EMPLOYMENT

Supreme Court Rules That an Employer Can Forfeit its Right to Challenge an Employee's Failure to Exhaust His or Her Administrative Remedies

By Mordy Yankovich

The Supreme Court of the United States unanimously held that an employee's failure to exhaust his or her administrative remedies in a discrimination claim pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII") does not divest the court of jurisdiction. An employer's ability to challenge an employee's failure to exhaust his or her administrative remedies may, thus, be waived if not raised in a timely manner.

By way of background, Title VII, which prohibits discrimination by employers with 15 or more employees on the basis of race, color, religion, sex, and national origin, requires individuals to first file a charge with the Equal Employment Opportunity Commission prior to filing a lawsuit in federal court. The charge must be filed within 180 or 300 days (depending on whether the state has an anti-discrimination statute) of the discriminatory act. The EEOC may then investigate the claim, mediate the claim, or elect to file a claim on behalf of the employee. If it chooses not to take the case on behalf of the employee (which occurs most of the time), the EEOC will issue a "right-to-sue" letter to the employee which permits the employee to file a federal lawsuit within 90 days of the receipt of the right-to-sue letter.

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In *Fort Bend Cnty., Tex., v. Davis*, decided on June 3, 2019, Lois M. Davis filed a charge against her employer, Fort Bend County, alleging sexual harassment and retaliation. While the EEOC was processing her charge, the employer terminated her employment because she attended a church event instead of showing up for work on a Sunday, as required. Davis did not formally supplement her EEOC charge to include a claim of discrimination on the basis of religion. The District Court dismissed all of the employee's claims related to sexual harassment and only the religious discrimination claim survived. Only then, after years had elapsed, did the employer assert that the District Court lacked jurisdiction to hear the employee's religious discrimination claim because she failed to exhaust her administrative remedies. The District Court dismissed the claim, but the Court of Appeals for the Fifth Circuit reversed the District Court's decision holding that the exhaustion of administrative remedies is not a jurisdictional requirement, rather a pre-requisite to suit. The employer, thus, forfeited its untimely claim that the employee failed to exhaust her administrative remedies.

The Supreme Court affirmed the Court of Appeals' decision that the exhaustion of administrative remedies is not considered to be "jurisdictional" and may be waived. The Supreme Court reasoned that "jurisdictional" claims are generally limited to subject matter jurisdiction, types of cases a court may hear; and personal jurisdiction, people over whom a court has authority. The exhaustion of administrative remedies requirement, on the other hand, is a "claim processing rule" which can be forfeited if not timely raised. In light of this decision, when responding to a federal complaint on behalf of an employer, counsel should immediately check to see that all claims were filed with the EEOC and immediately move to dismiss any claims on which the employee did not exhaust his or her administrative remedies.

Note: Mordy Yankovich is a senior associate at Lieb at Law, P.C. practicing in the areas of Employment, Real Estate and Corporate Law. He can be reached at Mordy@liebatlaw.com.

WHO'S YOUR EXPERT

When Enough Expert Disclosure is Enough, or Not

By Hillary Frommer

This month we examine two federal cases where courts addressed efforts to limit the scope of expert disclosure. In a toxic tort litigation, the United States District Court for the Western District of New York denied two motions by the defendants to compel further disclosure from two of the plaintiff's expert witnesses. In *Sarkees v E.I. DuPont de Nemours & Co. et al*,[1] the plaintiff alleged that the defendant companies failed to properly warn him that his work-place exposure to the chemical ortho-toluidine during his employment in 1974 would lead to bladder cancer. The plaintiff offered the testimony of two expert witness: Dr. Adam Finkel and Dr. L. Christine Oliver. Both experts produced reports in compliance with Rule 26 of the Federal Rules of Civil Procedure and were deposed.

Hillary Frommer

Dr. Finkel's report identified the research conducted about cancer risks of ortho-toluidine and opined on what the defendants would have known when they introduced the chemical to the plaintiff's workplace. Dr. Oliver concluded that plaintiff's exposure to the chemical at his workplace caused his bladder cancer. During discovery, the defendants learned that Dr. Finkel generated reports in three other cases concerning the risks from exposure of two different chemicals and moved to compel the production of those reports. While the defendants recognized that in formulating his expert opinion in the case at bar Dr. Finkel did not rely those prior reports, they nevertheless claimed that those other reports bore on the expert's credibility, *to wit*, whether the expert "has inconsistently analyzed scientific issues regarding chemical exposure and warnings in different actions."[2] The plaintiff opposed that motion, arguing that the defendants could not assess consistency where the cases involved different chemicals and different exposure risks.

The court agreed with the plaintiff. There were essentially three persuasive facts. First, the expert testified that he did not use any of those prior reports in forming the basis of his opinion. Indeed, had he relied on those reports, they would be discoverable under Fed. R. Civ. P. 26(a)(2)(B)(ii). Second, Dr. Finkel's report cited extensive research, which the defendants could use[3] to impeach the expert, should his opinions not square with the literature. Third, the defendants had prior reports from Dr. Finkel in cases pending in the Western District of New York involving ortho-toluidine, and they could obtain the trial transcripts of his testimony, which were part of the public record. In sum, the court found that "if all of the above available information fails to impeach Dr. Finkel then the three pri-

(Continued on page 43)

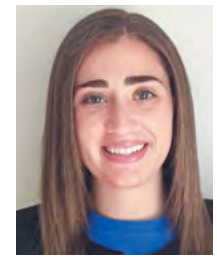
FUTURE LAWYER'S FORUM

A Law Student's Guide for Final Exams

By Olivia Lattanza

As I am writing this article, I am in the midst of final exams. This span of two weeks is truly a marathon because it is a routine of finishing outlines, studying, reviewing, taking the exam, and then repeating this cycle for three to four more exams. I always find the process of studying and taking the exams to be rewarding. It is truly remarkable how much material can be retained and learned from an entire semester. After each semester, I like to think about what I could have done differently to make the studying process more efficient. For this particular final exam period, I knew exactly what I needed to incorporate into my routine to feel productive and successful.

During this exam period, I made a conscious effort to exercise every night after studying for the day. This is a very important change that I made from previous semesters. In the past, I found it difficult to justify spending an hour running on the treadmill, which is an activity that I enjoy, when I could be studying for my upcoming exams. Time certainly feels precious in the days leading up to an exam, especially when you have to remember an entire semester's worth of material for five different courses. However, as my goal for this school year was to dedicate time each week for exercising, I decided to stick to it. Honestly, running on the treadmill and lifting weights has actually refreshed my mind and allowed me to not get too drained after a long day of studying. Final exams should not be an exception for taking time each day for yourself. In the end, this time spent away from the books will be invaluable for your overall performance because your mind will have the necessary rest to remember all the information being studied.



Olivia Lattanza

While I will only have two more semesters of finals exams before graduating, I believe that the habits and skills learned and practiced during these exams will benefit my overall experience after law school. For instance, the only way to be successful on an exam is to be prepared. The entire semester has been leading up to this point to show your professor your knowledge and application of the material. This preparation requires careful reading of the cases, applicable law, and relevant rules. The only way to commit this information to memory is to consistently review the material and to practice applying the law to hypothetical fact patterns. As a lawyer, similar skills are required in order to be successful. That is, it is essential that lawyers are prepared on the facts, law, and rules for each client's case. While preparing for an exam is not exactly the same as preparing a case before a judge, I believe that similar skills are required. These skills may include stamina, patience, and unwavering determination to learn the material. In that way, the skills developed during final exams have been a tool for real life experiences.

Overall, I appreciate the skills, lessons, and strategies learned throughout the entire process of studying for final exams. Ultimately, this preparation will prepare us for the Bar Examination and professional endeavors.

Note: Olivia Lattanza is a second-year student at Touro Jacob D. Fuchsberg Law Center, where she serves as the Managing Editor of the Touro Law Review. She also assists students as a Writing Coach in the Touro Law Writing Center. Olivia can be reached at olattanz@student.touro.edu.