EMPLOYMENT LAW UPDATE

RECENT ISSUES OF INTEREST TO GOVERNMENTAL EMPLOYERS

BY:

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2022 TCAA Summer Conference

June 17, 2022

Galveston, Texas

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Sarah is an employment attorney and Principal at Lloyd Gosselink Rochelle & Townsend, P.C. who specializes in assisting employers with federal and state employment law compliance. Sarah prides herself on providing efficient and cost-effective representation rooted in an understanding of the business. Sarah also defends employers before governmental agencies like the EEOC and DOL and when they are sued in state or federal court.

Sarah was named a Texas Super Lawyers Rising Star for the years 2019 through 2022 in the area of Employment Litigation: Defense and was named a Top Austin Attorney by Austin Monthly Magazine in Labor and Employment for the years 2020 through 2022. Additionally, Sarah enjoys getting involved with local HR groups and serves as Legal & Legislative director for Austin Society of Human Resources (SHRM) and as a Legal & Legislative co-director for Texas SHRM state council.

Sarah has long believed that it is important to love your job, enjoy your colleagues, and give back to your community. To that end, she has served as President of the Travis County Women Lawyers' Association, Chair of the Travis County Women Lawyers' Foundation, and is a member of the Robert W. Calvert Inn of Court.

EMPLOYMENT LAW UPDATE

RECENT ISSUES OF INTEREST TO GOVERNMENTAL EMPLOYERS

BY: SARAH T. GLASER[1]

This paper summarizes recent developments in employment law relevant to public employers, including the Equal Employment Opportunity Commission's latest priorities and recent cases and decisions involving unique and interesting issues related to the Family Medical Leave Act ("FMLA"), Americans with Disabilities Act ("ADA"), and Equal Employment Opportunity ("EEO") laws. This paper also includes an update on notable employment law legislation considered and enacted during the 87th Texas Legislative Session and closes with an update on actions taken by the Biden Administration that are impacting public employers.

I. EEOC'S COMMUNICATIONS RELATED TO ENFORCEMENT PRIORITIES

President Biden appointed Charlotte A. Burrows as Chair of the U.S. Equal Employment Opportunity Commission ("EEOC") on January 20, 2021. The EEOC is a bipartisan Commission comprised of five presidentially appointed members, including the Chair, Vice Chair, and three Commissioners. Chair Burrows and Vice Chair Jocelyn Samuels are Democrats and the remaining three Commissioners are Republicans.

The Chair is responsible for the administration and implementation of policy for and the financial management and organizational development of the Commission. The Vice Chair and the Commissioners participate equally in the development and approval of Commission policies, issue charges of discrimination where appropriate, and authorize the filing of suits. In addition to the Commissioners, the President appoints a General Counsel to support the Commission and provide direction, coordination, and supervision to the EEOC's litigation program. The General Counsel position is currently vacant.

A. Congressional Budget Justification for 2023

In March 2022, the Commission submitted its Congressional Budget Justification for Fiscal Year 2023.[2] The budget reflects an increase in dollars requested by about $60M from the FY 2022 budget. Part of the reason for this increase is a $31M allocation for state and local fair employment practice agencies and tribal employment rights organizations. Chair Burrows indicated that the Commission will focus on the following three areas:

Racial justice and systemic discrimination on all protected bases: According to the Commission, nearly one-third of all charges filed with the agency have alleged some form of racial discrimination. The EEOC plans to find ways to combat systemic discrimination, including working with employers who seek guidance on how to appropriately respond to questions about fairness in their own practices.

Pay equity: The Commission also notes that, today, women working full-time make 82 cents on the dollar when compared to white, non-Hispanic males. The agency plans to put more focus and resources towards addressing pay discrimination and unjustified wage gaps.

The civil rights impact of the COVID-19 pandemic in FY 2023: The EEOC plans to continue providing resources to assist employers and employees in solving pandemic-related issues. The agency is prepared to address

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[1] The author appreciates the assistance of University of Texas School of Law student Lauren Alexander-Bachelder in the preparation of this paper.

[2] *Fiscal Year 2023 Congressional Budget Justification*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Mar. 2022), https://www.eeoc.gov/fiscal-year-2023-congressional-budget-justification.

continued questions from stakeholders regarding reentry to physical workplaces, vaccination policies, testing and masking requirements, and the future of work. In an interview, Chair Burrows said, "This pandemic has been a challenge, not just in terms of public health. But really a civil rights challenge disproportionately hitting minorities, women, persons with disabilities, and vulnerable groups."[3]

B. Artificial Intelligence

In interviews regarding the EEOC's priorities, Chair Burrows has also indicated that the EEOC will take a closer look at how technology is fundamentally changing the way employment decisions are made, including through the use of artificial intelligence ("AI"). She noted that about 83% of employers use some form of AI in their hiring, and it is her goal for the EEOC to work with other federal agencies, employers, and AI vendors to educate the agency on the technology's uses and ways in which it has the potential for disparate treatment.

On October 28, 2021, the EEOC launched an initiative on artificial intelligence and algorithmic fairness to ensure that AI and other emerging tools used in hiring and other employment decisions comply with federal civil rights laws that the agency enforces.[4]

As part of the new initiative, the EEOC plans to:

1. Establish an internal working group to coordinate the agency's work on the initiative;
2. Launch a series of listening sessions with key stakeholders about algorithmic tools and their employment ramifications;
3. Gather information about the adoption, design, and impact of hiring and other employment-related technologies;
4. Identify promising practices; and
5. Issue technical assistance to provide guidance on algorithmic fairness and the use of AI in employment decisions.

On May 12, 2022, the EEOC issued new guidance (in conjunction with the Department of Justice[5]) for employers and workers about algorithmic fairness and the ADA.[6] The guidance explains how software use that relies on algorithmic decision-making may violate existing requirements under the ADA, provides practical tips for employers to comply with the ADA, and provides advice to job applicants and employees who think that their rights may have been violated.

C. Virtual Mediation

On June 1, 2022, the EEOC issued a press release indicating that two studies report overwhelming satisfaction with the EEOC's mediation program as well as a successful transition from in-person to online mediation as a result of

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[3] Emily Peck, *Civil rights agency warns on post-COVID caregiver discrimination*, AXIOS: ECON. & BUS. (Mar. 14, 2022), https://www.axios.com/2022/03/14/civil-rights-agency-warns-on-post-covid-caregiver-discrimination.

[4] *EEOC Launches Initiative on Artificial Intelligence and Algorithmic Fairness*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Oct. 28, 2021), https://www.eeoc.gov/newsroom/eeoc-launches-initiative-artificial-intelligence-and-algorithmic-fairness.

[5] *U.S. EEOC and U.S. Department of Justice Warn against Disability Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (May 12, 2022), https://www.eeoc.gov/newsroom/us-eeoc-and-us-department-justice-warn-against-disability-discrimination.

[6] *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (May 12, 2022), https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term.

the COVID-19 pandemic.[7] The studies indicate that the virtual format allows for a "safe space" for Charging Parties and provides employers with more flexibility, making employers more likely to participate in mediation. The EEOC says it will continue to offer virtual mediation as an option for those able to participate virtually, even after the agency resumes in-person service to the public.

II. RECENT CASES OF NOTE

A. FMLA Cases of Note

1. *Lindsey v. Bio-Med. Applications of La., L.L.C.*, 9 F.4th 317 (5th Cir. 2021)

Lindsey was a high-performing Clinical Manager for 17 years when she used FMLA leave. Two weeks after she returned from leave, Bio-Medical issued Lindsey her first ever discipline related to her attendance. Five months later, Bio-Medical issued Lindsey a second disciplinary action, also related to attendance. On August 1, 2017, Lindsey was fired over attendance and her failure to satisfy deadlines on a recent project. Lindsey filed suit alleging FMLA retaliation, but her claims were dismissed on summary judgment. The Fifth Circuit reversed, finding Lindsey had sufficient evidence of pretext to move past the summary judgment stage. The decision was centered on a finding that terminating her employment based on attendance was potentially unworthy of credence because Bio-Medical was unable to identify several of the dates during which she was allegedly absent, and Lindsey was at a company-mandated training meeting for another of the dates. Further, the court held that terminating her employment based on missed project deadlines was potentially unworthy of credence because Lindsey was never disciplined for missing deadlines or told that failure to meet the deadlines could jeopardize her job. There was also evidence that the company considered the deadlines to be minor, "hortatory," and not real, but they were seized upon as pretext for FMLA retaliation.

2. *Campos v. Steves & Sons, Inc.*, 10 F.4th 515 (5th Cir. 2021)

Campos had open heart surgery and took leave. When he tried to return to work about 13 weeks later, Steves & Sons terminated his employment. He sued, alleging, *inter alia*, disability discrimination under the Texas Commission on Human Rights Act ("TCHRA") and FMLA retaliation but lost on summary judgment. The Fifth Circuit affirmed dismissal of his disability discrimination claim because Campos failed to show he was "qualified" to work any job at the time of his termination. The return to work document Campos provided was inadmissible for lack of authentication, and his testimony alone that he was qualified to return to work was not sufficient and was undermined by statements Campos made to the Social Security Administration in a failed attempt to qualify for disability benefits.

But, the court reversed dismissal of his FMLA retaliation claim because Campos presented evidence controverting Steves & Sons' explanation for his termination and additional proof that: (1) the company made comments suggesting unhappiness with Campos taking so much FMLA leave; and (2) the company gave differing reasons for terminating Campos to the EEOC, and, at different times, to Campos himself.

3. *Hester v. Bell-Textron, Inc.*, 11 F.4th 301 (5th Cir. 2021)

Hester's employment was terminated while he was on approved FMLA leave, allegedly based on his angry reaction to a final warning issued two months earlier and on a poor performance review issued six months earlier. Upon realizing that Hester still had time left on his FMLA leave, his termination became effective at the end of his leave.

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[7] *EEOC's Pivot to Virtual Mediation Highly Successful, New Studies Find*, , U.S. EQUAL EMP. OPPORTUNITY COMM'N (Jun. 1, 2022), https://www.eeoc.gov/newsroom/eeocs-pivot-virtual-mediation-highly-successful-new-studies-find.

Hester sued for FMLA interference and retaliation. His claims were dismissed on a Rule 12(b)(6) motion to dismiss, for failure to assert a causal connection between FMLA and termination, which the Fifth Circuit reversed. The Fifth Circuit found that Hester sufficiently asserted all the elements of a FMLA retaliation claim, including causation. Specifically, causation was satisfied because Hester's termination was delayed until he was on FMLA leave. The court also found that Hester sufficiently asserted a FMLA interference claim by asserting that the company failed to restore him to his position—which is required by the FMLA as a general matter—once his FMLA leave was over because the company fired him while he was still on an approved FMLA leave, and made it clear that he would not return at the end of his leave. While the company argued that Hester would have been fired regardless of his FMLA leave, the facts undermined that assertion. For Rule 12(b)(6) purposes, it did not matter anyway, and the district court erroneously relied on summary judgment precedent for a motion to dismiss.

4. *Ziccarelli v. Dart,* No. 19-3435, 2022 WL 1768844 (7th Cir. Jun. 1, 2022)

Salvatore Ziccarelli, a Cook County Sheriff's Office Correctional Officer, worked for the Sheriff's Office for 27 years, during which time he developed a number of health conditions, including work-related post-traumatic stress disorder ("PTSD"). In September 2016, he had used more than two-thirds of the 12 weeks he was entitled to take as FMLA leave pursuing treatment for his PTSD. He asked to use some of his remaining FMLA hours to attend an intensive PTSD treatment program. The benefits manager allegedly told Ziccarelli, "[Y]ou've taken serious amounts of FMLA . . . don't take any more FMLA. If you do so, you will be disciplined." Upon hearing this, Ziccarelli opted to retire and sued the benefits manager, the county sheriff, and the county, alleging (among other things) FMLA interference. The lower court granted summary judgment and dismissed his claims. Ziccarelli appealed the summary judgment as to only his FMLA claims, including his claim that the benefits manager interfered with his FMLA leave when she discouraged him from taking FMLA leave but did not deny the leave outright.

A three-judge panel concluded that an employee does not need to prove that their FMLA leave request was outright denied to successfully assert an interference claim. The court stated, "We hope this opinion will help clarify that an employer can violate the FMLA by discouraging an employee from exercising rights under the FMLA without actually denying an FMLA leave request."

B. Disability Cases of Note

1. *Weber v. BNSF Ry. Corp.,* 989 F.3d 320 (5th Cir. 2021)

Weber, a train dispatcher, had epilepsy and missed work for medical appointments. When he had an epileptic seizure, it caused sleep deprivation, which would make him unable to safely work for a day or more. In the first quarter of 2016, Weber missed work four times because of epilepsy treatments or sleep deprivation from a seizure, and once for a colonoscopy procedure. His employment was terminated for excessive absenteeism, and he filed suit alleging disability discrimination under the ADA for failure to accommodate requests for discipline-free time off to receive medical care and to recover from a seizure. His case was dismissed on summary judgment, and the Fifth Circuit affirmed the dismissal. The court held that because regular worksite attendance was an essential job function, the company was not obligated by the ADA to give Weber discipline-free time off as a reasonable accommodation.

2. *Thompson v. Microsoft,* 2 F.4th 460 (5th Cir. 2021)

Microsoft hired Thompson as an Enterprise Architect ("EA"), which is a senior-level executive position that serves as a liaison between Microsoft and the client. After Thompson was unsuccessful in the role and the client requested his removal, Thompson revealed that he was autistic and requested a number of accommodations. Microsoft

granted some of the accommodations but denied others on the grounds that the accommodations were unreasonable and incompatible with an EA role because the accommodations would remove some of the job's essential functions. After several months of discussion, Microsoft began a job reassignment process. However, Thompson took long-term disability leave and then sued, alleging failure to accommodate under the ADA. The case was dismissed on summary judgment, and the Fifth Circuit affirmed. The Fifth Circuit held that Thompson's own requests for accommodation showed that he was not a "qualified individual" for the EA role because the requests would prevent performance of the job's essential functions.

3. *Tex. Dep't of Transp. v. Lara*, 625 S.W.3d 46 (Tex. 2021)

Lara sued the Texas Department of Transportation ("DOT") for failure to accommodate and retaliatory termination under the TCHRA. Lower courts differed on the outcome, and the Texas Supreme Court granted review. The Court held that there was a fact question about whether the additional leave of about five weeks without pay that Lara orally requested was reasonable as an accommodation or amounted to an unreasonable request for indefinite leave. The DOT had a policy permitting leave without pay for as long as 12 months, and the existence of this policy was a central factor in the Court's decision. The Court also held that the fact that the DOT told Lara to fill out forms to formally request a leave without pay, which he never did, did not bar his claim for failure to make a reasonable accommodation, given his repeated oral requests. Furthermore, accommodation requests need not follow a formal process.

The Court affirmed the dismissal of Lara's retaliation claim on the grounds that simply requesting an accommodation under the TCHRA is not "protected activity" for purposes of a TCHRA retaliation claim. In contrast, many federal courts have held that simply requesting an accommodation is "protected activity" for purposes of an ADA retaliation claim. However, the ADA has different statutory language in this regard that accounts for the difference.

4. *Tex. Tech Univ. Health Scis. Ctr. - El Paso v. Niehay*, 641 S.W.3d 761 (Tex. App.—El Paso 2022, pet. filed)

Dr. Niehay alleged that she was wrongfully terminated from an emergency medicine residency program because of a perceived impairment, which she identified as morbid obesity. The trial court denied the employer's motion for summary judgment and the Court of Appeals affirmed. The employer argued that morbid obesity, without any showing that the employer believed she suffered from an underlying physiological disorder, cannot be a physical impairment within the meaning of the TCHRA. The court held that morbid obesity can be considered a disability under the TCHRA in a "regarded as" claim without evidence that the employer believed the morbid obesity resulted from an underlying physiological cause.

5. *Jones v. Tex. Dep't of Pub. Safety*, No. 03-20-00615-CV, 2022 WL 318585 (Tex. App.—Austin Feb. 3, 2022, no pet.)

Trooper Patsy Jones sued the Texas Department of Public Safety ("DPS") for violations of the TCHRA based on, *inter alia*, disability discrimination (including failure to accommodate). Jones suffered from acute stress and requested FMLA leave, which was granted. When she returned to work, the DPS attempted to schedule a workplace facilitation to address a complaint Jones made about her coworkers prior to her leave, which Jones declined, "[d]ue to . . . unpredictable, unhealthy health conditions (mentally, emotionally and physically)." Upon reading this, the DPS was concerned about Jones's ability to perform her job and placed her on leave with pay. The trial court granted summary judgment for the DPS and the Court of Appeals affirmed. The court found that even if Jones met the other requirements to show disability discrimination, she did not present evidence of a resulting adverse employment decision against her, as it is well established that leave with pay does not rise to the level of an ultimate

employment action. The court also affirmed the determination that Jones's communications either did not request an accommodation or did not explain that she had a disability, which is required for a failure to accommodate claim.

C. Sexual Harassment Cases of Note

1. *Abbt v. City of Houston*, 28 F.4th 601 (5th Cir. 2022)

Melinda Abbt was a long-tenured firefighter for the Houston Fire Department. In 2008, an intimate video Abbt made for her husband was discovered by coworkers and shared with an unknown number of firefighters in the department. In 2017, Abbt learned about the video and that her colleagues were viewing it regularly when one colleague confessed to her husband (who was also a member of the fire department). Abbt was "completely distraught" and "disgusted" and called in sick for days and weeks following the discovery. She was ultimately diagnosed with post-traumatic stress disorder ("PTSD"). Ultimately, Abbt filed suit, alleging sexual harassment that created a hostile work environment, retaliation, and other claims. The District Court granted summary judgment to the City on all of her claims, finding that the sexual harassment claim failed because (in relevant part) it was her knowledge of what happened that led to her PTSD—not the actual conduct—and because anger and embarrassment is not sufficient to establish a hostile work environment.

The Fifth Circuit reversed the summary judgment on the sexual harassment claim, finding that repeatedly watching the video constituted unwelcome harassment and the complained-of conduct was sufficiently severe to create a hostile work environment. The court pointed to the fact that the "invasive and violative conduct" was not just a clear violation of department policy but was also potentially a crime under Texas law. Furthermore, Abbt was required to live with her coworkers while on duty and would have to do so with the knowledge that some had repeatedly watched an intimate video of her nude, and as a result she developed PTSD. The court specifically noted that the fact that Abbt did not learn of the viewing of the video until significant time passed did not change the effect the acts had on her and did not lessen culpability.

2. *Rivas v. Estech Sys., Inc.*, No. 06-20-00058-CV, 2021 WL 2231262 (Tex. App.—Texarkana Jun. 3, 2021, no pet.)

Cristina Rivas found a hidden camera underneath her desk at Estech Systems, Inc. Estech immediately gave Rivas the rest of the week off, called the police, and began an investigation. Estech's controller and one of Rivas's supervisors confessed that he placed the camera under Rivas's desk. His employment was terminated within minutes. Over the next four weeks, Estech "allowed Rivas to work when she was able, paid her for the time she was not able to work, rearranged their offices, and arranged for her to receive counseling." Nevertheless, less than a month later, Rivas resigned. Rivas filed suit against Estech, alleging that Estech was liable for sexual harassment under the TCHRA, retaliation by constructive discharge, intrusion on seclusion, and intentional infliction of emotional distress. The District Court granted summary judgment on all of her claims, and she appealed as to her sexual harassment claim only. The Court of Appeals held that Rivas had established all of the elements required for a sexual harassment claim based on sexual harassment by a supervisor, including that she was subjected to unwelcome harassment, even though she was unaware of the camera at the time it was photographing her. Importantly, Estech did not raise the *Faragher/Ellerth* affirmative defense in connection with this claim in the lower court, and therefore, the court was precluded from considering it. The *Faragher/Ellerth* affirmative defense holds that when no tangible employment action is taken against the victim, the employer may raise an affirmative defense that it exercised reasonable care to prevent and correct promptly any sexual harassment and that the employee unreasonably failed to take advantage or otherwise avoid the harm.

D. Title VII Gender Identity Case of Note

1. *Olivarez v. T-Mobile U.S.A., Inc.*, 997 F.3d 595 (5th Cir. 2021)

Olivarez was a retail store association for T-Mobile who identified as a transgender person. In September 2017, Olivarez stopped coming to work to undergo egg preservation and a hysterectomy. The next month, Olivarez requested leave to be applied retroactively from September through December 2017, which the company granted. The company later granted a request for an extension of leave through February 18, 2018 but denied a further extension of leave in March 2018. Olivarez's employment was terminated on April 27, 2018. Olivarez filed suit, alleging T-Mobile fired him because of his transgender status, in violation of Title VII and the ADA. The District Court dismissed Olivarez's claims on a Rule 12(b)(6) motion to dismiss, and Olivarez appealed. The Fifth Circuit affirmed the dismissal. The Fifth Circuit found that Olivarez failed to allege a Title VII claim because he failed to assert that any cisgender employee was treated better than he was under similar circumstances. Nor did Olivarez present any other facts that plausibly suggested that he was discriminated against because of his transgender status. The Fifth Circuit also found Olivarez failed to plausibly articulate an ADA claim because his allegations were conclusory and barebones, and he failed to articulate the nature of his disability.

E. Age Discrimination Cases of Note

1. *Ross v. Judson Indep. Sch. Dist.*, 993 F.3d 315 (5th Cir. 2021)

Ross was an African American school principal who was terminated for alleged policy violations. She filed suit for race, sex, and age discrimination under the TCHRA. The school district moved for summary judgment, which was granted. The Fifth Circuit affirmed, finding that Ross's race and sex discrimination claims failed because she could not identify a similarly situated comparator who was treated better than her. Ross did identify a comparator for her age discrimination claim—her replacement, who was six years younger than her. The Fifth Circuit noted that it is a "closer call" as to whether the age gap between her and her replacement was significant enough to establish a *prima facie* case. The court ultimately did not decide the issue because it found that Ross failed to present evidence of pretext, which was fatal to her claims.

F. Racial Discrimination and Harassment Cases of Note

1. *Johnson v. PRIDE Indus., Inc.*, 7 F.4th 392 (5th Cir. 2021)

PRIDE is a nonprofit that employs individuals with disabilities in manufacturing and service jobs. Michael Johnson was employed by PRIDE as a carpenter. Johnson alleged that he endured repeated race-based harassment, primarily racial slurs in Spanish at the hands of a coworker. This was primarily a racial harassment suit under 42 U.S.C. § 1981. The District Court granted summary judgment on the grounds that the harassment was not severe or pervasive enough to affect a term, condition, or privilege of employment. The Fifth Circuit reversed, holding that because some of the slurs were overtly racist (including the "n-word" in Spanish), a reasonable factfinder could also find that some of the terms which were not inherently offensive, such as "mijo" and "manos," could also be racially motivated. The court also found that given the evidence of the slurs, a reasonable factfinder could further find that other mistreatment, such as hiding promotion paperwork and giving less desirable work assignments (also not overtly racist) could be part of the racial harassment given the context.

2. *Burns v. Berry Glob., Inc.*, No. 21-5359, 2022 WL 351769 (6th Cir. Feb. 7, 2022)

Ronald Burns was employed as a maintenance technician by Berry Global, Inc., where he was the victim of four instances of racial harassment. Between August 7 and August 24, 2018, Burns found an offensive note, a noose, and a written threat in his locker. Burns was deeply troubled by these instances and reported them as they arose.

At each instance, Berry launched an inconclusive investigation that failed to identify the harasser; however, the suspect was ultimately suspended without pay and Burns was offered a transfer to a different unit, which he declined. In January 2019, Burns discovered another noose and resigned soon after this incident. He filed suit, alleging racial harassment and discrimination, retaliation, and constructive discharge. The District Court dismissed the suit at the summary judgment stage, finding that the supervisor standard of review does not apply to the claims, and under the coworker standard of review, Berry's response (although not perfect) was reasonably adequate.

G. Retaliation Cases of Note

1. *Apache Corp. v. Davis*, 627 S.W.3d 324 (Tex. 2021)

Davis, a female paralegal, complained about sex discrimination in writing on December 3, 2012 in a long and rambling email, and Apache terminated her employment on January 25, 2013 for her prior alleged insubordination—specifically, working overtime without authorization in violation of her supervisor's repeated directives. Davis sued for retaliation under the TCHRA and won a jury verdict. Apache appealed, and the Houston Court of Appeals, 14th District, affirmed in a lengthy opinion. Apache appealed to the Texas Supreme Court, which took the case. The Court unanimously ruled that Davis failed to present any evidence of "but for" causation and reversed and rendered judgment for Apache. The court anchored its ruling on the facts that: (1) Davis herself had noted in her own email that the company was preparing to fire her before she sent the email; and (2) Davis admitted to the insubordination that was the basis for her termination. The Court further held that evidence that other paralegals falsified timecards and were not fired was no proof of retaliation against Davis because falsifying timecards was not "nearly identical" to insubordination. The Court of Appeals previously found this evidence supported the jury's verdict, but the Texas Supreme Court rejected it as any evidence of retaliation at all.

2. *Yowell v. Admin. Rev. Bd., U.S. Dep't of Labor*, 993 F.3d 418 (5th Cir. 2021)

Yowell was a railroad employee who was injured on the job. His employer's policy required reporting any work injury immediately, no matter how small. Yowell did not report the injury until a week after it occurred and initially lied about the timing. His employment was terminated for failure to follow the company's injury reporting policy. The court held that reporting an injury is protected activity but that Yowell's termination was not based on the fact that he reported an injury, but that he failed to report it promptly.

H. Temporal Proximity Cases of Note

1. *Gosby v. Apache Indus. Servs.*, 30 F.4th 523 (5th Cir. 2022)

Apache hired Gosby as a scaffolding helper at an Exxon plant in Beaumont, Texas. The job consisted mostly of assisting in the building or dismantling of scaffolds. She was required to undertake a physical examination before she began work. In her pre-employment paperwork, Gosby disclosed she suffered from diabetes, which is a condition covered by the ADA. Ultimately, Gosby's physician recommended that she not climb in her scaffolding job, but she was otherwise cleared for work and subsequently worked for several weeks. Gosby was hired as a temporary employee, and therefore she expected the job to last no more than six months. However, she and 11 other employees were terminated far before six months during a reduction in force. One week prior to the layoff, Gosby was briefly taken to the medical tent for treatment after she suffered a diabetic attack but was cleared to return to work soon after. On her next scheduled day of work, Gosby was sent home allegedly due to lack of work, and the layoffs were announced the next day.

Gosby alleged discrimination on the basis of her disability, and after discovery, the District Court granted summary judgment in Apache's favor. Summary judgment was based on a finding that Gosby had not established a *prima*

facie case of discrimination because her only evidence of a causal link between her disability and her termination was the temporal proximity between the two. The Fifth Circuit disagreed, holding that temporal proximity alone can sometimes be enough to establish causation at the *prima facie* stage when the two acts are very close in time.

Additionally, Gosby argued Apache's legitimate, non-discriminatory reason for termination was insufficient. Apache claimed only that Gosby was laid off, and Gosby pointed out that a layoff in itself is not sufficient. Rather, the employer must articulate why the employee was selected for the layoff. The Court of Appeals agreed.

2. ***Watkins v. Tegre*, 997 F.3d 275 (5th Cir. 2021)**

Ten days after giving her boss a doctor's note indicating she needed intermittent time off due to anxiety, Watkins was fired from her job as a dispatch supervisor in the sheriff's office. Watkins filed suit for race discrimination and FMLA retaliation. She lost on summary judgment, but the Fifth Circuit reversed as to both claims. As to the FMLA retaliation claim, the court found that the close timing between her request for FMLA leave and her termination was strong evidence of pretext supporting her FMLA retaliation claim, particularly when combined with evidence that her supervisor was suddenly holding her accountable for performance concerns he had not previously addressed.

I. FLSA Cases of Note

1. ***U.S. Dep't of Labor v. Five Star Automatic Fire Prot., L.L.C.*, 987 F.3d 436 (5th Cir. 2021)**

Five Star paid its construction employees by the hour and required them to record their own time by writing a total number of hours worked each day on timesheets. The DOL filed a complaint against Five Star. At trial, the DOL called six former employees to testify about alleged violations. Although the testimony lacked many details, the District Court determined that Five Star failed to keep accurate records and that Five Star's pay practices violated a number of wage and hour rules, including not paying employees for all time worked. The Fifth Circuit upheld the judgment and the award, agreeing with the District Court's application of the U.S. Supreme Court's burden-shifting framework outlined in *Anderson v. Mt. Clemens Pottery Company*, which holds that where an employer fails to maintain proper records, a plaintiff need only show by "just and reasonable inference" that he or she was an employee, worked the hours, and was not paid. The Fifth Circuit explained that this concept is "rooted in the view that an employer shouldn't benefit from its failure to keep required payroll records, thereby making the best evidence of damages unavailable."

J. Qualified Immunity Cases of Note

1. ***Bevill v. Fletcher*, 26 F.4th 270 (5th Cir. 2022)**

Bevill, a police captain, signed an affidavit that was filed in a criminal suit averring that the defendant in the suit would not receive a fair trial in the county where the trial was currently located because the local sheriff, district attorney, and judge had close personal relationships. The affidavit stated that "[a]s a longtime resident and law enforcement officer in the Wood County area, Bevill was familiar with the local players and political climate, including the relationships between and among the sheriff, district attorney and judge." Bevill did not sign the affidavit in his capacity as an officer, nor did he speak with anyone at the department before signing it. Bevill's employment was terminated after an investigation found he violated city policies by making the statement. He sued under 42 U.S.C. § 1983 for conspiracy to commit retaliatory employment termination. The defendants moved to dismiss on the grounds that they were entitled to qualified immunity, but the Fifth Circuit concluded they were not. The court held that Bevill was speaking as a private citizen in his affidavit and his interest in submitting the affidavit outweighed any interest the government might have had. Having found Bevill had pleaded a deprivation of his

First Amendment rights, the court then held (2-1) that the First Amendment right at stake was "clearly established" at the time it was infringed. The court also found that although its decision in *Sims v. City of Madisonville*, 894 F.3d 632 (5th Cir. 2018) establishing that a person other than the ultimate decision maker can be liable for First Amendment retaliatory termination was not issued until after the defendants' alleged actions, there was other, existing case law, which could have led to the same conclusion, and therefore the right was "clearly established."

III. DEVELOPMENTS IN THE TEXAS LEGISLATURE

The Texas Legislature's 87th Regular Session convened on January 12, 2021. Following the end of the Regular Session and House Democrats' quorum break, Governor Greg Abbott called three special sessions. The laws summarized below were passed during Regular Session.

A. Sexual Harassment

1. HB 21[8] (Expansion of statute of limitations)

House Bill 21 (effective September 1, 2021) extended the statute of limitations to file a sexual harassment complaint with the Texas Workforce Commission from 180 days of the alleged sexual harassment to 300 days. Tex. Lab. Code Ann. § 21.202(a-1). It applies only to complaints which contain allegations of sexual harassment that occurred on or after September 1, 2021. HB 21 does not affect the statute of limitations for other forms of harassment or discrimination, including other forms of sex discrimination.

2. SB 45[9] (Expansion of liability)

Senate Bill 45 (effective September 1, 2021) changed the definition of "employer" for sexual harassment claims to:

"Employer" means a person who:

(A) employs one or more employees; or

(B) acts directly in the interests of an employer in relation to an employee.

Tex. Lab. Code Ann. § 21.141(1). Most governmental entities have always been covered by the Labor Code, regardless of the number of employees they employ. *Id.* at § 21.002(8)(D). The important change for public employers is the new alternative definition of "employer" as someone who "acts directly in the interests of an employer in relation to an employee." *Id.* at § 21.141(1)(B). This new definition opens agents, supervisors, and managers to liability for both sexual harassment itself and for not taking immediate and appropriate corrective action in response to sexual harassment (see below).

SB 45 also codified the definition of "sexual harassment" (which was developed through case law interpreting both federal and state cases) as:

"Sexual harassment" means an unwelcome sexual advance, a request for a sexual favor, or any other verbal or physical conduct of a sexual nature if:

(A) submission to the advance, request, or conduct is made a term or condition of an individual's employment, either explicitly or implicitly;

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[8] Act of May 22, 2021, 87th Leg., R.S., ch 443, 2021 Tex. Sess. Law Serv., https://capitol.texas.gov/tlodocs/87R/billtext/html/HB00021I.htm.

[9] Act of May 19, 2021, 87th Leg., R.S., ch 172, 2021 Tex. Sess. Law Serv., https://capitol.texas.gov/tlodocs/87R/billtext/html/SB00045F.htm.

(B) submission to or rejection of the advance, request, or conduct by an individual is used as the basis for a decision affecting the individual's employment;

(C) the advance, request, or conduct has the purpose or effect of unreasonably interfering with an individual's work performance; or

(D) the advance, request, or conduct has the purpose or effect of creating an intimidating, hostile, or offensive working environment.

Id. at § 21.141(2). Finally, SB 45 changed our understanding of how employers should respond to sexual harassment complaints. Previously, employers were obligated to take prompt and effective remedial action in response to sexual harassment. SB 45 changed the standard to "immediate and appropriate corrective action." *Id.* at § 21.142(2). This obligation extends to supervisors and managers, who can now be individually named and personally liable for not taking appropriate action. As of the date this paper was drafted, there is no case law interpreting the difference between these two standards, but it appears clear by the purposeful distinction between the terms that the Legislature intended for the terms to not be the same. SB 45 applies only to complaints which contain allegations of sexual harassment that occurred on or after September 1, 2021.

3. SB 282[10] (Settlement of sexual harassment claims)

Senate Bill 282 (effective September 1, 2021) amended the Texas Government, Local Government, and Education Codes to prohibit the use of public funds to settle or to pay sexual harassment claims made against certain individuals or employees of a governmental entity. Public employers may still settle sexual harassment claims, but the settlement should be structured to clarify that public funds are only paid to settle claims against the public entity and not individual officials.

The Government Code was amended to prohibit the appropriation or use of money to settle or otherwise pay a sexual harassment claim made against a person who:

(1) is an elected member of the executive, legislative, or judicial branch of state government;

(2) is appointed by the governor to serve as a member of a department, commission, board, or other public office within the executive, legislative, or judicial branch of state government; or

(3) serves as staff for a person described by Subdivision (1) or (2).

Tex. Gov't. Code Ann. § 576.001.

The Local Government Code was amended to prohibit a political subdivision (a county, municipality, school district, other special district, or other subdivision of state government) from using public money to settle or otherwise pay a sexual harassment claim made against a person who is:

(1) an elected or appointed member of the governing body of the political subdivision; or

(2) an officer or employee of the political subdivision.

Tex. Loc. Gov't Code Ann. § 180.008.

The Education Code was amended to clarify that an open-enrollment charter school is considered a political subdivision for purposes of Section 180.008 of the Local Government Code. Tex. Educ. Code Ann. § 12.1058(a).

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[10] Act of May 31, 2021, 87th Leg., R.S., ch 551, 2021 Tex. Sess. Law Serv., https://capitol.texas.gov/tlodocs/87R/billtext/html/SB00282F.htm.

4. Recommendations

In light of the changes to sexual harassment law in Texas, public employers should take the following steps:

1. Update anti-harassment policies to track the language in the statute, clearly set forth reporting procedures, and designate individuals that an employee can contact with complaints. Clearly indicate that supervisors may be subject to discipline for failing to report harassment they know about, for failing to work with the employer to impose appropriate corrective action, and that they can be held personally liable under the law.
2. Provide updated training. Workplace harassment training is recommended for all employees, though employers are encouraged to host specific sessions for managers and supervisors focused on how to recognize and report sexual harassment and how to respond to employee complaints. Managers and supervisors should also be trained so that they can be personally responsible under the new law.
3. Ensure that proper workplace investigations into complaints of workplace harassment are taking place. Employers need to have a plan in place to expeditiously investigate reported harassment, either internally or via a third-party independent investigator. If evidence of harassment or other wrongdoing is found, the employer should take prompt disciplinary action and keep the complainant informed of all remedial actions taken.

B. Paid Leave

1. HB 2073[11] (Paid quarantine leave for certain employees)

House Bill 2073 (effective June 15, 2021) amended the Local Government Code provide paid quarantine leave for firefighters, peace officers, and emergency medical technicians. HB 2073 requires political subdivisions to place firefighters, peace officers, and emergency medical technicians on paid quarantine leave when ordered to quarantine or isolate due to a possible or known exposure to a communicable disease while on duty. Employees on leave must receive all employment benefits and compensation for the duration of the leave and reimbursement for the cost of the quarantine such as lodging, medical treatment, and transportation. This leave must be provided in addition to any existing leave the employee has available.

2. SB 44[12] (Paid leave for volunteering to aid disaster)

Senate Bill 44 (effective September 1, 2021) amended the Government Code to provide up to ten hours of paid leave for state employees per fiscal year for volunteering during a state-declared disaster. This paid volunteer time must be provided without deductions in salary or loss of vacation time. To be eligible for this leave, employees must receive prior employer approval and must volunteer with any volunteer organization included on Texas' Voluntary Organizations Active in Disaster list.

3. SB 1359[13] (Paid mental health leave for peace officers)

Senate Bill 1359 (effective September 1, 2021) amended the Government Code to require law enforcement agencies to develop and adopt a policy allowing the use of paid mental health leave by peace officers who experience a traumatic event during the scope of their employment. For purposes of this bill "law enforcement agency" includes

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[11] Act of May 31, 2021, 87th Leg., R.S., ch 685, 2021 Tex. Sess. Law Serv., https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB02073F.pdf#navpanes=0.

[12] Act of May 12, 2021, 87th Leg., R.S., ch 77, 2021 Tex. Sess. Law Serv., https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00044F.pdf#navpanes=0.

[13] Act of May 24, 2021, 87th Leg., R.S., ch 396, 2021 Tex. Sess. Law Serv., https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB01359F.pdf#navpanes=0.

a political subdivision authorized to employ peace officers, including colleges and school districts. The policy must be implemented as soon as practicable after September 1, 2021 and must:

1. provide clear and objective guidelines for use of the mental health leave;
2. make the leave available without a deduction in compensation;
3. state the number of leave days available; and
4. detail the limit of anonymity for a peace officer taking such leave.

The policy may, but is not required to, list mental health services available to peace officers in the area.

4. HB 2063[14] (State employee family leave pool)

House Bill 2063 (effective September 1, 2021) amended the Government Code to establish a state employee family leave pool to give eligible state employees more flexibility to bond with and care for their children during the first year following birth, adoption or foster placement, and to care for a seriously ill family member or themselves, including for pandemic-related illnesses or complications caused by a pandemic. The bill requires the governing body of a state agency to establish a family leave program which allows employees to voluntarily transfer sick or vacation leave earned by the employee to a family leave pool in accordance with the parameters laid out in the text of the bill. Employees will be eligible to apply for leave from the pool for any of the following reasons after exhausting their own eligible compensatory, discretionary, sick and vacation leave for:

1. the birth of a child;
2. the placement of a foster child or adoption of a child under 18 years of age;
3. the placement of any person 18 years of age or older requiring guardianship;
4. a serious illness of an immediate family member or the employee, including a pandemic-related illness;
5. an extenuating circumstance created by an ongoing pandemic, including providing essential care to a family member; and
6. a previous donation of time to the pool.

On January 7, 2022, the Texas Comptroller's office issued the following guidance:[15]

> "Based on a review of Internal Revenue Service (IRS) Revenue Ruling 90-29 and IRS Private Letter Ruling 152644-06, this new leave pool may not qualify as a bona fide employer-sponsored leave sharing plan for medical emergencies afforded special tax treatment by the IRS, which exempts donations of leave to the leave pool from the general assignment of income rule. Therefore, there may be tax consequences for employees who choose to donate leave to this pool."

The Comptroller's office does not provide legal guidance or determine compliance with IRS guidelines, so agencies are responsible for reviewing the statutory provisions, as well as the IRS guidelines to determine the appropriate tax treatment of leave donated or and taken after awarded from the agency's family leave pool. The Comptroller's office notes that it has created a new taxable non-cash earnings code to adjust taxable base wage for a pay period to ensure proper tax withholding and reporting.

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[14] Act of May 31, 2021, 87th Leg., R.S., ch 684, 2021 Tex. Sess. Law Serv., https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB02063F.pdf#navpanes=0.

[15] *Tax Implications of the Family Leave Pool*, TEX. COMPTROLLER OF PUB. ACCOUNTS (Jan 7, 2022), https://fmx.cpa.texas.gov/fmx/payper/family_leave/a049_all.php.

C. Military

1. HB 1589[16] (Paid military leave)

House Bill 1589 (effective September 1, 2021) amended the Government Code to provide an additional seven days of paid leave for public employees engaged in military service in response to a federally declared disaster. This leave is in addition to the 15 days of paid leave provided for public employees who must miss work for authorized training or military duty under existing Texas law. While on this military leave, an employee may not be subjected to loss of time, efficiency rating, personal time, sick leave, or vacation time.

2. SB 484[17] (Private right of action for military leave)

Senate Bill 484 (effective September 1, 2021) amended the Government Code to provide a private right of action for members of the Texas military forces on active duty, state training duty, or other forms of duty to retain private legal counsel and file suit against persons who violate the benefits or protections offered to military personnel under The Service Members Civil Relief Act and the Uniformed Services Employment and Reemployment Rights Act and to be awarded compensation for damages and attorney's fees. Prior to SB 484, state military service members whose rights under state law were violated could only remedy the violation by filing a complaint with the Texas Workforce Commission's Civil Rights Division under Tex. Gov't. Code Ann. § 437.204(b).

D. Medical Marijuana

1. HB 1535[18] (Compassionate Use)

House Bill 1535 (effective September 1, 2021) amended the Occupations Code to expand authorized medical use of low-THC cannabis to patients with certain medical conditions, including all forms of cancer (previously only terminal cancer), post-traumatic stress disorder, and a medical condition which is approved for a statutorily authorized research program. Notably, the bill does not provide for employment protections to applicants or employees who qualify for medical use, nor does it in anyway authorize the use of THC in the workplace. Regardless, employers should be prepared for a rise in disability accommodation requests from users of medical, low-THC cannabis.

E. Open Carry

1. HB 1927[19] (Firearm Carry Act of 2021)

House Bill 1927 (effective September 1, 2021) amended the sections of the Texas Penal Code and Texas Government Code to authorize most Texans over the age of 21 to carry a handgun without a handgun license, though the bill left the existing handgun licensing scheme in place. HB 1927 does not affect an employers' ability to prohibit employees from carrying on work premises or while on duty. However, note the parking lot exception, which requires employers to allow employees to keep their legal firearms locked in a personal car when parked in

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[16] Act of May 27, 2021, 87th Leg., R.S., ch 923, 2021 Tex. Sess. Law Serv., https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB01589F.pdf#navpanes=0.

[17] Act of May 27, 2021, 87th Leg., R.S., ch 844, 2021 Tex. Sess. Law Serv., https://capitol.texas.gov/tlodocs/87R/billtext/pdf/SB00484F.pdf#navpanes=0.

[18] Act of May 31, 2021, 87th Leg., R.S., ch 660, 2021 Tex. Sess. Law Serv., https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB01535F.pdf#navpanes=0.

[19] Firearm Carry Act of 2021, 87th Leg., R.S., ch 809, 2021 Tex. Sess. Law Serv., https://capitol.texas.gov/tlodocs/87R/billtext/pdf/HB01927F.pdf#navpanes=0.

the work parking area that the employer provides for employees.[20] Employers who want to prohibit weapons in the workplace in light of HB 1927 can do so by enacting a weapons policy that states where weapons are prohibited and notifies employees of the parking lot exception. Governmental entities may continue to elect to prohibit both licensed and unlicensed carry at open meeting by posting notice under Section 30.06 and 30.07.

IV. OTHER DEVELOPMENTS OF NOTE

A. Wage and Hour Division to issue rulemaking on independent contractor classification.

On June 3, 2022, the DOL announced its wage and hour division will be issuing a notice of proposed rulemaking to address the distinction between independent workers and employees.[21] The Trump Administration Rule clarifying independent contractor status is currently in effect. It was delayed and then withdrawn by the Biden Administration in early 2021 as "inconsistent with the Fair Labor Standards Act's text and purpose." However, on March 14, 2022, the rule was reinstated by a district court in the Eastern District of Texas, and the court determined that the rule took effect as of its original effective date, March 8, 2021, and remains in effect. Under the Fair Labor Standards Act, employees are entitled to minimum wage, overtime pay, and other benefits. Independent contractors are not entitled to these benefits, but they generally have more flexibility to set their own schedules and work for multiple companies. The DOL's announcement means it will engage in the rulemaking process to address determining employee or independent contractor status under the FLSA. The first step is engaging in public forums in June 2022. Then, a proposed rule will be published in the Federal Register, and there will be a notice and comment period.

B. Wage and Hour Division to increase investigators

On February 2, 2022, the DOL announced its wage and hour division intends to hire an additional 100 investigators to support enforcement efforts, including the protection of workers' wages, migrant and seasonal workers, rights to FML, and prevailing wage requirements for workers on federal contracts.[22] "Adding 100 investigators to our team is an important step in the right direction," said Acting Wage and Hour Administrator Jessica Looman. "We anticipate significantly more hiring activity later in fiscal year 2022. While appropriations will determine our course of action, we are optimistic we will be able to bring new talented professionals onboard to expand our diverse team."

C. DOL guidance on tracking time for remote employees

The shift towards remote work for many employees who were previously in-person only raised a number of new workplace issues for employers to consider. In August 2020, the DOL issued Field Assistance Bulletin 2020-5, clarifying employers' obligations to track teleworkers' compensable hours.[23] The DOL notes that in a telework or remote work arrangement, the question of the employer's obligation to track hours actually worked for which the employee was not scheduled may often arise. The guidance reaffirms that an employer is required to pay its employees for all hours worked, including work not requested but allowed and work performed at home. If the

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[20] Tex. Gov't. Code Ann. § 411.203; Tex. Lab. Code Ann. § 52.061 *et seq*.; Tex. Att'y Gen. Op. No. GA-0972 (2012).

[21] Jessica Looman, *Misclassification of Employees as Independent Contractors Under the Fair Labor Standards Act*, U.S. DEP'T OF LABOR BLOG (Jun. 3, 2022), https://blog.dol.gov/2022/06/03/misclassification-of-employees-as-independent-contractors-under-the-fair-labor-standards-act?mkt_tok=ODIzLVRXUy05ODQAAAGEyi5RpIlMLbdsgcflNA6Vvv4BqoPDPgBFpOnpGkaR2G0QO15dbjcvaY5CWLSv4j3GCAp1EPoaduhOwSj9LBGEr4DYkXFTpOGSt5FOPJwpgN7u7w.

[22] *US Department of Labor Announces Plans to Hire 100 Investigators to Support its Wage and Hour Division's Compliance Efforts*, U.S. DEP'T OF LABOR (Feb. 1, 2022), https://www.dol.gov/newsroom/releases/whd/whd20220201-2

[23] https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_5.pdf.

employer knows or has reason to believe that an employee is performing work, the time must be counted as hours worked.

D. Joint Department of Justice and Health and Human Services Guidance

On July 26, 2021, the Department of Justice and Health and Human Services issued joint guidance that "Long COVID" may be considered a disability under the ADA if it substantially limits one or more major life activities.[24] "Major life activities" include a wide range of activities, such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, writing, communicating, interacting with others, and working. "Substantially limits" is construed broadly and should not demand extensive analysis. The guidance notes that even if the impairment comes and goes, it can be considered a disability if it would substantially limit a major life activity when active.

E. EEOC Mental Health Conditions and the Workplace Guidance

In connection with May 2022 as mental health awareness month, the EEOC issued a new resource page titled Mental Health Conditions: Resources for Job Seekers, Employees, and Employers.[25] The EEOC stated that, "[a]bout one in five adults in the U.S. experienced a mental health issue in 2020." Commissioner Andrea Lucas added that she believes that mental health-related ADA claims "are going to start to explode into the public's sight soon" and Chair Burrows said, "Our nation's growing mental health crisis is a serious problem, and the EEOC is committed to doing our part to address it. Our new landing page provides helpful information on legal workplace protections for individuals with mental health conditions and makes the agency's resources more accessible for the public." The EEOC's resource page is a landing page where employers can quickly find guidance on whether a mental health condition is a disability covered by the ADA, what types of reasonable accommodations might be available, and find links to resources that may assist in the interactive process.

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[24] *Guidance on "Long COVID" as a Disability Under the ADA, Section 504, and Section 1557*, U.S. DEP'T OF HEALTH HUM. SERV. AND DEP'T OF JUST. (Jul. 26, 2021), https://www.ada.gov/long_covid_joint_guidance.pdf.

[25] *Mental Health Conditions: Resources for Job Seekers, Employees, and Employers*, U.S. EQUAL EMP. COMM'N, https://www.eeoc.gov/mental-health-conditions-resources-job-seekers-employees-and-employers (last visited Jun. 6, 2022).