

2022 Hot Topics in Employment Law



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**2022 TCAA
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The background features a dark grey, angular shape in the lower-left corner that overlaps with several overlapping, semi-transparent green shapes of various shades and orientations, creating a modern, geometric aesthetic.

RECENT CASES OF NOTE

- Employee terminated while on FMLA leave based on behavior 2 mos prior and eval 6 months prior, then told he could finish out FMLA leave
- 5th Cir. reversed 12(b)(6) dismissal (causation)
- Employee established retaliation, including causation by fact of delayed termination while on leave
- Employee established interference by fact that company did not restore him to his position
- MSJ precedent should not inform MTD

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

WATCH WHAT YOU SAY!!!

- “[Y]ou’ve taken serious amounts of FMLA . . . Don’t take any more FMLA. If you do so, you will be disciplined.”
Discouragement = Interference w/o outright denial

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

- Employee terminated for attendance and failure to meet “hortatory” deadlines is evidence of pretext

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

- Evidence company made comments suggesting unhappiness with employee taking so much leave + gave differing reasons for termination = reversal of summary judgment on FMLA retaliation but not disability discrimination.

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

DISABILITY – ORAL REQUESTS ENOUGH

- TX Supreme Court holds that verbal requests for additional leave reasonable accommodation when employer had policy for LWOP for up to 12 months
- Employee's failure to formally fill out leave requests did not bar his claim – accommodation requests need not follow formal process

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

- New case reverses precedent that morbid obesity, without underlying disorder, is not a covered disability
- “Regarded as” a disability, even if no evidence that employer thought it resulted from underlying physiological cause

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

GENDER IDENTITY DISCRIMINATION

– Importance of Consistency

- Transgender employee granted 4-month retroactive leave for related surgery
- Employee requested and was granted 2-month extension of leave
- Company denied another month extension; terminated when employee didn't return
- 5th Cir affirmed 12(b)(6) dismissal:
 - Title VII: Failure to assert any other employee was treated better
 - ADA: Failure to plead nature of disability

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

- When some slurs are overtly racist (i.e. “n-word” in Spanish), a reasonable factfinder could also find that some of the behavior which was not overtly racist could also be racially motivated based on context
 - “Mijo”
 - “Manos”
 - Hiding promotion paperwork
 - Less desirable work assignments

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

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TEXAS LEGISLATIVE UPDATE

- SB 45: Creates personal liability for managers and supervisors who do not take “immediate and appropriate corrective action” if they know or should know that sexual harassment is occurring.
- SB 282: Prohibits use of public funds to “settle or pay” sexual harassment claim made *against individual*
- HB 21: Expansion of SOL to 300 days
- Recommendations:
 - Policy updates
 - Training for employees
 - Immediate investigation and appropriate corrective action

- HB 2073: Paid quarantine leave for firefighters, peace officers, and EMTs if exposed on duty
- SB 1359: Paid mental health leave for peace officers – Develop a policy:
 - provide guidelines for use of mental health leave;
 - no deduction in compensation;
 - state number of leave days available; and
 - detail the limit of anonymity for a peace officer taking such leave.
- HB 1589: Additional 7 days' paid military leave for federally-declared disaster
- SB 484: Private right of action for military leave

- HB 1535 (Occupations Code):
 - Expands medical use for all cancer, PTSD, and certain research
 - No employment protection in this statute
 - Expect ADA and Chap 21 claims for disability accommodation requests based on new Texas legalization

CONSTITUTIONAL CARRY

- HB 1927: Law-abiding individuals age 21+ may carry a handgun openly (in a holster) or concealed in non-prohibited places – without having to obtain a license to carry.
 - Repeals licensing requirement
- Does not amend any portion of the codes in a way that affects an employer’s ability to prohibit employees from carrying on the job.
 - No change to personnel policies necessary.
 - Don’t forget parking lot exception
- Governmental entities may continue to elect to prohibit both licensed and unlicensed carry at open meetings by posting notice under Sec. 30.06 and 30.07

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EEOC PRIORITIES

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- Requested budget increase for 2023 of \$60M
 - Racial justice, systemic discrimination on all bases
 - Pay equity
 - Civil rights impact of COVID-19 (re-entry, vaccines, testing/masking, and the future of work)
- Long COVID as a disability
- Expanding mental health claims
- Artificial Intelligence & Algorithmic Fairness Initiative
 - May 2022 guidance on how algorithmic decision making, interview questions and on-line testing may violate ADA
- Virtual Mediation

THANK YOU!

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