HOT TOPICS IN EMPLOYMENT LAW --THE MOST RECENT CASES

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1. *Burton v. Freescale Semiconductor, Inc.*, __ F.3d __, 2015 WL 4742174 (5th Cir. Aug. 10, 2015)

- Reversed SJ for employer in ADA disability discrimination case. In an aggressive opinion it found ample evidence of pretext in proof that:
  - Employer gave reasons for decision to terminate that a reasonable jury could conclude it did not know of at the time it made the decision.
  - After deciding to fire the plaintiff, the employer (with the staffing company's encouragement and participation) "acted to create an exculpatory paper trail."
  - The employer gave the EEOC reasons for termination that: (1) had not yet occurred when it made the decision to terminate; (2) were "flatly untrue"; and (3) conflicted with explanations given in court.
  - The employer had no *contemporaneous* documentation of the plaintiff's alleged serial poor performance even though its procedures indicated that such documentation should have existed if the serial poor performance had actually occurred.

2. *Zamora v. City of Houston*, 425 Fed. Appx. 314 (5th Cir. 2015)

Affirmed jury verdict for the plaintiff HPD police officer in a retaliation case:

- The "cat's paw" doctrine was recognized by the U.S. Supreme Court in the context of cases that only require proof that illegal discrimination was a "motivating factor" in the challenged employment decision (*Staub*).

- But, the Fifth Circuit nevertheless adopted the "cat's paw" doctrine in cases, such as Title VII retaliation cases like this one, that require "but for" causation (so long as the higher standard of causation could still be satisfied).

- The Fifth Circuit found ample proof that the "but for" standard was satisfied in this "cat's paw" case because: (1) a reasonable jury could easily find that the plaintiff's supervisors' statements to Internal Affairs were the product of retaliatory animus against the plaintiff; (2) the Internal Affairs report relied almost exclusively on those statements to recommend that the plaintiff be suspended for ten days for untruthfulness; and (3) a disciplinary committee within HPD relied on the Internal Affairs report to recommend that the plaintiff be suspended to the Chief of Police; and (4) the Chief of Police implemented the ten day suspension based on the disciplinary committee's recommendation. Thus, the "but for" causal chain was established.

3. *Goudeau v. Nat'l Oilwell Varco, L.P.*, 793 F.3d 470 (5th Cir. 2015)

Reversed SJ for employer in an ADEA/TCHRA case where the 57 year old plaintiff was fired and not replaced. Found:

- Because alleged age based comments by decision maker (calling older workers "old farts" saying the smoking area was were "old people met," and telling the plaintiff he wore "old man clothes") were offered as circumstantial evidence, not direct evidence, they were some evidence that the plaintiff was terminated because of his age for purposes of satisfying his *prima facie* case.

- There was sufficient evidence of pretext to survive SJ:

  - The decision maker's alleged comments, albeit made 8 months to a year before the plaintiff's termination, could be used to show pretext as well as a *prima facie* case.

  - The employee had worked at NOV 18 years with no discipline, but the decision maker gave him 5 warnings within 8 months, the last 4 of which were allegedly not given to him until the day he was actually fired, although they referred to different alleged incidents over the last two months. Further, none of the last 4 warnings were signed by the plaintiff, and the final warning had no signature by anyone.

  - Some of the warnings allegedly blamed the plaintiff for problems that were not part of his job duties

  - The decision maker allegedly told the plaintiff he was going to fire another employee after asking about his age and referring to him as an "old fart," and, sure enough, he later fired that employee.

4. *Paske v. Fitzgerald*, 785 F.3d 977 (5th Cir.), *pet. for cert. filed* (2015)

Affirmed SJ for employer in a reverse race discrimination case, finding the white ex-police officer failed to establish a *prima facie* case of race discrimination because the offense for which he was fired (refusal to obey the African-American police chief's direct order to immediately go to the department for drug testing) was not "nearly identical" to the alleged offenses that African-American officers allegedly committed and were not fired for (*e.g.*, lying about the hours they worked, leaving a gun unsecured in a police car, failure to report theft, and taking funeral leave on false pretenses).

- Held that the without such proof, the plaintiff could not even make out a *prima facie* case, and thus the burden of proof never even shifted to the employer to articulate a LNDR for termination. This ruling conflicts with rulings from the 3rd and 10th Circuits.

- Articulated the "nearly identical" test as the governing test for a *prima facie* case, without mentioning different articulations of the test that have been used by courts over the years that did not include that "stringent" requirement. This is arguably in tension with the ideas articulated in case law that: (1) what makes up a *prima facie* case is a flexible standard, depending on the specific factual context; and (2) a *prima facie* case is not meant to be extremely difficult to establish.

5. *Peterson v. Bell Helicopter*, 788 F.3d 384 (5th Cir. 2015)

A jury in a TCHRA age discrimination case found that the employer was motivated by age when it laid off the plaintiff in a RIF, but that it would have laid him off anyway even without considering age. Therefore, the plaintiff received no monetary damages.

- But: (1) the plaintiff sought injunctive relief *after* final judgment was entered; (2) was granted some injunctive relief (prohibiting Bell from relying on age in future RIFs); and (3) on the basis of that relief was awarded attorney's fees of $339,987.50 under Sections 21.125(a) and (b) of the TCHRA. The employer appealed.

- The Fifth Circuit reversed, holding that the award of attorney's fees was erroneous because "Peterson did not seek injunctive relief until his case was effectively concluded. This delay deprived Bell of the ability to present relevant evidence and defend itself from what turned out to be a sweeping and indeterminate injunction. . . because we vacate the only relief on which Peterson "prevailed," he was not entitled to collect attorney's fees."

6. *Nobach v. Woodland Village Nursing Center, Inc.*, __ F.3d __, 2015 WL 4978749 (5th Cir. Aug. 20, 2015)

Reversed and rendered jury verdict for the plaintiff in a Title VII religious discrimination because there was no evidence that, before terminating the plaintiff, any of the employer's decision makers knew that the plaintiff had refused the "pray the Rosary" with a nursing home patient because her religion allegedly precluded her from doing so.

The fact that plaintiff told the decision maker that her religious beliefs precluded her from doing so immediately *after* being told of termination, and the decision maker said she did not care, did not change the result.

7. *Bodle v. TXL Mort. Corp.*, 788 F.3d 159 (5th Cir. 2015)

Plaintiffs settled a claim against them in state court for breach of non-compete agreements brought by their ex-employer. The settlement contained a general release, but not specific reference to FLSA claims.

- Immediately after the aforementioned settlement, plaintiffs sued their ex-employer under the FLSA in federal court. The employer alleged that the state court case release barred their claims, and the district court agreed. The Fifth Circuit reversed, holding that the state court release did not bar the plaintiffs' claims because, "the parties never discussed overtime compensation or the FLSA in their settlement negotiations."

- Distinguished *Martin v. Spring Break*, a 5th Circuit 2012 case, which carved out a narrow exception that permitted private settlements of FLSA claims.

8. *Blanton v. Newton Assocs, Inc.*, 593 Fed. Appx. 389 (5th Cir. 2015)

Jury found Plaintiff was subjected to sexual and racial harassment, but that the Employer (a Pizza Hut store), proved the *Ellerth/Faragher* affirmative defense.

-In a harassment case, an employer is vicariously liable for a supervisor's severe or pervasive sexual or racial harassment of a subordinate.

-However, if the supervisor's harassment involves no adverse employment action, an employer can avoid liability by providing (1) employer exercised reasonable care to prevent and promptly correct harassing behavior; and (2) employee unreasonably failed to take advantage of the preventative or corrective opportunities provided by the employer.

-The fact that other low level supervisors knew of the harassment was not sufficient to remove the ultimate question of the reasonableness of Pizza Hut's preventative and corrective measures from the province of the jury.

9. *EEOC v. Boh Bros.*, 731 F.3d 444 (5th Cir. 2013)

- Held sex stereotyping was a cognizable theory to support same sex harassment claims.
- Here, the EEOC prevailed by showing that the harasser was motivated to harass his subordinate because he perceived his subordinate to be insufficiently masculine
- Most of these cases fell into “horseplay” or “locker room” antics. This holding opens up the door for a lot of new same sex harassment claims.

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