Federal Update

Katherine L. Butler
Butler & Harris
1007 Heights Boulevard
Houston, Texas 77008
713-526-5677
888-370-5035 (fax)
kathy@butlerharris.com

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Katherine L. Butler
Butler & Harris
Houston, Texas

In preparing this paper, I reviewed the Fifth Circuit's Title VII, ADA, FMLA, and age discrimination cases since the January State Bar conference. No retaliation cases, though, because Andrew Golub and Mark Oberti are handling those.

The Cases Themselves

Employee Beware of Forum Selection Clause. *Barnett v. DynCorp Int'l, L.L.C.,* 2016 WL 4100440 (5th Cir., July 26, 2016). Guy worked in Kuwait for two plus years under an employment agreement that said all disputes would be resolved in Kuwait and under that country's law. The problem was that he was not properly paid and when he got back to the US, he tried to remedy that by suing in Texas. Rather than succeed, he found his efforts fell flat as the Fifth Circuit affirmed the dismissal of his lawsuit.

The problem for the plaintiff is that forum selection clauses are viewed with a lot of deference. To get out from under them, the burden is to show the clause was unreasonable because

> (1) the incorporation of the forum selection clause into the agreement was the product of fraud or overreaching; (2) the party seeking to escape enforcement "will for all practical purposes be deprived of his day in court" because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy; or (4) enforcement of the forum selection clause would contravene a strong public policy of the forum state.

2016 WL 4100440 at * 3. In this case, the plaintiff pinned his hopes on (4), claiming that the short one-year limitations period would contravene section 16.070 of the Texas Civil Practice and Remedies Code, which provides that a contractual limitations period of less than two years is void.

The Court said the plaintiff was missing the boat because he had agreed to Kuwaiti law, which provided for the one-year limitations period. So it was inappropriate for him to assume that Texas law requirements had any place in the analysis. The Court also notes that the Texas Supreme Court has no blanket rule against this kind of forum selection clause.

The bottom line here is the deference given to forum selection clauses by the Courts is strong and leaves this plaintiff holding the bag. From one perspective, one might say that the Courts indulge in the fiction (similar to arbitration cases) that the parties have voluntarily chosen to submit to

Kuwait law and to a much shorter (one year) Kuwaiti statute of repose for bringing the suit. But the bottom line is that the details of the agreement matter to the Courts.

Even Judges Can Recognize Gender Differences. *Bauer v. Lynch*, 812 F.3d 340 (4th Cir. 2016), Just to vary things up a little, here is an interesting Fourth Circuit case. Because I thought it was interesting. Here a male FBI special agent trainee who flunked out because he was one push-up short of the requirement sues the FBI claiming that women get a better deal, since their standards are lower. He had washed out of Quantico simply because he could not do the 30 push-ups required for men. But he could do more than the 14 required for women.

The plaintiff won at the district court because the judge said, hey, there is clearly a difference because of gender and that is illegal. But not so at the Court of Appeals. Here's the important point: it is not illegal to consider gender differences insofar as they result from physiological differences.

> Put succinctly, an employer does not contravene Title VII when it utilizes physical fitness standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women, requiring the same level of physical fitness of each. Because the FBI purports to assess physical fitness by imposing the same burden on both men and women, this rule applies to Bauer's Title VII claims. Accordingly, the district court erred in failing to apply the rule in its disposition of Bauer's motion for summary judgment.

812 F.3d at 351.

Disability Smack Down. *Cannon v. Jacobs Field Services North America, Inc.*, 813 F.3d 586 (5th Cir. 2016). Many defendants still contend that individuals with disabilities have no disability and are not qualified. But, after the ADAAA, most district courts recognize that these arguments are rooted in the past. But this case got to the Fifth Circuit because a judge ignored the new law.

Here, a man applied to work for Jacobs as field engineer. He was offered the job and sent for a pre-employment physical. The physical revealed that the plaintiff had a torn rotator cuff which kept him from lifting his right arm above shoulder level. It also limited his ability to push or pull with his right arm. The doctor cleared the plaintiff with the proviso that he not drive company vehicles, not lift anything more than ten pounds or work with his hands above shoulder level. That did not please Jacobs, which immediately decided the plaintiff was physically incapable of doing the job.

When the case got to district court, it met the Lynn Hughes buzz saw. The judge dismissed the case, holding that the plaintiff had no disability and was not qualified anyway. First, he said that the "injured shoulder did not substantially impair [] his daily functioning." Second, he said that the plaintiff could not perform the essential functions of driving and climbing. At the Court of Appeals, the case was analyzed very differently.

First, the Court observed that the district judge was using the wrong test to determine disability – as if the ADAAA had not changed the law dramatically. Now the statute says that the term "substantially limits" should be construed in favor of board coverage. Here, of course, the man could not lift his arm above shoulder level and also could not lift anything heavier than 10 pounds. Wouldn't we all think that was a substantial limitation if it happened to us?

When it comes to whether the plaintiff was "regarded as" having a disability, the Court makes the great observation that Jacobs' own belief about the plaintiff's condition confirms that it is a disability:

> JFS's belief that Cannon's injury resulted in substantial impairment—even if that view were mistaken—is the second reason why the 2008 amendments support a finding that Cannon was disabled. The ADA now covers not just someone who is disabled but also those subjected to discrimination because they are "regarded as having ... an actual or perceived physical or mental impairment *whether or not* the impairment limits or is perceived to limit a major life activity." 42 U.S.C. §§ 12102(1)(C), 3(1)(A) (emphasis added). The amended "regarded as" provision reflects the view that "unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities are just as disabling as actual impairments." 29 C.F.R. Pt. 1630, App. § 1630.2(1) (quoting 2008 Senate Statement of Managers at 9; 2008 House Judiciary Committee Report at 17). It overrules "prior authority 'requiring a plaintiff to show that the employer regarded him or her as being substantially limited in a major life activity.' " *Burton v. Freescale Semiconductor, Inc.,* 798 F.3d 222, 230 (5th Cir.2015) (quoting *Dube v. Texas Health & Human Servs. Comm'n,* Case No. SA–11–CV–354–XR, 2012 WL 2397566, at *3 (W.D.Tex. June 25, 2012)). The evidence favoring Cannon again easily passes muster under the revised standard requiring only the perception that he suffered from a physical impairment.

The huge change in the ADA law was totally ignored by the court that granted summary judgment.

When it comes to whether the plaintiff was qualified for the job, the issue was whether he could drive and climb ladders. The argument is that the plaintiff could not do either because of his rotator cuff injury and a prescription for painkillers. The problem is that the plaintiff said he was not using painkillers. As for whether he could still climb ladders with his injury, he had provided a video showing his capability of doing so. A material fact issue exists here.

When it comes to pretext, the Court points out that Jacobs has never asserted a reason for the decision to disqualify him that does not relate to his impairment. Thus, if a jury found that the plaintiff was qualified for the job, the decision to remove him was clearly because of his disability.

> But if the jury credits the evidence we have cited favoring Cannon and concludes

> he was disabled, yet still qualified to be a field engineer, then revoking Cannon's job offer based on his physical impairment would have constituted the discrimination that the ADA forbids. We thus need not to address Cannon's arguments about alleged inconsistencies in who made the decision to rescind his offer, the contemporaneous justification for doing so, and whether the decision was withheld from Cannon while other JFS employees were asking him for more information. All of this can, of course, be considered at trial.

813 F.3d at 594.

Finally, Judge Hughes simply ignored the failure to accommodate claim the plaintiff raised. As the Court of Appeals points out, "there is little argument to be made the JFS engaged in the interactive process the law requires. It rescinded the offer almost immediately after learning of Cannon's impairment..." 813 F.3d at 595. Running the person off immediately is not really consistent with the interactive process. So this claim remains for trial as well.

As the Court noted more than a decade ago in *Cutrera v. Board of Supervisors of LSU,* 429 F.3d 108 (5th Cir. 2005).

> Once such a request has been made, "the appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability." *Id.* Thus, the employee's initial request for an accommodation triggers the employer's obligation to participate in the interactive process. *Taylor v. Principal Financial Group, Inc., 93 F.3d 155, 165 (5th Cir.)*, cert. denied, *519 U.S. 1029, 136 L. Ed. 2d 515, 117 S. Ct. 586 (1996)*. However, when an employer's unwillingness to engage in a good faith interactive process leads to a failure to reasonably accommodate an employee, the employer violates the ADA. See *Loulseged v. Akzo Nobel Inc., 178 F.3d 731, 736 (5th Cir. 1999)*

429 F.3d at 112

Proportionality and Fees. *Combs v. City of Huntington, Texas,* 2016 WL 3878176 (5th Cir., July 15, 2016). For someone on the plaintiff's side of the bar, it is always scary to see cases where judges have gutted an attorneys' fee request on the grounds of limited success. Hell, anytime you have a plaintiff's verdict, you have a substantial success. And, when it comes to awards for mental anguish, a limited award can be attributable to the composition of the jury as opposed to any problem with the case. As Judge Jones pointed out in *Forsyth v. City of Dallas,* 91 F.3d 769 (5th Cir. 1996), "Judgments regarding noneconomic damages are notoriously variable." 91 F.3d at 774.

But here a district judge cut a request for $94,612 in fees to $25,000 because of limited success. The plaintiff had brought claims for sexual harassment and retaliatory discharge, but prevailed only on the sexual harassment claim, where she received $5,000 in mental anguish. The district

court believed it was "constrained by the holding in *Migis* [v. Pearle Vision, 135 F.3d 1041 (5th Cir 1998)], to reduce the total to something less than 6.5 times the actual damages awarded." It then reduced the fee award to $25,000, an amount five times the damages awarded to the plaintiff.

The Court of Appeals had a very different view. It said the first step in determining an appropriate fee is calculating the lodestar, the number of hours spent times the appropriate hourly rate. But the parties fought vigorously about what happens after that.

The plaintiff argued that the degree of success should not even be a factor under consideration unless that lack of success is due to the attorneys' failings. But the Court rejected the plaintiff's position, saying that in *Helmsley v. Eckerhart,* 461 U.S. 424 (1983), the Supreme Court specifically said that "the most critical factor" in determining a reasonable fee is the "degree of success." 461 U.S. 436. The Court also pointed out that, while there is clear authority that enhancements to the lodestar should be rare, there is no such authority saying that download adjustments are inappropriate.

But when it came to how to adjust the fee, the Court of Appeals agreed that strict proportionality was inappropriate. *Migis* did not mandate it, it simply agreed that the degree of success was the most important consideration. So back to the district court goes this case.

Trying to Tell the EEOC How to Try Its Case. *Equal Employment Opportunity Commission v. Bass Pro Outdoor World, L.L.C.,* ___ F3d. ___, 2016 WL 3397696 (5th Cir. 2016). The defendant in this case has waged a long and vigorous battle against the EEOC challenging its hiring practices. The battle started back in 2007 when the EEOC issued a commissioner's charge stating there was reason to think that Bass Pro had discriminated against African-American applicants and employees on the basis of race.

In April 2010, the EEOC issued a letter of determination saying there was "good cause" to believe the allegations were true. The conciliation process started after that, but went nowhere. A lawsuit followed in September 2011, claiming a pattern or practice of race discrimination. Then the real fun started.

First, the defendant filed a motion to dismiss the case on the grounds that the EEOC could not sue under 42 U.S.C. 2000e-5 (section 706) for a pattern or practice case. The court granted the motion. Then, the EEOC amended its complaint and named more than 200 African-American and Hispanic aggrieved individuals. In 2014, the defendant again sought summary judgment on the rest of the case, the 707 claim. The EEOC asked the district court to reconsider its ruling rejecting the pattern or practice claim. And the court did, but it also gave the defense a right to file an interlocutory appeal.

But at the end of the day, the Court of Appeals rejected the defendant's position that the EEOC could not proceed under section 706.

> We conclude that Congress did not prohibit the EEOC from bringing pattern or practice suits under Section 706 and, in turn, from carrying them to trial with sequential determinations of liability and damages in a bifurcated framework. Bifurcation of liability and damage is a common tool deployed by federal district courts in a wide range of civil cases—well within its powers under Rules 16 and 26. We decline to imply limits upon the trial court's management power that not only cannot be located in the language of the statute but also confound the plain language of the Federal Rules.

2016 WL 3397696 at * 6. It also stated that the defense position "has been well stated by able lawyers, but the plain language of the statute cannot yield to such adversarial persuasion. We decline to undo the structure erected by Congress in the guise of interpretation seduced by judicially preferred policy choices." 2016 WL 3397696 at * 10.

The defendant's position that the EEOC had failed to fulfill administrative prerequisites also bit the dust. Specifically, the defense claimed that the supposed failure to name the aggrieved individuals in the investigation stage and try to conciliate their individual disputes was fatal.

This is the first post-*Mach Mining* case in the Fifth Circuit to determine whether the EEOC had done enough to conciliate. The Court held it had.

> We similarly hold that the conciliation here satisfied the *Mach Mining* standard. Efforts began in April 2010, when the EEOC informed Bass Pro that it had reasonable cause to believe that Bass Pro had engaged in discriminatory practices. Even if the EEOC did not initially provide the names of specific victims, it informed Bass Pro about the class it had allegedly discriminated against—African American, Hispanic, and Asian applicants. The parties negotiated for eleven months, via letters and face-to-face meetings about the charges. These efforts clearly put Bass Pro on notice as to the claims against it. Further, Bass Pro's argument that the EEOC never engaged in any conciliation of its Section 706 claims assumes that the EEOC's Section 706 claims are distinct from its pattern or practice claims. Since we hold that Section 706 authorizes the EEOC to claim a pattern or practice of discrimination, conciliation efforts for its pattern or practice claims are one and the same as its Section 706 conciliation efforts. Under *Mach Mining*, those efforts were sufficient.

2016 WL 3397696 at * 6.

Timing Cannot Be Everything. *Fairchild v. All American Check Cashing, Inc.*, 815 F.3d 949 (5th Cir. 2016). This is a pregnancy discrimination and overtime case. The overtime part of the case was tossed because the plaintiff did not follow the defendant's requirement to get approval before overtime was worked.

> To hold that she is entitled to deliberately evade All American's policy would

> improperly deny All American's "right to require an employee to adhere to its procedures for claiming overtime." *Id.; see also White v. Baptist Mem'l Health Care Corp.,* 699 F.3d 869, 876 (6th Cir.2012) ("When the employee fails to follow reasonable time reporting procedures she prevents the employer from knowing its obligation to compensate the employee and thwarts the employer's ability to comply with the FLSA.").

815 F.3d at 965. The plaintiff argued that the defendant should have been aware of her overtime because her computer usage reports showed her working after she clocked out. This too was rejected. "The district court did not clearly err in holding that mere 'access' to this information is insufficient for imputing constructive knowledge." *Id.*

The pregnancy discrimination case goes down the tubes because of a lack of evidence. The first piece of evidence the plaintiff offered was the comment by another supervisor that her pregnancy was related to his termination. The plaintiff said this made the grade under 803(d)(2)(d), because it is a statement made by the party's agent on a mater within the scope of that relationship and while it existed. But here's the rub. There was no proof of any basis for the other manager saying that. The person was not involved in the termination decision nor was there anything else offered to tie the comment to any knowledge. This is another cautionary tale for plaintiff's lawyers. You cannot just lob these kinds of comments into the record if there is no tie-in showing how the person had the information. Some judges don't like that.

The only other piece of evidence offered by the plaintiff was the timing of the termination. She told the defendant about her pregnancy in November and was gone by January. Here, the Court said that this timing, standing alone, was not enough.

> Moreover, we find instructive this Court's reasoning regarding temporal proximity as applied to retaliation claims: to allow the plaintiff to prove pretext based solely on temporal proximity "would unnecessarily tie the hands of employers" after the protected conduct or, in this case, the protected status is disclosed. *Strong v. Univ. Healthcare Sys., L.L.C.,* 482 F.3d 802, 808 (5th Cir.2007).
>
> Therefore, with respect to evidence of timing, we decline to adopt a different analysis for pregnancy-based sex discrimination claims under Title VII. Although the temporal proximity between the employer learning of the plaintiff's pregnancy and her termination may support a plaintiff's claim of pretext, such evidence—without more—is insufficient.

815 F.3d at 968. I must say that this case suffers from a problem we have often seen before, which is that the plaintiff was portrayed as a very deficient, whiny employee who had been written up countless times. It's hard to see good law coming out of a case when the plaintiff has been successfully portrayed that way.

Rehab Act Claims by Independent Contractors. *Flynn v. Distinctive Home Care, Inc.,* 812 F.3d 422 (5th Cir. 2016). In this case of first impression, the Fifth Circuit found that an independent contractor can properly bring a lawsuit under the Rehabilitation Act for disability discrimination.

The plaintiff is a physician who was working as an independent contractor serving Air Force personnel. At about the same time plaintiff was diagnosed with a disability (Asperger's Syndrome), a government representative contacted the defendant about problems with the plaintiff's performance and said it would be best if she were removed from the contract. The defendant contacted her about the claims and she revealed her diagnosis and sought accommodation. But when the government rejected the accommodations, the defendant removed her from the job. This suit ensued.

In the district court, the plaintiff lost because she was not an employee, but instead an independent contractor with no rights. But that changed in the Court of Appeals because of the much broader language in the Rehabilitation Act than in the ADA.

> We agree with the Ninth and Tenth Circuits that the Rehabilitation Act does not incorporate Title I's requirement that the defendant be the plaintiff's "employer" as that term is defined in the ADA.[21] Unlike Title I of the ADA, Section 504 of the Rehabilitation Act is not limited to the employment context. To reiterate, Title I prohibits discrimination "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." Section 504 of the Rehabilitation Act, by contrast, is far broader.It prohibits discrimination "under *any program or activity* receiving Federal financial assistance,"and "program or activity" is defined to include "*all of the operations* of ... an entire corporation, partnership, or other private organization, or an entire sole proprietorship." Thus, based on the plain language of the statute, the Ninth Circuit reasoned that "the Rehabilitation Act covers 'all of the operations' of covered entities, not only those related to employment."

812 F.3d at 427-28.

Severance Flushed. *Gomez v. Erisson, Inc.*, ___ F.3d ___ , 2016 WL 3669965 (5th Cir. 2016). Here is a very sad tale. A guy gets laid off and offered a severance. He agrees to it but then doesn't get it. Why? Because he failed to comply with the requirement to return all the company's property. Before turning over his computer, he wiped it and thus his work files were missing. Bad mistake.

Gomez pursued an administrative appeal of the decision of deny him benefits, but that didn't go well. Then he turned to federal court where it didn't go well either. First, he argued that this dispute was not covered by ERISA but was a simple breach of contract claim. He noted that the Court had previously said that not all severance plans are governed by ERISA. No dice says the

Court.

> It is thus the existence or nonexistence of an "ongoing administrative program" (*id.* at 11, 107 S.Ct. 2211) that is the key determinant of whether severance plans are governed by ERISA *Clayton*, 722 F.3d at 296. Even for plans that result in only a lump-sum payment, that administrative scheme can be found in a number of other features that require discretion: the eligibility determination; calculations of the payment amount (such as deductions and detailed formulas); the provision of additional services beyond the severance payment (such as insurance); and the establishment of procedures for handling claims and appeals.

2016 WL 3669965 at * 3. Unfortunately for the plaintiff, the Court found "such administrative activity is abundant when it comes to Ericcson's Plans." *Id.*

The plaintiff then said, hey look, the only condition for the money was the release. Again, that was a no go for the Court, although it did say that there is "some force" to the argument. But here is when the standard of review kicked in since this is a review of an administrative decision. So long as the company has given the plan a uniform construction and their interpretation of this section is consistent with a fair reading of the plan, the company is good to go.

> the Standard Plan states only that releasing claims is a necessary condition of receiving severance pay; it does not state that it is a sufficient one. Standard Plan ¶ 4 ("Severance Compensation is contingent upon the Participant signing and not revoking a satisfactory waiver and release of claims in favor of Ericsson ...."). Given the absence of language entitling Gomez to severance pay based solely on the release of legal claims, it is not inconsistent with the Plan to impose other conditions reasonably related to the termination of the employment relationship. *See id*. ¶ 6 ("The Plan Administrator shall have complete discretion and authority to ... decide all questions concerning the eligibility of any person to participate in this Plan [and] the right to and amount of any benefit payable under this Plan ....").[4]

One could argue that the Court was deferring too heavily to the company, but perhaps the real answer is Don't Wipe Your Computer. Really.

A Plaintiff's Testimony Credited. *Heinsohn v. Carabin & Shaw, P.C.,* ___ F.3d ___, 2016 WL 4011160 (5th Cir., July 26, 2016). The plaintiff in this case took maternity leave and within two weeks was fired for supposed errors on the job. When she took her case to court, she found it dismissed in an opinion that credits her employer's testimony, but ignores her testimony as "self serving." Not an uncommon situation, but what is uncommon is that the Fifth Circuit reversed the summary judgment – and its statements are well worth quoting.

The case begins with a long discussion about supplemental jurisdiction, which I will leave to folks to read if they suffer insomnia some evening. Hint: it is appropriate to keep jurisdiction

over the case even after the federal claim is dismissed so long as the federal and non-federal claims arise out of the same case or controversy

But the guts of the case pertains to the pregnancy discrimination case under Texas law. The bottom line is that the defendant fired this woman for making mistakes on the job that she denies making. There was a database that supposedly shows those mistakes but the plaintiff, who actually entered the information into the database, says the entries have been doctored. So the question arises, are these documents authentic? The company says yes, the plaintiff says no, they have been tampered with. The district court accepted the company's word for it. But, as the Court points out, the authenticity of a document is question of fact and the two parties present different evidence on this point.

> If the testimony of a witness with knowledge "that an item is what it is claimed to be" is evidence of authenticity,then the testimony of a witness with knowledge that an item is *not* what it is claimed must be evidence of its lack of authenticity. The uncontested evidence indicates that Heinsohn was primarily responsible for creating, updating, and reviewing the relevant notes in the case management system. Her deposition therefore creates a genuine issue of material fact as to whether the notes in question are authentic.

2016 WL 4011160 at * 9. Here is a disputed material fact.

Then the Court examined the actual evidence of the reason for the plaintiff's dismissal and found it wanting, noting that "contemporaneous written documentation must do more than simply indicate that an employee 'violated certain workplace rules.'"

> C&S's only contemporaneous evidence of its reason for terminating Heinsohn is the letter in which it stated: "Based on a review of your work, it has been decided that your employment with [C&S] has been terminated as of October 19, 2012." This letter, signed by Leonard, does not indicate that Heinsohn violated any policy or even that her work was flawed or inadequate. Neither does it indicate who decided to terminate her. Instead, C&S relies entirely on *post hoc* evidence of its reason, *viz*, Shaw's deposition, in which he declared that the decision to terminate Heinsohn was his and was based on what Escobedo and Leonard[58] had told him after her maternity had begun:

2016 WL 4011160 at * 7-8.

The Court then moved to a discussion of pretext that begins encouragingly for the plaintiff:

> As a preliminary observation, there is little for Heinsohn to refute or contest. C&S produced only scant evidence of a legitimate, nondiscriminatory reason for firing Heinsohn. "As the ultimate issue is the employer's reasoning *at the moment* the questioned employment decision is made, a justification that *could not* have

> motivated the employer's decision is not evidence that tends to illuminate this ultimate issue and is therefore simply irrelevant at this stage of the inquiry."An employer generally will satisfy its burden of production with "contemporaneous written documentation." But contemporaneous written documentation must do more than simply indicate that an employee "violated certain workplace rules."

Id. at * 7. The point, after all, is not to see how much negative information can be thrown against the wall later in litigation, but to analyze the case from the perspective of the actual reason for the dismissal. The Court observes that the ostensible decision-maker claims that he saw files indicating that the plaintiff missed deadlines, but couldn't remember which ones they were. So there was really no contemporaneous evidence of the basis for his decision.

Then there is much about the different evidence submitted by the two parties on the important factual issues that leads to a reversal and this great language:

> At bottom, the magistrate judge and district court erred in rejecting Heinsohn's statements as self-serving and accepting Shaw's, Escobedo's, Caravajal's, and Rendon's. Such an "approach is inconsistent with fundamental rules governing summary judgment.""By choosing which testimony to credit and which to discard, '[a] court improperly 'weigh[s] the evidence' and resolve[s] disputed issues in favor of the moving party.' "Doing so is tantamount to making a credibility determination, and—at this summary judgment stage—a court "may make no credibility determinations." Instead, a court "must disregard all evidence favorable to the moving party that the [finder of fact] is not *required* to believe." Although a court "is not required to accept the nonmovant's conclusory allegations, speculation, and unsubstantiated assertions which are either entirely unsupported, or supported by a mere scintilla of evidence," a nonmovant's statement may not be rejected merely because it is not supported by the movant's or its representatives' divergent statements.
>
> Simply put, Heinsohn's statements are no more and no less self-serving than those of the others. If we toss Heinsohn's deposition, we must also toss the depositions, affidavits, and declarations of the others for the same reason. To hold otherwise would signal that an employee's account could never prevail over an employer's. This would render an employee's protections against discrimination meaningless.

Id. at * 13-14.

> 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.

*14. Good to see that sometimes the plaintiff's evidence counts in the Fifth Circuit.

Arbitration Gotcha. *Kubala v. Supreme Production Servs., Inc.,* ___ F.3d ____, 2016 WL 3923866 (5th Cir. 2016). The plaintiff filed a proposed FLSA collective action and then the company implemented a new policy requiring arbitration of all claims and delegating to the arbitrator the gateway determination of whether the claim had to be arbitrated. The defendant claims it did not know about the lawsuit when it changed it policy.

The district court denied the motion to send the case to arbitration, saying the new arbitration policy said nothing about arbitrating preexisting disputes. The Court of Appeals says this misses the point.

> The district court erroneously held that there is no arbitration agreement. The court appears to have thought that the question at the first step of the analysis is whether there is an agreement to arbitrate *the claim currently before the court*. But as we have explained, the only issue at the first step is whether there is any agreement to arbitrate any set of claims. Determining whether that agreement covers the claim at bar is the second step. Thus, the district court erred by engaging in close contract interpretation at the first step, which focuses only on contract formation. The proper course is to examine only the formation issue, and it is obvious that these parties validly formed an agreement to arbitrate some set of claims.

2016 WL 3923866 at * 3. Since the plaintiff kept working for the defendant after it implemented this new arbitration clause, then there was clearly an arbitration agreement. Then the question arose as to who properly decided if this particular claim was subject to arbitration. The defense wired the answer to this one by putting specific language in its arbitration policy that requires the arbitrator to decide whether any claim is arbitrable.

> Thus, we do not opine on whether the agreement requires that the merits of Kubala's claim be arbitrated rather than tried in court. The only issue now is who answers that question. It is plainly the right and responsibility only of the arbitrator.

2016 WL 3923866 at * 5.

In another Fifth Circuit case, *Robinson v. J & K Administrative Mgmt. Serv., Inc.,* 817 F.3d 193 (5th Cir. 2016), the Court held that if parties agree to submit the question of arbitrability to the arbitrator, then the availability of class or collective action is decided by the arbitrator, not the Court.

Timing is Everything Sometimes. *Miller v. Metrocare Servs.*, 809 F.3d 827 (5th Cir. 2016). In this case, an HR director claims that he was mistreated because he spoke out against overtime and employee classification violations. But here's the problem. Shortly before the termination, the plaintiff's subordinate filed a complaint accusing him of wrongly exempting himself and others from the mandatory criminal background check that was performed every year. So, the

Court says you need to prove that this is not why they fired you and you cannot. Case closed on multiple claims.

The plaintiff also sued for violation of due process rights. After his termination, he requested and received a name clearing hearing. But it was not enough, he says. He says that a name clearing hearing must include a right to confront witnesses.

> We have never directly addressed this issue. Nevertheless, we decline Miller's invitation to make confrontation of witnesses a mandatory requirement for an adequate name-clearing hearing. Furthermore, the record demonstrates that Miller received sufficient due process at his name-clearing hearing, despite his inability to confront Metrocare employees. Miller, through his attorney, was allowed to present at length and was allowed to provide documents to the Board to combat the supposedly false, stigmatizing charges against him

809 F.3d at 834.

Illusory Arbitration Agreement. *Nelson v. Watch House Int'l,* 815 F.3d 190 (5th Cir. 2016). Here is the flip side of the arbitration coin. A case that finds an arbitration agreement illusory and unenforceable.

> Most recently, we articulated a simple, three-prong test to determine whether a *Halliburton*-type savings clause sufficiently restrains an employer's unilateral right to terminate its obligation to arbitrate. *See Lizalde [v. Vista Quality Markets],* 746 F.3d at 226. "[R]etaining termination power does not make an agreement illusory so long as that power (1) extends only to prospective claims, (2) applies equally to both the employer's and employee's claims, and (3) so long as advance notice to the employee is required before termination is effective." *Id.* (citing *Halliburton,* 80 S.W.3d at 569–70).

815 F.3d at 193-94. The problem here was that the agreement specifically stated

> This Agreement may not be altered except by consent of the Company and shall be immediately effective upon notice to Applicant/Employee of its terms, regardless of whether it is signed by either Agreeing Party. Any change to this Agreement will only be effective upon notice to Applicant/Employee and shall only apply prospectively.

815 F.3d at 191-92. No advance notice of termination equals an unenforceable agreement.

Mitigation of Damages. *Overman v. City of East Baton Rouge,* 2016 WL 3689317 (5th Cir., July 11, 2016). This lawsuit results from the decision of the City of East Baton Rouge to deny Ms. Overton a job as its police chief. She had the highest scores on the tests administered but, if came to interview time, she testified that the decision-makers showed their true colors.

> Overman testified that, during both the small and the large committee interviews, she received numerous questions regarding how, as a woman, she would be able to adequately command a police department composed predominantly of male employees. She also testified that, during the small committee interview, Mayor Holden asked her to "talk about men," and quizzed her about problems that he heard Overman had with supervisors at the NOPD because she was a woman.

2016 WL 3689317 at * 2. When it came time to explain why the City had selected the man who scored 18th out of 30 on the tests administered, the Mayor relied on his supposed "local experience," which the Court noted was rebutted by the same Mayor saying at the beginning of the search that he would be conducting a nationwide search for the best candidate. The Court also pointed out that the winning candidate had not worked for the police department for more than 20 years. So much for "local experience."

Not a surprise that she won on liability both at the district court and Court of Appeals.

But the big issue on appeal is mitigation of damages. After the plaintiff lost this job opportunity, she worked for awhile at a law enforcement training academy. But, after some time on that job, she resigned and went back to school to finish her Ph.D. So the City appealed, saying she had failed to mitigate her damages.

The Court does not make a decision about that issue, but gives lots of guidance for the district court and all of us. First, there is no bar to back pay damages simply because the plaintiff has returned to school.

> Contrary to the defendants' suggestions, a Title VII plaintiff's decision to attend school on a full-time basis does not always bar back pay during the period of enrollment. *See Dailey v. Societe Generale*, 108 F.3d 451, 456–57 (2d Cir. 1997) ("[T]here is no *per se* rule that finds inherently incompatible the duty of a Title VII plaintiff to use reasonable diligence in securing comparable employment and such a plaintiff's decision to attend school on a full-time basis. Rather, the central question a court must consider when deciding whether a student-claimant has mitigated her damages is whether an individual's furtherance of his education is inconsistent with his responsibility 'to use reasonable diligence in finding other suitable employment.' " (quoting *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 (1982))); *see also Green v. Admin. of Tulane Educ. Fund*, 284 F.3d 642, 659 (5th Cir. 2002), *overruled on other grounds by Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53 (2006).

But the Court admits there is a difference between going back to school after a long and unsuccessful job search and this situation, where the plaintiff resigned a job to go back to school.

> There is a distinction, however, between attending school only after a diligent, but ultimately unsuccessful, job hunt, and a plaintiff who takes herself out of the job

> market to attend school in the hope of gaining access to higher paying jobs, foregoing comparable employment in the meantime. *Compare Dailey*, 108 F.3d at 456–57 (affirming an award of back pay when the plaintiff quit the job market to attend school only after an extensive job hunt failed to offer any comparable employment), *with Miller v. Marsh*, 766 F.2d 490, 492–93 (11th Cir. 1985) (affirming denial of back pay award to plaintiff who withdrew from temporary employment to begin attending law school without first pursuing a comparable position as a legal stenographer).

In figuring out whether the plaintiff has behaved reasonably, the Court says the touchstone is the underlying purpose of damages – to make the person whole.

> As such, its purpose is to place the plaintiff in the position that she would have been in but for the defendant's illegal conduct. *Id.* at 418–19. When a plaintiff recovers back pay for the period of time when she has taken herself out of the relevant job market, the remedial purpose of back pay under Title VII, that is to "make whole" from the loss of the job, can be abnegated. *See, e.g.*, *Taylor v. Safeway Stores*, *Inc.*, 524 F.2d 263, 267–68 (10th Cir. 1975) ("If a discharged employee accepted employment elsewhere, there is little doubt that this would cut off any back pay award. If not, the employee would be receiving a double benefit for the same period of time. Likewise, when an employee opts to attend school, curtailing present earning capacity in order to reap greater future earnings, a back pay award for the period while attending school also would be like receiving a double benefit.").

The case returns to the district court for a determination of whether the plaintiff went back to school because of a diligent, but fruitless, job hunt. She said that she knew that her current job was getting ready to be over and if she really tried to find another job, then going back to school may have been the best alternative. But if she did not seek comparable available jobs, then she has not fulfilled her duty to mitigate and back pay award will need to be readjusted.

***Faragher Ellerth* Defense.** *Pullen, Caddo Parish School Bd.,* ___ F.3d ____, 2016 WL 3923867 (5th Cir. 2016). This case should be required reading for any company that thinks the first prong of the *Faragher-Ellerth* defense can be met merely by having a sexual harassment policy. Although the district court agreed with this, the Fifth Circuit did not.

Previously in the Fifth Circuit, if the plaintiff acknowledged that there was a policy in place then the Court would generally find that the employer took reasonable care to prevent sexual harassment. The Court acknowledges that it can find no previous cases saying otherwise. But it acknowledges that the plaintiff provided some good authority from other circuits on this point.

> In *Harrison v. Eddy Potash, Inc.*, 158 F.3d 1371, 1377 (10th Cir. 1998), the court denied JML where the evidence indicated that the policy was posted on a bulletin board, but the plaintiff testified that she was not aware of the policy and had never

> been given a copy. Similarly, in *Marrero v. Goya of Puerto Rico, Inc.*, 304 F.3d 7, 21–22 (1st Cir. 2002), the court denied JML where the company put on evidence that it had hung posters describing the company sexual-harassment policy, but plaintiffs and other employees testified that they never received training on the policy, were not given a copy, and never saw the purported posters.

2016 WL 3923867 at * 4. And, after reviewing that authority and the evidence, the Court reversed the summary judgment.

> A review of the summary-judgment evidence reveals that the district court erred in holding that the board's efforts to prevent sexual harassment were reasonable as a matter of law. Pullen produced evidence that, if believed, would show that employees at the central office were not trained on sexual harassment, were not informed of the existence of a policy, were not shown where to find it, and were not told whom to contact regarding sexual harassment. This would be a sufficient basis for a reasonable jury to find that the company did not take reasonable steps to prevent and remedy sexual harassment.

2016 WL 3923867 at * 4. In fact, the plaintiff submitted evidence from 8 people in addition to herself who said did not know about any policy nor had they ever received training. IN fact, that list included the perpetrator of the harassment, who admitted he had never seen a sexual harassment policy. Great that the plaintiff's lawyer asked him as well. Naturally, the defendant had a different story told by its witnesses. But that only serves to show that there was a material issue of fact.

> Pullen presented testimony from employees who indicated that they were given no training or information about the sexual-harassment policy and were not even aware of its existence. The evidence, construed in Pullen's favor, also shows that Graham was never given a copy of the policy, never saw it, and was never trained regarding its contents. Moreover, the evidence generates a reasonable inference that the policy was not posted in a conspicuous location (given that several employees said they had never noticed it). Thus, just as in *Faragher*, *Boh Bros.*, *Harrison*, and *Marrero*, there is a genuine dispute of material fact as to whether the board took reasonable steps to prevent sexual harassment in the central office.

Id. at * 5.

The plaintiff also had a claim for sexual harassment by the same perp after he stopped supervising her, but the Court affirmed the district court's decision that she did not present evidence that the district knew or should have known and failed to take prompt remedial action. She had not reported it for a long time and when it was reported, action was taken.

Balkanization of the Evidence. *Reynolds v. Sovran Acquisitions L.P.,* 2016 WL 2997205 (5th Cir., May 24, 2016). Lest anyone think that we have reached a new era where summary

judgments are going to be reversed en masse, here is a case for you. Summary judgment affirmed.

This plaintiff alleged that her termination was due to sex and age discrimination. The defendant said it was for customer service issues. There was no issue with the prima facie case or the legitimate, non-discriminatory reason, but, when the case reached the pretext phase, it washed out. Here's how the evidence played out.

> Reynolds contends that Tammy Vega's deposition raises a genuine issue of material fact. There Vega, who was hired as Atkinson's associate manager after Atkinson became manager of Store 751, stated that Atkinson told her that he had set Reynolds up to get fired, that he wanted Reynolds's apartment (which went along with the manager's position), and that he and Bagwell were trying to get Reynolds's fired. Sovran objected to Atkinson's alleged statements as hearsay, but the court declined to rule on the evidentiary issue because it concluded that, even assuming the statements were admissible, they would not enable a reasonable jury to find discrimination based on sex or age.

2016 WL 2997205 at * 3. But what about the fact that they said she was fired for customer service issues? Now, there is evidence contradicting that head on. Hmm. But there is more.

> Reynolds criticizes the district court for failing to consider Bagwell's statements to Reynolds as "admissible and relevant in raising a fact issue showing that he discriminated against her because of her sex or age." Reynolds testified that, twice when hiring an associate manager, Bagwell remarked that it would be preferable to hire a man. She also stated that Bagwell told her she should be more "friendly and bubbly" toward people and that she might be happier doing something else and maybe did not like working for Sovran.
>
> The district court concluded that those alleged remarks failed to qualify as circumstantial evidence of intentional discrimination. To demonstrate that an employer's proffered reason for termination is pretext or to serve as additional evidence of discrimination, a "remark must, first, demonstrate discriminatory animus and, second, be made by a person primarily responsible for the adverse employment action or by a person with influence or leverage over the formal decisionmaker." *Laxton v. Gap, Inc.*, 333 F.3d 572, 583 (5th Cir. 2003). Bagwell's alleged statements satisfy the second requirement, given that he was Reynolds's direct supervisor and participated in the decision to terminate her. The district court concluded, however, that Bagwell's statements failed to satisfy the first requirement
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> The court was correct. Bagwell's alleged remarks that Reynolds should be more "friendly and bubbly," that she might be happier doing something else, and that

> she might not like working for Sovran implicate neither sex nor age, nor do they demonstrate discriminatory animus on either basis. Reynolds's alleged statements regarding a man's being a preferable hire, on the other hand, do implicate sex but do not raise a genuine dispute concerning discriminatory animus, because they were not "proximate in time to the [complained-of adverse employment decision]" or "related to the employment decision at issue."Bagwell's alleged remarks expressing a preference for male hires occurred in 2012 and were made with regard to the hiring of associate managers. They were thus remote in time and unrelated to Reynolds's termination in August 2013. Those alleged comments do not create a genuine dispute of material fact.

2016 WL 2997205 at * 4. So we now have the manager who has an admitted bias against women directly involved in her termination. But that problem is that he didn't reveal his bias a few days before she was fired? Wow. That is directly contrary to a recent Fifth Circuit opinion, which noted that the "proximate in time" analysis only is relevant for direct evidence cases, which this was not. *Goudeau v. National Oilwell Varco, L.P.,* 793 F.3d 470 (5th Cir. 2015).

That case provided that the *Brown v. CSC Logic* four part test for stray remarks only applies if the plaintiff claims they are direct evidence of discrimination. If they do, then they have to show that the remarks are proximate in time to the termination, made by an individual with authority over the decision, and related to the decision.

> In a circumstantial case like this one, in which the discriminatory remarks are just one ingredient in the overall evidentiary mix, we consider the remarks under a "more flexible" standard
>
> as part of a broader circumstantial case, "the comments must show: '(1) 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.

793 F.3d at 471. This decision should remind all of us about a point that Judge Posner has made in his writings, which is that judges are generalists having to deal with a huge range of legal issues. We are the experts in this area and they need us to educate them about the intricacies of employment law. Otherwise, bad things can happen.

Not Similarly Situated. *Rogers v. Pearland Ind. School Dist.,* ___ F.3d ___, 2016 WL 3545991 (5th Cir. 2016). Ok, this is a *pro se* case, which means that perhaps the plaintiff's briefing was not optimal. But it does show how far some panels will go to say that comparators were not "similarly situated."

The plaintiff, who is African-American, was denied a job as an electrician because he failed to disclose his prior criminal convictions. He challenged that and pointed to another Caucasian man who also failed to disclose his a felony drug conviction and was hired. Seems like at least a

fact issue, no? Of course not. He couldn't get establish a *prima facie* case because, in the Court's view, the underlying offenses were not similar enough.

> Alvis's criminal history was not comparable to that of Rogers. Alvis was convicted in 1980 of delivery of marijuana and sentenced to 10 years of probation, and there is no suggestion in the record that he was ever convicted of another crime. In contrast, although the records are not entirely clear, it is apparent from the record that Rogers was convicted of at least three drug crimes and crimes for which Rogers received a much more severe sentence than 10 years of probation. He was convicted of possession in 1983, for which he received a sentence of 10 years of probation. He was subsequently arrested on two different dates in 1984 on charges, respectively, of possession of a controlled substance and sale of heroin. He was sentenced to 10 years in prison as a result of these incidents, and it appears that there were two, concurrent 10-year sentences imposed. Even had he received only a single 10-year sentence for a single offense in 1984, the seriousness of Rogers's and Alvis's respective criminal records are not comparable, and accordingly, their failure to disclose their convictions is also not comparable. Alvis was not treated more favorably than Rogers under circumstances that were "nearly identical" to those of Rogers and is therefore not a legitimate comparator for purposes of Rogers's prima facie case.

2016 WL 3545991 at * 5. But wasn't the plaintiff turned down, not because of the details of his criminal history, but only because he failed to tell them he had a criminal history? That is precisely what Judge Graves says in his concurrence and dissent. But that position did not carry the day.

Not Qualified. *Williams v. J.B. Hunt Transport, Inc.*, ___ F.3d ___, 2016 WL 3405790 (5th Cir., June 20, 2016). This is a case where the plaintiff's disability was clearly the reason for his dismissal, but he still loses. Here's why. He's a truck driver and cannot work without a DOT (Department of Transportation) medical card. Certain medical conditions are disqualifying. For purposes of this case, the issue is that a truck driver cannot be certified if he has a cardiovascular disease accompanied by syncope (fainting). All was well until the plaintiff fainted one day and was diagnosed with syncope. Later, it was tracked down to an irregular heartbeat.

After leave for his medical issues, he went to a DOT doctor, who cleared him for duty. But then his employer got the medical records showing his heart condition and forwarded them to the same clinic, where a different doctor looked at them and rescinded the DOT certification.

The plaintiff sued for disability discrimination but the Court says the employer is cleared because he did not have a DOT card, which was required for the job. And the Court also notes that he failed to appeal the determination that he was not qualified. Word to the wise that this is required.

> Thus, "courts have consistently held that an employment action based upon an

> employee's or prospective employee's inability to satisfy DOT medical standards does not violate disability discrimination laws." *Talbot v. Md. Transit Admin.*, No. WMN–12–1507, 2012 WL 5839945, at *2 (D. Md. Nov. 15, 2012). Otherwise, motor-carrier employers would face the dilemma of risking ADA liability or violating the DOT's command that "a motor carrier shall not ... permit a person to drive a commercial motor vehicle unless that person is qualified" under the agency's safety regulations. *See* 49 C.F.R. § 391.11. Applying this logic and recognizing the DOT's greater expertise in applying its medical-certification regulations, three sister circuits have rejected commercial drivers' ADA claims when, as here, a doctor found the plaintiff medically unqualified and the plaintiff did not obtain a contrary opinion through the DOT's administrative process.

2016 WL 3405790 at * 3. So, in the trucking industry, an appeal of an adverse DOT determination is mandatory in the Fifth Circuit for any disability case.