

THE  
AM LAW LITIGATION DAILYLitigators of the Week: Shaving a \$366M Retaliation  
Verdict Against FedEx to Less than \$249K

By Ross Todd

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**F**edEx Corp. started last week with a \$366,060,000 judgment on the books.

Federal jurors in Houston had sided with Jennifer Harris, a Black former district sales manager at FedEx, in a 2022 trial on claims that she was fired in retaliation for complaining about race discrimination, awarding her \$365 million in punitive damages.

But last week a Fifth Circuit panel found that Harris's claims under Section 1981 were time-barred by a provision in her employment contract with FedEx giving her six months to sue. That left her with just a claim standing under Title VII of the Civil Rights Act of 1964, which carries a \$300,000 damages cap. The panel also found the company made "good-faith efforts" to comply with the anti-discrimination law by investigating Harris' complaints, entitling the company to judgment as a matter of law on punitive damages.

This week's Litigators of the Week are **Kyle Hawkins** and **Leah Bower** of **Lehotsky Keller Cohn**, who ultimately helped FedEx carve the judgment down to just \$248,619.57.

**How would you characterize what was at stake here for FedEx?**



Courtesy photos

**Kyle Hawkins ,left, and Leah Bower , right, of Lehotsky Keller Cohn.**

**Kyle Hawkins:** Obviously, the financial stakes were high with the jury's breathtaking \$366 million award. But more than that, this appeal was an opportunity to demonstrate the robust procedures FedEx has in place to create a positive work environment and guard against unlawful harassment and retaliation. We're pleased the Fifth Circuit recognized as much when it held that no punitive damages were available as a matter of law.

**Leah Bower:** There were broader stakes for the business community as a whole as well,

including the permissibility of the contractual six-month limitations period provision in FedEx employment agreements. Before this case, the Fifth Circuit had not decided whether employers could rely on such clauses in this context, even though they're used commonly. We're pleased the Fifth Circuit has now confirmed that contractual six-month limitations clauses are reasonable and enforceable against Section 1981 claims.

**How did you and the firm get involved in this matter?**

Hawkins: FedEx reached out to us in November 2022, shortly after the jury issued its verdict. We had not previously had the pleasure of working with the FedEx team, and we were thrilled when they selected us to handle the appeal.

**Who was on your team and how did you divide the work?**

Bower: This was a truly collaborative process. Kyle and I are Fifth Circuit experts—we both clerked for Fifth Circuit judges, and we appear there regularly. Our phenomenal colleagues at FedEx, **Barak Babcock** and **Chris Ahearn**, had tried the case, and they knew the record inside and out. The four of us worked together closely throughout the process—from initial drafting to research to polishing to oral argument prep. Kyle argued the case—his 19th Fifth Circuit argument. Barak and I split second-chair duties, and Chris joined us in Austin and New Orleans leading up to the argument. And of course throughout all of this we received phenomenal support from FedEx leadership, including in multiple moot courts leading up to Kyle's argument.

**When you approach a trial outcome like this—a \$366,060,000 judgment against your client—where do you even start?**

Hawkins: I remember the first time I reviewed the record, it was clear to me that FedEx had worked in good faith to comply with Title VII. It seemed to me the starting point had to be that punitive damages could not be available as a matter of law. If we could prevail on that issue, we would knock out \$365 million.

Bower: Reading through the record, it was clear that FedEx in-house counsel had done a fantastic job of preserving and teeing up multiple issues for appeal. The contractual-limitations argument caught my eye—Barak and Chris had argued persuasively at summary judgment and again under Rule 50(a) that the Section 1981 claim should have been dismissed as time-barred. This presented a clean issue of law that became central to our briefing.

**Kyle, what did your preparation for oral argument look like? The panel gave you more than three-and-a-half minutes to speak uninterrupted before jumping in with the first question. I haven't listened to a lot of Fifth Circuit arguments. Was that expected?**

Hawkins: We didn't know what to expect, and so we prepared for everything. I did a series of moot courts leading up to the argument. In some of them, I asked my moot court judges to be aggressive—interrupt me, talk over me, challenge me. In others, I asked the moot court judges to be more deferential. I even did one moot court where I addressed a silent bench and reacted to body language.

**The panel ultimately decided against you on your argument about the sufficiency of the**

**evidence on the retaliation claim, and your new trial request, but agreed with you on key arguments that capped damages and eliminated punitive damages. In a case like this where you have a lot of potential asks of the court, how do you decide where to focus most of your time and energy?**

Bower: We were in a somewhat unusual situation in that we had numerous meritorious issues to choose from, but at the same time we recognize that you don't want to flood the court with every error in the proceedings below. Ultimately, we focused most on those arguments that would have the greatest impact for our client. We knew, for instance, that if the court upheld the contractual-limitations provision, that would knock out one claim and cap compensatory damages. And we knew that if the court understood the extent of the efforts by FedEx to comply with federal law, we had a strong chance of knocking out the punitive damages award.

**The panel cites extensively from a 2016 case where then-Judge Ketanji Brown Jackson held that a six-month limitation period for Section 1981 claims is “not unreasonable”—a boon to your argument that the plaintiff’s claims were time-barred under a provision of her employment agreement with FedEx. Who gets credit for finding that case?**

Hawkins: I can't recall who found that case—it wasn't me, but it might have been Leah, Barak, or Chris. We certainly thought Justice Jack-

son's reasoning in that case was persuasive, and we're glad the Fifth Circuit agreed.

**What can other defendants in FedEx's position take from this opinion and this result?**

Bower: One critical takeaway is that the Fifth Circuit has now approved the use of six-month contractual limitations periods, at least as to Section 1981 claims. That had until now been an open question in the Fifth Circuit. Employers should take note.

Hawkins: I'd note two additional important takeaways. First, the Fifth Circuit rejected punitive damages “as a matter of law because FedEx made good-faith efforts to comply with Title VII.” The court specifically highlighted “in-depth investigations” by FedEx of the plaintiff's complaints. Second, the Fifth Circuit reiterated the importance of the district court's “gate-keeping role” when it comes to expert testimony, rejecting the plaintiff's human resources expert based on her lack of foundation or reliable methodology.

**What will you remember most about this matter?**

Hawkins: The partnership with the FedEx attorneys. I've never had a better working relationship with a client. This really was a team effort.

Bower: The argument prep. We ran multiple moots with colleagues from our firm and FedEx and workshopped the issues together. Kyle did a stellar job presenting argument and it was really neat to see it all come together.