conflicted with its prior findings that the Wage Data collection had practical utility and was designed to minimize the burden of reporting for employers, yet the OMB failed to explain these inconsistencies. Accordingly, the court vacated the OMB's stay and immediately reinstated the previous approval of the revised EEO-1 Report, including Wage Data.

The ruling seems to have blindsided the EEOC. Following the district court's request for the EEOC to provide guidance about if, when and how it will collect Wage Data from employers, the EEOC submitted a brief on April 3, 2019 stating it did not have the infrastructure to accept and secure employers' Wage Data, but could collect the data by Sept. 30, 2019 if it enlisted the help of an outside data analytics contractor. On April 25, 2019, the court ordered that (1) employers must submit Wage Data for calendar year 2018 to the EEOC by Sept. 30, 2019, and (2) the EEOC must retroactively collect 2017 pay data by the same deadline or collect 2019 pay data with 2020 EEO-1 Reports. Pursuant to the latter requirement, the EEOC provided notice to EEO-1 filers on its website that they should submit Wage Data for calendar year 2017, in addition to data for calendar year 2018, by Sept. 30, 2019. In setting the Sept. 30 deadline, the court chided the EEOC for not being prepared, and said the government's actions show it "is not

committed to a prompt collection" of Wage Data.

The impact of the new reporting requirements on employers to collect expanded Wage Data for 2017 and 2018 is significant, as most employers have not kept pay data in a form transmissible to the EEOC. Business groups, including the U.S. Chamber of Commerce, have asserted that employers need at least 18 months to complete the expanded EEO-1 Report. The OMB has filed an appeal in the U.S. Court of Appeals for the DC Circuit seeking a stay of the district court's ruling that Wage Data must be reported at all until the issue can be decided by the appellate court.

However, until further clarity is provided, employers are advised to be prepared to submit Wage Data for 2017 and 2018 by Sept. 30, 2019. The EEOC has stated on its website that it expects to open a web-based portal for the collection of 2017 and 2018 Wage Data by mid-July 2019, and that a helpdesk will be fully operational to answer questions via the provided email and telephone number starting on June 17, 2019.