

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

United States District Court
Southern District of Texas
FILED
SEP 22 2009

CLIVE B HILGERT

PLAINTIFF

CASE NO 7107-CV-00094

CONSOLIDATED WITH 7109-CV-

GEORGE SMAY INTERNATIONAL

00154

Company

DEFENDANT

PLAINTIFF'S CROSS MOTION FOR SUMMARY
JUDGMENT AND OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT AND
DEFENDANT'S RULE 12(b)(6) MOTION.

PLAINTIFF CLIVE B HILGERT RESPECTFULLY
CROSS-MOVES FOR SUMMARY JUDGMENT IN
THIS ACTION, AND OPPOSES DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT. IN
SUPPORT OF THIS CROSS-MOTION AND
OPPOSITION, PLAINTIFF RELIES UPON THE
ACCOMPANYING MEMORANDUM, SWORN
DECLARATIONS, STATEMENT OF UNDISPUTED
MATERIAL FACTS, AND REPLY TO DEFENDANT'S
PROPOSED STATEMENT OF UNDISPUTED
MATERIAL FACTS.

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ON MARCH 19, 2009

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C BODY OF LETTER TO PRESIDENT OF
GEORGE S MAY, ISRAEL KUSHNIR
DATED 7-20-06

D AFFIDAVIT OF CLIVE B HILGERT
THAT IS BEING FILED WITH PLAINTIFF'S
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CROSS-MOTION FOR SUMMARY JUDGMENT
AND OPPOSITION TO DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT.

INTRODUCTION

"A PRO SE COMPLAINT, HOWEVER WANTONLY
PLEAD, MUST BE HELD TO LESS STRINGENT
STANDARDS THAN FORMAL PLEADINGS DRAFTED
BY LAWYERS" ERICKSON V PARDUS 551
U.S. — 127 S. CT 2197, 2200, 167 L ED
2d 1181 (2007)

MAY TERMINATED PLAINTIFF'S SALES
POSITION BECAUSE HE FILED THIS CASE
7:07-CV-00094 ON MAY 1-2007

PLAINTIFF FILED A NEW LAWSUIT
AGAINST MAY (THE CONSOLIDATED COMPLAINT)
THAT THE COURT RECEIVED ON MARCH 19, 2009
AND FILED ON JUNE 4, 2009. IN THE
CONSOLIDATED COMPLAINT PLAINTIFF
BROUGHT THREE NEW CAUSES OF ACTION
THAT HAPPENED AFTER MAY 1, 2007.

(1) A CLAIM FOR AGE DISCRIMINATION; (2)
A CLAIM OF RETALIATION AND (3) A CLAIM

(2)

FOR HOSTILE WORK ENVIRONMENT. THE COURT SUSPONENTE DROPPED THE HOSTILE WORK ENVIRONMENT AND ADDED A COMMON LAW BASED "PUBLIC POLICY" CLAIM FOR WRONGFUL TERMINATION THAT PLAINTIFF HAD LISTED UNDER AGE DISCRIMINATION AS NUMBER 28.

HILGERT ALLEGED THAT HE WAS ENGAGED IN PROTECTED ACTIVITY AS HE HAD BEEN OPPOSING THE UNLAWFUL EMPLOYMENT PRACTICE UNDER TITLE VII. (SEE PLAINTIFF'S AFFIRMATIVE CASE FOR SUMMARY JUDGMENT (AND) INTRODUCTION TO PLAINTIFF'S LEGAL THEORY RELATING TO TITLE VII.)

HILGERT'S LEGAL POSITION IS THAT CONGRESS USED THE WORD "INDIVIDUAL" SO AS TO COVER ALL OF THE INDIVIDUALS THAT WERE OR/AND INCLUDED IN EMPLOYMENT RELATIONSHIPS; THAT INCLUDES CLIENTS/CUSTOMERS WHEN AN EMPLOYEE IS PAID ON COMMISSION ONLY, AS HILGERT WAS.

THEREFORE DUE TO THE FACT THAT PLAINTIFF HILGERT WAS ON MAY 1 - 2007 INVOLVED IN PROTECTED ACTIVITY OR OPPOSING THE UNLAWFUL EMPLOYMENT PRACTICES OF DEFENDANT MAY, THE

THREE ADDITIONAL CHANGES WERE
FILED, AFTER TIMELY FILING WITH THE EEOC.

SUMMARY JUDGMENT STANDARDS

SUMMARY JUDGMENT IS APPROPRIATE
IF NO GENUINE ISSUES OF MATERIAL FACT
EXISTS AND THE MOVING PARTY IS ENTITLED
TO JUDGMENT AS A MATTER OF LAW. SEE
FED R. CIV P 56(C). THE PARTY MOVING FOR
SUMMARY JUDGMENT MUST DEMONSTRATE
THE ABSENCE OF A GENUINE ISSUE OF
MATERIAL FACT, BUT NEED NOT NEGATE
THE ELEMENTS OF THE NONMOVANT'S
CASE. *BOURDEAUX V SWIFT TRANSP CO,*
INC. 402 F3d 536, 540 (5TH CIR 2005).
WHEN THE MOVING PARTY HAS MET ITS
RULE 56(C) BURDEN, THE NONMOVING
PARTY CANNOT SURVIVE A MOTION FOR
SUMMARY JUDGMENT BY RESTING ON THE
MERE ALLEGATIONS OF ITS PLEADINGS.
THE NONMOVANT MUST IDENTIFY
SPECIFIC EVIDENCE IN THE RECORD AND
ARTICULATE THE MANNER IN WHICH
THAT EVIDENCE SUPPORTS THE PARTY'S
CLAIM. *JOHANSON V DEEP E TEX REC'L*

NARCOTICS TRAFFICKING TASK FORCE, 379
F3d 292, 305 (5th Cir 2004). THIS BURDEN
IS NOT SATISFIED BY "SOME METAPHYSICAL
DOUBT AS TO THE MATERIAL FACTS,"
"CONCLUSORY ALLEGATIONS," "UNSUBSTANTIATED
ASSERTIONS," OR ONLY A SCINTILLA OF
EVIDENCE. YOUNG V EXXONMOBIL CORP,
155 FED APPX 798, 800 (5th Cir 2005)

(3)

LEGAL STANDARDS

A. STANDARD FOR DISMISSAL FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6), A PURPORTED CAUSE OF ACTION MAY BE DISMISSED WHEN THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED. TO SURVIVE A MOTION TO DISMISS UNDER RULE 12(b)(6), THE COMPLAINT MUST MEET TWO CRITERIA:

1. IT MUST ASSERT A PLAUSIBLE CLAIM; AND
2. IT MUST SET FORTH SUFFICIENT FACTUAL ALLEGATIONS TO SUPPORT THE CLAIM.

TWOMBLY DOES NOT REQUIRE A COURT AT THE MOTION-TO-DISMISS STAGE TO CONSIDER WHETHER THE FACTUAL ALLEGATIONS ARE PROBABLY TRUE. WE MAKE IT CLEAR, ON THE CONTRARY, THAT A COURT MUST TAKE THE ALLEGATIONS AS TRUE, NO MATTER HOW SKEPTICAL THE COURT MAY BE. SEE TWOMBLY 550 U.S. AT 555 (A COURT MUST PROCEED ON THE ASSUMPTION THAT ALL THE ALLEGATIONS IN THE COMPLAINT ARE TRUE (EVEN IF DOUBTFUL IN FACT)) 14 AT 556 "[A] WELL

PLEAD COMPLAINT MAY PROCEED EVEN IF IT STRIKES A SAVVY JUDGE THAT ACTUAL PROOF OF THE FACTS ALLEGED IS IMPROBABLE"; SEE ALSO NEITZKE V WILLIAMS, 490 U.S. 319, 327 (1989) ("RULE 12(b)(6) DOES NOT COUNTERANACE DISMISSALS BASED ON A JUDGE'S DISBELIEF OF A COMPLAINT'S FACTUAL ALLEGATIONS")

B. SUMMARY JUDGMENT STANDARD.

SUMMARY JUDGMENT IS APPROPRIATE IF NO GENUINE ISSUE OF MATERIAL FACT EXISTS AND THE MOVING PARTY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW. SEE FED R. CIV. P 56(c). THE PARTY MOVING FOR SUMMARY JUDGMENT MUST DEMONSTRATE THE ABSENCE OF A GENUINE ISSUE OF MATERIAL FACT, BUT NEED NOT NEGATE THE ELEMENTS OF THE NONMOVANT'S CASE. BOURDEAUX V SWISS TRANSP CO INC 402 F3d 536, 540 (5TH CIR 2005) THE NONMOVANT MUST IDENTIFY SPECIFIC EVIDENCE IN THE RECORD AND ARTICULATE THE MANNER IN WHICH THE EVIDENCE SUPPORTS THAT PARTY'S CLAIM. JOHNSON V DEEP E TEX REG'L NARCOTICS TRAFFICKING TASK FORCE, 379 F3d 293, 305 (5TH CIR 2004)

C. LEGAL STANDARDS FOR AGE DISCRIMINATION CLAIMS.

TEXAS LABOR CODE SECTION 21.051 DISCRIMINATION BY EMPLOYER READS AS FOLLOWS:

21.051 DISCRIMINATION BY EMPLOYER. AN EMPLOYER COMMITS AN UNLAWFUL EMPLOYMENT PRACTICE IF BECAUSE OF RACE, COLOR, DISABILITY, RELIGION, SEX, NATIONAL ORIGIN, OR AGE THE EMPLOYER:

(1) FAILS OR REFUSES TO HIRE AN INDIVIDUAL, DISCHARGES AN INDIVIDUAL, OR DISCRIMINATES IN ANY OTHER MANNER AGAINST AN INDIVIDUAL IN CONNECTION WITH COMPENSATION OR THE TERMS, CONDITIONS, OR PRIVILEGES OF EMPLOYMENT

CROSS V. FBL FINANCIAL SERVICES, INC. HELD: A PLAINTIFF BRINGING AN ADEA DISPARATE-TREATMENT CLAIM MUST PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THAT AGE WAS THE "BUT-FOR" CAUSE OF THE CHALLENGED ADVERSE EMPLOYMENT ACTION. THE BURDEN OF PERSUASION DOES NOT SHIFT TO THE

EMPLOYER TO SHOW THAT IT WOULD HAVE
TAKEN THE ACTION REGARDLESS OF AGE,
EVEN WHEN A PLAINTIFF HAS PRODUCED
SOME EVIDENCE THAT AGE WAS ONE
MOTIVATING FACTOR IN THAT DECISION. P 4-12

PLAINTIFF MUST PROVE THE FOLLOWING:

1. MEMBER OF A PROTECTED CLASS
2. QUALIFIED FOR THE POSITION
3. SUFFERED AN ADVERSE EMPLOYMENT ACTION.
4. WAS EITHER REPLACED BY SOMEONE YOUNGER OR OTHERWISE DISCHARGED BECAUSE OF HIS AGE.

PLAINTIFF HILGENT WOULD STILL BE EMPLOYEE AT DEFENDANT MAY "BUT FOR" THE FOLLOWING UNDISPUTED FACTS:

1. THAT PLAINTIFF HILGENT BECAME A MEMBER OF A PROTECTED CLASS UNDER TITLE VII WHEN HE OPPOSED THE ACTIONS OF DEFENDANT MAY IN MAY'S DISCRIMINATION AGAINST INDIVIDUAL CLIENTS, DUE TO THE CLIENT'S RACE OR NATIONAL ORIGIN.

2. THAT PLAINTIFF HILGENT WAS ORDERED TO GO TO APPOINTMENTS THAT WERE PRE-SET BY THE TEL-MKT DEPARTMENT OF DEFENDANT; AND ON ARRIVING AT THE APPOINTMENTS WAS TOLD BY THE OWNERS THAT THEY HAD NOT MADE AN APPOINTMENT WITH DEFENDANT MAY AND WERE MOSTLY VERY UPSET TO HAVE HILGENT EVEN ALLEGE THAT HE WAS AT THE OWNER'S PLACE OF BUSINESS ALLEGING THAT HE HAD A APPOINTMENT THAT WAS SET BY HIS CHICAGO OFFICE. THE "PRESET" APPOINTMENTS WERE CLEARLY BOGUS AND A PRETEXT.

3. DEFENDANT MAY HIRED AND TRAINED A HISPANIC MALE THAT WAS 20± YEARS YOUNGER THAN HILGERT THAT WAS TO START WORK HERE IN MCALLEN ON JUNE 8-2007; THE LETTER FROM MR VAILL WAS NOTHING MORE THAN A PRETEXT TO "CYA"; DUE TO THE FACT THAT PLAINTIFF HAD ALREADY BEEN REPLACED.

4. THE NORMAL PRACTICE AND PROCEDURE FOR DEFENDANT MAY WAS TO SEND "HELP" TO ASSIST ANY COMMISSION ONLY EMPLOYEE WHEN THAT EMPLOYEE WAS HAVING A SALES SLUMP. DURING THE 12 WEEKS THAT DEFENDANT MAY ALLEGES THAT HILGERT FAILED TO MAKE A SALE; DEFENDANT MAY PROMISED TO SEND HELP; BUT FAILED TO DO SO. THIS WAS THE FIRST AND ONLY TIME IN THE 2+ YEARS THAT HILGERT FAILED TO MAKE QUOTA.

5. PLAINTIFF HILGERT WAS WELL QUALIFIED FOR THE JOB AND IN FACT WAS HAVING HIS BEST SALES YEAR; BUT NEEDED TO FILE THE MAY 1, 2007 COMPLAINT TO PROTECT THE INDIVIDUAL CLIENTS.

D LEGAL STANDARDS FOR RETALIATION CLAIM

IN A RETALIATION CLAIM, AN EMPLOYEE ALLEGES THAT AN EMPLOYER TREATED THE EMPLOYEE ADVERSELY BECAUSE THE EMPLOYEE PROTESTED ALLEGED DISCRIMINATION. TITLE VII RETALIATION CLAIMS ARE LITIGATED USING A COMMON JUDICIAL FRAMEWORK ORIGINALLY DEVELOPED FOR DISCRIMINATION CLAIMS.

THE FOCUS OF A TITLE VII RETALIATION CLAIM, HOWEVER, IS AN EMPLOYMENT ACTION, SUCH AS FIRING, DEMOTION, OR REDUCTION IN PAY, THAT ALLEGEDLY OCCURS IN RESPONSE TO THE EMPLOYEE'S ANTI-DISCRIMINATION ACTIVITY.

TO SUCCEED IN A TITLE VII RETALIATION CLAIM, A PLAINTIFF MUST PROVE THREE ELEMENTS

1. THE PLAINTIFF ENGAGED IN A STATUTORILY PROTECTED ANTI-DISCRIMINATION ACTIVITY ("PROTECTED ACTIVITY")

2. THE PLAINTIFF'S EMPLOYER TOOK ADVERSE EMPLOYMENT ACTION AGAINST THE PLAINTIFF ("ADVERSE ACTION")

3. A CAUSAL CONNECTION EXISTED BETWEEN THE PLAINTIFF'S PROTECTED ACTIVITY

AND THE EMPLOYER'S ADVERSE ACTION.
(CAUSAL CONNECTION")

RETALIATION CLAIMS PROCEED IN ONE OR TWO WAYS, DEPENDING ON THE NATURE OR THE EVIDENCE AVAILABLE.

PLAINTIFF HILGENT BELIEVES THAT HE HAS DIRECT EVIDENCE, BUT WISHES TO, IN THE ALTERNATIVE, USE THE CIRCUMSTANTIAL EVIDENCE ALLOWED BY MCDONNELL DOUGLAS CORP V GREEN; THAT PROVIDES FOR A BURDEN SHIFT INVOLVING THREE STEPS;

A. THE PLAINTIFF MUST MAKE A SHOWING OF A PRIMA FACIE CASE OF RETALIATION. IF THE PLAINTIFF'S SHOWING IS SUFFICIENT THE BURDEN SHIFTS TO THE DEFENDANT TO ARTICULATE A LEGITIMATE, NON-RETALIATORY REASON FOR THE ADVERSE ACTION TAKEN AGAINST THE PLAINTIFF. IF THE DEFENDANT ARTICULATES SUCH A REASON, THE BURDEN SHIFTS BACK TO THE PLAINTIFF TO PROVE THAT THE STATED REASON FOR THE ADVERSE ACTION IS ACTUALLY A PRETEXT FOR RETALIATION. UNDER THE BURDEN SHIFT, THEREFORE, PROVING PRETEXT

SATISFIES THE PLAINTIFF'S ULTIMATE
BURDEN OF PROOF IN A RETALIATION CLAIM.

TEXAS LABOR CODE - SECTION 21.055
RETALIATION — READS AS FOLLOWS:
21.055 RETALIATION. AN EMPLOYER
COMMITTS AN UNLAWFUL EMPLOYMENT
PRACTICE IF THE EMPLOYER
RETALIATES OR DISCRIMINATES AGAINST
A PERSON WHO, UNDER THIS CHAPTER;
(1) OPPOSES A DISCRIMINATORY PRACTICE;
(2) MAKES OR FILES A CHARGE.
(3) FILES A COMPLAINT

E. LEGAL STANDARDS FOR PUBLIC
POLICY CLAIMS, AKA HOSTILE WORK
ENVIRONMENT AS DEFINED IN PLAINTIFF'S
COMPLAINT AS COUNT #3

THE HOSTILE WORK ENVIRONMENT THAT
PLAINTIFF HILGERT WAS REFERRING TO
IN THE COMPLAINT THAT WAS RECEIVED
BY THE COURT ON MARCH 19, 2009 WAS
ABOUT THE TIME SPAN FROM MAY 1, 2007
(THE FILING OF THE FIRST COMPLAINT) THRU
PLAINTIFF HILGERT'S LAST EMPLOYMENT
DAY OF JUNE 8, 2007.

THE HOSTILE WORK ENVIRONMENT
INCLUDES ALL OF THE COMPLAINTS
PARAGRAPHS FROM 1 THRU 55.

IN *Harris V Forklift Systems Inc*
114 S CT 367 (1993), A UNANIMOUS SUPREME
COURT BROADLY DEFINED UNLAWFUL SEXUAL
HARASSMENT IN THE WORKPLACE AS ANY
CONDUCT CREATING A WORK ENVIRONMENT
THAT A "REASONABLE PERSON" WOULD FIND
"HOSTILE OR ABUSIVE". IN ADDITION, THE
COURT GAVE THE LOWER COURTS AND Juries
SUBSTANTIAL LEeway IN DETERMINING WHAT

CONDUCT MEETS THIS DEFINITION, THEREFORE, CONSTITUTING HARASSMENT. THE RESULT OR HANNAIS IS THAT EMPLOYEES MAY MORE EASILY REACH THE JURY AND ULTIMATELY PREVAIL IN HARASSMENT CASES WITHOUT PROVING PSYCHOLOGICAL INJURY OR INABILITY TO EFFECTIVELY PERFORM THEIR JOB.

TITLE VII PROHIBITS DISCRIMINATION IN THE WORKPLACE BASED ON RACE, SEX, COLOR, RELIGION AND NATIONAL ORIGIN. TWO TYPES OF HARASSMENT ARE UNLAWFUL UNDER TITLE VII (1) "QUID PRO QUO HARASSMENT" AND (2) "HOSTILE ENVIRONMENT SEXUAL HARASSMENT" IN WHICH THE WORKING ENVIRONMENT IS OPPRESSIVE TO MEMBERS OF A PROTECTED CLASS BECAUSE OF THE ACTIONS OF WORKERS, SUPERVISORS OR CUSTOMERS.

THE SECOND CIRCUIT EXPLAINED THAT IN HANNAIS, THE SUPREME COURT MADE A LIST OF FACTORS FOR ANALYZING HOSTILE ENVIRONMENT CASES, INCLUDING FREQUENCY AND SEVERITY OF THE ALLEGED MISCONDUCT, WHETHER IT WAS

PHYSICALLY THREATENING OR HUMILIATING,
AND WHETHER IT UNREASONABLY INTERFERED
WITH DOB'S PERFORMANCE.

DEFENDANT MAY KNOWINGLY, UNREASONABLY,
WILLFULLY AND UNLAWFULLY SENT
HILGERT ON "PRE-SET" APPOINTMENTS
THAT THE APPOINTMENTS WERE NOT
PRE-SET, BUT IN FACT A LIST OF
BUSINESS THAT WERE NOT CALLED
IN ADVANCE.

PLAINTIFF'S AFFIRMATIVE CASE FOR SUMMARY JUDGMENT

INTRODUCTION TO PLAINTIFF'S LEGAL THEORY RELATING TO TITLE VII

HILGERT WORKED AS A COMMISSION ONLY SALES INDIVIDUAL FOR DEFENDANT MAY FOR OVER 2(TWO) YEARS, DURING WHICH TIME HILGERT DISCOVERED THE UNKNOWN SECRET OF DEFENDANT'S MAY'S BUSINESS MODEL; THAT BEING THAT THROUGH THE USE OF EMPLOYMENT AGREEMENTS, THAT CONTAINED QUALIFIERS, SUCH AS A QUALIFIED SALE, THE DEFENDANT MAY COULD DISCRIMINATE AGAINST SOME CLIENT'S BASED ON THE CLIENT'S RACE AND/OR NATIONAL ORIGIN.

THIS SCHEME OF DISCRIMINATION COULD NOT EASILY BE DETECTED DUE TO THE FACT THAT DEFENDANT MAY DID NOT AND DOES NOT BELIEVE THAT THE SCHEME IS A VIOLATION OF TITLE VII ALLEGEDLY DUE TO CASES SITED THAT WOULD TEND TO ALLEGE THAT A CLIENT/CUSTOMER DOES NOT PROTECT EMPLOYEES THAT CLAIM THAT THEY ARE

ENGAGED IN A PROTECTED ACTIVITY UNDER TITLE VII.

PLAINTIFF HILBERT OBJECTIVELY AND REASONABLY BELIEVES THAT THEIR POSITION IS NOT THE FACTS IN THIS CASE FOR THE FOLLOWING REASONS:

UNLIKE THE CASES CITED BY DEFENDANT MAY, PLAINTIFF HILBERT WAS A COMMISSION ONLY EMPLOYEE. ALL OF THE CASES CITED BY DEFENDANT MAY WERE EMPLOYEES THAT WERE PAID THEIR WAGES, NO MATTER THAT THE EMPLOYER DISCRIMINATED OR NOT.

TITLE VII IS TO PROTECT AN EMPLOYEE'S COMPENSATION, TERMS, CONDITIONS, OR PRIVILEGES OF EMPLOYMENT, BECAUSE OF SUCH INDIVIDUAL'S RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN.

ALL OF THE CASES CITED BY DEFENDANT MAY, DO NOT, IN ANYWAY, EFFECT THE COMPENSATION, TERMS, CONDITIONS, OR PRIVILEGES OF EMPLOYMENT; BUT ALL OF THE ABOVE ARE DIRECTLY EFFECTED IN THIS CASE DUE TO THE FACT THAT PLAINTIFF HILBERT WAS PAID BY COMMISSION ONLY.

CONGRESS COULD HAVE WORDED TITLE VII
42 U.S.C 2000e2(a)(1) MANY WAYS BUT
CONGRESS CHOSE TO USE THE WORD
"INDIVIDUAL" TWICE, AND NOT THE WORDS
EMPLOYEE, JOB APPLICANT, ETC; BUT THE
WORD "INDIVIDUAL".

THE PHRASE "IT SHALL BE AN
UNLAWFUL EMPLOYMENT PRACTICE FOR AN
EMPLOYER . . . TO DISCRIMINATE AGAINST
ANY INDIVIDUAL WITH RESPECT TO HIS
COMPENSATION, TERMS, CONDITIONS, OR
PRIVILEGES OF EMPLOYMENT," IS VERY
STRAIGHT FORWARD; BUT WHEN IT COMES
TO THE NEXT USE OF THE WORD INDIVIDUAL
AS USED IN THE PHRASE "BECAUSE OF
SUCH INDIVIDUAL'S RACE, COLOR, RELIGION,
SEX, OR NATIONAL ORIGIN." THINGS
ARE NOT SO CLEAR AS TO WHOM IS THE
"INDIVIDUAL"!

ALL OF THE CASES SITED BY DEFENDANT
MAY REFER TO EMPLOYER'S ALLAGATIONS
ABOUT "BAD SERVICE", "UNEQUAL TREATMENT
OR AFRICAN-AMERICAN CUSTOMERS",
"STUDENTS", "MINORITY CITIZENS"; NONE OF
THE ALLIGATIONS IN ANY WAY EFFECTED
THE EMPLOYEE'S COMPENSATION, TERMS,

CONDITIONS, OR PRIVILEGES OF EMPLOYMENT;
BUT THE FACTS IN THIS CASE ARE THE
EXACT OPPOSITE

IT IS CLEARLY OBJECTIVELY
REASONABLE, BASED ON THE FACTS IN THIS
CASE THAT THE USE OF THE PHRASE BY
CONGRESS "BECAUSE OF SUCH INDIVIDUAL'S
RACE, COLOR, RELIGION, SEX, OR NATIONAL
ORIGIN," SHOULD REASONABLE INCLUDE THE
WORDS; CLIENT, CUSTOMER, GUEST, ETC

TITLE VII IN ITS DEFINITIONS OF
WORDS DOES NOT EVEN ~~TO~~ ATTEMPT TO
DEFINE THE WORD "INDIVIDUAL"; BUT
BLACK'S LAW DICTIONARY, 8TH ED
DEFINES THE WORD "INDIVIDUAL" AS AN
"ADJ 1. EXISTING AS AN INDIVISIBLE
ENTITY 2. OF OR RELATING TO A SINGLE
PERSON OR THING, AS OPPOSED TO A GROUP."

A CLIENT IS DEFINED AS "A PERSON
OR ENTITY THAT EMPLOYS A PROFESSIONAL
FOR ADVICE OR HELP IN THAT
PROFESSIONAL'S LINE OF WORK.

THE DIFFERENCE IN COMMISSION
ONLY AND A SALARIED EMPLOYEE IS THAT
THE RELATIONSHIP BETWEEN ALL THE
PARTIES; EMPLOYER, EMPLOYEE AND CLIENT

BECOME VERY PERSONAL SINCE THE EMPLOYER CAN DISCRIMINATE AGAINST THE CLIENT AND THE EMPLOYEE IS PUNISHED BY NOT RECEIVING A COMMISSION, A VIOLATION OF TITLE VII AND TEXAS LABOR STATUTES.

SUCH A READING OF TITLE VII DOES NOTHING TO CHANGE THE CLEAR OBJECTIVE OF FOCUSING ON HOW AN EMPLOYER TREATS HIS EMPLOYEES.

IT IS ONLY SETTLED LAW AS IT RELATES TO EMPLOYEES THAT ARE UNAFFECTED WITH RESPECT TO HIS COMPENSATION, TERMS, CONDITIONS, OR PRIVILEGES OF EMPLOYMENT, BUT THE FACTS IN THIS CASE ARE TOTALLY DIFFERENT AND UNSETTLED.

IT IS IMPORTANT TO NOTE THAT A UNION OR CORPORATION COULD NOT BE THE "INDIVIDUAL", SINCE NEITHER HAVE THE REQUIREMENTS OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN.

USING WORD REPLACEMENT BASED ON THE FACTS IN THIS CASE TITLE VII WOULD READ AS FOLLOWS:

"IT SHALL BE AN UNLAWFUL EMPLOYMENT PRACTICE FOR AN EMPLOYER.... TO DISCRIMINATE AGAINST ANY EMPLOYEE WITH RESPECT TO HIS COMPENSATION, TERMS, CONDITIONS, OR PRIVILEGES OF EMPLOYMENT.... BECAUSE OF SUCH "CLIENT/CUSTOMERS" RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN."

THE ABOVE READING WOULD PROTECT THE VERY ^{SMALL} AMOUNT OF EMPLOYEES THAT ARE PAID BY COMMISSION ONLY, INCLUDING PLAINTIFF HILGERT. AND DISCOURAGE EMPLOYERS LIKE DEFENDANT MAY FROM KNOWINGLY, WILLFULLY, INTENTIONALLY AND AS PLAINTIFF ALLEGES, UNLAWFULLY FROM EFFECTING THE COMPENSATION, TERMS, CONDITIONS, OR PRIVILEGES OF EMPLOYMENT BY DISCRIMINATING AGAINST CLIENTS DUE TO THE CLIENTS RACE AND/OR NATIONAL ORIGIN; AS PLAINTIFF HILGERT ALLEGES DEFENDANT MAY HAS DONE FOR THE 85 YEARS MAY HAS BEEN IN BUSINESS.

THE ABOVE REASONABLE READING OF TITLE VII WOULD HAVE MADE PLAINTIFF HILGERT A "PROTECTED PERSON" WHEN HE FILED THE COMPLAINT ON MAY 1, 2007.

PLAINTIFF'S STATEMENT OF MATERIAL
FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE

1. DEFENDANT MAY SENT HILGERT ON FROM
1-3 TEL-MKT APPOINTMENTS DURING THE
TIME SPAN OF EARLY MAY 2007 THRU
LATE MAY 2007.

2. DEFENDANT MAY HAS A POLICY AND PROCEDURE
TO SEND SOMEONE TO HELP SALES
INDIVIDUALS THAT ARE HAVING A SALES
SLUMP, BUT DID NOT SEND ANYONE TO
HELP HILGERT FROM MID APRIL 2007
THRU MAY 30, 2007.

3. DEFENDANT MAY HIRED AN HISPANIC
MALE 20+ YEARS YOUNGER THAN HILGERT
BEFORE DEFENDANT SENT THE LETTER
DATED MAY 30-2007, THAT ALLEGEDLY
WOULD HAVE GIVEN HILGERT A CHANCE
TO MAKE A QUALIFIED SALE.

4. DEFENDANT MAY WAS NOTIFIED OF THE
COMPLAINT THAT HILGERT FILED ON
MAY 1, 2007 ABOUT MAY 7, 2007
ALLEGING DISCRIMINATION AGAINST CLIENTS
AMONG OTHER CHARGES.

5. THAT HILGERT'S APPLICATION FOR EMPLOYMENT WITH DEFENDANT MAY SHOWED THAT HILGERT BECAME 66 YEARS OLD ON APRIL 1, 2007.

6. THAT HILGERT HAD QUALIFIED FOR THE RETIREMENT FUND IN 2006.

7. THAT HILGERT WAS HAVING THE BEST SALES YEAR (2007) THAT HE HAD SINCE JOINING THE COMPANY IN 2005.

8. PLAINTIFF HILGERT WAS QUALIFIED FOR THE POSITION AND IN FACT DID THE JOB AS REQUIRED FOR OVER 2 YEARS.

9. THAT DEFENDANT MAY, TO THIS DATE, HAS NEVER SOLD ANY OF THE CLIENTS THAT PLAINTIFF HILGERT COMPLAINED OF AS BEING BOGUS.

PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS A GENUINE DISPUTE.

1. THAT PLAINTIFF HILGERT WAS A PROTECT PERSON UNDER TITLE VII AFTER HE HAD FILED THE COMPLAINT ON MAY 1-2007.

2. THAT DEFENDANT MAY USED BOGUS APPOINTMENTS AS A PRETEXT THAT CAUSED PLAINTIFF TO NOT PRODUCE THE CLIENTS AS REQUIRED BY THE EMPLOYMENT AGREEMENT,

3. IF DEFENDANT MAY'S USE OF BOGUS APPOINTMENTS CREATED A HOSTILE WORKPLACE FOR PLAINTIFF

4. DID THE ACTIONS OF DEFENDANT MAY AFTER MAY 1, 2007 RESULT IN DEFENDANT USING RETALIATION AGAINST PLAINTIFF

5. THAT CLIENT'S OF MAY CAN BE THE INDIVIDUALS THAT TITLE VII IS DESIGNED TO PROTECT ALONG WITH EMPLOYEES.

6. DOES THE FACT THAT PLAINTIFF HILGERT IS PAID BY COMMISSION TOTALLY DISQUALIFY HIM FROM ANY AND ALL PROTECTION OF TITLE VII.

7. IF PLAINTIFF HILGERT WAS FIRED DUE TO HIS AGE OR WAS IT DUE TO OTHER PRETEXTS USED BY DEFENDANT MAY.

8. THAT HILGERT WAS FIRED DUE TO HIS AGE

9. THAT DEFENDANT MAY KNOWINGLY, WILLFULLY AND UNLAWFULLY CREATED A HOSTILE WORK ENVIRONMENT FOR HILGERT DURING THE TIME AFTER HILGERT FILED A COMPLAINT ON MAY 1-2007.

SUMMARY OF ARGUMENT IN
OPPOSITION TO SUMMARY JUDGMENT
FOR DEFENDANT MAY

PLAINTIFF HILGERT BELIEVING THAT IT WAS OBJECTIVELY REASONABLE FOR HIM TO THINK THAT HIS COMPLAINT CONCERNED AN UNLAWFUL EMPLOYMENT PRACTICE UNDER TITLE VII; DUE TO THE FACT THAT HE WAS PAID BY COMMISSION ONLY AND THAT CONGRESS HAD USED THE WORD "INDIVIDUAL" IN SEVERAL PLACES IN TITLE VII AND CHOSE NOT TO GIVE A DEFINITION OF THE WORD "INDIVIDUAL"; THUS GIVING THE WORD THE WIDEST MEANING POSSIBLE.

THE FACTS OF THIS CASE ARE TOTALLY DIFFERENT THAN THE CASES SITED BY DEFENDANT MAY DUE TO THE FACT THAT PLAINTIFF HILGERT WAS PAID BY COMMISSION ONLY AND IN ALL OF THE CASES SITED BY DEFENDANT MAY NO CHANGE ~~WOULD~~ IN WAGES WOULD HAVE HAPPENED TO THE EMPLOYEES EVEN IF THE EMPLOYER DID, IN FACT, DISCRIMINATE AGAINST CUSTOMERS.

DEFENDANT MAY, ON THE OTHER HAND, IS HopING THAT THIS COURT WILL APPROVE OF MAY'S BUSINESS MODEL OF DISCRIMINATING AGAINST CLIENTS DUE TO CLIENTS RACE AND/OR NATIONAL ORIGIN.

PLAINTIFF HILGERT WAS REPLACED BY AN HISPANIC MALE THAT WAS 20+ YEARS YOUNGER THAN PLAINTIFF BEFORE THE "LAST CHANCE" LETTER WAS SENT TO HILGERT ON MAY 30-2007.

THINGS HAPPENED SO FAST BETWEEN THE FILING OF THE COMPLAINT ON MAY 1 2007 THRU MAY 30, 2007 THAT IT IS HARD TO TELL WHICH CAME FIRST THE "CHICKEN OR THE EGG."

DEFENDANT MAY QUICKLY STARTED TO RETALATE AGAINST HILGERT BY DEMANDING THAT HE GO TO EACH AND EVERY APPOINTMENT AND EXCESSIVELY ATTEMPTING TO MANAGE EVERY HOUR OF HILGERT'S BUSINESS DAY; HopING THAT IF THEY COULD CONTROL EVERYTHING, HILGERT WOULD JUST

QUIT IN FLUSTRATION AND NOT BE ABLE TO MAKE A LIVING! DUE TO THE EXTRA EXPENSES THAT DEFENDANT MAY WAS CAUSING.

IF AS PLAINTIFF HILGERT HAS ALLEGED; THAT TITLE VII DOES IN FACT INCLUDE ~~THE~~ THE TERM CLIENT CUSTOMER IN THE CLASS OF "INDIVIDUALS"; THEN DEFENDANT MAY CAN PROVE NO SET OF FACTS IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT, SINCE PLAINTIFF HILGERT WAS IN FACT A PROTECTED PERSON, ENGAGED IN A PROTECTED ACTIVITY UNDER TITLE VII AND PLAINTIFF HILGERT CLAIM DOES NOT FAIL AS A MATTER OF LAW.

CONCLUSION

DEFENDANT MAY PROMISED TO PROVE THAT THERE WAS NO SET OF FACTS THAT PLAINTIFF HILGENT COULD PRODUCE; BUT THEY HAVE CLEARLY FAILED.

PLAINTIFF PROVED THAT TITLE VII DID IN FACT REASONABLE INCLUDE A "CLIENT/CUSTOMER" AS AN INDIVIDUAL WITHIN THE EMPLOYMENT RELATIONSHIP CONTROLLED BY TITLE VII ESPECIALLY WHEN IT APPLIES TO COMMISSION ONLY EMPLOYEES.

PLAINTIFF PROVED THAT HE WAS FIRED DUE TO HIS AGE, SINCE THE FACTS ARE THAT A REPLACEMENT, THAT WAS 20± YEARS YOUNGER THAN PLAINTIFF, WAS HIRED BEFORE THE MEMO DATED MAY 30, 2007.

PLAINTIFF PROVED THAT HE WAS A PROTECTED PERSON DUE TO THE FACT THAT HE HAD FILED A COMPLAINT AGAINST DEFENDANT MAY, ON MAY 1-2007, ALLEDGING THAT DEFENDANT MAY KNOWINGLY, WILLFULLY, AND UNLAWFULLY, DISCRIMINATED AGAINST SOME OF IT'S CLIENTS/CUSTOMERS

P(30)

DUE TO THE RACE AND/OR NATIONAL ORIGIN,
WHICH IS A VIOLATION OF TITLE VII.

DEFENDANT MAY HAS ATTEMPTED TO
CONVINCE THIS COURT THAT THOSE
EMPLOYEES THAT ARE PAID COMMISSION
ONLY ARE TOTALLY EXCLUDED UNDER
TITLE VII, EVEN WHEN IT IS THE DUTY
OF TITLE VIII TO PROTECT INDIVIDUALS
FROM UNLAWFUL ACTION OF EMPLOYERS.

DEFENDANT MAY CAN NOT PRODUCE
ANY SET OF FACTS THAT WOULD BE
REASONABLE TO CONCLUDE THAT COMMISSION
ONLY EMPLOYEES ARE THE ONLY GROUP
OF EMPLOYEES IN THE UNITED STATES
THAT ARE TOTALLY WITHOUT ANY
PROTECTION UNDER TITLE VII. THAT
ON ITS FACE IS TOTALLY UNBELIEVABLE
AND UNREALISTIC.

PLAINTIFF NUGENT RESPECTFULLY
PRAYS THAT THE COURT GRANT HIS
CROSS-MOTION AND DENY DEFENDANT'S
MOTION UNDER FED R. CIV P 12(b)(6) AND
DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT UNDER FED R. CIV P 56 AND
GRANT PLAINT'S MOTION UNDER FED R
CIV P 56; ORDER THAT DEFENDANT MAY

TAKE NOTHING BY WAY OF THESE CLAIMS,
AND GRANT PLAINTIFF HILGERT ALL
OTHER RELIEF TO WHICH HE IS
JUSTLY ENTITLED.

RESPECTFULLY SUBMITTED
CLIVE B. HILGERT

2500 N 32 ST APT 2
MCALLEN TX 78501
956-566-4540
PLAINTIFF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE AND
CORRECT COPY OF THE FOREGOING DOCUMENT
WAS SERVED UPON COUNSEL OF RECORD
LISTED BELOW BY CERTIFIED MAIL, RETURN
RECEIPT REQUESTED ON THIS 22 DAY OF
SEPT 2009.

DENNIS A CLIFFORD
SEYFARTH SHAW LLP
700 LOUISIANA ST SUITE 3700
HOUSTON TX. 77002


CLIVE B HIGGEN