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Ed Perkins, Editor
Travis Cade Armstrong, Assistant Editor
Sheehy, Ware & Pappas, P.C. – Houston

1. SUPREME COURT DECISIONS.

TITLE VII – An employer is liable under the statute's disparate treatment provisions if the employer makes an applicant's religious practice, confirmed or otherwise, a factor in employment decisions.

In *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028 (2015), the United States Supreme Court examined the extent to which Title VII of the Civil Rights Act of 1964 prohibits an employer from refusing to hire an applicant to avoid accommodating a religious practice. Specifically, the Court considered this issue of "whether [the Statute's] prohibition applies only where an applicant has informed the employer of his need for an accommodation." *Id.* at 2031.

In *Abercrombie*, Samantha Elauf ("Elauf") — a practicing Muslim who, consistent with her religion, wears a headscarf — applied for a job at an Abercrombie store. *Id.* The store in question imposed a policy prohibiting employees from wearing caps and other headgear. *Id.* Following an interview, the store's assistant manager determined Elauf was qualified to be hired, but sought guidance from management as to whether the headscarf would violate the headgear policy. *Id.* The district manager responded that the scarf, along with all other religious headgear, would violate the policy and, thus, directed that Elauf not be hired. *Id.*

The EEOC subsequently sued Abercrombie on Elauf's behalf, arguing that its refusal to hire Elauf violated Title VII. *Id.* The District Court granted the EEOC summary judgment on the issue of liability. *Id.* The Tenth Circuit Court of Appeals reversed and rendered summary judgment in Abercrombie's favor, concluding "ordinarily an employer cannot be liable under Title VII for failing to accommodate a religious practice until the applicant . . . provides the employer with actual knowledge of his need for an accommodation." *Id.*

The Supreme Court acknowledged that Title VII prohibits "disparate treatment" of applicants or employees, a claim for which requires that the employer (1) refused to hire or discharged any individual (2) because of (3) the individual's race, color, religion, sex, or national origin. *Id.* at 2031-32. Reasoning that Title VII defined "religion" as "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate [the practice] without undue hardship on . . . the employer's business," the Court concluded the first and third elements were met in this case—namely, that Abercrombie failed to hire Elauf, and that Elauf's wearing of a headscarf constituted a "religious practice" sufficient to invoke Title VII. *Id.* at 2032. Thus, the only remaining issue for the Court's consideration was whether Elauf was not hired "because of" her religious practice.

Abercrombie argued an applicant cannot show disparate treatment without first showing that the employer had actual knowledge of the applicant's need for accommodation. *Id.* The Court, however,

noted that Title VII, unlike other anti-discrimination statutes, did not impose a knowledge requirement. *Id.* at 2032-33. Rather, Title VII prohibited certain motives from governing hiring decisions, regardless of the employer's knowledge of an actual need for accommodation. *Id.* As the Court reasoned:

> An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his motive. Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed.

Id. at 2033. Thus, "the rule for disparate treatment claims is straightforward: [a]n employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." *Id.*

Abercrombie urged the Court to adopt the Tenth Circuit's rule "allocat[ing] the burden of raising a religious conflict," which would require the employer to have actual knowledge of a conflict between an applicant's religious practice and a work rule. *Id.* The Court refused because doing so would augment the statute with a knowledge requirement that did not exist, effectively "add[ing] words to the law to produce what is thought to be a desirable result." *Id.* According to the Court, "[a] request for accommodation, or the employer's certainty that the practice exists, may make it easier to infer motive, but is not a necessary condition of liability." *Id.*

2. FEDERAL COURT DECISIONS

AGE DISCRIMINATION UNDER THE ADEA AND TCHRA – the "stray remarks" test does not apply where ageist comments are simply a part of larger mix of conduct forming the basis of an age discrimination claim.

In *Goudeau v. Nat'l Oilwell Varco, L.P.*, 793 F.3d 470 (5th Cir. 2015), the Fifth Circuit Court of Appeals examined the sufficiency of evidence to establish a prima facie case of discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq. ("ADEA") and the Texas Commission on Human Rights Act, TEX. LAB. CODE §§ 21.051, 21.055 ("TCHRA"). In this case, Plaintiff Maurice Goudeau ("Goudeau") was a maintenance supervisor for Defendant National Oilwell Varco, L.P ("Varco") for almost 20 years. *Id.* at 472-74. On one occasion in 2010, Goudeau's supervisor Mike Perkins ("Perkins") told him during a break "there sure are a lot of old farts around here." *Id.* Perkins also inquired about the ages of two older employees and purportedly told Goudeau that he planned to fire them. *Id.*

Goudeau complained to Human Resources (HR) about Perkins's comments. *Id.* Following the complaint, Perkins stopped socializing with Goudeau, and reduced Goudeau's managerial authority. *Id.* Perkins also continued to make ageist remarks, such as repeatedly asking if the facility's smoking area was "where the old people meet," stating that Goudeau wore "old man clothes," and referring to Goudeau as an "old fart." *Id.*

During this time, Perkins also issued a disciplinary warning to Goudeau—the first Goudeau received during his time at Varco—for ignoring a direct request to

complete a task. *Id.* Perkins also gave Goudeau a below-standard rating on his annual performance review. *Id.* On August 11, 2011, Perkins fired Goudeau, citing poor job performance and insubordination. *Id.* During this August 11 meeting, Goudeau was, for the first time, presented with four new write-ups for miscellaneous infractions. *Id.* Goudeau brought claims of age discrimination and retaliation under the ADEA and TCHRA. The district court granted summary judgment in favor of Varco on both claims. *Id.*

On appeal, the Fifth Circuit acknowledged that both the ADEA and the TCHRA prohibit an employer from discharging an employee on account of the employee's age. *Id.* at 474. Claims brought under these laws are evaluated under a burden-shifting framework, wherein a plaintiff must establish (1) he was discharged; (2) he was qualified for the position; (3) he was within the protected class at the time of discharge; and (4) he was either (i) replaced by someone outside the protected class, (ii) replaced by someone younger, or (iii) otherwise discharged because of his age. *Id.* If the plaintiff successfully makes out a prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the termination. *Id.* Once the employer has met this burden, the plaintiff must establish that the employer's articulated rational for the termination was merely a "pretext" for the true discriminatory purpose. *Id.* at 474-75.[1]

[1] The Fifth Circuit recognized that the federal law (ADEA) and Texas law (TCHRA) differed in their analysis in the third and final "pretext" stage. Under the ADEA, the employee must prove that the reasons offered by the defendant were not its true reasons, thus requiring a showing of "but-for" causation. By contrast, the TCHRA requires a less demanding showing that discrimination was a motivating factor for the termination. *Id.*

The first three elements of Goudeau's prima facie case were undisputed. *Id.* at 475. Goudeau contended that Perkins's ageist comments satisfied the fourth element—that he was "otherwise discharged because of his age." *Id.* Varco argued the remarks were insufficient under the four-part "stray remarks" test articulated in *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1996). *Id.* The Fifth Circuit acknowledged that the *CSC Logic* test requires that any ageist remark be proximate in time to the termination, made by an individual with authority over the employment decision, and related to the challenged decision. *Id.* The court further observed, however, that the test applies "only when the remarks are being used as direct evidence of discrimination." *Id.* In a circumstantial case, in which the discriminatory remarks are just "one ingredient in the overall evidentiary mix," courts adopt the following, "more flexible" standard: the comments must show: (1) discriminatory animus (2) on the part of a person that is either primarily responsible for the challenged employment action or by a person with influence or leverage. *Id.* at 475-76. Using this approach, the Fifth Circuit found Perkins' statements, combined with his other conduct, "easily meet this less stringent standard." *Id.*

3. TEXAS APPELLATE COURT DECISIONS

BREACH OF EMPLOYMENT CONTRACT – An employee's outrageous behavior, even if in breach of an employment contract, did not obviate notice and opportunity to cure provisions, but did render performance of provisions futile.

In *Duncan v. Woodlawn Manufacturing, Ltd.*, ___ S.W.3d ___, 2015 WL 3777544 (Tex. App.—El Paso June 17, 2015, no pet.

h.), the El Paso Court of Appeals examined circumstances in which a "notice and cure" provision in an employment contract may be defeated. In this case, Plaintiff Sandy Duncan ("Duncan") was the CEO of Woodlawn Manufacturing, Ltd. ("Woodlawn"). *Id.* at *1-5. Under his employment agreement with Woodlawn, Duncan agreed to faithfully perform his duties and responsibilities to the best of his abilities, and to "comply with all policies, standards, and regulations of [Woodlawn] now or hereafter promulgated as the same are in effect from time to time." *Id.*

The agreement provided for termination "with cause" under various circumstances, including material breach of the agreement, violation of any covenant not to compete, and failure to diligently and effectively perform duties. *Id.* These provisions required that Duncan be provided 30 days' notice and an opportunity to cure before termination. *Id.* The employee handbook further provided that certain conduct—including immoral or indecent conduct, sexual harassment, and involvement with drugs or alcohol—could warrant immediate termination. *Id.* The agreement also provided for termination "without cause" for any reason not previously outlined. *Id.* An employee's termination "with cause" entitled the employee only to compensation through the date of termination, whereas termination "without cause" entitled the employee to additional benefits. *Id.*

During his time as CEO of Woodlawn, Duncan admitted to having sexual relationships with at least three subordinates and to discussing these relationships with others using Woodlawn's email server. *Id.* Duncan billed many of his sexual liaisons with employees and others on the company credit card. *Id.* Duncan also began drinking heavily in a manner that impaired his ability to work and at one point resulted in his arrest. *Id.* As a result, Duncan was terminated for cause on October 8, 2010, effective immediately. *Id.*

Duncan sued Woodlawn for breach of the employment agreement on the grounds that he was not provided 30 days' notice of termination or given an opportunity to cure. *Id.* A jury found that Woodlawn had breached the employment agreement; but, the jury also found that Duncan, through his conduct, had committed a prior breach of the agreement which excused any further performance by Woodlawn. *Id.* In view of this, the court rendered a take-nothing judgment in Woodlawn's favor. *Id.*

On appeal, Duncan relied on a line of cases requiring strict adherence to "notice and cure" clauses, arguing that Woodlawn could not terminate the employment contract absent proper notice of a claimed breach and an opportunity to cure. *Id.* at *6. Woodlawn responded that some breaches of contract fundamentally undermine the essential purpose of an agreement and thereby justify immediate termination notwithstanding any notice and cure provisions. *Id.*

The El Paso Court of Appeals acknowledged that "[n]otice and cure clauses are found in a number of different contracts, and are generally enforceable as valid contract terms." *Id.* at 7. Nevertheless, the court examined holdings from other jurisdictions that permitted an exception to the "notice and cure" provisions where the offending party committed a "vital" breach of the agreement. *Id.* at *7-8 (citing *Olin Corp. v. Central Industries, Inc.*, 576 F.2d 642 (5th Cir. 1978); *Larken, Inc. v. Larken Iowa City Ltd. Partnership*, 589 N.W.2d 700 (Iowa 1998); *L.K. Comstock & Co., Inc. v. United Engineers & Constructors Inc.*, 880 F.2d

219 (9th Cir.1989)). Even assuming that such cases reflected Texas law, however, the court concluded that such exception would not apply in this case. *Id.* at *8. The court reasoned "[w]hen parties have spoken comprehensively on an issue in their contract, we are not at liberty to add contractual terms they never intended." *Id.* After reviewing the terms of the employment agreement at issue, the court concluded the agreement "exhaustively details the various ways that Duncan could leave employment," along with the various rights and responsibilities attending each. *Id.* Judicially adding another category of termination "whether called vital breach or something else" would frustrate the intent of the parties. *Id.*

This, however, did not end the inquiry. The court recognized Texas law "does not require the performance of a futile act." *Id.* at *9 (citing *DiGiuseppe v. Lawler*, 269 S.W.3d 588, 594–95 (Tex.2008)). The court further held this rule applies to notice and cure provisions and can operate to defeat such provisions. *Id.* The court then observed evidence from the record indicating Duncan "had been counseled on his apparent excessive drinking without effect well before the termination." *Id.* Furthermore, Duncan, by his own admission "did not recognize that he had a problem with alcohol until three months after his termination when he finally came to the conclusion that he was an alcoholic." *Id.* As to his relationships with subordinates, the court noted there was direct evidence that Duncan's supervisors did not believe the issue could be cured. *Id.* Viewing the evidence in the light most favorable to the findings, the court concluded there was legally and factually sufficient evidence to support the conclusions that the notice and cure provisions were futile and, therefore, non-binding on Woodlawn. *Id.*

The court further observed that Duncan's conduct violated numerous provisions of Woodlawn's employee handbook, which contained provisions that permitted immediate termination depending on the frequency and severity of such violations. *Id.* at *10. The court acknowledged that an employment manual, which disclaims being an employment contract, generally cannot alter or add to the terms of an at-will employment relationship. *Id.* Nevertheless, the court recognized that the employment agreement incorporated by direct reference "company rules and policies and required [Duncan] to comply with them." *Id.* Construing the two documents together, the court determined there was sufficient evidence that Duncan violated the morality provisions of the employment handbook in a manner would constitute a material breach of the employment agreement, and overruled Duncan's objections on these grounds. *Id.*