RECENT DEVELOPMENTS IN FIFTH CIRCUIT EMPLOYMENT LAW

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A wide array of Supreme Court decisions, legislative initiatives, and even natural disasters wrought substantial change upon several different areas of Fifth Circuit employment law in the circuit's most recent annual

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term ending June 30, 2010. The court spent the term wrestling with questions as broad as the definition of an employee and employer to highly specialized reviews of the finer points of liability under the Longshore and Harbor Workers' Compensation Act. In the process, the circuit produced more than two dozen published decisions reshaping the way employers and employees should view their rights and responsibilities.

This Article provides a summary of the most notable of these decisions in six areas of employment law covered during the survey period. These areas range from traditional mainstays like Title VII and the Fair Labor Standards Act to less common areas of development like the special rules applicable to government employers. The cases profiled here were selected based on their particular significance as either the beginnings of new Fifth Circuit doctrines or because they provide evidence of an emerging trend in the circuit.

I. AMERICANS WITH DISABILITIES ACT/AGE DISCRIMINATION IN EMPLOYMENT ACT

Effective January 1, 2009, the Americans with Disabilities Act (ADA) was amended in an effort to broaden the scope of the Act, including its definition of "disability" and its consideration of the ameliorative effects of mitigating measures or devices utilized by disabled persons.[1] Consequently, during this survey period, several cases calling for interpretation and review of these new amendments came before the Fifth Circuit.[2]

The Fifth Circuit also endeavored to apply new Supreme Court precedent in the context of the Age Discrimination in Employment Act (ADEA).[3] In 2009, the Supreme Court decided *Gross v. FBL Financial Services, Inc.*, which held that unlike Title VII, the ADEA does not authorize "mixed-motive" claims; rather, the burden of persuasion remains on the plaintiff to demonstrate that age was the "but-for" cause of the adverse employment action.[4] While the *Gross* decision is favorable to employers, its benefits will likely be short lived as Congress already has legislation underway designed to overturn the Supreme Court's interpretation.[5] Nonetheless, this legislation should bring welcomed clarification for both the plaintiff and defense bars alike in light of the proliferation of questions the Court's interpretation has produced.[6]

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1. *See* ADA Amendments Act of 2008, 42 U.S.C.A. §§ 12101-12103 (West Supp. 2010).

2. *See, e.g.*, Kemp v. Holder, 610 F.3d 231, 233 (5th Cir. June 2010); Carmona v. Southwest Airlines Co., 604 F.3d 848, 852-53 (5th Cir. Apr. 2010).

3. *See* Smith v. Xerox Corp., 602 F.3d 320, 328-30 (5th Cir. Mar. 2010).

4. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2345-46 (2009).

5. *See* Protecting Older Workers Discrimination Act, S. 1756, 111th Cong. (2009).

6. *See, e.g.*, Jackson v. Cal-Western Pkg. Corp., 602 F.3d 374 (5th Cir. Mar. 2010) (superseding prior withdrawn opinion).

A. Carmona v. Southwest Airlines Co.

Edward Carmona, who was diagnosed with a skin disease called psoriasis when he was 12 or 13 years old, began working as a flight attendant for Southwest Airlines Company (Southwest) in 1991.[7] Years later, doctors diagnosed Carmona with psoriatic arthritis, which causes painful swelling and stiffness of the joints, rendering him unable to walk or move without great pain for days at a time.[8]

Carmona accumulated several absences from work, which led Southwest to terminate his employment.[9] Carmona filed suit, claiming gender and disability discrimination.[10] On appeal, Carmona argued "that the district court erred in granting judgment as a matter of law to Southwest on his ADA claim."[11]

To prevail, Carmona needed to establish that "he was an 'individual with a disability' within the meaning of the ADA."[12] Despite the fact that the ADA was amended before Carmona's case went to trial, the Fifth Circuit declined to apply the amendments retroactively, even in light of Supreme Court precedent establishing contrary intent.[13]

Carmona also needed to establish that he was "qualified" for his job within the meaning of the ADA.[14] A qualified individual with a disability is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[15]

While regular attendance is necessary at most jobs, the evidence introduced at trial was sufficient to show that a reasonable jury could conclude that flight attendants' schedules at Southwest were extremely flexible, such that regular attendance was not a requirement of Carmona's position.[16] Carmona was able to stay within the bounds of Southwest's lenient attendance policy for seven years, despite his irregular attendance and his disability.[17] Additionally, other flight attendants who exceeded the number of allowable absences were not terminated and were presumably qualified for their jobs.[18] There was no dispute that Carmona was capable of performing the essential functions of his job as a flight attendant when he

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7. *Carmona*, 604 F.3d at 850.
8. *Id.* at 850-51.
9. *Id.* at 852-53.
10. *Id.* at 853.
11. *Id.* at 854.
12. *Id.* (citing 42 U.S.C. § 12102 (2006)).
13. *See id.* at 855-57.
14. *Id.* at 854.
15. *Id.* at 859 (quoting 42 U.S.C. § 12111(8)).
16. *Id.*
17. *Id.* at 860.
18. *Id.* at 860-61.

did show up for work.[19] Accordingly, the Fifth Circuit affirmed the jury's conclusion that Carmona was a "qualified person with a disability."[20]

Finally, Carmona needed to demonstrate that Southwest discriminated against him because of his disability.[21] Southwest asserted it fired Carmona for violating its attendance policy.[22] But, Carmona introduced evidence that other employees exceeded the absenteeism policy and were not terminated.[23] Based on the evidence, the court concluded that "a reasonable jury could have found that Southwest's proffered explanation for Carmona's discharge was false and that the true reason was his disability."[24]

The takeaways from *Carmona* are twofold: First, even considering Supreme Court precedent, the ADA Amendments Act of 2008 (ADAAA) does not apply retroactively.[25] Second, employer practices are key in determining the essential functions of a job.[26] If the employer wants regular attendance to be considered an "essential function," it must be consistent in requiring it from all employees who hold the same position as the plaintiff.[27]

B. Kemp v. Holder

Don Kemp began working at the courthouse as a court security officer (CSO) with the United States Marshals Service (USMS) in February 2001.[28] Shortly thereafter, the USMS notified him that he had failed the unaided hearing test required for the CSO position and his employment was terminated.[29] Following his termination, Kemp filed suit, alleging violations of the Americans with Disabilities Act (ADA), the Rehabilitation Act (RA), and related state laws.[30] The district court granted summary judgment in favor of the government on all claims and Kemp appealed.[31]

To prevail on ADA and RA claims, the plaintiff must establish that "(1) he is disabled within the meaning of the ADA, (2) he is qualified and able to perform the essential functions of the job, and (3) his employer fired

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19. *Id.* at 856-57.
20. *Id.* at 861.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 862.
25. *Id.* at 856-57.
26. *See id.* at 859 (finding that regular attendance was not an essential function of flight attendants' jobs, given their flexible schedule).
27. *See id.* at 860-61 (finding significant the fact that Southwest allowed other flight attendants to have irregular attendance).
28. Kemp v. Holder, 610 F.3d 231, 233-34 (5th Cir. June 2010).
29. *Id.* at 234.
30. *Id.* The RA is the federal employer's equivalent to the ADA. *See id.* The same legal standards apply to both statutes, and the same remedies are available under each. *Id.*
31. *Id.*

him because of his disability."[32] Because Kemp filed his lawsuit before the ADAAA became effective, the court affirmed summary judgment in favor of the government, once again explaining that Congress did not intend the ADAAA to apply retroactively.[33] Applying the pre-amendment definition, Kemp was not "disabled" within the meaning of the Act.[34]

Kemp also disputed the district court's conclusion that he was not "regarded" as disabled.[35] In fact, the Fifth Circuit found evidence in the record showing that the defendants were aware of Kemp's hearing impairment and his use of hearing aids when he was initially hired.[36] Further, the court noted that the Ninth Circuit had previously held that "a CSO's 'failure to meet the USMS hearing standards does not raise a genuine issue of material fact that the USMS regarded her as disabled.'"[37] Since Kemp also did not proffer any evidence to support his claim that the defendants "regarded" him as disabled, summary judgment was proper.[38]

C. Jackson v. Cal-Western Packaging Corp.

The *Jackson* case represents one of the recent opportunities for the Fifth Circuit to analyze the ADEA in the wake of the Supreme Court's decision in *Gross v. FBL Financial Services*.[39] Unfortunately, the court utilized the *McDonnell Douglas* framework to resolve the case, so it remains unclear where the ADEA standard of proof requiring a plaintiff "to show 'that age was the "but-for" cause of [his] employer's adverse action'" fits into the analysis.[40]

Wayne Jackson brought claims against his employer under the ADEA after he was terminated for violating the company's sexual harassment

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32. *Id.* at 235. "Disability" means "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." ADA Amendments Act of 2008, 42 U.S.C.A § 12102(1)-(2)(a) (West Supp. 2010). Major life activities include "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, and working." *Id.*

33. *Kemp*, 610 F.3d at 236 (citing Carmona v. Southwest Airlines Co., 604 F.3d 848, 857 (5th Cir. Apr. 2010)).

34. *Id.* In contrast to *Carmona*, Kemp's case turned on the court's refusal to retroactively apply the ADAAA definition of disability, demonstrating the plaintiff-friendly nature of the amendments and their potential effects on disability discrimination case law. *See id.*

35. *Id.*

36. *Id.* at 234-35.

37. *Id.* at 237-38 (quoting Walton v. U.S. Marshals Serv., 492 F.3d 998, 1007 (9th Cir. 2007)).

38. *Id.* at 239.

39. Jackson v. Cal-Western Pkg. Corp., 602 F.3d 374, 377 (5th Cir. Mar. 2010) (superseding prior withdrawn opinion).

40. *Id.* Although the court points to the Supreme Court's *Gross* opinion and cites the "but-for" requirement, it effectively ignores it in application in favor of deferring to the familiar *McDonnell Douglas* approach. *See id.* at 378 (citing Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2349 (2009) (explaining that the Supreme Court has not definitively resolved whether *McDonnell Douglas* applies to age discrimination cases)).

policy.[41] Jackson was sixty-nine years old when he was terminated; he was replaced by an employee who was forty-two at the time.[42] The district court granted summary judgment in favor of Cal-Western, and Jackson appealed.[43]

Since the parties did not dispute that Jackson had established a prima facie case of age discrimination, the case turned upon whether Jackson raised a genuine issue of material fact as to pretext.[44] "A plaintiff may show pretext either through evidence of disparate treatment or by showing that the employer's proffered explanation is false or unworthy of credence."[45] To discredit his employer's proffered reason for termination, Jackson pointed to (1) his own statements that he had not engaged in sexual harassment; (2) his supervisor's statement that Jackson was an "old, gray-haired fart"; (3) evidence that the company did not discipline younger employees for similar conduct; and (4) a coworker's statement that she did not perceive Jackson's conduct to be harassment.[46] The court dismissed each in turn, first explaining that Jackson's own self-serving statements were insufficient to create a triable issue of fact.[47] The court also reviewed the alleged derogatory comment made about Jackson.[48] The court explained that such comments are evidence of discrimination only if they are "1) related to the protected class of persons of which the plaintiff is a member; 2) proximate in time to the complained-of adverse employment decision; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue."[49] Since Jackson provided no evidence regarding the temporal proximity of the comment or its relation to his termination, the court determined that the comment amounted to a mere stray remark.[50]

Even applying the more lenient standards under *McDonnell Douglas*, the court affirmed summary judgment in favor of Cal-Western.[51] There can be no doubt that having applied the *Gross* "but-for" standard would have rendered the same result. Hence, the confusion about which analysis is appropriate likely had no effect here, but under different facts, the outcomes could be polarizing.[52] Most probably, the Supreme Court will be called

41. *Id.* at 376.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 378-79 (internal quotations omitted).
46. *Id.* at 379.
47. *Id.*
48. *Id.* at 380 (quoting Rubinstein v. Adm'rs of Tulane Educ. Fund, 218 F.3d 392, 400-01 (5th Cir. 2000)) (internal quotations omitted).
49. *Id.*
50. *Id.*
51. *Id.* at 378, 381 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).
52. *See, e.g.*, Culver v. Birmingham Bd. of Ed., 646 F. Supp. 2d 1270, 1271-72 (N.D. Ala. 2009) (noting *Gross*'s "but-for" causation standard for age discrimination and going so far as to force a

upon to provide further guidance on this issue in the coming years—that is, if Congress does not beat them to the punch with clarifying legislation.

II. TITLE VII

In light of the Fifth Circuit's practice of similarly analyzing ADEA and Title VII cases, the Supreme Court's decision in *Gross* has implications reaching further than just age discrimination cases. Title VII case law is also affected, and as demonstrated by the *Smith v. Xerox Corp.* case, more questions arise about the proper analysis for discrimination *and* retaliation cases generally.[53]

This survey period also presented the Fifth Circuit with opportunities to consider unique issues in Title VII case law, such as continuing violations and associational discrimination.[54]

A. Smith v. Xerox Corp.

Smith v. Xerox Corp. resolved a previously open issue in the circuit, namely that direct proof is no longer needed to earn a mixed-motive jury instruction in a Title VII retaliation case.[55] In so doing, however, the 2-1 panel created an apparent circuit split about whether the mixed-motive analysis applies at all outside of Title VII discrimination cases.[56]

Long time employee, Kim Smith, brought suit for gender and age discrimination and retaliation after she was terminated by Xerox Corporation in January 2006.[57] The jury returned a verdict for Xerox on the discrimination charges but found in favor of Smith on the retaliation claim.[58] Xerox appealed.[59]

Xerox argued on appeal that the district court erroneously instructed the jury with a "motivating factor" causation standard on Smith's retaliation claim rather than a "but-for" causation standard, thereby improperly shifting the ultimate burden of persuasion to Xerox.[60] In analyzing the issue, the

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plaintiff to choose between his Title VII claim and his ADEA claim under the notion that if the adverse action would not have been taken "but-for" the plaintiff's age, then it cannot also be caused by race or some other reason).

53. *See infra* Part II.A.

54. *See infra* Part II.B.

55. Smith v. Xerox Corp., 602 F.3d 320, 330-31 (5th Cir. Mar. 2010) (relying on Supreme Court precedent, which previously held that such a heightened showing is not required in the discrimination context).

56. *Id.* at 336 (Jolly, J., dissenting) ("[T]he majority effectively creates an unnecessary split in the circuits by failing properly to apply the Supreme Court's ruling in *Gross v. FBL Financial Services, Inc.*").

57. *Id.* at 323 (majority opinion).

58. *Id.* at 325.

59. *Id.* at 322.

60. *Id.* at 325.

court provided an extensive overview of retaliation case law, beginning with the notion that "Title VII prohibits both discrimination and retaliation 'because of' protected factors."[61] The court then explained that the Supreme Court has interpreted Title VII to allow a plaintiff to show "discrimination was 'because of' an impermissible factor by showing that factor to be a 'motivating' or 'substantial' factor in the employer's decision."[62]

Next, the court considered the impact of the Supreme Court's recent *Gross* decision on retaliation cases.[63] The court declined to extend *Gross*'s holding to Title VII retaliation cases, emphasizing the Supreme Court's distinction between the ADEA's and Title VII's statutory frameworks; thus, unless and until the Supreme Court directs otherwise, the Fifth Circuit will continue to allow mixed-motive instructions in Title VII retaliation cases.[64]

The court then turned to answering the question of whether direct evidence is required to obtain a mixed-motive instruction.[65] Relying upon the Supreme Court's *Desert Palace* decision, the court determined that such evidence is not required.[66]

Finally, the court explained that a Title VII plaintiff is not required to concede the employer's stated reason for its adverse employment action in order to receive a mixed-motive jury instruction.[67] In other words, the plaintiff's concession is not a required "element" of a mixed-motive case.[68]

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61. *Id.* at 326.

62. *Id.* (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) and noting the differences between the "motivating factor" approach and the usual burden-shifting framework of *McDonnell Douglas*).

63. *Id.* at 328. In *Gross* (as explained *supra*), the Supreme Court held that a *Price Waterhouse* mixed-motive instruction is never proper in an ADEA discrimination case, relying on statutory differences between Title VII and the ADEA and Congress's approach to each. Gross v. FBL Fin. Servs., 129 S. Ct. 2343, 2346 (2009). Thus, the question became: Should a similar distinction be made between Title VII discrimination and retaliation cases? *See id.*

64. *Smith*, 602 F.3d at 328-30 (quoting *Gross* for the proposition that "courts 'must be careful not to apply rules applicable under one statute to a different statute'"). It should be noted that Judge Jolly's dissenting opinion points out that the Seventh Circuit, in the wake of *Gross*, has twice held that "but-for causation is part of the plaintiff's burden *in all suits under federal [employment] law*." *Id.* at 337 (Jolly, J., dissenting) (emphasis in original). Jolly further advocates that *Gross* suggests prior Fifth Circuit case law on this point is "plainly wrong" and seems to call for a complete overhaul of analysis in this area by the Supreme Court, beginning with overruling their opinion in *Price Waterhouse*, which allowed for a mixed-motive theory in the first instance. *Id.* at 338-39 (Jolly, J., dissenting) ("The Supreme Court was absolutely correct in its observation that the *Price Waterhouse* analysis is difficult to apply, as indicated by this case. Even the majority shows signs of frustration: 'Illogical or not, that is the law we follow.' Maj. Op. at 333.").

65. *Id.* at 330 (majority opinion).

66. *Id.* at 330-32 ("The *Desert Palace* Court held that . . . a heightened showing is not required by direct evidence because the Court was persuaded by Title VII's silence with respect to the type of evidence required."). Thus, "to the extent we have previously required direct evidence of retaliation in order to obtain a mixed-motive jury instruction in a Title VII case, our decisions have been necessarily overruled by *Desert Palace*." *Id.* at 332.

67. *Id.* at 332-33.

68. *Id.*

Rather, the mixed-motive theory is a defense that allows the employer "to show that it would have made the same decision even without consideration of the prohibited factor."[69]

Importantly, the Fifth Circuit clarified that "a case need not be 'correctly labeled as either a "pretext" case or a "mixed motives" case from the beginning.'"[70] At some point in the proceedings, however, the district court must make a determination and send the case to the jury with the appropriate instructions.[71] Obviously, it is in the best interest of the plaintiff to advocate for a mixed-motive instruction, while the defendant should urge a pretext (but-for) submission.[72]

Here, the court affirmed the jury's verdict in favor of Smith on the retaliation claim, holding that the mixed-motive instruction was proper in light of the evidence presented at trial.[73]

B. Stewart v. Mississippi Transportation Commission

In *Stewart*, a somewhat divided circuit panel contemplated the issue of a "continuing violation" in the context of a sexual harassment case where the employer did take remedial action.[74] Jelinda Stewart worked for the Mississippi Department of Transportation (MDOT) as a physical laborer in a crew supervised by Jerry Loftin, who sexually harassed Stewart from the start of her employment.[75] After Stewart complained, she was removed from Loftin's supervision and assigned to an office job under a different supervisor.[76] Stewart earned a promotion and was, by all accounts, happy in her new position.[77] Unfortunately, Stewart's new supervisor announced his retirement, and Loftin was selected as his replacement.[78] Once again, Loftin's harassment of Stewart began.[79] Stewart complained, and the company launched an immediate investigation, putting Stewart on administrative leave with full pay and benefits in the meantime.[80]

Although the investigation proved inconclusive, the company decided to move Loftin to a different building and reassigned Stewart to a different supervisor.[81] In her new role, Stewart's workload increased considerably.[82]

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69. *Id.* at 333.
70. *Id.* (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 247 n.12 (1989)).
71. *Id.*
72. *Id.*
73. *Id.* at 334.
74. Stewart v. Miss. Transp. Comm'n, 586 F.3d 321, 327 (5th Cir. Oct. 2009).
75. *Id.* at 325.
76. *Id.* at 326.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*

She also claimed that other employees refused to socialize with her and she was not allowed to close her office door, among other things.[83] Accordingly, Stewart filed a charge with the Equal Employment Opportunity Commission (EEOC) and a civil complaint for sexual harassment and retaliation.[84] The district court granted summary judgment in favor of MDOT and Stewart appealed.[85]

Stewart contended that Loftin's actions, from the beginning of her employment with MDOT, constituted a continuing violation for purposes of a hostile work environment claim.[86] The court disagreed, explaining that the intervening remedial action taken by the employer severed the continuity and precluded liability for the preceding acts outside the filing window.[87] Here, since MDOT took prompt, remedial action to reassign Stewart, it avoided any liability for the initial harassment suffered while Stewart worked under the direction of Loftin.[88]

The court then turned to the second bout of harassment Stewart encountered when she returned to Loftin's management. Assessing his conduct independent of the prior incidents, the court determined that his comments and actions, standing alone, were insufficient to create a hostile work environment.[89] Judge Haynes dissented to this portion of the opinion, acknowledging that although Stewart could not recover damages for the conduct outside the filing window, such conduct is not erased from the record.[90] To the contrary, the prior conduct provides context for how Stewart perceived Loftin's subsequent actions, leading Judge Haynes to conclude that a material fact issue did exist as to the 2006 hostile work environment claim and stating that she would reverse and remand on that issue.[91]

With respect to Stewart's retaliation claim, the court considered each of the adverse actions alleged, explaining that to constitute prohibited retaliation, the action must be "materially adverse."[92] As a matter of law, the court ruled many of Stewart's complaints to be merely "petty slights" or "minor annoyances" not rising to the level of material adversity.[93] The

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83. *Id.*

84. *Id.*

85. *Id.* at 327.

86. *Id.* at 328.

87. *Id.* at 328-29.

88. *Id.* The court further rejected Stewart's argument that MDOT "negated" the remedial effect of reassignment when Loftin became Stewart's supervisor for the second time. *Id.*

89. *Id.* at 330.

90. *Id.* at 333 (Haynes, J., concurring and dissenting) ("Viewed against the backdrop of what Stewart had already experienced from Loftin, Loftin's 2006 conduct goes from merely boorish to legally actionable.").

91. *Id.* at 333-34.

92. *Id.* at 331 (majority opinion).

93. *Id.* at 332 (having personal items taken from her desk, not being able to close her office door, and being ostracized by co-workers did not constitute materially adverse actions).

court examined more thoroughly Stewart's complaint of being put on administrative leave and being assigned a heavier workload under a new manager.[94] After considering all the facts and circumstances, it determined that neither action was materially adverse in Stewart's case.[95] She continued to receive the same rate of pay, was not required to use any leave time, and thrived (even received a promotion) under new management.[96] Finding no adverse action, summary judgment was proper on Stewart's retaliation claim.[97]

C. Floyd v. Amite County School District

This case presented a somewhat atypical scenario in employment discrimination case law: reverse associational discrimination.[98] In November 2002, Charlie Floyd, an African-American, was terminated as the principal of Amite County High School (ACHS).[99] Floyd sued, alleging that his termination was the product of racial animus in violation of Title VII and various state laws.[100] The district court granted summary judgment in favor of Amite County and Floyd appealed.[101]

Uniquely, Floyd contended Amite County was guilty of associational discrimination.[102] Specifically, Floyd argued that he was treated adversely for allowing white student athletes to participate in ACHS programs.[103] Title VII prohibits unlawful employment practices "because of" an employee's race.[104] Construing Title VII, the Fifth Circuit has recognized that discrimination against an employee based on a personal relationship between the employee and a person of a different race is prohibited.[105]

Here, the court acknowledged that racial animus did exist, but because the racial animus was directed *solely* towards the white students and not at Floyd, the employee, his claim lacked merit.[106] Summary judgment in favor of Amite County was therefore proper.

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94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 333.
98. *See* Floyd v. Amite Cnty. Sch. Dist., 581 F.3d 244, 246-47 (5th Cir. Aug. 2009).
99. *Id.* at 246.
100. *Id.* at 247.
101. *Id.* The district court determined that Floyd's claim was untimely but proceeded to the merits of his claim anyway. *Id.* at 248. The appellate court reviewed both issues, ultimately determining that his claim was timely filed since his time to file did not start running at the time of his termination, but rather, only once the school board approved the termination decision. *Id.* at 249.
102. *Id.* at 247.
103. *Id.*
104. *Id.* at 249 (citing 42 U.S.C. § 2000e-2(a)(1) (2006)).
105. *Id.*
106. *Id.* at 250.

III. FAIR LABOR STANDARDS ACT

Continuing its strong focus on wage calculation and coverage issues, the Fifth Circuit again dedicated substantial efforts to further refining the circuit's Fair Labor Standards Act (FLSA) case law. This concentrated interest in FLSA jurisprudence culminated with the court's decision to grant an en banc review to address the important question of how the FLSA affects certain classes of temporary foreign workers.[107] Though beyond the appropriate survey period for this Article, the court's apparent desire to develop specific new jurisprudence under FLSA boundaries, evidenced by the en banc grant, only reinforces the court's specific concern with the development of this increasingly important area of employment law.

As detailed below, the court took time during the last year to explore a variety of FLSA issues including: donning and doffing in the context of organized labor; the application of the FLSA to certain types of non-traditional employees; and the proper calculation of "regular rate" for the purposes of determining overtime rates.

A. Allen v. McWane, Inc.

The Fifth Circuit was not exempt from the recent surge in donning and doffing litigation seen around the country. Most recently, in *Allen v. McWane, Inc.*, the court attempted to further refine the standards for ascertaining customs or practices of non-compensation in the context of organized labor.[108] In so doing, the court joined numerous other circuits in broadly construing the permissive language of 29 U.S.C. § 203(o) to limit donning and doffing liability.[109] "'Under 29 U.S.C. § 203(o), the time spent changing clothes is to be excluded from the measured working time for purposes of § 207 if it has been excluded by custom or practice under a bona fide collective-bargaining agreement.'"[110]

McWane, Inc. operated ten different plants that manufactured cast iron pipe and fittings.[111] The hourly employees at McWane's plants were required to "wear protective gear while at work, including hard hats, steel-toed boots, safety glasses, and earplugs."[112] None of the McWane plants compensated employees for time spent donning and doffing this safety equipment.[113] Three plants operating under collective bargaining

107. *See* Castellanos-Contreras v. Decatur Hotels LLC, 601 F.3d 621, 621 (5th Cir. Mar. 2010).
108. Allen v. McWane, Inc., 593 F.3d 449, 454-57 (5th Cir. Jan. 2010).
109. *Id.* at 457 (citing 29 U.S.C. § 203(o)).
110. *Id.* at 453 (quoting Bejil v. Ethicon, Inc., 269 F.3d 477, 479 (5th Cir. 2001)).
111. *Id.* at 451-52.
112. *Id.* at 451.
113. *Id.* at 452.

agreements expressly excluded compensation for this time, and the remaining seven plants simply did not address the issue.[114]

The question before the court in *Allen* was whether, as the workers argued, "compensation for the pre- and post-shift changing time is a pre-existing right under the FLSA, subject to exclusion only if it has been affirmatively bargained away in CBA negotiations; [i.e.], negotiation of whether to pay for pre- and post-shift changing time must be shown before the court may conclude that there was a custom or practice as provided in § 203(o)."[115]

Rejecting the workers' construction of § 203(o), the court opted to join the Third and Eleventh Circuits in holding that a silent collective bargaining agreement does not preclude the court from finding a custom or practice of non-compensation.[116] In so doing, the court focused on the fact that McWane had never compensated for donning and doffing time and that this policy of non-compensation had been in effect at the time the collective bargaining agreements at all of the plants were executed.[117] In short, the Fifth Circuit held that:

> [A]s long as there was a company policy of non-compensation for time spent changing for a prolonged period of time—allowing the court to infer that the union had knowledge of and acquiesced to the employer's policy—and a [collective bargaining agreement] existed, the parties need not have explicitly discussed such compensation when negotiating the [collective bargaining agreement].[118]

B. Williams v. Henagan

It seems like an odd question with an answer that cannot be easily transported into other FLSA matters: does a trustee inmate required to work for local officials during his incarceration constitute an employee under the FLSA? But, writ large, the same questions informing the employee status of an inmate engaged in local business activities informs any other inquiry into whether an employee is sufficiently engaged in interstate commerce to trigger the FLSA.

John Williams brought a wide variety of claims against various state and individual defendants associated with the local government of DeQuincy, Louisiana, following his release from incarceration in DeQuincy

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114. *Id.*

115. *Id.* at 454.

116. *Id.*; *see* Anderson v. Cagle's, Inc., 488 F.3d 945, 958-59 (11th Cir. 2007); Turner v. City of Phila., 262 F.3d 222, 226 (3d Cir. 2001).

117. *Allen*, 593 F.3d at 457.

118. *Id.*

City Jail.[119] As part of his sentence, Williams had worked for the city.[120] He had been tasked to a number of different job assignments including maintaining city property and facilities.[121] "Williams was a trusty and the only inmate at DeQuincy who performed work of this nature."[122] Williams alleged he was also required to work additional hours for the private benefit of certain city officials.[123] As set forth in detail in the opinion, Williams complained about a wide-variety of special additional work for these officials ranging from personal favors to serving as an unpaid laborer in their private companies.[124] These private work requirements supposedly imposed throughout Williams's sentence triggered his claim for minimum wage and overtime violations under the FLSA.[125]

Initially, the Court applied the "economic reality" test to ascertain whether any of the city officials named in the complaint could constitute employers under the FLSA.[126] After a close review, the court concluded that only one of the officials engaged Williams with sufficient regularity and under sufficient direct control to qualify as an employer.[127] As a result, the court was required to take the next step of assessing whether Williams could qualify as an employee under the FLSA based on his work for that city official.[128] Thus, the question before the court was whether Williams satisfied one of the key requirements of employee status: whether he was "engaged in commerce or in the production of goods for commerce."[129]

Answering that question required the court to further develop and apply its relatively new "engaged in commerce" analytical rubric. In *Sobrinio v. Medical Center Visitor's Lodge, Inc.*, the court attempted for the first time to provide clear guidance on when an individual is "engaged in commerce" under the FLSA.[130] The court held that "engaged in commerce" should be construed to mean "whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it rather than isolated local activity."[131] Though limited in this way, "[a]ny regular contact with

119. Williams v. Henagan, 595 F.3d 610, 613 (5th Cir. Jan. 2010).

120. *Id.*

121. *Id.* at 613-14.

122. *Id.* at 614.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 620. For more on the economic reality test in the context of inmate employment, see Watson v. Graves, 909 F.2d 1549, 1553 (5th Cir. 1990) (defining the economic reality test as, among other things, requiring courts to consider "whether the alleged employer: (1) has 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").

127. *Williams*, 595 F.3d at 621.

128. *Id.* at 620-21.

129. *Id.* at 620 (quoting 29 U.S.C. §§ 206(a), 207(a)(1) (2006)).

130. Sobrinio v. Med. Ctr. Visitor's Lodge, Inc., 474 F.3d 828, 829 (5th Cir. 2007).

131. *Id.*

commerce, no matter how small, will result in coverage."[132] Comparing Williams's claims that he was required to work as a sporadically compensated laborer for various local companies owned by the remaining city official with the hotel employee who provided janitorial services in *Sobrinio*, the court found that localized and isolated activity, like that alleged by Williams, was insufficient to confer FLSA employee status.[133]

Notably, the *Williams* Court did not rely upon any specialized inmate rule in applying *Sobrinio* to preclude Williams's remaining claims. Rather, their application of a rigorous interstate requirement as a prerequisite to triggering FLSA protections reflects a continued movement towards restricting FLSA employee status.

C. Gagnon v. United Technisource, Inc.

In its third major FLSA case of the year, *Gagnon v. United Technisource, Inc.*, the Fifth Circuit turned to the question of how employers should calculate base pay for the purposes of subsequently determining employees' overtime rates.[134] More specifically, the court examined how per diem payments should be considered in determining an employee's "regular rate" of pay and the attendant consequences in assessing an employer's compliance with the FLSA's time-and-a-half requirements.[135]

Timothy Gagnon, a skilled craftsman with many years experience in prepping and painting the exterior and interior of aircrafts, brought suit against United Technisource, Inc. (UTI) alleging he had been denied required overtime payments.[136] Under the terms of his employment contract, Gagnon was paid $5.50 per hour in straight time, $12.50 per hour in per diem, and $20.00 per hour for any overtime beyond forty hours in a given week.[137] About a year after he began working for UTI, Gagnon received a raise of $1.00 per hour.[138] That raise was applied to his per diem and his overtime rate, but his straight time was not adjusted.[139] As the court noted, the attribution of Gagnon's raise to his per diem was not supported in the record by any evidence suggesting it was paid "based on any reasonably approximated increase in Gagnon's expenses."[140]

In light of these facts, the court addressed whether Gagnon's overtime rate of $21.00 violated FLSA when compared against his combined per

132. *Id.* at 829.
133. *Williams*, 595 F.3d at 621.
134. Gagnon v. United Technisource, Inc., 607 F.3d 1036 (5th Cir. May 2010).
135. *Id.* at 1040-41.
136. *Id.* at 1039.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*

diem and straight time rates of $19.00 per hour after the raise.[141] If Gagnon's per diem should have been included, then his overtime rate of $21.00 fell below the required time-and-a-half figure, in this case $28.50.[142] First setting out the foundational principles under the FLSA, the court explained that "[t]he 'regular rate' is not an arbitrary label," but rather, "it is an actual fact" tied to a mathematical calculation based on the amount of wages paid and the mode of payment.[143] Building on those principles, the court then rejected UTI's attempts to exclude per diem from the overtime calculation, explaining that:

> Although per diem can be excluded from an employee's regular rate [under 29 U.S.C. § 207(e)(2)], the regular rate of pay cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee; it must be drawn from what happens under the employment contract.[144]

Moreover, the court noted that "[t]he Department of Labor has recognized that when, as here, the amount of per diem varies with the amount of hours worked, the per diem payments are part of the regular rate in their entirety."[145] Thus, UTI was required to pay the higher overtime rate based upon the combined value of Gagnon's straight time and per diem rates.[146]

Gagnon serves as an important cautionary tale on two fronts. First, the court's decision to narrowly construe § 207(e)(2) to exclude nominal per diem unsupported by expense evidence puts employers on notice of their responsibility to show more than mere designation to justify a per diem exclusion from overtime rates.[147] Second, as the court upheld in *Gagnon*, reliance on arbitrary labeling of certain classes of compensation can constitute willful or intentional violations of the FLSA incurring an added year of back pay liability and an award of attorney's fees.[148] Thus, employers should take careful heed of *Gagnon* and be prepared to either adjust their overtime policies or provide a strong evidentiary foundation to justify any exclusions from employees' regular rates of pay under the FLSA.

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141. *Id.* at 1039-40.
142. *Id.*
143. *Id.* at 1041 (citing Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 461 (1948)).
144. *Id.* (citations and internal quotations omitted).
145. *Id.*
146. *Id.* at 1041-42.
147. *Id.* at 1040-45.
148. *Id.* at 1042-45.

IV. GOVERNMENT EMPLOYER

The United States is immune from suit except as it consents to be sued, and the terms of such consent in any court define the court's jurisdiction to entertain the case.[149] Similarly, state and local government entities enjoy immunity from suit under certain circumstances.[150] During this survey period, the Fifth Circuit reviewed various types of immunities and other issues special to government litigants.

A. Peacock v. United States

In *Peacock v. United States*, John Peacock sued the Department of Veterans Affairs under the Federal Tort Claims Act (FTCA), alleging that Dr. John Warner, a physician at the Dallas VA, breached the standard of care with respect to Peacock's cardiac surgeries.[151] Answering Peacock's complaint, the Government admitted that at the time of Peacock's injury, Dr. Warner was a federal employee.[152] "The Government continued to assert that Dr. Warner was an employee of the Dallas VA in its response to Peacock's interrogatories and stipulated in the pretrial order that the physicians, nurses, and staff who provided Peacock treatment at the Dallas VA were all employees."[153]

Less than a week before trial was scheduled to begin, the Government learned that Dr. Warner was not a federal employee but instead, he was employed by the University of Texas Southwestern Medical Center (UTSWMC) and simply worked at the Dallas VA according to a contract between the VA and UTSWMC.[154] Accordingly, the Government filed a motion to dismiss for lack of subject matter jurisdiction, contending that Dr. Warner's status as an independent contractor prohibited suit against the United States under the FTCA.[155] Peacock filed a motion for sanctions against the Government, contending that his reliance on the Government's misrepresentations concerning Dr. Warner's employment status caused him to lose significant time and money pursuing his claim.[156]

The district court granted both the Government's motion to dismiss and Peacock's motion for sanctions.[157] Peacock appealed the dismissal of his suit, arguing that the district court erred in determining that Dr. Warner could not be sued under the FTCA's waiver of judicial immunity for federal

149. *See, e.g.*, United States v. Sherwood, 312 U.S. 584, 586 (1941).
150. *See, e.g.*, Gen. Serv. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591, 594 (Tex. 2001).
151. Peacock v. United States, 597 F.3d 654, 657 (5th Cir. Feb. 2010).
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 657-58.

employees because he was an independent contractor.[158] In the alternative, Peacock argued that the Government should be judicially estopped from asserting Dr. Warner's independent contractor status, after continuously asserting throughout the litigation that he was a federal employee.[159] The Fifth Circuit affirmed the district court's decision.[160]

The court applied the *Linkous* factors to determine whether Dr. Warner was an employee or independent contractor.[161] Based on the factors applied, the court concluded Dr. Warner was an independent contractor because "'the power of the federal government to control Dr. Warner's detailed physical performance' at the Dallas VA was not sufficient to establish an employee relationship."[162]

Then, the court considered Peacock's argument that the Government should be judicially estopped from claiming Dr. Warner was an independent contractor because of its prior assertions that he was an employee.[163] The court noted that "[e]stoppel is rarely valid against the United States," particularly in matters that would support jurisdiction in a suit to which the Government has not waived its sovereign immunity.[164] "The Government's erroneous admission that Dr. Warner was a federal employee cannot *make* him a federal employee, and therefore subject to jurisdiction under the FTCA, where the relevant factors in our inquiry indicate that he is an independent contractor."[165] Since Peacock did not allege facts to sustain a showing of affirmative misconduct by the Government pertaining to Dr. Warner's employment status, estoppel was rejected and dismissal was appropriate.[166]

Among other points, *Peacock* demonstrates the sanctity of the Government's sovereign immunity. Despite the Government's failure to properly identify Dr. Warner throughout the litigation, the court could not

158. *Id.* at 658.

159. *Id.*

160. *Id.* at 661.

161. *Id.* at 659. "The key inquiry 'in determining whether an individual is an employee of the government or an independent contractor is the power of the federal government to control the detailed physical performance of the individual.'" *Id.* (citing Linkous v. United States, 142 F.3d 271, 275 (5th Cir. 1998)). Additional factors considered (taken from the Restatement (Second) of Agency) include: "(a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business"; (c) the kind of occupation; (d) the skill required; (e) who supplies the instrumentalities, tools, or place of work; (f) the length of employment; (g) the method of payment; (h) whether the work is part of the employer's regular business; (i) the parties' belief about their arrangement; and (j) whether the principal is or is not a business. *Id.* The Fifth Circuit visited this exact issue in another case during the reporting period. *See* Creel v. United States, 598 F.3d 210 (5th Cir. Mar. 2010) (reversing decision to dismiss based on finding that individual was government employee and remanding for further proceedings consistent with opinion that individual was actually an independent contractor).

162. *Peacock*, 597 F.3d at 660 (quoting *Linkous*, 142 F.3d at 277).

163. *Id.*

164. *Id.*

165. *Id.* at 660-61 (emphasis in original).

166. *Id.* at 661.

exercise jurisdiction once it was properly determined that Dr. Warner was an independent contractor. Still, the Government is not bulletproof. The district court was not precluded from awarding sanctions due to the time and resources expended on a case that could have been disposed of earlier had the Government properly identified Dr. Warner as an independent contractor. The *Peacock* court reminds practitioners of the importance of initial fact investigation and discovery, identifying key players, and ensuring we understand their role is a vital part of litigation, sometimes even providing a basis for early dismissal.

B. DePree v. Saunders

Tenured professor, Chauncey DePree, sued the University of Southern Mississippi's president and various administrators for alleged constitutional violations after he was removed from his teaching duties for engaging in negative, disruptive, and intimidating behavior.[167]

DePree contended that the disciplinary action taken against him was in retaliation for a website he maintained that was critical of the University and because he complained to the accreditation agency (AACSB) about the school.[168] DePree asserted that taking such disciplinary action against him infringed upon his right to freedom of speech.[169]

Analyzing the liability of the University defendants sued in their individual capacity, the court assumed "*arguendo* that DePree's evidence raised genuine, material fact issues sufficient to withstand summary judgment."[170] Nonetheless, the court confirmed that summary judgment was properly granted because Martha Saunders, the president and ultimate decision-maker, was shielded by qualified immunity and that the other defendants, both faculty and administrators, merely contributed to Saunders's decision-making process.[171] A public official is sheltered by qualified immunity unless a plaintiff demonstrates "(1) a violation of a constitutional right and (2) that the right at issue was clearly established at the time of the violation."[172]

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167. DePree v. Saunders, 588 F.3d 282, 285 (5th Cir. Nov. 2009).

168. *Id.* at 286.

169. *Id.* To establish a constitutional claim for First Amendment retaliation, the plaintiff must show: (1) that he suffered an adverse employment action; (2) that his speech involved a matter of public concern; (3) that his interest in commenting on matters of public concern outweigh the defendant's interest in promoting workplace efficiency; and (4) that the defendant's action was motivated by plaintiff's speech. *Id.* at 287. The parties did not dispute elements (2) and (3). *Id.* The University defendants argued, however, that DePree suffered no adverse employment action and that in light of DePree's disruptive conduct, his protected speech was not a "substantial" or "motivating" factor leading to his removal from duty. *Id.*

170. *Id.* at 287.

171. *Id.*

172. *Id.*

Here, the court explained, no "clearly established" law informed Saunders that removing DePree from his teaching duties constituted an adverse employment action.[173] Indeed, in the educational context, the Fifth Circuit had held that "'actions such as "decisions concerning teaching assignment, . . . administrative matters, and departmental procedures," while extremely important . . . do not rise to the level of constitutional deprivation.'"[174] For purposes of Title VII retaliation claims, however, the Supreme Court held in 2006 that "an adverse employment action is one that a reasonable employee would have found . . . to be materially adverse."[175] Still, at the time Saunders revoked DePree's teaching duties, the Fifth Circuit had not formally applied the "materially adverse" standard to First Amendment retaliation claims and thus, there was no "clearly established law" Saunders could have known she was violating.[176]

The remaining defendants also could not be individually liable because they did not possess leverage or assert influence over the ultimate decision-maker; they were not part of a committee tasked with overseeing DePree's work nor were they his supervisors.[177] Saunders acted in reliance upon letters from non-supervisory employees, and she commissioned a neutral investigation.[178]

Turning to DePree's due process claim, the court explained that "no protected property interest is implicated by reassigning or transferring an employee absent a specific statutory provision or contract term to the contrary."[179] DePree could not identify any state law or contract between him and the University reflecting an understanding that he had a unique property interest in teaching.[180] Thus, because his tenure, salary, and title remained intact, DePree had not been deprived of a constitutional property right.[181]

C. Thompson v. Connick

The *Thompson* case represents a procedural anomaly, in which an equally divided en banc court affirmed the district court's decision that the evidence was legally sufficient to support John Thompson's § 1983 claims.[182] Thompson "was convicted of murder and spent fourteen years on

173. *Id.*
174. *Id.* (quoting Harrington v. Harris, 118 F.3d 359, 365 (5th Cir. 1997)).
175. *Id.* at 288 (citing Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006)).
176. *Id.*
177. *Id.*
178. *Id.* at 289.
179. *Id.*
180. *Id.* at 290-91.
181. *Id.* at 289-90.
182. Thompson v. Connick, 578 F.3d 293, 295 (5th Cir. Aug. 2009) (Jolly, J., specially concurring) ("Ordinarily, when an en banc case results in a tie vote, we affirm the district court judgment without

death row for a crime he did not commit because prosecutors failed to turn over [an exculpatory] lab report in a related case."[183]

Thompson brought suit under 42 U.S.C. § 1983 against the Orleans Parish District Attorney and various individuals in their official and individual capacities.[184] The jury awarded Thompson $14 million.[185] On appeal, the court was asked to consider whether the District Attorney was "deliberately indifferent" to an obvious need to train employees on their obligations under *Brady v. Maryland* and whether a lack of such training was the "moving force" behind Thompson's constitutional injury.[186]

"Deliberate indifference" is a heightened standard of culpability and generally requires "a showing that the policymaker was made aware of the training deficiencies by 'at least a pattern' of similar deprivations."[187] Alternatively, under special circumstances, the plaintiff may establish liability based upon a single violation of constitutional rights where the need for training is "so obvious" such that a deprivation of constitutional rights is a "highly predictable consequence" of the lack of training.[188]

In addition to a heightened culpability standard, plaintiffs must also meet a heightened causation standard to establish municipal liability in § 1983 claims.[189] The plaintiff must show that the municipal policy or custom (e.g., failure to train) was the "moving force" that caused the specific constitutional violation.[190] This causation standard calls for "a 'direct causal link' between the municipal policy and the constitutional injury."[191] The court explained the following:

> To summarize, the requirements for imposing liability upon a municipality for the individual acts of its employees are demanding. Relaxing these heightened requirements would cause significant harm to the interests underlying this demanding evidentiary principle: adopting lesser standards of fault and causation would open municipalities to unprecedented liability, would result in *de facto respondeat superior* liability, and would engage the federal courts in an endless exercise of second-guessing municipal employee-training programs. Therefore, we can hold a municipality liable only where the evidence demonstrates unmistakable

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opinion. That is the way I would prefer it today. However, notwithstanding that there is no majority opinion, and that no opinion today will bind any court or future party in this circuit, each side has now written for publication, and judges are joining one or the other of the respective opinions.").

183. *Id.* at 296; *see* Connick v. Thompson, 130 S. Ct. 1880 (2010) (cert. granted in part).

184. *Thompson*, 578 F.3d at 296 (Jolly, J., specially concurring).

185. *Id.*

186. *Id.* (citing Brady v. Maryland, 373 U.S. 83, 87-88 (1963)).

187. *Id.* at 298 (quoting Burge v. St. Tammany Parish, 336 F.3d 363, 370 (5th Cir. 2003)).

188. *Id.* The Fifth Circuit has considered and rejected single violation liability many times over the course of 30 years with only one exception. *See id.* at 299.

189. *Id.* at 300.

190. *Id.*

191. *Id.*

culpability and clearly connected causation for the unconstitutional conduct of an individual employee.[192]

Normally, municipal liability will not attach under such demanding standards.[193] The divided court nonetheless upheld the jury decision in favor of Thompson.[194] Undeniably, as its procedural posture suggests, *Thompson* is an "extraordinary case with extraordinary facts."[195] The United States Supreme Court has granted certiorari in part to consider the limited issue of whether imposing liability for a single *Brady* violation contravenes the rigorous culpability and causation standards set forth above.[196]

V. LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

Not a particularly frequent target in past years, the Longshore and Harbor Workers' Compensation Act (LHWCA) took center stage in two major published decisions during the survey period.[197] The Fifth Circuit's efforts to develop the statutory meanings of "employee" and "employer" within the limited context of the LHWCA simplified the threshold question of claimant eligibility while simultaneously adding new layers to the employer liability inquiry.

A. Becker v. Tidewater, Inc.

Under a particularly unfortunate set of facts, the court's first foray into the LHWCA last year examined the scope of employer liability for employee injuries incurred while engaged in specific maritime activities.[198] More precisely, the court addressed critical definitional questions reshaping the circuit's jurisprudence on the definition of a covered longshoreman under the act and the mutability of employer status within the confines of a single transaction.[199]

Seth Becker was severely injured by an improperly restrained steel cable while working as a summer intern for Baker Hughes, Inc. aboard the M/V Republic Tide owned by co-defendant Tidewater, Inc.[200] As the

192. *Id.* at 301 (emphasis in original) (internal quotations omitted).

193. *Id.*

194. *Id.* at 311.

195. *Id.* at 314.

196. Connick v. Thompson, 130 S. Ct. 1880 (2010) (referencing Connick's Petition for Writ of Certiorari).

197. *See* Bollinger Shipyards, Inc., v. Dir., Office of Worker's Comp. Programs, 604 F.3d 864, 867 (5th Cir. Apr. 2010); Becker v. Tidewater, Inc., 586 F.3d 358, 366 (5th Cir. Oct. 2009).

198. *Becker*, 586 F.3d at 366.

199. *See id.* at 367.

200. *Id.* at 363-64.

Republic Tide was performing well-stimulation services on an oil rig, a bow thruster failed and the vessel began to drift.[201] In an effort to avoid a collision with the oil rig, the Republic Tide's captain ordered the crew to disconnect a steel hose linking the vessel to the rig.[202] Before the hose could be disengaged, however, it snapped taut around Becker's legs while he worked to disconnect it.[203] Becker brought suit against both Baker Hughes and Tidewater, and a jury found them 55% and 45% liable for his injuries, respectively.[204]

In the appeal that followed, the Fifth Circuit addressed a number of different issues—two of which represent significant developments in assessing potential liabilities on the part of employers. First, the court considered whether Becker was covered by the LHWCA.[205] Quickly deciding that Becker's intern status did not affect the analysis, the court focused in on whether the specific situs of injury would determine the proper statutory scheme for assessing liability.[206] The court rejected Baker Hughes's attempt to limit LHWCA liability to situations where employees are injured on the outer continental shelf.[207] Instead, the LHWCA extends to any longshoreman employee engaged in exploration or production of minerals.[208] In so holding, the court dismissed previous cases, such as *Demette v. Falcon Drilling Co.*, which would have limited liability under the Act based on the physical location of injury.[209] Though a seemingly abstract question of LHWCA law, this subtle but important development represents a major shift requiring restructuring of various employer indemnification agreements. As the court went on to hold, LHWCA coverage effectively validates a wide-range of reciprocal indemnity agreements in the maritime industry whenever employees will be engaged in covered mineral development activities.[210]

Second, the court dealt Baker Hughes a significant partial victory in its determination that employer versus time-charterer status under the LHWCA can change or shift within the confines of a single liability-creating incident.[211] Section 905(a) of the LHWCA precludes an employee from suing his employer in tort.[212] Building on earlier cases, the court drew a bright line between time-charterer negligence involving equipment

201. *Id.*
202. *Id.* at 364.
203. *Id.*
204. *Id.*
205. *Id.* at 366.
206. *Id.*
207. *Id.*
208. *Id.*
209. *See id.* at 367 n.6; Demette v. Falcon Drilling Co., 280 F.3d 492, 498-500 (5th Cir. 2002).
210. *See Becker*, 586 F.3d at 367.
211. *See id.* at 373.
212. 33 U.S.C. § 905(a) (2006) (codifying the 1984 amendment that established tort liability for employers).

maintenance covered by the LHWCA and uncovered employer issues like training in safety.[213] More precisely, the court explained that liability ceases where injury is caused by a defendant's failure to provide "a safe place to work."[214] As examples, the court pointed to faulty safety training and Baker Hughes's failure to warn Becker of the dangers involved with working to remove the stuck steel hose.[215] In so holding, the court provided important new guidance for assessing specific employer liabilities arising from particularized findings of causation.

B. Bollinger Shipyards, Inc. v. Director, Office of Worker's Compensation Programs

In its second major LHWCA decision of the survey period, the court again addressed the definition of "employee."[216] This time, however, the court considered a much less technical and more fundamental question about Congress's intent to include or exclude the large population of undocumented immigrants working as longshoremen and harbor workers in the circuit.[217]

Jorge Rodriguez, an undocumented immigrant, fell and was injured while employed as a pipefitter by Bollinger Shipyards.[218] The court explained, "Rodriguez had been working as a pipefitter for Bollinger for approximately eight months, having initially obtained employment with Bollinger after stating falsely that he was a U.S. citizen and providing the company with a false Social Security number."[219] While Bollinger initially paid benefits to Rodriguez and reimbursed him a portion of his medical expenses, it terminated all payments when it discovered that Rodriguez was an undocumented immigrant.[220] Then Rodriguez filed for benefits under the LHWCA, and the case progressed to an administrative trial.[221]

On appeal from the Benefits Review Board, the court considered the novel question of whether the LHWCA covers undocumented laborers notwithstanding the fact that they are not lawfully employed in the United States.[222] In finding that undocumented workers do enjoy LHWCA protections, the court rested largely on the breadth of the definition of employee under 33 U.S.C. § 902(3) and Congress's failure to include an

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213. *See Becker*, 586 F.3d at 373-74.
214. *Id.* at 374.
215. *Id.*
216. Bollinger Shipyards, Inc. v. Dir., Office of Worker's Comp. Programs, 604 F.3d 864, 867 (5th Cir. Apr. 2010).
217. *Id.* at 871-73.
218. *Id.* at 867.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at 871.

exception to employee status based on immigration status.[223] Moreover, the court found that other provisions of the statute, providing additional protections for foreign workers, made apparent that Congress had not intended to exclude undocumented immigrants.[224]

Consequently, the universe of potential LHWCA employee claimants has significantly expanded to include undocumented immigrants working for otherwise innocent employers.[225] As a result, employers like Bollinger, determining whether to pay out disability benefits and other claims, may no longer consider immigration status—disclosed or otherwise—in deciding to render payments required by the Act.[226]

VI. MISCELLANEOUS DECISIONS

In addition to the various statutory categories surveyed *supra*, the court also issued a few other newsworthy and noteworthy decisions reflecting both local and national concerns. These miscellaneous cases provide important instruction on areas ranging from the effect of exigencies on labor relations to derivative immunity and the proper analysis for assessing whether claims accrued abroad fall within the scope of employment for arbitration purposes.

A. National Labor Relations Board v. Seaport Printing & Ad Specialties, Inc.

The Fifth Circuit's effort to address the consequences of Hurricane Rita in the context of labor relations presents an important new understanding of the responsibility to initiate bargaining. As the court carefully explained in *National Labor Relations Board v. Seaport Printing & Ad Specialties, Inc.*, even in the wake of a natural disaster, management remains responsible for engaging in good faith bargaining while taking responsive action.[227]

In *Seaport Printing*, unionized employees working under a collective bargaining agreement filed charges with the National Labor Relations Board (NLRB) against Seaport Printing (Seaport)—a printing company located in Lake Charles, Louisiana—following Hurricane Rita.[228] Seaport ordered the evacuation of its facilities—an evacuation characterized as a layoff by the NLRB.[229] Following the hurricane, Seaport employed non-

223. *Id.* at 871-72; *see also* 33 U.S.C. § 902(3) (2006).
224. *Bollinger*, 604 F.3d at 872-73.
225. *See, e.g.*, *id.* at 879.
226. *See id.*
227. N.L.R.B. v. Seaport Printing & Ad Specialties, Inc., 589 F.3d 812, 816-17 (5th Cir. Dec. 2009).
228. *Id.* at 813.
229. *Id.* at 814 and 874 n.3.

union workers to clean and repair the damaged facilities.[230] Shortly thereafter, without contacting the union, Seaport discharged all of the evacuated employees.[231] In so doing, it failed to engage in any collective bargaining talks regarding post-hurricane operations.[232]

On appeal, the Fifth Circuit considered whether the exigent circumstances surrounding Hurricane Rita excused Seaport from bargaining.[233] The court began by noting that "[n]either party contest[ed] that the Act typically requires bargaining between a company and a union over the effects of a layoff and the decision to use non-unit personnel to replace unit members."[234] In rejecting Seaport's arguments, the court found that the union had not been afforded proper notice under the circumstances.[235] Moreover, Seaport's unequivocal post-hurricane assertions that it had withdrawn recognition of the union, "*a fortiori* indicate[d] the company's unwillingness to bargain with that union and place[d] the responsibility on the company for any failure to initiate bargaining that result[ed]."[236] In short, *Seaport Printing* stands for the proposition that management must consider labor law requirements in formulating plans to resume operations in the wake of natural disasters and other exigencies.

B. Jones v. Halliburton Co.

Jones v. Halliburton Co. was perhaps one of the most publicized cases addressed by the Court during the survey period.[237] Addressing the intersection of globalization, international business operations, and arbitration rules, the *Jones* decision marked a rare victory for employees seeking vindication in court.[238]

Jamie Jones (Jones) brought suit against Halliburton Company (Halliburton) asserting claims for assault and battery, emotional distress, negligent hiring, retention, and supervision and false imprisonment flowing from allegations of a sexual assault at the hands of fellow Halliburton employees.[239] Specifically, Jones contends that she was drugged, beaten, and gang-raped shortly after she began working for Halliburton's Overseas

230. *Id.* at 814.
231. *Id.*
232. *Id.*
233. *Id.* at 815.
234. *Id.* at 816.
235. *Id.* at 817-18.
236. *Id.* at 817.
237. Jones v. Halliburton Co., 583 F.3d 228, 241 (5th Cir. Sept. 2009); *see, e.g.*, *Iraq Rape Allegation Gets Congressional Hearing*, CNN.COM (Dec. 19, 2007), http://edition.cnn.com/2007/US/law/12/19/contractor.hearing/; *Hearing opens on ex-KBR worker's rape allegation*, HOUSTON CHRON. (Dec. 19, 2007), http://www.chron.com/disp/story.mpl/front/5390373.html.
238. *Jones*, 583 F.3d at 241-42.
239. *Id.* at 230.

Administrative Services subsidiary in Baghdad, Iraq.[240] Following the alleged assault, Jones claims she was confined by Halliburton in a container and repeatedly interrogated until a family member was able to secure "Congressional assistance" to bring her back to the United States.[241]

After Jones brought suit in the United States District Court for the Southern District of Texas, Halliburton sought to compel arbitration of all her claims under a provision of Jones's employment contract.[242] Halliburton contended that Jones's claims were arbitrable because they "related to [her] employment" as set forth in the arbitration provision of the employment contract.[243] Rejecting Halliburton's argument, the court declined to accept that claims arising from a rape by fellow employees were within the scope of employment or in the workplace, insofar as the events occurred in Jones's bedroom.[244] Rather, the court found that Jones's claims were facially outside the scope of the arbitration provision.[245] Moreover, the court refused to find that unrelated workers' compensation provisions covering sexual assault were sufficient in themselves to collaterally determine whether all sexual assault-related claims are arbitrable.[246] Ultimately settling on a fact-specific, case-by-case approach, the court held that "the outer limits of the 'related to' language of the arbitration provision [had] been tested, and breached."[247]

Judge DeMoss dissented from the majority opinion, arguing that Jones's tort claims were in fact related to her employment.[248] Judge DeMoss contended that the unique circumstances of Jones's claims—arising from a sexual assault overseas in a company-owned barracks—were sufficiently related to her employment to require arbitration.[249]

240. *Id.* at 230-31.
241. *Id.* at 232.
242. *Id.* at 233.
243. *Id.* at 230.
244. *Id.* at 241.
245. *Id.* at 242.
246. *Id.* at 239-40.
247. *Id.* at 241.
248. *Id.* at 242.
249. *Id.* at 242-43.