WHAT MEDIATORS AND ARBITRATORS NEED TO KNOW ABOUT EMPLOYMENT DISPUTES

NEW & EMERGING IMPLICATIONS FOR DISPUTE RESOLUTION

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2019 Annual Conference On ADR

May 3, 2019

No. 1: Cat's Paw Gains Steam

Trend in Plaintiffs' Favor . . .

Under the cat's paw theory, a subordinate employee's discriminatory remarks regarding a co-worker can be attributed to the workplace superior, ultimately the one in charge of making employment decisions, when it is shown that the subordinate influenced the superior's decision or thought process. *See, e.g., Staub v. Proctor Hospital*, 131 S. Ct. 1186, 1193 (2011)

In *Fisher v. Lufkin Indus.*, 847 F.3d 752 (5th Cir. 2017), the Fifth Circuit reversed a summary judgment that had been entered for the employer in a retaliation case, based on the "cat's paw" doctrine.

In *Zamora v. City Of Houston*, 798 F.3d 326 (5th Cir. 2015), the Fifth Circuit affirmed a jury verdict for the plaintiff in a Title VII retaliation case, and held that the evidence supported a finding of retaliation based on the cat's paw doctrine, even under a "but-for" causation standard.

No. 2: Retaliation Claims Harder To Prove

Development in Defendants' Favor . . .

In *Nassar v. Univ. of Texas Southwestern Med. Ctr.*, 133 S. Ct. 2517 (2013), the Supreme Court held that Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened "motivating factor" causation test.

This has had many ripples in other employment cases (ADA, FMLA).

Development in Plaintiffs' Favor . . .

In *Starnes v. Wallace*, 849 F.3d 627 (5th Cir.2017), the Fifth Circuit found that a 13-month gap between protected activity and termination was not fatal to Plaintiff's retaliation claim when there was evidence the Company's President had animus..

No. 3: Increased Use of Position Statements To Prove Pretext

Trend in Plaintiffs' Favor . .

Burton v. Freescale Semiconductor, Inc., 798 F.3d 222, 237 (5th Cir. 2015) ("A jury may view "erroneous statements in [an] EEOC position statement" as "circumstantial evidence of discrimination.")

Miller v. Raytheon Co., 716 F.3d 138, 144 (5th Cir. 2013) (affirming jury's liability finding in an age discrimination case partially because "[a]t trial, Miller presented undisputed evidence that Raytheon made erroneous statements in its EEOC position statement.")

No. 4: Higher Standard To Obtain Compensatory Damages?

Development in Defendants' Favor…

In *Miller v. Raytheon Co.*, 716 F.3d 138 (5th Cir. 2013), the Fifth Circuit held that the district court's 100k award to the plaintiff for compensatory damages was unsustainable because:

"[H]e presented no expert medical or psychological testimony of the extent of his mental anguish. While Miller testified that he suffered chest pain, back pain, sleep disturbances, he also admitted that he did not take any over-the-counter pain or sleep medications. Nor did Miller seek the assistance of any health care professional or counselor."

Id. at 147.

No. 5: Attorneys' Fees Awards

Court Developments in Plaintiffs' Favor:

When the plaintiff wins, courts are tending to permit significant fee awards:

- *Miller v. Raytheon Co.*, 716 F.3d 138, 144 (5th Cir. 2013)(affirming an award of attorneys' fees of $488,437.08 to the plaintiff in a single-plaintiff ADEA/TCHRA age discrimination case)
- *City of Houston v. Proler*, 373 S.W.3d 748, 770 (Tex. App. – Houston [14th Dist.] 2012, no pet.) (affirming an award of $361,770.00 in attorney's fees to a prevailing plaintiff under the TCHRA)
- *Apache Corp. v. Davis*, 2019 WL 1483488, (Tex. App. – Houston [14th Dist.] Apr. 4, 2019) (affirming $691,616 in attorneys' fees and $110,000 in appellate fees in a single plaintiff retaliation case).

Waiver of Right to Recover Attorneys' Fees

You can't always trust your "handbook" re waiver of attorneys' fees.

- *Venture Cotton Co'op v. Freeman*, 435 S.W.3d 222 (Tex. 2014) and 494 S.W.3d 186, 191 (Tex. App.—Eastland 2015)(finding attorney fee waiver language in arbitration agreement invalid where no reference to CPRC § 38.001, but invalid provision did not render arbitration clause unconscionable)

Bonus

Continuing Trend in Arbitrators' Favor…

In re JP Morgan Chase, 916 F.3d 494 (5th Cir. Feb. 21, 2019) (district courts lack discretion "to send or require notice of a pending FLSA collective action to employees who are unable to join the action because of binding arbitration agreements").

In re Primcogent Solutions LLC, 2019 WL 1222941 (5th Cir. Mar. 13, 2019) (1 word opinion, "affirmed," after Judge Smith told company's lawyer "You're just retrying the case after the arbitration panel made its ruling" and "I mean, I'd be embarrassed to take the position you're taking in this case. I would be absolutely embarrassed for you and your law firm that you think it's appropriate to retry this case after you agreed to arbitration"

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