

## Employment Law Update: Failure to File Charge of Discrimination Is Not The Death Knell For A Discrimination Lawsuit

### Failure to File Charge of Discrimination Is Not The Death Knell For A Discrimination Lawsuit

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In a recent decision, the U.S. Supreme Court opened the door for employees to bypass filing a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC) before filing suit. The Court unanimously decided, in *Fort Bend County v. Davis*, that Title VII's charge-filing requirement is procedural and not jurisdictional. By making this finding, the Court for the first time made clear that federal courts have the authority to hear Title VII claims that are not the subject of a Charge of Discrimination, and that the charge-filing requirement could be waived by employers for failure to timely assert it as a defense.

Title VII of the Civil Rights Act of 1964 outlines a specific process for filing employment discrimination claims. Title VII instructs employees to file a Charge of Discrimination with the EEOC or equivalent state agency stating the specific claim(s) of discrimination before filing litigation in federal court. If the EEOC chooses not to sue or has not acted in response to the charge, employees have then "exhausted" their claims and may pursue them in federal court.

In *Davis*, the employee filed a Charge of Discrimination with the EEOC asserting sexual harassment and retaliation claims. While her charge was pending, she was fired for attending a church event. On an EEOC intake form, she handwrote "religion" in an attempt to amend her charge to add an additional claim for religious discrimination based on her firing. After years of litigation, and with only the religious discrimination claim pending, the employer sought to dismiss the claim due to the employee's failure to exhaust her administrative remedies. The Supreme Court rejected the employer's argument, holding that Title VII's charge-filing requirement was procedural, not jurisdictional. The Court further held that the employer had waived the defense because it had waited too long to raise it, and the claim was permitted to proceed in federal court.

In light of this holding, employers may not become aware of an employee's claim of discrimination before suit is filed. Employers should have in place a document retention policy that complies, at a minimum, with the EEOC record keeping requirements to prevent the destruction of documents relevant to a potential discrimination lawsuit. EEOC regulations require that employers keep all personnel records for one year. If an employee is involuntarily terminated, his or her personnel records must be retained for one year from the date of termination.