

# CHAPTER 15

## Employment Law

<b>§ 15.1</b>	<b>INTRODUCTION .....</b>	<b>4</b>
<b>§ 15.2</b>	<b>DISABILITY DISCRIMINATION .....</b>	<b>4</b>
§ 15.2.1	Burden of Proof / Evidentiary Standards .....	4
§ 15.2.2	Defining Disability .....	4
§ 15.2.3	Reasonable Accommodations .....	4
§ 15.2.4	Regarded as Disabled .....	4
§ 15.2.5	Interactive Process.....	4
§ 15.2.6	Miscellaneous.....	5
<b>§ 15.3</b>	<b>AGE DISCRIMINATION .....</b>	<b>5</b>
§ 15.3.1	Burden of Proof / Evidentiary Issues / Damages .....	5
§ 15.3.2	Reductions in Force / Restructuring.....	5
§ 15.3.3	Miscellaneous.....	5
<b>§ 15.4</b>	<b>ARBITRATION .....</b>	<b>5</b>
§ 15.4.1	Claims Subject to Arbitration.....	5
§ 15.4.2	Enforceability .....	5
<b>§ 15.5</b>	<b>TITLE VII.....</b>	<b>6</b>
§ 15.5.1	Burden of Proof / Evidentiary Issues .....	6
§ 15.5.2	Damages / Attorneys' Fees .....	6
§ 15.5.3	Gender / Equal Pay Act.....	6
§ 15.5.4	Harassment / Reporting Harassment.....	7
§ 15.5.5	National Origin Discrimination.....	8
§ 15.5.6	Race Discrimination.....	8
§ 15.5.7	Retaliation Claims .....	9
§ 15.5.8	Religion .....	9
§ 15.5.9	Miscellaneous.....	10
<b>§ 15.6</b>	<b>RETALIATION.....</b>	<b>10</b>
§ 15.6.1	Protected Activity.....	10
§ 15.6.2	What Is a Sufficient Adverse Job Action to Support a Retaliation Claim? .....	10
§ 15.6.3	Retaliatory Intent.....	10
<b>§ 15.7</b>	<b>WAGE HOUR ISSUES.....</b>	<b>10</b>
§ 15.7.1	Exemptions.....	10

§ 15.7.2	Joint Employment .....	11
§ 15.7.3	Miscellaneous .....	11
<b>§ 15.8</b>	<b>FMLA .....</b>	<b>11</b>
<b>§ 15.9</b>	<b>TERMINATIONS / SETTLEMENT .....</b>	<b>12</b>
<b>§ 15.10</b>	<b>UNIFORMED SERVICES EMPLOYMENT .....</b>	<b>12</b>
<b>§ 15.11</b>	<b>MISCELLANEOUS .....</b>	<b>13</b>
§ 15.11.1	Benefits / ERISA / COBRA .....	13
§ 15.11.2	Hostile Work Environment .....	13
§ 15.11.3	Jurisdiction .....	15
§ 15.11.4	Protected Speech .....	15
§ 15.11.5	Statute of Limitations .....	15
§ 15.11.6	Unfair Labor Practices / National Labor Relations Act .....	15
§ 15.11.7	Admissibility of Evidence .....	16
§ 15.11.8	Determination of Employee Status .....	16
§ 15.11.9	Punitive Damages .....	16
§ 15.11.10	Miscellaneous .....	16

## *CANADA*

<b>§ 15.12</b>	<b>NOTICE AND DAMAGES .....</b>	<b>17</b>
§ 15.12.1	Bad Faith and Consequential Damages .....	17
§ 15.12.2	Punitive Damages .....	17
<b>§ 15.13</b>	<b>COSTS .....</b>	<b>17</b>
§ 15.13.1	Quantum .....	18
§ 15.13.2	Special Costs .....	18
<b>§ 15.14</b>	<b>HUMAN RIGHTS .....</b>	<b>18</b>
§ 15.14.1	Disability .....	18
§ 15.14.2	Sexual Orientation .....	18
§ 15.14.3	Government Programs .....	18
§ 15.14.4	Accommodation .....	18
<b>§ 15.15</b>	<b>CONTRACTS .....</b>	<b>18</b>
§ 15.15.1	Calculation of Reasonable Notice .....	18
§ 15.15.2	Changes to Contractual Terms—Constructive Dismissal .....	18
§ 15.15.3	Fixed vs. Indefinite Term Employment .....	18
§ 15.15.4	Codes of Conduct .....	19
§ 15.15.5	Pensions .....	19
<b>§ 15.16</b>	<b>DEFINITION OF EMPLOYEE .....</b>	<b>19</b>
§ 15.16.1	Determination of Employee Status .....	19
<b>§ 15.17</b>	<b>TORTS IN EMPLOYMENT .....</b>	<b>19</b>

§ 15.17.1 Duty and Standard of Care ..... 19

§ 15.17.2 Negligent Infliction of Mental Distress..... 19

**§ 15.18 WAGE HOUR ISSUES..... 19**

## Chapter 15

# Employment Law

---

## § 15.1 INTRODUCTION

---

---

### UNITED STATES

---

## § 15.2 DISABILITY DISCRIMINATION

---

### § 15.2.1 Burden of Proof / Evidentiary Standards

There were no qualifying decisions within the Fifth Circuit.

### § 15.2.2 Defining Disability

There were no qualifying decisions within the Fifth Circuit.

### § 15.2.3 Reasonable Accommodations

There were no qualifying decisions within the Fifth Circuit.

### § 15.2.4 Regarded as Disabled

There were no qualifying decisions within the Fifth Circuit.

### § 15.2.5 Interactive Process

There were no qualifying decisions within the Fifth Circuit.

## § 15.2.6 Miscellaneous

There were no qualifying decisions within the Fifth Circuit.

---

## § 15.3 AGE DISCRIMINATION

---

### § 15.3.1 Burden of Proof / Evidentiary Issues / Damages

There were no qualifying decisions within the Fifth Circuit.

### § 15.3.2 Reductions in Force / Restructuring

There were no qualifying decisions within the Fifth Circuit.

### § 15.3.3 Miscellaneous

There were no qualifying decisions within the Fifth Circuit.

---

## § 15.4 ARBITRATION

---

### § 15.4.1 Claims Subject to Arbitration

There were no qualifying decisions within the Fifth Circuit.

### § 15.4.2 Enforceability

*Edwards v. Doordash, Inc.*, 888 F.3d 738 (5th Cir. (Tex.) 2018). Plaintiff Edwards, an independent contractor for the Defendant, DoorDash, Inc. (DoorDash), sued Doordash for Fair Labor Standards Act (FLSA) violations and filed a motion for conditional certification of a class of similarly situated individuals. DoorDash moved to stay the certification and to compel arbitration based on an Individual Contractor Agreement (ICA) that Edwards signed as required to work with DoorDash. The magistrate judge recommended that the arbitration issue be determined prior to conditional certification, and held that Edwards should be compelled to arbitrate his claims. The district court agreed. On appeal, the Fifth Circuit affirmed and held that the issue of arbitration was a threshold issue that must be decided prior to the conditional certification of a collective action. Applying Fifth Circuit precedent, the court recognized that deciding conditional certification of a claim that the Plaintiff had to arbitrate raised unnecessary justiciability issues that went against the national policy favoring arbitration.

*Huckaba v. Ref-Chem, LP*, 892 F.3d 686 (5th Cir. (Tex.) 2018). Kimberly Huckaba (Huckaba) brought suit against her former employer Ref-Chem, L.P. (Ref-Chem), alleging sexual harassment, discrimination, and retaliation under Title VII. Ref-Chem moved to dismiss the suit and compel arbitration based on an arbitration agreement

signed by Huckaba. However, the arbitration agreement was not signed by Ref-Chem. The district court granted the motion and compelled arbitration, holding that Huckaba's continued employment constituted acceptance by both parties. Huckaba appealed, asserting that the agreement was invalid. The Fifth Circuit noted that generally Texas law does not require signatures for a valid contract as long as the parties consent to the terms of the contract and no terms establish an intent to require both signatures. But the court went on to hold that certain language in the contract established an intent that both signatures were required. Specifically, the court pointed to the terms that required both signatures for modification and both parties to give up rights by signing the agreement, as well as a signature block for both parties. The Fifth Circuit held the arbitration agreement invalid, and reversed and remanded.

---

## § 15.5 TITLE VII

---

### § 15.5.1 Burden of Proof / Evidentiary Issues

There were no qualifying decisions within the Fifth Circuit.

### § 15.5.2 Damages / Attorneys' Fees

There were no qualifying decisions within the Fifth Circuit.

### § 15.5.3 Gender / Equal Pay Act

*Wittmer v. Phillips 66 Co.*, 304 F. Supp. 3d 627 (S.D. Tex. 2018). Nicole Wittmer, a transgender woman, (Wittmer) sued Phillips 66 Company (Phillips) for sex discrimination after Phillips rescinded a post-interview job offer. Wittmer had applied for an Engineer position at Phillips' Refinery in Borger, Texas. Wittmer interviewed with a panel of people, and was offered a position, conditioned on certain requirements including a background check. The background check revealed discrepancies between Wittmer's interview statements and her period of employment with her previous employer. After being questioned about this, Wittmer sent unsolicited emails to Phillips critiquing her previous employer and accusing Phillips of rescinding her job offer, even though Phillips had not yet rescinded it. Phillips then rescinded the job offer to Wittmer alleging her lack of candor in the job interview. Wittmer filed an EEOC charge and after the charge was dismissed, sued Phillips. Phillips moved for summary judgment. In addressing the motion, the district court cited to multiple cases from other Federal Circuits recognizing transgender status and sexual orientation as protected classes under Title VII, and accepted that Wittmer, as a transgender female, was a member of a Title VII protected class. See *Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 577 (6th Cir. 2018); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc); *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc). However, the court held that Wittmer failed to establish a prima facie case of discrimination because she did not show that others similarly qualified, but outside the protected class, were treated more favorably. Further, the court

held that even if a prima facie case had been met, Phillips had demonstrated a legitimate, nondiscriminatory reason for termination based on the discrepancies presented in the background check.

#### **§ 15.5.4 Harassment / Reporting Harassment**

*Davenport v. Edward D. Jones & Co.*, 891 F.3d 162 (5th Cir. (La.) 2018). The plaintiff Davenport alleged constructive discharge, quid pro quo harassment, and invasion of privacy against her employer Edward D. Jones & Co. (Jones) for requesting that she go on a date with a third person, a client, in exchange for monetary bonuses and commenting that Davenport should provide nude pictures to the third person. The district court granted Jones' motion for summary judgment, dismissing Davenport's constructive discharge claim based on her failure to exhaust administrative remedies, an issue raised by the court. The district court dismissed Davenport's quid pro quo claim holding that bonuses were not a tangible employment action and that the beneficiary of the sexual advances cannot be a third party. The court also dismissed her invasion of privacy claim because Davenport testified that the request for nude pictures was just a joke and was not highly offensive. The Fifth Circuit disagreed with the district court's decision as to exhaustion, but held that Davenport failed to demonstrate that she had been constructively discharged. It held that Jones waived the failure to exhaust administrative remedies because it was a precondition to suit subject to waiver and estoppel and Jones had not raised it. As to the quid pro quo bonus claim, the court affirmed for different reasons. The Fifth Circuit, rejecting the district court's reasoning, held that quid pro quo harassment can occur when the beneficiary is a third party because all that is required to satisfy the "explicit sexual advance" element is unwelcome sexual advances, requests for sexual favors, and other nonverbal or physical conduct. As the court explained, the claim only requires this explicit conduct by the supervisor, but not that the beneficiary of the requested favors be the supervisor. Further, the court held that the denial of a "significant" bonus would be a tangible employment action, because it inflicts direct economic harm. However, the Fifth Circuit ultimately affirmed the district court's grant of summary judgment of the quid pro quo bonus claim because Davenport failed to present evidence that she was entitled to any bonus and that one had actually been denied. It also affirmed the district court decision on invasion of privacy.

*Morris v. Baton Rouge City Constable's Office*, 299 F. Supp. 3d 773 (M.D. La. 2018). Plaintiff Morris, a constable with the defendant Baton Rouge City Constable's Office (Office) who worked court and DMV security at the Baton Rouge City Court, filed suit alleging hostile work environment, discrimination, and retaliation. The Office filed a motion for summary judgment requesting dismissal of Morris' claims because she failed to exhaust her administrative remedies and did not satisfy the positive elements of the claims. Morris contended that the harassment began after she rejected her supervisor's sexual advances. Her supervisor allegedly began watching her more closely than her male coworkers and giving her undesirable positions. She was eventually terminated based on an internal investigation into misconduct regarding her duties. On her EEOC form, Morris only marked the box for "sex". While recognizing that failure to check the "retaliation" box is not fatal, the court held that this fact, along with Morris' failure to present any facts during the EEOC process on her retaliation claim, required dismissal of her retaliation claim for failure to exhaust administrative remedies. As to her

hostile work environment claim, the court held that, construing the EEOC facts liberally, Morris had presented sufficient facts to exhaust administrative remedies since she contended that defendant frequently and repeatedly harassed her because of her sex and created a hostile work environment. However, the court dismissed all of Morris' harassment claims, except for coworker sexual harassment, because she failed to allege an adverse employment action for the supervisor harassment. The Middle District requested supplemental memoranda regarding the coworker sexual harassment.

### **Additional Cases of Note**

*D'Onofrio v. Vacation Publications, Inc.*, 888 F.3d 197 (5th Cir. (Tex.) 2018).<sup>1</sup>

*Gardner v. CLC of Pascagoula, LLC*, 894 F.3d 654 (5th Cir. (Miss.) 2018).<sup>2</sup>

## **§ 15.5.5 National Origin Discrimination**

There were no qualifying decisions within the Fifth Circuit.

## **§ 15.5.6 Race Discrimination**

*Mitchell v. Mills*, 895 F.3d 365 (5th Cir. (Tex.) 2018). Plaintiff sued the city of Naples, Texas, along with its current and former mayors, under 42 U.S.C. § 1983 for violating equal protection rights by paying white coworkers more than Mitchell because of his race. The defendant mayors filed a motion for summary judgment based on qualified immunity. The district court denied the motion, without addressing the qualified immunity basis, holding that there was a genuine dispute of material fact as to whether Mitchell and his comparators were sufficiently comparable. On appeal, the mayors asserted their qualified immunity again and asserted that Mitchell failed to establish a prima facie case for his claim because the alleged coworkers are not proper comparators. The Fifth Circuit, addressing the first prong of the qualified immunity analysis, held that Mitchell failed to show a violation of his constitutional rights, as he failed to establish a racially discriminatory motive under the Equal Protection Clause. This determination was based on his failure to present adequate comparators. The court noted that although presented under § 1983, Title VII's wage discrimination framework applied. Utilizing the *McDonnell Douglas* framework, the court held that the job duties, skills, and experience of Mitchell's alleged comparators were not identical to his because they worked in a different department, with different machines, and had backgrounds in different mechanical fields. The Fifth Circuit remanded the case to the district court instructing it to grant summary judgment on qualified immunity and enter a dismissal in favor of the defendant mayors.

---

<sup>1</sup> See Section 15.8 for a summary of the court's ruling on the issue of FMLA.

<sup>2</sup> See Section 15.11.2 for a summary of the court's ruling on the issue of Hostile Work Environment.



### § 15.5.7 Retaliation Claims

*O’Daniel v. Indus. Serv. Solutions*, No. 17-19—RLB, 2018 WL 265585 (M.D. La. 2018) appeal filed, 18-30136 (5th Cir. (La.) 2018) (unpublished). Plaintiff Bonnie O’Daniel (O’Daniel) commenced an action *pro se* against her employer, Plant-N-Power Services, Inc., its parent company, and two supervisors, (Defendants). O’Daniel alleged that she was terminated because a photo O’Daniel posted to Facebook offended the president of the company. The photo was of a man dressed as a woman and included a contentious comment about his ability in today’s society to use the women’s dressing room. O’Daniel claimed she had told her employer, prior to termination, that she would file a complaint alleging discrimination based on being a married heterosexual female. O’Daniel’s suit began with multiple claims, including sex discrimination, retaliation, and intentional infliction of emotional distress. Her remaining claims after retaining counsel and amending her complaint twice were (1) retaliation for exercising her constitutional right to freedom of expression and (2) retaliation for opposing defendants’ practice of sex discrimination. Defendants filed a motion to dismiss and the district court granted the motion dismissing both claims. The court dismissed her freedom of expression claim, holding that the Louisiana Constitution’s freedom of expression protections require a state actor, which the defendants were not. Her retaliation claim based on her alleged opposition to alleged sex discrimination because of her sexual orientation was held not to be a protected activity. O’Daniel alleged that she had a reasonable belief that her employer engaged in unlawful employment practices. In response, the court opined that it was unreasonable for O’Daniel to believe that discrimination based on her status as a married heterosexual female constituted discrimination because of her sex. The court also stated that it was not reasonable for her to believe that complaining about such was a protected activity under current Fifth Circuit precedent, which does not recognize sexual orientation as a protected class under Title VII. The O’Daniel Court further held that even if Title VII’s protections against sex discrimination included sexual orientation discrimination, she had not alleged a causal relationship between her termination and her sexual orientation.

### § 15.5.8 Religion

*Davis v. Fort Bend County*, 893 F.3d 300 (5th Cir. (Tex.) 2018). Plaintiff Davis sued Fort Bend County (County) for retaliation and religious discrimination. Davis alleged that an information technology director sexually harassed and assaulted her, which led to his termination. Davis’ supervisor, a friend of the director, allegedly began retaliating against her. Davis contends she informed her supervisor that she could not work one Sunday because of a religious commitment, but her supervisor did not approve the absence. Davis attended the religious commitment instead of work and was terminated by the County. Davis filed an initial charge and intake questionnaire that excluded religious discrimination. She later updated the questionnaire by adding “religion,” but not the charge. After she filed suit, County moved for summary judgment on the merits. The district court granted the motion and Davis appealed. The Fifth Circuit affirmed summary judgment on retaliation, but reversed and remanded on religious discrimination, determining genuine issues of material fact existed. The district court then dismissed the religious discrimination claim for failure to exhaust administrative remedies, which the

County raised for the first time on remand. Davis appealed again. The Fifth Circuit noted internal disagreement among its prior decisions about whether the exhaustion requirement was jurisdictional or a prerequisite to suit. Applying the rule of orderliness and the earliest Fifth Circuit precedent, the Davis Court held that the failure to exhaust administrative remedies was a prerequisite to suit, rather than jurisdictional and was an affirmative defense that the County had forfeited by failing to raise it until remand five years after suit was filed. Note that the Davis Court cited to its recent decision in *Davenport*.<sup>3</sup>

## § 15.5.9 Miscellaneous

There were no qualifying decisions within the Fifth Circuit.

## § 15.6 RETALIATION

### § 15.6.1 Protected Activity

#### Additional Cases Note

*O'Daniel v. Indus. Serv. Solutions*, No. 17-19—RLB, 2018 WL 265585 (M.D. La. 2018) appeal filed, 18-30136 (5th Cir. (La.) 2018) (unpublished).<sup>4</sup>

### § 15.6.2 What Is a Sufficient Adverse Job Action to Support a Retaliation Claim?

There were no qualifying decisions within the Fifth Circuit.

### § 15.6.3 Retaliatory Intent

There were no qualifying decisions within the Fifth Circuit.

## § 15.7 WAGE HOUR ISSUES

### § 15.7.1 Exemptions

*Carley v. Crest Pumping Techs., LLC*, 890 F.3d 575 (5th Cir. (Tex.) 2018). Plaintiffs worked as cementers for Crest Pumping Techs, LLC (Crest), which involved the use of Ford F-350s because of their carrying capacity. Plaintiffs sued Crest for violation of the

<sup>3</sup> See Section 15.5.4 for a summary of the court's ruling on *Davenport v. Edward D. Jones & Co.*, 891 F.3d 162 (5th Cir. (La.) 2018).

<sup>4</sup> See Section 15.5.7 for a summary of the court's ruling on the issue of Retaliation.

Fair Labor Standards Act's (FLSA's) overtime requirements. Crest contended that plaintiffs were exempt from overtime payments under the Motor Carrier Act's (MCA) exemption for positions controlled by the Secretary of Transportation. While plaintiffs stipulated that the MCA exemption applied to them, plaintiffs asserted that the SAFETEA-LU Technical Corrections Act (Corrections Act), excluded plaintiffs from the MCA exemption, and thus Crest owed them overtime. The Corrections Act excludes drivers of vehicles weighing 10,000 pounds or less from the MCA exemption, thus requiring overtime for these drivers. At the jury trial on Crest's liability, the district court determined that Crest had the burden of proving the Corrections Act did not apply. The jury found Crest liable for overtime wages because the weight standard plaintiffs presented showed the trucks were less than 10,000 pounds, going against the gross vehicle weight rating (GVWR) that stated Ford F-350s were over 10,000 pounds. Crest appealed, asserting (1) that the burden should have been on plaintiffs to show the Corrections Act applied and (2) that the GVWR, which is over 10,000 pounds for F-350s, is the governing weight to determine Corrections Act applicability. The Fifth Circuit agreed, holding that the plaintiffs had the burden of proving the Corrections Act applied and that the correct weight for the determination was the GVWR. The Fifth Circuit vacated the lower court's judgment, and rendered judgment for Crest.

### § 15.7.2 Joint Employment

There were no qualifying decisions within the Fifth Circuit.

### § 15.7.3 Miscellaneous

There were no qualifying decisions within the Fifth Circuit.

---

## § 15.8 FMLA

---

*D'Onofrio v. Vacation Publications, Inc.*, 888 F.3d 197 (5th Cir. (Tex.) 2018). Plaintiff Karen D'Onofrio (D'Onofrio) began working with Vacation Publications, Inc. (Vacation) as a salesperson in 2012. D'Onofrio's husband purchased a franchise with another vacation company, CruiseOne, and D'Onofrio wanted to attend a training conference with CruiseOne. Vacation's HR specialist advised that she take Family and Medical Leave Act (FMLA) leave to care for her husband, who had ongoing back issues, and attend the training during her leave. D'Onofrio was offered two options: unpaid FMLA leave or continue to work with her existing clients periodically while on leave and continue to be paid commissions. D'Onofrio chose the latter, but actually stopped working while on FMLA leave. Vacation discovered that she stopped working during the leave, and reassigned her clients until she returned, but never terminated her. D'Onofrio, who thought she was terminated based on a mistaken email, did not return to work and filed for unemployment benefits. After her FMLA leave expired, Vacation asked when D'Onofrio would return, to which D'Onofrio responded she would not because she thought she was terminated. D'Onofrio sued alleging sexual harassment, FMLA interference, and breach of contract. Notably, she alleged that Vacation interfered with

her FMLA leave by giving her the option to work during her leave. Vacation moved for summary judgment on all claims, and the district court granted the motion. On appeal, the Fifth Circuit affirmed the finding of no FMLA interference and held that giving an employee the option to work from home is not FMLA interference as long as it is not a requirement for continuing employment after the leave ends. The Fifth Circuit disagreed with the district court on her other claims and held that the district court had improperly granted summary judgment on the hostile work environment claim as it was not addressed in Vacation's motion for summary judgment and that there were genuine issues of material fact requiring reversal on the breach of contract claim.

---

## § 15.9 TERMINATIONS / SETTLEMENT

---

There were no qualifying decisions within the Fifth Circuit.

---

## § 15.10 UNIFORMED SERVICES EMPLOYMENT

---

*Washington v. Shell Oil Co., et al* No. CV 17-8825, 2018 WL 2938310 (E.D. La. June 12, 2018). Plaintiff Greg Washington, a war veteran employed with Shell Oil Co. (Shell), claimed that he developed post-traumatic stress disorder (PTSD) while working for Shell because of a stressful work environment and coworker harassment. Washington applied for and received short-term disability for his PTSD. He then applied for long-term disability, but the insurer, MetLife, denied it because Shell's insurance plan excluded injuries from military service. After MetLife denied Washington's request, he signed a release agreement with Shell in conjunction with a severance offer. The agreement included an express waiver of Washington's right to sue for any employment issues with Shell. Washington sued Shell and MetLife, claiming (1) violation of the Uniformed Services Employment Reemployment Rights Act (USERRA), (2) Shell rescinded its release, and (3) intentional infliction of emotional distress (IIED). He claimed that he signed the release under duress, without knowledge, and that it was in violation of USERRA. Shell and MetLife filed motions to dismiss under Rule 12(b)(6). Shell's motion addressed the rescission and USERRA claims and MetLife's motion addressed USERRA, and the IIED claim based on preemption under the Employment Retirement Income Security Act (ERISA). The district court rejected Shell's release defense to the USERRA claim, because a contract is only exempt from USERRA if it provides more rights than USERRA provides. Shell's release defense, an affirmative defense that must be evident on the face of the pleadings, was rejected by the court since Washington's complaint alleged that he could not determine whether the rights in the release were more beneficial than USERRA. Also significant was MetLife's argument that USERRA did not apply to it as it was not Washington's employer. As an issue of first impression, the court held that MetLife was an employer under USERRA because it had the authority to accept or deny a benefit of employment and thus denied MetLife's motion as to USERRA. The court granted dismissal of the IIED based on ERISA preemption.

---

## § 15.11 MISCELLANEOUS

---

### § 15.11.1 Benefits / ERISA / COBRA

*Ariana M. v. Humana Health Plan of Tex., Inc.*, 884 F.3d 246 (5th Cir. (Tex.) 2018) (en banc). Plaintiff Ariana M. was covered by a group health plan insured by defendant Human Health Plan of Texas, Inc. (Humana). Plaintiff sought mental health care for self-harm and an eating disorder, which Humana determined did not require the amount of partial hospitalization requested. Ariana M. sued, claiming that the plan's clause that granted Humana exclusive discretion to interpret plan provisions violated Texas law. Humana agreed not to base its rejection of her request on the discretionary clause, and instead invoked the abuse of discretion standard established in *Pierre v. Conn. Gen. Life Ins. Co.* 932 F.2d 1552, 1562 (5th Cir. 1991). Ariana M. claimed that Texas law overrode *Pierre's* standard of review. The district court rejected that argument and, applying the abuse of discretion standard established in *Pierre*, held that Humana did not abuse its discretion in finding partial hospitalization unnecessary. The Fifth Circuit affirmed, applying *Pierre* as Fifth Circuit precedent and holding that Texas law provides only that a discretionary clause cannot be in a policy. However, the entire panel authored a "special concurring opinion" questioning *Pierre's* validity, given that every other circuit to consider the standard of review had determined otherwise. The Fifth Circuit granted Ariana M's petition for en banc review to consider *Pierre's* validity. After a review of other circuit court decisions and two United States Supreme Court cases, the en banc court in an eight to six decision overruled *Pierre* and held that when the plan does not grant discretion, the determinations of the insurer are subject to de novo review and not the abuse of discretion standard.

*Chamber of Commerce of the U.S. v. United States Dept. of Labor*, 885 F.3d 360 (5th Cir. (Tex.) 2018). Three business groups (Plaintiffs) sued the Department of Labor (DOL), challenging the fiduciary rule promulgated by the DOL in 2016 to change the obligations of financial service providers under the Employment Retirement Income Security Act (ERISA). The court vacated the fiduciary rule, holding that the new rule conflicted with the text of 29 U.S.C. § 1002(21) because the DOL has presupposed ambiguity in ERISA's definition of "fiduciary" where none existed. Congress's intent was clear, according to the court, that the definition of "fiduciary" follows the common law definition. Further, the court held that the new rule failed the *Chevron* reasonableness test. The court held DOL's fiduciary rule had conflated employer-sponsored plan fiduciaries and IRA financial service providers, where ERISA treated them differently, and excluded the provisions over IRA providers from DOL interpretation.

*Innova Hosp. San Antonio, Ltd. Partnership v. Blue Cross & Blue Shield of Ga., Inc.*, 892 F.3d 719 (5th Cir. (Tex.) 2018). The plaintiff hospital (Innova) brought multiple Employment Retirement Income Security Act (ERISA) claims against sixteen insurance companies and third party claims administrators (insurers) who did business under the Blue Cross Blue Shield trademark. Innova patients assigned their rights under the insurance policies to Innova. Innova's suit alleged that the insurers did not pay the bills owed, or significantly underpaid bills, but failed to mention any of the applicable plan language. Insurers filed a motion to dismiss under Rule 12(b)(6), asserting that the complaint failed to state a claim because the plan provisions were essential to Innova's

claims. Innova had attempted to obtain plan documents from the insurers, without success. The district court granted the motion. Innova then filed an amended complaint that included as many plan provisions as it could find, and also included claims for failure to provide information upon request, negligent representation, and attorney's fees. The district court granted defendants' second motion to dismiss as to all the claims except for the newly added claims. Innova appealed the district court's decision, contending that the district court's standard exceeded the pleading standards established in *Twombly* and *Iqbal* by requiring Innova to plead information it did not have access to without the defendants' cooperation. The claims at issue were the ERISA claims, breach of contract and fiduciary duty, and attorney's fees. The Fifth Circuit agreed with Innova and held that even when pleading claims under ERISA, the claimant need not identify the specific language of every plan at issue, provided sufficient facts are given to meet the pleading standards. Here, the Fifth Circuit recognized that Innova pled that it provided services to the insured patients, verified coverage, received a valid assignment of rights, and timely submitted claims for payment. Further, Innova pled that representative plans require reimbursement of 80 percent of the customary expenses, but insurers reimbursed Innova at an average rate of 11 percent. The court held these alleged facts sufficient to survive a motion to dismiss under Rule 12(b)(6).

#### Additional Cases Note

*Washington v. Shell Oil Co., et al* No. CV 17-8825, 2018 WL 2938310 (E.D. La. June 12, 2018).<sup>5</sup>

### § 15.11.2 Hostile Work Environment

*Gardner v. CLC of Pascagoula, LLC*, 894 F.3d 654 (5th Cir. (Miss.) 2018). Plaintiff Gardner, a certified nursing assistant at an assisted living facility, brought a hostile work environment claim against her employer CLC of Pascagoula, LLC (CLC) for third-party harassment based on the actions of a patient. The patient had a history of physical contact with female employees and aggressiveness. The patient had multiple physical and mental illnesses, including dementia. The patient had a documented history of misconduct, but Gardner alleged that CLC did not effectively address the harassment. In fact, CLC once told Gardner to put her "big girl panties" on and go back to work. Gardner was terminated as a result of an incident where the patient groped and hit her multiple times and Gardner allegedly attempted or threatened to hit the patient and made a comment about race. Gardner required medical care because of the incident and did not return for three months. The district court granted CLC's motion for summary judgment determining that the actions that occurred were not beyond what someone in Gardner's position should expect in a nursing home. The Fifth Circuit reversed and remanded, holding that a reasonable juror could find the conduct sufficiently severe or pervasive such that a hostile work environment existed. The Fifth Circuit noted that if the actor did not have mental illnesses, the consistent groping and aggressive behavior would certainly be severe and pervasive. The court distinguished this case from two prior Fifth Circuit cases where the court had dismissed the claims because they only involved verbal

---

<sup>5</sup> See Section 15.10 for a summary of the court's ruling on the issue of Uniformed Services Employment.

harassment. Looking to Eighth and Tenth Circuit cases involving similar facts that found harassment, the Fifth Circuit held that a jury could conclude that an objectively reasonable caregiver would not expect a patient to grope her daily, injure her so badly she could not work for three months, and have her complaints met with laughter and dismissal by the administration. The court further determined that there was sufficient evidence that CLC knew or should have known of the hostile work environment and did not take reasonable measures to address it.

### § 15.11.3 Jurisdiction

#### Additional Cases Note

*Davenport v. Edward D. Jones & Co.*, 891 F.3d 162 (5th Cir. (La.) 2018).<sup>6</sup>

*Davis v. Fort Bend County*, 893 F.3d 300 (5th Cir. (Tex.) 2018).<sup>7</sup>

### § 15.11.4 Protected Speech

There were no qualifying decisions within the Fifth Circuit.

### § 15.11.5 Statute of Limitations

There were no qualifying decisions within the Fifth Circuit.

### § 15.11.6 Unfair Labor Practices / National Labor Relations Act

*Creative Vision Resources, LLC v. NLRB*, 882 F.3d 510 (5th Cir. (La.) 2018), *petition for cert. filed*, No. 17-1667 (June 14, 2018). Creative Vision Resources, LLC (Creative) succeeded another company as the staffing provider for Richard's Disposal (Disposal), a New Orleans trash collection company. Disposal was unhappy with its prior staffing provider, and so Disposal's vice president formed Creative as its replacement. Creative changed some of the employment terms, including the status of the workers and their payment method. In preparation for the transition, Creative prepared employment applications and tax forms to give to all current workers. Approximately 20 workers received tax forms and communications regarding the change in terms, and an unknown number learned from word of mouth. Creative acknowledged that it intended to hire any prior worker who applied for a position and approximately 70 workers applied. Local 100, United Labor Unions (the Union) representing the garbage truck helpers, claimed to be the incumbent union and brought an unfair labor practice claim against Creative for not bargaining with it. The administrative law judge (ALJ) held that Creative violated the National Labor Relations Act (NLRA) because as a successor, it improperly refused to

---

<sup>6</sup> See Section 15.5.4 for a summary of the court's ruling on the issue of Harassment.

<sup>7</sup> See Section 15.5.8 for a summary of the court's ruling on the issue of Religious Discrimination.

recognize the Union, but held that Creative was not a perfectly clear successor because it did not speak candidly with the workers about the initial terms of employment after the transition from the predecessor company. The Board disagreed with the ALJ and held that Creative *was* a perfectly clear successor, deeming communications prior to the day the workers started under Creative as insufficient to negate the inference of perfectly clear successor status. Creative petitioned the Fifth Circuit to review the Board's partial acceptance of the ALJ's determination, arguing that Creative was not a perfectly clear successor and so did not have to bargain with the Union, and furthermore that the Union did not submit a demand for bargaining before Creative set its own terms and conditions. The Fifth Circuit, looking to the prior communications and actions of Creative, held that the Board's determination that Creative was a perfectly clear successor was valid because Creative did not provide sufficient and timely notice of its intent to change the employees' terms of employment. The tax forms and communications to 20 employees were insufficient notice, as was the meeting on the date of hire because the workers did not have sufficient advance notice to allow them to arrange their personal affairs. Further, the court declined to hold that a demand for bargaining by the Union was required to trigger Creative's statutory obligation to bargain. While a prerequisite for an ordinary successor, this would be superfluous where the employer is a perfectly clear successor that retains all of the predecessor's employees, since there is a clear assumption that the bargaining unit will remain with the incumbent union.

#### **§ 15.11.7 Admissibility of Evidence**

There were no qualifying decisions within the Fifth Circuit.

#### **§ 15.11.8 Determination of Employee Status**

There were no qualifying decisions within the Fifth Circuit.

#### **§ 15.11.9 Punitive Damages**

There were no qualifying decisions within the Fifth Circuit.

#### **§ 15.11.10 Miscellaneous**

*IberiaBank v. Broussard*, No. 17-30662 (5<sup>th</sup> Cir. (La.) 2018) (unpublished). When Teche Bank began merger discussions with Iberia Bank, Broussard, an officer with Teche Bank was upset. In spite of signing a Change-in-Control Severance Agreement (CCSA), obligating him to loyalty and honesty in assisting Teche Bank with the merger, Broussard began to look for alternate employment for himself and his department, which included sharing confidential information with at least one of Teche Bank's direct competitors, JD Bank. While searching for employment elsewhere, Broussard signed an employment agreement with IberiaBank, which required Broussard to remain loyal to IberiaBank and to assist with the merger to the best of his ability. Both the CCSA and employment agreement had an arbitration clause. Broussard deleted over two gigabytes of Teche Bank data while negotiating employment with JD Bank. IberiaBank discovered Broussard's



actions, terminated him, and filed for arbitration against him under the CCSA and the employment agreement. IberiaBank also filed suit in federal court for violation of the Computer Fraud and Abuse Act (CFAA) and seeking a declaratory judgment that it did not owe Broussard his bonus under the employment agreement. Both Broussard and IberiaBank agreed to move the arbitration claims to the federal case. IberiaBank claimed breach of the CCSA and violation of CFAA and the Louisiana Unfair Trade Practices Act (LUTPA). Broussard filed counterclaims alleging breach of the employment agreement, intentional interference with business relations, and breach of the attorney's fees provision of the CCSA. The lower court granted summary judgment for IberiaBank, dismissing Broussard's tortious interference claim and limited his right to attorney's fees under the CCSA to those from the arbitration. At the conclusion of the bench trial, the lower court held that Broussard breached the CCSA and violated the CFAA and that IberiaBank did not breach the employment agreement and could not recover attorney's fees under LUTPA. The parties appealed. The Fifth Circuit held that Broussard breached the CCSA because of his disloyalty and violated the CFAA by deleting restricted data. Notably, the appellate court reversed the lower court judgment that IberiaBank had no right to attorney's fees under LUTPA. The trial court held that IberiaBank had no relief because LUTPA only applies when plaintiff has no other recourse and IberiaBank failed to present evidence of unfair treatment to customers. The Fifth Circuit disagreed and held that the trial court improperly narrowed LUTPA's requirements, determining that the only factors for LUTPA were whether there were egregious actions against public policy and the defendant's motivation. The court remanded for the determination of LUTPA's applicability.

---

## CANADA

---

---

### § 15.12 NOTICE AND DAMAGES

---

#### § 15.12.1 Bad Faith and Consequential Damages

There were no qualifying decisions within the Fifth Circuit.

#### § 15.12.2 Punitive Damages

There were no qualifying decisions within the Fifth Circuit.

---

## **§ 15.13 COSTS**

---

### **§ 15.13.1 Quantum**

There were no qualifying decisions within the Fifth Circuit.

### **§ 15.13.2 Special Costs**

There were no qualifying decisions within the Fifth Circuit.

---

## **§ 15.14 HUMAN RIGHTS**

---

### **§ 15.14.1 Disability**

There were no qualifying decisions within the Fifth Circuit.

### **§ 15.14.2 Sexual Orientation**

There were no qualifying decisions within the Fifth Circuit.

### **§ 15.14.3 Government Programs**

There were no qualifying decisions within the Fifth Circuit.

### **§ 15.14.4 Accommodation**

There were no qualifying decisions within the Fifth Circuit.

---

## **§ 15.15 CONTRACTS**

---

### **§ 15.15.1 Calculation of Reasonable Notice**

There were no qualifying decisions within the Fifth Circuit.

### **§ 15.15.2 Changes to Contractual Terms—Constructive Dismissal**

There were no qualifying decisions within the Fifth Circuit.

**§ 15.15.3 Fixed vs. Indefinite Term Employment**

There were no qualifying decisions within the Fifth Circuit.

**§ 15.15.4 Codes of Conduct**

There were no qualifying decisions within the Fifth Circuit.

**§ 15.15.5 Pensions**

There were no qualifying decisions within the Fifth Circuit.

---

**§ 15.16 DEFINITION OF EMPLOYEE**

---

**§ 15.16.1 Determination of Employee Status**

There were no qualifying decisions within the Fifth Circuit.

---

**§ 15.17 TORTS IN EMPLOYMENT**

---

**§ 15.17.1 Duty and Standard of Care**

There were no qualifying decisions within the Fifth Circuit.

**§ 15.17.2 Negligent Infliction of Mental Distress**

There were no qualifying decisions within the Fifth Circuit.

---

**§ 15.18 WAGE HOUR ISSUES**

---

There were no qualifying decisions within the Fifth Circuit.