

Supreme Court Declines Review of Transgender Fire Chief's Discrimination Case

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On November 7, 2022, the Supreme Court of the United States declined to review a case by a Georgia fire chief alleging she was discharged for being transgender in violation of Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. The denial of the petition for certiorari in [*Mosby v. City of Byron*](#) leaves in place the dismissal of the case by the U.S. Court of Appeals for the Eleventh Circuit on the grounds that the plaintiff's pre-suit charge with the U.S. Equal Employment Opportunity Commission (EEOC) did not contain the requisite verification.

Background

Rachel Mosby was discharged as the fire chief for the City of Byron in 2019 after serving in that role for 11 years. She filed a charge with the EEOC alleging that the stated reasons for her discharge were a pretense and pointed out that just 36 days before she was featured on a local television news broadcast discussing her experience as a transgender firefighter. After the EEOC investigation stalled, she obtained a right to sue letter from the U.S. Department of Justice.

According to Mosby's petition, the EEOC charge was filed with a five-page letter drafted by counsel, an attached notice signed by Mosby of her legal representation, and eleven pages of exhibits. Both parties agreed that the charge was not properly verified under federal law, which requires Title VII and ADA charges to be "in writing under oath or affirmation" and under EEOC regulations, which mandate that such charges "be verified" (i.e., "sworn to or affirmed before" a person authorized to hear oaths).

The City of Byron did not point out that the charge was not properly verified during the EEOC's investigation, however, it did raise the issue in a motion to dismiss filed in the subsequent federal district court litigation. After the city's motion to dismiss, Mosby attempted to retroactively amend the initial EEOC charge, but the EEOC denied that effort because the case had already been closed. In April 2022, a panel for the Eleventh Circuit upheld the dismissal of the discrimination claims, rejecting the former fire chief's argument that she should be excused for her failure to file a verified charge.

Analysis

In her Supreme Court petition, Mosby argued that the Eleventh Circuit panel did not properly apply the Supreme Court's ruling in *Fort Bend County v. Davis*, which held that the Title VII charge-filing requirement is not jurisdictional. In *Fort Bend County*, the high court allowed a religious discrimination case to continue despite a question about whether the employee's initial EEOC charge raised a religion-based claim because the employer did not raise it until years into the litigation.

Mosby argued that the lack of verification in her case, similarly, should not be the end of her claims. She pointed to language in the *Fort Bend County* decision that Title VII's charge-filing requirement is not jurisdictional in nature, meaning that it must be followed for the federal courts to have subject matter jurisdiction over the suit, but rather "properly ranked among the array of claim-processing rules that must be timely raised to come into play."

Still, the high court stated, in *Fort Bend County*, that Title VII's charge-filing requirement is still mandatory "in the sense that a court must enforce the rule if a party 'properly raise[s]' it." "But an objection based on a mandatory claim-processing rule may be forfeited," according to the *Fort Bend* Court, "if the party asserting the rule waits too long to raise the point."

In Mosby's case, the Eleventh Circuit pointed out that unlike Mosby, the employee in *Fort Bend County* had filed the EEOC charge without the aid of counsel and the employer "waited four years and an entire round of appeals all the way to the Supreme Court to first raise the issue of verification in the litigation." Mosby, on the other hand, was represented by counsel and the employer "raised the verification issue in a pre-answer motion to dismiss rather than after an exhaustive series of appeals," the Eleventh Circuit stated.

Key Takeaways

The denial keeps in place the Eleventh Circuit's dismissal of Mosby's case and leaves open some uncertainty about how long it takes for an employer's failure to raise a charge-filing issue before the defense is waived. While in *Fort Bend County*, the employer was found to have waived the charge-filing issue after four years of litigation, the Eleventh Circuit in *Mosby*, held that employer had *not* waived it when it failed to raise it before the EEOC during its investigation but raised it in a motion to dismiss early in the federal court litigation. The *Mosby* case thus highlights for employers that Title VII and ADA claims against them must be supported by a properly filed EEOC charge and if it is not, that employers must raise it soon in the litigation to avoid waiving the defense.

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