THE TOP 12 FIFTH CIRCUIT EMPLOYMENT LAW CASES OF 2018

Houston Bar Association – L&E Section
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1. *Gardner v. CLC of Pascagoula, LLC*, 894 F.3d 654 (5th Cir. 2018)

- This is a Title VII sexual harassment and retaliation case.

- For years, a demented patient in an assisted living facility repeatedly aggressively sexually harassed and offensively touched the plaintiff, who was a Nursing Assistant.

- The plaintiff complained, and was told by the employer's Administrator, to "put [her] big girl panties on and go back to work."

- The patient eventually assaulted and groped the plaintiff in a final incident, causing her injuries. The plaintiff refused to care for the patient after that, and asked to be reassigned. Her request was denied and she was fired for alleged "insubordination" (and also for, among things, allegedly swearing at the patient, making a "racist type" statement, and attacking the patient (all of which she denied)).

- The plaintiff sued for sexual harassment and retaliation under Title VII, and lost on summary judgment in the trial court. On appeal, the Fifth Circuit reversed the trial court's ruling on both claims.

1. *Gardner v. CLC of Pascagoula, LLC*, 894 F.3d 654 (5th Cir. 2018)

- The Fifth Circuit noted that while sexual harassment cases arising out of assisted living type of environments require plaintiffs to come forward with especially strong proof of "severe or pervasive" harassment, the plaintiff met that standard here, at least for summary judgment purposes.

- As for attributing the patients' harassment to the employer, the Fifth Circuit found that since the employer, "did not undertake measures to try to remedy the harassment," it could most certainly be liable for it.

- As to the retaliation claim, the Fifth Circuit found that there was potential direct evidence of retaliation. Specifically, even the employer admitted that a big part of the reason the plaintiff was terminated was her alleged "insubordination" in refusing to care for the patient after the final assaultive incident with him.

- The Court held that particular proof could be direct evidence of retaliation because "there is a body of caselaw addressing when a refusal to engage in work that the plaintiff believes is subjecting her to unlawful conduct qualifies as protected activity." If, under that case law, the plaintiff's refusal was protected activity, and the employer admittedly fired her for it, then that constitutes "direct evidence" of retaliation under Title VII.

2. *Davenport v. Edward D. Jones & Co., L.P.*, 891 F.3d 162 (5th Cir. 2018)

- This is a Title VII *quid pro quo* sexual harassment claim.

- The plaintiff was hired in October 2014 as an Administrator. Her boss gave her a $400 bonus in March 2015. In September 2015, her boss allegedly told her that she, "should date" a wealthy prospective client in exchange for "big bonuses". The plaintiff declined to do so. In October 2015, the boss approved a 4% raise for the plaintiff, but no bonus. A month later, the boss told the the plaintiff, in front of the wealthy prospective client that, "maybe we can get some nudie pictures of you . . . That might entice him". The plaintiff was so offended she complained and never returned to work.

- The plaintiff sued, claiming that she did not receive "big bonuses" because she refused her boss's suggestion to date , *i.e*., engage in sexual relations, with the wealthy prospective client. The district court granted summary judgment against the plaintiff, and the Fifth Circuit affirmed.

- The Fifth Circuit agreed with the plaintiff that, if she was denied a bonus because she refused sexual relations with the prospective client, then she would have a viable Title VII *quid pro quo* sexual harassment claim.

2. *Davenport v. Edward D. Jones & Co., L.P.*, 891 F.3d 162 (5th Cir. 2018)

- However, a two-judge majority found that the plaintiff produced no evidence that her boss actually did deny a bonus because she refused sexual relations with the prospective client – she produced no evidence of the company‘s bonus structure; that she was scheduled to receive a bonus in October 2015; or that her boss recommended for or against her receiving a bonus at that time – or that he even had the power to decide bonuses at that time.

- One judge dissented, arguing that the boss‘s alleged statement that she, “should date” a wealthy prospective client in exchange for “big bonuses,” – followed by her refusal and receipt of no bonus – was sufficient to survive summary judgment.

3. *Herster v. Bd. of Supervisors of Louisiana State Univ.*, 887 F.3d 177 (5th Cir. 2018)

- This is a Title VII gender discrimination case.

- The plaintiff, Herster, was a female part-time instructor at LSU. LSU had hired her husband to be a professor at its law school, and then found her a job as a part-time instructor in its art school.

- Herster later complained that she was paid less than male instructors because of her gender. She complained to her supervisor, who allegedly said, "I thought you were a trailing spouse. I thought you were going to have children and be happy, like Jackie Parker."

- The supervisor also allegedly called Herster a "princess," and repeatedly told her that she should just have babies and be happy.

- Herster sued, claiming that her supervisor's alleged comments constituted "direct evidence" of gender discrimination in her pay. The trial court threw that claim out on summary judgment.

3. *Herster v. Bd. of Supervisors of Louisiana State Univ.*, 887 F.3d 177 (5th Cir. 2018)

- Herster filed an appeal, and the Fifth Circuit affirmed the trial court's ruling.

- The Fifth Circuit recited the rule that direct evidence is evidence that proves discrimination on its face. The court found that the supervisor's alleged comments did not meet this requirement, because they required an "inferential leap . . . to prove that Herster was paid less because of her gender." As such, the alleged comments did not constitute "direct evidence" of gender discrimination. Rather, they were mere "stray remarks."

- The court also found that Herster's proof did not circumstantially show gender discrimination in her pay. Thus, the court affirmed the district court's decision to throw out Herster's pay discrimination claim on summary judgment.

4. *DeVoss v. Southwest Airlines Co.*, 903 F.3d 487 (5th Cir. 2018)

- This is a FMLA retaliation case.

- DeVoss, an airline flight attendant called in late to work and invoked a commuter policy to justify her tardiness. After she was told that the commuter policy did not apply, and that she would be assessed attendance points for being late, DeVoss stated that she was sick, and missed three days of work. Southwest investigated (including by reviewing the recording of the at-issue call), concluded that DeVoss had lied about being sick, and fired her.

- DeVoss sued, claiming that the real reason she was fired was because she had allegedly taken FMLA protected leave a month before she had been terminated. The district court threw DeVoss's case out on summary judgment. DeVoss filed an appeal.

4. *DeVoss v. Southwest Airlines Co.*, 903 F.3d 487 (5th Cir. 2018)

- The Fifth Circuit affirmed the district court's ruling. The court observed that what mattered is not whether DeVoss had actually been dishonest or not, but whether Southwest believed in good faith that she had been dishonest, and terminated her employment based on that belief.

- In reviewing the evidence, and time line of events, the court found that there was no evidence to suggest that Southwest did not truly believe that DeVoss had lied about being sick, and that it had fired her based on that good faith belief. As such, whether or not DeVoss had actually been dishonest, the district court was correct to grant summary judgment in Southwest's favor.

5. *D'Onofrio v. Vacation Publications Inc.*, 888 F.3d 197 (5th Cir. 2018)

- This is a FMLA interference case. It also involved numerous counterclaims against the plaintiff, by the employer.

- The plaintiff wanted to take FMLA leave. She was given the option of taking unpaid FMLA leave, or to continue to service her existing customer accounts remotely while she was on leave in order to continue to earn commissions on those accounts. She chose the latter option.

- Plaintiff never returned from FMLA leave. She claimed she was fired. She then sued the employer, claiming it interfered with her FMLA rights by requiring her to perform work while on leave. The district court dismissed the claim on summary judgment, and the Fifth Circuit affirmed, holding that, "[g]iving employees the option to work while on leave does not constitute interference with FMLA rights so long as working while on leave is not a condition of continued employment."

- In this case, the employer counterclaimed under Texas law against the plaintiff for breach of her noncompete, trade secret misappropriation, tortious interference with prospective business relationships, tortious interference with existing business relationships, civil conspiracy, breach of fiduciary duty, and fraud. The district court granted summary judgment for the employer on all these claims. The Fifth Circuit found numerous fact issues, and reversed the district court's rulings on every one of the claims.

6. *Stroy v. Gibson*, 896 F.3d 693 (5th Cir. 2018)

- The plaintiff, Stroy, was an African-American doctor for the VA. Dr. Stroy believed that the VA implemented a peer review of his patient care decisions because of his race, so he filed a race discrimination suit against the VA under Title VII. The VA moved to have Dr. Stroy's case thrown out on summary judgment, and the district court granted the motion. Dr. Stroy then filed an appeal.

- The Fifth Circuit affirmed the district court decision. It noted that only "adverse employment actions" may be grounds to sue under Title VII. "Adverse employment actions" are "ultimate employment decisions . . . such as hiring, firing, demoting, promoting, granting leave, and compensating."

- Under this standard, the VA's implementation of a peer review was not an "adverse employment action," as it did not adversely affect Dr. Stroy's job responsibilities, pay, or privileges. As such, Dr. Stroy could not sue for discrimination under Title VII based on the VA's decision to implement a peer review of his patient care decisions.

- This cases illustrates the point that while employees may experience a wide array of annoying, irritating, and upsetting things in the workplace, only employer-initiated "adverse employment actions" may be grounds for a discrimination claim under Title VII.

7. *Robertson-King v. Louisiana Workforce Comm'n*, 904 F.3d 377 (5th Cir. 2018)

- This is a Title VII race discrimination case.

- The plaintiff, an African-American, applied for a promotion to supervisor, but it was given to a white coworker with less tenure instead. The plaintiff sued for race discrimination under Title VII. The district court dismissed her case on summary judgment. She appealed.

- The Fifth Circuit affirmed the district court's ruling. The court noted that one way for the plaintiff to prevail in a failure to promote case is to demonstrate that she is "*clearly* better qualified" than the successful candidate.

7. *Robertson-King v. Louisiana Workforce Comm'n*, 904 F.3d 377 (5th Cir. 2018)

- The plaintiff did have longer tenure than the white candidate, had supervised more subordinates than the white candidate, and had a slightly better production record. But, the white candidate had a special certification that the plaintiff did not, had achieved the rank of Master Counselor more quickly than the plaintiff had, and also had a good work record overall.

- As such, it was a close call as to who was actually better qualified, and the evidence did not show that the plaintiff was "clearly better qualified" than the successful white candidate. Accordingly, the grant of summary judgment was affirmed.

- This case shows that if the case simply boils down to the employer's business judgment – with no other evidence of discrimination or retaliation – the plaintiff is unlikely to survive summary judgment.

8. *Mitchell v. Mills*, 895 F.3d 365 (5th Cir. 2018)

- This is a Section 1983 race discrimination in pay case.

- The African-American plaintiff was a "City Worker" in the City of Naples, Texas's Public Works Department. He sued the present and former mayors of the city, claiming he was paid less than two white city employees because of his race. The mayors moved for summary judgment, based on qualified immunity. The district court denied the motion. The mayors appealed.

- The Fifth Circuit reversed the district court and rendered judgment for the mayors. The court held that the plaintiff failed to make out a *prima facie* case of race discrimination in pay, because the two white employees he compared himself to were not paid more under "nearly identical" circumstances. Specifically, those two employees: (1) had different experiential backgrounds, skills, job duties, and responsibilities; and (2) worked in a different department.

- As such, the district court erred in not granting the mayors' motion for summary judgment.

9. *Carley v. Crest Pumping Technologies*, 890 F.3d 575 (5th Cir. 2018)

- This is a FLSA case.

- The two plaintiffs worked as "cementers." They drove Ford F-350 trucks for their jobs. The evidence showed those trucks' Gross Vehicle Weight Rating ("GVWR") was 11,500 pounds. GVWR is not actual weight, but rather, "the value specified by the manufacturer as the loaded weight of a single motor vehicle."

- The evidence also showed that the Ford F-350 trucks actual "empty" or "gross weight" – not GVWR – was 7,600 and 9,600 pounds respectively.

- The Motor Carrier Act exemption to the FLSA has an exception (referred to as the "small vehicle exception"), providing that the Motor Carrier Act exemption does not apply to certain employees who perform duties on motor vehicles "weighing 10,000 pounds or less." The trial court: (1) placed the burden on the employer to prove the exception did not apply; and (2) refused to use GVWR in deciding whether the exception applied. A jury found for the plaintiffs. The employer appealed.

9. *Carley v. Crest Pumping Technologies*, 890 F.3d 575 (5th Cir. 2018)

- The Fifth Circuit reversed the jury's verdict, and rendered judgment for the employer.

- The court held that the employee-plaintiff bears the burden of proving that the exception to the Motor Carrier Act exemption applies.

- The court further held that in determining whether employees performed duties on motor vehicles "weighing 10,000 pounds or less" – and thus were potentially within the exception to the Motor Carrier Act exemption – "weight" is measured by GVWR.

- Because the only evidence at trial concerning the at-issue trucks' GVWR was that it was 11,500 pounds – above the 10,000 pound threshold for the exception to the Motor Carrier Act exemption to apply – the plaintiffs had no evidence to support the jury's verdict, so it had to be reversed, and judgment rendered for the employer.

10. *Dacar v. Saybolt, L.P.*, 907 F.3d 215 (5th Cir. 2018)

- This is an FLSA case.

- The employer paid the plaintiffs using the Fluctuating Workweek ("FWW") method to calculate overtime. The FWW regulations (29 C.F.R. § 778.114) require the employer to pay a "fixed salary." Here, the employer paid a salary, but also paid the plaintiffs incentive payments for working less desirable hours during the workweek. The plaintiffs sued, claiming the incentive payments invalidated the FWW method.

- The district court and Fifth Circuit agreed that the incentive payments invalidated the FWW method, even though the incentive payments were included by the employer in the employees' "regular rate" before calculating their overtime under the FWW method.

- The district court and Fifth Circuit agreed that there was no evidence that the employer's violation was "willful" (which would have extended the statute of limitations from 2 to 3 years). The fact that two lawyers expressed that the the law was not entirely clear that the employer's FWW method was lawful given the incentive payments was insufficient to prove willfulness.

10. *Dacar v. Saybolt, L.P.*, 907 F.3d 215 (5th Cir. 2018)

- To calculate damages, the district court used a: (a) hypothetical 40 hour workweek to determine the regular rate; and (b) a multiplier of one and one-half of the regular rate. That resulted in an award to the plaintiffs of more than $3 million, plus an equal amount of liquidated damages.

- The Fifth Circuit reversed the district court's damages calculation, and remanded for recalculation. It held that using a hypothetical 40 hour workweek to determine the regular rate – rather than all hours worked – to determine the regular rate was erroneous.

- On the other hand, it did agree that using a multiplier of one and one-half of the regular rate (not just half the regular rate) was proper, because the employer failed to comply with the FWW regulations by not paying a "fixed salary."

10. *Dacar v. Saybolt, L.P.*, 907 F.3d 215 (5th Cir. 2018)

- The Fifth Circuit agreed with the district court that the imposition of liquidated damages was appropriate.

- The Fifth Circuit also noted that the employer would get an offset for the overtime it already paid using the FWW method.

- Judge Jones dissented in part, arguing that the majority's ruling that it was proper to use a multiplier of one and one-half of the regular rate to calculate damages resulted in a windfall to the plaintiffs, and inappropriately punished the employer.

11. *Gurule v. Land Guardian, Inc., L.P.*, ___ F.3d ___ (5th Cir. 2018)

- This is an FLSA case decided December 27, 2018.
- The plaintiff rejected a Rule 68 offer of judgment, then went to trial and won less than the amount that had been offered.
- The trial court – relying heavily on the fact that the plaintiff won less than she had rejected – the district court declined to award her counsel the $129,565 he sought for all his time in the case, and instead awarded him only $25,089.30 in fees – a dramatic reduction from the lodestar.
- The Fifth Circuit affirmed, and held that in setting a reasonable attorney's fee under a fee-shifting statute like the FLSA, a court should consider the prevailing party's rejection of a Rule 68 offer that was more favorable than the judgment obtained.

12. *GE Betz v. Moffitt-Johnston*, 885 F.3d 318 (5th Cir. 2018)

- This is a case in which GE claimed its ex-employee breached a 1-year customer non-solicitation covenant and misappropriation of trade secrets. The district court granted summary judgment for the ex-employee against both claims, and the Fifth Circuit affirmed.

- The court found no evidence of a breach of the customer non-solicitation covenant even though:

  - The ex-employee downloaded 27,000 GE files with client information in many of them to an external drive very shortly before she resigned to work for a direct competitor.

  - The ex-employee was seen talking to GE customers she knew at an event right after she resigned and went to the new employer.

  - The ex-employee's subordinate at her new employer solicited GE customers who had worked with the ex-employee at GE (which GE argued was a subterfuge by the ex-employee to conceal her violations of the non-solicitation covenant).

  - Many of GE's customers began doing business with the ex-employee's new employer shortly after she went to work for the new employer.

12. *GE Betz v. Moffitt-Johnston*, 885 F.3d 318 (5th Cir. 2018)

- The court found no evidence of misappropriation of trade secrets – because there was no evidence the ex-employee ever "used" any supposed trade secrets – even though she tendered a draft business plan to her new potential employer at the time of her interview that said "Get Market Share," and had in fact improperly acquired trade secrets from GE on the eve of her departure to her new employer.

- Texas Business & Commerce Code § 15.51 gives a court discretion to award an employee fees if they prove that the employer knew, at the time the agreement was executed, that the agreement did not contain reasonable limitations as to time, geographical area, and scope of activity to be restrained, and the employer sought to enforce the agreement to a greater extent than necessary to protect its goodwill or business interests.

- The court reversed the district court's grant of attorneys' fees in the ex-employees' favor under Section 15.51 because she failed to prove that *at the time* GE executed the customer non-solicitation agreement it knew that its limitations as to solicitations of "Customers" and "Prospective Customers" were unreasonable and greater than necessary to protect its goodwill or other business interests.

  - On this point, the Court declined to rule on whether the inquiry required by Section 15.51 is a purely subjective one (that the employer actually knew the restraints were unreasonable), or whether that standard can be satisfied by a showing that objectively, a reasonable person would know, based on Texas law, that the restraints were unreasonable.

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13. *Cristain v. Hunter Building & Mfg., L.P.*, 908 F.3d 962 (5th Cir. 2018)

- This is a workers' compensation retaliation claim under Section 451.001 of the Texas Labor Code.

- The district court granted a JMOL against the claim.

- The Fifth Circuit reversed the JMOL, finding that there was sufficient evidence to make out a material question of fact for the jury to decide as to whether the plaintiff was terminated because of his workers' compensation claim.

13. *Cristain v. Hunter Building & Mfg., L.P.*, 908 F.3d 962 (5th Cir. 2018)

The court relied on the following evidence:

- The plaintiff was fired 15 days after his injury, and 11 days after his employer's HS&E Manager filed workers' compensation documentation – "stark temporal proximity."

- Immediately after the plaintiff's injury, the HS&E manager began "odd and suffocating behavior," such as insisting on driving the plaintiff to and from work and the doctor, and showing up at his house on a Sunday to "check on him."

- The HS&E manager insisted on describing the plaintiff's injury as his "supposed injury"; his restrictions as "self-imposed"; and his physical limitations from the injury as "perceived restrictions." This was evidence of a negative attitude towards the plaintiff's injured condition.

- The HS&E manager fired the plaintiff without following the employer's normal progressive disciplinary policy, and it was hotly contested as to whether the plaintiff had cussed and yelled at him, which might have justified immediate termination.

14. *Nall v. BNSF Railway Co.*, ___ F.3d ___ (5th Cir. 2018)

- This is an ADA "direct threat" case decided on December 27, 2018.
- The plaintiff, a "trainman," had Parkinson's disease. For over a year, he worked safely with the disease. Then, a coworker expressed concern about his ability to work safely because of his disease.
- In response, BNSF placed Nall on a LOA and required him to obtain a release from its medical department to return to work.
- BNSF's medical department requested a report and evaluations from Nall's neurologist, a neuropsychologist, and a physical therapist – all of whom concluded Nall could do his job's essential functions safely.

14. *Nall v. BNSF Railway Co.*, ___ F.3d ___ (5th Cir. 2018)

- BNSF nevertheless refused to return Nall to work. Instead, it added additional alleged – and disputed – duties to his job description, and required a new neurologist to confirm that Nall could perform these duties safely – which he did.

- BNSF still refused to return Nall to work. Instead, it required Nall to perform a "field test," during which he successfully performed all required tasks. Nevertheless, BNSF claimed that Nall violated two of its "eight deadly decisions" during the field test – something Nall vigorously disputed, and which was not documented in the contemporaneous report of the field test – and refused to return him to work on that basis.

- Nall alleged that BNSF employees had predetermined the outcome, and had made comments proving that, such as that "he was never coming back to work," the Company was only asking for updated medical paperwork to "be nice," and that "people with Parkinson's don't get better."

14. *Nall v. BNSF Railway Co.*, ___ F.3d ___ (5th Cir. 2018)

- Nall filed an EEOC Charge, and the EEOC found that BNSF had violated the ADA.

- Nall sued, and the district court granted SJ for BNSF on its "direct threat defense."

- The Fifth Circuit reversed, in a 2-1 decision, finding there was a fact issue on the objective reasonableness of BNSF's actions. Specifically, it held that, "[t]he numerous medical reports that cleared Nall to work, the comments made by BNSF employees, and the fact dispute on the "safety exceptions" during Nall's first field test—which BNSF cited as the basis for refusing to reinstate him—are sufficient to create a material fact issue on the question of whether BNSF's evaluation procedures were manipulated midstream in order to produce a certain outcome."

14. *Nall v. BNSF Railway Co.*, ___ F.3d ___ (5th Cir. 2018)

- Judge Elrod wrote the opinion. Judge Costa concurred, and made an observation about the use (or misuse) of the *McDonnell Douglas* analysis in ADA cases like this one.

- Judge Ho dissented. He would have affirmed the district court's grant of summary judgment for BNSF, based on his conclusion that: (1) despite four different doctors concluding that Nall could perform the essential functions of his job safely, some comments about Nall they made nevertheless justified BNSF's decision to require Nall to submit to a field test; and (2) Nall flunked the field test by violating two of its "eight deadly decisions" and Nall's own testimony to the contrary was not sufficient to thwart summary judgment.

15. *Minarsky v. Susquehanna Cty.*, 859 F.3d 303(3rd Cir. 2018)

- This is a Title VII sexual harassment case.

- Minarsky's boss sexually harassed her for years, but she never reported it, allegedly because: (a) he told her not to trust the individuals to whom the county's anti-harassment policy required her to report harassment; (b) she knew he had been reprimanded before for sexually harassing conduct, yet he continued to sexually harass her and other women anyway; and (c) he implied she could lose her job if she reported it.

- Eventually, the county became fully aware of the boss's widespread sexual harassment, and it promptly fired him.

15. *Minarsky v. Susquehanna Cty.*, 859 F.3d 303(3rd Cir. 2018)

- Nevertheless, Minarsky sued the country for sexual harassment. The district court threw her case out on summary judgment, based on the *Ellerth-Faragher* defense. The Third Circuit reversed.

- As to the first element of the *Ellerth-Faragher* defense, while the county had a written anti-harassment policy that Minarky was aware of, there was still a fact issue over whether the county "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," because a reasonable jury could have concluded that the county's failure to react more aggressively and proactively to the prior sexual harassment complaints against the boss showed that its policy was not "effective."

15. *Minarsky v. Susquehanna Cty.*, 859 F.3d 303(3rd Cir. 2018)

- As to the second element of the *Ellerth-Faragher* defense, there was a fact question over whether Minarsky's failure to report the harassment for years was "unreasonable," given:

  - She worked alone and away from others with the harassing boss.
  - When she tried to assert herself in the workplace, the boss became "nasty."
  - Her daughter had cancer, so she needed her job, and feared she would be fired if she reported the harassment.
  - Her fear of being fired was not unreasonable as a matter of law, because the boss allegedly stoked those fears by telling her not to trust the individuals she was supposed to report his harassment to, and by reminding her she could lose her job.

15. *Minarsky v. Susquehanna Cty.*, 859 F.3d 303(3rd Cir. 2018)

- Minarsky knew the county had known of some of the boss's sexually harassing conduct, and had only "slapped him on the wrist."

- The pernicious nature of the repeated harassment was relevant to show the reasonableness of Minarsky's not having previously reported the harassment.

*This opinion is a stark departure from numerous other similar fact patterns in which summary judgment was granted and affirmed on appeal. The Court included a lengthy footnote about the "me too" movement that may explain its decision. *See* fn. 12.

**Is this a harbinger of rulings to come in such cases? Perhaps 2019 will tell. We will be back this time next year to let you know.

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