RETALIATION UPDATE –STATE BAR OF TEXAS, LABOR AND EMPLOYMENT SECTION SEPTEMBER 19, 2015

Andrew S. Golub
Dow Golub Remels & Beverly, LLP
9 Greenway Plaza, Suite 500
Houston, Texas 77046
asgolub@dowgolub.com

Mark J. Oberti
Oberti Sullivan LLP
723 Main Street, Suite 340
Houston, Texas 77002
mark@osattorneys.com

Cats Paw Applies in Retaliation Cases

- 2014 Oberti/Golub presentation 1st slide asked: "Do the *Nassar* and *Gross* But-For Causation Standard Render the *Staub v. Proctor Hospital* Cat's-Paw Theory **Unavailable** in Title VII or ADEA Retaliation cases?"
- We now have a clear and unequivocal answer: "No". Cat's paw remains viable in retaliation cases.
- *Zamora v. City of Houston*, ___ F.3d ___, 2015 WL 4939633 (August 19, 2015)

Cat's Paw, continued

- "Read together, *Nassar* and *Staub* . . . make clear that cat's paw analysis remains viable in the but-for causation analysis."
- "In short, *Staub* supports using a cat's paw theory of causation in but-for cases, and nothing in *Nassar* is to the contrary."
- Joins all other circuits that have addressed the question.
- Says same rationale might apply to ADEA and other but-for statutes, but issue is not presented in *Zamora*.
- No reason to think a different result would apply.

Double Cats Paw Recognized as Viable, Pre-*Zamora*

- *Jackson v. Frisco Ind. Sch. Dist.*, 798 F.3d 589 (5th Cir. 2015)
  - Decided June 15, 2015.
  - African-American teacher/coach's contract was not renewed by public school, and he sued.
  - Fifth Circuit reversed SJ that had been granted for employer in a Title VII/TCHRA discrimination and retaliation case.

Double Cats Paw Recognized as Viable, Pre-*Zamora*, continued

Fifth Circuit found that evidence of a retaliatory motive by the Principal and Assistance Principal of the school where the Plaintiff worked could be imputed to the school district because:

1. The school district board relied on a hearing examiner's recommendation not to renew the Plaintiff's contract;

2. The hearing examiner relied on the testimony of the Principal and Assistance Principal, and their evaluations of the Plaintiff, to reach the recommendation not to renew the Plaintiff's contract.

The evidence that the Principal and Assistance Principal were motivated by retaliation in their decision not to renew the Plaintiff's contract, was primarily proof that: (a) other similarly situated teachers' contracts were renewed; and (b) that of all the individuals who reviewed the Plaintiff, their reviews of him were markedly more negative (allegedly after they learned of the Plaintiff's complaints about racial discrimination).

Adverse Action – Context Matters. Also, Context Matters

- *Davis v. Fort Bend County*, 765 F.3d 480 (5th Cir. 2014)
- Davis complained that:
  - She was subjected to daily thirty-minute meetings with upper management;
  - Management superseded her authority by giving order and assigning tasks directly to her subordinates;
  - Her computer server administrative rights were terminated;
  - That her staff was reduced from 15 to four; and
  - She was terminated.

Davis v. Fort Bend County, continued

- Davis presented no evidence of context sufficient to establish the circumstances that made these particular actions (except for termination) materially adverse.
- She did not even offer any evidence that she viewed the actions as a demotion, that they embarrassed her, made her duties more arduous, or carried any stigma in the workplace.
- Practice pointer – Context is key to establishing retaliatory adverse action.

Adequacy of Pleading "Adverse Employment Action"

- *Thompson v. City of Waco*, 764 F.3d 500 (5th Cir. 2014)
- Reversing dismissal for failure to state a claim in a discrimination case.
- Police detective whose complaint alleged that his job was stripped of the "integral and material responsibilities of a detective" such that he "no longer functions as a full-fledged detective [and] is, effectively, an assistant to other detectives", adequately pleading an adverse employment action, for 12(b)(6) purposes.

Adequacy of Pleading, cont'd

- Thompson alleged more than "mere loss of some job responsibilities".
- Judge Jerry Smith dissents because "the law of this circuit imposes a 'strict' standard, one that has been recognized as the most stringent among our sister courts, with only the Eleventh Circuit having a comparable one."
- Important case for pleading retaliation claims, as these facts were found sufficient to establish adverse action under an ostensibly tougher standard.

Disclosure of Whistleblower's Identity Can Be Adverse Action

- *Halliburton, Inc. v. Administrative Review Board*, 771 F.3d 254 (2014)
- Menendez submitted an internal complaint to company and a confidential external complaint to the SEC.
- When SEC requested materials, Halliburton assumed it was sparked by Menendez, and in a document preservation memo identified Menendez as the investigation's cause.
- The ARB deemed this illegal retaliation under SOX § 806 and the Fifth Circuit agreed.

Whistleblower Identification, cont'd

- Assertion that "adverse action" is a purely factual determination is incorrect – "Whether in its context a company's conduct might well dissuade a 'reasonable' worker from engaging in protected conduct is a legal question."
- Employer's targeted disclosure to whistleblower's colleagues, in a workplace where collaboration is important, creates an environment of ostracism and might dissuade a reasonable employee from whistleblowing.
- Regarding damages, court reads 18 U.S.C. § 1514A(c) list of compensatory damage categories as non-exhaustive. Thus, emotional distress and reputational harm damages are available.

Paske v. Fitzgerald

- *Paske v. Fitzgerald*, 785 F.3d 977 (5th Cir. 2015)
- Primarily a first amendment retaliation case.
  - Police officer's speech at a Supervisor Meeting, in response to police chief's invitation to pose job-related discussions, was speech as an employee, not as a public citizen, and thus not protected by the First Amendment.
- Court affirms summary judgment on Title VII discrimination and retaliation claims.
- *Paske* is interesting for a different reason, though.

Paske, cont'd

- Very interesting cert petition filed presenting two important Title VII questions:
  - Cert petition may be found at http://bit.ly/1UiiAN5
  - Question 1 – In summary judgment proceedings, does the rule in *U.S. Postal Service Board of Governors v. Aikens* apply such that consideration of the *prima facie* case becomes irrelevant?
  - Question 2 – Must a Title VII plaintiff prove, as an element of the *prima facie* case, that he was treated less favorably than a "nearly identical" "similarly situated" individual outside the protected class, a Fifth Circuit requirement that has been characterized as "stringent", "strict", and "demanding"?

Paske, Part 3

- Circuit splits exist as to both issues.
- For example, the 6th, 7th, 8th, and D.C. Circuits hold that *Aikens* governs summary judgment such that once the employer asserts an excuse "the question whether the employee actually made out a prima facie case is no longer relevant and thus disappear[s] and drops out of the picture."
- Three circuits (the 4th, 5th and 10th) hold otherwise.
- This split is widely remarked recognized.

Paske, Part 4

- Regarding "similarly situated" and "nearly identical", the circuits are widely split.
  - The 3rd Circuit, for example, has rejected the "nearly identical" standard as seriously undermining Title VII's protections.
  - The 10th Circuit has outright rejected the proposition that the prima facie case requires any proof that any comparator exists.
- This is an important case to watch.
- If cert is granted, it has the potential to substantially alter Title VII practice in this circuit.

Third Party Retaliation

- *Zastrow v. Houston Auto Imports Greenway Ltd.*, 789 F.3d 553 (5th Cir. 2015)
- Zastrow, who owned a body shop, bought parts from Mercedes Greenway at a 25% discount.
- Zastrow had inspected a car in 2012, unaware that it was the subject of a pending arbitration against Mercedes Greenway.
- The plaintiffs in that case were suing Greenway for many claims, including race discrimination and retaliation.

Zastrow, cont'd

- Zastrow identified numerous problems with the car, and the plaintiffs' counsel asked if he would serve as an expert.
- In January 2013, a Greenway employee called him, advising him not to sit for the deposition, warning that he would regret it.
- Zastrow testified, and one day later Greenway called and said he could no longer buy parts from it.

Zastrow, Part 3

- The Fifth Circuit found:
  - Zastrow enjoyed protection from retaliation because he testified in support of the customers' underlying discrimination claim.
  - Greenway's refusal to contract with Zastrow, as punishment for his involvement in the underlying claim, could be an actionable adverse action.
  - Summary judgment therefore reversed on the retaliation claim, and case remanded for further proceedings.

Decisionmaker knowledge of protected activity is critical to a retaliation claim

- *Goudeau v. Nat'l. Oilwell Varco*, 793 F.3d 470 (5th Cir. 2015)
  - Reversed SJ on ADEA/TCHRA age discrimination claim. Lots of good language in it for Plaintiffs lawyers.
  - But, affirmed SJ on retaliation claim because: (a) 8-10 month time gap between alleged protected complaint and termination; and (b) (most critically) lack of evidence the decisionmaker – who was the target of the complaint – ever knew about the complaint before he decided to fire the Plaintiff.

SOX Has An Exhaustion Requirement Similar to Title VII

- *Wallace v. Tesoro Corp.*, __ F.3d __, 2015 WL 4604967 (5th Cir. July 31, 2015)
  - District court dismissed SOX-retaliation Plaintiff's claim in part because of a failure to exhaust at the OSHA level.
  - Plaintiff asserted that SOX did not require exhaustion with OSHA to proceed with the claim in court, but the Fifth Circuit disagreed.

SOX Has An Exhaustion Requirement Similar to Title VII, continued

- The Fifth Circuit held that similar to the rule in Title VII cases *vis a vis* the EEOC, a SOX retaliation plaintiff may only pursue in court a complaint that was within the "sweep of the OSHA investigation that can reasonably be expected to ensue from the administrative complaint [to OSHA]."

- Under this rule, the Plaintiff's wire fraud based SOX retaliation claim was not exhausted as a matter of law.

  - Note: this case has other good guidance for pleading a SOX retaliation claim to survive *Iqbal/Twombley*.

A WC Retaliation Claim Cannot Be Brought Against An Employer That Does not Provide WC Coverage To the Plaintiff, Even If It Is A Joint Employer With An Employer That Does

- *Burton v. Freescale Semiconductor, Inc.*, __ F.3d __, 2015 WL 4742174 (5th Cir., Aug. 10, 2015)
  - Manpower hired Burton and assigned her to Freescale as a temp.
  - Manpower provided workers comp insurance for the temps it assigned to other companies, including Freescale.
  - Burton filed a WC claim and was fired. She sued both companies.

A WC Retaliation Claim Cannot Be Brought Against An Employer That Does not Provide WC Coverage To the Plaintiff, Even If It Is A Joint Employer With An Employer That Does, continued

- The Fifth Circuit held that Freescale was not a proper defendant, because its WC insurance did not cover Plaintiff, only Manpower's did. That Freescale was a "subscriber," in that it provided WC insurance for its permanent employees, was not enough.

- This was about the only good news for Freescale in the case. Otherwise, the case contains a cornucopia of great language and holdings for the Plaintiff.

Is A Complaint To the Harasser "Protected Activity" Under Title VII?

- *E.E.O.C. v New Breed Logistics*, 783 F.3d 1057 (6th Cir. 2015) held that a complaint to the harasser himself about his harassment was protected activity under Title VII.

- But, in *Frank v. Harris County*, 118 F.3d 799, 804 (5th Cir. 2004), the Fifth Circuit, in *dicta*, concluded it was not, at least on the facts of that case.

- This is something to keep an eye on, especially in light of *Crawford v. Metro. Gov't of Nashville and Davidson Cnty.*, 555 U.S. 271 (2009), which took a broad view of what constitutes protected oppositional activity under Title VII.

Don't Try To Win Through Blatant Cherrypicking – It May Turn Out Badly

- *Malin v. Hospira, Inc.*, 762 F.3d 552 (7th Cir. 2014), reversed SJ for the employer, and put a serious tongue-lashing on the defense lawyers for doing that.

- In *Freescale* the Fifth Circuit did much the same, and referred to Freescale's arguments as "dismissive blunder" that was not "compelling in the slightest."

Questions?

Andrew S. Golub
Dow Golub Remels & Beverly, LLP
9 Greenway Plaza, Suite 500
Houston, Texas 77046
asgolub@dowgolub.com

Mark J. Oberti
Oberti Sullivan LLP
723 Main Street, Suite 340
Houston, Texas 77002
mark@osattorneys.com