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Lessons Learned from Employment Law Trials

Drew Harris

Manager of Employment Litigation

Drew.Harris@oag.texas.gov

*Views expressed are those of the presenter, do not constitute legal advice,
and are not official opinions of the Office of the Texas Attorney General.*



Winning trials is fun, but better to avoid them!



Trial team after winning discrimination/retaliation
jury trial in *Pagani v. UT-Austin*



Roadmap

- ▶ High level overview of law on disability, discrimination, and retaliation
 - *Rockwood* (disability)
 - *Pendleton* (disability)
 - *Jiang* (discrimination/retaliation)
 - *Pagani* (discrimination/retaliation)
- ▶ Give practical tips to avoid lawsuits or make them easier to defend.



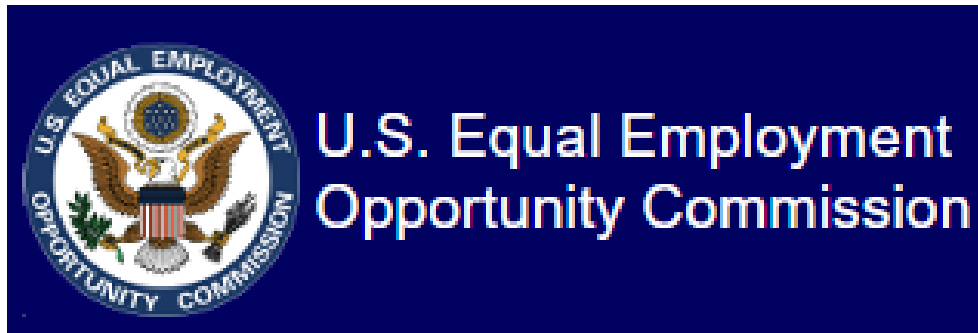
Overly Simplified Overview of Disability Law

- ▶ Disability laws (ADA, Rehab Act, TCHRA) generally prohibit discrimination based on disability in employment
- ▶ Protects otherwise “**qualified**” employees who are disabled or “regarded as” disabled
- ▶ Requires employers to engage in an “**interactive process**” to make “**reasonable accommodations**” (not necessarily the employee’s “**preferred accommodation**”)
- ▶ Prevents termination based on disability discrimination or failing to engage in the “**interactive process**”
- ▶ Prevents retaliation for “**protected activity**”



Disability EEOC charges

- ▶ General perception - seeing more disability discrimination lawsuits (and more for mental disorders)
- ▶ EEOC statistics show that disability discrimination charges increased from **20.4%** (2008) → **36.1%** (2020)



from EEOC Fiscal Year 2020 EEOC Enforcement and Litigation Data



Rockwood Trial

- ▶ ***Rockwood v. Dept. of State Health Services***
(Bexar County District Court, 2015)
- ▶ Nurse at state hospital alleged she was terminated for requesting a disability accommodation
- ▶ Our job at trial: show she was terminated for a legitimate reason
- ▶ Jury found that employer did not even know she was disabled



Rockwood Trial

Key document
demonstrative
from *Rockwood v.*
Dept. of State
Health Services
(October 2015
trial)

September 3

- Dr. Cathey emails Clinical Director.

From: Cathey, Steven W
Sent: Thursday, September 03, 2009 10:27 AM
To: Stalworth, Teresa
Subject: NEW LVN

I have **very serious concerns** about a new LVN on Seguin. She had problems on Arnold and was then placed on Seguin. Yesterday, she had a **complete mental breakdown** (crying, yelling, shaking) and was sent home. **The patients nearly rioted because meds passed out hours late.** She needs to be reassigned to a slow unit at minimum. I have had 10 admissions already this week and am basically the only MD on rotation the last 36 hours. This is a **really dangerous situation** in terms of med errors etc.

I have **very serious concerns** about a new LVN on Seguin.

Yesterday, she had a **complete mental breakdown**

The patients nearly rioted because meds passed out hours late.

This is a **really dangerous situation** in terms of med errors etc.



Rockwood Trial

KEY LESSONS:

- ▶ **Disability accommodations handled by proper HR person, not just by supervisor**
- ▶ **Documentation for the legitimate termination reason**



Pendleton Trial

- ▶ ***Pendleton v. Prairie View A&M University*** (S.D. Texas—Houston, 2016)
- ▶ Sympathetic professor plaintiff had requested several different accommodations, did not get all of them. She resigned, claiming disability discrimination.
- ▶ At trial, plaintiff's counsel attacked the "interactive process."
- ▶ We successfully showed her "preferred accommodation" requests were not reasonable



Pendleton Trial

KEY LESSONS:

- ▶ **Interactive process handled by qualified designated HR person**
- ▶ **Keep track of all accommodations offered or available**



Overview on Discriminatory/Retaliatory Termination Cases

- ▶ *McDonnell Douglas v. Green* framework
 - Employee shows *prima facie* case:
 - 1) employee is [protected characteristic],
 - 2) is qualified, and
 - 3) was terminated because of [protected characteristic]
 - Employer then must state a **legitimate reason** for termination
 - Employee then has the ultimate burden to prove the stated reason is “**mere pretext**”
- ▶ Different causation standards: “**motivating factor**” vs. “**but-for**”



Jiang Trial

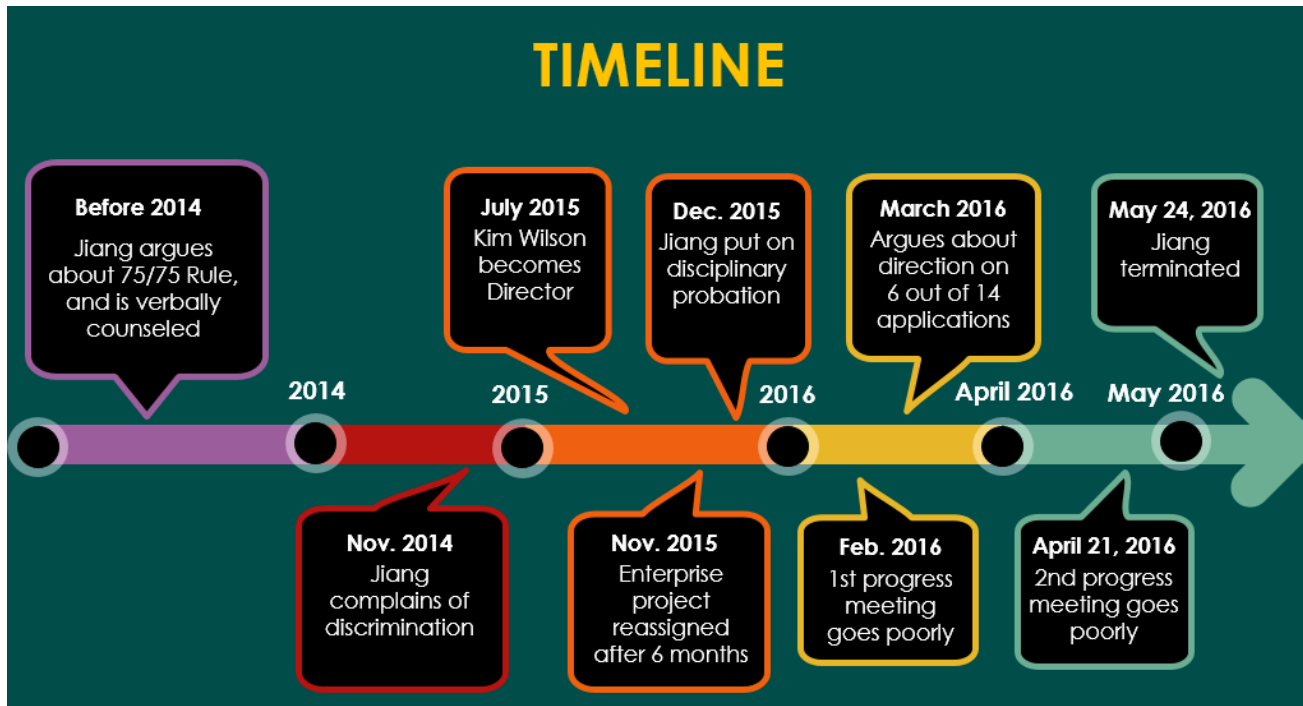
- ▶ ***Jiang v. Texas Commission on Environmental Quality*** (W.D. Texas—Austin, 2018)
- ▶ Employee terminated right after ranting and complaining of age discrimination
- ▶ At trial, plaintiff's counsel argued temporal proximity
- ▶ We successfully showed a legitimate, unchanging reason for discipline and termination



Jiang Trial

KEY LESSONS:

- ▶ Document ongoing issues
- ▶ Consider timing when reviewing terminations; build timelines for your litigation counsel



Timeline in
Jiang v. TCEQ
(September
2018 trial)



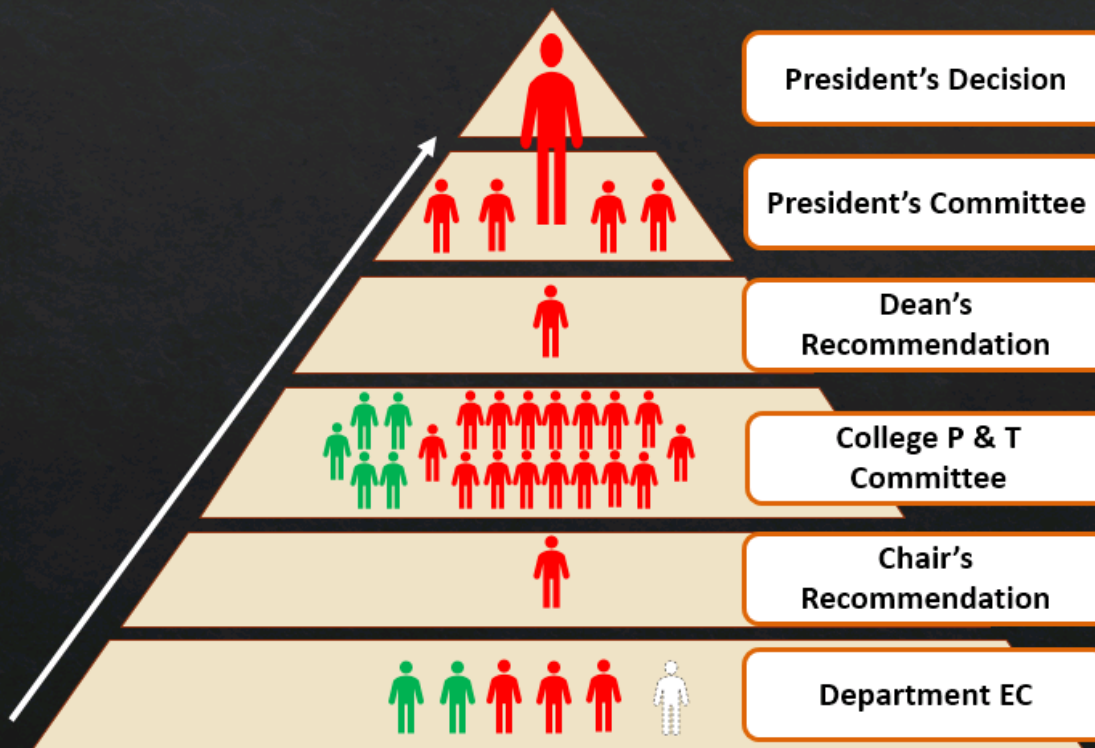
Pagani Trial

- ▶ ***Pagani v. University of Texas at Austin*** (W.D. Texas—Austin, 2018)
- ▶ Female professor denied tenure claimed it was gender discrimination and retaliation
- ▶ At trial, we needed to explain UT-Austin's complicated tenure review process
- ▶ Plaintiff's argued "cat's paw" theory of retaliation



Pagani Trial

President Powers' Decision



Demonstrative
from *Pagani v.*
UT-Austin (May
2018 trial)



KEY LESSONS:

- ▶ **Higher-up manager should do independent review of supervisor recommendations**
- ▶ **Careful about someone not following policy or normal procedure to potentially retaliate**



Summary of Practical Tips

1. Document ongoing discipline issues
2. Be consistent (and more general) in describing reason for termination
3. Be patient in the “interactive process,” and have a trained HR person handle it rather than individual supervisors
4. Watch out for potential retaliation claims, which are much harder to defend than discrimination claims
5. Be sensitive to “timing” issues, and if litigation seems likely, put together a timeline of key events



Thanks for Listening!

Any questions?

Feel free to email me for these slides
Drew.Harris@oag.texas.gov