THE TOP FIFTH CIRCUIT EMPLOYMENT LAW CASES OF 2020

State Bar of Texas Webcast CLE

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1. *Kitchen v. BASF*, 952 F.3d 247 (5th Cir. 2020)

- Kitchen was permitted to return to work after a second DWI conviction, subject to an agreement to be tested for alcohol any time at work, and terminated if he tested positive.

- About a year later, Kitchen tested positive for alcohol at work, and was terminated, as per the agreement. Kitchen sued under the ADA. He lost on summary judgment, and appealed.

- The Fifth Circuit held that Kitchen's ADA claim failed because: (a) he demonstrated no causal connection between his disability (alcoholism) and discharge; and (b) failed to produce evidence of pretext.

- The Fifth Circuit noted that the ADA explicitly permits employers to hold alcoholic employees to the same performance and behavioral standards as other employees.

2. *Clark v. Champion Nat'l Sec., Inc.*, 952 F.3d 570 (5th Cir. 2020)

- Clark, a Personnel Manager, was a Type II diabetic. He asked for two accommodations for his diabetes, which Champion granted.

- Champion fired Clark after he was caught sleeping on the job. Before he was fired, Clark told Champion that he was not sleeping, but rather had passed out from diabetes related low blood sugar. Champion fired him anyway. Clark sued under the ADA and lost on summary judgment. He appealed.

- The Fifth Circuit affirmed on the ground that Clark was not a "qualified individual" at the time the Company decided to terminate him, because he was not awake – an essential function of his job.

- The Fifth Circuit also affirmed summary judgment on Clark's other claims, for disability-based harassment, failure to accommodate, and retaliation.

3. *Amedee v. Shell Chemical, L.P.*, 953 F.3d 831 (5th Cir. 2020)

- Shell disciplined Amedee for violating its attendance policy, and warned her that additional violations could result in termination.

- The next day, Amedee drove drunk, wrecked her truck, got arrested for DUI, and failed to return to work. Amedee applied for FMLA leave for "anxiety." About two weeks later, Shell fired Amedee for missing work without a valid excuse on the day she was arrested. Amedee sued under the FMLA and ADA, and lost on summary judgment. She appealed.

- The Fifth Circuit affirmed. Amedee's FMLA and ADA claims failed because Shell fired Amedee for missing work the day she was arrested – in violation of Shell's attendance policy – which was a perfectly legitimate reason for terminating her employment.

4. *Lyons v. Katy Indep. School Dist.*, 964 F.3d 298 (5th Cir. 2020)

- Lyons, a H.S. coach of multiple sports, had lap-band surgery and shortly thereafter was reassigned to be the in-school suspension teacher. She filed a grievance claiming disability discrimination, and a week later she was removed as a basketball coach.

- Lyons sued for "regarded as" discrimination and retaliation under the ADA. She lost on summary judgment. She appealed.

- The Fifth Circuit affirmed. Her ADA "regarded as" case failed because the lap band surgery was a "transitory and minor" impairment lasting six months or less, which cannot support a "regarded as" claim under the statutory language of the ADA.

- Her retaliation claim failed because she presented no proof of pretext – the school claimed it removed her from coaching basketball because it thought she did not like coaching basketball, and Lyons herself admitted in her deposition that is what they thought.

5. *West v. City of Houston,* 960 F.3d 736 (5th Cir. 2020)

- The African-American female firefighter worked with males who allegedly posted racially derogatory photographs on the station walls, left porno magazines in open areas around the station, joked about "men's testicles," passed gas, and slept in their underwear at the station. She also claimed that she received less overtime opportunities than her white male coworkers because of her race and sex. She sued for race and sex based harassment and discrimination. She lost on summary judgment. She appealed.

- The Fifth Circuit affirmed. As for the harassment claim, the Court found that the alleged harassment was not "severe or pervasive" as a matter of law.

- The Court found that the plaintiff's claims of race and sex discrimination in overtime opportunities failed because her comparison to white male coworkers who received more overtime was flawed for various reasons, including:

  - She worked as a paramedic, whereas the comparators worked as fire suppression engineers/operators, and the difference in job duties were "too different to be valid comparators."

  - The comparators she offered had different supervisors who would decide who would receive overtime opportunities.

6. *Horvath v. City of Leander*, 946 F.3d 787 (5th Cir. 2020)

- The City mandated that certain personnel receive a vaccine. A Baptist firefighter sought an exemption based on religious grounds. The city gave him two options: (a) transfer to a different position with the same pay and benefits and did not require a vaccine; or (b) remain in his same position and wear a respirator at all times and submit to testing for possible diseases.

- Horvath rejected both proposals and made a counter-proposal, which the City rejected. Horvath did not back down, and was fired. He sued for failure to make a reasonable accommodation to his religious objection, and for retaliation for seeking a religious accommodation. He lost on summary judgment, and appealed.

- The Fifth Circuit affirmed. It found that under circuit precedent the transfer offer was a proposed reasonable accommodation as a matter of law, even if – as Horvath had alleged – it would have resulted in a new schedule that would have prevented Horvath from earning money from a second job.

- The Fifth Circuit found no retaliation because it was undisputed that Horvath was not terminated for asking for a religious accommodation, but rather because he refused to comply with the City's order to select one of the two lawful proposed accommodations it offered him – *i.e.*, insubordination.

7. *Brown v. Wal-Mart Stores East, L.P.*, 969 F.3d 571 (5th Cir. 2020)

- Brown, an assistant store manager, complained to Wal-Mart's ethics hotline that her store manager, Aurelio Quinn, was soliciting sexual favors from employees in exchange for money and employment-related favors. Seven weeks later, Brown was fired by the Asset Protectioni Manager ("APM") for allegedly violating two company policies.

- Three days after firing Brown, Wal-Mart found the allegations against Quinn "unsubstantiated." But Quinn was later fired for "gross sexual misconduct" based on the report of another employee.

- Brown sued for retaliation. She lost on summary judgment. She appealed. She relied on the "cat's paw" doctrine. The Fifth Circuit affirmed primarily because: (a) the APM credibly testified that he alone made the decision to terminate Brown and that Quinn did not participate in or influence the decision; and (b) Brown admitted to the key facts that the APM relied on in making his decision.

- There was evidence that Quinn had tried, but failed, to get other employees to lie to the APM about Brown's conduct, to make it look worse than it really was. The Fifth Circuit said "this evidence is deeply disturbing," but that since those efforts failed, they did not show that summary judgment was improper.

- During the at-issue incident that led to Brown's termination, Quinn had engaged in somewhat similar conduct as Brown, and was not fired for it. But the differences between what Quinn did, and what Brown did, were too great to justify an inference of pretext or to prove "but for" causation. Thus, summary judgment was proper.

8. *Simmons v. UBS Financial Servs., Inc.*, 972 F.3d 664 (5th Cir. 2020)

- Simmon's employer, Prelle Financial, sold life insurance products to clients of UBS.
- Simmons daughter worked for UBS. She filed a charge of pregnancy discrimination against UBS and ultimately resigned and settled.
- Shortly thereafter, UBS forbade Simmons from doing business with its clients, which effectively ended his employment at Prelle Financial. Simmons sued UBS for third-party retaliation under *Thompson v. N. Am. Stainless* (2011). His case was dismissed under Rule 12(b)(6). He appealed.
- The Fifth Circuit affirmed, holding that *Thompson* does not authorize a third-party retaliation claim against an entity that did not employ the plaintiff.
- Interestingly, Simmons himself had once worked for UBS. In footnote 18, the Fifth Circuit noted that if he invoked *Robinson v. Shell Oil Co.*, and combined it with *Thompson*, then he may have had a cognizable claim. But, Simmons never made that argument, so it was waived and the court did not consider it.

9. *Badgerow v. REJ Properties, Inc.*, 974 F.3d 610 (5th Cir. 2020)

- Badgerow complained to a compliance officer ("CO") that she "was not sure if she was not treated fairly because she was not family or because she is a woman." The CO reported that to Badgerow's boss, and told him he should consider consulting an attorney. Instead, that very same day, her boss fired her, allegedly because of complaints from her coworkers.

- Badgerow sued for pay discrimination, sexual harassment, and retaliation. She lost on summary judgment and appealed. The Fifth Circuit affirmed as to her pay discrimination and sexual harassment claims, but reversed as to her retaliation claim.

- As to the retaliation claim, the Fifth Circuit found that, contrary to the district court's findings: (a) Badgerow's complaint to the CO was "protected activity"; (b) temporal proximity established a *prima facie* case of causation; and (c) there was sufficient evidence of pretext, given that: (i) Badgerow's boss admittedly asked her right before firing her, "[d]o I have to worry about you suing me?"; and (ii) Badgerow's coworkers had been complaining about her for months and yet her boss seemed determined to keep her until the day he learned about her protected complaint of sex discrimination.

10. *Salazar v. Lubbock Cty. Hosp.*, 982 F.3d 386 (5th Cir. 2020)

- Salazar worked for Lubbock County Hospital 27 years, before she was terminated for alleged poor performance at age 57.

- She sued under the ADEA, and lost on summary judgment. She appealed, and the Fifth Circuit affirmed.

- The court concluded that Salazar produced no proof of pretext. It found her own claims that her performance was good "self-serving" and insufficient. It found Salazar's claim that the hospital failed to follow its own progressive disciplinary policyin terminating her without prior formal discipline insufficient to prove pretext because its policy was not mandatory and managers reserved the right to impose whatever level of discipline they deemed appropriate.

11. *Novice v. Shipcom Wireless, Inc.*, 946 F.3d 735 (5th Cir. 2020)

- The plaintiffs sued under the FLSA, claiming they had been misclassified as "exempt." They won at trial. The employer appealed on two grounds.

- First, the employer argued that the trial court abused its discretion by not allowing it to open and close arguments, since it bore the burden of proof on the exemption issue. The Fifth Circuit disagreed.

- Second, the employer argued that the trial court abused its discretion in admitting evidence that it had done an internal audit to determine if employees were properly classified as exempt under the FLSA, and decided to reclassify the very position that three of the plaintiffs occupied from exempt to non-exempt (and pay two of them back-pay). Again, the Fifth Circuit disagreed.

- Ultimately, the Fifth Circuit affirmed the judgment in the plaintiffs' favor in all respects.

12. *Hobbs v. Petroplex Pipe and Const., Inc.*, 946 F.3d 824 (5th Cir. 2020)

- Two pipe welders who had been classified as "independent contractors" sued under the FLSA for overtime pay claiming they were really "employees." After a bench trial, the district court found for the two plaintiffs. The company appealed.

- The Fifth Circuit affirmed, after applying the *Silk* factors under the deferential standard of review that applies to judgment after a bench trial. Important factors in the plaintiffs' favor were:

  - Petroplex set the welders' schedule; required them to work 7 a.m. to 5 p.m.; provided the welders with specific instructions; and sometimes required them to do work other than welding.

  - The welders were not hired on a project basis, and worked exclusively for Petroflex when they worked for the company.

  - One plaintiff worked for Petroflex nearly three years, and the other two tenures of four months and then six months.

13. *Escribano v. Travis County, Texas*, 947 F.3d 265 (5th Cir. 2020)

- Sheriff's office detectives sued for overtime under the FLSA, claiming they were misclassified as "exempt." A jury ruled in their favor. But, the county filed a motion for judgment as a matter of law, and the district court granted it. The detectives appealed.

- The Fifth Circuit affirmed. Ultimately, the case turned on whether the detectives were paid on a "salary basis." The detectives argued that they were not paid on a "salary basis" because their alleged salary was "subject to reduction because of variations in the quality or quantity of the work performed." Specifically, they claimed the county had a written policy that permitted unlawful docking for such reasons.

- The Fifth Circuit noted that DOL regulations require an actual practice of making unlawful deductions to invalidate the "salary basis" – in other words, the mere fact that an employer has a policy that permits unlawful docking is not good enough for the plaintiff to win. Here, the detectives failed to present proof that the county actually illegally docked their pay, or any other detectives' pay. Accordingly, as a matter of law, the county satisfied the salary basis test.

14. *Faludi v. U.S. Shale Solutions, L.L.C.,* 950 F.3d 269 (5th Cir. 2020)

- Faludi was an unlicensed lawyer working as a consultant for U.S. Shale. He was paid a day rate with no overtime, as he had been classified as an "independent contractor." He sued for overtime under the FLSA. He lost on summary judgment. The district court held he was exempt under the FLSA and that his "day rate" qualified as a "salary" for purposes of the FLSA's "salary basis" test. Faludi appealed.

- The Fifth Circuit affirmed in 2019, on the ground that Faludi was exempt under the FLSA and was paid on a salary basis. After Faludi filed a motion for rehearing *en banc* on the salary basis issue, the Court withdrew that decision, and affirmed on different grounds in 2020.

- Specifically, this time, the Fifth Circuit held that Faludi was an independent contractor, and thus not entitled to overtime pay under the FLSA as a matter of law. It reached this conclusion even though the district court had found a fact issue on the independent contractor issue.

15. *Miller v. Travis County, Texas*, 953 F.3d 817 (5th Cir. 2020)

- Lieutenants sued for overtime under the FLSA. The county defended on the basis of the FLSA's "executive exemption," which requires, among other things, that the employee have the authority to hire or fire or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change in status of other employees be given particular weight. The county stipulated that the lieutenants could not hire or fire, so the the only issue was whether their suggestions and recommendations received "particular weight." The jury found they did not, and thus found for the lieutenants.

- The county appealed, arguing that no reasonable jury could have found that the lieutenants' suggestions and recommendations concerning hiring, firing, advancement, promotion, or any other change in status of other employees did not receive "particular weight."

- The Fifth Circuit disagreed, stating, "[t]here was evidence on both sides, and the jury picked a winner. Our task is not to determine whether the verdict was correct – only whether there was sufficient basis to render it. *See* FED. R. CIV. P. 50(a). There was."

16. *Fraser v. Patrick O'Connor & Associates, L.P.*, 954 F.3d 742 (5th Cir. 2020)

- Defendant sells property tax consulting services to individuals challenging their property appraisal. The plaintiffs had the job title "property tax consultant." They presented the Defendant's clients' cases to the appraisal review board. They worked 60 to 90 hours a week, but were not paid any overtime. The sued for overtime under the FLSA, and won after a four-day bench trial. The Defendant appealed.

- The Defendant argued that the plaintiffs were exempt under the administrative exemption. That exemption requires, among other things, that the employee's primary duty be "work directly related to the management or general business operations of the employer or the employer's customers."

- The Fifth Circuit embraced the administrative/production dichotomy, under which duties which are production in nature are not deemed to be work that is related to the management or general business operations of the employer or the employer's customers. Here, the plaintiffs' work was part and parcel of what the Defendant sold to its clients. As such, their very nature of their work disqualified them from the administrative exemption under the administrative/production dichotomy. As such, the Fifth Circuit affirmed the district court's ruling in the plaintiffs' favor.

- As for damages, the district court found that the fluctuating workweek method of calculating back-pay (a methodology that is favorable to defendants) did not apply, and the Fifth Circuit affirmed that finding too because, "O'Connor's policies did not clearly indicate whether the plaintiffs' salaries or commissions could be docket or reduced, and the plaintiffs were provided no guidance on how to complain about their compensation."

17. *Jones v. New Orleans Reg'l Phys. Hosp.*, 981 F.3d 428 (5th Cir. 2020)

- Six plaintiffs that worked for a managed care company in white collar roles sued, claiming they were misclassified as exempt under the FLSA's administrative exemption.
- The district court granted summary judgment for the employer, and the Fifth Circuit affirmed.
- The court rejected all of the plaintiffs' arguments, including their claims that they did not exercise discretion and independent judgment with respect to matters of significance, as is required by 29 C.F.R. § 541.202(a).

18. *Sun Coast Resources, Inc. v. Conrad*, 956 F.3d 335 (5th Cir. 2020)

- An arbitrator in an FLSA case concluded that the parties' arbitration agreement provided for collective actions. The employer sued to vacate that finding. The district court denied the employer's request, and confirmed the award that the arbitrator entered in the plaintiffs' favor.

- The Fifth Circuit affirmed. The legal standard provides that the arbitrator's ruling had to be affirmed so long as his ruling was based on an interpretation of the agreement, even if that interpretation was not correct. Under that very forgiving standard, the ruling was easily confirmed.

- The employer also argued that the court should have decided the issue of whether the parties' arbitration agreement provided for collective actions. That is normally true, unless the arbitration agreement clearly provides for the arbitrator to decide that issue. But, here, the employer waived that argument by willing agreeing to allow the arbitrator to decide the issue in the arbitration, and by not arguing it was error in the district court.

- Finally, the employer had made a motion demanding oral argument, which the court denied and aggressively derided.

19. *Smith v. Ochsner Health System*, 956 F.3d 681 (5th Cir. 2020)

- Smith was a "organ procurement coordinator" earning around 120k a year, even though he was not a high school graduate. He resigned and sued for overtime under the FLSA. Ochsner defended on the Highly Compensated Employee ("HCE") exemption and won on summary judgment in the district court. Smith appealed.

- The Fifth Circuit affirmed. The Court noted that, given Smith's pay, to win under the HCE exemption, all Oschner had to prove was that Smith "customarily and regularly performed office or non-manual work directly related to the management or general business operations of the employer." Oschner did not also have to prove that Smith's duties included the exercise of discretion and independent judgment with regard to matters of significance, as it would in a straight administrative-exemption analysis.

- Ochsner easily proved that Smith customarily and regularly performed office or non-manual work directly related to its general business operations, including: (a) coordinating potential donations; (b) coordinating the pick-up and transportation of organs via limousine or airplane; and (c) taking the team to the airport, going to the operating room, and reporting back to the coordinator and surgeon in Louisiana.

20. *Cruz v. Maverick Cty.*, 957 F.3d 563 (5th Cir. 2020)

- Maverick County failed to pay overtime to 36 of its hourly paid Sheriff Deputies. The deputies sued under the FLSA. The county admitted liability, but challenged the number of overtime hours the plaintiffs claimed to have worked, and denied willfully violating the FLSA. They county lost a bench trial and the court found their violation was willful. The county appealed.

- The Fifth Circuit affirmed. The main issue had to do with Rule 615. The country invoked it. On the second day of trial, the plaintiffs' testimony shifted significantly and became far more uniform than the first day of trial. The county moved to strike all the plaintiffs' testimony for violating Rule 615. The district court denied the motion, mostly because it concluded that the change in testimony was not primarily caused by the plaintiffs talking to one another, but by plaintiffs' counsel's discussions with the plaintiffs, which does not violate Rule 615.

- On appeal, the Fifth Circuit was not happy with what it saw as fairly obvious Rule 615 violations, but reluctantly affirmed because: (a) the abuse of discretion standard is very deferential; (b) the county was able to fully cross-examine the plaintiffs about this issue, and thus suffered no prejudice; and (c) there was evidence that, to the extent that the plaintiffs violated Rule 615, they did not do so knowingly or willfully.

21. *Hewitt v. Helix Energy Solutions Grp., Inc.*, ___ F.3d___ (5th Cir. Dec. 21, 2020)

- Hewitt was a Tool Pusher for Helix. Helix classified him as "exempt" under the FLSA. He was paid a day rate with no overtime. He sued for overtime, claiming that he was not paid on a "salary basis". The district court granted summary judgment for Helix, holding that, since his day rate was higher than the FLSA's salary level, Helix paid him a salrry.

- In April, a three-judge panel reversed the district court 3-0 and determined that Helix did not pay Hewitt on a salary basis because his was was *post-determined* not pre-determined and was calculated by the day. Hewitt moved for rehearing, and the same panel heard oral argument.

- In December, the same panel still reversed the district court, but this time 2-1, withdrawing its earlier opinion. The majority concentrated on the application of 29 CFR 541.604(b), a regulation entitled "Minimum guarantee plus extras," which provides that day rate employees in limited circumstances can still be exempt from overtime IF the company pays the employee a guaranteed amount "regardless of the number of … days ..worked" AND "a reasonable relationship exists between the guaranteed amount and the amount earned."

- The majority determined Helix failed both parts of the test because Helix paid Hewitt based on the days worked, not "regardless" of the days worked; and that there was no reasonable relationship between any alleged guarantee and what Helix paid Hewitt.

- There were sharp concurring and dissenting opinions, mostly focused on textualism. The dissent's main point was that, because Hewitt's earned pay eclipsed the salary level floor, Helix paid him a salary, and the majority opinion misapplied 541.604(b), arguing it does not apply to highly compensated employees. It urged *en banc* reconsideration.

22. *Biziko v. Van Horne*, 981 F.3d 418 (5th Cir. 2020)

- In the district court, the defendants in this FLSA case stipulated that they were each an "enterprise engaged in commerce," and thus employers subject to the FLSA.

- Yet, after losing a jury trial, the defendants appealed, arguing that they were not "enterprise[s] engaged in commerce," and thus were not employers subject to the FLSA.

- The Fifth Circuit noted that if the FLSA's "enterprise" coverage requirement was jurisdictional, then the defendant could raise the issue on appeal, but it it were not, then it had forfeited, or waived, the issue in the district court.

- The court, relying on the U.S. Supreme Court's decision in *Arbaugh v. Y&H Corp*., and two First Circuit opinions, found that the the FLSA's "enterprise" coverage requirement was not jurisdictional.

- Because the defendants had forfeited or waived the non-jurisdictional issue in the district court, they could not raise it on appeal. Therefore, the judgment in the plaintiff's favor was affirmed.

23. *Texas Tech Univ. Health Science Ctr.-El Paso v. Flores*, ___ S.W.3d ___ 2020 WL 6811725(Tex. 2020)

- Flores sued for age discrimination after she was terminated in an alleged job elimination. Defendant filed a plea to the jurisdiction. The trial court denied the plea, and the court of appeals affirmed. The Supreme Court reversed, holding (1) Flores failed to submit legally sufficient evidence to establish a *prima facie* case of age discrimination; and (2) because the legislature has not waived governmental immunity in the absence of such evidence, Flores's age-discrimination claim must be dismissed for lack of jurisdiction.

- Concerning the *prima facie* case issue, the court focused first on whether Flores had been "replaced" by someone significantly younger. It concluded that she had not, because the significantly younger individual who she claimed "replaced her" was an existing employee who was given a new and different position, and then assumed some, but not all of Flores's former duties, and had many other duties as part of that position that Flores had not had.

23. *Texas Tech Univ. Health Science Ctr.-El Paso v. Flores*, ___ S.W.3d ___ 2020 WL 6811725 (Tex. Nov. 20, 2020)

- The court next analyzed whether Flores could establish a *prima facie* case through evidence of less favorable treatment under nearly identical circumstances as compared to one or more significantly younger employees.

- Flores argued that she satisfied this test, because Texas Tech eliminated her position, yet retained and promoted a significantly younger coworker. The court found that this evidence was not sufficient to establish a *prima facie* case either because she and the significantly younger coworker were not nearly identically situated, in that: (1) Flores and the significantly younger coworker held different jobs at the time Flores was terminated in the alleged job elimination; and (2) there was evidence that their supervisor who decided to eliminate Flores's job position was unhappy with Flores's job performance, but there was no evidence that he was unhappy with the significantly younger coworker's job performance.

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