

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

SHANNON CORBETT

Plaintiff,

v.

TEXAS TECH UNIVERSITY HEALTH
SCIENCES CENTER,

Defendant.

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CASE No. 5:21-CV-00281-H

PLAINTIFF'S BRIEF IN SUPPORT OF HER PROPOSED JURY CHARGES

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July 3, 2023

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TO THE HONORABLE JUDGE JAMES WESLEY HENDRIX:

NOW COMES Shannon Corbett, hereinafter called **Plaintiff**, who files this, her Brief in Support of her Proposed Jury Charges and will show the Court as follows:

I. SUMMARY OF THE ISSUES

1. **Plaintiff** will show that a jury instruction on the Ellerth/Faragher affirmative defense will unfairly surprise **Plaintiff**.

2. **Plaintiff** will show that Fifth Circuit Pattern Civil Jury Instruction 11.22 (2020) should follow a jury charge on the affirmative defense of mitigation to the extent that the affirmative defense of mitigation is included in the jury charge.

II. BACKGROUND

3. In *Defendant’s Original Answer and Affirmative Defenses to Plaintiff’s First Amended Petition* (Dkt. 1-16) and the *Joint Report Regarding Contents of Scheduling Order* (**Exhibit A**), **Defendant Texas Tech University Health Sciences Center** (“TTUHSC” herein) pled the

affirmative defense of mitigation.

4. In the *Joint Pretrial Order* (Dkt. 40), TTUHSC omitted the affirmative defense of mitigation and pled the following:

G. Defendant promptly responded to **Plaintiff's** charge of discrimination filed with the Texas Tech University System Office of Equal Opportunity ("EO") and found no evidence of discrimination or harassment.

— Dkt. 40, p. 3.

III. A JURY INSTRUCTION ON THE ELLERTH/FARAGHER AFFIRMATIVE DEFENSE WILL UNFAIRLY SURPRISE PLAINTIFF

5. Central to requiring the pleading of affirmative defenses is the prevention of unfair surprise. *Ingraham v. United States*, 808 F.2d 1075, 1079 (5th Cir. 1987). A defendant should not be permitted to "lie behind a log" and ambush a plaintiff with an unexpected defense. *Ingraham v. United States*, 808 F.2d 1075, 1079 (5th Cir. 1987).

6. **A final pretrial order supersedes all previous pleadings.** *Rockwell Intern. Corp. v. United States*, 549 U.S. 457, 474, (2007).

7. The elements of the Ellerth/Faragher affirmative defense are that: (a) the employer exercised reasonable care to prevent and correct promptly the harassing behavior; **and** (b) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, or to avoid harm otherwise. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

8. In *Perales*, the United States District Court for the Western District of Texas adopted an Eleventh Circuit opinion in holding that a defendant adequately pled the Ellerth/Faragher affirmative defense when the defendant expressly pleaded the first element of the Ellerth/Faragher defense **and** the affirmative defense of plaintiff's failure to mitigate her damages. *Perales v. YesA*

Communities, Inc., No. CIV. SA-12-CA-450-PM, 2013 WL 3245357, at *7 (W.D. Tex. June 26, 2013).

9. **TTUHSC** requests that the Court insert a jury instruction on the Ellerth/Faragher affirmative defense. *See Joint Proposed Jury Charge*, p. 14. **TTUHSC** has failed to plead the first element of the Ellerth/Faragher affirmative defense since its assertion in the *Joint Pretrial Order* does not allege that **TTUHSC** exercised reasonable care to prevent the harassing behavior. **TTUHSC** does not assert that “promptly responding to Plaintiff’s charge of discrimination filed with the Texas Tech University System Office of Equal Opportunity (“EO”)” prevents the harassing behavior complained of by **Plaintiff**. Additionally, since the *Joint Proposed Jury Charge* supersedes Dkt. 1-16 and **Exhibit A**, **TTUHSC** explicitly abandoned the affirmative defense of mitigation.

10. Therefore, this Court should DENY **TTUHSC**’s request to insert Ellerth/Faragher affirmative defense in the jury instructions, as well as the applicable jury questions, because it constitutes a surprise to **Plaintiff** because **TTUHSC** never pled the defense.

IV. FIFTH CIRCUIT PATTERN CIVIL JURY INSTRUCTION 11.22 (2020) SHOULD FOLLOW A JURY CHARGE ON THE AFFIRMATIVE DEFENSE OF MITIGATION TO THE EXTENT THAT THE DEFENSE IS INCLUDED IN THE JURY CHARGE

11. Although duty to mitigate damages falls squarely on a Title VII and TCHRA claimant, the employer has burden of proving failure to mitigate. *Sellers v. Delgado Coll.*, 902 F.2d 1189, 1193 (5th Cir. 1990); *see also Jackson v. Host Intern., Inc.*, 426 Fed. Appx. 215, 222 (5th Cir. 2011). To meet this burden, an employer may demonstrate that substantially equivalent work was available and that a Title VII and TCHRA claimant did not exercise reasonable diligence to obtain it. *Sellers v. Delgado Coll.*, 902 F.2d 1189, 1193 (5th Cir. 1990); *see also Jackson v. Host Intern., Inc.*, 426 Fed. Appx. 215, 222 (5th Cir. 2011).

12. The 5th Circuit Pattern Jury Charge 11.14 clearly shows that the affirmative defense of failure to mitigate should not be provided without context. In contrast to TTUHSC's proposed jury charge (*See Joint Proposed Jury Charge*, p. 14), 5th Circuit Pattern Jury Charge 11.14 requires a court to provide the jury with an explanation of the three elements a defendant must prove in order to succeed on mitigation:

(If the defendant asserts and provides evidence that the plaintiff failed to mitigate damages, the following charge should be given.)⁵

Defendant claims that Plaintiff [name] failed to mitigate [his/her] damages. Plaintiff [name] has a duty under the law to mitigate [his/her] damages, that is, to exercise reasonable diligence under the circumstances to minimize [his/her] damages.

To succeed on this defense, Defendant [name] must prove, by a preponderance of the evidence: (a) that there was substantially equivalent employment available; (b) Plaintiff [name] failed to use reasonable diligence in seeking those positions; and (c) the amount by which

Plaintiff [name]'s damages were increased by [his/her] failure to take such reasonable actions.⁶

— Fifth Circuit Pattern Civil Jury Instruction 11.22 (2020), p. 225-26.

13. Therefore, to the extent that the Court finds that TTUHSC did not completely abandon the affirmative defense of mitigation in the *Joint Pretrial Order*, this Court should include the entire Fifth Circuit Pattern Civil Jury Instruction 11.22 on the affirmative defense of mitigation and the accompanying questions [5th Cir. PJC 11.14].

WHEREFORE, PREMISES CONSIDERED, Shannon Corbett prays that the Court GRANT *Plaintiff Brief in Support of her Proposed Jury Charges* in accordance with the issues set

forth in this brief.

Respectfully submitted,

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Certificate of Service

I certify that a true copy of the above was served on each attorney of record or party in accordance with the Federal Rules of Civil Procedure on July 3, 2023, in the manner indicated below.



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