THE TOP FIFTH CIRCUIT EMPLOYMENT LAW CASES OF 2024

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1. *Harris v. FedEx Corp. Servs.*, 92 F.4th 286 (5th Cir. 2024), *cert. denied*

Facts:

- Harris, an African American, complained about race discrimination after her boss suggested she step down from her sales manager role.
- Her complaints were investigated internally and rejected.
- Over the next 6 months she was given a counseling, a warning, and two PIPs – all of which she internally complained were retaliatory.
- Four months later she was terminated for failing to satisfy her two PIPs.
- Harris sued for race discrimination and retaliation under Section 1981 and Title VII.
- She won on her retaliation claims under both laws and was awarded $365 million in punitive damages and over $1 million in compensatory damages.

1. *Harris v. FedEx Corp. Servs.*, 92 F.4th 286 (5th Cir. 2024), *cert. denied*

Holdings:

- Her Section 1981 claim was time-barred on the basis that FedEx contractually required Harris to bring all legal actions against it within 6 months of their accrual, and she did not do so.
- Dismissing her Section 1981 claim eliminated any award of punitive damages of more than $300,000 and limited her combined punitive and compensatory damages to $300,000 (the maximum one can recover in compensatory and punitive damages under Title VII).
- Harris was not entitled to punitive damages at all because (1) Harris did not prove that FedEx acted with "malice" or "reckless indifference"; and (2) FedEx satisfied the *Kolstad* defense by demonstrating good faith efforts to comply with Title VII, primarily through its investigations of Harris's discrimination and retaliation complaints.

1. *Harris v. FedEx Corp. Servs.*, 92 F.4th 286 (5th Cir. 2024), *cert. denied*

- Evidence to support the jury verdict of retaliation was sufficient based on proof of pretext – mostly disparate treatment as compared to arguably similarly situated sales managers.
- Evidence to support the jury's award of compensatory damages (including that she went on medication, sought professional help, gained weight, suffered insomnia, etc.) was also sufficient, but under the circuit's so-called "maximum recovery" rule, she could only recover $248,619.57 in compensatory damages.
- The district court abused its discretion in allowing a "human resources expert" to testify that FedEx did not follow normal protocol and procedure and that discrimination and retaliation did occur.
- The erroneous admission of the "human resources expert's" testimony, however, was harmless (especially given that the massive punitive damages award had now been entirely wiped out by the Court), so FedEx was not entitled to a new trial.

2. *Johnson v. Bd. Of Supvs. Of La. State University*, 90 F.4th 449 (5th Cir. 2024)

- Johnson was an administrative worker. A university vet she supported – but who was not her supervisor – slapped her butt one day. Johnson then reported his conduct to her manager, along with a lot of prior sexual harassment by the vet.
- Johnson was removed from her workplace in order to get her away from the vet. She was moved to a storage room that smelled, was full of gnats, and had windows covered by black paper.
- Upon the return of a Chancellor from vacation, an investigation commenced. Johnson's complaint about the butt slap was confirmed, she was moved back to her original work area, and the vet was moved. She had spent approximately three weeks in the hellish, gnat infested, storage room.

2. *Johnson v. Bd. Of Supvs. Of La. State University*, 90 F.4th 449 (5th Cir. 2024)

- Johnson was not fired. But, she sued for sexual harassment and retaliation. She lost on summary judgment.
- The Fifth Circuit affirmed.
- The court found that the University took "prompt and effective remedial" action so it was not liable for the vet's butt slap.
- The court found that the University could not be found liable for the vet's pre-butt slap alleged sexual harassment because Johnson failed to show that it "knew or should have known" about the prior harassment. To have demonstrated that, Johnson had to show that someone within the University "with authority to address the problem" knew about it. Although she did show that another vet knew about the prior harassment, she failed to show that other vet had authority to address the problem in that she was not a supervisor of either Johnson or the vet.

2. *Johnson v. Bd. Of Supvs. Of La. State University*, 90 F.4th 449 (5th Cir. 2024)

- Johnson had also argued that a prior sexual harassment complaint by an intern against the same vet was sufficient to show that the University "knew or should have known" about the vet's prior harassment. The Fifth Circuit took a very skeptical, pro-employer, view of that argument and rejected it.
- Finally, the court rejected Johnson's claim that moving her to the horrifying storage room was retaliatory. Rather, the court held that the evidence proved as a matter of law that the University made the move to protect Johnson and give her a "safe place" to be away from the vet. Plus, the Court noted that Johnson did not offer any proof that some other nicer space was available, so there was no evidence from which to conclude that the move was motivated by the desire to retaliate against Johnson.

3. *Cerda v. Blue Cube Operations, L.L.C.*, 95 F.4th 996 (5th Cir. 2024)

- Cerda used her 30-minute lunch break to care for her ailing father, but she frequently exceeded the 30-minute limit. Her boss suggested she explore taking FMLA to care for her father, but she never did. The Company later learned that Cerda had been paid for time she did not work. It fired her for that, and also because she threatened to come to work with COVID and infect her co-workers.
- Cerda sued for FMLA interference and retaliation, as well as sexual harassment (based on harassing comments from her coworkers). She lost on summary judgment. She appealed. The Fifth Circuit affirmed.
- Cerda's FMLA interference claim failed because she never put the Company on notice that she intended to take leave that may qualify as FMLA leave. Her brief exchange with her boss – that the boss initiated – was not sufficient. And, Cerda had taken FMLA leave before and thus knew the proper process to follow to request FMLA leave had she wanted to do so to care for her father.

3. *Cerda v. Blue Cube Operations, L.L.C.*, 95 F.4th 996 (5th Cir. 2024)

- Cerda's FMLA retaliation claim failed because the Company articulated two good reasons for firing her (stealing time/pay and threatening to infect her coworkers with COVID) and she failed to rebut either one, much less both. Although she did contend some other workers were paid when they were on a break she failed to present proof that they took as much time off that they were paid for or that any of them had also threatened their coworkers.

- Finally, the Court rejected Cerda's hostile environment sexual harassment claim because the comments from her coworkers that she based the claim on where either: (1) not based on sex; (2) not sufficiently severe or pervasive to affect a term, condition, or privilege of her employment; or (3) not known by the employer.

4. *Bunker v. Dow Chemical Co.*, 111 F.4th 683 (5th Cir. 2024)

- Bunker filed an EEOC Charge using EEOC Form 5, but failed to:
  - Enter the name of the TWC-CRD on the blank line on the form where she could have written the name of the "State or local Agency, if any"; and
  - Did not sign or mark under the statement on the form that says "I want this charge filed with both the EEOC and the State or local Agency, if any."
- Bunker sued Dow in state court only under the TCHRA, not any federal law.
- Dow removed the case to federal court based on diversity and moved to dismiss for failure to exhaust administrative remedies based on its claim that Bunker never filed a Charge with the TWC-CRD, as is required to bring a TCHRA claim.

4. *Bunker v. Dow Chemical Co.*, 111 F.4th 683 (5th Cir. 2024)

- Judge Lee Rosenthal granted Dow's motion and Bunker appealed.
- Bunker argued that any Charge filed with the EEOC in Texas is considered automatically filed with the TWC-CRD under the two agencies' "Worksharing Agreement."
- The Fifth Circuit disagreed with Bunker and affirmed, holding that for a Charge filed with the EEOC to also be considered filed with the TWC-CRD, the filer must give some indication or request to the EEOC to transmit the form to the TWC- CRD
- This is a low bar and the EEOC Form 5 gives filers pretty easy ways to do that, but Bunker did not.

5. *Weathers v. Houston Methodist Hosp.*, No. 23-20536, 116 F.4th 324 (5th Cir. 2024)

Facts:

- Weathers' *pro se* Title VII race discrimination case was dismissed because she filed her EEOC Charge 302 days from her termination – 2 days too late.
- Weathers appealed, arguing that equitable tolling should apply based on the argument that she did everything she could to file timely and the delays that plagued her, and caused her to file her Charge two days too late, were attributable to the EEOC.

Holding:

- The Fifth Circuit agreed with Weathers and reversed and remanded the case. It relied on the combined fact pattern showing that: (a) Weathers was *pro se*; (b) she vigorously pursued the filing of her Charge and repeatedly fully and timely cooperated with the EEOC; (c) the EEOC repeatedly inexplicably delayed the process of her filing her Charge; and (d) there was no prejudice to the Defendant.

6. *Gentry v. Hamilton-Ryker IT Solutions, L.L.C.*, 102 F.4th 712 (5th Cir. 2024)

- Two systems engineers sued for overtime pay under the FLSA, claiming they were not paid on a "salary basis."
- They received what the employer called a "Guaranteed Weekly Salary" equal to 8 hours of pay (using their hourly rates of $125 or $150 per hour) and their hourly rates for all hours worked beyond their eighth hour. But no overtime pay.
- The district court held that this pay scheme was not consistent with payment on a "salary basis" and held that the Company violated the FLSA and owed the plaintiffs overtime pay.
- The company appealed.

6. *Gentry v. Hamilton-Ryker IT Solutions, L.L.C.*, 102 F.4th 712 (5th Cir. 2024)

- The Fifth Circuit affirmed. It held that the case was controlled by the U.S. Supreme Court's decision in *Helix Energy Solutions Group, Inc. v. Hewitt* (2023).

- In *Helix*, the Supreme Court held that Section 541.602(a) of the FLSA regs require a salaried employee to be paid on a "weekly basis" and that is only satisfied if their predetermined sum is calculated, not merely provided, by the week. In other words, payment on a "weekly basis" requires than an employee be paid a "weekly rate."

- Here, the plaintiffs' "Guaranteed Weekly Salary" was calculated using their hourly rate times eight hours, and thus their alleged "salary" was paid on an hourly basis and not by the week as Section 541.602(a) requires.

6. *Gentry v. Hamilton-Ryker IT Solutions, L.L.C.*, 102 F.4th 712 (5th Cir. 2024)

- Despite flunking the test under Section 541.602(a), Section 541.604(b) recognizes that hourly-rate employees may be paid on a "salary basis" as long as so long as "[1] the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and [2] a reasonable relationship exists between the guaranteed amount and the amount actually earned." The reasonable relationship test is satisfied so long as the "weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek." Department of Labor opinion letters advise that a 1.5 to 1 ratio of actual earnings to a guaranteed weekly salary satisfies this test.

- In this case, the employer guaranteed the employees $984 and $1,200 per week, respectively.

6. *Gentry v. Hamilton-Ryker IT Solutions, L.L.C.*, 102 F.4th 712 (5th Cir. 2024)

- That was on average a ratio of about 5 to 1 between their actual total weekly earnings and their guaranteed weekly amounts, which plainly flunked the reasonable relationship test.
- The Fifth Circuit noted that its decision was consistent with three pre-*Helix* decisions from the Second, Third, and Eight Circuit.
- The Fifth Circuit acknowledged that its decision was in tension with the Tenth Circuit's post-*Helix* decision in *Wilson v. Schlumberger*, but opined that case overlooked key aspects of *Helix*.

7. *Venable v. Smith International, Inc.*, No. 22-30227, 117 F.4th 295 (5th Cir. 2024)

- "Reamers" were paid on a "salary basis" of more than $455 a week, plus received additional compensation at a daily rate. Each earned more than $140,000 a year in total pay.
- The district court granted summary judgment for Smith International, finding that the Reamers were paid on a "salary basis" and met the duties test for a Highly Compensated Employee ("HCE").
- On appeal, the Reamers argued that their pay flunked the "reasonable relationship" test in CFR Section 541.604(b). The Fifth Circuit rejected that argument, holding the "reasonable relationship" test in Section 541.604(b) does not apply at all where, as here, the employees are paid on a "salary basis."

8. *Gray v. Killick Group,* No. 23-20295, 113 F.4th 543 (5th Cir. 2024)

- Gray worked as a welding inspector for Killick Group for seven years on a project-by-project basis. He sued for overtime pay under the FLSA.
- The district court dismissed his case on summary judgment based on judicial estoppel. He appealed and the Fifth Circuit affirmed on the alternative ground that Gray was an independent contractor, not an FLSA-covered employee.
- The Court applied the "economic-realities" test and found Gray was an independent contractor, primarily because:
  - Gray worked on a project-by-project basis.
  - Gray could accept or reject projects without retaliation.

8. *Gray v. Killick Group,* No. 23-20295, 113 F.4th 543 (5th Cir. 2024)

- Gray used his own equipment and vehicle and paid for his own certifications.
- Gray formed his own company, marketed it, and did work for other entities than Killick.
- Gray negotiated his hourly rates and reported his income on his tax returns as business income, not salary or wages.
- Gray had specialized skills and was a well-credentialed welding inspector.

9. *Klick v. Cenikor Foundation,* 94 F.4th 362 (5th Cir. 2024)

- Cenikor operates long-term, in-patient drug/alcohol rehab facilities in which it required patients to work for outside businesses that paid regular hourly wages and overtime to Cenikor, not the patients, for the patients' work. In two years, Cenikor reaped about $14 million through this arrangement.
- Some patients sued under the FLSA. After substantial discovery, the district court certified a collective action of the patients, and 226 of them joined.
- Cenikor filed an interlocutory appeal, arguing that the "patients" were not FLSA-protected "employees" and challenging the collective certification decision.
- The Fifth Circuit affirmed in 2023, but granted rehearing and issued this new decision in 2024.

9. *Klick v. Cenikor Foundation,* 94 F.4th 362 (5th Cir. 2024)

- Cenikor claimed the patients were not FLSA-protected "employees." The Fifth Circuit held the governing test in this type of situation to determine if they were employees was to decide who the primary beneficiary of the arrangement was, the company or the patient. The Fifth Circuit provided factors to consider and remanded to the district court to perform that analysis.
- Cenikor also argued that collective certification was inappropriate under *Swales v. KLLM Transp. Servs*. because it had three defenses that could not be decided on a collective basis.
- The Fifth Circuit disagreed with Cenikor as to two of the defenses, but held that the third defense (offset) may or may not be capable of deciding on a collective basis and therefore remanded the issue for further factual development so that the District Court could analyze that issue in light of *Swales*.
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10. Escobedo v. Ace Gathering, Inc., 109 F.4th 831 (5th Cir. 2024)

- Crude Haulers drove 18-wheeled tanker trucks of crude oil from oil fields to a pipeline – all entirely in the State of Texas.
- But, from the pipeline, most of the crude oil was taken to out-of-state refineries, mostly in Louisiana.
- The Crude Haulers sued for overtime pay under the FLSA.
- On a certified interlocutory appeal, the question was whether the Motor Carrier Act ("MCA") exemption applied to the FLSA even though the Crude Haulers only drove intrastate, never interstate.
- The Fifth Circuit held that the MCA exemption applied because it applies to "the *intrastate* transport of goods in the flow of interstate commerce," which was the case here.
- Hence, the Crude Haulers lost.

11. Mayfield v. Dept. of Labor, 117 F.4th 611 (5th Cir. 2024)

- Robert Mayfield, a Texas-based fast-food franchise owner, challenged the DOL's 2019 rule that raised the minimum salary for EAP-exempt employees from $455 to $684 per week. Mayfield argued that the DOL exceeded its authority by setting a salary threshold, claiming the FLSA allows exemptions based solely on job duties, not salary levels. After the district court ruled in favor of the DOL, Mayfield appealed to the Fifth Circuit.

- On September 11, 2024, the Fifth Circuit affirmed the lower court's decision, confirming the DOL's authority to "define and delimit" the terms of the EAP exemptions, including setting a minimum salary level. The court emphasized that using salary as a criterion for exempt status has long been recognized under the FLSA.

11. Mayfield v. Dept. of Labor, 117 F.4th 611 (5th Cir. 2024)

- As noted, this case involved the 2019 rule. In July 2024, the DOL increased the minimum weekly salary for EAP exemptions to $844, with a further rise to $1,128 per week scheduled for January 1, 2025. The rule also includes automatic adjustments every three years and raises the threshold for highly compensated employees.

- While the Fifth Circuit validated the DOL's use of salary as a factor in determining exempt status, it noted that the DOL's authority is not unlimited. The court acknowledged that any salary level must align with congressional intent. The Fifth Circuit's discussion suggests that, while the 2019 rule is upheld, larger increases— like the one scheduled for January 2025— may face further scrutiny if viewed as exceeding the DOL's authority.

11. Mayfield v. Dept. of Labor, 117 F.4th 611 (5th Cir. 2024)

Sure enough, two months later, on November 15, 2024, a judge from the U.S. District Court for the Eastern District of Texas distinguished *Mayfield* and issued a decision invalidating the entirety of the DOL's overtime final rule that was scheduled to take effect in January 2025. *See State of Texas v. Dept. of Labor*, 2024 WL 4806268 (E.D. Tex. Nov. 15, 2024).

In invalidating the rule, the court stated that although the DOL has the authority to define and delimit the terms of the overtime exemption, "that authority 'is not unbounded.'" The heart of the decision is the court's finding that the DOL was not authorized "to make salary rather than an employee duties determinative of whether" a bona fide executive, administrative, or professional (EAP) employee is exempt from the obligation to provide overtime pay. The court found that given the nationwide effect of the rule on hundreds of thousands of employers and millions of employees, striking down the rule on a nationwide basis was warranted.

12. Restaurant Law Center v. Dept. of Labor, 120 F.4th 163 (5th Cir. 2024)

In this case the Fifth Circuit vacated the DOL's so-called "80/20/30 Rule" that governed how tipped employees must be paid under the FLSA in order for the employer to take a "tip credit" against the minimum wage. The Fifth Circuit found the Rule was inconsistent with the text of the FLSA and arbitrary and capricious.

The Fifth Circuit strongly criticized the DOL's 80/20/30 Rule's framework because it impermissibly "disaggregate[d] the component tasks of a single occupation." Relying in part on the recent *Loper Bright* Supreme Court case that changed the law regarding a court's deference to federal agency pronouncements, the Fifth Circuit concluded that the Rule was invalid because it strayed too far from "the FLSA's focus on employees' occupations rather than on their discrete pursuit of tips."

13. Muldrow v. City of St. Louis, Missouri, 601 U.S. 346 (2024)

Facts

- The plaintiff, a police officer, was transferred, which did not affect her rank or pay, but reduced her responsibilities and perks and changed her schedule to a rotating schedule that often involved working weekends.
- She sued under Title VII for sex discrimination, but her case was thrown out on summary judgment and the Eight Circuit Court of Appeals affirmed, finding that she did not show the transfer resulted in a "materially significant disadvantage."

13. Muldrow v. City of St. Louis, Missouri, 601 U.S. 346 (2024)

Holding

- The Supreme Court unanimously decided that employees need not suffer "significant" harm to state a claim of discrimination under Title VII and rejected the high level of proof many courts had previously required.
- Under the new, controlling standard, while plaintiffs are not required to show "significant" harm, they must nevertheless show they suffered "some" harm.
- The Court did not define "some" harm. (In a concurring opinion, Justice Samuel Alito stated "I have no idea what this means...")
- Lower courts will have to sort this out on a case-by-case basis.
- The overall take-away is that many claims that were previously not actionable under Title VII and similar employment laws can now be brought in light of *Muldrow*. *See, e.g,, Anderson v. Amazon.com, Inc*., No. 23-cv-8347 (AS), 2024 WL 2801986, at *10-11 (S.D.N.Y. May 31, 2024) (holding that based on *Muldrow* a plaintiff could now base a discrimination claim on having been given a PIP).

14. Murray v. UBS Securities, LLC, 601 U.S. 23 (2024)

- Murray prevailed in a jury trial on his SOX retaliation claim. The jury found that his SOX-protected activity was a contributing factor in UBS's decision to terminate him. The District Court judge rejected UBS's claim that the jury also had to find retaliatory intent in order for Murray to prevail.
- The Second Circuit reversed and remanded, holding that retaliatory intent is an element of a SOX retaliation claim.
- The Supreme Court unanimously reversed. It held that a SOX retaliation plaintiff must show that his protected activity was a contributing factor in the employer's unfavorable personnel action but need not prove that his employer acted with "retaliatory intent."
- Note that the Court's decision was in line with the Fifth Circuit's SOX retaliation decision in *Halliburton, Inc. v. ARB*, 771 F.3d 254, 263 (5th Cir. 2014), which had also held that retaliatory intent is not required for a SOX retaliation plaintiff to prevail.

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