

## Two Recent Decisions Highlight Procedural Pitfalls in Employment Litigation (US)

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Would-be plaintiffs in two employment decisions – one from the Fifth Circuit, one from the Ninth Circuit – were recently reminded that, no matter how solid the facts of their case, they can still lose on a technicality.

The first case, [Lee v. Venetian Casino Resort, LLC](#), considered whether a plaintiff's Title VII claim was time-barred because he did not file suit within 90 days of receiving a right-to-sue notice from the U.S. Equal Employment Opportunity Commission ("EEOC"). This 90-day period runs from the day the right-to-sue letter arrives at the claimant's address of record.

Ordinarily, any lawsuit relating to the allegations in an EEOC charge are time-barred if not filed within that 90-day period unless circumstances are such that the court will equitably toll the statute of limitations, i.e., despite reasonable efforts, the claimant did not uncover the injury or identify the proper party until after the deadline has passed. Because statutes of limitation are intended to expedite the resolution of disputes, courts apply the doctrine of equitable tolling sparingly. In *Lee*, the claimant did not inform his attorney that he had received his right-to-sue notice within the statutory period, so his lawyer did not file suit in federal court until after the 90-day window. The Ninth Circuit Court of Appeals was unmoved. The plaintiff's ignorance regarding the filing deadline did not constitute the type of "extraordinary circumstance" that warranted application of equitable tolling.

Before even receiving a right-to-sue notice, a claimant must first have crossed another procedural hurdle: exhausting his or her administrative remedies before the EEOC. What that means, exactly, depends on the court hearing the case. The First, Second, Third, Fifth, Sixth, Seventh, Tenth and D.C. Circuits have held that Title VII's exhaustion requirement is non-jurisdictional, meaning that employees are not required to exhaust administrative remedies prior to bringing workplace bias actions in federal court. In contrast, the Fourth, Ninth, and Eleventh Circuits each have concluded the opposite, and prohibit courts from hearing Title VII claims unless the plaintiff first complains to the EEOC. The Eighth Circuit remains undecided on this issue.

In order to resolve this circuit split, the U.S. Supreme Court has agreed to review a Fifth Circuit Court of Appeals decision involving Title VII's exhaustion requirement. See [Fort Bend County v. Davis](#),

case no. 18-525. In *Davis*, the Fifth Circuit held that Title VII's exhaustion requirement is a claim-processing rule subject to waiver or other equitable exceptions, "not a jurisdictional bar to suit but rather a prudential prerequisite." As the employer in the action had not timely argued that the plaintiff had failed to fully exhaust her administrative remedies, the Fifth Circuit found the legal issue waived. If the Court affirms the Fifth Circuit's holding, litigants may be able to pursue employment discrimination lawsuit even if they have not fully exhausted their administrative remedies, if equitable grounds support waiver. On the other hand, if the Court overturns the Fifth Circuit's ruling, any defect in the administrative process will be found to jurisdictionally bar a subsequent lawsuit. Although prudent plaintiffs will continue to file EEOC charges and fully exhaust the process before pursuing a federal lawsuit, the Supreme Court's decision may finally clarify how exhaustive the exhaustion requirement really is. In the meantime, employers are reminded not to delay in asserting any exhaustion defense, lest the defense be barred.

Both *Lee* and *Davis* illustrate the nuances of procedure in the employment law context. Failure to abide by the statute of limitations and exhaustion requirements can derail an otherwise viable Title VII lawsuit. We will continue to track these issues and update you with the Supreme Court's *Davis* decision.

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