THE TOP TEN FIFTH CIRCUIT EMPLOYMENT LAW CASES OF 2016

Houston Bar Association, Labor and Employment Section
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1. *Heinsohn v. Carabin & Shaw, P.C.*, 832 F.3d 224 (5th Cir. 2016)

- Reversed SJ for employer in TCHRA sex/pregnancy discrimination case. The opinion is notable for its emphasis on the fact that the employer's given reasons for termination were: (a) not contemporaneously documented and presented to the employee in real time; and (b) in her deposition, their truth was contested by the plaintiff.

- In its conclusion, the Court stated that: "When, as here, a motion for summary judgment is premised almost entirely on the basis of depositions, declarations, and affidavits, a court must resist the urge to resolve the dispute – especially when, as here, it does not even have the complete depositions. Instead, the finder of fact should resolve the dispute at trial."

- This case highlights for employers the continuing importance of following basic documentation and discipline processes.

2. *Nicholson v. Securitas Sec. Svcs.*, 830 F.3d 186 (5th Cir. 2016)

- In reversing SJ for the employer, the Court held that a staffing company is only liable for honoring its customer's illegal discriminatory transfer or termination request if it either:
  - Participated in its customer's discrimination by honoring its customer's request to transfer the employee off their site (or terminate the employee) with knowledge that the request is motivated by illegal discrimination; or
  - Should reasonably have known the customer's request was motivated by illegal discrimination.

2. *Nicholson v. Securitas Sec. Svcs.*, 830 F.3d 186 (5th Cir. 2016) (*cont.*)

- The Court held there was some evidence that Securitas (the staffing company) should have known that its customer's request to transfer the plaintiff (who was 83 years old) was motivated by age discrimination.

- The Court mainly emphasized the fact that Securitas did no investigation at all to determine if its customer's given reason for making the transfer request (the plaintiff's alleged inability to perform new technology related tasks) was true or not, even though: (a) its policies required it to make such investigation, and they had done so in other situations; and (b) its policies also indicated that poor performance normally did not result in immediate termination.

3. *E.E.O.C. v. Rite Way Svcs., Inc.*, 819 F.3d 235 (5th Cir. 2016)

Reversed SJ for employer in a Title VII retaliation case where the claimant was not the alleged victim of the complained of sexual harassment, but rather a coworker who witnessed two incidents of alleged harassment, and reported them, and was fired shortly thereafter under arguably suspicious circumstances. The Court found:

- Contrary to the EEOC's argument, the Fifth Circuit held that the well known "reasonable belief" standard applicable to retaliation cases based on the "opposition clause" applied to retaliation claims brought by third-party witnesses.

- In other words, merely being a witness who supported the complainant in an internal company sexual harassment investigation was not enough to constitute protected conduct. Rather, to be protected under Title VII, the witness must have reasonably believed that the situation they were providing information about constituted a violation of Title VII.

3. *E.E.O.C. v. Rite Way Svcs., Inc.*, 819 F.3d 235 (5th Cir. 2016) (*cont.*)

- The EEOC argued based on *Crawford v. Metro. Gov't of Nashville and Davidson Cnty.*, 555 U.S. 271 (2009) that it was enough that the witness "opposed" conduct "by responding to someone else's question." The Court rejected that argument, stating that "creating a lower threshold for reactive plaintiffs bringing retaliation claims would be at odds with *Crawford's* reasoning that the language of the opposition clause does not permit courts to treat reactive opposition any differently than proactive opposition."

- Nevertheless, even under this standard, the Court held that SJ was improper, because the claimant could have reasonably believed sexual harassment had occurred based on: (1) seeing the alleged harasser pretending to smack the alleged victim's butt, while stating, "ooh wee"; and (2) six days later, hearing the alleged harasser say, in front of the alleged victim, regarding her butt, "I'm a man. I'm gonna look." This holding arguably lowers the bar for plaintiff's claiming they engaged in protected oppositional conduct.

4. *Wheat v. Florida Parish Juvenile Justice Comm.*, 811 F.3d 702 (5th Cir. 2016)

- Reversed SJ for employer in a retaliation case. In *Wheat*, the plaintiff was a juvenile detention officer. In 2005 she was disciplined for using excessive force on a juvenile.

- In 2009 Wheat took FMLA leave and was terminated for failing to return to work after her leave expired. Wheat sued and the case was settled.

- As part of the settlement, Wheat was returned to work in March 2011.

4. *Wheat v. Florida Parish Juvenile Justice Comm.*, 811 F.3d 702 (5th Cir. 2016) (*cont.*)

- In November 2011, Wheat alleged that a twelve-year old female inmate made inappropriate sexual advances towards her. In January 2012, Wheat used excessive force on another inmate and had to be physically restrained twice from attacking the inmate. Wheat also threatened to "whip that bitch's ass." Wheat was fired after this incident. Wheat sued, alleging retaliation for her FMLA suit and for her complaint about the twelve-year old allegedly sexually harassing her. The district court threw Wheat's case out on summary judgment, but the Fifth Circuit reversed because:

  - The employer initially claimed that it fire Wheat because "no JDS officer had ever attacked a youth resident before Ms. Wheat did, and, no JDS officer was allowed to remain in the Commission's employ after such an attack." *Id*. at 710. This assertion, however, was rebutted by evidence that: (1) Wheat herself had attacked an inmate in 2005 and was not fired for it; and (2) while some other JDS officers were terminated for excessive force, others were not. *Id*. at 711.

  - After being confronted with the fact that its original explanation for firing Wheat was not accurate, the employer offered a new explanation that focused only on the obvious impropriety of attacking a juvenile, as Wheat had admitted to doing in January 2012. *Id.* The appellate court found this explanation wanting, stating, "the Commission's inconsistent treatment of Wheat raises disputed issues of material fact as to whether: but for exercising her rights she would have been discharged." *Id*.

5. *Rodriguez v. Eli Lilly and Co.*, 820 F.3d 759 (5th Cir. 2016)

The plaintiff, who had PTSD, was fired the day he was approved for FMLA leave. He sued for retaliation under the ADA and FMLA. The district court threw his case out on summary judgment, and the Fifth Circuit affirming, noting.

- The alleged comments his new supervisor made suggesting she could not work with him because of his PTSD were not sufficient to thwart SJ, because they were not proximate in time to his termination (they were five months earlier), and because there was a mountain of independent evidence justifying Eli Lilly's decision to terminate the plaintiff.

- Of the five reasons Eli Lilly gave for terminating the plaintiff, the plaintiff did not even contest two of them, and although he contested the other three reasons, he provided no evidence showing they were false.

6. *Cannon v. Jacobs Field Svcs. N.A., Inc.*, 813 F.3d 586 (5th Cir. 2016)

Reversed SJ for the employer in an ADA case. The employer claimed driving and climbing ladders were essential job functions for a field engineer that the applicant could not do, and so he was lawfully denied employment and was not a "qualified individual with a disability" as required to win an ADA case. The district court agreed.

The Fifth Circuit reversed. It held that, although safely driving and climbing ladders were essential functions of the job, there was sufficient evidence that the plaintiff could have performed both functions with or without a reasonable accommodation, so as to mandate reversal of summary judgment in the employer's favor and submission of the case to a jury.

6. *Cannon v. Jacobs Field Svcs. N.A., Inc.*, 813 F.3d 586 (5th Cir. 2016) (*cont.*).

The big problem here is that the evidence suggested that the employer learned of the applicant's disability (and related prescription drug use) and then just jumped to the conclusions that he could not safely drive or climb ladders.

The employer should have done a better job of the interactive process to actually confirm in a reliable way whether the applicant could have safely driven and climbed ladders before making that decision. In the absence of that, SJ was not proper and it was going to be up to a jury to decide.

7. *Dillard v. City of Austin*, 837 F.3d 557 (5th Cir. 2016)

The Fifth Circuit affirmed SJ for the employer in this ADA case. The plaintiff had been injured in a car accident, such that he could not medically perform his job with the City any longer. Nevertheless, the City gave the plaintiff 14 months off work – more time off work than the FMLA and its ordinary policies required it to.

Once the plaintiff was given a release for sedentary work, the City searched for and found the plaintiff a job as an administrative assistant. Though he was not qualified to be an administrative assistant, the plaintiff accepted the job, and received training on how to do it.

7. *Dillard v. City of Austin*, 837 F.3d 557 (5th Cir. 2016) (*cont.*)

Nevertheless, after starting the job, the plaintiff regularly arrived late to work, left early, and was also caught sleeping on the job, playing computer games when he should have been working, and lying about his time. After five months, the City fired the plaintiff for poor performance and misconduct.

The plaintiff claimed the City failed to engage in the ADA-mandated interactive process by placing him in an administrative role he was unqualified for, and then failing to find him a job more like his pre-injury job as he received broader medical releases over time.

The Fifth Circuit disagreed, stating that the evidence conclusively demonstrated that: (1) the job offer was in good faith; (2) the plaintiff accepted it voluntarily; and (3) the plaintiff's claim was foreclosed because he mismanaged his new position and did not make an honest attempt to succeed in the new position.

8. *Pullen v. Caddo Parish Sch. Bd.*, 830 F.3d 205 (5th Cir. 2016)

The Fifth Circuit partially reversed SJ for the employer in a sexual harassment case. During one relevant period of her employment, the alleged harasser was the plaintiff's supervisor. The district court granted SJ for the employer as to that period based on the *Ellerth/Faragher* affirmative defense. The first element of that two part defense requires the employer to prove that it exercised reasonable care to to prevent and correct sexual harassment. The Court held there was a fact question on this element because:

- The plaintiff testified she had never seen the sexual harassment policy, was not aware it was posted on-line, and was not trained on the policy.

- Many coworkers of the plaintiff testified they had never seen the sexual harassment policy, was not aware it was posted on-line, and was not trained on the policy.

- The alleged harasser indicated that he was never directly trained about the employer's sexual harassment policy and never received a copy of it.

9. *Fairchild v. All Amer. Check Cashing, Inc.*, 815 F.3d 959 (5th Cir. 2016)

Affirmed judgment (after a bench trial) for the employer in an off-the-clock FLSA case. The employer's policy forbade working unauthorized overtime. The policy required one to accurately report all hours worked. Plaintiff was paid for all hours she reported. Yet, after being terminated, Plaintiff claimed she failed to report all overtime hours worked and sought payment for additional overtime.

The Fifth Circuit held that judgment was proper for the employer because the plaintiff failed to notify the employer she had worked overtime, and she additionally deliberately prevented the employer from acquiring knowledge of the overtime she worked by submitting false time reports (there was no proof the employer encouraged the submission of false time reports).

9. *Fairchild v. All Amer. Check Cashing, Inc.*, 815 F.3d 959 (5th Cir. 2016) (*cont.*)

In other words, there was no evidence that the employer actually knew, or should have known, that the plaintiff had worked unreported overtime. As such, the employer was not liable even if the plaintiff had worked overtime and not been paid for it.

The plaintiff claimed that the employer could have seen from her computer usage reports that she was working many more hours than she was reporting. The Fifth Circuit held that merely because the employer had access to such reports did not prove that it should have known that the plaintiff was working unauthorized overtime that she had not reported.

10. *Oilbuas v. Barclay*, 838 F.3d 442 (5th Cir. 2016)

The Fifth Circuit affirmed a jury verdict and more than $3.5 million judgment for the plaintiffs in a collective action FLSA case:

- The defendant relied on the Motor Carrier Act exemption as its defense.

- But, the Court held that given the employer's lack of any definitive documentary proof that the drivers crossed state lines as part of their job duties, or transported goods in the flow of interstate commerce, it was up to the jury to decide whether or not the drivers could reasonably have been expected to engage in interstate commerce in performing their job duties. The jury believed the drivers. Hence, the Motor Carrier Act exemption from overtime was properly rejected by the district court.

10. *Oilbuas v. Barclay*, 838 F.3d 442 (5th Cir. 2016) (*cont.*)

- The district court did not err in instructing the jury that it could determine damages based on an estimate of average hours worked per week, rather than filling out a verdict form proposed by defense counsel of over 400 pages that would have required a week-by-week determination of hours worked for all 108 plaintiffs.

- The Court did not err in making damages calculations by relying on post-trial declarations from the approximately 21 drivers who actually tried their cases, and from the other 80+ drivers whose cases were won on the basis of representative testimony from those 21.

BONUS ALERT!!!!!!

Wait, it's not over yet . . . .

11. *Pineda v. JTCH Apartments, LLC.*, 843 F.3d 1062 (5th Cir. 2016)

The Fifth Circuit joined the Sixth Circuit and the Seventh Circuit in holding that a prevailing plaintiff in a FLSA retaliation case may recover damages for emotional distress.

The district court had refused to give an instruction on emotional distress, believing it was not available in an FLSA retaliation case.

Because the Fifth Circuit held otherwise, the case was remanded to the district court for further proceedings on the issue of emotional distress.

2017 Teaser

Fisher v. Lufkin Industries, __ F.3d __, No. 15-40428, 2017 WL 562444 (5th Cir., Feb. 10, 2017):

Not the exact holding, but along the lines of:

Title VII's anti-retaliation provision protects a purveyor of porn at the worksite who pretty clearly lied about receiving an emergency call from his wife in order to abort the company's investigation into his side porno sales business.

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