It says what?!

cases, statutes, and rules you were surprised to learn

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I. Introduction

We've all been there. You're so sure that the law is on your side because "that's how everyone does it," or that's how your amazing mentor trained you. Then the other side points out the text of a rule you don't remember reading. Or quotes a case you've never heard of before. An "OMG" moment. These are the best and worst moments. Ideally, they hit you at a time that isn't detrimental to the case. But even if you're left shattered and wondering how you've made it this far into your practice without ever reading the statute, case, or rule before—there is one thing that is certain. You'll never forget it again.

The idea for this paper was born after reading the CLE series *"OMG – I did not know that!"* first presented at the State Bar of Texas' annual Advanced Family Law course, and authored by Honorable Scott A. Beauhchamp and Larry L. Martin. Where the original catered toward family law practitioners, this paper aims to cater to employment lawyers. These are not merely tidbits from my own experiences. I've collected a number of "I didn't know that!" or "*they* didn't know that!" moments from many employment lawyers on both sides of the docket. I promised to keep everything anonymous. There were many great responses, but only a limited number could be researched in time, so not everything that was submitted is included. To all of you that wrote or called with examples, thank you!

This paper is purely educational and not meant to be legal advice.

II. Before filing suit

A. SOL runs from *notice* of termination date

Something to remember for intake: the statute of limitations begins to run at the date that the employee has notice of the termination, not on the last day of employment.[1] Notice "is based upon an objective standard, focusing upon when the employee knew, or reasonably should have known, that the adverse employment decision had been made."[2]

This isn't always as easy to figure out as it seems. Take the case of *Phillips v. Leggett.* There, the employer notified its 66 year-old employee that she would be laid off. The company was closing one of its plants. Ms. Phillips was the only employee not allowed to work at the second plant. Approximately one month later she was laid off. Then, less than a week after her layoff, she was recalled to work temporarily at another location. Leggett officially terminated Ms. Phillips about 5 months later (after it hired a 35 year old employee for the position).[3] The case went to trial and a jury found that Leggett willfully discriminated against Ms. Phillips because of her age. When

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[1] *See, e.g. Clark v. Resistoflex Co.,* 854 F.2d 762, 765 (5th Cir. 1988) (citations omitted); *see also Tex. Dep't of Pub. Safety v. Alexander*, 300 S.W.3d 62, 70 (Tex. App.—Austin 2009, pet. denied) ("In the case of an alleged discriminatory employment decision, the limitations period begins to run when the employee is informed of the decision, not when the decision comes to fruition.").

[2] *Clark,* at 765.

[3] *Phillips v. Leggett & Platt, Inc.,* 685 F.3d 452, 454 (5th Cir. 2011).

Leggett moved for judgment as a matter of law, the district court denied the motion, finding that the adverse action was the final termination date, or in the alternative, the 180-day limitations period should be tolled.[4] The Fifth Circuit reversed, concluding the claim was time-barred.

B. 180 days? You sure about that?

Several statutes we see every day require filing a charge within 180 days of an adverse action. For example, the Texas Labor Code and the Surface Transportation Assistance Act allow 180 days to file a charge with the appropriate agency. The antiretaliation provision protecting employees of hospitals and other treatment facilities in Texas, however, requires *suit* "before the 180th day after the date the alleged violation occurred or was discovered by the employee through the use of reasonable diligence."[5] In other words, you only get 179 days to file suit under Texas Health & Safety Code § 161.134.

Another point to note is the National Labor Relations Act states not only that the charge be filed within 6 months from the unfair labor practice, but it must also be *served* within those 6 months.[6] So, if you intend on e-filing right before midnight on the date of your deadline, that likely will not fly.

C. Title VII has its own unique venue provision

Title VII gives plaintiffs several choices of venue:

- "in any judicial district court in the State in which the unlawful employment practice is alleged to have been committed;
- "in the judicial district in which the employment records relevant to such practice are maintained and administered;" or
- "in the judicial district in which the aggrieved person would have worked but for the alleged unlawful practice; *but*
- "if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office."[7]

D. Are they immune?

Attorneys on both sides of the docket are repeatedly surprised to learn that the State of Texas has so much immunity from suit. And determining whether the entity is considered an arm of the State can also be wholly confusing. The Fifth Circuit has developed this six factor test:

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[4] *Id.* at 454-55.

[5] TEX. HEALTH & SAFETY CODE § 161.134.

[6] *See Dun & Bradstreet Software Services,* 317 NLRB 84, 84-85 (1995), affd. 79 F.3d 1238 (1st Cir. 1996) (when a charge was served one day late, based in part on erroneous advice from the applicable regional office, it was untimely).

[7] 42 U.S.C. § 2000e-5(f)(3) (emphasis added); *see also Broussard v. First Tower Loan, LLC,* 135 F.Supp.3d 540, 545 (E.D. La. 2015).

Title search: It Says What?

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