Employment Law Update

Legal Issues Facing
City and County Governments
May 10-11, 2019

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Agenda

- Trends in EEOC charges.
- New overtime rule.
- Sexual orientation discrimination.
- Eleventh Circuit clarifies comparator test.
- Equal Rights Amendment.
- Officers Donning and Doffing appear in Eleventh Circuit.
- ADEA applies to small government entities.
- Is failure to exhaust administrative remedies a jurisdictional bar or an affirmative defense?
- In Handout:
  - Opinion letters are back.
  - Proposed joint-employer rule.

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Trends in EEOC Charges

Latest Statistics for 2018

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Changes from 2017 to 2018 by %

- Race: ▼ 1.7%
- Sex: ▲ 1.8%
- National origin: ▼ 0.5%
- Religion: ▼ 0.4%
- Color: ▲ 0.3%
- All retaliation: ▲ 2.8%
- Title VII Retaliation: ▲ 2.0%
- Age: ▼ 0.3%
- Disability: ▲ 0.3%
- Equal Pay: ▲ 0.2%
- GINA: ▲ 0.1%

Change of less than 1.0%.

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Retaliation claims going up

- Survey of published Federal court decisions in U.S. District Courts in Alabama generally reflects the **same trend** (January 1, 2018, to March 31, 2019).
- Whatever you do, don't fire the employee who filed an EEOC charge!
  - Retaliation claims are subject to lower adverse employment actions standards and are overall easier to prove than discrimination claims.
  - Gap of 3 months between first notice of protected activity and adverse action is likely sufficient to prevent employee from arguing temporal proximity alone as a proxy of causation.

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New Overtime Rule

New overtime rule

- In 2016, President Obama tried to increase white-collar exemption threshold from $23,660 to $47,000 and made other changes.
- Rule was enjoined by a Federal judge in Texas.
- Trump administration abandoned an appeal.
- Two and a half years later, President Trump's Dept. of Labor (DOL) has proposed a new rule which has recently been published and is open to public comment until **May 21**.
- Neither the Obama or Trump administration rules affected the minimum wage.

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New overtime rule (cont.)

- Current ”salary basis” threshold is $455 a week or $23,660 a year.
- Proposed increased threshold is $679 a week or $35,308 a year.
- Potentially 1 million employees will become eligible to receive overtime **or** get a raise to threshold amount.
- **This includes public employees.**

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New overtime rule also—

- Allows employers to use nondiscretionary bonuses, commissions, and incentive payments to satisfy up to 10% of the standard salary level.
  - In theory, an employer could make a “catch up” payment at the end of the year.
- Increases the total required compensation for eligibility for the “highly compensated employee” test from $100,000 to $147,414 a year.

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New overtime rule does NOT—

- Change “duties tests” for white-collar exemptions, nor does it expand the available exemptions.
- Affect Federal or Alabama minimum wage.
- Affect existing exemptions and exclusions used by local governments for police officers, fire fighters, or paramedics.
- Make changes in overtime requirements for “blue collar” employees.
- Require automatic adjustments as Obama rule did.
  - FLSA requires DOL to only review from “time to time.”

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Next steps

- New rule will probably be adopted sometime this year.
- Identify any exempt employees making less than $679 a week.

Next steps (cont.)

- Decide whether you are going to **either**—
  - Raise their pay to at least $679 a week so that they remain exempt.
  - Convert to hourly (which means OT where required).
  - Keep them salaried below the threshold, but pay them overtime when they exceed 40 hours, using 1.5 × "regular rate" as basis for OT. (This means using a time clock.)
  - Utilize comp time systems or other methods to cope.
  - Rely upon any existing exemptions for fire, law enforcement, elected officials, etc.

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Overall impact?

- The Washington Post reports that—
  - In the 1970's, over 65 percent of America's workforce was covered by the nation's overtime rules.
  - Because of the 2004 overtime regulations, which dramatically weakened coverage, that number has now shrunk to 7 percent.
  - The Trump administration's rule would likely raise it to, at most, 25 percent, while Obama's would have raised it to about 33 percent.

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Sexual Orientation Discrimination

Review of last year's cases

- At this time last year, the Eleventh Circuit had ruled that Title VII does **not** protect employees from sexual-orientation discrimination. *Evans v. Georgia Regional Hospital,* 850 F.3d 1248 (11th Cir. 2017).
- The Eleventh Circuit denied *en banc* rehearing on July 2, 2017.
- The Supreme Court denied *certiorari*. 138 S.Ct. 557, 199 L.Ed.2d 446 (2017).
- Litigation continues in *Evans* case at district court level. 2018 WL 4610630 (S.D. Ga. Sept. 25, 2018).

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Review (cont.)

- At this time last year, Seventh Circuit had reversed its own panel precedent and held *en banc* that Title VII **did** protect employees against sexual orientation discrimination.
  - *Hively v. Ivy Tech Community College,* 830 F.3d 698 (7th Cir. 2016) and 853 F.3d 339 (7th Cir. 2017).
  - No party sought review from the U.S. Supreme Court.
  - Litigation continues at district court level. 2018 WL 3198888 (N.D. Ind. 2018).

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Review (cont.)

- At this time last year, Second Circuit held Title VII did **not** protect employees against sexual-orientation discrimination. *Zarda v. Altitude Express,* 855 F.3d 76 (2d Cir. 2017).
- Since that time, Second Circuit, sitting *en banc*, reversed the panel and held that Title VII **does** protect employees against sexual-orientation discrimination. 883 F.3d 100 (2d Cir. 2018).
- The employer sought *certiorari* from the U.S. Supreme Court.

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Meanwhile, another case made an appearance in 11th Circuit

- *Bostock v. Clayton County* (Georgia).
- Bostock is gay male who worked as child welfare services coordinator in Clayton County Juvenile Court.
  - Primary responsibility was court-appointed special advocacy (CASA) program.
  - CASA volunteers represent children involved in court's processes.

Work history

- Had worked for Clayton County for over 10 years.
- Had received good performance evaluations.
- As a result of his leadership, Clayton County CASA program was the first in the metropolitan Atlanta area to supply an advocate for every child in system.
- National CASA recognized his contributions.
  - Served on the National CASA Standards and Policy Committee in 2011 and 2012.

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Basis for his claim

- January 2013: Bostock joined gay recreational softball league in Atlanta.
- Among members of the league, he promoted his CASA program to recruit more advocates.
- April 2013: Clayton County began audit of CASA program—apparently after his participation in softball league became known to other county employees.

Basis (cont.)

- May 2013: At meeting of CASA advisory board, at least one person made disparaging comment about Bostock's sexual orientation and his participation in softball league.
- June 2013: Clayton County terminated his employment for conduct unbecoming of a county employee.

Procedural history of case

- November 2016: U.S. Magistrate Judge recommended dismissing sexual-orientation discrimination claim because of Eleventh Circuit precedent. 2016 WL 9753356 (N.D. Ga. Nov. 3, 2016).
- July 2017: U.S. District Judge adopted magistrate's recommendation. 2017 WL 4456898 (N.D. Ga. July 21, 2017).

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Procedural history (cont.)

- May 2018: Eleventh Circuit affirmed district court decision. 723 Fed.Appx. 964 (11th Cir. 2018).
- July 2018: Eleventh Circuit denied *en banc* hearing. 894 F.3d 1335 (11th Cir. 2018).
- Bostock filed petition for writ of *certiorari* with U.S. Supreme Court.

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Certiorari for you, and you, and you

- On April 22, the U.S. Supreme Court granted writs of certiorari in—
  - *Zarda* (2d Cir.).
    - Side note: the employer in this case is now out of business, and the respondent had urged against *certiorari* on this ground.
  - *Bostock* (11th Cir.).
    - Gay CASA employee.
  - A third case out of the 6th Circuit, *R.G. & G.R. Harris Funeral Homes v. EEOC*.
    - In this case, the funeral home director transitioned to a female during the course of employment. He was expressly terminated "because he is no longer going to represent himself as a man and will not conform to the dress code for male employees."

Questions presented

- The Court in *R.G. & G.R.* "limited" the question presented to the following:
  - Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U. S. 228 (1989).
- Interestingly, this question presented is not really a limitation; instead, the re-formulation **removes a limitation** inherent in the actual *cert* petition, which focused solely on the original intent of Congress when it enacted the 1964 Civil Rights Act.
- The origin QP asked, in part:
  - "Whether the word "sex" in Title VII's prohibition on discrimination "because of . . . sex," 42 U.S.C. 2000e-2(a)(1), meant "gender identity" and included "transgender status" when Congress enacted Title VII in 1964.

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Questions presented (cont.)

- QP in *Zarda*:
  - Whether the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), against employment discrimination "because of . . . sex" encompasses discrimination based on an individual's sexual orientation.
- QP in *Bostock:*
  - Whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination "because of . . . sex" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

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What does it mean?

- Supreme Court probably accepted nearly identical questions in *Zarda* and *Bostock* to ensure against jurisdictional issues and to ensure both viewpoints of circuit courts were considered.
- Expansion of the *cert* grant to also review *R.G. & G.R.* strongly suggests the court is ready to settle the questions as to transgender status at the same time as the orientation issue is addressed, although these are doctrinally and even socially, different questions.

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Review: Discrimination on the basis of orientation vs. stereotypes

- Courts have traditionally made distinction between sexual-stereotyping and sexual-orientation discrimination.
- Eleventh Circuit recognizes sexual-stereotyping discrimination under both Title VII and the Fourteenth Amendment's Equal Protection Clause.
  - In *Evans*, the 11th Circuit expressly suggested that the *pro se* plaintiff return to the lower court and pursue a stereotyping theory under Title VII.
  - The Eleventh Circuit also recognizes discrimination against transgendered persons in that they do not conform to sexual stereotypes. In *Glenn v. Brumby* (11th Cir. 2011), the Court applied the Equal Protection Clause against a public employer, holding that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior."

Example from *Hively* (2017)

- But recognition of a ban on sexual stereotyping only makes for some odd law.
- Under the anti-stereotyping principle, Title VII protects lesbian who faces discrimination because she doesn't meet gender norms:
  - Wearing pants instead of a dress.
  - Having short hair.
  - Not wearing makeup.
- On the other hand, when limited to that principle, Title VII does **not** protect lesbian who "acts female" but openly announces she is gay.

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Hively example (cont.)

- As the Second Circuit put it (paraphrased): Current case law—
  - "Protects 'flamboyant' gay men and 'butch' lesbians."
  - Does not protect the "lesbian or gay employee who acts and appears straight."

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Word of caution

- **Government contractors:** Presidential Executive Order 13672 (2014) added sexual orientation to the list of protected classes.
- This order also applies to recipients of federal **grants** for funding **construction** projects.
  - Local government entities can receive such grants.
- Federal government contractors and potentially, grant recipients, are already required not to discriminate on the basis of sexual orientation.

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“It’s a mess.”

Eleventh Circuit Clarifies Comparator Test

Remember *Ash v. Tyson Foods Inc*.?

- That's when the Supreme Court backhanded the Eleventh Circuit for using a rather dramatic standard for failure-to-promote cases.
- Court rejected Eleventh Circuit's requirement that employer decisions in failure to promote cases be upheld except where the differences between the plaintiff and the selected candidate "jump off the page and slap you in the face."

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Lewis v. Union City (Ga.)
2019 WL 1285058 (March 21, 2019)

- *En banc* Eleventh Circuit announced two critical principles applying to almost all employment cases:
  - Comparators in discrimination cases no longer have to be "nearly identical" to the plaintiff; instead, they must be "similarly situated in all material respects."
  - The analysis of whether a proper comparator is identified must occur during the *prima facie* case evaluation, not at the pretext stage.

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Lewis v. Union City (cont.)

- Court acknowledged the Eleventh Circuit has gone back and forth between two tests:
  - Same or similar.
  - "Nearly identical."
  - Court also acknowledged it had expressly rejected "nearly identical" test in some cases.
- Court acknowledged that, **even worse,** it had sometimes applied both standards at same time.

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New comparator test

- **Language of new test:** Similarly situated in all material aspects.
- Meaning of that test will have to be worked out case by case.
- But court pointed to some guideposts.

Guideposts (cont.)

- Valid comparators will—
  - **Have engaged in same basic conduct or misconduct.**
    - *Example*: Employee accused of insubordination not similar to employee accused of damaging employer property.
  - **Have been subject to same employment policy, guideline, or rule as plaintiff.**
  - **Ordinarily (but not invariably) have been under jurisdiction of same supervisor.**
  - **Share the plaintiff's employment or disciplinary history.**
    - *Probationary vs. non-probationary?*

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Court's summary guideline

- A valid comparison will not turn on formal labels, but on substantive likenesses.
- "To borrow a phrase from a recent Supreme Court decision, a plaintiff and her comparators must be sufficiently similar, in an objective sense, that they 'cannot reasonably be distinguished.'"
  - *Young v. United Parcel Service,* 135 S.Ct. 1338, 191 L.Ed.2d 279 (2015).

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Impact

- Loss of the "nearly identical" standard won't sting like many initially believed. Arguably, the new standard is stronger for employers.
- 68-page dissent argues that—
  - The majority "drops an anvil on the employer's side" of the *McDonnell Douglas* balancing inquiry.
  - Argues the opinion will have the effect of "significantly reducing the employee's chances of surviving summary judgment" because of the combination of the court's clarification of the similarly situated standard with its holding that the comparator analysis occurs at the *prima facie* stage.
  - Claims that the decision conflicts with Supreme Court precedent because the Supreme Court in *McDonnell Douglas* itself analyzed comparators both at the *prima facie* AND at the pretext stages.

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Equal Rights Amendment: The Push for 38

Equal Rights Amendment

“Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex."

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History

- Proposed and passed Congress in 1972.
- Only 35 states ratified it before the 1982 deadline set by Congress.
- Approval of 38 states is required for ratification.
- But some doubt that Congress can set such deadlines.
- So amendment process may still be “alive.”

Recent developments

- 2017: Nevada legislature ratified (36th state).
- 2018: Illinois legislature ratified (37th state).
- 2019: Virginia Senate passed ratification resolution on January 16, 2019, and sent it to Virginia House.
  - House assigned it to a committee, which assigned it to a subcommittee.
  - On January 22, subcommittee voted to "pass it by indefinitely."
  - Virginia legislature adjourned on February 24.
- So a 38th state has yet to ratify the amendment.

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Breaking news out of Louisiana

- On March 27, 2019, Louisiana State Senator J. P. Morrell from New Orleans announced that he intends to file a Senate Concurrent Resolution to ratify the Equal Rights Amendment.
- On May 8, 2019, the measure failed by a vote of 9-26.

Officers Donning and Doffing Appear in Eleventh Circuit

Llorca v. Sheriff of Collier Co., Fla. 893 F.3d 1319 (11th Cir. 2018)

- Deputies in two Florida counties instituted lawsuit based on not being paid for—
  - Donning and doffing police gear (allegedly took 30 minutes).
  - Driving to and from work in marked patrol vehicles.

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Legal background

- After Fair Labor Standards Act (FLSA) was passed, Congress amended it (in 1947) by passing the Portal-to-Portal Act.
- Congress amended P-to-P Act in 1996 with the Employee Commuting Flexibility Act (ECFA).
- Codified at 29 U.S.C. § 251 et seq.

ECFA says FLSA doesn't apply to—

- Traveling to and from principal place of employment.
- Activities before starting work and after "principal activity or activities" of work.
- Has a specific provision explaining that use of employer's vehicle to commute back and forth to work does not render time compensable.

Principal activities

- Supreme Court has held that **principal activities** are integral and indispensable part of work activities.
- Integral ≠ indispensable.
  - *Integrity Staffing Solutions v. Busk,* 135 S.Ct. 513, 517; 190 L.Ed.2d 410 (2014).

Integral

- Belonging to or making up an integral whole.
- Constituent, component.
- Specifically necessary to completeness or integrity of whole.
- Forming intrinsic portion or element, as distinguished from adjunct or appendage.

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Indispensable

- A duty that cannot be—
  - Dispensed with.
  - Remitted.
  - Set aside.
  - Disregarded.
  - Neglected.

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To be compensable—

- Activity must be tied to productive work employee is hired to perform.
- Must be **both** integral **and** indispensable.

- Determining compensability is—
  - Subject to intensive fact finding.
  - Not amenable to bright-line rules.

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Holding

- **Principal** activity of deputies is law enforcement.
- So donning and offing of gear is **not** compensable.
- Similar to airport construction workers who had to go through mandatory screening before starting work.
  - Also not compensable.
  - *Bonilla v. Baker Construction,* 487 F.3d 1340 (11th Cir. 2007).

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Claim about commuting time

- Deputies commuting back and forth to work in marked vehicles were required to—
  - Have their radios on.
  - Listen to calls from district through which they were driving.
  - Respond to major calls and emergencies.
  - Observe road for traffic violations
  - Engage in general traffic law enforcement.
- Deputies not paid for time spent doing these things.

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But deputies were paid if they—

- Responded to calls or emergencies.
- Actually enforced any traffic laws during commute.
- So this claim also falls under amended Portal-to-Portal Act.

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Holding

- Law enforcement would be undermined if uniformed officers in marked cars didn't respond to accidents, disabled vehicles, flagrant safety violations, or even routine traffic violations.
- But such activities are **incidental** to the use of the marked cars—as envisioned by P-to-P Act.

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Holding (cont.)

- Activities don't meet tests of being both essential and indispensable.
- Activities may be essential to effective law enforcement.
- But activities are not **indispensable**.
- Deputies can perform their law enforcement duties during their shifts even if they don't do activities required during commute.

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Can small government entities escape ADEA coverage?

Mount Lemmon Fire Dist. v. Guido
139 S.Ct. 22 (Nov. 6, 2018)

- Fire district had budget shortfall.
- Laid off its two oldest firefighters:
  - John Guido (46).
  - Dennis Ranking (54).
- They filed suit under the Age Discrimination in Employment Act (ADEA).
- Fire district maintained that it was too small to be covered by ADEA.

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Statutory Language

The term “employer” means a person engaged in an industry affecting commerce who has twenty or more employees. . . . The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State . . . .

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Statutory History

- 1964: Civil Rights Act of 1964 (Title VII).
  - Race, color, religion, sex, and national origin.
- 1967: Age Discrimination in Employment Act.
  - Only applied to businesses engaged in an industry affecting commerce who meet numerical threshold.
  - Governmental entities excluded.

History (cont.)

- 1972: Title VII was amended to include state and local employers.
- 1974: ADEA amended to include state and local employers.
- 1974: FLSA also amended to reach all government employers, regardless of size.

Question presented

- Does “twenty or more” (in first sentence of statute) apply to state and local governments (in the second sentence of the statute)?
- Circuits were divided on issue:
  - 7th, 10th, 8th, and 6th said state and local governments had to have 20 or more employees to be covered by ADEA.
  - 9th said state and local governments are covered by ADEA regardless of size.

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Holding

- "Twenty or more" does **not** apply to state or local governments.
- So state and local government entities **are subject to** ADEA regardless of the number of employees they have.
- Supreme Court's decision was 8-0, with Justice Ginsburg writing the opinion for a unanimous Court.

Rationale for decision

- "Also means" is additive and adds another category of employer, different from "a person engaged in an industry affecting commerce who has twenty or more employees . . . ."
- Two other categories of employers are defined:
  - Agent of a person (in sentence 1).
  - State and local government entities.

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Rationale (cont.)

- Court had already hinted at this definition in *EEOC v. Wyoming,* 460 U.S. 226 (1983).
- "Also means" is used in numerous places in U.S. Code to be additive in definitions.
- ADEA can't be interpreted the same way as Title VII because Congress used different language.
- Wording of ADEA more closely resembled wording of FLSA (which applies regardless to size).
- For 30 years, Equal Employment Opportunity Commission has interpreted ADEA as applying to state and local governmental entities regardless of size.

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Is failure to exhaust administrative remedies a jurisdictional bar or an affirmative defense?

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Davis v. Fort Bend Co., Texas 893 F.3d 300 (5th Cir. 2018), cert. granted (Jan. 11, 2019)

- On remand, County raised, for first time, plaintiff's failure to exhaust administrative remedies on her religious discrimination claim. District court ruled exhaustion of administrative remedies was a jurisdictional prerequisite and dismissed her claim.
- The Fifth Circuit reversed, finding that failure to exhaust is not jurisdictional, and is therefore subject to waiver.
- Issue now squarely before Supreme Court.

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Circuit split

- Circuits are divided 8-3 on the issue, with most circuits holding that failure to exhaust is not jurisdiction and is subject to waiver.
- Circuits that hold exhaustion of administrative remedies is jurisdictional:
  - 10th, 4th.
  - 11th Circuit is listed in this category, but actually it's more complicated.
- Circuits that hold exhaustion of remedies is not jurisdictional:
  - 1st, 2d, 6th, 7th, 8th, 9th, D.C. Circuit

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Notes about 11th Circuit

- Fifth Circuit's decision was based on *Womble v. Bhangu,* 864 F.2d 1212 (5th Cir. 1989), which occurred after the 11th Circuit was created.
- *Womble* is therefore not precedent for 11th Circuit. *Bonner v. City of Pritchard,* 661 F.2d 1206 (11th Cir 1981).
- Issue is not totally clear in 11th Circuit.

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Notes (cont.)

- "The filing of an administrative complaint with the EEOC is **ordinarily** a jurisdictional prerequisite to a Title VII action." *Chanda v. Engelhard/ICC,* 234 F.3d 1219, 1225 (11th Cir. 2000), as cited by *Lambert v. Alabama Dep't of Youth Servs.*, 150 Fed. Appx. 990, 993 (11th Cir. 2005). [Emphasis added.]

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Notes (cont.)

- **"Generally,** only a party named in an EEOC charge can subsequently be charged in a lawsuit filed in court under Title VII. *Virgo v. Riviera Beach Assocs., Ltd.,* 30 F.3d 1350, 1358 (11th Cir. 1994). . . . Our courts **liberally construe** this requirement and, where the Act's purposes are fulfilled, a party not named in an EEOC charge **may be subject** to federal court jurisdiction. Id. at 1358-59. . . . We have treated the administrative exhaustion requirement as a '**jurisdictional prerequisite** to filing a Title VII action.' *Crawford v. Babbitt,* 186 F.3d 1322, 1326 (11th Cir. 1999)," as cited in *Peppers v. Cobb County,* 835 F.3d 1289, 1296-97 (11th Cir. 2016). [Emphasis added.]

So **stay tuned** to our employment law blog for the latest developments!

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Questions?

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