THE TOP FIFTH CIRCUIT EMPLOYMENT LAW CASES OF 2021 AND 2022

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1. *Watkins v. Tegre*, 997 F.3d 275 (5th Cir. 2021)

- Ten days after giving her boss a doctor's note indicating she needed intermittent time off due to anxiety, Watkins was fired from her job as a dispatch supervisor in the Sheriff's office.
- The reason given for her termination was sleeping on the job, but a white dispatch supervisor was also caught sleeping on the job and was only given a "counseling."
- Watkins, who is African American, sued for race discrimination and FMLA retaliation. The district court threw out her case on summary judgment. Watkins appealed. The Fifth Circuit reversed as to both claims.
- The Fifth Circuit found the disparate treatment evidence alone sufficient to create a fact question on her race discrimination claim.
- Interestingly, the Fifth Circuit did not reject Watkins disparate treatment evidence on the grounds that she had a been caught sleeping on the job before, whereas the white dispatch supervisor had not (or at least there was no mention in the decision that he had).
- The Fifth Circuit found: (a) the close timing between Watkins giving her boss the doctor's note about needing time off due to anxiety, and her termination, was strong evidence of pretext supporting the FMLA retaliation claim; and (b) the fact that Watkin's boss initially tried to rely on events that had occurred before he received the doctor's note – and had never made any issue of – to justify her termination, also suggested pretext.

2. *Ross v. Judson Ind. Sch. Dist.*, 993 F.3d 315 (5th Cir. 2021)

- The African American school principal was terminated for alleged policy violations, and sued for race, sex, and age discrimination under the TCHRA. She lost on summary judgment. The Fifth Circuit affirmed.
- She was permanently replaced by an African American woman and could not identify any non-African American or male who was treated better than her under nearly identical circumstances, so she failed to establish a *prima facie* case of race or sex discrimination.
- Regarding age discrimination, her replacement was six years younger, which the Fifth Circuit noted is a "closer call" as to whether that was a significant enough difference to establish a *prima facie* case.
- But, the court affirmed summary judgment anyway, finding Ross failed to present evidence of pretext.

3. *Johnson v. Pride Indus., Inc.*, 7 F.4th 392 (5th Cir. 2021)

- This was primarily a racial harassment case under 42 U.S.C. § 1981. Over a nine month period, the African American plaintiff was subjected to numerous racial slurs (in Spanish) by a coworker, and was mistreated as compared to non-African Americans. The district court granted summary judgment on the grounds that the harassment was not severe or pervasive enough to affect a term, condition, or privilege of employment, and the plaintiff appealed. The Fifth Circuit reversed.
- The Fifth Circuit held that given that some of the main harasser's slurs were overtly racist – the "N" word in Spanish – a reasonable jury could conclude that other more ambiguous names he called the plaintiff that are not expressly racist (like "mijo"" or "manos") could be found to be racially motivated by a reasonably jury.
- The court also found that given the evidence of the main harasser's racist slurs, a reasonable jury could conclude that other mistreatment the main harasser dished out to the plaintiff that was not explicitly racist could nevertheless be found by a reasonable jury to be part of the racial harassment of the plaintiff.
- In addition, the court found that the fact the plaintiff took a medical leave of absence allegedly as a result of the harassment was evidence that the harassment "unreasonably interfered" with his work performance, and further bolstered its conclusion that the plaintiff's racial harassment claim was for the jury to decide.

4. *Ernst v. Methodist Hosp. Sys.*, 1 F.4th 333 (5th Cir. 2021)

- Ernst, a gay white man, interviewed a job applicant, who later alleged that Ernst "winked at him, grabbed and rubbed his own penis suggestively, and nodded for the candidate to follow him around the corner to the men's room." Methodist investigated and fired Ernst. Ernst sued for sex and race discrimination, and retaliation. His case was thrown out on summary judgment, and Ernst appealed. The Fifth Circuit affirmed.
- Ernst had only asserted sex discrimination and retaliation in an unverified EEOC intake questionnaire that was never sent to Methodist. Because it was unverified and never sent to Methodist, the Court held that Ernst failed to exhaust administrative remedies as to these two claims.
- As for Ernst's race discrimination claim, he failed to show he was replaced by someone outside of his race. Specifically, the evidence showed his duties were distributed among his former co-workers, and he failed to show that all of those former co-workers were not white.
- Ernst also failed to show that any non-white engaged in "nearly identical" conduct and was not terminated. Hence, he failed to make out a *prima facie* case of race discrimination, and summary judgment was properly granted against that claim too.

5. *Lindsley v. TRT Holdings, Inc.*, 984 F.3d 460 (5th Cir. 2021)

- After Lindsley became the food and beverage director of the Omni Corpus Christi, she learned that she was being paid less than the three males who had the job before her. She complained internally and did not get a pay increase. Eventually she sued for pay discrimination under the TCHRA, Title VII, and the EPA. The district court dismissed her claims on summary judgment, finding that Lindsley failed to present evidence that her job was "in any way similar" to the higher paid males.
- The Fifth Circuit reversed and remanded. Judge Ho explained that Lindsley's evidence was sufficient to establish a *prima facie* case of pay discrimination under all three statutes, and thus the burden switched to the Defendant to articulate a non-discriminatory reason for that pay disparity. The case was remanded to see if the Defendant could satisfy its burden.
- Lindsley also brought claims for retaliation under the EPA, Title VII, the TCHRA, and the FMLA, all of which were thrown out on summary judgment for lack of an adverse employment action. The Fifth Circuit affirmed that ruling.

6. *Lindsey v. Bio-Medical Applications of La., L.L.C.*, 9 F.4th 317 (5th Cir. 2021)

- Lindsey was a high performing Clinical Manager for 17 years. In July/August 2016, she took FMLA leave. Two weeks after she returned from leave the Defendant issued Lindsey her first discipline ever, over attendance. Five months later, Defendant issued Lindsey a second disciplinary action, also over attendance. Lindsey objected to each one. On August 1, 2017, Defendant fired Lindsey over attendance and her failure to satisfy deadlines on a recent project.
- Lindsey sued for FMLA retaliation. She lost on summary judgment. She appealed, and the Fifth Circuit reversed. Judge Ho wrote the opinion. He found sufficient evidence of pretext to send the case to a jury because:
- The "attendance" rationale was potentially "unworthy of credence" because the Defendant could not identify several of the specific dates Lindsey was absent, and as to another alleged absence Lindsey testified she was at a company mandated training meeting.
- The missed "project deadlines" rationale was potentially "unworthy of credence" because: (1) over a period of four months the Defendant never told Lindsey once that her late reports could jeopardize her job; (2) never disciplined her in violation of its own progressive discipline policy; (3) evidence suggested that being tardy with reports was seen by the Company as a minor issue that never caused it any adverse impact; and (4) for all these reasons a jury could conclude the deadlines Lindsey missed were "hortatory ones," not real ones, and that Defendant seized on her missing them as a pretext for FMLA retaliation.

7. *Campos v. Steves & Sons, Inc.*, 10 F.4th 515 (5th Cir. 2021)

- Campos had open heart surgery and took leave. According to Campos, when he tried to return to work about 13 weeks after his leave began, Defendant terminated his employment instead. He sued for, *inter alia*, disability discrimination under the TCHRA, and FMLA retaliation. He lost on summary judgment.
- The Fifth Circuit affirmed on the disability discrimination claim, because Campos failed to show he was "qualified" to work any job at Defendant at the time of his termination. The RTW document Campos gave Defendant was inadmissible for lack of authentication, and his mere testimony that he was qualified to return to work was not sufficient under prior precedent and also was undermined by statements Campos himself had made to the Social Security Administration in a failed attempt to qualify for disability benefits.
- But, the court reversed on the FMLA retaliation claim. The employer alleged it terminated his employment because Campos had not provided a compliant RTW release, his FMLA leave had expired, and because Campos refused to accept an alternative position. But, Campos presented contrary evidence on all three points, and additional proof that: (1) the employer had made some comments suggesting unhappiness with Campos taking so much FMLA leave; and (2) the employer had given different reasons for terminating Campos to the EEOC, and, at different times, to Campos himself.

8. *Weber v. BNSF Railway Corp.*, 989 F.3d 320 (5th Cir. 2021)

- Weber, a train dispatcher, had epilepsy. He was a 35-year employee. He missed a lot of work for medical appointments and also because when he had an epileptic seizure it would cause sleep deprivation, which would then render him unable to safely work for a day or so.

- In the first quarter of 2016, Weber missed work five times. Four of the times were related to epilepsy treatments or sleep deprivation from a seizure, and one time was for a colonoscopy procedure. BNSF fired Weber for excessive absenteeism. Weber sued for disability discrimination under the ADA. He claimed BNSF failed to accommodate his requests to take discipline-free time off to receive medical care for his epilepsy or to recover from a seizure. He lost on summary judgment. He appealed. He lost again.

- Weber argued that regular worksite attendance was not an essential job function at BNSF – and thus his requested accommodations should have been granted – but, in an opinion written by Judge Willett, the court rejected Weber's argument.

- The court held that because regular worksite attendance was an essential job function, BNSF was not obligated by the ADA to give Weber discipline-free time off to receive medical care for his epilepsy or to recover from a seizure. Accordingly, Weber's "failure to accommodate" claim failed.

9. *Thompson v. Microsoft*, 2 F.4th 460 (5th Cir. 2021)

- Thompson was hired into an Enterprise Architect ("EA") role in Austin. The EA role is a senior level executive position serving as a liaison between Microsoft and its client. Thompson failed in the role. The client asked that he be removed, which Microsoft did.
- At that point, Thompson revealed he was autistic. He then sought many accommodations that were incompatible with the EA role, such as providing a scribe to him to translate information given to him verbally into written form. Microsoft agreed to some of Thompson's requests (for example, to provide him a noise-cancelling headset), but declined to provide others on the grounds they were unreasonable and incompatible with an EA role and would excuse Thompson from performing the role's essential functions.
- After several months of back and forth with Thompson, Microsoft placed him in a job-reassignment process. But rather than look for a new job within Microsoft, Thompson took and remained on LTD leave. He then sued Microsoft for, *inter alia*, failure to accommodate under the ADA. This case was thrown out on summary judgment. He appealed and lost again.
- The Fifth Circuit found that Thompson's own requests for accommodation proved that he was not a "qualified individual" for the EA role, because they were incompatible with the job's essential functions. Plus, Thompson failed to show that Microsoft did not negotiate with him concerning potential accommodations in a good-faith manner.

10. *Jennings v. Towers Watson,* 11 F.4th 335 (5th Cir. 2021)

- Jennings was hired in May 2016; suffered an on-the-job injury on her second day; filed an EEOC Charge of Discrimination in June 2016; was written up twice in July 2016; and was fired on July 12, 2016. She sued under the ADA for failure to accommodate and for terminating her. She lost on summary judgment and appealed. The Fifth Circuit affirmed.
- Jennings' failure to accommodate claim was based on the fact that after her injury, the Company placed on her on unpaid leave for about two weeks, so she could recover from her injury and then return and restart her training – which she did.
- Jennings claimed that instead, the Company should have accommodated her injury so that she could have continued her training uninterrupted, without an unpaid leave, by changing its location and giving her a dedicated trainer.
- The Fifth Circuit rejected this argument because: (1) unpaid leave can be a reasonable accommodation under the ADA; and (2) the ADA provides the employee a right to reasonable accommodation (which she received), not to the employee's preferred accommodation.
- Jennings' termination claim failed because she presented no evidence that she had an actual disability as of the date of her termination in July 2016. Her only medical documentation indicated that her injury-related limitations were expected to last until July 1, 2016. She submitted no evidence that the limitations lasted beyond July 1, 2016.

11. *Wright v. Union Pacific R.R. Co.*, 990 F.3d 428 (5th Cir. 2021)

- The district court threw out Wright's Title VII retaliation case on a Rule 12(b)(6) motion to dismiss. Wright appealed. The Fifth Circuit reversed.
- Wright based her retaliation claim, in part, on an assertion that the company fired her in August 2018 in retaliation for prior lawsuit against the Company in August 2016. The Fifth Circuit agreed that this two-year time gap was too long to permit a reasonable inference of causation and thus if that were her sole basis for her retaliation case, the dismissal would have been upheld.
- However, Wright also based her retaliation claim on an assertion that the company fired her in August 2018 in retaliation for an internal complaint of discrimination she made in July 2018, just one month before her termination.
- The court held this timing (and the fact that Wright plausibly factually alleged decisionmaker knowledge of that complaint) was sufficient to permit a reasonable inference of causation, and thus it reversed the district court.

12. *Scott v. U.S. Bank Nat'l*, 16 F.4th 1204 (5th Cir. 2021)

- In January 2018, Scott overheard a white manager tell his African American boss that he "intended to terminate four African American employees," and Scott warned the four employees and ultimately provided a statement about it to HR when asked to do so and promised he would not be retaliated against for giving the statement.
- In February 2018, Scott's boss and supervisors began nit-picking his work, and gave him a verbal warning – his first since he had joined the company two years earlier. Ultimately, in May 2018, U.S. Bank fired Scott without any logical explanation.
- The district court granted U.S. Bank's Rule 12(b)(6) motion on the grounds that when Scott engaged in his allegedly protected conduct, he did not demonstrate that he had a reasonable good faith belief that the supposed plan to terminate the four African American employees was based on unlawful racial discrimination.
- The Fifth Circuit disagreed and reversed. It noted that the reference to the race of the employees by the white manager alone supported Scott's reasonable belief that racial discrimination was afoot. It also noted that before Scott told HR about the situation, HR told him that he was protected from retaliation. The court noted that this also supported a finding that Scott had a reasonable belief that racial discrimination was occurring, and cited *EEOC v. Rite Way Serv.*, a case from 2016 on that point.
- Finally, the fact that the white manager never said he planned to replace the four African Americans with white workers, and had no alleged pattern of racial discrimination, did not mean as a matter of law that Scott's complaint was not reasonable or not in good faith.

13. *Hester v. Bell-Textron, Inc.*, 11 F.4th 301 (5th Cir. 2021)

- While Hester was on approved FMLA leave, the Company fired him, allegedly based on a a poor performance review he had received six months earlier, and his angry protest of a final warning he was given two months earlier. Hester sued for FMLA retaliation and interference.
- The district court threw out Hester's FMLA claims on a Rule 12(b)(6) motion to dismiss. Hester appealed. The Fifth Circuit reversed. The Court held that Hester sufficiently asserted all the elements of a FMLA retaliation claim, including causation. Specifically, causation was satisfied based on the fact that Hester was terminated while on FMLA leave.
- The Court also held that Hester sufficiently asserted a FMLA interference claim by asserting that the Company failed to restore him to his position – which is required by the FMLA as a general matter – once his FMLA leave was over, by firing him while he was still on an approved FMLA leave. While the Company argued that Hester would have been fired regardless of his FMLA leave or not, the facts undermined that assertion, and for Rule 12(b)(6) purposes it did not matter anyway.

14. *Olivarez v. T-Mobile USA, Inc.*, 997 F.3d 595 (5th Cir. 2021)

- Olivarez claimed T-Mobile fired him because of his transgendered status, in violation of Title VII and the ADA.
- The district court threw out Olivarez's Title VII and ADA claims on a Rule 12(b)(6) motion to dismiss. Olivarez appealed. The Fifth Circuit affirmed.
- The Fifth Circuit (Judge Ho), found that Olivarez failed to plausibly allege a Title VII claim because he failed to assert that any non-transgendered employee was treated better that he was under similar circumstances. Nor did Olivarez present any other facts that plausibly suggested that he was discriminated against because of his transgendered status.
- The Fifth Circuit found Olivarez failed to plausibly articulate an ADA claim as well, because his allegations here were conclusory and barebones, and failed to articulate even what his disability allegedly was.

15. *Hewitt v. Helix Energy Solutions Grp*, 15 F.4th 289 (5th Cir. 2021) (*en banc*)

- 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 salary.

- In April 2020, a three-judge panel reversed the district court 3-0 and determined that Helix did not pay Hewitt on a salary basis because his pay 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.

- After *en banc* reconsideration, in September 2021, the Fifth Circuit again ruled in Hewitt's favor, this time 12 to 6. Judge Ho wrote a powerful majority and concurring opinion largely focused on textualism. Judge Edith Jones wrote a dissent. Helix petitioned the U.S. Supreme Court for review. That petition was granted. Oral argument is set for October 12, 2022.

16. *Swales v. KLLM Transport Servs.*, 985 F.3d 430 (5th Cir. 2021)

- Concerning the certification of FLSA collective actions, the Fifth Circuit stated that the routine two-step practice of first sending of notice to a broad group of current and former employees, and deferring consideration of an employer's evidence and arguments until the decertification stage (the second stage), carried the unintended consequence of stirring up litigation and was often used by plaintiffs to create settlement leverage.

- Accordingly, the court crafted a new approach altogether to replace the former two-step certification process in collective actions. District courts within the Fifth Circuit now "must rigorously scrutinize" whether the plaintiffs and potential opt-in plaintiffs are sufficiently similar to each other "at the outset of litigation" –before the potential opt-in plaintiffs can be notified of the FLSA action.

- Under the new procedure, before notice is sent, the district court should, with the help of the parties, identify the material facts that will be germane to the "similarly situated" determination and authorize limited, preliminary discovery on those issues. Then, with an evidentiary record before it, the district court must "consider all available evidence" to conclude whether the plaintiffs and putative opt-ins are similarly situated. Notice should be circulated only to those individuals who have been shown to be "similarly situated" to the named plaintiffs.

17. *U.S. Dept. of Labor v. Five Star Automatic Fire Protection, L.L.C.*, 987 F.3d 436 (5th Cir. 2021)

- Five Star paid its 53 construction employees by the hour, and required them to record their own time by handwriting how many hours they worked each day on timesheets. However, employees were told to only include the total number of hours worked at a jobsite, and when employees worked at two or more locations in one day, they did not record their start or end time for each location and they did not indicate the order in which they worked at those locations.

- The DOL filed a complaint against Five Star. At trial, the DOL called six former employees to testify about the violations. Although their testimony lacked many details, the district court determined that Five Star failed to keep accurate records. Specifically, the court found that Five Star required employees to arrive at the shop 15 minutes prior to their shift start time but did not compensate its employees for the 15-minute gap between arrival and shift start time. In addition, Five Star did not compensate employees for the required travel time back from the worksite to the shop at the end of the day. Finally, the court found additionally violations based on errors plainly revealed by the payroll records themselves. Accordingly, the district court held that Five Star was liable to 53 employees for $121,687.37 in back wages, and an equal amount in liquidated damages. Five Star appealed the court's findings as to liability for the 47 non-testifying employees and the back-wages calculation for all 53 employees.

- The Fifth Circuit upheld the judgment and the award, agreeing with the district court's application of the U.S. Supreme Court's burden-shifting framework outlined in *Anderson v. Mt. Clemens Pottery Company*.

- Ultimately, the Fifth Circuit held that Five Star's "bare-bones timesheets" left "numerous evidentiary gaps," and the DOL was able to fill those gaps with consistent testimony that Five Star encouraged employees not to record some of the time they worked pre- and post-shift. The DOL used this testimony to estimate unpaid hours and calculate back wages, and Five Star's only rebuttal evidence was a summary chart based on the company president's memory, which the court determined failed to negate any inferences of unpaid work.

- The Court also found no error in extrapolating liability to all 53 employees based on the testimony of only six employees.

18. *Adams v. All Coast, L.L.C.*, 15 F.4th 365(5th Cir. 2021)

- The plaintiffs served as members of the crew of liftboats and would also operate cranes aboard the liftboats. Other plaintiffs were cooks on the liftboats. They all argued that they were entitled to payment of overtime wages and were improperly classified as "seaman" exempt from the FLSA's overtime requirements.

- The crane operator plaintiffs alleged that, although they were hired to perform various maritime tasks, they spent most of their time doing something "completely terrestrial"—operating cranes attached to the liftboats to move customers' equipment on and off the boats, docks, and offshore oil rigs. The plaintiffs argued that they spent no less than 80% of their time on the vessel in a jacked up, stationary position, and that during some hitches they were jacked up 100% of the time.

- The district court entered summary judgment for All Coast, concluding that all of the non-cook employees' work served the liftboats' operation as a means of transportation, and thus they were exempt "seamen." The plaintiffs appealed. The Fifth Circuit held:

- The crane operator plaintiffs' work operating cranes attached to the liftboats to move customers' equipment on and off the boats, docks, and offshore oil rigs was not in service of the lifeboats' operation as a means of transportation, and thus summary judgment on their seaman act status was not proper.

- Summary judgment was also improper as to the cooks, because there was a question of fact as to whether the cooks rendered a service (cooking) that was primarily an aid in the operation of the lifeboat and performed no substantial (i.e., 20%) amount of work of a different character.

- Judge Jones authored a strident dissent from the court's refusal to grant *en banc* review.

19. *White v. U.S. Corrections, L.L.C.*, 996 F.3d 302(5th Cir. 2021)

- White transported prisoners between prisons. She was not paid overtime. She sued for overtime under the FLSA. The trial court dismissed her case under the Motor Carrier Act ("MCA") exemption based on Rule 12(b)(6). White appealed.
- On appeal, White argued that the MCA exemption could not apply to her because "Jeanna's Act" gave the Attorney General, rather than the DOT, the power to regulate the transportation prisoners by private prisoner transportation companies. The Fifth Circuit disagreed, pointing on that "Jeanna's Act" did not remove the class of workers from DOT regulation, but rather simply added that private prisoner transportation companies must comply with any regulations promulgated by the Attorney General, in addition to the DOT regulations.
- Nevertheless, the Fifth Circuit reversed the district court, holding that whether or not the MCA exemption applied was not appropriately resolved on a motion to dismiss, but instead at least had to await a fully developed factual record on summary judgment.

20. *Dean v. Akal Sec. Inc.*, 3 F.4th 137 (5th Cir. 2021)

- The plaintiffs were hourly paid Aviation Security Officers ("ASO") who flew with deportees to their home countries, dropped them off, and then returned. When they returned, they were on planes without any deportees. Akal policy provided that one hour of the return flight would be considered a meal break, for which the ASOs would not be paid.
- The ASO's sued, claiming the one-hour uncompensated meal break was actually compensable time under the FLSA. The district court granted summary judgment for Akal. The ASO's appealed. The Fifth Circuit affirmed.
- The court held that the evidence showed that the one-hour meal break was a "bona fide" meal period because it was for the "predominant benefit" of the ASOs. In fact, the ASO's could do whatever they wanted, subject to the inherent limitations anyone on a plane is subject to. As such, the one-hour breaks were not compensable.

21. *Texas Dept. of Transp. v. Lara,* 625 S.W.3d 46 (Tex. 2021)

- Lara sued the Texas DOT for failure to accommodate and retaliatory termination under the TCHRA. Lower courts differed on the outcome, and the Texas Supreme Court granted review.
- The court held that there was a fact question about whether additional leave of about 5 weeks without pay as orally requested by Lara was reasonable as an accommodation or amounted to an unreasonable request for indefinite leave. That DOT had a policy permitting leave without pay for as long as 12 months was a big factor in reaching this conclusion.
- The court also held that the fact that DOT told Lara to fill out forms to formally request a leave without pay, and he never did, did not bar his claim for failure to make a reasonable accommodation, given his repeatedly oral requests even after DOT had done that.
- The court affirmed the dismissal of Lara's retaliation claim on the grounds that under the TCHRA simply requesting an accommodation is not "protected activity" for purposes of a TCHRA retaliation claim. In contrast, many federal courts have held that simply requesting an accommodation is "protected activity" for purposes of an ADA retaliation claim. However, the ADA has different statutory language in this regard that accounts for the difference.

22. *Apache Corp. v. Davis*, 627 S.W.3d 324 (Tex. 2021)

- Davis, a female paralegal, complained about sex discrimination in writing on December 3, 2012 in a long and rambling email, and Apache terminated her employment on January 25, 2013 for her prior alleged insubordination – specifically, working overtime without authorization in violation of her supervisor's repeated directives.
- Davis sued for retaliation under the TCHRA and won a jury verdict. Apache appealed, and the Houston Court of Appeals, 14th District, affirmed in a lengthy opinion. Apache appealed to the Texas Supreme Court, which took the case.
- The court unanimously ruled that Davis failed to present any evidence of "but for" causation and reversed and rendered judgment for Apache. The court anchored its ruling on the facts that: (1) Davis herself had noted in her own email that the Company was preparing to fire her before she sent the email; and (2) Davis admitted to the insubordination that was the basis for her termination.
- The court further held that evidence other paralegals falsified timecards and were not fired was no proof of retaliation against Davis, because falsifying timecards was not "nearly identical" to insubordination. The court of appeals had found this evidence supported the jury's verdict, but the Texas Supreme Court rejected it as any evidence of retaliation at all.
- This is a muscular pro-employer decision.

23. *Newman v. Plains All American Pipeline, L.P.*, 23 F.4th 393 (5th Cir. 2022)

- The plaintiffs were hired by a staffing company and send to the staffing company's client, Plains, to work. The plaintiffs later sued Plains for FLSA violations. The plaintiffs did not sue the staffing company.
- The plaintiffs had signed arbitration agreements with the staffing company. The agreements did not mention Plains. Nevertheless, Plains moved to compel arbitration based on those arbitration agreements. The district court denied the motion to compel arbitration. Plains appealed.
- The Fifth Circuit affirmed the district court's decision. The court held that whether Plains could enforce the arbitration agreement between the staffing company and plaintiffs was for the court to decide, not an arbitrator.
- The Fifth Circuit also held that Plains could not enforce the arbitration agreement between the staffing company and the plaintiffs because Texas law presumes noncontracting parties are not third-party beneficiaries and Plains failed to present evidence to overcome that presumption (presumably because there was none).
- The Fifth Circuit also rejected Plains' reliance on the theory of "interwined-claims estoppel" because that requires a "close relationship" and Plains and the staffing company did not have a "close relationship."
- *En Banc* review was denied on August 5, 2022. Judges Jones, Smith and Duncan dissented.

24. *Wantou v. Wal-Mart Stores, Texas, L.L.C.*, 23 F.4th 422 (5th Cir. 2022)

- Wantou, who is from Cameroon, West Africa, was subjected to racial slurs and mistreatment. He complained. He subsequently received three coachings and was terminated. He sued for a racially hostile environment and retaliation.
- The district court granted summary judgment on the hostile environment claim. The jury found that one of the three coachings was retaliatory and awarded Wantou $32,240 in back pay and $75,000 in punitive damages. The district court reduced the back pay award to $5,177.50. Both parties appealed. The Fifth Circuit affirmed.
- As for the hostile environment claim, the Fifth Circuit found that Wantou had not proven that Walmart knew about the harassment and failed to take prompt remedial action. Judge Ho vigorously dissented from this holding.
- The Fifth Circuit found the plaintiff's manager acted with "malice," and Walmart did not prove the *Kolstad* defense to punitive damages.
- Finally, the Fifth Circuit upheld the $75,000 punitive damages award despite there being only $5,177.50 in actual damages awarded because, under *Abner v. Kansas City Southern R. Co.,* any punitive damages award under Title VII's cap is immune from a ratio-based analysis.

25. *Woods v. Cantrell*, 29 F.4th 284 (5th Cir. 2022)

- Woods, a *pro se* plaintiff, asserted that he had once been called the "N" word by his Hispanic supervisor. The district court dismissed his racially hostile environment claim on a Rule 12(b)(6) motion to dismiss.
- On appeal, the Fifth Circuit joined other circuit courts in holding that one use of the "N" word by a supervisor in the presence of his or her subordinate is sufficient to establish a racially hostile environment claim under Title VII and 42 U.S.C. § 1981.
- The Fifth Circuit noted that even without direct economic harm, Woods may be entitled to damages for mental anguish and punitive damages.

26. *Gosby v. Apache Indus. Servs., Inc.*, 30 F.4th 523 (5th Cir. 2022)

- Gosby is diabetic. She was hired on March 23, 2018, and was expected to work for Apache for six months. On April 26, 2018, she had a diabetic attack at work. A week later, May 2, 2018, she was laid off along with 11 other workers. She sued for disability discrimination under the ADA. She lost on summary judgment. She appealed.
- The Fifth Circuit reversed. It held that, contrary to the district court's determination, that only six days passed between her diabetic episode and lay-off was sufficient to create a *prima facie* case of disability discrimination.
- The Fifth Circuit found Gosby showed pretext because: (1) Apache's witnesses gave different rationales for how it made decisions on who to select in the RIF; (2) there was no evidence Apache evaluated terminated and retained workers against any fixed criteria.
- The Fifth Circuit held that "the inconsistent explanations and the absence of clear criteria, though, is evidence tending to show that Apache's "proffered explanation is false or 'unworthy of credence,'" and thus summary judgment was not proper.

27. *In re A&D Interests, Inc.*, 33 F.4th 254 (5th Cir. 2022)

- The district court certified a class of exotic dancers under the FLSA that included all such dancers who worked at Heartbreakers the last three years, regardless of the fact that some of them had signed arbitration agreements. Heartbreakers petitioned the Fifth Circuit for a writ of mandamus directing the district court to withdraw its order.
- The Fifth Circuit granted the petition. It held that the district court's certification ran afoul of its holding in *In re JP Morgan Chase & Co.*, 916 F.3d 494 (5th Cir. 2019), and thus the district court had "clearly and indisputably erred," in allowing employees who had signed arbitration agreements to be included in the class.
- Judge Higgison dissented.

28. *Owens v. Circassia Pharmaceuticals, Inc.*, 33 F.4th 814 (5th Cir. 2022)

- Owens, an Asian woman, was a Regional Sales Manager for the defendant. She was placed on a 60-day PIP for alleged performance issues and terminated when the PIP expired. She sued for national origin and sex discrimination, and retaliation. Her case was dismissed on summary judgment. She appealed.
- The Fifth Circuit affirmed. It held that Owens had presented substantial evidence of pretext, but that summary judgment was still proper because she presented no evidence that the defendant was motivated by discrimination or retaliation.
- The Fifth Circuit noted that proof of pretext alone can be enough to infer discrimination and survive summary judgment in some cases, but was not enough in this case.
- In *Reeves*, the Supreme Court indicated that as a general rule, proof of pretext is enough to justify an inference of discrimination and survive summary judgment, and that it was only in a distinct subgroup of cases where it would not be – *e.g.*, where the record conclusively shows some other non-discriminatory reason for the challenged adverse employment action.
- This decision is not as vocal about reminding the reader that in most cases, proof of pretext will be enough to justify an inference of discrimination and survive summary judgment. This is a decision defense lawyers will want to cite in almost every summary judgment motion.

29. *Easom v. US Well Servs.*, 37 F.4th 238 (5th Cir. 2022)

- The plaintiffs filed a WARN Act class action after US Well terminated their employment without giving any notice, must less the 60 days' notice required by the WARN Act. The plaintiffs sued.
- US Well argued that COVID fits under the "natural-disaster exception" in WARN, so their lack of notice was excused. The district court agreed. On appeal, on that point, the Fifth Circuit reversed, finding that COVID did not fit under the WARN Act's "natural-disaster exception".
- The District Court had also held that the WARN Act's "natural-disaster exception" incorporated "but-for" causation, rather than proximate causation. *I.e.*, that the natural disaster had to be the "but-for" cause of the otherwise WARN Act covered terminations. On appeal, on that point, the Fifth Circuit reversed as well, holding that the correct standard was proximate cause.

30. *Perthuis v. Baylor Miraca Genetics Labs, L.L.C.*, 645 S.W.3d 228 (Tex. 2022)

- Over a period of months, the plaintiff negotiated, worked up, and had a contract ready for a customer to sign that would be the largest sale in the defendant's history.
- The defendant fired him, and the next day the customer signed the contract he had negotiated and worked up. The defendant refused to pay him any commissions on the sale, on the grounds that he was only entitled to commissions on sales he made during his employment. But there was no agreement that actually said that.
- The plaintiff sued, and ultimately the Texas Supreme Court took his case and adopted the "procuring-cause doctrine."
- Based on that doctrine, it held that in the absence of an agreement to the contrary, when a salesperson's efforts are the direct and proximate cause of the sale, then they are entitled to the commissions from the sale, even if they are no longer employed by the Company when the sale is contractually executed or the commissions are paid.
- The Texas Supreme Court emphasized that the "procuring-cause doctrine" is simply a default common law rule to be applied in the absence of an agreement to the contrary.
- In other words, employers can always override the "procuring-cause doctrine" with a specific agreement specifying that if the salesperson is not employed when the sale is completed, or the commissions are paid, they are not entitled to any commission.
  - Query: then how would *Sellers v. Minerals Techs., Inc.*, 753 F. App'x 272 (5th Cir. 2018) fit into the analysis?

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