THE TEN FIFTH CIRCUIT EMPLOYMENT CASES EVERY LAWYER MUST KNOW

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1. EEOC Position Statements Can Kill Employers: *Miller v. Raytheon Co.*, 716 F.3d 138 (5th Cir. 2013)

Affirming a seven-figure jury verdict in an age discrimination case partially because "[a]t trial, Miller presented undisputed evidence that Raytheon made erroneous statements in its EEOC position statement."

2. Merely Because The Employer Is Sloppy or Wrong, Does Not Mean The Plaintiff Has A Good Discrimination Case: *Waggoner v. City of Garland, Tex.*, 987 F.2d 1160 (5th Cir. 1993)

"[T]he inquiry is limited to whether the employer believed the allegation in good faith and whether the decision to discharge the employee was based on that belief."

3. But, When An Employer Is Super Sloppy, Or Plainly Wrong, It Is Sometimes Enough To Create A Fact Question: *Ion v. Chevron*, 731 F.3d 379 (5th Cir. 2013)

"Chevron's failure to conduct even the most cursory investigation, confront Ion about Peel's statements, or seek a second opinion under the FMLA calls into doubt Chevron's reasonable reliance and good faith on Peel's statements, and, at the very least, creates a fact issue as to whether it would have terminated Ion despite its retaliatory motive."

4. Warning To Employers: If It Wasn't Documented, It's Like It Never Happened: *Laxton v. Gap Inc.*, 333 F.3d 572 (5th Cir. 2003).

The Gap fired a manager allegedly based in part on employee complaints. "Yet, at trial, [The] Gap produced no contemporaneous written documentation of any employee complaints, despite testimony that the corporation abides by rigorous record-keeping policies."

Based in part of this evidence, the Fifth Circuit affirmed a jury verdict in the plaintiff's favor in a pregnancy discrimination case.

5. "I Was Great. No, You Stunk" = Employer Wins. *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893 (5th Cir. 2002)

"Merely disputing [the employer's] assessment of [the employee's] performance will not create an issue of fact."

6. "They Did It Too" Is Only A Winner In A Discrimination Case If The Circumstances Being Compared Are "Nearly Identical": *Lee v. Kan. City S. Ry.*, 574 F.3d 253 (5th Cir. 2009)

This is a high standard that is not easily satisfied. It is only fulfilled "when the employees being compared held the same job or responsibilities, shared the same supervisor or had their employment status determined by the same person, and have essentially comparable violation histories." *Id*. at 260 (citations omitted). "[C]ritically, the plaintiff's conduct that drew the adverse employment decision must have been 'nearly identical' to that of the proffered comparator who allegedly drew dissimilar employment decisions." *Id*.

7. Not All Discriminatory Comments Are Proof Of Discrimination: *Reed v. Neopost USA, Inc.*, 701 F.3d 434 (5th Cir. 2012)

A. <u>As Direct Evidence</u>: In order for comments in the workplace to provide sufficient direct evidence of discrimination by themselves, they must be 1) related to the protected class of persons of which the plaintiff is a member; 2) proximate in time to the termination; 3) made by an individual with authority over the employment decision at issue (but note cat's paw); and 4) related to the employment decision at issue.

B. <u>As Additional Circumstantial Evidence</u>: Even when offered in conjunction with other circumstantial evidence, to be probative at all they must: (1) show discriminatory animus; (2) on the part of a person that is either primarily responsible for the challenged employment action or by a person with influence or leverage over the relevant decisionmaker.

8. An Employer's Truly Shifting Explanations Creates A Fact Question For The Jury To Decide: *Nasti v. CIBA Specialty Chemicals Corp*., 492 F.3d 589 (5th Cir. 2007)

"A court may infer pretext where a defendant has provided inconsistent or conflicting explanations for its conduct."

9. "Boys Will Be Boys" May Equal A Sexual Harassment Lawsuit: *EEOC v. Boh Bros.*, 731 F.3d 444 (5th Cir. 2013) (en banc)

Holding that a Plaintiff in a "same sex" sex stereotyping hostile environment case could rely on evidence that a heterosexual male supervisor harassed him because he considered him to be insufficiently masculine to prove a claim under Title VII.

* This holding has major implications for retaliation claims arising out of such circumstances as well.

10. Protection From Punitive Damages: *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473 (5th Cir. 2002)

Fact that company gave training on sexual harassment allowed it to successfully invoke the *Kolstad* defense to punitive damages, whereby "an employer may not be held vicariously liable for the discriminatory employment decisions of managerial agents where those decisions are contrary to the employer's 'good faith efforts to comply with Title VII.'" *Kolstad v. American Dental Assn.*, 119 S. Ct. 2118, 2129 (1999).

* This applies even if the managerial agent acted with malice or reckless indifference to the plaintiff's federally protected rights.

Bonus Case No. 1: But, When It Comes To Punitive Damages, Sometimes A Dollar Will Do It: *Abner v. Kansas City Southern Railroad Co.*, 513 F.3d 154 (5th Cir. 2008)

Affirming $125,000.00 punitive damages awards to each plaintiff under Section 1981, even though each plaintiff was awarded only $1.00 in actual damages, and suggesting that any punitive damages award up to $300,000.00 per plaintiff would have passed Constitutional muster.

Bonus Case No. 2: Too Subjective Potentially Equals "Tell It To A Jury": *Patrick v. Ridge,* 394 F.3d 311 (5th Cir. 2004).

In *Patrick*, the Fifth Circuit found that "a hiring official's subjective belief than an individual would not 'fit in' or was 'not sufficiently suited' for a job is at least as consistent with discriminatory intent as it is with nondiscriminatory intent . . . ." *Id.* at 318.

THE END

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