

# Employment Law

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## Editors

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### **Barbara L. Johnson**

*BLJohnsonLaw PLLC  
1300 E Street, NW  
Suite 400E  
Washington, DC 20005  
(202) 749-8322  
blj@bjlawyer.com*

### **Andrew N. Knauss**

*Potter & Murdock, P.C.  
400 S. Maple Ave.  
Suite 210  
Falls Church, VA 22046  
(240) 994-3061  
aknauss@pottermurdock.com*

### **Anat Maytal**

*BakerHostetler  
45 Rockefeller Plaza  
New York, NY 10111  
(212) 847-2813  
amaytal@bakerlaw.com*

---

## Contributors

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### **First Circuit**

#### **Andrew N. Knauss**

*Potter & Murdock, P.C.  
400 S. Maple Ave.  
Suite 210  
Falls Church, VA 22046  
(240) 994-3061  
aknauss@pottermurdock.com*

### **Third Circuit**

#### **Larry L. Turner**

*Morgan, Lewis & Bockius LLP  
1701 Market Street  
Philadelphia, PA 19103  
(215) 963-5017  
larry.turner@morganlewis.com*

### **Second Circuit**

#### **Anat Maytal**

*BakerHostetler  
45 Rockefeller Plaza  
New York, NY 10111  
(212) 847-2813  
amaytal@bakerlaw.com*

### **Tara Param**

*Morgan, Lewis & Bockius LLP  
One Oxford Centre, 32nd Floor  
Pittsburg, PA 15219-6401  
(412) 560-7461  
tara.param@morganlewis.com*

### **Fourth Circuit**

#### **Kerry A. Shad**

*Smith Anderson LLP  
150 Fayetteville Street  
Suite 2300  
Raleigh, NC 27601  
(919) 821-6672  
kshad@smithlaw.com*

#### **Tracy Benning**

*Smith Anderson LLP  
150 Fayetteville Street  
Suite 2300  
Raleigh, NC 27601  
(919) 821-6654  
tbenning@smithlaw.com*

### **Fifth Circuit**

#### **Eve Barrie Masinter**

*Breazeale, Sachse & Wilson, LLP  
One American Place  
301 Main Street  
Suite 2300  
New Orleans, LA 70801  
(504) 584-5468  
eve.masinter@bswllp.com*

#### **Philip Giorlando**

*Breazeale, Sachse & Wilson, LLP  
One American Place  
301 Main Street  
Suite 2300  
New Orleans, LA 70801  
(504) 680-5244  
Philip.giorlando@bswllp.com*

### **Sixth Circuit**

#### **Christopher M. Trebilcock**

*Clark Hill PLC  
500 Woodward Avenue  
Suite 3500  
Detroit, MI 48226  
(313) 965-8575  
ctrebilcock@clarkhill.com*

#### **Stephanie V. Romeo**

*Clark Hill PLC  
500 Woodward Avenue  
Suite 3500  
Detroit, MI 48226  
(313) 309-4279  
sromeo@clarkhill.com*

### **Seventh Circuit**

#### **Andrew N. Knauss**

*Potter & Murdock, P.C.  
400 S. Maple Avenue  
Suite 210  
Falls Church, VA 22046  
(240) 994-3061  
aknauss@pottermurdock.com*

### **Eighth Circuit**

#### **Andrew B. Murphy**

*Faegre Baker Daniels LLP  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402  
(612) 766-8897  
andrew.murphy@faegrebd.com*

#### **Sara L. Lewenstein**

*Faegre Baker Daniels LLP  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402  
(612) 766-7709  
sara.lewenstein@faegrebd.com*

### **Ninth Circuit**

#### **Jennifer S. Baldocchi**

*Paul Hastings LLP  
515 South Flower Street, 25th Floor  
Los Angeles, CA 90071  
(213) 683-6133  
jenniferbaldocchi@paulhastings.com*

**Amy Rankin**

*Paul Hastings LLP  
515 South Flower Street, 25th Floor  
Los Angeles, CA 90071  
(213) 683-6000  
amyrankin@paulhastings.com*

**Daniel Rojas**

*Paul Hastings LLP  
515 South Flower Street, 25th Floor  
Los Angeles, CA 90071  
(213) 683-6000  
danielrojas@paulhastings.com*

**Sarah Spiegelman**

*Paul Hastings LLP  
515 South Flower Street, 25th Floor  
Los Angeles, CA 90071  
(213) 683-6000  
sarahspiegelman@paulhastings.com*

**Tenth Circuit**

**Tomas J. Garcia**

*Modrall Sperling  
500 Fourth Street NW  
Suite 1000  
Albuquerque, NM 87102  
(505) 848-1892  
tomas.garcia@modrall.com*

**Eleventh Circuit**

**Andrew N. Knauss**

*Potter & Murdock, P.C.  
400 S. Maple Avenue  
Suite 210  
Falls Church, VA 22046  
(240) 994-3061  
aknauss@pottermurdock.com*

**D.C. Circuit & Supreme Court**

**Andrew N. Knauss**

*Potter & Murdock, P.C.  
400 S. Maple Avenue  
Suite 210  
Falls Church, VA 22046  
(240) 994-3061  
aknauss@pottermurdock.com*

---

**Canada**

---

**Michael C. Comartin**

*Ogletree Deakins International LLP  
220 Bay Street  
Suite 1100, PO Box 15  
Toronto, Ontario M5J 2W4  
(416) 637-9057  
michael.comartin@ogletree.com*

**Shir Fulga**

*Ogletree Deakins International LLP  
220 Bay Street  
Suite 1100, PO Box 15  
Toronto, Ontario M5J 2W4  
(416) 637-9064  
shir.fulga@ogletree.com*

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## Employment Law

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### § 19.1 Introduction

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#### UNITED STATES

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### § 19.2 Disability Discrimination

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#### § 19.2.1 Burden of Proof / Evidentiary Standards

#### § 19.2.2 Defining Disability

#### § 19.2.3 Reasonable Accommodations

*Clark v. Charter Communications, LLC*, No. 18-11492, 2019 WL 2537395 (5th Cir. June 19, 2019). Plaintiff, a telecommunications worker who suffered from narcolepsy, fell asleep at work repeatedly, including while surveilling the network for outages and communicating with technicians. Defendant made several attempts at accommodations, including more frequent breaks than her co-workers, but they did not diminish the frequency of Plaintiff sleeping at work. Plaintiff’s supervisors allegedly began to communicate with her less often, and co-workers allegedly made negative comments about her break periods. Plaintiff filed suit alleging discrimination, failure to accommodate, failure to engage in the interactive process, harassment, and retaliation. Plaintiff argued that although staying awake and rendering “speedy and accurate performance ... are admirable and desirable qualities,” they were not essential functions of the job. The employer argued that staying awake was an

essential function of the job and Plaintiff had no evidence to refute this, and so failed to present a genuine issue of fact. The Fifth Circuit agreed with the employer and affirmed the district court's dismissal of her disability discrimination claim. It stated that Plaintiff "failed to point us to any genuine factual dispute regarding whether a specialist could fulfill her tasks when she might sleep through a time-sensitive network alert or an urgent call from a technician addressing an outage." *Id.* at 767. The court also affirmed the dismissal of her harassment and retaliation claims for a failure of sufficient evidence to establish a *prima facie* case.

## § 19.2.4 Regarded as Disabled

### § 19.2.5 Interactive Process

*Trautman v. Time-Warner Cable Texas, LLC*, 756 Fed. Appx. 421 (5th Cir. 2018) (per curiam). Plaintiff "missed a staggering amount of work" during her pregnancy, she had panic attacks while driving to or from work in heavy traffic, and she was granted, on her doctor's recommendation, an accommodation of leaving the office between 2 and 3 p.m. to avoid heavy traffic and working from home the rest of the workday. After the birth, Plaintiff wanted to continue with the partial-day-in-the-office arrangement, but her supervisor declined. However, her employer permitted her to come in an hour earlier and leave an hour later, but Plaintiff rejected this accommodation. She also refused to investigate other transportation options so that she was not driving in heavy traffic. Plaintiff then began submitting FMLA leave slips requesting intermittent FMLA leave. She submitted a doctor's note about her "severe driving phobia at times of high traffic." Despite the employer's request for clarification, the doctor did not indicate how many such episodes Plaintiff experienced per week and how long they lasted. Plaintiff was terminated after missing the majority of her work days, despite two FMLA extensions of intermittent leave. Her termination notice listed all of Plaintiff's unapproved absences (over 60% of working hours within a year). Plaintiff sued under the FMLA and ADA. The district court granted the Defendant's motion for summary judgment. The Fifth Circuit affirmed, holding that Plaintiff had no direct evidence of FMLA retaliation, and the employer had an obvious nondiscriminatory reason for discharging her—"excessive absenteeism." Further, the Court held that the employer proved a legitimate, nondiscriminatory reason that was not pretextual. Regarding the failure to accommodate claim, the Court held that Plaintiff was not engaged in flexible, interactive discussions, required by the ADA, by denying every accommodation offered by her employer. "Neither the ADA nor the 2008 amendments to the ADA permits an employee to leave work early and then sue her employer for being unreasonable." *Id.* at 431.

## § 19.2.6 Miscellaneous

*Nall v. BNSF Ry. Co.*, 917 F.3d 335 (5th Cir. 2019) (amended opinion filed Feb. 15, 2019). Plaintiff, a trainman diagnosed with Parkinson’s disease, was cleared to continue working in his position by his neurologist. Subsequently, the employer’s doctor revised the job duty list to the duties of a switchman, including a number of duties which would be difficult to perform for one with Parkinson’s. Plaintiff worked without incident, but the employer placed plaintiff on medical leave and required him to obtain a medical release to resume work after a co-worker raised concerns. After medical evaluations and a field test, Plaintiff passed the test but the medical examiners expressed cautions. Based on the field test results and co-worker testimony, the employer did not permit him to return to work. Plaintiff then filed an EEOC charge and provided two more medical status forms clearing him to work. Yet, a doctor retained by the employer classified him as “permanently medically disqualified.” The EEOC disagreed with the employer’s decision that Plaintiff was a direct threat. Plaintiff sued under the ADA and Texas discrimination law. The district court granted the employer’s motion for summary judgment, finding that plaintiff was not qualified for the job, that he did not present evidence of pretext, and that he posed a direct threat within the meaning of the ADA. The Fifth Circuit reversed and remanded, finding that a reasonable jury could conclude that the employer did not consider the “best available objective evidence” or engage in a meaningful “individualized assessment” in determining Plaintiff was a direct threat. The Court expressed doubt about utilizing the second (changed) list of job duties and instead focused on the job duties on the first list. The Court considered the Plaintiff’s medical release forms, field test results, changes in job duties, and the comments regarding Plaintiff’s disease. It also noted that inconsistent statements undermined the employer’s credibility. Considering all, the Court found a material issue of fact existed as to whether the employer had considered the best available objective evidence and engaged in a meaningful individualized assessment of Plaintiff.

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## § 19.3 Age Discrimination

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



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## § 19.3.2 Reductions in Force / Restructuring

## § 19.3.3 Miscellaneous

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# § 19.4 Arbitration

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## § 19.4.1 Claims Subject to Arbitration

*20/20 Commc'ns, Inc. v. Crawford*, No. 18-10260, 2019 WL 3281412 (5th Cir. July 22, 2019). The Arbitration agreement permitted the arbitrator to “hear only individual claims,” and prohibited arbitration “as a class or collective action ... to the maximum extent permitted by law.” Nonetheless, the arbitrator commenced class arbitration, concluding that federal law prohibited the bar on class arbitration. The district court affirmed the class award. The Fifth Circuit vacated the award and remanded the case to the arbitrator. The Fifth Circuit, based on decisions in other federal circuits, held that “class arbitration is a ‘gateway’ issue that must be decided by the courts, not arbitrators” unless there is “clear and unmistakable language” in the arbitration agreement to the contrary. The Court based its rationale that it was a gateway issue on these factors: a class arbitration award binds absent parties; absent parties are entitled to notice, an opportunity to be heard, and the right to opt out, which often increases the expense for class arbitrations and makes them more complex; and, the lack of efficiency and the difficulty of protecting confidentiality and privacy in class arbitrations. The Fifth Circuit concluded that the availability of class arbitration is presumptively an issue for the court to decide and went on to analyze whether the arbitration agreement was sufficient to overcome that presumption by determining whether the parties “clearly and unmistakably agreed to allow the arbitrator to determine that issue.” Although the Court did not give examples of what exact language would be considered clear and unmistakable, the Court found that none of the provisions in the agreement before it spoke “with any specificity to the particular matter of class arbitrations” and held that they did not overcome the presumption.

## § 19.4.2 Enforceability

## § 19.5 Title VII

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### § 19.5.1 Burden of Proof / Evidentiary Issues

### § 19.5.2 Damages / Attorneys' Fees

### § 19.5.3 Gender / Equal Pay Act

*Wittmer v. Phillips 66 Co.*, 915 F.3d 328 (5th Cir. 2019). Plaintiff, a transgender woman, sued Defendant for sex discrimination after Phillips rescinded a post-interview job offer. Plaintiff's offer had been conditioned on certain requirements, including a background check. The background check revealed discrepancies between Plaintiff's interview statements and her period of employment with her previous employer. Defendant subsequently rescinded the job offer, pointing to Plaintiff's lack of candor in her interview. Addressing Defendant's motion for summary judgment, the district court cited multiple cases from other Federal Circuits that recognized transgender status and sexual orientation as protected classes under Title VII, two of which are currently before the Supreme Court. *See, e.g., EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (*en banc*). The district court accepted that Plaintiff was a member of a protected class under Title VII. However, it held that she failed to establish a *prima facie* case of discrimination because she did not show that similarly qualified individuals outside the protected class were treated more favorably. Further, Defendant had demonstrated a legitimate, nondiscriminatory reason for rescinding Plaintiff's job offer, based on the discrepancies revealed in her background check. On appeal, the Fifth Circuit affirmed, but stated that it had addressed the protected class issue in *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979), which held that Title VII does not prohibit discrimination on the basis of sexual orientation. The Fifth Circuit acknowledged *Blum* as binding precedent and affirmed the district court's decision granting summary judgment in favor of Phillips because Plaintiff failed to present sufficient evidence to support a *prima facie* case of discrimination, i.e., that she was in a protected class. Otherwise, the Fifth Circuit agreed with the district court on the lack of a *prima facie* case.

## § 19.5.4 Harassment / Reporting Harassment

*Gardner v. CLC of Pascagoula, LLC*, 915 F.3d 320 (5th Cir. 2019), *superseding* 894 F.3d 654 (5th Cir. 2018). The Fifth Circuit superseded its 2018 opinion. Plaintiff brought a hostile work environment claim against Defendant-employer for third-party harassment based on the actions of a patient. The patient had multiple physical and mental illnesses as well as a documented history of misconduct, but Plaintiff alleged that Defendant did not effectively address the harassment. Plaintiff claimed she was terminated after the patient groped and hit her multiple times. Plaintiff allegedly attempted to hit the patient and made a comment about race. The district court granted Defendant's motion for summary judgment, determining that the actions that occurred were not beyond what someone in Plaintiff'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 to create a hostile work environment. The Court noted that if the patient did not have mental illnesses, his conduct certainly would be considered severe and pervasive. The Fifth Circuit determined 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. The Fifth Circuit found in its original 2018 opinion that there was sufficient evidence that Defendant knew or should have known about the hostile work environment and did not take reasonable measures to address it. However, in its 2019 superseding opinion, the Court retracted that finding of knowledge and stated that to impose liability on the nursing home for the conduct of someone other than a supervisor the Plaintiff must prove that the nursing home knew or should have known of the conduct and failed to take reasonable measures to stop it. But, because Defendant did not base its summary judgment on that ground, the Court declined to consider that issue and remanded.

## § 19.5.5 National Origin Discrimination

## § 19.5.6 Race Discrimination

## § 19.5.7 Retaliation Claims

*O'Daniel v. Industrial Serv. Solutions*, 922 F. 3d 299 (5th Cir. 2019), *petition for reh'g and reh'g en banc denied*, June 4, 2019. Plaintiff sued her employer, its parent company, and two supervisors, alleging that she was terminated because a photo she posted to Facebook offended the company's president. The photo was of a man dressed as a woman and included a contentious

comment about his ability to use the women’s dressing room. After retaining counsel and amending her complaint twice, Plaintiff brought retaliation claims regarding the exercise of her right to freedom of expression and her opposition to Defendants’ practice of sex discrimination. The district court granted Defendants’ motion to dismiss both claims. That court held that the Louisiana Constitution’s freedom of expression protections require a state actor, which the Defendants were not. Further, her retaliation claim based on her alleged opposition to sex discrimination was not protected activity. For the district court, it was unreasonable for Plaintiff to believe that discrimination based on her status as a married heterosexual female constituted discrimination based on her sex. The district court also determined that it was not reasonable for Plaintiff to believe that complaining about such was a protected activity under Fifth Circuit precedent, which does not recognize sexual orientation as a protected class under Title VII. Finally, even if Title VII’s protections against sex discrimination included sexual orientation discrimination, Plaintiff had not alleged a causal relationship between her termination and her sexual orientation. The Fifth Circuit affirmed in full. It agreed with the district court on the Constitutional claim. The Fifth Circuit also held that Plaintiff had not filed a valid claim for retaliation. It stressed that in order to have a viable claim of retaliation under Title VII, a person must have a reasonable belief that the conduct that was the basis of the retaliation was protected conduct. Because under its precedent sexual orientation is not covered by Title VII, the belief was not reasonable. The Fifth Circuit could not accept the position that Plaintiff was “knowledgeable about the ‘uncertain’ state of federal law throughout the circuit courts about the coverage of sexual orientation in Title VII, but ignorant about what this court has held.” *Id.* at 306.

## **§ 19.5.8 Religion**

## **§ 19.5.9 Miscellaneous**

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## § 19.6 Retaliation

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### § 19.6.1 Protected Activity

### § 19.6.2 What is a Sufficient Adverse Job Action to Support a Retaliation Claim?

### § 19.6.3 Retaliatory Intent

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## § 19.7 Wage Hour Issues

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### § 19.7.1 Exemptions

### § 19.7.2 Joint Employment

### § 19.7.3 Miscellaneous

*Gurule v. Land Guardian, Inc.*, 912 F.3d 252 (5th Cir. 2018). Plaintiff sued to recover alleged unpaid minimum wages. About a year and a half before trial, Defendant made an offer of judgment for \$3,133.44, which was rejected. After trial, Plaintiff won \$1,131.39 in compensatory damages and an equal amount in liquidated damages. The trial court awarded Plaintiff \$25,089.30 in attorney’s fees, and ordered Plaintiff to pay \$1,517.57 in costs pursuant to FRCP Rule 68 for costs incurred after a more favorable offer was rejected. The attorney’s fee award was adjusted downward 60 percent because of the rejected offer of judgment. The Fifth Circuit held that a rejected offer of judgment can reduce a prevailing Plaintiff’s attorney fees recoverable in such cases where a fee shifting provision applies. The Fifth Circuit joined other circuits that have ruled on the issue. The Fifth Circuit noted that the “most critical factor” in determining an award of attorneys’ fees should be the prevailing party’s “degree of success.” The Fifth Circuit reasoned that “[i]n measuring success, a court should ask whether the party would have been more successful had its attorney accepted a Rule 68 offer instead of pressing on to trial.” *Gurule*, 912 F. 3d at 261. “We thus hold that in setting a reasonable attorney’s fee under a fee-shifting statute such as 29 U.S.C. § 216(b), a court should consider the prevailing party’s rejection of a Rule 68 offer that was more favorable than the judgment obtained.” *Id.*

*In re JPMorgan Chase & Co.*, 916 F.3d 494 (5<sup>th</sup> Cir. 2019). Call-center employees filed a collective action for failure to pay overtime for pre-shift work. Employer filed writ of mandamus to exclude from the collective action notice any employees who signed arbitration agreements waiving the right to participate in collective actions. The Fifth Circuit became the first federal court of appeals to rule on the issue of whether notice of an FLSA collective action may be sent to employees who have signed mandatory arbitration agreements. Although some federal district courts have held that courts should wait until stage two of the certification process to consider the existence of arbitration agreements, the Fifth Circuit held that district courts may not send notice to employees with a valid arbitration agreement unless the record shows that nothing in the agreement would prohibit the employee from participating in the collective action. The burden is on the defendant to show a valid arbitration agreement. The Fifth Circuit also held that giving notice of a collective action to persons who could not participate in it because they signed mandatory arbitration agreements was incompatible with *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989).

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## **§ 19.8 FMLA**

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*DeVoss v. Southwest Airlines Co.*, 903 F.3d 487 (5<sup>th</sup> Cir. September 7, 2018). Plaintiff, a flight attendant with Southwest took sick leave. The employer sent her a notice of her eligibility for FMLA leave and indicated the deadline, under company policy, for submitting an application for FMLA leave. Plaintiff did not submit an FMLA application by the deadline. Plaintiff later called to invoke a commuter policy because she was going to be late for work. When she was told that the commuter policy would not apply, she said she was sick again for the same reason. Plaintiff then missed a three-day work assignment. Southwest initiated an investigation and, based on that investigation fired Plaintiff for dishonesty. Plaintiff unsuccessfully pursued a grievance and then filed a lawsuit alleging interference and retaliation under the FMLA. The district court granted summary judgment in favor of Southwest on the interference claim because Plaintiff failed to give her employer the notice of intent to take FMLA leave as required by company policy. The district court also granted summary judgment on the retaliation claim and ruled that Plaintiff could not prove that the reason given by the employer was pretextual. The Fifth Circuit agreed with the district court and held that Plaintiff failed to satisfy the FMLA notice requirement. The FMLA requires employers to give employees notice of their FMLA eligibility at the beginning of the first instance of leave for each qualifying event. Because Plaintiff claimed the same sickness on the two occasions, one notice by the employer was all that was required, and that triggered Plaintiff's duty to provide notice of intent to take FMLA leave for each illness, which she failed

to do. Further, the Fifth Circuit held on the retaliation claim that, even assuming Plaintiff gave proper notice, she failed to raise a genuine issue of material fact that the employer's reason for terminating her, dishonesty, was pretextual.

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## **§ 19.9 Terminations / Settlement**

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### **§ 19.10 Uniformed Services Employment**

### **§ 19.11 Miscellaneous**

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#### **§ 19.11.1 Benefits / ERISA / COBRA**

#### **§ 19.11.2 Hostile Work Environment**

#### **§ 19.11.3 Jurisdiction**

#### **§ 19.11.4 Protected Speech**

#### **§ 19.11.5 Statute of Limitations**

#### **§ 19.11.6 Unfair Labor Practices / National Labor Relations Act**

#### **§ 19.11.7 Admissibility of Evidence**

#### **§ 19.11.8 Determination of Employee Status**

*Parrish v. Premier Directional Drilling, L.P.*, 917 F.3d 369 (5th Cir. 2019). Defendant, a directional drilling company, utilized directional-drillers (“DDs”) and measurement-while-drilling consultants. Some DDs were classified by Premier as employees and others as independent contractors. Plaintiffs were DDs who claimed they were misclassified by Premier as independent contractors, and they alleged that Defendant violated the FLSA with respect to them by not paying overtime. The evidence was that

independent contractor DDs and employee DDs perform essentially the same jobs. The main difference between them was their ability to turn down work and negotiate their pay. Plaintiffs filed the lawsuit as a collective action under the FLSA. The parties filed cross-motions for summary judgment. The trial court concluded the Plaintiff DDs were employees and rendered judgment in their favor. The Fifth Circuit held these Plaintiff workers were independent contractors. Because the question was one of law, the Fifth Circuit reviewed *de novo*. The *Parrish* Court considered the five factors from *United States v. Silk*, 331 U.S. 704 (1947): “(1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and the alleged employer; (3) the degree to which the worker’s opportunity for profit or loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship.” *Parrish*, 917 F.3d at 379. No single factor is dispositive; rather, the test turns on the totality of the circumstances. After evaluating the five *Silk* factors, the Court also considered (1) the existence of an express agreement; (2) the industry standard for DDs; and (3) the purpose of the FLSA. Considering all factors, the Fifth Circuit determined that the totality of the circumstances favored a finding of independent contractor status. Accordingly, the Court vacated the trial court’s judgment and rendered judgment in favor of the Defendant business.

## **§ 19.11.9 Punitive Damages**

### **§ 19.11.10 Miscellaneous**

*Acosta v. Hensel Phelps Construction Co.*, 909 F.3d 723 (5th Cir. 2018). Hensel Phelps, the contractor for a public library in Austin, Texas, carried out an excavation that led to OSHA complaints. A compliance officer found in his investigation that subcontractor employees had worked near an excavation wall without proper safety precautions and that Phelps directed these workers to continue regardless. OSHA issued a willful citation for violation of cave-in protections to Phelps although those in danger were not his own employees. Under the multi-employer worksite rule, OSHA can issue citations to multiple employers regardless of whether the employer actually employs those exposed to the hazard. The OSHA rule provides that the “creating employer,” who creates the hazardous condition, or the “controlling employer,” who could have detected a hazardous situation, may both be cited for a violation. Generally, this gives compliance officers broad authority to issue citations. Phelps appealed the citation to the OSHA Review Commission, which found that Phelps had sufficient control and authority over the worksite, including the subcontractors and his own employees. The Commission, however, acknowledged that the worksite was under the jurisdiction of the Fifth Circuit, which did not recognize the multi-employer rule. Thus, it determined that



Phelps could not be held liable for the OSHA violation based solely on the presence of subcontractors in a dangerous environment it controlled. OSHA appealed the Commission's decision to the Fifth Circuit asking that the Court overturn its precedent. Noting that the 1981 ruling was obsolete, the Fifth Circuit overturned over thirty years of precedent. "[W]e conclude that the Secretary of Labor has the authority under section 5(a)(2) of the Occupational Safety and Health Act, 29 U.S.C. § 654(a)(2), to issue citations to controlling employers at multi-employer worksites for violations of the Act's standards." *Hensel Phelps*, 909 F.3d at 743.