ADA UPDATE— RECENT CASES AND OTHER AUTHORITIES

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Employer/Joint Employer

EEOC v. S&B Indus., Inc., 2016 WL 7178969 (N.D. Tex. Dec. 8, 2016)

- Sufficient evidence that individuals were employees of "client firm"; right to control is most important factor; client-firm's employees directly supervised workers
- Same evidence was sufficient to show client firm was "joint employer" [prospective employer] of the staffing firm employee.

Exhaustion

El Paso Cnty. v. Vasquez, 2016 WL 2620115 (Tex. App.—El Paso May 5, 2016, *pet. filed*)

- Tex. Lab. Code § 21.201(f) allows relation back, but amendment that raised new legal theory (retaliation) did not relate back to original age and disability charge

- Reference in charge to "disability" is sufficient to exhaust claims based on "regarded as"

Exhaustion (cont'd)

Williams v. J.B. Hunt Transp., Inc., 826 F.3d 806 (5th Cir. 2016) (reversing dismissal, but granting summary judgment to employer)

- Exhausting DOT appeal process is not a jurisdictional prerequisite in truck-driver cases
- But exhausting DOT appeal process may be a practical requirement in truck-driver cases, because it may be part of proving "qualified"

"Actual" Disability

- *Alexander v. Washington Metro. Area Transit Auth.*, 826 F.3d 544 (D.C. Cir. 2016) (sufficient evidence that alcoholism substantially limited mechanic's sleeping, caring for self, etc.)
- *Daniels v. Texas Dep't of Transp.*, 2016 WL 7188836 (E.D. Tex. Dec. 10, 2016) (under ADAAA's liberal-construction mandate, suffic. evidence that leg-artery blockages were physical impairments of cardiovascular system; plaintiff testified that he was limited in walking, bending, lifting, climbing, and sustained exertion of any of them)

"Actual" Disability (cont'd)

Benson v. Tyson Foods Inc, 2016 WL 3617803 (E.D. Tex. July 6, 2016) (sufficient evidence)

- For 9 months plaintiff was either unable to work or could only perform sedentary work;
- Instructed to elevate and ice her foot as much as possible, prescribed pain meds, and restricted to minimal walking and standing;
- Court rejected employer's argument that there can be no disability without a permanent or expected long-term impact

"Actual" Disability (cont'd)

But see Datar v. Nat'l Oilwell Varco, L.P., 2017 WL 219155 (Tex. App.—Houston [1st Dist.] Jan. 19, 2017) (affirming summary judgment)

- Although court recognizes changes to Chapter 21, it also appears to reply on pre-amendment case law in ways that are questionable:
  - Substantial limitation no longer requires a "significant" restriction;
  - Major life activities are not confined to "activities of daily living";
  - Fact that person can do his/her job without limitations does not mean no disability.

"Record of" Disability

Benson v. Tyson Foods Inc, 2016 WL 3617803 (E.D. Tex. July 6, 2016) (sufficient evidence that badly broken foot was "record of" disability)

- Employer's own detailed medical records regarding plaintiff's medical treatment, condition, and work restrictions defeat its argument that there was no record of a disability;
- Court rejected employer's argument that because the plaintiff designated no experts, there could be no "record of" disability.

"Regarded as" Disability

Benson v. Tyson Foods Inc, 2016 WL 3617803 (E.D. Tex. July 6, 2016)

- Plaintiff broke foot at work, taken to hospital, multiple surgeries and leave of absence, employer records demonstrated foot pain and other problems, placed on various restrictions
- Employer's "regarded as" arguments were "defeated by the enactment of the ADAAA."
- Plaintiff is no longer required to show how or to what degree the employer believed the impairment affected her

"Regarded as" Disability (cont'd)

Alexander v. Washington Metro. Area Transit Auth., 826 F.3d 544 (D.C. Cir. 2016)

- District court erred because in ADAAA "regarded as" cases, major life activities and substantial limitations are irrelevant
- Sufficient evidence that adverse action was because of impairment (alcoholism), based on shifting explanations, inconsistent statements, false statements, and disproving misconduct (allegedly false answer denying being in "drug rehab/counseling," could be seen as accurate)

"Regarded as" Disability (cont'd)

Drechsel v. Liberty Mut. Ins. Co., 2016 WL 6139097 (N.D. Tex. Oct. 20, 2016)

- Granted summary judgment for employer
- Appeal pending, perhaps because (in part):
  - Court mistakenly used pre-ADAAA analysis; no longer necessary that employer perceived plaintiff as substantially limited in major life activity
  - Court was wrong in suggesting that continuing to employ an individual means no "regarded as" disability

"Regarded as" Disability (cont'd)

Toro v. Fed. Express Corp., 2016 WL 4800900 (S.D. Tex. Sept. 14, 2016)

- Granted summary judgment for employer
- Another court mistakenly using pre-ADAAA analysis; terms substantial limitation and major life activities irrelevant to "regarded as"
- But no appeal, perhaps because court also found no evidence that the termination was because of disability or was in retaliation for accommodation requests

Obesity Under the ADAAA

Morriss v. BNSF Ry. Co., 817 F.3d 1104 (8th Cir. 2016)

- Summary judgment for employer affirmed
- Insufficient evidence that obesity was "physiological," or that it was perceived as such
- So it was neither an actual nor a perceived impairment

Adverse Action

Pendleton v. Prairie View A&M Univ., 2016 WL 7116210 (S.D. Tex. Dec. 7, 2016)

- Sufficient evidence of constructive discharge; no demotion or menial or degrading work, but prof's salary and responsibilities were reduced, plus there was badgering, harassment, or humiliation calculated to encourage resignation
- Sufficient evidence of pay discrimination; removed from project and class because accommodation refused; resigned because of reduced pay, not choice

Adverse Action

Donaldson v. Texas Dep't of Aging & Disability Servs., 495 S.W.3d 421 (Tex. App.—Houston [1st Dist.] 2016, appeal pending on other grounds)

- Most actions here not sufficiently adverse; although supervisor made critical remarks about internal complaint, it was only once and no adverse consequences followed;
- No evidence that transfer involved work that was appreciably less prestigious, involved less responsibility, had less overtime opportunities, or left less room for advancement.

Pretext

Dillard v. City of Austin, Texas, 837 F.3d 557 (5th Cir. 2016)

- City employee injured back and shoulder in on-the-job car accident, and could no longer perform his job
- Reassigned to administrative position, and given training, but wanted different assignment
- Court found that the alleged performance and behavior problems were not pretextual (and also not because of disability)

Pretext (cont'd)

Benson v. Tyson Foods Inc, 2016 WL 3617803 (E.D. Tex. July 6, 2016)

- Although employer argued job abandonment because plaintiff never informed that she was off work because of medical restrictions, there was sufficient evidence that employer knew of her medical visits and work restrictions;
- In addition, there was some inconsistency in the employer's policy and practice regarding notice and documentation.

Pretext (cont'd)

Donaldson v. Texas Dep't of Aging & Disability Servs., 495 S.W.3d 421 (Tex. App.—Houston [1st Dist.] 2016, appeal pending on other grounds)

- Insufficient evidence that firing was pretext
- Although plaintiff denied some performance issues, it's not enough that plaintiff disagrees
- Plaintiff admitted to some of performance issues, and although there was some evidence that others were also late in submitting reports, there was no evidence showing comparable number or similar performance issues.

Qualified

“Qualified” means able to perform the essential functions of the job, with or without reasonable accommodation.

Essential Job Function

EEOC v. Vicksburg Healthcare, L.L.C., 2016 WL 5939424 (5th Cir. Oct. 12, 2016) (per curiam)

- Sufficient evidence that lifting more than ten pounds was not essential:
  - Fact that it was listed in job description gets some deference, but is not dispositive
  - There was testimony that it was rarely done (and conflicting evidence on this point just created factual dispute)

Essential Job Functions (cont'd)

Kowitz v. Trinity Health, 839 F.3d 742 (8th Cir. 2016)

- After surgery, respiratory therapist could not do chest compressions required for basic life support certification
- Court found certification was essential function of relevant jobs
- But certification is not a function at all; it is a qualification standard
- On the other hand, performing CPR may be an essential function [so results likely the same]

Essential Job Functions (cont'd)

Brown v. Smith, 827 F.3d 609 (7th Cir. 2016)

- Bus-driver supervisor developed diabetes, lost his CDL, and was fired
- Sufficient evidence to support jury finding that CDL was not essential function, including:
  - Although job description listed CDL as job requirement, that is not determinative
  - Supervisor admitted driving buses was not key responsibility for supervisors because others CDLs were typically available to drive
  - Rare that supervisors drive; argument that emergencies might arise was for jury

Qualified (cont'd)

Williams v. J.B. Hunt Transp., Inc., 826 F.3d 806 (5th Cir. 2016)

- Although exhausting DOT appeal process is not a jurisdictional prerequisite, it may be a practical requirement in truck-driver cases, as part of proving "qualified"

EEOC v. Vicksburg Healthcare, L.L.C., 2016 WL 5939424 (5th Cir. Oct. 12, 2016) (per curiam)

- Plaintiff who applied for disability benefits made sufficient *Cleveland* explanation, based on ability to work with accommodations

Request for Accommodation

Kowitz v. Trinity Health, 839 F.3d 742 (8th Cir. 2016) (after surgery, respiratory therapist could not do chest compressions required for CPR)

- Sufficient evidence of accommodation request:
  - Doctor told her she needed 4 months of PT before completing; she emailed note to her boss
  - She did not ask for accommodation in so many words, but notice implied that she needed an additional 4 months
  - Employer was aware of her condition and limitations from FMLA forms

Accommodation Request (cont'd)

EEOC v. Vicksburg Healthcare, L.L.C., No. 15-60764, ___ F. App'x ___, 2016 WL 5939424 (5th Cir. Oct. 12, 2016) (per curiam)

- Doctor's note clearing her to work with restrictions ("no lifting, no pulling, no pushing anything greater than 10 pounds") could reasonably be viewed as request for light duty

Accommodation Request (cont'd)

Lawler v. Peoria Sch. Dist. No. 150, 837 F.3d 779 (7th Cir. 2016) (per curiam)

- District argued that it was not required to consider plaintiff's transfer request because she never completed necessary paperwork
- But plaintiff testified that District had already refused transfer, and packet she was given related only to FMLA leave, not ADA accommodations
- [Other cases say no special form required]

Accommodation Request (cont'd)

Foster v. Mountain Coal Co., LLC, 830 F.3d 1178 (10th Cir. 2016)

- Injured neck on the job; discussed possibility of surgery with doctors; asked employer to allow time for surgery and recovery; fired
- Requests for accommodations are protected activity, as long as they are sufficient
- Request, though w/out magic words, was OK
- Court distinguished cases involving possibility of time off at some uncertain, future date

Interactive Process

Delaval v. PTech Drilling Tubulars, L.L.C., 824 F.3d 476 (5th Cir. 2016)

- Employer could ask for documentation corroborating that plaintiff was undergoing medical testing during his week-long absence
- "Based on the record evidence before us, a reasonable juror could only conclude that Delaval caused a breakdown in the interactive process by failing to provide the documentation requested."

Interactive Process (cont'd)

Lawler v. Peoria Sch. Dist. No. 150, 837 F.3d 779 (7th Cir. 2016) (per curiam)

- Psychiatrist notified District that special-ed teacher with PTSD needed transfer
- District didn't transfer, accelerated her next performance appraisal, gave unsatisfactory rating, then RIF-ed her
- Refusal to transfer, didn't explore options; "What was not an option, however, was for the school district to look the other way until Lawler could be fired for poor performance."

Interactive Process (cont'd)

Lawler v. Peoria Sch. Dist. (cont'd)

- District sat on its hands instead of asking for more info
- If District had inquired, would've learned that supposed interpersonal issues (e.g., nosiness) likely were caused by PTSD
- District claimed it thought plaintiff changed her mind, but it failed to seek clarification from plaintiff or doctor (and there was contrary evidence)

Interactive Process (cont'd)

EEOC v. Vicksburg Healthcare, L.L.C., No. 15-60764, ___ F. App'x ___, 2016 WL 5939424 (5th Cir. Oct. 12, 2016) (per curiam)

- Sufficient evidence to rebut defense claim that plaintiff rejected light-duty offer; it was unclear that offer remained open

Interactive Process (cont'd)

Dawson v. Akal Sec. Inc., 660 F. App'x 504 (9th Cir. 2016)

- Delay: unpaid leave for two months while it considered accommodation could be FIP violation or retaliation for RA request; no reason given for delay or unpaid status (and evidence it contradicted staffing contract)
- Choice: "The fact that unpaid leave may be a reasonable accommodation *when it is requested* does not mean that it cannot also be an adverse action" (emphasis added)

Reasonable Accommodations

- *Kowitz v. Trinity Health*, 839 F.3d 742 (8th Cir. 2016) (extra time to seek CPR certification);
- *EEOC v. Vicksburg Healthcare, L.L.C.*, 2016 WL 5939424 (5th Cir. Oct. 12, 2016) (temporary light duty; excusing marginal functions);
- *Lawler v. Peoria Sch. Dist. No. 150*, 837 F.3d 779 (7th Cir. 2016) (per curiam) (transfer);
- *Pendleton v. Prairie View A&M Univ.*, 2016 WL 7116210 (S.D. Tex. Dec. 7, 2016) (use of golf cart and driver, alternate parking, assigning TA);
- *Donaldson v. Texas Dep't of Aging & Disability Servs.*, 495 S.W.3d 421 (Tex. App.—Houston [1st Dist.] 2016, app. pending) (clerical assistance)

Reassignment as Accommodation

Dillard v. City of Austin, 837 F.3d 557 (5th Cir. 2016)

- On-job injury; could no longer do his job
- Granted reassignment, but not to job he wanted
- Had performance and behavior problems; fired
- District court held no accommodation claim because the employer could have fired once he ran out of leave
- Fifth Circuit disagreed—whether or not it *could've* fired then, it didn't, so it had to accommodate
- No discrimination here, but 5th Cir. would've upheld claim if plaintiff had evidence that employer's choice for reassignment was to a job it knew the plaintiff would fail in

Reassignment as Accommodation

EEOC v. St. Joseph's Hospital, Inc., 842 F.3d 1333 (11th Cir. 2016)

- Reassignment does not require actual placement; allowing employee to compete is enough, if there is a company policy to hire the best-qualified applicant
- Under facts here, employer's 30-day period for identifying and applying for vacancy was reasonable
- Sufficient evidence to uphold jury finding that employer failed to reasonably accommodate plaintiff; jury could have disbelieved the employer's arguments about why it did not reassign
- [But jury also found that employer made good-faith effort to accommodate]

Good-Faith Accommodation Defense

EEOC v. St. Joseph's Hospital, Inc. (cont'd)

- Jury found that employer failed to accommodate, but it also found that employer made a good-faith effort to accommodate
- Per 42 U.S.C. § 1981a(a)(3), this is not a defense to liability but only to damages
- But, the appeals court found that the EEOC waived this limitation, and in fact argued to the contrary, so it became compete defense

See also Dillard v. City of Austin, Texas, 837 F.3d 557 (5th Cir. 2016) (making accommodation is the best practical "defense")

Retaliation

- *Foster v. Mountain Coal Co., LLC*, 830 F.3d 1178 (10th Cir. 2016) (requests for accommodations, if sufficient, are protected activity)

- *Dawson v. Akal Sec. Inc.*, 660 F. App'x 504 (9th Cir. 2016) (unpaid leave and delay in responding to accommodation request could be retaliation)

Retaliation (cont'd)

Foster v. Mountain Coal Co., LLC, 830 F.3d 1178 (10th Cir. 2016)

- Employer argued that accommodation request was made after firing decision, but sufficient evidence to doubt (supervisor didn't know; separation doc. made effective two days before written)
- Court distinguished *Breeden* because no evidence that earlier suspension was intended to result in firing, and the bases of each were different
- Even after *Nasser*, very close temporal proximity (here days or hours) enough for causal connection
- Inconsistent reasons for firing sufficient to show pretext, even though defense later clarified at trial

Limitations Under § 504

Mercado v. Puerto Rico, 814 F.3d 581 (1st Cir. 2016) (non-employment case)

- Sec. 504 has no limitations period, so we "borrow" most analogous state-law limitations
- But for claims based on federal statutes passed after Dec. 1, 1990, there is a federal 4-year "catch-all" statute, 28 U.S.C. § 1658(a)
- Four-year statute applies to claims made possible by the ADAAA (passed 2008)
- True here bc. changes to "regarded as" eliminated need to show perceived substantial limitation of MLA

Immunity

Daniels v. Texas Dep't of Transp., 2016 WL 7034518 (E.D. Tex. Dec. 2, 2016)

- Under *Ex parte Young*, plaintiff can sue agency head in official capacity for reinstatement w/ benefits, accommodations, an order to cease discriminating, plus fees and costs.
- State agency waived immunity from § 504 suits by accepting federal funds

Immunity (cont'd)

Shaw v. Texas Juvenile Justice Dep't, 2016 WL 7336865 (E.D. Tex. Nov. 23, 2016), *rep't and rec. adopted*, 2016 WL 7326661 (E.D. Tex. Dec. 16, 2016)

- Eleventh Amendment bars an individual from suing a state agency in federal court for violations of Title I of the ADA
- Waiver of sovereign immunity in Texas Labor Code Ch. 21 may subject the state to suit in state court, but it does not waive immunity for such claims if originally filed in federal court

New Regulations

- 29 C.F.R. § 1614.203—new affirmative-action regulation for federal employees (under Rehab Act § 501)
- 29 C.F.R. Parts 1630.14—ADA regs related to wellness programs under ACA [?]
- 29 C.F.R. § 1635.14—GINA regs related to wellness programs under ACA [?]

New EEOC Guidance

- Questions and Answers: The EEOC's Final Rule on Affirmative Action for People with Disabilities in Federal Employment
- Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights
- Living With HIV Infection: Your Legal Rights in the Workplace Under the ADA
- Helping Patients with HIV Infection Who Need Accommodations at Work
- Webinar, The ADA, GINA, and Employer Wellness Programs [?]
- Employer-Provided Leave and the Americans with Disabilities Act
- EEO Laws for Employees Affected by the Zika Virus

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