THE TOP FIFTH CIRCUIT EMPLOYMENT LAW CASES OF 2023

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1. *Hamilton v. Dallas Cty.*, 79 F.4th 494 (5th Cir. 2023) (*en banc*)

- It was undisputed that Dallas county required female jail guards, but not men, to work at least one day each weekend. This was an explicitly sex-based schedule.
- Nine female guards sued for sex discrimination under Title VII but lost on a 12(b)(6) motion based on Fifth Circuit precedent holding that Title VII only prohibits bias in "ultimate employment decisions" such as hiring, promotions and setting pay – none of which were at issue here.
- In 2022, a three-judge panel of the Fifth Circuit affirmed.
- On *en banc* review, the Fifth Circuit reversed and overruled its precedent, holding that by its own statutory terms Title VII expressly broadly applies to all "terms, conditions, or privileges of employment," which would include the scheduling of shifts.

1. *Hamilton v. Dallas Cty.*, 79 F.4th 494 (5th Cir. 2023) (*en banc*)

- DEI Point:
- Judge Ho concurred and asserted that the court's broad reading of Title VII would protect "anyone harmed by divisive workplace policies that allocate professional opportunities to employees based on sex or skin color under the guise of furthering diversity, equity, and inclusion." (underline added).
- Judge Ho specifically referenced law firm policies that provided CLE lunches, mentoring, training, interviewing, etc. that are restricted based on gender or race as being subject to Title VII scrutiny.
- Judge Jones and two other judges concurred in the judgment only and noted that the U.S. Supreme Court granted cert. in *Muldrow v. City of St. Louis Missouri* to decide if a transfer was actionable and opined that the court should wait and "see what the Supreme Court does in *Muldrow* before we render any workplace "difference" an equivalent, for filing suit at least, of "discrimination.'"

2. *Wallace v. Performance Contractors, Inc.*, 57 F.4th 209 (5th Cir. 2023)

- The plaintiff was a female worker for the defendant construction company. She claimed sex discrimination, sexual harassment, and retaliation, and was poured out on summary judgment. She appealed. The Fifth Circuit reversed on all claims.
- It found that *direct evidence* supported Wallace's sex discrimination claim over her failure to be trained to work "at elevation" (a type of training that is necessary to be promoted) because her supervisor stated that she could not work at elevation because "she had t**** and an a**, and that "females stay on the ground."
- It found a reasonable jury could conclude that the plaintiff suffered tangible employment actions when she was suspended and terminated because she rejected a supervisor's sexual advances, which created a fact question as to her *quid pro quo* sexual harassment claim and rendered the *Ellerth/Faragher* defense inapplicable.
- For example, as to the suspension, a supervisor had: (i) sent Wallace a picture of his genitals; (ii) asked for her to send him pictures of her breasts; and (iii) asked to grab her breasts. Wallace refused. A month later, the supervisor suspended Wallace, claiming it was due to absenteeism. But given the factual background the Court held that a reasonable jury could conclude it was because she had rejected his advances.

2. *Wallace v. Performance Contractors, Inc.*, 57 F.4th 209 (5th Cir. 2023)

Alternatively, the court found that even if the employer could invoke the *Ellerth/Faragher* affirmative defense, it could not prevail on it as a matter of law because the evidence permitted a reasonably jury to conclude that the employer had an anti-harassment "policy in theory but not one in practice."

For example:

- Numerous coworkers and supervisors allegedly witnessed sexual harassment but failed to report it to HR.
- Wallace and her husband/coworker allegedly attempted to contact HR about the harassment but never received a response.

Finally, the court reversed the summary judgment as to Wallace's retaliation claim and noted that "magic words" were not necessary for a complaint of sex discrimination or harassment to constitute "protected activity" under Title VII "as long as the employee "alerts an employer to the employee's reasonable belief that unlawful discrimination is at issue.").

3. *Hudson v. Lincare, Inc.*, 58 F.4th 222 (5th Cir. 2023)

- Hudson was a sales rep. She alleged two coworkers called her "loud and black," "ghetto," and that one repeatedly used the "N-word" in the office and flat out called her a "n***r bitch" in front of their manager, who did nothing about it other than to tell the employee that such comments are unacceptable and to put a note in her file. Hudson then complained to HR and five days later the Company gave final warnings to the two offending coworkers.
- Either shortly before, or concurrently with, the final warnings, one of the two coworkers called Hudson "Aunt Jemima." After that, Hudson suffered no further racial harassment. Hudson claimed that in retaliation for her complaints, Lincare placed her on a "formal action plan."

3. *Hudson v. Lincare, Inc.*, 58 F.4th 222 (5th Cir. 2023)

- Ultimately, Hudson resigned for another job, then sued Lincare under Title VII, Section 1981, and the TCHRA for racial harassment and retaliation. She lost on summary judgment and appealed.
- The Fifth Circuit affirmed. It rejected Hudson's racial harassment case on the grounds that Lincare took prompt and effective remedial action once she complained to HR.
- It rejected her retaliation claim on numerous grounds, including the lack of an adverse employment action or proof of pretext.

4. *Allen v. United States Postal Service*, 63 F.4th 292 (5th Cir. 2023)

Allen was fired, rehired as part of a settlement of an EEO complaint she made, and then fired again from the Postal Service. She sued for age discrimination and retaliation over her second termination and retaliation over a job offer being rescinded by another station after she was fired the second time. The District Court threw her claims out on summary judgment. The Fifth Circuit reversed.

- The Court disagreed with the District Court and found the "same actor" presumption of non-discrimination did not apply, even though the decisionmaker in her termination had rehired Allen at age 54, because he rehired her as part of a settlement of an EEO complaint alleging discrimination from his having fired her.
- The Fifth Circuit found that the decision to rehire Allen was not evidence of non-discrimination, but rather "a begrudging re-hire effectuated to settle a discrimination complaint."

4. *Allen v. United States Postal Service*, 63 F.4th 292 (5th Cir. 2023)

- The Court disagreed with the District Court and found that for purposes of creating a *prima facie* case Allen had presented evidence that she had been "discharged because of her age" by presenting proof that, *inter alia*, a 26-year-old coworker named Chloe Bickman had been retained under "nearly identical" circumstances to which she had been fired.
- USPS argued that Bickman was not "nearly identically situated to Allen because Bickman did not have the same history of misconduct and poor performance as Allen. The Fifth Circuit rejected that argument because Allen swore under oath that she never engaged in the alleged misconduct or had poor performance and presented specific testimony to support her denials.
- The Court disagreed with the District Court that the employer's failure to have gone through the normal documented disciplinary steps before firing Allen was not evidence of pretext. Instead, it held that the failure substantiated Allen's claims that "management's claims of poor performance were artificial." This is an area of law where there are Fifth Circuit cases going both ways.

4. *Allen v. United States Postal Service*, 63 F.4th 292 (5th Cir. 2023)

- The Court found that Allen was terminated six months after she initially made EEO contact, which is too long to establish a causal link based on timing. But the Fifth Circuit noted that Allen was terminated just seven weeks after another EEO contact, which is close enough timing to establish a causal link.

- This is interesting because the Fifth Circuit has previously held that for purposes of analyzing temporal proximity in a retaliation case, a court is required to measure it from the first protected activity. *See Alkhawaldeh v. Dow Chem. Co.*, 851 F.3d 422, 428 n. 23 (5th Cir. 2017) (plaintiff cannot "re-start" the temporal clock with each new protected activity).

4. *Allen v. United States Postal Service*, 63 F.4th 292 (5th Cir. 2023)

- At the same time, summary judgment was clearly not appropriate on one of Allen's other retaliation claims because she presented direct evidence – a flat out statement from a hiring official that a job offer to her was rescinded because she "was at war with the post office due to [her] current EEO activity." That the District Court granted summary judgment despite this evidence clearly required reversal.
- Note: Plaintiffs often argue they were "set up to fail." Usually, that argument goes down in flames. But, in this case, it worked, at least at the summary judgment stage. So, for anyone dealing with that allegation this case is worth a very close look.

5. *Bernstein v. Maximus Federal Servs., Inc.*, 63 F.4th 967 (5th Cir. 2023)

- The EEOC sent a RTS notice to Bernstein and his lawyer, giving Bernstein 90 days from receipt to file a Title VII suit, but the notice only reached Bernstein's lawyer, not Bernstein, because the EEOC had an incorrect address for Bernstein.
- The notice to Bernstein was returned to the EEOC, and about 50 days after it had sent out the first notice, the EEOC sent Bernstein a new RTS notice that he personally received which said he had 90 days from its receipt to file a Title VII suit. Bernstein filed suit 89 days later.
- The employer moved to dismiss Bernstein's case because he failed to file suit within 90 days of his lawyer's receipt of the RTS notice. The District Court granted the employer's motion.
- The District Court held that equitable tolling did not apply.

5. *Bernstein v. Maximus Federal Servs., Inc.*, 63 F.4th 967 (5th Cir. 2023)

- Bernstein appealed and the Fifth Circuit reversed and remanded. It noted that equitable tolling may apply when the EEOC has mislead the plaintiff about the nature of his rights. It held that the EEOC's statement that Bernstein had 90 days to sue from when he personally received the second RTS notice could be sufficient to trigger equitable tolling.
- The Fifth Circuit noted that even when there are sufficient circumstances to trigger equitable tolling, the doctrine will still only apply if the plaintiff "has vigorously pursued his action." The case was remanded to the district court to develop the facts relevant to that aspect of the inquiry.

6. *Norsworthy v. Houston Ind. Sch. Dist.,* 70 F.4th 332 (5th Cir. 2023)

- The plaintiff was not selected for jobs she had applied for that would have been a promotion for her. She sued for retaliation and discrimination under the ADEA and TCHRA, and retaliation under the FMLA. Judge Lee H. Rosenthal granted the employer's Rule 12(b)(6) motion to dismiss all the claims for failure to state a claim.
- On appeal, the Fifth Circuit affirmed. It noted that, for example, as to the ADEA/TCHRA retaliation claims, the plaintiff failed to alleged any facts "to suggest that those responsible for hiring decisions knew about any of the grievances Norsworthy filed."
- The Court also recited the elements of a *prima facie* case of age discrimination and found that Norsworthy had not alleged sufficient facts to fulfill each element – for example, she failed to state facts about her qualifications for the promotions.

7. *Garcia-Ascanio v. Spring Ind. Sch. Dist.*, 74 F.4th 305 (5th Cir. 2023)

- Garcia is a Military Reservist. He complained about perceived on-the-job retaliation against him in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA). He claimed he was later constructively discharged because of his military status and USERRA-protected complaints.
- A jury found that his military status and complaints were a motivating factor for his constructive discharge, but that his employer would have constructively discharged him even if it had not taken his military status and USERRA-protected complaints into account.
- The District Court entered judgment for Spring ISD and Garcia appealed. The Fifth Circuit affirmed, based largely on the "invited error" doctrine: specifically, the fact that Garcia himself had proffered the mixed-motive jury instructions that he complained on appeal should not have been given. It also noted that the jury instruction was entirely proper anyway.

8. *Arredondo v. Elwood Staffing Servs., Inc.*, 81 F.4th 419 (5th Cir. 2023)

- In *Arredondo*, the Fifth Circuit found that a staffing agency, Elwood Staffing Services ("Elwood"), was not liable for Title VII violations against its employees by its client, Schlumberger.
- Elwood placed two women, Arredondo and Coleman, at a Schlumberger site. Both Arredondo and Coleman worked under a Schlumberger supervisor, Mitre, and a Schlumberger manager, Carrasco. Mitre and Carrasco are both lesbians.
- Mitre raped, sexually assaulted, and harassed Arredondo and Coleman. Coleman submitted a complaint about sexual harassment to Schlumberger's HR department, and Schlumberger terminated her. Arredondo later resigned.
- Together, the women filed suit in federal court alleging violations of Title VII. The district court entered a mixed summary judgment order, finding the women had viable claims against Schlumberger but releasing Elwood from the suit. Schlumberger subsequently settled with Plaintiffs at mediation.

8. *Arredondo v. Elwood Staffing Servs., Inc.*, 81 F.4th 419 (5th Cir. 2023)

- Arredondo and Coleman appealed the summary judgment in Elwood's favor.
- Both Coleman's and Arredondo's claims against Elwood failed for several reasons, including (i) Elwood did not take any adverse employment actions; (ii) Elwood did not participate in, know about, and was not in a position where it should have known of Schlumberger's actions; and (iii) Elwood took proper corrective action after learning of Schlumberger actions.
- Likewise, Arredondo's claims against Elwood failed because Elwood did not have actual or constructive knowledge (i.e., that it should have known if it exercised reasonable care) of Schlumberger actions, and Arredondo only reported the abuse after she resigned.

9. *Harrison v. Brookhaven Sch. Dist.*, 82 F.4th 427 (5th Cir. 2023)

- Harrison sued under Title VII and Section 1981, alleging that her employer discriminated against her based on race and sex when it reneged on its promise to pay for her to attend a training program. The District Court granted the defendant's Rule 12(b)(6) motion on the grounds that what she complained of was not an "ultimate employment action."
- After the District Court's ruling, the Fifth Circuit issued its *en banc* decision in *Hamilton v. Dallas Cty*., overruling the "ultimate employment action" standard.
- The Fifth Circuit held that even post-*Hamilton*, an adverse employment action is necessary to plead a disparate treatment case, meaning "discrimination in hiring, firing, compensation, or in the '*terms, conditions, or privileges*' of his or her employment.'"

9. *Harrison v. Brookhaven Sch. Dist.*, 82 F.4th 427 (5th Cir. 2023)

- The Fifth Circuit held that to meet that standard as it relates to discrimination in the "*terms, conditions, or privileges* of his or her employment" the plaintiff must establish adversity and assert a *non-de minimus* injury (*i.e.*, materiality). Harrison did both:
- - Adversity: having the at-issue benefit denied was a denial of a "privilege" and/or a "benefit" covered by Title VII.
- - Materiality: Title VII does not prohibit immaterial or *de minimum* differences, *i.e.*, trifles. There must be a meaningful difference in the terms of employment that injures the plaintiff. In this case, that was satisfied, as the cost of the training was $2,500 and Harrison ultimately paid for it herself.
- Accordingly, the Fifth Circuit reversed the District Court.

10. *EEOC v. Methodist Hospitals of Dallas,* 62 F.4th 938 (5th Cir. 2023)

- The EEOC brought a pattern and practice claim challenging Methodist's categorical policy of hiring the most qualified applicant for a vacancy, regardless of disability. The EEOC claimed that policy violated the ADA's reasonable accommodation requirement. The District Court granted summary judgment against the EEOC.

- The Fifth Circuit, relying on *US Airways, Inc. v. Barnett,* held that the EEOC's argument that making exceptions to Methodist's policy in order to accommodate a disabled employee is not reasonable (and thus not required) in the run of cases, *but* that there could be special circumstances in any individual case that make such an exception reasonable. The District Court failed to consider this possibility. Hence, the Court reversed the District Court.

10. *EEOC v. Methodist Hospitals of Dallas,* 62 F.4th 938 (5th Cir. 2023)

- The EEOC also brought a claim for failure to make a reasonable accommodation on behalf of a disabled employee who resigned after she exhausted FMLA leave and was told she could not return to work, but instead could take an additional six month leave of absence with no guarantee of reemployment. The District Court granted summary judgment against the employee, and the Fifth Circuit affirmed on the grounds that the employee "caused a breakdown on the interactive process."

- The EEOC reached this conclusion even though, at one point, Methodist told the employee there was nothing they could to to accommodate her and that she should resign.

- The Court noted that a clear declaration from an employer that no reasonable accommodation will be forthcoming might be seen as terminating the interactive process and removing any duty from the employee to continue the process, but that, seen in full evidentiary context, Methodist's statement did amount to such a declaration.

- Thus, when the employee resigned, rather than continue the interactive process, she fatally wounded her reasonable accommodation claim.

11. *Mueck v. La Grange*, 75 F.4th 469 (5th Cir. 2023)

- Mueck worked for a natural gas plant and would drink excessively when off duty, often to the point of passing out. Following his third citation for driving while intoxicated (DWI), he was ordered as part of his probation to attend a three-month substance abuse course that included weekly discussion groups.
- The employee met with his manager to explain that he was required to attend classes due to his DWI and that he was looking for co-workers who could cover his work hours that conflicted with his class schedule.
- With his manager's help, the employee was able to find substitutes with whom to trade his day shifts but was unable to find replacements during four of the evening classes, which overlapped the first few hours of his night shifts. When nobody was found to help cover those shifts, the employee was fired.
- Mueck sued under the ADA for discrimination, failure to reasonably accommodate, and retaliation. He lost on summary judgment and the Fifth Circuit affirmed.

11. *Mueck v. La Grange*, 75 F.4th 469 (5th Cir. 2023)

- Discrimination:
  - Although it found that Mueck's alcoholism was an ADA defined disability, the Fifth Circuit held that La Grange had produced a legitimate, nondiscriminatory reason for terminating Mueck: the conflict between his court-ordered substance abuse classes and his night shift work schedule.
  - Mueck attempted to show that the employer's reason for termination was a pretext for discrimination, but his arguments were inadequate and did not show that similarly situated employees were treated differently.
- Failure to Accommodate:
  - The Court found that Mueck had not informed La Grange that his request for time off was due to a disability. Instead, Mueck had referred to his struggles with drinking only when discussing his need to deal with the consequences of his DWI and attend his court-ordered substance abuse practices.

11. *Mueck v. La Grange*, 75 F.4th 469 (5th Cir. 2023)

- The Court explained that under the ADA an employee who needs an accommodation because of a disability has the responsibility of informing the employer.
- It upheld the lower court's dismissal of the claim, observing that "failure to request an accommodation, particularly where an employee's disability is not obvious, will doom a claim."

- Retaliation:
  - Because the Court had found that Mueck had not requested a reasonable accommodation for his alcoholism, it also denied his retaliation claim.
  - "Here," the Court said, "no reasonable juror could have found that [the employee], by notifying [his employer] that his court-ordered classes would conflict with his shift schedule and informing his supervisors that he was attempting to resolve this conflict by finding coverage, was requesting an accommodation for his disability of alcoholism."

12. *Cunningham v. Circle 8 Crane Servs, L.L.C.*, 64 F.4th 597 (5th Cir. 2023)

- A crane mechanic sued for overtime under the FLSA. He lost on summary judgment. The Fifth Circuit affirmed, holding that he was exempt under the Motor Carrier Act's "mechanic" exemption.
- The MCA's "mechanic" exemption requires: (1) "employment by a carrier subject to the Secretary of Transportation's jurisdiction"; and (2) "engagement in activities of a character directly affecting the safety of operation of motor vehicles." The first element was not at-issue in the case.
- As to the second element, the evidence showed that the self-propelled cranes (which were permanently affixed to truck chassis) were able to travel on highways and that the plaintiff's job was to perform repairs and maintenance on them – including their brakes, lights, horns, wheels, axles, etc.
- Moreover, the cranes were attached to truck chassis, and the plaintiff admittedly performed repairs and maintenance on the truck chassis itself. Hence, the second element of the MCA "mechanic" exemption was clearly satisfied.

13. *Loy v. Rehab Synergies, L.L.C.,* 71 F.4th 329 (5th Cir. 2023)

- Plaintiffs in 5 different positions at 20 different facilities, reporting to 22 different directors, were allowed to collectively pursue a FLSA "off-the-clock" case, and the 22 individual plaintiffs each testified, and all won at trial.
- On appeal, the employer argued that the district court erred in certifying and allowing the case to proceed as a collective action. The Fifth Circuit affirmed.
- The Court held there was sufficient evidence of widespread employer knowledge of "off-the-clock" work to permit the case to proceed collectively.
- The Court held that the differences in positions, locations, and supervisors, did not mean the case could not proceed collectively, given the evidence that they all were subject to the "off-the-clock" work violations.
- The Court found it was not unfair to allow the case to be tried through 22 individual plaintiff's testimony, especially given that the employer had filed a motion, which was granted, for the jury to make individual findings of liability.

14. *Flores v. FS Blinds, L.L.C.,* 73 F.4th 356 (5th Cir. 2023)

- Three blind installs who had been classified as independent contractors sued for overtime under the FLSA.
- Because it had classified them as independent contractors, the alleged employer had not maintained or kept records of the hours the plaintiffs worked.
- The District Court granted summary judgment against the plaintiffs on the grounds that they failed to satisfy their burden under *Anderson v. Mt. Clemens* to come forward with evidence they: (a) worked unpaid overtime; (b) in amount ”as a matter of just and reasonable inference.”

14. *Flores v. FS Blinds, L.L.C.,* 73 F.4th 356 (5th Cir. 2023)

- The Fifth Circuit reversed. It noted that *Mt. Clemens* applied in overtime cases where, as here, the employer failed maintain and keep required time records.
- Here, the plaintiffs satisfied the "lenient" *Mt. Clemens* standard with their own weekly estimates of unpaid overtime (which is enough), plus additional work orders and some corroborating testimony from the defendant.
- The defendant's proof failed to rebut the plaintiffs' showing without dispute. Thus, summary judgment was improper, and the case was reversed and remanded.

15. *Klick v. Cenikor Foundation,* 79 F.4th 433 (5th Cir. 2023)

- 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, challenging the collective certification decision.
- The Fifth Circuit affirmed.

15. *Klick v. Cenikor Foundation,* 79 F.4th 433 (5th Cir. 2023)

- The court found that the district court did not err in finding as a threshold matter that the patients were "employees."
- The court noted that whether the patients were "employees" could be appropriately collectively decided in the case – given the similarities of all of the patients' relevant situations.
- The court held that the evidence supported the district court's finding that the patients were all "similarly situated" under *Swales v. KLLM Transp. Servs, LLC* because they were all subject to a company-wide policy in which they provided labor without monetary compensation.
- The court found that Cenikor's individualized defenses were either meritless, or, in any event, did not defeat collective certification in the case.

16. *Price v. Valvoline, L.L.C.,* __ F.4th __ (5th Cir., Dec. 15, 2023)

- Price was terminated. He sued under Title VII, claiming race discrimination and that he was subjected to a racially hostile environment. He lost on summary judgment. He appealed, and the Fifth Circuit affirmed.
- On appeal, Price claimed he had presented direct evidence of racial discrimination in his termination, consisting of several race related alleged statements from management. The Fifth Circuit found it unnecessary to resolve that issue, because "even if Price had presented direct evidence of racial discrimination his discrimination claim would fail."
- Specifically, the Fifth Circuit found that the evidence that Price was terminated due to his absenteeism was undisputed – which means Valvoline prevailed even if he had presented direct evidence.

16. *Price v. Valvoline, L.L.C.,* __ F.4th __ (5th Cir., Dec. 15, 2023)

- Price's hostile environment claim was based on two comments, one in which his supervisor allegedly said "you people always want something for free" and another in which the assistant plant manager called him a "lazy boy." The Fifth Circuit held this was not sufficiently severe or pervasive enough to create a hostile work environment.
- Price alleged that facially neutral nitpicking and yelling at him should be factored into the analysis, but the Fifth Circuit refused to do so, asserting that "Price presented no evidence beyond his own speculation and that of Brown [a coworker who provided an affidavit] that these "facially neutral actions" were racially motivated."
- Judge Ho's used his concurrence to focus on diversity/DEI and its intersection with anti-discrimination laws.

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