THE TOP 10 FIFTH CIRCUIT EMPLOYMENT LAW CASES OF 2020

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1. *Clark v. Champion Nat'l Sec., Inc.*, 952 F.3d 570 (5th Cir. 2020)

- Clark, a Personnel Manager, was a Type II diabetic. He asked for two accommodations for his diabetes, which Champion granted.

- Champion fired Clark after he was caught sleeping on the job. Before he was fired, Clark told Champion that he was not sleeping, but rather had passed out from diabetes related low blood sugar. Champion fired him anyway. Clark sued under the ADA and lost on summary judgment. He appealed.

- The Fifth Circuit affirmed on the ground that Clark was not a "qualified individual" at the time the Company decided to terminate him, because he was not awake – an essential function of his job.

- The Fifth Circuit also affirmed summary judgment on Clark's other claims, for disability-based harassment, failure to accommodate, and retaliation.

2. *Lyons v. Katy Indep. School Dist.*, 964 F.3d 298 (5th Cir. 2020)

- Lyons, a H.S. coach of multiple sports, had lap-band surgery and shortly thereafter was reassigned to be the in-school suspension teacher. She filed a grievance claiming disability discrimination, and a week later she was removed as a basketball coach.

- Lyons sued for "regarded as" discrimination and retaliation under the ADA. She lost on summary judgment. She appealed.

- The Fifth Circuit affirmed. Her ADA "regarded as" case failed because the lap band surgery was a "transitory and minor" impairment lasting six months or less, which cannot support a "regarded as" claim under the statutory language of the ADA.

- Her retaliation claim failed because she presented no proof of pretext – the school claimed it removed her from coaching basketball because it thought she did not like coaching basketball, and Lyons herself admitted in her deposition that is what they thought.

3. *Horvath v. City of Leander*, 946 F.3d 787 (5th Cir. 2020)

- The City mandated that certain personnel receive a vaccine. A Baptist firefighter sought an exemption based on religious grounds. The city gave him two options: (a) transfer to a different position with the same pay and benefits and did not require a vaccine; or (b) remain in his same position and wear a respirator at all times and submit to testing for possible diseases.

- Horvath rejected both proposals and made a counter-proposal, which the City rejected. Horvath did not back down, and was fired. He sued for failure to make a reasonable accommodation to his religious objection, and for retaliation for seeking a religious accommodation. He lost on summary judgment, and appealed.

- The Fifth Circuit affirmed. It found that under circuit precedent the transfer offer was a proposed reasonable accommodation as a matter of law, even if – as Horvath had alleged – it would have resulted in a new schedule that would have prevented Horvath from earning money from a second job.

- The Fifth Circuit found no retaliation because it was undisputed that Horvath was not terminated for asking for a religious accommodation, but rather because he refused to comply with the City's order to select one of the two lawful proposed accommodations it offered him – *i.e.*, insubordination.

4. *Brown v. Wal-Mart Stores East, L.P.*, 969 F.3d 571 (5th Cir. 2020)

- Brown, an assistant store manager, complained to Wal-Mart's ethics hotline that her store manager, Aurelio Quinn, was soliciting sexual favors from employees in exchange for money and employment-related favors. Seven weeks later, Brown was fired by the Asset Protection Manager ("APM") for allegedly violating two company policies.

- Three days after firing Brown, Wal-Mart found the allegations against Quinn "unsubstantiated." But Quinn was later fired for "gross sexual misconduct" based on the report of another employee.

- Brown sued for retaliation. She lost on summary judgment. She appealed. She relied on the "cat's paw" doctrine. The Fifth Circuit affirmed primarily because: (a) the APM credibly testified that he alone made the decision to terminate Brown and that Quinn did not participate in or influence the decision; and (b) Brown admitted to the key facts that the APM relied on in making his decision.

- There was evidence that Quinn had tried, but failed, to get other employees to lie to the APM about Brown's conduct, to make it look worse than it really was. The Fifth Circuit said "this evidence is deeply disturbing," but that since those efforts failed, they did not show that summary judgment was improper.

- During the at-issue incident that led to Brown's termination, Quinn had engaged in somewhat similar conduct as Brown, and was not fired for it. But the differences between what Quinn did, and what Brown did, were too great to justify an inference of pretext or to prove "but for" causation. Thus, summary judgment was proper.

5. *Simmons v. UBS Financial Servs., Inc.*, 972 F.3d 664 (5th Cir. 2020)

- Simmon's employer, Prelle Financial, sold life insurance products to clients of UBS.
- Simmons daughter worked for UBS. She filed a charge of pregnancy discrimination against UBS and ultimately resigned and settled.
- Shortly thereafter, UBS forbade Simmons from doing business with its clients, which effectively ended his employment at Prelle Financial. Simmons sued UBS for third-party retaliation under *Thompson v. N. Am. Stainless* (2011). His case was dismissed under Rule 12(b)(6). He appealed.
- The Fifth Circuit affirmed, holding that *Thompson* does not authorize a third-party retaliation claim against an entity that did not employ the plaintiff.
- Interestingly, Simmons himself had once worked for UBS. In footnote 18, the Fifth Circuit noted that if he invoked *Robinson v. Shell Oil Co.*, and combined it with *Thompson*, then he may have had a cognizable claim. But, Simmons never made that argument, so it was waived and the court did not consider it.

6. *Badgerow v. REJ Properties, Inc.*, 974 F.3d 610 (5th Cir. 2020)

- Badgerow complained to a compliance officer ("CO") that she "was not sure if she was not treated fairly because she was not family or because she is a woman." The CO reported that to Badgerow's boss, and told him he should consider consulting an attorney. Instead, that very same day, her boss fired her, allegedly because of complaints from her coworkers.

- Badgerow sued for pay discrimination, sexual harassment, and retaliation. She lost on summary judgment and appealed. The Fifth Circuit affirmed as to her pay discrimination and sexual harassment claims, but reversed as to her retaliation claim.

- As to the retaliation claim, the Fifth Circuit found that, contrary to the district court's findings: (a) Badgerow's complaint to the CO was "protected activity"; (b) temporal proximity established a *prima facie* case of causation; and (c) there was sufficient evidence of pretext, given that: (i) Badgerow's boss admittedly asked her right before firing her, "[d]o I have to worry about you suing me?"; and (ii) Badgerow's coworkers had been complaining about her for months and yet her boss seemed determined to keep her until the day he learned about her protected complaint of sex discrimination.

7. *Novick v. Shipcom Wireless, Inc.*, 946 F.3d 735 (5th Cir. 2020)

- The plaintiffs sued under the FLSA, claiming they had been misclassified as "exempt." They won at trial. The employer appealed on two grounds.

- First, the employer argued that the trial court abused its discretion by not allowing it to open and close arguments, since it bore the burden of proof on the exemption issue. The Fifth Circuit disagreed.

- Second, the employer argued that the trial court abused its discretion in admitting evidence that it had done an internal audit to determine if employees were properly classified as exempt under the FLSA, and decided to reclassify the very position that three of the plaintiffs occupied from exempt to non-exempt (and pay two of them back-pay). Again, the Fifth Circuit disagreed.

- Ultimately, the Fifth Circuit affirmed the judgment in the plaintiffs' favor in all respects.

8. *Escribano v. Travis County, Texas*, 947 F.3d 265 (5th Cir. 2020)

- Sheriff's office detectives sued for overtime under the FLSA, claiming they were misclassified as "exempt." A jury ruled in their favor. But, the county filed a motion for judgment as a matter of law, and the district court granted it. The detectives appealed.

- The Fifth Circuit affirmed. Ultimately, the case turned on whether the detectives were paid on a "salary basis." The detectives argued that they were not paid on a "salary basis" because their alleged salary was "subject to reduction because of variations in the quality or quantity of the work performed." Specifically, they claimed the county had a written policy that permitted unlawful docking for such reasons.

- The Fifth Circuit noted that DOL regulations require an actual practice of making unlawful deductions to invalidate the "salary basis" – in other words, the mere fact that an employer has a policy that permits unlawful docking is not good enough for the plaintiff to win. Here, the detectives failed to present proof that the county actually illegally docked their pay, or any other detectives' pay. Accordingly, as a matter of law, the county satisfied the salary basis test.

9. *Fraser v. Patrick O'Connor & Associates, L.P.*, 954 F.3d 742 (5th Cir. 2020)

- Defendant sells property tax consulting services to individuals challenging their property appraisal. The plaintiffs had the job title "property tax consultant." They presented the Defendant's clients' cases to the appraisal review board. They worked 60 to 90 hours a week, but were not paid any overtime. The sued for overtime under the FLSA, and won after a four-day bench trial. The Defendant appealed.

- The Defendant argued that the plaintiffs were exempt under the administrative exemption. That exemption requires, among other things, that the employee's primary duty be "work directly related to the management or general business operations of the employer or the employer's customers."

- The Fifth Circuit embraced the administrative/production dichotomy, under which duties which are production in nature are not deemed to be work that is related to the management or general business operations of the employer or the employer's customers. Here, the plaintiffs' work was part and parcel of what the Defendant sold to its clients. As such, their very nature of their work disqualified them from the administrative exemption under the administrative/production dichotomy. As such, the Fifth Circuit affirmed the district court's ruling in the plaintiffs' favor.

- As for damages, the district court found that the fluctuating workweek method of calculating back-pay (a methodology that is favorable to defendants) did not apply, and the Fifth Circuit affirmed that finding too because, "O'Connor's policies did not clearly indicate whether the plaintiffs' salaries or commissions could be docket or reduced, and the plaintiffs were provided no guidance on how to complain about their compensation."

10. *Hewitt v. Helix Energy Solutions Grp., Inc.*, 983 F.3d 789 (5th Cir. 2020)

- Hewitt was a Tool Pusher for Helix. Helix classified him as "exempt" under the FLSA. He was paid a day rate with no overtime. He sued for overtime, claiming that he was not paid on a "salary basis". The district court granted summary judgment for Helix, holding that, since his day rate was higher than the FLSA's salary level, Helix paid him a salary.

- In April, a three-judge panel reversed the district court 3-0 and determined that Helix did not pay Hewitt on a salary basis because his was was *post-determined* not pre-determined and was calculated by the day. Hewitt moved for rehearing, and the same panel heard oral argument.

- In December, the same panel still reversed the district court, but this time 2-1, withdrawing its earlier opinion. The majority concentrated on the application of 29 CFR 541.604(b), a regulation entitled "Minimum guarantee plus extras," which provides that day rate employees in limited circumstances can still be exempt from overtime IF the company pays the employee a guaranteed amount "regardless of the number of … days ..worked" AND "a reasonable relationship exists between the guaranteed amount and the amount earned."

- The majority determined Helix failed both parts of the test because Helix paid Hewitt based on the days worked, not "regardless" of the days worked; and that there was no reasonable relationship between any alleged guarantee and what Helix paid Hewitt.

- There were sharp concurring and dissenting opinions, mostly focused on textualism. The dissent's main point was that, because Hewitt's earned pay eclipsed the salary level floor, Helix paid him a salary, and the majority opinion misapplied 541.604(b), arguing it does not apply to highly compensated employees. It urged *en banc* reconsideration.

Texas Tech Univ. Health Science Ctr.-El Paso v. Flores, ___ S.W.3d ___ 2020 WL 6811725(Tex. 2020)

- Flores sued for age discrimination after she was terminated in an alleged job elimination. Defendant filed a plea to the jurisdiction. The trial court denied the plea, and the court of appeals affirmed. The Supreme Court reversed, holding (1) Flores failed to submit legally sufficient evidence to establish a *prima facie* case of age discrimination; and (2) because the legislature has not waived governmental immunity in the absence of such evidence, Flores's age-discrimination claim must be dismissed for lack of jurisdiction.

- Concerning the *prima facie* case issue, the court focused first on whether Flores had been "replaced" by someone significantly younger. It concluded that she had not, because the significantly younger individual who she claimed "replaced her" was an existing employee who was given a new and different position, and then assumed some, but not all of Flores's former duties, and had many other duties as part of that position that Flores had not had.

Texas Tech Univ. Health Science Ctr.-El Paso v. Flores, ___ S.W.3d ___ 2020 WL 6811725 (Tex. Nov. 20, 2020)

- The court next analyzed whether Flores could establish a *prima facie* case through evidence of less favorable treatment under nearly identical circumstances as compared to one or more significantly younger employees.

- Flores argued that she satisfied this test, because Texas Tech eliminated her position, yet retained and promoted a significantly younger coworker. The court found that this evidence was not sufficient to establish a *prima facie* case either because she and the significantly younger coworker were not nearly identically situated, in that: (1) Flores and the significantly younger coworker held different jobs at the time Flores was terminated in the alleged job elimination; and (2) there was evidence that their supervisor who decided to eliminate Flores's job position was unhappy with Flores's job performance, but there was no evidence that he was unhappy with the significantly younger coworker's job performance.

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