CLIENT ALERTS & INSIGHTS

Scotus Makes Defending Job Bias Claims More Difficult for Employers

JUNE 3, 2019

Authors: Margo Wolf O'Donnell, Joseph R. Blalock

On June 3, 2019, the Supreme Court of the United States affirmed a decision of the 5th Circuit Court of Appeals, which held that employers in discrimination claims can waive their right to assert that the Plaintiff failed to exhaust her administrative remedies prior to filing suit.

The case, which originated in Texas, dealt with the religious discrimination claim of Lois Davis ("Davis") against her employer, Fort Bend County ("Fort Bend"). Fort Bend argued that Davis failed to include her religious discrimination claim in the administrative charge that she previously filed with the EEOC and that, as such, the claim should be dismissed for want of jurisdiction. The Court of Appeals for the Fifth Circuit denied Fort Bend's relief by setting forth that (1) administrative exhaustion is merely an element of the claim that the worker must prove in order to take the claim to trial; (2) failure to exhaust is an affirmative defense which, if proven, could result in dismissal of the claim prior to trial; (3) failure on the part of the employer to timely raise the defense will result in waiver of the right to assert it; and (4) Fort Bend, in waiting five years and a round of appeals to assert the failure to exhaust defense, had waived its right to do so.

On Appeal, The Supreme Court unanimously affirmed the decision of the 5th Circuit and held that a Plaintiff's requirement to file charges with the Equal Employment Opportunity Commission or similar state agencies isn't a jurisdictional question, and is merely an element of the Plaintiff's claim. As such, employers who fail to timely raise the defense may waive their right to do so.

The decision settled a significant circuit split on the issue. Eight circuit courts had ruled that pre-suit exhaustion is just an element of making a discrimination claim, while three had held that it's a jurisdictional obligation not subject to waiver.

While the Supreme Court did not set forth a specific time-frame within which employers should assert the failure to exhaust defense to avoid waiver, employers and their counsel should take care to assert the defense in the answer to the Plaintiff's Complaint or as soon thereafter as possible.

For more information on this topic, please contact a member of the firm's Labor & Employment Practice Group.

Margo Wolf O'Donnell at modonnell@beneschlaw.com or 312.212.4982.

Joseph R. Blalock at jblalock@beneschlaw.com or 614.223.9359.