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EMPLOYMENT LAW UPDATE

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Fifth Circuit Court of Appeals

***Hewitt v. Helix Energy Sols. Grp.*, No. 19-20023, 2021 U.S. App. LEXIS 27215 (5th Cir. 2021) (*en banc*)**

In a case with significant implications for the oil and gas industry, the Fifth Circuit, sitting *en banc*, found that even a highly compensated worker who is paid a daily rate may be eligible for overtime pay under the Fair Labor Standards Act ("FLSA"). The court explained that workers who receive a daily rate are exempt from the FLSA's overtime pay provisions only if: (1) they are guaranteed a minimum weekly payment regardless of the number of hours, days, or shifts worked; and (2) a reasonable relationship exists between the guaranteed amount and the amount actually earned. Because Helix did not demonstrate that Hewitt's employment met these two conditions, Hewitt was not exempt from FLSA overtime pay provisions even though he earned in excess of $200,000 per year.

Hewitt managed employees on an offshore oil rig. He worked "hitches" on the rig, each of which lasted about a month. Hewitt worked for more than forty hours a week during his hitches on the rig. Helix argued that Hewitt was exempt from the FLSA's overtime requirements because he was a highly compensated executive employee. However, FLSA regulations define highly compensated employees not simply in relation to the employees' annual earnings, but also in terms of a threshold requirement for weekly pay. Helix did not demonstrate that it met this weekly pay requirement with respect to Hewitt.

In order to establish that Hewitt was exempt from the FLSA's overtime requirements, Helix needed to show that he was paid on a salary basis as defined by FLSA regulations. Hewitt argued that he was not paid on a salary basis because Helix calculated his pay using a daily rate, but Helix did not provide him guaranteed minimum weekly payments and Helix did not show a reasonable relationship between his guaranteed pay and the amount he actually earned.

A sharply divided Fifth Circuit agreed with Hewitt, reversed the district court's grant of summary judgment in favor of Helix, and remanded the case. Six judges dissented, expressing, generally, their belief that the majority read provisions of the FLSA out of their proper context and that the majority opinion disregards the broad purpose of the FLSA.

***Campos v. Steves & Sons, Inc.*, No. 19-51100, 2021 U.S. App. LEXIS 24870 (5th Cir.**

2021)

The Fifth Circuit determined that a plaintiff's use of FMLA leave cannot support a retaliation claim under the Texas Commission on Human Rights Act ("TCHRA"). Additionally, a plaintiff's representations to the Social Security Administration when seeking disability benefits can be used to rebut the plaintiff's representations about whether he is qualified for his job in the context of TCHRA claims alleging disability discrimination.

Campos was an employee whose position required substantial physical exertion. He took extended FMLA leave when his heart surgery led to significant complications. His employer terminated Campos a month after his FMLA leave was exhausted. Campos sued Steves & Sons, asserting claims under the TCHRA for disability discrimination and retaliation, as well as claims for FMLA interference and retaliation under the FMLA.

A divided panel of the Fifth Circuit affirmed summary judgment dismissing Campos' retaliation claim under the TCHRA after finding that this claim rested solely on the employee's allegation that he was terminated in retaliation for taking FMLA leave. The court held that taking FMLA leave is not a protected activity under the TCHRA, so it cannot serve as the basis for a retaliation claim under the TCHRA.

The court also affirmed summary judgment dismissing Campos' disability discrimination claim under the TCHRA. In determining whether Campos raised a genuine question of material fact concerning whether he was qualified for the job after his surgery, the panel majority considered the representations Campos made to the Social Security Administration when he sought disability benefits. Because Campos expressly stated that he could not engage in several of the activities which were necessary to his position with Steves & Sons, Campos did not establish an element of his claim—that he was qualified for his position.

The Fifth Circuit reversed summary judgment in favor of the employer with respect to Campos' claim of FMLA retaliation because the evidence presented genuine questions of material fact with respect to whether the employer provided legitimate, non-retaliatory reasons for terminating Campos' employment.

***Hester v. Bell-Textron, Inc.*, No. 20-11140, 2021 U.S. App. LEXIS 25212 (5th Cir. 2021)**

A plaintiff properly pleads the causation element of a discrimination claim under the FMLA by pleading that he was terminated in the middle of his FMLA leave.

Hester, a long-time employee of Bell-Textron, suffered from epilepsy and glaucoma and provided care and support for his wife who had stage four cancer. After being assigned to report to a new supervisor, Hester received two negative performance evaluations. He

objected so strongly to the second negative evaluation that he was escorted from the building. Bell-Textron then assisted Hester in obtaining disability leave and FMLA leave. Several months later, while Hester was in the middle of his FMLA leave, Bell-Textron terminated his employment. Hester sued his former employer asserting claims of FMLA discrimination and interference.

The Fifth Circuit reversed the order granting Bell-Textron's motion to dismiss. The appellate court found that Hester sufficiently alleged a causal link between his termination and his request for FMLA leave because he alleged that was terminated in the middle of his FMLA leave, months after receiving his negative performance evaluations and being removed from the facility. The court explained that the fact that the employer provided other reasons for terminating Hester is not fatal to Hester's claim, because an employee is not required to allege that his protected FMLA activity was the sole cause of his termination.

The Fifth Circuit also reversed dismissal of Hester's FMLA interference claim, finding that the district court improperly employed a summary judgment standard to a motion to dismiss.

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

An unverified EEOC intake questionnaire did not constitute a charge of discrimination sufficient to establish administrative exhaustion for a former employee's claims of sex discrimination and retaliation under Title VII.

Ernst, who identified himself as a gay, white male, filed a verified charge of discrimination with the EEOC alleging discrimination based on race after he was terminated from his employment with Methodist. The EEOC investigated this charge but found no evidence of racial discrimination. Ernst also filled out and submitted an EEOC intake questionnaire in which he complained of sex discrimination based on his sexual orientation, age discrimination, and retaliation. Ernst subsequently sued Methodist, alleging claims of race discrimination, sex discrimination, and retaliation under Title VII.

The Fifth Circuit affirmed dismissal of Ernst's sex discrimination and retaliation claims, finding that he did not administratively exhaust these claims. The court rejected Ernst's argument that his intake questionnaire was sufficient to establish administrative exhaustion under the Supreme Court's holding in *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 405-07 (2008), a case which involved claims under the Age Discrimination in Employment Act. In *EEOC v. Vantage Energy Servs., Inc*., 954 F.3d 749, 753-54 (5th Cir. 2020) (per curiam), the Fifth Circuit recognized that *Holowecki*'s holding extends to Title VII claims and that "a questionnaire may qualify as a charge if it satisfies the EEOC's charge-filing requirements." However, the court found that Ernst's EEOC intake questionnaire did not satisfy the EEOC's charge-filing requirements because it was not verified.

Prior to the lawsuit, Methodist only received notice of Ernst's charge of race discrimination in connection with the EEOC investigation. The court was concerned that Ernst's EEOC intake questionnaire did not serve the central purposes of the exhaustion requirement—to put employers on notice of the existence and nature of the charges against them and to provide the EEOC the opportunity to investigate and facilitate possible conciliation before an employee resorts to a lawsuit. Because Methodist lacked notice of Ernst's complaints of sex discrimination and retaliation made in his unverified EEOC intake questionnaire, the questionnaire did not qualify as a charge of discrimination for the purpose of administrative exhaustion.

The Fifth Circuit also found that Ernst failed to establish a *prima facie* case of race discrimination under Title VII because he did not show that a similarly situated comparator of another race was treated more favorably.

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

Under the Supreme Court's ruling in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), a plaintiff who alleges transgender discrimination is entitled to the same benefits, but is also subject to the same burdens, as any other plaintiff who claims sex discrimination under Title VII. Accordingly, at the pleading stage, plaintiffs must plead facts plausibly showing that they were discriminated against because of their transgender status. At the summary judgment stage, if the claim relies on circumstantial evidence, plaintiffs must identify more favorably treated comparators.

Olivarez worked as a retail store associate for T-Mobile from December 2015 to April 2018. In 2016, a supervisor made demeaning comments about Olivarez's transgender status, and Olivarez filed a complaint with human resources. From late 2017 to early 2018, T-Mobile granted Olivarez paid and unpaid leave to undergo egg preservation and a hysterectomy. T-Mobile also granted an extension of leave through February 2018 but denied a subsequent extension. Olivarez was fired in April. Olivarez asserted discrimination claims under both Title VII and the ADA.

The Fifth Circuit ruled that Olivarez failed to plead facts indicating less favorable treatment than others similarly situated outside of the asserted protected class. Because the complaint did not contain facts alleging that a non-transgender employee who acted similarly was not fired, the complaint did not create a reasonable inference that T-Mobile fired Olivarez based on gender identity. The Fifth Circuit ruled that the ADA claim failed for similar reasons and affirmed the district court's decision in favor of T-Mobile.

***Aldridge v. Miss. Dep't of Corr.*, 990 F.3d 868 (5th Cir. 2021)**

The Fifth Circuit joined the First Circuit and Fourth Circuit in holding that the FLSA preempts redundant state law tort claims for unpaid minimum wages and overtime

compensation when the state's law does not provide for minimum wages and overtime compensation. When the FLSA provides a remedy, that remedy preempts state law causes of action, but no preemption arises when no FLSA remedy exists. The court also concluded that when the FLSA and state law provide a cause of action, an employee can bring a claim under either, but not both.

Nearly nine hundred current and former employees of the Mississippi Department of Corrections alleged that the department's commissioner had failed to properly calculate and dispense wages, including overtime wages. In Mississippi, minimum wages and overtime compensation are only covered by the FLSA.

The court had previously ruled that the FLSA does not contain express preemption language. In this appeal, the court ruled that the FLSA does not create field preemption, because the FLSA's savings clause requires employers to comply with state laws. However, the Fifth Circuit ruled that the FLSA gives rise to conflict preemption, because the purposes of the state and federal law overlap. Even though some of the employees' claims did not explicitly refer to the FLSA, the claims are based on the FLSA, because they deal with unpaid minimum wages and overtime compensation. As Mississippi does not have laws governing these areas, these claims must be analyzed under the FLSA, and state law is preempted. The Fifth Circuit affirmed all dispositions of the district court.

Texas Supreme Court

***Texas Department of Transportation v. Lara*, 625 S.W.3d 46 (Tex. 2021)**

Although the Texas Supreme Court agreed that indefinite leave does not constitute a reasonable accommodation under the TCHRA, the Court refused to create a bright line rule that several months' leave is never a reasonable accommodation. Additionally, the Court held that, in order to establish a *prima facie* case of retaliation under the TCHRA, the employee must identify conduct by which he or she alerted the employer of the employee's reasonable belief that the employer was engaging in unlawful discrimination. A request for leave could, but does not necessarily, suffice to support a retaliation claim.

Lara was a 21 year employee of Texas DOT when he became sick and in need of extensive surgery. He requested and received FMLA leave and also requested paid and unpaid leave under his employer's policies. After Lara requested extensions to his leave, Texas DOT terminated his employment. Lara asserted claims under the TCHRA alleging failure to accommodate and retaliation based on his request for additional leave.

The Texas Supreme Court held that Lara raised a genuine question of material fact concerning the failure to accommodate claim, because Lara identified evidence to show that he requested leave which was available under Texas DOT policies. The Court disagreed with Texas DOT's argument that Lara had requested indefinite leave. The Court explained that a request for indefinite leave would be an unreasonable

accommodation. However, the Court disagreed that a request for lengthy leave—even leave of several months—would always be an unreasonable accommodation.

With respect to Lara's retaliation claim, the question was whether Lara's requests for leave are sufficient to support a retaliation claim under the TCHRA. The Court assumed that, in some circumstances, an accommodation request could count as opposition to a discriminatory practice sufficient to support a retaliation claim. However, in order to invoke the protection of the anti-retaliation provision of the TCHRA, the employee must identify conduct which, at a minimum, alerts the employer to the employee's reasonable belief that unlawful discrimination is at issue. No evidence supported the notion that Lara's requests for leave had alerted Texas DOT to Lara's belief that disability discrimination was at issue. For this reason, no evidence showed that Lara had opposed any discriminatory practice by his employer, and Lara could not make out a *prima facie* case of retaliation under the TCHRA.

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