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THE CROSSROADS: SECTION 504, THE ADA, AND CHAPTER 21

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INTRODUCTION

Attorneys who handle employment discrimination claims involving Texas governmental entities are generally familiar with differences between claims asserted under Title VII of the Civil Rights Act of 1964 and the similar, but not identical, provisions of Chapter 21 of the Texas Labor Code. Increasingly, in cases involving disability discrimination, plaintiffs are also asserting claims under Section 504 of the Rehabilitation Act of 1973. In this paper, we shall compare some of the key similarities – and differences – among these three causes of action.

EXHAUSTION OF REMEDIES/LIMITATIONS

Americans with Disabilities Act

"The powers, remedies, and procedures set forth in Sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9" of Title 42 of the United States Code "shall be the powers, remedies and procedures" the ADA provides to the Equal Employment Opportunity Commission, "to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of" the Act, "concerning employment." 42 U.S.C. § 12117(a). Thus, the ADA incorporates by reference the exhaustion requirements of Title VII.

Under Title VII, a charge of discrimination "shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . ., except that in the case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice . . ., such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1).

Failure to file the charge of discrimination with the EEOC within the prescribed time period generally bars the underlying claim. *Ricks v. Delaware State College*, 449 U.S. 250 (1980). The

limitations period commences at the time the applicable employment "decision was made and communicated" to the plaintiff – not at a later date, such as when "the *effects* of the" employment decision are felt. *Id.* at 258 (original emphasis).

The federal circuit courts of appeals are divided on the issue of whether exhaustion is jurisdictional. The Fifth Circuit has held that the exhaustion requirement under Title VII is not jurisdictional, and thus can be waived by the defendant. *Fort Bend Cty. v. Davis*, 893 F.3d 300 (5th Cir. 2018), *cert. granted*, No. 18-525, 2019 WL 166880 (Jan. 11, 2019). The Fifth Circuit held that "Title VII's administrative exhaustion requirement is not a jurisdictional bar to suit but rather a prudential prerequisite under our binding precedent, and Fort Bend forfeited its exhaustion argument by not raising it in a timely manner before the district court." *Id.* at 308. Argument has been scheduled for April 22, so the Supreme Court should issue its decision by June or July of this year.

Additionally, a plaintiff shall file suit "within 90 days after" receipt of a notice of right to sue. 42 U.S.C. § 2000e-5(f)(1). Plaintiffs in disability cases occasionally argue that a failure to accommodate is a "continuing violation" that would allow them to go beyond the 180-day or 300-day period prior to the filing of the charge.

National R.R. Passenger Corp. v. Morgan basically sounded the death knell for the so-called continuing violation theory, except for hostile work environment claims. 536 U.S. 101, 105 (2002). The Court held that Title VII of the Civil Rights Act of 1964 "precludes recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period." *Id.* at 113.

The Court distinguished "hostile environment claims," which are "different in kind from discrete acts," because "a single act of harassment may not be actionable on its own," and such

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