THE TOP 12 FIFTH CIRCUIT EMPLOYMENT LAW CASES OF 2017

HBA L&E Section
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1. *Starnes v. Wallace*, 849 F.3d 627 (5th Cir. 2017)

- In late 2010, an employee named Estrada complained to Starnes, the Risk Manager, that the company, Daybreak Ventures, was paying her husband in violation of the FLSA. Starnes passed Estrada's complaint to the HR department and the President later told her he would resolve the situation.

- In subsequent negotiations with Estrada's husband, the President angrily said he believed that Starnes "was to blame" for the situation. The company later reclassified all the workers in the husband's job classification from salaried to hourly. In December 2011, the Company settled with Estrada's husband for $40,000.00. 10 days later, the company laid off five workers due to alleged financial difficulties, including Starnes and Estrada. Starnes was not replaced; rather, her job was eliminated.

- Starnes sued for FLSA retaliation, and the district court threw her case out on summary judgment, because of: (a) the so-called "manager's rule"; and (b) the 13+ month gap between Starnes protected activity and her termination. The Fifth Circuit reversed. First, it found that the "manager's rule" did not apply as a matter of law, because there was a fact question over whether FLSA compliance was part of Starnes' job when Estrada complained to her in late 2010. Second, it found that in considering the "big picture," the 13+ month time gap was not fatal to Starnes' claim, because:

  - (a) a reasonable jury could conclude that it was when the company settled the dispute with Estrada's husband for $40,000.00 – ten days before Starnes was terminated – that its retaliatory impulse was the strongest;

  - (b) the Company's President had heatedly blamed Starnes for the situation less than a month before her termination;

  - (c) of the five workers laid off, one already had a new job lined up when he was let go, and the other two were rehired shortly thereafter in different positions – leaving only Starnes and Estrada without jobs at all.

  - (d) there was some evidence that the alleged "financial difficulties" was a pretext, including the amounts paid for bonuses in 2011, and the company's partners' assurances as late as the fall of 2011 that there would be no need for layoffs.

2. *E.E.O.C. v. EmCare, Inc.*, 857 F.3d 678 (5th Cir. 2017)

- McKinney, a CEO of an EmCare division, allegedly repeatedly sexually harassed women at work. Trahan (a male) and others complained to EmCare about it, but nothing was done.

- On "Bring Your Child to Work Day," McKinney allegedly told an employee that "there is no way [her daughter] is 15 with breasts like that." The employee and two others, including Trahan, complained. Six weeks later all three of the employees who complained were fired. The EEOC sued, and all three prevailed at trial. EmCare appealed only as to Trahan, claiming that the decisionmaker who allegedly decided to fire him, the divisional COO, had no knowledge of any of Trahan's complaints about McKinney, so he could not have fired Trahan because of his complaints.

- The Fifth Circuit affirmed the judgment. It noted that McKinney and the divisional COO were executives in the same division; there was evidence McKinney knew about Trahan's complaints; and evidence that McKinney discussed Trahan's performance and termination with the divisional COO. The Fifth Circuit found that from all this evidence, a reasonable jury could have logically inferred that McKinney told the divisional COO about Trahan's complaints.

- Alternatively, there was substantial evidence that EmCare's HR VP knew about Trahan's complaints, and that she orchestrated and participated in the decision to fire him. Thus, even if the divisional COO did not know about Trahan's complaints, there was sufficient evidence that the HR VP did, and that she was also a decisionmaker, which would independently be enough to hold EmCare liable.

3. *Alkhawaldeh v. Dow Chem. Co.*, 851 F.3d 422 (5th Cir. 2017)

- In October 2009, Alkhawaldeh, a Muslim employee of Dow, was given a 1 rating (out of 5) and placed on a PIP. In November 2009, he reported alleged anti-Arab discrimination to HR. In April 2010, he filed an EEOC Charge. In July 2010, he was transferred to a new supervisor. On October 30, 2010, he was fired for alleged poor performance, insubordination, and general incompetence. He sued for retaliation under Title VII. He relied in part on the fact that the EEOC had issued a Letter of Determination ("LOD") that Dow had retaliated against him.

- The district court granted summary judgment for Dow, and the Fifth Circuit affirmed. It found that, unlike an EEOC investigative report, which a district court must consider, an EEOC LOD could be "freely ignored."

- It also concluded that the pre-November 2009 poor rating and PIP substantially undercut Alkhawaldeh's retaliation claim. In addition, the court found it compelling that Alkhawaldeh's performance was viewed as poor by two separate supervisors and a committee Dow convened to evaluate his performance. Finally, the Court emphasized the "high burden" of the "but for" causation standard in Title VII retaliation cases, and found that Alkhawaldeh had not met it.

4. *Caldwell v. KHOU-TV*, 850 F.3d 237 (5th Cir. 2017)

- In 1995, Caldwell began working as a video editor for KHOU-TV. He used crutches because of the effects of childhood bone cancer. Video editors are responsible for editing scripts and working in electronic digital recording ("EDR"). But, Caldwell's supervisors did not schedule him to work in EDR because they speculated that because of his disability it would put his health in jeopardy. In 2014, KHOU-TV was required by its parent company to eliminate two video editor jobs. It selected Caldwell as one of the two video editors to let go. Caldwell sued under the ADA (and FMLA). The district court threw his case out on summary judgment. The Fifth Circuit reversed, finding:

  - KHOU-TV had given different rationales for selecting Caldwell for the RIF over time, thus giving rise to an inference of pretext. KHOU-TV argued that the different rationales were articulated by non-decisionmakers, so therefore they did not give rise to an inference of pretext. The Fifth Circuit disagreed that made any difference.

  - KHOU-TV argued that one of the reasons it selected Caldwell for the RIF was because of his inexperience with EDR. But, Caldwell pointed out that it was KHOU-TV itself that precluded him from working in EDR, and that it did so because of its speculation that he could not work in EDR safely because of his disability – *i.e.*, his alleged inexperience with EDR was itself the product of KHOU-TV's disability discrimination. Thus, according to Caldwell, KHOU-TV's reliance on his inexperience in EDR to select him for the RIF tainted his termination with disability discrimination. The Fifth Circuit agreed with this point, reversed summary judgment, and remanded the case to the district court for a trial.

5 *Credeur v. Louisiana Through Office of Attorney General*, 860 F.3d 785 (5th Cir. 2017)

- Credeur was a litigation attorney for the state of Louisiana. Complications from a kidney transplant rendered her disabled. Credeur asked to work from home for several months while she recovered from a hospitalization. Defendant denied that request, but offered alternative accommodations, which Credeur rejected. Although Credeur did eventually return to work in the office without restrictions, she sued under the ADA, claiming that as a reasonable accommodation, she should have been allowed to work from home during the time that she asked to do so, and was refused. The district court granted summary judgment for the Defendant, and the Fifth Circuit affirmed.

- The Fifth Circuit noted that: (a) an element of an ADA claim is that the plaintiff has to be qualified for the job, meaning that they can perform the essential functions of the job, with or without a reasonable accommodation; and (b) the ADA's reasonable accommodation obligation never requires an employer to remove or eliminate an essential function of a job. Thus, if the ability to come to work regularly in the office was an essential function of a litigation attorney's job, then, by her own admission, Credeur was not qualified for the job, and could not make out an ADA claim.

- The Fifth Circuit found that, indeed, the ability to come to work regularly in the office was an essential function of a litigation attorney's job, and, in general, most jobs. The Court noted that the employer's judgment as to what a job's essential functions are is a highly relevant factor in determining whether a function is essential. It also found that the Defendant's policies and practices were consistent with its position that the ability to come to work regularly in the office was an essential function of a litigation attorney's job. Accordingly, the grant of summary judgment against Credeur's ADA claim was affirmed.

6. *Moss v. Harris Cty. Constable Precinct One*, 851 F.3d 413 (5th Cir. 2017)

Moss was a deputy constable. He went out for back surgery in November 2012. In January 2013, his doctor indicated that he could not return to work until June 2013. In March 2013, Moss sent a letter to his employer requesting to retire May 31, 2013. In response, in April 2013, his employer terminated Moss's employment because all his FMLA and other leave had expired. Moss sued under the ADA and his case was dismissed on summary judgment. He appealed, and the Fifth Circuit affirmed.

- The Court held that Moss was not qualified for his job *at the time of his termination* (the relevant time under the law) because he was medically unable to perform the job. The Court noted that in some cases, a short leave may be a required reasonable accommodation, but only if the short leave would permit the employee to recover so that he or she could return to work and perform the job's essential functions upon their return. Here, that did not apply, because Moss admitted that he did not intend to return to work – he had already given notice of his intent to retire effective May 31, 2013.

- The Fifth Circuit also brushed aside Moss's claim that the Defendant failed to engage in the interactive process. It noted that a such a claim is only viable when the employer's failure to engage in the interactive process results in the failure to reasonably accommodate an employee who could have been reasonably accommodated. Here, given Moss's medical situation and planned retirement before he was to be released to work, no reasonable accommodation was possible, so even if the Defendant failed to engage in the interactive process it was not liable.

7. *Patton v. Jacobs Eng'g Group, Inc.*, 874 F.3d 437 (5th Cir. 2017)

Patton had childhood onset fluency disorder, which caused him to stutter and have anxiety. Coworkers and even his supervisor relentlessly mocked him over his stuttering. Noise made his condition worse. His workplace was noisy, and he asked to be moved to a less noisy area, which he said would reduce his stuttering and anxiety. The Company did nothing, and the resulting stress from the harassment and the noise caused Patton to have a panic attack while driving, resulting in a car wreck that he never returned to work from. Instead, Patton sued Jacobs for failure to accommodate under the ADA. Patton also sued for a hostile environment. The district court dismissed his case on summary judgment, and the Fifth Circuit affirmed.

- As for Patton's failure to accommodate claim, the Court found that it was doomed as a matter of law because there was no evidence that Jacobs was on notice that Patton was requesting to be moved to a quieter area, or for any other accommodation, *because* of a disability. Nor was it obvious that he had a disability that made him sensitive to noise and required him to be moved. All Jacobs knew was that Patton was a stutterer who had anxiety. According to the Fifth Circuit that was not enough to demonstrate that Jacobs had knowledge that Patton was requesting an accommodation because of a disability, and thus his failure to accommodate claim failed as a matter of law.

- As for Patton's hostile environment claim, the Court found that the alleged harassment was severe or pervasive. But, the Court agreed the claim was properly dismissed because the district court determined that Patton failed to show that Jacobs did not take prompt, remedial action addressing the harassment, in that he unreasonably failed to follow Jacobs' handbook's instruction to report any such harassment to HR. Patton did not challenge the district court's determination on appeal, and thus he "forfeited his objection to this determination."

8. *Acker v. General Motors, L.L.C.*, 853 F.3d 784 (5th Cir. 2017)

- Acker has a disability. He was certified for intermittent FMLA leave. G.M. has a detailed policy on how employees are to report an unforeseen need to be absent from work. Specifically, the employee must notify G.M. at least 30 minutes before their shift is to start. Acker repeatedly violated this policy when taking FMLA intermittent leave, and was ultimately given discipline in the form of a two week unpaid suspension. He sued over the two week unpaid suspension under the FMLA and ADA and lost on summary judgment. The Fifth Circuit affirmed.

- As for Acker's FMLA interference claim, the revised regulations require an employee to follow their usual call in policies for requesting FMLA leave, and permit employers to deny FMLA leave, and discipline the employee, when they do not. The only exception is if the employee was unable to follow the employer's normal policies because of "unusual circumstances." Here, Acker violated G.M.'s usual call in policy for requesting intermittent FMLA leave, and did not prove that he was unable to do so because of any "unusual circumstances." Therefore, his FMLA interference claim failed as a matter of law.

- As for Acker's ADA reasonable accommodation claim, the Court held, contrary to Acker's argument, a request for FMLA leave is not automatically also a request for a reasonable accommodation under the ADA. Hence, Acker's request for FMLA intermittent leave did not, by itself, trigger any ADA obligations on G.M.'s behalf, and for this reason Acker's ADA claim was properly dismissed on summary judgment.

9. *Dewan v. M-I, L.L.C.*, 858 F.3d 331 (5th Cir. 2017)

Salaried Mud engineers brought a misclassification case under the FLSA. Mud engineers are not true "engineers" – they only need H.S. diplomas. The district court granted summary judgment for the employer on the administrative exemption defense. The Fifth Circuit reversed and remanded for trial.

- The Court found a fact question over whether the Mud engineers' primary duties were directly related to management or general business operations of their employer or its customers. The Court seemed to at least implicitly endorse the much-discussed "administrative/production dichotomy," and said that the work the engineers did seemed "more related to producing the commodities than the administering of M-I's business."

- The Court also found a fact question over whether their primary duty included the exercise of discretion and independent judgment in matters of significance. Specifically, based on the evidence, a reasonable jury could conclude that the Mud engineers did not satisfy this standard, but instead merely applied well-established techniques, procedures or specific standards described in manuals or other sources."

10. *Hills v. Entergy Operations, Inc.*, 866 F.3d 610 (5th Cir. 2017)

- The salaried plaintiffs brought a misclassification case under the FLSA. The district court held on summary judgment that if they were misclassified, their back-pay damages would be calculated using the Fluctuating Workweek ("FWW") method, rather than the fixed method. The FWW method is far more advantageous to employers. The Fifth Circuit reversed and remanded for trial, holding:

  - That the plaintiffs themselves contended that their schedules were supposed to be 36 hours every other week, and 48 hours every other week, did not constitute the sort of agreed fluctuation in work hours necessary to trigger the FWW method. Rather, FWW only applies when the employee "clearly understands" their salary is intended to compensate any *unlimited* amount of hours worked in any given work week even though those hours may vary each week.

  - That the plaintiffs complained about having to work "extra" hours mere days after being hired arguably supported opposing inferences about their understanding of what work hours their salary was intended to cover, thus giving rise to a fact question for the jury to decide.

  - The mere fact that the plaintiffs admitted that they knew they would not receive overtime pay when they were hired did not justify imposing the FWW method, because it does not imply or prove that they "clearly understood" their salary to compensate *unlimited* hours each week.

11. *Bridges v. Empire Scaffold, L.L.C.*, 875 F.3d 222 (5th Cir. 2017)

The employer required employees to catch a company-provided bus to the work site and then wait around for 30 minutes to an hour or more until 7 am to begin work. The employees sued, claiming that the time they spent waiting around at the site each day 30 minutes to an hour or more before they could begin work was compensable, yet they were not paid for the time.

The district court granted SJ for the employer, and the Fifth Circuit affirmed. The Court held that under the Portal-to-Portal Act, the critical question was whether the pre-shift waiting time was "integral and indispensable" to the workers' principal activities – meaning the productive work they were employed to perform. Here, the work the plaintiffs were employed to perform was erecting and dismantling scaffolding. The pre-shift waiting time was neither tied to nor necessary to that work. As such, the pre-shift waiting time was not compensable under the Portal-to-Portal Act.

In reaching its holding, the Court rejected the plaintiff's argument that the governing test was whether the waiting time was predominantly for the employer's benefit. The Court held that test did not govern in Portal-to-Portal Act cases.

12. *Heath v. Bd. of Supervisors for Southern Univ.*, 850 F.3d 731 (5th Cir. 2017)

- The continuing violations theory holds that in an hostile environment claim, as long as the plaintiff files their EEOC Charge while at least one act which comprises the alleged hostile environment is still timely (*i.e.*, within 300 days of that act in Texas, or 180 days in a non-deferral state), the entire time period of the hostile environment may be considered by a court in determining whether a hostile environment existed.

- But what if the plaintiff admits they knew that they were being subjected to an illegal hostile environment and waited more than 300 days (or 180 days in a non-deferral state) from knowing that to file an EEOC Charge? Does that defeat application of the continuing violations theory? The district court said it did, and dismissed the plaintiff's hostile environment claim on that basis.

- The Fifth Circuit reversed, holding that post-*Morgan* (a U.S. Supreme Court case from 2002), the plaintiff's awareness that their rights were being violated was not a consideration in determining whether they could invoke the continuing violation doctrine.

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