THE TOP 15 FIFTH CIRCUIT EMPLOYMENT LAW CASES OF 2019

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Update On Two 2018 Cases That Were Revised And Reissued In 2019

- *Gardner v. Pascagoula, L.L.C.*, 915 F.3d 320 (5th Cir. 2019) (reversing summary judgment in a sexual harassment and retaliation case that arose out of sexual harassment by a demented patient in an assisted living facility, and finding that both claims should be decided by a jury).
  - Removed language from retaliation claim analysis that recognized that a refusal to follow orders to work with a sexual harasser may be "protected activity."

- *Nall v. BNSF Railway Co.*, 917 F.3d 335 (5th Cir. 2019) (reversing summary judgment in an ADA disability discrimination case that turned on the "direct threat" defense).

  - Added a footnote to clarify that the "direct threat" defense does not require the employer to show that, in addition to having made an objectively reasonable decision, the process it followed was also objectively reasonable.

1. *Tatum v. Southern Co. Servs., Inc.*, 930 F.3d 709 (5th Cir. 2019)

Days after Tatum requested FMLA leave for his high blood pressure, Southern fired Tatum. Tatum sued for FMLA retaliation. He lost on SJ. The Fifth Circuit affirmed, because:

- Before requesting the at-issue FMLA leave, Tatum had been repeatedly warned in writing for his inappropriate communication style, such as sarcasm and profanity, including an incident that occurred immediately before he sought FMLA leave.

- Hours after Tatum sought FMLA leave, he informed the Company for the first time about a potentially fatal safety risk created by a coworker more than a month earlier, and sent pictures he had taken at the time. A coworker who witnessed the situation told the Company that Tatum had boasted of taking the pictures as "job security."

- Thus, the Company's decision to fire Tatum for his communication style, and for failure to timely report a potential safety concern, was made in good faith, and there was no evidence that it was a pretext for FMLA retaliation.

1. *Tatum v. Southern Co. Servs., Inc.*, 930 F.3d 709 (5th Cir. 2019)

- The Court rejected Tatum's argument that Southern's failure to seek out his side of the story concerning the alleged late report somehow proved pretext.

- The Court rejected Tatum's argument that Southern's failure to fire two coworkers who also witnessed the potential safety concern, but did not report it at the time either, proved pretext. The Court rejected this argument because there was no evidence that those two coworkers had a comparable record of unprofessional conduct in the workplace as Tatum did.

- Finally, the Court made much out of the fact that Tatum's medical records from right before he sought FMLA leave reflected that Tatum told his doctor that "recent issues . . . could terminate his employment."

2. *McMichael v. Transocean Offshore Deepwater Drilling, Inc.*, 934 F.3d 447 (5th Cir. 2019)

Transocean laid off 7,300 employees over a four year period; 48% of its toolpushers over a two year period; and every toolpusher on McMichael's rig except one in early 2015. McMichael was 59 years old. He sued for age discrimination under the ADEA. He lost on SJ. The Fifth Circuit affirmed, noting:

- A manager's statement to McMichael concerning his eligibility for retirement was no evidence of age discrimination. Rather, it was merely a benign statement of fact.

- That the two of the three persons involved in the decision to lay McMichael off were over 50 years old made "discrimination less likely."

- That Transocean laid off numerous employees from McMichael's rig who were both younger and more qualified also made discrimination less likely.

- Bottom line: when an employer undergoes a massive lay off that results in the termination of nearly every employee in the same position as the plaintiff who worked at the same location, it is extremely difficult to prove discrimination.

3. *Harville v. City of Houston, Mississippi*, 935 F.3d 404 (5th Cir. 2019)

- Harville was one of four deputy clerks. Harville and one other were white, and two were African-American. The two African-American clerks were related to a city Alderwoman. The other white deputy clerk's father had been the mayor at one time.

- The city decided to lay off one of the four deputy clerks. The five-person Board of Alderman voted unanimously to lay off Harville. Harville filed an EEOC Charge. While the Charge was pending, the City Clerk job opened up. Harville applied, was interviewed, and was rejected in favor of a different candidate.

- Harville sued for race discrimination in her termination, and retaliation for the City's failure to rehire her. She lost on SJ. The Fifth Circuit affirmed:

  - The Board's decision to select Harville for lay-off because it believed her job was seasonal was not shown to be pretextual. Even if her job was not truly seasonal, Harville presented no evidence to show that the Board did not really believe in good that that was – which is the relevant inquiry.

3. *Harville v. City of Houston, Mississippi*, 935 F.3d 404 (5th Cir. 2019)

- That an African-American Alderman allegedly protected the jobs of her two relatives would be (lawful) nepotism, not (unlawful) racial discrimination.

- Moreover, even if the African-American Alderman personally voted to lay off Harville based on race, that would not be sufficient to prove racial discrimination in the lay off decision, because there was no evidence that particular Alderman influenced a majority of the board to vote the way that it had based on race.

- Harville's retaliation claim failed at the *prima facie* case stage because the 12-month gap between Harville's EEOC Charge and the City's decision to hire a different candidate for the Clerk job was too far apart to infer any causal connection between the two. Though Harville engaged in additional protected activity after she filed her EEOC Charge, "the temporal clock does not "re-start" with each protected activity."

- Furthermore, the City asserted that it hired a superior candidate for the Clerk job, and the record evidence did not show that the City's assertion was false.

4. *Hassen v. Ruston Louisiana Hosp. Co., L.L.C.*, 932 F.3d 353 (5th Cir. 2019)

Hassen, who is African-American, applied online for a full-time nurse position and a PRN ("as needed") nurse. She was interviewed for the PRN position only, and hired. The same day, the hospital hired two full-time nurses. Both were white. A few months later, Hassen took a full-time nursing position somewhere else, and the hospital terminated her employment because the hours in her new job conflicted with the only shifts it had that were available to PRN nurses.

Hassen sued for race discrimination for being hired as a PRN, rather than a full-time, nurse. The hospital's defense was that she applied for a PRN position; was interviewed for a PRN position; accepted a PRN position, and never applied for a full-time position after she accepted the PRN position.

Plus, the hospital put forth evidence that during the time Hassen worked there, it hired at least six other black candidates for registered nurse positions.

4. *Hassen v. Ruston Louisiana Hosp. Co., L.L.C.*, 932 F.3d 353 (5th Cir. 2019)

- The district court granted summary judgment, and the Fifth Circuit affirmed, finding that Hassen produced no evidence to refute the hospital's articulated reasons for not hiring her as a full-time nurse.

- Hassen also claimed race discrimination in her termination, and lost that claim on SJ too at the district and appellate court. The the hospital said it terminated her employment because the hours in her new job conflicted with the only shifts it had that were available to PRN nurses, and Hassen offered no proof to rebut that.

5. *Wallace v. Andeavor Corp.*, 916 F.3d 423 (5th Cir. 2019)

- Wallace, a Vice President of Pricing and Commercial Analysis, was a sub-certifier of the company's financial statements. He was tasked with investigating the company's financial performance in various industry segments, and purportedly concluded that it improperly booked taxes as revenues in certain internal reporting channels.

- On February 8, 2010, he reported his concerns to his supervisor. Yet, shortly thereafter, he certified that he knew of no reason why the company's 2009 10-K could not be certified. That 10-K, which was filed on March 1, 2010, included a statement disclosing that certain taxes were included in both the "Revenues" and "Costs of Sales and Operating Expenses."

- On March 12, 2010, Plaintiff certified that he was unaware of any "business or financial transaction that may not have been properly authorized, negotiated, or recorded" for 2009.

- While Wallace was investigating the company's internal profitability and accounting for taxes, the human resources department determined that he had been creating a hostile work environment, and his employment was terminated. Wallace's termination occurred on March 12, 2010, the same day he provided the above-referenced certification.

5. *Wallace v. Andeavor Corp.*, 916 F.3d 423 (5th Cir. 2019)

- Wallace filed suit in the Western District of Texas under Section 806 of SOX, claiming he was discharged in retaliation for reporting the company's alleged practice of booking sales taxes as revenues, which he claims was not properly disclosed in SEC filings. The district court ultimately granted summary judgment in the company's favor, concluding that the decision to terminate the plaintiff's employment was not prohibited retaliation and that the plaintiff did not have an objectively reasonable belief that the company had misreported its revenue to the SEC.

- The Fifth Circuit focused on whether Wallace had an objectively reasonable belief that the company was misreporting revenue. In ruling on this issue, it noted that Wallace had extensive business experience, including with the company's accounting systems, and had expertise in SEC financial reporting practices. It concluded that in light of his position as a sub-certifier with accounting oversight experience, he should have investigated to ensure the reasonableness of his conclusion that the public disclosures contained a reporting violation.

5. *Wallace v. Andeavor Corp.*, 916 F.3d 423 (5th Cir. 2019)

- According to the court, had Wallace conducted a limited investigation, he would have determined that the company had properly disclosed its treatment of certain taxes as revenue in the 10K that was filed with the SEC. Thus, the court concluded, Wallace lacked an objectively reasonable belief that the company had violated the law. For that reason, the court affirmed the summary judgment in the company's favor.

- As set out in the ARB's seminal holding in *Welch v. Cardinal Bankshares Corp.*, ARB Case No. 05-064 (May 31, 2007), SOX's "reasonable belief" standard looks beyond a plaintiff's purported subjective belief of wrongdoing to whether that belief is objectively reasonable based on the expertise and background of the complainant. This decision holds experienced professionals bringing SOX whistleblower claims to a higher standard and considers whether they conducted reasonable investigations in determining whether they held an objectively reasonable belief that unlawful conduct occurred.

6. *Cicalese v. Univ. of Texas Medical Branch*, 924 F.3d 762 (5th Cir. 2019)

Married professors from Italy sued UTMB, claiming that a new Dean and Chairman discriminated against them based on their Italian national origin, asserting, for example, that:

- The Dean said to them, "[w]hat are you doing here? You should go back to Italy."
- The Dean altered the wife's job evaluation criteria to hurt her professionally.
- The Dean moved the wife to an "inadequate" laboratory.
- The Dean removed the husband from his position and initiated a "sham" investigation of his surgeries in order to discredit him.
- The Chairman said he did not care about "these Italians," when speaking about Italian Ph.D students.
- The Chairman referred to unpleasant situations as an "Italian thing."
- The Chairman demoted the wife, and reduced the husband's salary.

6. *Cicalese v. Univ. of Texas Medical Branch*, 924 F.3d 762 (5th Cir. 2019)

- The district court threw the plaintiffs' discrimination case out on a Rule 12(b)(6) motion, holding that they failed to demonstrate disparate treatment under nearly identical circumstances, and that the remarks they recited were mere "stray remarks" that could not prove discrimination.

- The Fifth Circuit reversed, stating, "[t]he court's analysis of the complaint's allegations – scrutinizing whether Appellants' fellow employees were really "similarly situated" and whether Jacobs's and Tyler's derogatory statements about Italians amounted to "stray remarks" – was more suited to the summary judgment phase."

- The court held that the plaintiffs "plausibly allege[d] facts going to the ultimate elements of the claim," which was good enough to survive a Rule 12(b)(6) motion.

7. *Bogan v. MTD Consumer Group, Inc.*, 919 F.3d 332 (5th Cir. 2019)

- The plaintiff alleged she was terminated because of her race and sex. She won at trial, but the jury only awarded her $1. The trial court then denied both reinstatement and front pay. The plaintiff appealed.

- The Fifth Circuit held that, as a general rule, a prevailing plaintiff should get reinstatement or front pay, with reinstatement being the "preferred remedy."

- The Fifth Circuit found that the trial court did not abuse its discretion in denying front pay on the grounds that the plaintiff failed to mitigate her damages.

- The Fifth Circuit found that the district court erred in finding that "discord between the parties" militated against reinstatement. The Court held that for acrimony between the parties to rise to the level sufficient to deny reinstatement, it must show that the parties' relationship is "irreparably damaged." The evidence here did not rise to that level. Accordingly, the Fifth Circuit remanded the case to the district court to reconsider its decision regarding reinstatement.

8. *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369 (5th Cir. 2019)

- The plaintiffs are directional-driller consultants. Premier employed several of them as employees, but then moved them to "independent contractor" status, along with others it classified as independent contractors. They sued Premier under the FLSA, claiming they were misclassified, and should have been employees receiving overtime pay. After applying the non-exclusive *Silk* factors, the district court granted summary judgment for the employees.

- On appeal, the Fifth Circuit reversed and rendered judgment for Premier. It primarily relied on the following:

  - Control: While Premier gave the plaintiffs well plans, they made that work, and Premier did not dictate the details of how they completed their work. That Premier subjected the plaintiffs to safety training, drug tests, and had them sign non-disclosure agreements did not demonstrate the sort of control necessary to establish employee status.

8. *Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369 (5th Cir. 2019)

- Workers' ability to determine profit or loss. The plaintiffs' tax returns showed profits and expenses. One plaintiff ran a money producing goat farm between projects for Premier. That Premier prohibited the plaintiffs from subcontracting their work to others did not establish employee status.

- Skill and initiative. The plaintiffs were highly skilled, which militated heavily in favor of independent contractor status. That the plaintiffs worked side-by-side with other directional-driller consultants that Premier classified as employees did not undermine their independent contractor status.

- Permanency of the relationship. The plaintiffs generally only worked for Premier. But, only three of the five plaintiffs worked for Premier ten months or longer. And, the work was on a "project-by-project" basis, which "counsels heavily in favor of IC [independent contractor] status."

9. *Faludi v. U.S. Shale Solutions, L.L.C.*, 936 F.3d 215 (5th Cir. 2019)

- Faludi was an unlicensed lawyer who agreed to be a "consultant" for U.S. Shale in return for $1,000 a day when he worked in Houston, and $1,350 a day when he elsewhere. Faludi submitted invoices once or twice a month.

- Although the day rates applied regardless of how many hours he worked in a day, sometimes, when he did not work a full day, Faludi voluntarily billed less than a full day rate, and U.S. Shale paid the bill without asking Faludi why he had reduced his day rate.

- Faludi always received at least $1,000 a week, and his annual compensation was approximately $260,000. Faludi was not, however, paid overtime under the FLSA.

- Faludi sued under the FLSA, alleging that he was not compensated on a "salary basis" as defined by 29 C.F.R. § 541.602(a), and therefore he was ineligible for the "highly compensated" exemption, and was entitled to overtime.

9. *Faludi v. U.S. Shale Solutions, L.L.C.*, 936 F.3d 215 (5th Cir. 2019)

- Faludi lost on SJ in the district court. The Fifth Circuit affirmed, holding that
  - Under 29 C.F.R. § 541.602(a), to be compensated on a "salary basis," one must be guaranteed to receive at least $455 a week on a weekly or less frequent basis, irrespective of the quantity or quality of work performed.
  - Faludi's compensation satisfied that test, because: (1) his $1,000 per day rate guaranteed him at least $455 a week in any week he performed any work; and (2) he received that guaranteed minimum amount (and actually more) once or twice per month, which is "on a less frequent basis" than weekly, as permitted by 29 C.F.R. § 541.602(a).
  - In reaching this ruling, the Fifth Circuit rejected a contrary Sixth Circuit case.
  - The Fifth Circuit rejected Faludi's argument that 29 C.F.R. § 541.602(a) was not satisfied because his occasional voluntary reductions to his minimum day rate showed that the rate was "subject to reduction because of variations in the . . . quantity of work performed." The Court stated that to hold otherwise would permit employees to thwart FLSA exemptions by intentionally withholding their own pay and then arguing that they were not paid on a "salary basis."
  - Judge Ho dissented. A petition for rehearing was filed, and is pending.

10. *In re JPMorgan Chase & Co, 916* F.3d 494 (5th Cir. 2019)

- In December 2017, several call-center employees at JPMorgan Chase sued the bank, asserting that Chase failed to pay them for all overtime owed. The plaintiffs brought their lawsuit as a collective action under the FLSA and sought to represent a group of approximately 42,000 current and former employees. More than 85 percent of those employees (about 35,000) had signed arbitration agreements with the bank, however, requiring them to arbitrate any employment claims on an individual basis instead of going to court.

- The plaintiffs asked the district court to conditionally certify the case and grant plaintiffs permission to send notice of the lawsuit to the entire group of 42,000 current and former employees. Chase opposed this, arguing in part that sending notice to the entire group was improper because a vast majority of them had agreed to arbitrate their claims individually and were, therefore, not eligible to participate in the lawsuit.

- The district court reasoned that, even if Chase was correct, until the arbitration-bound employees joined the case and Chase moved to compel arbitration against specific individual, the court could not definitively ascertain whether any of the agreements were, in fact, enforceable. Because Chase had not moved to compel arbitration, the district court ordered that notice be sent to the entire group of 42,000 and ordered Chase to produce contact information (including names, and physical and e-mail addresses) for each individual.

10. *In re JPMorgan Chase & Co, 916* F.3d 494 (5th Cir. 2019)

- After the district court declined to grant an interlocutory appeal, Chase filed a mandamus petition with the Fifth Circuit.

- The Fifth Circuit overturned the district court's decision to send notice to the entire group of workers, holding "that district courts may not send notice to an employee with a valid arbitration agreement unless that record shows that nothing in the agreement would prohibit that employee from participating in the collective action." Whose burden is it to meet this threshold?

- According to the Fifth Circuit, if there is a genuine dispute as to the existence or validity of an arbitration agreement, the employer has the burden to show (by a preponderance of the evidence) the existence of a valid arbitration agreement as to any particular employee. In such circumstances, district courts should allow the parties to submit additional evidence "carefully limited to the disputed facts" to resolve the issues. Only if the employer fails to meet this burden should the employee receive the same notice as others. The Fifth Circuit sent the case back to the district court to address these issues in the first instance.

10. *In re JPMorgan Chase & Co, 916* F.3d 494 (5th Cir. 2019)

- This is an important decision for employers with mandatory arbitration programs, especially those in the Fifth Circuit.

- It removes the plaintiffs' most effective weapon in FLSA lawsuits following the landmark *Epic Systems* ruling: using the conditional certification process to obtain contact information for and send notice of the lawsuit to large numbers of potential opt-in plaintiffs (even those who agreed to arbitrate their claims), and then using the information gathered to submit (or threaten to submit) hundreds or even thousands of individual arbitration claims, resulting in the proverbial "death by a thousand cuts."

- Nevertheless, the Fifth Circuit's ruling still left some important questions unanswered: When should the parties and the district court delve into these issues—during the briefing on conditional certification or after the court rules that notice should go out? How do plaintiffs establish a genuine dispute as to the existence or validity of an arbitration agreement without a mechanism for obtaining the arbitration agreements for the entire putative collective? How will any evidentiary issues be addressed efficiently in cases involving hundreds or thousands of potential plaintiffs? Should the district courts undertake in camera review of arbitration agreements or lists of employees with arbitration agreement to prevent plaintiffs' counsel from obtaining those names? Do defendants have an obligation to meet their burden for each individual in the putative collective who have an arbitration agreement?

11. *Garcia v. Professional Contract Servs., Inc.*, 938 F.3d 236 (5th Cir. 2019)

- This is a False Claims Act retaliation case. In such cases, the Court applies the *McDonnell Douglas* model as in Title VII Cases.

- Summary judgment for the employer had been entered by the district court. The Fifth Circuit reversed and remanded. It held:

- *Nassar*'s heightened "but-for"causation standard applies only in the third step (the pretext stage) of the *McDonnell Douglas* analysis, not the *prima facie* stage.

- Although a 3 or 4 months gap between protected activity and termination may or may not be sufficient to establish a causal connection between the two, two and one-half months is clearly sufficient.

11. *Garcia v. Professional Contract Servs., Inc.*, 938 F.3d 236 (5th Cir. 2019)

- In this case, Garcia presented not just close timing (two and one-half months), but other significant evidence of pretext, sufficient to make summary judgment improper. For example:

- He disputed the facts leading to his termination.

- He presented proof his supervisor harassed him after learning of his protected activities.

- He presented evidence that the mistakes he made that the Company relied on to fire him had been known to the Company for years.

11. *Garcia v. Professional Contract Servs., Inc.*, 938 F.3d 236 (5th Cir. 2019)

- Garcia also presented proof that a nearly identically situated employee made similar mistakes and was not fired. The district court had held that employee was not nearly identically situated because he worked in a different division.

- The Fifth Circuit held that was error. The evidence showed that in all meaningful respects, the two men were nearly identical. That they were in different divisions was not a meaningful difference.

- Since the employee was actually nearly identically situated, the fact that he was not fired, but Garcia was, was additional evidence of pretext, making summary judgment improper.

12. *Solis v. S.V.Z.*, 566 S.W.3d 82 (Tex. App. – Houston [14th Dist.] 2018, pet. filed)

- A 16-year old girl who worked at Chipotle had sex at work, and during working hours, with her 26-year old married supervisor. The store GM helped them conceal their relationship from the girl's mother.

- The 16-year old went on vacation. While she was out on vacation, her mother learned the truth, and confronted the GM about it. The 16-year old never returned to work, stating she felt it was a hostile place to work. She sued Chipotle for sexual harassment. In a non-unanimous verdict, she was awarded $2.9 million for sexual assault and sexual harassment.

12. *Solis v. S.V.Z.*, 566 S.W.3d 82 (Tex. App. – Houston [14th Dist.] 2018, pet. filed)

- The appeals court held that:

- The TCHRA's 180-day limitations period was tolled until the plaintiff turned 18, pursuant to CPRC Section 16.001.

- The trial court was correct in not requiring plaintiff to prove that the sexual harassment was "unwelcome" (which is ordinarily a requirement in a TCHRA/Title VII sexual harassment claim), because that requirement does not apply to a sexual harassment victim who is under the age of 17 – which is the age of consent in Texas.

12. *Solis v. S.V.Z.*, 566 S.W.3d 82 (Tex. App. – Houston [14th Dist.] 2018, pet. filed)

- The appeals court held that:

- Although evidence of the plaintiff's "welcoming" or "consenting" to the sexual relationship was irrelevant to liability, it was relevant to damages – specifically the plaintiff's mental anguish. As such, the trial court erred in instructing the jury not to consider the plaintiff's consent to the sexual relationship for any purposes at all. The required reversal of the sexual harassment judgment for a new trial.

- The sexual assault claim against Chipolte that the trial court had permitted to proceed to verdict was, in actuality, preempted by the TCHRA, *B.C. v. Steak N Shake* notwithstanding. This ruling is fairly devasting to the Plaintiff's potential damages model.

- Plaintiff has filed a petition for review with the Texas Supreme Court. It is pending.

13. *Henry v. Spectrum, L.L.C.*, No. 19-10452, 2019 WL 6248917 (5th Cir. 2019)

Henry was driving a company truck when he ran a red light, causing multiple injuries. He was fired.

Henry sued under the ADA, claiming he had a diabetic emergency which triggered his unsafe driving. As such, he asserted that his termination was based on his disability, and thus violated the ADA. The district court threw his case out on summary judgment. Henry appealed.

The Fifth Circuit cited to a prior case, holding that when an employer believes that certain conduct may be symptomatic of a disability, termination is still permissible on the "basis of the conduct itself, as long as the collateral assessment of disability plays no role in the decision to dismiss." That case dealt with a plaintiff who suffered OCD, which caused work-related performance deficiencies.

Here, Henry produced no evidence that the company relied on his diabetic condition as a factor in its decision to terminate. Rather, the company simply relied on the fact that Henry caused an at-fault severe accident, which was a terminable offense under company policy. Accordingly, summary judgment was affirmed for the company.

14. *O'Daniel v. Industrial Serv. Solutions,* 922 F.3d 299 (5th Cir. 2019)

- O'Daniel, a hetrosexual female, posted a Facebook message objecting to the idea of a man using a woman's dressing room at Target if the man is transgendered, and transitioning to becoming a woman. Her post was incendiary and profane.

- As it turns out, the (female) President of the Defendant is a member of the LGBT community.

- After seeing the Facebook message, the President made O'Daniel undergo sensitivity training, allegedly subjected her to undue scrutiny, had her reprimanded, and then fired her after she said she planned to file a formal complaint about the alleged discrimination and harassment.

- O'Daniel sued, claiming retaliation. The district court dismissed her case on summary judgment, and the Fifth Circuit affirmed. The Fifth Circuit held that Title VII does not protect against discrimination based on sexual orientation. As such, O'Daniel could not have reasonably believed in good faith that the things of which she complained violated Title VII, and her claim failed for want of any legally protected activity.

15. *Wittmer v. Phillips 66 Co.*, 915 F.3d 328 (5th Cir. 2019)

Wittmer, a transgendered woman, applied for a job with Phillips 66. During interviews, she was asked about her job with her current employer, and she said the job's heavy travel was the reason she was looking to change jobs. Phillips 66 offered her the job, contingent on passing background checks. During the background check process, Phillips 66 learned that Wittmer's current employer had actually already terminated her employment. Phillips 66 asked Wittmer about this discrepancy, and she acknowledge it, but said she did not think it was "that big of a deal." Phillips 66 then rescinded her job offer.

Wittmer sued, claiming discrimination based on her transgendered status. The district court assumed such discrimination violated Title VII, and dismissed the case on summary judgment anyway, based on plaintiff's failure to make out a *prima facie* case, and the lack of evidence pretext. Wittmer appealed.

The Fifth Circuit agreed on both points, and affirmed summary judgment for Phillips 66.

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