



Employment Litigation Update

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Agency Litigation

- In 1999 the EEOC filed 465 lawsuits (highest in 15-year period).
 - Monetary benefits recovered totaled \$98.7 million dollars.
- In 2013 the EEOC filed 148 lawsuits.
 - Monetary benefits recovered totaled \$38.6 million dollars (lowest in 15-year period).
 - Of the \$38.6 million dollars recovered, approximately \$22 million came from lawsuits based on Title VII violations (lowest in 15-year period).
 - \$14 million came from lawsuits based on ADAAA violations (3rd highest in 15-year period).
 - \$2.1 million came from lawsuits based on ADEA violations (2nd lowest in 15-year period).



Agency Litigation (continued)

- The U.S. Department of Labor (“DOL”) Wage & Hour Division recovered more than \$185 million in back wages for over 228,000 employees in 2008 (last year statistics were published).
- In 2010 (last year statistics published), OSHA inspected 40,993 employers, found 96,742 violations (a 15.3% increase over 2006), and conducted 1,177 Section 11(c) (whistleblower) investigations.

Statistically Speaking In Tennessee



- In 2013, there were 12 cases tried in Tennessee federal courts that included claims relating to disputes between employers and employees.
 - Employers won 6, employees won 6.
 - The average amount recovered when Plaintiffs prevailed was \$217,006.
- Compare to 2010, in which there were 25 cases tried in Tennessee federal courts that included claims relating to disputes between employers and employees.
 - Employers won 11, employees won 14.
 - The average amount recovered when Plaintiffs prevailed was \$463,423.

Statistically Speaking in Tennessee (continued)



- In 2013, there were 3 cases tried that involved claims of retaliation, 4 that involved discrimination, and 3 that involved sexual harassment.
 - Employees won ALL 3 **retaliation** cases, with an average recovery of \$247,713.
 - Employers won 3 of the **discrimination** cases, with 1 employee recovering \$60,000 in the sole victory for employees.
 - Employees won 2 of the 3 **sexual harassment** cases, with an average verdict of \$10,000.



Statistically Speaking In Mississippi

- In 2013, there were 9 cases tried in Mississippi federal courts that included claims relating to disputes between employers and employees.
 - Employers won 7, employees won 2.
 - The average amount recovered when Plaintiffs prevailed was \$90,000.
- Compare to 2012, in which there were 19 cases tried in Mississippi federal courts that included claims relating to disputes between employers and employees.
 - Employers won 6, employees won 13.
 - The average amount recovered when Plaintiffs prevailed was \$174,352.

Statistically Speaking in Mississippi (continued)



- In Mississippi, in 2011, 2012, and 2013 combined, there were 57 cases tried in federal courts that included employment-related claims.
 - Employees prevailed in 30 cases, with employers winning 27.
 - A total of \$7,221,751 was awarded to plaintiffs.
 - The average verdict for an employee/plaintiff was \$240,725.
 - The average verdict in retaliation cases was \$330,004, with plaintiffs prevailing 45.4 % of the time in 11 cases.
 - The average verdict in sexual harassment cases was \$1,098,520, with plaintiffs prevailing 66.6% of the time in 6 cases.

Goree v. UPS (Consolidated with Wherry v. UPS) (TN)

- Plaintiff Goree, a Black UPS employee with almost 30 years of service, filed a federal lawsuit in 2004 alleging racial discrimination. Case was dismissed on summary judgment.
- In 2010 Goree was told he was in line for promotion to “center manager” position.
- Plaintiff Wherry, also Black, was district manager and was at meeting where Goree was informed promotion was coming.
- For four months, Goree performed “center manager” duties without compensation increase or promotion. He also trained White employee with 6 years of service during this time.
- White manager received promotion.
- Wherry was present at meeting where decision was made to promote White manager, and he objected that Goree was the most qualified.

Goree & Wherry v. UPS (continued)

- A week after meeting where promotion decision was made, Wherry was demoted.
- Wherry and Goree proceeded with same lawyers in consolidated lawsuit filed in state court.
- UPS decision maker explained that White employee was given center manager job because it was a less expensive “lateral” move.
- Decision maker denied knowledge of Goree’s 2004 lawsuit. Wherry maintained that it was discussed in promotional decision meeting.
- Decision maker explained basis for Wherry demotion was his failure to properly handle racial discrimination investigation.
- Both Plaintiffs remained employed, and sought back pay and compensatory damages.

Goree & Wherry v. UPS (continued)

- Case was tried for 5 days before Circuit Judge Jerry Stokes.
- A Memphis jury returned a verdict on January 13, 2014 in favor of both Plaintiffs that included:
 - Goree: \$600,000 in back pay and \$2,000,000 in compensatory damages.
 - Wherry: \$1,042,000 in back pay and \$1,000,000 in compensatory damages.
- Total verdict was for \$4,642,000 in favor of Plaintiffs.
- Plaintiffs have since moved for: 1) attorney fees; 2) equitable relief, including promotion of Goree and restoration of Wherry's pre-demotion management position; and 3) pre-judgment interest, which could exceed \$1.5 million dollars.

Compare to: *Zulfer v. Playboy Enterprises (CA)*

- Plaintiff was accounting executive for Playboy, which is publicly traded company and therefore subject to Sarbanes-Oxley legislation.
- Plaintiff worked closely with CFO, who asked her to issue \$1.1 million dollars in bonuses to him and the CEO.
- Because the bonuses had not been approved by Board, which Plaintiff maintained was required, she refused.
- Following a second request for issuance of the bonuses, Plaintiff took her concerns to Company's General Counsel.
- After she escalated matter to the GC, Plaintiff alleges she was ostracized and subjected to retaliation.
- Plaintiff was ultimately fired.

Zulfer v. Playboy Enterprises (continued)

- Playboy denied that Plaintiff's complaint to GC amounted to protected activity, and then that the complaint was moot because the Board subsequently approved the bonuses.
- Plaintiff maintained her career was ruined because public companies would not hire a perceived whistleblower.
- Case was filed and tried in federal court in Los Angeles, California, and a verdict was returned on March 5, 2014.
- Jury found in favor of Plaintiff, awarding her \$6,000,000 in compensatory damages.
- Jury also found Playboy acted with malice, fraud, or recklessness, thus triggering punitive damage phase of trial.
- As punitive damage phase began, case was settled.

Compare to: *Alexander v. Medpoint Professional Staffing (TN)*

- Plaintiff, a Black employee, held CSR position until she received interim promotion to “acting” Warehouse Manager.
- Plaintiff was not awarded permanent position, which went instead to a White employee.
- Plaintiff filed an EEOC Charge over denial of promotion, and shortly thereafter took a vacation to pick up her stepchildren. She has taken same time off in previous two years without incident.
- Plaintiff returned to find out she was fired. Company explained that she had no accrued vacation, and that she was needed because warehouse was busy.
- Plaintiff alleged discrimination and retaliation. Discrimination claim was dismissed, and retaliation claim proceeded to trial in federal court in Aberdeen, Mississippi.

Alexander v. Medpoint Professional Staffing (continued)

- Plaintiff maintained that she had taken same vacation in prior years with no problems, and therefore that her termination was retaliatory because the only difference was her filing of EEOC Charge.
- Employer/Defendant maintained the difference was the degree to which warehouse was busy. More importantly, Defendant noted that it routinely denies vacation requests when this is the case.
- North Mississippi jury returned a verdict in favor of Defendant/Employer on January 29, 2014.

Smith v. Rock-Tenn Services (TN)

- Plaintiff was employed by Defendant for a little over 1 year.
- Plaintiff alleged that he was harassed by a male co-worker on 3 separate occasions.
- After the 3rd alleged incident, Plaintiff reported the harassment and the Defendant investigated. The investigation confirmed the conduct occurred, and the harasser was suspended for 2 days.
- Plaintiff alleges he could not take it any more, that he suffered from depression and PTSD, and he resigned and filed suit.
- Company claimed first that conduct was not severe and pervasive, and then that it acted when Plaintiff complained.
- Plaintiff's alleged harasser was a serial harasser, and that Company should have known through exercise of reasonable care.
- Nashville federal court jury returned a verdict in favor of Plaintiff for \$307,000 on February 7, 2014. Motion for attorney fees pending.



Hurst v. Lee County Sheriff (MS)

- Plaintiff, a sergeant for the Lee County Sheriff's Department, was assigned to work the jail on 1/1/2012.
- Chad Bumphis, a former Tupelo football star now playing for Mississippi State, was allegedly involved in a bar fight and was arrested.
- A reporter called the jail and reached plaintiff, who confirmed Bumphis' arrest in connection with the bar fight.
- Plaintiff was quoted in an article, and when the Sheriff saw it he fired plaintiff for violating a “no-talking-to-the-media” policy.
- Plaintiff claimed he was fired for exercising first amendment rights and because he spoke ill of a key player associated with the Sherriff's beloved football team.
- Federal Judge dismissed the case, holding speech was not protected because it was not a matter of great public concern.
- What if the player had been involved in a murder?

Summary Judgment: *Demarce v. Robinson Property Group Corp.*

- Plaintiff was a blackjack dealer in Tunica.
- Plaintiff suffered from a variety of ailments, including COPD.
- Plaintiff's husband was employed as a dealer at same casino, and he also suffered from a variety of ailments.
- Plaintiff exhausted her FMLA leave, and was unable to renew entitlement because she did not satisfy FMLA thresholds in prior year (she worked under 1,250 hours).
- Plaintiff and her husband worked the "swing shift" – meaning they worked the shift between day shift and graveyard shift.
- Plaintiff requested an accommodation for her condition that included only dealing blackjack at the "sit-down" tables.
- The "sit-down" tables regularly closed during her shift as business slowed.

Demarce v. Robinson Property Group Corp. **(continued)**

- Plaintiff could have changed to a shift where “sit-down” table did not close, or she could have learned to deal different game that allowed her to stay seated on swing shift.
- Plaintiff refused, instead maintaining that casino should have moved her gaming table to a section that allowed it to stay open on swing shift.
- Plaintiff also could have taken advantage of “early out” system, which would have allowed her to leave when the table closed without accruing attendance points.
- Plaintiff refused to “early out,” and her employment was ultimately terminated for excessive absenteeism.
- Mississippi Federal Judge granted summary judgment in favor of employer. On appeal now to 5th Circuit Court of Appeals.

Avoiding The Jury: Dismissal Motions and Summary Judgment (Federal)

- The Federal and Tennessee Rules of Civil Procedure provide effective tools for testing and challenging claims in employment lawsuits.
 - Rule 12 standard (*Twombly v. Ashcroft*).
 - Rule 56 standard – no genuine issues of material fact.
 - Rule 50 standard – judgment as a matter of law.



Avoiding The Jury: Motions To Dismiss (Federal)

- “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are ‘merely consistent with’ a defendant's liability, it ‘stops short of the line between possibility and plausibility of `entitlement to relief.’”
 - Supreme Court of the United States (2006)

Avoiding The Jury: Motions To Dismiss (Tennessee)

- “Ms. Webb's amended complaint alleges that she was an employee of Habitat who was terminated for her complaints regarding, and unwillingness to implement, participate in or remain silent about, discriminatory and illegal policies that Habitat's management requested staff members to implement. Construing ‘the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences,’ it is not apparent from the face of the amended complaint that Ms. Webb ‘can prove no set of facts in support of the claim that would entitle [her] to relief.’”
 - Supreme Court of Tennessee (2011) (rejecting *Twombly* standard) (internal citations omitted)

Summary Judgment (Federal)

- “[Rule 56] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”
 - Supreme Court of the United States (1986)
- Still the standard.

Summary Judgment (Tennessee)

- “The summary judgment standard to be applied in this employment discrimination case is the standard announced in *Hannan v. Alltel Publishing Co.* To obtain summary judgment under this standard, the movant employer must negate an essential element of the employee’s claim or defense or show by undisputed evidence that the employee cannot prove an essential element of the claim or defense at trial.”
 - Supreme Court of Tennessee (2008) (rejecting federal burden shifting standard) (internal citations and parentheticals omitted)



Social Media Evidence

- Headmaster at private school sued for age discrimination and retaliation when his contract was not renewed.
- Case settled, and former Headmaster signed a Settlement Agreement that provided for \$10,000 in back pay and \$80,000 in “1099 payment.”
 - Settlement agreement contained a confidentiality clause that required repayment of \$80,000 if breached.
- Former Headmaster told his daughter about settlement.
 - She posted the following on Facebook: “Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT.”
- School refused to pay \$80,000, and Florida appellate court refused to enforce settlement agreement.



Best Practices – Staying Out Of Court



- Involve HR and counsel to help identify cases with potential legal risk and exposure.
- Focus on training and documentation.
- Involve counsel early when claims are threatened and lawsuits are filed. Work with counsel to determine whether there are forum selection alternatives.
- Be honest with your organization when attempting to quantify risk.
- Attempt to resolve bad cases early. Do not stop trying.
- Learn from legal mistakes, and avoid making them again.
- Recognize the inherent risks with trial, and work with counsel to minimize or avoid them.
- Do not ignore or avoid legal risks – they almost always get worse.