

# Does it Matter that the Supreme Court has Agreed to Review *Fort Bend County v. Davis*?

By [Carolyn Wheeler](#)  
January 29, 2019

UPDATE: The Supreme Court [unanimously held](#) that the administrative charge filing requirement in the federal employment discrimination statutes is not a jurisdictional requirement. That means that while filing a charge is still required, if a plaintiff fails to file or fails to put all of her claims or allegations in her charge, the defendant must immediately assert a failure to exhaust administrative remedies defense and cannot wait and raise that defense later in the litigation.

---

The only new employment case the Supreme Court has taken for review this term has left most practitioners wondering why the Court took it, and what practical difference the outcome will make. The issue seems to be one of those procedural points that will not matter in the “real” world. The Court has taken *Fort Bend County v. Davis* to decide whether Title VII’s requirement that aggrieved individuals file charges with administrative agencies, *i.e.*, exhaust administrative remedies, is a jurisdictional requirement that must be satisfied before a suit can be filed, or merely a prerequisite condition, or claim-processing rule, that can be waived by a defendant. If exhaustion is required before a court can exercise jurisdiction over the case, a defendant cannot waive that requirement, and a court must satisfy itself that it has jurisdiction, and may do so at any stage of the proceedings. If it is not a jurisdictional requirement, then a defendant would have to assert the failure to exhaust administrative proceedings in its answer to the plaintiff’s complaint, and failure to assert that defense would mean it had waived it or forfeited it, and could not bring it up later in the litigation.

## **Related Supreme Court Decisions**

The last time the Supreme Court considered a comparable question, it was whether being a covered employer under Title VII, *i.e.* having 15 or more employees, is a jurisdictional requirement or an element of the plaintiff’s claim. See *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006). In that case, Ms. Arbaugh sued her small employer, the Moon Light Café, for sexual harassment, and won a jury verdict. After the trial was over, the defendant moved to overturn the verdict and dismiss the case on the grounds that it did not have 15 employees, and thus could not be sued under Title VII. The district court and Fifth Circuit agreed with the company that this was a matter of the court’s subject matter jurisdiction and threw the case out. The Supreme Court disagreed and held that the number of employees is an element of a plaintiff’s claim, not a matter of jurisdiction, and thus the employer had waited too long to make this argument. In an earlier case the Supreme Court had held that the requirement of filing a timely charge with the EEOC is a claim-processing rule and not a limitation on a court’s jurisdiction to hear a case. See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). In *Zipes* and *Arbaugh* the Court reasoned that the timely charge filing rule and the employer numerosity coverage rule are not in the section of Title VII that confers jurisdiction on federal courts, and thus cannot be viewed as limits on a court’s jurisdiction. The principal consequence of this distinction is that defendants must raise their arguments about timeliness or coverage early in the litigation and otherwise will be held to have waived these defenses to suit.

## **Timeliness of Failure to Exhaust Defense**

It is possible the Court will come to a similar conclusion in this case and hold that exhaustion of administrative remedies is merely a condition precedent to suit and not a limitation on a court's jurisdiction to hear a case. If that is so, Fort Bend County will lose its case because it did not raise the defense of failure to exhaust soon enough in the litigation. Here, the plaintiff filed a timely charge of [sex discrimination](#) with the administrative agencies, but after filing her charge her employer ordered her to report to work on a day she needed to attend a special church service. She explained she could not work, arranged for someone to cover for her, but was fired for not coming to work. She notified the investigating agency that she had a claim of [religious discrimination](#) and failure to accommodate, and when she filed suit she included those claims. Belatedly, five years after Ms. Davis filed suit, Fort Bend County argued that she had not fully exhausted her administrative remedies because she had not clearly put the agency or employer on notice that she was alleging religious discrimination. The district court dismissed the case, and the Fifth Circuit reversed, holding the defendant had forfeited its opportunity to raise the administrative exhaustion requirement.

The Fifth Circuit, in holding exhaustion is not a jurisdictional requirement, is in agreement with seven other circuits; only three have concluded it is a jurisdictional requirement. The Supreme Court took the case to resolve this split. Will the outcome make much of a difference?

## **Practical Implications for Employees Filing Discrimination Charges**

Even if the Court agrees with the court of appeals that exhaustion is not a jurisdictional requirement, plaintiffs will continue to file charges with administrative agencies for a host of reasons. Going to the EEOC or a state or local agency is still a requirement, even if it is not a jurisdictional one. Most employers who become defendants in lawsuits will assert the defense of failure to exhaust when a plaintiff has not taken that step. Plaintiffs will avail themselves of the administrative process whether it is a jurisdictional requirement for suit or not, because the process is one that may lead to a resolution if the EEOC offers mediation or finds reasonable cause and successfully conciliates the charge, and it is a process that has no filing fee, unlike suit filing.

If the Court concludes that exhaustion of administrative remedies is a jurisdictional requirement, the biggest practical consequence will be that charging parties will have to be zealous in assuring that the EEOC has recorded any amendments to their charges to encompass adverse actions taken against them after they filed their original charge.

The lesson for [victims of discrimination](#) who file charges while the Court decides this legal question is that they should assert all of their potential claims when they file their charges, and follow up to make amendments if additional discriminatory acts occur. In many cases, having legal assistance before filing a charge can help an individual to avoid any missteps, but such assistance must be sought before the time limit for filing a charge, ordinarily within 300 days of the discriminatory decision or action being challenged.

*This blog was subsequently published in [Law360](#).*