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business and employment litigation

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Five Minute Employment Law Update: 12 cases, 60 Minutes

Standard of Proof for Retaliation Claims under Title VII

1. *University of Texas Southwestern Medical Center v. Nassar*, 674 F.3d 448 (5th Cir. 2012), *cert. granted*, 133 S.Ct. 978 (Jan. 18, 2013).

Dr. Nassar, who is of Middle Eastern descent, worked as Assistant Professor and Associate Medical Director for an HIV/AIDS clinic at UTSW. After being hired, his supervisor's supervisor began inquiring about and criticizing Nassar's productivity and billing practices. She stated in Nassar's presence, "Middle Easterners are lazy." She made a similar comment in front of another coworker. Nassar complained. He then applied for a promotion that the supervisor's supervisor actively undermined. He then resigned, citing the harassment and hostile work environment, with the understanding that he would be offered a position at another clinic. The clinic withdrew its offer after heavy opposition from UTSW, which had an agreement with the Clinic regarding under what circumstances positions at the clinic could be filled by faculty doctors.

Nassar sued, claiming retaliation. UTSW claimed it opposed the job offer because the offer did not meet the requirements of its agreement with the clinic. Jury found for Nassar, and Fifth Circuit affirmed. At trial, jury was given a "mixed motive" (pro-employee: judge tells jury that retaliation need be only ONE of multiple reasons for the adverse employment action) rather than a "but for" (pro-employer: judge tells jury that retaliation must be the ONLY reason for the adverse employment action) jury instruction.

Supreme Court granted cert: Does the retaliation provision of Title VII of the Civil Rights Act of 1964 require a plaintiff to prove that an employer would not have taken an action BUT FOR the existence of an improper motive, or does the provision require only proof that the employer had mixed motives for taking an action?

Court: will hear oral argument April 24, 2013.

Hostile work environment—who qualifies as supervisor?

2. *Vance v. Ball State University*, 646 F.3d at 468 (7th Cir. 2011), *cert. granted*, 133 S.Ct. 23 (June 25, 2012)

Employee was a catering assistant in the banquet and catering department at Ball State. She had advanced baking and cooking skills, but after she complained about her coworkers' racial epithets, including the n word and having ties to the Ku Klux Klan, and veiled threats, one of the alleged harassers—someone who did not have the power to hire or fire her but directed and controlled her daily work—reassigned her to be a "glorified salad girl."

Employers are "strictly liable" for harassment inflicted by "supervisors," but if co-workers harass, employer only liable if plaintiff can show that employer has been negligent in either discovering or remedying the alleged harassment.

Seventh Circuit found that Ball State had promptly investigated and responded to the complaints. Accordingly, it dismissed her case because she was unable to prove either that (1) any of the harassers was her supervisor—that is, someone with the power to hire, fire, promote, demote, transfer, or discipline; or (2) that Ball State was negligent in remedying the harassment.

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Question to Supreme Court: Is "supervisor" limited to harassers who have the power to hire, fire, promote, demote, transfer, or discipline? Or does supervisor include harassers who direct and oversee their victim's daily work? Circuit split. Argued in November 2012. *Vance* should be decided by June, when the high court's current term ends.

Texas Whistleblower Act

3. *University of Texas Southwestern Medical Center v. Gentilello*, No. 10–0582, 2013 WL 781598 (Tex. Feb. 22, 2013) (not yet released for publication)

Professor of surgery at UTSW reported to supervisor that residents at a hospital served by UTSW were violating Medicare and Medicaid requirements and procedures by treating and operating on patients without the supervision of an attending physician. Following his report, he was stripped of his faculty chair positions. He sued under the Texas Whisteblower Act.

To prove violation of Whistleblower Act, a plaintiff must establish (1) public employee (2) reports in good faith a violation of law (3) to appropriate law enforcement authority. "Appropriate law enforcement authority" is unit of government the employee in good faith believes is authorized to: (1) regulate under or enforce the law alleged to be violated in the report; or (2) investigate or prosecute a violation of criminal law.

Court: professor did not have an objectively reasonable good-faith belief that his supervisor was an appropriate law enforcement authority under the Texas Whistleblower Act, and thus professor's report to the supervisor was not protected by the act. "Given his training and expertise, he should have known that his supervisor's purely internal authority was not law enforcement but law compliance—in other words, [supervisor] was only capable of ensuring that UTSW followed federal directives. The bare power to urge compliance or purge noncompliance does not transform [supervisor] into an 'appropriate law enforcement authority' as defined in the Act." Case dismissed.

4. *Texas A&M University Kingsville v. Moreno*, No. 11–0469, 2013 WL 646380 (Tex. Feb. 22, 2013) (not yet released for publication).

Employee, an assistant vice president and comptroller at TAMUK, was fired after reporting to the TAMUK president that her supervisor's daughter had received in-state tuition in violation of state law. She sued under Texas Whistleblower Act.

Court: employee did not submit evidence that she had a good faith belief that university president had authority to regulate under or enforce tuition waiver law such that she was protected by Whistleblower Act for report of violation. Internal complaint not enough.

Transgender discrimination/sexual stereotyping/discrimination based on gender identity

5. *Macy v. Holder*, Appeal No. 0120120821 (EEOC Apr. 20, 2012)

Complainant, a transgender woman, was a police detective in Phoenix, Arizona. She decided to relocate to San Francisco. She was still known as a male at that time. Her supervisor in Phoenix told her that the Bureau of Alcohol,

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Tobacco, Firearms and Explosives (Agency) had a position open at its Walnut Creek crime laboratory for which she was qualified.

Complainant discussed the position with the Director of the Walnut Creek lab by telephone, while still presenting as a man. They talked about her experience, credentials, salary and benefits. Following the conversation, the Director told her she would be able to have the position assuming no problems arose during her background check.

During the background check process, she informed the employer that she was in the process of transitioning from male to female.

Five days later, she was informed that, due to federal budget reductions, the position at Walnut Creek was no longer available.

She brought EEOC charge.

EEOC: Discrimination based on sex under Title VII includes transgender discrimination/sexual stereotyping/discrimination based on gender identity.

HB 1146 (same as HB 238 and SB 237) !	Johnson, Eric	Relating to the prohibition of employment discrimination on the basis of sexual orientation or gender identity or expression.
HB 238 (same as HB 1146 and SB 237) !	Villarreal	Relating to the prohibition of employment discrimination on the basis of sexual orientation or gender identity or expression.
SB 237 (same as HBs 238 and 1146) !	Van de Putte	Relating to the prohibition of employment discrimination on the basis of sexual orientation or gender identity or expression.

Proving age discrimination under state law

6. *Mission Consolidated Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629 (Tex. 2012)

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Plaintiff worked for school district for 27 years. She was fired when she was 48 and replaced by someone three years older. She sued for age discrimination under the Texas Commission on Human Rights Act (TCHRA), the state law that mirrors the Age Discrimination in Employment Act (ADEA).

Under the ADEA, to establish a prima facie case of age discrimination, a plaintiff has to show: (1) over 40, (2) qualified, (3) suffered an adverse employment action, (4) replaced by someone younger or otherwise discriminated against because of age.

Court: employee suing for age discrimination under state law who is replaced with someone older may *never* establish age discrimination by circumstantial evidence.

Mission Consolidated fails to acknowledge that the motives for replacement may be completely unrelated to the motives for termination. As pointed out by Chief Justice Jefferson in his dissent, "It cannot logically follow that the employer's later decision to hire an older worker absolves it of its original sin." As a result of the Court's ruling, however, state employers who may have discriminated on the basis of age now have a "winning blueprint: hire a worker of the same protected class."

Statute of limitations for pay discrimination under state law

7. Prairie A&M University v. Chatha, 381 S.W.3d 500 (Tex. 2012)

The Lilly Ledbetter Fair Pay Act amended Title VII to provide that a discriminatory pay decision occurs *each time a paycheck is received* and not just when an initial salary decision is made. That means that under federal law, an employee has 180 days after *each discriminatory paycheck* to bring a claim with the EEOC.

Court: Texas has not amended the Texas Commission on Human Rights Act (TCHRA), the state law mirroring Title VII, to provide that a discriminatory pay decision occurs each time a paycheck is received. Accordingly, the Lilly Ledbetter Fair Pay Act does not apply to TCHRA. Under state law, therefore, an employee has 180 days from the date she is informed of the discriminatory pay decision to bring a claim. Accordingly, unless the Texas Legislature adopts a law mirroring the Lilly Ledbetter Fair Pay Act, employers' potential exposure for pay discrimination is much greater under federal law than under state law. In addition, an employee who wants to bring a claim for pay discrimination more than 180 days from the date she was informed of the discriminatory pay decision will want to file suit in a place not generally known for its hospitality to employees: federal court.

HB 950 (same as SB 248)		Relating to unlawful employment practices regarding discrimination in payment of compensation. ****Incorporates federal law in the Lily Ledbetter Fair Pay Act of 2009 into Chapter 21 of the Texas Labor Code (ongoing pay discrimination relates back to original act of discrimination).
SB 248 (same as HB 950)	Davis	Relating to unlawful employment practices regarding discrimination in payment of compensation. ****Incorporates federal law in the Lily Ledbetter Fair Pay Act of 2009

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		into Chapter 21 of the Texas Labor Code (ongoing pay discrimination relates back to original act of discrimination).

Arbitration Agreements

8. *Carey v. 24 Hour Fitness*, 669 F.3d 202 (5th Cir. 2012).

Former employee brought collective action against employer, alleging that it had violated FLSA by failing to adequately compensate him and other similarly-situated employees for overtime work. Employer moved to stay proceedings and compel arbitration. Trial court denied motion. Employer appealed.

Court: Because the arbitration agreement was in the employee handbook, which had a provision that the policies in the handbook could be changed at any time, it was illusory and therefore unenforceable. Important: arbitration agreement had no savings clause, i.e., no provision stating that changes could NOT be made retroactively. "If a 24 Hour Fitness employee sought to invoke arbitration with the company pursuant to the agreement, nothing would prevent 24 Hour Fitness from changing the agreement and making those changes applicable to that pending dispute if it determined that arbitration was no longer in its interest. In effect, the agreement allows 24 Hour Fitness to hold its employees to the promise to arbitrate while reserving its own escape hatch."

Jury Waivers

9. *In re Frank Kent Motor Company d/b/a Frank Kent Cadillac*, 361 S.W.3d 628 (Tex. 2012) (orig. proceeding).

Employee signed conspicuous jury waiver after being told he would lose his job if he didn't sign.

I agree that with respect to any dispute between [Frank Kent] and me to resolve any disputes between us arising out of or in any way related to the employment relationship (including, but not limited to, employment and discontinuation of employment) before a judge without a jury. ***[FRANK KENT] AND EACH EMPLOYEE THAT SIGNS THIS ACKNOWLEDGMENT, RECEIVES A COPY OF THIS HANDBOOK, HAS KNOWLEDGE OF THIS POLICY, AND CONTINUES TO WORK FOR [FRANK KENT] THEREAFTER, HEREBY WAIVES THEIR RIGHT TO TRIAL BY JURY AND AGREE TO HAVE ANY DISPUTES ARISING BETWEEN THEM RESOLVED BY A JUDGE OF A COMPETENT COURT SITTING WITHOUT A JURY.***

After his employed was terminated, he sued for age discrimination and demanded a jury trial. Trial court and Fort Worth court of appeals refused to enforce jury waiver, agreeing with the employee that he had been coerced to sign.

Court: "[B]ecause an employer has the legal right to terminate an at-will employee, a threat to exercise that right cannot amount to coercion that would invalidate a jury waiver agreement."

Managers and Retaliation

10. *Lasater v. Texas A&M University at Commerce*, 495 Fed. Appx. 458 (5th Cir. 2012) (per curiam) (not selected for publication).

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Plaintiff Delinda "Dolly"Lasater brought suit under Fair Labor Standards Act (FLSA) and Texas Whistleblower Act alleging President, Vice President and Texas A&M University–Commerce ("TAMUC") terminated her employment because she reported FLSA violations involving employee compensation time. Lasater was the Director of the Office of Financial Aid and Scholarships. During meeting with outside auditor, Lasater brought up concerns about University's "comp time" policies as applied to other employees. Lasater did not say she believed issues violated FLSA or any other law. Her concerns were passed on to her supervisor, Vice President, and President, after which time she alleges the supervisor and Vice President began treating her coldly and harassing her. After voicing her concerns, she received a favorable evaluation. Then, two of her subordinates complained about her management style, including her failure to train her subordinates, her tendency to arrive late, and to "lash out." University terminated her employment, and she sued for retaliation under the FLSA and the Texas Whistleblower Act.

Court: manager's concerns about "comp time" policies as applied to other employees were not "protected activity." For a manager to engage in "protected activity" sufficient to support a retaliation claim, she has to step outside her role as manager and make a personal complaint/take a position adverse to the Company's interests. Expressing concerns about policies generally is not adverse to an employer's interests; it is exactly what the employer expects a manager to do. Plaintiff was not engaging in "protected activity"; she was merely doing her job.

Lactation accommodation/retaliation under FLSA

11. *Salz v. Casey's Marketing Co.*, No. 11-cv-3055 (N.D. Iowa July 19, 2012)

Patient Protection and Affordable Care Act ("PPACA" or "Obamacare") amends Fair Labor Standards Act (FLSA) to require employers to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public" for nursing mothers to pump breastmilk.

The express breast milk provisions are codified at 29 U.S.C. § 207(r). 29 U.S.C. § 207(r) provides:

(r)(1) An employer shall provide—

(A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and

(B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

(2) An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.

Plaintiff returned to work at convenience store after having a baby. Plaintiff pumped at work and her supervisor assured her that the store's office was a secure and private place to pump.

Store was later acquired by Defendant, who installed a security camera in the office. After Plaintiff expressed discomfort with the presence of the camera, Defendant failed to promptly respond to her concerns. When Defendant finally did

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respond, it told Plaintiff to place a plastic bag over the camera, rather than disable it, and refused to provide any other accommodations. After that, Plaintiff was unable to relax and experienced a noticeable reduction in her milk production.

After Plaintiff complained about the situation, she was reprimanded for allegedly failing to fill an ice cream machine, failing to put hot dogs on a grill, and leaving dirty dishes. Plaintiff subsequently left her position, claiming constructive discharge.

Plaintiff sued under the FLSA for (1) failing to provide private place to pump; and (2) retaliating against her after she complained.

Court: no private cause of action under FLSA for failing to provide nursing mother private place to pump breastmilk. Remedy is to file complaint with Department of Labor, which may seek injunctive relief on plaintiff's behalf. If employer fires nursing mother for complaining about failing to provide private place to breastfeed, however, she may bring a retaliation claim under the FLSA.

Lactation Discrimination under Title VII/Pregnancy Discrimination Act

12. *EEOC v. Houston Funding II, Ltd.*, Civil Action No. H–11–2442, 2013 WL 739494 (S.D. Tex. Feb. 2, 2012).

In December 2008, employee who worked for employer that was NOT subject to FMLA had baby. After baby's birth, she had complications from c-section. When asked by her employer when was going to return, she said she hoped she would be able to return soon. According to the employer, about two months after the baby was born, it decided to fire her effective February 13 for job abandonment. It did not communicate this to her. On February 16, employee was told by doctor that she could return to work. That same day, employee called employer and left message that she had doctor's approval to return to work. The next day, she told employer she was ready to come back and asked if she could use a back room to pump milk. Employer told her they had filled her spot because they assumed she had abandoned her job. When she asked for her firing date, employer told her it would get back to her. On February 26, she received the letter firing her. The letter was dated February 16 and sent on February 20. Employee sued, claiming employer wanted to fire her because she asked to pump at work.

Court: "Discrimination because of pregnancy, childbirth, or a related medical condition is illegal . . . . Even if the company's claim that she was fired for abandonment is meant to hide the real reason—she wanted to pump breast-milk—lactation is not pregnancy, childbirth, or a related medical condition. She gave birth on December 11, 2009. After that day, she was no longer pregnant and her pregnancy-related conditions ended. Firing someone because of lactation or breast-pumping is not sex discrimination."

Fifth Circuit heard oral argument on November 6, 2012.

Side note: Texas statute: Texas Health and Safety Code addresses breastfeeding in public under Texas law. Section 165.002 provides: "A mother is entitled to breast-feed her baby in any location in which the mother is authorized to be."

HB 741	Walle	Relating to the right of a public employee to breast-feed, or to express

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!		breast milk for, the employee's child in the workplace. ****Public employees are entitled to breast-feed, or express breast milk for, the employee's child at the workplace. Written policy required; policy must require the employer to support and encourage breastfeeding and accommodate employees' breast-feeding needs. No limits on time, or age of child, or accommodations. Employer must provide a "reasonable amount" of break time for such purposes; no definition of "reasonable" or "accommodation"; no provision for rules; discrimination prohibited; refusal of public employer to comply is a violation of Chapter 21, Labor Code. Bill leaves unclear whether the statute would entitle a mother to bring her young child to the workplace.

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