EMPLOYMENT LAW

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I. INTRODUCTION

This Article analyzes recent Fifth Circuit Court of Appeals' labor and employment law opinions from July 1, 2011, through June 30, 2012. During this period, the appeals court addressed, in large part, a host of discrimination, sexual harassment, and retaliation claims under Title VII of the 1964 Civil Rights Act.[1] The court also decided several cases vital to the development of labor and wage and hour law under the National Labor Relations Act (NLRA) and the Fair Labor Standards Act (FLSA).[2] Given the wide variety of labor and employment law developments, this Article is divided into two parts: (i) an analysis of recent Fifth Circuit decisions and trends involving discrimination, harassment, and retaliation cases under Title VII, the Age Discrimination in Employment Act (ADEA), the Family Medical Leave Act (FMLA), and the Americans with Disability Act (ADA)[3] and (ii) an analysis of published Fifth Circuit decisions under the NLRA and FLSA.[4] Based upon a review of the cases discussed in this Article, the authors conclude that the Fifth Circuit is beginning to take a more employee-friendly approach in certain employment cases, especially in giving deference to pro-plaintiff sexual harassment and retaliation jury verdicts and National Labor Relations Board decisions.

II. EMPLOYMENT DISCRIMINATION CASE LAW DISCUSSION AND ANALYSIS

The following section discusses Fifth Circuit employment discrimination, retaliation, and harassment cases arising under Title VII, the ADEA, the ADA, and the FMLA.[5]

A. Discrimination and Retaliation—Title VII

During the survey time frame, the Fifth Circuit decided several significant cases involving retaliation and discrimination allegations under Title VII. While the appeals court affirmed the lower courts' grants of summary judgment for the employer in a group of unpublished opinions,[6] it affirmed several lower court jury verdicts involving sex discrimination and same-sex-harassment allegations.[7] Moreover, the appeals court continued to scrutinize a jury's

1. *See infra* Part II.
2. *See infra* Part III.
3. *See infra* Part II.
4. *See infra* Part III.
5. This Article does not purport to summarize state law discrimination cases or cases arising under federal or state whistleblower statutes, such as the Sarbanes-Oxley Act, 15 U.S.C. §§ 7201-7266 (2011).
6. *See, e.g.*, Picard v. City of Dall., 467 F. App'x 327, 328 (5th Cir. May 2012) (per curiam); Anthony v. Donahoe, 460 F. App'x 399, 401 (5th Cir. Feb. 2012) (per curiam).
7. *See* Black v. Pan Am. Labs., L.L.C., 646 F.3d 254, 259 (5th Cir. July 2011) (affirming, in part, a jury verdict in favor of the plaintiff on Title VII sex discrimination and retaliation claims).

damages findings in an effort to tailor the damages awarded to the harm done to the individual plaintiff.

1. Black v. Pan American Laboratories, L.L.C.

Black sued Pan American Labs (Pamlab), her former employer, asserting a variety of sex discrimination and retaliatory termination claims under Title VII and the Texas Commission on Human Rights Act (TCHRA).[8] Specifically, she asserted three theories of recovery: (i) disparate treatment sex discrimination by assigning her a sales quota and not doing so for a male counterpart; (ii) sex discrimination by terminating her employment; and (iii) retaliation by terminating her employment after she pursued internal company complaints about alleged sexually harassing comments.[9]

After trial, the jury returned a verdict in Black's favor for $3,450,000.[10] The district court reduced the back-pay award to $300,000 and, in turn, lowered the compensatory and punitive damages award to $200,000 based on Title VII's damages cap.[11] Pamlab appealed and argued that the district court erred in denying its renewed motion for judgment as a matter of law because insufficient evidence existed to support the jury findings of liability on the disparate treatment quota, employment termination, and retaliation claims.[12] Pamlab also argued that the evidence did not support the jury's back-pay award for the disparate treatment quota claim or the punitive damages award for all claims.[13] Black filed a cross-appeal and maintained that the district court misapplied Title VII's damages cap by applying it to the total compensatory/punitive damages amount recovered per party and not for each claim Black asserted.[14]

The facts underlying Black's claims reveal a pattern of discriminatory treatment. "Black worked as a sales representative for Pamlab, a pharmaceutical company, from February 2003 until" her separation from employment in 2006.[15] Black's primary job was to visit with physicians and pharmacists to convince them to prescribe or stock Pamlab's products.[16] The

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8. *Id.* at 256.
9. *Id.* at 258.
10. *Id.* at 256.
11. *Id.* The district court reduced the $300,000 in total back-pay awards to $150,000 for Black's termination and retaliation claims because the jury verdict resulted in a double recovery of back pay from Black's termination from employment. *Id*. at 258. Additionally, the court reduced Black's total compensatory/punitive damages award to $200,000 under Title VII and the TCHRA damages caps. *See* 42 U.S.C. § 1981a(b)(3) (2006); TEX. LAB. CODE ANN. § 21.2585(d) (West 2006). Title VII and the TCHRA contain independent damages caps; however, the Fifth Circuit has held that the caps are coextensive, not cumulative. *See* Giles v. Gen. Elec. Co., 245 F.3d 474, 492 (5th Cir. 2001).
12. *See Black*, 646 F.3d at 258.
13. *Id.* at 259.
14. *Id.*
15. *Id.* at 257.
16. *See id.*

sales representative would make office visits within the geographical region or territory the company assigned to her.[17] Pamlab assigned Black a territory covering a large portion of Las Vegas, Nevada, beginning with her employment until June 2005.[18] Pamlab split the Las Vegas area into two sales territories, resulting in an eastern and a western territory.[19] Black was assigned to the eastern territory and a male sales representative, Shane Livingston, covered the western territory.[20]

Black maintained that, when she began work with Pamlab, she did not have a sales quota.[21] Approximately 120 days after her start date, she received a sales quota; in turn, the company also told Livingston that he would not have a sales quota, but he received one.[22] "[F]rom February 2003 to the end of 2004, Black's sales quota was higher than Livingston's."[23] Black complained about her quota to a Pamlab Vice-President of Sales and Marketing, and "he replied that the quota 'shouldn't matter to you [because] you're not the breadwinner anyway.'"[24]

In June 2004, Black notified Pamlab that she was moving to Texas; as a result, Pamlab offered her a sales representative position in San Antonio, Texas, and she accepted it.[25] Thereafter, "[i]n April 2006, Black attended Pamlab's National Sales Meeting, a week-long annual event held in Orlando, Florida."[26] She "failed to appear when her name was called for an award at a banquet and failed to attend a 'send off' breakfast the following morning."[27] The following week, Pamlab's CEO, President, Director of Sales, and Human Resources Director met and decided to terminate Black's employment.[28] Pamlab supposedly terminated Black's employment on April 14, 2006, because she missed meetings at a national sales meeting and complained about her sales territory.[29]

During her tenure with Pamlab, Black apparently objected to a number of sexually charged comments made by Pamlab's management to her or in her presence.[30] She alleged that several managers made explicit comments about parts of her body and that one manager asked her if he could accompany her to her hotel room at a national sales meeting.[31] Black lodged "informal

17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* (alteration in original).
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 257-58.

complaints" about these comments to several of her supervisors, some of whom were the individuals who made the sex-based comments.[32]

After articulating the pretext and motivating factor alternatives for Black to prove her sex-discrimination case, the court first analyzed the evidence to support the jury's verdict.[33] Because the case was fully tried on the merits, the court did not address Black's prima facie case burden; rather, it focused on the *ultimate question* of whether Black produced sufficient evidence to support the jury's finding of sex discrimination.[34]

The Fifth Circuit concluded that there was "ample evidence" to support the jury's sex-discrimination finding, including the following:

- Several management members who were involved in the decision to terminate Black's employment had previously made sexist comments.[35]
- One of Black's managers, Samuel Camp (Pamlab's President), told her that women were a detriment to the company and that Black had taken a position from a male counterpart.[36]
- Samuel Camp had stated "that women 'get hired on, get married, and/or get pregnant and they leave.'"[37]
- Stephen Camp also said to Black that she didn't need to worry about a quota because she was not the "breadwinner anyway."[38]
- Several managers made sexually inappropriate comments about Black's body and what it would be like to have sex with her.[39]
- Other managers in her reporting chain made sexually discriminatory comments about her at a national sales meeting.[40]

In summary, the appeals court reasoned that "the jury could conclude that Pamlab had a corporate culture hostile to women," that its discriminatory animus extended to Pamlab's management, and that Black's sex was a motivating factor in the company's decision to terminate her employment.[41] Pamlab also asserted that it was entitled to the "same actor" inference because Stephen Camp, the alleged discriminator, had hired Black.[42] Rejecting this

32. *Id.* at 258.
33. *Id.* at 259.
34. *Id.*
35. *Id.* at 260.
36. *Id.*
37. *Id*. (internal quotation marks omitted).
38. *Id.* (internal quotation marks omitted).
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 268 n.4.

argument, the court reasoned that several management members were involved in the decision to terminate Black's employment and not just Camp.[43]

Turning to the parties' damages issues, the Fifth Circuit reasoned that Black had presented sufficient evidence to support the jury verdict in her favor on her employment termination claim and, therefore, that she was entitled to her $200,000 compensatory damage award.[44] In any event, Pamlab did not contest the amount of compensatory damages on her termination claim, and therefore, the appeals court affirmed the compensatory award.[45] The appeals court also applied the damages caps to limit her recovery to $200,000 for all compensatory and punitive damages.[46]

The court also affirmed the $150,000 back-pay award on Black's termination claim but required the district court to recalculate on remand the $150,000 back-pay award on her quota claim.[47] According to the appeals court, no evidence existed to support Black's "Zero Quota Theory" because the male comparator she relied on to support her disparate treatment claim (zero-quota theory) was *also told* that Pamlab would not assign him a quota when Pamlab hired him, but he received one anyway.[48] Nevertheless, the Fifth Circuit found that sufficient evidence supported Black's "quota" *disparate treatment theory*—she presented evidence that she had a higher sales quota than her similarly situated male comparator and that the differences in sales territories did not account for differences in Black's and her male comparator's quotas; therefore, the jury could infer discrimination.[49] Citing *EEOC v. Waffle House*, the Fifth Circuit also concluded that the district court had properly prohibited a double recovery of back pay on both Black's termination and retaliation claims, thus reducing her $300,000 back-pay award to $150,000.[50]

The *Pamlab* decision demonstrates that the Fifth Circuit will defer to a jury's Title VII discrimination findings when the case involves a litany of management-based discriminatory sexual comments and other comparative disparate treatment.[51] Regarding the damages findings, the appeals court continued its trend in carefully scrutinizing the evidence to support a jury's

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43. *Id.* at 260.
44. *Id.* at 261.
45. *Id.*
46. *Id.*
47. *Id.* at 262-63.
48. *Id.* at 262. The appeals court refused to address the zero-quota theory because Black did not assert the theory at trial. *Id.* Nevertheless, the court explained that, even if Black had lodged the zero-quota theory at trial and had not waived it, insufficient evidence existed to support that theory; while Pamlab had also informed Black's proffered male comparator, Livingston, that he would not have a quota, Pamlab still assigned him a quota. *Id.* The evidence of similar quota promises and assignments to Black and Livingston, in the court's view, was "highly relevant" to defeat Black's zero-quota theory. *Id.* at 261 n.6, 262.
49. *Id.* at 263.
50. *Id.* at 261 (citing EEOC v. Waffle House, Inc., 534 U.S. 279, 296 (2002)).
51. *Id.* at 261-63.

damages findings—namely, back-pay and compensatory/punitive damages awards.[52]

2. Yancy v. U.S. Airways, Inc.

Yancy illustrates that, even when a plaintiff has evidence of a company's discriminatory treatment, it is incumbent on the plaintiff, when lodging a separate *retaliation* claim, to connect the dots and identify the causal nexus between the plaintiff's "protected activity" (such as filing an EEOC charge) and the employer's adverse employment decision.

Yancy was employed with U.S. Airways as a customer service agent in New Orleans.[53] In May 2009, Yancy learned from her supervisor, Polk, that another co-worker, Macaluso, had posted a photograph of Yancy leaning over a table while at work, which revealed a portion of Yancy's underwear.[54] A month later, Yancy complained to the human resources department, and an investigation determined that three employees were responsible—U.S. Airways disciplined them but did not terminate their employment.[55] Unsatisfied, Yancy filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC).[56] About a month later, Yancy sustained a non-work-related injury, requiring her to take a medical leave of absence for several months.[57] During her leave, Yancy received a phone call from Polk advising her to drop her EEOC charge because she was not "squeaky clean" herself and because, if the investigation continued, many people would be fired.[58]

Following Yancy's return to work, U.S. Airways suspended Yancy because the company learned that she had sent a sexually explicit photograph of a "tattooed penis" to one of the three employees responsible for the original Facebook photo of her.[59] Yancy filed another charge of discrimination with the EEOC, alleging that the use of the explicit photo she sent amounted to sex and race discrimination and was retaliatory.[60] Around that same time, the company announced that it would be conducting a workforce reduction consistent with the union's collective bargaining agreement (CBA), namely, based on employee seniority.[61] Under the CBA, the company selected Yancy for a furlough because she had the least amount of seniority.[62] Yancy then filed another charge with the EEOC based on retaliation.[63]

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52. *Id.*
53. Yancy v. U.S. Airways, Inc., 469 F. App'x 339, 343 (5th Cir. Apr. 2012) (per curiam).
54. *Id.* at 341.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 342.
61. *Id.*
62. *Id.*
63. *Id.*

Reviewing her claims, the district court granted summary judgment for U.S. Airways on Yancy's claims of retaliation, discrimination, tortious inference, and intentional infliction of emotional distress.[64] Yancy appealed the summary judgment on her retaliation claim, arguing that "the district court improperly evaluated her claims under the pretext-prong of Title VII's retaliation analysis and failed to" evaluate it under the mixed-motive prong.[65] The Fifth Circuit affirmed the grant of summary judgment, finding that even if the more lenient mixed-motive analysis was appropriate, it was irrelevant because Yancy had failed to establish a prima facie case of retaliation—she failed to produce competent evidence of a causal connection between her protected activity (filing an EEOC charge) and her suspension and furlough.[66] Thus, the more lenient mixed-motive analysis did not apply to save her claims.[67] The appeals court discounted Polk's alleged telephone call telling her to drop her EEOC complaint because Polk was not the decision maker who decided to suspend Yancy and because he did not exert any leverage over the ultimate decision maker.[68]

3. Turner v. Kansas City Southern Railway Co.

Turner represents a case in which the Fifth Circuit "split the baby" on a variety of Title VII disparate treatment claims lodged by multiple plaintiffs against a railroad company.[69] The EEOC and Thomas D. Turner appealed the district court's grant of summary judgment in favor "of defendant Kansas City Southern Railway Company (KCSR), dismissing all of plaintiffs' claims that the decisions to discipline Turner and three other African American employees for putative work-rule violations were based on race."[70] The Fifth Circuit affirmed summary judgment regarding the plaintiffs Frank's and Cargo's discriminatory discipline (suspension of Frank) and termination (Cargo's dismissal) claims because "the EEOC ha[d] failed to establish a prima facie case of discrimination."[71] Frank, a train engineer, failed to show that he had a substantially similar employment history to his white comparator; he had more moving violations than his white counterpart, including one violation that resulted in Frank having his license suspended.[72] In turn, Cargo, a train conductor, failed to assert a "same incident" test in the district court to prove that two employees of different races received disparate treatment arising out of

64. *Id.*
65. *Id.* at 343.
66. *Id.* at 343-45.
67. *Id.* at 343-44.
68. *Id.* at 344.
69. Turner v. Kan. City S. Ry. Co., 675 F.3d 887, 889 (5th Cir. Mar. 2012).
70. *Id.*
71. *Id.* at 889-90.
72. *Id.* at 890, 900.

the same incident.[73] His failure to do so prevented him from establishing a prima facie case of disparate treatment.[74]

The appeals court, however, reversed the district court based on KCSR's decisions to discipline plaintiffs Turner and Thomas, concluding that they had established a prima facie case of discrimination.[75] Both produced competent evidence that white comparators were treated more favorably than they were treated under nearly identical circumstances.[76] Moreover, KCSR failed to produce admissible evidence of a legitimate, nondiscriminatory reason for those decisions; rather, the company relied on contradictory evidence concerning who made the decisions to discipline Turner and Thomas, and KCSR failed to explain the reasons for its disciplinary actions with reasonable specificity.[77] Thus, a jury should have had the opportunity to decide "whether the decisions to discipline Turner and Thomas were impermissibly based on race."[78]

The court reasoned that, in Title VII "work-rule violation cases[,] . . . a Title VII plaintiff may establish a prima facie case by showing either [(1)] that he did not violate the rule or [(2)] that, if he did, white employees who engaged in similar acts were not punished similarly."[79] To establish a prima facie case under the second approach, a plaintiff must demonstrate that "employees [who were not members of the plaintiff's protected class] were treated differently under circumstances nearly identical to" the plaintiff's.[80] The "nearly identical circumstances" test means that the employees being compared were nearly identical when they held "the same job or responsibilities, share[d] the same supervisor or had their employment status determined by the same person, and ha[d] essentially comparable" policies on disciplinary violation histories.[81]

Moreover, the conduct that led to "the adverse employment decision must have been nearly identical to that of the proffered comparator who allegedly" received more favorable treatment—if the difference between the plaintiff's conduct and the comparator's conduct "*accounts* for the difference in treatment received from the employer, the employees are not similarly situated" and the difference will usually negate any inference of discrimination.[82] While plaintiffs Turner and Thomas identified with specificity similarly situated white employees whom KCSR disciplined less severely than themselves under nearly

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73. *Id.*

74. *Id.* at 900.

75. *Id.* at 895-98.

76. *Id.*

77. *Id.* at 900-04.

78. *Id.* at 889.

79. *Id.* at 892-93 (second, third, and fourth alterations in original) (quoting Mayberry v. Vought Aircraft Co., 55 F.3d 1086, 1090 (5th Cir. 1995)) (internal quotation marks omitted).

80. *Id.* at 893 (alteration in original) (quoting *Mayberry*, 55 F.3d at 1090) (internal quotation marks omitted).

81. *Id.* (quoting Lee v. Kan. City S. Ry. Co., 574 F.3d 253, 260 (5th Cir. 2009)) (internal quotation marks omitted).

82. *Id.* (quoting *Lee*, 574 F.3d at 260) (internal quotation marks omitted).

identical circumstances, plaintiffs Frank and Cargo failed to do so.[83] Thus, two plaintiffs survived summary judgment, while the other two cases were fit grist for the summary judgment mill.[84]

4. Vaughn v. Woodforest Bank

Vaughn exemplifies what can happen when a company has decentralized operations and fails to adequately train its managers concerning racial diversity and workplace anti-harassment issues. On February 20, 2009, Carol L. Vaughn (a white woman) was fired from Woodforest Bank for "unsatisfactory conduct."[85] Vaughn later pursued a lawsuit and claimed that the bank terminated her employment based on her race in violation of Title VII.[86] Concluding that Vaughn presented a material fact issue concerning Woodforest's proffered reason for terminating her employment, the Fifth Circuit "reverse[d] the district court's grant of summary judgment and remand[ed] for a trial on the merits."[87]

During her employment, Vaughn's supervisor,

> Gaskamp[,] approved three pay increases for [her] between September 2008 and February 2009 and gave [her] a generally positive performance evaluation on February 3, 2009. [Nevertheless,] on February 20, 2009, Gaskamp fired Vaughn after conducting a brief "climate survey" of the Starkville branch and after a human resources representative conducted a brief follow-up investigation over the phone. Gaskamp checked the box "Unsatisfactory Conduct" on [Vaughn's employment] termination form.[88]

The unsatisfactory conduct stemmed from Vaughn's alleged actions in making her co-workers uncomfortable with regard to race.[89] Gaskamp noted that during a branch visit, Vaughn's co-workers expressed concerns about Vaughn's inappropriate race-related comments and the overall work environment.[90] The bank's human resources department then "conducted [a brief] investigation of the employee complaints and determined that Carol Vaughn . . . made inappropriate comments in the presence of employees and customers that created a perception of racial discrimination [against African Americans] and an uncomfortable work environment."[91] For example, Gaskamp noted that,

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83. *Id.* at 903-05.
84. *Id.* at 905.
85. Vaughn v. Woodforest Bank, 665 F.3d 632, 634 (5th Cir. Dec. 2011).
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 634-35.
90. *Id.* at 634.
91. *Id.*

while watching television coverage of the Presidential Inauguration, Vaughn told a co-worker that she wished the media would stop making President Obama's election a "black and white issue."[92] Apparently, Vaughn later stated that she and her Sunday school "class hoped if anything were to happen to [Obama] it would be done by 'his own people' rather than 'Americans.'"[93] Gaskamp noted two other incidents as well. Following Vaughn's employment termination, the branch's personnel was made up of a black manager, four black retail bankers, and one white retail banker.[94]

Vaughn produced evidence rebutting each of the proffered reasons that amounted to her alleged unsatisfactory conduct.[95] The Fifth Circuit concluded that this evidence was sufficient to raise a triable fact issue of whether Woodforest's explanation was not the true reason for firing Vaughn but, rather, pretext for race discrimination.[96] According to the court, a jury could draw inferences from this evidence and reasonably conclude that Woodforest intentionally exaggerated its concern over Vaughn's unsatisfactory conduct and that her workplace comments were not the real reason Woodforest discharged her.[97] "On these disputed facts, the district court 'impermissibly substituted its judgment concerning the weight of the evidence for the jury's.'"[98]

5. Wesley v. General Drivers, Warehousemen and Helpers Local 745

Wesley demonstrates that a union member faces a high bar in attempting to establish that his union subjected him to racial discrimination by failing to pursue his grievance over his discharge. Wesley lodged his claim under 42 U.S.C. § 1981 against his former union, which represented him in a grievance hearing in connection with his employment termination.[99] Wesley

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92. *Id.* at 635.
93. *Id.* (second alteration in original).
94. *Id.*
95. *Id.* at 637-40.
96. *Id.* at 640.
97. *Id.* at 639.
98. *Id.* (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000)).
99. Wesley v. Gen. Drivers, Warehousemen & Helpers Local 745, 660 F.3d 211, 212 (5th Cir. Oct. 2011). 42 U.S.C. § 1981 (2006) provides, in pertinent part, the following:

> (a) Statement of equal rights
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
> (b) "Make and enforce contracts" defined
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
> (c) Protection against impairment
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

alleged that defendants, General Drivers, Warehousemen and Helpers Local 745 (Local 745), and Brent Taylor, the union representative, discriminated against him on account of his race by failing to argue during his grievance hearing that Yellow Transportation, Inc. terminated Wesley from employment for a racially discriminatory reason.[100] The district court granted summary judgment for both defendants and the Fifth Circuit affirmed.[101]

Wesley, an African American, was a former employee of Yellow Transportation, Inc., and while employed with Yellow, he was a member of union Local 745.[102] In 2005, Yellow terminated his employment because security surveillance cameras caught him overstaying his break period while playing a pornographic video in the break room.[103] Following a grievance hearing, Wesley filed a federal court complaint naming Taylor and Local 745.[104] The complaint alleged that Taylor and Local 745 had violated § 1981 by deliberately discriminating against Wesley on account of his race.[105] Reviewing Wesley's claim, the Fifth Circuit reasoned that Wesley had to prove three claim elements: first, that he was subjected to an adverse union action; second, that the union treated him less favorably than employees of different races; and, third, that the differential treatment arose from intentional racial discrimination.[106]

The Fifth Circuit determined that, even if Wesley had presented evidence that the union subjected him to an adverse action, he failed to demonstrate that the union treated him less favorably than it treated employees of other races.[107] Taylor, the union representative, presented the only comparative evidence concerning the union's treatment of Wesley's race discrimination grievance, reciting in a declaration attached to the union's summary judgment motion, "I did not handle Wesley's grievance any differently than I would have handled any other employee's grievance, regardless of their race or national origin."[108] Wesley did not present any evidence to contradict this statement.[109] Because Wesley failed to prove that he was treated less favorably than similarly situated union members of other races, he failed to prove that the union purposefully discriminated against him because of his race.[110]

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§ 1981.

100. *Wesley*, 660 F.3d at 212.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 215.
108. *Id.* (internal quotation marks omitted).
109. *Id.*
110. *Id.* at 216.

6. Nassar v. University of Texas Southwestern Medical Center

This case involved a jury's award in favor of a plaintiff faculty member/doctor, Nassar, on his Title VII constructive discharge and retaliation claims.[111] Defendant University of Texas Southwestern Medical Center (UTSW) appealed, challenging the sufficiency of the evidence and the back-pay and compensatory damages awards; Nassar, in turn, appealed the court's decision to deny him front pay as an additional equitable remedy.[112]

Nassar was a member of the faculty at UTSW.[113] A district court jury found that UTSW constructively discharged Nassar from his position because of a manager's racially motivated harassment against him.[114] The district court also found that UTSW retaliated against Nassar by preventing him from getting a job with an affiliated hospital.[115] The manager in question, Beth Levine, made comments, among others, such as "Middle Easterners are lazy" and they have "hired another one."[116] Applying the well-established constructive-discharge test under Title VII, the appeals court explained that Nassar was required to prove that his "working conditions . . . [were] so intolerable that a reasonable person in [his] position would have felt compelled to resign."[117] The Fifth Circuit, however, decided that the doctor did no more than the minimum required to prove a hostile work environment.[118] Nassar failed to present additional competent evidence of "aggravating factors" sufficient to show that UTSW compelled him to resign.[119] These aggravating factors include (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement or continued employment on terms less favorable than the employee's former status.[120]

Regarding the doctor's retaliation claim, the Fifth Circuit applied a less arduous standard than it applied on his constructive discharge claim and reviewed the retaliation finding

> to determine only whether the record contains sufficient evidence for a reasonable jury to have made its ultimate finding that [the employer's]

111. Nassar v. Univ. of Tex. Sw. Med. Ctr., 674 F.3d 448, 450 (5th Cir. Mar. 2012).
112. *Id.* at 450-52.
113. *Id.* at 450.
114. *Id.*
115. *Id.*
116. *Id.* (internal quotation marks omitted).
117. *Id.* at 453 (first alteration in original) (quoting Aryain v. Wal-Mart Stores Tex. LP, 534 F.3d 473, 480 (5th Cir. 2008)) (internal quotation marks omitted).
118. *Id.*
119. *Id.*
120. *Id.*

> stated reason for [taking adverse employment action against the employee] was pretext or that, while true, was only one reason for their being fired, and race was another motivating factor.[121]

Under this less lofty standard, the Fifth Circuit affirmed the retaliation finding.[122] The Fifth Circuit concluded that, viewing the evidence in a light most favorable to the jury's verdict, Nassar offered sufficient proof that his attempt to move to an affiliated hospital was blocked by UTSW as punishment for the complaints Nassar made about Levine.[123] The jury evaluated conflicting testimony on this issue in favor of Nassar.[124] The Fifth Circuit noted that no reason existed to upset the jury verdict because of the credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.[125]

B. Age Discrimination in Employment Act—Phillips v. Leggett & Platt, Inc.

Phillips presents a classic discrimination case involving the running of the ADEA's statute of limitations and whether the discrimination plaintiff may invoke the doctrine of equitable tolling. Here, plaintiff Phillips prevailed before a jury, but her verdict disappeared in the appeals court based on her failure to pursue her claim in a timely manner.[126] In June 2007, Leggett & Platt, Inc. (Leggett) informed its employees that it was consolidating the operations of two of its Mississippi facilities by closing the one in Verona and leaving open the Houlka plant.[127] Jean Phillips, employed by Leggett for twenty-four years, was the accounts-payable clerk at the Verona plant.[128] Leggett informed Phillips that there were no positions available for her at the Houlka facility.[129] The record evidence demonstrated that Phillips was the only Verona employee who was willing to work in the Houlka facility but was unable to do so.[130] Phillips was sixty-six years old when she received her employment termination notice.[131] She suspected that she was denied the accounts-payable clerk position at the Houlka facility because of her age.[132] Kathy Gamble, the employee who transferred to the Houlka facility to do that

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121. *Id.* (alterations in original) (quoting DeCorte v. Jordan, 497 F.3d 433, 438 (5th Cir. 2007)) (internal quotation marks omitted).
122. *Id.*
123. *Id.* at 452-53.
124. *Id.* at 453.
125. *Id.* at 454.
126. Phillips v. Leggett & Platt, Inc., 658 F.3d 452, 454 (5th Cir. Sept. 2011).
127. *Id*. at 453-54.
128. *Id.*
129. *Id.* at 454.
130. *Id.*
131. *Id.*
132. *Id.*

work, was younger and less experienced than Phillips.[133] A few days after Leggett discharged her, Leggett rehired Phillips to fill a temporary position; she accepted the position with the hope of it becoming permanent.[134] At about the same time, Gamble, arguably Phillips's replacement, left the company.[135] Leggett then hired another employee, who had previously been laid off, to take Gamble's place.[136] As a result, Phillips was passed over for the accounts-payable clerk position twice.[137]

The Fifth Circuit addressed the threshold question of whether Phillips's ADEA claims were time barred.[138] The relevant inquiry, the court reasoned, was whether the unlawful practice occurred when Phillips was originally "terminated" on paper or when she was actually let go.[139] The appeals court explained that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination."[140] Thus, the 180-day limitations period begins on the date the employee received her notice of termination rather than on the final day of employment.[141] Stated differently, the limitations period begins when an employee is unambiguously informed of an immediate or future employment termination.[142] The appeals court did not apply the narrow equitable tolling exception to the limitations statutory provision because it is restricted to "(1) a pending action between parties in the wrong forum; (2) the plaintiff's unawareness of facts supporting [her] claim because [the employer] intentionally concealed them; and (3) the EEOC's misleading the plaintiff about [her] rights."[143] Given that these limited exceptions did not apply, the court reversed the jury's pro-plaintiff verdict and decided that Phillips's claims were time barred.[144]

C. Title VII/ADEA Harassment Cases

During the 2011-2012 time frame, the Fifth Circuit addressed a group of harassment cases, ranging from (a) age, religion, and same-sex harassment to (b) whether a Hispanic plaintiff may rely on "cross-category" discrimination/harassment against other ethnic groups, such as African Americans, to support

133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 455.
139. *Id.* at 455-56.
140. *Id.* at 455 (quoting Del. State Coll. v. Ricks, 449 U.S. 250, 257 (1980)) (internal quotation marks omitted).
141. *Id.* at 456.
142. *See id.*
143. *Id.* at 457.
144. *Id.* at 457-59.

the Hispanic plaintiff's discrimination claim.[145] In three hostile-work-environment harassment cases arising under Title VII and the ADEA, the appeals court (i) reversed the district court's summary judgment in favor of the employer and allowed the case to proceed to a jury trial on the plaintiff's age- and religion-based hostile-work-environment claims; (ii) upheld a jury's same-sex harassment verdict; and (iii) vacated a same-sex jury verdict in favor of the plaintiff based on the court's ultimate conclusion that the plaintiff was subjected to rude, boorish, and gross behavior but not behavior that constituted same-sex harassment.[146] In large part, these harassment cases reveal the Fifth Circuit's renewed deference to the jury's fact-finding role in Title VII and ADEA harassment cases. Nevertheless, in *Hernandez*, the Fifth Circuit applied a moderate approach and limited the plaintiff's use of cross-category "group" discrimination evidence to support an *individual* plaintiff's discrimination claim.[147]

1. Dediol v. Best Chevrolet, Inc.

The *Dediol* decision begs the question, Why was this case litigated? It exemplifies the kind of bad facts that allow a discrimination plaintiff to present his case to a jury and receive their sympathy based on the age- and religion-based harassment that Dediol was subjected to during his employment as a car salesman.[148]

Dediol worked as a car salesman for about two months under supervisor Donald Clay.[149] Dediol was sixty-five years old during his employment and was a practicing born-again Christian.[150] Dediol asked for permission to take off from work on July 4, 2007, to volunteer at a church event; Clay's assistant manager agreed, but Clay overruled this permission and stated, "'[Y]ou old mother******, you are not going over there tomorrow' and 'if you go over there, [I'll] fire your f*****g ass.'"[151] From July 4 through August 30, Clay repeatedly referred to Dediol on a daily basis as "old mother******," "old man," and "pops."[152] According to Dediol, Clay directed these comments to

145. *See* Dediol v. Best Chevrolet, Inc., 655 F.3d 435 (5th Cir. Sept. 2011) (age- and religion-harassment claims); Cherry v. Shaw Coastal, Inc., 668 F.3d 182, 185 (5th Cir. Jan. 2012) (same-sex harassment claim), *cert. denied*, 133 S. Ct. 162 (2012); EEOC v. BOH Bros. Constr. Co., 689 F.3d 458, 460-61 (5th Cir. July 2012), *cert. granted*, No. 11-30770, 2013 WL 1276022 (5th Cir. Mar. 27, 2013) (same sex harassment claim); Hernandez v. Yellow Transp., Inc., 670 F.3d 644, 653 (5th Cir. Feb. 2012), *cert. denied*, 133 S. Ct. 136 (2012) (deciding a case in which the plaintiff attempted to rely on cross-category discrimination/harassment).

146. *Dediol*, 655 F.3d at 438; *Cherry*, 668 F.3d at 185; *Boh Bros.*, 689 F.3d at 458-59.

147. *See Hernandez*, 670 F.3d at 653-54.

148. *Dediol*, 655 F.3d at 438.

149. *Id.*

150. *Id.*

151. *Id.* (alterations in original).

152. *Id.* (alterations in original) (internal quotation marks omitted).

Dediol about six times per day.[153] Dediol also alleged that Clay stole several auto sales deals from Dediol and gave them to younger salespersons.[154] Additionally, Dediol alleged that Clay made disparaging remarks about Dediol's religion, including, "'go to your God and [God] would save your job;' 'God would not put food on your plate;' and '[G]o to your f****ng God and see if he can save your job.'"[155] Dediol estimated that Clay made disparaging religious remarks directed toward Dediol approximately twelve times during Dediol's employment.[156] Clay also made direct physical violence and intimidation threats toward Dediol.[157]

In view of Clay's pervasive harassment, Dediol complained to management, and it was clear that higher-level management was aware of Clay's conduct.[158] Nevertheless, the company, through Clay, denied Dediol a transfer to the new car sales area.[159] Indeed, Clay participated in the transfer request decision and denied it.[160] Thereafter, Clay proclaimed that he was going to "beat the 'F' out of [Dediol]."[161] On one occasion, Clay kept his promise and physically charged at Dediol in front of nine or so employees.[162] After the "charging" incident, Dediol worked the balance of the day and then stopped showing up for work.[163] Dediol then pursued claims against the company for age- and religion-related hostile-work-environment harassment and constructive discharge under the ADEA and Title VII; he also lodged an assault claim against Clay based on the charging incident.[164]

The district court granted summary judgment in favor of the company based on its view that Dediol did not produce sufficient evidence to support a finding of severe or pervasive age- or religion-related discriminatory harassment.[165] The Fifth Circuit disagreed.[166] First, the appeals court held that a plaintiff may lodge a cognizable claim for age-based hostile-work-environment harassment under the ADEA by proving several elements: the plaintiff is over the age of forty; he is subjected to harassment, either by words or actions, based on an offensive work environment; and some basis exists for liability on the part of the employer.[167] Accordingly, the appeals court adopted the sex-harassment hostile-work-environment standard—namely, whether the

153. *Id.*
154. *Id.*
155. *Id.* (alterations in original).
156. *Id.*
157. *Id.* at 439.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* (internal quotation marks omitted).
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 445.
167. *Id.* at 441.

workplace is permeated with discriminatory intimidation, ridicule, and insult that are sufficiently severe or pervasive to alter the conditions of the victim's employment.[168]

Turning to Dediol's harassment claims, the appeals court concluded that the district court erred in granting summary judgment in favor of his employer.[169] Dediol presented competent evidence that he was subjected to various age-related harassing incidents witnessed by management, including derogatory epithets such as "old man," "old mother ******," and "pops."[170] Indeed, Dediol was subjected to the name calling approximately six times daily for over a month; thus, the pervasiveness of the incidents over time supported Dediol's claim—as the appeals court reasoned, a continuous pattern of less severe incidents can create an actionable claim.[171] In this case, age-related remarks directed at Dediol six times a day for over a month supported his age-related harassment claim.[172]

Dediol also presented evidence that the age- and religion-based harassment was physically threatening or humiliating.[173] Clay repeatedly made physical threats to Dediol, such as threating to "kick [his] ass"; telling him,"I . . . was in jail"; and then taking his shirt off in a threatening manner.[174] Clay also charged at Dediol on one occasion in front of co-workers.[175] Finally, the evidence presented revealed that Clay interfered with Dediol's work performance based on conflicting evidence that Clay steered sales deals away from Dediol.[176]

The Fifth Circuit also concluded that the district court erred in granting the employer summary judgment on Dediol's religion-harassment claim.[177] Clay had made numerous remarks against Dediol's religious beliefs, such as making fun of his Bible reading, failing to accommodate his religious beliefs, and making other derogatory remarks about Dediol's God.[178]

Finally, the appeals court concluded that a triable fact issue existed on Dediol's constructive discharge claim.[179] Dediol presented evidence of numerous comments, escalating tensions, the charging incident, a denied transfer request, and ignored complaints.[180] Under these circumstances, the

168. *Id.*
169. *Id.*
170. *Id.* at 441-42 (internal quotation marks omitted).
171. *Id.* at 442.
172. *Id.* at 442-43.
173. *Id.* at 443.
174. *Id.* (internal quotation marks omitted).
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 443-44.
179. *Id.* at 444.
180. *Id.* at 444-45.

Fifth Circuit agreed that a jury should determine whether Dediol was forced to resign.[181]

2. Cherry v. Shaw Coastal, Inc.

Plaintiff Cherry lodged claims against his employer, Shaw, for sexual harassment, retaliation, loss of overtime, and punitive damages. After a jury trial, Cherry appealed a judgment as a matter of law in favor of Shaw.[182] On appeal, the Fifth Circuit concluded that Cherry should lose on all claims except his sex-harassment claim.[183] The appeals court reasoned that (i) Cherry was subjected to severe or pervasive same-sex harassment and (ii) his employer, Shaw, failed to promptly respond to Cherry's harassment complaints.[184]

Cherry was an employee of the engineering firm Shaw and worked on a survey crew as an instrument man under two managers, Reasoner and Thornton.[185] Cherry reported to Thornton who, in turn, reported to Reasoner.[186] During Cherry's employment, Manager Reasoner subjected Cherry to a wide variety of harassing behavior.[187] Reasoner would brush his body up against Cherry on several occasions.[188] Further, "Reasoner would ask Cherry to take his shirt off and to wear cut-off jean shorts . . . ."[189] Reasoner also made comments about Cherry's looks.[190]

Reasoner's alleged harassment was not limited to oral comments.[191] Reasoner made various comments in text messages to Cherry about wanting cock, Cherry's sexy voice, and Cherry missing the dipper (Reasoner's penis).[192] Cherry responded that he did not want to speak with Reasoner and did not appreciate his comments.[193] Reasoner also touched Cherry regularly and, specifically, touched Cherry on his buttocks.[194] At all times, Cherry refused Reasoner's advances.[195] To be sure, Thornton witnessed Reasoner touch Cherry during work-related auto travels, and Thornton felt uncomfortable about Reasoner's behavior.[196] During these travels, Reasoner would rub his hands on Cherry's shoulders, and Cherry became very uncomfortable with this

181. *Id.*
182. Cherry v. Shaw Coastal, Inc., 668 F.3d 182, 185 (5th Cir. Jan. 2012), *cert. denied*, 133 S. Ct. 162 (2012).
183. *Id.*
184. *Id.* at 189.
185. *Id.* at 185.
186. *Id.*
187. *See id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* at 185-86.
192. *Id.* at 185.
193. *Id.*
194. *Id.*
195. *See id.* at 185-86.
196. *Id.* at 185.

behavior.[197] Unfortunately, Reasoner's harassing behavior continued.[198] For instance, Reasoner asked Cherry to stay at his house, and when Cherry said he did not have a change of clothes, Reasoner replied that Cherry did not need a change of clothes and could wear Reasoner's underwear.[199]

Thornton eventually acknowledged that he witnessed these events and reported them to his manager and a higher-level manager; nevertheless, higher level management did not take any action to investigate the complaints or elevate the complaints to human resources.[200] Moreover, Cherry complained to management and offered to show them Reasoner's text messages.[201] But Cherry received no response.[202] Cherry then explained to management that he did not want to work with Reasoner.[203] As a result, Shaw arranged for Cherry and Reasoner to work on different crews.[204] At this point, Shaw management questioned whether Reasoner's conduct amounted to "horsing around" or engaging in a sex-based hostile work environment.[205] Cherry, however, was adamant that he did not want to continue to work with Reasoner.[206] These points of contention finally led to a company investigation into Cherry's allegations.[207] Shaw's human resources department conducted the belated investigation and concluded that Cherry's allegations constituted "one [individual's] word against the other[,]" and therefore, Shaw took no remedial actions against Reasoner.[208] Cherry later complained about Reasoner's conduct a second time; however, Shaw did not respond and Cherry resigned.[209]

During the trial on Cherry's claims, the district court dismissed all of his claims—except his sexual harassment claim—before the jury rendered its verdict.[210] During jury deliberations, the jury submitted a note to the judge and asked whether Reasoner had to be considered a homosexual for Cherry to prove his hostile-work-environment claim.[211] The district court responded, over Cherry's objection, that "'there must be credible evidence that Mr. Reasoner is or was homosexual,' which 'may be proven if you find . . . that Mr. Reasoner intended to have some kind of sexual contact with Mr. Cherry.'"[212] The jury rendered a verdict and concluded that Shaw, through Reasoner, subjected

197. *Id.*
198. *See id.* at 185-86.
199. *Id.* at 185.
200. *Id.* at 185-86.
201. *Id*. at 186.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* (internal quotation marks omitted).
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*

Cherry to pervasive or severe harassment and failed to take prompt remedial action after Cherry reported the harassment to Shaw's management.[213] After the jury rendered its verdict in favor of Cherry on his same-sex harassment claim, the district court granted judgment as a matter of law in favor of Shaw on all of Cherry's claims, except his battery claim.[214] The district court reasoned that the evidence did not reveal that Reasoner had a sexual interest in men and was a homosexual.[215] The court also found that Cherry was "sensitive to homoerotic teasing."[216]

On appeal, the Fifth Circuit rejected Cherry's retaliation and punitive damages claims, determining (i) that Shaw had a well-established anti-harassment policy and that, while it conducted a belated harassment investigation into Cherry's allegations, the existence of its policy and complaint procedures (along with the ultimate decision to separate Reasoner from Cherry in the workplace) negated any malicious intent or reckless disregard of the law sufficient to support a punitive damages finding and (ii) that Cherry failed to demonstrate that he suffered any adverse employment action as a result of the his harassment complaint.[217] Cherry conceded that overtime pay was eliminated when the primary surveying job to which he was assigned was cut back.[218] Thus, the lack of available surveying work explained the change in Cherry's assigned tasks; indeed, the lack of work applied to everyone in Cherry's position and could not be characterized as retaliatory.[219]

The appeals court reached a starkly different conclusion regarding Cherry's sexual harassment claim.[220] The court explained that a plaintiff may support a same-sex harassment claim with credible evidence that the alleged harasser is homosexual, identifying two types of evidence to do so: (1) "the harasser 'intended to have some kind of sexual contact with the plaintiff rather than to merely humiliate him for reasons unrelated to sexual interest', or (ii) evidence that the harasser 'made same-sex sexual advances to others, especially to other employees.'"[221]

Analyzing the evidence presented, the Fifth Circuit concluded that Cherry produced sufficient evidence to support his same-sex hostile-work-environment claim.[222] The competent evidence at trial included the following: Reasoner's "I want cock" text message; his "[You can] stay at [my] house and wear [my] underwear" remark; and his repeated physical touching and caressing Cherry's

213. *Id.* at 186-87.
214. *Id.*
215. *Id.* at 187.
216. *Id.* (internal quotation marks omitted).
217. *Id.* at 187-88.
218. *Id.* at 188.
219. *Id.* at 187-88.
220. *Id*. at 188.
221. *Id.* (quoting La Day v. Catalyst Tech., Inc., 302 F.3d 474, 430 (5th Cir. 2002)).
222. *Id.*

body—all of which were offensive to Cherry.[223] Moreover, Cherry's co-worker, Thornton, reported and complained about Reasoner's bodily brushings toward Cherry.[224] In summary, the totality of evidence raised a reasonable inference that Reasoner's harassment was explicitly or implicitly sexual in nature.[225] Accordingly, Reasoner's conduct satisfied the severe or pervasive harassment standard.[226] As the appeals court explained, deliberate and unwanted touching of intimate body parts can constitute severe harassment.[227] Indeed, the court focused on the rear-end touching and physical caressing incidents, coupled with the sex-based comments, to support its finding that Cherry was subjected to severe same-sex harassment.[228]

Finally, the appeals court held that Shaw failed to take prompt remedial action in response to Cherry's harassment complaints and the complaints his manager, Thornton, lodged about Reasoner's inappropriate "touching" conduct.[229] The bottom line was that several managers failed to elevate complaints and to report them to human resources to allow human resources to conduct a thorough investigation.[230] Further, even when the complaints eventually reached human resources, Shaw's HR department made a flawed decision not to act based on a knee-jerk reaction that "insufficient evidence" existed to support Cherry's allegations.[231] But the undisputed evidence demonstrated that Shaw received several complaints with *objective evidence* of Reasoner's sex-based text messages.[232] In turn, Shaw had received sufficient corroborating evidence from Thornton concerning Reasoner's inappropriate touching of Cherry on several occasions.[233]

Consequently, the *Cherry* decision is a powerful example of an employer's failure to conduct ongoing anti-harassment training and to *apply* its anti-harassment policy consistently to prevent and remedy workplace harassment.[234] Additionally, the underlying facts demonstrate that management and human resources must conduct thorough internal investigations to ensure that the employer has a well-reasoned factual basis, accompanied by documentation, for its investigation conclusions.

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223. *Id.* (internal quotation marks omitted).
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.* at 189.
230. *Id.*
231. *Id.* (internal quotation marks omitted).
232. *Id.*
233. *Id.*
234. *See id.*

3. EEOC v. Boh Brothers Construction Co.

In *Boh Brothers*, the Fifth Circuit again addressed a same-sex harassment case under Title VII—but this time in a blue-collar construction site context.[235] Charles Wolfe supposedly engaged in same-sex harassment against Kerry Woods, a male construction worker in an all-male crew, by referring to Woods "in raw homophobic epithets and lewd gestures."[236] The parties did not claim that Woods or Wolfe is homosexual or effeminate; abundant evidence existed, however, that Wolfe was "a world-class trash talker and the master of vulgarity in an environment where these characteristics abound."[237] Wolfe claimed that Woods used "Wet Ones" when he used the toilet, but that is the only alleged unmanly characteristic of which Woods was accused.[238] In light of the offensive abuse and harassment, all based on sexual vulgarity, the jury sympathized with Woods and awarded a substantial jury verdict, and the district court granted injunctive relief.[239] The Fifth Circuit vacated the judgment, stating that Title VII is not a general civility code and that it is not the "business of the federal courts generally to clean up the language and conduct of construction sites."[240]

Woods began work as an ironworker for Boh in November 2005.[241] Boh assigned Woods "to a maintenance crew for the Twin Spans bridge [project] between New Orleans and Slidell, which had been repaired and returned to service after Hurricane Katrina."[242] By April 2005, Wolfe, a crew superintendent, was regularly harassing Woods by calling him names, such as "faggot" and "princess," and approaching "him from behind to simulate having sexual intercourse while Woods was bent over to perform [his] duties."[243] Wolfe apparently exposed himself to Woods numerous times.[244] Woods complained to the crew foreman about the way Wolfe spoke to Woods.[245] Nevertheless, no evidence existed that either man was homosexual or attracted to homosexuals.[246]

During the time of the alleged harassment, Woods asked to review his time records and possibly other employee time records.[247] An onsite inspector believed that asking to review other employees' time records was a terminable

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235. EEOC v. Boh Bros. Constr. Co., 689 F.3d 458, 458-59 (5th Cir. July 2012), *reh'g granted*, No. 11-30770, 2013 WL 1276022 (5th Cir. Mar. 27, 2013).
236. *Id.* at 459.
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.* at 460.
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id.*

offense; Wolfe notified his supervisor, Duckworth, about Woods's request.[248] Duckworth then met with Woods.[249] Woods complained in detail about Wolfe's harassment.[250] Duckworth investigated the harassment allegations and concluded that they were unprofessional but did not constitute sexual harassment.[251]

In February 2007, Boh laid off Woods based on a lack of work.[252] Woods then filed an EEOC charge claiming harassment and retaliation based on his November 2006 removal from the maintenance crew.[253] The EEOC lodged an enforcement action on behalf of Woods, and after a trial, the jury awarded $200,000 in compensatory damages and $250,000 in punitive damages in favor of Woods.[254] The district court reduced the punitive damages award to $50,000 based on Title VII's compensatory/punitive damages cap.[255] Boh only appealed the jury's decision on the same-sex harassment claim.[256]

Before the appeals court, the EEOC argued that sex stereotyping by a member of the same sex constitutes sex harassment under Title VII.[257] The EEOC's theory was that Wolfe harassed Woods because Woods did not conform to male sex stereotypes.[258] Boh, however, insisted that "sex stereotyping" is not one of the three evidentiary paths to establish same-sex harassment.[259] The three paths outlined by the United States Supreme Court were enumerated in *Oncale*. First, the plaintiff may produce credible evidence that the harasser was homosexual and that harassment is based on sex.[260] Second, the harasser may be motivated by general hostility to the presence of members of the same sex in the workplace.[261] Third, a plaintiff may offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.[262]

The Fifth Circuit noted that it had not, post-*Oncale*, addressed the question whether the *Oncale* court's decision to enumerate three forms of same-sex harassment precludes other evidentiary paths, such as sex stereotyping.[263] The Fifth Circuit's prior cases had only dealt with the first path, namely, proposals of sexual activity.[264] Other courts have allowed sex-stereotyping

248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.* (citing 42 U.S.C. § 1981a(b)(3)(D) (2006)).
256. *Id.*
257. *Id.* at 461.
258. *Id.*
259. *Id.*
260. *Id.* (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80-81 (1998)).
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*; *see* Cherry v. Shaw Coastal, Inc., 668 F.3d 182, 185 (5th Cir. Jan. 2012), *cert. denied*, 133 S.

evidence to prove employment discrimination but have resisted allowing this evidentiary path outside of the three paths identified in *Oncale*.[265] The EEOC relied largely on Wolfe's comment that Woods used "Wet Ones" when Woods used the toilet.[266] The evidence, however, also showed that Woods was not the only target.[267] As the Fifth Circuit noted, "[M]isogynistic and homophobic epithets were bandied about routinely among crew members, and the recipients —Woods not excepted—reciprocated with like vulgarity."[268]

Here, insufficient evidence existed to support the asserted sex-stereotyping theory of same-sex harassment—Woods did not proffer sufficient evidence that Wolfe acted on the basis of gender in his treatment of Woods.[269] Given the lack of evidence, the appeals court determined that it is not necessary to decide whether a sex-stereotyping theory is cognizable in the Fifth Circuit.[270] Whatever evidentiary path a plaintiff chooses to follow, the plaintiff must always prove that the conduct at issue was not merely tinged with offensive sexual connotations but actually constituted discrimination because of sex.[271] Ultimately, the appeals court concluded that the "Wet Ones" comments were insufficient to support a sex-stereotyping theory, and as a result, the court vacated the judgment in favor of Woods on his sexual harassment claim.[272]

4. Hernandez v. Yellow Transportation, Inc.

This case involved a group of Hispanic employees at a terminal of Yellow Transportation, Inc. (Yellow) who pursued race, hostile-work-environment, and discrimination claims against Yellow.[273] The summary judgment evidence revealed that plaintiffs were subjected to crude, mean-spirited, and insulting comments during their employment.[274] The appeals court addressed the following questions: (i) whether the alleged harassing incidents constituted severe or pervasive harassment based on the plaintiffs' race and (ii) whether the Hispanic plaintiffs could rely on cross-category harassment against African-

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Ct. 162 (2012); Love v. Motiva Enters. LLC, 349 F. App'x 900 (5th Cir. 2009) (per curiam); La Day v. Catalyst Tech., Inc., 302 F.3d 474 (5th Cir. 2002).

265. *Boh Bros.*, 689 F.3d at 461. *Compare* Wasek v. Arrow Energy Servs., Inc., 682 F.3d 463 (6th Cir. 2012) (treating the three *Oncale* forms of same-sex harassment as exclusive), *with* Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874 (9th Cir. 2001) (allowing a same-sex harassment claim by a man who was "discriminated against for acting too feminine").

266. *Boh Bros.*, 689 F.3d at 463.

267. *Id.* at 462.

268. *Id.*

269. *Id.*

270. *Id.*

271. *See id.*

272. *Id.* at 463.

273. Hernandez v. Yellow Transp., Inc., 670 F.3d 644, 649 (5th Cir. Feb. 2012), *cert. denied*, 133 S. Ct. 136 (2012).

274. *Id.*

American co-workers to support the Hispanic plaintiffs' discrimination and harassment claims.[275]

For example, Plaintiff Hernandez had an altercation with a white co-worker, threatened the co-worker, and was ultimately terminated from employment because he violated the company's policy against workplace violence.[276] The co-worker, who was not a passive victim in the altercation and who exchanged derogatory epithets with Hernandez, received a lesser penalty.[277]

"To support his hostile work environment claim, Hernandez [maintained that] he either personally experienced or witnessed race-based and non-race-based harassment while employed at Yellow."[278] After a considerable amount of discovery, Yellow prevailed against Hernandez on his discrimination, retaliation, and hostile-work-environment claims.[279] Hernandez and another co-plaintiff alleged on appeal that the district court improperly refused to consider all of the evidence of harassment, including harassment suffered by other Hispanics and by African Americans and instances of non-race-based harassment.[280]

Hernandez insisted that he was called a racially derogatory name on one occasion and that once viewed a poster or letter that was derogatory about Hispanics.[281] Hernandez's co-worker, in turn, supposedly heard a derogatory reference about Hispanics over a company radio on one occasion.[282] Reviewing these incidents, the district court concluded that they were plainly offensive to Hispanic persons; the incidents did not support a hostile-work-environment claim, however, because they were too few and isolated and because they occurred over more than a "decade of employment."[283] The district court determined that these incidents standing alone did not constitute severe or pervasive racial harassment as a matter of law.[284]

Moreover, the district court rejected much of the evidence Hernandez and his co-worker presented to support their harassment claims.[285] For instance, the district court discounted as irrelevant Hernandez's incident in which a co-worker threatened him with a knife because no evidence supported a finding that the incident was motivated by race discrimination.[286] Indeed, the evidence

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275. *See id.* at 649, 653.
276. *Id.* at 649.
277. *Id.*
278. *Id.* Several other plaintiffs lodged discrimination, retaliation, and hostile-work-environment claims; this Article focuses on Hernandez's hostile-work-environment and race-discrimination claims under Title VII, however, and does not discuss the other plaintiffs' claims. *See id.*
279. *Id.* at 650.
280. *See id.*
281. *Id.* at 652.
282. *Id.*
283. *Id.*
284. *See id.*
285. *Id.*
286. *Id.*

revealed that Hernandez and the knife-wielding co-worker had a long-running dispute that would eventually lead to the company's decision to discipline both men.[287] The district court also rejected a wide range of behaviors towards Hernandez and his co-plaintiff because no evidence existed that the actions were taken based on race.[288] Finally, the court rejected—and the appeals court affirmed the rejection of—Hernandez's attempt to rely on events that he did not personally experience or that were directed to persons of a different racial background—namely, African-American employees.[289]

In the court's view, Hernandez and his co-plaintiff produced evidence of specific incidences of workplace hostility toward African-American employees; however, the incidents were not "physically threatening or humiliating" to Hernandez and his co-plaintiff, nor did the harassment "unreasonably interfere[] with [their] work performance."[290] The Fifth Circuit reasoned that the evidence "offered of a hostile [work] environment for African-American employees did not transform what was an otherwise insufficient case of a hostile work environment experienced by these two Hispanic employees into one that could survive summary judgment."[291] Finally, the appeals court refused to "consider the various incidents of harassment not based on race."[292] Distinguishing other Fifth Circuit decisions, the appeals court reasoned that Hernandez and his co-plaintiff failed to establish a nexus between the alleged non-race-based incidents and their race to support a finding that the "non-race-based harassment was part of a pattern of race-based harassment."[293] Nevertheless, the appeals court reasoned that evidence of cross-category discrimination might be relevant when evidence exists to provide a sufficient correlation between the kinds of discrimination a plaintiff claims and that directed at others of a different ethnic background.[294]

D. ADA Case—EEOC v. Service Temps, Inc.

While the Fifth Circuit decided several ADA cases during the 2011-2012 time frame, most of them involved pre-Americans with Disabilities Act Amendments Act (ADAAA) of 2008 case law.[295] Accordingly, this Article does not discuss pre-ADAAA cases—causes of action arising before January 1, 2009. Nevertheless, the *Service Temps* decision contains informative lessons

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287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* at 654 (alterations in original) (quoting Ramsey v. Henderson, 286 F.3d 264, 268 (5th Cir. 2002)) (internal quotation marks omitted).

291. *Id.*

292. *Id.*

293. *Id.*

294. *See id.* at 653.

295. *See, e.g.*, Hale v. King, 642 F.3d 492, 499 (5th Cir. 2011) (per curiam) (deciding whether prison officials were entitled to sovereign immunity for violating the ADA prior to the enactment of the ADA Amendments Act of 2008); *see also* 42 U.S.C. § 12101 (2006 & Supp. 2009).

(not good for the employer) for employment law counsel when preparing responsive pleadings and motions.

Service Temps is yet another case in which the employer appears to have exercised poor strategy and judgment in proceeding to trial to defend against a discrimination claim. In short, the jury ruled in favor of the ADA plaintiff because the employer, a corporate staffing company, violated the ADA by refusing to let a deaf woman apply for a warehouse job.[296] Hence, the jury awarded her back pay, compensatory relief, and punitive damages.[297]

The staffing company raised five points on appeal, ranging from jurisdiction to jury instructions, and lost on each point.[298] The case stemmed from an online posting in which the staffing company looked to place an employee for a stock clerk position to package cosmetics for its client, Tuesday Morning.[299] Plaintiff Moncada was deaf from birth, and she arranged for an interpreter to meet her at the job site to assist her in applying for the job.[300] Unfortunately, the staffing company representative, Carl Ray, told her that she could not apply for the position because she was deaf and that the warehouse position was too dangerous for her.[301]

Moncada attempted to explain that she had no problem working in warehouses in the past and had no trouble communicating.[302] Nevertheless, Ray persisted and stated that she could not apply.[303] Moncada then filed an EEOC charge.[304] Service Temps responded by "stating its willingness to 'assist Ms. Moncada in her job search, assuming that [it could] in fact communicate.'"[305] Shortly thereafter, the EEOC issued an adverse determination against Smith for turning Moncada away at the job site in violation of the ADA.[306]

During conciliation discussions, the parties traded settlement offers, but they did not reach an agreement.[307] The EEOC, as part of the settlement discussions, did not communicate Service Temps's alleged offer to help Moncada find a job if she could communicate.[308] Mediation also failed.[309] After the EEOC filed its lawsuit, Service Temps, in its answer, "generically denied" that all conditions to filing suit had been satisfied.[310] Service Temps,

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296. EEOC v. Serv. Temps, Inc., 679 F.3d 323, 327-29 (5th Cir. Apr. 2012).
297. *Id.* at 329.
298. *Id.* at 327.
299. *Id.*
300. *Id.* at 327-28.
301. *Id.* at 328.
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.*

however, did not specifically plead that the EEOC had failed to conciliate in good faith by failing to communicate its settlement offer to Moncada.[311] A key issue before the appeals court was whether Service Temps was entitled to lodge a "failure to conciliate" defense based on its generic failure to satisfy conditions precedent defense.[312]

The district court did not allow Service Temps to amend its answer to plead a specific failure to conciliate defense because it waited over three months after the pleading amendment deadline to pursue its amended defense.[313] The Fifth Circuit concluded that the district court did not abuse its discretion in denying the amendment.[314] In the appeals court's view, Service Temps could have raised its defense long before the pleadings deadline; additionally, the appeals court explained that Service Temps failed to conduct discovery until two months after the motion for leave to amend deadline.[315] As the court recognized, Service Temps "dragged its feet on discovery and [could not] explain why."[316] As a result, the court refused to allow Service Temps to use a summary judgment motion to lodge a belated failure to conciliate defense that it should have pleaded in a timely amended answer.[317]

Service Temps reveals that labor and employment defense counsel must be vigilant to pursue its defenses and *to plead them specifically* in timely filed pleadings.[318] Counsel must not ignore the scheduling deadlines and, in turn, should work diligently to pursue the company's defense up front and develop the factual basis to support its defenses.[319]

E. FMLA Cases

In two cases, the Fifth Circuit affirmed summary judgment for the employer in the FMLA setting based on the plaintiffs' failure to produce specific evidence of discriminatory or retaliatory treatment.[320]

1. Amsel v. Texas Water Development Board

Amsel sued employer Texas Water Development Board (TWDB) for disability discrimination under the ADA and Rehabilitation Act, age discrimination under the ADEA, and retaliation under the FMLA.[321] TWDB is

311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.* at 339.
315. *Id.* at 333-35.
316. *Id.* at 334.
317. *Id.*
318. *See id.* at 335.
319. *See id.*
320. *See infra* Part II.E.1-2.
321. Amsel v. Tex. Water Dev. Bd., 464 F. App'x 395, 396 (5th Cir. Mar. 2012) (per curiam).

a state agency providing water planning, financial, and technical assistance to the State of Texas.[322] Amsel worked in various positions with TWDB from 1997 to 2007.[323] From 1997 to 2005, he worked in the IT Group as a Systems Analyst.[324] Amsel suffered from a host of medical conditions, including ischemic heart disease, class IV angina, and major digestive disorder.[325] TWDB provided telecommuting accommodations to Amsel designed to allow him to work despite his health difficulties.[326] Most of his conditions stemmed from a 1992 quadruple coronary bypass and cancer in 1993.[327] These conditions apparently limited "Amsel's ability to walk, bend, and engage in daily tasks."[328] Amsel was rendered homebound by symptoms of his conditions, including indigestion, vomiting, reflux, and dumping reflex.[329]

The company identified Amsel's position as one of four to outsource in August 2004.[330] As a result, Amsel became additionally stressed.[331] In response, his primary care physician recommended a flexible position with reduced stress to allow him to continue to telecommute.[332] Amsel met with Robert Ruiz, Human Resources Director, concerning the primary care physician's recommendation.[333] Ruiz also met with the Director of Administration about creating a new position for Amsel.[334] The director "determined that Amsel qualified to fill a back-up role to a TWDB employee in another department."[335] Accordingly, TWDB offered the position to Amsel but expressed concern about his health and suggested that he may want to apply for disability benefits.[336] The new position would require regular office hours as telecommuting was not an option at that time.[337] Amsel accepted the position.[338]

Thereafter, in March 2006, Amsel complained about having to work eight hours in the office and mentioned that his office was moved several times.[339] TWDB maintained that Amsel only needed to confirm hours in the office because his job was customer-service based and the team needed consistency to

322. *Id.* at 397.
323. *Id.*
324. *Id.*
325. *Id.*
326. *Id.* at 397-98.
327. *Id.* at 397.
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.*
336. *Id.*
337. *Id.*
338. *Id.*
339. *Id.*

serve its client base.[340] TWDB still allowed Amsel to telecommute with approval but ultimately reduced that time from two hours to one hour a day.[341] In late May 2006, TWDB granted Amsel FMLA leave due to his bronchitis.[342] In January 2007, Amsel exhausted his domestic medical options and traveled to Thailand to receive cardiac stem cell treatment.[343] Approximately four months later, the company informed Amsel that his job would be eliminated.[344]

The Fifth Circuit recognized that TWDB provided various accommodations over a ten-year period: TWDB allowed Amsel to telecommute, provided a flexible work schedule, and created a position for him when stress enhanced the symptoms of his conditions; Amsel was a qualified individual with a disability for most of his employment but was unable to work with reasonable accommodation in last few years.[345] Indefinite leave is not a reasonable accommodation. "Team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance."[346] It was undisputed that Amsel could not perform essential job functions *at the time* of his dismissal; therefore, he was not a qualified individual with a disability.[347]

Regarding Amsel's FMLA claim, the court noted that he "was no longer eligible for FMLA coverage at the time of his discharge."[348] FMLA retaliation protection does not apply to an employee's FMLA leave inquiry when the employee is not eligible for FMLA leave.[349] Amsel's FMLA leave ended more than two months before his dismissal, and standing alone, the two month temporal proximity between the end of his FMLA leave and his discharge did not satisfy the "causation" element of the claim.[350] Further, the undisputed facts revealed that no causal relationship existed between his use of FMLA leave and his discharge.[351] The appeals court discussed several cases for the proposition that a three to four month period does not satisfy the causation requirement in an FMLA retaliation case.[352] Rather, the court requires "very close" proximity between the protected conduct and the adverse employment action to raise an inference of retaliatory treatment.[353] Thus, timing alone will

340. *Id.*
341. *Id.* at 397-98.
342. *Id.* at 398.
343. *Id.*
344. *Id.*
345. *Id.* at 399-401.
346. *Id.* (quoting Hypes *ex rel.* Hypes v. First Commerce Corp., 134 F.3d 721, 727 (5th Cir. 1998) (per curiam)) (internal quotation marks omitted).
347. *Id.*
348. *Id.* at 401.
349. *Id.* at 401 n.7.
350. *Id.* at 402.
351. *Id.*
352. *Id.* at 402 n.8.
353. *Id.* at 402.

not always be enough to raise a fact issue on the causation element of a[n] FMLA plaintiff's retaliation prima facie case."[354]

2. Smith v. Southwestern Bell Telephone Co.

Smith pursued a retaliation claim against Southwestern Bell under the FMLA, alleging that the company terminated her employment based on her decision to take FMLA leave.[355] To support her claim, Smith referenced comments made by her supervisor, including calling her the "FMLA queen," and her supervisor's refusal to give her the PIN number necessary to apply for a higher paying job unless she came to work for three months without taking FMLA leave.[356] The district court granted summary judgment in favor of Southwestern Bell, and the Fifth Circuit affirmed.[357] The appeals court concluded that because Southwestern Bell had articulated a legitimate, non-discriminatory reason for Smith's employment termination—namely, her improper treatment of a customer on a service phone call—Smith could only survive summary judgment if she established that the reason was a pretext for discrimination.[358] Smith's self-serving affidavit, without more, was not enough to defeat Southwestern Bell's summary judgment motion, "particularly one supported by plentiful contrary evidence."[359] The appeals court also reasoned that an e-mail from an administrative manager asking employees to report fellow employees who abuse FMLA leave did not, as Smith asserted, evidence a hostile culture towards FMLA leave.[360] The e-mail did not constitute competent evidence of a discriminatory motive because the e-mail only sought to identify those employees who *abused* FMLA leave.[361] Moreover, the e-mail was largely immaterial to Smith's case because it was not sent "by a person 'primarily responsible for the adverse employment action or by a person with influence or leverage over the formal decision maker.'"[362] Finally, Southwestern Bell's offer to allow Smith to retain her job on a "[l]ast [c]hance" basis negated any inference of a discriminatory motive.[363]

354. *See id.* (citing Swanson v. Gen. Servs. Admin., 110 F.3d 1180, 1188 n.3 (5th Cir. 1997)).
355. Smith v. Sw. Bell Tel. Co., 456 F. App'x 489, 490 (5th Cir. Jan. 2012) (per curiam).
356. *Id.*
357. *Id.*
358. *Id.* at 492.
359. *Id.*
360. *Id.* at 492-93.
361. *Id.*
362. *Id.* (quoting Laxton v. Gap Inc., 333 F.3d 572, 583 (5th. Cir. 2003)).
363. *Id.* at 491, 493 (internal quotation marks omitted).

F. Plaintiff's Perjury in Title VII Case Bars Discrimination Claim—Brown v. Oil States Skagit Smatco

The *Brown* decision exemplifies the Fifth Circuit's view that a Title VII discrimination plaintiff will not be allowed to make representations in one lawsuit (personal injury lawsuit) and, thereafter, contradict his earlier testimony to support his Title VII claim.[364] Brown asserted racial-harassment and constructive-discharge claims against his former employer, Oil States, insisting that his co-workers "made racially derogatory remarks to him on a daily basis and subjected him to racial graffiti and the display of a noose."[365] He also maintained that Oil States "subjected [him] to life-threatening activity, such as 'heavy plates and pipes being dropped near him.'"[366]

In a personal injury lawsuit that Brown filed four months before he filed his Title VII lawsuit, "[he] testified that he left his job at Oil States solely because of back pain related to a car accident."[367] Brown also testified that he worked on light duty with Oil States for a few months and that his back pain became so bad that he was forced to quit.[368] He never mentioned racial harassment as a reason for his resignation from the company.[369] Nevertheless, approximately four months later, he testified in his Title VII lawsuit that his only reason for leaving Oil States was racial harassment, including terms such as "niggers" and "monkeys" directed at him on a daily basis.[370] Accordingly, Brown contradicted his testimony in the personal injury action and never mentioned his back pain.[371]

After Oil States discovered the contradictory deposition testimony in the personal injury lawsuit, the company filed a motion for sanctions against Brown and his attorney.[372] Oil States asked the court to dismiss Brown's lawsuit based on his blatant misconduct in providing contradictory testimony or, alternatively, to dismiss his constructive discharge claim and order him to pay Oil States' attorneys' fees.[373] Brown admitted that he had provided inconsistent testimony and agreed to dismiss his constructive discharge claim; however, he insisted that the dismissal of his racial harassment claim was too harsh of a penalty.[374]

The Fifth Circuit concluded that Brown "[lied] under oath" and "deceitfully provided conflicting testimony in order to further his own pecuniary interests in two lawsuits."[375] The appeals court reasoned that

364. *See* Brown v. Oil States Skagit Smatco, 664 F.3d 71 (5th Cir. Dec. 2011) (per curiam).
365. *Id.* at 73.
366. *Id.*
367. *Id.*
368. *Id.* at 74.
369. *Id.* at 75.
370. *Id.* at 74-75 (internal quotation marks omitted).
371. *Id.* at 75.
372. *Id.*
373. *Id.*
374. *Id.*
375. *Id.* at 78.

Brown's conduct undermined the integrity of the judicial process and constituted fraud upon the court.[376] Accordingly, the appeals court affirmed the district court's death penalty sanction because the dismissal of Brown's complaint with prejudice was the only "appropriate sanction commensurate with Brown's serious misconduct."[377] Relying on deterrence and institutional integrity rationales, the appeals court decided that the death penalty sanction against Brown was proper and that any lesser sanction would be futile.[378] In the appeals court's view, Brown had plainly committed perjury, and it was an "affront to the courts and thwart[ed] the administration of justice."[379]

III. NLRA AND FLSA CASES

In addition to the plethora of discrimination and retaliation cases the Fifth Circuit addressed, the appeals court also decided several noteworthy cases under the NLRA and FLSA during the survey period.

A. National Labor Relations Act Cases

1. El Paso Electric Co. v. NLRB

In *El Paso Electric Company v. NLRB*, the employer challenged a decision by the National Labor Relations Board (NLRB or Board) that it had violated the National Labor Relations Act (NLRA) by unilaterally changing various work rules and policies without bargaining with the union, disciplining employees based on the changed policies, and failing to bargain in good faith with the union over the closure of a facility.[380] In a 2–1 decision, the Fifth Circuit majority emphasized that the court applies a deferential standard of review to NLRB factual determinations and that it "would uphold a Board decision 'if it is reasonable and supported by substantial evidence on the record as a whole.'"[381]

Next, turning to the unilateral implementation of work rules and disciplinary actions taken based on those rules, the court majority stated that an employer violates § 8 of the NLRA by unilaterally implementing new work rules that constitute a material, substantial, and significant change in terms and conditions of employment and by subjecting employees to discipline for violating those rules.[382] The court proceeded to analyze each of the work rules

376. *Id.*
377. *Id.* at 80.
378. *Id.* at 79.
379. *Id.* at 80.
380. El Paso Elec. Co. v. NLRB, 681 F.3d 651, 656 (5th Cir. May 2012).
381. *Id.* (quoting Strand Theatre of Shreveport Corp. v. NLRB, 493 F.3d 515, 518 (5th Cir. 2007)).
382. *Id.* at 657 (citing Miss. Power Co. v. NLRB, 284 F.3d 605, 615 (5th Cir. 2002), and Peerless Food Prods., 236 N.L.R.B. 161 (1978)). The work rules, disciplinary actions, and bargaining at issue were to (i) change—allegedly—the company's policy allowing employees to aggregate their breaks rather than taking

challenged by the Board; held that the changes were material, substantial, and significant; and affirmed the Board's findings that the changes were unilaterally implemented in violation of § 8(a)(1) and (5) of the Act.[383] The court further rejected the employer's argument that, for disciplinary action based on a unilaterally implemented work rule to violate § 8(a)(5), it must be based *solely* on the rule itself, and it held that, under existing Board law, the disciplinary action need only be based *in part* on the changed rule to constitute a violation.[384]

Finally, the court addressed the issue of the employer's failure to bargain over the effects of closing one of its facilities.[385] In determining whether a § 8(a)(5) violation occurred with respect to this duty, the court focused on (1) when the employer first notified the union of the decision to close and (2) whether the notification "allowed for meaningful bargaining over the effects of the closure at a meaningful time."[386] The employer argued that it did meet and bargain with the union over the effects of the closure.[387] Nevertheless, the court affirmed the Board's rejection of this argument because the first time the employer met with the union to discuss the issue was seventeen minutes before it announced the decision to the employees (albeit several weeks before the closure itself was to take place) and the same day it informed the employees that they would be transferred based on the closure.[388] Ultimately, the court determined that the Board's decision was based upon a credibility determination in favor of the union's business manager.[389] According to the court, the Board properly relied on the business manager's testimony that the employer had informed the union that various aspects of the employees' benefits upon closure were not up for discussion.[390] Because the court does not make credibility determinations or reweigh the evidence, it determined that the Board's conclusion was supported by substantial evidence.[391]

This case, however, is more remarkable for Judge Clement's dissenting opinion than for the majority's technical application of the substantial evidence review standard. In the first sentence of her dissent, Judge Clement stated, "This case provides six examples of why companies struggle to remain competitive and efficient when they are unable to enforce basic rules of the

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three separate breaks; (ii) terminate an employee based in part on his violation of the changed break time policy; (iii) change a disciplinary procedure by placing employees on performance improvement plans for attendance violations; (iv) change employees' ability to work on co-workers' accounts; (v) fail to bargain over the effect of a facility closure; and (vi) change the boot replacement policy. *Id.* at 658-70.

383. *Id.* at 658-60, 662-65, 668-70.

384. *Id.* at 661-62.

385. *Id.* at 666.

386. *Id.* (citing First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 679 (1981), and E.I. DuPont de Nemours & Co. v. Sawyer, 517 F.3d 785, 793-94 (5th Cir. 2008)).

387. *Id.* at 667.

388. *Id.* at 667-68.

389. *Id.* at 667.

390. *Id.*

391. *Id.* at 667-68.

workplace under the fear of being sued for labor violations."[392] She then proceeded to disagree with the six violations found by the Board and affirmed by the court on practical, legal, and substantial evidence grounds.[393] For example, with respect to the finding that a "new" requirement that employees show their boots to a company official before being reimbursed for new boots was a material change in terms and conditions of employment, Judge Clement opined,

> If such a minor inconvenience or change to operating procedure results in a labor violation as a change in "terms and conditions of employment" in light of the fact that there was no evidence that [the company] denied any specific employee's request for new boots, employers effectively have no control over how to manage their day-to-day business operations.[394]

Judge Clement concluded, "In lieu of common sense and attempting to abide by the basic rules of the workplace we all learn in school or in a first job, employees and companies now resort to allegations of and defenses to labor violations, respectively."[395] The result, in Judge Clement's opinion, is that companies are placed in a situation in which they are "overly constrained" by possible liability for labor violations.[396] Thus, Judge Clement would have reversed the Board's decision with respect to the six found violations.[397]

The back-and-forth between the majority and the dissent reflects an emerging debate among the court's conservative and more liberal judges about how searching the court's review of an NLRB decision should be and about the role the NLRA should play in today's society. It illustrates that even though the substantial evidence standard of review is ostensibly narrow, the court retains some flexibility in applying it. Thus, the court may give great deference to the Board's decisions, as the majority did here, or it may more carefully search the record and rely on evidence that detracts from the challenged decision to reverse those decisions, as Judge Clement would have done.[398]

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392. *Id.* at 670 (Clement, J., dissenting).
393. *Id.* at 670-77.
394. *Id*. at 677.
395. *Id.*
396. *Id.*
397. *See id.*
398. *See*, *e.g.*, Oaktree Capital Mgmt, L.P. v. NLRB, 452 F. App'x 433, 449-53 (5th Cir. Sept. 2011) (Jones, C.J., dissenting) (per curiam) (providing a similar dissent in which Chief Judge Jones dissented on the issue of whether Oaktree was part of a single employer with a resort operator and another company because, without regard to the substantial evidence standard of review, application of the single employer theory to Oaktree ran afoul of the Supreme Court's efforts to enforce corporate separateness and advanced no significant labor law purpose).

2. McKnight v. Dresser, Inc.

The Fifth Circuit addressed the preemptive scope of § 301 of the Labor Management Relations Act (LMRA) in *McKnight v. Dresser*.[399] McKnight and several other plaintiffs filed suit in Louisiana state court alleging that Dresser failed to maintain a safe work place in violation of Louisiana law.[400] Dresser removed the case to federal court under § 301 of the LMRA, arguing that the plaintiffs' state law claims could not be adjudicated without interpreting the applicable collective bargaining agreement, which contained provisions related to workplace safety.[401] Dresser further insisted that the plaintiffs' claims were time barred under the LMRA's applicable statue of limitations.[402] The plaintiffs filed a motion to remand, but the district court denied the remand motion on preemption grounds and dismissed plaintiffs' claims as time barred.[403]

On appeal, the plaintiffs maintained that, even though the applicable collective bargaining agreement contained provisions regarding workplace safety, this did not mean that the court had to interpret the agreement to adjudicate their workplace safety claims; rather, they were bringing independent claims under Louisiana law, and all the court had to do was look to Louisiana law to resolve their claims.[404] Dresser countered that because the collective bargaining agreement did more than simply acknowledge the duty of providing a safe workplace and instead helped define the scope of that duty, the court would have to interpret the agreement to resolve the plaintiffs' claims.[405] The Fifth Circuit rejected Dresser's argument, however, because the case on which it relied arose under Texas law, which allows employees to waive state law workplace safety claims by agreement.[406] Louisiana law, by contrast, does not allow employees to waive these claims by agreement.[407]

In conclusion, under Louisiana law, plaintiffs could have brought claims in tort or under contract, and they chose to sue in tort without reference to the collective bargaining agreement.[408] Because their claims could be resolved by

399. McKnight v. Dresser, Inc., 676 F.3d 426, 428-29 (5th Cir. Mar. 2012). The Fifth Circuit resolved another case arising under § 301 of the LMRA. *See* Ominski v. Northrop Grumman Shipbuilding, Inc., 466 F. App'x 341, 345 (5th Cir. Apr. 2012) (per curiam). There, the plaintiff claimed that the company violated § 301 of the LMRA by discharging her in violation of a collective bargaining agreement and that the union breached its duty of fair representation towards her by refusing to file a grievance regarding her discharge. *Id.* at 346, 348. The court upheld the district court's grant of summary judgment on these issues based on a plain reading of the collective bargaining agreement. *Id.* at 347-48.

400. *McKnight*, 676 F.3d at 428.

401. *Id.*

402. *Id.* at 428-29.

403. *Id.* at 429.

404. *Id.* at 431 (citing Arceneaux v. Amstar Corp., No. 03-3588, 2004 WL 574718 (E.D. La. Mar. 22, 2004)).

405. *Id.* at 431-32 (citing Espinoza v. Cargill Meat Solutions Corp., 622 F.3d 432, 445 (5th Cir. 2010)).

406. *Id.* at 432.

407. *Id.*

408. *Id.* at 434.

resorting solely to Louisiana tort law, their claims were not preempted by § 301, and the Fifth Circuit reversed the district court's decision.[409]

B. FLSA Cases

1. Gray v. Powers

In *Gray v. Powers*, the appeals court addressed the issue of when an individually named defendant is a proper defendant to an FLSA claim.[410] Gray sued his employer, a nightclub, and one of the members of the limited liability company that owned it, Powers, for violating the minimum wage provisions of the FLSA.[411] Gray admitted in his deposition, however, that Powers was not involved in the club's day-to-day operations.[412] Further, Gray could only remember two occasions when Powers directed his work (both of which occurred while Powers was visiting the club socially): once when he told Gray that Gray was doing a good job and once when Powers asked Gray to serve specific customers.[413]

The Fifth Circuit first reiterated that it applies the "economic realities" test to determine whether an employer/employee relationship exists under the FLSA.[414] Under this test, the court considers whether the person alleged to be an employer "(1) possessed the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records."[415] In cases when plaintiffs claim more than one employer, the test must be applied to each claimed employer individually.[416]

The appeals court then proceeded to apply the four-part test to Powers.[417] Gray argued that because Powers was part of the ownership group, he had the inherent power to hire and fire Gray.[418] As evidence, Gray noted that Powers and the other two members of the ownership group hired and fired the general manager.[419] The court rejected this theory, however, because participation in a joint decision about the general manager proved nothing about whether Powers

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409. *Id.*
410. Gray v. Powers, 673 F.3d 352, 354 (5th Cir. Feb. 2012).
411. *Id.* at 353.
412. *Id.* at 354.
413. *Id.*
414. *Id.* (quoting Watson v. Graves, 909 F.2d 1549, 1556 (5th Cir. 1990)) (internal quotation marks omitted).
415. *Id.* at 355 (quoting Williams v. Henagan, 595 F.3d 610, 620 (5th Cir. 2010) (per curiam)) (internal quotation marks omitted).
416. *Id.*
417. *See id.* at 355-57.
418. *Id.* at 355.
419. *Id.*

had the ability to control the employment terms of lower-level employees.[420] Significantly, the court rejected the idea that merely being an officer or owner of an employer, without more, is sufficient to confer employer status on an individual under the FLSA.[421]

Regarding the second element, Gray insisted that because Powers acted with the others in the ownership group to hire the general manager, they cannot escape the duties owed to lower-level employees by delegating certain duties to the general manager.[422] The court rejected this argument too, however, and held that Gray failed to satisfy the second element because he failed to adduce any evidence that Powers supervised him, controlled his work schedule, or controlled his employment conditions.[423] The only specific incidents on which Gray relied as evidence of control occurred while Powers was at the club socially, and further, Gray admitted that he considered the general manager to be his boss.[424]

Next, with respect to the third element, Gray maintained that Powers's ability to sign checks and the fact that bartenders sometimes told him how much money they made in tips during his few trips to the club constituted evidence that Powers determined their rate or method of pay.[425] Again, the appeals court concluded that this evidence, without more, was insufficient to overcome summary judgment.[426]

Finally, no evidence existed that Powers or anyone else maintained employment records, so this factor did not benefit Gray, who had the burden of proof.[427] In sum, Gray attempted to impute employer status to Powers by virtue of Powers's position, namely, being a member of the limited liability company that owned Gray's employer.[428] The Fifth Circuit rejected this effort, however, and instead held that each person who is claimed to be an employer must satisfy the four-factor economic-realities test.[429]

2. Martin v. Spring Break '83 Productions, L.L.C.

In *Martin v. Spring Break '83 Productions, L.L.C.*, the Fifth Circuit addressed two issues: (1) whether the named individual defendants were statutory employers under the FLSA and (2) whether plaintiffs' claims under the FLSA were released in a settlement agreement between the employees'

420. *Id.*
421. *Id.* at 355-56.
422. *Id.* at 356.
423. *Id.*
424. *Id.* at 356-57.
425. *Id.* at 357.
426. *Id.*
427. *Id.*
428. *See id.* at 354-57.
429. *Id.* at 357.

union and the employer.[430] Relying on *Gray v. Powers*,[431] the appeals court once again applied the economic-realities test to the question of whether each individual defendant was an FLSA employer and held that the individual defendants failed to satisfy this test.[432]

More significantly, the court held that a private settlement agreement and release between the employees' union and the employer waived the employees' FLSA claims, even though it was not supervised by the Department of Labor (DOL) or approved by a court.[433] The settlement agreement stated the following:

> The Union on its own behalf and on behalf of the IATSE Employees agrees and acknowledges that the Union has not and will not file any complaints, charges or other proceedings against Producer, its successors, licenses and/or assignees, with any agency, court, administrative body, or in any forum, on condition that payment in full is made pursuant to the terms of this Settlement Agreement.[434]

The employees, including Martin, admittedly received full payment for their claims under the settlement agreement and cashed the checks they had received.[435]

Nonetheless, Martin, on behalf of himself and others similarly situated, argued that the settlement agreement did not bar employees from pursuing relief under the FLSA because, as a general rule, individuals may not privately settle FLSA claims but, instead, that such settlements had to be supervised by the DOL or approved by a court.[436] The Fifth Circuit disagreed with this argument.[437]

Instead, it held that when a bona fide dispute exists between employees and their employer over the number of hours for which they are owed at their set rate of pay, the parties may enter into an enforceable resolution of the dispute provided that there is not a compromise of substantive FLSA rights.[438] Thus, because the settlement agreement in *Spring Break '83* resolved a bona fide dispute about hours worked and not the rate at which Martin and other employees were to be paid for those hours, the settlement agreement was enforceable in the absence of DOL or court approval.[439]

This decision does not ease the requirements for entering into settlement agreements that compromise substantive FLSA rights, such as whether an

430. Martin v. Spring Break '83 Prods., L.L.C., 688 F.3d 247, 250 (5th Cir. July 2012).
431. *Gray*, 673 F.3d at 354-55.
432. *Martin*, 688 F.3d at 251.
433. *Id.* at 256.
434. *Id.* at 254.
435. *Id.*
436. *Id.*
437. *See id.* at 254-56.
438. *See id.* at 255.
439. *See id.* at 256.

employee was misclassified as exempt from minimum wage and overtime requirements or whether the employee's regular rate of pay was miscalculated.[440] Nevertheless, it could allow parties to settle FLSA disputes involving alleged off-the-clock work when the only question is the number of hours employees in fact worked off-the-clock without seeking DOL involvement or court approval. As a result, in these latter types of disputes, litigants have a better chance at keeping the terms of the settlement confidential, and they can avoid the time and expense associated with drafting the requisite motions and attendant settlement hearings.

IV. CONCLUSION

The Fifth Circuit addressed a wide variety of employment cases during the survey period; however, the court was confronted with an inordinate number of discrimination, retaliation, and harassment cases, which produced a series of pro-plaintiff published opinions on key topics for labor and employment law practitioners. Moreover, although the Fifth Circuit's decisions under the NLRA and related statutes were not necessarily groundbreaking for their majority opinions, the dissents in these opinions have begun to reveal several fault lines between the more conservative members of the court and more recent appointees. These fault lines will likely develop further and expand to other areas of law as President Obama appoints additional judges to the appeals court. Finally, the Fifth Circuit issued several pro-defendant FLSA decisions allowing dismissal of individual defendants and making it easier to settle certain types of FLSA cases. As the complexion of the appeals court changes, practitioners should exercise caution to keep track of recent developments and trends.

440. *See id.* at 254-56.