

EPLI Claims in the 5th Circuit

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What are we going to cover today?

- Overview of applicable federal and state employment laws
- Discussion of real world issues
- Purpose: help you spot risk points as you evaluate a matter
- Questions, Questions, Questions

Title VII

- Civil Rights Act of 1964
- Prohibits discrimination in all areas of employment.
It shall be an unlawful employment practice for an employer:
(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his **compensation**, terms, conditions, or privileges of employment because of such individual's . . . sex.
42 U.S.C. §2000e-2
- Potential damages include backpay, frontpay, compensatory damages (pain and suffering) punitive damages, reinstatement and costs and attorneys' fees

Title VII Cont.

- Prima facie case. Employee must show:
 - Membership in a protected class
 - Qualified for the job in question
 - Treated less favorably than non-status employees similarly situated
- After the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973)
- Then, employee must show employer's adverse employment decision occurred under circumstances that raise an inference of discrimination –
Key issue

Section 1981 (Race Discrimination)

- “[w]hen used as parallel causes of action, Title VII and [S]ection 1981 require the same proof to establish liability.”

Outley v. Luke & Associates, Inc., 840 F.3d 212, 216 (5th Cir. 2016)

- No cap on damages.
- Retaliation claims cognizable under § 1981 include claim by individual, whether black or white, who suffers retaliation because he has tried to help different individual, suffering direct racial discrimination,

CBOCS W., Inc. v. Humphries, 553 U.S. 442, 128 S. Ct. 1951, 170 L. Ed. 2d 864 (2008)

Equal Pay Act

- To establish a prima facie case under the EPA, an employee must show:
 1. Different wages are paid to employees of the opposite sex
 2. The employees perform substantially equal work on jobs requiring equal skill, effort, and responsibility; and
 3. The jobs are performed under similar working conditions

INTENT NOT REQUIRED

- Affirmative Defenses:

If the plaintiff meets a prima facie case (there is unequal pay for equal work), the burden of persuasion shifts to the employer to prove that the disparity is justified. No liability to the employer if the wages are set pursuant to a:

- Seniority system;
- Merit system;
- System which measures earnings by quantity or quality of production; or
- Differential basis on any factor other than sex.

29 U.S.C. §206(d)(1)

Lily Ledbetter Act

- Amends Title VII, ADEA, ADA and Rehab Act (not EPA)
- Only applies to compensation, not every claim that may have some effect on compensation *Poullard v. McDonald*, 829 F.3d 844 (7th Cir. 2016)
- Each week's pay check is an actionable wrong.

Age Discrimination in Employment Act 1967 (ADEA)

- Prohibits discrimination against individuals who are at least 40 years old
- Applies to employees and applicants
- Covers employers with at least 20 employees

Age Discrimination in Employment Act of 1967 (ADEA)

- Potential damages include backpay, frontpay, compensatory damages (pain and suffering), punitive damages, reinstatement and costs and attorneys' fees
- Issue: younger replacements who are also over 40 years old

Americans With Disabilities Act of 1990 (ADA)

- Generally prohibits disability discrimination
- Protects “qualified” individuals with a “disability”
- Requires that employers provide reasonable accommodations to covered individuals unless the accommodation would pose an undue hardship to the employer

Americans With Disabilities Act of 1990 (ADA)

- Potential damages include backpay, frontpay, compensatory damages (pain and suffering), punitive damages, reinstatement and costs and attorneys' fees
- Issue: Failure to Accommodate

Harassment

- Sexual Harassment
 - Because of sex (i.e., gender-based)
 - Severe and pervasive
 - *Ellerth/Faragher* defense
- Race, gender, age, disability

Family and Medical Leave Act (FMLA)

- Grants eligible employees the right to take up to 12 weeks of unpaid leave
- Applies only if the employee or a “family member” is suffering from a serious health condition
- Applies to employers with 50 employees up to a 75-mile radius

Family and Medical Leave Act (FMLA)

- Applies only to employees who have worked 1200 hours in the current or preceding 12-month period
- Potential damages include backpay, reinstatement and costs and attorneys' fees
- Issue: Intermittent Leave and Estoppel

Fair Labor Standards Act (FLSA)

- Grants non-exempt employees the right to overtime and minimum wage
- Applies to every employer with at least one employee
- Applies to employers that engage in interstate commerce (basically everyone)

Fair Labor Standards Act (FLSA)

- Potential damages include backpay, reinstatement and costs and attorneys' fees
- Running statute of limitations
- Retaliation (front pay possible)
- Key Issues: Exempt/non-exempt employees; white-collar exemptions; salary-basis test; and retaliation

RECENT 5TH CIRCUIT CASES

Inaccurate Statements in EEOC Position Statements

Miller v. Raytheon Co., 716 F.3d 138 (5th Cir. 2013). Affirming a seven-figure jury verdict in an age discrimination case partially because “[a]t trial, Miller presented undisputed evidence that Raytheon made erroneous statements in its EEOC position statement.”

See also Burton v. Freescale Semiconductor, Inc. 798 F.3d 222, 239-40 (5th Cir. 2015) (holding that a jury may view “Erroneous statements in [an] EEOC position statement” as “circumstantial evidence of discrimination.”); *McInnis v. Alamo Comm. College Dist.*, 207 F.3d 276, 283 (5th Cir. 2000) (reversing summary judgment that had been entered for the employer in a discrimination case partially because the employer’s report to the EEOC “contained false statements. . . .”).

Lack of Documentation

New Fifth Circuit case reversing summary judgment in a TCHRA pregnancy discrimination claim states:

When, as here, a motion for summary judgment is premised almost entirely on the basis of depositions, declarations, and affidavits, a court must resist the urge to resolve the dispute – especially when, as here, it does not even have the complete depositions. Instead, the finder of fact should resolve the dispute at trial.

Heinsohn v. Carabin & Shaw, P.C., No. 15-50300, 2016 wl 4011160, AT *14 (5TH Ci. July 26, 2016).

Though unpublished, this case could substantially impact summary judgment practice in discrimination cases for years to come.

Failure to Investigate Under Highly Suspicious Circumstances

Ion v. Chevron, 731 F.3d 379 (5th Cir. 2013). “Chevron’s failure to conduct even the most cursory investigation, confront Ion about Peel’s statements, or seek a second opinion under the FMLA calls into doubt Chevron’s reasonable reliance and good faith on Peel’s statements, and, at the very least, creates a fact issue as to whether it would have terminated Ion despite its retaliatory motive.”

*Note: there are many cases saying that merely a sloppy or no investigation is not proof of pretext. Thus, the additional “highly suspicious circumstances” are critical to this argument.

Discriminatory Comments May Be Direct or Indirect Evidence

- A. **As Direct Evidence:** In order for comments in the workplace to provide sufficient direct evidence of discrimination by themselves, they must be 1) related to the protected class of persons of which the plaintiff is a member; 2) proximate in time to the termination; 3) made by an individual with authority over the employment decision at issue (but note cat's paw); and 4) related to the employment decision at issue . *See Reed v. Neopost USA, Inc.*, 701 F. 3d 434 (5th Cir. 2012).
- B. **But, As Additional Circumstantial Evidence:** When offered in conjunction with other circumstantial evidence, to be probative they must merely: (1) show discriminatory animus; (2) on the part of a person that is either primarily responsible for the challenged employment action or by a person with influence or leverage over the relevant decisionmaker. *Goudeau v. National Oilwell Varco, L.P.*, 793 F.3d 470 (5th Cir. 2015).

Shifting Explanations

Burton v. Freescale Semiconductor, Inc., 798 F.3d 222, 235-36 (5th Cir. 2015) (reversing summary judgment for employer in discrimination case where two company witnesses gave different and shifting reasons for the decision to terminate the plaintiff).

Be consistent during EEOC investigation and litigation.

Make sure everyone understands the reason for the decision.

Make Sure Decision is Not So Subjective It Is Essentially Meaningless

Patrick v. Ridge, 394 F.3d 311 (5th Cir. 2004). In *Patrick*, the Fifth Circuit found that “a hiring official’s subjective belief that an individual would not ‘fit in’ or was ‘not sufficiently suited’ for a job is at least as consistent with discriminatory intent as it is with nondiscriminatory intent. . .” *Id.* At 318.

Statistics Often Used To Prove Discrimination

Miller v. Raytheon Co., 716 F.3d 138, 144 (5th Cir. 2013). Affirming jury verdict in an age discrimination case and relying in part of the fact that “[i]t is also undisputed that 77% of the employees laid off in supply chain manager were at least 48 years old.”

Employer's False Reason For May Prove Discrimination

Haire v. Board of Sup'rs of La. State Univ. Agricultural & Mech. Coll., 719 F.3d 356, 365 N. 10 (5th Cir. 2013). In *Haire*, the court reversed summary judgment for the employer in a discrimination case, and held that, “[e]vidence demonstrating that the employer’s explanation is false or unworthy of credence . . . is likely to support an inference of discrimination *even without further evidence of defendant’s true motive.*”) (italics in original).

A Failure To Follow Company Policies May Prove Discrimination

Smith v. Xerox Corp., 371 Fed. Appx. 514 (5th Cir. Mar. 2010).

Affirming jury verdict in retaliation claim in part because, “Xerox’s policies generally state that counseling and coaching of employees should occur prior to the issuance of formal warning letters, yet Xerox offered no documentation supporting Jankowski’s claim that he counseled Smith before placing her on probation.

See also Tyler v. Unocal Oil Co. of Cal., 304 F.3d 379, 396 (5th Cir. 2002), affirming jury verdict in an age discrimination case arising out of a RIF, and stating:

An employer’s conscious, unexplained departure from its usual policies and procedures when conducting a RIF may in appropriate circumstances support an inference of age discrimination if the plaintiff established some nexus between employment actions and the plaintiff’s age.

Proof of Other Employees Committing Nearly Identical Acts of Misconduct But Given Lesser Discipline

Wheat v. Fla. Par. Juvenile Justic Comm'n, 811 F.3d 702 (5th Cir. 2016):

Wheat, a juvenile detention officer, attempted to assault a juvenile and to “whip that b____s’ a__.” *Id.* At 705. She was fired. She sued for retaliation, and lost in the district court on summary judgment.

The Fifth Circuit reversed summary judgment on her retaliation claim, finding sufficient evidence of pretext from evidence Wheat presented of situations “in which she, and other employees as well, were physically excessive toward juveniles but not discharged.” *Id.* at 710.

The fact that her prior excessive force (for which she was not fired) occurred before her protected activity allowed Wheat to use her own prior situation as a comparator to prove pretext.

The “Unfit for Duty” Trap

The function the employee cannot perform without or without reasonable accommodation may not be an “essential” function, such that their inability to perform it does not render them “unqualified” under the ADA/ADAAA:

EEOC v. LHC Group, Inc., 773 F.3d 688, 702 (5th Cir. 2014)

Even though the job description indicated that driving was an essential function of Team Leader position, there was a genuine dispute of material fact as to whether it really was, and thus the employee’s inability to drive did not necessarily render her unqualified for the position.

The “Regarded As” Problem

Because it is so easy to demonstrate an employee was “regarded as disabled,” an employees fired after a relatively minor injury can overcome summary judgment.

Burton v. Freescale Semiconductor, Inc., 798 F.3d 222, 239-40 (5th Cir. 2015):

Plaintiff inhaled chemical fumes while on the job, later reported chest pains at work and was ultimately attended to by the company medical department and then EMS. As a result, a workers’ compensation claim was filed. About two weeks later the decision was made to fire her for alleged poor performance. She sued under the ADA, for discrimination based on her status as being “regarded as” having a disability. The district court granted summary judgment, but the Fifth Circuit reversed.

The Fifth Circuit explained that under the ADAAA a “regarded as” ADA plaintiff can prevail by establishing “she has been subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”

Emails by her supervisors showed they perceived her to have medical issues.

Discrimination by Association

Employee not hired because of wife's cancer.

E.E.O.C. v. DynMcdermott Petroleum Operations Co., 537 Fed. Appx. 437
(5th Cir. 2013).

FMLA Estoppel

The Fifth Circuit recognized an FMLA estoppel theory based on an employer's statement in a written memorandum that the plaintiff, who did not work at or within 75 miles of a worksite with at least 50 employees, was an "eligible employee" under the FMLA in response to the plaintiff's request for leave. *See Minard v. ITC Deltacom Commc'ns, Inc.*

FLSA Overtime and Retaliation Claim

- Employee, a maintenance worker for an apartment complex brought action against his employer, claiming that he was not paid overtime and that employer retaliated against him for demanding overtime wages, in violation of the Fair Labor Standards Act (FLSA).
- 5th Circuit held, in matter of first impression, that FLSA anti-retaliation provision permits award of emotional distress damages

Pineda v. JTCH Apartments, L.L.C., 843 F.3d 1062 (5th Cir. 2016)

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