

# U.S. Supreme Court Refuses Review of Case Involving Technical Issue With Plaintiff's EEOC Charge

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Refusing to weigh in on the impact of a plaintiff's failure to verify her discrimination charge filed with the Equal Employment Opportunity Commission (EEOC), the U.S. Supreme Court lets stand the lower court's conclusion that the plaintiff's failure to verify her charge barred her from filing a lawsuit. *Mosby v. City of Byron*, No. 21-10377, 2022 U.S. App. LEXIS 10436 (11th Cir. Apr. 18, 2022), *cert. denied*, No. 22-283 (U.S. Nov. 7, 2022).

### Background

Rachel Mosby served as the fire chief of Byron, Georgia, for 11 years. One month after she came out as transgender, the city fired her.

Mosby filed a charge of discrimination with the EEOC, alleging violations of Title VII of the Civil Rights Act and the Americans with Disabilities Act (ADA). Title VII states that charges filed "shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5. This process is called "verification." The parties did not dispute that Mosby did not properly verify her charge.

The City of Byron submitted a position statement with the EEOC on the merits of Mosby's claim, but it did not raise the fact that Mosby failed to verify her charge. Mosby never amended her charge to meet the verification requirement.

After receiving a "right to sue" letter from the EEOC, Mosby sued the City of Byron. Before answering Mosby's complaint, the City of Byron moved to dismiss because Mosby failed to verify her charge, requiring dismissal as a matter of law. After converting the City's motion to dismiss to a motion for summary judgment, the district court held the failure to verify the charge barred Mosby's Title VII and ADA claims.

### Jurisdictional or Procedural?

Whether EEOC's charge filing requirements are prerequisite to filing a lawsuit is jurisdictional or procedural remains in dispute. While procedural requirements can be waived or cured, jurisdictional requirements cannot. In 2019, the Supreme Court provided guidance in *Fort Bend City v. Davis*, 139 S. Ct. 1843, in which it held that a charge's lack of verification does not strip the federal courts of jurisdiction to consider in a subsequent federal lawsuit. Unlike a jurisdictional issue, the Court reasoned, the lack of verification can be waived or forfeited by the parties. Accordingly, the Court held that an employer forfeited the issue of verification when it failed to raise it promptly at the outset of litigation.

### Eleventh Circuit's Reasoning

In appealing the dismissal of her claims to the U.S. Court of Appeals for the Eleventh Circuit (which has jurisdiction over Alabama, Florida, and Georgia), Mosby argued that *Fort Bend* required a finding that the City of Byron waived its verification defense because it did not raise the defense in its position statement submitted with the EEOC. The Eleventh Circuit disagreed. In the Supreme Court decision, the Eleventh Circuit said, Fort Bend City did not raise the verification defense until four years and “an entire round of appeals all the way to the Supreme Court” had passed. By contrast, the City of Byron raised the defense in a pre-answer motion to dismiss before causing “a waste of adjudicatory resources.”

The Eleventh Circuit affirmed the lower court, holding that “a charge neither filed under oath or affirmation nor subsequently cured by amendment fails to satisfy the statutory requirement that an employee submit [her] charge to the Commission.” The Fifth Circuit (which has jurisdiction over Louisiana, Mississippi, and Texas) reached a similar conclusion in 2021, making these the only two circuits that have addressed the issue. *See Ernst v. Methodist Hosp. Sys.*, 1 F.4th 333.

### Takeaway for Employers

An employer responding to a charge of discrimination filed with the EEOC should evaluate whether the claimant properly verified the charge. If not, preserve the defense by raising it as soon as practicable at the EEOC charge stage and in any ensuing litigation.

Jackson Lewis attorneys are available to discuss the availability of and appropriate times to raise defenses to discrimination.

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