RETALIATION – WHAT'S NEW?

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Families First Coronavirus Response Act (FFCRA)

- 29 CFR Section 826.150 Prohibited Acts and Enforcement under the Emergency Paid Sick Leave Act (EPSLA)

- 29 CFR Section 826.151 Prohibited Acts and Enforcement under the Emergency Family Medical Leave Act (EFMLEA)

Families First Coronavirus Response Act (FFCRA)…cont'd

- **§826.150 Prohibited Acts and Enforcement under the EPSLA**

  (a) Prohibited Acts. An Employer is prohibited from discharging, disciplining, or discriminating against any Employee because such Employee took Paid Sick Leave under EPSLA. Likewise, an Employer is **prohibited from discharging, disciplining, or discriminating against any Employee because such Employee has filed any complaint or instituted or caused to be instituted any proceeding, including an enforcement proceeding** ,under or related to the EPSLA, or has testified or is about to testify in any such proceeding.

  (b) Enforcement.

  (1) Failure to provide Paid Sick Leave. An Employer who fails to pro vide its Employee Paid Sick Leave under the EPSLA is considered to have failed to pay the minimum wage as required by section 6 of the FLSA, 29 U.S.C. 206, and shall be subject to the enforcement provisions set forth in section 16 and 17 of the FLSA, 29 U.S.C. 216, 217.

  (2) *Discharge, discipline, or discrimination*. An Employer who discharges, disciplines, or discriminates against an Employee in the manner described in subsection (a) **is considered to have violated section 15(a)(3) of the FLSA, 29 U.S.C. 215(a)(3), and shall be subject to the enforcement provisions** relevant to such violations set forth in sections 16 and 17 of the FLSA, 29 U.S.C. 216, 217.

Families First Coronavirus Response Act (FFCRA)…cont'd

- **§826.151 Prohibited Acts and Enforcement under the EFMLEA**
  - *Prohibited Acts.* The **prohibitions against interference with the exercise of rights, discrimination, and interference with proceedings or inquiries** described in the FMLA, 29 U.S.C. 2615, apply to Employers with respect to Eligible Employees taking, or attempting to take, leave under the EFMLEA.

  - *Enforcement.* An Employer who commits a prohibited act described in section (a) **shall be subject to the enforcement provisions** set forth in section 107 of the FMLA, 29 U.S.C. 2617, and 29 CFR 825.400, except that an Eligible Employee may file a private action to enforce the EFMLEA only if the Employer is otherwise subject to the FMLA in the absence of EFMLEA.

Families First Coronavirus Response Act (FFCRA)…cont'd

- Applicable to Collective Bargaining too.
- 29 CFR §826.160(a)(1) explains that an employee's entitlement to, or actual use of, paid sick leave is not grounds for diminishment, reduction, or elimination of any other right or benefit to which the employee is entitled under any other federal, state, or local law, under any collective bargaining agreement, or under any employer policy that existed prior to April 1, 2020. *See* 29 U.S.C. 2651(b), 2652. Paid sick leave is in addition to, and not a substitute for, other sources of leave which the employee had already accrued, was already entitled to, or had already used, before the EPSLA became effective on April 1, 2020. Therefore, neither eligibility for, nor use of, paid sick leave may count against an employee's balance or accrual of any other source or type of leave.
- DOL has investigative authority under FLSA and FMLA
- **Expires December 31, 2020**

No "But For" Anymore?

- *Garcia v. Professional Contract Services, Inc.,* 938 F.3d 236 (5th Cir. 2019)
  - On causation – standard at the pretext or also to prima facie part of case
  - Court only applies at the pretext stage
  - If applied to a prima facie stage, no need for *McDonnell Douglass* burden shifting
  - Avoiding summary judgment here – more than mere temporal proximity
  - Court rejected "nearly identical" situations required working in the same department

What is an Adverse Employment Action?

- *Nall v. BNSF Railway Co.*, 917 F.3d 335 (5th Cir. 2019)
  - Even where supervisors/decisionmakers knew about EEOC Charge, no evidence that decisions subsequent to their knowledge had causal link to placement on leave; MSJ upheld
- *O'Quinn v. City of Houston, Tx.*, 770 Fed. App'x. 162 (5th Cir. 2019)
  - Court found that if there is evidence, lost overtime could result in adverse employment action based on retaliatory actions in decrease in overtime wage
  - The record in this case was devoid of that evidence
  - MSJ granted and upheld for City

What is an Adverse Employment Action?...cont'd

- *Johnson v. Halstead*, 916 F.3d 410 (5th Cir. 2019)
  - Under §1981, show employment decision is only "materially adverse" meaning "it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."
  - Transfer from day shift to night shift may be adverse employment action under §1981
- *Welsh v. Fort Bend Indep. Sch. Dist.*, 941 F.3d 818 (5th Cir. 2019)
  - School district's actions in changing teacher's curriculum yearly and giving her classes with at risk and special needs students did not constitute "adverse employment actions" required to support her retaliation claims against district under Title VII and Age Discrimination in Employment Act (ADEA)

What is time? Temporal Proximity

- *Perkins v. Child Care Assoc.*, 751 Fed. App'x. 469 (5th Cir. 2019)
  - Gap of 8 months in between FMLA leave and termination too long to establish causation for retaliation
- *Melvin v. Barr Roofing Co.*, No. 19-10214, 2020 WL 1696121, at *3 (5th Cir. Apr. 7, 2020)
  - Employee who alleged he was terminated 5 days after reporting harassment is very close in time for prima facie case
- *Musser v. Paul Quinn Coll.,* 944 F.3d 557, 564 (5th Cir. 2019), as revised (Dec. 10, 2019), as revised (Dec. 23, 2019)
  - Plaintiff only had some evidence of temporal proximity but no other evidence of pretext
  - No evidence of retaliation for temporal proximity, even if she could prove "suspicious timing of her termination in tight proximity to her protected activity."
  - Temporal proximity alone is insufficient to establish burden at th pretext stage. Court did not hear her temporal proximity arguments.

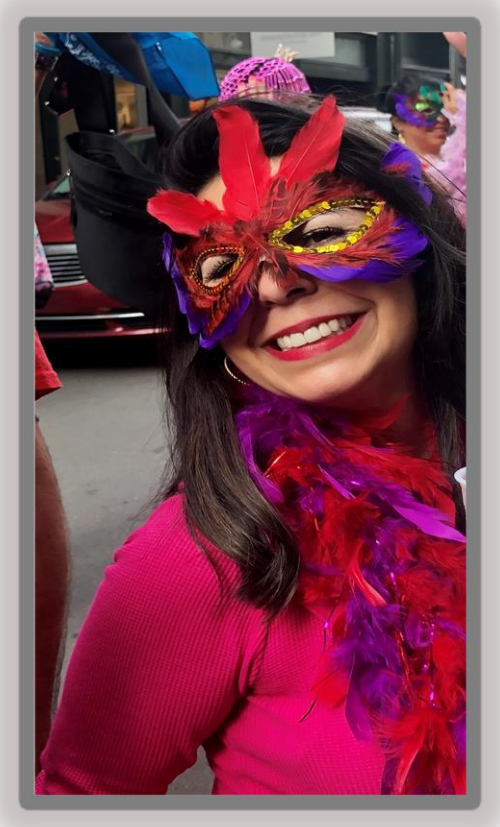
Do or Don't Speak!
First Amendment Retaliation

- *Jackson v. Texas*, 959 F.3d 194 (5th Cir. 2020)
  - Allegations City Manager retaliated by "trying to rig" criminal trial.
  - City Manager merely informed the court that certain discovery would not be available until the Attorney General had issued a ruling on release of public information act documents.
  - Even a constitutional violation was alleged, it would not be clearly established
- *Moreau v. St. Landry Par. Fire Dist. No. 3,* No. 19-30767, 2020 WL 1696124 (5th Cir. Apr. 7, 2020)
  - Former fire captain's social media post, in which he both discussed an incident in which a teacher was arrested at a school board meeting and the fire protection district's board of commissioners, was predominately of private concern
  - Post was public and addressed some issues of public concerns, mostly internal grievances and personal problems with leadership
  - Not First Amendment retaliation
- *Corn v. Mississippi Dep't of Pub. Safety,* 954 F.3d 268, 276 (5th Cir. 2020)
  - First Amendment analysis: whether the employee spoke as a citizen on a matter of public concern or pursuant to his or her official duties
  - Court stated and reiterated: "a public employee's speech is made pursuant to his or her official duties when it is 'made in the course of performing his employment.'"

Interesting 5th Circuit Approaches

- *White Glove Staffing, Inc. v. Methodist Hosps. of Dallas,* 947 F.3d 301 (5th Cir. 2020)
  - staffing company had statutory standing to bring § 1981 claim
  - as a matter of apparent first impression, corporation did not need racial identity to have standing to assert § 1981 racial discrimination claim
  - staffing company did not purposely oppose employer's alleged racial discrimination, as required to support § 1981 retaliation claim.
- *Snider v. L-3 Commc'ns Vertex Aerospace, L.L.C.,* 946 F.3d 660 (5th Cir. 2019)
  - Courts possess the inherent authority to impose sanctions for misconduct and to protect the judicial process.
  - *D*ismissal of employee's gender discrimination, harassment, and retaliation claims under Title VII as sanction for her discovery violations involving perjury and failure to produce documents did not violate due process,
  - Where employee had sufficient notice of possible sanctions and opportunity to be heard at sanctions hearing.
- *Inocencio v. Montalvo*, 774 Fed. App'x. 824 (5th Cir. 2019)
  - Establishment of disinterested panel and Captain's acceptance of hiring recommendation is not enough to infer retaliation

Questions?



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