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Climate Change:
An update on recent cases interpreting Title VII and the ADA

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Over the last year, the United States Supreme Court and the 5th Circuit either issued opinions or heard arguments which may drastically change the landscape for employers managing discrimination claims. For example, under a recent U.S. Supreme Court ruling, a Title VII plaintiff may now bring a cause of action for lateral transfers without showing significant harm. Similarly, the 5th Circuit has altered long-standing precedent, abandoning the "ultimate employment action" standard. The terrain for religious exercise in the workplace continues to be reshaped by accommodation cases on the heels of the *Kennedy v. Bremerton School District*[1] opinion from the 2022 term. Meanwhile, the Equal Employment Opportunity Commission ("EEOC") has stated it will utilize Title VII, along with the other federal anti-discrimination actions, to achieve its stated priorities[2] to:

- Protect vulnerable workers
- Eliminate barriers in recruitment and hiring
- Advance equal pay
- Preserve access to the legal system
- Prevent and remedy systemic harassment

The following are decisions which may be notable to labor and employment practitioners representing public employers.

Decisions of the Supreme Court of the United States

***Groff v. DeJoy;* 600 U.S. 447, 143 S. Ct. 2279, 2281, 216 L. Ed. 2d 1041 (2023)**

[1] 597 U.S. 507, 142 S. Ct. 2407 (2022)
[2] EEOC Strategic Enforcement Plan FY 2024-2028

In this religious accommodation case, Mr. Groff is an employee of the United States Postal Service and also professes to be an evangelical Christian. Groff sought an accommodation to not work on Sundays (per a USPS agreement with Amazon to deliver packages) so he could attend religious services. Groff's assignments were redistributed to other employees, but he was given successive progressive discipline for his refusal to work, and he sued for a failure to accommodate his Sabbath practice which he claimed did not cause the USPS to incur an undue hardship. SCOTUS reversed the Third Circuit and rendered a unanimous verdict for the employee, with a concurrence by J. Sotomayor (joined by J. Jackson).

Critical Holding

To meet the "undue hardship" standard required to deny a request for accommodation under Title VII (and likely the ADA), Employers must show more than a *de minimis* cost related to the accommodation. Instead, employers must demonstrate the accommodation would cause the employer to incur "substantial increased costs." Writing for the court, Justice Alito stated, "the [hardship] burden must be substantial in the overall context of an employer's business," such that the burden is excessive or unjustifiable.[3]

Muldrow v. City of Saint Louis, Muldrow v. City of St. Louis, Missouri, 601 U.S. ___, 144 S. Ct. 967 (2024)

Sergeant Jatonya Clayborn Muldrow was employed within the intelligence division of the St. Louis Police Department. After her supervisor changed, a new male supervisor transferred her back to a uniformed position and replaced Muldrow with a male officer who was deemed "a better fit for the very dangerous work" performed by the intelligence division. Although Muldrow did not suffer a loss of rank or pay as the result of the transfer, she lost her regular schedule, an unmarked take-home vehicle and her FBI credentials. Moreover, the court characterized Muldrow's transfer to a uniformed position as less prestigious.

Critical Holding

Justice Kagan authored the unanimous opinion of the court stating that while employees must show some harm from the employer's actions, they do not have to show a significant or substantial disadvantage created by the transfer.[4] Even lateral transfers which did not result in a loss of pay are protected by Title VII, when motivated by discriminatory animus.

Circuit Court Decisions

Hamilton v. Dallas Cnty., 79 F.4th 494, 497 (5th Cir. 2023)

Dallas County Sheriff's Department gave its detention officers two days off each week. However, it had a long-standing policy that no shift could be staffed by only female detention officers which resulted in the female officers being unable to take two consecutive days off. The trial court ruled that while the policy was clearly gender based, the officers were unable to show that the policy resulted in an "ultimate employment action" such as a suspension, termination or demotion to state a cognizable Title VII action and dismissed the female officers' claim(s). A three-judge panel

[3] 600 U.S. 447, 468 (2023).
[4] 144 S. Ct. 967, 974 (2024)

upheld the trial court's decision and applied the same "ultimate adverse action" standard but urged the full court to reconsider the rule. As a result, the *en banc* court issued a revised opinion which eliminates the "ultimate adverse action" standard as a threshold evidentiary issue to sustain a claim under Title VII. The court stated, "Here, giving men full weekends off while denying the same to women—a scheduling policy that the County admits is sex-based— states a plausible claim of discrimination under Title VII."

Critical Holding

To sustain an action for Title VII beyond a 12(b)(6) motion, employees must meet a reduced standard of proof of "adverse" impact and are no longer required to show an ultimate action by the employer.

Harrison v. Brookhaven Sch. Dist., 82 F.4th 427 (5th Cir. 2023)

Mrs. Harrison is a Black female educator and school administrator who alleged that her employer's refusal to pay for her to attend a leadership training program for prospective superintendents when it frequently paid for White male employees to attend the same program was result of race and sex discrimination. Ms. Harrison's action was considered post *Hamilton v. Dallas Cnty* and in light of the reduced pleading standard, took up the question of whether Ms. Harrison's injury was more than the *de minimus* injury required for a Title VII action. The court held that because Ms. Harrison was required to expend more than $2000 of her own funds on the training course to attend the leadership training she suffered a sufficient injury to proceed with her case.

Critical Holding

While employees no longer have to show an "ultimate adverse action" to sustain a Title VII cause of action, they must still show a material injury or more than an inconvenience or *de minimis* injury.

Rahman v. Exxon Mobile Corporation, 56 F.4th 1041 (5th Cir. 2023)

Rahman was hired to work as a plant operator and alleged his failure to successfully complete the company's training program was the result of race-based discrimination in which White co-workers were provided with more opportunities and additional support for the training program. The court held that Mr. Rahman received the same level of support as the White trainees, but that inadequate training can be considered an adverse action under *McDonnell Douglas*.

Critical Holding

Inadequate training can serve as the basis for a disparate treatment claim under Title VII.

January v. City of Huntsville, 74 F.4th 646 (5th Cir. 2023)

Firefighter Jason January suffered from complications following gallbladder surgery that occurred almost ten years prior to his termination. He needed ongoing medication and treatment which the City and its fire department accommodated. He was placed on probation in 2016 for asking another employee for his leftover painkillers and warned additional violations could result in termination. In 2018, he submitted and rescinded his resignation. The department reinstated him but passed him over for promotion and declined to reinstate him to a trainer position. He alleged the City was

discriminating and retaliating against him because of his age and disability. The City retained outside counsel and began an investigation. When his complaint was not resolved, January notified the City of his intent to file an EEOC claim. Shortly afterward he went to City Hall to make copies of documents in support of his complaint. According to City employees January appeared impaired, slurring his words, and making a statement which the City Secretary interpreted as threatening. The next day he was given and passed a drug test, but the City began an investigation into his conduct toward the City Secretary and fired January two weeks later for insubordination, intoxication, and disrespectful and intimidating conduct toward the City Secretary. January denied he was intoxicated, but said he was suffering from sleep deprivation and hypoglycemia. He also pointed to a body cam video which he claimed showed him unimpaired. However, the appeals panel declined to adopt his assertions without additional evidence.

The court held that the six-week period between January's disclosure of his intent to file his complaint and his termination met the test for temporal proximity, January was unable to provide additional proof as to causation. As a result, the court determined that temporal proximity alone was insufficient proof to allow January's claim to survive and reaffirmed that his "protected act" was a 'but for' cause of his termination.[5]

Critical Holding

A six-week time period between the employee's protected activity (filing a complaint of discrimination) and termination was sufficient to demonstrate a causal connection for the employee's retaliation claim(s). However, employees must still show termination would not have occurred *but for* the protected activity.

Wallace v. Performance Contractors, Inc., 57 F.4th 209 (5th Cir.)

Magan Wallace sued the construction company she worked for alleging sex discrimination, sexual harassment and retaliation. The district court granted summary judgment for the employer and the 5th Circuit reversed and remanded the case to the trial court, finding genuine issues of material fact on each claim. Notably, the court found there was evidence of severe and pervasive harassment which included:

- Wallace was told she could not perform work at elevation because the employer did not have harnesses that fit women.
- She did not count for assignments because she was a woman with "t*** and a**"
- Her supervisor texted a picture of genitals and asked her to send back a picture of her breasts. (He later told her it took "guts" for him to send her that picture.)
- The same supervisor asked to grab and squeeze Wallace's breasts.
- Another co-worker asked Wallace how old she was, told her she was in her sexual prime and then began to massage her shoulders.

Wallace claimed that she reported the offending conduct to her supervisor(s), called HR, but received no call back and tried to visit HR in person to make a complaint, but was told no one was available to help her. Under the *Ellerth*/*Faragher* affirmative defense, "an employer will not be vicariously liable for harassment by a supervisor if it can show" that (1) "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) the "employee unreasonably failed to take advantage of any preventative or corrective opportunities

[5] 74 F.4th at 653.

provided by the employer or to avoid harm otherwise."[6] The court held that the lack of HR involvement in the management of Wallace's claim resulted in severe and pervasive sexual harassment of the employee.

Critical Holding

Egregious facts combined with a lack of HR oversight and involvement led the Court to find evidence of severe and pervasive sexual harassment. The court also held the employer had failed to take reasonable care to prevent and correct the harassing conduct by failing to enforce its anti-harassment policy, failing to investigate the employee's complaints or train its employees in general to recognize harassment.

***Hudson v. Lincare, Incorporated*, 58 F.4th 222 (2023)**

Brittany Hudson is a Black female who sued her former employer, Lincare Incorporated, alleging that she suffered from a racially hostile work environment. She also alleged that Lincare failed intervene when she complained and subsequently retaliated against her for complaining. In support of her claim Hudson alleged:

- Her area manager told Hudson that she needed to change her hairstyle and style of dress and it was okay for her to make these comments to Hudson because her daughter-in-law was Black.
- Another supervisor told a co-worker that Hudson was "loud and black" and "ghetto".
- At a team meeting, Hudson accused a co-worker of freely using the N-word. According to Hudson, the co-worker then called her a "n****r bitch." Hudson asserts that, although their manager was in the room when it happened, she did nothing in the wake of the comment besides telling everyone to treat each other with respect.
- Hudson also alleges that Lincare took inadequate steps to address the events at the Team Meeting. She claims that the company's HR representative did not come in person to visit with people, there were no follow up meetings to address the use of racial slurs and there was no formal apology from the company. Finally, she alleges that her manager told her to "move on" and "get over it."

Lincare, however, claimed its manager immediately reported the incident to its Human Resources staff, started an investigation and sent final warnings to the two co-workers who had used the offensive language. Lincare admitted that Hudson's co-worker called her a "bitch," but stated that the investigation did not sustain the use of the "N-word." There was an additional allegation that one of the same co-workers called Hudson "Aunt Jemima," although the timing

Hudson contended that the two co-workers who were sent final warnings punished her for speaking out by refusing to work with her. Although Hudson never reported that behavior to HR, another co-worker allegedly sent an email to HR in which she claimed to overhear the disciplined co-workers conspiring to sabotage Hudson work. Hudson alleges that Lincare took no action in

[6] 57 F.4th 209, 223 (5th Cir. 2023)

response to the tip. Additionally, Hudson claims that Lincare put her on a "formal action plan," meaning she was one infraction away from being fired.

Hudson, meanwhile, insists that it was not on notice about the post-disciplinary behavior of Hudson's co-workers and denies that Hudon was ever placed on a formal action plan.

The Court declined to review Hudson's claims for severe or pervasive harassment analysis and instead determined that as soon as Lincare knew about the harassing conduct, it intervened. The court stated, "Lincare "took the allegations seriously, it conducted prompt and thorough investigations, and it immediately implemented remedial and disciplinary measures based on the results of such investigations." [7]

Critical Holding

The employer's prompt and remedial actions to investigate discriminatory conduct and issue discipline avoided liability for the employee's claim.

Mueck v. LaGrange Acquisitions, L.P. 75 F.4th 469 (5th Cir. 2023), as revised (August 4, 2023).

Employee Mueck had an alcohol use disorder for which he attended weekly substance abuse classes as a term of his probation following a third DWI citation. His employer, LaGrange terminated him due to the conflict between his scheduled shifts and the court-ordered classes. The Fifth Circuit affirmed the trial court's denial of summary judgment for the employer, which held that triable issues of fact existed as to whether Mueck's impairment equated to a disability. The court held that the Employee's terse references during meetings with his supervisor to his struggles with drinking and self-identification as an individual with alcohol use disorder, made while discussing the legal implications of a recent driving while intoxicated (DWI) citation, were not enough to place a legal responsibility on employer, pursuant to the ADA, to probe whether employee was requesting a disability accommodation, for purposes of employee's failure-to-accommodate claim; to require employer to determine whether employee had a disability and needed accommodation in this situation would place the initial burden of identifying an accommodation request on employer, and not employee, who had to initiate the dialogue. However, the Fifth Circuit also affirmed that an alcohol use disorder can rise to the level of a disability under the ADA and an impairment need not be permanent or long-term to qualify as a disability under the ADA.

Critical Holding

An employer's duty under the ADA to engage in an interactive process with an employee is only triggered after the employee has requested an accommodation. However, a transitory impairment can rise to the level of a disability.

***EEOC v. Methodist Hospital of Dallas*, 62 F4th 938 (5th Cir. 2023)**

This case involved a lengthy timeline related to a workplace injury which prevented Adrianna Cook from returning to her position as a patient care technician. While Ms. Cook applied for a vacant position for which she was minimally qualified, she was not selected by the hiring manager

[7] 58 F.4th 222, 230 (5th Cir. 2023)

and was ultimately separated from her employment. The EEOC claimed that Methodist could not categorically refuse to reassign disabled employees to a vacation position for which they were qualified. Moreover, the EEOC claimed that Methodist's policy of hiring the most qualified applicant for a vacancy, regardless of disability. The EEOC claimed that policy violated the ADA's reasonable accommodation requirement. Both the trial court and the 5th Circuit relied on *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) to hold that Methodist policy was not unreasonable on its face. The 5th Circuit remanded the matter to the trial court to determine whether the EEOC could raise genuine issues of material fact involving the qualified disabled employee who requested a vacant role or similar special circumstances. However, the court's dicta provided that "when lives of patients are on the line, mandatory reassignment in violation of a best-qualified system is unreasonable in the run of cases."

Critical Holding

Absent special circumstances, a policy to hire the most qualified applicant for a vacancy is not unreasonable on its face, but the employer should engage in the interactive process to determine whether it can accommodate an employee in a vacant position.

***Kinney v. St. Mary's Health, Inc.*, 76 F.4th 635 (7th Cir. 2023)**

Anna Kinney worked as the executive director of imaging services for Defendant St. Mary's Health, Inc. In this post pandemic case, the court questioned thirty years of precedent holding "attendance in the workplace can be an essential function." Her job description summarized the position as responsible for planning, administering, monitoring, and evaluating the delivery of imaging services to patients. Though Kinney did not directly provide medical services to patients in this position, she was required to monitor the "plan for patient care services" and to be a "liaison between the radiologists, radiology residents, chairperson, radiology staff and other department leaders." She also oversaw the installation and maintenance of equipment "to promote efficiency, health, comfort and safety of patients and staff." The job description said that the position required "using personal protective equipment as required."[8]

At the onset of the COVID-19 pandemic, Kinney began working remotely except for two-to-three times per month. She had previously been diagnosed with attention-deficit/hyperactivity disorder, an anxiety disorder and PTSD. Kinney sought an accommodation to work fully remote because she claimed her anxiety disorder prevented her from wearing a mask. Kinney provided a note from her physician in support of her request. Her supervisor asked about whether she could wear a face shield, but Kinney did not respond to the request or provide additional documentation as to this request. She eventually submitted a request to work in an isolated environment and limiting mask wearing situations to 15 minutes each or as tolerated. From January 2021 through May 2021, she worked in person two days a week, mostly from her office with her door closed. She took intermittent FMLA and used accrued leave the remainder of the workday and filed her first EEOC charge on March 8, 2021. Beginning in May, Kinney began a leave of absence and although she

[8] 76 F.4th 635, 640 (7th Cir. 2023)

indicated she would return in August 2021, she resigned without returning to her position. She filed a second charge of discrimination with the EEOC on September 28, 2021.

In analyzing Kinney's failure to accommodate claim, the court reframed the question as "whether the essential functions of the job must be performed in person, such that allowing the employee to perform those functions from home would not a reasonable accommodation."

Critical Holding

Simply noting that attendance is an essential function within a job description may be insufficient to overcome a request to work remotely unless the employer can show that the position requires in-person attendance for the safe or effective performance of assigned duties such as patient care, management of other employees or the performance of particular duties which cannot be done remotely.

***Harrison v. Sheriff, Holmes Cnty. Fla.*, No. 22-14288, (11th Cir. Feb. 6, 2024)**

Harrison was a former Sheriff's deputy who alleged he was constructively discharged because of mental health issues. He resigned following twelve weeks of leave under the FMLA because of a self-inflicted gunshot wound that he suffered while on call in his patrol vehicle. The trial court found that a reasonable jury could find that Harrison's constructive discharge was based partially on Harrison's own misleading comments about his relationship with a coworker, as well as the shooting incident and his state of intoxication at the time.

Notably, Harrison had a history of mental illness including stress, anxiety, depression, PTSD and alcoholism, of which the Sheriff and Harrison's supervisor were aware. However, Harrison had never received a formal diagnosis for those disorders or sought a formal accommodation. While on leave to recover from the shooting, Harrison's direct supervisor told him that if Harrison did not resign the Sheriff would initiate an investigation of the shooting and Harrison's conduct around that event to support termination. Harrison alleged that he was treated differently than reasonable comparators who had all had significant alcohol related offenses but had not been investigated. However, the court applied the McDonnell Douglas analysis and held that Harrison's alleged untruthfulness regarding his relationship with a co-worker, as well as the intoxication while in a County vehicle were terminable offenses unrelated to his alleged disability.

Critical Holding

Even where an employee has a known disability, egregious misconduct may be investigated and serve as the basis for disciplinary action or termination.

Texas Courts of Appeal

Tex. Woman's Univ. v. Casper, No. 02-23-00384-CV, 2024 WL 1561061 (Tex. App.—Fort Worth Apr. 11, 2024, pet. filed)

Casper, a tenured professor at TWU brought her action alleging discrimination and a hostile work environment based on age. She filed her initial complaint in federal court before filing her state action under the TCHRA based on the same underlying complaint and dismissing her federal

claim. TWU filed a plea to the jurisdiction alleging Casper's suit was barred by the TCHRA's election-of remedies-provision, which provides:

> A person who has initiated an action in a court of competent jurisdiction or who has an action pending before an administrative agency under other law or an order or ordinance of a political subdivision of this state based on an act that would be an unlawful employment practice under this chapter may not file a complaint under this subchapter for the same grievance.[9]

Chief Justice Sudderth wrote for the panel, holding that Casper's TCHRA claim was barred by her initial federal filing.

Critical Holding

The election of remedies provision of TCHRA bars claims under the act if an action is previously filed in another court or with an administrative agency.

Pending Actions to Watch

Pregnant Worker's Fairness Act Enjoined

***State of Texas v. Merrick Garland et al.*, No. 5:23-cv-0034 (N.D. Tex. Feb. 27, 2024).**

Judge Hendrix (Lubbock Division) ruled that Congress violated the Quorum Clause (by allowing proxy votes) when it passed the Consolidated Appropriations Act of 2023 which incorporated the Pregnant Worker's Fairness Act [10]and permanently enjoined the enforcement of the act against the State of Texas. This matter is being appealed to the Fifth Circuit and because of the overlapping jurisdiction with Title VII, the ADA, the previously adopted Pregnancy Discrimination Act, the PUMP Act and the Texas Pregnancy Discrimination Act, employers should use caution and consult with their legal counsel before disregarding protections for pregnant workers.

New EEOC Harassment Guidance

On April 29, 2024, the EEOC issued updated guidance entitled "Enforcement Guidance on Harassment in the Workplace). This is the first updated guidance since 1999 and incorporates more than seventy (70) hypotheticals that the agency would consider as examples of potentially unlawful harassment and expands the previous categories.

Race and Color

The Guidance separates "color" as its own protected category distinct from race. The guidance intends to capture harassment and discrimination based on an individual's pigmentation, complexion and skin tone within a distinct racial category.

Gender Identity or Expression

[9] TEX. LABOR CODE ANN. §21.211
[10] 42 U.S.C. §§2000gg et seq.

The new guidance incorporates the rulings from *Bostock v. Clayton County, Georgia*,[11] and *R.G. and G.R. Harris Funeral Homes, Inc. v. EEOC*[12] which established explicit protection for both sexual orientation and gender identity or expression. Specifically, the guidance identifies the following behaviors as potentially harassing:

- Repeated and intentional misgendering an individual by name or pronoun
- Denial of access to a restroom or other sex-segregated facility based on an individual's biological sex at birth versus gender identity.

Pregnancy, Childbirth, or Related Medical Conditions (including lactation)

If connected to the targeted individual's sex, harassment can include:

- Lactation (including harassing an employee while expressing breast milk)
- Using or not using contraception
- Deciding to or not to have an abortion
- Conduct related to the request or provision of pregnancy related accommodations.

Guidance Challenged

State of Texas v. EEOC; 2:21-CV-00194-Z (N.D. Tex. – Amarillo Division); Filed May 21, 2024;

Texas Attorney General Ken Paxton recently sued the EEOC seeking to prohibit the enforcement of the new guidance as it applies to gender identity or expression, particularly with regard to the dress code, pronoun and restroom requirements and claims the EEOC has exceeded its authority and is attempting to illegally expand the holdings of Bostock under both its 2021 and 2024 guidance.

[11] 590U.S. 644; 140 S.Ct.1731 (2020)
[12] 139 S.Ct. 1599, affirmed by *Bostock v. Clayton County, Georgia*, 590 U.S. 644; 140 S.Ct. 1731 (2020).