APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20640

LOIS M. DAVIS,
Plaintiff-Appellant,
v.
FORT BEND COUNTY,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

Filed June 20, 2018

Before KING, JONES,[*] AND ELROD, Circuit Judges.

JENNIFER WALKER ELROD, Circuit Judge:

Once again Lois Davis appeals the district court's dismissal of her lawsuit against her former employer, Fort Bend County. We previously reversed and remanded, and we do so again today.

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[*] Concurring in the judgment only.

I.

Lois Davis was an information technology supervisor for Fort Bend County. Davis filed a complaint with Fort Bend's Human Resources Department alleging that the information technology director had sexually harassed and assaulted her. Fort Bend's own investigation led to the director's eventual resignation. According to Davis, her supervisor began retaliating against her because Davis had made a formal complaint against the director, who was a personal friend of her supervisor. When Davis informed her supervisor that she could not work one specific Sunday because she had a "previous religious commitment" to attend a special church service, her supervisor did not approve the absence. After Davis attended the church service and did not report to work, Fort Bend terminated her employment.

Alleging sexual harassment and retaliation by Fort Bend, she submitted an intake questionnaire and filed a charge with the Texas Workforce Commission. While her case was still pending before the Texas Workforce Commission, she amended her intake questionnaire to include religious discrimination but did not amend her charge. Specifically, she added the word "religion" in the box labeled "Employment Harms or Actions."

After the Texas Workforce Commission issued a right-to-sue letter, Davis filed her lawsuit in district court. She alleged both retaliation and religious discrimination under Title VII and intentional infliction of emotional distress. The district court

granted summary judgment on all claims, and Davis timely appealed.

In her first appeal, Davis argued that the district court erred when it granted summary judgment for Fort Bend, and we affirmed summary judgment on her retaliation claim but reversed on her religious discrimination claim.[1] *See Davis v. Fort Bend County*, 765 F.3d 480, 491 (5th Cir. 2014), *cert denied*, 135 S. Ct. 2804 (2015). On the religious discrimination claim, we held that genuine disputes of material fact existed as to whether: (1) Davis held a bona fide religious belief that she needed to attend the Sunday service; and (2) Fort Bend would have suffered an undue hardship in accommodating Davis's religious observance. *Id.* at 487, 489. Fort Bend filed a petition for writ of certiorari challenging this determination, and the Court denied it.

On remand, Fort Bend argued to the district court—for the first time—that Davis had failed to exhaust her administrative remedies on her religious discrimination claim. Agreeing with Fort Bend, the district court held that administrative exhaustion is a jurisdictional prerequisite in Title VII cases. Thus, the district court reasoned, Davis's contention that Fort Bend had waived this argument was "irrelevant." It determined that Davis had failed to exhaust her administrative remedies. Accordingly, the district court dismissed with prejudice Davis's religious discrimination claim.

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[1] Davis did not challenge the grant of summary judgment on her intentional infliction of emotional distress claim. *See Davis v. Fort Bend County*, 765 F.3d 480, 484 (5th Cir. 2014), *cert denied*, 135 S. Ct. 2804 (2015).

On appeal, Davis argues that failure to exhaust administrative remedies under Title VII is not a jurisdictional bar to suit. Rather, administrative exhaustion is only a prudential prerequisite for suit, and Fort Bend has waived any exhaustion argument. In the alternative, Davis raises two other arguments: (1) that she did exhaust her administrative remedies; and (2) that requiring her to exhaust further would have been futile.

II.

A.

We review questions of subject matter jurisdiction *de novo*. *See Nat'l Football League Players Ass'n v. Nat'l Football League*, 874 F.3d 222, 225 (5th Cir. 2017). We also review *de novo* a district court's determination that a plaintiff did not exhaust her administrative remedies. *Ruiz v. Brennan*, 851 F.3d 464, 468 (5th Cir. 2017).

III.

Title VII of the Civil Rights Act provides for private causes of action arising out of employment discrimination and gives federal courts subject matter jurisdiction to resolve such disputes. *See* 42 U.S.C. § 2000e-5(f). Before seeking judicial relief, however, Title VII plaintiffs are required to exhaust their administrative remedies by filing a charge of discrimination with the Equal Employment Opportunity Commission within 180 days of the alleged discrimination. 42 U.S.C. § 2000e-5(e)(1).[2]

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[2] 42 U.S.C. §2000e-5(e)(1) reads:

"[A] primary purpose of Title VII is to trigger the investigatory and conciliatory procedures of the EEOC, in attempt to achieve non-judicial resolution of employment discrimination claims." *Pacheco v. Mineta*, 448 F.3d 783, 788–89 (5th Cir. 2006). By exhausting their administrative remedies by filing formal charges with the EEOC, Title VII plaintiffs initiate this process. In our circuit, there is disagreement on whether Title VII's administrative exhaustion requirement is a jurisdictional requirement that implicates subject matter jurisdiction or merely a prerequisite to suit (and thus subject to waiver or estoppel). *See id.* at 788 n.7.

"Jurisdiction . . . is a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)). Cautioning against the "profligate" use of the term,

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(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a 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 or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

the Supreme Court has admitted that it and other courts have been "less than meticulous" when using this word in the past. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510–11 (2006). We must be careful to distinguish between jurisdictional requirements that bear on a court's power to adjudicate a case and nonjurisdictional requirements.

We have a line of cases that characterize Title VII's administrative exhaustion requirement as jurisdictional. *See, e.g.*, *Randel v. U.S. Dep't of Navy*, 157 F.3d 392, 395 (5th Cir. 1998) ("If the claimant fails to comply with either of these [Title VII] requirements then the court is deprived of jurisdiction over the case."); *Nat'l Ass'n of Gov't Emps. v. City Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 711 (5th Cir. 1994) ("It is well-settled that courts have no jurisdiction to consider Title VII claims as to which the aggrieved party has not exhausted administrative remedies."); *Tolbert v. United States*, 916 F.2d 245, 247 (5th Cir. 1990) ("Failure to comply with [Title VII's administrative exhaustion requirement] wholly deprives the district court of jurisdiction over the case.").

On the other hand, we have also treated Title VII's exhaustion requirement as merely a prerequisite to suit. *See, e.g.*, *Young v. City of Hous.*, 906 F.2d 177, 180 (5th Cir. 1990) ("A failure of the EEOC prerequisite does not rob a court of jurisdiction."); *Womble v. Bhangu*, 864 F.2d 1212, 1213 (5th Cir. 1989) ("In holding that the failure of [the plaintiff] to exhaust administrative remedies deprived it of subject matter jurisdiction, the court erred."); *Fellows v. Universal Rests., Inc.*, 701 F.2d 447, 449 (5th Cir. 1983) (acknowledging that Title VII's

requirements are "not necessarily 'jurisdictional'"); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460 (5th Cir. 1970) (noting that "the filing of a charge of discrimination with the EEOC is a condition precedent to the bringing of a civil action under Title VII").

In fact, there is a *third* line of cases. These more recent cases acknowledge an intra-circuit split but do "not take sides in this dispute." *Pacheco*, 448 F.3d at 788 n.7; *see, e.g.*, *Ruiz*, 851 F.3d at 472 ("Because neither party is arguing waiver or estoppel, and because the outcome would remain the same whether we consider exhaustion to be a condition precedent or a jurisdictional prerequisite, 'we need not take sides in this dispute.'" (quoting *Pacheco*, 448 F.3d at 788 n.7)); *Sapp v. Porter*, 413 F. App'x 750, 752 (5th Cir. 2011) ("We decline to address this disagreement because the facts of this case do not implicate any of the equitable doctrines of relief."); *Devaughn v. U.S. Postal Serv.*, 293 F. App'x 276, 281 (5th Cir. 2008) (deciding not to settle "whether a failure to exhaust Title VII administrative remedies is a jurisdictional requirement or a prerequisite to suit").

This has caused confusion for district courts. *See, e.g.*, *Muoneke v. Prairie View A&M Univ.*, No. H-15-2212, 2016 WL 3017157, at *6 n.2 (S.D. Tex. May 26, 2016) (noting that "[w]hat appears to be the most recent Fifth Circuit case addressing this issue makes clear that the failure to administratively exhaust is viewed as a jurisdictional bar to suit" (citing *Simmons-Myers v. Caesars Entm't Corp.*, 515 F. App'x 269, 272 (5th Cir. 2013))); *Ruiz v. Brennan*, No. 3:11-cv-02072-BH, slip op. at 10 (N.D. Tex. June 8,

2016) (magistrate judge order) (noting that "[d]ifferent Fifth Circuit panels have reached differing conclusions" on the issue of whether Title VII exhaustion is jurisdictional and conducting a rule-of-orderliness analysis).

Recently, we held that *Womble* and *Young* control under our rule of orderliness, so "the exhaustion requirement under Title VII is not jurisdictional." *Davenport v. Edward D. Jones & Co., L.P.*, 891 F.3d 162, 169 (5th Cir. 2018). We explained that *Arbaugh* "strongly suggests" that *Womble* "reached the correct result" because of the bright-line rule that *Arbaugh* announces. *Id.* at 169 n.19.[3]

Under our rule of orderliness, "one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court." *Mercado v. Lynch*, 823 F.3d 276, 279 (5th Cir. 2016) (quoting *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008)); *see also Arnold v. U.S. Dep't of Interior*, 213 F.3d 193, 196 n.4 (5th Cir. 2000) ("[T]o the extent that a more recent case contradicts an older case, the newer language has no effect."). Our earliest case, *Womble*, determined that Title VII's administrative exhaustion requirement is not jurisdictional. 864 F.2d at 1213. In *Womble*, we held that the district court erred "[i]n holding that the failure of [the Title VII plaintiff] to exhaust administrative remedies deprived it of subject matter jurisdiction." 864 F.2d

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[3] *Davenport* was originally issued on May 16, 2018 as an unpublished opinion. Later, on May 22, 2018, it was reissued as published opinion.

at 1213. The *Womble* plaintiff failed to file a Title VII charge with the EEOC before bringing her lawsuit in district court. *Id.* We held that her claim "was barred," but the district court had jurisdiction over it. *Id.* Under the rule of orderliness, we are bound by *Womble*'s holding that a Title VII plaintiff's failure to exhaust her administrative remedies is not a jurisdictional bar but rather a prudential prerequisite to suit.[4]

Some Fifth Circuit cases cite to *Tolbert v. United States*, 916 F.2d 245 (5th Cir. 1990), for the proposition that Title VII's administrative exhaustion requirement is a jurisdictional requirement. *Tolbert* declared that "it is the well-settled law of this circuit that [Title VII's administrative exhaustion requirement] is a prerequisite to federal subject matter jurisdiction." 916 F.2d at 247. Even though our cases may rely on *Tolbert* for the proposition that Title VII's administrative exhaustion requirement is a jurisdictional requirement, under our rule of orderliness, *Womble* controls.

Moreover, the Supreme Court's decision in *Arbaugh* is instructive. *Arbaugh* held that Title VII's statutory limitation of covered employers—to those with 15 or more employees—is not a jurisdictional limitation. 546 U.S. at 516. The Court articulated a

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[4] In an even earlier case, on the issue of receipt of a right-to-sue letter, we held that this specific Title VII requirement is "a condition precedent to a Title VII claim rather than a jurisdictional prerequisite." *Pinkard v. Pullman-Standard, a Div. of Pullman, Inc*, 678 F.2d 1211, 1215 (5th Cir. Unit B 1982).

"readily administrable bright line" for courts and litigants to determine whether a statutory requirement is jurisdictional. *Id.* The Court explained:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue . . . . But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Id. at 515–16 (internal citation omitted) (footnote omitted).

Here, Congress did not suggest—much less clearly state—that Title VII's administrative exhaustion requirement is jurisdictional, and so we must treat this requirement as nonjurisdictional in character. See 42 U.S.C. § 2000e-5. The statute says nothing about a connection between the EEOC enforcement process and the power of a court to hear a Title VII case. In other statutes, by contrast, "Congress has exercised its prerogative to restrict the subject-matter jurisdiction of federal district courts based on a wide variety of factors . . . ." *Arbaugh*, 546 U.S. at 515 n.11. For example:

> Certain statutes confer subject-matter jurisdiction only for actions brought by specific plaintiffs, *e.g.*, 28 U.S.C. § 1345 (United States and its agencies and officers); 49 U.S.C. § 24301(l)(2) (Amtrak), or for claims against

> particular defendants, *e.g.*, 7 U.S.C. § 2707(e)(3) (persons subject to orders of the Egg Board); 28 U.S.C. § 1348 (national banking associations), or for actions in which the amount in controversy exceeds, *e.g.*, 16 U.S.C. § 814, or falls below, *e.g.*, 22 U.S.C. § 6713(a)(1)(B); 28 U.S.C. § 1346(a)(2), a stated amount.

Id. Title VII's administrative exhaustion requirement is not expressed in jurisdictional terms in the statute, *see* 42 U.S.C. § 2000e-5, and just as in *Arbaugh*, there is nothing in the statute to suggest that Congress intended for this requirement to be jurisdictional.

Tolbert is out-of-step with the Supreme Court's approach in *Arbaugh*. There, we said that Title VII's exhaustion requirement was jurisdictional and endorsed the Third Circuit's reasoning that "[a]bsent an indication of contrary congressional intent, we will not countenance circumventing the administrative process" by allowing a plaintiff to file a lawsuit before exhausting her administrative remedies. *Tolbert*, 916 F.2d at 249 n.1 (quoting *Purtill v. Harris*, 658 F.2d 134, 138 (3d Cir. 1981)). However, *Arbaugh* directs us to apply precisely the opposite presumption: "A rule is jurisdictional 'if the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional.'" *Gonzalez v. Thaler*, 565 U.S. 134, 141–42 (2012) (quoting *Arbaugh*, 546 U.S. at 515) (emphasis added); *see also United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) ("In recent years, we have repeatedly held that procedural rules . . . cabin a court's power only if Congress has 'clearly stated' as

much." (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013))). Accordingly, today, we reaffirm our earlier holding in *Womble* that Title VII's administrative exhaustion requirement is not a jurisdictional bar to suit.

This holding that Title VII's exhaustion requirement is not jurisdictional is consistent with the First, Second, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits. *See Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 385 (2d Cir. 2015) (acknowledging imprecise language in its own case law and clarifying that "the failure of a Title VII plaintiff to exhaust administrative remedies raises no jurisdictional bar to the claim proceeding in federal court"); *Adamov v. U.S. Bank Nat'l Ass'n*, 726 F.3d 851, 855–57 (6th Cir. 2013) (concluding that "the question of administrative exhaustion is nonjurisdictional"); *Williams v. Target Stores*, 479 F. App'x 26, 28 (8th Cir. 2012) (noting that failure to exhaust administrative remedies is not a jurisdictional prerequisite under Title VII); *Vera v. McHugh*, 622 F.3d 17, 29–30 (1st Cir. 2010) ("Although typically a failure to exhaust administrative remedies will bar suit in federal court, 'the exhaustion requirement is not a jurisdictional prerequisite' to filing a Title VII claim in federal court." (quoting *Frederique-Alexandre v. Dep't of Nat'l & Envtl. Res.*, 478 F.3d 433, 440 (1st Cir. 2007))); *Kraus v. Presidio Tr. Facilities Div./Residential Mgmt. Branch*, 572 F.3d 1039, 1043 (9th Cir. 2009) (concluding that Title VII's exhaustion requirement is not a jurisdictional prerequisite for suit); *Douglas v. Donovan*, 559 F.3d 549, 556 n.4 (D.C. Cir. 2009) ("[T]he exhaustion requirement, though mandatory, is not jurisdictional

. . . ."); *Gibson v. West*, 201 F.3d 990, 994 (7th Cir. 2000) (overruling circuit precedent and holding "that, as a general matter, the failure to exhaust administrative remedies is a precondition to bringing a Title VII claim in federal court, rather than a jurisdictional requirement"); *but see Logsdon v. Turbines, Inc.*, 399 F. App'x 376, 379 n.2 (10th Cir. 2010) (noting that in the Tenth Circuit "EEOC exhaustion is still considered jurisdictional" even if undermined by recent Supreme Court cases (quoting *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993))); *Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 300 (4th Cir. 2009) ("[A] failure by the plaintiff to exhaust administrative remedies concerning a Title VII claim deprives the federal courts of subject matter jurisdiction over the claim.").

B.

We now turn to the issue of whether Fort Bend has forfeited its opportunity to raise Davis's alleged failure to exhaust. Just because Title VII's administrative exhaustion requirement is not jurisdictional does not mean that this requirement should be ignored. "The purpose of this exhaustion doctrine is to facilitate the administrative agency's investigation and conciliatory functions and to recognize its role as primary enforcer of anti-discrimination laws." *Filer v. Donley*, 690 F.3d 643, 647 (5th Cir. 2012). Administrative exhaustion is important because it provides an opportunity for voluntary compliance before a civil action is instituted. For this reason, Title VII requires administrative exhaustion.

Failure to exhaust is an affirmative defense that should be pleaded. *See Flagg v. Stryker Corp.*, 819 F.3d 132, 142 (5th Cir. 2016) (en banc) (Haynes, J., concurring) ("Absent a jurisdictional nature to 'failure to exhaust,' we treat such failures to exhaust as affirmative defenses, not jurisdictional prerequisites."); *Carbe v. Lappin*, 492 F.3d 325, 328 (5th Cir. 2007) (noting that in PLRA cases, "[a]ny failure to exhaust must be asserted by the defendant").

Fort Bend did not raise the issue of administrative exhaustion in the district court originally. Davis's complaint alleged that "[a]ll conditions precedent" to suit had been met, but Fort Bend's answer only stated that Fort Bend did not have "sufficient knowledge or information, after reasonable inquiry, to admit or deny" the claim of jurisdiction. *See F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1327 (5th Cir. 1994) ("As we have held, if a litigant desires to preserve an argument for appeal, the litigant must press and not merely intimate the argument during the proceedings before the district court."). In its original motion for summary judgment, Fort Bend did not argue that Davis failed to exhaust her administrative remedies. Then, when Davis appealed for the first time, Fort Bend did not argue to us, in its briefing or during oral argument, that Davis failed to exhaust her administrative remedies. Nor did it raise the issue in its petition for rehearing *en banc* or in its petition for certiorari to the Supreme Court.

Simply put, Fort Bend waited five years and an entire round of appeals all the way to the Supreme Court before it argued that Davis failed to exhaust.

On these facts, it is abundantly clear that Fort Bend has forfeited its opportunity to assert this claim.[5] Accordingly, the district court erred in dismissing this case based on Davis's alleged failure to exhaust.

IV.

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. For these reasons, we REVERSE and REMAND for further proceedings consistent with this opinion.

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[5] In light of our holdings that Title VII's administrative exhaustion requirement is not jurisdictional and that Fort Bend forfeited its argument that Davis failed to exhaust her administrative remedies as to her religious discrimination claim, we need not address Davis's alternative arguments that she did exhaust her administrative remedies or that requiring her to do so would have been futile.

APPENDIX B

UNITED STATES DISTRICT COURT,
S.D. TEXAS, HOUSTON DIVISION

LOIS M. DAVIS,

Plaintiff,

v.

FORT BEND COUNTY,

Defendant.

Civil Action No. 4:12-CV-131

Signed August 24, 2016

ORDER AND OPINION

MELINDA HARMON, UNITED STATES DISTRICT JUDGE

Pending before the Court is Defendant's Motion to Dismiss (Document No. 42). Plaintiff filed a Response (Document No. 49), and Defendant filed a Reply (Document No. 53). Having considered these filings, the facts in the record, and the applicable law, the Court concludes Defendant's Motion (Document No. 42) should be granted.

Background

Plaintiff originally filed a complaint in 2012, which included claims of retaliation and religious

discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17 ("Title VII"), and a claim of intentional infliction of emotional distress.[1] (Document No. 1). This Court granted Defendant's Motion for Summary Judgment (Document No. 13), which Plaintiff appealed to the Fifth Circuit. The Fifth Circuit affirmed the grant of summary judgment on Plaintiff's retaliation claim, but reversed the grant of summary judgment on Plaintiff's religious discrimination claim. (Document No. 27 at 17).[2] Therefore Plaintiff has filed an

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[1] This claim was not appealed to the Fifth Circuit, and has been abandoned.

[2] For thoroughness the Court also includes the factual and procedural background as summarized by the Fifth Circuit:

> Fort Bend hired Davis in December 2007 as a Desktop Support Supervisor responsible for supervising about fifteen information technology ("IT") technicians. Charles Cook ("Cook") was the IT Director at the time. In November 2009, he hired his personal friend and fellow church member, Kenneth Ford ("Ford"), as Davis's supervisor.
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> On or about April 1, 2010, Davis filed a complaint with Fort Bend's Human Resources Department, alleging that Cook subjected her to constant sexual harassment and assaults soon after her employment began. Fort Bend placed Davis on Family Medical Leave Act ("FMLA") leave during its investigation of her complaint. The investigation substantiated Davis's allegations against Cook and ultimately led to Cook's resignation on April 22, 2010.
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> According to Davis, Ford immediately began retaliating against her when she returned to work from FMLA leave. She alleged that Ford "effectively" demoted her by reducing the number of her direct reports from fifteen to four; removed her from projects she had previously managed; superseded her authority by giving orders and assigning

> different projects and tasks directly to Davis's staff; removed her administrative rights from the computer server; and assigned her tasks that similarly situated employees were not required to perform.
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> In March 2011, Fort Bend prepared to install personal computers, network components, and audiovisual equipment into its newly built Fort Bend County Justice Center. All technical support employees, including Davis, were involved in the process. As the Desktop Support Supervisor, Davis and her team were to "assist with the testing of the computers [and] make sure all of the computers had been set up properly." The installation was scheduled for the weekend of July 4, 2011, and all employees were required to be present.
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> On June 28, 2011, Davis informed Ford that she would not be available to work the morning of Sunday July 3, 2011, allegedly "due to a previous religious commitment." Davis testified that "[i]t was a special church service, and that I needed to be off that Sunday[,]...but I would be more than willing to come in after church services." Davis also testified that she had arranged for a replacement during her *484 absence, as she had done in the past. Ford did not approve her absence, stating that it "would be grounds for a write-up or termination." After Davis attended her church event and did not report to work, Fort Bend terminated Davis's employment.
>
> Davis filed suit against Fort Bend, alleging retaliation and religious discrimination under Title VII, and intentional infliction of emotional distress. The district court granted Fort Bend's motion for summary judgment on all claims and dismissed Davis's action. Davis timely appealed the district court's grant of summary judgment. On appeal, Davis challenges the grant of summary judgment on her Title VII claims, but not on her intentional infliction of emotional distress claim.

Davis v. Fort Bend Cty., 765 F.3d 480, 483–84 (5th Cir. 2014), *cert. denied sub nom. Fort Bend Cty., Tex. v. Davis*, 135 S. Ct. 2804 (2015).

Amended Complaint against Defendant, alleging only religious discrimination. (Document No. 39). Plaintiff alleges that she "possessed a sincere religious belief that she was obligated to attend church, by her own personal view of her religious faith, on July 3, 2011." *Id.* at 9. Therefore she informed her supervisor, Ford, of this obligation, and told him that she could return to work immediately after the service. *Id.* Plaintiff also arranged for a replacement during her absence. *Id.* Although Ford initially approved her request, he later denied it and informed Plaintiff that "she would be subject to discipline" if she did not report to work first thing in the morning (despite allowing another employee time off to attend a parade). *Id.* When Plaintiff chose to attend church, she was immediately terminated, despite the fact that Fort Bend County had suffered no hardship as a result of her absence. *Id.* at 10.

Defendant has filed a Motion to Dismiss Plaintiff's claim, arguing that "Plaintiff did not exhaust her administrative remedies relating to religious discrimination before filing suit." (Document No. 42 at 1). Plaintiff's original Charge of Discrimination filed with the Texas Workforce Commission ("TWC"), dated March 9, 2011, does not include religious discrimination. (Document No. 49-2 at 9). However, Plaintiff's intake questionnaire includes a handwritten addition of the word "religion" in the boxes labeled "Employment Harms or Actions." *Id.* at 17. The intake questionnaire was dated February 15, 2011, before the alleged religious discrimination. *Id.* Therefore Defendant notes that Plaintiff must have added "religion" to the intake questionnaire after its

completion. (Document No. 42 at 2). Plaintiff explains this in her declaration, stating:

> I amended my TWC intake form to include the word "Religion" as well as marking the Employment Harms or Actions of Discharge and Reasonable Accommodation. These modifications were made to inform the TWC of the religious discrimination which occurred upon my termination. [...] I presented the amended form to the TWC and the EEOC during late summer or fall of 2011, prior to November 2011.

(Document No. 49-2 at 2).

In an August 1, 2011 letter responding to the TWC's request for separation information, Defendant explained Plaintiff's termination for failing to report to work on July 3 and 4, 2011. *Id.* at 14. The relevant sections state:

> On June 28, 2011, two (2) days before the scheduled move, Ms Davis verbally notified her supervisor, Kenneth Ford, that she was not able to work on Sunday, July 3, 2011, because she had an all day church event to attend. Kenneth Ford informed Ms Davis that she was expected to work the entire weekend. Mr. Ford attempted to compromise with Ms Davis by allowing her the opportunity to go to church on Sunday morning and report to work after services. She rejected this offer. Mr. Ford informed her that if she did not report to work on Sunday, she would be subject to discipline up to and including termination. Ms Davis

> failed to report to work on Sunday, July 3, 2011. [...] The decision was made to terminate Ms Davis for failure to report to work on Sunday and Monday July 3 and 4 as directed.

Id. On November 20, 2011, Plaintiff received a predetermination letter from the TWC, explaining that it had made a preliminary decision to dismiss the charge. *Id.* at 19. The letter explains that "it cannot be established that the employer has discriminated against you based on Sex, Retaliation, or any other reason prohibited by the laws we enforce." *Id.* The letter mentions Plaintiff's "church commitments" briefly, but does not discuss her claims of religious discrimination. *Id.* at 20. Instead, the letter focuses largely on Fort Bend's response to the sexual harassment allegations, and details Plaintiff's termination for violation of policies (including her failure to come to work on July 3, 2011). *Id.* On November 17, 2011, Plaintiff received a "Dismissal and Notice of Right to File a Civil Action" from the TWC. *Id.* at 22. On December 15, 2011, Plaintiff received a "Notice of Right to Sue Within 90 Days" from the Department of Justice. *Id.* at 29.

Parties' Motions

Defendant's Motion to Dismiss argues that "Plaintiff did not exhaust her administrative remedies relating to religious discrimination before filing suit," because her Charge of Discrimination "does not include religion as a basis of discrimination." (Document No. 42 at 1). Defendant argues that Plaintiff's questionnaire was not

sufficient to "satisfy her burden of having exhausted her administrative remedies," citing *Harris v. David McDavid Honda*, 213 Fed.Appx. 258 (5th Cir. 2006). *Id.* at 2. Defendant also takes issue with the questionnaire itself, arguing that it "was altered to include her religion claim after being completed and before being filed with this Court." *Id.* at 1-2. Although Defendant has not raised the argument that Plaintiff did not exhaust her administrative remedies previously, Defendant argues that it is an issue of subject matter jurisdiction, and therefore can be raised with the Court at any time. *Id.* at 3.

Plaintiff's Response first argues that the issue is not one of subject matter jurisdiction, and therefore Defendant waived its defense that Plaintiff did not exhaust her administrative remedies. (Document No. 49 at 10). Plaintiff also argues that "Davis exhausted her administrative remedies by providing clear notice of her claims in an amendment to her TWC charge documents. The TWC and therefore the EEOC's own documents demonstrate that the relevant administrative agencies had notice of, and considered, Davis's amended claims." *Id.* at 10-11. In addition Plaintiff argues that "under controlling Fifth Circuit law, further acts of discrimination that occur after the filing of an initial charge of discrimination (such as the employee's ultimate termination) need not be raised in a new EEOC complaint;" that "Davis exhausted her administrative remedies because her lawsuit arose out of the investigation conducted by the EEOC/TWC;" and finally that "any failure to exhaust remedies is excused because, in these circumstances, exhaustion would have been futile." *Id.* at 11.

Defendant's Reply again argues that the failure to exhaust administrative remedies is jurisdictional, and also argues that Plaintiff's religious discrimination claim was not adjudicated or exhausted by the EEOC, and that "Fort Bend timely raised Plaintiff's non-exhaustion of remedies." (Document No. 53 at 3).

Standard of Review

Exhaustion of Remedies

"Employment discrimination plaintiffs must exhaust administrative remedies before pursuing claims in federal court. Exhaustion occurs when the plaintiff files a timely charge with the EEOC and receives a statutory notice of right to sue." *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378-79 (5th Cir. 2002) (citation omitted). "Courts should not condone lawsuits that exceed the scope of EEOC exhaustion, because doing so would thwart the administrative process and peremptorily substitute litigation for conciliation. Nevertheless, competing policies underlie judicial interpretation of the exhaustion requirement." *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 273 (5th Cir. 2008) (citation omitted). "On the one hand, because 'the provisions of Title VII were not designed for the sophisticated,' and because most complaints are initiated *pro se*,[3] the scope of an EEOC complaint should be construed liberally." *Pacheco v. Mineta*, 448 F.3d 783, 788–89 (5th Cir.

[3] Notably, Plaintiff was not *pro se*; she listed her attorney on the original questionnaire. (Document No. 49-2 at 4).

2006) (citations omitted). "On the other hand, a primary purpose of Title VII is to trigger the investigatory and conciliatory procedures of the EEOC, in attempt to achieve nonjudicial resolution of employment discrimination claims." *Id.* "With that balance in mind, this court interprets what is properly embraced in review of a Title–VII claim somewhat broadly, not solely by the scope of the administrative charge itself, but by the scope of the EEOC investigation which 'can reasonably be expected to grow out of the charge of discrimination.' " *Id.* This involves a "fact-intensive analysis" of the administrative charge, and looking "slightly beyond its four corners, to its substance rather than its label." *Id.*

Failure to Exhaust as a Jurisdictional Issue

The Court will first address whether a failure to exhaust administrative remedies is "merely a prerequisite to suit, and thus subject to waiver and estoppel, or whether it is a requirement that implicates subject matter jurisdiction." *Id.* at 788 n. 7. The Court finds that this is a jurisdictional issue. As noted in *Mineta*, there is "disagreement in this circuit" regarding this issue, as "[n]either the Supreme Court nor this court sitting en banc has ruled that the exhaustion requirement is subject to waiver or estoppel, and our panels are in disagreement over that question." *Id.*[4] However, this

[4] The cases cited for this proposition in Mineta are as follows:

Compare Tolbert v. United States, 916 F.2d 245, 247 (5th Cir. 1990) ("[I]t is the well-settled law of this circuit that

Court recently explained that "[w]hat appears to be the most recent Fifth Circuit case addressing this issue [*Simmons-Myers v. Caesars Entertainment Corp.*] makes clear that the failure to administratively exhaust is viewed as a jurisdictional bar to suit." *Muoneke v. Prairie View A&M Univ.*, No. CV H-15-2212, 2016 WL 3017157, at *6 n.2 (S.D. Tex. May 26, 2016) (citing *Simmons-Myers v. Caesars Entm't Corp.*, 515 Fed.Appx. 269, 272 (5th Cir. 2013)) ("[C]ourts have no jurisdiction to consider Title VII claims as to which the aggrieved party has not exhausted administrative remedies.") (per curiam) (citing *Nat'l Ass'n of Gov't Emps. v. City of Pub. Serv. Bd. of San Antonio*, 40 F.3d 698, 711 (5th Cir. 1994)). *Compare Yee v. Baldwin-Price*, 325 Fed.Appx. 375, 378 (5th Cir. 2009) ("The exhaustion requirement is not jurisdictional, however, and is subject to the traditional equitable defenses of waiver, estoppel, and equitable tolling.") (per curiam) (citing *Pacheco v. Rice*, 966 F.2d 904, 906 (5th Cir.

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each [Title VII] requirement is a prerequisite to federal subject matter jurisdiction.") *and Porter v. Adams*, 639 F.2d 273, 276 (5th Cir. 1981) ("The exhaustion requirement...is an absolute prerequisite to suit") *and Randel v. Dep't. of U.S. Navy*, 157 F.3d 392, 395 (5th Cir. 1998) ("If the claimant fails to comply with either of these [Title VII] requirements then the court is deprived of jurisdiction over the case.") *with Young v. City of Houston, Tex.*, 906 F.2d 177, 180 (5th Cir. 1990) ("A failure of the EEOC prerequisite does not rob a court of jurisdiction.") and *Fellows v. Universal Restaurants, Inc.*, 701 F.2d 447, 449 (5th Cir. 1983) ("The basic two statutory requirements (although these are not necessarily 'jurisdictional') for a Title VII suit are....").

Pacheco v. Mineta, 448 F.3d 783, 788 n.7 (5th Cir. 2006).

1992)). Both *Simmons-Myers* and *Yee* were designated as unpublished opinions by the Fifth Circuit, and are therefore not precedent, but may be viewed as persuasive. *Cantu v. Hidalgo Cty.*, 398 S.W.3d 824, 830 n. 2 (Tex. App.—Corpus Christi 2012, review denied). The Court agrees with the reasoning in *Muoneke* that *Simmons-Myers* is more persuasive, as it was decided most recently. 2016 WL 3017157, at *6 n. 2.[5]

Furthermore, *Muoneke* explains that "[t]he disagreement centers on whether the Supreme Court's decision in *Zipes*[6] [ ], which made clear that Title VII's limitations period for filing an EEOC charge was mandatory but nonjurisdictional, also applies to the administrative-exhaustion requirement." *Id.* The Court believes that the finding in *Zipes* does not apply to the administrative-exhaustion requirement, because *Zipes* "relies heavily on legislative history and Supreme Court precedents that characterize the filing deadlines as statutes of limitations," reasoning which does not

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[5] Similarly, a 2014 case discussing the Rehabilitation Act noted that federal subject matter jurisdiction does not exist if administrative remedies are not exhausted. *Ruiz v. Donahoe*, 569 Fed.Appx. 207, 211–12 (5th Cir. 2014) (per curiam), *reh'g denied*, 784 F.3d 247 (5th Cir. 2015) (citing *Tolbert*, 916 F.2d at 247-8) (Title VII's exhaustion requirement is a "prerequisite to federal subject matter jurisdiction."). The Fifth Circuit has held that "the 1978 amendments to the Rehabilitation Act 1) established a private right of action, *subject to the same procedural constraints (administrative exhaustion, etc.)* set forth in Title VII of the Civil Rights Act ...." *Prewitt v. U.S. Postal Serv.*, 662 F.2d 292, 304 (5th Cir. 1981) (emphasis added).

[6] *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

extend to the exhaustion requirement. *Mineta*, 448 F.3d at 788 n. 7 (citing *Henderson v. U.S. Veterans Admin.*, 790 F.2d 436, 440 (5th Cir. 1986) ("The filing deadlines are in the nature of statutes of limitations which are subject to waiver, estoppel, and equitable tolling.")). *Compare Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (The legislative history states that the purpose of the filing provision is "preventing 'stale' claims, the end served by a statute of limitations.") (citation omitted), *with McClain*, 519 F.3d at 273 ("[T]he 'primary purpose of Title VII is to trigger the investigatory and conciliatory procedures of the EEOC, in [an] attempt to achieve non-judicial resolution of employment discrimination claims.' ") (citation omitted).

For these reasons, the Court finds that the exhaustion requirement is jurisdictional; therefore the Court will consider Defendant's Motion under Rule 12(b)(1). *Muoneke*, 2016 WL 3017157, at *6.[7]

Standard of Review under FRCP 12(b)(1)

Rule 12(b)(1) allows a party to move for dismissal of an action for lack of subject matter jurisdiction. The party asserting that subject matter jurisdiction exists, here the Plaintiff, must bear the burden of proof by a preponderance of the evidence for a 12(b)(1) motion. *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 327 (5th Cir. 2008); *Ramming*

[7] Plaintiff's waiver arguments therefore become irrelevant, as "[c]hallenges to subject-matter jurisdiction can of course be raised at any time prior to final judgment." *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 571 (2004).

v. United States, 281 F.3d 158, 161 (5th Cir. 2001). In reviewing a motion under 12(b)(1) the court may consider (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981).

This motion is characterized as a "factual" attack, i.e., the facts in the complaint supporting subject matter jurisdiction are questioned. *In re Blue Water Endeavors, LLC*, Bankr. No. 08-10466, Adv. No. 10-1015, 2011 WL 52525, *3 (E.D. Tex. Jan. 6, 2011) (citations omitted). In a factual attack, the Court may consider any evidence (affidavits, testimony, documents, etc.) submitted by the parties that is relevant to the issue of jurisdiction. *Id.* The court's consideration of such matters outside the pleadings does not convert the motion to one for summary judgment under Rule 56(c). *Robinson v. Paulson*, H-06-4083, 2008 WL 4692392 at *10 (S.D. Tex. Oct. 28, 2008) (citation omitted). "[W]hen a factual attack is made upon federal jurisdiction, no presumption of truthfulness attaches to the plaintiffs' jurisdictional allegations, and the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In a factual attack, the plaintiffs have the burden of proving that federal jurisdiction does in fact exist." *Evans v. Tubbe*, 657 F.2d 661, 663 (5th Cir. 1981). In resolving a factual attack on subject matter jurisdiction under Rule 12(b)(1), the district court, which does not address the merits of the suit, has significant authority " 'to weigh the evidence and satisfy itself as to the

existence of its power to hear the case.' " *Robinson*, 2008 WL 4692392 at *10 (citations omitted).

Discussion

As discussed above, Plaintiff's Charge of Discrimination does not mention religious discrimination. (Document No. 49-2 at 9), but Plaintiff argues that her amendment to the TWC intake questionnaire was sufficient to exhaust her administrative remedies. (Document No. 49 at 17). The Court disagrees. As noted in *Harris v. Honda*, "an intake questionnaire does not constitute a charge." 213 Fed.Appx. at 261.[8] *Harris* explained that the "primary difference between intake questionnaires and formal charges of discrimination is the notification requirement of a charge," and that "equating intake questionnaires to charges, without more, would be the equivalent of dispensing with the requirement to notify the perspective defendant." *Id.* (citing *Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 79 (7th Cir. 1992)). Therefore the Court ruled that the plaintiff's intake questionnaire could not substitute for a proper charge, because the plaintiff failed to provide any evidence that defendant received notice of the plaintiff's claim. *Id.* at 262. *Compare Price v. Sw. Bell Tel. Co.*, 687 F.2d 74, 78 (5th Cir. 1982) (unsigned form was sufficient to set "administrative machinery in motion" where defendant received notice and the EEOC actually

[8] Although unpublished, the Court finds this opinion persuasive. *Cantu v. Hidalgo Cty.*, 398 S.W.3d 824, 830 n. 2 (Tex. App.—Corpus Christi 2012, reviewed denied).

investigated the plaintiff's allegations). Similarly, Plaintiff has provided no evidence that Defendant was aware of her amendment to the questionnaire, only stating that she "presented the amended form to the TWC and the EEOC,"[9] and generally referring to Fort Bend's letter to the TWC. (Document No. 49-2 at 2). Fort Bend's letter to the TWC does not demonstrate it had any awareness of Plaintiff's religious discrimination claim.[10] In the letter Defendant mentions Plaintiff's claim that she needed to attend church, but only in the context of explaining that she was terminated for failing to come to work. *Id.* at 14. There is no mention of Plaintiff's claim of religious discrimination; the letter largely functions as a response to allegations of retaliation, and does not appear to present a defense to religious discrimination claims. Without concrete evidence of this notice, it would not be appropriate to view the amended questionnaire as a charge. *Compare Price*, 687 F.2d at 78 (fact that employer received official notice of the charge was undisputed).

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[9] Furthermore, Plaintiff does not provide any evidence, other than her own statement, that this occurred. As discussed in greater detail below, there is no evidence that the EEOC considered her claim of religious discrimination, which it presumably would have done upon receipt of her updated form. Therefore the Court believes Plaintiff's claim is questionable at best. Even if true, however, the amendment to the intake questionnaire was not sufficient to exhaust her administrative remedies.

[10] The letter was dated August 1, 2011, while Plaintiff claims that she sent the amended form to the TWC "during late summer or fall of 2011, prior to November 2011." (Document No. 49-2 at 2, 14). Therefore, based on the dates alone, it is not clear that Defendant could have been aware of the amendment.

In addition, Plaintiff's amendment to the questionnaire was not under oath, and was factually unrelated to her original allegations of gender discrimination and retaliation in the charge. Courts have explained that "a charge must '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(b)]. The verification requirement is designed to protect an employer from the filing of frivolous claims." *Price*, 687 F.2d at 77 (citing *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 231 (5th Cir. 1969)). Also, Plaintiff's religious discrimination claims are not at all related to her claims of sex discrimination or retaliation, a factor the *Harris* Court, as well as this Court and the Northern District of Texas, have found relevant in determining whether to consider documents other than the charge. *Harris*, 213 Fed.Appx. at 261-262 (noting that allegations in the intake questionnaire were not "like or related to the allegations within the charge"); *Kojin v. Barton Protective Servs.*, 339 F. Supp. 2d 923, 929 (S.D. Tex. 2004) (The Court dismissed plaintiff's age discrimination claims, partly because the claims were only mentioned in a questionnaire, and were "not a reasonable consequence of the facts [alleging discrimination based on national origin] set forth in the EEOC Charge of Discrimination."); *Hayes v. MBNA Tech., Inc.*, No. CIV.A.3:03-CV1766-D, 2004 WL 1283965, at *6 (N.D. Tex. June 9, 2004) ("Accordingly, the court holds that, when determining whether a claim has been exhausted, the decision is to be based on the four corners of the EEOC charge, but the court may also consult related documents, such as a plaintiff's affidavit, her

response to the EEOC questionnaire, and attachments to the response, *when (1) the facts set out in the document are a reasonable consequence of a claim set forth in the EEOC charge*, and (2) the employer had actual knowledge of the contents of the document during the course of the EEOC investigation.") (emphasis added). *Compare Wolf v. E. Texas Med. Ctr.*, 515 F. Supp. 2d 682, 688–89 (E.D. Tex. 2007) (allowing plaintiff's questionnaires to be construed as a timely charge, where the plaintiff "later filed a Charge of Discrimination concerning the same factual allegations").

It is also notable that Plaintiff's only addition to her questionnaire was including the word religion, and "marking the Employment Harms or Actions of Discharge and Reasonable Accommodation." (Document No. 49-2 at 2). Plaintiff did not include any additional information or explain her new claim whatsoever, despite the warning at the top of the questionnaire stating that "you must provide complete information or your complaint may be dismissed." *Id.* at 4. Several courts have explained that the most crucial elements of a charge of discrimination are the factual statements therein; without adding any additional facts to her questionnaire, it is unclear how the EEOC/TWC could have followed up on her new claims. *See Jaber v. Metro. Transit Auth. of Harris Cty., Tex.*, No. 4:14-CV-201, 2014 WL 4102120, at *2 (S.D. Tex. Aug. 14, 2014) ("However, "[b]ecause factual statements are such a major element of a charge of discrimination, [courts] will not construe the charge to include facts that were initially omitted.") (citations omitted); *Vlasek v. Wal-Mart Stores, Inc.*, No. CIV.A. H-07-

0386, 2007 WL 2402183, at *3 (S.D. Tex. Aug. 20, 2007) ("[T]he crucial element of a charge of discrimination is the factual statement contained therein.") (citations omitted). *See also Price*, 687 F.2d at 78 ("We also take into account the principal function of the administrative charge: the provision of an adequate factual basis for the Commission's initiation of the investigatory and conciliatory procedures contemplated by Title VII.").

Furthermore, there is no evidence that the EEOC investigated Plaintiff's claim of religious discrimination. The only evidence cited by Plaintiff for her proposition that "the EEOC/TWC acknowledged, considered, and took into account Davis's claims of religious discrimination" is Fort Bend's letter to the TWC (discussed above), and the TWC's predetermination letter. (Document No. 49 at 18). The pre-determination letter contains no discussion of potential religious discrimination suffered by Plaintiff; it states that "it cannot be established that the employer has discriminated against you based on *Sex, Retaliation*, or any other reason prohibited by the laws we enforce." (Document No. 49-2 at 19) (emphasis added). The letter contains thorough discussion of Defendant's response to Plaintiff's sexual harassment allegations, but does not include any discussion of religious discrimination. *Id.* at 19-20.[11] Plaintiff's "church

[11] For example, it does not include any discussion of Fort Bend's obligation "to make reasonable accommodation for the religious observances of its employees, short of incurring an undue hardship," which would be highly relevant to a religious discrimination claim. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977). Nor does it discuss elements of religious

commitments" are only mentioned briefly, and as part of the letter's explanation that Plaintiff was fired for violation of policies, and not as retaliation for her sexual harassment complaint. *Id.* The "actual scope of the EEOC's investigation" is "clearly pertinent to an exhaustion inquiry," and in this case strongly suggests that Plaintiff has not exhausted her remedies regarding the religious discrimination claim. *McClain*, 519 F.3d at 274 (citations omitted).

Additionally, the Court does not believe that a religious discrimination investigation could reasonably have been expected to grow out of Plaintiff's original charge of discrimination, which only alleged retaliation and discrimination based on sex. *Young v. City of Houston, Tex.*, 906 F.2d 177, 179 (5th Cir. 1990) ("The scope of inquiry of a court hearing in a Title VII action is limited to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.") (internal quotations and citation omitted). Religion and sex are obviously very different, and the EEOC could not have been expected to investigate religious discrimination based on Plaintiff's charge of gender discrimination. *See, e.g.*, *Thomas v. Texas Dep't of Criminal Justice*,

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discrimination, such as the plaintiff's bona fide religious belief. *Hackney v. Texas Dep't of Criminal Justice*, No. CIV.A.1:07CV113TH, 2009 WL 2391232, at *6 (E.D. Tex. Aug. 4, 2009) ("To establish a prima facie case of religious discrimination under Title VII, [plaintiff] must prove that: (1) he had a bona fide religious belief that conflicted with an employment requirement; (2) his employer was informed of that belief; and (3) he was disciplined for failing to comply with the conflicting employment requirement.") (citing *Jenkins v. Louisiana*, 874 F.2d 992, 995 (5th Cir. 1989)).

220 F.3d 389, 395 (5th Cir. 2000) (charge alleging gender discrimination "did not necessarily encompass" race discrimination claim). In affirming dismissal of her retaliation claim, the Fifth Circuit explained that Plaintiff's religious discrimination claim was not related to her retaliation claim:

> Turning to her termination, there is no dispute that it was an adverse action. However, Davis does not present any evidence that Fort Bend's legitimate, non-retaliatory reason for terminating her—that she failed to report to work—was pretext for retaliation. Instead, she argues only that Fort Bend's reason for terminating her was pretext for its *religious discrimination*. This is irrelevant to her *retaliation* claim.

Davis v. Fort Bend Cty., 765 F.3d 480, 491 (5th Cir. 2014), *cert. denied sub nom. Fort Bend Cty., Tex. v. Davis*, 135 S. Ct. 2804 (2015).

Plaintiff cites *Gupta v. East Texas State University* for the proposition that "a charging party need not file an amendment to her EEOC/TWC charge of discrimination every time an additional act covered by Title VII occurs." (Document No. 49 at 19) (citing 654 F.2d 411, 414 (5th Cir. 1981)). In *Gupta* the plaintiff had filed two complaints/charges with the EEOC: one alleging discrimination based on race, and a second alleging retaliation because of the first charge. 654 F.2d at 414. Once Gupta initiated his district court case, his contract was not renewed. *Id.* However, he never filed a third charge with the EEOC detailing this additional retaliation. *Id.* The Court found that a third charge was not necessary,

explaining that "the district court has ancillary jurisdiction to hear such a claim when it grows out of an administrative charge that is properly before the court." *Id.* Plaintiff's case is different from *Gupta* for several reasons. First, *Gupta* considered additional acts of *retaliation*, not discrimination. Plaintiff's retaliation claim has already been dismissed. [12] Second, Gupta's claim that he was fired due to his complaint clearly "grows out" of his second charge; it is another act of retaliation directly *related to* the second charge. As discussed above, Plaintiff's religious discrimination claim is completely different from her sex and retaliation claims, and therefore cannot "grow out" of her prior charge. *See also Manning v. Chevron Chem. Co., LLC*, 332 F.3d 874, 879 (5th Cir. 2003) ("Despite the important policy justifications for requiring employees to assert all of their claims in the original charge, we have identified one very narrow exception to this general rule. We have held that an amendment, even one that alleges a new theory of recovery, can relate back to the date of the original charge *when the facts supporting both the amendment and the original charge are essentially the same*.") (emphasis added).

Finally, Plaintiff argues that exhaustion would have been futile. However, Plaintiff cites no Fifth

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[12] Plaintiff argues in this section that, during the pendency of the EEOC investigation, she "was fired, in large part in retaliation for her previous Title VII complaints." (Document No. 49 at 20). First, as noted above, her retaliation claims have already failed; this argument is not relevant to her religious discrimination claim. Second, her argument that she was fired "in large part" for her prior complaints would appear to discredit her religious discrimination claims.

Circuit precedent for her futility argument. Furthermore, the only case Plaintiff cites applying this futility standard to Title VII also held that the exhaustion requirement at issue was merely prudential, not jurisdictional. *Wilson v. MVM, Inc.*, 475 F.3d 166, 174 (3d Cir. 2007). As discussed above, the exhaustion requirement is jurisdictional, and therefore cannot be excused by futility. *Id.*

Conclusion

For the reasons stated above, the Court finds that Plaintiff failed to exhaust her administrative remedies regarding her religious discrimination claim. Her alleged amendment to the questionnaire was insufficient because Plaintiff has not demonstrated that Defendant had notice of the new claim, the form was not under oath, and the amendment was completely unrelated to her original claims. Furthermore, there is no evidence that the TWC/EEOC actually investigated her religious discrimination claim. Without the alleged amendment her religious discrimination claims do not reasonably grow out of the original charge.

Therefore, this Court does not have subject-matter jurisdiction over her claim, and her claim must be dismissed. Furthermore, re-pleading the claim for religious discrimination would be futile, as more than five years have passed since Plaintiff's termination. Therefore the dismissal will be with prejudice. *Jaber*, 2014 WL 4102120, at *4.

The Court hereby ORDERS that Defendant's Motion to Dismiss (Document No. 42) is GRANTED

and Plaintiff's claim of religious discrimination is DISMISSED with prejudice.

SIGNED at Houston, Texas, this 24th day of August, 2016.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20640

LOIS M. DAVIS,
Plaintiff-Appellant,
v.
FORT BEND COUNTY,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

Filed: July 20, 2018

ON PETITION FOR REHEARING EN BANC

(Opinion June 20, 2018, 5 Cir., ____, ____ F.3d ____)

Before KING, JONES AND ELROD, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En

Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Jennifer W. Elrod
UNITED STATES CIRCUIT JUDGE

APPENDIX D

Section 706 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, provides:

Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission

shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on

reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[1] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a 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 or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or

other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the

Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and

may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful

employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay;

reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would

have taken the same action in the absence of the impermissible motivating factor, the court--

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of Title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of Title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United

States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.