

Earlier this week the United States Supreme Court issued its unanimous opinion in *Fort Bend County, Texas v. Davis*, holding that a plaintiff's failure to exhaust administrative remedies does not necessarily prevent the person from pursuing employment discrimination claims in court. In a charge filed with the federal Equal Employment Opportunity Commission ("EEOC"), the plaintiff in the case alleged that she was subjected to sexual harassment and retaliation for complaining about that harassment. She was subsequently fired for missing work to attend church services, and claimed that the termination was based on religious discrimination. However, she did not formally amend her EEOC charge to allege religious discrimination, opening the possibility that she had failed to exhaust her administrative remedies.

The plaintiff then filed a lawsuit in federal court, and claimed that she was subject to wrongful discharge based on unlawful harassment, retaliation and religious discrimination. The defendant initially defended the case without raising the failure to exhaust defense, and it was not until years later that the defendant filed a motion to dismiss. The Court affirmed the finding of the lower appeals court that the motion to dismiss was untimely and should have been raised earlier in the case. This case has now been in litigation for 7 years, and is being sent back to the trial court for further proceedings.

In Nebraska, there is a statute that allows an aggrieved employee to go directly to court without filing a charge of discrimination with the Nebraska Equal Opportunity Commission ("NEOC"). Plaintiffs lawyers do not typically utilize this statute because remedies available under state law do not include punitive damages, which are available under federal law. In addition, the lawyers appreciate the NEOC/EEOC process because it can lead to the discovery of information regarding an employer's defenses, which the attorney can then utilize to develop the case in court.

When facing claims of discrimination, whether the employee is currently employed, or has already been terminated, employers should carefully consider the status and details of the allegations at each stage of the process, and identify the procedural requirements that may apply. For instance, if the person complaining is still an employee, the employer must consistently apply the applicable policies, typically included in an employee handbook. Failure to properly investigate and, if necessary, remediate a complaint of discrimination may, in and of itself, be considered evidence of unlawful discrimination.

Once an employee files a formal charge with the NEOC or EEOC, or files litigation, the employer should carefully review all the applicable facts, particularly the timing of the allegations, and work with legal counsel to determine if there are any procedural or other irregularities to raise as defenses.