Dog Days of Summer Case Update 2018

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As always, there are many lessons in the Fifth Circuit case law over the last year. But one of the most interesting things to see is the Fifth Circuit addressing various situations in which panels have ignored prior precedent and so turned what should have been the law on its head.

What is Retaliation? *Marchman v. Crawford*, 2018 WL 1308703 (5th Cir., March 12, 2018). This is a convoluted case involving a judge who sued her peers (including Judge Rambo) and a subordinate for supposedly engaging in first amendment retaliation. The Court finds no adverse action, again saying that the filing of pleadings, false allegations, verbal reprimands and investigations are not actionable adverse employment actions.

Improper Removal – What is the Lesson? *Griffith v. Alcon Research Ltd.*, 712 Fed. Appx. 406 (5th Cir., Dec. 6, 2017). Here a defendant removed a case even though no federal cause of action was asserted. What was the hook? The petition referenced filing a charge with the EEOC and getting a right to sue letter from the same entity. A district judge bought that the plaintiff was asserting a federal claim. The Court of Appeals did not, because it noted there was no federal claim stated on the face of the complaint. But given the references to EEOC, there was enough in the Court's mind to prevent the plaintiff from getting fees for improper removal.

Administrative Exhaustion. *Phillips v. Caris Life Sciences, Inc.*, 2017 WL 4987751 (5th Cir., Dec. 4, 2017). Plaintiff filed an EEOC charge complaining of sexual harassment. But, after she was terminated, her counsel did not amend the charge. He only sent a letter telling the investigator what was going on. At the end of the day, the Court said this was not enough. NOTE: Court says *Gupta* does not apply to cases in which both retaliation and discrimination claims are alleged.

Davenport v. Edward D. Jones & Co., L.P., 891 F.3d 162 (4th Cir. 2018). This is a sexual harassment and constructive discharge case brought because of a supervisor who "created a volatile working relationship" and made comments of a sexual nature to the plaintiff. In front of a prospective client, he said as follows: "maybe we can get some nudie pictures of you ... that might entice him." He also said that she would get "big bonuses" if she dated the prospective client.

The plaintiff reported the nude pictures request but nothing about the bonuses. The defendant gave her an extended leave of absence at her request. A few days later, the plaintiff filed an EEOC charge that again recounted the nude pictures request but nothing about the bonuses. After the plaintiff's therapist said she should not go back to work at the bad guy's office, she

resigned because no other job was offered. But her resignation prompted two letters regarding employment options at another office. The plaintiff pursued neither option.

After the plaintiff sued, the district court threw out the case, saying among other things that the Fifth Circuit did not recognize a quid pro quo claim unless the supervisor was making the advances. The plaintiff appealed.

Regarding her constructive discharge claim, the Court said the problem was that the claim had not been administratively exhausted.

> Although Davenport did not have to use the magic words "constructive discharge," she had to include allegations "like or related to" her constructive discharge claim.[11] Davenport did not do so. She did not allege facts suggesting that she endured severe or pervasive harassment that would have compelled a reasonable employee to resign. In fact, she did not allege that she left her employment or her reasons for leaving.

With regard to the plaintiff's bonus denial claim, the Court said that a the denial of a monetary bonus may be a tangible employment action so long as it is significant. It also held that it was of no consequence that a third party was to be the beneficiary of the sexual favors. It was the boss who was the harasser.

But these rulings did not help the plaintiff because, at the end of the day, the Court did not believe that she had been denied any bonus for refusing to date the prospective client. She produced no evidence of the defendant's bonus structure or even that she would have been eligible for a bonus when she received a good performance review. Neither did she produce evidence that the bad guy argued either for or against her getting a bonus. The evidence only showed that she received an "exceeds expectations" rating from her boss and a four percent raise. According to the Court, there was simply not sufficient evidence to allow a jury to rule in her favor. (Except the direct statements of the bad guy, I must add).

There is a dissent here and it notes, as I just did, that there is no authority for the proposition that the bad guy's direct statements should be ignored in deciding whether the plaintiff has produced sufficient evidence to show a triable issue of fact.

Temporal Proximity. *Atkins v. Southeast Commnity Heatlh Sys.,* 712 Fd. Appx 388 (Nov. 1, 2017). This retaliation case makes the point – once again – that temporal proximity is not enough to establish a causal connection between protected activity and adverse action. The Court also notes that, even if the plaintiff had established a prima facie case, she would lose at the pretext stage where her only response is that she was not guilty of misconduct. This is not enough to show that "but for" her protected activity, she would not have been terminated.

No Relation Back. *Barrett v. American Airlines, Inc.*, 711 Fed. Appx. 761 (5th Cir., Oct. 27, 2017). I don't think any of our brethren or sisteren would make this mistake, but it is worth knowing what the Fifth Circuit judges see in employment law. Here the plaintiff filed in state court on a claim she had not taken to the Texas Commission until after the 180 days. When the defendant sought summary judgment, she said, hey wait a minute, I also have a Title VII claim here. But she had never mentioned Title VII or a federal claim in her original suit. In Texas, there is no relation back if the original petition would be subject to a plea to limitations when filed. This one definitely was. Sigh!

How to Present Circumstantial Evidence and Pretext. *Robinson v. Jackson State University*, 2017 WL 6003389 (5th Cir., Dec. 4, 2017). This is the sad case of a man who lost his job because he told the truth in an EEOC investigation. The problem arose when Dr. Fuller, a new athletic director, was appointed. The new director bombarded a department secretary with looks and gestures of a sexual nature. She later fired the secretary who filed an EEOC charge. Rather than doing the right thing in this situation, the University president held a department meeting and threatened that she would let anyone go who opposed Dr. Fuller.

Later, Fred Robinson was interviewed as part of the EEOC investigation (wow, they do sometimes interview folks). He admitted seeing Dr. Fuller undress the secretary with her eyes. Two Jackson State lawyers prepared him for his interview and attended it. About one month later, Dr. Fuller fired Robinson and Henderson, another witness. The termination letters gave no reason for the action.

After a successful jury trial, the trial judge granted judgment as a matter of law. On appeal, the defense says there is no proof that Dr. Fuller had actual knowledge of Robinson's EEOC interview and no proof that Dr. Fuller's explanations for the termination were pretextual. The defense is poured out on both points.

> Drawing all reasonable inferences in favor of Robinson, the record established the following. Before Robinson attended the EEOC interview, Dr. Fuller's direct superior, President Meyers, had already threatened the athletics department "that she would take legal matters and they would let anybody go who opposed Dr. Fuller." Robinson and Henderson were the only interviewees to exhibit such "opposition" through testimony unfavorable to Dr. Fuller. Moreover, two Jackson State attorneys witnessed the Robinson and Henderson interviews firsthand and thus learned of the testimony given therein. Dr. Fuller met with both attorneys prior to her own interview, and she continued to meet with those attorneys to discuss the Ward legal matter—the very topic at the heart of Robinson and Henderson's testimony. It was by no means unreasonable for the jury to infer from these attorney-and-accused conversations that Dr. Fuller learned the identities of the sole corroborators.[1] This is particularly true in light of what followed; Dr. Fuller began to treat Robinson differently following the interview, avoiding him at all costs. And ultimately, just as President Meyers foreshadowed, Dr. Fuller fired

> both Robinson and Henderson the following month, supplying the same boilerplate, arguably pretextual justification.

As the Court put it, there is no need to speculate about whether any single category of evidence would suffice. That, after all, is not the standard. You do not consider the evidence in isolation, but, instead, you look at the "accumulation of circumstantial evidence" to evaluate a retaliation claim.

When it came to pretext, the Court found it in spades. Here is an excerpt:

> [W]e note further that Robinson's evidence tracks each of the three traditional indicators of pretext: changing explanations, departure from termination protocol, and temporal proximity. Jackson State justified Robinson's termination first on the basis of the reorganization plan and his absenteeism. But, at trial, Dr. Fuller's explanation grew substantially, including four previously undisclosed justifications. In addition, Dr. Fuller neither submitted a letter to Human Resources nor received approval from Robinson's department head prior to termination – both prerequisites under Jackson State's policies. And finally, Dr. Fuller fired Robinson just one month after Robinson's testimony. These traditional indicators of pretext gave the jury further reason to doubt the veracity of Dr. Fuller's proffered justifications.

Similarly Situated. *Delaronde v. Legend Classic Homes, Ltd.*, 2018 WL 473559 (5th Cir., Jan. 18, 2018). This is an appeal from a jury verdict for the plaintiff. Among the defense challenges is the claim that the Court erred in failing to give this jury instruction on "similarly situated:"

> "Similarly situated" employees are employees who are treated more favorably in "nearly identical" circumstances. Similarly situated individuals must be "nearly identical" and must fall outside the Plaintiff's protective class – i.e., they must be male. Significantly, individuals must share the same capabilities to be considered "similarly situated." Put another way, "[e]mployees with different capabilities are not considered to be nearly identical." Consistent with that principle, individuals who are truly "similarly situated" will have the same level of experience and seniority. Proper comparators must also be contemporaneously employed at the same location as the plaintiff.

As the Court put it. "Legend's proposed instruction, while based on Fifth Circuit precedent, ignores the "case-specific" inquiry the Fifth Circuit has mandated, because "[w]hat is relevant in one case might not be relevant in another."

The jury was instructed that the plaintiff had to show she was treated differently than a person similarly situated, but the district court left it at that. And the Court added, "In not getting into the weeds of the meaning of 'substantially similar,' the instruction did not misstate the law."

Checking the Box *Williams v. Tarrant County College Dist.*, 2018 WL 480487 (5th Cir., Jan. 18, 2018). There are many great nuggets in this case. One for the defendant is that it is enough for a defendant to just say I want summary judgment on the entire case.

One for the plaintiff regards administrative exhaustion,

> [O]ur court does not require a "plaintiff [to] check a certain box or recite a specific incantation to exhaust", *Pacheco v. Mineta*, 448 F.3d 783, 792 (5th Cir. 2006) (footnote omitted), and will not "cut off [a party's rights] merely because [s]he fails to articulate correctly the legal conclusion emanating from h[er] factual allegations", *Sanchez*, 431 F.2d at 462. "[F]ailure to fill in the appropriate box in the filed charge" warrants summary judgment on exhaustion grounds only when "coupled with the inability to describe the general nature of the claim in the narrative section of the charge". *Miller v. Sw. Bell. Tel. Co.*, 51 Fed.Appx. 928, at *7 (5th Cir. 2002).

This district judge was mired in the past in many way including wrongly misstating the definition of disability. I guess it is hard to keep up with the law that has been on the book for 10 years. Anyway, even though the plaintiff had a detailed statement of her disability, the district court thought that was insufficient. She needed an expert. Wrong!

> The 2008 amendments and their implementing regulations broaden protection for the disabled, in part by clarifying, as noted *supra*, that showing substantial limitation "usually will not require scientific, medical, or statistical analysis". *Id.* § 1630.2(j)(1)(v). The court's requiring medical corroboration at the summary-judgment stage was, therefore, erroneous.

Amazingly, the court also thought that being able to work meant the plaintiff did not have a disability.

> The court also erred in suggesting Williams' being certified to "work a full, regularly scheduled day with no restrictions" undercut her disability claim. An individual's ability to perform her job does not prevent a finding of disability; her disability may be unrelated to the performance of her job, or perhaps, with reasonable accommodations, she is capable of fulfilling her duties. The court's statement was therefore contrary to both law and experience. *E.g.*, *Cannon*, 813 F.3d at 591 n.3 (plaintiff's statements that she needed no accommodation at work do not undermine evidence of actual disability). Similarly, the implication Williams could not show disability without showing she is "a person who has difficulty leading a normal life" finds no support in the ADA, its implementing regulations, or our caselaw.

When the court got to the regarded as claim, it again wrongly defined the standard, claiming the

plaintiff had to show either that the employer mistakenly believed she had an impairment that limited a major life activity or that it believed that her non-limiting impairment substantially limited a major life activity. In other words, she had to make a showing that was eliminated by the ADAAA. Again, I know how hard it is for the court to keep up.

Discovery Orders Reversed. *EEOC v. BDO USA, LLP,* 876 F.3d 690 (5th Cir. 2017). The EEOC brought this case on behalf of BDO's former head of HR, Hang Bower, who made very serious allegations that BDO subjected her and other female employees to discrimination, retaliation and hostile work environment. Bower claimed that her belief that complaints should be fairly investigated and her efforts at compliance hit a brick wall with the company and led to it excluding her from leadership meetings, reducing her job responsibilities, and ordering her to stop investigating cases.

As you might imagine, the EEOC asked for lots of documents in its investigation and BDO claimed that many of them were not discoverable because of the attorney-client privilege. Bower pushed back on this, explaining that, in many cases, business-related emails were sent to the attorney only to keep them informed. She also noted that the company had asked her to include attorneys on darn near every email so that the privilege could be raised. And in the court below, that worked. The magistrate judge who first considered the matter stated on the record that "anything that comes out of a lawyer's mouth is legal advice," and "I'm telling you that if it's communications from or to an attorney it's privileged." Huh? Kinda varies from settled law, which states that there is no presumption that communications with counsel are privileged.

The Court pointed out that simply describing a lawyer's advice as "legal," without more, is conclusory and insufficient to carry out the proponent's burden of establishing attorney-client privilege.

The original version of this opinion went further and strongly stated that BDO's privilege log was woefully inadequate. Vague and incomplete entries, entries that fail to distinguish between legal advice and business advice, entries that fail to establish that communications were made in confidence and that confidentiality was not breached. Many entries just said "legal advice," when this in no way helps the opponent figure out whether the entire document or portions thereof are protected from disclosure.

But this new version leaves that analysis to the lower court in the first instance. So back this case goes to the district court after this Court finds that it had inverted the burden of proof by requiring the EEOC to prove that BDO improperly asserted the attorney-client privilege and that it had wrongly concluded that all communications between a corporation's employees and counsel are per se privileged. That burden falls on BDO.

The case also involved a protective order granted to BDO prohibiting the EEOC from communicating with Bower or other BDO employees about conversations with counsel; requiring the EEOC to disclose the names of BDO employees and the substance of discussions

about conversations with counsel; requiring the production of notes of those conversations; and destruction of any notes or documents that were created as a result of reviewing the documents; The Court agreed that this order was based on the magistrate's misunderstanding of the law of privilege. So back the case goes for a analysis of the protective order under the correct standard.

Forced Transfer Ain't Always Enough. *Rayborn v. Bossier Parish School Bd.*, 881 F. 3d 409 (5th Cir. 2018). Here is a case where the plaintiff was transferred from School A to School B with the same pay. But the Fifth Circuit said she could not show this transfer was a demotion and thus there was no adverse action.

> "To be the equivalent to a demotion, a transfer need not result in a decrease in pay, title, or grade; it can be a demotion if the new position proves objectively worse – such as being less prestigious or less interesting or providing less room for advancement." *Id.* (quoting *Alvarado*, 492 F.3d at 613 alterations omitted)). Rayborn's transfer to another school within the BPSS is not an adverse employment action. She did not lose any pay or benefits. There is no evidence that she suffered a loss of responsibilities. Although her office facilities at the new school were subjectively less desirable, and she no longer worked at the school her children attended, these differences do not amount to a demotion. Thus, she did not suffer a significant change in employment status..

Speculation Bites. *GE Betz, Inc., v Moffitt-Johnston,* 2018 WL 1281965 (5th Cir., March 13, 2018). This is a non-compete case. The case starts with an employee who had signed an agreement not to solicit any of her customers for 18 months. She left the company, immediately moved to another position, and the company sued, claiming four separate buckets of evidence show she violated her agreement.

> GE points to the fact that Moffitt-Johnston downloaded over 27,000 GE files prior to departing, many of which contained client information, then lied about working for a competitor, supporting an inference that her motive was to "deprive GE of the opportunity to shore up its customer relationships before she could solicit their business." The contention that Moffitt-Johnston must have solicited clients because she allegedly misappropriated files with their information amounts to speculation....

And then there is this:

> GE references two incidents it believes constitute solicitations themselves. Specifically, at the 2012 New York Harbor Show, Moffitt-Johnston was observed speaking with two GE customers. However, there is no evidence as to the content of those conversations. While the event's purpose was business development, there is evidence in the record that it was also largely a social affair to which spouses and "significant others" were invited for dinner and a cruise. As the

> district court observed, the non-solicitation covenant does not prohibit Moffitt-Johnston from *speaking* with any former clients; it prevents her from *soliciting* them "regarding products or services that are similar to or competitive with those [she] gained knowledge of while employed by [GE]." The district court held that GE's belief that Moffitt-Johnston solicited customers at the New York Harbor Show is "mere speculation." With no evidence that Moffitt-Johnston spoke with the clients at issue about AmSpec's services or even anything industry-related during this event, the district court's conclusion was correct.

In a similar vein, GE presents evidence of email exchanges between Moffitt-Johnston and a former GE customer but they have nothing to do with solicitation of business. Again, this is of no help to the company.

GE also presented evidence of the new company's success in business, as if that was evidence that Moffitt-Jackson solicited clients she was not allowed to solicit. It could just as readily be attributable to the fact that the company was in a related line of business and had a track record with these clients. Again the Court points to improper speculation.

And finally, GE argues that Moffitt-Johnston engaged in subterfuge to violate the non-compete agreement, including supervising others to solicit GE customer. But the language of her agreement said she would not "assist another" in soliciting a former client, not that she could not supervise such a person in general. Here, she did not supervise his activities regarding any GE customer. Bottom line: she crossed her t's and dotted her i's.

Moffitt-Johnston was not so lucky when it came to fees. The district court awarded more than $200,000, but the Fifth Circuit said she had failed to prove that (1) the employer knew when she executed the agreement that it imposed a greater restraint than necessary to protect the company's legitimate business interests; and (2) that the employer sought to enforce the covenant to a greater extent than necessary to protect its business interests.

In stepping back, I think there are lessons here for discrimination cases. The panel in this case was Owen, Elrod, and Higginbotham. You should think about this case no matter which side you are on. Make sure you cannot be accused of the sins of this employer – speculating when the evidence goes both way and only speculation allows for the ultimate conclusion.

Barriers Are Cool. *Acker v. General Motors***,** 853 F.3d 784 (5th Cir. 2017). It is often said that union workers get a better deal than those in the private sector. But this case shows it ain't necessarily so. At GM, the collective bargaining agreement requires workers taking intermittent FMLA leave to make not one, but two, phone calls every day at least 30 minutes before the shift starts to report their absence. If they do not, they go down the path that ultimately leads to discipline. And the Fifth Circuit says that is hunky-dory so long as there are no "unusual circumstances." After all, the employer is just requiring employees to follow Its "usual and customary" procedures for requesting FMLA leave. Presumably, if the person were in a coma

they might be excused from this requirement. But a man who needed FMLA leave for a condition that caused blackouts, grayouts, and heart palpitations is not.

The other point of this case is that requesting FMLA leave cannot be considered a request for reasonable accommodation. As the Court points out, a request for FMLA leave is a request to be off work because of a serious health condition. A request for reasonable accommodation, by contrast, says the employee can do the essential functions of the job.

Beware the Narrow Prima Facie Case. *Alkhawaldeh v. Dow Chemical Co.*, 851 F.3d 422 (5th Cir. 2017). Sometimes, the case gods conspire to make things difficult for plaintiffs because the case includes just too much that allows judges to pigeonhole it in a negative way. They take a case where the guy is short-timer, has praised his boss effusively in the past, but now complains about his "racist" agenda after getting a bad appraisal. Then they mix in the fact that no other employee got such a low rating, and that rather than being fired, he is put on a PIP and even moved to another supervisor before finally being run out the door.

When the case gods get this kind of case, sometimes the results are really bad, as they were here. The Court says that the only way to prove a circumstantial case of discrimination is to show that an employee outside your protective group is treated more favorably under nearly identical circumstances. Here, that means someone who not only got a terrible performance appraisal but then made it thru the PIP process and was not fired. Wow. That's a search for a unicorn.

Sorry, folks, but that is not the law. The Fifth Circuit has long ago said that this is not what is needed to make a prima facie case. Take a look at this from *Palasota v. Haggar Clothing Co.,* 342 F.3d 569, 576 (5th Cir. 2003):

> the plaintiff need only show "evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." *Nichols v. Loral Vought Sys. Corp.,* 81 F.3d 38, 41 (5th Cir. 1996*)* (quoting *Amburgey v. Corhart Refractories Corp.,* 936 F.2d 805, 812 (5th Cir. 1991)).

It's deja vu all over again. In *Palasota*, after all, the district court took the same position that the Fifth Circuit takes here – that there was only one narrow way to present a circumstantial evidence case. You really need a sense of history in this line of work. And, of course, you need the cooperation of the case gods.

Policymaker AWOL. *Bowden v. Jefferson County*, 676 Fed. App'x 251 (5th Cir., Jan. 19, 2017). The Fifth Circuit affirms dismissal of this case on the grounds that a constable is not a policymaker under 42 U.S.C. 1983. This case cites a string of cases to that effect. Worth keeping in mind. You need very unusual circumstances to vary from this.

Two Day Suspension Not Enough for Frequent Filer. *Cabral v. Brennan*, 853 F.3d 763 (5th Cir. 2017). Here is a case that says a two day suspension is not a "materially adverse action" to

support a retaliation case. The test, as established in *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006), is whether the action might have dissuaded a reasonable worker from making or supporting a charge of discrimination. But what does it take to dissuade a frequent filer (this guy had submitted multiple EEO complaints)?

> Unlike the plaintiff in *White*, Cabral has not shown that his suspension exacted a physical, emotional, or economic toll. He offers conclusional statements attesting to the emotional or psychological harm he suffered because of the two-day suspension, but he provides no documentation of any alleged harm. He points to the number of grievances he has filed against the Postal Service related to purported discrimination, harassment, and retaliation, but those complaints are not relevant to whether the two-day suspension in September 2013 constituted a materially adverse action.

Pretext in Abundance. *Caldwell v. KHOU-TV*, 850 F.3d 237 (5th Cir. 2017). This is a good case to use when the employer changes its tune about why it dismissed the employee. The employer first said that Caldwell refused to do part of his job and that is why he was chosen for lay-off. In litigation, the employer said something very different – that Caldwell had not taken the initiative to spend as much time doing that part of his job as his colleagues. Curiously, they also said that his work ethic had nothing to do with the decision. Despite these vivid changes in their story, summary judgment was granted.

On appeal, however, thankfully there is a different result. The Court says this evidence presents a material fact issue on pretext. First, the explanations changed over time and the inconsistencies in their story "are those probative of their truth." But there is more. The Court pointed out that KHOU's own witnesses rebutted the veracity of the explanations.

The Court also found that there was another reason to reverse the case – noting that the employer refused to give Caldwell the same opportunities it gave other employees. The employer scheduled every other employee to do certain job duties multiple times per week. But they had removed Caldwell from these duties because of his serious disability – but not at his request. Further, the employer counseled every other employee who was deemed deficient at some job duty, but admittedly did not do so for Caldwell. This is exactly what happened in *Vaughn v. Edel,* 918 F.2d 517 (5th Cir. 1990) where the issue was the plaintiff's race. Good to see the Fifth Circuit acknowledge the power of this precedent and bring it back to life.

No To Telework. *Credeur v. Louisiana*, 860 F.3d 875 (5th Cir. 2017). Plaintiff's lawyers take note. A panel of Reavley, Elrod, and Graves rejected the notion that telework was a reasonable accommodation for a lawyer with disabilities.

Credeur's problems arose after a kidney transplant. After the 2010 transplant, she was granted an accommodation to work from home for about 6 months. Then she went back to the office and, in 2013, needed FMLA leave because of complications. After she exhausted her FMLA leave, she

asked again for the accommodation of working from home. That was granted with the proviso that she start reintegrating into the office. But then things broke down between the parties. Finally, Credeur returned to work without restrictions, but not before she sued the State for failing to accommodate her. Six months later, she voluntarily resigned.

The big ticket item that Credeur wanted in his case was a declaration that telework was a reasonable accommodation. But she didn't get it. Instead, the Fifth Circuit adopted the anti-telework opinion from the Sixth Circuit.

While recognizing that the employer's word alone is not enough to show what the plaintiff's job duties really are, the Court makes very clear that the plaintiff's word alone is not enough either. "'An employee's unsupported testimony that she could perform her job from home' does not create a genuine dispute of fact to preclude summary judgment," *citing EEOC v. Ford Motor Co.,* 782 F.3d 753 F.3d 763-64 (6th Cir. 2017). Otherwise, the Sixth Circuit said, every accommodation case would have to go to trial because the employee always thinks the requested accommodation is reasonable.

The Court cites a "general consensus" among Courts that most jobs require regular work-site attendance. The Court also refers to the EEOC's own guidance on this point, which provides "[t]eleworking may not be feasible, for example, if the job requires 'face-to-face interaction and coordination of work with other employees', 'in-person interactions with outside colleagues, clients or customers, or 'immediate access to documents or other information located only in the workplace.'" And then there is the issue of supervision and whether a person working at home can be adequately supervised.

Here, the job of a litigation attorney was interactive, team oriented, required day to day coordination and thus fell into that bucket of jobs where in-person attendance was required. "Construing the ADA to require employers to offer the option of unlimited telecommuting to a disabled employee would have a chilling effect."

But here is one thing that clearly underlies this decision: The Court notes that an increasing number of employers are permitting telework under certain circumstances.

Causal Connection. *EEOC v. Emcare, Inc.,* 857 F.3d 678 (5th Cir. 2017). This appeal comes from a trial verdict for the EEOC, finding that Emcare fired three employees in retaliation for complaining of sexual harassment. What was the harassment? Persistent sexual remarks and gestures by a CEO that ultimately led him to saying this about a 15 year girl who came to "Bring Your Child to Work Day": "There is no way she is 15 with breasts like that." And, of course, he did that in the kid's presence. When the mother got upset, he laughed. Three employees complained about the guy and within two months, they had all been fired. Surely, this was mere coincidence. When the case got to trial, numerous witnesses testified how offensive this guy was. And the jury agreed.

Emcare appealed, claiming that there was no evidence that Richardson, the person who fired one of the employees (Trahan), had any idea about the CEO's conduct. The Court says no way, there is adequate information.

First of all, there was testimony that the purported decision-maker, Richardson, had personally observed the perp's harassment. So the jury could conclude that he had knowledge and still had taken no action.

The court also noted that Trahan testified that whenever he complained, his boss (the perp) would criticize him, always without being able to offer specifics. This would lead to the inference that the perp knew about the complaints. Richardson was a supervisor in the same division as the perp, leading to a conclusion he probably knew as well. The jury could also infer that Trahan's boss, Thornton, who met with Richardson to discuss Trahan's performance and termination would have discussed the harassment allegations Trahan made.

And finally, there was information that Richardson and Thornton jointly made the termination decision, rendering Thornton's unquestioned knowledge an appropriate consideration. A decision-maker is one who actually made the decision or caused it to be made. And Thornton clearly is the one who ordered the audit that was used as the grounds to terminate Trahan. She was also present for the firing. And she entered it into their system when she was personally involved.

So plenty of information to support a causal connection between the complaint and the termination.

Can They Read? *Heath v. Southern University,* 850 F.3d 731 (5th Cir. 2017). Those who have heard me at past seminars may recall that I have often suggested that federal judges be required to read the important employment law precedents and be tested to ensure they actually understand them. If that had happened, this case would never have gotten to the Fifth Circuit.

The lawsuit is by a university professor (strike one for the Courts), raising claims of harassment on the basis of sex, national origin, race, and religion under Title VII and 1983 (strike two). The case was thrown out because, in the lower court's view, the case was cut off 300 days before the EEOC charge. The Court ruled similarly on the 1983 claim. In making this decision, the lower court judge did not even mention *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). Instead, it based its opinion on pre-*Morgan* case law saying that a plaintiff may not base a suit on individual acts that took place outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran.

Morgan took a different approach, holding hostile environment cases are deemed to be continuing violations if one act contributing to the claim occurs within the filing period. That means that the cases the magistrate relied on have been overruled by the top dogs of the court hierarchy. There is no "should have filed earlier" rule any longer.

OK, so clearly the magistrate judge wasn't keeping up on the case law. I mean the case had only been on the books for 14 years and it is only from the Supreme Court. And the magistrate made another significant error, ruling that it was significant that another female had not suffered similar discrimination. As the Court reaffirms, "there is no token exception to anti-discrimination law."

Back this case goes to the magistrate. Wonder if she will read *Morgan* now. I do remember the tale of a judge who would get reversed and make a big show of throwing the decision away, saying "they can reverse me, but they cannot make me read it." Sigh!

When is a Supervisor not a Supervisor? *Morrow v. Kroger Ltd. Partnership,* 2017 WL 1013072 (5th Cir., March 14, 2017). Two women filed suit against their manager, claiming he had sexually harassed them and Kroger was responsible since the perp was their supervisor. Kroger investigated and gave the guy (ironically the head of the meat market) a "constructive advice" for his actions. Kroger also gave the women the choice between transferring to another department or store or remaining in place.

This case is one of a series of cases showing how hard it is to get courts to find that a supervisor is really a supervisor. Here, the faux supervisor did the following acts: filled out performance evaluations, handled scheduling; boasted that he could influence who was hired into his department, was consulted about hiring decisions, and may have had a close relationship with the store manager. But is he a supervisor? No way, says the Court. That evidence does not show that the faux supervisor had authority to cause a tangible employment action as required under *Vance v. Ball State Univ.,* 133 S.Ct. 2434, 2443 (2013). So not even an issue of fact about whether this faux supervisor's admission was accurate. Case closed.

This result causes one to ponder filing claims for sexual harassment, not under the *Faragher/Ellerth* model, but the negligence model. Under that approach, the employer is liable if Kroger knew or should have known and failed to take prompt remedial action. Until a more common sense approach comes from the Courts, this may be the only way to go in lots of cases.

Reasonable Accommodation? Not. *Moss v. Harris County Constable, Precinct One*, 851 F.3d 413 (5th Cir. 2017). Just in case anyone is in the dark about this, the Fifth Circuit does not believe that an unlimited request for leave can be a reasonable accommodation. "[T]aking leave without a specified date to return or, in this case, with the intent of never returning is not a reasonable accommodation."

So Moss, whose FMLA leave ran out when he was still not ready to return for months is not "qualified" for the job and thus his claim that his dismissal violated the ADA is slapped down. And while Moss also said he could have done a light duty job, he presented no evidence that such a job was available or that he could have done it, if it was.

Arbitration. *Salas v. GE Oil & Gas***,** 847 F.3d 278 (5th Cir. 2017). Salas filed a claim against GE

and GE responded with a motion to compel arbitration. Salas had signed an arbitration agreement with Dresser, GE's predecessor. And when GE took over, the company instituted a dispute resolution system that forced an employee to agree to arbitration or forfeit their job.

In December 2014, the judge granted the motion to compel arbitration. But then nothing happened with the arbitration. The opinion says each party blamed the other for the delay. In February 2016, the plaintiff moved to compel arbitration, which GE said was redundant. But on March 30, 2016, the judge withdrew the earlier order and reopened the case, noting that the parties had failed to arbitrate.

The Fifth Circuit rules that the district judge did not have the power to reopen the case. Although noting that a judge does retain ancillary authority after compelling arbitration and dismissing the case, that authority is narrow. And the district court's order went beyond that authority. So while a court can determine whether the agreement to arbitrate was valid and enforce the decision reached in arbitration, it had no jurisdiction to reopen the case.

And while a party can sometimes be found to waive arbitration if it "substantially invokes the judicial process," the defendant here did not invoke the judicial process at all. So no way no how can Salas get relief.

BTW, isn't arbitration sold as quicker than litigation? Hmmm.

Huckaba v. Ref-Chem, L.P., 892 F.3d 686 (5th Cir. 2018). Here is a case reversing a district court order sending a case to arbitration. How did that happen? Well, it was a straight-forward application of Texas contract law and a cautionary tale about careful drafting.

Ref-Chem presented its employee with an arbitration agreement that included provisions that most of us would just see a boilerplate:

> "[b]y signing this agreement the parties are giving up any right they may have to sue each other" and that the agreement "may not be changed, except in writing and signed by all parties."

The agreement also included a signature block for Ref-Chem. But, guess what? Ref-Chem never signed it. When the plaintiff sued, the company said that didn't matter. After all, the there are many cases where a missing signature is not a problem and the company sought arbitration as soon as the plaintiff sued.

The Court does acknowledge that there are situations where a missing signature does not doom enforceability, but says that cannot be true here.

> Considering the record as a whole, this evidence does not satisfy Ref–Chem's burden that it intended to be bound without signing the agreement.Indeed, if it

> were, then Ref–Chem could have it both ways—argue that it did not intend to be bound because it did not sign the agreement or it did because it kept the agreement and sought to compel arbitration. We give meaning to the words Ref–Chem used in its agreement. And because Ref–Chem did not sign the agreement, neither party is bound. *See Scaife v. Associated Air Ctr. Inc.*, 100 F.3d 406, 411 (5th Cir. 1996) ("If parties negotiating a contract intend that the contract shall be reduced to writing and signed by the parties, ... then either party may withdraw at any time before the written agreement is drawn up and signed by both parties." (alteration in original).

The company also argues that the agreement's reference to continued employment dooms the plaintiff's position (just as it did in *In re Halliburton,* 80 S.W.3d 566 (Tex. 2002)(orig. proceeding), but the Fifth Circuit disagrees. It notes that the actual language in this agreement only says that continuation of employment serves as consideration for the agreement.

Clarifying First Amendment Law. *Sims v. City of Madisonville,* 894 F.3d 632 (5th Cir. 2018). It is not every day that a Court admits a serious mistake, but it happens here. The context is First Amendment retaliation law and whether an individual can be liable when he or she is not the final decision-maker.

Here's the upshot: liability for a government official who violates constituional rights, including those protected by the first amendment, turns on "but for" causation.

> Because it is at odds with our earlier holding in *Jett*, *Johnson*'s absolute bar on First Amendment liability for those who are not final decisionmakers is not binding. Nor are the imputation principles of cat's paw liability applicable to an effort to hold a nondecisionmaker liable. *Jett*'s "causal link" standard sets the causation requirement for a suit against an individual defendant with retaliatory motives who does not make the final employment decision.

Notably, *Jett* is a case from 1986 and *Johnson* is from 2004. So, I guess the lesson is that when you see an error, even if it comes from decades ago, sometimes the Court will recognize where it went off the rails.

For this particular plaintiff, who was suing someone who was not the final decision-maker, this correction did not help. Unfortunately, the confusion in the law meant that he could not show that a violation of his rights was "clearly established" at the time. As the Court notes, it the Courts couldn't get it right, law enforcement officials could not be expected to know that the principle was "clearly established."

Fees Slashed. *Saldivar v. Austin Ind. School Dist.,* 675 Fed. App'x 429 (5th Cir., Jan. 11, 2017). It is painful for a plaintiff's lawyer to read a case like this. This case started off as an age discrimination and FLSA case. The judge threw out the age claims and a jury then found the

plaintiff due 80 hours of overtime. Total award was a little over $2,100.

When it came to fees, the case took a second sad turn. The plaintiff sought $172,000 in fees at a rate of $350 per hour. In response, the defendant did not contest the hourly rate or that fees were due. It said, whoa, this is over the top. And ultimately the district court agreed, slashing the award to $29,000 based on Saldivar's limited success and an analysis of fee awards in similar cases.

The Fifth Circuit affirms that award. The starting point, the Court says, is the lodestar – the reasonable hourly rate times the reasonable hours spent. There is a strong presumption that the lodestar amount is a reasonable fee, but the court can adjust based on a number of factors. The "most critical factor" is "the degree of success obtained." And here, the degree of success would have to be analyzed by the fact that the main claim was dismissed before trial.

Saldivar claimed that the district court's decision impermissibly imposed a strict proportionality requirement, which the Court rejected in *Combs v. City of Huntington,* 829 F.3d 388, 398 (5th Cir. 2016). After all, the district court's opinion mentions that the award sought was 79 times the damages received. But the Court rejects this, saying the district court even recognized this would be error and entered an award more than 13 times the actual damages.

Saldivar also claims that the district court improperly focused only on only one *Johnson* factor, degree of success. Again, the Court rejects this, saying the district court looked at the fees awarded in similar cases, which was entirely appropriate.

Perhaps the main lesson here is that judges really expect plaintiffs to exercise billing judgment and, when they feel that is not being done, the result will not be pretty.

The Devil is in the Details. *Seibert v. Jackson County,* 851 F.3d 430 (5th Cir. 2017). This case is truly a cautionary tale about how failure to dot I's and cross T's really can screw up a case. The underlying facts are disturbing and indicate gross sexual harassment by a sheriff of a subordinate. The sheriff was eventually removed from office.

When the plaintiff went to trial against Jackson County for this sheriff's sexual harassment, the jury found against her. However, the plaintiff got a verdict on intentional infliction of emotional distress against the former sheriff individually.

This led to two JMOLs. One by the bad sheriff arguing that if there was a negative jury verdict against the county, there had to be one against him as well. The plaintiff had the opposite view, that the evidence was so strongly in her favor that the jury could not reach the opposite conclusion.

Ultimately, the district judge granted JMOL to the bad sheriff and denied it to the plaintiff. His rationale for granting the sheriff's motion was that, if there was a finding of no sexual

harassment, there could be no intentional infliction. The Fifth Circuit rejects this, pointing out that this analysis violates Rule 50. That rule requires a judge to look at all the evidence and grant the motion only if "there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did." The judge didn't analyze the case looking at all the evidence. Instead, it threw out all the sexual harassment evidence and only dealt with non-sexual harassment. This was reversible error.

As to the plaintiff, however, the Court notes that she never asked for JMOL before the case went to the jury. While the plaintiff said this should be excused, the Court noted that she had not presented evidence of the kind of narrow non-compliance that is excused. Accordingly, the decision was reviewed under a plain error standard, which means that the bad guy needed to show only that there was some evidence to support the jury's verdict. Since the bad sheriff had taken the stand and denied everything, this was enough to justify a denial of the JMOL. This same evidence was also enough to deny her motion for new trial on this claim. Only if there is "an absolute absence of evidence" to support a jury verdict is a new trial mandated.

Seibert also appealed the district court's grant of summary judgment on her quid pro quo sexual harassment claim. The district court ruled that she had waived this by failing to include this claim in her pre-trial order. The Court of Appeals agrees.

Res Judicata. *Welsh v. Ft. Bend Independent School Dist.,* 2017 WL 2684490 (5th Cir., June 22, 2017). Welsh is a teacher who sued Ft. Bend ISD for discrimination under Title VII and the ADEA – twice. So here's what happened. Welsh filed a charge in 2012, which she amended in 2014. She got a right to sue in August and she filed a state court lawsuit the following month. A state court judge dismissed the case in January 2015. Later that same month, Welsh was back at the EEOC, alleging discrimination and retaliation for incidents occurring between April and December of 2014. In May 2015, she filed this lawsuit in federal court. The district court threw out all her claims based on res judicata. This appeal says some of those claims have a new chance.

The reason? There were claims in Welsh II that were not mature at the time of filing of Welsh I. Texas has refused to apply res judicata to claims that were not yet mature at the time of the first lawsuit. The Court also noted that Texas' compulsory counterclaim rule requires that a party assert as a counterclaim any action arising out of the same transaction so long as the action is mature at the time of filing the pleading. But if the claim matures after the filing of the pleading, it is a permissive counterclaim only. Accordingly, the case goes back to the district court.

Do Lawyers Have First Amendment Rights? *Benson v. Tyson Foods, Inc.,* 889 F.3d 223 (5th Cir. 2018). This is an important case about an issue that has bedeviled lawyers on both sides of the docket – the refusal of courts to allow the parties to talk to jurors after a trial is over. Here, the district court was asked to allow plaintiff's counsel to speak with jurors after a trial in an effort to improve his skills. The Court denied the motion in a one sentence order and the plaintiff appealed this and the underlying verdict. The key authority cited by the Court for refusing to

allow lawyers to talk with jurors is *Haerberle v. Texas International Airlines,* 739 F.2d 1019 (5th Cir. 1984). But, here's the deal, *Haeberle* was wrong and the US Supreme Court has made that clear. So while the district court had every right to rely on the case, the case suggests a distinction between the First Amendment rights of the press and those of the public at large that does not find support in either constitutional text or precedent. Further, while government may have an interest in regulating the speech of attorneys, given their unique role as officers of the court,

> here, as in *Haeberle*, the district court articulated no such interest. In light of the First Amendment interests at stake here, which *Haeberle* did not appear to fully appreciate, district courts in the future would be wise to consider seriously whether there exists any genuine government interest in preventing attorneys from conversing with consenting jurors—and if so, whether that interest should be specifically articulated, in order to facilitate appellate review and fidelity to the Constitution.

So perhaps there is hope that in the future all of us can improve our skills without Courts saying that the rights of "both the disgruntled litigant and its counsel" are "plainly outweighed by the jurors' interest in privacy and the public's interest in well-administered justice." Because that's what *Haeberle* said.

Harassment in a Nursing Home. *Gardner v. CLC of Pascagoula, LLC,* 894 F.3d 654 (5th Cir. 2018). This is a sexual harassment case where the perpetrator is an elderly man diagnosed with dementia and a host of other maladies. The plaintiff is a nursing assistant who had to deal with not only his words, but his persistent assaults. She alleges the nursing home refused to assist her in dealing with this resident and ultimately terminated her when she became upset.

Although the Court in prior cases had sided with nursing homes that deal with this issue, this case crossed the line because it involves not just verbal harassment but multiple assaults. That, the Fifth Circuit says, is just too much to expect. So while summary judgment was granted in this case by the district court, the Court of Appeals reverses.

> Inappropriate comments and incidental contact are sufficiently common behaviors among patients with reduced cognitive ability that it is not objectively reasonable for a caregiver to expect they will never happen. In contrast, the facility must take steps to try to protect an employee once there is physical contact that progresses from occasional inappropriate touching or minor slapping to persistent sexual harassment or violence with the risk of significant physical harm.
>
> A jury could find such a situation here. The frequency and nature of the conduct, along with its effect on Gardner's employment, are sufficient to allow a finding that a reasonable caregiver on the receiving end of the harassment would have viewed it as sufficiently severe or pervasive even considering the medical

condition of the harasser

The Court also notes that harassment, which included physical sexual assault and violent outbursts, was a daily occurrence. This is not something a reasonable caregiver would expect to deal with.

Of course, the existence of the harassment alone is not enough for liability. There must be evidence that the employer knew or should have known and failed to take prompt remedial action. Here, there was evidence that management would laugh when the plaintiff raised the issue of her treatment and tell her to get back to work. There was also evidence of the ways in which nursing homes appropriately deal with such situations, including removal of the person from the facility. Notably, this nursing home ultimately removed this patient and sent him to an all-male facility but only after he assaulted another patient. No reason was given for why this sort of action was not taken when caregivers complained about this man's grossly inappropriate behavior. So, this too is a jury question.

Deja Vu All Over Again. *Davis v. Ft. Bend County.,* 893 F.3d 300 (5th Cir. 2018). This is the second time the Court has reversed the district court's ruling in this case. The first time, the Court sent back a religious discrimination claim for further proceedings. Then, after years of litigation and even a cert. petition after it lost the first time, the County argued for the first time that the plaintiff had not exhausted her religious discrimination claim. But the Court says it is too late to make that argument because the administrative process is just a prerequisite to suit and not jurisdictional.

Here is yet another case that discusses contradictory case law in the Fifth Circuit. In fact, it identifies three strands of case law. One saying failure to exhaust is jurisdictional, one saying it is not and one noting these two strands but not taking sides.

This case decides that the administrative process is not jurisdictional and points out that the Supreme Court in *Arbaugh v. Y & H Corp*., 546 U.S. 500 (2006) is instructive. That case said that when Congress does not declare something jurisdictional, it just isn't. So, while the procedures cannot just be ignored, it is too late to raise them when you have not raised the issue in a case you already appealed the case to the U.S. Supreme Court and lost. Second time is definitely not the charm.

FMLA, Non-Compete and a Bevy of Torts. *D'Onofrio v. Vacation Publications, Inc.,* 888 F.3d 197 (5th Cir. 2018). This case did not start well for the plaintiff and who knows where it will end. But I am getting ahead of myself. This case reverses summary judgment for the defendant and sends the case back to the trial curt.

The plaintiff began working as a sales rep for the defendant in 2012. She signed an 18 month non-compete that prohibited her from working for any direct or indirect competitor of the defendant in any job relating to sales or marketing of cruises, resort stays, safaris, etc. The non-

compete also prohibited her from dong business with anyone who has purchased such services from the defendant in the past five years.

While the plaintiff was working for the defendant, her husband bought a franchise for a competing company and both of them got approved to go get some training from that company. Two days later, the plaintiff asked for FMLA leave. And the defendant granted it, saying you can either take unpaid leave or you can work a little and keep getting commissions. The plaintiff chose the paid route, but didn't hold up her end of the bargain. When she later sued claiming that this paid leave was illegal under the FMLA, the court was not impressed and said that the defendant was fine because it had not forced her to work, it had merely given her that option.

Her suit also led to a host of claims against her for breach of the non-compete, breach of fiduciary duty, conversion, and tortious interference. The district court granted summary judgment for the defendant across the board and even awarded fees. The Court of Appeals affirmed as to the FMLA claim, but found fact issues everywhere else and returned the claims against the plaintiff to the trial court.

This case includes a clear statement about the unenforceability of many of the covenants to compete we see every day.

> Under Texas law, covenants not to compete that "extend[ ] to clients with whom the employee had no dealings during [her] employment" or amount to industry-wide exclusions are "overbroad and unreasonable." *Gallagher Healthcare Ins. Servs. v. Vogelsang*, 312 S.W.3d 640, 654 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (quoting *John R. Ray & Sons, Inc. v. Stroman*, 923 S.W.2d 80, 85 (Tex. App.—Houston [14th Dist.] 1996, writ denied)). Similarly, the absence of a geographical restriction will generally render a covenant not to compete unreasonable. *See Peat Marwick Main & Co.*, 818 S.W.2d at 387 (stating that a restrictive covenant "must not restrain [a former employee's] activities into a territory into which his former work has not taken him" (quoting *Wis. Ice & Coal Co. v. Lueth*, 213 Wis. 42, 250 N.W. 819, 820 (1933))). Here, the covenants at issue prohibit Karen—for a period of 18 months after her employment with Vacation—from, among other things, working "in any capacity" for "any direct or indirect competitor of VTG in any job related to sales or marketing of cruises, escorted or independent tours, river cruises, safaris, or resort stays" or doing any business with "any person or entity" who has purchased a cruise or other travel product from Vacation in the preceding 3 years. The covenants amount to an industry-wide restriction—preventing former employees from working in any job related to the sales or marketing of not just cruises, but also a host of other travel products—and are not limited as to either geography or clients with whom former employees actually worked during their employment. Accordingly, they amount to unreasonable restraints on trade and are therefore unenforceable.

The bummer is that the Court goes on to say that the Texas statute requires such a covenant to be reformed, so the case goes back to the trial court for further proceedings. As the saying goes, you can beat the rap, but you can't beat the ride.

The defendant also got summary judgment on a number of other tort claims, which once again the court says was improper. Fact issues mean these claims also return to the district court.